No. 20-1000

In the Supreme Court of the United States

MONICO DOMINGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner is entitled to appellate relief on his forfeited claim that 18 U.S.C. 924(c)(3)(A)'s definition of "crime of violence" fails to include attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

United States v. *Dominguez*, No. 12-cr-834 (Jan. 28, 2015)

United States Court of Appeals (9th Cir.):

United States v. *Dominguez*, No. 14-10268 (Aug. 24, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 954 F.3d 1251.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2020. A petition for rehearing was denied on August 24, 2020 (Pet. App. 49a-50a). By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on January 21, 2021. 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 Northern District of California, petitioner was convicted of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) (Count 1); Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2 (Count 2); possessing a firearm in furtherance of a crime of violence (the Hobbs Act robbery offenses charged in Counts 1 and 2), in violation of 18 U.S.C. 924(c) and 2 (Count 3); three counts of money laundering, in violation of 18 U.S.C. 1957 (2006 & Supp. III 2009) (Counts 4-6); unlawfully structuring financial transactions to avoid reporting requirements, in violation of 31 U.S.C. 5324(a)(3) and (d)(2) (Count 7); conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) (Count 8); attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2 (Count 9); and possessing a firearm in furtherance of a crime of violence (the Hobbs Act offenses charged in Counts 8 and 9), in violation of 18 U.S.C. 924(c) (Count 10). Pet. App. 6a-7a, 34a. He was sentenced to 384 months and one day of imprisonment, to be followed by three years of supervised release. *Id.* at 36a-38a. The court of appeals reversed the money-laundering conviction in Count 4 but affirmed the remainder of the judgment and did not remand for resentencing. *Id.* at 7a n.1, 8a-9a & n.2, 21a.

1. On August 11, 2011, petitioner and his accomplice Milton Fierro robbed the Garda Cash Logistics armored car warehouse in Santa Rosa, California. Pet. App. 4a. Wearing masks and armed with an AK-47 rifle and a handgun, the men snuck into the warehouse and demanded access to the company's vaults from two guards whom petitioner and Fierro had forced to the

ground at gunpoint and tied up with rope. *Ibid.* Petitioner and Fierro made off with $900,000 in cash and two guns belonging to one of the guards. *Ibid.* The men were not apprehended at the time, and the FBI offered a $100,000 reward for information about the robbery. *Ibid.*

About a year later, petitioner approached a friend (Kevin Jensen) and offered him $100,000 to participate in another armed robbery, this time of a Garda armored car. Pet. App. 4a. Jensen learned about the FBI reward, however, and began working with the FBI as a confidential informant. *Ibid.* On the day of the planned robbery (August 6, 2012), petitioner armed himself with a .357 revolver and drove with Jensen to the Garda warehouse, intending to rob an armored car there. *Ibid.* Aware of the plan, the FBI and local law enforcement staged a fake crime scene near the warehouse to make it difficult for petitioner to reach the robbery target. *Ibid.* Petitioner drove to about a block from the warehouse but then terminated the plan and turned around due to the unusual law enforcement activity nearby. *Id.* at 5a. Petitioner was arrested the next day. *Ibid.*

2. A federal grand jury in the Northern District of California charged petitioner with multiple robbery and firearms offenses, as well as money laundering and structuring crimes. Pet. App. 5a. As relevant here, in connection with the 2011 Garda robbery, petitioner was charged with conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) (Count 1); Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2 (Count 2); and possessing a firearm in furtherance of a crime of violence (the conspiracy to commit Hobbs Act robbery and Hobbs Act robbery charged in Counts 1 and 2), in

violation of 18 U.S.C. 924(c) and 2 (Count 3). In connection with the 2012 attempted robbery, petitioner was charged with conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) (Count 8); attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2 (Count 9); and possessing a firearm in furtherance of a crime of violence (the Hobbs Act conspiracy and attempted Hobbs Act robbery charged in Counts 8 and 9), in violation of 18 U.S.C. 924(c) (Count 10). *Id.* at 7a.

Petitioner proceeded to trial, where a jury convicted him of all charges relevant here. See Pet. App. 6a-7a. The district court sentenced him to 384 months and one day of imprisonment, to be followed by three years of supervised release. *Id.* at 36a-38a.

3. The court of appeals affirmed in relevant part, vacating (with the government's consent) one money-laundering count but affirming the rest of petitioner's convictions. See Pet. App. 1a-21a. As relevant here, petitioner argued for the first time on appeal that his Section 924(c) convictions were infirm, asserting that Hobbs Act robbery, attempted Hobbs Act robbery, and conspiracy to commit Hobbs Act robbery do not qualify as predicate "crime[s] of violence" under 18 U.S.C. 924(c)(3)(A), which defines the term "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." See C.A. Doc. 38 (Nov. 5, 2015). The court noted that the claim was unpreserved, but applied circuit precedent stating that the court is "not limited to plain error review when [it is] presented with a question that is purely one of law and where the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court." Pet. App. 8a (quoting *United States* v. *Begay*, 934 F.3d 1033, 1037

(9th Cir. 2019), holding reh'g in abeyance, No. 14-10080, 2019 WL 7900329 (9th Cir. Dec. 5, 2019)).

The court of appeals explained that it applied "the categorical approach" in determining whether an "alleged predicate crime" qualifies "as a crime of violence," focusing "on the elements of the relevant statutory offense, not on the facts underlying the convictions." Pet. App. 13a. Employing that approach, the court first determined that Hobbs Act robbery is a crime of violence under Section 924(c)(3)(A). *Id.* at 15a-18a. The court observed that "[a]ll of our sister circuits have considered this question too, and have held that Hobbs Act robbery is a crime of violence under the elements clause." *Id.* at 16a.

The court of appeals, in accord with every other circuit that had addressed the question at that time, rejected petitioner's contention that attempted Hobbs Act robbery is not likewise a "crime of violence," which was premised on the assertion that "the 'substantial step' required for an attempt conviction need not be itself violent." Pet. App. 19a; see *id.* at 18a-20a (citing, *inter alia*, *United States* v. *Ingram*, 947 F.3d 1021, 1025-1026 (7th Cir.), cert. denied, 141 S. Ct. 323 (2020); *United States* v. *St. Hubert*, 909 F.3d 335, 351-353 (11th Cir. 2018), cert. denied, 139 S. Ct. 1394 (2019), and 140 S. Ct. 1727 (2020)). "This argument," the court explained, "would have us ignore [petitioner's] specific intention to commit a violent crime, as well as common sense," because a "criminal who specifically intends to use violence, and then takes a substantial step toward that use, has, by definition, attempted a violent crime." *Id.* at 20a. And because it had determined "that each of [petitioner's] § 924(c) convictions is supported by a predicate crime of violence—completed and attempted Hobbs Act

robbery, respectively," the court found it unnecessary to address whether conspiracy to commit Hobbs Act robbery is also a crime of violence under Section 924(c)(3)(A). *Ibid.*

Judge Nguyen concurred in part and dissented in part. Pet. App. 22a-31a. She agreed that Hobbs Act robbery is a crime of violence under Section 924(c)(3)(A) but would have held that attempted Hobbs Act robbery is not. *Id.* at 22a-24a.

ARGUMENT

Petitioner argues (Pet. 13-17) that the court of appeals erred in determining that attempted Hobbs Act robbery is a crime of violence under Section 924(c)(3)(A). He observes (Pet. 11-13) that the Fourth Circuit reached the contrary conclusion in *United States* v. *Taylor*, 979 F.3d 203, 208 (2020), petition for cert. pending, No. 20-1459 (filed Apr. 14, 2021), and contends (Pet. 18-21) that this Court should resolve the circuit conflict. The government agrees that whether attempted Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A) is a recurring issue of substantial importance that warrants this Court's review. This case, however, would be a poor vehicle for that review because petitioner did not raise his claim in the district court, and it is therefore subject to review only for plain error. The Court should instead grant the petition for a writ of certiorari in *Taylor*, *supra* (No. 20-1459), and hold the petition in this case pending the disposition of *Taylor*.

1. The court of appeals correctly recognized that attempted Hobbs Act robbery is a "crime of violence" under 18 U.S.C. 924(c)(3)(A). For the reasons explained on pages 10 to 19 of the government's petition for a writ of certiorari in *Taylor*, *supra* (No. 20-1459), attempted

Hobbs Act robbery "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).* Accordingly, other than the Fourth Circuit, every court of appeals to have considered the question has recognized, like the court of appeals in this case, that attempted Hobbs Act robbery qualifies as a "crime of violence" under Section 924(c)(3)(A). See Pet. App. 18a-20a; *United States* v. *McCoy*, No. 17-3515, 2021 WL 1567745, at *18-*20 (2d Cir. Apr. 22, 2021); *United States* v. *Walker*, 990 F.3d 316, 329 (3d Cir. 2021); *United States* v. *Ingram*, 947 F.3d 1021, 1025-1026 (7th Cir.), cert. denied, 141 S. Ct. 323 (2020); *United States* v. *St. Hubert*, 909 F.3d 335, 351-353 (11th Cir. 2018), cert. denied, 139 S. Ct. 1394 (2019), and 140 S. Ct. 1727 (2020); contra *Taylor*, 979 F.3d at 208.

2. As explained on pages 19 to 24 of the government's petition for a writ of certiorari in *Taylor*, *supra* (No. 20-1459), the Fourth Circuit's decision created a circuit conflict on a recurring issue of substantial importance, and this Court's review is warranted. This case, however, would be a poor vehicle for such review because of the posture in which it arises. This Court should therefore grant the petition in *Taylor* and hold the petition in this case pending the Court's decision in *Taylor*.

When a defendant fails to object to an alleged error in the district court, he may not obtain appellate relief based on that error unless he establishes reversible "plain error" under Federal Rule of Criminal Procedure 52(b). See *Puckett* v. *United States*, 556 U.S. 129, 134-135 (2009). The plain-error inquiry requires that any

* A copy of the government's petition in *Taylor* is being served on petitioner, and the petition is available on this Court's online docket.

error be "clear" or "obvious," *United States* v. *Olano*, 507 U.S. 725, 734 (1993), and not "subject to reasonable dispute," *Puckett*, 556 U.S. at 135. Any such error must also be plain "at the time of appeal." *Johnson* v. *United States*, 520 U.S. 461, 468 (1997); see *Henderson* v. *United States*, 568 U.S. 266, 273, 276 (2013) (concluding that, where "the law is unsettled at the time of error," the plain-error "rule will help [a defendant] only if * * * the law changes in the defendant's favor" and "the change comes after trial but before the appeal is decided").

Petitioner has not attempted to make such a showing, and he could not. At a minimum, the error he asserts is neither "'clear'" nor "'obvious'" given the near-unanimous appellate authority—which was fully unanimous at the time the court of appeals decided this case—recognizing that attempted Hobbs Act robbery is a crime of violence under 18 U.S.C. 924(c)(3)(A). *Olano*, 507 U.S. at 734. This case therefore would not provide an appropriate vehicle for addressing the question presented.

Further complicating this Court's review, the court of appeals declined to apply the standards of plain-error review based on erroneous Ninth Circuit precedent stating that it is "not limited to plain error review when [it is] presented with a question that is purely one of law and where the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court." Pet. App. 8a (citation omitted). That rule, unique to the Ninth Circuit, is inconsistent with this Court's instructions that the "plain error" standard of Rule 52(b) must be applied to forfeited claims and that courts do not have authority to "creat[e] out of whole cloth" exceptions to Rule 52(b). *Johnson*, 520 U.S. at

466. The Ninth Circuit's approach is also contrary to precedent in the other courts of appeals establishing that plain-error review applies to purely legal issues. See, *e.g.*, *United States* v. *Fuertes*, 805 F.3d 485, 497 (4th Cir. 2015), cert. denied, 136 S. Ct. 1220 (2016); *United States* v. *Angel*, 355 F.3d 462, 469 (6th Cir.), cert. denied, 543 U.S. 867 (2004); cf. *United States* v. *Yijun Zhou*, 838 F.3d 1007, 1016-1017 (9th Cir. 2016) (Graber, J., concurring) (explaining that the Ninth Circuit's line of "cases permitting an exception for 'pure questions of law' is contrary to Rule 52(b), Supreme Court precedent, and the practice of our sister circuits").

The appropriate standard of review is a question antecedent to whether attempted Hobbs Act robbery is a crime of violence under Section 924(c)(3)(A), making this case a poor vehicle for further review of the question presented. See C.A. Doc. 47, at 7-10 (Jan. 22, 2016) (government brief asserting that plain-error review applies to this claim). The Court should instead grant the petition in *Taylor*, which clearly presents the question whether attempted Hobbs Act robbery is a crime of violence. The Court should then hold the petition in this case pending *Taylor* and dispose of it as appropriate in light of the Court's disposition of *Taylor*. That procedure could permit petitioner to benefit from a defendant-favorable ruling in *Taylor* without complicating further review of the correct classification of attempted Hobbs Act robbery.

CONCLUSION

The Court should hold this petition pending its disposition of the petition for a writ of certiorari in *Taylor*.

Respectfully submitted.

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