No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

TYRONE WALKER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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Issues Presented

1. Whether the substantive offense of Hobbs Act robbery is categorically a "crime of violence" for purposes of 18 U.S.C. § 924(c)(3)(A).

2. Whether Hobbs Act robbery can realistically be committed by means of actual or threatened force against a person's property that does not involve the minimum quantum of physical force required by *Stokeling v. United States.*

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PETITION FOR WRIT OF CERTIORARI

Petitioner Tyrone Walker ("Walker") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, affirming Walker's convictions and sentences is styled: *United States v. Tyrone Walker, Kevin Walker,* ___ Fed. Appx. ___, 2019 U.S. App. LEXIS 29934 (2d Cir. Oct. 4, 2019).

Jurisdiction

The opinion of the United States Court of Appeals for the Second Circuit, affirming the Petitioner's conviction and sentence was announced on October 4, 2019 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the date of the judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions

Title 18 U.S.C. § 924. Penalties

(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 –

. . .

(c)(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.

Title 18 U.S.C. § 1951. Interference with commerce by threats or violence

(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 or property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Statement of the Case

Walker pled guilty to a four-count superseding information charging him with (Count One) Hobbs Act robbery conspiracy, in violation of Title 18 U.S.C. § 1951(a), (Count Two) Hobbs Act robbery, in violation of Title 18 U.S.C. § 1951(a), (Count Three) possession of a firearm in furtherance of the Hobbs Act counts, in violation of Title 18 U.S.C. § 924(c)(1)(A), and (Count Four) witness tampering, in violation of Title 18 U.S.C. § 1512(b)(1). The § 924(c)(1)(A) charge carried a ten year mandatory minimum to be served consecutively to the underlying "crimes of violence." At sentencing, the district judge made it clear he did not agree with having to impose the ten-year mandatory minimum, but viewed his "hands as tied[.]" The judge sentenced Walker to concurrent one month sentences on all counts except the § 924(c)(1) count for which the judge imposed the mandatory 120-month minimum.

Walker filed his principal brief December 4, 2018, wherein he argued that his plea to the § 924(c)(1) count was not a knowing voluntary plea. Walker now argues that two subsequent Supreme Court decisions have changed the legal landscape to the extent that Walker is actually

innocent of his § 924(c)(1) conviction, given that the underlying conviction, Hobbs Act robbery, is not categorically a crime of violence.

On August 2, 2019, Walker filed a Rule 28(j) letter, noting that the Supreme Court in *United States v. Davis,* 139 S.Ct. 2319 (June 24, 2019), held § 924(c)(3)(B), the crime of violence residual clause definition, to be unconstitutionally vague. Walker filed a second Rule 28(j) letter September 7, 2019, noting that the Second Circuit had acknowledged in *United States v. Barrett,* 937 F.3d 126 (2d 2019), citing *Davis*, that Hobbs Act conspiracy no longer qualifies as a crime of violence.

At oral argument, undersigned counsel argued that Walker's substantive Hobbs Act robbery conviction (the only remaining underlying offense that could conceivably support his § 924(c)(1) conviction) is no longer categorically a crime of violence. Counsel argued this was true for two reasons: (1) *Stokeling v. United States,* 139 S.Ct. 544 (2019) established a minimum quantum of force required for robbery that is greater than the amount of force relied upon by Second Circuit precedent (*United States v. Hill,* 890 F.3d 51 (2d Cir. 2018)) in holding that substantive Hobbs Act robbery is categorically a crime of violence, and (2) there are actual (not hypothetical) cases where Hobbs Act robbery has

been accomplished without the minimum quantum of force required for robbery under *Stokeling*. Counsel was granted permission to file a supplemental brief to support his arguments.

The Second Circuit panel affirmed the judgments of the district court, believing itself bound by *Hill*.

First Reason for Granting the Writ: *Stokeling v. United States,* 139 S.Ct. 544 (2019) established a minimum quantum of force required for robbery that is greater than the amount of force relied upon by the Second Circuit in *United States v. Hill,* 890 F.3d 51 (2d Cir. 2018).

(a) United States v. Hill

The Government, in responding to Walker's first Rule 28(j) letter, cited *United States v. Hill,* 890 F.3d 51 (2d Cir. 2018) for the proposition that Walker's § 924(c)(1) conviction can be upheld under the force clause violent crime definition set forth in § 924(c)(3)(A). In *Hill*, wherein the appellant was convicted of committing a firearm-related murder in the course of a "crime of violence" (§ 1951 Hobbs Act robbery), he argued in part that Hobbs Act robbery is not categorically a crime of violence under § 924(c)(3)(A) because "an individual can commit a Hobbs Act robbery

without using or threatening the use of physical force by putting the victim in fear of injury by [e.g.] threatening to withhold vital medicine from the victim or to poison him." *Hill*, 890 F.3d at 58. The Second Circuit panel disagreed, noting that appellant was "[l]acking any case" to support this argument, and citing *United States v. Castleman,* 572 U.S. 157 (2014):

> In *Castleman*, the Supreme Court, construing "physical force" as it is employed in connection with § 922(g)(9), made clear that physical force "encompasses even its indirect application," as when a battery is committed by administering a poison: "That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter" lest we conclude that pulling the trigger on a gun involves no use of force "because it is the bullet, not the trigger, that actually strikes the victim." . . . Hill offers no persuasive reason why the same principle should not apply to the construction of § 924(c)(3)[.]

Hill, 890 F.3d at 59.

In summary, the *Hill* panel disagreed with the appellant because (1) he offered nothing but hypotheticals to support his arguments, and (2) *Castleman* (according to the panel) stands for the proposition that physical force for purposes of § 924(c)(3) can be indirect.

(b) Stokeling qualifies Castleman

At issue in *Stokeling* was whether a prior Florida robbery conviction constituted a "violent felony" for purposes of the Armed Career Criminal Act, which provides that a violent felony is an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another[.]" *Stokeling,* 139 S.Ct. 544, 549 (2019). The Court held that the relevant quantum of necessary force was to be found in the elements of common-law robbery:

> Under the common law, it was robbery "to seize another's watch or purse, and use sufficient force to break a chain or guard by which it is attached to his person, or to run against another, or rudely push him about, for the purpose of diverting his attention and robbing him." . . . Similarly, it was robbery to pull a diamond pin out of a woman's hair when doing so tore away hair attached to the pin. . . . But the crime was larceny, not robbery, if the thief did not have to overcome such resistance. . . . If there is any injury to the person of the owner, or if he resists the attempt to rob him, and his resistance is overcome, there is sufficient *violence* to make the taking robbery, however slight the resistance. (Emphasis in original.).

Id. at 550. The Court distinguished generally between the force necessary to commit common-law misdemeanor battery and the force necessary to commit common-law robbery:

> The force necessary for misdemeanor battery does not require resistance or even physical aversion on the part of the victim; the "unwanted" nature of the physical contact itself suffices to render it unlawful. . . . By contrast, the force necessary to

> overcome a victim's physical resistance is inherently "violent" . . . and "suggest[s] a degree of power that would not be satisfied by the merest touching."

Id. at 553. The Court then specifically distinguished force for purposes of robbery and force as referenced in *Castleman*:

> In *Castleman*, the Court noted that for purposes of a statute focused on domestic-violence misdemeanors, crimes involving relatively "minor uses of force" that might not "constitute 'violence' in the generic sense" could nevertheless qualify as predicate offenses. . . . The Court thus had no need to decide more generally whether . . . conduct that leads to relatively minor forms of injury—such as "a cut, abrasion, [or] bruise"—"necessitate[s]" the use of "violent force."

Id. at 554. According to *Stokeling* the necessary quantum of force for robbery is as follows. It has to be more than offensive touching, it is force capable of causing physical pain or injury (which can be as small as hitting, slapping, shoving, grabbing, pinching, biting and hair pulling), including the amount of force necessary to overcome a robbery victim's resistance. *Id.* at 554-55.

The *Hill* panel took the concept of common-law misdemeanor battery force from *Castleman* and applied it as the minimum quantum of force necessary for Hobbs Act robbery. Under *Stokeling,* that was improper.

Second Reason for Granting the Writ: There are actual (not hypothetical or theoretical) cases where Hobbs Act robbery (or cases that could have been charged as Hobbs Act robberies) has been accomplished without the minimum quantum of force required for robbery under *Stokeling*.

In the following three Hobbs Act robbery cases there was no threat of force or actual force used by the perpetrator towards the victim (the person from whom the goods were taken): *United States v. Cordero,* 1998 U.S. App. LEXIS 31039, at *13-14 (4th Cir. 1998) (Staged robbery where money passed hands between colluding assistant store manager and defendant; the factual basis for Hobbs Act robbery charge was deemed sufficient because a bystander was "intimidated" by defendant's body language,); *United States v. Pledge,* 51 F. App'x 911, 914-15 (4th Cir. 2002) (affirming Hobbs Act robbery conviction of police officer who took money, drugs, and weapons from drug dealers in exchange for not arresting them, warning them of pending charges, providing security for drug deals and recruiting an individual to transport drugs to New York); *United States v. Smith*, 1995 U.S. App. LEXIS 42675, at *3-4 (5th Cir. 1995) (Evidence that defendant who took property from a store without

threatening the store clerk and only later brandished a firearm held sufficient to sustain Hobbs Act robbery conviction).

Additionally, nearly every federal circuit has approved use of the Hobbs Act to charge robbery of private citizens or local stores under a "depletion of assets" theory.[1] That being said, each of the following state cases, none of which involved the amount of force required by *Stokeling,* could have been charged as Hobbs Act robbery: *Saffold v. State*, 951 So.

[1] *See e.g. United States v. Rodriguez-Casiano*, 425 F.3d 12, 15 (1st Cir. 2005) (money taken from victim's briefcase belonged to his company and was to be used to provide a check cashing service to clients); *United States v. Silverio,* 335 F.3d 183, 184 (2d Cir. 2003) (depletion of assets of doctor engaged in interstate commerce); *United States v. Urban*, 404 F.3d 754, 767 (3d Cir. 2005) (depletion of assets of plumbers engaged in interstate commerce); *United States v. Drayton*, 51 F. App'x 95, 97 (4th Cir. 2002) ("The victim of the robbery, who was the owner of 'The Winery,' testified as to the amount of money taken and the scope of The Winery's commercial activities."); *United States v. Jennings*, 195 F.3d 795, 801 (5th Cir. 1999) (Extorting money from daycare workers); *United States v. Mills*, 204 F.3d 669, 672-73 (6th Cir. 2000) (aspiring young men, promised positions as deputy sheriffs if they made bribe payments to chief deputy and staff deputy, would likely have borrowed money from lending institutions involved in interstate commerce); *United States v. Wrobel*, 841 F.3d 450, 455 (7th Cir. 2016) (defendants crossed state lines for the purpose of robbing diamonds from a diamond merchant whose diamonds were invariably obtained via foreign commerce); *United States v. Williams*, 308 F.3d 833, 839 (8th Cir. 2002) (Cab driver who occasionally transported people to the airport); *United States v. Hanigan,* 681 F.2d 1127, 1130-31 (9th Cir. 1982) (defendant robbed three undocumented alien farm workers, affecting the movement of labor across borders); *United States v. Chanthadara*, 230 F.3d 1237, 1253 (10th Cir. 2000) (seven percent of Chinese restaurant's total expenses were comprised of out-of-state food purchases); *United States v. Carcione*, 272 F.3d 1297, 1301 (11th Cir. 2001) (Defendant flew from Illinois to Florida to assist in robbery of wealthy elderly woman).

2d 777, 778-81 (Ala. Crim. App. 2006) (affirming conviction of first-degree robbery where police discovered defendant had a gun hidden in his trench coat but it was never mentioned or seen during the robbery of Dairy Queen owner heading home after work); *Woods v. State*, 769 So. 2d 501, 502 (Fla. Dist. Ct. App. 2000) (defendant did not threaten force against the cashier, did not commit any acts of physical force towards her, did not carry a weapon, and did not say or intimate that he was carrying a weapon); *State v. Chance*, 2008 N.C. App. LEXIS 1158, at *8 (N.C. Ct. App. 2008) (defendant pushed cashier's hand off of box of cigarettes to get possession).

Third Reason for Granting the Writ: There is a disagreement among the circuits as to whether the threatened use of physical force against a person's *property* is categorically a crime of violence.

As noted above, Hobbs Act robbery can be accomplished through the actual or threatened force to a person's property. The Tenth Circuit has specifically held, citing *Stokeling*, that the crime of witness retaliation, because it can be accomplished by damaging or threatening

to damage the tangible property of another, is *not* categorically a crime of violence under the § 924(c)(3) elements clause. *United States v. Bowen,* 936 F.3d 1091, 1103 (10th Cir. 2019).

The First and Second Circuits have entertained arguments that actual or threatened force to a person's property is not categorically a crime of violence, but each of these circuits has rejected the argument, in part because the appellant in each case posed only theoretical scenarios. In *United States v. Garcia-Ortiz,* 904 F.3d 102 (1st Cir. 2018), the appellant offered up the following scenario not involving physical force: threatening to "devalue some intangible economic interest like a stock holding or contract right." *Id.* at 107. The First Circuit rejected the argument, noting that appellant "points to no actual convictions for Hobbs Act robbery matching or approximating his theorized scenario." *Id.* In *United States v. Hill,* 890 F.3d 51 (2d Cir. 2018), the appellant argued that a perpetrator could rob a victim by putting him in fear of injury to his property through the non-forceful means of "threatening to throw paint on the victim's house, to spray paint his car, or, . . . pour [] chocolate syrup on his passport." *Id.* at 57. The Second Circuit rejected the argument, noting that the appellant failed to "point to his own case

or other cases" where there was a realistic probability that the Hobbs Act would reach the posed hypothetical conduct. *Id.* at 59.

In *United States v. Mathis,* 932 F.3d 242 (4th Cir. 2019), the Fourth Circuit was faced with the argument that Hobbs Act robbery could be accomplished without the use of force "by threatening another with injury to intangible property, such as share of stock in a corporation." *Id.* at 265. The Court basically dodged the argument:

> [W]e do not discern any basis . . . for creating a distinction between threats of injury to tangible and intangible property for purposes of defining a crime of violence. Accordingly, we conclude that Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c).

Id. at 266.

The Third Circuit, also faced with posited theoretical scenarios, allowed for the possibility that a Hobbs Act robbery could be accomplished without the use of force, but held that under the facts of the case, that couldn't have happened:

> It is possible that Robinson's far-fetched scenarios could provide a basis for conviction under 18 U.S.C. § 1951(a), but the combined convictions before us make clear that the "actual or threatened force, or violence, or fear of injury" in Robinson's Hobbs Act robbery sprang from the barrel of a gun. Accordingly, we will affirm Robinson's conviction under 18 U.S.C. § 924(c).

Id. at 144.

It should be noted that there are actual cases where threatened force or actual force against another's property has been held *not* to constitute a crime of violence. *See Bowen,* 936 F.3d at 1104 ("[W]e easily conclude that the act of spray-painting another's car does not entail the use of violent force."); *United States v. Landeros-Gonzales,* 262 F.3d 424, 426-27 (5th Cir. 2001) (Felony conviction for criminal mischief where defendant admitted spray painting graffiti on a building and fence, did not constitute a "crime of violence" because force involved was not violent force).

Conclusion

For the foregoing reasons, Petitioner Walker respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing petition for writ of certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 18th day of December, 2019.

/s/ John A. Kuchera
John A. Kuchera, Attorney for
Petitioner Tyrone Walker