

No. 20-7610

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSE HERNANDEZ, 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 NINTH CIRCUIT

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MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 8-17) that this Court's review is warranted to resolve a circuit conflict over whether 18 U.S.C. 924(c)(3)(A)'s definition of "crime of violence" excludes attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a). As explained in the government's petition for a writ of certiorari in United States v. Taylor, No. 20-1459 (filed Apr. 14, 2021), petitioner is correct that the circuits are divided on that recurring question and that it warrants the Court's review.

The government's petition for a writ of certiorari in Taylor, however, is a better vehicle for this Court's review of the issue. In this case, the court of appeals' unpublished opinion did not

independently analyze whether attempted Hobbs Act robbery is a “crime of violence” under 18 U.S.C. 924(c)(3)(A), instead devoting just one sentence to that question and citing prior circuit precedent that foreclosed petitioner’s claim. See Pet. App. 2 (citing United States v. Dominguez, 954 F.3d 1251, 1261 (9th Cir. 2020), petition for cert. pending, No. 20-1000 (filed Jan. 21, 2021)).

In addition, petitioner did not raise his claim in the district court, and it is therefore subject to review only for “plain error” under Federal Rule of Criminal Procedure 52(b). See Puckett v. United States, 556 U.S. 129, 134-135 (2009) (citation omitted); Gov’t C.A. Br. 11-12. The plain-error inquiry requires that any error be “clear” or “obvious,” United States v. Olano, 507 U.S. 725, 734 (1993) (citation omitted), and not “subject to reasonable dispute,” Puckett, 556 U.S. at 135, “at the time of appeal.” Johnson v. United States, 520 U.S. 461, 468 (1997); see Henderson v. United States, 568 U.S. 266, 273, 276 (2013). Petitioner has not attempted to demonstrate that his claim satisfies those requirements, and he could not. At a minimum, the error he asserts is neither “clear” nor “obvious” given the near-unanimous appellate authority recognizing that attempted Hobbs Act robbery is a crime of violence under 18 U.S.C. 924(c)(3)(A). Olano, 507 U.S. at 734. This case therefore would not provide an appropriate vehicle for addressing the question presented.

In contrast, the government's petition for a writ of certiorari in Taylor arises from a published decision in which the Fourth Circuit squarely addressed the question whether attempted Hobbs Act robbery is a crime of violence, considering and disagreeing with the decisions of other circuits. Accordingly, rather than grant plenary review in this case, the Court should hold the petition pending its consideration of the government's petition for a writ of certiorari in Taylor, and then dispose of it as appropriate.\*

Respectfully submitted.

ELIZABETH B. PRELOGAR  
Acting Solicitor General

JUNE 2021

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