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IN THE
Supreme Court of the United States

EFRAIN HIDALGO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should grant certiorari to resolve the conflict among the circuits on the question of whether attempted Hobbs Act Robbery constitutes a crime of violence under 18 U.S.C. § 924(c)?

LIST OF PARTIES IN THE COURT OF APPEALS

United States of America
Efrain Hidalgo

STATEMENT PURSUANT TO RULE 14(1)(b)(iii)

United States v. Hidalgo., 1:11-cr-00366-3, is the trial court docket in the Western District of New York, from which this case originates

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In the
Supreme Court of the United States
October Term, 2020

Efrain Hidalgo ,
Petitioner,
v.
United States of America,
Respondent.

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

To secure and maintain the uniformity of judicial decisions, it is up to this Court to resolve the conflict among the circuits on the important issue of whether attempted Hobbs Act Robbery constitutes a crime of violence under 18 U.S.C. § 924(c)? Such conflict warrants the grant of the writ.

OPINION BELOW

The Summary Order of the Court of Appeals for the Second Circuit is reproduced in the appendix bound herewith (A1).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C § 1254(1). The Court of Appeals issued an opinion affirming Petitioner's conviction on May 17, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is the protection of the Due Process Clause of the Fifth Amendment

The statutory provision involved is 18 U.S.C. § 924(c).

STATEMENT OF THE CASE

Petitioner seeks review of the Second Circuit's determination that his 18 U.S.C. § 924(c) conviction was properly supported by the crime of violence of attempted Hobbs Act robbery.¹ In Petitioner's case, the Court of Appeals for the Second Circuit held that attempt to commit Hobbs Act robbery categorically qualifies as a crime of violence. There is a split among the Circuits on this issue as the 4th Circuit has held that attempted Hobbs Act robbery is not categorically a crime of violence.

REASONS FOR THE GRANTING OF THE WRIT

THE COURT OF APPEALS' DECISION HOLDING THAT ATTEMPTED HOBBS ACT ROBBERY CONSTITUTES A CRIME OF VIOLENCE CONFLICTS WITH DECISIONS OF OTHER CIRCUITS. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO RESOLVE THE CONFLICT AND ENSURE UNIFORMITY ACROSS THE CIRCUITS.

The Court of Appeals decision holding that attempt to commit Hobbs Act Robbery is a crime of violence and does support Petitioner's 924(c) conviction conflicts with decisions of other circuits such as the Fourth Circuit as to call for an exercise of this Court's supervisory power. In *United States v. Taylor*, 979 F.3d 203, 208 (4th Cir. 2020), the Fourth Circuit explained that unlike substantive Hobbs Act robbery, attempted Hobbs Act robbery does not invariably require the use, attempted use, or threatened use of physical force. The Court stated that the

¹ Numerical References preceded by "A." refer to the pages of the Appendix filed herewith.

Government may obtain a conviction for attempted Hobbs Act robbery by proving that: (1) the defendant specifically intended to commit robbery by means of a threat to use physical force; and (2) the defendant took a substantial step corroborating that intent and the substantial step need not be violent. *Id.* (citing *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984)). “Where a defendant takes a nonviolent substantial step toward threatening to use physical force — conduct that undoubtedly satisfies the elements of attempted Hobbs Act robbery — the defendant has not used, attempted to use, or threatened to use physical force. Rather, the defendant has merely *attempted to threaten* to use physical force. The plain text of § 924(c)(3)(A) does not cover such conduct.” *Id.* at 208.

The Fourth Circuit stated that it has repeatedly held that certain crimes, such as Hobbs Act Robbery, may be committed *without* the use or attempted use of physical force because they may be committed merely by means of threats. *Id.* (citing *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019)(holding that “Hobbs Act robbery, when committed by means of causing *fear of injury*, qualifies as a crime of violence”) (emphasis added); *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016)(holding that “[b]ank robbery under [18 U.S.C.] § 2113(a), ‘by intimidation,’ requires the *threatened use* of physical force” and thus “constitutes a crime of violence”) (emphasis added); *United States v. Evans*, 848 F.3d 242, [*209] 247 (4th Cir. 2017) (holding “that the term ‘intimidation,’ as used in the phrase ‘by force and violence or by intimidation’ in the carjacking statute, necessarily includes a *threat* of violent force within the meaning of the ‘force clause”).

The Fourth Circuit noted that these cases establish that, contrary to those circuits that hold attempted Hobbs Act is a crime of violence, an attempt to commit a crime of violence need not involve the attempted use of physical force. *Taylor*, 979 F.3d at 208-09. “Some crimes of violence can be accomplished merely through the threatened use of force. The crime at issue here — attempted Hobbs Act robbery — is just such a crime. But an attempt to *threaten* force does not constitute an attempt to *use* force. A person who attempts to commit Hobbs Act robbery by passing a threatening note to a store cashier has attempted the planned robbery without using or attempting to use physical force. He may case the store that he intends to rob, discuss plans with a coconspirator, and buy weapons to complete the job. But none of this conduct involves an attempt to use physical force, nor does it involve the use of physical force or the threatened use of physical force.” *Id.* The Fourth Circuit held that attempted Hobbs Act robbery is not "categorically" a "crime of violence." *Id.* at 210.

While the Fourth Circuit has held that attempted Hobbs Act robbery does not constitute a crime of violence, the Second, Third, Seventh, and Eleventh Circuits have held that it does qualify as a crime of violence, (See *United States v. McCoy*, 995 F.3d 32 (2d Cir. 2021); *United States v. Walker*, 990 F.3d 316 (3d Cir. 2021); *United States v. Dominguez*, 954 F.3d 1251, 1255, 1261-62 (9th Cir. 2020); *United States v. Ingram*, 947 F.3d 1021, 1025-26 (7th Cir. 2020); *United States v. St. Hubert*, 909 F.3d 335, 351-53 (11th Cir. 2018)(holding that attempted Hobbs Act robbery qualifies as a "crime of violence" under the "attempted use" prong of the

elements clause)), creating a circuit split, as to call for an exercise of this Court's supervisory power to resolve the conflict and ensure uniformity across the circuits.

In holding that attempted Hobbs Act robbery qualifies as a crime of violence, those courts/circuits have adopted a flawed premise that an attempt to commit a "crime of violence" *necessarily* constitutes an attempt to use physical force. However, as the Fourth Circuit has explained, crimes such as Hobbs Act attempted robbery, could also theoretically include "attempt[s] to *threaten* force," which would appear not to constitute an "attempt to *use* force" as required by § 924(c)(3)(A). *Taylor*, 979 F.3d at 209.

Thus, this Court's intervention is needed in order to ensure uniformity across the circuits. While the Fourth Circuit has held that attempted Hobbs Act robbery does not constitute a crime of violence, *Id.* at 210, the Second, Third, Seventh, and Eleventh Circuits have held that it does qualify as a crime of violence, *McCoy*, 995 F.3d at 32; *Walker*, 990 F.3d at 316; *Dominguez*, 954 F.3d at 1261-62; *Ingram*, 947 F.3d at 1025-26; *St. Hubert*, 909 F.3d at 351-53, so as to call for an exercise of this Court's supervisory power to resolve the conflict.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

Dated: August 3, 2021

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