No. 20-294

In the Supreme Court of the United States

LAMONT KORTEZ GAINES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
DAVID P. BURNS
Acting Assistant Attorney General
DANIEL N. LERMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether sufficient evidence supported petitioner's conviction for carjacking, in violation of 18 U.S.C. 2119.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rules:

Statutes and rules—Continued: Page

In the Supreme Court of the United States

No. 20-294

LAMONT KORTEZ GAINES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the Federal Reporter but is reprinted at 815 Fed. Appx. 709.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2020. The petition for a writ of certiorari was filed on September 3, 2020. 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 Eastern District of Virginia, petitioner was convicted on one count of conspiring to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); three counts of robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); one count of carjacking, in violation

of 18 U.S.C. 2119; four counts of using, carrying, and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A); and three counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 11a-13a. He was sentenced to 356 months of imprisonment, to be followed by five years of supervised release. *Id.* at 15a-17a. The court of appeals affirmed. *Id.* at 1a-10a.

1. In March 2017, Muhammad Kurshid saw a man attempting to open one of the doors to Kurshid's car while it was parked at an apartment complex in Alexandria, Virginia. Pet. App. 2a. As Kurshid approached his car, a second, shorter man approached him, pointed a gun at him, and told him to put his hands up. *Ibid.* The first (taller) man took Kurshid's wallet, cell phone, and car keys from his pocket. *Id.* at 2a-3a. The two men then got into Kurshid's car and drove away. *Id.* at 3a.

Kurshid called 911 a few minutes later. Pet. App. 3a. He described the taller carjacker as approximately six feet tall, 150 pounds, clean shaven, and wearing a black hoodie, tan jeans, and black shoes. *Ibid.* He described the shorter carjacker as 5'8" tall, 200 pounds, clean shaven, and wearing a black hoodie, blue jeans, and black shoes. Gov't C.A. Br. 12-13.

Security-camera footage recorded 20 minutes after the carjacking showed petitioner and another man, Desmar Gayles, exiting Kurshid's stolen car near a food market in Washington, D.C. Gov't C.A. Br. 4; Pet. App. 3a. The footage showed petitioner driving the car and that he was wearing a black hoodie, black jeans, and pink shoes. Pet. App. 3a. Gayles, who was shorter and stockier than petitioner, was also wearing a black hoodie. Gov't C.A. Br. 15. Petitioner and Gayles then met up with Anton Harris and Andrew Duncan outside

the market and walked back to Kurshid's car together. *Ibid.*

One month later, petitioner, Gayles, Harris, and Duncan were arrested in connection with a string of armed robberies and carjackings in the Washington, D.C. area, including the theft of Kurshid's car. Pet. App. 3a. A federal grand jury in the Eastern District of Virginia charged petitioner and his three codefendants in a 41-count indictment. *Ibid.* The indictment charged petitioner with 18 counts, including one count of conspiring to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a) (Count 1); five counts of robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a) (Counts 9-10 and 12-14); one count of carjacking, in violation of 18 U.S.C. 2119 (Count 15); six counts of using, carrying, and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) (Counts 23-24 and 26-29); and five counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) (Counts 37-41). Indictment 1-16, 24-25, 27-30, 38-39, 41-44, 52-56. For five of the Section 924(c) counts (Counts 23-24 and 26-28), the indictment specified the Hobbs Act robbery offenses (the ones charged in Counts 9-10 and 12-14, respectively) as the underlying crimes of violence. Indictment 38-39, 41-43.[1] For the sixth Section 924(c) count

---

[1] Count 9 of the indictment alleged that petitioner stole $2000 from a Red Roof Inn in Alexandria, Virginia, by means of actual and threatened force; Count 10 alleged that petitioner stole $180 from a Domino's Pizza store in Alexandria, Virginia, by means of actual and threatened force; Count 12 alleged that petitioner stole $2168 from the Advance America Cash Advance store in Alexandria, Virginia, by means of actual and threatened force; Count 13 alleged that petitioner stole $110 and 230 packs of cigarettes from a 7-Eleven store in Arlington, Virginia, by means of actual and threatened force; and

(Count 29), the indictment specified the carjacking offense charged in Count 15 involving Kurshid's vehicle as the underlying crime of violence. Indictment 44.

2. Petitioner proceeded to trial. Pet. App. 4a. Regarding the carjacking, Kurshid testified that the taller man he had described on the 911 call—who the government alleged was petitioner—was the man who had taken his car keys, phone, and wallet. *Ibid.* He further testified that the taller carjacker had "[j]ust [a] little bit" of facial hair, but not a "heavy beard." *Ibid.* (brackets in original). And he testified that the taller man was wearing a black hoodie, tan jeans, and black shoes. *Ibid.* When Kurshid was asked about the inconsistency between his testimony at trial that the man had facial hair and his statement on the 911 call that the man was clean shaven, Kurshid explained that he was scared during the encounter and that his attention was focused on the gun, not the carjackers' features. *Ibid.*

The government's evidence against petitioner included a text message that Harris had sent approximately 30 minutes before the carjacking, telling petitioner: "Make sure you keep your head low broski." Pet. App. 4a (citation omitted). Petitioner had responded, "I[']m hip." *Ibid.* (citation omitted; brackets in original). In addition, Federal Bureau of Investigation (FBI) Special Agent James Berni testified about historical call data obtained from cell phones belonging to petitioner and his confederates. *Ibid.* The cell phone placed Duncan, Gayles, and Harris at or near the apartment building when Kurshid's car was stolen. *Ibid.*

Count 14 alleged that petitioner stole $200 and 35 cartons of cigarettes from another 7-Eleven store in Arlington, Virginia, by means of actual and threatened force. Indictment 24-25, 27-29.

And the cell phone data showed Gayles's phone traveling toward Washington, D.C. just after the carjacking. *Id.* at 5a. The FBI was unable to retrieve call data from petitioner's phone, but Special Agent Berni testified that the lack of data could mean that petitioner had shut off his phone or was not using it at the time of the carjacking. *Id.* at 4a-5a. The government also introduced the surveillance video showing petitioner and Gayles exiting Kurshid's stolen car outside the food market in Washington about 20 minutes after the robbery. Gov't C.A. Br. 15.

At the close of the government's case-in-chief, petitioner moved for judgment of acquittal on all counts under Federal Rule of Criminal Procedure 29. Pet. App. 5a; C.A. App. 1595-1603. The district court stated that petitioner's "strongest position" pertained to Counts 15 and 29, relating to the theft of Kurshid's car, but the court denied the motion on the ground that "the evidence [wa]s sufficient to send the matter to the jury" because a reasonable trier of fact "could find beyond a reasonable doubt [petitioner's] guilt." C.A. App. 1616. The court stated that it would reconsider the sufficiency of the evidence related to those counts if petitioner renewed his motion after an unfavorable verdict. *Id.* at 1617; Pet. App. 5a-6a.

Petitioner testified at trial. Pet. App. 6a. He claimed that he was in Kurshid's stolen car shortly after the carjacking because Gayles had driven the car past him in Washington as he was walking to a friend's house there. *Ibid.* According to petitioner, he then drove the car because Gayles did not know how to get to the friend's house. *Ibid.* He stated that he and Gayles had decided to stop at the market, and that when they returned to

the car, it would not start. *Ibid.* Petitioner further testified that he did not know that the car was stolen, and that his text-message exchange with Harris just before the carjacking referred to dealing marijuana, not the carjacking. *Ibid.*

At the close of evidence, petitioner renewed his Rule 29 motion for judgment of acquittal. Pet. App. 6a; C.A. App. 1684. The district court denied the motion "for the reasons" it had denied the prior motion. C.A. App. 1684. The court again stated that, "if there is an unfavorable verdict for [petitioner]," he could renew his motion, and reminded defense counsel that the court had "even suggested to you which [counts] I thought you would come close on." *Ibid.*

When the government addressed Kurshid's carjacking in its closing statement, the government urged the jury to place little weight on Kurshid's description of petitioner to the 911 operator (which differed in some respects from petitioner's appearance in the surveillance video), because petitioner had been scared and had not given his full attention to the carjackers' features, and instead to focus on the fact that the surveillance video showed petitioner driving the stolen car in Washington shortly after the carjacking. Pet. App. 5a.

The jury found petitioner guilty on one count of conspiring to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a) (Count 1); three counts of robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a) (Counts 12-14); one count of carjacking, in violation of 18 U.S.C. 2119 (Count 15); four counts of using, carrying, and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) (Counts 26-29); and three counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) (Counts 39-41). Pet. App.

11a-13a. The jury acquitted petitioner on Counts 9, 10, 23, 24, 37, and 38. *Id.* at 14a. Petitioner did not renew his Rule 29 motion for judgment of acquittal after the verdict. See *id.* at 6a.

At sentencing, petitioner argued for the first time that Hobbs Act robbery does not qualify as a "crime of violence" under Section 924(c)(3). C.A. App. 112-115. While petitioner's sentencing was pending, however, the court of appeals held in *United States* v. *Mathis*, 932 F.3d 242, 266 (4th Cir.), cert. denied, 140 S. Ct. 639, and 140 S. Ct. 640 (2019), that Hobbs Act robbery constitutes a "crime of violence" under 18 U.S.C. 924(c)(3)(A). See Gov't C.A. Br. 19. Each of petitioner's four Section 924(c) convictions carried a statutory minimum sentence of 84 months of imprisonment, to be served consecutively to each other and to the sentences on the other counts. See 18 U.S.C. 924(c)(1)(A)(ii) and (D)(ii). The district court accordingly sentenced petitioner to 336 months of imprisonment for those counts, and 20 months for each of the other eight counts of conviction, to be served concurrently with each other, for a total term of imprisonment of 356 months, to be followed by five years of supervised release. Pet. App. 15a-17a.

3. The court of appeals affirmed. Pet. App. 1a-10a.

Petitioner primarily argued on appeal that the evidence was insufficient to sustain his conviction for carjacking. Pet. C.A. Br. 10-15. The court of appeals rejected that claim, explaining that, on review, it "must view the evidence in the light most favorable to the government, and * * * must affirm a guilty verdict if it is supported by 'substantial evidence.'" Pet. App. 7a (citation omitted). "'Substantial evidence,'" the court continued, "means 'evidence that a reasonable finder of fact

could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.'" *Ibid.* (citation omitted).

The court of appeals rejected petitioner's argument comparing his case to *United States* v. *Bonner*, 648 F.3d 209 (4th Cir. 2011), in which the court had affirmed a district court's conclusion that the evidence was insufficient to support a guilty verdict. Pet. App. 8a. The court explained that "the identity evidence here is stronger than in *Bonner* because it includes a physical description of the robbers by the victim and video of [petitioner] driving the stolen vehicle." *Id.* at 9a (emphasis added). The court observed that "Kurshid's description in the 911 call of one of his assailants was mostly consistent with that shown in the surveillance video, even if not an exact match," and "the jury could have resolved any discrepancies by accepting Kurshid's explanation for them." *Ibid.* And the court found that, when Kurshid's description of the carjacker was "considered in conjunction with the video of [petitioner] driving the vehicle twenty minutes after it was stolen and the evidence from the historical call detail analysis," the sum of the evidence was "more than adequate to support [petitioner's] conviction" for carjacking. *Ibid.*

In a footnote in his appellate brief, petitioner stated that he "wishe[d] to preserve for later appeal his argument, first raised in his supplemental sentencing memoranda, that his three robbery convictions should be overturned because Hobbs Act robbery is not a 'crime of violence' for purposes of § 924(c)," notwithstanding the court of appeals' decision in *Mathis*. Pet. C.A. Br. 16 n.6; see *id.* at 5 n.2. The court did not address petitioner's Hobbs Act robbery convictions.

ARGUMENT

Petitioner contends (Pet. 8-14) that the court of appeals erred in failing to apply the so-called "equipoise rule," under which a court will vacate a conviction where the "evidence of guilt and innocence is essentially in equipoise." Pet. 8. That contention does not warrant this Court's review. The court of appeals properly applied the settled standard for evaluating sufficiency-of-the-evidence claims from *Jackson* v. *Virginia*, 443 U.S. 307 (1979), to the facts of this case. In addition, the circuit conflict that petitioner alleges (Pet. 9-10) is illusory. Although the Fifth Circuit has wisely rejected the equipoise rule as a rule of thumb for applying the *Jackson* standard, and some other circuits treat the rule as a useful guidepost, the circuits agree that *Jackson* supplies the ultimate standard for reviewing sufficiency claims. And in any event, this case would be an unsuitable vehicle for considering the "equipoise rule," because neither the court of appeals nor the district court found that the evidence here was in equipoise.

Petitioner additionally contends (Pet. 14-22) that Hobbs Act robbery does not constitute a "crime of violence" under 18 U.S.C. 924(c)(3). That contention likewise does not warrant this Court's review. Every court of appeals to address the issue has correctly recognized that Hobbs Act robbery constitutes a "crime of violence" under Section 924(c)(3)(A).

1. This Court should deny the petition for a writ of certiorari on the question whether a court should use the "equipoise rule" to evaluate a challenge to the sufficiency of the evidence in a criminal case. The court of appeals applied the correct legal standard; the disagreement among the circuit courts over the utility of the equipoise rule lacks practical significance; and this case

is an unsuitable vehicle for addressing that disagreement. This Court denied a writ of certiorari on the same issue in *Hoffman* v. *United States*, 139 S. Ct. 2615 (2019), and *Vargas-Ocampo* v. *United States*, 574 U.S. 864 (2014), and the same result is appropriate here.

a. The court of appeals applied the correct legal standard in rejecting petitioner's challenge to the sufficiency of the evidence for his conviction for carjacking. This Court held in *Jackson* that a court reviewing the sufficiency of the evidence supporting a criminal conviction must affirm when, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319 (emphasis omitted). The Court has since explained that, under *Jackson*, "the mere existence of sufficient evidence to convict [is] determinative." *Schlup* v. *Delo*, 513 U.S. 298, 330 (1995). "This deferential standard does not permit * * * fine-grained factual parsing" of the record supporting conviction. *Coleman* v. *Johnson*, 566 U.S. 650, 655 (2012) (per curiam).

The court of appeals correctly applied the *Jackson* standard to the circumstances of this case. The court explained that the evidence was "more than adequate to support [petitioner's] conviction" for carjacking, because the "video of [petitioner] driving the vehicle twenty minutes after it was stolen directly links [petitioner] to the crime," and Kurshid's physical description of petitioner on the 911 call "was mostly consistent with that shown in the surveillance video, even if not an exact match." Pet. App. 9a.

b. Contrary to petitioners' contention (Pet. 10-13), the court of appeals did not err by failing to apply the equipoise rule instead of, or in addition to, the standard

this Court articulated in *Jackson*. The equipoise rule posits that a court "must reverse a conviction if the evidence construed in favor of the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged." *United States* v. *Vargas-Ocampo*, 747 F.3d 299, 301-302 (5th Cir.) (en banc) (rejecting the rule) (citation and internal quotation marks omitted), cert. denied, 574 U.S. 864 (2014). Some courts applying *Jackson* have articulated that approach in attempting to translate the beyond-a-reasonable-doubt requirement into a functional standard. See, *e.g.*, *United States* v. *Glenn*, 312 F.3d 58, 70 (2d Cir. 2002).

The equipoise rule is not necessarily inconsistent with *Jackson* so long as a reviewing court first construes all conflicting inferences "in the light most favorable to the Government," before evaluating whether the sum totals of the prosecution-favoring inferences and the defendant-favoring inferences are "in equipoise." *United States* v. *Christian*, 452 Fed. Appx. 283, 286 n.2 (4th Cir. 2011) (per curiam). In addition, any application of the equipoise rule must reflect that the evidence is not insufficient merely because the jury might have found support in the record for either conviction or acquittal. See *United States* v. *Hunt*, 526 F.3d 739, 746 (11th Cir. 2008) (explaining that evidence is not insufficient simply because "the jury could have reasonably reached either conclusion based on the evidence"). Rather, "if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make." *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972) (Friendly, J.) (citation omitted).

Although the equipoise rule need not invariably lead courts astray, the Fifth Circuit wisely abandoned the equipoise rule in its en banc decision in *Vargas-Ocampo*. See 747 F.3d at 301. The court explained three reasons why the equipoise rule "is not helpful in applying the Supreme Court's standard prescribed in *Jackson*," and is in "tension, in practical if not theoretical terms, with the *Jackson* standard." *Id.* at 301-302. First, the rule is difficult to apply: "[N]o court opinion has explained how a court determines that evidence * * * is 'in equipoise.' Is it a matter of counting inferences or of determining qualitatively whether inferences equally support a theory of guilt or innocence?" *Id.* at 301. Second, the "'type of fine-grained factual parsing' necessary to determine that the evidence * * * was in 'equipoise'" inappropriately invites a court of appeals "to usurp the jury's function." *Ibid.* (quoting *Coleman*, 566 U.S. at 655). Third, application of the equipoise rule may cause reviewing courts to overlook *Jackson*'s requirement to discount any defendant-favoring inferences that conflict with rational inferences favoring the prosecution. *Ibid.* In short, the equipoise rule can create confusion in applying the *Jackson* standard and does not offer adequate countervailing benefits.

c. Petitioner errs in contending (Pet. 9-10) that a conflict of authority among the courts of appeals about the equipoise rule merits this Court's review. As a threshold matter, petitioner is incorrect (Pet. 10) that the Fourth Circuit has "effectively joined the Third and Fifth Circuits" in rejecting the equipoise rule. As noted above (p. 11, *supra*), the Fourth Circuit has suggested that reversal of a conviction may be required where "the evidence is in equipoise after viewing the evidence in the light most favorable to the Government," *Christian*,

452 Fed. Appx. at 286 n.2—the very rule advocated by petitioner. The court of appeals did not reject that interpretation in the unpublished and nonprecedential decision below; indeed, the court did not address the equipoise rule.

Moreover, while several circuits have applied or favorably cited the equipoise rule as one method for assessing the sufficiency of the evidence to sustain a criminal conviction, all courts of appeals agree that the *Jackson* standard ultimately governs sufficiency claims. See, *e.g.*, *United States* v. *Ridolfi*, 768 F.3d 57, 61 (1st Cir. 2014); *United States* v. *Cox*, 871 F.3d 479, 490 (6th Cir. 2017), cert. denied, 138 S. Ct. 754 (2018); *United States* v. *Edwards*, 869 F.3d 490, 503 (7th Cir. 2017); *United States* v. *Shelabarger*, 770 F.3d 714, 716 (8th Cir. 2014); *United States* v. *Lovern*, 590 F.3d 1095, 1107 (10th Cir. 2009) (Gorsuch, J.); *United States* v. *Miranda*, 666 F.3d 1280, 1282 (11th Cir.) (per curiam), cert. denied, 566 U.S. 1002 (2012); *United States* v. *Sitzmann*, 893 F.3d 811, 821 (D.C. Cir. 2018) (per curiam), cert. denied, 140 S. Ct. 1551 (2020). Mere disagreement about the utility of the equipoise rule for implementing *Jackson* is not an issue of sufficient practical significance to warrant this Court's consideration. "In truth," "very few cases will be in evidentiary equipoise." *Schaffer* v. *Weast*, 546 U.S. 49, 58 (2005). And petitioner has not demonstrated that, in those few cases, the equipoise rule would produce a different outcome than the unelaborated *Jackson* standard as articulated by this Court.

d. Even if the equipoise rule merited this Court's review, this case would be a poor vehicle for considering the issue. As noted, the court of appeals did not reference the equipoise rule in the decision below, and it did not conclude that the evidence of petitioner's guilt for

carjacking was in equipoise with the evidence of his innocence. To the contrary, the court determined that the evidence was "more than adequate to support [petitioner's] conviction." Pet. App. 9a. That factbound determination was correct. The evidence at trial showed that petitioner's co-conspirator had sent him a text message 30 minutes before the carjacking telling him to keep his "head low"; petitioner was captured on surveillance video driving Kurshid's car 20 minutes after it had been stolen; and Kurshid's description of one of the two carjackers—tall and thin, and wearing a black hoodie—was consistent with the surveillance footage of petitioner in key respects, though not a perfect match. See *id.* at 3a-4a. Considered together, the evidence was not in equipoise but instead amply supported a rational conclusion that petitioner committed the carjacking. This case therefore does not implicate the question whether a conviction can be sustained where the evidence is in equipoise.

Petitioner nevertheless contends (Pet. 13) that this case is a good vehicle for resolving the equipoise issue because the district court's "repeated statements about the frailty of the evidence on the carjacking count strongly suggest[] that the court believed that the evidence of guilt and innocence was about the same." But petitioner did not argue in his Rule 29 motion that the evidence was in equipoise. Rather, he argued that Kurshid's description of the carjackers was "wholly inconsistent" with the surveillance video, and that the evidence could not establish guilt beyond a "reasonable doubt." C.A. App. 1597-1598. And the district court did not find that the evidence was in equipoise in the course of denying petitioner's motion; the court denied the motion because it determined that "a reasonable trier of

fact" could "find beyond a reasonable doubt [petitioner's] guilt." *Id.* at 1616. The court's statement that petitioner could renew his Rule 29 motion if he were to receive an unfavorable verdict does not demonstrate that the court believed that the evidence was in equipoise—much less that it believed that it was required to deny a Rule 29 motion if the evidence was in equipoise.

2. Petitioner additionally contends that this Court should grant a writ of certiorari to consider whether Hobbs Act robbery constitutes a "crime of violence" under 18 U.S.C. 924(c)(3)(A). That question likewise does not warrant further review.

a. 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). This Court held in *United States* v. *Davis*, 139 S. Ct. 2319 (2019), that Section 924(c)(3)(B) is unconstitutionally vague. *Id.* at 2336.

Hobbs Act robbery requires the "unlawful taking or obtaining of personal property" from another "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). For the reasons stated on pages 6 to 12 of the government's brief in opposition to the petition for a writ of certiorari in *Steward* v. *United States*, No. 19-8043 (May 21, 2020), Hobbs Act robbery qualifies as a crime of violence under 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," 18 U.S.C. 924(c)(3)(A).[2]

Petitioner contends (Pet. 17-20) that Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A) because Hobbs Act robbery does not require a defendant to use or threaten to use "violent" force and may be accomplished by threats to harm "intangible property." Those contentions are meritless for the reasons explained at pages 8 to 12 of the government's brief in opposition in *Steward*, *supra* (No. 19-8043). Every court of appeals to have considered the question, including the court below, has recognized that Section 924(c)(3)(A) encompasses Hobbs Act robbery. See *id.* at 7; see also, *e.g.*, *United States* v. *Melgar-Cabrera*, 892 F.3d 1053, 1060-1066 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018). This Court has recently and repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on that issue, see Gov't Br. in Opp. at 7-8 & n.1, *Steward*, *supra* (No. 19-8043), including in *Steward*, *supra*, No. 19-8043 (June 29, 2020), and in subsequent cases. See, *e.g.*, *Becker* v. *United States*, 141 S. Ct. 145 (2020); *Terry* v. *United States*, 141 S. Ct. 114 (2020); *Hamilton* v. *United States*, 140 S. Ct. 2754 (2020). The same result is appropriate here.

b. Petitioner acknowledges (Pet. 21) that "[e]very circuit court to have previously considered whether Hobbs Act robbery is a crime of violence under [Section 924(c)(3)(A)] has determined that it is." Petitioner contends, however, that the district court's decision in *United States* v. *Chea*, No. 98-cr-20005, 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019), "was the first case to

---

[2] We have served petitioner with a copy of the government's brief in opposition in *Steward*, which is also available from this Court's online docket.

fully and correctly grapple with this issue," because "fear of injury to property (in particular, intangible property) falls outside the definition of 'crime of violence.'" Pet. 21. That nonprecedential decision does not create a conflict that warrants this Court's review. See Sup. Ct. R. 10; *Camreta* v. *Greene*, 563 U.S. 692, 709 n.7 (2011). And in any event, the district court's decision in *Chea* was abrogated by the Ninth Circuit's subsequent decision in *United States* v. *Dominguez*, 954 F.3d 1251 (2020), which squarely held that Hobbs Act robbery is a crime of violence under Section 924(c)(3)(A).

Petitioner argues (Pet. 22) that "the [defendant] in *Chea* may have the opportunity on appeal to the Ninth Circuit" to present arguments similar to those that he advances here. But the government has moved for summary reversal in the court of appeals in *Chea* based on the court's decision in *Dominguez*. See Gov't Motion for Summ. Reversal, *United States* v. *Chea*, No. 19-10437 (9th Cir. Apr. 9, 2020). The court stayed the appellate proceedings in *Chea* until "final resolution" of *Dominguez*, see Order, *Chea*, *supra* (No. 19-10437) (May 1, 2020), and it subsequently denied a petition for rehearing en banc in *Dominguez*, *supra* (No. 14-10268) (Aug. 24, 2020). Further proceedings in *Chea* are therefore unlikely, and the remote possibility that the court of appeals would revisit the same question on which it recently denied en banc rehearing does not warrant this Court's review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
DAVID P. BURNS
Acting Assistant Attorney General
DANIEL N. LERMAN
Attorney

JANUARY 2021