NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

MICHAEL ST. HUBERT,

***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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QUESTIONS PRESENTED FOR REVIEW

1. Is the definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague, given the Court's holding in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) that the identical definition in 18 U.S.C. § 16(b) is unconstitutionally vague?

2. Can a completed Hobbs Act robbery under 18 U.S.C. § 1951(b) categorically be a "crime of violence" as defined in 18 U.S.C. § 924(c)(3)(A), if the offense is indivisible, and juries in three circuits are routinely instructed according to those circuits' pattern instructions that the "property" taken may include "intangible rights" and the offense may be committed by simply causing the victim to "fear harm" which includes "*fear of financial loss* as well as fear of physical violence"? Does *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) require a defendant to identify an actual prosecuted "case," in addition to such a pattern instruction, to show a "realistic probability" that the statute covers non-violent conduct?

3. If a completed offense categorically has the use or threat of "*violent* force" "as an element," is the *attempted* commission of that offense categorically a "crime of violence" simply because of the defendant's "intent" to commit every element of the crime? Or must the "substantial step" required for an attempt offense itself be categorically violent to meet the elements clause?

INTERESTED PARTIES

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

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Michael St. Hubert ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion affirming Petitioner's convictions and sentence, *United States v. St. Hubert*, 883 F.3d 1319 (11th Cir. Feb. 28, 2018) is included in the Appendix at A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming Petitioner's convictions and sentence was entered on February 28, 2018. Petitioner sought, and Justice Thomas granted, a 45-day extension of time until July 13, 2018 for filing a petition for writ of certiorari. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 16. Crime of violence defined

The term "crime of violence" means –

> **(a)** an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> **(b)** any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 922. Unlawful acts

> **(g)(1)** It shall be unlawful for any person [] who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... to ... possess in or affecting commerce, any firearm or ammunition ...

18 U.S.C. § 924. Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such

crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

> **(i)** be sentenced to a term of imprisonment of not less than 5 years;
>
> **(ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; . . .

(C) In the case of a second or subsequent conviction under this subsection, the person shall –

> **(i)** be sentenced to a term of imprisonment of not less than 25 years . . .

(c)(3) For purposes of this subsection, the term "crime of violence" means an offense that is a felony and –

> **(A)** has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> **(B)** that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. . . .

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court ... for a violent felony

(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; or
> >
> > **(ii)** is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to 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 family or 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.

STATEMENT OF THE CASE

The Charges, Motion to Dismiss, and Plea

Petitioner Michael St. Hubert ("Petitioner") was charged in a multi-count indictment with several counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951 (Counts 1, 3, 5, 7, and 9); a single count of attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951 (Count 11); two counts of using and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (Count 8, alleging that Count 7 was the predicate "crime of violence;" and Count 12 alleging that Count 11 was the predicate "crime of violence"); and a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Although Petitioner moved to dismiss the two § 924(c) counts for failure of the predicate offenses to qualify as "crimes of violence" under either the elements or residual clauses of § 924(c)(3), the district court summarily denied that motion.

Thereafter, pursuant to a negotiated plea agreement, Petitioner pled guilty to the two § 924(c) charges – Counts 8 and 12 – and the district court sentenced him to the statutory mandatory minimum term of 32 years imprisonment. That term consisted of 7 years on Count 8, followed by a consecutive 25 years on Count 12.

The Appeal to the Eleventh Circuit

On appeal to the Eleventh Circuit, Petitioner argued that his Count 8 and 12 § 924(c) convictions could not be sustained for two reasons. First, he argued, § 924(c)(3)(B) which – identically to 18 U.S.C. § 16(b), and similarly to the ACCA's residual clause in 18 U.S.C. § 924(e)(2)(B) – defines "crime of violence" as an offense "that by its nature, involves a substantial risk that physical force against the person of property of another may be used in the course of committing the offense," was unconstitutionally vague after *Johnson v. United States*, 135 S.Ct. 2551 (2015).

Second, he argued, the predicate offense for both Counts 8 and 12 – Hobbs Act Robbery, as alleged in Counts 7 and 11 – categorically failed to qualify as a "crime of violence" under § 924(c)(3)(A), as it did not "have as an element the use, attempted use, or threatened use of physical force against the person or property of another" for multiple reasons. In particular, he emphasized, the "fear of injury" and "actual or threatened force" means of committing this indivisible offense were both overbroad. According to the Eleventh Circuit standard jury instructions, he noted, "fear" could be of purely 'financial loss," rather than "physical violence." And the property taken could even include "intangible rights." With regard to the "actual or threatened force" means of committing the offense, he pointed out that Hobbs Act

robbery was modeled on New York robbery which could be committed without violent force. And under settled rules of construction, a robbery by "force" under the Hobbs Act should be presumed to incorporate that meaning.

After the case was fully briefed, the Eleventh Circuit held as a matter of first impression (without oral argument) in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), that § 924(c)(3)(B) was not unconstitutionally vague due to differences in wording and function of § 924(c)(3)(B) and § 924(e)(2)(B)(ii). *See id.* at 861 F.3d at 1263-1267 (agreeing with opinions of the Sixth, Second, and Eighth Circuits holding § 16(b) was not unconstitutionally vague; disagreeing with the Seventh Circuit's decision in *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2017) finding § 924(c) vague for the same reasons a prior panel had held § 16(b) was vague). While acknowledging that § 924(c)(3)((B) is identically-worded to 18 U.S.C. § 16(b), the *Ovalles* panel criticized the reasoning of the Seventh Circuit, arguing that "the required substantial nexus between the § 924(c) firearm offense and the contemporaneous federal predicate crime of violence makes the crime of violence determination more precise, predictable, and judicially administrable. Section 924(c)(3)(B) determinations," it held, "simply do not suffer from the uncertainties found by the Supreme Court in 924(e) cases in *Johnson*." *Id.* at 1267.

Although the government immediately filed a letter of supplemental authority arguing that *Ovalles* was case-dispositive, the panel set Petitioner's case for oral argument. Petitioner asked the court to remove the case from the calendar and stay its decision pending this Court's decision in *Sessions v. Dimaya*, No. 15-

1498, which could undercut *Ovalles*. But the panel denied that motion, and heard oral argument on January 30, 2018.

In response to one judge's emphasis at oral argument that every court to have yet considered the issue had concluded that Hobbs Act robbery was a "crime of violence" – namely, United States v. Hill, 832 F.3d 135 (2d Cir. 2016); *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017); *United States v. Gooch*, 850 F.3d 285 (6th Cir. 2017); and *United States v. Anglin*, 856 F.3d 954 (7th Cir. 2017) – Petitioner filed a post-argument Rule 28(j) letter pointing out that none of those circuits had, or had specifically considered, a pattern jury instruction like Eleventh Circuit O70.1 when those decisions were rendered.[1] Since Eleventh Circuit judges routinely instruct juries in Hobbs Act robbery cases that they may convict if they found the defendant caused the victim to "fear harm, either immediately or in the future," including "the *fear of financial loss* as well as fear of physical violence," and that "property" taken included "intangible rights," Petitioner argued this was indeed the "least culpable conduct" for which someone might plausibly be convicted of Hobbs Act robbery. It did *not* require the use or threat of violent force to either a person or property, he reiterated, and thus Hobbs Act robbery was not categorically a "crime of violence."

Thereafter, Petitioner moved the panel to allow supplemental briefing on whether *attempted* Hobbs Act robbery (the predicate conviction for Count 12, the second § 924(c) count) was categorically a crime of violence. He confessed that both

[1] Petitioner acknowledged that Fifth Circuit, which decided *Buck*, uses the same instruction for Hobbs Act extortion and robbery, and defines both "property" and "fear" as did Eleventh Circuit Pattern O70.3. However, he noted, the Fifth Circuit did not consider those aspects of its pattern instruction in *Buck*.

he and the government had mischaracterized that predicate in their briefing as a substantive Hobbs Act robbery, but asserted that question was jurisdictional and unwaivable. Although the government opposed the request for supplemental briefing, the panel allowed it, directing the parties to file simultaneous briefs on whether an *attempted* Hobbs Act robbery was a "crime of violence."

In his supplemental letter brief, Petitioner argued that an attempted Hobbs Act robbery was not a "crime of violence" for the same reasons a completed Hobbs Act robbery was not a "crime of violence" (in particular, the unique definitions in the Eleventh Circuit pattern instruction). However, he additionally argued that in *In re Gomez*, 830 F.3d 1225, 1228 (11th Cir. 2016) a prior panel had acknowledged that "'the plausible applications of attempted Hobbs Act robbery might not 'all require the [attempted] use of threatened use of force,'" *id.* at 1228 (citing *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013)); that the "substantial step" in any federal attempt crime must itself be violent for an attempt to qualify as a "crime of violence;" and that multiple cases, including *United States v. Wrobel*, 841 F.3d 450, 455-456 (7th Cir. 2016), confirmed that a person may easily be convicted of attempted Hobbs Act robbery based on an objectively non-violent substantial step. Supplemental Letter Brief, *United States v. St. Hubert*, 2018 WL 1161283 at **4-12 (11th Cir. Feb. 23, 2018). In *Wrobel*, Petitioner noted, the Seventh Circuit had upheld a conviction for attempted Hobbs Act robbery where the defendants made plans to travel from Chicago to New York to rob a diamond merchant; they believed – and expressly stated their belief – that he would turn the diamonds over *without*

the need to do anything to him; and they simply travelled as far as New Jersey in a rented van before they were arrested). *Id.* at 455-56.

The government responded that an attempted Hobbs Act robbery qualified as a crime of violence because an attempt requires proof of the intent to commit all elements of the completed offense, and in its view, a substantive Hobbs Act robbery required a taking by a use, attempted use, or threat of violent force in all cases.

The Eleventh Circuit's Decision

Five days after the filing of those supplemental briefs, the Eleventh Circuit issued a precedential decision affirming Petitioners § 924(c) convictions and consecutive sentences. *United States v. St. Hubert*, 883 F.3d 1319 (Feb. 28, 2018). While the panel agreed with Petitioner as a threshold matter that his challenges to his § 924(c) convictions were constitutional, jurisdictional, and not waived by his plea, *id.* at 1324-27, it nonetheless rejected his claims on the merits. *Id.* at 1327-37.

With regard to the "crime of violence" definition in § 924(c)(3)(B), the court noted that it had "already rejected a *Johnson*-based void-for-vagueness" challenge to that provision in *Ovalles*, and "[u]nder our prior panel precedent rule," the court was "bound to follow *Ovalles* and conclude that St. Hubert's constitutional challenge to § 924(c)(3)(B) lacks merit." 883 F.3d at 1328. Although the court thus affirmed Petitioner's convictions and sentences "based on *Ovalles*," *id.*, it implicitly recognized that *Dimaya* might well undercut that decision. For that reason, it argued there were "several reasons why *Dimaya* is inapposite here." *See id.* at 1336-37 (reiterating the *Ovalles* panel's arguments for distinguishing § 16(b) from §

924(c)(3)(B)). But in the event § 924(c)(3)(B) were ultimately declared unconstitutionally vague and void as well, the court found that the elements clause in § 924(c)(3)(A) provided an "independent and alternative ground" upon which to uphold Petitioner's Count 8 and Count 12 convictions. *See id.* at 1328, 1334.

With regard to Count 8, the court noted that it had "already held" in *In re Saint Fleur*, 824 F.3d 1337 1340 (11th Cir. 2016), that the predicate crime of Hobbs Act robbery "independently qualifies as a crime of violence under the § 924(c)(3)(A)'s use-of-force clause." *St. Hubert*, 883 F.3d at 1329. While asserting initially that it was bound by the holding of *Saint Fleur* – even though *Saint Fleur* was rendered within a 30-day period at the authorization state of a second or successive § 2255 motion without counsel, briefing, or the right to appeal[2] – the court thereafter acknowledged *Saint Fleur* had not properly applied the categorical approach. Indeed, the court expressly agreed with Petitioner that "the Supreme Court's discussion of the categorical approach in [*Moncrieffe v. Holder*, 569 U.S. 184 (2013), *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136

[2] The Eleventh Circuit, notably, is the only circuit in this country to decide an open merits question at the authorization stage of second or successor § 2255 motion, and its practice in this regard has been criticized both within and outside the circuit as inconsistent with 28 U.S.C. § 2244(b)(3)(C), unwise, and unjust. *See, e.g.*, *In re Hoffner*, 870 F.3d 301, 310 n. 13 (3rd Cir. 2017); *United States v. Seabrooks*, 839 F.3d 1326, 1349-50 (11th Cir. 2016) (Martin, J., concurring); *Davenport v. United States*, Order at 3 (11th Cir. Mar. 28, 2017) (No. 16-15939) (Martin, J., granting COA on that question); *United States v. Rosales-Acosta*, 2017 WL 562439 at *3 (11th Cir. Feb. 13, 2017)(agreeing, prior to the decision in the instant case, that it "may be true" that an order issued upon an application for second or successive motion "is not controlling" in a direct appeal)(Marcus, Julie Carnes, and Jill Prylor, JJ); Noah Feldman, "This Is What 'Travesty of Justice' Looks Like," available at https://www.bloomberg.com/view/articles/2016-07-22/appeals-court-fumbles-supreme-court-ruling.

S.Ct. 2243 (2016)]" – all of which were ignored in *Saint Fleur* – was "relevant to St. Hubert's appeal." *Id.* at 1229.

To avoid having to agree with Petitioner that *Saint Fleur* should be disregarded due to its failure to apply the dictates of the above precedents, the court stated that it "would take time to apply the categorical approach" "in more detail than *Saint Fleur*" did. *Id.* at 1329 & n. 10. In that regard, the court followed the lead of the Sixth Circuit in *United States v. Gooch*, 850 F.3d 285 (6th Cir. 2017) by ruling for the first in this case that the Hobbs Act, 18 U.S.C. § 1951, was "a divisible statute that set out multiple crimes" and that "robbery and extortion are distinct offenses, not merely alternative means of violating § 1951(a)." *Id.* at 290-92. The court agreed with Petitioner that the Hobbs Act robbery offense in § 1951(b) was itself indivisible; a Hobbs Act robbery could be committed by several different means, "actual or threatened force, or violence, or fear of injury;" and that each of these means must meet the elements clause for the offense to categorically be declared a "crime of violence." *Id.* at 1331. However, the court noted with significance, not only the Sixth Circuit in *Gooch*, but three other circuit courts applying the categorical approach as well, had "list[ed] each of those means," and reached the same conclusion as the *Saint Fleur* panel did, that Hobbs Act robbery was categorically a "crime of violence" under § 924(c)(3)(A). *See* 883 F.3d at 1331-1333 (citing *United States v. Gooch*, 850 F.3d 285, 291-92 (6th Cir. 2017); *United States v. Rivera*, 847, 848-49 (7th Cir. 2017); *United States v. Anglin*, 856 F.3d 954, 964-65 (7th Cir. 2017), *cert. granted & judgment vacated on other grounds*, 138 S.Ct.

126 (2017); *United States v. Hill*, 832 F.3d 135, 140-140-44 (2d Cir. 2016);[3] and *United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016)).

Although the court newly-mentioned *House*, it notably did not mention *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017), which it had mentioned at oral argument, and Petitioner had specifically addressed in his Rule 28(j) letter (noting that the Fifth Circuit's pattern Hobbs Act instruction included language just like Eleventh Circuit Pattern O71.3, but the *Buck* court had not specifically considered it). And indeed, the only circuit decision that the court chose to discuss at length was *Hill*, even though Petitioner had pointed out that the Second Circuit did not have *any* pattern instructions, and could not have considered his precise "fear of injury" argument.

Ignoring that Petitioner's "fear of injury" argument was predicated specifically upon Eleventh Circuit Pattern Instruction O71.3, the court claimed that the Second Circuit in *Hill* had rejected an argument "*like St. Hubert's*" "main argument" that "fear of injury to person to property" was an overly broad means of committing Hobbs Act robbery. *Id.* at 1332 (emphasis added). It agreed with the Second Circuit that "a hypothetical nonviolent violation of the statute, without evidence of actual application of the statute to such conduct, is insufficient to show a 'realistic probability' that Hobbs Act robbery could encompass nonviolent

[3] As noted *supra* n. 1, the Second Circuit amended its 2016 decision in *Hill* after *Dimaya*. *See United States v. Hill*, 890 F.3d 51 (2d Cir. 2018). In doing so, the Second Circuit not only left open the vagueness question under § 924(c)(3)(B); it revised its original discussion of § 924(c)(3)(A) in certain regards also, including, by citing the Eleventh Circuit's decision in *St. Hubert* as among "a consistent line of cases from our sister circuits, concluding that Hobbs Act robbery satisfies the force clause." *Hill*, 890 F.3d at 56 & n. 7.

conduct." 883 F.3d at 1332 (citing *Hill*, 832 F.3d at 139-40, 142-43; *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007); and *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013)(citing *Duenas-Alvarez*). And the court reasoned similarly here, stating:

> St. Hubert ha[d] not pointed to any case at all, much less one in which the Hobbs Act applied to a robbery or attempted robbery, that did not involve, at a minimum, a threat to use physical force. Indeed, St. Hubert does not offer a plausible scenario, and we can think of none, in which a Hobbs Act robber could take property from the victim against his will and by putting the victim in fear of injury (to his person or property) without at least threatening to use physical force capable of causing such injury. *See Curtis Johnson v. United States*, 559 U.S. 133, 140 [(2010)].

883 F.3d at 1332. For that reason, "[h]aving [now] applied the categorical approach" as *Hill* did, and without addressing any of Petitioner's other arguments as to why his Count 8 conviction was categorically overbroad, the court found *Saint Fleur* "properly concluded that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)." *Id.* at 1332-33.

With regard to Petitioner's Court 12 conviction, the court acknowledged that the circuit had not yet squarely considered the separate question of whether the predicate crime for Count 12, *attempted* Hobbs Act robbery, was a "crime of violence" within § 924(c)(3)(A). *Id.* at 1329, 1333. In addressing that question of first impression, it ruled – as the government had argued — that *attempted* Hobbs Act robbery was indeed a "crime of violence" because the underlying substantive offense was categorically violent, and therefore, "the attempted taking of [] property in such manner must also include at least the "attempted use' of force." *Id.* at 1333-

34 (citing as support *United States v. Wade*, 458 F.3d 1273, 1278 (11th Cir. 1006); *Hill v. United States*, 877 F.3d 717, 718-19 (7th Cir. 2017); *United States v. Armour*, 840 F.3d 904, 908-09 (7th Cir. 2016)).

In reaching that conclusion, the court below was swayed by the Seventh Circuit's reasoning in *Hill* (not to be confused with the Second Circuit's *Hill* case). Specifically, the Seventh Circuit had emphasized that "a defendant must intend to commit every element of the completed crime in order to be guilty of attempt," and for that reason concluded that an attempt to commit *any* crime "'should be treated as an attempt to commit every element of that crime.'" *Id*. at 1334 (citing *Hill*, 877 F.3d at 719). Although *Hill* was an ACCA case involving an attempted murder predicate, the court below found *Hill* completely "analogous." *Id*. at 1334. "Under *Hill*'s analysis," it found, the intent to commit violence was an element of a Hobbs Act robbery crime due to the "taking in a forcible manner" requirement, and given that intent, an attempted Hobbs Act robbery was a "crime of violence." *Id*. (noting with significance, "under *Hill*'s analysis," that § 924(c)(3)(A) "equates the use of force with attempted use of force;" "thus, the text of § 924(c)(3)(A) makes clear that actual force need not be used for a crime to qualify under § 924(c)(3)(A)").

For that "alternative and independent" reason, the court held *attempted* Hobbs Act robbery was a "crime of violence" under § 924(c). That conclusion, it noted, was "unaffected by *Johnson*," *Ovalles*, or the expected decision in *Dimaya*. Without addressing any of Petitioner's supplemental arguments or authorities, the court affirmed his Count 12 conviction under § 924(c)(3)(A) on the "alternative and

independent" ground that because Petitioner attempted to commit a "crime of violence," he intended to commit violence, and such intent met the elements clause. *Id.* & n. 15; 1336-37.

The Decision in *Dimaya* and the En Banc Proceedings in *Ovalles*

Less than two months after the Eleventh Circuit issued its precedential decision in Petitioner's case, this Court in *Sessions v. Dimaya*, 138 S.Ct. 1204 (April 17, 2018) struck down 18 U.S.C. § 16(b) as unconstitutionally vague for the same reasons in *Johnson* it had found the ACCA's residual clause unconstitutionally vague. In particular, the Court noted with significance that § 16(b) required the same "inscrutable" "ordinary case" analysis under the categorical approach that § 924(e)(2)(B)(ii) did, and the same uncertainty about the "not-well-specified-yet sufficiently-large degree of risk." *Id.* at 1215-1216.

The day *Dimaya* issued, the Eleventh Circuit panel in *Ovalles sua sponte* ordered supplemental briefing on the effect of *Dimaya* for its holding that § 924(c)(3)(B) was not unconstitutionally vague, and asked the parties to also address whether the en banc Court should reconsider the holding of *United States v. McGuire*, 706 F.3d 1333, 1336-37 (11th Cir. 2013) that the categorical approach applies to § 924(c)(3). After Ms. Ovalles filed her supplemental brief arguing that § 924(c)(3)(B) was unconstitutionally vague, and *McGuire* should not be reconsidered, but before the government filed its supplemental brief taking contrary positions, the court vacated the panel opinion in *Ovalles* and set the case for rehearing en banc. *Ovalles v. United States*, 889 F.3d 1259 (11th Cir. May 15, 2015).

The Eleventh Circuit set an expedited en banc briefing schedule in *Ovalles*, and reheard the case en banc July 9th. The question of whether § 924(c)(3)(B) is unconstitutionally vague remains an open one in the Eleventh Circuit at this time.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's decision holding 18 U.S.C. § 924(c)(3)(B) constitutional after *Johnson*, conflicts with decisions of the Seventh and Tenth Circuits holding that provision void for vagueness.

In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), this Court held that the definition of "crime of violence" under 18 U.S.C. § 16(b) is void for vagueness in violation of due process for the same reasons the Court held the similar residual clause in 18 U.S.C. § 924(e)(2)(B)(ii) void for vagueness in *Johnson v. United States*, 135 S.Ct. 2551 (2015). Because the definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B) is identical to § 16(b) and operates in precisely the same way (with the same categorical approach and ordinary case inquiry) as § 16(b), *Dimaya* compels the conclusion that § 924(c)(3)(B) is also void for vagueness.

The court below refused to so hold prior to *Dimaya*, finding itself bound by *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), *vacated pending reh'g en banc*, 889 F.3d 1259 (11th Cir. May 15, 2018). However, the Seventh Circuit in *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016) easily held § 924(c)(3)(B) to be vague and void for the same reasons § 16(b) was vague and void even prior to *Dimaya*'s holding in that regard. And once the Court declared § 16(b) unconstitutional in *Dimaya*, the Tenth Circuit quickly joined the Seventh in holding § 924(c)(3)(B) unconstitutional. *See United States v. Salas*, 889 F.3d 681 (10th Cir.

2018). The decision below therefore directly conflicts with the Seventh and Tenth Circuit decisions.

Admittedly, the Eleventh Circuit is now reconsidering *Ovalles* in light of *Dimaya*. However, if the en banc court ultimately rejects the views of the Seventh and Tenth Circuits, and attempts to avoid the logical import of *Dimaya* for § 924(c) cases by declaring the categorical approach inapplicable to § 924(c)(3)(B) – contrary to its own prior precedent, and the long-held views of every other circuit in this country – there will soon be a direct, fully-entrenched, and completely intractable circuit conflict on the issue. And this Court will need to immediately resolve it.

A. Section 924(c)(3)(B) is unconstitutionally vague and void for the same reasons § 16(b) is unconstitutionally vague and void.

In *Dimaya*, this Court held that § 16(b)'s definition of "crime of violence" is unconstitutionally vague in light of its reasoning in *Johnson,* 135 S. Ct. 2551, which invalidated the definition of "violent felony" in the similarly-worded residual clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii) (requiring that an offense "otherwise involve[s] conduct that presents a serious potential risk of physical injury to another"). The *Dimaya* Court found that "a straightforward application of *Johnson*" effectively "resolve[d]" the case before it. *Dimaya*, 138 S. Ct. at 1213, 1223. And in *Johnson,* the Court singled out two features of ACCA's residual clause that "conspire[d] to make it unconstitutionally vague." 135 S. Ct at 2557. In *Dimaya*, the Court found those same two features made § 16(b) unconstitutionally vague as well.

In *Johnson*, the Court first emphasized that in order to determine the risk posed by the statute, the ACCA residual clause "require[d] a court to [apply the categorical approach] and picture the kind of conduct that the crime involves 'in the ordinary case'" rather than looking at the "real-world" facts in the individual case at hand to determine the risk of injury. *Johnson*, 135 S. Ct. at 2557 (citation omitted). The clause left "grave uncertainty" about how to estimate the risk posed by a crime by asking judges "to imagine how *the idealized ordinary case* of the crime" occurs. *Id.* at 2557-58 (emphasis added).

Second, and compounding that uncertainty, the ACCA's residual clause layered an imprecise "serious potential risk" threshold on top of the requisite "ordinary case" inquiry. The combination of "indeterminacy" created by the "ordinary case" inquiry and an ill-defined risk threshold resulted in "more unpredictability and arbitrariness than Due Process tolerates." *Id.* at 2558.

The *Dimaya* Court found § 16(b) suffers from those same two flaws. Like the ACCA's residual clause, § 16(b) requires the court to identify a crime's "ordinary case" in order to measure the crime's risk, but "[n]othing in § 16(b) helps courts to perform that task." *Dimaya*, 138 S. Ct. at 1215. And the Court also found that § 16(b)'s "substantial risk" threshold is no more determinate that the ACCA's "serious potential risk" threshold. *Id.* Thus, the same "[t]wo features" that "conspire[d] to make" the ACCA's residual clause unconstitutionally vague – "the ordinary case requirement and an ill-defined risk threshold" – likewise conspired to make § 16(b) unconstitutionally void. *Id.* at 1216, 1223 (citing *Johnson*, 135 S. Ct. at 2557).

Because § 924(c)(3)(B) is identical to § 16(b) – requiring the same categorical "ordinary case" approach and risk threshold – *Dimaya* dictates that § 924(c)(3)(B) is also unconstitutionally vague. Indeed, as noted *supra*, immediately after this Court issued its decision in *Dimaya*, the Tenth Circuit, in *Salas*, found exactly that and struck § 924(c)(3)(B) as unconstitutionally vague. And the Seventh Circuit did the same pre-*Dimaya* because § 924(c)(3)(B) is exactly "the same residual clause contained in [§16(b)]." *Cardena*, 842 F.3d at 996). The decision below adhering to the panel decision in *Ovalles*, thus conflicts with both the Seventh and Tenth Circuit decisions. As rightly recognized by the Tenth Circuit in *Salas*, *Dimaya* has abrogated the reasoning in *Ovalles* and similar pre-*Dimaya* circuit decisions upholding § 924(c)(3)(B) as constitutional and not vague. 889 F.3d at 685-97.[4]

The government has no legitimate basis at this time to argue the decision below – which relied entirely upon the panel decision in *Ovalles* for its § 924(c)(3)(B) ruling – was correct. *Dimaya* directly shattered each of the *Ovalles* panel's erroneous, text-based distinctions between § 16(b) and the ACCA's residual clause. For that reason, the full Eleventh Circuit rightly vacated the *Ovalles* panel decision within days of *Dimaya*.

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[4] *See Salas*, 889 F.3d at 685-86 (citing *United States v. Garcia*, 837 F.3d 708, 711 (5th Cir. 2017); *United States v. Eshetu*, 863 F.3d 946, 955 (D.C. Cir. 2017);*United States v. Ovalles*, 861 F.3d 1257, 1265 (11th Cir. 2017), *vacated* by Order granting petition for rehearing (11th Cir. May 15, 2018); *United States v. Prickett*, 839 F.3d 697, 699 (8th Cir. 2016); *United States v. Hill,* 832 F.3d 135, 150 (2d Cir. 2016), *amended by* 890 F.3d 51 (2d Cir. 2018) (amending decision post-*Dimaya* to remove residual clause analysis and affirming § 924(c) conviction solely based on elements clause); *United States v. Taylor*, 814 F.3d 340, 379 (6th Cir. 2016)*; see also United States v. Jones,* 854 F.3d 737, 740-41 (5th Cir. 2017).

B. Neither the nexus between the use of the firearm and the "crime of violence" in § 924(c), nor the contemporaneity of those offenses, makes § 924(c)(3)(B) any less vague than § 16(b).

To the extent the *Ovalles* panel maintained (as did the panel below, by following *Ovalles*) that § 924(c)(3)(B) was materially distinguishable from § 16(b) for vagueness purposes because § 924(c) requires a nexus between the "crime of violence" and the firearm, and the "crime of violence" is a "contemporaneous, companion crime" rather than a prior one, 883 F.3d at 1328 (citing *Ovalles*, 861 F.3d at 1263-67, which drew such distinctions), both decisions were wrong. As the Tenth Circuit rightly explained in *Salas*, the "firearm requirement simply means that the statute will apply in fewer instances, not that it is any less vague. The required nexus does not change the fact that § 924(c)(3)(B) possesses the same two features that rendered the ACCA's residual clause and § 16(b) unconstitutionally vague: 'an ordinary-case requirement and an ill-defined risk threshold.'" 889 F.3d at 685 (quoting *Dimaya*, 138 S. Ct. at 1207)). Therefore, "[r]equiring a sufficient nexus to a firearm does not remedy those two flaws." *Salas,* 889 F.3d at 685.

Nor does the "contemporaneity" of the use of a firearm in the underlying offense render § 924(c)(3)(B) any less vague than the residual clauses in ACCA or § 16(b) which involve prior crimes. It makes no difference *when* a predicate offense occurred, if the relevant legal question is whether that offense "by its nature" – that is, in the "ordinary case" – presents the risk targeted by the residual clause. And here, given the statutory text, this Court's precedents mandate a categorical approach. *See Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (the "by its nature" language

in § 16(b) "requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime"); *Dimaya*, 138 S.Ct. at 1217 ("And the words 'by its nature' in § 16(b) make that meaning all the clearer. . . . An offense's 'nature' means its 'normal and characteristic quality.'") Any temporal differences between § 16(b) and § 924(c)(3)(B) are irrelevant under the categorical approach. The distinction the Eleventh Circuit tried to draw in both *Ovalles* and the decision below between § 16(b) and § 924(c)(3)(B), is irrelevant under the categorical approach.

Prior to *Dimaya*, both in *Ovalles* and in the instant case, the government conceded that the categorical approach governed the "crime of violence" inquiry under § 924(c)(3)(B). *See* Brief for the United States, *United States v. St. Hubert*, 2016 WL 3912898 at *4 (11th Cir. July 15, 2016) (No. 16-10874-GG) ("[w]hether an offense qualifies as a crime of violence pursuant to 18 U.S.C. § 924(c) is a question of law," pursuant to *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013)). On the cited page of *McGuire*, former Justice O'Connor sitting by designation wrote for a united Eleventh Circuit panel in holding it clear from the "terms" of § 924(c)(3)(B) – specifically, the "*by its nature*" language in that provision – that the "crime of violence" determination under § 924(c)'s residual clause, was indeed one "of law" that must be answered "'categorically' – that is, by reference to the elements of the offense and not the actual facts of [the defendant's contemporaneous] conduct."

But while *McGuire* was controlling in the Eleventh Circuit when the decision below was rendered, it appears increasingly possible that the Eleventh Circuit will overrule *McGuire* to counteract the impact of *Dimaya* in § 924(c) cases. In the decision below, the court stated in *dicta* that despite being bound by *McGuire* to "apply only the categorical approach," it believed "another approach" "made sense" in making the "crime of violence" determination, and "the firearm's presence should not be ignored in determining whether a defendant is guilty of a § 924(c) offense." 883 F.3d at 1334-1336. When *Dimaya* issued, the *Ovalles* panel (which included one judge from the instant case) ordered supplemental briefing not only on whether *Dimaya* implied § 924(c)(3)(B) was unconstitutionally vague, but also on whether the Court should overrule *McGuire* "insofar as [*McGuire*] requires applying the categorical approach to determine whether an offense constitutes a 'crime of violence' under § 924(c)(3)." En Banc Briefing Notice, *Ovalles v. United States*, No. 17-10172 (11th Cir. May 15, 2018). With that cue from the court, the government has backtracked from its prior position, and strenuously urged the full court to overrule *McGuire*, and adopt a "fact-based" approach instead of the categorical approach for § 924(c)(3)(B). And indeed, from the questions posed at the July 9th en banc oral argument in *Ovalles*,[5] a majority of the court appears poised to do just that. Should the full Eleventh Circuit uphold the *Ovalles* panel's § 924(c)(3)(B) ruling on that (different) ground, there will not only be an entrenched conflict between the Eleventh, Seventh, and Tenth Circuits on whether § 924(c)(3)(B) is

[5] The transcript of the *Ovalles* oral argument is available on the Eleventh Circuit website, at www.ca11.uscourts.gov/oral-argument-recordings.

unconstitutionally vague; there will be an even more fundamental conflict between the Eleventh Circuit and its sister courts on whether the categorical approach applies to § 924(c)(3)(B) in need of immediate resolution.[6]

Given the expedited briefing schedule for the *Ovalles* en banc proceedings, the en banc Court's decision is expected shortly. In the meantime, Petitioner asks that the Court stay its consideration of the instant petition.[7] If the en banc court becomes the only court in this country to reject the categorical approach for § 924(c)(3)(B), and upholds that provision's constitutionality on that basis, the Court will need to resolve that important circuit conflict. Because Petitioner's case comes to the Court on direct appeal, with no distracting side issues as there often are on collateral review, and because the issue of § 924(c)(3)(B)'s constitutionality was pressed and passed on at length below, this case will provide a clean and ideal vehicle in which to resolve the circuit conflict.

Admittedly, even if the en banc Eleventh Circuit ultimately adheres to *McGuire* and the categorical approach, and declares § 924(c)(3)(B)

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[6] *See United States v. Taylor*, 848 F.3d 476, 491 (1st Cir. 2017) (categorical approach applies to § 924(c)(3)(B)); *United States v. Acosta*, 470 F.3d 132, 135 (2nd Cir. 2006)(same); *United States v. Fuertes*, 805 F.3d 485, 497-99 (4th Cir. 2015)(same); *United States v. Jennings*, 195 F.3d 795, 797-98 (5th Cir. 1999)(same); *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016)(same); *United States v. Williams*, 864 F.3d 826 (7th Cir. 2017)(same); *United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994)(same); *United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995)(same); *McGuire*, 706 F.3d at 1336-37(same); *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018)(same); *United States v. Kennedy*, 133 F.3d 53, 56-57 (D.C. Cir. 1998)(same)).

[7] The Court has frequently deferred its consideration of an issue raised in a petition for writ of certiorari when the en banc court of appeals is reconsidering a prior panel precedent followed in the decision below. *See, e.g., Brown v. United States*, No. 17-6344; *Sykes v. United States*, No. 16-9604.

unconstitutionally vague in light of *Dimaya*, that would only abrogate the § 924(c)(3)(B) portion of the decision below. Petitioner would not be able to secure relief in the Eleventh Circuit unless this Court reverses one or both of the court's "alternative and independent" holdings under § 924(c)'s elements clause. Both are in error, and preclusive of relief not only for petitioner, but for other defendants convicted of like and even different offenses, for the reasons detailed below.

II. The Eleventh Circuit has decided an important and far-reaching question of federal law which has not been, but should be resolved by the Court, namely, whether Hobbs Act robbery can categorically be a "crime of violence" as defined in 18 U.S.C. § 924(c)(3)(A) if juries in three circuits are routinely instructed pursuant to those circuits' pattern instructions that the offense can be committed in a non-violent manner.

In *Curtis Johnson v. United States*, 559 U.S 133 (2010), this Court construed the "physical force" language in the ACCA's elements clause to require "*violent* force," which it explained was a "substantial degree of force" "capable of causing pain or injury to another person." *Id.* at 140. The elements clause in § 924(c)(3)(A) is worded identically to § 924(e)(2)(B)(i), except that it may be satisfied by using or threatening physical force, that is, "*violent* force," against a "person *or property*." Admittedly, as the court below recognized, several circuits applying the categorical approach have now held that Hobbs Act robbery categorically satisfies that "crime of violence" definition. *See United States v. St. Hubert*, 883 F.3d 1319, 1331-1333 (11th Cir. 2018)(citing *United States v. Gooch*, 850 F.3d 285, 291-92 (6th Cir. 2017); *United States v. Rivera*, 847, 848-49 (7th Cir. 2017); *United States v. Anglin*, 856 F.3d 954, 964-65 (7th Cir. 2017), *cert. granted & judgment vacated on other*

grounds, 138 S.Ct. 126 (2017); *United States v. Hill*, 832 F.3d 135, 140-140-44 (2d Cir. 2016);[8] and *United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016)).

But notably, none of the circuit decisions followed by the court below in justifying its similar holding under the "categorical approach," have specifically considered the question raised by Petitioner below, and herein, of whether a Hobbs Act robbery is categorically overbroad if juries are routinely instructed pursuant to a pattern Hobbs Act robbery instruction that a Hobbs Act robbery can be committed without the use, threat, or fear of any physical violence.

As Petitioner emphasized to the court below, and it tellingly did not mention, Eleventh Circuit Pattern Instruction O70.3 (Hobbs Act robbery) provides:

> It's a Federal crime to acquire someone else's property by robbery . . .
>
> The Defendant can be found guilty of this crime only if all the following facts beyond a reasonable doubt.
>
> > (1) the Defendant knowingly acquired someone else's personal property;
> >
> > (2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence or causing the victim to *fear harm*, either immediately or in the future; ...
>
> "Property" includes money, tangible things of value, *and intangible rights that are a source or element of income or we*alth.

[8] As noted *supra* n. 1, the Second Circuit amended its 2016 decision in *Hill* after *Dimaya*. *See United States v. Hill*, 890 F.3d 51 (2d Cir. 2018). In doing so, the Second Circuit not only left open the vagueness question under § 924(c)(3)(B); it also revised its original discussion of § 924(c)(3)(A) in certain regards, and newly cited the Eleventh Circuit's decision in *St. Hubert* as among "a consistent line of cases from our sister circuits, concluding that Hobbs Act robbery satisfies the force clause." *Hill*, 890 F.3d at 56 & n. 7.

> "Fear means a state of anxious concern, alarm, or anticipation of harm. *It includes the fear of financial loss as well as fear of physical violence*.

(Emphasis added) (Appendix A-7).

According to this instruction, a defendant's taking of intangible rights (such as a stock option, or the right to conduct business) by causing a victim to simply "fear" a financial loss – but without causing the victim to fear *any* physical violence – is a plausible means of committing a Hobbs Act robbery. Indeed, before the Eleventh Circuit definitively resolved the "crime of violence" issue against Petitioner in the decision below, two judges on the Eleventh Circuit had specifically opined that an offense might *not* categorically be a "crime of violence," if juries were routinely instructed in Hobbs Act cases, that the statute could be violated without the use or threat of physical violence, and simply by causing "fear of financial loss." *See Davenport v. United States*, No. 16-15939, Order at 6 (11th Cir. Mar. 28, 2017) (Martin, J.) (granting certificate of appealability on whether Hobbs Act robbery is an offense that categorically meets §924(c)'s elements clause; noting that, given Eleventh Circuit Pattern Jury Instruction O70.3, a defendant could be convicted of that offense simply because he caused the victim to "fear harm" to "property," which includes "financial loss" and "intangible rights"); *In re Hernandez*, 857 F.3d 1162 (2017) (Martin, J., joined by Jill Pryor, J. concurring in result) (noting, based on the same definition of "fear" in the pattern Hobbs Act extortion instruction, that "the plausible applications of attempted Hobbs Act extortion might not "all require the [attempted] use or threatened use of force;" citing *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013)).

After Senior Judge Hull emphasized at the oral argument in this case that at least four circuits – the Fifth Circuit in *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017), the Second Circuit in *Hill*, the Sixth Circuit in *Gooch*, and the Seventh Circuit in *Anglin* – had consistently held that Hobbs Act robbery categorically qualified as a "crime of violence," Petitioner filed a Rule 28(j) letter, pointing out that *none* of these courts had specifically considered whether a pattern instruction like Eleventh Circuit Pattern O70.3, rendered a Hobbs Act robbery offense categorically overbroad. To this day, Petitioner informed the court, the Seventh Circuit does not have a pattern Hobbs Act robbery instruction. When *Gooch* was decided, the Sixth Circuit did not. The Second Circuit has *no* pattern instructions at all. And, although the Fifth Circuit uses the same pattern instruction for both Hobbs Act extortion and Hobbs Act robbery, and defines both "property" and "fear" in that instruction just like the Eleventh Circuit does in its Pattern O70.3, the Fifth Circuit in *Buck* did not specifically consider that language in its own pattern instruction. (Appendix A-7). Because none of these circuits had ever considered whether having a pattern instruction (like Eleventh Circuit Pattern O70.3) makes it "plausible" that a Hobbs Act conviction covers "non-violent conduct" such as the taking of the victim's intangible rights, by causing him to fear a financial loss, Petitioner rightly argued the other circuit decisions were not persuasive in resolving the specific "crime of violence" challenge he had raised.

He urged the Eleventh Circuit to hold as a matter of first impression that the plain language in Eleventh Circuit Pattern O70.3 confirmed that Hobbs Act robbery

could "plausibly" be committed without the use or threat of physical violence. As support, he cited *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013), where former-Justice O'Connor writing for the court had explained that § 924(c)(3)(A), by its terms, requires a categorical approach. And pursuant to that approach, the court "must ask whether the crime, in general, plausibly covers any non-violent conduct." *Id.* at 1337. *McGuire* was clear that "[o]nly if the plausible applications of the statute of conviction all require the use or threatened use of force can [a defendant] be held guilty of a crime of violence." *Id.* (parallel citations omitted).

In so holding, the court cited *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 192-93 (2007), where this Court addressed how to identify the scope of an offense for purposes of applying the categorical approach, and had cautioned that doing so "requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the [federal] definition." While the Court added that "[t]o show that realistic probability," an offender "must point to his own case or other cases in which the state courts in fact did apply the statute in the special . . . manner for which he argues," *id.* that particular statement must be read in context. The offender in *Duenas-Alvarez* had argued that California's aiding-and-abetting doctrine rendered his theft offense non-generic, because it made a defendant criminally liable for unintended conduct. *Id.* at 190-91. And that argument found no support in either the statutory language, precedent establishing the scope of aiding-and-abetting liability, or any other source such as a

pattern jury instruction. In the absence of such support, the Court required the offender in *Duenas-Alvarez* to identify an actual case to support his novel, proposed application. Fatally for his argument, he could not. *See id.* at 187, 190-91.

Strictly applying *Duenas-Alvarez*, the Second Circuit held that the defendant in *Hill* likewise could not show a "realistic probability" that the "fear of injury" means of committing a Hobbs Act robbery could occur without fear of physical violence, unless he could identify a case on point. But again, there were no pattern instructions in the Second Circuit for the court to draw upon. The defendant in *Hill* did not offer anecdotal evidence as to how Second Circuit juries were instructed in Hobbs Act cases. Nor did he support his "fear of injury" argument with any other circuit's pattern, like Eleventh Circuit Instruction O71.3. His argument was based entirely upon hypotheticals. And the Second Circuit rejected it for that reason.

The defendant in *Buck* did not propose hypotheticals, but simply argued (for the first time on appeal) that based on the language in § 1951(b) that Hobbs Act robbery was not a "crime of violence" under § 924(c)(3)(A) because a person could be convicted "for nothing more than threatening some future injury to property." Brief of Appellant, *United States v. Buck*, 2016 WL 3035348, at *9 (5th Cir. May 26, 2015). He did not argue that the plain language in Fifth Circuit Pattern Instruction 2.73A ("'property' includes money and other tangible and intangible things of value;" "[t]he term 'fear' includes fear of economic loss or damage, as well as fear of physical harm") supported his argument. The government responded that Buck had not shown plain error, citing *Hill* as support. Brief of the United States, *United*

States v. Buck, 2016 WL 5436198, **27-30 (5th Cir. Sept. 26, 2016). And in reply, the defendant did not distinguish *Hill* as Petitioner did here. Reply Brief of the Appellant, *United States v. Buck*, 2016 WL 5436198, at *1 (5th Cir. Sept. 26, 2016). Not surprisingly, given the briefing, the Fifth Circuit found no plain error, citing *Hill* and other decisions holding Hobbs Act robbery was categorically a "crime of violence." *Buck*, 847 F.3d at 274-75. *Buck* is now precedential, and will be preclusive of a contrary finding in the Fifth Circuit, even if a future defendant raises a challenge predicated upon the plain language of the Fifth Circuit pattern, similar to Petitioner's challenge here.

In *McGuire*, the Eleventh Circuit notably did not require the defendant to identify a reported case confirming that there had been an actual prosecution under 18 U.S.C. § 32(a)(1), for a non-violent commission of the offense (disabling an aircraft in the special jurisdiction of the United States). Instead, the *McGuire* court simply considered the "possibilities" of purportedly non-violent means of committing the offense of "disabling an aircraft" suggested by the defendant – such as deflating the tires or disabling the ignition while the plane is on the ground, or disconnecting the onboard circuitry or the radio transponder while the plane is airborne – and found that because each of these "minimally forceful acts" is specifically calculated to seriously interfere with the freedom, safety and security of the passengers, or cause damage to the plane, it involves the "use of force against that plane or its passengers." 706 F.3d at 1337-38.

Here, by contrast, the conduct Petitioner suggested could qualify as a Hobbs Act violation based on the plain language of the Eleventh Circuit pattern instruction, was not even "minimally forceful." Taking a person's "intangible rights" by causing fear of a "financial loss" is not calculated to cause physical harm to any person, or to property. Under both *McGuire* and *Duenas-Alvarez*, the Eleventh Circuit improperly failed to consider that a *completely non-violent* commission of a Hobbs Act robbery was not only "plausible," but "probable," based upon the plain language of its own pattern instruction. The court erroneously followed *Hill* in finding "fear of injury" was categorically violent, and insisting that an actual case was necessary to show that means of committing the offense could occur without violence, notwithstanding the language in the court's pattern instruction.

This Court has not yet considered whether the case-specific requirement of *Duenas-Alvarez* should apply where, as here, the plain language of a circuit's pattern jury instruction, establishes that an offense is overbroad vis-a-vis the elements clause. And indeed, it should grant certiorari in this case to specifically address that issue, since not only the Eleventh Circuit but the Fifth and Tenth Circuits as well have pattern instructions defining the "property" taken in a Hobbs Act robbery to include purely "intangible rights," and specifying that the offense may be committed by causing "fear" of purely economic harm. *See* Tenth Circuit Pattern Instruction 2.70 ([Robbery][Extortion] By Force, Violence of Fear, 18 U.S.C. § 1951(a)(Hobbs Act)) (In a robbery, "[p]roperty' includes money and other tangible and intangible things of value. 'Fear' means an apprehension, concern, or anxiety

about physical violence or harm or economic loss or harm that is reasonable under the circumstances") (Appendix A-8).

While no other circuit beyond the Fifth, Tenth, and Eleventh have similar Hobbs Act robbery instructions, and at least one circuit – the Eighth (which decided *House*, followed in the decision below) – has a model instruction specifying very differently, that a Hobbs Act robbery can only be committed by "committing physical violence," or 'threatening physical violence." *See* Eighth Circuit Model Jury Instruction 6.18.1951B (2017, ed.)(Appendix A-9). Ultimately, the number of circuits on either side of this sharp divide does not matter under the categorical approach. If it were only the Eleventh Circuit that had an instruction informing juries they could convict a defendant simply for causing fear of a financial loss, not personal violence, "violent force" would still not be an "element" of *every* Hobbs Act crime. But indeed, the fact that courts in three circuits (covering Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) now routinely instruct juries in all Hobbs Act robbery cases that this offense does not necessitate the use, threat, or fear of physical violence, underscores the error by the court below in finding that a Hobbs Act robbery by "fear of injury" was categorically violent, simply because Petitioner had not submitted a reported "case" confirming his argument that "fear of injury" could simply be fear of financial loss (exactly as stated in the pattern instruction).

And in any event, the court below erroneously stated Petitioner had not cited *any* cases that even "plausibly" showed Hobbs Act robbery applied "to a robbery that

did not involve, at a minimum, a threat to use physical force." 883 F.3d at 1332-33. Petitioner cited three cases that recognized that the concept of "property" under the Hobbs Act extends to "intangible rights." *See United States v. Local 560 of the International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America*, 780 F.2d 267, 281 (3rd Cir. 1986) (the Hobbs act was written and has been interpreted broadly to "protect intangible, as well as tangible property; describing the circuits as "unanimous" on this point); *United States v. Arena*, 180 F.3d 380, 392 (2d. Cir. 1999)("[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"), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003); *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").

While admittedly, these were Hobbs Act extortion not Hobbs Act robbery cases, in the Eleventh Circuit – as in the Fifth Circuit – the pattern instructions on Hobbs Act robbery and Hobbs Act extortion define the terms "fear" and "property" *identically*. *See* Eleventh Circuit Pattern Instruction O70.1 (Hobbs Act Extortion) (defining "extortion" as "obtaining property from a person who consents to give it up because of the wrongful use of actual or threatened force, violence, or fear;" defining "property" to include "intangible rights that are a source or part of income or wealth, and "fear" as including "the fear of financial loss as well as fear of physical violence")(Appendix A-7).

Given the complete identity of the pattern robbery and extortion instructions in these material respects in the Eleventh and Fifth Circuits, it is notable that the Court GVR'd a § 924(c) case after *Dimaya*, where the predicate "crime of violence" was Hobbs Act extortion, and the petitioner had specifically pointed out that courts "routinely" charge juries in Hobbs Act extortion cases "that fear of economic injury is sufficient." *See* Petition for Writ of Certiorari, *Xing Lin v. United States*, No. 17-5767, at 18-19 (Aug. 28, 2017); *Xing Lin v. United States*, 138 S.Ct. 1982 (June 15, 2018)(granting certiorari, vacating the judgment, and remanding the case for further consideration in light of *Dimaya*).

While the government noted in response to the *Xing Lin* petition that the Second Circuit "found it 'far from clear that the 'ordinary case' of Hobbs Act extortion would not entail a substantial risk of the use of physical force for purposes of Section, 924(c)(3)(B)," Memorandum for the United States, *Xing Lin v. United States*, No. 17-5767, at 2-3 (Oct. 30, 2017), the government nonetheless conceded that *Xing Lin* "may be affected by *Dimaya*" and should be held pending that decision. And presumably, the government took that position because it knew the "ordinary case" is irrelevant under § 924(c)(3)(A); the categorical approach required by the "elements" language in that provision is an "every case" analysis; and Hobbs Act extortion is indeed categorically overbroad under an "elements-only," every-case approach, if juries are "routinely" instructed that they may convict a defendant for causing fear of financial loss, without any physical violence.[9]

[9] Notably, in the First, Third, and Ninth Circuits, as well as the Fifth and Eleventh Circuits, juries are routinely instructed that Hobbs Act extortion may be committed

Given the identity of the Hobbs Act robbery and extortion instructions in these material respects in the Eleventh Circuit, the Court should grant certiorari in this case for the same reason it GVR'd in *Xing Lin*. Petitioner specifically predicated his "fear of injury" argument on the Eleventh Circuit pattern instruction, pressed that argument strenuously to the court below, and that court below erroneously found this case no different than *Hill*, even though the Second Circuit has no similar pattern instruction. Because this case comes to the Court on direct review, without distracting procedural or collateral issues, it presents an ideal vehicle for certiorari. It will permit the Court to determine definitively whether Hobbs Act robbery is categorically a "crime of violence" as many other courts have held, while considering – finally – all of the relevant circumstances, which include the fact that juries are routinely instructed in three circuits that the offense can be committed without the use, threat, or fear of any personal violence. In resolving the newly-relevant issue of whether this frequent § 924(c) predicate can remain a predicate if § 924(c)(3)(B) is declared unconstitutional after *Dimaya*, the Court would be able to also clarify still-unresolved questions as to proper application of *Duenas-Alvarez*'s "reasonable probability" standard. Lower courts need to know whether an "actual

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by causing fear of economic loss, without the use or threat of physical force. *See* First Circuit Pattern Instruction 4.18.1951 ("To prove extortion by fear, the government must show ... that the victim believed that economic loss would result from failing to comply with [defendant's demands"); Third Circuit Pattern Instruction 6.18.1951-4 (Hobbs Act – "Fear of Injury" Defined") (citing an extortion case in the "Comment" section, for the proposition that "fear" "may be of economic or physical harm"); Ninth Circuit Pattern Instruction 8.142A (Hobbs Act – Extortion or Attempted Extortion by Nonviolent Threat)("the defendant [[induced][intended to induce]][name of victim] to part with property by wrongful threat of [economic harm][specify other nonviolent harm]").

case" is *always* necessary to show a statute extends to non-violent conduct, as the court below found, or whether "reasonable probability" of a non-violent application may be shown in other ways, such as by the plain language of the statute,[10] or the plain language of a pattern jury instruction defining key statutory terms. If the Court finds the Eleventh Circuit erred in requiring an "actual case," because the definitional language in Eleventh Circuit O71.3 was itself sufficient to satisfy *Duenas-Alvarez*, that clarification assure proper application of the categorical approach in all § 924(c), ACCA, and § 16(a) cases going forward.

III. The Eleventh Circuit has decided another important and far-reaching question of federal law that has not been, but should be, settled by this Court, namely, whether – if a completed crime has the use or threat of "violent force" as an element – the *attempted* commission of that offense is likewise categorically a "crime of violence" due to the defendant's intent to commit every element of the crime, or whether the "substantial step" must itself be categorically violent

If the Court agrees that a completed Hobbs Act robbery is not categorically a "crime of violence" for the above reasons, it would logically follow that an attempt to commit that not-categorically-violent offense is likewise not a "crime of violence." But notably, the converse proposition adopted in the decision below does *not* logically follow. Even *if* a completed offense is a categorically violent crime, every

[10] The First, Third, Sixth, Ninth, and Tenth Circuits have held that plain statutory language can establish that an offense is overbroad, notwithstanding the absence of a reported case. *See Swaby v. Yates*, 847 F.3d 62, 66 & n.2 (1st Cir. 2017); *Jean Louis v. U.S. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009); *United States v. Lara*, 590 Fed. App'x 574, 584 (6th Cir. 2014); *United States v. Grisel*, 488 F.3d 844, 849 (9th Cir. 2007) (en banc); *United States v. Tittles*, 852 F.3d 1257, 1274-75 & n. 23 (10th Cir. 2017). By contrast, the en banc Fifth and Eleventh Circuits have taken the contrary view, over vigorous dissents in both courts. *See United States v. Castillo-Rivera*, 853 F.3d 218, 222-24 (5th Cir. 2017) (en banc); *United States v. Vail-Bailon*, 868 F.3d 1293, 1305-07 (en banc).

attempt to commit a violent crime is *not* a violent crime. In *James v. United States*, 550 U.S. 192, 201 (2007), *overruled on other grounds* by *Johnson v. United States*, 135 S.Ct. 2551 (2015), this Court rejected that very logic by the Eleventh Circuit.

The Eleventh Circuit in *James* had presumed that every attempt to commit an enumerated "violent felony" (such as burglary) in 18 U.S.C. § 924(e)(2)(B)(ii), was necessarily a "violent felony" within the residual clause. 430 F.3d at 1155-58. But upon certiorari, the Court rejected such presumptive reasoning. It delved deeply into Florida law to determine precisely how Florida courts interpreted their attempt statute – whether "any act" toward the commission of a burglary was sufficient for an attempted burglary, or the courts required an overt act that *itself* created the "potential risk of injury to another." Only upon determining that Florida courts indeed required an "overt act directed toward entering or remaining in a structure or conveyance," did the Court conclude that the "risk" created by such conduct was sufficient to qualify "attempted burglary" as a "violent felony" within the ACCA's residual clause. *James*, 550 U.S. at 201-05. The Court was clear, however, that mere "preparatory conduct that does not pose the same risk of violent confrontation and physical harm posed by an attempt to enter a structure" would not even meet the then-all-inclusive residual clause. *Id.* at 204-05. As such, similar preparatory conduct for a Hobbs Act robbery offense (temporally or locationally separated from the crime scene or designated victim) should not meet the much-narrower elements clause. And in fact, as Petitioner pointed out, and the Eleventh Circuit ignored, an attempted Hobbs Act robbery can be predicated upon precisely such conduct.

Notably, a federal attempt crime only requires that the government prove (1) that the defendant had the specific intent to engage in the underlying criminal conduct, and (2) that he took a "substantial step toward commission of the offense" that strongly corroborates his criminal intent. *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004). In that regard, "the federal courts have rather uniformly adopted the standard found in Section 5.01 of the American Law Institute's Model Penal Code." *United States v. Carmen Ramirez*, 823 F.2d 1 (1st Cir. 1987 (citation omitted). And in fact, the Model Penal Code includes as conduct that will amount to a "substantial step" "strongly corroborative of the actor's criminal purpose" simply "reconnoitering" the place contemplated for the commission of the crime, and possession of materials to be employed in the commission of the crime. Such classic preparatory conduct is not itself violent.

The caselaw on *attempted* Hobbs Act robbery further confirms that the "substantial step" need not itself involve the use, attempted use, or threatened use of violent force against any person or property. Indeed, it may involve no more than planning, preparing for, travelling to, beginning one's travel to an agreed-upon robbery destination – without intending to ever engage in violencet. *See, e.g.*, *United States v. Wrobel*, 841 F.3d 450, 455-456 (7th Cir. 2016)(defendants made plans to travel from Chicago to New York to rob a diamond merchant, they believed he would turn the diamonds over *without the need to do anything to him*, and they travelled as far as New Jersey in a rented van before they were arrested) (emphasis added); *United States v. Turner*, 501 F.3d 59, 68–69 (1st Cir. 2007) (defendant and

his compatriots planned a robbery, surveilled the target, prepared vehicles, and gathered at the designated assembly point on the day scheduled for the robbery); *United States v. Gonzalez*, 322 Fed. App'x. 963, 969 (11th Cir. 2009)(defendants simply planned a robbery, and travelled to a location in preparation for it).

To the extent the court below adopted the Seventh Circuit's presumption in *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017), that the mere "intent" to commit a violent crime alone suffices to qualify an attempt offense as a violent crime, it erred for multiple reasons.

First, *Hill* was an ACCA case predicated upon an Illinois attempted murder conviction. The issues there were simply not "analogous" to whether an attempted Hobbs Act robbery is a crime of violence within §924(c)(3)(A), for the same reasons the attempted carjacking offense in *Ovalles* is not analogous: namely, there is no "intent to kill" requirement in a Hobbs Act robbery.

Second, the other-circuit cases *Hill* relied upon including *United States v. Wade*, 458 F.3d 1273, 1278 (11th Cir. 2006)) were either distinguishable, abrogated, or both. None focused upon whether an attempt should categorically be treated the same as the object of the attempt under the ACCA. In *James*, this Court expressly rejected the reasoning in *Wade* (which had followed the Eleventh Circuit's wrong decision in *James*). See 458 F.3d at 1277-78. *Hill* ignored that.

Third, *Hill* adopted the concurring opinion in *Morris v. United States*, 827 F.3d 696 (7th Cir. 2016), which proposed that an attempt to commit an ACCA violent felony should categorically be an ACCA "violent felony," based upon the

completely unsupported assumption – of no relevance in a § 924(c) case, and one expressly rejected in *James* – that Congress must have intended the ACCA to include attempts. *See* 827 F.3d at 699 ("I suspect the Congress that enacted ACCA would have wanted the courts to treat such attempts at violent felonies as violent felonies under the Act.").

Finally, it has never before been the law that *intent alone* satisfies § 924(c)(3)(A), or in § 924(e)(2)(B)(i), or in § 16(a). If *mens rea* alone were sufficient, the government would not have conceded, nor would so many courts have found, that conspiracy crimes do not meet those provisions.

The fallout from the Eleventh Circuit's wholesale adoption of the clearly erroneous reasoning in *Hill* has been swift and expansive. The government has already cited *St. Hubert* as authority for finding attempted carjacking categorically qualifies is a "crime of violence" under § 924(c)(3)(A) in the pending *Ovalles* en banc proceedings, and for finding attempted Florida robbery categorically is an ACCA "violent felony" in *United States v. Stacy*, Eleventh Circuit No. 17-13229. If not immediately reviewed and reversed by this Court, *St. Hubert* will effectively close the book, and preclude meaningful judicial review, of any attempt crime.

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

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