

No. 17-6295

IN THE SUPREME COURT OF THE UNITED STATES

DESHAWN KENNETH JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying a certificate of appealability on petitioner's claim that attempted robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), does not qualify as a "crime of violence" under 18 U.S.C. 924(c)(3).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1) is unreported. The opinion of the district court (Pet. App. A2-A8) is not published in the Federal Supplement but is available at 2017 WL 1831671. Prior opinions of the court of appeals are not published in the Federal Reporter but are reprinted or available at 623 Fed. Appx. 973, 434 Fed. Appx. 863, and 2016 WL 4608125.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2017. The petition for a writ of certiorari was filed on October

4, 2017. 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 Southern District of Florida, petitioner was convicted of conspiracy to commit robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a); attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i); three counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and three counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). The district court sentenced petitioner to 1017 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed, 434 Fed. Appx. 863, and this Court denied a petition for a writ of certiorari, 565 U.S. 1173. In 2013, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied that motion, and the court of appeals affirmed. 623 Fed. Appx. 973, 974. In 2016, petitioner filed a second or successive motion under Section 2255 challenging one of his Section 924(c) convictions. The district court denied petitioner's motion and denied his request for a certificate of appealability (COA). Pet. App. A2-A8. The court of appeals likewise denied a COA. Id. at A1.

1. In February 2008, petitioner and an accomplice committed a string of armed robberies of gas stations and a convenience store, and an attempted armed robbery of another gas station, in southern Florida. Presentence Investigation Report (PSR) ¶¶ 23-36, 42. A federal grand jury charged petitioner with conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); carrying a firearm during and in relation to a crime of violence (the attempted Hobbs Act robbery), in violation of 18 U.S.C. 924(c) (1) (A) (i); four counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and four counts of brandishing a firearm during and in relation to crimes of violence (the Hobbs Act robberies), in violation of 18 U.S.C. 924(c) (1) (A) (ii). Superseding Indictment 1-3, 8-14.

The government subsequently dismissed one of the Hobbs Act robbery counts and one of the Section 924(c) counts, and a jury found petitioner guilty of each of the remaining counts. Judgment 1. The district court sentenced petitioner to 1017 months of imprisonment, including concurrent 57-month terms on the Hobbs Act robbery, attempted Hobbs Act robbery, and Hobbs Act conspiracy counts; a mandatory minimum consecutive term of 60 months on the Section 924(c) count related to the attempted Hobbs Act robbery; and mandatory minimum consecutive terms of 300 months on each of the remaining Section 924(c) counts. Id. at 2. The court of

appeals affirmed, 434 Fed. Appx. 863, and this Court denied a petition for a writ of certiorari, 565 U.S. 1173.

2. In 2013, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. 13-cv-14018 D. Ct. Doc. 1 (Jan. 16, 2013). Petitioner alleged that his trial counsel was ineffective under the Sixth Amendment and that the government violated the Fifth Amendment by failing to disclose impeachment evidence. Id. at 3-9. The district court denied the motion but issued a COA. 13-cv-14018 Docket entry No. 34 (Aug. 21, 2014). The court of appeals affirmed. 623 Fed. Appx. 973.

3. In 2016, petitioner filed an application for leave to file a second or successive motion under Section 2255 to challenge his Section 924(c) convictions. 2016 WL 4608125, at *1; see 28 U.S.C. 2255(h). Petitioner contended that the predicate offenses underlying his Section 924(c) convictions -- Hobbs Act robbery and attempted Hobbs Act robbery -- did not qualify as "crime[s] of violence" under Section 924(c)(3). 2016 WL 4608125, at *3. That paragraph defines a "crime of violence" as a felony 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). Petitioner argued that neither Hobbs Act robbery nor attempted Hobbs Act robbery qualifies as a crime of

violence under Section 924(c)(3)(A) and that Section 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the “residual clause” of the definition of a “violent felony” in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness. 2016 WL 4608125, at *1, *3.

The court of appeals granted petitioner’s application in part and denied it in part. 2016 WL 4608125, at *4. The court observed that, under its precedent, Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A), the constitutionality of which petitioner did not question. Id. at *3 (citing In re Saint Fleur, 824 F.3d 1337, 1340-1341 (11th Cir. 2016)). The court therefore determined that petitioner’s challenges to the Section 924(c) counts that identified Hobbs Act robbery as the underlying crime of violence lacked the type of prima facie support necessary to justify a second or successive collateral attack. Ibid.; see 28 U.S.C. 2255(h) (providing that, to obtain leave to file a second or successive motion under Section 2255, a prisoner must base his claim on a sufficiently strong showing of either factual innocence based on new evidence or “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable”).

The court of appeals concluded, however, that petitioner had made the requisite prima facie showing with respect to his conviction on the Section 924(c) count that identified attempted

Hobbs Act robbery as the underlying crime of violence. 2016 WL 4608125, at *3. The court viewed it as “unclear” whether an attempt to commit Hobbs Act robbery would qualify as a crime of violence under Section 924(c)(3)(A), or whether the offense could only qualify under Section 924(c)(3)(B). Ibid. Because, at that time, it was “an open question” in the Eleventh Circuit whether Section 924(c)(3)(B) was unconstitutionally vague in light of Johnson, id. at *2, the court granted petitioner’s request to file a second or successive collateral attack on his Section 924(c) conviction for having carried a firearm during the attempted Hobbs Act robbery, id. at *4.¹

4. The district court denied petitioner’s motion for post-conviction relief under Section 2255. Pet. App. A2-A8. The court adopted a magistrate judge’s determination that attempted Hobbs Act robbery necessarily involves at least the “attempted use . . . of physical force,” id. at A42 (quoting 18 U.S.C. 924(c)(3)(A)), and thus held that attempted Hobbs Act robbery qualifies as a “crime of violence” under Section 924(c)(3)(A), id. at A6. The court declined to issue a COA. Id. at A8.

5. The court of appeals summarily denied petitioner’s request for a COA. Pet. App. A1.

¹ The Eleventh Circuit has subsequently held that Section 924(c)(3)(B) is not unconstitutionally vague. See Ovalles v. United States, 861 F.3d 1257, 1265 (2017).

ARGUMENT

Petitioner contends (Pet. 7-14) that the court of appeals erred in denying a COA on his claim that attempted 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). The decision below is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The Hobbs Act defines robbery to require the "taking or obtaining" of personal property from another "by means of actual or threatened force, or violence, or fear of injury." 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 filed in Garcia v. United States, cert. denied, No. 17-5704 (Jan. 8, 2017), Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. 924(c)(3)(A) because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Ibid.; see Br. in Opp. at 7-10, Garcia, supra (No. 17-5704).² Every court of appeals to consider the issue, including the Eleventh Circuit, has so held. Br. in Opp. at 8, Garcia, supra (No. 17-5704). And this Court has repeatedly denied review in other cases raising that issue, id. at 5 & n.1, including in Garcia, supra.

² We have served petitioner with a copy of the government's brief in opposition in Garcia.

2. Petitioner asserts (Pet. 12-14) that the court of appeals erred in denying his request for a COA because, unlike completed Hobbs Act robbery, “reasonable jurists may debate whether attempted Hobbs Act robbery” is a “crime of violence” under Section 924(c)(3)(A) (emphasis added). That is incorrect.

Numerous courts of appeals have held that an attempt to commit a crime that requires the use, attempted use, or threatened use of physical force is itself a “crime of violence” under Section 924(c)(3)(A) and similarly worded provisions. See Arellano Hernandez v. Lynch, 831 F.3d 1127, 1132 (9th Cir. 2016) (“The ‘attempt’ portion of Arellano Hernandez’s conviction does not alter our determination that the conviction is a crime of violence. We have ‘generally found attempts to commit crimes of violence, enumerated or not, to be themselves crimes of violence.’”) (citation omitted), cert. denied, 137 S. Ct. 2180 (2017); see also, e.g., United States v. Armour, 840 F.3d 904, 907-909 (7th Cir. 2016) (holding that attempted federal bank robbery is a “crime of violence” under Section 924(c)(3)(A)); United States v. McGuire, 706 F.3d 1333, 1337 (11th Cir.) (O’Connor, Ret. J.) (same for offense of attempting to “set[] fire to, damage[], destroy[] . . . or wreck[]” an aircraft with people on board) (brackets in original), cert. denied, 569 U.S. 912 (2013); cf. United States v. Alexander, 809 F.3d 1029, 1033 (8th Cir. 2016) (holding that attempted second-degree assault under Missouri law is a “violent felony” under the ACCA’s elements clause, 18 U.S.C.

924(e) (2) (B) (i)), cert. denied, 137 S. Ct. 1608 (2017). As the Seventh Circuit has explained, “[a]n attempt conviction requires proof of intent to carry out all elements of the crime, including, for violent offenses, threats or use of violence,” as well as a “substantial step toward completion of the crime.” Armour, 840 F.3d at 910 n.3. Although petitioner is correct (Pet. 13) that not every act constituting an attempt to commit Hobbs Act robbery must itself be violent, a person who takes a substantial step toward committing such an inherently violent offense is properly understood to have at least attempted or threatened the use of violent force within the meaning of Section 924(c) (3) (A).

Petitioner identifies no conflict among the circuits over whether attempted Hobbs Act robbery is a crime of violence under Section 924(c) (3) (A). Instead, he cites (Pet. 12, 14) a published order from the court below granting authorization to file a second or successive Section 2255 motion concerning whether attempted Hobbs Act robbery qualifies as a crime of violence under Section 924(c), see In re Gomez, 830 F.3d 1225, 1228 (11th Cir. 2016), and two unpublished orders from that court granting COAs to review whether Hobbs Act robbery or attempted Hobbs Act robbery qualify as crimes of violence. None of those orders holds that attempted Hobbs Act robbery is not a crime of violence under Section 924(c) (3) (A). And in any event, an intracircuit conflict on that question would not merit this Court’s review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) (“It is

primarily the task of a Court of Appeals to reconcile its internal difficulties.”).

3. Because the district court’s determination that attempted Hobbs Act robbery qualifies as a “crime of violence” under 18 U.S.C. 924(c)(3)(A) is correct, no reason exists to consider petitioner’s alternative argument (Pet. 7-10) that the court of appeals erred in denying a COA on his claim that 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. Nor does any reason exist to hold this petition for the decision in Sessions v. Dimaya, No. 15-1498 (reargued Oct. 2, 2017). Dimaya concerns the constitutionality of 18 U.S.C. 16(b), the language of which is similar to Section 924(c)(3)(B). But Dimaya presents no issue concerning a provision similar to Section 924(c)(3)(A), and thus the Court’s holding in Dimaya will not resolve any question that will affect the outcome of this case.³

³ Petitioner identifies (Pet. i-ii) two other questions presented in his petition for a writ of certiorari: whether the court of appeals erred in applying a “rule that reasonable jurists could not debate an issue foreclosed by binding circuit precedent, even where a judge on the panel issuing the binding precedent subsequently states the panel’s decision may be erroneous,” and whether “published orders” issued by a court of appeals “in the context of applications to file second or successive” Section 2255 motions “constitute binding precedent outside that context.” Apart from citing Judge Martin’s statement, concurring in an unpublished order, that she “may have been mistaken” in joining the unanimous decision in Saint Fleur, supra, petitioner does not present any argument concerning those questions. Pet. 14 (citation omitted). Petitioner has therefore forfeited those claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2018

No. 17-5704

IN THE SUPREME COURT OF THE UNITED STATES

JAIME SHAKUR GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH 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(a), qualifies as a "crime of violence" within the meaning of 18 U.S.C. 924(c) (3) .

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-5704

JAIME SHAKUR GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 857 F.3d 708.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2017. The petition for a writ of certiorari was filed on August 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of

robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a) and 2; and discharging a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) and 2. The district court sentenced petitioner to 171 months of imprisonment, to be followed by five years of supervised release. Pet. App. B2-B3. The court of appeals affirmed petitioner's Section 924(c) conviction but vacated petitioner's sentence on the Hobbs Act robbery count. Id. at A1-A9.

1. On October 20, 2015, petitioner and two confederates robbed a gun store in Lubbock, Texas. Pet. App. A2; Presentence Investigation Report (PSR) ¶ 9. The three men entered the store wearing ski masks and brandishing firearms. Ibid. One of the robbers put a gun to the head of a store employee and shot twice at another employee, striking the employee in the ankle. Pet. App. A2; PSR ¶¶ 9-10. A brief shootout ensued between the store employees and the robbers, during which the robbers stole nine handguns and fled. Pet. App. A2; PSR ¶¶ 10-11, 13.

2. A federal grand jury charged petitioner with numerous offenses, including one count of robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a) and 2; and one count of discharging a firearm in furtherance of a "crime of violence" (namely, the robbery), in violation of 18 U.S.C. 924(c)(1)(A) and 2. Indictment 1-3. Petitioner pleaded guilty to both of those counts. Pet. App. A2; Plea Agreement 1-2. The district court sentenced petitioner to 171 months of imprisonment, including 51 months on

the Hobbs Act robbery count and a mandatory minimum consecutive sentence of 120 months on the Section 924(c) count. Pet. App. B2.

3. The court of appeals affirmed petitioner's conviction on the Section 924(c) count but vacated his sentence on the Hobbs Act robbery count. Pet. App. A1-A9. Petitioner argued for the first time on appeal that Hobbs Act robbery is not a "crime of violence" under Section 924(c) and that his conviction on the Section 924(c) count should therefore be vacated on plain-error review. Pet. C.A. Br. 15-22. Section 924(c) defines a "crime of violence" as a felony 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).

Petitioner contended that Hobbs Act robbery does not qualify as a "crime of violence" under Section 924(c) (3) (A) because the offense may be accomplished by "minor" uses of force. Pet. C.A. Br. 16. He further argued that Hobbs Act robbery cannot qualify as a "crime of violence" under Section 924(c) (3) (B) because that provision is unconstitutionally vague under Johnson v. United States, 135 S. Ct. 2551 (2015). Pet. C.A. Br. 18-20. In Johnson, this Court held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), which defines a "violent felony" as an offense that "otherwise involves conduct that presents a serious

potential risk of physical injury to another,” 18 U.S.C. 924(e) (2) (B) (ii), is unconstitutionally vague. 135 S. Ct. at 2557. Petitioner asserted that Section 924(c) (3) (B) is likewise vague, but he acknowledged that his argument was foreclosed by United States v. Gonzalez-Longoria, 831 F.3d 670 (2016) (en banc), petition for cert. pending, No. 16-6259 (filed Sept. 29, 2016), in which the Fifth Circuit held that a similarly worded statute, 18 U.S.C. 16(b), is not unconstitutional in light of Johnson. Gonzalez-Longoria, 831 F.3d at 672; see Pet. C.A. Br. 20.

The court of appeals accepted petitioner’s concession that his challenge to Section 924(c) (3) (B) was foreclosed by Gonzalez-Longoria and affirmed his conviction on the Section 924(c) count. Pet. App. A4. The court determined, however, that the district court had misapplied the Sentencing Guidelines in calculating petitioner’s advisory sentencing range on the Hobbs Act robbery count. Id. at A5-A9. The court of appeals thus vacated petitioner’s sentence on that count and remanded to the district court for resentencing. Id. at A9.

4. On remand, the district court reimposed a sentence of 51 months of imprisonment on the Hobbs Act robbery count and a mandatory minimum consecutive sentence of 120 months on the Section 924(c) count. Pet. App. C2. Petitioner has appealed from that judgment. D. Ct. Doc. 201, at 1 (Aug. 30, 2017).

ARGUMENT

Petitioner contends (Pet. 4-7) 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). Petitioner’s request for relief is interlocutory and should be denied on that basis. Moreover, as petitioner acknowledged in the court of appeals, he did not preserve a challenge to his Section 924(c) conviction in the district court and thus his claim is subject to review only for plain error. Pet. C.A. Br. 15. Petitioner cannot establish error, plain or otherwise. Every court of appeals to consider the issue, including the court below, has held that Hobbs Act robbery satisfies the definition of a “crime of violence” in 18 U.S.C. 924(c)(3)(A). That basis for upholding the judgment obviates any need for this Court to consider petitioner’s argument (Pet. 4-5, 7) that the alternative definition of a “crime of violence” in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague or to hold this case pending the decision in Sessions v. Dimaya, No. 15-1498 (reargued Oct. 2, 2017). This Court has repeatedly denied petitions for writs of certiorari seeking review of whether Hobbs Act robbery qualifies as a “crime of violence” under Section 924(c).¹ The same result is warranted here.

¹ See, e.g., Cortez Harris v. United States, No. 16-9196 (Oct. 16, 2017); Thomas v. United States, No. 16-9017 (Oct. 2, 2017); Bluford v. United States, No. 16-8858 (Oct. 2, 2017); Brewton v. United States, 137 S. Ct. 2264 (2017) (No. 16-7686); Allen v. United States, 137 S. Ct. 2231 (2017) (No. 16-9034); Gooch v. United States, 137 S. Ct. 2230 (2017) (No. 16-9008); Rivera v.

1. Although the court of appeals affirmed petitioner's conviction on the Section 924(c) count, it vacated his sentence on the Hobbs Act robbery count and remanded to the district court for resentencing. Pet. App. A9. The district court resentenced petitioner and issued a revised judgment, from which petitioner has appealed. Id. at C1-C5; D. Ct. Doc. 201, at 1. The decision of the court of appeals at issue here is therefore interlocutory, which by itself "furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R., 389 U.S. 327, 328 (1967) (per curiam). After the court of appeals resolves petitioner's pending appeal from the district court's revised judgment, petitioner will have an opportunity to raise the claims pressed here, in addition to any claims arising from the disposition of his second appeal, in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting Court's "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). No justification exists in this case to depart from this Court's usual practice of declining to review interlocutory petitions.

United States, 137 S. Ct. 2228 (2017) (No. 16-8980); Eubanks v. United States, 137 S. Ct. 2203 (2017) (No. 16-8893).

2. In any event, the district court's acceptance of petitioner's guilty plea on the Section 924(c) count was not plainly erroneous. To establish reversible plain error under Federal Rule of Criminal Procedure 52(b), a defendant must demonstrate that (1) the district court committed an "error"; (2) the error was "plain," meaning "clear" or "obvious" under the law as it existed at the time of the relevant district court or appellate proceedings; (3) the error "affect[ed] [his] substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993) (citations omitted); "Meeting all four prongs is difficult, 'as it should be.'" Puckett v. United States, 556 U.S. 129, 135 (2009) (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

Petitioner cannot prove an error, much less a clear or obvious one. As noted above, Section 924(c)(3)(A) defines a "crime of violence" to include a 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). The "crime of violence" that provided the basis for petitioner's Section 924(c) conviction was Hobbs Act robbery, which 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 United States v. Hill, 832 F.3d 135, 140 (2d Cir. 2016) (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)(3)(A)).

Every court of appeals that has considered the issue, including the court below, has held that Hobbs Act robbery is a “crime of violence” under Section 924(c)(3)(A). See, e.g., United States v. Gooch, 850 F.3d 285, 291-292 (6th Cir.), cert. denied, 137 S. Ct. 2230 (2017); United States v. Buck, 847 F.3d 267, 274-275 (5th Cir.), cert. denied, 137 S. Ct. 2231 (2017), and No. 16-9520 (Oct. 2, 2017); United States v. Anglin, 846 F.3d 954, 965 (7th Cir.), cert. granted, vacated, and remanded on other grounds, No. 16-9411 (Oct. 2, 2017); Hill, 832 F.3d at 140-144; United States v. House, 825 F.3d 381, 387 (8th Cir. 2016), cert. denied, 137 S. Ct. 1124 (2017); In re Saint Fleur, 824 F.3d 1337, 1340-1341 (11th Cir. 2016); cf. United States v. Robinson, 844 F.3d 137, 141-144 (3d Cir. 2016) (same, without applying categorical approach), cert. denied, No. 17-5139 (Oct. 2, 2017); Robinson, 844 F.3d at 150-151 (Fuentes, J., concurring in part and concurring in the judgment) (same, applying categorical approach).

Petitioner nonetheless contends (Pet. 6-7) that Hobbs Act robbery does not qualify as a “crime of violence” under Section 924(c)(3)(A) because the offense may be committed without the use of “violent force.” In Johnson v. United States, 559 U.S. 133 (2010) (Curtis Johnson), this Court held that the term “physical

force" in a provision of the ACCA requiring "the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i), means "force capable of causing physical pain or injury to another person," Curtis Johnson, 559 U.S. at 140. That requirement "does not necessarily extend to a statute like [Section] 924(c)(3)(A), which includes within its definition of crime of violence those felonies that have as an element physical force threatened or employed against the person or property of another, as opposed to only the former." Hill, 832 F.3d at 142 n.9. But even assuming that Curtis Johnson's heightened force standard applies to Section 924(c)(3)(A), petitioner's offense would still qualify as a "crime of violence" because Hobbs Act robbery requires at least the threatened use of "force capable of causing physical pain or injury to a person or injury to property." Id. at 142 (emphasis omitted).

Petitioner asserts that Hobbs Act robbery can involve future threats to property or "intangible assets" that may not entail the use or threatened use of physical force, Pet. 6 (citation omitted), but he cites no case in which the statute was applied in such a manner. Instead, he relies (ibid.) on United States v. Arena, 180 F.3d 380 (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), which involved the Hobbs Act's separate extortion offense, not its robbery offense. Id. at 391-392; see 18 U.S.C. 1951(a) and (b)(2). And although

Arena stated that Hobbs Act extortion may encompass damage to intangible property, the offense in that case was committed by means of physical force and violence. See 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 United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 270-271, 281-282 (3d Cir.) (affirming Hobbs Act extortion conviction where the defendants used violent means, including murder, to intimidate union members into surrendering "intangible" rights under certain labor laws), cert. denied, 476 U.S. 1140 (1986). Robbery of an intangible property interest, by contrast, is an unlikely scenario. Cf. Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) ("[O]ur focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense.") (citation omitted).²

In any event, given the uniform precedent holding that Hobbs Act robbery qualifies as a "crime of violence" under Section 924(c)(3)(A) -- including binding authority in the court below, see Buck, 847 F.3d at 274-275 -- petitioner cannot establish that

² The other cases on which petitioner relies (Pet. 6) do not involve the Hobbs Act or Section 924(c)(3)(A). See, e.g., United States v. Gardner, 823 F.3d 793, 804 (4th Cir. 2016) (holding that North Carolina common-law robbery is not a "violent felony" under the ACCA); United States v. Castro-Vazquez, 802 F.3d 28, 34-35, 37-38 (1st Cir. 2015) (remanding to determine whether Puerto Rico's robbery statute is a "crime of violence" under Section 2K2.1(a)(2) of the Sentencing Guidelines).

the district court clearly and obviously erred in accepting his plea of guilty to the Section 924(c) count.

3. Petitioner notes (Pet. 4-5) that this Court has granted a petition for a writ of certiorari in Dimaya, supra, to consider whether the definition of a "crime of violence" in 18 U.S.C. 16(b) is unconstitutionally vague. Although Section 16(b) and Section 924(c)(3)(B) contain similar language, the Court's decision in Dimaya will not resolve any question that will affect the outcome of this case. As explained, Hobbs Act robbery qualifies as a "crime of violence" under Section 924(c)(3)(A), the language of which is not at issue in Dimaya. Holding this petition for the decision in Dimaya is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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