No. 19-7113

In the

Supreme Court of the United States

RAYNARD GRAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY

I. The government ignores vigorous dissents maintaining that attempted robbery is not a crime of violence.

Petitioner explained in his supplemental brief why attempted bank robbery does not qualify as a "crime of violence." Pet. Supp. B. 2-3. In response, the government noted that every court of appeals to consider whether attempted robbery is categorically a "crime of violence" has answered that question in the affirmative. BIO 9. However, a least two courts of appeal have done so over spirited dissents.

In the Eleventh Circuit, Judge Jill Pryor argued persuasively in dissent that "*[i]ntending* to commit each element of a crime involving the use of force simply is not the same as *attempting* to commit each element of that crime." *United States v. St. Hubert*, 918 F.3d 1174, 1212 (11th Cir. 2019) (Pryor, J., dissenting from denial of rehearing en banc). Accordingly, although someone who takes a non-violent, substantial step toward committing a Hobbs Act robbery has intended to attempt violence, that does not mean that person has in fact attempted to commit violence. Judge Pryor, joined by Judges Charles Wilson and Beverly Martin, concluded that attempted Hobbs Act robbery is not a crime of violence. *Id*. at 1210-13.

In the Ninth Circuit, Judge Jacqueline Nguyen maintained in dissent that "[a]ttempted Hobbs Act robbery is not a crime of violence because a substantial step toward completing a Hobbs Act robbery need not involve the use, attempted use, or threatened use of physical force." *United States v. Dominguez*, 954 F.3d 1251, 1263

(9th Cir. 2020) (Nguyen, J., dissenting). Further, Judge Nguyen concluded that "[t]he majority's analysis . . . impermissibly bootstraps a defendant's *intent* to commit a violent crime into categorizing all *attempts* of crimes of violence as violent crimes themselves." *Id*. at 1265.

In sum, because attempted Hobbs Act robbery is not a crime of violence, the same should be said of attempted bank robbery under 18 U.S.C. 2113(a). *See United States v. Stewards*, No. 1:95-CR-05111-LJO-2, 2017 WL 3593702, at *4 (E.D. Cal. Aug. 21, 2017) ("The federal bank robbery statute shares the same essential elements as Hobbs Act robbery.") (citing *United States v. Howard*, 650 F. App'x 466, 468 (9th Cir. 2016), as amended (June 24, 2016)); *see also Pangelinan v. United States*, No. 1:19-cv-00015, 2020 WL 1858403 at *7 (D.N. Mar. Is. April 10, 2020) (noting that "attempted bank robbery should fall outside the firearms elements clause").

II. Courts of appeal have affirmed bank robbery convictions where violence – threatened, attempted, or otherwise – was absent.

The government suggests that no "court of appeals has affirmed a federal bank-robbery conviction in circumstances that did not involve at least an implicit threatened use of force." BIO 6 (incorporating BIO 12 to the Pet. in *Johnson v. United States*, No. 19-7079). The government is wrong.

As noted in *United States v. Culbert*, --- F.Supp.3d ----, 2020 WL 1849692 (E.D.N.Y. Apr. 13, 2020), the Second Circuit has affirmed federal bank-robbery convictions in circumstances that did not involve an implicit threatened use of force.

> In *United States v. Stallworth*, 543 F.2d 1038, 1041 (2d Cir. 1976), the Second Circuit upheld an attempted robbery conviction where the defendants "reconnoitered the bank, discussed (on tape) their plan of attack, armed themselves and stole ski masks and surgical gloves," had a getaway car ready, and "moved ominously toward the bank." None of these actions was violent.
>
> Even less was sufficient to convict the defendants of attempted bank robbery in *United States v. Jackson,* 560 F.2d 112 (2d Cir. 1977). In that case, the Court upheld the conviction where the defendants "reconnoitered the place contemplated for the commission of the crime and possessed the paraphernalia to be employed in the commission of the crime." *Id*. at 120. 2 There, too, violence – threatened, attempted, or otherwise – was absent.
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> *Culbert*, 2020 WL 1849692, at *2.

Relying upon these cases and others, United States District Judge Brian Cogan of the Eastern District of New York held that attempted Hobbs Act robbery is not a crime of violence. *Id*. at *3. Significantly, Judge Cogan rejected the government's interpretation of "crime of violence" because it "would create the very same vagueness that the Supreme Court sought to eradicate in" *United States v. Davis*, 139 S. Ct. 2319, 2324, 2336 (2019). *Culbert*, 2020 WL 1849692, at *4.

III. This case is an excellent vehicle for considering this important issue.

The government first seeks to avoid review by suggesting that the plain-error posture of the case makes it an unsuitable vehicle for addressing the question presented. BIO 7. The government is mistaken.

Even though this case did arise in a plain-error posture, this would not affect its suitability as a vehicle for addressing the question presented. The government seems to assume that if the plain-error standard applied, this Court would be required to apply

all four of its prongs. *United States v. Olano*, 507 U.S. 725, 732-35 (1993). But that is not how this Court operates. To the contrary, "[a]fter identifying an unpreserved but plain legal error, this Court [] routinely remands the case so the court of appeals may resolve whether the error affected the defendant's substantial rights and implicated the fairness, integrity, or public reputation of judicial proceedings." *Hicks v. United States*, 137 S. Ct. 2000, 2000 (2017) (Gorsuch, J., concurring); *accord Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (quoting *Hicks*, 137 S. Ct. at 2000-01 (Gorsuch, J., concurring)). Thus, if this Court grants certiorari, it need only address and decide the question presented, exactly as it would if the plain error standard was inapplicable. *E.g.*, *Tapia v. United States*, 564 U.S. 319, 335 (2011) (reversing, remanding, and "leav[ing] it to the Court of Appeals to consider the effect of [defendant] Tapia's failure to object to the sentence when imposed").

Further, the government invites this Court to avoid review under the "not pressed or passed upon below" rule. BIO 8. However, the government misunderstands this rule. It is uncontested that one of the issues pressed by petitioner and passed upon by the court below was whether petitioner's attempted bank robbery on July 26, 2014, was a "crime of violence" for purposes of 18 U.S.C. § 924(c) (hereinafter the " firearms statute"). Pet. App. 1a-2a, 7a-9a. Accordingly, the petitioner clearly raised this issue below.

The only new argument presented by petitioner is that attempted bank robbery falls outside the "elements" clause of the firearm statute. Pet. Supp. B. 2-3. Despite

the government's claim to the contrary, this Court may properly consider this new argument. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010); *Lebron v. National Railroad Passenger Corp*., 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). The cases cited by the government do not preclude new arguments on the same issue.

The issue presented here is important because it affects each case where the government claims that an attempted robbery conviction serves as a predicate crime of violence. The issue is vexing because, thus far, no court of appeals majority has explained how Judges Jill Pryor and Jacqueline Nguyen erred by analyzing the plain language of the two pertinent statutes to conclude that attempted robbery does not categorically qualify as a crime of violence. The analysis by other courts misses the mark because those courts do not begin with a careful consideration of the plain language of the two pertinent statutes. That plain language is clear and unambiguous, so all that is left for courts to do is enforce that requirement. Finally, this case is an ideal vehicle as the petitioner's conviction for attempted bank robbery (Count 1 of the Second Superseding Indictment) is the predicate crime of violence for a conviction under the firearm statute (Count 2 of the Second Superseding Indictment). Ct.'s Instruction to Jury 10-18, R. Gray Jury Verdict 1.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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