

IN THE
SUPREME COURT OF THE UNITED STATES

DESHA COOPER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

18 U.S.C. § 924(c) criminalizes using or carrying a firearm during and in relation to a crime of violence, or possessing a firearm in furtherance of such an underlying crime. A first conviction under § 924(c) carries a seven-year mandatory minimum penalty. This petition presents the following questions:

I. Whether § 924(c)'s residual clause (18 U.S.C. § 924(c)(3)(B)) is unconstitutionally vague after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*).

II. Whether carjacking (18 U.S.C. § 2119(1)) has as an element “the use. . . of physical force against the person or property of another” under 18 U.S.C. § 924(c)(3)(A).

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REPLY TO THE BRIEF IN OPPOSITION

For the reasons previously argued and below, the petition for certiorari should be granted.

I. The Issues Presented Are Reasonably Debatable

The government contends that this Court should deny review because some circuit courts have held carjacking to be a “crime of violence” under § 924(c)(3)(A) and because “[t]his Court has recently and repeatedly denied review of [this] issue. . . .” BIO 5. However, that assertion is inaccurate. This was most recently shown when this Court in *Taylor v. United States* granted the defendant’s petition for certiorari, vacated the judgment, and remanded a § 2119 carjacking “crime of violence” case to the Eighth Circuit Court of Appeals “for further consideration in light of *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018).” *Taylor v. United States*, 138 S. Ct. 1979 (2018).

In August 2018, following this Court’s remand, the Eighth Circuit Court of Appeals granted the appellant in the *Taylor* carjacking “crime of violence” case a Certificate of Appealability (COA) on two issues:

1. Whether the residual-clause definition of a "crime of violence" in 18 U.S.C. Sec. Sec. [sic] 924(c)(3)(B) is void for vagueness in light of *Session [sic] v. Dimaya*, 138 S. Ct. 1204 (2018); and
2. Whether Taylor's conviction for carjacking under 18 U.S.C. Sec. 2119 is a crime of violence under the force clause of 18 U.S.C. Sec. 924(C)(3)(A).

Taylor v. United States, No. 16-4192, Order at *1 (8th Cir. Aug. 6, 2018). Thus, the case this Court remanded, *Taylor*, resulted in a COA from a circuit court on the same

two issues that Petitioner now seeks a COA from this Court. *See supra*, Questions Presented.¹

Thus, the government's contentions that "no reasonable debate exists," and "nor does any reason exists to remand this case to the court of appeals for further consideration in light of this Court's recent decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)," is inaccurate. BIO 9-10. Reasonable debate exists and continues, and is worthy of consideration as shown by this Court, and as was recently recognized by the Eighth Circuit Court of Appeals on granting a COA on the exact issues presented to this Court by Petitioner. BIO 9-10. The petition for certiorari should be granted on this basis and remanded to the Eleventh Circuit Court of Appeals for further consideration in light of *Dimaya*.

II. This Petition Should be GVR'ed in Light of *Sessions v. Dimaya*

This petition presents two questions:

I. Whether § 924(c)'s residual clause (18 U.S.C. § 924(c)(3)(B)) is unconstitutionally vague after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*).

II. Whether carjacking (18 U.S.C. § 2119(1)) has as an element "the use. . . of physical force against the person or property of another" under 18 U.S.C. § 924(c)(3)(A).

See Questions Presented, *supra*.

Petitioner argues that *Dimaya* is relevant to the first question only. *See* Pet. 4-10. Yet the government fails to respond to all of Petitioner's arguments about exactly

¹ Briefing has commenced in *Taylor*, but has not yet completed.

that—*Dimaya*’s impact on the § 924(c) residual clause (18 U.S.C. § 924(c)(3)(B)). See BIO 10; see also Pet 4-10. Instead, without citing any authority (other than *Dimaya* itself), the government merely announces that *Dimaya* “does not address the constitutionality of a provision similar to Section 924(c)(3)(A).” BIO 10. Thus, the government responds only to an argument Petitioner never made (*Dimaya*’s impact on the second question) while it fails to respond to the argument Petitioner did make (*Dimaya*’s impact on the first question). BIO 10; see also Pet 4-10.

Moreover, the government then errantly states—again without argument or cited authority—that “[t]his Court’s holding in *Dimaya* thus does not resolve any question that will affect the outcome of this case.” BIO 10. By doing so, the government ignores the dozen § 924(c) “crime of violence” GVR’s this Court has issued in light of *Dimaya*²—such as the § 2119 carjacking “crime of violence” GVR issued in *Taylor v. United States*, 138 S. Ct. 1979 (2018), discussed in Section I, *supra*.

The government also ignores the growing precedent relevant to the first question presented that has developed since *Dimaya*, including *United States v. Salas*, where the Tenth Circuit held, in light of *Dimaya*:

In sum, the reasons why § 16(b) is unconstitutionally vague apply equally to § 924(c)(3)(B). Because they are identically worded, we interpret § 16(b) and § 924(c)(3)(B) similarly and apply caselaw

² See also *Glover v. United States*, 138 S. Ct. 1979 (2018); *Davis v. United States*, 138 S. Ct. 1979 (2018); *Enix v. United States*, 138 S. Ct. 1983 (2018); *Ecourse-Westbrook v. United States*, 138 S. Ct. 1983 (2018); *Lin v. United States*, 138 S. Ct. 1982 (2018); *United States v. Jenkins*, 138 S. Ct. 1980 (2018); *Eizember v. United States*, 138 S. Ct. 1983 (2018); *Carreon v. United States*, 138 S. Ct. 1985 (2018); *United States v. Jackson*, 138 S. Ct. 1983 (2018); *McCoy v. United States*, 138 S. Ct. 1981 (2018); *Winters v. United States*, 138 S. Ct. 1982 (2018).

interpreting the former to the latter. *Serafin*, 562 F.3d at 1108 & n.4. Additionally, we apply the plain error rule “less rigidly when reviewing a potential constitutional error.” *James*, 257 F.3d at 1182. As a result, Mr. Salas's conviction under § 924(c)(1) was clearly erroneous under Supreme Court and Tenth Circuit precedent and constitutes plain error.

United States v. Salas, 889 F.3d 681, 687–88 (10th Cir. 2018). *Dimaya*'s impact on this petition is undeniable. The petition for certiorari should be granted and remanded to the Eleventh Circuit Court of Appeals for further consideration in light of *Dimaya*.

III. The Government's Position is Overstated

A. Carjacking, 18 U.S.C. § 2119, has few actual force clause holdings

The government states, “Every court of appeals that has considered the question has held that federal carjacking qualifies as a ‘crime of violence’ under Section 924(c)(3)(A).” BIO 7. However, close examination of the cases shows that the government cites to dicta and orders in cases that were not fully litigated appeals. BIO 7. Moreover, the government fails to respond to the Petitioner's arguments.

To begin, the government cited a case from 1994, *United States v. Mohammed*, 27 F.3d 815 (2d Cir.), cert. denied, 513 U.S. 975 (1994). BIO 7. *Mohammed* discussed carjacking relative to § 924(c) only in the double jeopardy issue presented in that case:

On this appeal, Mohammed raises the question of whether imposing a sentence for using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c), consecutive to a sentence for the predicate offense of carjacking, in violation of 18 U.S.C. § 2119, violates the constitutional prohibition against double jeopardy.

Mohammed, 27 F.3d at 818 (emphasis supplied). The court in *Mohammed* did not hold, as contended by the government, that “that federal carjacking qualifies as a ‘crime of violence’ under Section 924(c)(3)(A).” BIO 7.

The government also did not clarify that some cases it cited limited their holdings. BIO 7. For instance, in *United States v. Kundo*, an unpublished opinion, the court “conclude[d] that no reasonable jurist could debate whether armed carjacking is a crime of violence under § 924(c)(3)(A).” *United States v. Kundo*, No. 16-4128, 2018 WL 3613211, at *3 (10th Cir. July 27, 2018). Petitioner was convicted of carjacking—not armed carjacking, carjacking with serious bodily injury, or carjacking with death.

The government also cited to *In re Smith*, 829 F.3d 1276, 1280-81 (11th Cir. 2016), an order on a motion for authorization to file a second or successive § 2255—not a fully litigated appeal—and a case the Petitioner discussed in his brief. BIO 7; *see also* Pet. 12-16. That said, the government did not respond to any of Petitioner’s arguments. BIO 7.

B. Bank Robbery, 18 U.S.C. § 2113, has few actual force clause holdings

Ignoring the substantive differences between carjacking and bank robbery, the government seeks to raise in its response § 2113 bank robbery as relevant stating “Every court of appeals to have considered the issue. . . concluded that bank robbery... qualifies as a ‘crime of violence’ under Section 924(c)(3)(A).” BIO 8. Again, close examination of these cases shows that the government again cites to dicta, orders in cases that were not fully litigated appeals, and a *pro se* § 2241 opinion.

The government cites *United States v. Rinker*, No. 18-1227, 2018 WL 3996828, at *1-2 (10th Cir. Aug. 21, 2018). Yet as the Tenth Circuit noted, “[b]ecause the bank-robbery statute is divisible, we use the modified categorical approach to identify the offense underlying Mr. Rinker’s conviction.” *Rinker*, 2018 WL 3996828, at *3. Thus, *Rinker* does not hold that bank robbery is categorically a “crime of violence” under the § 924(c) force clause.

And as with carjacking in *In re Smith*, discussed supra, the government cites several orders on motions for authorization to file a second or successive § 2255 motion, instead of appellate opinions. BIO 8 citing *Holder v. United States*, 836 F.3d 891, 892 (8th Cir. 2016); *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016).

Again, the government cites dicta, *Leonard Johnson v. United States*, where the unrelated issue was:

Can a defendant be convicted of a firearms offense under 18 U.S.C. § 924(c) who has not been convicted of the predicate crime of violence (or drug trafficking) in connection with which the firearms offense was committed?

Leonard Johnson v. United States, 779 F.3d 125, 128 (2d Cir. 2015). The dicta cited was from a non-contested, non-litigated statement in that opinion:

Among the crimes of violence that may serve as a predicate for a § 924(c) conviction are the bank robbery and armed bank robbery offenses charged against Johnson in Counts One and Two.

Johnson, 779 F.3d at 128.

The government does the same for yet another opinion citing *United States v. Wright*, a sufficiency of the evidence appeal. BIO 8. Again, the proposition the

government states is dicta on the sufficiency issue. *Id.* The “crime of violence” statement—with no analysis, rationale, or caselaw, states:

Armed bank robbery qualifies as a crime of violence because one of the elements of the offense is a taking “by force and violence, or by intimidation.” 18 U.S.C. § 2113(a).

United States v. Wright, 215 F.3d 1020, 1028 (9th Cir. 2000).

Finally, the government cites a twenty-year old 28 U.S.C. § 2241 opinion for dicta, *Royal v. Tombone*, 141 F.3d 596, 602 (5th Cir. 1998). BIO 8-9. Again, this opinion cites *only* to the bank robbery statute itself in denying a *pro se* inmate’s claim against BOP policy change that “by definition, the crime of bank robbery includes as a necessary element the use of ‘force and violence’ or ‘intimidation.’” *Id.* (emphasis supplied).

On close examination, most of government’s authority is dicta, and most of the circuit courts have not held that § 2113 bank robbery, let alone § 2119 carjacking based upon bank robbery, is a crime of violence under § 924(c)(3)(A).

C. “Intimidation” Supports Petitioner’s Arguments

Given the government’s comparison of bank robbery to carjacking, its arguments on “intimidation” are also overstated. Contrary to the government’s contention, the Eleventh Circuit has set a low threshold for the term “intimidation” in carjacking cases. *See, e.g., United States v. Graham*, 931 F.2d 1442, 1443 (11th Cir. 1991) (intimidation in the context of 18 U.S.C. § 2113(a) is defined as an act by defendant “reasonably calculated to put another in fear”). There is no mention of force as it pertains to intimidation, and, more troublingly, the term “fear” is enough even

with no discussion of fear of bodily harm. *See United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) (“[A] defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating.”).

Despite this, the government, citing *United States v. Evans*, 848 F.3d 242 (4th Cir.), *cert. denied*, 137 S. Ct. 2253, 198 L. Ed. 2d 688 (2017), goes so far as to make the errant statement that “Petitioner’s argument lacks merit, because no court has interpreted ‘the term ‘intimidation’ in the carjacking statute as meaning anything other than a threat of violent force.” BIO 9 citing *Evans*, 848 F.3d at 247 (emphasis supplied). That said, what *Evans* actually states is:

We are not aware of any case in which a court has interpreted the term “intimidation” in the carjacking statute as meaning anything other than a threat of violent force. *See, e.g., In re Smith*, 829 F.3d 1276, 1280 (11th Cir. 2016) (holding that “intimidation” in the federal carjacking statute necessarily means threatened use of violent physical force).

Id. at 247 (emphasis supplied). Thus, for its proposition that no court agrees with Petitioner’s arguments, the government cites one case, *Evans*, that *does not* make such a conclusive statement and that case is an order on a motion for a second or successive § 2255—an order entered without the benefit of full appellate briefing or argument by the parties. *Id.* The government’s statement is in err.

CONCLUSION

As this Court did in *Taylor v. United States*, 138 S. Ct. 1979 (2018), Petitioner Desha Cooper respectfully requests that this Court grant his petition for writ of certiorari, and remand his case to the Eleventh Circuit Court of Appeals for further consideration in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

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