NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

XAVIER DAUGHTRY,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

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*.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Xavier Daughtry, No. 22-14047-Cr-Middlebrooks (May 10, 2023)

United States Court of Appeals (11th Cir.):

United States v. Xavier Daughtry, No. 23-11695 (May 15, 2024)

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Xavier Daughtry respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 23-11695 in that court on May 15, 2024, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

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 decision of the court of appeals was entered on May 15, 2024. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

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….

STATEMENT OF THE CASE

I. Pretrial Proceedings

On August 4, 2022, Mr. Xavier Daughtry ("Daughtry") was indicted on (1) carjacking in violation of 18 U.S.C. §2119(1) and (2) brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §924(c)(a)(A)(ii). The indictment alleged that on May 9, 2022, Mr. Daughtry stole "a 2022 Nissan Altima, from the person and presence of . . . 'V.G.' by force, violence, and by intimidation," and that he brandished a firearm, during the commission of that crime. A forfeiture count was also alleged, seeking the forfeiture of property that was the result or proceeds of the carjacking crime.

As proceedings progressed, Mr. Daughtry exhibited erratic behavior both in and out of the courtroom. Accordingly, the court granted an unopposed motion by the defense to have Mr. Daughtry evaluated for competency. Based on that evaluation, the defense and the government stipulated to competency, a competency hearing was held, and the court issued an order finding that Mr. Daughtry was competent to stand trial.

Thereafter on February 9, 2023, Mr. Daughtry appeared in court for a scheduled change of plea. The proceeding was very abbreviated because Mr. Daughtry continued to exhibit erratic behavior. At this hearing, Mr. Daughtry had outbursts expressing anger at the type of questions that were asked during the plea colloquy, and he made general death threats to the people in the courtroom at the end

of the hearing. The court terminated the plea and set the case for trial.

II. The Trial

A. The Government's Witnesses

Mr. Daughtry had a one-day trial on February 27, 2023. The government presented six witnesses as well as documents, videos, pictures, and physical evidence.

During the testimony, it was revealed that the woman who had been carjacked had, herself, sustained multiple felony convictions for fraud and bad checks.

The evidence showed that the victim, Veronica Garcia ("Garcia") went to a 7-Eleven store a little before midnight on May 9, 2022. Garcia exited her car, and leaving the engine running, she locked the car using a key fob. When Garcia came back out of the store, she saw a man pulling on her car door handle. According to Garcia, she ran over to the man and yelled that the car was hers. He turned around and pointed a gun at her and told her to "back the f*** up." Garcia stopped yelling, but she did not leave the area. She stated that the man lowered his gun after she stopped yelling. He then entered the car.

Garcia remained at the side of the car and began to question the man, asking him if he was sure he wanted to steal the car. He did not respond, but instead made adjustments to the interior of the car. Garcia continued to speak to the man, letting him know that he would certainly go to jail if he stole the car because it was a rental vehicle, and the rental companies tracked their cars. He remained silent, but adjusted the seat to make room for himself. Garcia then asked for her cell phone

which was in the car. The man gave Garcia her cell phone and then exited the 7-Eleven with the car.

As the man backed the car out of the parking spot, Garcia walked back into the store. She had the store clerk call 911. Garcia told the 911 operator that her car had just been stolen, and then she went outside the store to wait for the police.

A few minutes later, Fort Pierce police officer Catalina Escobar arrived at the 7-Eleven and took Ms. Garcia's verbal and written statements. In her written witness statement, Garcia described the perpetrator as, "no shirt 1 B/M (has dreads)" In her verbal statement, Garcia stated that the perpetrator was a black male who was wearing no shirt, but who had something on his head, which she believed was his shirt. She stated that the discrepancy in the descriptions was because another patron of the store had told her he thought the robber had dreads. Garcia stated that the individual who gave this information had already left the store. Garcia did not identify any tattoos or body-piercings as visible on the suspect. Garcia described the gun as gray or silver.

After speaking with the police at the 7-Eleven, Garcia was informed that other officers had found the car, and they wanted her to come to the scene to identify the suspect who was driving the car. She was taken to the scene, approximately one mile away, in a police vehicle driven by Escobar. When they got there, Garcia remained in the police car. She observed a black male being taken out of the back of a police car. He had a short/close haircut. He was not wearing a shirt. He was

in handcuffs. Police put a spot light on him. Garcia identified him as the carjacker. The show-up took place at approximately 12:34 am.

The police officers who found the car and arrested Mr. Daughtry also testified. Officer John Leckenbusch worked for the St. Lucie County Sheriff's Office. Leckenbusch was notified of the 911 call at approximately midnight. A BOLO issued for a black male driving a white rental car. About 2-5 minutes later, Leckenbusch observed a white car traveling on the road and he confirmed through the tag number that it was the same car. He noted that the driver seemed to be a little bit confused as he was driving a little all over the road and then seemed to make a sudden turn. Police pulled the car over at approximately 12:04, and put lights on the car. Police directed the driver to put his hands in the air, get out of the car keeping his hands up, and lie face-down on the ground. The driver was cooperative and complied with all the orders. They took him into custody and put him in the back of a police car. They also saw a black gun in the car. One of the officers put gloves on and disarmed the gun which had one bullet in the chamber and the hammer cocked. The police took evidence from the car which included a black shirt and the black gun. None of the officers knew if DNA or fingerprint tests had been attempted on Garcia's phone, the gun, the shirt, or the car.

After the show-up was concluded, the car and Garcia's personal items inside the car were returned to her.

B. The Defense.

Mr. Daughtry did not call any witnesses on his behalf.

C. Rule 29 Motions and the Verdict.

At the close of the government's case, counsel for Daughtry moved for a Judgment of Acquittal; the motion was renewed after the defense rested. Regarding the carjacking count, the defense argued: (1) there was insufficient evidence that Mr. Daughtry was the perpetrator of the carjacking; (2) even if there was sufficient evidence as to Daughtry's identity, there was insufficient evidence of an intent to cause death and serious bodily harm. As to the §924(c) count, the defense argued: (1) there was insufficient evidence of a §924(c) offense, given that a judgment of acquittal should have been granted on the carjacking offense; and (2) regardless of whether the carjacking offense was dismissed, a §924(c) conviction could not be sustained because carjacking is not a proper §924(c) predicate capable of supporting a §924(c) conviction. The court denied Mr. Daughtry's original and renewed Rule 29 motions.

Subsequently, the parties gave closing arguments, and the court gave jury instructions. The jury was sent to deliberate at 4:45 pm. Shortly thereafter, the jury returned a guilty verdict as to both counts of the indictment.

III. The Presentence Investigation Report (PSR) and Sentencing.

The United States Probation Office prepared a Presentence Investigation Report. (PSR). The PSR calculated the carjacking offense guidelines under

U.S.S.G. §2B3.1. It found that the base offense level was 20, and it enhanced that level by five additional points for carjacking, loss amount, and obstruction based on the outbursts at trial. It also found that Mr. Daughtry had a criminal history category (CHC) of III. Based on offense level 25, CHC III, the guideline range was 70-87 months for the carjacking conviction. The §924(c) conviction required a consecutive sentence of 84 months. Thus, the total recommended sentence was 154-171 months.

The court sentenced Mr. Daughtry to 72 months on count I, and the mandatory consecutive 84 months on count II. Thus, the total term of incarceration was 156 months imprisonment. The court also imposed three years of supervised release.

IV. The Appeal

Mr. Daughtry filed an appeal. Among other issues, Mr. Daughtry challenged his §924(c) conviction on the basis that the underlying carjacking offense was not a proper §924(c) predicate. He argued that carjacking failed as a predicate because it only required a *mens rea* of recklessness, which under *Borden v. United States*, 593 U.S. 420 (2021), did not provide the requisite level of intent for a crime of violence under §924(c). The Eleventh Circuit rejected this argument. *United States v. Daughtry,* 2024 WL 2182343 (11th Cir. 2024). It found instead that its prior panel precedent *In re Smith*, 829 F.3d 1276 (11th Cir. 2016), controlled and based on *Smith,* carjacking continued to qualify as a crime of violence predicate for §924(c). *Daughtry,* 2024 WL 2182343, *6-*7. This petition follows.

REASON FOR GRANTING THE WRIT

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.

Taking again 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

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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