Questions for the Record from Senator Charles E. Grassley
Hearing on "Federal Support for Preventing and Responding to Carjackings"
March 1, 2022

Justin E. Herdman
Former U.S. Attorney for the Northern District of Ohio

1. **You discussed the federal prosecution of juveniles in your written testimony and during questioning from Senators. Can you elaborate on how the Juvenile Justice and Delinquency Prevention Act (JJDPA) affects federal juvenile prosecutions? How would this affect federal juvenile prosecutions in the carjacking context?**

Response

In the federal system, juvenile prosecutions are rare and, when they are brought, handled much differently than adult prosecutions. The reasons for this are obvious – juveniles constitute a unique class of offender due to their physical, emotional, and intellectual development, as well as the heightened opportunity for rehabilitation of these offenders. The Juvenile Justice and Delinquency Prevention Act (JJDPA) was enacted in order to help ensure that a juvenile offender's rights are protected if a federal juvenile prosecution is necessary, while also holding juveniles accountable for their actions in an age-appropriate manner. In my opinion, two of the most notable areas in which JJDPA affects federal carjacking prosecutions are the promotion of research and rehabilitation efforts—two areas that are critical in juvenile prosecutions.

As discussed during the hearing, there is a disproportionately high number of juvenile offenders involved in carjacking cases, some as young as 11 years old. Although widespread expansion of federal juvenile prosecutions is not a realistic answer, there are other important ways that federal resources can be used to combat this problem. Legislation, such as the JJDPA, provides some of these resources. For example, JJDPA facilitates widespread data collection that allows stakeholders (law enforcement, the courts, social service organizations, etc.) to identify high risk juvenile offenders and create robust re-entry and rehabilitation efforts directed at those youth. JJDPA also established the Office of Juvenile Justice and Delinquency Prevention (OJJDP), which helps support these local and state efforts to prevent juvenile delinquency.

To illustrate this in action, the OJJDP has been actively working with states on the current spike in violent crimes by juveniles. Through funding from OJJDP at the U.S. Department of Justice, the National District Attorneys Association (NDAA) is currently working with prosecutors, law enforcement, and other juvenile justice experts to address the rise of these violent crimes, such as juvenile carjackings, and help parties respond swiftly and appropriately. *See* Susan Broderick, Miranda Cassidy, and Irene Ryu, *What's Behind the Rise in Juvenile Carjackings? What Can We Do About It?*, National District Attorneys Association, https://ndaa.org/wp-content/uploads/Juvenile-Carjackings-Article-FINAL.pdf (last visited March 21, 2022).

We also must acknowledge that the juvenile is not necessarily the one orchestrating the carjacking. Adult offenders use juveniles in carjackings to insulate themselves from prosecution.

That is why, in my testimony, I also recommend adding a conspiracy offense to the federal carjacking statute, 18 U.S.C. § 2119.

The federal carjacking statute is unlike many other federal violent crime statutes that contain conspiracy provisions, such as conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951(a), or conspiracy to commit kidnapping under 18 U.S.C. § 1201(c). The absence of a conspiracy provision in § 2119 forces prosecutors to rely on 18 U.S.C. § 371, a general conspiracy statute, that caps imprisonment at 5 years. Adding a conspiracy offense to § 2119 would help focus federal investigators on the appropriate parties and stop carjackings before they occur.

2. During questioning, you discussed the need for an altered *mens rea* requirement in the federal carjacking statute, 18 U.S.C. § 2119. Please elaborate.

Response

The federal carjacking statute, 18 U.S.C. § 2119, currently requires an additional intent element not present in many other federal statutes for violent crimes. This specific intent element, added in 1994, requires that, in addition to proof that the offender took a car by violence or through intimidation, there must also be evidence to establish that the offender acted "with the intent to cause death or serious bodily harm" at the precise moment the vehicle was taken or the threat to take the vehicle was made. *Holloway v. United States*, 526 U.S. 1, 1–2 (1999). This intent language effectively imposes a heightened requirement for proving a federal carjacking offense, since prosecutors must necessarily link the specific intent to kill or harm with the actual taking of the car. *Id*.

For example, the 5th Circuit in *United States v. Harris*, 420 F.3d 467, 475 (5th Cir. 2005), stated that there must be "a nexus between the intent to kill or harm and the taking of the car at the precise moment of either the taking of the car or the threat to do so." The 4th Circuit in *United States v. Bailey*, 819 F.3d 92, 95 (4th Cir. 2016) similarly stated that "[t]o satisfy the intent element, the government must show that the defendant unconditionally intended to kill or seriously injure the car's driver[.]"

Because of this additional requirement, federal prosecutors are hindered when bringing carjacking cases. The prosecutor must prove, beyond a reasonable doubt, that an offender acted with the "intent to cause death or serious bodily injury" at the *exact* moment the property was taken. This is an uniquely unreasonable burden for prosecutors, and shields those who commit or threaten violence to obtain a vehicle unlawfully by allowing them to, at a later date, simply claim that they had no intent to kill or badly injure the victim at the precise moment they took the car.

This obstacle for federal prosecutors permits offenders to produce logically strained defenses, which have led to absurd case results. To illustrate:

- In *Harris*, the defendant shot the victim to death and then took his car. At trial, the defendant testified that he took the vehicle as a "larcenous afterthought" to murder. Because of this, the 5th Circuit reversed the defendant's carjacking conviction, reasoning that a rational jury could not have found beyond a

reasonable doubt that, "at the precise moment Harris demanded or took control over the car by force and violence or by intimidation, Harris intended to cause [the victim's] death or serious bodily harm."

- Additionally, in *United States v. Applewhaite*, 195 F.3d 679, 685–86 (3d Cir. 1999), this contemporaneous *mens rea* requirement resulted in the reversal of a conviction where a defendant senselessly beat and then shot a victim while taking control of the victim's vehicle. In that case, the defendant beat the victim unconscious with a bat, hoisted him into the back of his van, and then drove away in the victim's van. During the drive, the victim regained consciousness and then was shot three times by the offender. Like in *Harris*, the 3rd Circuit reversed the carjacking conviction because the evidence "failed to establish the required nexus between the assault and the taking. Rather, the record establishes that the van was taken as an afterthought in an attempt to get [the victim's] limp body away from the crime scene. That is not sufficient to establish the intent required under § 2119."

For all these reasons, I propose that the specific *mens rea* requirement should be stricken from the federal carjacking statute so that it instead reads:

> Whoever~~, with the intent to cause death or serious bodily harm~~ takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall--
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

Striking the specific intent requirement would allow the federal carjacking statute to be more aligned with similar federal robbery statutes. Other types of robbery merely require that the offender take property from the victim by force and violence, or by intimidation. Some specific examples of robbery statutes without this heightened *mens rea* include:

- Hobbs Act robbery under 18 U.S.C. § 1951;
- Robbery within the special maritime and territorial jurisdiction of the United States under 18 U.S.C. § 2111;
- Bank robbery under 18 U.S.C. § 2113; and
- Robbery involving controlled substances under 18 U.S.C. § 2118.

Lastly, striking this specific intent element would not affect the federal carjacking statute's status as a "crime of violence" under 18 U.S.C. § 924(c)(3) because the statute would still require, as many other robbery statutes, that the taking be "by force and violence or by intimidation." There

has been ample case law demonstrating that the "by force and violence" or "intimidation" language is sufficient to qualify as a "crime of violence." For example:

- In *United States v. Jackson*, 918 F.3d 467, 486 (6th Cir. 2019), there is a discussion about how "the commission of carjacking by 'intimidation' necessarily involves the threatened use of violent physical force and, therefore, that carjacking constitutes a crime of violence under § 924(c)'s elements clause."

- *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016), similarly explains that "bank robbery under 18 U.S.C. § 2113(a) is a 'crime of violence' within the meaning of the force clause of 18 U.S.C. § 924 (c)(3), because it 'has as an element the use, attempted use, or threatened use of physical force,'—specifically, the taking or attempted taking of property 'by force and violence, or by intimidation.'"

In sum, eliminating this unjustified additional intent element in the federal carjacking statute will (1) help prevent the absurd case results outlined in this response; (2) better allow prosecutors to hold defendants responsible for heinous crimes that involve taking control of vehicles by force, violence, or intimidation; and (3) better parallel similar robbery statutes without affecting its status as a "crime of violence" under 18 U.S.C. § 924(c)(3).

Questions for the Record from Senator Thom Tillis
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Justin E. Herdman
Former U.S. Attorney for the Northern District of Ohio

1. **Mr. Herdman, can you provide an overview of *Operation Legend*, both nationally and in the Northern District of Ohio.**

Response

Operation Legend was a sustained, systematic, and coordinated federal law enforcement initiative, in which federal agencies worked in conjunction with state and local law enforcement officials to fight violent crime. The effort was announced by Attorney General William Barr after a 4-year-old boy, LeGend Taliferro, who was shot and killed in his sleep on June 29, 2020, in Kansas City, Missouri. The operation was launched nationwide in Kansas City on July 8, 2020, and began in the city of Cleveland on July 29, 2020.

I was fortunate to have been asked to assist Attorney General Barr in implementing Operation Legend over the summer and fall of 2020. Like him, I am immensely proud of the combined efforts of federal agents, local law enforcement, and federal prosecutors to staunch the alarming upward trend in violent crime. Those efforts, which were considerable, did make a difference and they are an excellent example of what can be accomplished through coordinated federal, state, local, and tribal crime prevention efforts.

Although only in operation for less than a year, the program had many notable accomplishments. For example:

- Despite operating during the pandemic, over 6,000 arrests were conducted at the local, state, and federal level nationwide, including approximately 467 arrests for homicide. More than 2,600 firearms were seized, and more than 32 kilos of heroin, 17 kilos of fentanyl, 300 kilos of methamphetamine, 135 kilos of cocaine, and $11 million in drug and other illicit proceeds were also confiscated during the operation's lifespan.

- When Operation Legend ended in the city of Cleveland, it had seen the arrest of 122 drug traffickers, firearms offenders, domestic violence convicts, and other violent criminals. Of that total, 61 defendants were charged with narcotics-related offenses, 57 were charged with firearms-related offenses, and four were charged with other violent crimes.

There were three main factors that appeared to contribute to these results. *First*, local law enforcement had immediate access to federal resources through the ATF, FBI, DEA, and U.S. Marshals, all of whom were all working in tandem with local police officers and often out of local police districts or precincts. *Second*, there were federal prosecutors who were willing to bring

cases federally to target the most violent offenders. This had an immediate impact on violent crime, particularly during those early months of the epidemic, because unlike many state and local prosecutors or courts, federal prosecutors were willing to seek bail and federal courts were willing to hold offenders. This ensured that the most violent and prolific offenders remained in custody and were not back in the community. And *third*, there was substantial funding, which helped keep the morale among law enforcement high and also assisted with the long-term growth and coordination with federal agencies. Specific funding to assist the U.S. Marshal's Fugitive Task Forces, for example, had a force multiplying effect on our crime reduction efforts. The ATF also obtained additional funding to support the deployment of their mobile National Integrated Ballistic Information Network (NIBIN) correlation unit to Operation Legend cities, which again had a profound impact on the efficacy of crime reduction efforts.

2. What were the drastic changes that you saw after *Operation Legend* was initiated and implemented?

Response

In LeGend Taliferro's hometown of Kansas City, where more than 200 federal agents were deployed to specifically assist in violent crime investigations, the outcomes were dramatic. Over the roughly three months that those agents worked arm-in-arm with local law enforcement, homicides were down 22-percent, non-fatal shootings were down 24-percent, and aggravated assaults were down 44-percent when compared to the immediately preceding time period. The United States Attorney for the Western District of Missouri, Tim Garrison, stated at the completion of this operational phase: "We promised that Operation LeGend would be a short-term, high-impact strategy to freeze the escalation of violent crime and respond to the record number of homicides in Kansas City this year. That promise was kept. Operation LeGend has had a significant impact on violent crime in Kansas City, and those efforts will continue."

Similar success was seen in Chicago, where Attorney General Barr announced that over the first five weeks of Operation Legend in the city, homicides dropped by 50-percent. Over the first twelve weeks of Operation Legend's implementation in St. Louis, murders dropped by over 50-percent and assaults, including those with a firearm, dropped by 30-percent. And in Indianapolis, homicides were down 22-percent in the first two months of Operation Legend.

I strongly believe that Operation Legend was an effective demonstration of the positive impact that additional resources, prosecutorial will, and proven law enforcement tactics can have in saving lives. Crime reduction in any community requires uniformed officer presence, investigative resources, and prosecutorial commitment to hold violent offenders accountable. Operation Legend offered cities struggling with a surge in violence with all three of those tools and I believe that it stands as an enduring model program for future efforts directed at increasing public safety.

3. **Do you agree that policies to defund or abolish the police are dangerous to our communities and to our brave law enforcement officers?**

Response

Yes. Policing is a difficult and dangerous profession that requires long hours on the job, often overnight and on holidays, with periods of routine and mundane activity that can turn deadly at an instant. We rely on police officers to protect our communities and families, to assist us when we need help, and to do so in a national climate that is often outright hostile to law enforcement. The simple fact remains that when responding to criminal incidents, especially violent crime, there is absolutely no substitute for well-trained, uniformed, and armed law enforcement.

I offer just one area of law enforcement response that demonstrates the above proposition. Any police officer knows that responding to a domestic violence incident is among the most dangerous calls they can receive. The tragic results of this fact were demonstrated clearly to me in October 2017, when a 31-year old police officer named Justin Leo responded to a domestic violence call in Girard, Ohio. The suspect was armed with a firearm and shot Officer Leo with absolutely no warning, murdering him before the officer had a chance to draw his own weapon. As horrific as the killing of Officer Leo was, this was not an incident to which an unarmed, civilian social service worker should ever be asked to respond.

We ask police officers to perform a tremendously difficult task for the overall betterment of our communities and society. In exchange, they are often underpaid and overworked. A reduction in police funding cannot result in safer cities or less violence against well-meaning residents, but rather the exact opposite.