NO: 18-5269

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

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

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

MICHAEL CARUSO
Federal Public Defender
Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Petitioner St. Hubert
1 East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.1(8), Petitioner Michael St. Hubert advises the Court of several developments since the filing of his petition, which confirm the need for the Court to review his case.

1. On July 24th, the government waived its right to respond to Petitioner's argument that certiorari is necessary to resolve the direct conflict between the Eleventh Circuit's holding that 18 U.S.C. § 924(c)(3)(B) is constitutional, and the contrary holdings of the Seventh and Tenth Circuit's that § 924(c)(3)(B) is void for vagueness. (Pet. 16-24). However, after the government's July 24th waiver, the circuit conflict has widened.

First, in *United States v. Eshetu*, 898 F.3d 36 (D.C. Cir. Aug. 3, 2018), the D.C. Circuit joined the Tenth Circuit in holding that *Sessions v. Dimaya*, ___ U.S. ___, 138 S.Ct. 1203, 12010 (2018) rendered § 924(c)(3)(B) void for vagueness, and required the court to "abjure [its] earlier analysis to the contrary." 898 F.3d at 37. In so holding, the D.C. Circuit panel not only approved of and followed the Tenth Circuit's decision in *United States v. Salas*, 889 F.3d 681, 684-86 (10th Cir. 2018); it rejected the government's call to dispense with the categorical approach, and instead "construe § 924(c)(3)(B) to require a case-specific approach that considers appellants' own conduct, rather than the 'ordinary case' of the crime." 898 F.3d at 37 (citation omitted).

The government thereafter sought rehearing en banc in *Eshetu* to advance the latter claim. *See* Petition for Rehearing En Banc in *United States v. Eshetu* (No. 15-3020) (D.C. Cir. Aug. 31, 2018). However, it also sought – and received – a 30-

day extension until September 20th to determine whether to seek certiorari in *Salas*. *See* Application for Extension of Time in *United States v. Salas*, No. 18A152. And notably, in the interim, another circuit has held § 924(c)(3)(B) unconstitutionally vague.

Specifically, in a Fifth Circuit case GVR'd by the Court "for further consideration in light of *Sessions v. Dimaya*," *Davis v. United States*, ___ U.S. ___, 138 S.Ct. 1979 (May 14, 2018), the government made the same claim as in *Eshetu*, "attempt[ing] to change its prior approach . . . by abandoning its longstanding position that 18 U.S.C. § 924(c)(3)(B) should be analyzed under the categorical approach." *United States v. Davis, et al.*, ___ F.3d ___, 2018 WL 4268432 at *2 (5th Cir. Sept. 7, 2018). However, the Fifth Circuit panel – just like the D.C. Circuit panel in *Eshetu* – adhered to its longstanding precedent finding the categorical approach to be the "proper inquiry" under § 924(c)(3)(B). *Id.* (citation omitted). Based on the "language of the statute itself," the Fifth Circuit joined the Seventh, Tenth, and D.C. Circuits in holding "§ 924(c)'s residual clause is unconstitutionally vague." *Id.* at *3.

In light of the ever-increasing number of circuits holding – contrary to the Eleventh Circuit in the decision below – that § 924(c)(3)(B) is indeed unconstitutionally vague, certiorari is warranted to resolve the conflict here. At the very least, if the government does seek certiorari in *Salas*, and the Court intends to resolve the circuit conflict in *Salas* or in another case this term, it should hold Petitioner's petition pending its decision in that case.

2. Notably, a ruling that § 924(c)(3)(B) is unconstitutionally vague would be case-dispositive here, if – as petitioner has argued – the Eleventh Circuit erred in holding that both attempted Hobbs Act robbery and substantive Hobbs Act robbery are categorically "crimes of violence" within 18 U.S.C. § 924(c)(3)(A), even though the Court's own pattern Hobbs Act robbery instruction states explicitly that the Hobbs Act robbery offense includes causing fear of financial loss to intangible rights, which is categorically non-violent conduct. The Eleventh Circuit refused to find that the plain language of its pattern Hobbs Act instruction clarifying the plain meaning of the "fear of injury . . . to property" language in 18 U.S.C. § 1951(b) was *itself* sufficient to meet the "reasonable probability" standard of *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007); it required a "case" confirming an actual prosecution on such a theory. *United States v. St. Hubert*, 883 F.3d 1319, 1332-33 (11th Cir. 2018). And the correctness or incorrectness of that application of *Duenas-Alvarez* may be determined by the Court's resolution of a related issue this term in *United States v. Sims*, No. 17-766 (to be argued October 9th).

In *Sims*, the Respondent has asked the Court to weigh in on the longstanding circuit conflict (noted by St. Hubert, Pet. 36 & n. 10) as to whether *Duenas-Alvarez* requires identification of a real case in which a court has applied the statute in an overbroad fashion, if the plain language of the statute of conviction is *itself* facially overbroad. *See* Resp. Br., *United States v. Sims*, No. 17-766, 2018 WL 3913908 at **34-39 (Aug. 14, 2018). If the Court agrees with the Respondent in *Sims* that no "legal imagination" is required to find there is a "realistic probability" that Arkansas will apply its burglary statute to conduct that falls outside the generic

definition of burglary, because the "'statute's greater breadth is evident from its text,'" id. at Resp. Br. at *34 (citation omitted), that reading of *Duenas-Alvarez* will impact the related *Duenas-Alvarez* issue here. (Pet. 28-32). Indeed, the fact that the plain language of *several* circuits' pattern Hobbs Act jury instructions state that a Hobbs Act robbery can be committed by simply causing fear of future financial injury to intangible rights – not physical injury to either a person or tangible property[1] – should then be more than enough to show a "reasonable probability" that, as Petitioner has argued, the indivisible Hobbs Act robbery offense extends to non-violent conduct, and is therefore not a "crime of violence" within 18 U.S.C. § 924(c)(3)(A) under the categorical approach. (Pet. 24-36).

A ruling for the Respondent in *Sims* on the *Duenas-Alvarez* issue should compel rejection of the Eleventh Circuit's holding below that Petitioner could not show that his Hobbs Act robbery conviction was overbroad vis-a-vis § 924(c)(3)(A), without identifying a real "case" in which a defendant had been prosecuted on a theory expressly articulated by the plain text of the circuit's pattern instruction. At the very least, the Court should hold this case pending resolution of *Sims*, and – if the Court rules in favor of the Respondent there on the *Duenas-Alvarez* issue – grant certiorari here, vacate the decision below, and remand this case to the Eleventh Circuit to reconsider both of its § 924(c)(3)(A) rulings in light of the Court's clarification of *Duenas-Alvarez* in *Sims*.

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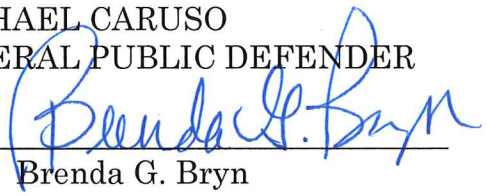
[1] Notably, the Modern Federal Jury Instructions similarly define "fear of injury" for purposes of the Hobbs Act to exist "if a victim experiences *anxiety, concern, or worry over* expected personal harm *or business loss, or over financial or job security.*" Sand & Siffert, *Modern Federal Jury Instructions – Criminal* 50-6 ("Fear of Injury")(Matthew Bender & Company, Inc. 2018)(emphasis added).

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: 
Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
September 10, 2018