No. 18-9319

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT GRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 12-18) that attempted robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), does not qualify as a "crime of violence" under 18 U.S.C. 924(c)(3)(A), and that the court of appeals erred in denying a certificate of appealability (COA) on that claim. He further contends (Pet. 18) that his claim "may fall within the purview" of United States v. Davis, 139 S. Ct. 2319 (2019), in which this Court determined that the alternative definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. 139 S. Ct. at 2336. Petitioner's challenge to the classification of his attempted Hobbs Act robbery offense as a crime of violence does not warrant

review, and his conviction and sentence under 18 U.S.C. 924(c) (2012) are unaffected by this Court's decision in Davis. The petition for a writ of certiorari should be denied.

1. Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and possessing a firearm in furtherance of a "crime of violence," in violation of 18 U.S.C. 924(c) (2012). C.A. Order 2;[1] Am. Judgment 1. Petitioner's conviction under Section 924(c) was predicated on both the conspiracy to commit Hobbs Act robbery and the attempt to commit Hobbs Act robbery. Am. Judgment 1; Superseding Indictment 1-3. Petitioner did not appeal. C.A. Order 3.

In 2016, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, in which he contended that his conviction for attempted Hobbs Act robbery did not qualify as a "crime of violence" under Section 924(c). See D. Ct. Doc. 188, at 4 (June 3, 2016) (2255 Mot.); C.A. Order 3 n.1 (noting that petitioner challenged only the classification of attempted Hobbs Act robbery as a "crime of violence," and did not contend that his Section

[1] Petitioner's appendix is not consecutively paginated. It contains the court of appeals' order (C.A. Order), the district court's order (D. Ct. Order), and the magistrate judge's report (Mag. J. Report).

924(c) conviction depended on the conspiracy to commit Hobbs Act robbery). Section 924(c)(3) defines a "crime of violence" as a felony offense that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or, "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. 924(c)(3)(B). Petitioner asserted that his conviction for attempted Hobbs Act robbery did not qualify as a crime of violence because Section 924(c)(3)(B) is unconstitutionally vague in light of this Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness, 135 S. Ct. at 2557. See 2255 Mot. 4.

A magistrate judge recommended that petitioner's motion be denied. Mag. J. Report 1-18. The magistrate judge explained that it was unnecessary to decide whether Section 924(c)(3)(B) is unconstitutionally vague under Johnson, because attempted Hobbs Act robbery "categorically qualifies as a 'crime of violence'" under Section 924(c)(3)(A). Id. at 8; see id. at 8-16. The magistrate judge found that Section 924(c)(3)(A)'s applicability precluded petitioner from showing prejudice to overcome his procedural default in having failed to raised that claim on direct

appeal, or demonstrating that his claim was timely filed in reliance on Johnson. Id. at 6, 8, 16. Petitioner failed to file objections to the magistrate judge's recommendation, and the district court adopted that recommendation, denied petitioner's motion for postconviction relief, and declined to issue a COA. D. Ct. Order 1-2.

The court of appeals denied a COA. C.A. Order 2-4. The court recognized that this Court had granted review in Davis, supra, to consider whether the definition of a "crime of violence" in Section 924(c)(3)(B) is unconstitutionally vague. C.A. Order 3. The court of appeals determined, however, that petitioner could not make the "substantial showing of the denial of a constitutional right" necessary to obtain a COA, id. at 4 (quoting 28 U.S.C. 2253(c)(2)), because attempted Hobbs Act robbery qualifies as a "crime of violence" under the "elements clause" of Section 924(c)(3)(A), ibid.

2. The court of appeals correctly determined that attempted Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A). Hobbs Act robbery requires the "unlawful taking or obtaining of personal property" from another "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. 1951(b)(1). For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Garcia v. United States,

138 S. Ct. 641 (2018), Hobbs Act robbery categorically qualifies as a crime of violence under Section 924(c) because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A). See Br. in Opp. at 7-10, Garcia, supra (No. 17-5704).[2] Every court of appeals to consider the issue has so held. See id. at 8. And this Court has recently and repeatedly denied petitions for writs of certiorari challenging the circuits' consensus on the application of Section 924(c)(3)(A) to Hobbs Act robbery.[3]

Because Hobbs Act robbery categorically qualifies as a crime of violence under Section 924(c)(3)(A), attempted Hobbs Act robbery likewise qualifies under that provision. Numerous courts of appeals have held that an attempt to commit a crime that requires the use, attempted use, or threatened use of physical force is itself a "crime of violence" under Section 924(c)(3)(A) and similarly worded provisions. See Arellano Hernandez v. Lynch, 831 F.3d 1127, 1132 (9th Cir. 2016) ("The 'attempt' portion of

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[2] We have served petitioner with a copy of the government's brief in opposition in Garcia.

[3] See, e.g., Greer v. United States, No. 18-8292 (June 3, 2019); Rojas v. United States, 139 S. Ct. 1324 (2019) (No. 18-6914); Foster v. United States, 139 S. Ct. 789 (2019) (No. 18-5655); Desilien v. United States, 139 S. Ct. 413 (2018) (No. 17-9377); Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248); Robinson v. United States, 138 S. Ct. 1986 (2018) (No. 17-6927); Chandler v. United States, 138 S. Ct. 1281 (2018) (No. 17-6415); Middleton v. United States, 138 S. Ct. 1280 (2018) (No. 17-6343); Jackson v. United States, 138 S. Ct. 977 (2018) (No. 17-6247); Garcia, 138 S. Ct. at 641 (No. 17-5704).

Arellano Hernandez's conviction does not alter our determination that the conviction is a crime of violence [under 18 U.S.C. 16(a)]. We have 'generally found attempts to commit crimes of violence, enumerated or not, to be themselves crimes of violence.'") (citation omitted), cert. denied, 137 S. Ct. 2180 (2017); see also, e.g., United States v. Armour, 840 F.3d 904, 907-909 (7th Cir. 2016) (holding that attempted federal bank robbery is a "crime of violence" under Section 924(c)(3)(A)); United States v. McGuire, 706 F.3d 1333, 1337 (11th Cir.) (O'Connor, J. (Retired)) (same for offense of attempting to "'set[] fire to, damage[], destroy[] . . . or wreck[]' an aircraft with people on board") (brackets in original), cert. denied, 569 U.S. 912 (2013); cf. United States v. Alexander, 809 F.3d 1029, 1033 (8th Cir. 2016) (holding that attempted second-degree assault under Missouri law is a "violent felony" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i)), cert. denied, 137 S. Ct. 1608 (2017).

As the Seventh Circuit has explained, "[a]n attempt conviction requires proof of intent to carry out all elements of the crime, including, for violent offenses, threats or use of violence," as well as a "substantial step toward completion of the crime." Armour, 840 F.3d at 910 n.3. A person who takes a substantial step toward committing such an inherently violent offense is properly understood to have at least attempted or threatened the use of violent force within the meaning of Section

924(c)(3)(A). And this Court has repeatedly denied review of petitions for writs of certiorari raising the question whether attempts to commit Hobbs Act robbery or other violent offenses qualify as crimes of violence under Section 924(c)(3)(A).[4]

3. Under these circumstances, no reason exists to remand this case to the court of appeals in light of the Court's decision in Davis. See Pet. 18. Davis concerns only the definition of a "crime of violence" in Section 924(c)(3)(B), and thus does not affect the validity of petitioner's conviction, which is valid under Section 924(c)(3)(A). Nor can petitioner make the "substantial showing of the denial of a constitutional right" necessary to obtain a COA. C.A. Order 4 (quoting 28 U.S.C. 2253(c)(2)).

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[4] See, e.g., Ovalles v. United States, No. 18-8393 (June 17, 2019) (attempted carjacking); Sosa v. United States, 139 S. Ct. 1581 (2019) (No. 18-8333) (attempted murder in aid of racketeering); Myrthil v. United States, 139 S. Ct. 1164 (2019) (No. 18-6009) (attempted Hobbs Act robbery); St. Hubert v. United States, 139 S. Ct. 246 (2018) (No. 18-5269) (same); Corker v. United States, 139 S. Ct. 196 (2018) (No. 17-9582) (same); Beavers v. United States, 139 S. Ct. 56 (2018) (No. 17-8059) (same); Berry v. United States, 138 S. Ct. 2665 (2018) (No. 17-8987) (attempted carjacking); Chance v. United States, 138 S. Ct. 2642 (2018) (No. 17-8880) (attempted Hobbs Act robbery); Ragland, 138 S. Ct. at 1987 (No. 17-7248) (same); Sampson v. United States, 138 S. Ct. 1583 (2018) (No. 17-8183) (same); Robbio v. United States, 138 S. Ct. 1583 (2018) (No. 17-8182) (same); James v. United States, 138 S. Ct. 1280 (2018) (No. 17-6295) (same); Galvan v. United States, 138 S. Ct. 691 (2018) (No. 17-6711) (attempted carjacking); Wheeler v. United States, 138 S. Ct. 640 (2018) (No. 17-5660) (attempted Hobbs Act robbery).

The petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JULY 2019

[5] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.

No. 17-5704

IN THE SUPREME COURT OF THE UNITED STATES

JAIME SHAKUR GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), qualifies as a "crime of violence" within the meaning of 18 U.S.C. 924(c)(3).

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-5704

JAIME SHAKUR GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 857 F.3d 708.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2017. The petition for a writ of certiorari was filed on August 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of

robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a) and 2; and discharging a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) and 2. The district court sentenced petitioner to 171 months of imprisonment, to be followed by five years of supervised release. Pet. App. B2-B3. The court of appeals affirmed petitioner's Section 924(c) conviction but vacated petitioner's sentence on the Hobbs Act robbery count. Id. at A1-A9.

1. On October 20, 2015, petitioner and two confederates robbed a gun store in Lubbock, Texas. Pet. App. A2; Presentence Investigation Report (PSR) ¶ 9. The three men entered the store wearing ski masks and brandishing firearms. Ibid. One of the robbers put a gun to the head of a store employee and shot twice at another employee, striking the employee in the ankle. Pet. App. A2; PSR ¶¶ 9-10. A brief shootout ensued between the store employees and the robbers, during which the robbers stole nine handguns and fled. Pet. App. A2; PSR ¶¶ 10-11, 13.

2. A federal grand jury charged petitioner with numerous offenses, including one count of robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a) and 2; and one count of discharging a firearm in furtherance of a "crime of violence" (namely, the robbery), in violation of 18 U.S.C. 924(c)(1)(A) and 2. Indictment 1-3. Petitioner pleaded guilty to both of those counts. Pet. App. A2; Plea Agreement 1-2. The district court sentenced petitioner to 171 months of imprisonment, including 51 months on

the Hobbs Act robbery count and a mandatory minimum consecutive sentence of 120 months on the Section 924(c) count. Pet. App. B2.

3. The court of appeals affirmed petitioner's conviction on the Section 924(c) count but vacated his sentence on the Hobbs Act robbery count. Pet. App. A1-A9. Petitioner argued for the first time on appeal that Hobbs Act robbery is not a "crime of violence" under Section 924(c) and that his conviction on the Section 924(c) count should therefore be vacated on plain-error review. Pet. C.A. Br. 15-22. Section 924(c) defines a "crime of violence" as a felony that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or, "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. 924(c)(3)(B).

Petitioner contended that Hobbs Act robbery does not qualify as a "crime of violence" under Section 924(c)(3)(A) because the offense may be accomplished by "minor" uses of force. Pet. C.A. Br. 16. He further argued that Hobbs Act robbery cannot qualify as a "crime of violence" under Section 924(c)(3)(B) because that provision is unconstitutionally vague under Johnson v. United States, 135 S. Ct. 2551 (2015). Pet. C.A. Br. 18-20. In Johnson, this Court held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), which defines a "violent felony" as an offense that "otherwise involves conduct that presents a serious

potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. 135 S. Ct. at 2557. Petitioner asserted that Section 924(c)(3)(B) is likewise vague, but he acknowledged that his argument was foreclosed by United States v. Gonzalez-Longoria, 831 F.3d 670 (2016) (en banc), petition for cert. pending, No. 16-6259 (filed Sept. 29, 2016), in which the Fifth Circuit held that a similarly worded statute, 18 U.S.C. 16(b), is not unconstitutional in light of Johnson. Gonzalez-Longoria, 831 F.3d at 672; see Pet. C.A. Br. 20.

The court of appeals accepted petitioner's concession that his challenge to Section 924(c)(3)(B) was foreclosed by Gonzalez-Longoria and affirmed his conviction on the Section 924(c) count. Pet. App. A4. The court determined, however, that the district court had misapplied the Sentencing Guidelines in calculating petitioner's advisory sentencing range on the Hobbs Act robbery count. Id. at A5-A9. The court of appeals thus vacated petitioner's sentence on that count and remanded to the district court for resentencing. Id. at A9.

4. On remand, the district court reimposed a sentence of 51 months of imprisonment on the Hobbs Act robbery count and a mandatory minimum consecutive sentence of 120 months on the Section 924(c) count. Pet. App. C2. Petitioner has appealed from that judgment. D. Ct. Doc. 201, at 1 (Aug. 30, 2017).

ARGUMENT

Petitioner contends (Pet. 4-7) that robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), does not qualify as a "crime of violence" within the meaning of 18 U.S.C. 924(c)(3). Petitioner's request for relief is interlocutory and should be denied on that basis. Moreover, as petitioner acknowledged in the court of appeals, he did not preserve a challenge to his Section 924(c) conviction in the district court and thus his claim is subject to review only for plain error. Pet. C.A. Br. 15. Petitioner cannot establish error, plain or otherwise. Every court of appeals to consider the issue, including the court below, has held that Hobbs Act robbery satisfies the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(A). That basis for upholding the judgment obviates any need for this Court to consider petitioner's argument (Pet. 4-5, 7) that the alternative definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague or to hold this case pending the decision in Sessions v. Dimaya, No. 15-1498 (reargued Oct. 2, 2017). This Court has repeatedly denied petitions for writs of certiorari seeking review of whether Hobbs Act robbery qualifies as a "crime of violence" under Section 924(c).[1] The same result is warranted here.

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[1] See, e.g., Cortez Harris v. United States, No. 16-9196 (Oct. 16, 2017); Thomas v. United States, No. 16-9017 (Oct. 2, 2017); Bluford v. United States, No. 16-8858 (Oct. 2, 2017); Brewton v. United States, 137 S. Ct. 2264 (2017) (No. 16-7686); Allen v. United States, 137 S. Ct. 2231 (2017) (No. 16-9034); Gooch v. United States, 137 S. Ct. 2230 (2017) (No. 16-9008); Rivera v.

1. Although the court of appeals affirmed petitioner's conviction on the Section 924(c) count, it vacated his sentence on the Hobbs Act robbery count and remanded to the district court for resentencing. Pet. App. A9. The district court resentenced petitioner and issued a revised judgment, from which petitioner has appealed. Id. at C1-C5; D. Ct. Doc. 201, at 1. The decision of the court of appeals at issue here is therefore interlocutory, which by itself "furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R., 389 U.S. 327, 328 (1967) (per curiam). After the court of appeals resolves petitioner's pending appeal from the district court's revised judgment, petitioner will have an opportunity to raise the claims pressed here, in addition to any claims arising from the disposition of his second appeal, in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting Court's "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). No justification exists in this case to depart from this Court's usual practice of declining to review interlocutory petitions.

United States, 137 S. Ct. 2228 (2017) (No. 16-8980); Eubanks v. United States, 137 S. Ct. 2203 (2017) (No. 16-8893).

2. In any event, the district court's acceptance of petitioner's guilty plea on the Section 924(c) count was not plainly erroneous. To establish reversible plain error under Federal Rule of Criminal Procedure 52(b), a defendant must demonstrate that (1) the district court committed an "error"; (2) the error was "plain," meaning "clear" or "obvious" under the law as it existed at the time of the relevant district court or appellate proceedings; (3) the error "affect[ed] [his] substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993) (citations omitted); "Meeting all four prongs is difficult, 'as it should be.'" Puckett v. United States, 556 U.S. 129, 135 (2009) (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

Petitioner cannot prove an error, much less a clear or obvious one. As noted above, Section 924(c)(3)(A) defines a "crime of violence" to include a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). The "crime of violence" that provided the basis for petitioner's Section 924(c) conviction was Hobbs Act robbery, which requires the taking of personal property "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. 1951(b)(1). Those requirements match the definition of a "crime of violence" in Section

924(c)(3)(A). See United States v. Hill, 832 F.3d 135, 140 (2d Cir. 2016) (observing that the elements of Hobbs Act robbery "would appear, self-evidently, to satisfy" the definition of a "crime of violence" in Section 924(c)(3)(A)).

Every court of appeals that has considered the issue, including the court below, has held that Hobbs Act robbery is a "crime of violence" under Section 924(c)(3)(A). See, e.g., United States v. Gooch, 850 F.3d 285, 291-292 (6th Cir.), cert. denied, 137 S. Ct. 2230 (2017); United States v. Buck, 847 F.3d 267, 274-275 (5th Cir.), cert. denied, 137 S. Ct. 2231 (2017), and No. 16-9520 (Oct. 2, 2017); United States v. Anglin, 846 F.3d 954, 965 (7th Cir.), cert. granted, vacated, and remanded on other grounds, No. 16-9411 (Oct. 2, 2017); Hill, 832 F.3d at 140–144; United States v. House, 825 F.3d 381, 387 (8th Cir. 2016), cert. denied, 137 S. Ct. 1124 (2017); In re Saint Fleur, 824 F.3d 1337, 1340-1341 (11th Cir. 2016); cf. United States v. Robinson, 844 F.3d 137, 141–144 (3d Cir. 2016) (same, without applying categorical approach), cert. denied, No. 17-5139 (Oct. 2, 2017); Robinson, 844 F.3d at 150-151 (Fuentes, J., concurring in part and concurring in the judgment) (same, applying categorical approach).

Petitioner nonetheless contends (Pet. 6-7) that Hobbs Act robbery does not qualify as a "crime of violence" under Section 924(c)(3)(A) because the offense may be committed without the use of "violent force." In Johnson v. United States, 559 U.S. 133 (2010) (Curtis Johnson), this Court held that the term "physical

force" in a provision of the ACCA requiring "the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i), means "force capable of causing physical pain or injury to another person," Curtis Johnson, 559 U.S. at 140. That requirement "does not necessarily extend to a statute like [Section] 924(c)(3)(A), which includes within its definition of crime of violence those felonies that have as an element physical force threatened or employed against the person or property of another, as opposed to only the former." Hill, 832 F.3d at 142 n.9. But even assuming that Curtis Johnson's heightened force standard applies to Section 924(c)(3)(A), petitioner's offense would still qualify as a "crime of violence" because Hobbs Act robbery requires at least the threatened use of "force capable of causing physical pain or injury to a person or injury to property." Id. at 142 (emphasis omitted).

Petitioner asserts that Hobbs Act robbery can involve future threats to property or "intangible assets" that may not entail the use or threatened use of physical force, Pet. 6 (citation omitted), but he cites no case in which the statute was applied in such a manner. Instead, he relies (ibid.) on United States v. Arena, 180 F.3d 380 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000), abrogated in part on other grounds by Scheidler v. National Org. for Women, Inc., 537 U.S. 393, 403 n.8 (2003), which involved the Hobbs Act's separate extortion offense, not its robbery offense. Id. at 391-392; see 18 U.S.C. 1951(a) and (b)(2). And although

Arena stated that Hobbs Act extortion may encompass damage to intangible property, the offense in that case was committed by means of physical force and violence. See 180 F.3d at 393 (describing defendant's scheme to "pour the butyric acid into ventilation systems, in order to have the fumes permeate the facilities and prevent operations for several days"); see also United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 270-271, 281-282 (3d Cir.) (affirming Hobbs Act extortion conviction where the defendants used violent means, including murder, to intimidate union members into surrendering "intangible" rights under certain labor laws), cert. denied, 476 U.S. 1140 (1986). Robbery of an intangible property interest, by contrast, is an unlikely scenario. Cf. Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) ("[O]ur focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense.") (citation omitted).[2]

In any event, given the uniform precedent holding that Hobbs Act robbery qualifies as a "crime of violence" under Section 924(c)(3)(A) -- including binding authority in the court below, see Buck, 847 F.3d at 274-275 -- petitioner cannot establish that

[2] The other cases on which petitioner relies (Pet. 6) do not involve the Hobbs Act or Section 924(c)(3)(A). See, e.g., United States v. Gardner, 823 F.3d 793, 804 (4th Cir. 2016) (holding that North Carolina common-law robbery is not a "violent felony" under the ACCA); United States v. Castro-Vazquez, 802 F.3d 28, 34-35, 37-38 (1st Cir. 2015) (remanding to determine whether Puerto Rico's robbery statute is a "crime of violence" under Section 2K2.1(a)(2) of the Sentencing Guidelines).

the district court clearly and obviously erred in accepting his plea of guilty to the Section 924(c) count.

3. Petitioner notes (Pet. 4-5) that this Court has granted a petition for a writ of certiorari in Dimaya, supra, to consider whether the definition of a "crime of violence" in 18 U.S.C. 16(b) is unconstitutionally vague. Although Section 16(b) and Section 924(c)(3)(B) contain similar language, the Court's decision in Dimaya will not resolve any question that will affect the outcome of this case. As explained, Hobbs Act robbery qualifies as a "crime of violence" under Section 924(c)(3)(A), the language of which is not at issue in Dimaya. Holding this petition for the decision in Dimaya is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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KENNETH A. BLANCO
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NOVEMBER 2017