No. _____

In the Supreme Court of the United States

AVERY TERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Linda S. Sheffield
Counsel of Record
LINDA S. SHEFFIELD
ATTORNEY AT LAW
P. O. Box 682136
Marietta, GA 30068
(770) 671-1234
lindasheffield@gmail.com

Counsel for Petitioner

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL PURSUANT TO AN INVALID APPEAL WAIVER, AFTER MAKNG ERRONEOUS FINDINGS, OVERLOOKING AND MISAPPREHENDING PRECEDENTIAL LAW, IN AN EFFORT TO CIRCUMVENT THE HOLDING IN *DAVIS*, THAT THE RESIDUAL CLAUSE OF 18 U.S.C. § 924(c) IS UNCONSTITUTIONALLY VAGUE, APPLYING THE FORCE CLAUSE OF 924(c) IN ORDER TO FIND THAT HOBBS ACT ROBBERY CONSTITUTES A CRIME OF VIOLENCE.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no known related cases.

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IN THE SUPREME COURT OF THE UNITED STATES PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix A to the petition and is unpublished. (Page 1a)

The judgment of the U.S. District Court for the District of Maryland appears at Appendix B. (Page 5a)

JURISDICTION

The United States Court of Appeals for the Fourth Circuit decided this case on January 7, 2020. No petition for rehearing was filed in this case.

Pursuant to an emergency Order of this Court, the time for filing a petition for writ of certiorari has been extended to 150 days from the date the appeal was denied.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

Fifth Amendment to the U.S. Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutory Provisions

18 U.S.C. § 924(c)(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(ii)

if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

18 U.S.C. § 924(c)

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

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

RESIDUAL CLAUSE: (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. § 1951 Interference with commerce by threats or violence (Hobbs Act)

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
(b) As used in this section—
(1)
The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2)
The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
(3)
The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

Proceedings in Lower Courts. Avery Terry pled guilty, pursuant to a written plea agreement, to interfering with commerce by robbery ("Hobbs Act robbery"), in violation of 18 U.S.C. § 1951(a) (2012), using and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c) (2012), and accessory after the fact to robbery, in violation of 18 U.S.C. § 3 (2012). The district court sentenced Terry to 97 months' imprisonment for Hobbs Act robbery and for accessory after the fact to robbery, and to 84 months' imprisonment for brandishing a firearm during a crime of violence, to be served consecutively. Terry appealed his § 924(c) conviction, arguing that Hobbs Act robbery is not a crime of violence as defined in § 924(c). The Government moved to dismiss the appeal pursuant to an appellate waiver contained in Terry's plea agreement, which was granted by the Fourth Circuit.

The gravamen of Terry's appeal was that Hobbs Act robbery is not a crime of violence, and he therefore cannot be convicted of brandishing a firearm in furtherance of a crime of violence. He argued that this claim is outside of the scope of his appellate waiver because it concerns the district court's jurisdiction and he is actually innocent of the § 924(c) offense. Section § 924(c) contains two independent clauses defining a crime of violence: the "force clause" in 18 U.S.C. § 924(c)(3)(A), and the "residual clause" in 18 U.S.C. § 924(c)(3)(B). In *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), the Supreme Court held that the residual clause of § 924(c) is unconstitutionally vague. The force clause, however, remains valid, and the Fourth Circuit recently held, post-*Davis*, that "Hobbs Act robbery constitutes a crime of violence

under the force clause of § 924(c)." *United States v. Mathis*, 932 F.3d 242 at 266 (4th Circuit 2020). The *Mathis* case involved a murder requiring the willful, deliberate and premeditated killing of another and the Fourth Circuit incorrectly applied *Mathis* to Terry's case. "Murder requires the uses of force capable of causing physical pain or injury to another person irrespective whether that force is exerted directly or indirectly by the defendant. Therefore, the crime of first-degree murder under Virginia law qualified categorically as a crime of violence under the force clause of 18 U.S.C. § 924(c)." *Id*, at 265. It was held in Terry's appeal that even though this Court held the residual clause of section 924(c) unconstitutionally vague in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), the force clause of section 924© remained valid. The Fourth Circuit recently held in *Mathis*, post-*Davis*, that since the force clause remained valid, ergo Hobbs Act robbery is a crime of violence under the force clause of section 924©. In light of its' holding in *Mathis*, the Fourth Circuit held that Terry failed to make a showing of actual innocence. The Court found that Terry's waiver of appellate rights was knowing and voluntary, and it encompassed the § 924(c) claim he sought to raise on appeal.

Statement of Underlying Facts. Mr. Terry and another individual robbed a CVS Pharmacy of approximately $200. A security camera recorded the entire robbery. Video from that camera showed that the other individual was armed with a handgun. Two days earlier, Mr. Terry had sent a text message with a picture of himself holding a gun that looked similar to the one in the CVS security camera footage. Terry pled guilty to aiding and abetting 18 U.S.C. § 924(c).

A plea agreement was entered into where Mr. Terry would plead guilty to three counts of the indictment. At the plea allocution AUSA Ms. Wilkinson told the Court that by pleading guilty to Count 3 (the 924© count) the government would have to prove beyond a reasonable doubt that the defendant committed the elements of Count 1; that the defendant knowingly aided and abetted the use, carrying, and brandishing of a firearm; and third, that the use and carrying of that firearm was during and in relation to the crime of violence that's charged in count 1, the armed robbery.

When AUSA Wilkinson stated the elements of the Hobbs Act Violation, Count 1, she stated the elements of the offense the government would have to prove were first, the defendant obtained property from another without that person's consent; second, that the defendant did so by wrongful use of actual or threatened force, violence or fear; and third as a result of defendant's actions, interstate commerce was actually or potentially delayed, obstructed or affected in some way.

There was no mention of the force clause or the residual clause anywhere in the record of the case until the Fourth Circuit found that he was bound by his plea of guilty to the force clause, since the residual clause was held to be unconstitutionally vague by this Court in *Davis*.

REASONS FOR GRANTING THE PETITION

Due Process Violation Resulted in the misapplication of the decisions of this Court. The Conviction itself violated due process of law because the petitioner entered a guilty plea to an offense that is not actually an offense against the United States and the appeal fell squarely within the parameters recognized by this Court in numerous holdings. Section 924(c) defines the term "crime of violence" in two sections: 18 U.S.C. § 924(c)(3)(A), known as the "force clause," and 18 U.S.C. § 924(c)(3)(B), known as the residual clause. Hobbs Act robbery, however, does not fall within the definition of a crime of violence under either clause. First, it does not have an element of force. Second, the "residual clause" is void for vagueness in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

In order to qualify as a crime of violence under the force clause, the elements of the offense must categorically include an element of 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). "Force" in this context means strong, violent physical force, not de minimis force. If the elements of the proposed predicate offense do not require the use, threatened use, or attempted use of strong physical force, then the offense does not meet the definition of a crime of violence under this clause.

The Plea of Guilty was not knowingly entered as construed, since Terry did not have notice that he was pleading guilty to either the force clause or the residual clause of 924(c).

The Hobbs Act is not a crime of violence. The Hobbs Act lacks this element of violent physical force. A Hobbs Act robbery may be committed by putting someone in fear of injury or fear of injury to intangible property. This Court is urged to adopt the reasoning of the eleventh Circuit Court of Appeals in *United States v. Eason*, 2020 U.S. App. LEXIS 9096 (March 24, 2020). Numerous cases from this Court and other Circuits establish that placing someone in fear of injury or fear of injury to intangible property does not require "physical force." Moreover, one can commit a Hobbs Act robbery without *intentionally* using, attempting, or threatening to use violent physical force. This lack of intentionality also removes Hobbs Act robbery from the definition of a crime of violence under the force clause.

Hobbs Act robbery also fails to qualify as a crime of violence under the residual clause because that clause is unconstitutionally vague. The residual clause of § 924(c)(3)(B), which defines a crime of violence as one that, "by its nature involves the substantial risk that physical force against the person or property of another may be used in the course of committing the offense," is materially indistinguishable from the residual clause of the Armed Career Criminal Act that the Supreme Court recently found was unconstitutionally vague. No offense, let alone a Hobbs Act robbery, can qualify as a crime of violence under the residual clause. Because a Hobbs Act robbery categorically fails to qualify as a crime of violence, Mr. Terry did not commit a crime of violence in which to aid and abet the use and brandishing of a firearm. The charged conduct is actually not a crime. The district court therefore did not have the power to convict and sentence Avery

Terry for violating § 924(c). The court had no jurisdiction to enter judgment on this non-offense.

To apply the categorical approach to the elements clause, the Eleventh Circuit in *United States v. Eason*, 2020 U.S. App. LEXIS 9096 (March 24, 2020) considered whether the Hobbs Act robbery statute criminalizes only conduct that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). By its terms, the Hobbs Act robbery statute—which can be violated with threats of force to "person *or* property," 18 U.S.C. § 1951(b)(1) (emphasis added), is broader than the Guidelines' elements clause definition. Because a person can commit Hobbs Act robbery without using, attempting to use, or threatening to use physical force "against the person of another," Hobbs Act robbery does not satisfy the elements clause. In reaching this conclusion, the Eleventh Circuit joined the only two circuit courts that have squarely considered the issue. *See United States v. Camp*, 903 F.3d 594, 600-04 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 845 (2019); *United States v. O'Connor*, 874 F.3d 1147 at 1153-58 (10th Cir. 2017). The Ninth Circuit, although construing a state statute that was worded identically to the Hobbs Act robbery statute in all relevant respects, applied the same analysis and reached the same result. *United States v. Edling*, 895 F.3d 1153, 1157-58 (9th Cir. 2018) (Nevada robbery statute).

In *United States v. House*, 825 F.3d 381 (8th Cir. 2016), the Eighth Circuit held that Hobbs Act robbery "was a 'serious violent felony' under 18 U.S.C. § 3559(c)(2)(F)(ii)," without specifying under which clause the crime qualified. *House*, 825 F.3d at 386-87. *House* was based in part on a previous decision,

United States v. Farmer, 73 F.3d 836 (8th Cir. 1996), which did not hold that Hobbs Act robbery satisfied the elements clause of § 3559(c)(2)(F)(ii) alone. Rather, *Farmer* relied on *both* the elements and residual clauses to conclude that Hobbs Act robbery satisfied subparagraph (ii). *Farmer*, 73 F.3d at 842. In Terry's case, the Hobbs Act was found to be a crime of violence by the Fourth Circuit by linking it to the force clause, since the Hobbs Act offense alone did not meet categorical approach to be a crime of violence. The linking of the Force Clause of 924(c) to the Hobbs Act in Terry's case was nothing more than an attempt to circumvent *Davis*, substituting the force clause for the now unconstitutional residual clause, which is the applicable clause to Terry's case

The entirety of the Hobbs Act robbery definition makes clear that statute does not require proximity between the person from whom the taking occurs and the threat to property:

> [Robbery is] the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or *property of a relative or member of his family* or of anyone in his company at the time of the taking or obtaining. 18 U.S.C. § 1951(b)(1). In addition to the circumstances that rely on proximity between the victim and the threat of force, the statute criminalizes "the unlawful taking or obtaining of personal property from the person or in the presence of another . . . by means of actual or threatened force . . . to . . . the . . .

> property of a relative or member of his family," with no requirement that the relative or family member be present at the time of the robbery. *Eason*, supra.

The words "or property" from the statute, are very important here. It is a well-established rule of statutory construction that courts must give effect to every word of a statute when possible." *Accardo v. U.S. Att'y Gen.*, 634 F.3d 1333, 1337 (11th Cir. 2011) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). The next clause— "or of anyone in [the victim's] company at the time of the taking or obtaining" covers an alternative factual scenario in which another person's property is threatened in proximity to the victim. *Id.*

In *Eason*, the government argued that the defendants must, but have failed to, cite a plausible, real-world example of a Hobbs Act robbery that could be committed without a threat to a person, with only a threat to property. *See United States v. Vail-Bailon*, 868 F.3d 1293, 1306 (11th Cir. 2017) (en banc) ("[T]he need to focus on the least culpable conduct criminalized by a statute is not an invitation to apply legal imagination to the statute." (internal quotations omitted)). In *United States v. St. Hubert*, 909 F.3d 335, 350 (11th Cir. 2018), the Court held that Hobbs Act robbery satisfies the elements clause in 18 U.S.C. § 924(c). *St. Hubert*, 909 F.3d at 350. Section 924(c)'s elements clause is broader than U.S.S.G. § 4B1.2(a)(1) because it reaches the use, attempted use, or threatened use of force against property. *Compare* 18 U.S.C. § 924(c), *with* U.S.S.G. § 4B1.2(a)(1). "There is nothing incongruous about holding that Hobbs Act robbery is a crime of violence for purposes of . . . § 924(c)(3)(A), which includes force against a person *or*

property, but not for purposes of U.S.S.G. § 4B1.2(a)(1), which is limited to force against a person." *O'Connor*, 874 F.3d at 1158.

St. Hubert does not support the argument that the defendants must "point to a case." Either the text of a statute plainly reaches conduct outside a generic definition, or it does not. In the latter circumstance a defendant is only required to "point to his own case or other cases" in which a statute has been applied in the manner for which he argues, but there is no such requirement in the former circumstance. *Bourtzakis v. U.S. Att'y Gen.*, 940 F.3d 616, 620 (11th Cir. 2019) (describing instances "when 'the statutory language itself . . . creates the realistic probability that a state would apply the statute'" in the manner for which the defendant argues as "exception[s] to th[e] rule" that a defendant must point to a case in which the statute applied in that manner (quoting *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013)).

In *St. Hubert* the Eleventh Circuit required the defendant to point to a case in which a court applied the statute in the way he advocated—to robbery with fear of injury without any threat of force—because the statutory language itself did not create the realistic probability that fear of injury could exist without a threat of force. *St. Hubert*, 909 F.3d at 350. Indeed, in *St. Hubert* the Court acknowledged that Hobbs Act robbery could be committed "by putting the victim in fear of injury . . . to his . . . property" by "threatening to use physical force capable of causing *such* injury," *Id.*

The Plea Allocution (and the Record Below) Failed to Reference Either the Force or Residual Clause of '924© and There was No

Intelligent Waiver of Appellate or Collateral Review. The Fourth Circuit erroneously found that the Hobbs Act is a crime of violence under the force clause of 18 U.S.C. § 924(c). See at page 1a, 4a, unpublished decision in *Terry*, citing *United States v. Mathis*, 932 F.3d at 266. The Court adopted the government's position to circumvent this Court's ruling in *Davis*, by finding that because the force clause remains valid, therefore the Hobbs Act conviction constitutes a crime of violence under § 924(c).

This case involves a plea of guilty and, utilizing the categorical approach, the statutory requirements for guilt and not the case specific approach determines whether or not this constituted a violent felony.

In *Johnson v. United States*, 576 U. S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), the Court addressed the residual clause of the Armed Career Criminal Act (ACCA), which defined a "violent felony" to include offenses that presented a "serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). The ACCA's residual clause required judges to use a form of what we've called the "categorical approach" to determine whether an offense qualified as a violent felony. Following the categorical approach, judges had to disregard how the defendant actually committed his crime. Instead, they were required to imagine the idealized "'ordinary case'" of the defendant's crime and then guess whether a "'serious potential risk of physical injury to another'" would attend its commission. *Id.*, at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569, 578). Johnson held this judicial inquiry produced "more unpredictability and arbitrariness" when it comes to specifying unlawful conduct than the

Constitution allows. *Id.*, at ___-___, 135 S. Ct. 2551, 192 L. Ed. 2d 569, 579).

There was no reference at any point in the prosecution of this case as to the force clause or the residual clause. At the plea allocution AUSA Wilkinson stated the elements of the Hobbs Act Violation, Count 1, which the government would have to prove, if the case had proceeded to trial, were first, the defendant obtained property from another without that person's consent; second, that the defendant did so by wrongful use of actual or threatened force, violence or fear; and third as a result of defendant's actions, interstate commerce was actually or potentially delayed, obstructed or affected in some way.

Ms. Wilkinson told the Court that by pleading guilty to Count 3 (the 924(c) count) the government would have to prove beyond a reasonable doubt that the defendant committed the elements of Count 1 (the Hobbs Act violation); that the defendant knowingly aided and abetted the use, carrying, and brandishing of a firearm; and third, that the use and carrying of that firearm was during and in relation to the crime of violence that's charged in count 1, the armed robbery.

It was Terry's position on appeal that the conviction itself violates due process because he entered a guilty plea to an offense that is actually no longer an offense against the United States. The appeal therefore falls squarely within the parameters of what this Court recognizes as valid despite the entry of a guilty plea. Shortly after the plea of guilty, *Johnson* was decided, which opened up a whole new aspect to Terry's case and he was faced with

determining challenging the residual clause of 924©, which he now had reason to believe was unconstitutional. The Fourth Circuit, instead of applying *Davis*, as it should have done, unfairly created a manipulated solution to circumvent Davis, by inserting the force clause. Comparing the statute and the plea colloquy, it is clear that Terry did not plead to the force clause, and that the force clause was applied only when he tried to exercise his rights after the residual clause was found by this Court to be unconstitutionally vague.

18 U.S.C. § 924(c)(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
(ii)
if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

18 U.S.C. § 924(c)(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

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

RESIDUAL CLAUSE: (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.

The Fourth Circuit recently decided a case that has direct bearing on this point: *United States v. Adams*, 814 F.3d 178 (4th Cir. 2016). *Adams* addressed appellate and collateral review of a conviction for possessing a firearm after having been previously convicted of a felony, when a change in the law rendered the erstwhile felony no longer a felony. *Adams* thus addressed the identical issue here: a change in the law rendered what previously qualified as a predicate crime no longer a qualifying predicate. Whereas the *Mathis* case, relied upon by the Fourth Circuit, was a murder case, found to be a violent felony under Virginia law (state felony charged in the racketeering indictment in that case). This is not a singular instance of the government asking courts to avoid the application of *Davis*. This united effort by the government is being utilized throughout the federal courts. Many courts are sitting on resolutions of the *Davis* bypass pleas by the government in cases just like Terry's.

When the instant offense depends on proof that the defendant had committed a qualifying predicate offense, but a change in the law altered the status of the predicate–changing it from felony to misdemeanor–the defendant is "actually innocent" of the instant offense. *Id*. at 182. And claims of actual innocence fall outside the scope of otherwise valid, knowing, intelligent waivers of appellate and collateral review. *Id.* at 182- 83.

The appellate waiver in Mr. Terry's plea agreement may be valid for most purposes, but not all purposes. Like in *Adams*, a change in the law has altered the status of the predicate offense. The government can no longer an essential element of 1 "Because Adams was not a convicted felon at the time of the charged offense, it was not illegal under § 922(g) for him to possess a firearm. He should not remain convicted of a crime of which he is, under our precedent in Simmons and *Miller v. United States*, 735 F.3d 141 (4th Cir. 2013), actually innocent." *Adams*, 814 F.3d at 185. Mr. Terry is therefore actually innocent of violating § 924(c). He therefore did not waive his right to raise the claim on appeal.

CONCLUSION

It is respectfully requested that the petition for certiorari be granted.

Respectfully submitted,

/s/ Linda S. Sheffield
Linda S. Sheffield
Counsel of Record
GA Bar No. 639725
Post Office Box 682136
Marietta, GA 30068
(770) 671-1234 Office
lindasheffield@gmail.com