No.

IN THE

Supreme Court of the United States

DONTAE SMALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Riley v. California*, 573 U.S. 373 (2014), this Court held that the "search incident to arrest" exception to the Fourth Amendment's warrant requirement permits warrantless searches of the physical aspects of a cell phone but not its digital contents. The question presented is whether, consistent with *Riley*, the "abandonment" exception to the Fourth Amendment's warrant requirement permits warrantless searches of the digital contents of an abandoned cell phone.

2. Whether evidence that assailants pointed a gun at a victim and patted his pockets, without more, supports an inference that the robbers intended "to cause death or serious bodily harm" under the carjacking statute, 18 U.S.C. § 2119, when the assailants did not harm the victim even though he repeatedly rebuffed their commands, and there is no evidence that the gun was loaded, discharged, or even operational.

RULE 14.1(b)(iii) STATEMENT

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are related to this case:

- *United States v. Small*, No. 16-86 (D. Md. May 3, 2018).
- *United States v. Small*, No. 18-4327 (4th Cir. Dec. 6, 2019).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dontae Small respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 944 F.3d 490 (4th Cir. 2019). Pet. App. 1a-26a. The district court's judgment, *id.* at 27a-39a; order denying Small's motion to suppress, *id.* at 41a-42a; and order denying Small's motion for judgment of acquittal, *id.* at 40a, are unreported.

JURISDICTION

The court of appeals entered its judgment on December 6, 2019. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. The full text of the Fourth Amendment is reproduced at Pet. App. 43a.

The text of 18 U.S.C. §§ 371 and 2119 is reproduced at Pet. App. 43a-44a.

STATEMENT

"Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of" ordinary "physical items." *Riley v. California*, 573 U.S. 373, 393 (2014). For that reason, *Riley* unanimously held that the "search incident to arrest" exception to the Fourth Amendment's warrant requirement allows warrantless searches of the "physical aspects" of a cell phone but not its "[d]igital data." *Id.* at 387. *Riley* reserved the question whether "other case-specific exceptions" to the warrant requirement "may still justify a warrantless search of" cell phone data. *Id.* at 401-02.

The Fourth Circuit determined below that abandonment is one such exception, holding that the Government may conduct warrantless searches of the digital data on a cell phone if the phone meets the criteria for abandonment. In the court's view, when a person "abandon[s] his physical phone"—e.g., discarding it while fleeing police—he necessarily abandons all "digital contents" on the phone and, therefore, the Government can search those contents without a warrant. Pet. App. 21a n.2.

The Fourth Circuit's decision adds to the lower-court conflict and confusion over whether or how the abandonment exception applies to the digital contents of cell phones. At least four federal courts of appeals and six state appellate courts have considered the issue since *Riley*, resulting in ten majority and five dissenting opinions. All but one of those majority opinions held that the Fourth Amendment allows warrantless searches of the digital contents of an abandoned cell phone.

The Court should grant this petition to unify the law on this recurring and important issue, and to confirm that most of these lower-court decisions are wrong: the Government cannot conduct warrantless searches of data on a person's cell phone—the "digital record of nearly every aspect of" his or her life—just because the person leaves the phone behind while fleeing police, throws it in the trash, or otherwise discards it. *Riley*, 573 U.S. at 395. This case is an opportunity for the Court to reiterate the unique and heightened privacy interests that people have in the data on their cell phones, and to continue refining what expectations of privacy are "reasonable" in the digital age. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Riley*, 573 U.S. 373; *United States v. Jones*, 565 U.S. 400 (2012). This refinement is especially important for the abandonment exception to the warrant requirement because the Court has not considered the exception in nearly three decades—long before cell phones became "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley*, 573 U.S. at 385.

The Court also should grant the petition because the Fourth Circuit's decision creates a circuit split over what evidence is sufficient to support an inference beyond a reasonable doubt that a defendant intended "to cause death or serious bodily harm" under the carjacking statute. 18 U.S.C. § 2119. The Ninth Circuit has held that a jury *cannot* reasonably infer an intent to kill or seriously harm when (1) an assailant points a *loaded* gun at a victim without discharging it and (2) the victim was not harmed. *United States v. Randolph*, 93 F.3d 656, 664 (9th Cir. 1996)

(vacating carjacking conviction), *abrogated on other grounds by Holloway v. United States*, 526 U.S. 1 (1999). In this case, by contrast, the Fourth Circuit held that the jury *could* reasonably infer an intent to kill or seriously harm when the assailants (1) pointed a gun at a victim, without evidence that the gun was loaded; and (2) patted the victim's pockets without harming him, even though he repeatedly defied their demands. The Fourth Circuit's decision is also in tension with precedents in the Sixth Circuit holding that "evidence that a defendant brandished a firearm during a carjacking is insufficient on its own to establish a specific intent to kill or cause serious bodily harm." *United States v. Fekete*, 535 F.3d 471, 480 (6th Cir. 2008).

When the court of appeals asked the Government whether a decision finding sufficient evidence to sustain the carjacking conviction in this case would create a split with the Ninth Circuit's decision in *Randolph* and the Sixth Circuit's decision in *Fekete*, the Government answered: "Both of them were wrongly decided."[1] The Fourth Circuit apparently agreed, creating a conflict that warrants this Court's review.

A. District Court Proceedings.

1. In March 2016, the Government charged petitioner Dontae Small with conspiracy to commit carjacking under 18 U.S.C. § 371, carjacking under 18 U.S.C. § 2119(1), and destruction of government property exceeding $1,000 under 18 U.S.C. § 1361. The case went to trial in October 2017.

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[1] Argument Archive at 32:30-34:30, *United States v. Small*, No. 18-4327 (Oct. 31, 2019), https://tinyurl.com/rh6ju65.

Brandon Rowe was the victim of the alleged conspiracy and carjacking. He testified at trial that on the night of October 4, 2015, three masked men confronted him in Baltimore, and one pointed a gun at his face. Pet. App. 3a. When the gunman ordered Rowe to hand over "everything" he had, *id.*, he refused, handed over only his car keys, and said: "You're not getting my house keys," JA 182;[2] *see* Pet. App. 3a.

The men then patted Rowe's pants pockets to "confirm[ ] [he] did not have anything else," JA 182, and ordered Rowe to follow them to his car—a silver Acura, Pet. App. 3a. Rowe refused again, turned his back to the men, and walked away. JA 183. The men let him go and left in the opposite direction. JA 201. Rowe's car was gone when police arrived at the scene. Pet. App. 3a.

Rowe testified that, despite his double acts of defiance, the three men did not harm or try to harm him. JA 181-83, JA 200-01. Nor did they touch him with the gun or verbally threaten him. JA 200-01. Rowe never heard the gun make a "chamber[ing]" noise and did not know whether it was loaded. JA 200.

In an attempt to support the conspiracy charge, the Government also presented testimony about a second robbery that occurred a few blocks away within minutes of the Rowe robbery.

Joseph Dougherty and Hannah Caswell testified that a masked man confronted them as they were walking home from dinner. Pet. App. 3a-4a. The man pointed a gun at Caswell and repeatedly said—in a

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2 "JA" refers to the Joint Appendix filed on the docket in the Fourth Circuit at ECF Nos. 24-1 and 24-2 (Nov. 21, 2018).

"tentative" voice—"[e]mpty your pockets" and "[d]on't make a scene." JA 215-16, JA 226. Dougherty responded by making a scene, "yelling" and "screaming" so loud that someone came out of a nearby house. JA 216. During the commotion, a second robber came from behind Dougherty and "swiped" at his sweatshirt pocket, dislodging an iPhone. JA 228, JA 238. The robbers grabbed the iPhone and "took off running." JA 238; *see* Pet. App. 4a. Dougherty and Caswell were not injured. JA 226-28, JA 257-58.

2. The Government tried to implicate Small in the two robberies with evidence that, three days later, he drove Rowe's silver Acura to a shopping mall in Hanover, Maryland. JA 55-56. Security cameras at the mall scanned the license plate and reported the vehicle as stolen. Pet. App. 4a.

After Small parked the car and went in the mall, police set up a perimeter and waited. Pet. App. 4a. Small returned around 8:50 p.m. and got in the car. *Id.* When an officer activated his emergency equipment, Small drove over the curb and led police on a high-speed chase that ended a few miles away when he crashed through the visitor's gate of the National Security Agency ("NSA"). *Id.* at 4a-5a. Damage to the gate was the basis for the third count of the indictment (destruction of government property).

Small was gone when police arrived at the NSA crash site around 9:00 p.m. Pet. App. 5a. Approximately 200 state and federal officers took part in searching the area. *Id.*

Around 4:52 a.m. the next day—nearly eight hours after the crash—officers found an LG smartphone lying on the ground approximately

fifty yards from the crash site. Pet. App. 5a. The officers took the phone to a mobile command center. *Id.*

Thirty minutes later, around 5:18 a.m., the Government started searching the phone without a warrant. An NSA special agent "opened" the digital contents of the phone, which was not password protected, and searched through Instagram, a picture-sharing social media application. D. Ct. Dkt. 40, Gov't Opp'n to Mot. to Suppress 3 ("Gov't Opp'n"); *see also* JA 34. Next, the agent looked at the missed messages on the phone and used it to call "Sincere my Wife"—a contact who had made the last missed call to the phone. *See* Gov't Opp'n 4. When a woman answered, the agent did not identify herself as a federal agent and instead "used a ruse," falsely stating that she had found the phone in Baltimore and was trying to return it to its owner. *Id.* The woman, Kimberly Duckfield, responded that the phone belonged to her husband, Dontae Small. *Id.* at 4-5. Police obtained a photo of Small, matched the photo to the mall's security footage, and concluded that Small likely was the driver of the stolen Acura. Pet. App. 6a. The search continued.

At 7:24 a.m., a detective used the phone to call Duckfield again. The detective identified himself as a police officer and told Duckfield that Small might be injured. Duckfield said she had not heard from Small. Pet. App. 6a.

At 8:21 a.m., Duckfield called the cell phone and the detective answered, telling Duckfield that police were still looking for her husband. Pet. App. 6a. Sometime later, the detective removed the phone's back casing and its battery, and located the serial

number and other identifying information for the phone. *Id.*

It is undisputed that the Government had time to get a warrant before conducting these searches, but it did not even try to do so until October 14, 2015—more than a week later. *See* Reply Br. 18; Gov't Opp'n 10.

3. At approximately 10:19 a.m. on October 5, 2015, the day after the crash, police arrested Small after seeing him emerge from a manhole near the crash site. Pet. App. 6a. In the following days, the Government used information obtained from the warrantless searches of his cell phone to request and receive two warrants authorizing collection of the phone's text messages, internet browsing history, and historical cell site location data, among other data. *Id.* at 6a-7a. These searches yielded evidence linking Small to the two robberies—evidence that the Government, in its words, "very heavily" relied on during trial. JA 657.

Before trial, Small moved to suppress evidence derived from his cell phone, arguing that the warrantless searches violated the Fourth Amendment. Pet. App. 9a; *see id.* at 40a-41a; *see also* D. Ct. Dkt. 25, Mot. to Suppress 2-3 (citing *Riley*). The district court denied the motion, concluding that Small "abandoned" his cell phone the night of the crash. *Id.* at 9a-10a.

After trial, Small moved for a judgment of acquittal on the carjacking and conspiracy counts, arguing that the Government failed to present sufficient evidence that he acted with the requisite "'intent to cause death or serious bodily harm.'" D. Ct. Dkt. 97, Mot. for Judgment of Acquittal 2 (quoting 18 U.S.C. § 2119). Small argued that, although the

robbers had pointed a gun at Rowe, "there is no evidence that the robbers made anything more than an intimidating bluff." *Id.* at 5. The district court called the question "close," JA 637, but ultimately denied the motion, JA 638.

The jury found Small guilty on all three counts, and the district court sentenced him to 27 years' imprisonment. *See* Pet. App. 27a-39a.

B. Fourth Circuit Proceedings.

Small argued on appeal, among other things, that the district court erred in failing to suppress the fruits of the warrantless searches because the Government did not prove he "abandoned" the cell phone and, "[e]ven assuming" he abandoned the physical phone, he did not abandon "its sensitive digital content." Opening Br. 44-45 (citing *Riley*, 573 U.S. at 387); *see also* Reply Br. 16 (similar).

The Fourth Circuit disagreed. It reasoned that the warrantless searches of Small's cell phone were permissible because he "abandoned" the phone by presumably "tossing" it while fleeing police. Pet. App. 19a-20a. The court also rejected Small's alternative argument that, "even if he abandoned his physical phone, he did not abandon its digital contents," reasoning:

> While *Riley* held that "the search incident to arrest exception does not apply to digital information stored on cell phones," it emphasized that "other case-specific exceptions may still justify a warrantless search of a particular phone." 134 S. Ct. at 2493-94. . . . [T]his is such a case.

Id. at 21a n.2 (alterations omitted).

Small also argued in the court of appeals that "[t]he Government presented insufficient evidence to sustain [the] conspiracy and carjacking convictions, both of which require proof beyond a reasonable doubt that Small intended 'to cause death or serious bodily harm.'" Opening Br. 22 (quoting 18 U.S.C. § 2119).

The Fourth Circuit disagreed again. It held that "[t]here is substantial evidence in the record from which a reasonable juror could conclude that Small or his coconspirators intended to seriously harm or kill Rowe if necessary to steal his vehicle." Pet. App. 12a. Although the Fourth Circuit acknowledged that "Rowe's assailants did not verbally threaten him," that "the [G]overnment did not present proof that the gun was loaded," and that "Rowe's assailants did not harm him when he failed to follow certain instructions," the court nevertheless reasoned that these factors "speak to evidentiary weight, a matter that belongs with the jury." *Id.* at 14a. The Fourth Circuit thus affirmed Small's convictions.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit gave no weight to the Fourth Amendment distinction—recognized in *Riley*—between searches of the physical aspects of a cell phone and searches of its digital contents. That failure further fractures lower-court decisions addressing whether the Government may search the digital contents of abandoned cell phones without a warrant.

The Fourth Circuit also split with other courts of appeals in erroneously holding that pointing a gun at a victim and touching the victim, standing alone, is enough to infer an intent to kill or cause serious bodily

harm under the carjacking statute, even when there is no evidence that the gun was loaded and the robbers did nothing to impose their will when the victim repeatedly rebuffed their commands.

The Court should use this case to correct both errors and announce "a uniform rule" on these important, recurring issues. *Comm'r v. Bilder*, 369 U.S. 499, 501 (1962).

I. THE DECISION BELOW COMPOUNDS LOWER-COURT CONFUSION OVER WHETHER OR HOW THE ABANDONMENT EXCEPTION APPLIES TO THE DIGITAL CONTENTS OF CELL PHONES.

The first question presented—whether the Government can search the digital contents of abandoned cell phones without a warrant—has confused and divided lower courts since *Riley*, which distinguished between searching a cell phone's "physical aspects" and searching its "digital data." 573 U.S. 373, 387 (2014). Courts have struggled with whether to recognize and apply that distinction in the abandonment context—an issue with massive implications for privacy rights given the ubiquitous presence of cell phones in everyday life and in everyday police work.

A. Whether The Government Can Search The Digital Contents Of Abandoned Cell Phones Without A Warrant Is An Important, Unsettled, And Recurring Question This Court Reserved In *Riley*.

The Court first recognized the abandonment exception in *Hester v. United States*, 265 U.S. 57 (1924), holding that a Fourth Amendment "seizure" does not occur if a person "abandon[s]" the seized property. *Id.*

at 58. Thus, in *Hester*, "there was no seizure in the sense of the law" when officers examined a bottle of moonshine that the defendant "threw away" while fleeing police. *Id.* Likewise, in *Abel v. United States*, 362 U.S. 217 (1960), a defendant who "paid his [hotel] bill and vacated the room" could not complain about a warrantless search of a "hollowed-out pencil" and a "block of wood" left in the room's trash can because he had "abandoned these articles." *Id.* at 240-41 (citing *Hester*, 265 U.S. at 58).

Later, in *California v. Greenwood*, 486 U.S. 35 (1988), the Court held that a warrantless search of garbage bags containing drug paraphernalia that were left on a curb did not violate the Fourth Amendment because people do not have an "objectively reasonable" expectation of privacy in such garbage. *Id.* at 40-41.[3] Two years later, the Court held that a defendant who merely puts a paper bag on the hood of a car when approached by police "clearly has not abandoned that property." *Smith v. Ohio*, 494 U.S. 541, 543-44 (1990) (per curiam). And a year later, the Court held that a defendant abandoned drugs when

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[3] Although *Greenwood* did not mention "abandonment," lower courts have since approached "abandonment in terms of the view that the Fourth Amendment protects individuals against official intrusion into areas where they have a 'reasonable expectation of privacy,' defining and analyzing abandonment as an intentional relinquishment of that expectation with regard to the property in question." John P. Ludington, *Search and Seizure: What Constitutes Abandonment of Personal Property Within Rule That Search and Seizure of Abandoned Property Is Not Unreasonable—Modern Cases*, 40 A.L.R. 4th 381, § 2(a) (1985) (footnote omitted). As a result, abandonment "is primarily a question of intent." *Id.*

he "tossed [them] away" while fleeing police. *California v. Hodari D.*, 499 U.S. 621, 623, 629 (1991) (citing *Hester*, 265 U.S. at 58).

The Court has not considered the abandonment doctrine since *Hodari D.* Much has changed since then. Not only are "[t]he facts of the digital world . . . different from the physical world," Orin S. Kerr, *Implementing* Carpenter, *in* The Digital Fourth Amendment (forthcoming) (manuscript at i), but *Riley* recognized those differences as constitutionally significant: Because modern cell phones "implicate privacy concerns far beyond those implicated by the search of" ordinary physical objects, *Riley*, 573 U.S. at 393, the "search incident to arrest" doctrine allows warrantless searches of the physical aspects of a cell phone but not its digital contents, *id.* at 403.

The "privacy concerns" that animated *Riley* six years ago are even more substantial today. In 2014, 91% of American adults owned a cell phone. *See Mobile Fact Sheet*, Pew Research Ctr., Internet & Tech. (June 12, 2019), https://tinyurl.com/s5vm63n. That number is now 96%. *Id.* And in 2018, Americans exchanged *two trillion* text messages—an average of about 63,000 per second. *2019 Annual Survey Highlights* 1, 3, CTIA (2019), https://tinyurl.com/ufkw4zn. "Wireless has never played a more central role in how we live, work, and play." *Id.* at 1.

Moreover, in light of the "immense storage capacity" of modern cell phones, *Riley*, 573 U.S. at 393, a search of their digital data "would typically expose to the government far *more* than the most exhaustive search of a house," *id.* at 396, and could include

years—if not decades—of bank records, medical records, emails, text messages, and a "broad array of [other] private information," *id.* at 397. A search of data on cell phones thus "implicate[s] privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id.* at 393. No wonder, then, that 40% of males and 52% of females are "[v]ery anxious" about the possibility of losing the messages, photos, and other data on their cell phones. Ross Tucker, *How Americans Use and Feel About Their Mobile Phones*, Kantar (Mar. 6, 2018), https://tinyurl.com/unm7jfq.

These unique privacy concerns raise important and recurring questions about when, if ever, a person abandons the digital contents of a cell phone. The issue arises not only when a suspect discards or leaves a phone behind while fleeing police, but also when a person discards or trades in an old or broken phone—something that happens more than 416,000 times every day. Charmaine Crutchfield, *Smartphone Disposal Poses Security Risks, Experts Warn*, USA Today (Nov. 10, 2014), https://tinyurl.com/ufg3loy.

Given the substantial privacy rights at stake and the passage of time since the Court last considered the abandonment doctrine, the Court's guidance is urgently needed to ensure that the rules governing "the protection of privacy . . . keep up with technological advances." *State v. Moore*, — S.E.2d —, 2020 WL 811715, at *11 (S.C. Feb. 19, 2020) (Beatty, C.J., dissenting). If the Fourth Amendment *does* allow warrantless searches of the digital contents of abandoned cell phones, a contrary court holding needlessly removes a significant arrow from the law-enforcement quiver. But if the Fourth Amendment does *not* allow

those searches, courts holding otherwise have allowed the Government to invade the legitimate privacy expectations of American citizens.

To ensure that citizens "know the scope of [their] constitutional protection," *New York v. Belton*, 453 U.S. 454, 460 (1981), and to give police officers "workable rules" for applying the Fourth Amendment, *Riley*, 573 U.S. at 398 (quotation marks omitted), the Court should provide much-needed clarity as to how, if at all, the abandonment doctrine applies to the "privacies of life" stored in the digital contents of modern cell phones, *id.* at 403 (quotation marks omitted).

B. This Issue Has Confused And Fractured State And Federal Appellate Courts.

At least four federal courts of appeals and six state appellate courts have considered the Fourth Amendment status of the digital contents of abandoned cell phones after *Riley*. The resulting ten majority and five dissenting opinions highlight the confusion over this issue and the need for the Court to intervene. Moreover, most majority opinions have allowed warrantless searches of the digital contents of abandoned cell phones—a conclusion that defies both *Riley* and reasonable expectations of privacy.

1. Four federal courts of appeals and three state courts of last resort now have concluded post-*Riley* that the Fourth Amendment allows warrantless searches of the digital contents of an abandoned cell phone. *See United States v. Small*, 944 F.3d 490 (4th Cir. 2019); *United States v. Crumble*, 878 F.3d 656 (8th Cir.), *cert. denied*, 139 S. Ct. 187 (2018); *United States v. Escamilla*, 852 F.3d 474 (5th Cir.), *cert. denied*, 138 S. Ct. 336 (2017); *United States v. Sparks*,

806 F.3d 1323 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 2009 (2016); *State v. Valles*, 925 N.W.2d 404 (N.D. 2019); *State v. Brown*, 815 S.E.2d 761 (S.C. 2018), *cert. denied*, 139 S. Ct. 486 (2018); *State v. Samalia*, 375 P.3d 1082 (Wash. 2016).

These courts rely on abandonment cases from the pre-digital era that involved ordinary physical objects, such as the drug paraphernalia in *Greenwood*. According to these courts, *Riley*'s recognition that "[c]ell phones differ in both a quantitative and a qualitative sense" from ordinary physical objects, 573 U.S. at 393, does not alter the abandonment analysis for cell phones. As the Washington Supreme Court put it, *Riley* "demonstrate[s] that no special rules are necessary for cell phones because they can be analyzed under established rules." *Samalia*, 375 P.3d at 1088.[4]

Most of these decisions were deeply fractured, overturned the decision below, or demonstrated other signs of judicial bewilderment.

In *State v. Brown*, for example, a divided South Carolina Court of Appeals allowed the warrantless search of the list of contacts on an abandoned, password-protected cell phone, analogizing the inquiry to warrantless searches of abandoned, locked containers. 776 S.E.2d 917, 919, 923-24 (S.C. Ct. App. 2015). The dissent rejected that analogy, explaining that cases involving locked containers "occurred decades before the technology on which modern cell phones are

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[4] *Samalia* involved the Washington Constitution, but the provision at issue "encompasses the privacy expectations protected by the Fourth Amendment to the United States Constitution," and both the court and the parties extensively discussed *Riley* and the Fourth Amendment. 375 P.3d at 1085-89.

based was fully conceivable." *Id.* at 926 (Konduros, J., dissenting); *see also Riley*, 573 U.S. at 397 (noting that the analogy between "a cell phone" and "a container" "crumbles entirely"). The dissent further reasoned that, although the defendant did not have a reasonable expectation of privacy "in the physical object of the phone, . . . a person preserves their [sic] reasonable expectation of privacy in its *contents*, which is precisely what provides a phone its significance." 776 S.E.2d at 927 (Konduros, J., dissenting).

A fractured South Carolina Supreme Court affirmed, concluding that "*Riley* does not alter the standard abandonment analysis." 815 S.E.2d 761, 764 (S.C. 2018). That decision also drew a dissent, which criticized the majority for "fail[ing] to appreciate the full import of . . . *Riley*." *Id.* at 766-67 (Beatty, C.J., dissenting). According to the dissent, *Riley* points to "a categorical rule that, absent exigent circumstances, law enforcement must procure a search warrant before searching the data contents of a cell phone." *Id.* The "logic behind the Supreme Court's need to protect cell phones during arrests applies just as convincingly to cell phones left behind by their users." *Id.* at 768 (quotation marks omitted).[5]

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5 The South Carolina Supreme Court revisited the issue last month, fracturing again yet resolving the case on alternative grounds. *See Moore*, 2020 WL 811715, at *1. The majority "acknowledge[d] a close question . . . on the issue of abandonment" and recognized disagreement over the issue, *id.* at *24 & n.4, whereas the dissent would have reached the issue and held that, "absent exigent circumstances," police cannot perform warrantless searches of "the data contents of a cell phone," *id.* at *9 (Beatty, C.J., dissenting) (quotation marks omitted).

The Washington Supreme Court also was fractured in *State v. Samalia*, which affirmed the decision of a fractured Washington Court of Appeals. The Washington Court of Appeals upheld the warrantless search of the contacts list of an abandoned cell phone and found *Riley* inapposite "because the cell phone was not seized from [the defendant's] person during his arrest, but was found abandoned in a stolen vehicle." 344 P.3d 722, 726 (Wash. Ct. App. 2015). The dissent countered that *Riley* and other "[r]ecent search and seizure jurisprudence recognize[ ] that conventional cell phones are fundamentally different from other property, and that exceptions to the warrant requirement might not apply or might apply more narrowly where a cell phone or a similar device is at issue." *Id.* at 727 (Siddoway, J., dissenting).

The Washington Supreme Court affirmed over a three-judge dissent. 375 P.3d at 1090-91, 1096. The majority held that "the abandonment doctrine applies to cell phones" and that *Riley* "do[es] not create [an] exception[ ] for cell phones." *Id.* at 1087-88. The dissenting judges agreed that the abandonment doctrine applies to "the phone as a physical object," but reasoned that the strong privacy interests that attach to data on a cell phone compel a rule that "a search of digital data . . . on an abandoned cell phone . . . must be pursuant to a lawfully issued warrant, supported by probable cause." *Id.* at 1093, 1966 (Yu, J., dissenting) (quotation marks omitted).

Likewise, in *United States v. Sparks*, a divided Eleventh Circuit concluded that the Fourth Amendment allowed officers to search photographs and videos on an abandoned cell phone. 806 F.3d at 1331-32,

1349. According to the majority, the defendants abandoned their cell phone—including its digital contents—at a Walmart because, after accidentally leaving it there, they made "a considered and voluntary choice over a three-day period" not to retrieve the phone. *Id.* at 1344. The dissent disagreed, noting that, in light of *Riley*, courts must "be mindful of the status cell phones now have as property," and that when the defendants "lost their cell phone, they lost troves of information necessary for navigating modern life." *Id.* at 1354 (Martin, J., dissenting).

Similarly, in *United States v. Crumble*, the Eighth Circuit refused to "deny application of the abandonment doctrine to cell phones." 878 F.3d at 660. The magistrate judge in *Crumble* had found that, in light of *Riley*, the defendant's "cell phone was lawfully seized but his privacy interest in its contents [was] not extinguished merely by his lack of possession." 2015 WL 13687910, at *5 (D. Minn. July 22, 2015), *report and recommendation adopted in part, rejected in part*, 2015 WL 13687911 (D. Minn. Sept. 28, 2015). The district court disagreed, but it recognized "that the issue [was] admittedly complex in light of . . . *Riley*." *Crumble*, 2015 WL 13687911, at *2. The Eighth Circuit affirmed, concluding that "*Riley*'s holding is limited to cell phones seized incident to arrest." *Crumble*, 878 F.3d at 660.

Finally, in *United States v. Escamilla*, the Fifth Circuit concluded that a defendant "abandoned any privacy interest" in the digital contents of his cell phone because he "expressly disclaimed ownership of the phone and left it in the possession of DEA agents." 852 F.3d at 485-86. As a result, he could not challenge

the DEA agents' use of Cellebrite—an invasive forensic examination program—to conduct a warrantless search of the phone's digital data. *Id.* at 484, 486. The Fifth Circuit's reasoning relied on a prior panel decision issued before *Riley* holding that a defendant abandoned the digital contents of his cell phone because he "'disclaim[ed] personal connection to the phone.'" *Id.* at 485-86 (quoting *United States v. Powell*, 732 F.3d 361, 374 (5th Cir. 2013), *cert. denied*, 571 U.S. 1219 (2014)).

2. On the other side of the ledger, a unanimous Florida District Court of Appeal concluded in *State v. K.C.*, 207 So. 3d 951 (Fla. Dist. Ct. App. 2016), *cert. denied* 137 S. Ct. 2269 (2017), that the Fourth Amendment does not allow police to search the digital contents of an abandoned, password-protected cell phone. The court reasoned that, "[i]n light of *Riley*, the United States Supreme Court treats cell phones differently, for the purposes of privacy protection, than other physical objects." *Id.* at 955. Although *Riley* left room for "some 'case-specific' exceptions [to] apply to justify a warrantless search of a cell phone," "the example given was a search based upon exigent circumstances," and "[t]he abandonment exception does not compel a similar conclusion that a warrantless search is authorized." *Id.* (quoting *Riley*, 573 U.S. at 401). Accordingly, police officers may not search the digital contents of an abandoned, password-protected cell phone unless they "get a warrant." *Id.* at 958 (quoting *Riley*, 573 U.S. at 403).

The Florida District Court of Appeal also noted the lower-court disagreement over this issue, and explained that "the dissents in *Brown* and *Samalia* hew closer to the analysis in *Riley* than do the majority

opinions in those cases." *K.C.*, 207 So. 3d at 956-57. In the court's view, *Riley* compels the conclusion that "the quantitative and qualitative nature of the information contained on a cell phone sets it apart from other physical objects, even locked containers." *Id.* at 958. The court "thus side[d] with the dissents" in *Brown* and *Samalia*, suppressing evidence obtained from a warrantless search of the digital contents of the defendant's cell phone. *Id.* at 956.[6]

3. In an effort to craft a rule for when the Government may conduct warrantless searches of an abandoned cell phone, some courts have tried to draw what they view as a meaningful Fourth Amendment distinction between password- and non-password-protected phones. *See, e.g.*, *Valles*, 925 N.W.2d at 410; *K.C.*, 207 So. 3d at 955. These courts reason that a person who discards a phone abandons its digital contents if the phone is *not* password protected, but does not abandon the digital contents if the phone *is* password protected. That is purportedly because passwords "indicat[e] an intention to protect the privacy of all of the digital material on the cell phone or able to be accessed by it." *K.C.*, 207 So. 3d at 955; *see also Valles*, 925 N.W.2d at 410 ("A security lock on a cell

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[6] Arizona courts also give significant Fourth Amendment protection to the digital contents of cell phones. In *State v. Peoples*, 378 P.3d 421 (Ariz. 2016), for example, an officer conducted a warrantless search of the defendant's non-password-protected cell phone left in an apartment. *Id.* at 424. The Arizona Supreme Court recognized that the defendant "had a legitimate expectation of privacy in his cell phone . . . at the time of the search," explaining that *Riley* "recognized a uniquely broad expectation of privacy in cell phones because they essentially serve as their owners' digital alter egos." *Id.* at 425.

phone signals that the information within is not intended for public viewing.").

That distinction is irrelevant, unworkable, and nonsensical—and only further highlights lower-court confusion. To begin with, *Riley* did not distinguish between password- and non-password-protected phones; it applied the warrant requirement to the digital data of *all* cell phones, including a "flip" phone that remained unlocked at least "[f]ive to ten minutes" after officers seized it. *Riley*, 573 U.S. at 380. The short of it is that "personal belongings need not be locked for a legitimate expectation of privacy to exist." *Peoples*, 378 P.3d at 426. "Cell phones are intrinsically private," so "the failure to password protect access to them is not an invitation for others to snoop." *Id.*

The password–no password distinction is also unworkable. For example, police officers in the field who see a defendant discard a phone or otherwise "come upon . . . a phone in an unlocked state" might not know whether the phone is password protected—e.g., whether it would automatically lock after a period of inactivity. *Riley*, 573 U.S. at 389. And even if officers could implement the rule in the field, it gives talismanic significance to one consideration—password protection—whose connection to modern Fourth Amendment doctrine is gossamer thin: less than half of people protect their cell phones with a password or other form of lock. *See* Kaspersky Lab, *Not Logging On, But Living On* (2017), https://tinyurl.com/v44dw5l. It strains credulity to say, as these courts do, that society would not accept as reasonable a privacy expectation that these people have in the digital contents of their cell phones.

In short, lower courts are confused about how abandonment cases from the pre-digital era apply to searches of the digital contents of abandoned cell phones.[7] Until this Court resolves that confusion, a current or even former cell-phone owner "cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *Belton*, 453 U.S. at 460.

C. The Fourth Amendment Prohibits Warrantless Searches Of The Digital Contents Of Abandoned Cell Phones.

Review is also warranted because the decision below—like the decisions of most other appellate courts that have considered this issue—is wrong. The

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[7] Many scholars have noted the post-*Riley* judicial struggle to apply precedents from the pre-digital era to new technologies. *See, e.g.*, Maureen E. Brady, *The Lost 'Effects' of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 955 (2016) ("[*Riley*] indicate[s] a desperate need for some guidance as to the interaction of privacy and personal property in the Fourth Amendment calculus."); Sarah Tate Chambers, *Cybercrime Roundup: Searching and Seizing*, Lawfare (Feb. 22, 2017), https://tinyurl.com/uf8mrzm ("[C]ourts on both the state and federal level are grappling with these issues."); Abigail Hoverman, Note, Riley *And Abandonment: Expanding Fourth Amendment Protection of Cell Phones*, 111 Nw. U. L. Rev. 517, 543 (2017) ("In light of the modern developments of personal technological devices and the Court's analysis in *Riley*, courts should . . . require police officers to obtain a search warrant before searching cell phones left behind by their owners."); Erica L. Danielsen, *Cell Phone Searches After* Riley*: Establishing Probable Cause and Applying Search Warrant Exceptions*, 36 Pace. L. Rev. 970, 995 (2016) ("[Although] the [*Riley*] decision left open the possibility of applying warrant exceptions, . . . courts should not analyze these exceptions lightly.").

Fourth Circuit's failure to address the substantial privacy interests at stake flouts *Riley*'s recognition that "[c]ell phones differ in both a quantitative and a qualitative sense from" ordinary physical objects. 573 U.S. at 393. Nor did the Fourth Circuit attempt to explain why these differences are constitutionally significant—indeed, dispositive—in the context of the search incident to arrest exception, but are constitutionally irrelevant in the context of the abandonment exception.

To say, as the Fourth Circuit did, that abandoning a physical cell phone is materially indistinguishable from abandoning its digital contents "is like saying a ride on horseback is materially indistinguishable from a flight to the moon." *Riley*, 573 U.S. at 393. It also defies this Court's admonition that, "[w]hen confronting new concerns wrought by digital technology," courts must be "careful not to uncritically extend existing precedents." *Carpenter v. United States*, 138 S. Ct. 2206, 2222 (2018); *see also Riley*, 573 U.S. at 406-07 (Alito, J., concurring) ("[W]e should not mechanically apply the rule used in the predigital era to the search of a cell phone."); *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) ("It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.").

Because cell phones are not ordinary physical objects, their searches—and the resulting privacy invasions—"bear[ ] little resemblance to the type of . . . physical search[es]" considered in the Court's past abandonment cases. *Riley*, 573 U.S. at 386 (majority opinion). Failing to recognize these differences upsets the legitimate privacy expectations people have in the

digital contents of their cell phones—technology that was "nearly inconceivable" when the Court last considered the abandonment doctrine. *Id.* at 385.

The advent of cloud computing has further increased these privacy expectations. Cloud computing allows cell phones to "display data stored on remote servers rather than on the device" itself. *Riley*, 573 U.S. at 397. In other words, the cloud lets people view their digital data from many devices—computers, tablets, other cell phones, etc.—even after relinquishing possession of only one device. Just as people do not abandon all contents of their house merely by discarding a copy of their house key, they do not abandon all data in the cloud accessible on their cell phone (e.g., emails) merely by tossing away the phone.

The "touchstone" of the constitutionality of any warrantless search is "reasonableness." *Samson v. California*, 547 U.S. 843, 855 n.4 (2006). "[T]he reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests.'" *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (citation omitted). Applying that familiar framework compels a categorical rule allowing the Government to conduct warrantless searches of the physical aspects of an abandoned cell phone but not its digital contents. The first question presented is an opportunity for the Court to reiterate this distinction from *Riley* and to reaffirm the legitimate privacy interests people have in the "digital record of nearly every aspect of their lives—from the mundane to the intimate." *Riley*, 573 U.S. at 395.

II. REVIEW IS NEEDED TO CLARIFY WHAT EVIDENCE IS SUFFICIENT TO SATISFY THE *MENS REA* ELEMENT OF THE CARJACKING STATUTE.

A person violates the federal carjacking statute if he, "*with the intent to cause death or serious bodily harm*[,] takes a motor vehicle . . . from the person or presence of another *by force and violence or by intimidation*." 18 U.S.C. § 2119 (emphases added). The statute thus requires, in addition to proof that a defendant took a vehicle "by force and violence or by intimidation," proof that the defendant had the specific intent to kill or cause serious bodily harm. This "*mens rea*" component is a standalone element of the offense that "modifies" the "*actus reus* component." *Holloway v. United States*, 526 U.S. 1, 8 (1999).

The specific intent to harm or kill may be "unconditional" or "conditional." *Holloway*, 526 U.S. at 7 (quotation marks omitted). Unconditional intent exists when a defendant intended "to harm or kill even if not necessary to complete a carjacking." *Id.* at 8. Conditional intent exists when a defendant intended to harm or kill only if necessary to take the car. *Id.* Either way, a defendant lacks the requisite intent if he makes only "an empty threat, or intimidating bluff" in order to scare a driver into relinquishing control of the vehicle. *Id.* at 11.

The courts of appeals frequently confront sufficiency challenges to carjacking convictions based on a

purported lack of evidence of the requisite specific intent.[8] Since *Holloway*, these courts have struggled to articulate what evidence is necessary to support an inference that a defendant acted with the intent "to cause death or serious bodily harm," as opposed to the intent to make an "empty threat" or "intimidating bluff." *See generally United States v. Fekete*, 535 F.3d 471, 477-78 (6th Cir. 2008) (noting the "limited guidance" and "conflicting caselaw" on this issue). The decision below adds to this confusion and is out of step with the decisions of most other circuit courts.

A. The Decision Below Is Irreconcilable With Decisions Of The Ninth And Sixth Circuits.

The Fourth Circuit affirmed Small's carjacking and conspiracy convictions even though the Government introduced no evidence that the robbers harmed Rowe; no evidence that the gun they used was loaded or even operational (much less that they discharged it); and no evidence that they responded with violence or threats of violence when Rowe repeatedly rebuffed their demands, first refusing to give the robbers his

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[8] In the past four years, for example, the courts of appeals have issued at least eleven decisions addressing this issue. *See United States v. Reed*, 778 F. App'x 654 (11th Cir. 2019); *United States v. Benson*, 756 F. App'x 258, (4th Cir. 2018); *United States v. Foster*, 734 F. App'x 129, (3d Cir. 2018); *United States v. Hinton*, 730 F. App'x 719 (11th Cir. 2018); *United States v. Janqdhari*, 755 F. App'x 127 (3d Cir. 2018); *United States v. Diaz-Rosado*, 857 F.3d 116 (1st Cir. 2017); *United States v. Hayworth*, 682 F. App'x 369, (6th Cir. 2017); *United States v. Leon*, 713 F. App'x 948 (11th Cir. 2017); *United States v. Robinson*, 855 F.3d 265 (4th Cir. 2017); *United States v. Baker*, 669 F. App'x 525 (11th Cir. 2016); *United States v. Green*, 664 F. App'x 193 (3d Cir. 2016).

house keys despite being ordered to hand over "everything," and then refusing to walk with the robbers to his car. JA 182-83. Although the robbers patted Rowe's pants pockets to "confirm[ ] [he] did not have anything else," JA 182, they did not respond to Rowe's defiance with violence. They let him walk away unharmed.

The only reasonable inference from this evidence is that the robbers intended to *steal* from Rowe through either force or intimidation, not to *kill* or seriously harm him if necessary to take his car. The Fourth Circuit nevertheless held that a reasonable jury could find beyond a reasonable doubt that the robbers intended to kill or seriously harm Rowe because: "(1) an assailant pointed a gun at Rowe; and (2) an assailant made physical contact with Rowe." Pet. App. 12a.

That holding conflicts with *United States v. Randolph*, 93 F.3d 656, 664 (9th Cir. 1996), *abrogated on other grounds by Holloway*, 526 U.S. 1, where the Ninth Circuit vacated a defendant's carjacking conviction for insufficient evidence of an intent to kill or cause serious bodily harm despite the defendant pointing a "*loaded* semi-automatic assault rifle" at the victim's face when taking her car. 93 F.3d at 658 (emphasis added). The Ninth Circuit explained that, although the defendant "was armed and clearly capable of harming" the victim, he—like the robbers here—never "said [any]thing to indicate any animosity toward the victim," "never discharged the weapon," and "did not physically harm his victim, despite the ample opportunity he had to do so." *Id.* at 663, 664. Thus, because the only reasonable inference from the evidence is that the defendant's "intent in brandishing

the weapon was *not* to kill or to harm but to merely intimidate [the victim] into relinquishing her car and money," the Ninth Circuit vacated the carjacking conviction. *Id.* at 664.

The Fourth Circuit's decision also cannot be reconciled with the Sixth Circuit's decision in *Fekete*, which held that "evidence that a defendant brandished a firearm during a carjacking is insufficient on its own to establish a specific intent to kill or cause serious bodily harm." 535 F.3d at 480. Applying a "brandishing-plus test," the court explained that the Government cannot establish the *mens rea* element of § 2119 unless it offers evidence of intent in addition to brandishing a firearm, such as evidence of "physical violence." *Id.* at 478, 481. Applying this rule, the jury in *Fekete*—a "very close case"—reasonably *could* have concluded that the defendant had the requisite specific intent under § 2119 because the Government offered evidence that he "used a *loaded* .40 caliber pistol during the offense," *id.* at 481 (emphasis added), and participated in a second carjacking within the same 24-hour period where he "made an explicit threat to shoot the victim and [in so doing] had cocked the pistol," *id.* at 482.

The Fourth Circuit acknowledged *Randolph* and *Fekete*, but reasoned that "it is unclear that our holding conflicts with those" two decisions. Pet. App. 16a. According to the Fourth Circuit, the Ninth and Sixth Circuits might have affirmed Small's convictions under the so-called "brandishing-plus" rubric because "Rowe's assailants did not merely 'brandish' a gun;" they also "pointed and trained [the gun] at [Rowe's] head" and "physically touched Rowe during the carjacking, when they patted him down." *Id.*

That is wrong. As in *Randolph*, although the robbers pointed a gun at Rowe, there was "nothing to indicate any animosity toward [him], *much less* to suggest a specific intent to cause . . . death or serious bodily harm." 93 F.3d at 664 (emphasis added). And in *Randolph*, unlike here, the court reversed the conviction despite evidence that the brandished gun was loaded and pointed at the victim.

As for *Fekete*, the Sixth Circuit affirmed the carjacking conviction in that case because there, unlike here, there was evidence that the assailant "used a loaded [gun]" and purchased ammunition before the carjacking. 535 F.3d at 481-82. Moreover, the incidents of physical touching that the Sixth Circuit has deemed to satisfy the "plus" prong of its "brandishing-plus test" have all been either touching the victim with the weapon or otherwise violently touching the victim—actions quite different than the pat-down in this case, which did not harm Rowe or evince any intent to harm him. *See, e.g.*, *United States v. Mack*, 729 F.3d 594, 603-04 (6th Cir. 2013) (sustaining a carjacking conviction where defendant "forcibly" and "repeatedly" pushed a loaded gun "into the back of [the victim's] head"); *United States v. Washington*, 714 F.3d 962 (6th Cir. 2013) (finding sufficient evidence of intent where defendant put his firearm to the victim's head, grabbed her son's arm, and threw her son out of the car).

After trying to reconcile its holding with those of the Ninth and Sixth Circuits, the Fourth Circuit seemed to recognize that its efforts fell short: "If we have any disagreement with our sister circuits," the court reasoned, "it is limited to precisely when the question of intent switches from one of fact for the jury

. . . to one of law for the courts." Pet. App. 16a. That's exactly right. In *Randolph*, for example, the Ninth Circuit held *as matter of law* that the intent element of § 2119 was *not* satisfied even though the Government presented *more* evidence of an intent to kill (e.g., a loaded gun) than the Government presented here. Also in *Randolph*, the defendant's intent to harm was not so thoroughly negated as it was here, where Rowe repeatedly rebuffed the robbers' commands, and the robbers made no attempt to impose their will. The only reasonable inference in this case is that the robbers pointed the gun at Rowe as an "empty threat, or intimidating bluff," which fails as a matter of law to satisfy the intent element of § 2119. *Holloway*, 526 U.S. at 11.

Despite its attempted self-absolution, the Fourth Circuit created a circuit conflict. This Court should therefore grant the petition to ensure that, no matter the circuit, defendants are "treated consistently, and thus predictably, under federal law." *Moncrieffe v. Holder*, 569 U.S. 184, 205 n.11 (2013); *see also Linkletter v. Walker*, 381 U.S. 618, 620 (1965) (granting review because a conflict had developed over "a most troublesome question in the administration of justice").

B. The Decision Below Is In Tension With The Decisions Of Other Circuit Courts.

The Fourth Circuit's decision is out of step with the decisions of other courts of appeals that have considered sufficiency challenges to carjacking convictions.

Consider the First Circuit. In cases involving physical contact (albeit in the absence of a firearm),

that court has relied on some evidence of physical *violence*—which is lacking here. Thus, in *United States v. Diaz-Rosado*, 857 F.3d 116 (1st Cir. 2017), the court sustained a conviction where the defendant "showed from the get-go that he was . . . prepared to overcome [maximum] resistance" by "grabb[ing] [the victim's] hand, struggl[ing] with her, and push[ing] and shov[ing] her." *Id.* at 121-22 (quotation marks omitted). The defendant also "threw [the victim] onto the cement sidewalk" and "slam[med]" her onto the floor. *Id.*; *see also United States v. Lebron-Cepeda*, 324 F.3d 52, 57 (1st Cir. 2003) (affirming conviction where assailant "placed a loaded and cocked revolver against [the victim's] head . . . and verbally threatened him").

The Third and Fifth Circuits similarly have affirmed carjacking convictions where evidence of violence showed a specific intent to kill or cause serious bodily harm. In *United States v. Anderson*, 108 F.3d 478 (3d Cir. 1997), for example, the defendant "placed the loaded and operable gun up against the back of [the victim's] neck." *Id.* at 485. And when the victim turned around, the defendant "pointed the gun right at him" and later "fired a shot." *Id.* Likewise, in *United States v. Frye*, 489 F.3d 201 (5th Cir. 2007), the defendant's co-conspirator shot a victim multiple times.

Opinions sustaining carjacking convictions in the Seventh and Eighth Circuits also have highlighted the importance of physical violence, verbal threats, or other evidence of an intent to kill in addition to brandishing a weapon. For example, in *United States v. Hunter*, 932 F.3d 610 (7th Cir. 2019), the defendant forced the victim to the ground and hit him in the head with a gun. In *United States v. Carter*, 695 F.3d 690

(7th Cir. 2012), the defendant repeatedly threatened to kill the victim if he did not comply. And in *United States v. Dean*, 810 F.3d 521 (8th Cir. 2015), *rev'd on other grounds*, 137 S. Ct. 1170 (2017), a defendant hit the victim "in the head with [a] rifle and threaten[ed] to kill him." *Id.* at 529.[9]

* * *

In sum, until the decision below, the courts of appeals generally agreed that an intent to kill or cause serious bodily harm may be inferred for purposes of § 2119 only if the defendant wields a gun *and* there is evidence that (1) the defendant touched the victim with the gun; (2) the gun was loaded; (3) the defendant made verbal threats to harm or kill the victim; and/or (4) the victim was harmed. None of that applies here. Instead, the robbers let the victim walk away unharmed after he repeatedly defied their demands, confirming that brandishing the gun was precisely the type of "empty threat, or intimidating bluff" that fails to satisfy the *mens rea* element of § 2119 as a matter of law. *Holloway*, 526 U.S. at 11.

The Court should grant the petition to bring the Fourth Circuit in line with its sister circuits and to

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[9] The decision below is also in tension with state court decisions in other contexts holding that pointing a gun, standing alone, does not support an inference of an intent to kill. *See, e.g.*, *People v. Rodriguez*, 406 N.Y.S.2d 63 (N.Y. App. Div. 1978) (reducing attempted murder conviction to attempted assault where defendant fired gun toward police because jury could only speculate whether the defendant intended to kill or to cause non-fatal injury); *Merritt v. Commonwealth*, 164 Va. 653 (1935) (holding that pointing a loaded gun at someone does not, by itself, support an inference of a specific intent to kill); *Hairston v. State*, 54 Miss. 689 (1877) (similar).

confirm that the only reasonable inference from the evidence in this case is that the robbers did not intend to kill or cause serious bodily harm.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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