No. 20-5672

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

REPLY TO BRIEF IN OPPOSITION

G. ALAN DUBOIS
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA

JACLYN L. TARLTON
ASSISTANT FEDERAL PUBLIC DEFENDER
Counsel of Record
EASTERN DISTRICT OF NORTH CAROLINA
150 Fayetteville St.
Suite 450
Raleigh, N.C. 27601
(919) 856-4236
jackie_tarlton@fd.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER SOURCES

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

REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

The Government's brief in opposition makes two arguments, neither of which should give the Court pause in granting certiorari. *First*, it cites appellate cases concluding that Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A), but it fails to engage with Mr. Turpin's primary argument, namely that the majority of these decisions engage in only cursory analysis and are wrongly decided: Many do not even address that Hobbs Act robbery can be committed by a threat to intangible property, which does not categorically require violent force. Those that do address it do so only summarily and based on flawed logic. *Second*, it argues that this Court should enforce an appellate waiver that the Government never asserted below to bar a claim of actual innocence despite this Court's holding that enforcement of such a waiver would work a manifest injustice. Neither of the

Government's arguments should carry the day. The Court's guidance is sorely needed now on this critical issue of national importance.

ARGUMENT

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

A. Hobbs Act robbery can be committed by a threat of injury to intangible property, which does not categorically require violent force.

As explained in Mr. Turpin's petition, Hobbs Act robbery can be committed with a threat of injury to intangible property. 18 U.S.C. § 1951(b)(1). Courts of appeals have understood the term "property" in the Hobbs Act to "protect intangible, as well as tangible property." *United States* v. *Local 560 of the Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.*, 780 F.2d 267, 281 (3d Cir. 1986) (describing the circuits as "unanimous" on this point); *see also United States* v. *Arena*, 180 F.3d 380, 392 (2d Cir. 1999) (emphasis added) (citing 18 U.S.C. § 1951(a)), *abrogated in part on other grounds by Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003) ("The concept of 'property' under the Hobbs Act is an expansive one" that includes "*intangible assets*, such as rights to solicit customers and to conduct a lawful business."); *United States* v. *Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction for threat "to slow down or stop construction projects unless his demands were met"). In other words, a defendant may commit Hobbs Act robbery by threatening to harm an intangible interest, like

a stock option or a contract right. But injury to intangible property does not necessarily require the use of physical force, as required by Section 924(c)(3)(A)[1].

The Government incorporates by reference citation to a number of court of appeals decisions concluding that Hobbs Act robbery is categorically a crime of violence under Section 924(c)(3)(A). *Steward* Brief in Opposition at 7-8. But each of them either does not address this argument or wrongly rejects it.

The Fifth Circuit did not address this argument in *United States* v. *Buck*. 847 F.3d 267, 274-275 (5th Cir. 2017). In fact, it did no independent analysis at all, merely citing to the opinions of other circuits, including two that did not even apply the categorical approach and one unpublished opinion. *Id.* (citing *United States* v. *Robinson*, 844 F.3d 137 (3d Cir. 2016); *In re Fleur*, 824 F.3d 1337 (11th Cir. 2016); *United States* v. *Howard*, 650 F. App'x 466 (9th Cir. 2016)). The Sixth Circuit held that Hobbs Act robbery is a Section 924(c) crime of violence with no independent analysis on issues beyond divisibility, merely citing to decisions of other circuits. *United States* v. *Gooch*, 850 F. 3d 292 (6th Cir. 2017).[2] The Eighth Circuit also

---

[1] As an initial matter, and contrary to the Government's assertion (at 7), the causation aspect of *United States* v. *Torres-Miguel*'s holding was not abrogated by *United States v. Castleman*, 572 U.S. 157 (2014), as reflected in the very case cited by the Government in its brief in opposition. *United States* v. *Covington*, 880 F.3d 129, 134 n. 4 (4th Cir. 2018) (citing *United States* v. *McNeal*, 818 F.3d 141, 156 n.10 (4th Cir. 2016)) ("*Castleman* did not however abrogate the causation aspect of *Torres-Miguel* that 'a crime may *result* in death or serious injury without involving the *use* of physical force.' "). In other words, resulting harm or injury does not necessarily mean that physical force is required.

[2] *United States* v. *Richardson*, 948 F.3d 733 (6th Cir. 2020), cited by the Government, addresses aiding and abetting Hobbs Act robbery, not substantive Hobbs Act robbery.

failed to engage in any independent analysis. *United States* v. *Jones*, 919 F.3d 1064 (8th Cir. 2019). The Seventh Circuit did not address this argument in *United States* v. *Rivera*, 847 F.3d 847 (7th Cir. 2017).

In *United States* v. *Toki*, 822 F. App'x 848, 853 (10th Cir. 2020), the Tenth Circuit acknowledged that its decision in *United States* v. *Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018) did not address this argument, but nonetheless entrenched its prior holding, stating that it was " 'bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.' " It then promptly denied rehearing en banc to a petition squarely presenting that argument. Order Denying Petition for Rehearing and Rehearing En Banc, *United States* v. *Toki*, Tenth Cir. No. 17-4153 (filed Nov. 13, 2020).

Despite the Government's citation, *Brown* v. *United States* did not even address substantive Hobbs Act robbery; it discussed conspiracy to commit that offense. 942 F.3d 1069, 1075 (11th Cir. 2019). But the Eleventh Circuit decision that did hold that Hobbs Act robbery qualifies as a crime of violence under Section 924(c), *United States* v. *St. Hubert*, 909 F.3d 335 (11th Cir. 2018), never addressed the argument that Hobbs Act robbery can be committed by a threat to intangible property and, as Justice Sotomayor explained, was decided based on reference to prior cases that "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).

The First Circuit did address this argument in *United States* v. *Garcia-Ortiz*, but wrongly rejected it, asserting that a threat to devalue an intangible economic interest "sounds to us like Hobbs Act extortion." 904 F.3d 102, 107 (1st Cir. 2018). The Second Circuit made the same error and claimed "Hill has failed to show any realistic probability that a perpetrator could effect such a robbery in the manner he posits without employing or threatening physical force." *United States* v. *Hill*, 890 F.3d 51, 57, n.9 (2d Cir. 2018). The Fourth Circuit claimed to address this argument in *United States* v. *Mathis*, but did so only by summarily concluding that "we do not discern any basis in the text of either statutory provision for creating a distinction between threats of injury to tangible and intangible property for purposes of defining a crime of violence," citing *Garcia-Ortiz*, *Hill*, *Rivera*, and *Fleur*. 932 F.3d 242, 265-266 (4th Cir. 2019). The Ninth Circuit rejected this argument, claiming that the appellant "fails to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest." *United States* v. *Dominguez*, 954 F.3d 1251, 1260-1261 (9th Cir. 2020)

All in all, only four circuits have purported to address the argument that Hobbs Act robbery is not a crime of violence because it can be committed by threats to intangible property. And they wrongly conclude that such threats would constitute only Hobbs Act extortion and not Hobbs Act robbery. But there is no authority to support the conclusion that the definition of "property" differs from one subsection of Section 1951 to another. "Property"—in Hobbs Act robbery *and* extortion—

includes "intangible property," and the fear of future injury to intangible property is not necessarily caused by the use or threat of physical force. The Tenth and Eleventh Circuits have pattern jury instructions that extend Hobbs Act robbery to situations where the defendant causes fear of future injury to intangible property. Tenth Circuit, Criminal Pattern Jury Instructions § 2.70 (2018), *available at* https://www.ca10.uscourts.gov/sites/default/files/clerk/Jury%20Instructions%20Update%202018.pdf ("fear" may be fear of injury "immediately *or in the future*" and includes "anxiety about . . . economic loss"; "property" includes other "intangible things of value"); Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (2020), *available at* https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsCurrentComplete.pdf?revDate=20200227 (" 'Property' includes money, tangible things of value, and intangible rights that are a source or element of income or wealth."; " 'Fear' means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence."). And a leading jury instruction treatise includes intangible property for both Hobbs Act robbery and extortion. 3-50 Leonard B. Sand et al., Modern Federal Jury Instructions Criminal ¶ 50.03 (2007). Similar instructions have been used in trials around the country. *See, e.g.*, *United States* v. *Baker*, No. 2:11-CR-20020, ECF No. 53 at 20 (D. Kan. Sept. 15, 2011) (allowing conviction based on causing anxiety about future harm to intangible property); *United States* v. *Hennefer*, No. 1:96-CR-24, ECF No. 195 at 32, 35, 36 (D. Utah Jul. 9, 1997) (same); *United States*

v. *Nguyen*, No. 2:03-CR-158, ECF No. 157 at 28 (D. Nev. Feb. 10, 2005) (same); *United States* v. *Lowe*, No. 1:11-CR-20678, ECF No. 229 at 12, 13 (S.D. Fla. Feb. 6, 2012) (same); *United States* v. *Graham*, No. 1:11-CR-94, ECF No. 211 at 142 (D. Md. Jan. 29, 2013) (same); *United States* v. *Brown*, No. 11-CR-334-APG, ECF No. 197 at 15 (D. Nev. Jul. 28, 2015) (same).

The Government relies (at 8) on this Court previously denying certiorari in certain cases, but of course, this Court's denial of certiorari does not represent a ruling on the merits. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1404 n.56 (2020) (quoting *Darr* v. *Burford*, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting)) (" '[T]he significance of a denial of a petition for certiorari ought no longer * * * require discussion. This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim.' ").

And, in any event, this Court has previously taken up recurring issues of national importance in federal criminal law, even in the absence of a circuit split. *See, e.g.*, *Rehaif* v. *United States*, 139 S. Ct. 2191, 2201 (2019) (Alito, J., dissenting) (noting that "every single Court of Appeals to address the question" had agreed); *Gundy* v. *United States*, 139 S. Ct. 2116, 2119 (2019) (noting that every court to have considered Gundy's claim had rejected it, but that "[w]e nonetheless granted certiorari"); *Gamble* v. *United States*, 139 S. Ct. 1960, 1964 (2019) (noting that "170 years of precedent" were against Gamble's argument).

B. Hobbs Act robbery, like federal bank robbery, can be committed by putting another in fear of physical injury, without the intent to threaten force.

What is more, Hobbs Act robbery, like federal bank robbery, can be accomplished by putting another in fear of physical injury, which does not necessarily require an actual intent to threaten force. *See* 18 U.S.C. § 1951(b)(1) ("the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by * * * 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"). To qualify as a crime of violence under the force clause, a predicate crime must have a *mens rea* of at least "knowingly" or "intentionally." *See Leocal* v. *Ashcroft*, 543 U.S. 1, 10-11 (2004). Because the force clause requires such a *mens rea*, Hobbs Act robbery is categorically overbroad.

A number of petitions for certiorari presenting this issue in the context of federal bank robbery are currently pending before this Court. *See, e.g.*, *Rogers* v. *United States*, No. 19-7320 (docketed Jan. 17, 2020); *Johnson* v. *United States*, No. 19-7079 (docketed Dec. 23, 2019). Even if the Court is not inclined to grant plenary review, it should at least hold this petition pending disposition of cases raising this issue in the context of federal bank robbery.

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

The Government argues (at 8) that Mr. Turpin's case presents an "unsuitable vehicle" for this Court's review because he entered into a plea agreement with an

appellate waiver. Not so, for two reasons. *First*, if Mr. Turpin is correct that Hobbs Act robbery is categorically not a crime of violence for purposes of 18 U.S.C. § 924(c), then he is actually innocent of his Section 924(c) conviction. *See United States* v. *Bowen*, 936 F.3d 1091, 1109 (10th Cir. 2019) ("Had the trial court correctly concluded that witness retaliation was not a crime of violence, the jury could not have convicted Bowen of violating 18 U.S.C. § 924(c)(1)(A)(ii)."); *United States* v. *Reece*, 938 F.3d 630, 636 (5th Cir. 2019) (holding that conspiracy-predicated Section 924(c) convictions "must be set aside" and noting that if a conviction is based only on the crime of violence definition in Section 924(c)(3)(B), the defendant is "actually innocent" of that charge). And when a defendant is actually innocent of a crime of conviction, courts will not enforce an appellate waiver because to do so would result in a complete miscarriage of justice. *See Davis* v. *United States*, 417 U.S. 333, 346-347 (1974) (If one's "conviction and punishment are for an act that the law does not make criminal," then "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present(s) exceptional circumstances' that justify collateral relief under § 2255."); *United States* v. *Adams*, 814 F.3d 178, 183 (4th Cir. 2016) (declining to enforce a collateral review waiver where Adams "makes a valid claim of actual innocence" to prevent a miscarriage of justice).

Second, the Government did not invoke the appellate waiver at all in the court of appeals and thus has "waived the waiver." *United States* v. *Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995); *Fagan* v. *Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991)

(holding Government "waived [its] waiver" argument by failing to raise it); *see also United States* v. *Babwah*, 972 F.2d 30, 34 (2d Cir. 1992) ("[A]n argument not raised on appeal is deemed abandoned."). Mr. Turpin, of course, did not address the unenforceability of the appellate waiver in the Fourth Circuit because the Government never invoked it. *See, e.g.*, *United States* v. *Goodson*, 544 F.3d 529, 535 (3d Cir. 2008) ("[T]he government may always choose not to invoke an appellate waiver. Where the government has not first invoked an appellate waiver, there is no reason for any party to address the enforceability of the waiver.") (footnote omitted); *United States* v. *Powers*, 885 F.3d 728, 732 (D.C. Cir. 2018) ("Powers was not required to assume in his opening brief that the government would rely on the appeal waiver. Rather, he could wait to see if the government would invoke the appeal waiver in its brief, and then, if so, contest the appeal waiver's enforceability in his reply brief.").

Mr. Turpin raised his claim that Hobbs Act robbery is not a crime of violence under Section 924(c)(3)(A) at each stage of this case and each court passed upon his argument, even if briefly. As discussed in Mr. Turpin's petition and above, nearly every circuit in the country has weighed in on this issue and further percolation is unlikely in light of these entrenched decisions. This issue is ripe for this Court's review and Mr. Turpin's case squarely presents it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

G. ALAN DUBOIS
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA
Jaclyn L Tarlton
JACLYN L. TARLTON
ASSISTANT FEDERAL PUBLIC DEFENDER
Counsel of Record
EASTERN DISTRICT OF NORTH CAROLINA
150 Fayetteville St.
Suite 450
Raleigh, N.C. 27601
(919) 856-4236
jackie_tarlton@fd.org

DECEMBER 2020

Counsel for Petitioner