

IN THE SUPREME COURT OF THE UNITED STATES

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DOMONIC DEVARRISE USHER, 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 FOURTH CIRCUIT

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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No. 20-6272

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Petitioner contends (Pet. 5-11) 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), and that the court of appeals erred in denying a certificate of appealability (COA) on that claim. Those contentions lack merit. Every court of appeals that has considered the issue has determined that Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A), and this Court has repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on that issue. The petition for a writ of certiorari should be denied.

1. Following a jury trial, petitioner was convicted on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); seven counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; and seven counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A) and 2. Judgment 1-2. Each of the Section 924(c) counts identified a charged offense of Hobbs Act robbery as the underlying crime of violence. Fourth Superseding Indictment 3-10. The district court sentenced petitioner to 2119 months of imprisonment, consisting of concurrent terms of 235 months of imprisonment on the Hobbs Act conspiracy and substantive Hobbs Act robbery counts, a consecutive term of 84 months of imprisonment on the first Section 924(c) count, and consecutive terms of 300 months of imprisonment for each additional Section 924(c) count. Judgment 3. The court of appeals affirmed, 555 Fed. Appx. 227, and this Court denied a petition for a writ of certiorari, 573 U.S. 938.

In 2016, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, in which he argued (as relevant here) that his Section 924(c) convictions should be vacated on the theory that Hobbs Act robbery is not a crime of violence. D. Ct. Doc. 375, at 1-2 (June 7, 2016) (Amended 2255 Motion). 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 Hobbs Act robbery does not qualify as a crime of violence under either provision in light of this Court's decision in Johnson v. United States, 576 U.S. 591 (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, 576 U.S. at 597. See Amended 2255 Motion 1-2.

The district court denied petitioner's motion. Pet. App. 3a-10a. The court determined that petitioner's claim that Hobbs Act robbery is not a crime of violence should be dismissed, because he had procedurally defaulted that claim by not raising it on direct appeal and had not made any of the showings necessary to excuse that default. Id. at 6a-7a (citing, inter alia, Bousley v. United States, 523 U.S. 614, 622-624 (1998)). Alternatively, the court determined that petitioner's claim "fail[ed] on the merits" because Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A), the validity of which had not been called into question by Johnson. Id. at 7a. The court denied petitioner's request for a COA. Id. at 9a-10a.

The court of appeals likewise denied a COA. Pet. App. 1a-2a. While petitioner's case was pending on appeal, this Court held in

United States v. Davis, 139 S. Ct. 2319 (2019), that the “crime of violence” definition in Section 924(c)(3)(B) is unconstitutionally vague. Id. at 2336. Shortly thereafter, the court of appeals recognized in United States v. Mathis, 932 F.3d 242 (4th Cir.), cert. denied, 140 S. Ct. 639 and 140 S. Ct. 640 (2019), that Hobbs Act robbery qualifies as a crime of violence under the alternative definition in Section 924(c)(3)(A), because it categorically requires the use, attempted use, or threatened use of physical force. Id. at 265-266. The court here found that petitioner had not made the showing required for a COA. Pet. App. 2a.

2. The court of appeals correctly denied relief in this case. 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 Steward v. United States, No. 19-8043 (May 21, 2020), Hobbs Act robbery qualifies as a “crime of violence” under Section 924(c)(3) 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 6-12, Steward, supra (No. 19-8043).<sup>1</sup>

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<sup>1</sup> We have served petitioner with a copy of the government’s brief in opposition in Steward, which is also available from this Court’s online docket.

Petitioner contends (Pet. 5-10) that Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A) because Hobbs Act robbery does not require a defendant to use or threaten to use "violent" force and may be accomplished by threats to harm "intangible property." Pet. 9 (emphasis omitted). Those contentions are meritless for the reasons explained at pages 8 to 12 of the government's brief in opposition in Steward, supra (No. 19-8043). Every court of appeals to have considered the question, including the court below, has recognized that Section 924(c)(3)(A) encompasses Hobbs Act robbery. See id. at 7; see also, e.g., United States v. Melgar-Cabrera, 892 F.3d 1053, 1060-1066 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018).

Petitioner's reliance (Pet. 7-8) on United States v. Torres-Miguel, 701 F.3d 165 (4th Cir. 2012), is misplaced. The Fourth Circuit concluded in Torres-Miguel that a state statute prohibiting "'threat[s] to commit a crime which will result in death or great bodily injury'" did not categorically require the "'threatened use of physical force'" because the offense could be committed by threatening indirect harm, such as "by threatening to poison another." Id. at 168 (citations and emphases omitted). As the Fourth Circuit has subsequently recognized, however, Torres-Miguel was abrogated by this Court's decision in United States v. Castleman, 572 U.S. 157 (2014). See United States v. Covington, 880 F.3d 129, 134 (4th Cir.), cert. denied, 138 S. Ct. 2588 (2018).

In any event, any intracircuit conflict would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

In light of the circuits' consensus that Hobbs Act robbery is a crime of violence, petitioner failed to make the "substantial showing of the denial of a constitutional right" necessary to obtain a COA. Pet. App. 2a (quoting 28 U.S.C. 2253(c)(2)). Moreover, petitioner procedurally defaulted any challenge to the classification of Hobbs Act robbery as a crime of violence by failing to raise that claim on direct appeal, which provides an additional reason not to consider the issue on collateral review. See id. at 6a-7a; see also Bousley, 523 U.S. at 621.

This Court has consistently declined to review petitions for a writ of certiorari contending that Hobbs Act robbery is not a crime of violence under Section 924(c)(3)(A), see Br. in Opp. at 7-8 & n.1, Steward, supra (No. 19-8043), including in Steward, 141 S. Ct. 167 (2020), and in subsequent cases. See, e.g., Becker v. United States, 141 S. Ct. 145 (2020) (No. 19-8459); Terry v. United States, 141 S. Ct. 114 (2020) (No. 19-1282); Hamilton v. United States, 140 S. Ct. 2754 (2020) (No. 19-8188). The Court should follow the same course here.

The petition for a writ of certiorari should be denied.<sup>2</sup>

Respectfully submitted.

JEFFREY B. WALL  
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JANUARY 2021

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<sup>2</sup> The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.