Nos. 23-5427 and 23-5454

IN THE SUPREME COURT OF THE UNITED STATES

RANSON LONG PUMPKIN, PETITIONER

v.

UNITED STATES OF AMERICA

MOSES CROWE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected petitioners' assertion that the district court violated their Confrontation Clause rights by prohibiting petitioners from questioning witnesses about their drug use, where the district court had determined that the witnesses would invoke their Fifth Amendment rights in response to those questions and that petitioners had other means of eliciting the relevant information.

2. Whether the court of appeals correctly affirmed petitioner Crowe's carjacking conviction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 001-023[1]) is reported at 56 F.4th 604.

[1] Unless otherwise specified, references to "Pet. App." are to the appendix in Crowe v. United States, No. 23-5454 (filed Aug. 23, 2023).

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2022. The petitions for rehearing were denied on April 21, 2023. Pet. App. 24. On July 13, 2023, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari in Crowe v. United States, No. 23-5454, to and including August 23, 2023, and the petition was filed on that date. On July 17, 2023, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari in Pumpkin v. United States, No. 23-5427, to and including August 19, 2023, and the petition was filed on August 15, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Dakota, petitioners Crowe and Long Pumpkin were each convicted of carjacking resulting in serious bodily injury, in violation of 18 U.S.C. 2119(2), and using and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii). Crowe Judgment 1; Long Pumpkin Judgment 1. Crowe was also convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Crowe Judgment 1. The district court sentenced Crowe to 241 months of imprisonment and Long Pumpkin to 210 months of imprisonment, with each petitioner's term of imprisonment to be followed by five years of supervised release.

Crowe Judgment 2-3; Long Pumpkin Judgment 2-3. The court of appeals affirmed. Pet. App. 16.

1. In October 2017, petitioner Crowe's brother Saul was shopping at Walmart with Zach Perry, Vanessa High Pipe, Jessica Maho, and Philip Moore. Pet. App. 2; see Crowe Pet. 5. Saul and Moore got into an argument, after which the group left the store in Moore's van, with Moore as the driver. Pet. App. 3. During the drive, Saul spoke to someone on the phone, and then pointed a handgun at Moore's head and instructed him to drive to the Ramkota Hotel. Ibid.

Petitioners Crowe and Long Pumpkin were waiting in the hotel parking lot. Pet. App. 3. When the van arrived, everyone but Moore got out, and petitioners approached the van. Ibid. Moore attempted to escape by backing the van up. Ibid. Crowe ran to the driver's side window and punched Moore in the face. Ibid. Long Pumpkin entered the van, dragged Moore out of his seat, and choked him unconscious. Ibid.

The rest of the group then reentered the van, and they drove to the outskirts of town. Pet. App. 3. Long Pumpkin and the unconscious Moore remained with the group in the van, while Crowe followed the van in a separate vehicle. Ibid. During the trip, Moore regained consciousness on several occasions, but Long Pumpkin choked him back into unconsciousness each time. Ibid.

Once they reached their destination, Crowe struck Perry with a gun and told him to leave. Pet. App. 3. Petitioners then

"pulled Moore from the vehicle and beat him," with the assistance of Saul. Ibid. Crowe shouted that they should "kill [Moore] and leave no witnesses"; Long Pumpkin objected. Ibid. Gunshots were fired, but they sailed to the right of Moore, shortly before he was "punched again, and * * * fell unconscious." Ibid. When Moore regained consciousness, he was alone, and the keys to his van were missing. Ibid. Investigators subsequently found shell casings at the scene that matched the caliber of the weapons carried by Crowe and Saul. Ibid.

2. A grand jury in the District of South Dakota charged petitioners with carjacking resulting in serious bodily injury, in violation of 18 U.S.C 2119(2), and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii). Pet. App. 3. Crowe was also charged with possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Id. at 3-4.

Petitioners proceeded to trial, where High Pipe and Maho testified for the government. Pet. App. 3-4. After the district court determined that both High Pipe and Maho would invoke their Fifth Amendment rights if they were asked about their habitual drug use, including on the night of the carjacking, the court declined to permit petitioners to question the women on that topic. Id. at 4. The court rejected petitioners' assertion that prohibiting the questions would interfere with petitioners' Sixth Amendment confrontation rights because "the proposed questioning

concerned only a collateral matter of credibility." Id. at 5. The court offered, however, to facilitate "a stipulation that both women ingested controlled substances at the time of the" relevant events. Id. at 7; see Trial Tr. 415-417. And the court subsequently made clear that petitioners could question each witness about whether and when she had seen the other witness take drugs. Pet. App. 7. But petitioners opted to neither pursue the stipulation nor question the witnesses about each other's drug use. Ibid.

The jury found petitioners guilty on all counts. Pet. App. 4. Both before and after the jury verdict, Crowe moved for a judgment of acquittal on the carjacking count on the theory that the evidence was insufficient to show his involvement in the "taking" of Moore's van. Trial Tr. 551-561; D. Ct. Doc. 246, at 11-12 (Dec. 4, 2019); see Crowe C.A. Br. 12-21. Crowe argued that the carjacking was complete when Saul first pointed his gun at Moore in the van and directed Moore -- who was still driving the van -- to the hotel parking lot, before Crowe joined his confederates. Ibid. The district court rejected that argument, reasoning that a "reasonable jury could find beyond a reasonable doubt that the taking, which can occur for some period of time, continued under this fact pattern until * * * Moore was incapable, physically, of regaining any sort of control or possession of the vehicle." Trial Tr. 562.

3. The court of appeals affirmed petitioners' convictions, although it reduced their Section 924(c) convictions to the lesser included offense of using, rather than discharging, a firearm. Pet. App. 1-16.

The court of appeals found that the district court did not violate petitioners' Confrontation Clause rights when it declined to allow petitioners to pose direct questions to Maho and High Pipe about their own drug use that each of them would have refused on Fifth Amendment grounds to answer. Pet. App. 4-7. The court determined that the district court had reasonably found the witnesses' drug use to be a collateral matter regarding credibility, such that prohibiting the questions did not interfere with petitioners' ability to question the witnesses regarding "substantive matters about which the witness testified on direct examination." Id. at 6 (citation omitted). And the court emphasized that petitioners "had sufficient chance to lay the foundation for an argument that the witnesses were impaired by drug use, but failed to do so." Id. at 6-7. The court observed that petitioners had declined when the district court asked whether they would accept a "stipulation that both women ingested controlled substances," and that petitioners had similarly failed to "take advantage" of their explicitly recognized ability question Maho and High Pipe about each other's drug use, a "line of questioning that would have allowed the defense to establish that both women were [drug] users." Id. at 7.

The court of appeals also rejected the assertion that it was necessary to question the witnesses about their own drug use to establish how it "affected their ability to recall" the events of the carjacking. Pet. App. 7. The court observed that the district court had not precluded the defense from asking about the clarity of the witnesses' vision or memory, and that the defense had failed to question another witness, Moore, about the effects of his drug use on his perception -- even though the district court had not placed any restrictions on that questioning. Ibid. The court observed that the defense had instead "treated the potential effect of drug use on [Moore's] perception or memory as a matter for argument to the jury based on the fact of drug use alone," an approach the defense could have taken with Maho and High Pipe as well. Ibid.

The court of appeals separately rejected Crowe's renewed argument "that there was insufficient evidence that he committed a carjacking," which was premised on the theory that the carjacking offense was complete when Saul held the gun to Moore's head while Moore was driving the van. Pet. App. 8. The court was "not convinced that the only reasonable conclusion for the jury was that a single carjacking offense occurred before Moore and his vehicle arrived at the Ramkota Hotel." Ibid. The court observed that a reasonable jury could have found either that the offense was not complete until Moore had been "removed * * * from the driver's seat of the vehicle" and "disabled * * * in the rear of

the van," ibid., or that -- even if a carjacking were complete before arrival at Crowe's location -- a second carjacking offense occurred after Moore temporarily regained possession of the van in the hotel parking lot. Id. at 11-12.

The court of appeals also rejected petitioners' argument "that there was insufficient evidence that the carjacking resulted in serious bodily injury" because "the jury reasonably could have found, based on reason and common sense, that strangulation to the degree that Moore described inflicts a bodily injury involving a substantial risk of death." Pet. App. 12. The court did, however, conclude that insufficient evidence supported petitioners' convictions for the greater offense of "discharging" a firearm during a crime of violence in violation of 18 U.S.C. 924(c)(1)(A)(iii), and that petitioners should instead have been convicted only of the lesser included offense of "using" a firearm during the carjacking. Pet. App. 14-16. The court reasoned that, by any measure, the carjacking was complete by the time the shots were fired -- which did not happen until after Crowe and Long Pumpkin had incapacitated Moore and dragged him to the back of the van, and Saul had taken over the driver seat and driven the van to the outskirts of the city. Ibid.

Judge Kelly dissented on the confrontation issue. Pet. App. 16-23. In her view, the precluded questions did not go to "credibility" (which she acknowledged was a collateral issue), but

instead to the "reliability" of the testimony, which she viewed as substantive. Pet. App. 19-20 (citation omitted).

ARGUMENT

Petitioners renew their contention (Long Pumpkin Pet. 4-13; Crowe Pet. 7-9) that the district court's limitation on the questioning of Maho and High Pipe violated their Confrontation Clause rights. The court of appeals' interlocutory decision is correct and does not implicate any division in the circuits or otherwise warrant this Court's review. Crowe separately contends (Pet. 9-12) that his carjacking conviction is invalid, but the factbound challenge he appears to be raising now was neither pressed nor passed upon below. The petitions should be denied.

1. As a threshold matter, review is unwarranted because the petitions are in an interlocutory posture. See, e.g., American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372, 384 (1893). The court of appeals remanded to the district court for resentencing based on its Section 924(c)(1)(A) ruling. Pet. App. 14-16. The decision's interlocutory posture "alone furnishe[s] sufficient ground for the denial of" a petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam); Virginia Military Inst. v. United States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari); see also Stephen M. Shapiro et al., Supreme Court

Practice § 4.18 & n.72, at 282-283 (10th ed. 2013) (noting that the Court routinely denies interlocutory petitions in criminal cases).

Petitioners will be able to raise their current claims, together with any other claims that may arise with respect to the resentencing proceedings, in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent" judgment). Nothing about this case warrants departure from the Court's usual practice of awaiting final judgment before determining whether to review a challenge to a criminal conviction.

2. In any event, even setting aside the case's interlocutory posture, petitioners' Confrontation Clause challenge would not warrant this Court's review. The court of appeals decision is correct, and it does not conflict with decisions of this Court or other courts of appeals.

a. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. The Clause secures a criminal defendant's "opportunity of cross-examination." Davis v. Alaska, 415 U.S. 308, 315-316 (1974) (citation and emphasis omitted). But "[i]t does not follow, of course," that the Constitution "prevents a trial judge from

imposing any limits on defense counsel's inquiry" about matters including "potential bias." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). "On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Ibid.

The Confrontation Clause thus "guarantees an opportunity for effective cross-examination," but it does not guarantee "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Van Arsdall, 475 U.S. at 679 (emphasis and citation omitted). Accordingly, to establish a Confrontation Clause violation based on a restriction on cross-examination questioning, a defendant must demonstrate that "[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [the defendant's] counsel been permitted to pursue his proposed line of cross-examination." Id. at 680. Petitioners, however, have not made that showing in this case.

As the court of appeals explained (Pet. App. 6-7), the district court restricted only petitioners' ability to directly question Maho and High Pipe about their drug use on the day of the crime, in order to protect the witnesses' Fifth Amendment rights. Petitioners were free to explore the potential for impairment in

other ways -- such as through entering a stipulation that each witness used drugs on the day in question, eliciting testimony from each about the other's drug use, questioning each about her ability to perceive and recall the events in question, and encouraging the jury to infer from common knowledge that perception and recall would be impaired. See id. at 7.

Thus, at best, petitioners' desire to pose a live question to each witness about her drug use that day amounts only to the sort of preference that the Confrontation Clause does not protect. See Van Arsdall, 475 U.S. at 679 (citation omitted). Even assuming that petitioners' preferred method might have been marginally more "effective," ibid., the district court retained discretion to require petitioners to pursue an alternative that did not implicate the witnesses' Fifth Amendment rights, see ibid. Petitioners, however, failed to explore the issue with the witnesses at all, and similarly declined to question Moore about the effects of his drug use on his perception when it had the chance. Pet. App. 7.

Petitioners assert (Crowe Pet. 8-9; Long Pumpkin Pet. 8-9) that the court of appeals erred because the majority found that the drug-use evidence was relevant to "credibility," while the dissent found it relevant to "reliability." But as the court observed (Pet. App. 6), the "distinction in this context is questionable." And petitioners do not themselves explain why a distinction would makes a difference here, offer any reason why they failed to take advantage of the other means they had for

introducing information about the witnesses' drug use, or provide any explanation of why those means were insufficient to preserve their confrontation rights. They accordingly fail to show any abuse of discretion by the district court or error by the court of appeals in the circumstances of this case.

b. Petitioners also do not identify any conflict with the decisions of this Court or the other courts of appeals.

Petitioners principally contend (Crowe Pet. 8-9; Long Pumpkin Pet. 9-11) that the Eighth Circuit's decision conflicts with this Court's decision in Davis v. Alaska. In Davis, the defendant sought to override "a State's asserted interest in confidentiality" by cross-examining a prosecution witness about "possible bias deriving from the witness' probationary status as a juvenile delinquent," 415 U.S. 309, and this Court rejected "the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury," id. at 318; see id. at 315 (explaining that "the essential question turns on the correctness of the Alaska court's evaluation of the 'adequacy' of the scope of cross-examination permitted"). The circumstances of this case, in contrast, involve the witnesses' constitutional rights, and nothing in Davis demonstrates that the district court exceeded its discretion in providing alternative routes that would protect those rights while allowing petitioners to explore the perception and recall issue in alternative ways.

Petitioners are also mistaken in asserting (Crowe Pet. 8-9; Long Pumpkin Pet. 11-13) disagreement in the circuits regarding a district court's ability to restrict questioning in these circumstances. Most of the allegedly conflicting circuit precedent petitioners cite is from the Eighth Circuit, the court of appeals from which this case arose. Even if petitioners were correct that the decision below creates intra-circuit tension, that would not be a reason for this Court's intervention because "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). And the handful of cases that Long Pumpkin cites from other courts of appeals establish only the unremarkable proposition that a witness' drug abuse may be relevant or probative; none of the cases (almost all of which predate Delaware v. Van Arsdall) involve the propriety of placing some limitations on cross-examination in order to protect a witness' Fifth Amendment rights.

3. Crowe also asserts (Pet. 9-12) that his carjacking conviction is invalid. Crowe appears to contend (ibid.) that, because the district court may have been acting on the assumption that the carjacking offense continued even after the van reached the outskirts of town, the jury may not have been "unanimous" in finding that Crowe committed carjacking based on the conduct that occurred during the appropriate timeframe. That factbound contention does not warrant this Court's review, see Sup. Ct. R.

10, particularly because it was neither pressed nor passed upon below.

In the court of appeals, Crowe argued that there was insufficient evidence to support his carjacking conviction because the carjacking was complete before the van arrived in the hotel parking lot where petitioners were waiting. Crowe C.A. Br. 12-21; see Pet. App. 8-12 (rejecting this argument). Crowe did not contend that the jury verdict might not have been "unanimous," nor did he suggest that the jury should have been given "special interrogatories," as he now contends, Crowe Pet. 12. And the court of appeals correctly resolved the claim before it, observing that Crowe's carjacking conviction would be valid irrespective of whether a carjacking offense was complete when Saul directed Moore at gunpoint while Moore was still driving, because the jury could find that a second carjacking offense occurred when Moore was left alone in the van, exercised dominion and control over it by using it in an escape attempt, and was forcefully subdued and deprived of the vehicle. See Pet. App. 8-12.

Certiorari is accordingly not appropriate in these circumstances. Not only does Crowe fail to identify any error in the decision below, let alone any circuit conflict, this is "a court of review, not of first view." Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005). And its "traditional rule * * * precludes a grant of certiorari" on a question that "'was not pressed or passed upon below,'" United States v. Williams, 504

U.S. 36, 41 (1992) (citation omitted), as is the case here. See, e.g., Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (declining to review claim "without the benefit of thorough lower court opinions to guide our analysis of the merits").

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2023