

IN THE SUPREME COURT OF THE UNITED STATES

PAUL XAVIER ESPINOZA ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether robbery in violation of the Hobbs Act, 18 U.S.C. 1951, is a "crime of violence" under 18 U.S.C. 924(c)(3)(A).

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No. 20-8275

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OPINIONS BELOW

Petitioners are Paul Espinoza, Desmond Hayes, Mitchell Pulido, and Adolph Stankus. The opinion of the court of appeals in Espinoza's case, No. 17-16666 (Pet. App. 1a) is not published in the Federal Reporter but is reprinted at 834 Fed. Appx. 379. The district court's order (Pet. App. 2a-6a) is not published in the Federal Supplement but is available at 2017 WL 2974932. The opinion of the court of appeals in Hayes's case, No. 17-15048 (Pet. App. 7a) is unreported but is available at 2021 WL 2389830. The district court's order (Pet. App. 10a-11a) is unreported but is available at 2017 WL 58578. The opinion of the court of appeals

in Pulido's case, No. 17-16045 (Pet. App. 12a) is not published in the Federal Reporter but is reprinted at 834 Fed. Appx. 385. The district court's order (Pet. App. 15a-17a) is unreported but is available at 2017 WL 2113735. The opinion of the court of appeals in Stankus's case, No. 17-16630 (Pet. App. 18a) is not published in the Federal Reporter but is reprinted at 834 Fed. Appx. 375. The district court's order (Pet. App. 19a-24a) is unreported but is available at 2017 WL 2974933.

JURISDICTION

The judgments of the court of appeals in Espinoza's (No. 17-16666), Pulido's (No. 17-16045), and Stankus's (No. 17-16630) cases were entered on January 26, 2021. The judgment of the court of appeals in Hayes's case (No. 17-15048) was entered on February 24, 2021. The petition for a writ of certiorari was filed on June 8, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in separate proceedings in the United States District Court for the District of Nevada, petitioners were each convicted on one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). See Pet. 10. Petitioners Hayes, Pulido, and Stankus were each also convicted on two counts of robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a). See Pet. 11-12. Petitioners subsequently

filed motions under 28 U.S.C. 2255 collaterally attacking their Section 924(c) sentences. The district court denied the motions, and the court of appeals affirmed in separate decisions. See Pet. App. 1a, 7a, 12a, 18a.

1. Petitioners each committed armed robberies and pleaded guilty to violating 18 U.S.C. 924(c). See Pet. 10-12. Section 924(c) makes it a crime to "use[] or carr[y]" a firearm "during and in relation to" any federal "crime of violence." 18 U.S.C. 924(c) (1) (A). 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). Each petitioner pleaded guilty to using a firearm during and in relation to a Hobbs Act robbery, in violation of 18 U.S.C. 1951(a).

a. In February 2014, petitioner Espinoza entered the Go-Fer Market in Reno, Nevada, aimed a gun at the clerk, and demanded that the clerk open the cash register. Espinoza Presentence Investigation Report (PSR) ¶ 5. Espinoza took about \$800 from the store and fled. Ibid. Less than a month later, Espinoza went to the same store, again pointed a handgun at the clerk, and stole about \$500. Id. ¶¶ 6-9.

Espinoza pleaded guilty to one count of using a firearm during and in relation to a crime of violence (Hobbs Act robbery), in violation of 18 U.S.C. 924(c). Espinoza Judgment 1. He was sentenced to 108 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3.

b. In December 2012, petitioner Hayes served as a lookout while an accomplice went into a Walgreens drug store in Reno, Nevada, and stole \$796 at gunpoint. Hayes PSR ¶ 7. Less than a week later, Hayes entered a restaurant in Reno, pointed a shotgun at several employees, ordered the employees to the ground, and then directed the manager to fill a backpack with cash before fleeing with \$650. Id. ¶¶ 7-9.

Hayes pleaded guilty to two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and one count of using a firearm during and in relation to a crime of violence (Hobbs Act robbery), in violation of 18 U.S.C. 924(c). Hayes Judgment 1. He was sentenced to 120 months of imprisonment for the Hobbs Act robberies and a consecutive 120 months of imprisonment for the Section 924(c) conviction, to be followed by five years of supervised release. Id. at 2-3.

c. In January 2011, petitioner Pulido went into the Alex Smoke Shop in Las Vegas, Nevada, pointed a gun at an employee's head, and ordered the employee to empty his pockets. Pulido PSR ¶ 6. The employee complied, handing over \$927 to Pulido, who fled.

Ibid. Less than a month later, petitioner entered GeeBee's bar in Las Vegas armed with a handgun, ordered the customers to put their hands behind their heads, and directed the bartender to hand over money from the cash registers. Id. ¶ 10. As Pulido was leaving with \$573 in cash and checks, a customer cursed at him. Id. ¶ 12. Pulido pointed his gun at that customer and fired a shot, but did not strike the customer. Ibid. Pulido then fled. Ibid.

Pulido pleaded guilty to two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and one count of using a firearm during and in relation to a crime of violence (Hobbs Act robbery), in violation of 18 U.S.C. 924(c). Pulido Judgment 1. He was sentenced to 84 months of imprisonment for the Hobbs Act robberies and a consecutive 120 months of imprisonment for the Section 924(c) conviction, to be followed by five years of supervised release. Id. at 2-3.

d. In February 2012, petitioner Stankus entered a J&M Mini-Mart in Minden, Nevada, pointed what appeared to be a large handgun (actually an airsoft gun) at an employee, and demanded money. Stankus PSR ¶ 14. The employee opened a cash register, and Stankus grabbed approximately \$500 from inside and fled. Ibid. Less than a month later, Stankus entered a 7-11 in Reno, pointed a genuine firearm at a clerk, and demanded money. Id. ¶ 8-9. After the clerk opened a cash register, Stankus grabbed about \$70 from inside and fled. Id. ¶ 11; see id. ¶¶ 8-18.

Stankus pleaded guilty to two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and one count of using a firearm during and in relation to a crime of violence (Hobbs Act robbery), in violation of 18 U.S.C. 924(c). Stankus Am. Judgment 1. He was sentenced to 18 months of imprisonment for the Hobbs Act robberies and a consecutive 84 months of imprisonment for the Section 924(c) conviction, to be followed by five years of supervised release. Id. at 2-3.

2. Petitioners each subsequently filed motions under 28 U.S.C. 2255 collaterally attacking their Section 924(c) sentences. They argued that Hobbs Act robbery cannot qualify as a “crime of violence” under Section 924(c)(3)(B) because that provision is unconstitutionally vague, citing Johnson v. United States, 576 U.S. 591 (2015), which held that the “residual clause” of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. See 576 U.S. at 596. Petitioners further asserted that Hobbs Act robbery does not qualify as a “crime of violence” under the alternative definition of that term in Section 924(c)(3)(A). The district court denied the motions. See Pet. App. 2a-6a, 10a-11a, 15a-17a, 19a-24a.

This Court in United States v. Davis, 139 S. Ct. 2319 (2019), held that Section 924(c)(3)(B) is unconstitutionally vague. Id. at 2336. Subsequently, however, in United States v. Dominguez, 954 F.3d 1251 (9th Cir. 2020), petition for cert. pending,

No. 20-1000 (filed Jan. 21, 2021), the court of appeals “reiterate[d] [its] previous holding that Hobbs Act armed robbery is a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A).” 954 F.3d at 1255; see id. at 1260-1261. The court observed that “[a]ll of our sister circuits have considered this question too, and have held that Hobbs Act robbery is a crime of violence under [Section 924(c)(3)(A)].” Id. at 1260.¹ After Dominguez, the court of appeals issued separate decisions affirming the denial of each petitioner’s Section 2255 motion. See Pet. App. 1a, 7a, 12a, 18a.

ARGUMENT

Petitioners renew their contention (Pet. 14-24) that robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), does not qualify as a “crime of violence” within the meaning of 18 U.S.C. 924(c)(3)(A). The court of appeals correctly rejected that contention, and the decisions below do not conflict with any decision of this Court or another federal court of appeals. Further review is unwarranted.

¹ Dominguez additionally determined that attempted Hobbs Act robbery qualified as a “crime of violence” under Section 924(c)(3)(A). See 954 F.3d at 1261-1262. Dominguez has filed a petition for a writ of certiorari challenging that aspect of the decision, but not the court’s separate determination that completed Hobbs Act robbery is a crime of violence under Section 924(c)(3)(A). See Dominguez, supra, No. 20-1000. This Court has granted review in United States v. Taylor, No. 20-1459 (oral argument scheduled for Dec. 7, 2021), to determine whether attempted Hobbs Act robbery qualifies as a “crime of violence” under Section 924(c)(3)(A). The petition for a writ of certiorari in Dominguez remains pending.

1. A conviction for 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), cert. denied, 141 S. Ct. 167 (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).²

Petitioners contend (Pet. 14-22) that Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A) on the theory that 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. Those contentions lack merit for the reasons explained at pages 8 to 12 of the government’s brief in opposition in Steward, supra (No. 19-8043). And every court of appeals to have considered the issue, including the court below, has recognized that Section 924(c)(3)(A) encompasses Hobbs Act robbery. See id. at 7; United States v.

² We have served petitioners with a copy of the government’s brief in opposition in Steward, which is also available from this Court’s online docket.

Dominguez, 954 F.3d 1251, 1260 (9th Cir. 2020), petition for cert. pending, No. 20-1000 (filed Jan. 21, 2021); see also, e.g., United States v. Walker, 990 F.3d 316, 325-326 (3d Cir. 2021), petition for cert. pending, No. 21-102 (filed July 22, 2021); United States v. Melgar-Cabrera, 892 F.3d 1053, 1060-1066 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018); Pet. 14 (acknowledging the courts' "consensus").

2. This Court has repeatedly and recently declined to review petitions for a writ of certiorari asserting 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 other cases. See, e.g., Moore v. United States, No. 21-5066 (Oct. 4, 2021); Lavert v. United States, No. 21-5057 (Oct. 4, 2021); Copes v. United States, No. 21-5028 (Oct. 4, 2021); Council v. United States, No. 21-5013 (Oct. 4, 2021); Fields v. United States, No. 20-7413 (June 21, 2021); Thomas v. United States, No. 20-7382 (June 21, 2021); Walker v. United States, No. 20-7183 (June 21, 2021); Usher v. United States, 141 S. Ct. 1399 (2021) (No. 20-6272); 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 same course is warranted here.

Although this Court has granted review in United States v. Taylor, No. 20-1459 (oral argument scheduled for Dec. 7, 2021), to determine whether attempted Hobbs Act robbery qualifies as a “crime of violence” under Section 924(c)(3)(A), petitioners do not contend that Taylor has any bearing on their cases, and it would not be appropriate to hold the petition here pending the outcome of Taylor because petitioners would not benefit from a decision in favor of the respondent in Taylor. Even if this Court were to conclude that attempted Hobbs Act robbery is not a crime of violence under Section 924(c)(3)(A), both the Fourth Circuit in Taylor and the Ninth Circuit in Dominguez have reaffirmed that completed Hobbs Act robbery qualifies as a “crime of violence.” See United States v. Taylor, 979 F.3d 203, 207-208 (2020); Dominguez, 954 F.3d at 1260-1261. The respondent in Taylor does not argue otherwise, see Br. in Opp. 11-17, United States v. Taylor, No. 20-1459 (May 21, 2021), nor does the petitioner in Dominguez, see p. 7 n.1, supra. Accordingly, no reasonable prospect exists that this Court’s decision in Taylor will affect the outcome of these cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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