No. 21-5057

IN THE SUPREME COURT OF THE UNITED STATES

LANCE LAMONT LAVERT, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY TO THE UNITED STATES' OPPOSITION

David J. Zugman
Burcham & Zugman
402 West Broadway, Suite 1130
San Diego, CA 92101
Tel: (619) 699-5931
Email: dzugman@gmail.com
Attorney for Lavert

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Lance Lavert is serving a seven-year minimum mandatory sentence for using a firearm during a Hobbs Act robbery, 18 U.S.C. § 1951, in violation of 18 U.S.C. § 924(c). (Pet. 3-8). He asked this Court to review the question of whether his Hobbs Act robbery is a violent crime. The 9th Circuit rejected his claim. *United States v. Lavert*, 830 F. App'x 894, 895 (9th Cir. 2020). He petitioned this Court arguing that the Ninth Circuit and Fourth Circuit are split as to whether an attempted Hobbs Act robbery is a crime of violence. One way to resolve the conflict is to find Hobbs Act robbery categorically overbroad. (Pet. 7-8).

After Lavert filed his petition, this Court granted certiorari review of the Fourth Circuit's *Taylor* case. *United States v. Taylor*, 979 F.3d 203, 205 (4th Cir.

2020), c*ert. granted sub nom. United States v. Taylor*, No. 20-1459, 2021 U.S. LEXIS 3582, 2021 WL 2742792 (U.S. July 2, 2021).

OPPOSITION OF THE UNITED STATES

The United States asks the Court to deny Lavert's petition for certiorari and argues that Taylor is confined to just attempted Hobbs Act robberies, and completed Hobbs Act robberies have the necessary element of the use, attempted use, or threatened use of violence. (Opp. 2-3). The United States refers the Court to its briefing in *Steward v. United States*, No. 19-8043 (May 21, 2020), *cert. denied*, 141 S. Ct. 167 (2020), noting that every circuit has rejected the argument that a Hobbs Act robbery is categorically overbroad.[1] The United States argues that Lavert's argument that the Hobbs Act is overbroad is not viable so the Court need not stay Lavert's case because *Taylor* will not hold that Hobbs Act robbery is categorically overbroad. (Opp. at 3-5).

[1] Opposition of the United States at 7 (citing *United States v. García-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1208 (2019); *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018); *United States v. Mathis*, 932 F.3d 242, 265-266 (4th Cir.), *cert. denied,* 140 S. Ct. 639-40 (2019); *United States v. Buck*, 847 F.3d 267, 274-275 (5th Cir.), *cert. denied*, 137 S. Ct. 2231, and 138 S. Ct. 149 (2017); *United States v. Richardson*, 948 F.3d 733, 742 (6th Cir. 2020); *United States v. Rivera*, 847 F.3d 847, 848-849 (7th Cir.), *cert. denied*, 137 S. Ct. 2228 (2017); *Diaz v. United States*, 863 F.3d 781, 783 (8th Cir. 2017); *United States v. Dominguez*, 954 F.3d 1251, 1260-1261 (9th Cir. 2020); *Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019) (per curiam)).

REPLIES

The United States' opposition to even a stay pending in Lavert's Act fails to acknowledge that the Court will be considering the status of completed Hobbs Act robbery when it decides whether an attempted Hobbs Act robbery is a crime of violence in *Taylor*. The question is both logically necessary to answer and legally included under Supreme Court Rule 14.1(a). Second, Lavert's argument flows from the plain text of the statute; it is not frivolous. Indeed, though the decision would not last long, at least one reasonable jurist agreed that Hobbs Act robbery is categorically overbroad. *United States v. Chea*, No. 98-cr-20005-1 CW, 2019 U.S. Dist. LEXIS 177651, at *35-36 (N.D. Cal. Oct. 2, 2019), *rev'd,* 2021 U.S. App. LEXIS 18904 (9th Cir. Cal., June 24, 2021) (unpublished).

Lavert's argument starts on the foundational requirement that a predicate conviction for an 18 U.S.C. § 924(c) must necessarily involve the use, attempted use, or threatened use of violence. *United States v. Davis*, 139 S. Ct. 2319 (2019). The categorical determination examines the statutory text in deciding whether a prior conviction qualifies. *See Descamps v. United States*, 133 S. Ct. 2276, 2287, 186 L. Ed. 2d 438 (2013) ("T]he categorical approach requires the crime-of-violence determination to be made on a categorical basis—either all convictions under a particular statute qualify or none do.")

1. Hobbs Act robbery is indivisible.

In *United States v. Gooch*, 850 F.3d 285 (6th Cir. 2017), the Sixth Circuit held that the Hobbs Act is divisible into two offenses: robbery and extortion. Other

circuits agree.[2] But once robbery and extortion are separated, the robbery prong cannot be further divided. *United States v. Mendoza*, No. 2:16-cr-00324-LRH-GWF, 2017 U.S. Dist. LEXIS 76351, at *8 (D. Nev. May 18, 2017) (". . . the court finds that Hobbs Act robbery—in contrast to the statute as a whole—is an indivisible crime. . ..Therefore, the court may not apply the modified categorical approach to this specific offense and must only determine whether Hobbs Act robbery extends to conduct not encompassed by the force clause.") (citation omitted).

For a statute to be divisible, it must define multiple crimes that differ in punishment. *United States v. Schopp*, 938 F.3d 1053, 1059 (9th Cir. 2019). A statute that lists alternative ways of committing the same offense is not further divisible. *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016) (if a statute lists alternative means of committing the offense, "the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution.") A Hobbs Act robbery does not have different levels of punishment for particular ways of committing the crime; it is not further divisible under *Mathis*.

The lack of further divisibility means that there is no further inquiry under the modified categorical approach. *Descamps v. United States*, 570 U.S. at 265, 133

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2 The Other Circuits to consider the question are in accord: *See United States v. Hill*, 890 F.3d 51, 55 n.6 (2d Cir. 2016); *United States v. Mathis*, 932 F.3d 242, 265 n.23 (4th Cir. 2019) (same); *Haynes v. United States*, 936 F.3d 683, 692 (7th Cir. 2019) (same); *United States v. St. Hubert*, 909 F.3d 335, 348 (11th Cir. 2018) (same); *United States v. O'Connor*, 874 F.3d 1147, 1152 (10th Cir. 2017) ("The Hobbs Act, for example, is a divisible statute setting out two separate crimes—Hobbs Act robbery and Hobbs Act extortion. *See United States v. Gooch,* 850 F.3d 285, 291 (6th Cir. 2017).")

S. Ct. at 2286 ("Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines burglary not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not. In that circumstance, a court may look to the additional documents to determine which of the statutory offenses (generic or non-generic) formed the basis of the defendant's conviction. But here no uncertainty of that kind exists, and so the categorical approach needs no help from its modified partner. We know Descamps' crime of conviction, and it does not correspond to the relevant generic offense. Under our prior decisions, the inquiry is over.") In short, no divisibility means no modified categorical approach.

2. The Hobbs Act reaches nonviolent conduct

The Ninth Circuit reversed the district court in *United States v. Chea*, [3] but it did not explain why *Chea* was wrong in concluding that Hobbs Act robbery is overbroad. Here is how *Chea* explained the argument. *Johnson v. United States*, 559 U.S. 133 (2010), held that for a conviction to qualify under the Armed Career Criminal Act (ACCA), the conviction must involve the use, attempted use, or threatened use of violent force. Because ACCA and Section 924(c) offense are close kin, *United States v. Watson*, 881 F.3d 782, 784 (9th Cir. 2018) (citation omitted),

[3] *United States v. Chea*, No. 98-cr-20005-1 CW, 2019 U.S. Dist. LEXIS 177651 (N.D. Cal. Oct. 2, 2019), *rev'd*, 2021 U.S. App. LEXIS 18904 (9th Cir. Cal., June 24, 2021) (unpublished).

Section 924(c) also requires that any predicate conviction must involve the use, attempted use, or threatened use of violent force.[4]

Requirement of violence in place, *Chea* then explains that future threats to property is sufficient to commit a Hobbs Act robbery:

> [I]t can be committed "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . ." (emphasis added). Courts have recognized that, based on its plain language, Hobbs Act robbery can be committed by threats to property. *See, e.g., United States v. O'Connor*, 874 F.3d 1147, 1158 (10th Cir. 2017) (holding that "Hobbs Act robbery criminalizes conduct involving threats to property," and that "Hobbs Act robbery reaches conduct directed at 'property' because the statute specifically says so") (citing 18 U.S.C. § 1951(b)(1)).

The Hobbs Act does not define what "property" is, what "fear of injury" is, nor how far the "future" extends:

> Nothing in the ordinary meaning of these phrases suggests that placing a person in fear that his or her property will suffer future injury requires the use or threatened use of any physical force, much less violent physical force. Where the property in question is intangible, it can be injured without the use of any physical contact at all; in that context, the use of violent physical force would be an impossibility. Even tangible property can be injured without using violent force. For example, a vintage car can be injured by a mere scratch, and a collector's stamp can be injured by tearing it gently.[5]

Moreover, the use of the disjunctive means that Congress meant each word to add something to the statute's reach:

> Interpreting "fear of injury" as requiring the use or threat of violent physical force would render superfluous the other, potentially violent alternative means of committing Hobbs Act robbery, specifically, by threatened force or violence. *See Ratzlaf v. United States*, 510 U.S.135,

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[4] *United States v. Chea*, No. 98-cr-20005-1 CW, 2019 U.S. Dist. LEXIS 177651, at *19 (N.D. Cal. Oct. 2, 2019).

[5] *Id.* at 22.

> 140-41 (1994) ("Judges should hesitate . . . to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense."); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (citations and internal quotation marks omitted). If Congress had intended "fear of injury" to mean "fear of violence or violent force," it could have said so expressly. It did not.[6]

The coup de grace of *Chea* is the Hobbs Act's reach to intangible property, and how the Hobbs Act does not require the "more than de minimis" force.[7] *Chea* cites the 10th Circuit's opinion in U*nited States v. Bowen*, 936 F.3d 1091 (10th Cir. 2019), and noted how some clear property crimes (spraying painting a car, despoiling a passport) might damage and diminish the value of the property, but would not be violent under Section 924(c)(3). *United States v. Chea*, No. 98-cr-20005-1 CW, 2019 U.S. Dist. LEXIS 177651, at *25-26 (N.D. Cal. Oct. 2, 2019).

The Hobbs Act includes not only future threats to property, that property can also be intangible.[8] And the Hobbs Act also reaches "fear of injury" cases. Since the fear of injury means is listed in addition to "actual or threatened force, or violence," 'fear of injury' is assumed to add something to the statutory reach beyond the actual or threatened use of violence requirement. *See Ratzlaf v. United States*, 510 U.S. 135, 140-41, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994) ("Judges should hesitate . . . to

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[6] *Id.* at*22.

[7] *Id.* at *29.

[8] *Id.* ("'[T]he language of the Hobbs Act makes no such distinction between tangible and intangible property." *United States v. Local 560 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers of Am.*, 780 F.2d 267, 281 (3d Cir. 1985) (collecting cases).'")

treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense.") If fear of injury means the same thing as the "actual or threatened use of force" it would be superfluous, and that is an outcome to be avoided. *See, e.g., Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019) ("If respondents were correct that 'addressed and dispatched' means 'reasonably calculated to give notice,' then the phrase 'reasonably calculated to give actual notice' in §1608(b)(3) would be superfluous.")

If Hobbs Act robbery is overbroad, then the categorical inquiry is over because the statute is not further divisible. *Descamps v. United States*, 570 U.S. at 265. So even though robberies are historically considered a violent crime, so is murder, but that did not save second-degree murder from being declared categorically nonviolent. *United States v. Begay*, 934 F.3d 1033, 1038 (9th Cir. 2019) ("Second-degree murder does not constitute a crime of violence under the elements clause — 18 U.S.C. § 924(c)(3)(A) — because it can be committed recklessly.")

Hobbs Act robbery is not necessarily violent, and this Court should hold Mr. Lavert's petition in abeyance while it decides the *Taylor* case.

Respectfully Submitted,

S/David Zugman
David Zugman
Attorney for Lavert

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