No. _____

IN THE

Supreme Court of the United States

KENNEDY WALKER,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a criminal defendant moving for relief under 28 U.S.C. § 2255 for the first time should be subject to the statutory hurdles applicable to movants in a second or successive posture.

2. Whether a conviction for Florida robbery, pursuant to Fla. Stat. § 812.13, qualifies as a "serious violent felony" under the elements clause of § 3559(c)(2)(F)(ii) post-*Borden*.

3. Whether a conviction for federal carjacking, pursuant to 18 U.S.C. § 2119, qualifies as a "crime of violence" under § 924(c)(3)(A) post-*Borden*.

PARTIES TO THE PROCEEDINGS

The case caption contains the names of all parties to the proceedings.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

- *Walker v. United States*, No. 1:16-cv-21973-RNS (S.D. Fla.) (Judgment entered Aug. 18, 2017), *aff'd*, *Walker v. United States*, No. 17-14701 (11th Cir. Aug. 25, 2021) (unpublished).

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

No: _____

KENNEDY WALKER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Kennedy Walker ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's opinion (App. A) is unreported, and available at 2021 WL 3754596.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Eleventh Circuit entered judgment on August 25, 2021. Per Supreme Court Rule 13, any petition was due on or before November 23, 2021. Thus, the petition is timely filed.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

….

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain–

> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.

28 U.S.C. § 2244 Finality of determination

(b)

> (3)
>
> > (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
> >
> > (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

18 U.S.C. § 3559(c)(2)(F): the term "serious violent felony" means–

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense[.]

18 U.S.C. § 924(c)

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and–

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 2119

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall–

(1) Be fined under this title or imprisoned not more than 15 years, or both….

Fla. Stat. § 812.13 Robbery

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

STATEMENT OF THE CASE

On February 24, 2004, a federal grand jury sitting in the Southern District of Florida returned an indictment charging Petitioner with two counts of carjacking, in violation of 18 U.S.C. § 2119 (Counts 1 and 2), one count of brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count 3), and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count 5). The government notified Petitioner that it intended to seek enhanced penalties under the "three strikes" statute, 18 U.S.C. § 3559(c), which requires the imposition of a mandatory sentence of life imprisonment for a defendant convicted of a "serious violent felony" who has two or more prior convictions for "serious violent felonies." 18 U.S.C. § 3559(c)(1)(A)(i). The government identified two prior Florida robbery convictions as the predicate offenses justifying the imposition of the three-strike enhancement. Petitioner pleaded not guilty and proceeded to trial. On December 13, 2004, a jury returned a verdict of guilty on all counts.

Prior to sentencing, the United States Probation Office prepared a Presentence Investigation Report ("PSR"), which set Petitioner's adjusted offense level at 37 with

a criminal history category of VI, amounting to an advisory Guidelines' range of 360 months to life imprisonment. Pursuant to § 3559(c), however, the PSR noted that Petitioner was subject to a mandatory life imprisonment sentence.

At the sentencing hearing, the district court listed the prior "serious violent felonies" it believed qualified Petitioner for a mandatory life imprisonment sentence under § 3559. These included a 1989 conviction for Florida robbery in violation of Fla. Stat. § 812.13—case number F88-86544D—and a 1990 conviction for Florida robbery in violation of Fla. Stat. § 812.13—case number F90-22303B. The district court conducted an analysis of whether Petitioner's two prior Florida robbery convictions qualified as "serious violent felonies" under § 3559(c)(2)(f). The court reasoned:

> [T]his prior [1989] conviction under Section 812.13 qualifies as a serious violent felony under Section 3559 for various reasons. One, because I think that it is an offense like firearms possession, ascribed in Section 924(c). I also think that it is an offense that by its nature involves a substantial risk that physical force might be used. I also think that it is an offense punishable by a maximum term of ten years or more, that has as an element the use, attempted use or threatened use of physical force. So I think that prior conviction qualifies under all three of those definitions for a serious violent felony under Section 3559. The second conviction is the 1990 conviction, again under Section 812.13 . . . . For the same reasons I find that both of those convictions qualify as serious violent felonies under Section 3559.

(Cr-DE 168:7–8.) With that, and believing itself bound by § 3559 to impose a mandatory life imprisonment sentence, the district court sentenced Petitioner to a

term of life imprisonment as to Counts 1, 2, and 5, to be served concurrently, followed by a mandatory consecutive term of seven years imprisonment as to Count 3. The court also imposed an alternative sentence "in case [it had] made any sort of error or mistake with regard to the mandatory life sentence under Section 3559." (Cr-DE 168:15.) If allowed to exercise its discretion, the district court indicated that it would have sentenced Petitioner to a total term of imprisonment of 480 months.

Petitioner appealed his convictions and sentence to the Eleventh Circuit, which affirmed in an unpublished opinion. *United States v. Walker*, 201 F. App'x 737 (11th Cir. 2006). Thereafter, in June 2016, nearly a year after this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), Petitioner filed a pro se first 28 U.S.C. § 2255 motion, which is the subject of this petition. He argued that *Johnson*, which invalidated as unconstitutionally vague the ACCA's residual clause, also invalidated the residual clause of § 3559(c)(2)(f)(ii). He also argued that he no longer had the requisite three strikes to support the enhancement because his two predicate convictions for Florida robbery could no longer qualify as serious violent felonies absent § 3559(c)(2)(f)(ii)'s residual clause. After obtaining counsel, Petitioner also raised the additional claim that his conviction and sentence under § 924(c) were invalid because *Johnson* also compelled the conclusion that § 924(c)(3)(B) was void for vagueness. He explained that his federal carjacking conviction could not satisfy § 924(c)(3)'s definition of "crime of violence" without relying on the residual clause of § 924(c)(3)(B).

The district court denied Petitioner's § 2255 motion. The court first determined that Petitioner's § 924(c) claim was foreclosed by the Eleventh Circuit's then-binding decision in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), that *Johnson* did not apply to or invalidate § 924(c)'s residual clause. The district court then concluded that *Johnson* did not invalidate § 3559(c)'s residual clause because that clause closely resembled § 924(c)'s residual clause. Nevertheless, the district court issued a certificate of appealability ("COA") as to the question "whether *Johnson* applies to the provisions of § 924(c) and § 3559(c) . . . since it appears from [Petitioner's] citations that the questions raised are indeed debatable and, in fact, are being debated, among reasonable jurists." (Civ-DE 20:2.)

Petitioner appealed. While his appeal was pending, this Court decided the first question posed in the COA when it held, in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), that § 924(c)'s residual clause is unconstitutionally vague per the reasoning in *Johnson*. Accordingly, the Eleventh Circuit revised and expanded the COA to include the following questions: whether (1) the residual clause of § 3559(c) is unconstitutionally vague, and whether (2) the residual clauses of § 3559(c) or § 924(c) "adversely affected the sentence that [Petitioner] received" as required for him to obtain relief on his § 2255 petition.

The Eleventh Circuit then affirmed the district court's denial of Petitioner's § 2255 motion. The court first accepted the government's concession that the residual clause of § 3559(c) is unconstitutional. (App. A at 4a.) Nevertheless, the court

reasoned that a petitioner is entitled to § 2255 relief on a *Johnson*-based claim "only if the residual clause 'actually adversely affected the sentence he received.'" (App. A at 4a (citing *Beeman v. United States*, 871 F.3d 1215, 1221 (11th Cir. 2017).) As to Petitioner's sentence of mandatory life pursuant to § 3559(c), the court applied its reasoning from *Beeman* to hold that "a § 2255 petitioner asserting a *Johnson* challenge to his life sentence under § 3559(c) must show that the sentencing judge did not rely on the still-valid enumerated crimes or elements clause when applying § 3559(c)." (App. A at 6a.) That is, the court found that Petitioner could not meet his burden under *Beeman* "to show that the sentencing court 'relied solely on the residual clause, as opposed to also or solely relying on either the enumerated offenses clause or elements clause.'" (App. A at 6a.)

Additionally, the Eleventh Circuit reasoned that a Florida robbery conviction pursuant to Fla. Stat. § 812.13 "satisfies the ACCA's elements clause under current law," citing to this Court's opinion in *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019). (App. A at 6a.) The court held that because the ACCA's elements clause is identical to the elements clause of § 3559(c), Petitioner's prior Florida robbery convictions "would thus satisfy § 3559(c)'s elements clause even if he were convicted today." (App. A at 7a.) In so holding, the court noted its reasoning "remains true" even after this Court's decision in *Borden v. United States*, 141 S. Ct. 1817 (2021), because the Florida robbery statute "requires, and has always required resistance by the victim and physical force by the offender that overcomes that resistance," and no

authority suggests that "such force could be employed recklessly or negligently." (App. A at 8a, n.2.)

Finally, the Eleventh Circuit reaffirmed that federal carjacking, in violation of 18 U.S.C. § 2119, "still qualifies as a valid predicate under § 924(c)'s elements clause." (App. A at 7a.) As such, any arguments otherwise are precluded.

REASONS FOR GRANTING THE PETITION

I. The Circuit Courts Have Incorrectly Imported And Applied The Gatekeeping Requirements Applicable To Second Or Successive § 2255 Applications To Initial § 2255 Motions, And In So Doing, Have Denied Relief To Movants Serving Illegally-Enhanced Sentences After *Johnson*, And Created A Messy And Confusing Body Of Binding Precedent

Section 2255 allows for the collateral attack of a criminal sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). The language is clear, unambiguous, and self-contained. The Eleventh Circuit, however, in *Beeman*, imported language applicable to second or successive applications for § 2255 relief into its analysis of first § 2255 motions, thereby erecting an almost insurmountable hurdle where none had previously existed. Numerous other circuits have since followed suit, creating a messy and confusing body of binding precedent that is fully disconnected from the language of the statute itself.

The movant in *Beeman* filed his first-ever § 2255 motion after this Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015), which struck down as unconstitutionally vague the residual clause of 18 U.S.C. § 924(e). In reviewing movant's claim for relief, the Eleventh Circuit declared: "To prove a *Johnson* claim, a movant must establish that his sentence enhancement 'turn[ed] on the validity of the residual clause.'" *Beeman*, 871 F.3d at 1221. This language, in turn, comes from the Eleventh Circuit's opinion in *In re Thomas*, 823 F.3d 1345, 1349 (11th Cir. 2016), which the court in *Beeman* openly acknowledged was decided in the context of a "prisoner's application for certification to file a second or successive § 2255 motion." *Id.* at 1221 n.1. Nonetheless, and without any analysis or textual support, the Eleventh Circuit in *Beeman* forged ahead and applied statutory text applicable in the second or successive context to the *Beeman* movant's first § 2255 motion, holding that, "[t]o prove a *Johnson* claim, the movant must show that—more likely than not—it was use of the residual clause that led to the sentencing court's enhancement of his sentence." *Id.* at 1221–22.

Numerous circuits have since followed the Eleventh Circuit's lead. *See, e.g.*, *Dimott v. United States*, 881 F.3d 232 (1st Cir. 2018); *Potter v. United States*, 887 F.3d 785 (6th Cir. 2018); *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017). Other circuits have disagreed and forged their own unique paths. *See, e.g.*, *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017); *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018). But what is common

amongst all circuit courts is their erroneous application of provisions governing the filing of second or successive § 2255 motions to first § 2255 motions.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), a defendant in federal custody may file a motion collaterally attacking his sentence based upon certain specifically listed grounds, namely that the sentence was imposed in violation of the Constitution or federal law, that the court was without jurisdiction to impose the sentence, that the sentence exceeded the maximum authorized by law, or that the sentence "is otherwise subject to collateral attack[.]" 28 U.S.C. § 2255(a). A defendant is only allowed one such motion as of right. *Id.* §§ 2255(b), (h). Any second or successive motion must be certified by a court of appeals to rely upon either "newly discovered evidence" showing innocence or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2255(h). Those are the gatekeeping requirements of § 2255(h) that limit collateral review. And, the required certification is to be made pursuant to § 2244, which directs that a panel of "[t]he court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the [gatekeeping] requirements[.]" *Id.* § 2244(b)(3)(C) (made applicable by 28 U.S.C. § 2255(h)).

That is, by § 2255's plain language, and Congress' intent in enacting AEDPA, only second or successive motions for relief are to be subject to the more rigorous

screening demanded by § 2255(h) and § 2244(b)(3)(C). Those same hurdles do not apply to first-time movants. *See United States v. Driscoll*, 892 F.3d 1127, 1135 n.5 (10th Cir. 2018) ("In the context of a second or successive § 2255 motion, there are procedural hurdles not present when filing a first § 2255 motion."). First time movants for collateral relief must simply satisfy the requirements of § 2255(a). *See Raines v. United States*, 898 F.3d 680, 685 (6th Cir. 2018) (noting the differences inherent to initial § 2255 motions versus second or successive motions for relief). That is it.

The Eleventh Circuit, however, denied Petitioner's first § 2255 motion after subjecting it to the gatekeeping requirements imported from the second or successive realm. It held that Petitioner's challenge to his mandatory life sentence pursuant to § 3559(c) failed because he could not "show that the sentencing court 'relied solely on the residual clause, as opposed to also or solely relying on either the enumerated offenses clause or elements clause.'" (App. A at 6a (citing *Beeman*, 871 F.3d at 1221).) But this "relies on" standard is the incorrect standard. Petitioner, as a first-time movant under § 2255, should only have been subject to the requirements of § 2255(a), which he easily meets.

This Court's intervention is urgently required to clarify the standards applicable to first-time § 2255 movants, and to return uniformity to the resolution of motions brought pursuant to § 2255.

II. The Eleventh Circuit Incorrectly Determined That Florida Robbery Meets The Elements Clause of 18 U.S.C. § 3559(c) Post-*Borden*, Placing It In Conflict With Other Courts That Have Determined Otherwise When Interpreting Similar Statutes

Petitioner's mandatory life sentence relies upon two prior Florida robbery convictions, which the Eleventh Circuit held qualified as "serious violent felonies" under § 3559(c)'s elements clause. (App. A at 6a–7a.) The Eleventh Circuit so held even in light of this Court's decision in *Borden v. United States*, 141 S. Ct. 1817 (2021), holding that a criminal offense that can be committed with a mens rea of recklessness cannot qualify as a violent felony under the elements clause of the Armed Career Criminal Act ("ACCA"). *Borden*, 141 S. Ct. at 1821–22. The Eleventh Circuit's holding puts it at odds with other courts that have considered whether a robbery offense that can be committed with a mens rea of recklessness can still be considered a "violent felony" under the elements clause of the ACCA, and have held that it cannot. *See, e.g.*, *United States v. Blakney*, 2021 WL 3929694 (E.D. Pa. Sept. 2, 2021). As such, this Court's intervention is necessary to lend clarity and correct the Eleventh Circuit's mistaken conclusion regarding Florida robbery.

A conviction for Florida robbery is not a qualifying "serious violent felony" under the elements clause of § 3559(c) because the offense may be committed by "putting in fear," which does not require an intentional mens rea, or by assault, which can be committed recklessly. *See* Fla. Stat. § 812.13 ("'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the

person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, *assault*, or *putting in fear*.") (emphasis added).

First, "putting in fear" is judged by a "reasonable person" standard, which means it can be committed negligently. *See State v. Baldwin*, 709 So. 2d 636, 637–38 (Fla. Dist. Ct. App. 1998) ("We note that the test does not require conduct that is, itself, threatening or forceful. Rather, a jury may conclude that, in context, the conduct would induce fear in the mind of a reasonable person notwithstanding that the conduct is not expressly threatening."). Not only is it unnecessary for an offender to engage in conduct that is threatening or forceful, but indeed, the offender need not intend to put the victim in fear. *See Smithson v. State*, 689 So. 2d 1226, 1228 (Fla. Dist. Ct. App. 1997) (noting that a robbery conviction does not require "that actual violence was used, nor . . . that the victim [was] placed in actual fear," but only that a jury could find that a "reasonable person under like circumstances" would be in fear). The controlling factor is whether a jury could conclude that a "reasonable person" in the victim's shoes "would have felt sufficiently threatened to accede to the robber's demands." *Magnotti v. State*, 842 So. 2d 963, 965 (Fla. Dist. Ct. App. 2003). Therefore, Florida robbery by "putting in fear" does not meet the heightened mens rea required by the elements clause.

Additionally, a robbery in Florida can be committed by a simple (misdemeanor) "assault" as defined in Fla. Stat. § 784.011. *See United States v. Lockley*, 632 F.3d 1238, 1242 (11th Cir. 2011) (recognizing that assault, as defined in § 784.011(1), is a

means of committing robbery). And, as the government conceded in *Borden*, Florida is a state whose courts have "construed felony assault offenses to encompass recklessness." Br. for United States, *Borden v. United States*, 2020 WL 4455245, at *20 and n.5 (June 8, 2020).

Therefore, because neither robbery by putting in fear nor by assault requires an intent by the perpetrator to harm the victim, but can be committed with a means rea of recklessness or less, a Florida robbery conviction is categorically overbroad under § 3559(c)(2)(F)(ii) after *Borden*.

A federal district court in Pennsylvania so held when considering Pennsylvania's second-degree robbery statute, which provides, in part, that "a person is guilty of robbery if, in the course of committing a theft, he . . . inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury." 18 Pa. Cons. Stat. § 3701(a)(1)(iv). Finding the robbery statute in question indivisible, the court reasoned that an individual could "pose a threat recklessly without intending to do so. In other words, without the defendant intending to threaten another, that person may feel threatened by the defendant's action. In that case, it may be the defendant's reckless conduct that resulted in the threat." *Blakney*, 2021 WL 3929694, at *2. As a result, because a robbery in Pennsylvania could be committed recklessly, the court held that, post-*Borden*, the conviction no longer qualified as a violent felony under the ACCA. *Id.*

Faithful application of this Court's precedent in *Borden*, as conducted by the district court in *Blakney*, mandates that Florida robbery no longer be considered a violent felony under the ACCA or a serious violent felony under § 3559(c). This Court's intervention is required to ensure that its holdings are faithfully applied to ensure uniformity in federal criminal proceedings, especially where the stakes are as high as mandatory life imprisonment.

III. Post-*Borden*, The Court Should Grant Review to Determine Whether Carjacking—Which Can Be Accomplished By Intimidation—Satisfies the Elements Clause of 18 U.S.C. § 924(c)(3)(A)

The federal carjacking statute provides, in pertinent part:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so [shall be punished in accordance with the remainder of the statute].

18 U.S.C. § 2119. The offense thus requires proof of the following elements : (1) the taking of a motor vehicle, (2) transported in interstate or foreign commerce, (3) from the person or in the presence of another, (4) "by force and violence," *or* "by intimidation," (5) "with the intent to cause either death or serious bodily harm. As the emphasized language shows, the "force and violence" and "intimidation" components of the carjacking statute represent alternative means of satisfying a single element. Accordingly, the statute is indivisible. *See United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987) (discussing similar language in the federal bank robbery statute). Section 2119 thus fails to qualify as a "crime of violence" because

intimidation (1) does not require the use, attempted use, or threatened use of violent physical force and (2) does not require the *intentional* use, attempted use, or threatened use of the same.

Interpreting the elements clause of the ACCA—which, for present purposes is indistinguishable from the elements clause in § 924(c)(3)(A)—*Borden* held that a criminal offense requiring a mens rea less than purpose or knowledge, such as recklessness, did not satisfy the elements clause. *Id.* at 1821, 1826, 1828. The four-Justice plurality reasoned that "[t]he phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." *Id.* at 1825. The elements clause thus requires a "deliberate choice of wreaking harm on another, rather than mere indifference to risk." *Id.* at 1830. Supplying the fifth vote, Justice Thomas agreed that the elements clause captures only purposeful or knowing conduct "designed to cause harm" to another. *Id.* at 1835 (Thomas, J., concurring in the judgment).

The elements of federal carjacking lack that requisite mens rea. The face of the statute makes clear that the offense can be committed where the car is taken "by force and violence *or* by intimidation." 18 U.S.C. § 2119(a) (emphasis added). And the intimidation element is satisfied "when an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Kelley*, 412 F.3d 1230, 144–45 (11th Cir. 2005) (interpreting identical intimidation element in the federal bank robbery statute) (quotation omitted). Thus,

the government need not prove that the perpetrator intended to intimidate or threaten the victim with harm. Rather, carjacking by intimidation occurs where an ordinary person in the victim's position could reasonably infer a threat of harm.

Take the following example. A carjacker wearing a face covering to conceal his identity approaches a driver about to enter her car. The carjacker says in a pleasant voice to the driver: "I will not hurt you, but please give me your keys." Given the context, an ordinary person could reasonably infer a threat of physical force, satisfying the intimidation element of the carjacking statute. At trial, the government would not need to prove that the perpetrator actually or intentionally threatened to use physical force against the victim. After *Borden*, such conduct does not satisfy the elements clause because, while the victim may infer a threatened use of physical force, that threatened use of physical force need not be intended by the perpetrator. Indeed, the perpetrator can go out of his way not to threaten any force, but he will still be guilty of carjacking if an ordinary victim could reasonably infer such a threat.

The carjacking statute also requires that the perpetrator possess an "intent to cause death or serious bodily harm" at the moment of the taking. But that intent need not be conveyed or expressed to the victim; that intent can exist entirely within the perpetrator's mind. Thus, that intent element does not transform carjacking by intimidation into an offense requiring an intentional threat of physical force. As long as the perpetrator possesses the requisite intent in his mind, he still commits

carjacking by intimidation if an ordinary victim could reasonably infer a threat of force. That is so even if the perpetrator has never conveyed—and even affirmatively disclaims—an intent to use physical force.

Moreover, the requisite intent exists even where it is "conditional" on how the driver reacts. In *Holloway v. United States*, 526 U.S. 1 (1999), the carjacker's "plan was to steal the cars without harming the victims"; he would harm them only if it became necessary to effectuate the taking. *Id.* at 4. Nonetheless, the Supreme Court held that this "conditional intent" satisfied the carjacking statute's intent requirement. Thus, not only does the perpetrator not need to convey any intent to harm to the victim, but any intent to do so can be "subject to a condition which the [offender] hopes will not occur." *Id.* at 13 (Scalia, J., dissenting). That essentially describes reckless conduct: the carjacker acts without regard to a known risk of harm, even though the carjacker does not intend or hope to inflict such harm.

So take the above example. The carjacker informs the victim that he will not harm her, and he asks for her keys. Again, there is no threatened use of force (just the opposite). Yet the intimidation element is satisfied because a reasonable person might nonetheless feel threatened. Moreover, the carjacker possesses the requisite intent to harm in his mind, but he never conveys that intent to the victim. And that intent element could be satisfied even where the carjacker hopes not to harm the victim, but would do so only as a last resort if, say, the victim deployed mace. In that example, the elements of the carjacking statute are satisfied, but there is no actual

"use, attempted use, or threatened use of physical force against the person" of another because there is no intent to harm the victim or threaten the victim with such harm. Absent that mens rea, the offense does not satisfy the elements clause after *Borden*.

Carjacking is therefore not a "crime of violence" under § 924(c)(3)(A). This is an issue of exceptional importance, which has not been, but should be, addressed by the Court in order to ensure that its precedents are faithfully and uniformly applied.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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