No. 22-5538

IN THE SUPREME COURT OF THE UNITED STATES

KEPA MAUMAU, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

FRANCESCO VALENTINI
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

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

RELATED PROCEEDINGS

United States District Court (D. Utah):

United States v. Kamahele, No. 08-cr-758 (Jan. 5, 2012) (judgment as to Eric Kamahele)

United States v. Kamahele, No. 08-cr-758 (Jan. 5, 2012) (judgment as to petitioner)

United States v. Kamahele, No. 08-cr-758 (Jan. 20, 2012) (judgment as to Sitamipa Toki)

United States v. Kamahele, No. 08-cr-758 (Sept. 24, 2013) (amended sentence and judgment as to Sitamipa Toki)

United States v. Kamahele, No. 08-cr-758 (Sept. 24, 2013) (amended sentence and judgment as to Eric Kamahele)

United States v. Kamahele, No. 08-cr-758 (Sept. 24, 2013) (amended sentence and judgment as to petitioner)

United States v. Kamahele, No. 08-cr-758 (Aug. 10, 2017) (order denying motion to vacate under 28 U.S.C. 2255)

Kamahele v. United States, Nos. 15-cv-506 et al. (Apr. 13, 2018) (order denying certificate of appealability (COA) as to petitioner and granting COA in part and denying COA in part as to Kamahele)

United States v. Kamahele, No. 08-cr-758 (May 11, 2020) (order granting motion for sentence reduction as to petitioner)

United States v. Kamahele, No. 08-cr-758 (Nov. 5, 2021) (order granting motion for sentence reduction as to Eric Kamahele)

United States Court of Appeals Court (10th Cir.):

United States v. Maumau, No. 12-4007 (Aug. 26, 2013) (order issuing limited remand in light of Alleyne v. United States, 570 U.S. 99 (2013))

United States v. Kamahele, No. 12-4003 (Aug. 26, 2013) (order issuing limited remand in light of Alleyne v. United States, 570 U.S. 99 (2013))

United States v. Maumau, No. 12-4007 (Apr. 8, 2014) (opinion and judgment affirming judgment of the district court)

United States v. Kamahele, No. 12-4003 (Apr. 8, 2014) (opinion and judgment affirming judgment of the district court)

United States v. Toki, No. 17-4153 (Aug. 11, 2020) (order and judgment affirming denial of motion to vacate convictions under 28 U.S.C. 2255)

United States v. Maumau, No. 20-4056 (Apr. 1, 2021) (opinion and judgment affirming order granting petitioner's motion for sentence reduction)

United States v. Toki, No. 17-4153 (Jan. 31, 2022) (opinion and judgment vacating in part, affirming in part, and remanding)

United States Supreme Court:

Kamahele v. United States, No. 20-7749 (Nov. 5, 2021) (order granting petition for writ of certiorari, vacating judgment, and remanding in light of Borden v. United States, 141 S. Ct. 1817 (2021))

Maumau v. United States, No. 20-7750 (Nov. 5, 2021) (order granting petition for writ of certiorari, vacating judgment, and remanding in light of Borden v. United States, 141 S. Ct. 1817 (2021))

Kamahele v. United States, petition for cert. pending, No. 22-5535 (filed Sept. 2, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 23 F.4th 1277. A prior opinion of the court of appeals (Pet. App. A10-A28) is not published in the Federal Reporter but is reprinted at 822 Fed. Appx. 848. The orders of the district court are not published in the Federal Supplement but are available at 2017 WL 3437671 and 2018 WL 1801916. Another prior opinion of the court of appeals is reported at 748 F.3d 984.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2022. A petition for rehearing was denied on April 5, 2022.

On July 11, 2022, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including August 3, 2022. On July 22, Justice Gorsuch further extended the time to September 2, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioner was convicted on one count of racketeering conspiracy, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d); one count of robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); three counts of assault with a dangerous weapon in aid of racketeering, in violation of the Violent Crime in Aid of Racketeering statute (VICAR), 18 U.S.C. 1959(a)(3); and three 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). 1/5/12 Judgment 1. The district court sentenced petitioner to 55 years of imprisonment, to be followed by 3 years of supervised release. Am. Judgment 2. The court of appeals affirmed. 748 F.3d 984.

Petitioner subsequently filed a motion for postconviction relief under 28 U.S.C. 2255. 15-cv-600 D. Ct. Doc. 10 (July 6, 2016). The district court denied that motion and denied petitioner's request for a certificate of appealability (COA). D. Ct. Doc. 36 (Aug. 10, 2017); D. Ct. Doc. 56 (Apr. 3, 2018). The court of appeals granted a COA as to certain issues related to

petitioner's Section 924(c) convictions predicated on the VICAR assaults, affirmed as to those issues, and denied a COA as to all other issues. Pet. App. A10-A28. This Court granted certiorari, vacated the court of appeals' judgment in light of this Court's intervening decision in Borden v. United States, 141 S. Ct. 1817 (2021), and remanded. 142 S. Ct. 57. On remand, the court of appeals reversed the district court's denial of collateral relief with respect to two of petitioner's Section 924(c) convictions but otherwise affirmed. Pet. App. A1-A9.

1. Petitioner is a former member of a street gang known as the Tongan Crip Gang. Pet. App. A30. In 2007 and 2008, members of the gang, including petitioner, advanced the interests of the gang by committing a series of armed robberies and shootings in Glendale, Utah. See generally United States v. Kamahele, 748 F.3d 984, 993-995 (10th Cir. 2014).

In one of those offenses, petitioner and a fellow Tongan Crip Gang member, Edward "EJ" Kamoto, robbed a clothing store in South Ogden, Utah. 748 F.3d at 995. Petitioner and Kamoto entered the store and approached the registers. 9/13/11 Trial Tr. 10. Petitioner pulled out a gun, covered his face with his shirt, and told the cashiers to hand over the money. Tr. 11, 17, 23, 33, 40, 92-93. While petitioner remained in front of the counter with the gun, Kamoto went behind the counter and ordered one of the cashiers to open the register. Tr. 11, 33, 93. Kamoto picked up a store bag, told a cashier to hold it open, and began filling it with

money. Tr. 11, 17, 33-34. As he was removing the money from the register, Kamoto noticed a black toolbox underneath the counter and told the cashier to open it. Tr. 12. The box contained the money collected by the store over several days. Trial Tr. 9/12/11 Trial Tr. 263-264; 9/13/11 Trial Tr. 12. Petitioner and Kamoto left the store with approximately $7000. 9/12/11 Trial Tr. 263.

2. A federal grand jury charged petitioner and several codefendants with numerous gang-related offenses. Pet. App. A30-A53. It charged petitioner in particular with RICO conspiracy; Hobbs Act robbery (based on his participation in robbery described above); three counts of VICAR assault with a dangerous weapon (one of which was based on that robbery); and three counts of using or carrying a firearm during and in relation to a crime of violence, where the predicate crimes of violence were the Hobbs Act robbery and the VICAR assaults. Ibid. A jury found petitioner guilty on all counts. Verdict Form 1-3.

At sentencing, which took place before this Court's decision in Alleyne v. United States, 570 U.S. 99 (2013), the district court found that petitioner brandished a firearm during the robbery and associated assault, thereby triggering a two-year increase (from five to seven years) of the statutory-minimum penalty for the associated Section 924(c) offense. 1/5/12 Judgment 2; see 18 U.S.C. 924(c)(1)(A)(i)-(ii). The court sentenced petitioner to a total of 57 years of imprisonment, to be followed by three years of supervised release. 1/5/12 Judgment 2. Petitioner appealed.

While his appeal was pending, this Court issued its decision in Alleyne, which held that a fact necessary for a statutory-minimum sentence must be found by a jury. See 579 U.S. at 102. After a limited remand, the district court decreased petitioner's prison term on the robbery-based Section 924(c) count by two years and left the remainder of petitioner's sentence unchanged. Am. Judgment 2. The court of appeals affirmed. See 748 F.3d 984, 993.

3. Petitioner later moved for postconviction relief under 28 U.S.C. 2255, claiming (among other things) that the predicate offenses for his Section 924(c) convictions no longer constituted crimes of violence under 18 U.S.C. 924(c)(3). See D. Ct. Doc. 10. 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).

With respect to his robbery-based Section 924(c) conviction, petitioner relied on 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 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague, 576 U.S. at 596 -- to contend that Section 924(c)(3)(B) was similarly

unconstitutional, and also argued that Hobbs Act robbery is not a crime of violence under Section 924(c)(3)(A). See D. Ct. Doc. 10 at 1-2, 12-14, 16-25. This Court later held in United States v. Davis, 139 S. Ct. 2319 (2019), that Section 924(c)(3)(B) is unconstitutionally vague. Id. at 2336.

The district court denied petitioner's Section 2255 motion as untimely and denied petitioner's request for a certificate of appealability (COA). D. Ct. Doc. 36; D. Ct. Doc. 56. The court of appeals granted a COA on two issues raised by petitioner with respect to his convictions for VICAR assault, but declined to issue a COA on the question whether Hobbs Act robbery constitutes a crime of violence for purposes of Section 924(c). Pet. App. A4-A5, A12-A19. The court of appeals then affirmed the denial of petitioner's Section 2255 motion in an unpublished decision, again declining to issue a COA as to whether Hobbs Act robbery constitutes a crime of violence. Id. at A12-A19.[1]

Petitioner sought a writ of certiorari in this Court, contending, inter alia, that his VICAR assault offenses did not qualify as crimes of violence under 18 U.S.C. 924(c)(3)(A) because the underlying state law predicates -- Utah aggravated assault and

[1] While petitioner's appeal from the denial of postconviction relief was pending, the district court granted petitioner's motion for sentence reduction under 18 U.S.C. 3582(c)(1)(A)(i) and reduced petitioner's sentence to time served. 08-cr-758 D. Ct. Docs. 1760, 1762, at 13-14 (Feb. 18, 2020). The court of appeals affirmed. See United States v. Maumau, 993 F.3d 821, 824 (10th Cir. 2021).

Arizona aggravated assault -- required only a mens rea of recklessness. No. 20-7750, Pet. i. While the petition was pending, this Court held in Borden v. United States, 141 S. Ct. 1817, 1821-1822 (2021), that assault offenses that require only recklessness do not satisfy the definition of a "violent felony" under a similarly worded provision of the ACCA, 18 U.S.C. 924(e)(2)(B)(i). This Court then granted certiorari in this case, vacated the court of appeals' judgment, and remanded to the court of appeals for further consideration in light of Borden. 142 S. Ct. 57.

On remand, the court of appeals concluded, based on Borden, that petitioner's VICAR assault convictions were not crimes of violence under Section 924(c)(3) and thus could not support petitioner's Section 924(c) convictions. Pet. App. A5-A9. The court then observed that petitioner did "not argue that Borden undermined the validity of * * * [his] § 924(c) conviction[] predicated on Hobbs Act robbery," and cited circuit precedent holding that Hobbs Act robbery categorically constitutes a crime of violence under Section 924(c)(3)(A). Id. at A9. (citing United States v. Melgar-Cabrera, 892 F.3d 1053, 1061-1066 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018)).

Following the panel decision and a denial of rehearing in this case, this Court held in United States v. Taylor, 142 S. Ct. 2015 (2022), that attempted Hobbs Act robbery is not a crime of violence under Section 924(c)(3)(A). See id. at 2025-2026.

Petitioner subsequently filed a motion to recall the mandate, which the court of appeals denied. Pet. App. A60-A61.

ARGUMENT

Petitioner contends (Pet. 9-10) that this Court should grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand for further proceedings (GVR) in light of United States v. Taylor, 142 S. Ct. 2015 (2022), on the premise that his conviction for carrying and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c), may have rested on an attempted Hobbs Act robbery predicate. He further contends (Pet. 10-21) that, even if that conviction rested on completed Hobbs Act robbery predicate, it does not constitute a crime of violence under 18 U.S.C. 924(c). Neither contention has merit. Petitioner's Section 924(c) conviction was based on a completed Hobbs Act robbery predicate; the court of appeals correctly determined that completed Hobbs Act robbery constitutes a crime of violence under 18 U.S.C. 924(c)(3)(A); and that determination does not conflict with the decision of any other court of appeals. No further review is warranted.

1. Petitioner contends (Pet. 9-10) that his conviction for carrying and using a firearm during and in relation to Hobbs Act robbery is infirm in light of United States v. Taylor, supra. In Taylor, this Court held that attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), does not qualify as a crime of violence under Section 924(c)(3)(A) because it does not "require

the government to prove the use, attempted use, or threatened use of force." 142 S. Ct. at 2025. Petitioner asserts (Pet. 10) that, "[b]ecause [his] Hobbs Act conviction does not categorically establish completed Hobbs Act robbery," this Court should GVR. That course is not warranted here.

Petitioner bears the burden on collateral review to affirmatively establish that his conviction rested on an invalid ground. See, e.g., Parke v. Raley, 506 U.S. 20, 31 (1992) (explaining that the "presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant" on collateral review). He cannot meet that burden. Notwithstanding Taylor's pendency in this Court while the court below was considering his appeal, petitioner never asserted that his conviction was premised on attempted Hobbs Act robbery. And in denying relief, the court of appeals explicitly and repeatedly observed that petitioner's conviction was "predicated on Hobbs Act robbery." Pet. App. A16; see also id. at A9, A12, A17. Consistent with that understanding, the court denied relief in reliance on a prior decision United States v. Melgar-Cabrera, 892 F.3d 1053 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018), that classified completed Hobbs Act robbery as a crime of violence under Section 924(c)(3)(A), but did not address attempted Hobbs Act robbery. See Pet. App. A16 (citing Melgar-Cabrera, 892 F.3d at 1061-1066); see also id. at A9 (citing Melgar-Cabrera as "holding that Hobbs Act robbery is a crime of violence under § 924(c) based on the

elements of the offense"). Only after the issuance of Taylor -- which came well after the panel's decision and the denial of rehearing -- did petitioner assert, for the first time in 13 years of litigation, that his Section 924(c) conviction must rest on attempted Hobbs Act robbery.

Even now, petitioner has not attempted to articulate a view of the evidence that could have led a rational jury to find him guilty of attempted, but not completed, Hobbs Act robbery. And the record confirms that petitioner's Section 924(c) conviction was supported by a predicate offense of completed, not attempted, Hobbs Act robbery. Petitioner asserts that the indictment (Pet. App. A49) and jury instructions (id. at A55-A56) left open the theoretical possibility that the jury found him guilty of attempted -- as opposed to completed -- Hobbs Act robbery and based its guilty verdict on that finding. Pet. 9-10. At trial, however, overwhelming and uncontroverted evidence -- including the testimony of two eyewitnesses, of petitioner's accomplice, and of the store's general manager, as well as surveillance video -- conclusively established that the August 12, 2008 robbery of the clothing store was a completed crime, resulting in the robbers taking approximately $7000 from the store. See 9/12/2011 Trial Tr. 263; 9/13/11 Trial Tr. 10-48, 90-95.

2. Petitioner separately contends (Pet. 10-21) that the court of appeals erred in recognizing that completed Hobbs Act robbery, 18 U.S.C. 1951(a), qualifies as a "crime of violence"

within the meaning of 18 U.S.C. 924(c)(3). Petitioner advances that contention both as another basis for his GVR request (Pet. 10-19), and as a basis, in the alternative, for granting plenary review to decide whether completed Hobbs Act robbery qualifies as a crime of violence (Pet. 19-21). Neither request has merit. This Court has recently and repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on the application of Section 924(c)(3)(A) to Hobbs Act robbery.[2] It should follow the same course here.

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[2] See, e.g., Felder v. United States, 142 S. Ct. 597 (2021) (No. 21-5461); Lavert v. United States, 142 S. Ct. 578 (2021) (No. 21-5057); Ross v. United States, 142 S. Ct. 493 (2021) (No. 21-5664); Hall v. United States, 142 S. Ct. 492 (2021) (No. 21-5644); Moore v. United States, 142 S. Ct. 252 (2021) (No. 21-5066); Copes v. United States, 142 S. Ct. 247 (2021) (No. 21-5028); Council v. United States, 142 S. Ct. 243 (2021) (No. 21-5013); Fields v. United States, 141 S. Ct. 2828 (2021) (No. 20-7413); Thomas v. United States, 141 S. Ct. 2827 (2021) (No. 20-7382); Walker v. United States, 141 S. Ct. 2823 (2021) (No. 20-7183); Usher v. United States, 141 S. Ct. 1399 (2021) (No. 20-6272); Steward v. United States, 141 S. Ct. 167 (2020) (No. 19-8043); Terry v. United States, 141 S. Ct. 114 (2020) (No. 19-1282); Hamilton v. United States, 140 S. Ct. 2754 (2020) (No. 19-8188); Diaz-Cestary v. United States, 140 S. Ct. 1236 (2020) (No. 19-7334); Walker v. United States, 140 S. Ct. 979 (2020) (No. 19-7072); Tyler v. United States, 140 S. Ct. 819 (2020) (No. 19-6850); Hilario-Bello v. United States, 140 S. Ct. 473 (2019) (No. 19-5172); Nelson v. United States, 140 S. Ct. 469 (2019) (No. 19-5010); Apodaca v. United States, 140 S Ct. 432 (2019) (No. 19-5956); Young v. United States, 140 S. Ct. 262 (2019) (No. 19-5061); Durham v. United States, 140 S. Ct. 259 (2019) (No. 19-5124); Munoz v. United States, 140 S. Ct. 182 (2019) (No. 18-9725); Lindsay v. United States, 140 S. Ct. 155 (2019) (No. 18-9064); Hill v. United States, 140 S. Ct. 54 (2019) (No. 18-8642); Greer v. United States, 139 S. Ct. 2667 (2019) (No. 18-8292); Rojas v. United States, 139 S. Ct. 1324 (2019) (No. 18-6914); Foster v. United States, 139 S. Ct. 789 (2019) (No. 18-5655); Desilien v. United States, 139 S. Ct. 413 (2018) (No. 17-9377); Ragland v. United States, 138 S. Ct. 1987

a. Like every other court of appeals that has considered the issue,[3] the court below has correctly recognized that petitioner's conviction for completed Hobbs Act robbery qualifies as a "crime of violence" under Section 924(c)(3).

As noted above, Section 924(c)(3) defines a "crime of violence" to include a federal felony 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). Hobbs Act robbery requires the taking of personal property "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). Those requirements match the definition of a "crime of violence" in Section 924(c)(3)(A). See, e.g., United States v.

(2018) (No. 17-7248); Robinson v. United States, 138 S. Ct. 1986 (2018) (No. 17-6927); Chandler v. United States, 138 S. Ct. 1281 (2018) (No. 17-6415); Middleton v. United States, 138 S. Ct. 1280 (2018) (No. 17-6343); Jackson v. United States, 138 S. Ct. 977 (2018) (No. 17-6247); Garcia v. United States, 138 S. Ct. 641 (2018) (No. 17-5704).

[3] See, e.g., United States v. Scott, 14 F.4th 190, 195 n.1 (3d Cir. 2021); United States v. Tuan Ngoc Luong, 965 F.3d 973, 990 (9th Cir. 2020), cert. denied, 142 S. Ct. 336 (2021); United States v. Richardson, 948 F.3d 733, 741-742 (6th Cir.), cert. denied, 141 S. Ct. 344 (2020); Brown v. United States, 942 F.3d 1069, 1075 (11th Cir. 2019) (per curiam); United States v. Mathis, 932 F.3d 242, 265-266 (4th Cir.), cert. denied, 140 S. Ct. 639, and 140 S. Ct. 640 (2019)); United States v. García-Ortiz, 904 F.3d 102, 109 (1st Cir. 2018), cert. denied, 139 S. Ct. 1208 (2019); Melgar-Cabrera, 892 F.3d at 1060-1066 (10th Cir.); United States v. Hill, 890 F.3d 57, 56-60 (2d Cir. 2018), cert. denied, 139 S. Ct. 844 (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); Diaz v. United States, 863 F.3d 781, 783 (8th Cir. 2017); United States v. Rivera, 847 F.3d 847, 848-849 (7th Cir.), cert. denied, 137 S. Ct. 2228 (2017).

Hill, 890 F.3d 51, 57 (2d Cir. 2018) (observing that the elements of Hobbs Act robbery "would appear, self-evidently, to satisfy" the definition of a "crime of violence" in Section 924(c)(2)(A)), cert. denied, 139 S. Ct. 844 (2019).

The circuits' uniform determination that Hobbs Act robbery categorically requires the use, attempted use, or threatened use of force -- and that Hobbs Act robbery thus qualifies as a "crime of violence" under Section 924(c)(3)(A) -- is reinforced by this Court's decision in Stokeling v. United States, 139 S. Ct. 544 (2019), which identified common-law robbery as the "quintessential" example of a crime that requires the use or threatened used of physical force. Id. at 551 (discussing definition of "violent felony" in 18 U.S.C. 924(e)(2)(B)(i)). The elements of common-law robbery track the elements of Hobbs Act robbery in relevant respects. See 139 S. Ct. at 550 (observing that common-law robbery was an "unlawful taking" by "force or violence," meaning force sufficient "'to overcome the resistance encountered"') (citation omitted).

b. Petitioner nonetheless argues (Pet. 12-13) that Hobbs Act robbery can be committed by making a threat of future harm to "intangible property" that would not entail a threatened use of physical force. But in advancing that interpretation, petitioner relies on decisions in which defendants were convicted of extortion under the Hobbs Act, defined in 18 U.S.C. 1951(b)(2), not the statute's separate robbery offense defined in Section 1951(b)(1).

See United States v. Arena, 180 F.3d 380, 391-392 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000), abrogated in part on other grounds by Scheidler v. National Org. for Women, Inc., 537 U.S. 393, 403 n.8 (2003); United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 270-271, 281-282 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986); United States v. Iozzi, 420 F.2d 512, 515 (4th Cir. 1970), cert. denied, 402 U.S. 943 (1971). And even in those cases, the extortion offense was committed by means of physical force and violence. See Arena, 180 F.3d at 393 (describing defendant's scheme to "pour the butyric acid into ventilation systems, in order to have the fumes permeate the facilities and prevent operations for several days"); see also Local 560 of Int'l Bhd. of Teamsters, 780 F.2d at 270-271, 281-282 (defendants used violent means, including murder, to intimidate union members into surrendering "intangible" rights under certain labor laws); Iozzi, 420 F.2d at 515 (extortion was committed through "threats of violence and force").

As those decisions illustrate, the Hobbs Act classifies a crime that involves only threats or harm to intangible property as Hobbs Act "extortion," but not as Hobbs Act "robbery." 18 U.S.C. 1951(b). Robbery requires that the defendant took personal property from the defendant "against his will," 18 U.S.C. 1951(b)(1); extortion, by contrast, prohibits obtaining another person's property "with his consent," where that consent is "induced by wrongful use of actual or threatened force, violence,

or fear, or under color of official right," 18 U.S.C. 1951(b)(2). See Ocasio v. United States, 136 S. Ct. 1423, 1435 (2016). A victim who hands over personal property in order to protect a stock option presumably does so with the kind of "grudging consent," ibid., that would show Hobbs Act extortion. But as reflected in the case law's distinction between the scenarios giving rise to each crime, a victim must experience force capable of causing pain or injury (or fear of such) for his "will" to be overborne, as required for robbery. 18 U.S.C. 1951(b)(1).

Because that statutory distinction would not allow the government to prosecute a threat to harm intangible property as Hobbs Act robbery, the recognition of Hobbs Act robbery as a crime of violence under Section 924(c)(3)(A) does not depend on the "realistic probability" test whose post-Taylor viability petitioner questions (Pet. 12-13, 19-20). The absence of any actual cases reinforces the proper interpretation of Hobbs Act robbery. But the limitations are inherent in the statute; they are legal, not experiential.[4]

[4] Petitioner's assertion (19-21) that this Court should grant certiorari to resolve a conflict in the court of appeals' "rationale[s]" for classifying Hobbs Act robbery as a crime of violence under Section 924(c) lacks merit. Whatever variations the circuits' particular reasoning might have, petitioner does not dispute that the courts of appeals are unanimous in recognizing that Hobbs Act robbery is categorically a crime of violence. See Pet. 19-21. And this Court "reviews judgments, not statements in opinions." Black v. Cutter Labs., 351 U.S. 292, 297 (1956).

Petitioner's citation (Pet. 14-16) of the jury instructions that three circuits have (at least until recently) used for Hobbs Act robbery does not show otherwise. Id. at 13.[5] Pattern instructions are instructive -- but not binding -- within the circuits in which they are issued. See, e.g., United States v. Dohan, 508 F.3d 989, 994 (11th Cir. 2007) (per curiam), cert. denied, 553 U.S. 1034 (2008); United States v. Sparkman, 500 F.3d 678, 684 (8th Cir. 2007). They thus do not present a sound basis for concluding that any court of appeals would in fact affirm a Hobbs Act robbery conviction premised on threats to harm intangible property (or even that a district court would allow one).

3. Finally, petitioner contends (Pet. 21-25) that, by adhering to its circuit precedent recognizing Hobbs Act robbery as a crime of violence without expressly examining the pattern jury instructions, the court of appeals departed so far from the accepted and usual course of judicial proceedings that an exercise of this Court's supervisory power is warranted. See Sup. Ct. R. 10(a). Petitioner is incorrect. Courts have "wide latitude in their decisions of whether or how to write opinions." Taylor v. McKeithen, 407 U.S. 191, 194 n.4 (1972) (per curiam). The court of appeals did not depart from the accepted and usual course of judicial proceedings in declining to reopen circuit precedent to

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[5] As petitioner acknowledges (Pet. 16 & n.5), the Fifth Circuit recently amended its pattern jury instruction to clarify that Hobbs Act robbery requires injury to tangible property. See 5th Cir. Pattern Jury Instructions (Crim. Cases) 2.73B (2019 ed.).

consider petitioner's reliance on pattern jury instructions. Petitioner's dissatisfaction with the court's reasoning does not render the court's action an extraordinary departure from "the accepted and usual course of judicial proceedings," Sup. Ct. R. 10(a), that warrants an exercise of this Court's supervisory power.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

FRANCESCO VALENTINI
Attorney

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