

NO:

In the  
Supreme Court of the United States

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NATHANIEL PEMBROOK,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Both issues raised in this petition are likely to be affected by pending cases already argued before this Court:

- (1) **Did the warrantless collection of cell-site information used against the defendant at trial violate his rights under the Fourth Amendment?**

This Court's pending decision in *Carpenter v. United States*, Case No. 16-402, is likely to affect the resolution of this issue.

- (2) **Is 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), so that conspiracy to commit Hobbs Act robbery is no longer a crime of violence under that provision?**

This Court's pending decision *Sessions v. Dimaya*, Case No. 15-1498, is likely to affect the resolution of this issue.

## **PARTIES TO THE PROCEEDINGS**

There are no parties to the proceeding other than those named in the caption of the case.

## TABLE OF CONTENTS

|                                                                                                                                                                                                              |     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| QUESTIONS PRESENTED FOR REVIEW .....                                                                                                                                                                         | i   |
| PARTIES TO THE PROCEEDINGS.....                                                                                                                                                                              | ii  |
| TABLE OF AUTHORITIES.....                                                                                                                                                                                    | iv  |
| PETITION FOR WRIT OF CERTIORARI .....                                                                                                                                                                        | 1   |
| OPINIONS BELOW .....                                                                                                                                                                                         | 1   |
| STATEMENT OF JURISDICTION.....                                                                                                                                                                               | 2   |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....                                                                                                                                                       | 2   |
| INTRODUCTION.....                                                                                                                                                                                            | 3   |
| STATEMENT OF THE CASE .....                                                                                                                                                                                  | 4   |
| REASONS FOR GRANTING THE WRIT.....                                                                                                                                                                           | 6   |
| I. Remand to the Sixth Circuit is appropriate if this Court rules in <i>United States v. Carpenter</i> that the warrantless collection of cell-site location information violates the Fourth Amendment. .... | 6   |
| II. This case provides an opportunity to review whether conspiracy to commit Hobbs Act robbery is a violent felony under § 924(c) in light of <i>Johnson v. United States</i> . ....                         | 7   |
| A. If this Court rules in favor of the respondent in <i>Sessions v. Dimaya</i> , it will demand revisiting prevailing Sixth Circuit law on the vagueness of the residual clause in § 924(c). ....            | 7   |
| B. Without § 924(c)'s residual clause, Hobbs Act conspiracy does not qualify as a crime of violence under § 924(c).....                                                                                      | 8   |
| CONCLUSION .....                                                                                                                                                                                             | 10  |
| A-1 - Sixth Circuit Opinion Affirming Conviction and Judgment.....                                                                                                                                           | 1a  |
| A-2 - District Court Opinion and Order Denying Motion to Suppress Cell Site Location Information.....                                                                                                        | 24a |
| A-3 - District Court Opinion Granting in Part and Denying in Part Defense Post-Trial Motion.....                                                                                                             | 62a |

## TABLE OF AUTHORITIES

### Cases

|                                                                                    |         |
|------------------------------------------------------------------------------------|---------|
| <i>Carpenter v. United States</i> , No. 16-402, 137 S. Ct. 2211 (2017).....        | 5, 6    |
| <i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015) .....                     | 4       |
| <i>Johnson v. United States</i> , 559 U.S. 133 (2010) .....                        | 8, 9    |
| <i>Sessions v. Dimaya</i> , No. 15-1498, 137 S. Ct. 31 (2016).....                 | 5, 7, 8 |
| <i>United States v. Baires-Reyes</i> , 191 F. Supp. 3d 1046 (N.D. Cal. 2016) ..... | 9       |
| <i>United States v. Edmundson</i> , 153 F. Supp. 3d 857 (D. Md. 2015) .....        | 9       |
| <i>United States v. Pembroke</i> , 876 F.3d at 812 (6th Cir. 2017) .....           | 8       |
| <i>United States v. Ransfer</i> , 749 F.3d 914 (11th Cir. 2014) .....              | 9       |
| <i>United States v. Si</i> , 343 F.3d 1116 (9th Cir. 2003) .....                   | 9       |
| <i>United States v. Taylor</i> , 814 F.3d 340 (6th Cir. 2016) .....                | 5, 7, 8 |

### Statutes

|                          |         |
|--------------------------|---------|
| 18 U.S.C. § 16(b) .....  | 5, 7, 8 |
| 18 U.S.C. § 1951 .....   | 3, 4, 9 |
| 18 U.S.C. § 371 .....    | 9       |
| 18 U.S.C. § 922(g) ..... | 4       |
| 18 U.S.C. § 924(c) ..... | passim  |
| 28 U.S.C. § 1254 .....   | 2       |
| FSA § 784.03(1) .....    | 9       |

## Other Authorities

Transcript of Oral Argument, *Carpenter v. United States* (No. 16-402 Nov. 29, 2017)

.....7

Transcript of Oral Argument, *Sessions v. Dimaya* (No. 15-1498 Oct. 2, 2017) .....7

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**PETITION FOR WRIT OF CERTIORARI**

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Nathaniel Pembroke respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

**OPINIONS BELOW**

The decision of the United States Court of Appeals for the Sixth Circuit is reported at 876 F.3d 812 (6th Cir. 2017) and is reprinted in the appendix at 1a. The opinion by the district court regarding the cell site location information is in the appendix at 24a. The opinion by the district court regarding the definition of violence in 18 U.S.C. § 924(c) is in the appendix at 62a.

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the court of appeals affirming Pembroke's conviction and sentence was entered on November 15, 2017. Pembroke sought and obtained an extension of time to file this petition until Saturday, April 14, 2018, which pursuant to Supreme Court Rule 30.1 is extended to Monday, April 16, 2018. This petition is timely filed pursuant to Supreme Court Rule 13.1.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides, in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

18 U.S.C. § 924(c) sets forth mandatory minimum sentences for anyone who possesses a firearm, "during and in relation to any crime of violence or drug trafficking crime," and defines "crime of violence" as follows:

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that 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)(A)–(B).

18 U.S.C. § 1951 sets forth the offense commonly referred to as “Hobbs Act robbery.” It prohibits, in pertinent part, the following:

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

18 U.S.C. § 1951(a)(1)–(2).

## INTRODUCTION

Two cases expected to be resolved this term before this Court—*Carpenter v. United States* (16-402) and *Sessions v. Dimaya* (15-1498)—may provide Nathaniel Pembroke relief from the sentence of 33 years’ incarceration he received in this case. If the outcome in those cases is favorable to Pembroke’s position on the two issues raised in this petition, this Court should grant this petition, vacate the opinion of the Sixth Circuit, and remand for further proceedings.

## STATEMENT OF THE CASE

1. This case centers on two robberies that occurred in 2014. The government tried Pembroke for the robberies with three alleged co-conspirators. A jury convicted Pembroke of one count of Hobbs Act robbery, 18 U.S.C. § 1951(a), one count of conspiracy to interfere with commerce by robbery, 18 U.S.C. § 1951(a), one count of possession of a firearm by a felon, 18 U.S.C. § 922(g), and two separate counts of brandishing a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c). On May 3, 2016, the district court sentenced Pembroke to a total term of imprisonment of 33 years.

2. The government's case prominently featured the use of cell-site location information obtained without a warrant. Pembroke challenged the warrantless collection of this information as a violation of the Fourth Amendment. But the district court refused to suppress this evidence on the grounds that, at the time officers collected the information, no Supreme Court precedent established that obtaining cell-site data was a search within the meaning of the Fourth Amendment. Appendix 24a–61a. Prosecutors used this location information as evidence that Pembroke and his co-defendants travelled together to the locations of the robberies.

3. After the trial, the district court addressed whether § 924(c)(3)(B) is unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). If § 924(c)(3)(B) is stricken, then conspiracy to commit Hobbs Act robbery cannot constitute a predicate crime of violence for purposes of applying the mandatory

minimum sentences under § 924(c). The district court rejected this argument under governing Sixth Circuit law. Appendix at 62a–64a. The court thus applied the mandatory minimum for a second § 924(c) count of 25 years, which in combination with a mandatory sentence of 7 years on the other § 924(c) count, and a 12-month sentence on the remaining counts, resulted in a sentence of 33 years’ incarceration.

4. Pembroke raised the two issues in this petition in his direct appeal to the Sixth Circuit, and the Sixth Circuit affirmed Pembroke’s conviction and sentence. Appendix at 1a–23a.

5. In regard to the warrantless collection of cell-site information, the Sixth Circuit acknowledged that this Court granted certiorari in *Carpenter v. United States*, No. 16-402, 137 S. Ct. 2211 (2017), but upheld the district court’s ruling that the good-faith exception applies to officers’ collection of this information in this case. Appendix at 11a–13a. Concerning the question about the vagueness of § 924(c)(3)(B), the Sixth Circuit rejected Pembroke’s challenge to § 924(c)(3)(B) as foreclosed by current Sixth Circuit precedent, *United States v. Taylor*, 814 F.3d 340, 376–79 (6th Cir. 2016). The Sixth Circuit recognized, however, that Pembroke preserved this claim “on the possibility that the case of *Sessions v. Dimaya*, No. 15-1498, 137 S. Ct. 31 (2016), pending in the Supreme Court on the question of whether 18 U.S.C. § 16(b) is unconstitutionally vague per *Johnson*, will result in [his] favor.” Appendix at 23a.

## REASONS FOR GRANTING THE WRIT

- I. Remand to the Sixth Circuit is appropriate if this Court rules in *United States v. Carpenter* that the warrantless collection of cell-site location information violates the Fourth Amendment.

The government's case-in-chief against Pembroke and his co-defendants prominently featured cell-site location information collected without a warrant. The constitutionality of the warrantless collection of this type of cell-site location information is an issue currently pending before this Court in *Carpenter v. United States*, Case No. 16-402, which was argued on November 29, 2017.

If *Carpenter* recognizes Fourth Amendment protection for cell-site information, this Court should grant certiorari, vacate the Sixth Circuit decision in this case, and remand with instructions that the Sixth Circuit re-evaluate its decision. In resolving this case, the Sixth Circuit relied on the district court's holding that there was a good faith basis for the agents not to seek a search warrant. Appendix at 11a–13a. The district court did not rely on any testimony from the agents. Instead, the district court relied on the current legal landscape of decisions from this Court. Appendix at 47a–54a. That legal landscape will be significantly altered should this Court decide *Carpenter* in favor of the petitioner in that case.

To be sure, the Sixth Circuit suggested that the good-faith exception would apply regardless of the outcome in *Carpenter* because the law at the time was not clearly established. Appendix at 12a n.14. But as discussed at oral argument before

this Court in *Carpenter*, the best approach, if this Court rules in favor of the petitioner in *Carpenter*, is to remand for a re-evaluation of the good-faith exception in light of the new rule. Transcript of Oral Argument at 90–91, *Carpenter v. United States* (No. 16-402 Nov. 29, 2017). That is also the best approach here: to allow the Sixth Circuit to address good-faith in the first instance if *Carpenter* results in a ruling recognizing that cell-site location information is afforded Fourth Amendment protections.

**II. This case provides an opportunity to review whether conspiracy to commit Hobbs Act robbery is a violent felony under § 924(c) in light of *Johnson v. United States*.**

**A. If this Court rules in favor of the respondent in *Sessions v. Dimaya*, it will demand revisiting prevailing Sixth Circuit law on the vagueness of the residual clause in § 924(c).**

As raised at oral argument before this Court in *Sessions v. Dimaya* (15-1498), on January 17, 2017, 18 U.S.C. § 16(b) and 18 U.S.C. § 924(c)(3)(B) are counterparts. Transcript of Oral Argument at 58, *Sessions v. Dimaya* (No. 15-1498 Oct. 2, 2017). Indeed, the two provisions are materially identical, and thus their constitutionality should rise or fall together. If *Dimaya* is decided in favor of the respondent, this Court thus should grant this petition, vacate the Sixth Circuit decision, and remand with instructions to re-evaluate the decision.

The Sixth Circuit explicitly noted that this Court's ruling in *Dimaya* may require it to revisit its decision, remarking as follows:

The problem for the defendants is that we have, since *Johnson*, held that § 924(c)(3)(B) is not vague (i.e., it is valid), see *United States v. Taylor*, 814 F.3d 340, 376–79 (6th Cir. 2016). But the defendants preserve this

claim on the possibility that the case of *Sessions v. Dimaya*, 137 S. Ct. 31, 195 L. Ed. 2d 902 (2016), pending in the Supreme Court on the question of whether 18 U.S.C. § 16(b) is unconstitutionally vague per *Johnson*, will result in their favor. Their theory, which they say was raised at oral argument in *Dimaya* (Jan. 17, 2017), is that § 16(b) and § 924(c)(3)(B) are materially identical, so if one is vague then the other must be also.

Were the defendants correct that § 924(c)(3)(B) is invalid and the conspiracy (and Hobbs Act robbery as well, Pembroke claims) is not a crime of violence, such that the § 924(c) sentencing minimum does not apply, they would be entitled to resentencing. But that is not correct under our presently prevailing law. *Taylor*, 814 F.3d at 376–79.

Appendix at 23a; *United States v. Pembroke*, 876 F.3d at 812, 830–31 (6th Cir. 2017).

**B. Without § 924(c)’s residual clause, Hobbs Act conspiracy does not qualify as a crime of violence under § 924(c).**

If § 924(c)(3)(B)’s residual clause is invalid, Pembroke’s predicate offense is no longer a “crime of violence” under § 924(c). Without the residual clause, to qualify as a “crime of violence,” a felony offense must have “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). This clause is nearly identical to the force clause of the Armed Career Criminal Act (ACCA) addressed in *Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson 2010*).

In *Johnson 2010*, the Court held that a Florida conviction for felony battery could not qualify as an ACCA predicate under the force clause. The Florida statute defined battery as the actual and intentional touching or striking of another person against the will of the other, or the intentional causing of harm to another person.

FSA § 784.03(1). The Court reasoned that the phrase “physical force,” as used in ACCA, required “*violent* force—that is, force capable of causing physical pain or injury to another person.” *Johnson 2010*, 559 U.S. at 140. Because the Florida battery statute could be violated by the merest touching, a conviction for violating it cannot be an ACCA predicate under the force clause.

Conspiracy to commit Hobbs Act robbery is not a crime of violence as defined by the force clause. In order to prove a Hobbs Act conspiracy under 18 U.S.C. § 1951(a), the government must prove that two or more people agreed to commit an offense described in the Hobbs Act, the defendant knew the conspiratorial goal, and the defendant voluntarily participated in attempting to further that goal. *See United States v. Ransfer*, 749 F.3d 914, 930 (11th Cir. 2014); *United States v. Si*, 343 F.3d 1116, 1124 (9th Cir. 2003). In contrast to “the general conspiracy statute, 18 U.S.C. § 371—where the essential elements include a requirement that the conspirators ‘do any act to effect the object of the conspiracy’—the statutory definition of Hobbs Act Conspiracy does not expressly require as an element the commission of an overt act.” *United States v. Edmundson*, 153 F. Supp. 3d 857, 859 (D. Md. 2015). In fact, no element of the statute, requires “the use, attempted use, or threatened use of force by a conspirator.” *United States v. Baires-Reyes*, 191 F. Supp. 3d 1046, 1049 (N.D. Cal. 2016). For that reason, conspiracy to commit Hobbs Act robbery does not fall within the force clause of § 924(c). If this offense is not a crime of violence, then Pembroke

deserves re-sentencing without the 25-year mandatory minimum that ensued from his conviction of a second offense under § 924(c).

### CONCLUSION

For the foregoing reasons, Petitioner Nathaniel Pembroke prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER

By:

A handwritten signature in dark ink, appearing to read "B.C. Martin", written over a horizontal line.

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Detroit, Michigan  
April 16, 2018