No. 19-8043

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER LAMONT STEWARD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court plainly erred in instructing the jury that robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), is a "crime of violence" under 18 U.S.C. 924(c)(3)(A).

2. Whether the court of appeals erred in finding that petitioner had not shown, under plain-error review, that he was prejudiced by the district court's error in additionally instructing the jury that conspiracy to commit Hobbs Act robbery is also a crime of violence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 793 Fed. Appx. 188.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2018. The petition for a writ of certiorari was filed on March 16, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of conspiring to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); one count of robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a) and 2; and one count of using, carrying, and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii) and 2. Judgment 1. The district court sentenced petitioner to 147 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-5a.

1. In June 2014, petitioner and his girlfriend, Cynthia Presley, came up with a plan to rob the Lone Star Steakhouse in Hampton, Virginia, where Presley worked. Gov't C.A. Br. 3-5. Petitioner recruited two accomplices to carry out the robbery, and on June 5, after the restaurant closed, the two accomplices entered the restaurant through a side door that Pressley had left open. Id. at 5. Brandishing firearms, the two robbers directed the employees to the back of the restaurant and escaped with a cash drawer and its contents. Id. at 5-6.

A federal grand jury charged petitioner with one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) (Count 1), one count of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2 (Count 2), and one count of brandishing a

firearm during and in relation to a crime of violence (the offenses charged in Counts 1 and 2), in violation of 18 U.S.C. 924(c)(1)(A)(ii) and 2. Indictment 1-5. The case proceeded to trial. See Pet. App. 2a.

When the district court charged the jury on the elements of the Section 924(c) offense, it instructed that the government needed to prove that petitioner had, "aided and abetted by co-conspirators, committed the crime of violence as charged in Counts 1 and 2 of the indictment" and that he, "aided and abetted by co-conspirators, knowingly brandished, carried or possessed a firearm during and in relation to, and in furtherance of, the crime of violence." C.A. App. 458. The court also instructed the jury that "[t]he robbery offenses alleged in Counts 1 and 2 of the indictment are crimes of violence," id. at 460; that "Count 3 charges that the crimes of violence associated with Count 3 are Count 1, conspiracy to interfere with commerce by robbery, and Count 2, interference with commerce by robbery," id. at 462; and that "Count 3 is to be considered only if [the jurors] have found the defendant guilty of the crime of violence charged in Count 1, and/or the crime of violence charged in Count 2," ibid. Petitioner did not object to those instructions. Pet. App. 2a. The jury found petitioner guilty on all counts. Ibid.

2. The court of appeals affirmed. Pet. App. 1a-5a.

As relevant here, petitioner argued that his Section 924(c) conviction was invalid, asserting that conspiracy to commit Hobbs

Act robbery and Hobbs Act robbery do not qualify as "crimes of violence" as that term is defined in 18 U.S.C. 924(c)(3). Pet. App. 2a. Section 924(c)(3) defines a "crime of violence" as a felony offense 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), 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). This Court held in United States v. Davis, 139 S. Ct. 2319, 2336 (2019) that Section 924(c)(3)(B) is unconstitutionally vague.

The court of appeals observed that, following petitioner's convictions, it had held that conspiracy to commit Hobbs Act robbery is not a crime of violence, Pet. App. 2a (citing United States v. Simms, 914 F.3d 229, 233-234 (4th Cir.) (en banc), cert. denied, 140 S. Ct. 304 (2019)), but that Hobbs Act robbery is a crime of violence, id. at 3a (citing United States v. Mathis, 932 F.3d 242, 265-266 (4th Cir.), cert. denied, 140 S. Ct. 639, and 140 S. Ct. 640 (2019)). The court then rejected petitioner's argument that his Section 924(c) conviction must be vacated because the jury had been instructed that either conspiracy to commit Hobbs Act robbery or Hobbs Act robbery could serve as a predicate offense for a conviction on his Section 924(c) charge. Id. at 2a-3a. The court observed that, because petitioner did not object to the jury instructions in the district court, its review was only for plain

error. Ibid. And here, the court of appeals found that petitioner had failed to show that the error in the jury instructions affected his substantial rights. Id. at 3a. The court observed that "[t]he conspiracy offense and the robbery offense are coextensive, and the conspiracy offense related solely to the robbery offense." Ibid. The court accordingly found "no reasonable probability that the result of the proceeding would have been different had the conspiracy offense not been listed as an underlying crime of violence on the § 924(c) charge," and it saw "no reason to vacate the § 924(c) conviction." Ibid.

ARGUMENT

Petitioner contends (Pet. 7-14) that 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). He additionally contends (Pet. 14-24) that, even assuming that Hobbs Act robbery is a crime of violence, the court of appeals here should have vacated his Section 924(c) conviction because the jury was erroneously instructed that conspiracy to commit Hobbs Act robbery is a crime of violence. The decision below is correct, and it does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner did not preserve a challenge to his Section 924(c) conviction in the district court, and thus his claims are subject to review only for plain error. See Pet. App. 2a-3a. 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, 734-736 (1993). "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 has not met his burden here.

2. Petitioner has not shown any error, plain or otherwise, in the court of appeals' determination that his conviction for Hobbs Act robbery qualifies as a "crime of violence" for purposes of his conviction under Section 924(c). As noted above, 18 U.S.C. 924(c)(3) defines a "crime of violence" to include a felony offense 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). Hobbs Act robbery 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, e.g., United States v. Hill, 890 F.3d 51, 57 (2d Cir. 2018) (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)), cert. denied, 139 S. Ct. 844 (2019). Every court of appeals that has considered the issue has held that Hobbs Act robbery is categorically a "crime of violence" under Section 924(c)(3)(A). See, e.g., United States v. Dominguez, 954 F.3d 1251, 1260-1261 (9th Cir. 2020); United States v. Richardson, 948 F.3d 733, 742 (6th Cir. 2020); Brown v. United States, 942 F.3d 1069, 1075 (11th Cir. 2019) (per curiam); United States v. Mathis, 932 F.3d 242, 265-266 (4th Cir.), cert. denied, 140 S. Ct. 639, and 140 S. Ct. 640 (2019)); United States v. García-Ortiz, 904 F.3d 102, 109 (1st Cir. 2018), cert. denied, 139 S. Ct. 1208 (2019); Hill, 890 F.3d at 56-60 (2d Cir.); United States v. Buck, 847 F.3d 267, 274-275 (5th Cir.), cert. denied, 137 S. Ct. 2231, and 138 S. Ct. 149 (2017); Diaz v. United States, 863 F.3d 781, 783 (8th Cir. 2017); United States v. Rivera, 847 F.3d 847, 848-849 (7th Cir.), cert. denied, 137 S. Ct. 2228 (2017). And this Court has recently and repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on the application of Section 924(c)(3)(A) to Hobbs Act robbery.[1] Petitioner argues

[1] See, e.g., Diaz-Cestary v. United States, 140 S. Ct. 1236 (2020) (No. 19-7334); Walker v. United States, 140 S. Ct. 979 (2020) (No. 19-7072); Tyler v. United States, 140 S. Ct. 819 (2020) (No. 19-6850); Hilario-Bello v. United States, 140 S. Ct. 473 (2019) (No. 19-5172); Nelson v. United States, 140 S. Ct. 469 (2019) (No. 19-5010); Apodaca v. United States, 140 S Ct. 432 (2019) (No. 19-5956); 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)

(Pet. 11-12) that a single unpublished decision by a district court, in United States v. Chea, No. 98-cr-20005, 2019 WL 5061085 (N.D. Cal. 2019), establishes a "split." But the Ninth Circuit has recently reaffirmed that Hobbs Act robbery is a crime of violence, thereby abrogating the district court's order in Chea. See Dominguez, 954 F.3d at 1260-1261.

The circuits' uniform determination that Hobbs Act robbery categorically requires the use, attempted, use, or threatened use of force -- and that Hobbs Act robbery thus qualifies as a "crime of violence" under Section 924(c)(3)(A) -- is reinforced by this Court's decision in Stokeling v. United States, 139 S. Ct. 544 (2019), which identified common-law robbery as the "quintessential" example of a crime that requires the use or threatened used of physical force. Id. at 551 (discussing definition of "violent felony" in 18 U.S.C. 924(e)(2)(B)(i)). The elements of common-law robbery track the elements of Hobbs Act robbery in relevant respects. See id. at 550 (observing that common-law robbery was an "unlawful taking" by "force or violence,"

(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 v. United States, 138 S. Ct. 641 (2018)
(No. 17-5704).

meaning force sufficient "'to overcome the resistance encountered'") (citation omitted).

Petitioner nonetheless argues (Pet. 7-8) that Hobbs Act robbery is not a crime of violence because it can be committed without the use or threatened use of "violent (i.e., strong) physical force." In Johnson v. United States, 559 U.S. 133 (2010), this Court held that the term "physical force" in a provision of the Armed Career Criminal Act of 1984 (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," 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, 890 F.3d at 58 n.10. But even assuming that Johnson's force standard (rather than a reduced one) applies to Section 924(c)(3)(A), Hobbs Act robbery would still qualify as a "crime of violence" because it 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); see Dominguez, 954 F.3d at 1260 ("[E]ven Hobbs Act robbery committed by placing a victim in fear of bodily injury is categorically a crime of violence under [18 U.S.C. 924(c)(3)(A)], because it 'requires at

least an implicit threat to use the type of violent physical force necessary to meet the Johnson standard.'") (citation omitted). Petitioner is therefore incorrect (Pet. 7-8) that Hobbs Act robbery can be committed by means of harm to property "without the use of violent force, or even any force at all." A threat to damage or destroy the victim's property, as suggested by petitioner (Pet. 8), would constitute a threat to use "force capable of causing * * * injury to" property. Johnson, 559 U.S. at 140.

Petitioner further argues that Hobbs Act robbery can be committed by making a threat of future harm to "intangible property" that would not entail a threatened use of physical force. Pet. 8 (emphasis omitted). But petitioner does not identify a single case in which a defendant was convicted of Hobbs Act robbery on such a theory. See Dominguez, 954 F.3d at 1260 (finding that the defendant "fails to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest"). Instead, petitioner cites decisions in which defendants were convicted of extortion under the Hobbs Act, defined in 18 U.S.C. 1951(b)(2), not the statute's separate robbery offense defined in Section 1951(b)(1). See United States v. Arena, 180 F.3d 380, 391-392 (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); United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 270-271, 281-282 (3d Cir. 1985),

cert. denied, 476 U.S. 1140 (1986); United States v. Iozzi, 420 F.2d 512, 515 (4th Cir. 1970), cert. denied, 402 U.S. 943 (1971). And even in those cases, the extortion offense was committed by means of physical force and violence. See Arena, 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"); Local 560 of Int'l Bhd. of Teamsters, 780 F.2d at 270-271, 281-282 (defendants used violent means, including murder, to intimidate union members into surrendering "intangible" rights under certain labor laws); Iozzi, 420 F.2d at 515 (extortion was committed through "threats of violence and force").

Petitioner also claims (Pet. 9-11) that three circuits' pattern jury instructions for Hobbs Act robbery show that the offense can theoretically be committed by "conduct that does not necessarily require the use of any force at all," such as "a defendant's threat to harm" a "stock option." But that type of speculative argument does not establish any error -- let along a clear or obvious error -- in the classification of Hobbs Act robbery as a crime of violence. Under the categorical approach, a crime falls outside the applicable statutory definition only when a "realistic probability" of overbreadth exists. Moncrieffe v. Holder, 569 U.S. 184, 191 (2013). Robbery involving threatened or actual harm solely to an intangible property interest is an unrealistic scenario. See Dominguez, 954 F.3d at 1260; cf.

Moncrieffe, 569 U.S. at 191 ("[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).

The Hobbs Act would classify a crime that involves only threats or harm to intangible property as the separate crime of "extortion," rather than "robbery." 18 U.S.C. 1951(b). Robbery requires that the defendant took personal property from the defendant "against his will," 18 U.S.C. 1951(b)(1); extortion, by contrast, prohibits obtaining another person's property "with his consent," where that consent is "induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right," 18 U.S.C. 1951(b)(2). See Ocasio v. United States, 136 S. Ct. 1423, 1435 (2016). A victim who hands over personal property in order to protect a stock option may well do so with the kind of "grudging consent," ibid., that would show Hobbs Act extortion. But as reflected in the case law's distinction between the scenarios giving rise to each crime, a victim must experience force capable of causing pain or injury (or fear of such) for his "will" to be overborne, as required for robbery. 18 U.S.C. 1951(b)(1).

3. Petitioner additionally contends (Pet. 14-24) that the court of appeals erred by declining to vacate his conviction due to an "ambiguous verdict" in which the jury did not clearly indicate whether it found petitioner guilty of violating Section 924(c) based on his Hobbs Act robbery, his conspiracy to commit

Hobbs Act robbery, or both. Pet. 14 (capitalization and emphasis omitted). That contention lacks merit. The court of appeals correctly determined that petitioner could not meet the requirements for reversal on the plain-error standard.

a. As previously discussed (see p. 6, supra), to demonstrate plain error, a defendant must show not only a clear or obvious error, but also that the error "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings,'" and also establish that the error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" Puckett, 556 U.S. at 135 (quoting Olano, 507 U.S. at 734, 736). This Court has explained that determining whether an error "affected the outcome" under plain-error review generally "requires the same kind of inquiry" as the inquiry "to determine whether the error was prejudicial" for purposes of harmless-error review, except that in the plain-error context, the defendant "bears the burden of persuasion with respect to prejudice" and thus must make a "specific showing" that the error "affected the outcome of the district court proceedings." Olano, 507 U.S. at 734-735. The defendant's burden to demonstrate that a plain error "affected the outcome" of the proceeding requires the defendant to establish "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." Dominguez Benitez, 542 U.S. at 82 (brackets and citation omitted).

When courts of appeals consider whether a general verdict must be set aside because the jury was instructed on alternative theories of guilt, one of which was incorrect, reviewing courts apply the same substantial-rights analysis that applies when a trial court fails to instruct the jury correctly on an element of an offense. See Hedgpeth v. Pulido, 555 U.S. 57, 60-62 (2008) (per curiam) (citing Neder v. United States, 527 U.S. 1 (1999), and clarifying that harmless-error analysis applies to alternative-theory error); see also Skilling v. United States, 561 U.S. 358, 414 (2010). Under that analysis, an instructional error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Neder, 527 U.S. at 18. The court of appeals correctly applied those standards here.

The jury verdict in this case, construed in light of the indictment and trial evidence, established beyond any reasonable doubt that the jury made all the factual findings required to sustain petitioner's Section 924(c) conviction on the basis of his Hobbs Act robbery conviction, irrespective of the instruction that conspiracy to commit Hobbs Act robbery could also support the Section 924(c) charge. As the court of appeals explained, the conspiracy and substantive robbery offenses were "coextensive" in this case, and the jury found petitioner guilty of both. Pet. App. 3a. Petitioner points to no trial evidence suggesting that the jury's verdicts on those counts might have been based on

different facts; to the contrary, the counts were supported by the same evidence about the steakhouse robbery. Thus, the court of appeals correctly determined that petitioner's conviction on the Hobbs Act robbery offense charged in Count 2 independently supported his Section 924(c) conviction. Cf. United States v. Vasquez, 672 Fed. Appx. 56, 61 (2d Cir. 2016) (holding, in a drug robbery case, that "there was no possibility that the jury's [Section] 924(c) verdict rested only on a" potentially invalid predicate offense, where "(1) the robbery was an act inextricably intertwined with and, indeed, in furtherance of the charged narcotics conspiracy, and (2) the jury found that narcotics conspiracy proved beyond a reasonable doubt").

b. Petitioner argues (Pet. 14-16) that the court of appeals erred by failing to apply the "categorical approach," but that approach has no bearing on the plain-error substantial-rights question that is at issue here.

This Court has required a categorical approach -- under which courts "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [a defendant's] crime" -- to determine whether the elements of an offense like Hobbs Act robbery fit an applicable statutory definition like 18 U.S.C. 924(c)(3)(A). See, e.g., Leocal v. Ashcroft, 543 U.S. 1, 7 (2004) (interpreting 18 U.S.C. 16(a)); James v. United States, 550 U.S. 192, 200-209 (2007) (interpreting 18 U.S.C. 924(e)(2)(B)). As described above, the court of appeals

here correctly applied the categorical approach to determine that Hobbs Act robbery is categorically a crime of violence, whereas conspiracy to commit Hobbs Act robbery is not. Pet. App. 2a-3a.

Determining whether an error affected a defendant's substantial rights, by contrast, does not involve the categorical approach. Instead, as this Court has repeatedly emphasized, that is necessarily a case-specific and factbound analysis of the record to determine whether a defendant was prejudiced by an error. See, e.g., Olano, 507 U.S. at 735 (a defendant normally "must make a specific showing of prejudice" in order to obtain relief under Fed. R. Crim. P. 52(b)); cf. Neder, 527 U.S. at 19 (explaining that, in considering whether an error was harmless, "a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element"). Petitioner does not identify any precedent of this Court suggesting that a "categorical approach" should be employed for the type of prejudice analysis conducted by the court of appeals in this case.

The three categorical-approach decisions that petitioner cites (Pet. 20-22) are accordingly inapposite. In each of those cases, the court of appeals applied the modified categorical approach under Shepard v. United States, 544 U.S. 13 (2005), to determine whether the defendant had a prior conviction -- i.e., a conviction in an earlier proceeding, not the proceeding at issue -- for an offense that satisfied the statutory (or Sentencing

Guidelines) definition at issue, and the courts concluded that the Shepard-approved documents did not sufficiently establish that the prior conviction qualified. See United States v. Horse Looking, 828 F.3d 744, 747 (8th Cir. 2016) (applying definition of "misdemeanor crime of domestic violence" in 18 U.S.C. 921(a)(33)); United States v. Kennedy, 881 F.3d 14, 19-24 (1st Cir. 2018) (applying definition of "violent felony" in 18 U.S.C. 924(e)); United States v. Marcia-Acosta, 780 F.3d 1244, 1251-1253 (9th Cir. 2015) (applying definition of "crime of violence" in Sentencing Guidelines § 2L1.2(b)(1)(A)(ii)). None of those cases involved a determination under plain-error review that the jury instructions did not affect the outcome of the defendant's case.

c. Contrary to petitioner's contention (Pet. 18-22), the court of appeals' factbound rejection of his case-specific prejudice claim does not conflict with decisions of any other circuits.

Petitioner relies (Pet. 18-19) principally on United States v. Jones, 935 F.3d 266 (5th Cir. 2019) (per curiam), but that case involved substantially different circumstances. In particular, the Fifth Circuit in Jones determined, based on "the record," that the two crimes charged as predicate offenses for the defendant's Section 924(c) were not "coextensive." Id. at 273. The court therefore found that the defendant in Jones had established a "reasonable probability" that the jury had relied on an offense that does not qualify as a crime of violence to find the defendant

guilty of violating Section 924(c). Ibid. Here, in contrast, as explained above, the court of appeals expressly found that both petitioner's conspiracy and robbery offenses were coextensive because they were based on the same evidence. Pet. App. 3a. Petitioner has not rebutted that finding, and any fact-bound argument to that effect would not warrant this Court's review. See S. Ct. R. 10.

Petitioner's reliance (Pet. 19) on In re Gomez, 830 F.3d 1225 (11th Cir. 2016), is also misplaced. There, the Eleventh Circuit authorized the filing of a second or successive motion under 28 U.S.C. 2255 because, at that gateway stage, the record did not rule out the possibility that the jury had found the defendant guilty of violating Section 924(c) based only on predicate offenses that might not have qualified as crimes of violence. See id. at 1227 ("[W]e can't know what, if anything, the jury found with regard to [defendant's] connection to a gun and these crimes."). The Eleventh Circuit's authorization reflects only a preliminary determination that the prisoner had made out a prima facie claim on which he was entitled to proceed further; that decision did not guarantee relief on the merits of the collateral attack. See 28 U.S.C. 2244(b)(3), 2255(h). And as discussed above, in this case, the court of appeals found that it is possible to know with

certainty that the jury found petitioner guilty of the Section 924(c) offense based on Hobbs Act robbery.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2020

[2] Petitioner also cites (Pet. 19-20) several unpublished district court decisions involving collateral challenges to Section 924(c) convictions. Those decisions are similarly inapposite because they did not involve an application of the plain-error standard.