

No. 19-6372

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IN THE SUPREME COURT OF THE UNITED STATES

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KELBY GERMAINE PARSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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NOEL J. FRANCISCO  
Solicitor General  
Counsel of Record  
Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217

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Petitioner contends (Pet. 7-8) that this case presents the same issue as United States v. Davis, 139 S. Ct. 2319 (2019), in which this Court held that the definition of a “crime of violence” in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. The validity of petitioner’s conviction under Section 924(c) does not, however, turn on the classification of his underlying offense as a crime of violence under Section 924(c)(3)(B). The petition for a writ of certiorari should therefore be denied.

1. Following a guilty plea, petitioner was convicted of attempted Hobbs Act robbery, in violation of 18 U.S.C. 2 and 1951(a), and brandishing a firearm in furtherance of a crime of

violence, in violation of 18 U.S.C. 924(c)(1)(A). Judgment 1. The Section 924(c) count identified the charged offense of attempted Hobbs Act robbery as the predicate "crime of violence." Indictment 1-2. The district court sentenced petitioner to 141 months of imprisonment, consisting of 57 months of imprisonment on the attempted Hobbs Act robbery count and a consecutive term of 84 months of imprisonment on the Section 924(c) count, to be followed by three years of supervised release. Judgment 2-3. Petitioner did not appeal his convictions or sentence. Pet. App. A13.

2. In 2016, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, in which he contended that his Section 924(c) conviction should be vacated because it was not premised on a valid "crime of violence." 16-cv-81142 D. Ct. Doc. 10, at 11-22 (Oct. 24, 2016) (Am. 2255 Mot.); see 12-cr-80232 D. Ct. Doc. 39, at 4 (June 28, 2016). Section 924(c)(3) defines a "'crime of violence'" as a felony offense that either (A) "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, (B) "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), and that Section 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States,

135 S. Ct. 2551 (2015), which held that the “residual clause” of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2) (B) (ii), is void for vagueness, 135 S. Ct. at 2557. See Am. 2255 Mot. 11-22.

A magistrate judge recommended that petitioner’s Section 2255 motion be denied. Pet. App. A19-A26. The magistrate judge determined that petitioner had procedurally defaulted his claim by failing to raise it on direct appeal, id. at A22-A23, and that petitioner had failed to demonstrate prejudice sufficient to overcome that default in light of then-existing Eleventh Circuit precedent holding that Johnson did not “apply or extend to invalidate” Section 924(c) (3) (B), id. at A23-A24 (citing Ovalles v. United States, 861 F.3d 1257 (11th Cir. 2017), remanded, 905 F.3d 1231 (11th Cir. 2018) (en banc), reinstated on other grounds, 905 F.3d 1300 (11th Cir. 2018) (per curiam), cert. denied, 139 S. Ct. 2716 (2019)).

The district court adopted the magistrate judge’s recommendation and denied petitioner’s Section 2255 motion. Pet. App. A5-A6. The court determined that petitioner could not “overcome” his procedural default because, among other things, Hobbs Act robbery qualifies as a “crime of violence” under Section 924(c) (3) (A). Ibid. The court denied petitioner’s request for a certificate of appealability (COA). Id. at A6.

The court of appeals likewise denied a COA. Pet. App. A1-A4. The court observed that in Davis, this Court had held that the definition of a "crime of violence" in Section 924(c)(3)(B) is unconstitutionally vague. Pet. App. A3. The court of appeals explained, however, that petitioner's conviction for attempted Hobbs Act robbery qualified as a "crime of violence" under the alternative definition of that term in Section 924(c)(3)(A), the validity of which was not at issue in Davis. Ibid. The court therefore determined that petitioner had failed to make "a substantial showing of the denial of a constitutional right," as he must to obtain a COA. Id. at A3 (quoting 28 U.S.C. 2253(c)(2)); see id. at A4.

3. The petition for a writ of certiorari should be denied because this Court's decision in Davis does not affect the validity of petitioner's Section 924(c) conviction. That conviction was predicated on petitioner's conviction for attempted Hobbs Act robbery. Indictment 1-2. 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) (No. 17-5704), Hobbs Act robbery 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 7-11, Garcia, supra (No. 17-5704).<sup>1</sup> 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.<sup>2</sup>

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. As explained in the government's brief in opposition to the petition for a writ of certiorari in Ragland v. United States, 138 S. Ct. 1987 (2018)

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<sup>1</sup> We have served petitioner with a copy of the government's brief in opposition in Garcia.

<sup>2</sup> See, e.g., Hilario-Bello v. United States, No. 19-5172 (Nov. 4, 2019); Apodaca v. United States, No. 19-5956 (Oct. 21, 2019); Young v. United States, 140 S. Ct. 262 (2019) (No. 19-5061); Durham v. United States, 140 S. Ct. 259 (2019) (No. 19-5124); Munoz v. United States, 140 S. Ct. 182 (2019) (No. 18-9725); Lindsay v. United States, 140 S. Ct. 155 (2019) (No. 18-9064); Hill v. United States, 140 S. Ct. 54 (2019) (No. 18-8642); Greer v. United States, 139 S. Ct. 2667 (2019) (No. 18-8292); 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, supra (No. 17-5704).

(No. 17-7248), every court of appeals to consider the question has 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 18 U.S.C. 924(c)(3)(A) and similarly worded provisions. See Br. in Opp. at 6-9, Ragland, supra (No. 17-7248).<sup>3</sup> 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).<sup>4</sup>

4. Under these circumstances, no reason exists to remand this case to the court of appeals in light of the Court’s decision

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<sup>3</sup> We have served petitioner with a copy of the government’s brief in opposition in Ragland.

<sup>4</sup> See, e.g., Burke v. United States, No. 19-5312 (Nov. 4, 2019) (attempted Hobbs Act robbery); Gray v. United States, 140 S. Ct. 63 (2019) (No. 18-9319) (same); Ovalles v. United States, supra (No. 18-8393) (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, supra (No. 17-7248); 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).

in Davis. See Pet. 7-8. Davis concerns only the definition of a “crime of violence” in Section 924(c)(3)(B), not the alternative definition in Section 924(c)(3)(A), and thus does not affect the validity of petitioner’s conviction under Section 924(c).

The petition for a writ of certiorari should be denied.<sup>5</sup>

Respectfully submitted.

NOEL J. FRANCISCO  
Solicitor General

DECEMBER 2019

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<sup>5</sup> The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.