No.

In The Supreme Court Of The United States

Gustavo Navaro,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

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Questions Presented for Review

The first question presented is whether Circuits have failed to apply categorical analysis to aiding and abetting's distinct elements, which do not meet the requirements of 18 U.S.C. § 924(c)(3)(A)'s force clause. Aiding and abetting carjacking, 18 U.S.C. §§ 2119 and 2, does not require as an element the use, attempted use, or threatened use of violent physical force under 18 U.S.C. § 924(c)(3)(A)'s force clause. The Circuits confuse categorical analysis—which examines only statutory elements—with the contextually distinct rule that an aider and abettor is punishable for the acts of a principal. Thus, Circuits are not applying categorical analysis to aiding and abetting's distinct elements and are failing to assume the least culpable conduct for aiding and abetting carjacking. The actus reus element of aiding and abetting merely requires the defendant to aid or abet *one* element of the substantive offense, and not every element of carjacking requires intentional violent force.

The second question presented is whether the Circuits interpreted the actus reus of federal carjacking too narrowly by providing that the threat of violent physical force constitutes an element of the offense. By its plain language, completed federal carjacking can be committed by "intimidation." 18 U.S.C. § 2119. This Court recognizes carjacking by intimidation is satisfied by "an empty threat, or intimidating bluff." *Holloway v. United States*, 526 U.S. 1, 11 (1999). Thus, a defendant could be found guilty of carjacking by intimidation in a "case in which the driver surrendered or otherwise lost control over his car" without the defendant

ever using, attempting to use, or threatening to use physical force. *Id.* While the government must prove the defendant "would have at least attempted to seriously harm or kill the driver if that action had been necessary to complete the taking of the car," the statute does not require the outward threat of such harm to obtain a carjacking conviction. *Id.*

Related Proceedings

Petitioner Gustavo Navaro timely moved to vacate his 18 U.S.C. § 924(c) conviction under 28 U.S.C. § 2255 in the District of Nevada. The district court denied the motion to vacate on May 22, 2023. *United States v. Navaro*, Nos. 2:20-cv-01154-RFB, 2:15-cr-00180-RFB-1 (D. Nev. May 22, 2023) (unpublished); App. C. Navaro timely appealed and the Ninth Circuit remanded for the district court to grant or deny a certificate of appealability (COA). The district court denied a COA on January 24, 2024. *United States v. Navaro*, No. 2:15-CR-00180-RFB-1, 2024 WL 263830 (D. Nev. Jan. 24, 2024) (unpublished); App. B. The Ninth Circuit denied a COA on September 12, 2024. *United States v. Navaro*, No. 23-4321, Dkt. No. 11.1 (9th Cir. Sept. 12, 2024) (unpublished); App. A.

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Petition for Certiorari

Petitioner Gustavo Navaro petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit denying relief under 28 U.S.C. § 2255.

Opinions Below

The Ninth Circuit Court of Appeals' order denying a COA is not published in the Federal Reporter. App. A: *United States v. Navaro*, No. 23-4321, Dkt. No. 11.1 (9th Cir. Sept. 12, 2024) (unpublished). The district court's order denying a COA is unreported but reprinted at *United States v. Navaro*, No. 2:15-CR-00180-RFB-1, 2024 WL 263830 (D. Nev. Jan. 24, 2024) (unpublished). App. B. The district court's order denying a motion to vacate is not published nor reprinted. App. C: *United States v. Navaro*, Nos. 2:20-cv-01154-RFB, 2:15-cr-00180-RFB-1 (D. Nev. May 22, 2023) (unpublished).

Jurisdiction

The Ninth Circuit denied a certificate of appealability on September 12, 2024. App. A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254. This petition is timely per Supreme Court Rule 13.1.

Constitutional and Statutory Provisions Involved

1. U.S. Const. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

2. Title 18, Section 924(c), of the United States Code provides in relevant part:

> (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.

3. Title 18, Section 2, of the United States Code, provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

4. The federal carjacking statute, 18 U.S.C. § 2119, provides:

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,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

4. The statutory definitions of "serious bodily injury" and "bodily injury," 18 U.S.C. § 1365, are:

As used in this section--

(3) the term "serious bodily injury" means bodily injury which involves-
(A) a substantial risk of death;

(B) extreme physical pain;

(C) protracted and obvious disfigurement; or

(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and

(4) the term "bodily injury" means--

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary.

Statement of the Case

Petitioner Navaro is one of many defendants convicted and sentenced to a mandatory minimum sentence under 18 U.S.C. § 924(c) where the predicate offense no longer qualifies as a crime of violence. Section 924(c) provides graduated, mandatory, consecutive sentences for using a firearm during and in relation to a crime of violence. Navaro was sentenced to 7 years in prison, attributable solely to the mandatory sentencing scheme under 18 U.S.C. § 924(c).

In 2015, Navaro pled guilty to one count of use of a firearm during and in relation to "a crime of violence" (specifically, aiding and abetting carjacking) in violation of 18 U.S.C. § 924(c)(1)(A) (Count Two). Dist. Ct. Dkts. 17, 46, 48. On February 19, 2016, the district court sentenced Mr. Navaro to the mandatory 84 months of imprisonment for Count Two. Dist. Ct. Dkts. 57, 58. Further, the Court imposed a supervised release term of 5 years. Dist. Ct. Dkt. 58.

In 2015, this Court held the Due Process Clause precluded imposing an increased sentence under the residual clause of the Armed Career Criminal Act's ("ACCA") violent felony definition. *Johnson v. United States*, 576 U.S. 591 (2015). This Court later issued *Welch v. United States*, 578 U.S. 120, 132–34 (2016), holding *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. In June 2019, this Court issued *United States v. Davis*, 588 U.S. 445 (2019), holding the similar residual clause of 18 U.S.C. § 924(c)(3)(B) violates the Constitution's guarantee of due process.

Navaro sought relief from his § 924(c) conviction by filing a timely motion to vacate under 28 U.S.C. § 2255 in the District of Nevada. He raised a claim under *Davis*, arguing that federal aiding and abetting and completed carjacking no longer qualify as crimes of violence. The district court denied the motion on the merits and denied a COA. App. B, C.

Navaro timely appealed and requested a COA. The Ninth Circuit summarily denied that request. App. A.

Reasons for Granting the Petition

The Court should instruct the Circuits on the proper interpretation of the federal carjacking statute, 18 U.S.C. § 2119. The current federal circuit consensus that carjacking necessarily requires the use, attempted use, or threatened use of violent physical force conflicts with the plain language of § 2119. To make the carjacking statute "fit" the 18 U.S.C. § 924(c)(3)(A) physical force requirement for a crime of violence, the Circuits have attempted to judicially narrow the conduct that

the carjacking statute actually covers. It is imperative this Court properly interpret the federal carjacking statute, so defendants are not mandatorily incarcerated for offenses that do not legally meet the § 924(c) statutory crime-of-violence definition.

Additionally, the Circuits to address aiding and abetting federal carjacking confuse punishment liability with categorical analysis of an offense's elements to reach their erroneous holdings.[1] These Circuits fail to properly analyze the distinct aiding and abetting elements, as required by categorical analysis. Thus, Navaro asks this Court to correct the Circuits' disregard of categorical analysis and instruct

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[1] *See United States v. Draven*, 77 F.4th 307, 317 (4th Cir. 2023) (holding carjacking is a crime of violence and that "aiding and abetting does not alter the analysis" because "aiders and abettors are treated as principals"); *Steiner v. United States*, 940 F.3d 1282, 1293 (11th Cir. 2019) (same); *see also* cases involving Hobbs Act robbery holding aiding and abetting a substantive crime of violence also qualifies as a crime of violence: *United States v. García-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018) (finding, with no categorical analysis, aiding and abetting Hobbs Act robbery is a § 924(c) crime of violence because aiders and abettors are punishable as principals), *cert. denied*, 139 S. Ct. 1208 (2019)*; United States v. McCoy*, 995 F.3d 32, 57–58 (2d Cir. 2021) (same); *United States v. McKelvey*, 773 F. App'x 74, 75 (3d Cir. 2019) (same); *United States v. Ali*, 991 F.3d 561, 573–74 (4th Cir. 2021) (same); *United States v. Hill*, 63 F.4th 335, 363 (5th Cir. 2023) (same), *cert. denied*, 144 S. Ct. 207, 217 L. Ed. 2d 68 (2023), *reh'g denied*, 144 S. Ct. 443, 217 L. Ed. 2d 246 (2023);*United States v. Richardson*, 948 F.3d 733, 741–42 (6th Cir. 2020) (same), *cert. denied*, 141 S. Ct. 344 (2020); *United States v. Brown*, 973 F.3d 667, 697 (7th Cir. 2020) (same), *cert. denied*, 141 S. Ct. 1253 (2021); *United States v. Eckford*, 77 F.4th 1228, 1237 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 521 (2023) (same); *Kidd v. United States*, 929 F.3d 578, 581 (8th Cir. 2019) (same), *cert. denied*, 140 S. Ct. 894 (2020); *see also United States v. Deiter*, 890 F.3d 1203, 1214–16 (10th Cir. 2018) (finding aiding and abetting bank robbery qualifies as an ACCA violent felony because the defendant must intend to commit the underlying offense, declining to apply categorical analysis to aiding and abetting's elements), *cert. denied*, 139 S. Ct. 647 (2018).

the Circuits that aiding and abetting carjacking is not a crime of violence under § 924(c)'s force clause.

I. The residual clause in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, and this rule applies retroactively.

Section 924(c) provides graduated, mandatory, consecutive sentences for using a firearm during and in relation to a crime of violence. The term "crime of violence" is defined as a felony that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) 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. § 924(c)(3). The first clause, § 924(c)(3)(A), is called the force clause (also called the elements clause). The second, § 924(c)(3)(B), is called the residual clause. In *Davis*, 588 U.S.at 470, this Court held § 924(c)(3)(B)'s vague residual clause violates the Due Process Clause. U.S. Const. amend. V.

Petitioner expects the government will concede, as it has done elsewhere, that *Davis* pronounced a substantive rule applying retroactively to motions to vacate brought under 28 U.S.C. § 2255.[2]

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[2] Every circuit to address this question in a published opinion agrees *Davis* applies retroactively. *See King v. United States*, 965 F.3d 60, 64 (1st Cir. 2020); *Hall v. United States*, 58 F.4th 55, 60-63 (2d Cir. 2023); *In re Matthews*, 934 F.3d 296, 301 (3d Cir. 2019); *In re Thomas*, 988 F.3d 783, 789-90 (4th Cir. 2021); *United States v. Reece*, 938 F.3d 630, 635 (5th Cir. 2019); *In re Franklin*, 950 F.3d 909, 910-11 (6th Cir. 2020); *Cross v. United States*, 892 F.3d 288, 293-94 (7th Cir. 2018); *Jones v. United States*, 39 F.4th 523 (8th Cir. 2022); *United States v. Bowen*, 936 F.3d 1091, 1100 (10th Cir. 2019); *In re Hammoud*, 931 F.3d 1032, 1038–39 (11th Cir. 2019).

Therefore, to qualify as a § 924(c) crime of violence, aiding and abetting carjacking must meet the physical force clause at § 924(c)(3)(A). To qualify under the force clause, the offense must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). This means the offense must necessarily require two elements: (1) violent physical force capable of causing physical pain or injury to another person or property, *Stokeling v. United States*, 586 U.S. 73, 84–85 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)); and (2) the use of force must be intentional, *Borden v. United States*, 593 U.S. 420 (2021).

II. Aiding and abetting carjacking does not qualify as a § 924(c) crime of violence.

To establish guilt for aiding and abetting a federal offense under 18 U.S.C. § 2, a defendant need only facilitate commission of the offense—he need not participate in every offense element. *Rosemond v. United States*, 572 U.S. 65, 73 (2014). An aider and abettor, therefore, need not necessarily "use" force.

The aiding and abetting statute provides: "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a). A defendant "can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." *Rosemond*, 572 U.S. at 73. Indeed, "[t]he quantity of assistance [is] immaterial, so long as the accomplice did *something* to aid the crime." *Id.* (cleaned up). An aider and abettor simply need not use, attempt to use, or threaten violent physical force to be convicted.

This Court has not addressed whether aiding and abetting carjacking is a crime of violence under § 924(c)'s force clause. Petitioner urges this Court to ensure Circuits follow the categorical analysis for aiding and abetting that has been outlined by three federal circuit judges in separate dissenting and concurring opinions: Judge Nguyen's concurrence and dissent in part in *United States v. Dominguez*, 954 F.3d 1251, 1262 (9th Cir. 2020), *cert. granted, judgment vacated*, 142 S. Ct. 2857 (2022), *and reinstated in part by* 48 F.4th 1040 (9th Cir. 2022); Judge J. Pryor's concurrence in *Boston v. United States*, 939 F.3d 1266, 1272 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 103 (2020); and Judge Martin's dissent in *In re Colon*, 826 F.3d 1301, 1306 (11th Cir. 2016).[3] The categorical analysis these judges undertake and the reasoning they provide explains why aiding and abetting carjacking is not a crime of violence.

In denying a COA, the Ninth Circuit did not explain its reasoning. In similar cases, the Ninth Circuit confused categorical analysis with the contextually distinct rule that an aider and abettor is punishable for the acts of a principal. *See United States v. Eckford*, 77 F.4th 1228, 1236–37 (9th Cir. 2023) (holding aiding and abetting a substantive crime of violence also qualifies as a crime of violence). But the issue here is not punishment, the issue is the distinct *statutory elements* the government must necessarily prove to convict a defendant of aiding and abetting.

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[3] While these opinions address attempted and substantive Hobbs Act robbery, the outlined categorical analysis is helpful in determining whether aiding and abetting carjacking is a crime of violence because the means of commission are similar, and because the Circuits incorrectly rely on the rule that an aider and abettor is punishable for the acts of a principal for all these offenses.

A. Aiding and abetting carjacking has distinct elements from substantive carjacking.

In categorical analysis, a court must compare the statutory elements of the underlying offense with § 924(c)(3)(A)'s force clause requirements. *Davis*, 588 U.S. at 462–70. For any offense to qualify under § 924(c)'s force clause, that offense's actus reus must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). There is no carve-out under *Davis* for aiding and abetting offenses—the statutory elements must be categorically analyzed.

The Ninth Circuit has long held the government must prove four elements for aiding and abetting, which are distinct from the elements of the substantive offense. *United States v. Gaskins*, 849 F.2d 454 (9th Cir. 1988). In *Gaskins*, the Ninth Circuit reversed an aiding and abetting drug conviction where the district court precluded the defense at trial from rebutting the government's required elements for aiding and abetting. *Id.* at 460. The Ninth Circuit specifically noted the distinct elements required for aiding and abetting:

> [T]he government's argument that an aider and abettor is a principal does not provide an answer to the issue before us because the argument ignores the different elements the government must prove under the two theories and ignores the different arguments that the defense may make concerning the elements of the theory involved.

Id.

The Ninth Circuit's jury instruction contains the elements of aiding and abetting, which are materially distinct from the elements required for substantive

carjacking as enumerated in the Eighth Circuit's jury instructions.[4] These distinct elements are:

Aiding and Abetting	**Carjacking**
(1) someone else committed a carjacking;	(1) the defendant took a vehicle from the person or presence of another
(2) the defendant aided, counseled, commanded, induced or procured that person with respect to at least one element of carjacking;	(2) the defendant did so by means of force and violence or intimidation
(3) the defendant acted with the intent to facilitate carjacking; and	(3) the vehicle had been transported, shipped, or received in interstate commerce; and
(4) the defendant acted before the crime was completed.	(4) when the defendant took the vehicle he intended to cause death or serious bodily injury.

Compare Ninth Circuit Manual of Model Criminal Jury Instructions, § 4.1 Aiding and Abetting (Rev. Sept. 2019); *with* Eighth Circuit Manual of Model Criminal Jury Instructions, § 6.18.2119A Carjacking (no serious bodily injury or death) (2023) (cleaned up).

Other Circuits also require separate elements to obtain an aiding and abetting conviction, distinct from the substantive offense. *See, e.g.*, Third Circuit Pattern Jury Instructions (Criminal Cases), § 7.02 Accomplice Liability: Aiding and

[4] As the Ninth Circuit Model Jury instructions do not include an instruction for carjacking specifically, Petitioner relies on the Eighth Circuit's instruction for comparison.

Abetting (Rev. Jan. 2024)[5] (requiring the government to prove four elements: (1) the alleged principal "committed the offense charged by committing each of the elements of the offense charged;" (2) the defendant "knew the offense charged was going to be committed or was being committed by alleged principal;" (3) the defendant "knowingly did some act for the purpose of aiding alleged principal in committing the specific offense charged and with the intent that alleged principal commit that specific offense;" and (4) the defendant "performed an act in furtherance of the offense charged."); Fifth Circuit Pattern Criminal Jury Instructions, § 2.04 Aiding and Abetting (2024)[6] (requiring the government to prove four elements: (1) the substantive offense "was committed by some person;" (2) "the defendant associated with the criminal venture;" (3) "the defendant purposefully participated in the criminal venture;" (4) "the defendant sought by action to make that venture successful."); Sixth Circuit Pattern Criminal Jury Instructions, § 4.01 Aiding and Abetting (Jan. 2024)[7] (requiring the government to prove three elements: (1) the substantive crime "was committed;" (2) "the defendant helped to commit the crime or encouraged someone else to commit the crime;" (3) "the defendant intended to help commit or encourage the crime."); Eighth Circuit

[5] Available at https://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions.

[6] Available at https://www.lb5.uscourts.gov/JuryInstructions/.

[7] Available at https://www.ca6.uscourts.gov/pattern-jury-instructions.

Manual of Model Criminal Jury Instructions, § 5.01 Aiding and Abetting (2023)[8] (requiring the government to prove four elements: the defendant "before or at the time the crime was committed" must have (1) "known [principal offense] was being committed or going to be committed;" (2) "had enough advance knowledge of the extent and character of [crime] that he was able to make the relevant choice to walk away from the [crime] before all elements of [principal offense] were complete;" (3) "knowingly acted in some way for the purpose of causing, encouraging, or aiding the commission of [principal offense];" (4) "intended or known [the mental state required by the principal offense].").

Indeed, "[t]he elements clause does not ask whether the defendant committed a crime of violence or attempted to commit one. It asks whether the defendant *did* commit a crime of violence—and it proceeds to define a crime of violence as a felony that includes as an element the use, attempted use, or threatened use of force." *United States v. Taylor*, 596 U.S. 845, 853 (2022) (emphasis in original). Accordingly, there are distinct elements required for aiding and abetting offenses that courts must analyze categorically. Yet the Circuits fail to apply this step.

[8] Available at https://juryinstructions.ca8.uscourts.gov/instructions/criminal/Criminal-Jury-Instructions.pdf.

B. The distinct elements of aiding and abetting carjacking do not necessarily require the use, attempted use, or threatened use of force.

This Court, in *Rosemond*, 572 U.S. 65, clarified the actus reus element of aiding and abetting merely requires the defendant to aid or abet *one* element of the substantive offense. "Even when a principal's crime involves an element of force, there is 'no authority for demanding that an affirmative act [of aiding and abetting] go toward an element considered peculiarly significant; rather, . . . courts have never thought relevant the importance of the aid rendered.'" *In re Colon*, 826 F.3d at 1307 (Martin. J., dissenting) (quoting *Rosemond*, 572 U.S. at 75).

And, in categorical analysis, a court must presume the least of the acts charged. *Borden*, 593 U.S. at 423–24; *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013). Here, a defendant need not aid or abet by using, attempting use, or threatening use of force. *In re Colon*, 826 F.3d at 1306-07 (Martin, J., dissenting) (noting even if a defendant did use force to aid and abet a crime, "this use of force was not necessarily an *element* of the crime, as is required to meet the 'elements clause' definition."); *Boston*, 939 F.3d at 1273–74 (Pryor, J., concurring) ("A person who aids or abets another in committing armed robbery *may* use, attempt to use, or threaten to use physical force, or he may only be a getaway driver. Transforming that role in a crime into one that *necessarily* involves the use, attempted use, or threatened use of physical force contradicts [categorial analysis].").

When the statutory elements are facially overbroad, as here, a defendant need not provide a "realistic scenario" of non-violent conduct that would satisfy the

statute. *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc), *abrogated on other grounds by United States v. Stitt*, 586 U.S. 27 (2018). Still, several scenarios illustrate carjacking without the use, attempted use, or threatened use of force. *See infra*, pp. 28-29.

The actus reus element of aiding and abetting merely requires the defendant to aid or abet *one* element of carjacking—not all of which encompass the use, attempted use, or threatened use of violent physical force against another person. Thus, aiding and abetting carjacking does not qualify under § 924(c)'s force clause.

C. An offense's punishment is irrelevant to categorical analysis of the statutory elements.

Categorical analysis considers only the statutory elements and does not consider the punishment imposed for an offense. *See Mathis v. United States*, 579 U.S. 500, 503–05 (2016) (limiting categorical analysis to statutory elements). Yet, Circuit opinions erroneously rely on aiding and abetting's punishment rather than its statutory elements. *See Draven*, 77 F.4th at 317; *Steiner v. United States*, 940 F.3d at 1293; *Eckford*, 77 F.4th at 1236–37; *Hill*, 63 F.4th at 363; *García-Ortiz*, 904 F.3d at 109; *McCoy*, 995 F.3d at 57–58; *McKelvey*, 773 F. App'x at 75; *Richardson*, 948 F.3d at 741–42; *Brown*, 973 F.3d at 697; *Kidd*, 929 F.3d at 581; *In re Colon*, 826 F.3d at 1305.

This critical flaw is detailed by Judge Martin in her dissent, which explains conspiracy is not a crime of violence even though conspirators have the same penalties as those who commit the offense. *In re Colon*, 826 F.3d at 1307–08 (Martin, J., dissenting). And Judge Nguyen noted the government conceded

conspiracy to commit Hobbs Act robbery is not a crime of violence, *Dominguez*, 954 F.3d at 1265 n.3 (Nguyen, J., concurring and dissenting in part), even though the Hobbs Act robbery statute punishes conspirators the same as principals. *See* 18 U.S.C. § 1951(a).

The correct question is not whether a defendant aids and abets a crime of violence, but whether the aiding and abetting itself qualifies as a crime of violence. *See Dominguez*, 954 F.3d at 1265 (Nguyen, J., concurring and dissenting in part). Under the correct categorical analysis, aiding and abetting carjacking is not a qualifying § 924(c) crime of violence because the government need not prove—as an element—the defendant used, attempted use, or threatened use of physical force against the person of another. Therefore, Petitioner ask this Court to grant review, rectify the Circuits' disregard of categorical analysis, and instruct the Circuits that aiding and abetting carjacking is not a crime of violence under § 924(c)'s force clause.

III. Carjacking by intimidation does not require the use, attempted use, or threatened use of violent physical force.

Even if Navaro had been convicted of substantive carjacking, this offense is overbroad and does not qualify under the physical force clause for three reasons. First, the carjacking statute, as interpreted by this Court, does not require proof of an outward threat for conviction. Second, "intimidation" includes non-corporeal harm. Third, when reviewing carjacking convictions for sufficient evidence, the Circuits interpret intimidation broadly to encompass conduct that does not include

the use, attempted use, or threatened use of force. This Court must resolve this dispute over the proper interpretation and scope of the carjacking statute.

A. This Court holds that the carjacking statute does not require proof of an outward threat for conviction.

Carjacking can be committed "by force and violence or by intimidation." 18 U.S.C. § 2119. Applying the categorical approach, the least egregious conduct the statute covers is intimidation.

This Court recognizes carjacking by intimidation is satisfied by "an empty threat, or intimidating bluff." *Holloway v. United States*, 526 U.S. 1, 11 (1999). *Holloway* addressed the intent necessary for carjacking and ruled that a defendant could be found guilty of carjacking by intimidation in a "case in which the driver surrendered or otherwise lost control over his car" without the defendant ever using, attempting to use, or threatening to use physical force. *Id.* This Court concluded that while to obtain a § 2119 conviction the government must "prove beyond a reasonable doubt that the defendant would have at least attempted to seriously harm or kill the driver if that action had been necessary to complete the taking of the car," the statute does not require the threat of such harm to obtain a carjacking conviction. *Id.* In another context, when defining threat, this Court recognized that a victim's reasonable fear of "bodily" harm does not prove that a defendant communicated an intent to inflict harm. *Elonis v. United States*, 135 S. Ct. 2001, 2008 (2015).

Under this Court's precedent, the carjacking statute does not require a threat of force, let alone its use or attempted use. *See also United States v. Parnell*, 818

F.3d 974, 980 (9th Cir. 2016) (a threat of physical force "requires some outward expression or indication of an intention to inflict pain, harm or punishment."). This Court should correct the Circuits' erroneous interpretation otherwise.

B. "Intimidation" includes non-corporeal harm.

Textual statutory analysis also supports the broad definition of carjacking by "intimidation" to include non-corporeal harm. A threat of mental, emotional, or psychological harm will put the defendant in fear of "bodily harm" and thus constitute carjacking. The carjacking statute cross-references 18 U.S.C. § 1365 to define "bodily injury" as "serious bodily injury (as defined in section 1365 of this title . . .)." In turn, § 1365's definition includes not only traditional physical corporal harm, but also non-corporeal harm. Specifically, "bodily injury" includes the "impairment of the function of a . . . mental faculty," 18 U.S.C. § 1365(h)(4), and "serious bodily injury" includes "bodily injury which involves . . . protracted loss or impairment of the function of a . . . mental faculty," 18 U.S.C. § 1365(h)(3).

Congress has demonstrated its ability to limit "bodily" to purely physical harm, either by not cross-referencing § 1365, or by specifically removing the mental-injury component. For example, the federal hate crime statute, at 18 U.S.C. § 249(c)(1), limits "bodily injury" to corporeal harm: "the term 'bodily injury' has the meaning given such term in section 1365(h)(4) of this title, but *does not include solely emotional or psychological* harm to the victim." 18 U.S.C. § 249(c)(1) (emphasis added); *see also* 18 U.S.C. § 113(b)(2) (assaults within maritime and territorial jurisdiction); 18 U.S.C. § 115(b)(1)(B)(iv) (influencing, impeding, or

retaliating against a federal official by threatening or injuring a family member); 18 U.S.C. § 1347(a) (health care fraud).

But for the carjacking statute, Congress specifically cross-referenced § 1365 to define "bodily injury." This cross-reference to include a specific definition of "bodily injury" shows a deliberate legislative choice to give "bodily" a broad definition here.

In addition, carjacking by "intimidation" can be committed by threats to inflict legal or reputational harm. For example, take a defendant pretending to be an armed uniformed police officer when seizing a car from the victim, or a defendant towing a victim's car while claiming authority to do so and while possessing a firearm. In both examples, a victim turns over the vehicle out of fear of the legal and economic implications of resisting, even though there has been no threat—explicit or implicit—to inflict physical harm. The fear of legal consequences intimidates.

Caselaw documents this police-impersonation carjacking scenario. *See, e.g., United States v. Martinez,* 862 F.3d 223, 230, 240-41 (2d Cir. 2017) ("One of the coconspirators' main stratagems was to impersonate officers of the New York City Police Department."); *United States v. Green,* 664 Fed. App'x 193, 195 (3d Cir. 2016) ("Green and an unidentified accomplice carried out an armed carjacking while impersonating police officers."); *United States v. Vizcarrondo-Casanova*, 763 F.3d 89, 93 (1st Cir. 2014) (discussing prior bad acts evidence, including instances where co-defendants impersonated police or federal agents to commit robberies and

carjackings); *United States v. Diaz*, 248 F.3d 1065, 1097 (11th Cir. 2001) ("appellants impersonated police by driving a white Chevrolet Caprice and using a blue flashing light to pull Armando Gonzalez over"); *Khneiser v. Fisher*, No. 5:16-cv-00936, 2017 WL 3394323 (C.D. Cal. Aug. 7, 2017) (affirming denial of 28 U.S.C. § 2254 challenge where defendant impersonated police officer to commit armed robbery and carjacking); *Jones v. Prelesnik*, 2:08-cv-14126, 2011 WL 1429206, *1 (E.D. Mich. Apr. 14, 2011) (same).

Although the defendants in these cases did ultimately use physical force to carry out the carjackings, these citations show carjacking by impersonation would not *require* such force or threats of force. Intimidation in this manner—not involving force or threatened force—is, thus, "more than the application of legal imagination." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

C. Circuits interpret intimidation broadly for sufficiency of the evidence purposes, conflicting with their crime of violence rulings.

A review of "intimidation" decisions among the Circuits reveals a broad interpretation of "intimidation" for sufficiency—to sweep the widest possible range of conduct into robbery. These courts affirm robbery convictions including non-violent conduct that *does not* involve the use, attempted use, or threats of violent force:

- A teller at a bank inside a grocery store left her station to use the phone and two men laid across the bank counter to open the unlocked cash drawer, taking $961.00. *United States v. Kelley*, 412 F.3d 1240, 1243 (11th Cir. 2005). The men did not speak during the robbery. *Id.*

- A defendant gave a teller a note that read, "These people are making me do this," and told the teller, "They are forcing me and have a gun.

Please don't call the cops. I must have at least $500." *United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008).

- A defendant gave the teller a note reading, "Give me all your hundreds, fifties and twenties. This is a robbery." *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983). The teller said she had no hundreds or fifties, and the defendant responded, "Okay, then give me what you've got." *Id.* The teller walked toward the bank vault, at which point the defendant "left the bank in a nonchalant manner." *Id.* The defendant "spoke calmly, made no threats, and was clearly unarmed." *Id.*

- A defendant entered a bank, walked behind the counter, and removed cash from the tellers' drawers. *United States v. Slater*, 692 F.2d 107, 107–08 (10th Cir. 1982). Defendant did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing. *Id.*

But despite this broad definition of "intimidation," the Circuits find "intimidation" must, as a matter of law, involve the use, attempted use, or threats of violent physical force for § 924(c) analysis. *United States v. Gutierrez*, 876 F.3d 1254, 1255–57 (9th Cir. 2017); *Estell v. United States*, 924 F.3d 1291, 1293 (8th Cir. 2019), *cert. denied* WL 5875233 (2019); *United States v. Jackson*, 918 F.3d 467, 486 (6th Cir. 2019); *United States v. Cruz-Rivera*, 904 F.3d 63, 66 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1391 (2019); *Ovalles v. United States*, 905 F.3d 1300, 1304 (11th Cir. 2018) (en banc), *cert. denied*, 139 S. Ct. 2716 (2019); *United States v. Jones*, 854 F.3d 737, 740 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 242 (2017), *abrogated in part on other grounds by Davis*, 139 S. Ct. at 2336; *United States v. Evans*, 848 F.3d 242, 246–48 (4th Cir. 2017), *cert. denied*, 137 S. Ct. 2253 (2017); *United States v. Kundo*, 743 F. App'x 201, 203 (10th Cir. 2018).

The conflicting interpretations of "intimidation"—a non-violent one for sufficiency analysis and a violent one for crime-of-violence analysis—cannot stand. This Court, in *Stokeling*, reiterated that the modifier "physical" in § 924(c)(3)(A), "plainly refers to force exerted by and through concrete bodies—*distinguishing physical force, from, for example, intellectual force or emotional force*." 139 S. Ct. at 552 (quoting *Johnson*, 559 U.S. at 140) (emphasis added). While the conduct in the above examples would no doubt be emotionally or intellectually disturbing to the victims, the offenses involved no physical force or threat of physical force. Non-violent robbery by intimidation does not qualify under *Stokeling*.

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This Court requires § 924(c) crimes of violence to involve force, or threatened force, "capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. Because federal carjacking permits intimidating conduct threatening non-corporeal harm, it cannot qualify as a crime of violence after *Davis*.

III. The questions herein raise issues of exceptional importance this Court has not yet addressed, particularly given § 924(c)'s mandatory minimum sentences.

The questions presented by Navaro are of exceptional importance to federal courts and defendants given the mandatory minimum sentences required by § 924(c), ranging from five years to life imprisonment. Navaro is one of thousands of defendants sentenced under § 924(c). According to the Sentencing Commission's latest statistics, approximately 20,700 individuals (13.2% of the federal prison

population) are serving a § 924(c) mandatory sentence. U.S. Sent. Comm'n, *Quick Facts: Individuals in the Federal Bureau of Prisons* (May 2024).[9]

While this Court has interpreted the aiding and abetting statute, this Court has not yet addressed whether aiding and abetting carjacking necessarily meets the § 924(c)(3)(A) physical force clause definition of a crime of violence. *See e.g.*, *Rosemond*, 572 U.S. at 73 (clarifying proof required for aiding and abetting use of a firearm during federal drug-trafficking offense under 18 U.S.C. §§ 924(c) and 2). And this Court has not yet addressed whether the plain language of 18 U.S.C. § 2119 necessarily meets the § 924(c)(3)(A) physical force clause definition of a crime of violence. The proper interpretation of aiding and abetting carjacking requires this Court's review and intervention.

[9] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_January2024.pdf.

Conclusion

Navaro requests the Court grant this petition for a writ of certiorari.

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