NO:

IN THE
SUPREME COURT OF THE UNITED STATES

BURNETT GODBEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do state law robbery offenses categorically qualify as violent felonies Under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i) (an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), where conviction of the offenses does not require proof of an intentional act of violence or threat of violence?

INTERESTED PARTIES

There are no parties interested in the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Burnett Godbee respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 16-17211 in an unpublished decision by that court on February 14, 2018, *Burnett Godbee v. United States*, affirming the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (App. 1).

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on February 14, 2018. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Mr. Godbee intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

18 U.S.C. § 924. Penalties

(e)(2) As used in this subsection– …(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, ... , that – (i) has as an

element the use, attempted use, or threatened use of physical force against the person of another.

18 U.S.C. § 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both. (b) As used in this section—...(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the

same State through any place outside such State; and all other commerce over which the United States has jurisdiction. (c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45.

Fla. Stat. § 812.13. Robbery

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear …(3)(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

STATEMENT OF THE CASE

On June 17, 2013, Mr. Godbee was convicted and sentenced for conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), discharge of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii), and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). Cr-DE 104. The district court sentenced Mr. Godbee to serve a total term of 360

months. Cr-DE 104. This term consisted of 240 months as to counts 1 and 2 (conspiracy to commit Hobbs Act Robbery and attempted Hobbs Act Robbery), to be served concurrent to each other; 120 months as to count 3 (discharge of a firearm in furtherance of a crime of violence); and 240 months as to count 5 (possession of a firearm by a convicted felon). Cr-DE 104. Counts 3 and 5 were to run consecutively to each other and to counts 1 and 2. Cr-DE 104. Mr. Godbee's sentence was later reduced to 204 months after the government filed a motion for reduction of sentence pursuant to Federal Rule of Criminal Procedure 35. Cr-DE 155.

Mr. Godbee filed a motion under 28 U.S.C. § 2255, in which he challenged his sentence imposed pursuant to the Armed Career Criminal Act as unlawful in light of the Supreme Court's opinion in *Johnson v. United States,* 135 S. Ct. 2551 (2015). Cv-DE 1. Furthermore, in his supplemented motion to vacate, Mr. Godbee claimed that his §924(c) conviction and resultant sentence were unlawful. *See* Cv-DE 16. The district court denied the motion, Cv-DE 26, and the Court of Appeals granted Mr. Godbee a certificate of appealability as to the following issues:

1. Does *Johnson v. United States*, 135 S. Ct. 2551 (2015)'s void for vagueness ruling, as to the Armed Career Criminal Act's ("ACCA") residual clause, extend to 18 U.S.C. § 924(c)(3)(B)?
2. If *Johnson* invalidates the residual clause of § 924(c)(3)(B), does attempted Hobbs Act Robbery constitute a crime of violence under the use-of-force clause, such that it still qualifies?

3. If *Johnson* invalidates the residual clause of § 924(c)(3)(B), does conspiracy to commit Hobbs Act Robbery constitute a crime of violence under the use-of-force clause, such that it still qualifies?

Mr. Godbee's appeal was ultimately denied by the Court of Appeals based on the Eleventh Circuit's decision in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), holding that *Johnson's* holding did not invalidate the residual clause of 18 U.S.C. § 924(c)(3)(B).

REASONS FOR GRANTING THE WRIT

1. The Court recently declared 18 U.S.C. § 16(b) unconstitutionally vague in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). That result was compelled by a "straightforward application" of the "straightforward decision" in *Johnson v. United States,* 135 S.Ct. 2551(2015). *Dimaya*, 138 S. Ct. at 1213. The Court found § 16(b) indistinguishable from the residual clause struck down in *Johnson*. It emphasized that both provisions required courts to imagine an "ordinary case" and apply it against an uncertain level of risk. *Id.* at 1213-16. In so doing, the Court rejected the government's textual and experiential attempts to distinguish the clauses, finding each argument "to be the proverbial distinction without a difference." *Id.* at 1218-21. Since § 924(c)(3)(B) is perfectly identical to § 16(b), the Court's decision in *Dimaya* supports the conclusion that § 924(c)(3)(B) is void for vagueness as well.

The denial of Mr. Godbee's petition rested on the Eleventh Circuit precedent of *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), holding that § 924(c)(3)(B) is *not* unconstitutionally vague. *Dimaya* most likely abrogates contrary precedents not only in *Ovalles* but also in *United States v. St. Hubert*, 883 F.3d 1319, 1327-28 (11th Cir. 2018). The Court should therefore grant the petition in the instant case.

2. The Court recently granted certiorari in *Stokeling v. United States*, 200 L.Ed.2d 716 (2018), to address the issue of whether Florida's robbery statute, Fla. Stat. § 812.13(1) (which requires only force sufficient to overcome resistance by the victim) is categorically a violent felony under the Armed Career Criminal Act's elements clause, 18 U.S.C. § 924(e)(2)(B)(i). The identical issue is presented in this petition with regard to Mr. Godbee's robbery convictions. The Court should therefore either grant the petition in the instant case or hold the petition pending resolution of *Stokeling*.

3. The Court should also grant a writ of certiorari to resolve whether a Hobbs Act Robbery constitutes a crime of violence under the use-of-force clause. The Hobbs Act statute, 18 U.S.C. § 1951, defines the term "robbery" in subsection (a) to mean:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the

> person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b)(1).

In determining whether an offense qualifies as a "crime of violence" under the elements clause of § 924(c)(3)(A), sentencing courts must employ the categorical approach as clarified in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2011) and *Descamps v. United States*, 133 S.Ct. 2276 (2013), because this Court's precedent requires that the "crime of violence" determination for § 924(c) be made "categorically" – based upon the elements, not the underlying facts, of the companion/predicate offense. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

Application of the post-*Descamps/Moncrieffe*, elements-driven categorical approach to Hobbs Act robbery compels the conclusion that a Hobbs Act robbery is *not* a divisible offense; it is categorically overbroad vis-à-vis an offense within the elements clause in § 924(c)(3)(A); and it is thus *not* a countable "crime of violence" at this time.

This Court has long emphasized in its statutory construction jurisprudence that the meaning of terms in a statute cannot be determined in a vacuum, divorced from "context"; that "context" includes a statute's legislative history and specific indications of Congressional intent; and that identical terms or phrases in different statutes may have different meanings because of different "contexts". *See, e.g.,*

Begay v. United States, 533 U.S. 137, 143-144 (2008) (referencing the ACCA's history, and Congress's intent, as support for interpretation of the residual clause); *United States v. Castleman*, 134 S.Ct. 1405, 1413, 1415 (2014) (the term "physical force" in definition of "misdemeanor crime of violence" in 18 U.S.C. §922(g)(2), had a different meaning than the identical term in 18 U.S.C. § 922(e)(2)(B)(i), which was interpreted in *Curtis Johnson v. United States*, 559 U.S. 133, 137 (2010), to mean "violent force").

Under the categorical approach as clarified in *Moncrieffe* and *Descamps*, a Hobbs Act robbery conviction categorically does *not* qualify as a "crime of violence" within the elements clause of 18 U.S.C. § 924(c)(3)(A). While it may be unclear from the face of the statute which of the "means" (by means of "force," or "violence," or "causing the victim to fear harm," or that the fear must be "either immediately" or "in the future) is the least of the acts criminalized" in a Hobbs Act robbery offense, the interpretive case law makes clear that several different "acts" or "means" criminalized under § 1951 most definitely do *not* require the use of "violent force" either against a person or against property. Post-*Descamps* and *Moncrieffe*, if a statute does *not* require the threat of *violent physical force* against persons or property in ***every*** case, under the now-clarified categorical approach a Hobbs Act robbery conviction under § 1951 cannot qualify as a "crime of violence" under the elements clause in § 924(c)(3)(A).

Hobbs Act robbery under 18 U.S.C. § 1951 is categorically overbroad in other ways as well. By the statute's plain terms, the offense can be committed by putting one in fear of "future" injury to either his person or to his property. Neither type of fear of future injury is an exact match to the elements clause in § 924(c)(3)(A).

Taking these two "means" of committing the offense in reverse order, placing someone in fear of injury to his *property* will not require the use of violent physical force in *every* case. For indeed, as the courts interpreting the Hobbs Act have long recognized, and Eleventh Circuit Pattern Jury Instruction 70.3 confirms, "[t]he concept of 'property' under the Hobbs Act is an expansive one" that includes "*intangible assets*, such as rights to solicit customers and to conduct a lawful business." *United States v. Arena*, 180 F.3d 380, 392 (2d. Cir. 1999), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003) (emphasis added). *See* 11th Cir. Pattern Jury Instruction 70.3 ("Property includes . . . intangible rights that are a source or element of income or wealth"); *United States v. Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that "other circuits which have considered this question "are unanimous in extending the Hobbs Act to protect intangible as well as tangible property"); *United States v. Iozzi,* 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction when

boss threatened "to slow down or stop construction projects unless his demands were met").

Such threats to intangible economic interests are certainly *not* threats of "violent force" to property. Indeed, whenever a Hobbs Act robbery is committed by "causing the victim to fear harm, either immediately or in the future," the Eleventh Circuit has clearly explained in its pattern instruction that the term "fear" "***includes the fear of financial loss as well as fear of physical violence***." (emphasis added). Even if the statute requires that the "fear of injury" be *instilled* when the perpetrator is "in close physical proximity to the victim" it does not follow that the "fear of injury" means *only* "fear of bodily injury". The Eleventh Circuit pattern Hobbs Act jury instruction says just the opposite.

Finally, with regard to committing Hobbs Act robbery by means of placing someone in fear of direct future injury to his "person", the reasoning in many cases in which other courts have rightly recognized in analogous settings that physical injury can easily occur without the use or threat of any force, let alone violent force, cannot be ignored. *See, e.g., United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 194 (2d Cir. 2003); *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010); *United States v. Perez-Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005). These cases confirm that this "means" of committing Hobbs Act robbery is overbroad as well.

In sum, the full range of conduct covered by the Hobbs Act robbery statute plainly does not require the use or threat of "violent force" to a person or property in *every* case, as it must under the categorical approach as clarified by *Descamps* and *Moncrieffe*. Accordingly, the Court should hold that a Hobbs Act robbery conviction does not qualify as a "crime of violence" under the elements clause in 18 U.S.C. § 924(c)(3)(A).

CONCLUSION

The Eleventh Circuit's decision in Mr. Godbee's case warrants review by the Court.

Respectfully submitted,

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