No. _____

IN THE

Supreme Court of the United States

DAVID KAREEM TURPIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Hobbs Act robbery, which can be committed by putting another in fear of future injury to himself, his property, or even his intangible property, is a crime of violence that necessarily requires violent force under the force clause of 18 U.S.C. § 924(c)(3)(A).

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit, *United States* v. *Turpin*, No. 18-4640 (Apr. 7, 2020)

United States District Court for the Eastern District of North Carolina, *United States* v. *Turpin*, No. 5:17-CR-157-D-1 (Aug. 22, 2018)

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PETITION FOR WRIT OF CERTIORARI

Petitioner David Turpin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion is unreported, but is available at 800 F. App'x 194. Pet. App. 1a. The District Court's judgment is available at Pet. App. 6a.

JURISDICTION

The Fourth Circuit issued its opinion on April 7, 2020. Pet. App.1a. This Court entered an order on March 19, 2020, extending the deadline to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(1)(A) provides, in pertinent part:

> * * * any person who, during and in relation to any crime of violence
> * * * 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 a crime of violence * * *—
>
> > (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years;
> >
> > * * *

18 U.S.C. § 924(c)(3) defines a "crime of violence" as follows:

> (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(a) defines Hobbs Act robbery:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . 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 [commit robbery under the statute]

18 U.S.C. § 1951(b)(1) defines robbery within the statute 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, 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

INTRODUCTION

Hobbs Act robbery can be committed by causing someone to fear that they, their property, or even their intangible property may be injured in the future. In other words, causing someone to fear that he will be poisoned or that his computer

software or database could be harmed is enough for the Government to obtain a conviction for Hobbs Act robbery. One would not call this "violent force" with a straight face, and yet the Fourth Circuit (and other courts) have come to the conclusion that such a crime is categorically a crime of violence, deserving of a mandatory consecutive penalty of five, seven, or even ten years of imprisonment.

Hobbs Act robbery does not categorically require violent force, and the federal courts of appeals are getting this question wrong, again and again, sometimes because they have not considered it in the context of full briefing and adversary presentation. But this issue is too significant for the defendants it affects and too widespread to rely on the unconsidered consensus of the lower courts.

This Court should grant certiorari and reverse.

STATEMENT

In May 2017, David Turpin was charged in a five-count indictment with three counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951, and two counts of using and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2. Pet. App. 80a-85a.

Mr. Turpin moved to dismiss the two Section 924(c) counts, arguing that the Hobbs Act robbery crimes on which they were based are not "crimes of violence" for purposes of Section 924(c), but the District Court denied that motion, Pet. App. 13a-15a. Mr. Turpin thus pleaded guilty to one count of Hobbs Act robbery and one count of using and brandishing a firearm in furtherance of a crime of violence, pursuant to a written plea agreement. Pet. App. 46a-79a.

The Probation Office prepared a presentence report. CAJA155-CAJA170. Applying U.S.S.G. § 2B3.1, the Office began with a base offense level of twenty, adding four points because a person was abducted to facilitate commission of the offense, and one point because the loss was more than $20,000 but less than $95,000. CAJA166. It removed two levels in recognition of Mr. Turpin's acceptance of responsibility. CAJA167. With a criminal history score of VI, Mr. Turpin's advisory guideline range for the Hobbs Act robbery was 92 to 115 months and his advisory guideline range for the Section 924(c) offense was 84 months. CAJA167.

The Government moved for an upward departure or variance. CAJA89-CAJA93. Mr. Turpin filed a sentencing memorandum seeking a sentence of 199 months. CAJA142-CAJA154.

The District Court departed upward under U.S.S.G. § 5K2.21, concluding that a robbery charged in a count dismissed in exchange for Mr. Turpin's guilty plea warranted such a departure. Pet. App. 34a-36a. The court recalculated the advisory guideline range to be 130 to 162 months on the Hobbs Act robbery count. Pet. App. 36a. After stating it had considered the sentencing factors under 18 U.S.C. § 3553(a), the court imposed a sentence of 156 months of imprisonment on the Hobbs Act robbery and a consecutive term of eighty-four months of imprisonment on the Section 924(c) count, for a total of 240 months, or twenty years. Pet. App. 36a-41a. It imposed concurrent terms of three and five years of supervised release, a special assessment of $200, and deferred a restitution order. Pet. App. 41a.

Mr. Turpin noted his appeal the same day. CAJA131. He argued that his twenty-year sentence was substantively unreasonable and also preserved the argument, foreclosed by binding circuit precedent, that Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c)(3), and thus cannot serve as a predicate offense for his 18 U.S.C. § 924(c)(1)(A) conviction.

The court of appeals affirmed Mr. Turpin's Section 924(c) conviction, citing *United States* v. *Mathis*, 932 F.3d 242, 266 (4th Cir.), *cert. denied*, 140 S. Ct. 639 (2019), and *cert. denied*, 140 S. Ct. 640 (2019). Pet. App. 4a-5a. And it affirmed Mr. Turpin's sentence as substantively reasonable. Pet. App. 1a-4a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION IS WRONG AND CONTRAVENES THIS COURT'S DECISION IN *JOHNSON*

Section 924(c) prohibits the use of a firearm in furtherance of a crime of violence. And it has serious consequences: It subjects violators to a mandatory minimum sentence of at least five years in prison, over and above any other sentence they receive. 18 U.S.C. § 924(c)(1)(A). Section 924(c) defines "crime of violence" in two different clauses: the force clause, Section 924(c)(3)(A), and the residual clause, Section 924(c)(3)(B). This Court has held that the residual clause is unconstitutionally vague. *United States* v. *Davis*, 139 S. Ct. 2319, 2336 (2019). So an offense is only a "crime of violence" if it satisfies the force clause. That is, if it is a felony that "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).

In determining whether an offense qualifies as a crime of violence under Section 924(c)'s force clause, courts use the categorical approach. *Davis*, 139 S. Ct. at 2328. Under the categorical approach, courts analyze whether the statutory elements of the offense necessarily require the use, attempted use, or threatened use of physical force. The categorical approach requires that courts look only to the "statutory definitions—*i.e.*, the elements—of a defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a "crime of violence." *Descamps* v. *United States*, 133 S. Ct. 2276, 2283 (2013) (citation omitted). Under the categorical approach, an offense qualifies as a "crime of violence" only if all the criminal conduct covered by a statute—including the "most innocent conduct"—matches, or is narrower than, the "crime of violence" definition. *United States* v. *Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012).

This Court has been clear that not any type or degree of force suffices. Rather, "[p]hysical force" is " 'force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force.' " *Stokeling* v. *United States*, 139 S. Ct. 544, 552 (2019) (quoting *Johnson* v. *United States*, 559 U.S. 133, 138 (2010)). And it means " '*violent* force—that is, force capable of causing physical pain or injury to another person.' " *Stokeling*, 139 S. Ct. at 553 (quoting *Johnson*, 559 U.S. at 140).

A person commits Hobbs Act robbery when he:

> in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . 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 [commit robbery under the statute]

18 U.S.C. § 1951(a). "Robbery" is defined 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, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining

18 U.S.C. § 1951(b)(1). Because Hobbs Act robbery can be accomplished by putting someone in fear of future injury to his person or property, it does not categorically require the use, attempted use, or threatened use of violent force.

Placing another in fear of injury does not categorically require the use or attempted use of violent physical force. Instead, at best, placing another in fear of injury constitutes a threat of physical injury to another. However, a threat of physical injury does not equate to the use or threatened use of violent force against another. As the Fourth Circuit has explained, the threat of any physical injury, even "serious bodily injury or death," does not necessarily require the use of force—let alone violent force. *Torres-Miguel*, 701 F.3d 165.

In *Torres-Miguel*, the defendant had previously been convicted of the California offense of willfully threatening to commit a crime that "will result in death or great bodily injury to another." 701 F.3d at 168. The court was asked to determine whether the statute had an element equating to a threat of violent force under U.S.S.G. § 2L1.2, the force clause of which is identical in all respects to the Section 924(c)(3)(A) force clause. *Id.*

Even though the California statute required, as an element, "death or great bodily injury," the court found the offense was missing a "violent force" element and thus could not qualify under the force clause. *Id.* at 168-169. It explained: "An offense that *results* in physical injury, but does not involve the use or threatened use of force, simply does not meet the Guidelines definition of crime of violence." *Id.* at 168. That was so because "a crime may *result* in death or serious injury without involving *use* of physical force." *Id.* The court relied on appellate decisions from around the country reflecting that there are many ways in which physical injury—even death—can result without use of violent force. *Id.* at 168-169. "For example, as the Fifth Circuit has noted, a defendant can violate statutes like [the California statute] by threatening to poison another, which involves no use or threatened use of force." *Id.* (citing *United States* v. *Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010)). In other words, "fear of injury" does not equate to "use of violent force." 701 F.3d at 169. The court spoke plainly: "Not to recognize the distinction between a *use* of force and a *result* of injury is not to recognize the logical fallacy . . . that simply because all conduct involving a risk of the use of physical force also involves a risk of injury then the converse must also be true." *Id.*

Hobbs Act robbery can be accomplished by putting another in fear of physical injury and thus does not require violent force. Indeed, a person could place another in fear of physical injury by threatening to poison that person, to expose that person to hazardous chemicals, to place a barrier in front of the person's car, to lock the

person up in the car on a hot day, or to lock the person in an abandoned site without food or shelter, none of which requires use of violent force.

What is more, Section 1951(b)(1) also encompasses "fear of injury, immediate or future, to . . . property." 18 U.S.C. § 1951(b)(1). And nothing in the statute requires that the fear of injury be sustained through violent force. *United States* v. *Chea*, Nos. 98-CR-20005-1 CW, 98-CR-40003-2 CW, 2019 WL 5061085, at *8 (N.D. Cal. 2019). In fact, the statute's structure separates the "use of force" from the "fear of injury" to persons or property, thus creating alternate means of committing Hobbs Act robbery and demonstrating Congress's intent that these represent distinct concepts, some of which involve violence and one of which that does not. *See id.* at *9. Hobbs Act robbery thus cannot qualify under the force clause because the offense can be accomplished by putting someone in fear of future injury to his property, which does not require the use, attempted use, or threatened use of "violent force."

Property, like persons, can be injured without using violent force. For example, "a vintage car can be injured by a mere scratch, and a collector's stamp can be injured by tearing it gently." *Id.* at *8.

In fact, Hobbs Act robbery can be committed by threatening future injury even to *intangible* property, such as a computer software system or database. And "[w]here the property in question is intangible, it can be injured without the use of any physical contact at all; in that context, the use of violent physical force would be an impossibility." 2019 WL 5061085, at *8.

Although every federal court of appeals except the D.C. Circuit and the Third Circuit has now ruled in a published opinion that Hobbs Act robbery is a crime of violence under the force clause, they have not always done so in fully briefed appeals subject to adversarial testing. For example, in *United States* v. *Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018), the Tenth Circuit held that Hobbs Act robbery is a crime of violence under the force clause of Section 924(c). In *United States* v. *Toki*, ___F. App'x ___, 2020 WL 4590536, at *3 (10th Cir. 2020), the court acknowledged that *Melgar-Cabrera* did not address the argument that Hobbs Act robbery is not a crime of violence because it can be accomplished by threatening injury to intangible property, but nonetheless entrenched its prior holding, stating simply that it was " 'bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.' " *Id.* (quoting *Strauss* v. *Angie's List*, 951 F.3d 1263, 1269 (10th Cir. 2020)). And in *United States* v. *St. Hubert*, 909 F.3d 335 (11th Cir. 2018), the Eleventh Circuit concluded that Hobbs Act robbery is a crime of violence under the force clause, but it did so based on prior cases, which Justice Sotomayor explained were "not fully briefed direct appeals subject to adversarial testing; instead, they were denials of applications seeking authorization to file second or successive habeas petitions." *St. Hubert* v. *United States*, 140 S. Ct. 1727 (2020) (Sotomayor, J., dissenting from denial of certiorari).

In *United States* v. *Buck*, 847 F.3d 267 (5th Cir. 2017), the Fifth Circuit did no independent analysis and merely cited the opinions of other circuits, including one

that did not even apply the categorical approach (*United States* v. *Robinson*, 844 F.3d 137 (3d Cir. 2016), to hold that a district court did not plainly err in classifying Hobbs Act robbery as a Section 924(c) predicate. The Eighth Circuit, in *United States* v. *Jones*, 919 F.3d 1064 (8th Cir. 2019), similarly did not engage in any independent analysis and merely cited the opinions of other circuits.

The federal courts of appeals that have concluded Hobbs Act robbery is a crime of violence have done so in contravention of *Johnson*, because the crime can be committed without violent physical force. What is more, some have reached their conclusions with only cursory analysis and without full adversary presentation and consideration of all relevant arguments.

II. THIS ISSUE IS IMPORTANT AND RECURS FREQUENTLY

The impact of a Section 924(c) conviction is significant, with mandatory consecutive penalties of five, seven, or ten years, depending on whether the firearm was merely used, brandished, or discharged. 18 U.S.C. § 924(c)(1)(A)(i)-(iii). And this particular predicate—Hobbs Act robbery—often serves as the predicate for a Section 924(c) offense. This issue is too important, and too common, to be left to the cursory analysis of some federal courts of appeals. This Court's intervention is needed now.

III. THIS IS A CLEAN VEHICLE TO DECIDE THE QUESTION PRESENTED

Mr. Turpin argued at each stage of this case that his Section 924(c) conviction was invalid because it was based on Hobbs Act robbery, which is not a crime of violence. Each court (however briefly) passed upon his argument. Nearly every

circuit in the country has weighed in on this question and indicated that those precedents are entrenched absent further guidance from this Court. That guidance is sorely needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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