No. 18-5655

IN THE SUPREME COURT OF THE UNITED STATES

CORY FOSTER,
PETITIONER

-VS.-

UNITED STATES OF AMERICA,
RESPONDENT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

INTRODUCTION

In this case, the Third Circuit relied on its novel approach, that is out of step with all of the other circuits, to determine that Petitioner's convictions qualify as predicate crimes of violence for purposes of 18 U.S.C. § 924(c); instead of examining the elements of the offenses, as has always been done. Under the new circuit rule, courts are now to consider whether the jury found (or the defendant admitted) that a gun was brandished or discharged during the offense. If so, the offense is a crime of violence supporting a § 924(c) conviction—regardless of its elements. In other words, the Third Circuit has replaced the categorical approach with a tautological approach whereby every offense is a § 924(c) predicate upon a finding that a gun was involved.[1]

The Government does not even attempt to defend this approach, because it is indefensible. As explained in Petitioner's petition, the approach is contrary to this Court's precedent, contrary to the holdings of nine other courts of appeal, and contrary to § 924(c)'s text. Pet. at 8-15. The Government contests none of this, and instead argues that certiorari should be

[1] This approach was adopted in *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016).

denied because the Third Circuit's error "makes no difference because the same result would obtain in this case under a categorical approach to § 924(c)(3)(A)." BIO at 5. This is because, in the Government's estimation, the predicate crimes at issue, Hobbs Act robbery (18 U.S. C. § 1951) and federal carjacking (18 U.S. C. § 2119) are crimes of violence under the categorical approach. BIO at 6-9.

The Government is incorrect that further review is unnecessary. *Certiorari* is warranted.

THE QUESTION PRESENTED IS WHETHER THE CATEGORICAL APPROACH APPLIES IN DECIDING IF AN OFFENSE IS A CRIME OF VIOLENCE FOR PURPOSES OF § 924(C), NOT WHETHER HOBBS ACT ROBBERY OR FEDERAL CARJACKING ARE CATEGORICALLY CRIMES OF VIOLENCE

A central holding of both *Robinson* and this case is that the categorical approach does not apply in determining whether an offense is a crime of violence for purposes of § 924(c). 844 F.3d at 141. The court of appeals held that for contemporaneous offenses like § 924(c) and its predicates, the offenses can be "read together" to determine if, between them, they have an element of force and thereby together qualify as a crime of violence. *Id.* at 143. The *Robinson* court proceeded to apply that holding to the facts of the case before it, holding that the fact of the defendant having brandished a gun in that particular case, made the Hobbs Act robbery a crime of violence. *Id.* at 143-44. That holding was applied here, and its application turned the "crime of violence" determinations into a ministerial step given the nature of the new approach: if there is a finding or admission regarding a gun, there is a crime of violence.

Nowhere in *Robinson* or this case, did the court of appeals consider whether the predicate offenses, standing alone, are categorically crimes of violence. Indeed, in both cases

the court emphasized that issue was not before the court for decision. *Id.* at 144; *United States v. Foster,* 734 Fed. Appx. 129 at *132 n.5 (3d Cir. May 23, 2018).

The Government cannot avoid review by recasting the question presented. That question is whether the categorical approach applies in deciding if an offense is a crime of violence for purposes of § 924(c), not whether Hobbs Act robbery or federal carjacking are categorically crimes of violence. It is not accurate to suggest, as the Government does, that Petitioner is asking the Court to review a "statement[]" in an "opinion[]" and not a judgment. BIO at 5 (citing *California v. Rooney,* 483 U.S. 307, 311 (1987)). Petitioner's challenge is not to a "statement" of the lower court, but rather to the construct of its central holding. *Rooney* is inapposite because there, the lower court's "statement" (that evidence mentioned in a warrant affidavit was seized illegally) had no influence on the lower court's analysis or judgment (that nonetheless the affidavit established probable cause). *Id.* at 309-311. Thus, this Court rejected the Government's appeal (of, essentially, the statement), since it played no role in the lower court's judgment.

In contrast, here, the Third Circuit's newly-minted approach informed its "crime of violence" determination. It is axiomatic that cases and issues come before this Court ripe for review, notwithstanding the existence of other case-dispositive questions that are not before the Court. *See, e.g., Sedima v. Imrex Co.,* 473 U.S. 479, 500 (1985), *superseded by statute as stated in Abene v. Jaybar, LLC* , 802 F. Supp. 2d 716, 721 (E.D. La. 2011) (in civil RICO matter, acknowledging case dispositive question of "pattern" was "not before the Court," in reversing overly restrictive interpretation of statute). It makes no difference that Petitioner's case involves a pure question of law, i.e., whether the statutory elements in question categorically establish crimes of violence. Neither of these related questions have yet to be determined by this Court. Indeed, this Court's recent *certiorari* grant in *Taylor v. United States,* 138 S. Ct. 1979 (2018), is reason alone to question the Government's confidence that whether carjacking is a "crime of violence" has been

resolved. In *Taylor*, the Court recently granted the defendant's petition for *certiorari,* vacated the judgment, and remanded a § 2119 carjacking "crime of violence" case to the Eighth Circuit Court of Appeals "for further consideration in light of *Sessions v. Dimaya,* 584 U.S. ___, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018)." *Taylor v. United States*, 138 S. Ct. 1979 (2018). Following remand in *Taylor*, one of the issues on which the Eighth Circuit granted a COA was whether carjacking is a crime of violence under the force clause of 18 U.S.C. § 924(c)(3)(A). *Taylor v. United States,* No. 16-4192, Order at *1 (8th Cir. Aug. 6, 2018).

The flaw in the Government's suggestion that this Court consider unpresented case-dispositive issues, is exemplified in a case like Petitioner's, where there is more than one such issue. The lower court's analyses in determining these "crime of violence" questions will be different for each predicate statute. Those respective determinations will be consequential, since Petitioner received significant, consecutive sentences based on separate predicate offenses. Diverting this Court to issues not before it, serves no purpose other than to ratify the Government's role as prognosticator (of how those issues will ultimately resolve).

If this Court were to grant review and ultimately reverse, the proper course would be to remand the case to the court of appeals for a determination in the first instance of whether Hobbs Act robbery and federal carjacking are categorically crimes of violence. These determinations should be made by the court of appeals on full briefing and review of the record, not at this stage of the proceedings. These questions may or may not come before this Court one day, but they are not properly before the Court today.

The Government trumpets this Court's denials of certiorari on the questions not raised in the instant petition, whether Hobbs Act robbery or federal carjacking constitute crimes of violence under § 924(c). But as this Court has made clear:

> [T]he "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.). *Accord, Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366, n. 1 (1973); *Brown v. Allen*, 344 U.S. 443, 489-497 (1953). The "variety of considerations [that] underlie denials of the writ," *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917 (1950) (opinion of Frankfurter, J.), counsels against according denials of certiorari any precedential value.

Teague v. Lane, 489 U.S. 288, 296 (1989). Petitioner will not take the Government's bait and argue the merits of issues not before the Court. On the other hand, as noted above, these issues ***have not*** been determined by this Court. They are still open questions, and Petitioner's arguments that the statutory elements of neither offense categorically establish crimes of violence are reasonably debatable. Petitioner's arguments, to be made on remand, are ***briefly summarized below.***

As to carjacking, the Government's argument that this "Court has recently and repeatedly denied review of whether carjacking is categorically a crime of violence" (BIO at 8), neglects to mention the Court's recent GVR in *Taylor,* referenced above. On remand here, Petitioner's argument will be that for carjacking under 18 U.S.C. § 2119 to qualify as a "crime of violence" under § 924(c)(3)'s elements clause, the offense must have an element of "violent force." Carjacking, as defined by § 2119, does not meet this requirement. While carjacking can be accomplished through "force and violence," it can also be accomplished through "intimidation." 18 § 2119. Intimidation need not entail the use or threatened use of violent force. Violent force is not inherent to intimidation, which can be accomplished through numerous modes of conduct falling short of violent force. There are many ways to put someone in fear of injury to his person or property without use, attempted use, or threatened use of violent force. Several Circuits - including the Second, the Fourth, the Fifth, and the Tenth - have analyzed statutes covering the fear of future injury under force clauses and have concluded that similar offenses are not categorical crimes of violence. *See, e.g. Chrzanoski v. Ashcroft*, 327 F.3d 188, 195 (2d Cir. 2003)

(18 U.S.C. §16(b)) ("the intentional causation of injury does not necessarily involve the use of force[,] an individual could be convicted of intentional assault in the third degree for injury caused not by physical force, but by guile, deception, or even deliberate omission."); *United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012) (California offense of willfully threatening to commit a crime that will result in death or great bodily injury does not contain element equating to threat of violent force under U.S.S.G. § 2L1.2); *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010) (same): *United States v. Perez-Vargas*, 414 F.3d 1282, 1286 (10th Cir. 2005) (no § 2L1.2 enhancement, because Colorado third degree assault statute that focuses on the result of conduct, means crime can be committed without the use or threatened use of physical force). Additionally, the statute does not require proof of a defendant's mental state as it relates to intimidation, and thus does not require the use or threatened use of physical force. Therefore, even if intimidation that produces fear of bodily harm is otherwise sufficient to establish carjacking, it does not satisfy the higher *mens rea* standard of § 924(c)(3)(A).

Reasonable debate exists and continues on this question, and is worthy of consideration as shown by this Court, and as was recently recognized by the Eighth Circuit Court of Appeals on granting a COA on the exact issues Petitioner would present to the lower court on remand.

As to Hobbs Act robbery, on remand, Petitioner will argue that, for several reasons, the statue does not categorically qualify as a crime of violence. First, the offense can be accomplished by the act of placing another in "fear of injury" without employing violent physical force. Under the same analysis employed above at 5-6 above, with the focus on ***result***, as opposed to ***means***, such conduct does not satisfy § 924(c)(3)(A).

Second, the act of putting someone in "fear of injury," as defined under the Hobbs Act robbery statute, does not constitute a "crime of violence" under the force clause, because it does

not require an intentional threat of physical force. The "fear of injury" element under the Hobbs Act robbery statute does not require a defendant to intentionally place another in fear of injury. Federal cases interpreting the "intimidation" element in the federal bank robbery statute (18 U.S.C. § 2113(a)) are instructive. Federal bank robbery may be accomplished by "intimidation," which means placing someone in fear of bodily harm – the same action required under the Hobbs Act robbery statute. *See United States v. Woodrop*, 86 F.3d 359, 364 (4th Cir. 1996) ("intimidation" under federal bank robbery statute means "an ordinary person in the [victim's position] reasonably could infer a threat of bodily harm from the defendant's acts."); *see also United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) (same).

It is plain that the "intimidation" element of federal bank robbery is missing this necessary intentional *mens rea* element. "Intimidation" is satisfied under the bank robbery statute "whether or not the defendant actually intended the intimidation," as long as "an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts." *Woodrup*, 86 F.3d at 36. *See also Yockel*, 320 F.3d at 821 (8th Cir. 2003) (upholding bank robbery conviction even though there was no evidence that defendant intended to put teller in fear of injury: defendant did not make any sort of physical movement toward the teller and never presented her with a note demanding money, never displayed a weapon of any sort, never claimed to have a weapon, and by all accounts, did not appear to possess a weapon). It is enough that the victim reasonably fears injury from the defendant's actions – whether or not the defendant actually intended to create that fear. Due to the lack of this intent, federal bank robbery criminalizes conduct that does not require an intentional threat of physical force. Therefore, bank robbery fails to qualify as a crime of violence. Because the federal bank robbery "intimidation" element is defined the

same as the Hobbs Act robbery "fear of injury" element, it follows that Hobbs Act robbery also fails to qualify as a "crime of violence."

Third, a Hobbs Act robbery can also be accomplished by placing someone in fear of injury to his property. This also does not require "violent force" against property under § 924(c)(3)(A), because it can be accomplished by many means short of violent physical force. "The 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); *see also United States v. Local 560 of the International* Brotherhood of Teamsters, Chauffeurs, *Warehousemen, and Helpers of America*, 780 F.2d 267, 281 (3d Cir. 1986) (the circuits "are unanimous in extending Hobbs Act to protect intangible, as well as tangible property."); *United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining conviction under Hobbs Act for threats "to slow down or stop construction projects unless his demands were met."). Thus, Hobbs Act robbery can be committed via threats to cause a devaluation of some economic interest like a stock holding. Such threats to economic interests are certainly not threats of "violent force." Even injury to tangible property does not require the threat of violent force. In *United States v. O'Connor,* 874 F.3d 1147, 1158-59 (10th Cir. 2017), the Tenth Circuit held that that because Hobbs Act robbery contemplates the use of force against property, it is not a crime of violence under § 4B1.2 of the Sentencing Guidelines. Although § 924(c)(3)(A) includes "physical force" against "property," and § 4B1.2 does not, in *O'Connor,* the Government argued that §§ 924(c)(3)(A) and 4B1.2(a)(1) are "virtually mirror images of one another." *Id.* at 1158. The Government's position supports Petitioner's contention that the scope of "property" under the Hobbs Act takes it out outside the reach of § 924(c)(3)(A).

Reasonable debate exists and continues on the question of whether Hobbs Act Robbery constitutes a crime of violence. The fact that this related issue will have to be addressed on remand is no impediment to *certiorari* review.

CONCLUSION

For all of the foregoing reasons, a writ of *certiorari* should issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on May 23, 2018.

Respectfully Submitted:

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