No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUSTIN EUGENE TAYLOR

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. 924(c)(3)(A)'s definition of "crime of violence" excludes attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a).

RELATED PROCEEDINGS

United States District Court (E.D. Va.):

United States v. *Taylor*, No. 08-cr-326 (May 14, 2009)

Taylor v. *United States*, No. 16-cv-508 (Aug. 26, 2019)

United States Court of Appeals (4th Cir.):

United States v. *Taylor*, No. 19-7616 (Oct. 14, 2020)

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The Deputy Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 979 F.3d 203. The order of the court of appeals denying rehearing (App., *infra*, 24a) is not published in the Federal Reporter. The order of the district court (App., *infra*, 13a-23a) is not published in the Federal Supplement but is available at 2019 WL 4018340.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2020. A petition for rehearing was denied on December 11, 2020 (App., *infra*, 24a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 924 provides in pertinent part:

* * * * *

(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—

(i) be sentenced to a term of imprisonment of not less than 5 years;
(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

* * * * *

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

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(B) that by its nature, involves a substantial risk that physical force against the person or

> property of another may be used in the course of committing the offense.

18 U.S.C. 1951 provides in pertinent part:

(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.

* * * * *

Other pertinent statutory provisions are reproduced in the appendix to this brief. See App., *infra*, 25a-26a.

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Virginia, respondent was convicted of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). C.A. App. 52. He was sentenced to 360 months of imprisonment, to be followed by three years of supervised release. *Id.* at 54-

55. The court of appeals dismissed respondent's direct appeal, No. 09-4468 (Jan. 7, 2011), and this Court denied certiorari, 564 U.S. 1029. The district court denied a motion by respondent for collateral relief under 28 U.S.C. 2255. No. 08-cr-326 (July 7, 2015). The court of appeals later authorized respondent to file a second or successive Section 2255 motion. C.A. App. 59-60. The district court denied that motion, but the court of appeals reversed and remanded with instructions to vacate respondent's Section 924(c) conviction and resentence him accordingly. App., *infra*, 1a-12a.

1. In the early 2000s, respondent was a marijuana dealer in the Richmond, Virginia area who sold wholesale quantities of marijuana to purchasers for redistribution. C.A. App. 48. He financed his drug-trafficking business in part by stealing money from some would-be marijuana buyers. *Ibid.*

In August 2003, respondent and an accomplice hatched a plan to steal marijuana-purchase money from would-be customer Martin Silvester. C.A. App. 49; see, *e.g.*, App., *infra*, 15a-17a & n.2 (misspelling name as "Sylvester"). Respondent arranged a meeting between the accomplice and Silvester for the ostensible purpose of completing a marijuana sale, but respondent and his accomplice instead planned for the accomplice—armed with a nine-millimeter semiautomatic pistol—to take the purchase money by force and then flee with respondent in respondent's car. *Id.* at 49-50.

The accomplice and Silvester met at the appointed location while respondent waited nearby with his car. C.A. App. 50. As planned, the accomplice displayed the pistol and demanded money from Silvester. *Ibid.* When Silvester resisted, the accomplice's gun discharged, and Silvester was shot. *Ibid.* The accomplice fled the scene

with respondent in respondent's car. *Ibid.* Silvester died of the gunshot wound the next day. *Ibid.*; see 979 F.3d at 205.

2. A grand jury returned a seven-count indictment charging respondent with conspiring to distribute and possess with the intent to distribute marijuana, in violation of 21 U.S.C. 846 (Count 1); attempting to distribute marijuana, in violation of 21 U.S.C. 846 (Count 2); possessing a firearm in furtherance of a drug trafficking crime (namely, the drug conspiracy charged in Count 1), in violation of 18 U.S.C. 924(c) (Count 3); using and carrying a firearm during and in relation to a drug trafficking crime (namely, the attempted distribution charged in Count 2), in violation of 18 U.S.C. 924(c) (Count 4); conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) (Count 5); attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951 and 2 (Count 6); and using and carrying a firearm during and relation to a crime of violence (namely, the conspiracy to commit Hobbs Act robbery and the attempted Hobbs Act robbery charged in Counts 5 and 6), in violation of 18 U.S.C. 924(c) (Count 7). C.A. App. 11-14.

Respondent pleaded guilty, pursuant to a plea agreement, to the Hobbs Act robbery conspiracy charged in Count 5 and the Section 924(c) offense charged in Count 7. C.A. App. 32-33. As a condition of his plea agreement, respondent waived his right to challenge his convictions on appeal and additionally waived his right to challenge any sentence within the applicable statutory range. *Id.* at 35. The government, for its part, agreed to dismiss the remaining counts of the indictment. *Id.* at 38. The district court accepted the plea agreement and sentenced respondent to 360 months of imprison-

ment, to be followed by three years of supervised release. *Id.* at 54-55. The sentence consisted of 240 months of imprisonment for the Hobbs Act conspiracy conviction and a consecutive 120 months of imprisonment for the Section 924(c) conviction. *Ibid.*

Respondent appealed, contending that the district court had erred in calculating his Sentencing Guidelines range, but the court of appeals dismissed the appeal as barred by respondent's appeal waiver in his plea agreement. No. 09-4468 C.A. Doc. 55-1 (Jan. 7, 2011). This Court denied certiorari. 564 U.S. 1029. The district court subsequently denied a motion by respondent under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. No. 08-cr-326 D. Ct. Doc. 70 (July 7, 2015).

3. Section 924(c) makes it a crime to "use[] or carr[y]" a firearm "during and in relation to," or to "possess[]" a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). The statute contains its own definition of the term "crime of violence," which has two subparagraphs, (A) and (B), that provide alternative and independent definitions. Section 924(c)(3)(A)—which courts often refer to as containing the "elements" clause—specifies that the term "crime of violence" includes any "offense that is a felony" and "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). Section 924(c)(3)(B)—which courts often refer to as containing the "residual" clause—specifies that the term "crime of violence" also includes any "offense that is a felony and * * * that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B).

In 2016, respondent sought authorization from the court of appeals to file a second or successive Section 2255 motion seeking vacatur of his Section 924(c) conviction. See C.A. App. 59; 28 U.S.C. 2255(h) (providing that a second or successive Section 2255 motion must be certified by the court of appeals to satisfy one of two specific statutory prerequisites in order to be filed in district court). Respondent sought to raise a claim that his Section 924(c) conviction was invalid because the charged predicate offenses—conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery—did not qualify as "crime[s] of violence" in light of this Court's decision in *Johnson* v. *United States*, 576 U.S. 591 (2015). See No. 16-9177 C.A. Doc. 2-1 (June 13, 2016). In *Johnson*, the Court invalidated on vagueness grounds the residual clause in the sentence-enhancement provisions of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), which is worded similarly to Section 924(c)(3)(B). See 576 U.S. at 604-606.

The court of appeals authorized respondent to file the successive Section 2255 motion. C.A. App. 59-60. While respondent's motion was pending in the district court, the Fourth Circuit held that Section 924(c)(3)(B) was unconstitutionally vague and that conspiracy to commit Hobbs Act robbery did not meet the alternative definition of "crime of violence" in Section 924(c)(3)(A). See *United States* v. *Simms*, 914 F.3d 229, 233-234, 236-237 (en banc), cert. denied, 140 S. Ct. 304 (2019). Shortly after the Fourth Circuit's decision, this Court itself invalidated the definition of "crime of violence" in Section 924(c)(3)(B) on vagueness grounds in *United States* v. *Davis*, 139 S. Ct. 2319, 2324 (2019).

The district court subsequently denied respondent's successive Section 2255 motion. App., *infra*, 13a-23a.

The court acknowledged that conspiracy to commit Hobbs Act robbery no longer qualified as a "crime of violence" under Section 924(c) after the invalidation of Section 924(c)(3)(B) and the Fourth Circuit's holding in *United States* v. *Simms*, *supra*, that conspiracy to commit Hobbs Act robbery does not constitute a "crime of violence" under Section 924(c)(3)(A). *Id.* at 21a (citing *Simms*, 914 F.3d 229). The court explained, however, that attempted Hobbs Act robbery remained a "crime of violence" under Section 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." *Id.* at 20a (quoting 18 U.S.C. 924(c)(3)). The court therefore determined that respondent's Section 924(c) conviction remained valid. *Id.* at 22a.

4. The court of appeals reversed, holding that even the offense of attempted Hobbs Act robbery does not qualify as a "crime of violence" under Section 924(c)(3)(A). App., *infra*, 2a & n.1. The court acknowledged that its decision conflicted with decisions from other courts of appeals. *Id.* at 8a-9a (citing *United States* v. *Dominguez*, 954 F.3d 1251, 1255 (9th Cir. 2020), petition for cert. pending, No. 20-1000 (filed Jan. 21, 2021), *United States* v. *Ingram*, 947 F.3d 1021, 1026 (7th Cir.), cert. denied, 141 S. Ct. 323 (2020), and *United States* v. *St. Hubert*, 909 F.3d 335, 351-353 (11th Cir. 2018), cert. denied, 139 S. Ct. 1394 (2019)).

The court of appeals recognized that completed Hobbs Act robbery "'categorically' qualifies as a 'crime of violence' under § 924(c)(3)(A)" because it "involves," at the least, "'the threat to use [physical] force.'" App., *infra*, 7a (quoting *United States* v. *Mathis*, 932 F.3d 242, 266 (4th Cir.), cert. denied, 140 S. Ct. 639, and 140 S. Ct. 640 (2019) (brackets in original)). But the court

took the view that attempted Hobbs Act robbery might not "require the use, attempted use, or threatened use of physical force." 18 U.S.C. 924(c)(3)(A); see App., *infra*, 8a. The court identified the elements of attempted Hobbs Act robbery as "(1) the defendant had the culpable intent to commit Hobbs Act robbery; and (2) the defendant took a substantial step toward the completion of Hobbs Act robbery that strongly corroborates the intent to commit the offense." App., *infra*, 6a. According to the court, the crime might encompass "a nonviolent substantial step toward threatening to use physical force" that would constitute merely an "*attempt[] to threaten* to use physical force," which the court deemed to be beyond the scope of Section 924(c)(3)(A). *Id.* at 8a. And the court indicated that it might also exclude attempted bank robbery and attempted carjacking as Section 924(c) predicates. *Id.* at 9a-10a.

The court of appeals vacated respondent's Section 924(c) conviction and remanded his case for resentencing. App., *infra,* 12a. It subsequently denied the government's petition for rehearing en banc. See *id.* at 24a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in excising attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), from the "crime of violence" definition in 18 U.S.C. 924(c)(3)(A). Congress did not implausibly fail to include federal attempted robbery offenses in that definition. To the contrary, the definition was designed, and has consistently been well understood, to include attempted robbery crimes. In holding otherwise, the court of appeals acknowledged that it was deviating from the preexisting circuit consensus, and the decision

below creates an unambiguous circuit conflict on an issue that directly affects many federal prosecutions. This Court should grant certiorari and reverse.

A. The Court Of Appeals' Decision Is Wrong

As every court of appeals to address the question until now has recognized, 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); see *United States* v. *Walker*, 990 F.3d 316, 329 (3d Cir. 2021); *United States* v. *Dominguez*, 954 F.3d 1251, 1255 (9th Cir. 2020), petition for cert. pending, No. 20-1000 (filed Jan. 21, 2021); *United States* v. *Ingram*, 947 F.3d 1021, 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). The Fourth Circuit's contrary conclusion cannot be squared with the text or history of that statutory definition, which make plain that robbery offenses lie at the very core of the elements clause.

1. The decision below correctly recognized, and reaffirmed, that *completed* Hobbs Act robbery "'categorically' qualifies as a 'crime of violence' under § 924(c)(3)(A)." App., *infra*, 7a (quoting *United States* v. *Mathis*, 932 F.3d 242, 266 (4th Cir.), cert. denied, 140 S. Ct. 639, and 140 S. Ct. 640 (2019)). That is because any Hobbs Act robbery necessarily includes either the use or threatened use of force. See *id.* at 7a-8a. The Hobbs Act's definition of "robbery"—"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 to certain other persons or property, 18 U.S.C.

1951(b)(1)—tracks precisely the "use" and "threatened use" components of Section 924(c)(3)(A). More generally, the definition of a "crime of violence" in Section 924(c) and parallel definitions in statutes like the ACCA, 18 U.S.C. 924(e), were specifically drafted to capture robbery, the "quintessential" predicate crime of violence. *Stokeling* v. *United States*, 139 S. Ct. 544, 551 (2019).

No sound construction of the full elements clause of Section 924(c)(3)(A)—which expressly provides that offenses involving the "attempted use of force" also qualify as "crime[s] of violence," 18 U.S.C. 924(c)(3)(A)—would exclude attempted Hobbs Act robberies (let alone *all* federal attempted robberies, cf. Pet. App. 9a-10a) from its scope. Instead, the inclusion of "attempted use, or threatened use," in the elements clause makes clear Congress's determination that "an element of attempted force operates the same as an element of completed force" for the purposes of identifying "crimes of violence." *Hill* v. *United States*, 877 F.3d 717, 719 (7th Cir. 2017), cert. denied, 139 S. Ct. 352 (2018). The Hobbs Act similarly treats completed robbery and "attempt[ed]" robbery in the same manner, prescribing the same penalties for both. 18 U.S.C. 1951(a).

To be convicted of attempted Hobbs Act robbery, a defendant must (1) have the intent to commit each element of the completed crime, and (2) take a "substantial step" toward the crime's completion. See *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 106-107 (2007); *Braxton* v. *United States*, 500 U.S. 344, 349 (1991). A "substantial step" sufficient to support attempt liability must "strongly corroborat[e] * * * the actor's criminal purpose." Model Penal Code § 5.01(2); see *Resendiz-Ponce*, 549 U.S. at 107 ("As was true at common law,"

the requisite intent must be "accompanied by significant conduct."); see also, *e.g.*, *Swift & Co.* v. *United States*, 196 U.S. 375, 402 (1905) ("The distinction between mere preparation and attempt is well known in the criminal law."). The Fourth Circuit itself has accordingly defined a "substantial step" as "a direct act in a course of conduct planned to culminate in commission of a crime that is strongly corroborative of the defendant's criminal purpose." *United States* v. *Dozier*, 848 F.3d 180, 186 (2017) (quoting *United States* v. *Engle*, 676 F.3d 405, 423 (4th Cir.), cert. denied, 568 U.S. 850 (2012)).

A defendant who intends to take the property of another, against the victim's will, through actual or threatened violence, and then takes a substantial step toward completing that crime, necessarily "attempt[s] to commit every element of" Hobbs Act robbery. *Dominguez*, 954 F.3d at 1261. And when a defendant commits "a direct act in a course of conduct planned to culminate in [the] commission" of a completed Hobbs Act robbery, and that act is unambiguous enough that it "strongly corroborat[es] * * * the defendant's criminal purpose" to overcome the victim's will and obtain property, *Dozier*, 848 F.3d at 186, then the defendant has necessarily engaged in the "attempted use[] or threatened use of physical force" within the meaning of Section 924(c)(3)(A). By including in the elements clause not only the direct application of force but also attempts and threats of force, the elements clause covers the waterfront of substantial efforts to employ force as the instrument by which a defendant seeks to obtain others' property, irrespective of whether those substantial efforts succeed. Cf., *e.g.*, *Voisine* v. *United States*, 136

S. Ct. 2272, 2278 & n.3 (2016) (noting consistent dictionary and precedential definitions of "'use' to mean the 'act of employing' something") (citations omitted).

The types of conduct that might sustain a conviction for attempted Hobbs Act robbery, such as gathering weapons to rob a store clerk or conduct that would involve passing the clerk a threatening note, are naturally understood as "attempt[ing]" or "threaten[ing]" the employment of force. To use the Fourth Circuit's own example, a defendant who "pass[es] a threatening note to a store cashier," App., *infra*, 10a, has engaged in a "threaten[ed] use of physical force" even if the defendant had no intent of carrying out the threat, the cashier stands her ground, and the defendant walks away empty-handed. See, *e.g.*, *Virginia* v. *Black*, 538 U.S. 343, 360 (2003) (recognizing that a "speaker need not actually intend to carry out [a] threat"). And Section 924(c)(3)(A)'s language does not distinguish between an attempt that fails for that reason and a theoretical attempt that fails because the defendant is apprehended before he actually presents such a note, but has taken a substantial step toward doing so.

To the contrary, such a defendant has "threatened" the use of force in the ordinary sense. A statement or action is objectively a "threat" so long as it "conveys the notion of an intent to inflict harm" as it "would be understood by a reasonable person." *Elonis* v. *United States*, 575 U.S. 723, 731, 737 (2015) (citation omitted); see *id.* at 732 (surveying dictionary definitions of "threat" and "threatened"). As the Fourth Circuit noted, a defendant's particular substantial step in furtherance of his intent to commit all the elements of Hobbs Act robbery need not be violent in and of itself. App, *infra*, 9a-10a. But a conviction for the offense of attempted

Hobbs Act robbery requires that the jury—which stands in the shoes of a reasonable person, see *Hana Fin., Inc.* v. *Hana Bank*, 574 U.S. 418, 422-423 (2015)—find that the step establishes a course of action that is sufficiently certain, if unchecked, to culminate in conduct through which the defendant obtains property through physical harm or the fear of it. And anyone observing a course of action that has progressed to that point would naturally describe it as "threaten[ing]" the use of force.

That is true even if a particular defendant planned only to "convey[] the notion of an intent to inflict harm," *Elonis*, 575 U.S. at 732, while privately hoping that he could overcome the victim's will without actually causing such harm. The definition of a defendant's conduct as a "threat" does not turn on the mental state of the communicator. See *id.* at 732-733 (definitions of "threat" turn on "what the statement conveys—not * * * the mental state of the author"). A store clerk on the business end of a gun, subject to a demand for money, would perceive a threat no matter how deeply the defendant is committed to pacifism. The same is true of a written note intended to cow the clerk into giving up the money in the register. And to the extent that an attempted Hobbs Act robbery conviction could be predicated on conduct evincing the intent to deliver such a note, but without getting quite to the point of delivery, that would be "threatening" as well. Nothing in the language of Section 924(c)(3)(A) requires that the intended victim herself be made *aware* of the "threatened use of physical force," 18 U.S.C. 924(c)(3)(A). See, *e.g.*, *United States* v. *Spring*, 305 F.3d 276, 280 (4th Cir. 2002) ("[A] statement may qualify as a threat even if it is never communicated to the victim."); *United States* v.

Martin, 163 F.3d 1212, 1216 (10th Cir. 1998) ("This court has not required that true threats be made directly to the proposed victim."), cert. denied, 526 U.S. 1137 (1999).

Section 924(c)(3)(A)'s inclusion of an express "attempted use" component reinforces that the definition of "crime of violence" would encompass that circumstance. A statutory list of alternative categories may well have some overlap among them. See, *e.g.*, *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) ("[C]ontrary to the dissent's suggestion that each item in the list 'refers to something different,' * * * the items appear to have substantial overlap.") (citation omitted). The term "attempted use" accordingly should not be understood as a hermetically sealed-off set of crimes that cannot encompass some attempted threats, nor can "threatened use" be understood as exclusive of attempts that are objectively threatening while still incomplete. Instead, the mutually supportive terms work *together* to emphasize the scope of the statutory definition, which accordingly includes attempted robbery. Cf., *e.g.*, *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1141 (2018) (recognizing that a list read as a whole "bespeaks breadth"); *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) ("[W]ords grouped in a list should be given related meaning.") (citation omitted).

2. The inclusion of attempted Hobbs Act robbery is the product of deliberate congressional design. The definition of a "crime of violence" in Section 924(c)(3)(A) and parallel definitions in statutes like the ACCA, 18 U.S.C. 924(e), were specifically focused on robbery crimes.

As this Court has recognized, "robbery" is "the quintessential" predicate crime of violence under the ACCA,

and thus the center of its elements clause. *Stokeling*, 139 S. Ct. at 551. In the original ACCA, enacted at the same time as Section 924(c)(3)'s "crime of violence" definition, Congress expressly listed a prior robbery as a conviction that could increase the statutory penalties for unlawful firearm possession. See *ibid.* Like the definition of "robbery" in the Hobbs Act, see, *e.g.*, *United States* v. *Melgar-Cabrera*, 892 F.3d 1053, 1064 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018), the definition of "robbery" in the ACCA "mirrored the elements of the common-law crime," *Stokeling*, 139 S. Ct. 551, both including robberies that were committed by threats of force. Specifically, the ACCA defined robbery as "any felony consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury." See 18 U.S.C. App. 1202(c)(8) (Supp. II 1984); cf. Model Penal Code § 222.1 (1980) (defining robbery as including crimes involving the "threat of serious bodily injury").

In 1986, Congress amended the ACCA to "expand[] the predicate offenses triggering the sentence enhancement from 'robbery or burglary' to 'a violent felony or a serious drug offense.'" *Taylor* v. *United States*, 495 U.S. 575, 582 (1990); see Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39. The more expansive language that Congress chose largely replicated the language in Section 924(c)(3)'s preexisting "crime of violence" definition. The updated (and still current) ACCA elements clause—which encompasses crimes that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C.

924(e)(2)(B)(i)—has largely tracked the interpretation of the similarly-worded elements clause in Section 924(c)(3)(A). See, *e.g.*, App., *infra*, 4a n.2; *United States* v. *Evans*, 924 F.3d 21, 29 n.4 (2d Cir.), cert. denied, 140 S. Ct. 505 (2019). Congress's evident understanding of that language as an expansion of the prior definition of "robbery or burglary," see *Taylor*, 495 U.S. at 583-584, confirms that the "attempted use" component—which the amendment added—and the "threatened use" component should be understood as complementing, rather than limiting, one another.

Indeed, the legislative record of Section 924(c)(3)(A)'s enactment explicitly shows that it was designed to cover attempt crimes, such as "a threatened or attempted simple assault or battery on another person." S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983) (citing 18 U.S.C. 113(d) and (e) (1982) as examples, which criminalized "[a]ssault by striking, beating, or wounding" and "[s]imple assault") (footnotes omitted). That was true even though some forms of assault—like some Hobbs Act robberies—may be completed "by putting another in apprehension of harm" without the use of physical force itself. *Ladner* v. *United States*, 358 U.S. 169, 177 (1958); see, *e.g.*, *United States* v. *Knife*, 592 F.2d 472, 482 n.12 (8th Cir. 1979) ("When he forced the officer into the patrol car at the point of a shotgun and waved the gun in the officer's face, Iyotte committed the offense of simple assault set forth in 18 U.S.C. § 113(e).").

3. "The elected lawmakers wanted to categorically include attempt crimes in the statutory definition, and they said so plainly." *Walker*, 990 F.3d at 330. In concluding otherwise, the decision below erroneously envisions a category of attempted Hobbs Act robberies in

which the defendant took a substantial step toward completing the robbery, but the defendant's well-developed course of conduct could not be considered an "attempted use" or "threatened use" of force because a reasonable person could nonetheless believe that neither the defendant nor his accomplices would ever have done anything forceful during the robbery, even if the victim resisted. See *Stokeling*, 139 S. Ct. at 553 (holding that "force necessary to overcome a victim's physical resistance" suffices under the ACCA's elements clause). With the actual requirements of attempted Hobbs Act robbery in focus, however, that category of cases is difficult to imagine. Cf. *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (looking to "realistic probabilit[ies]," not "theoretical possibilit[ies]," to determine the scope of a similar provision).

The Fourth Circuit failed to meaningfully address, in particular, the Hobbs Act's specific definition of robbery as taking or obtaining property "against [the victim's] will." 18 U.S.C. 1951(b)(1); see App., *infra*, at 11a n.3 (stating that Hobbs Act robbery "contains no similar requirement" to the common-law requirement that a robber "overcome the victim's resistance"). Because Hobbs Act robbery requires overcoming the victim's will, attempted Hobbs Act robbery requires both intent to overcome the victim's will and a substantial step in a course of conduct directed at that result. See pp. 12-14, *supra*. A defendant who satisfies those requirements, as well as the other requirements of the Hobbs Act, is inherently engaging in the "attempted use[] or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). Indeed, many attempted robberies, like the one in this case, are *more* violent than completed robberies, as they are foiled by

a physical confrontation between the perpetrator and a resisting victim whose will the perpetrator intends to overcome. The other attempted robbery crimes that the decision below might also exclude—attempted bank robbery and attempted carjacking—are similarly often violent. As the text and history illustrate, Congress did not counterintuitively exclude some of the most common and most violent crimes in the federal system when it designed the elements clause of Section 924(c).

B. The Question Presented Warrants This Court's Review

The decision below creates an entrenched circuit conflict on a recurring issue of substantial importance. And in creating that conflict, this case itself provides the best vehicle to resolve it.

1. The decision below directly conflicts with decisions by four other courts of appeals that have explicitly recognized that attempted Hobbs Act robbery is a crime of violence under 18 U.S.C. 924(c)(3)(A). See *Walker*, 990 F.3d at 329 (3d Cir.); *Dominguez*, 954 F.3d at 1255 (9th Cir.); *Ingram*, 947 F.3d at 1026 (7th Cir.); *St. Hubert*, 909 F.3d at 351-353 (11th Cir.); see also *United States* v. *Smith*, 957 F.3d 590, 596 (5th Cir.) (determining that an attempt to commit a "crime of violence" is itself a "crime of violence"), cert. denied, 141 S. Ct. 828 (2020).

The decision below is also at odds with decisions from other courts of appeals applying the definition of "crime of violence" in Section 924(c)(3)(A) to other federal attempt crimes. The decision below specifically identified attempted bank robbery, in violation of 18 U.S.C. 2113(a), and attempted carjacking, in violation of 18 U.S.C. 2119, as offenses that might also not qualify as crimes of violence in the Fourth Circuit under the rationale of the decision below. App., *infra*, 9a-10a. Other

courts of appeals have recognized that those offenses do qualify as crimes of violence, in decisions issued both before and after the Fourth Circuit's decision in this case. See, *e.g.*, *Collier* v. *United States*, 989 F.3d 212, 221 (2d Cir. 2021) (attempted bank robbery); *Ovalles* v. *United States*, 905 F.3d 1300, 1304-1307 (11th Cir. 2018) (per curiam) (attempted carjacking), cert. denied, 139 S. Ct. 2716 (2019); *United States* v. *Armour*, 840 F.3d 904, 907-909 (7th Cir. 2016) (attempted bank robbery). The decision below is also in tension with decisions holding that state attempted robbery offenses qualify as violent felonies under the ACCA's similarly-worded elements clause. See, *e.g.*, *United States* v. *Thrower*, 914 F.3d 770, 776-777 (2d Cir.) (per curiam), cert. denied, 140 S. Ct. 305 (2019) (attempted New York robbery); *Chaney* v. *United States*, 917 F.3d 895, 903-904 (6th Cir.) (attempted Michigan robbery), cert. denied, 140 S. Ct. 265 (2019).

The court of appeals was aware of other circuit precedent weighing against its approach but expressly declined to follow its sister circuits. See App., *infra*, 8a-9a. The court then denied a petition for rehearing en banc, rejecting an opportunity to align itself with the other circuits. See *id.* at 24a. And the circuit courts that have addressed the issue since the court of appeals issued its opinion in this case have expressly declined to adopt the Fourth Circuit's reasoning. See, *e.g.*, *Walker*, 990 F.3d at 327-328; *Collier*, 989 F.3d at 221-222. The circuit conflict therefore will not be resolved without this Court's intervention.

2. The conflict concerns an important and recurring issue. The government frequently prosecutes Section 924(c) offenses connected to attempted Hobbs Act robberies, as well as attempted federal bank robberies and

carjackings. Exact comprehensive numbers of such prosecutions are difficult to find based on existing records, precisely because defendants convicted of attempted robberies are convicted under the very same statutes and face the same penalties as defendants convicted of completed robberies. But for some perspective, data from the U.S. Sentencing Commission indicate that in Fiscal Year 2019 alone, 813 federal defendants were convicted under both Section 924(c) and a federal robbery statute (18 U.S.C. 1951, 2111, 2113, 2118, or 2119).[*] In a random sample of 100 of those cases, approximately 13% included a Section 924(c) conviction predicated on an attempted robbery. And the United States Attorney's Office in the Eastern District of Virginia (from which this case originated) informs this Office that it has already identified approximately 20 cases, some at the Fourth Circuit and some in the district court, in which the defendants committed attempted Hobbs Act robberies and have Section 924(c) convictions called into question (or, in three instances, already vacated) as a result of the decision below. More broadly, robbery is a very common crime. The Bureau of Justice Statistics reports that in 2017, there were 613,840 robberies in the United States, and in 2018 there were 573,100. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Criminal Victimizing 2018*, https://www.bjs.gov/content/pub/pdf/cv18.pdf.

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[*] That number is likely underinclusive for purposes of the question presented here, because—as this case itself exemplifies—a defendant may be convicted of a Section 924(c) charge based on a robbery or attempted robbery without also being convicted of the robbery or attempt itself. See *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999); see, *e.g.*, *United States* v. *Hill*, 971 F.2d 1461, 1467 (10th Cir. 1992).

Because the court of appeals has denied en banc review, the government will be unable to pursue Section 924(c) prosecutions arising from attempted Hobbs Act robberies (and possibly other attempted federal robberies) in an entire section of the country. Those prosecutions often involve some of the most violent firearm-related conduct, warranting the consecutive penalties that Congress enacted in Section 924(c). For example, following the decision below, the Fourth Circuit has already vacated the Section 924(c) conviction of a defendant who attempted to rob a convenience store and whose accomplice shot at the store clerk and a customer who came to the clerk's aid, hitting the customer in the forehead, leg, shoulder, and groin. See Order, *United States* v. *Winston Sylvester Oliver, II*, No. 19-4854 (Feb. 5, 2021).

While the courts of appeals were in alignment, numerous defendants unsuccessfully sought this Court's review of whether attempted federal robbery offenses are crimes of violence under Section 924(c). See, *e.g.*, *Burke* v. *United States*, No. 19-5312 (Nov. 4, 2019) (attempted Hobbs Act robbery); *Barriera-Vera* v. *United States*, 140 S. Ct. 263 (2019) (No. 19-5063) (attempted bank robbery); *Gray* v. *United States*, 140 S. Ct. 63 (2019) (No. 18-9319) (attempted Hobbs Act robbery); *Ovalles* v. *United States*, 139 S. Ct. 2716 (2019) (No. 18-8393) (attempted carjacking); *Myrthil* v. *United States*, 139 S. Ct. 1164 (2019) (No. 18-6009) (attempted Hobbs Act robbery); *St. Hubert* v. *United States*, 139 S. Ct. 246 (2018) (No. 18-5269) (same); *Corker* v. *United States*, 139 S. Ct. 196 (2018) (No. 17-9582) (same); *Beavers* v. *United States*, 139 S. Ct. 56 (2018) (No. 17-8059) (same); *Berry* v. *United States*, 138 S. Ct. 2665 (2018) (No. 17-8987) (attempted carjacking); *Chance* v. *United*

States, 138 S. Ct. 2642 (2018) (No. 17-8880) (attempted Hobbs Act robbery); *Ragland* v. *United States*, 138 S. Ct. 1987 (2018) (No. 17-7248) (same); *Sampson* v. *United States*, 138 S. Ct. 1583 (2018) (No. 17-8183) (same); *Robbio* v. *United States*, 138 S. Ct. 1583 (2018) (No. 17-8182) (same); *James* v. *United States*, 138 S. Ct. 1280 (2018) (No. 17-6295) (same); *Griffith* v. *United States*, 138 S. Ct. 1165 (2018) (No. 17-6855) (attempted bank robbery); *Galvan* v. *United States*, 138 S. Ct. 691 (2018) (No. 17-6711) (attempted carjacking); *Wheeler* v. *United States*, 138 S. Ct. 640 (2018) (No. 17-5660) (attempted Hobbs Act robbery). Those petitions were routinely and appropriately denied before the Fourth Circuit created a circuit conflict. But the decision below, which sharply deviated from the circuits' prior consensus, warrants this Court's review.

This case is an ideal vehicle for further review. The question is squarely presented, was thoroughly considered below, and provided the sole basis for the court of appeals' decision. Compare, *e.g.*, Pet., *Dominguez* v. *United States* (No. 20-1000) (pending petition presenting same question in unpreserved posture). Given the number of cases affected and the entrenched nature of the conflict, this Court's review is needed to restore the preexisting uniformity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2021

[†] The Acting Solicitor General did not participate in the preparation or authorization of this petition.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7616

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JUSTIN EUGENE TAYLOR, A/K/A MOOKIE, A/K/A/ MOOK,
DEFENDANT-APPELLANT

Argued: Sept. 10, 2020
Decided: Oct. 14, 2020

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
M. Hannah Lauck, District Judge.
(3:08-cr-00326-MHL-RCY-1; 3:16-cv-00508-MHL)

Before: MOTZ, KING, and FLOYD, Circuit Judges.

DIANA GRIBBON MOTZ, Circuit Judge:

In this successive federal habeas petition, Justin Eugene Taylor, convicted of using a firearm in furtherance of a "crime of violence" in violation of 18 U.S.C. § 924(c), asks us to vacate this conviction and remand for resentencing. He contends that this conviction was predicated on two offenses—conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery—that do not constitute "crimes of violence" under § 924(c). The parties agree that conspiracy to commit Hobbs Act robbery no longer qualifies as a valid § 924(c) predicate.

The Government contends, however, that attempted Hobbs Act robbery does constitute a crime of violence and so is a valid predicate. The district court so held. Taylor petitioned for a certificate of appealability, which we granted. Because the elements of attempted Hobbs Act robbery do not invariably require "the use, attempted use, or threatened use of physical force," the offense does not qualify as a "crime of violence" under § 924(c).[1] Accordingly, we vacate Taylor's § 924(c) conviction and remand for resentencing consistent with this opinion.

I.

This case arises from a 2003 conspiracy to rob a drug dealer. Taylor arranged a transaction to sell marijuana to Martin Sylvester, who in turn planned to sell marijuana to others. But Taylor had an ulterior plan: rather than complete the proposed transaction, Taylor and a coconspirator (whose name does not appear in the record) would steal Sylvester's money.

After meeting at a mutual acquaintance's residence, Taylor and Sylvester traveled together to Richmond, Virginia. Upon their arrival in Richmond, Taylor instructed Sylvester to meet Taylor's coconspirator in a

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[1] Relying on *United States v. Vann*, 660 F.3d 771 (4th Cir. 2011) (en banc) and *United States v. Chapman*, 666 F.3d 220 (4th Cir. 2012), Taylor also contends that because his § 924(c) conviction rested on at least one invalid predicate, there is grave ambiguity as to which predicate constituted the "crime of violence" necessary to sustain his conviction. *See also United States v. Quicksey*, 525 F.2d 337 (4th Cir. 1975). We also granted a certificate of appealability as to this question. But given our holding that here neither predicate constitutes a "crime of violence" under § 924(c), we cannot reach that question in this case.

nearby alleyway to complete the transaction. Sylvester did so, but Taylor's plan quickly went off the rails. The coconspirator, who was armed with a semiautomatic pistol, demanded Sylvester's money. Sylvester refused and resisted. The pistol discharged and Sylvester sustained a fatal gunshot wound.

The Government charged Taylor in a seven-count indictment. In relevant part, the indictment alleges Taylor conspired to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951, attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951, and used a firearm in furtherance of a "crime of violence" in violation of 18 U.S.C. § 924(c). The indictment further alleges two predicate crimes of violence: the conspiracy to commit Hobbs Act robbery and the attempted Hobbs Act robbery. Taylor pled guilty to conspiracy to commit Hobbs Act robbery and use of a firearm in furtherance of a "crime of violence." The Government agreed to dismiss the remaining charges. The district court sentenced Taylor to 240 months' incarceration for the conspiracy conviction and 120 consecutive months for the § 924(c) conviction, yielding a total sentence of 360 months.

Taylor appealed, but his appeal was dismissed based on a waiver in his plea agreement. In 2015, the district court denied Taylor's first motion to vacate his sentence under 28 U.S.C. § 2255. In 2016, we granted Taylor permission to file a second § 2255 motion in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which substantially narrowed the definition of "violent felony" in the Armed Career Criminal Act (ACCA), and *Welch v. United States*, 136 S. Ct. 1257 (2016), which held that

Johnson applied retroactively to cases on collateral review.[2]

In this second § 2255 motion, Taylor contends that, after *Johnson*, attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery no longer qualify as crimes of violence under § 924(c)(3) and so his conviction for use of a firearm in furtherance of a "crime of violence" must be vacated. During the pendency of that motion, we invalidated § 924(c)(3)(B), one of the statute's two clauses defining "crime of violence," and further held that conspiracy to commit Hobbs Act robbery does not qualify as a "crime of violence" under either clause. *United States v. Simms*, 914 F.3d 229, 233-34, 236 (4th Cir. 2019) (en banc). Shortly thereafter, the Supreme Court similarly invalidated § 924(c)(3)(B) as unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

Notwithstanding these shifts in the legal landscape, the district court denied Taylor's second § 2255 motion. The court held that attempted Hobbs Act robbery continued to qualify as a "crime of violence" under § 924(c)(3)(A) and that Taylor's conviction for use of a firearm in furtherance of a "crime of violence" remained valid because it was predicated on attempted Hobbs Act robbery. Taylor noted this appeal, and we granted a

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[2] Because the definition of "crime of violence" in § 924(c)(3)(A) is almost identical to the definition of "violent felony" in ACCA our "decisions interpreting one [] definition are persuasive as to the meaning of the other[]." *United States v. McNeal*, 818 F.3d 141, 153 n.9 (4th Cir. 2016).

certificate of appealability. For the reasons that follow, we now vacate Taylor's § 924(c) conviction and remand for resentencing.

II.

Under federal law, a person who uses or carries a firearm "during and in relation to any crime of violence" or who "possesses a firearm" "in furtherance of any such crime" may be convicted of both the underlying "crime of violence" and the additional crime of utilizing a firearm in connection with a "crime of violence." 18 U.S.C. § 924(c)(1)(A).

Section 924(c)(3) defines "crime of violence" as "an offense that is a felony" and:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Courts typically refer to § 924(c)(3)(A) as the "force clause" and § 924(c)(3)(B) as the "residual clause." In view of the Supreme Court's invalidation of the residual clause as unconstitutionally vague, *Davis*, 139 S. Ct. at 2336, Taylor's § 924(c) conviction may stand only if attempted Hobbs Act robbery constitutes a "crime of violence" under the force clause.

To determine whether an offense constitutes a "crime of violence" under the force clause, courts must employ the "categorical" approach. *Descamps v. United States*, 570 U.S. 254, 258 (2013); *United States v. Dinkins*,

928 F.3d 349, 354 (4th Cir. 2019). Pursuant to the categorical approach, a court "focuses on the *elements* of the prior offense rather than the *conduct* underlying the conviction." *United States v. Cabrera-Umanzor*, 728 F.3d 347, 350 (4th Cir. 2013) (citation omitted) (emphasis in original); *see also Simms*, 914 F.3d at 233 (observing that, under the categorical approach, our analysis "begins and ends with the offense's elements"). We must ask whether the elements of the underlying offense necessarily require "the use, attempted use, or threatened use of physical force." *McNeal*, 818 F.3d at 151-52 (quoting § 924(c)(3)(A)). When the elements of an offense encompass both violent and nonviolent means of commission—that is, when the offense may be committed without the use, attempted use, or threatened use of physical force—the offense is not "categorically" a "crime of violence."

To obtain a conviction for attempted Hobbs Act robbery, the Government must prove two elements: (1) the defendant had the culpable intent to commit Hobbs Act robbery; and (2) the defendant took a substantial step toward the completion of Hobbs Act robbery that strongly corroborates the intent to commit the offense. *See United States v. Engle*, 676 F.3d 405, 419-20 (4th Cir. 2012).

As to the first element, the Hobbs Act penalizes a person who "in any way or degree obstructs, delays, or affects 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." 18 U.S.C. § 1951(a). The Hobbs Act defines "robbery" as 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." 18 U.S.C. § 1951(b)(1).

With respect to the second element, a "substantial step" is a "direct act in a course of conduct planned to culminate in commission of a crime that is strongly corroborative of the defendant's criminal purpose." *United States v. Dozier*, 848 F.3d 180, 186 (4th Cir. 2017) (quoting *Engle*, 676 F.3d at 423). "This definition is consistent with the definition of attempt found in the Model Penal Code," which includes some nonviolent acts. *United States v. Neal*, 78 F.3d 901, 906 (4th Cir. 1996); *see also* Model Penal Code § 5.01(1)(c) (enumerating examples of conduct that constitute a substantial step, like "possession of materials to be employed in the commission of the crime"). While "[m]ere preparation . . . does not constitute an attempt to commit a crime," a "direct, substantial act toward the commission of a crime need not be the last possible act before its commission." *United States v. Pratt*, 351 F.3d 131, 136 (4th Cir. 2003) (noting that "a specific discussion" may constitute a "substantial step" where it is "so final in nature that it left little doubt that a crime was intended and would be committed").

Our application of the categorical approach to attempted Hobbs Act robbery is informed by our recent decision in *United States v. Mathis*, 932 F.3d 242 (4th Cir. 2019). In *Mathis*, we held that substantive Hobbs Act robbery "categorically" qualifies as a "crime of violence" under § 924(c)(3)(A) because although it may be committed simply by causing "fear of injury," doing so "necessarily 'involves the threat to use [physical] force.'"

Id. at 266 (quoting *McNeal*, 818 F.3d at 153). In other words, because the commission of Hobbs Act robbery requires, at a minimum, the "threatened use of physical force," it categorically qualifies as a "crime of violence" under § 924(c)'s force clause.

However, a straightforward application of the categorical approach to attempted Hobbs Act robbery yields a different result. This is so because, unlike substantive Hobbs Act robbery, attempted Hobbs Act robbery does not invariably require the use, attempted use, or threatened use of physical force. The Government may obtain a conviction for attempted Hobbs Act robbery by proving that: (1) the defendant specifically intended to commit robbery by means of a threat to use physical force; and (2) the defendant took a substantial step corroborating that intent. The substantial step need not be violent. *See, e.g.*, *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984) (concluding that defendants took a substantial step toward bank robbery where they "discussed their plans," "reconnoitered the banks in question," "assembled [] weapons and disguises," and "proceeded to the area of the bank"). Where a defendant takes a nonviolent substantial step toward threatening to use physical force—conduct that undoubtedly satisfies the elements of attempted Hobbs Act robbery —the defendant has not used, attempted to use, or threatened to use physical force. Rather, the defendant has merely *attempted to threaten* to use physical force. The plain text of § 924(c)(3)(A) does not cover such conduct.

Three of our sister circuits have eschewed this conclusion, instead holding that attempted Hobbs Act robbery does qualify as a "crime of violence." *See United*

States v. Dominguez, 954 F.3d 1251, 1255 (9th Cir. 2020); *United States v. Ingram*, 947 F.3d 1021, 1026 (7th Cir. 2020); *United States v. St. Hubert*, 909 F.3d 335, 351-53 (11th Cir. 2018). Rather than apply the categorical approach—as directed by the Supreme Court—they instead rest their conclusion on a rule of their own creation. Specifically, they hold that "[w]hen a substantive offense would be a violent felony under § 924(e) and similar statutes, an attempt to commit that offense also is a violent felony." *St. Hubert*, 909 F.3d at 351 (quoting *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017)); *Ingram*, 947 F.3d at 1026 (same); *Dominguez*, 954 F.3d at 1261 (same). In doing so, those courts adopt the same flawed premise that the Government recites here: that an attempt to commit a "crime of violence" *necessarily* constitutes an attempt to use physical force. *See, e.g.*, *St. Hubert*, 909 F.3d at 351 (asserting that an attempt to commit a "crime of violence" "must [] include at least the 'attempted use' of force"); Gov't Br. at 12 (arguing that "an attempt to commit a substantive crime of violence is an 'attempted use . . . of physical force'").

This simply is not so. Rather, as we have repeatedly held, certain crimes of violence—like Hobbs Act robbery, federal bank robbery, and carjacking—may be committed *without* the use or attempted use of physical force because they may be committed merely by means of threats. *See Mathis*, 932 F.3d at 266 (holding that "Hobbs Act robbery, when committed by means of causing *fear of injury*, qualifies as a crime of violence") (emphasis added); *McNeal*, 818 F.3d at 153 (holding that "[b]ank robbery under [18 U.S.C.] § 2113(a), 'by intimidation,' requires the *threatened use* of physical force" and thus "constitutes a crime of violence") (emphasis

added); *United States v. Evans*, 848 F.3d 242, 247 (4th Cir. 2017) (holding "that the term 'intimidation,' as used in the phrase 'by force and violence or by intimidation' in the carjacking statute, necessarily includes a *threat* of violent force within the meaning of the 'force clause'") (emphasis added).

These cases establish that, contrary to the Government's assertion, an attempt to commit a crime of violence need not involve the attempted use of physical force. Some crimes of violence can be accomplished merely though the threatened use of force. The crime at issue here—attempted Hobbs Act robbery—is just such a crime. But an attempt to *threaten* force does not constitute an attempt to *use* force. A person who attempts to commit Hobbs Act robbery by passing a threatening note to a store cashier has attempted the planned robbery without using or attempting to use physical force. He may case the store that he intends to rob, discuss plans with a coconspirator, and buy weapons to complete the job. But none of this conduct involves an attempt to use physical force, nor does it involve the use of physical force or the threatened use of physical force. In these circumstances, the defendant has merely taken nonviolent substantial steps toward threatening to use physical force. The plain text of § 924(c)(3)(A) does not embrace such activity.

Resisting this conclusion, the Government protests that application of the categorical approach here would, by extension, "leave[] *all* federal attempt crimes," even attempted murder, "outside § 924(c)(3)(A)." Gov't Br. at 18 (emphasis in original). Not so. To be sure, where a crime of violence may be committed without the use or attempted use of physical force, an attempt to commit

that crime falls outside the purview of the force clause. But where a crime of violence *requires* the use of physical force—as is usually the case—the categorical approach produces the opposite outcome: because the substantive crime of violence invariably involves the use of force, the corresponding attempt to commit that crime necessarily involves the attempted use of force. Such an attempt constitutes a "crime of violence" within the meaning of the force clause in § 924(c)(3). *See, e.g.*, *Mathis*, 932 F.3d at 265 (explaining that "[m]urder *requires* the use of force capable of causing physical pain or injury to another person" and so "qualifies categorically as a crime of violence under the force clause") (quotation marks omitted) (emphasis added); *In re Irby*, 858 F.3d 231, 236 (4th Cir. 2017) (holding that "second-degree retaliatory murder is a crime of violence under the force clause because unlawfully killing another human being *requires* the use of force") (emphasis added). Thus, the Government's dire warning rests on a misunderstanding of the consequences of adhering to the categorical approach in this case.[3]

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[3] In a post-argument letter, the Government contends that *Stokeling v. United States*, 139 S. Ct. 544 (2019), supports its view that attempted Hobbs Act robbery constitutes a crime of violence. *Stokeling* is of no aid to the Government because *Stokeling* considered only whether *common law* robbery constitutes a "violent felony"; it held it did because common law robbery "require[s] the criminal to overcome the victim's resistance." *Id.* at 550. But of course, the crime at issue here, Hobbs Act robbery, contains no similar requirement. Rather, Hobbs Act robbery criminalizes the "unlawful taking or obtaining of personal property . . . by means of actual or *threatened force*." 18 U.S.C. § 1951(b)(1) (emphasis added). *Compare Stokeling*, 139 S. Ct. at 550 (noting that "at common law,

Accordingly, we hold that attempted Hobbs Act robbery is not "categorically" a "crime of violence." We must vacate Taylor's § 924(c) conviction predicated on attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery—two offenses that are not crimes of violence.

III.

For these reasons, we reverse the district court, vacate Taylor's § 924(c) conviction, and remand for resentencing consistent with this opinion.

VACATED AND REMANDED

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an unlawful taking was merely larceny unless the crime involved 'violence,'" defined as "sufficient force [] exerted to overcome the resistance encountered"). Thus, as we held in *Mathis*, Hobbs Act robbery does not require an offender to overcome the victim's resistance; instead, this federal statutory crime, unlike common law robbery, may be committed solely by causing fear of injury—that is, by conveying a threat—and a threat does not itself constitute "force [] exerted to overcome the resistance encountered." *Id.*

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Criminal No. 3:08CR326

UNITED STATES OF AMERICA

v.

JUSTIN EUGENE TAYLOR, PETITIONER

[Filed: Aug. 26, 2019]

MEMORANDUM OPINION

Justin Eugene Taylor, a federal inmate proceeding with counsel, brings this successive motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence ("§ 2255 Motion," ECF No. 76). Taylor contends that his firearm conviction and sentence are invalid under *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Government filed a Motion to Dismiss the § 2255 Motion, contending that the relevant statute of limitations bars relief. (ECF No. 81.) The Court subsequently ordered further briefing. In its Supplemental Mem-

orandum, the Government argues, *inter alia*, that Taylor's claim lacks merit.[1] (ECF No. 89.) Taylor filed his Reply. (ECF No. 92.) As discussed below, the Court finds that Taylor's claim lacks merit and may be dismissed on that ground.

I. Procedural History

On February 4, 2009, a grand jury charged Taylor with: conspiracy to possess with intent to distribute and distribute marijuana (Count One); attempted distribution of marijuana (Count Two); possession of a firearm in furtherance of a drug trafficking crime (Count Three); use and carry of a firearm during and in relation to a drug trafficking crime, to wit, attempting to distribute marijuana as charged in Count Two (Count Four); conspiracy to interfere with commerce by threats and violence ("Hobbs Act robbery") (Count Five); one count of attempting to aid and abet Hobbs Act robbery (Count Six); and, use and carry of a firearm in furtherance of a felony crime of violence, to wit, "conspiracy to interfere with commerce by armed robbery as charged in Count Five and Interference with Commerce by Threats and Force as charged in Count Six," in violation of 18 U.S.C. § 924(c) (Count Seven). (Sec. Super. Indictment 1-4, ECF No. 17.) On February 13, 2009, Taylor pled guilty to Counts Five and Seven of the Second Superseding Indictment. (Plea Agreement ¶ 1, ECF No. 31.) The Government agreed to dismiss the other five counts. (*Id.* ¶ 12.)

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[1] In addition to the timeliness arguments made in the Motion to Dismiss, the Government also argues that Taylor's claim is procedurally defaulted. (Supp'l Mem. 10-13.) The Court need not address this argument because the Court finds Taylor's claim lacks merit.

In the Statement of Facts supporting his guilty plea to Counts Five and Seven, Taylor agreed that following facts were true:

> Starting before January 1, 2012, and continuing through December 14, 2003, and thereafter, JUSTIN EUGENE TAYLOR conspired with others to distribute and possess with intent to distribute marijuana. In furtherance of this conspiracy, JUSTIN EUGENE TAYLOR and others, known and unknown, would obtain wholesale quantities of marijuana and distribute the marijuana to coconspirators for redistribution. Also, in furtherance of this conspiracy, JUSTIN EUGENE TAYLOR and others would arrange wholesale marijuana transactions and, rather than complete the transaction, would take the money from the customer, intentionally fail to distribute the marijuana to the customer, and use the money to finance their own drug trafficking business.
>
> Prior to August 14, 2003, JUSTIN EUGENE TAYLOR met with Martin Sylvester and Jonathan Hartzell. During that meeting JUSTIN EUGENE TAYLOR discussed his ability to supply Martin Sylvester with marijuana for redistribution and exchanged cell phone numbers with Sylvester.
>
> On August 14, 2003, JUSTIN EUGENE TAYLOR arranged to meet Martin Sylvester for the purpose of distributing marijuana to Sylvester so that Sylvester could redistribute the marijuana to others. Per their arrangements, JUSTIN EUGENE TAYLOR met Martin Sylvester and Jonathan Hartzell at the residence of a mutual acquaintance. JUSTIN EUGENE TAYLOR was driven in his car to the res-

idence by his Coconspirator, who dropped off JUSTIN EUGENE TAYLOR without being seen. JUSTIN EUGENE TAYLOR met with Sylvester and Hartzell at the residence and then rode in Hartzell's car with Hartzell and Sylvester to the area of Hanover Avenue and North Lombardy Street, in the City of Richmond, Virginia, in order to obtain marijuana for Sylvester. Upon arriving at that area, JUSTIN EUGENE TAYLOR asked Sylvester for the money to pay for the marijuana, but Sylvester refused to give the money to JUSTIN EUGENE TAYLOR until he saw the marijuana. JUSTIN EUGENE TAYLOR left Hartzell's vehicle in order to obtain the marijuana, however, he was unable to do so.

JUSTIN EUGENE TAYLOR contacted his Coconspirator and the two of them devised a plan to steal the money that Sylvester had to purchase the marijuana. Pursuant to that plan, the Coconspirator, who was armed with a 9mm semiautomatic pistol, would pose as the drug dealer, meet with Sylvester and demand to see the purchase money. Upon Sylvester showing Coconspirator the money, the plan was for the Conspirator to take the money by force and flee the area with JUSTIN EUGENE TAYLOR, in JUSTIN EUGENE TAYLOR'S car. JUSTIN EUGENE TAYLOR did not explicitly plan or agree to kill Martin Scott Silvester [sic].

Pursuant to this plan, the Coconspirator went to the alleyway located between Hanover and Grove Avenues, and North Lombardy and North Vine Streets. JUSTIN EUGENE TAYLOR called Sylvester and told him to meet the man in the alleyway to obtain the

> marijuana. JUSTIN EUGENE TAYLOR then went to his car to wait for the Coconspirator.
>
> The Coconspirator met Sylvester in the alleyway, displayed the 9mm semiautomatic pistol and demanded Sylvester's marijuana purchase money. Martin Sylvester resisted, the pistol discharged and Martin Sylvester was fatally shot. Martin Sylvester died the next day from a gunshot wound.
>
> The Coconspirator fled to JUSTIN EUGENE TAYLOR'S care and the Conspirator and JUSTIN EUGENE TAYLOR fled the area.

(Statement of Facts ¶¶ 1-7 (paragraph numbers omitted).)[2]

On May 24, 2009, the Court entered judgment against Taylor and sentenced him to 240 months of imprisonment on Count Five, and 120 months of imprisonment on Count Seven, to run consecutively. (J. 3, ECF No. 44 (as paginated by CM/ECF).)

By Memorandum Opinion and Order entered on July 7, 2015, the Court denied on the merits Taylor's first § 2255 motion. (ECF Nos. 69, 70.) On June 24, 2016, the Fourth Circuit granted Taylor permission to file a successive § 2255 motion based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). (ECF No. 74.) On June 27, 2016, Taylor filed the instant § 2255 Motion. (ECF No. 76.)

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[2] It appears that the Government may have spelled the victim's name wrong in the Statement of Facts as the Superseding Indictment spells the victim's name "Silvester" rather than "Sylvester." The Court spells the victim's name as the Government spells it in each document quoted here.

II. ***Johnson v. United States***

In *Johnson v. United States*, the Supreme Court described the impact of the Armed Career Criminal Act "(ACCA") on federal gun laws and noted that:

> Federal law forbids certain people—such as convicted felons, persons committed to mental institutions, and drug users—to ship, possess, and receive firearms. § 922(g). In general, the law punishes violation[s] of this ban by up to 10 years' imprisonment. § 924(a)(2). But if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," the [ACCA] increases his prison term to a minimum of 15 years and a maximum of life. § 924(e)(1).

135 S. Ct. 2551, 2555 (2015) (citations omitted).

The ACCA defines a violent felony as: "any crime punishable by imprisonment for a term exceeding one year" and "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B) (emphasis added). "The closing words of this definition, italicized above, have come to be known as the Act's residual clause." *Johnson*, 135 S. Ct. at 2556. In *Johnson*, the Supreme Court held that the residual clause of the ACCA is unconstitutionally vague because the clause encompassed "conduct that presents a serious potential risk of physical injury to another," which defied clear definition. *Id.* at 2557-58 (citation omitted). Subsequently, in *Welch v. United States*, the Supreme Court held that

"*Johnson* announced a substantive rule [of law] that has retroactive effect in cases on collateral review." 136 S. Ct. 1257, 1268 (2016).

III. Analysis

Taylor asserts that the substantive rule announced in *Johnson* affords him relief. However, Taylor's claim lacks merit. *See United States v. Nahodil*, 36 F.3d 323, 326 (3d Cir. 1994) (noting that a district court may summarily dismiss a § 2255 motion where "files, and records 'show conclusively that the movant is not entitled to relief" (quoting *United States v. Day*, 969 F.2d 39, 41-42 (3d Cir. 1992))). Taylor pled guilty to conspiracy to commit Hobbs Act robbery and using and carrying a firearm in furtherance of a felony crime of violence, to wit, "conspiracy to interfere with commerce by armed robbery as charged in Count Five and attempting to aid and abet Interference with Commerce by Threats and Force as charged in Count Six." (Sec. Super. Indictment 3-4.)[3] Taylor contends that, after *Johnson*, the offenses of attempting to aid and abet Hobbs Act robbery and conspiracy to commit Hobbs Act robbery can no longer qualify as a crime of violence under 18 U.S.C. § 924(c)(3), and thus the Court must vacate his conviction for Count Seven.[4] Taylor is incorrect.

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[3] Both Counts Five and Six arose from the robbery and killing of Martin Silvester on August 14, 2002. (Sec. Superseding Ind. 3-4.)

[4] Title 18 U.S.C. section 924(c)(1)(A) provides for consecutive periods of imprisonment when a defendant uses or carries a firearm in furtherance of a crime of violence. The baseline additional period of imprisonment is five years. 18 U.S.C. § 924(c)(1)(A)(i). If the defendant brandishes the firearm, the additional period of imprisonment increases to at least seven years. *Id.* § 924(c)(1)(A)(ii). And,

At the time of Taylor's conviction, the United States could demonstrate that an underlying offense constituted a crime of violence if it established that the offense was a felony and satisfied one of two requirements. Namely, the statute defines a crime of violence as any felony:

> **(A)** [that] has as an element the use, attempted use, or threatened use of physical force against the person or property of another [(the "Force Clause")], 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 [(the "Residual Clause")].

Id. § 924(c)(3). The Supreme Court recently invalidated the Residual Clause. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019) (holding that "§ 924(c)(3)(B) is unconstitutionally vague"). Despite the invalidity of the Residual Clause, attempting to aid and abet Hobbs Act robbery qualifies as a crime of violence under the Force Clause.

Here, Taylor's § 924(c) conviction was predicated on two counts: conspiracy to commit Hobbs Act robbery as charged in Count Five and attempting to aid and abet Hobbs Act robbery as charged in Count Six. (Indictment 4.) The Hobbs Act makes it a crime to obstruct, delay, or affect commerce "by robbery" or to "attempt[ ] or

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if the defendant discharges the firearm, the additional period of imprisonment increases to at least ten years. *Id.* § 924(c)(1)(A)(iii).

conspire[ ] to do so" or to "commit[ ] or threaten[ ] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section. . . . " 18 U.S.C. § 1951(a). "Robbery" under the Hobbs Act is defined as "the unlawful taking or obtaining of personal property" from a person "by means of actual or threatened force, or violence, or fear of injury, immediate or future." *Id.* § 1951(b)(1).

Hobbs Act robbery remains a qualifying crime of violence under the Force Clause. *United States v. Mathis*, — F.3d —, Nos. 16-4633, 16-4635, 16-4637, 16-4641, 16-4837, 16-4838, 2019 WL 3437626, at *16 (4th Cir. July 31, 2019) (citations omitted) (holding that "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)"). Although the Fourth Circuit has invalidated any reliance on *conspiracy* to commit Hobbs Act robbery as a predicate crime of violence for § 924(c), *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019), attempting to aid and abet Hobbs Act robbery constitutes a valid crime of violence under the Force Clause because it invariably requires the actual, attempted, or threatened use of physical force. *United States v. St. Hubert*, 909 F.3d 335, 351 (11th Cir. 2018), cert. denied, 139 S. Ct. 1394 (2019) ("attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause because that clause expressly includes 'attempted use' of force"); *see Mathis*, 2019 WL 3437626, at *16; *see also In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) (because aiding and abetting presents an alternative charge that permits one to be found guilty as a principal, "conviction for aiding and abetting a Hobbs Act robbery qualifies as a 'crime of violence' under the § 924(c)(3)(A) use-of-force

clause"). And because the substantive offense of Hobbs Act robbery "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," then an aider and abettor of a Hobbs Act robbery necessarily commits a crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Accordingly, Taylor's conviction for attempted aiding and abetting a Hobbs Act robbery qualifies as a "crime of violence" under the § 924(c)(3)(A) Force Clause, without regard to the § 924(c)(3)(B) Residual Clause.

Thus, Taylor's conviction remains valid after *Johnson* and its progeny because it was predicated on attempting to aid and abet Hobbs Act robbery charged in Count Six. *See United States v. Doyle*, No. 2:18cr177, 2019 WL 3225705, at *3-4 (E.D. Va. July 17, 2019) (finding § 924(c) conviction valid when based on both conspiracy to commit Hobbs Act robbery and Hobbs Act robbery); *cf. United States v. Hare*, 820 F.3d 93, 105-06 (4th Cir. 2016) (explaining that "the court need not reach the merits of this argument . . . [because]" a § 924(c) conviction predicated on *both* conspiracy to commit Hobbs Act robbery and in furtherance of a drug trafficking crime is not affected by *Johnson*). Accordingly, Taylor's claim pursuant to *Johnson* lacks merit and will be DISMISSED.

III. Conclusion

The § 2255 Motion (ECF No. 76) will be DENIED. The Government's Motion to Dismiss (ECF No. 81) will be DENIED as MOOT. Taylor's claim and the action will be DISMISSED.

An appeal may not be taken from the final order in a § 2255 proceeding unless a judge issues a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1)(B). A COA will not issue unless a prisoner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requirement is satisfied only when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). Taylor has not satisfied this standard. Accordingly, a COA will be DENIED.

An appropriate Order will accompany this Memorandum Opinion.

/s/ M. HANNAH LAUCK
M. HANNAH LAUCK
United States District Judge

Date: [Aug. 26, 2019]
Richmond, Virginia

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7616
(3:08-cr-00326-MHL-RCY-1)
(3:16-cv-00508-MHL)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JUSTIN EUGENE TAYLOR, A/K/A MOOKIE, A/K/A/ MOOK,
DEFENDANT-APPELLANT

Filed: Dec. 11, 2020

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ PATRICIA S. CONNOR, Clerk
PATRICIA S. CONNOR

APPENDIX D

1. 18 U.S.C. 2113(a) provides:

Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined under this title or imprisoned not more than twenty years, or both.

2. 18 U.S.C. 2119 provides:

Motor vehicles

Whoever, with the intent to cause death or serious bodily harm[1] takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

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[1] So in original. Probably should be followed by a comma.