No. 20-6200

IN THE SUPREME COURT OF THE UNITED STATES

RANDALL GRAY WEBB, PETITIONER

v.

UNITED STATES OF AMERICA

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

Reply Brief For The Petitioner

RANDALL GRAY WEBB
Pro se Petitioner
Bennettsville Federal Correctional
Institution
P.O. Box 52020
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QUESTION PRESENTED

Whether the Fourth Circuit Erred by not granting Petitioner a Certificate of Appealability, Although the Standard for one had been Satisfied?

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JURISDICTION

The judgment of the Court of appeals was entered on July 23, 2020. The petition for a writ of Certiorari was filed on October 22, 2020. See Hohn v. U.S., 524 U.S. 236, 241 (1998) (Supreme Court has jurisdiction to review denial of application for Certificate of appealability by Circuit judge or appellate panel because application qualifies as "case" under 28 U.S.C. Section 1254(1) (2000)). Therefore the jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

ARGUMENT

As clearly stated by this Court's precedent (See Buck v. Davis, 580 U.S. ___, 137 S. Ct. ___, 197 L. Ed 2d 1, 2017 U.S. LEXIS 1429: A prisoner whose petition for a Writ of habeas Corpus is denied by a Federal District Court does not enjoy an absolute right to appeal. Federal law requires that he first obtain a Certificate of appealability (COA) from a Circuit Justice or Judge. 28 U.S.C.S. Section 2253(c)(1). A COA may issue only if the applicant has made a substantial showing of the denial of a Constitutional right. 28 U.S.C.S. Section 2253 (c)(2). Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case.

The Certificate of appealability (COA) inquiry is not Coextensive with a merits analysis. At the COA Stage, the only question is whether the applicant has shown that Jurists of reason Could disagree with the District Court's resolution of his Constitutional Claims or that Jurists Could Conclude the issues presented are adequate to deserve encouragement to proceed further.

As previously stated, the district Court adopted the magistrate Judge's Report and Recommendation, "finding that "Hobbs Act robbery" remains a valid "Crime of Violence" to Support a Section 924(c)(3)(A), Conviction." and declined to issue Mr. Webb a Certificate of Appealability although one was requested based on the decisions rendered by two different district Court's. See Haynes v. United States, No. 16-CV-4106, 2017 WL 3684408 (C.D. Ill. January 25, 2017); and See also United States v. Chea, No. 98-CR-20005, 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019); Both decisions Concluded that Hobbs Act robbery is not a Crime of Violence.

The Government in its opposition brief first, argues that: Mr. Webb Contended that Hobbs Act robbery does not qualify as a Crime of Violence under 18 U.S.C. 924(c)(3)(A), and that the Court of appeals erred in denying a COA on that Claim. That is an incorrect assessment. The question presented does not dispute whether Hobbs Act robbery is a Crime of Violence or not. That's an issue on the merits for the Court of appeals to decide once a Certificate of Appealability had been granted. Mr. Webb only Attempted to Show that jurists of reason Could disagree With the district Court's resolution of his Constitutional Claims or that jurists Could Conclude that the issue presented are adequate to deserve encouragement to proceed futher. This threshold question Should have been decided Without full Consideration of the factual or legal bases adduced in Support of the Claim.

Throughout the Government's Opposition, the Government made Several Arguments that goes to the merits of Mr. Webbs petition Such as, "Every Court of Appeals that has Considered Whether robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), Qualifies as a "Crime of violence" under 18 U.S.C. 924(c)(3)(A), has determined that Hobbs Act robbery qualifies as a Crime of violence, and this Court has repeatedly denied petitions for a Writ of Certiorari Challenging the Circuits' Consensus on that issue... Further the government argued: that this Case would be an Unsuitable Vehicle for Considering the question presented because Mr. Webb Waived any Challenge to his Section 924(c) Convictions as a Condition of his guilty plea".

The Hobbs Act Statue as a Whole has presented problems in the Courts below on the issue of Whether Such Crime would Qualify as a Crime of Violence. See Appendix [A]. In United States v. Taylor, 978 F.3d 73; 2020 U.S. App. LEXIS 32393 No. 19-7016, A three Judge panel in the Court of Appeals for the Fourth Circuit Concluded that, because the elements of attempted Hobbs

STATEMENT

A grand jury in the Middle District of North Carolina Charged Mr. Randall Gray Webb with eight Counts of Interference with Commerce by Threats or Violence, in violation of 18 U.S.C. Section 1951(a) (Hobbs Act) and 2, and two Counts of brandishing a firearm during and in relation to a Crime of Violence, in violation of 18 U.S.C. Section 924(c)(1)(A)(ii) and 2. Following a guilty plea, Mr. Webb was Convicted on two Counts of brandishing a firearm during and in relation to a Crime of Violence. The district Court Sentenced Mr. Webb to 384 months of imprisonment to be followed by five years of Supervised release. Mr. Webb did not appeal.

In 2016, Mr. Webb filed a motion pursuant to 28 U.S.C. Section 2255(f)(3), relying on this Court's decision in Johnson v. United States, 576 U.S. 591 (2015), which held that the "residual Clause" of the Armed Career Criminal Act of 1984, 18 U.S.C. Section 924(e)(2)(B)(ii), was void for Vagueness. Mr. Webb like many other Similar Situated Criminal defendants argued that: Johnson's reasoning invalidated the Similar "residual Clause" portion of the definition of "Crime of Violence" under 18 U.S.C. Section 924(c)(3), Such that his to Convictions for Violating 18 U.S.C. Section 924(c)(1)(A)(ii), Should be Vacated and Set aside. Due to a Hobbs Act Crime failure to Categorically qualify as a Crime of Violence within the meaning of 18 U.S.C. Section 924(c)(3)'s definition.

The Magistrate Judge Stayed the proceedings pending a decision by this Court in Dimaya v. Lynch... (Text order dated November 15, 2016.). The Court thereafter extended the Stay pending this Court's decision in United States v. Mathis, 16-6633(L). Following decisions in those cases the Stay was lifted. With the Stay lifted the Court issued a Report and Recommendation, Recommending that the district

Act robbery did not invariably require the use, attempted use, or threatened use of physical force, the offense did not qualify as a "crime of violence" under 18 U.S.C. Section 924(c). Defendant's section 924(c) conviction was vacated and remanded for resentencing.

Such decision was significant because the Court of appeals recognized several issues within the opinion. First, the Court stated that three of its Sister Circuits have eschewed the 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). Secondly, the Court observed that 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. 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. Rather, Hobbs Act robbery criminalizes the unlawful taking or obtaining of personal property by means of actual or threatened force, 18 U.S.C.S Section 1951(b)(1) 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.

Its clear from the decision above that a reasonable jurists could have easily disagreed with the district Court's assessement of the Constitutional claim, and that the Hobbs Act statue itself is problematic and therefore the issue are adequate to deserve encouragement to proceed further.

CONCLUSION

The Court of Appeals was in error to not grant Mr. Webb a Certificate of appealability (COA), because Mr. Webb satisfied the standard to recieve one. Mr. Webb humbly request this Court to grant his petition for a Writ of Certiorari.

Respectfully Submitted.
/s/ Randall Webb

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Date: 2/9/2021

Appendix [A]

Case in Support

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JUSTIN EUGENE TAYLOR, a/k/a Mookie, a/k/a Mook, Defendant - Appellant.
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
978 F.3d 73; 2020 U.S. App. LEXIS 32393
No. 19-7616
October 14, 2020, Decided
September 10, 2020, Argued

Editorial Information: Prior History

{2020 U.S. App. LEXIS 1}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).United States v. Taylor, 2015 U.S. Dist. LEXIS 88177, 2015 WL 4095845 (E.D. Va., July 7, 2015)

Disposition:
VACATED AND REMANDED.

Counsel ARGUED: Frances H. Pratt, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellant. Richard Daniel Cooke, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

ON BRIEF: Geremy C. Kamens, Federal Public Defender, Laura J. Koenig, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellant.

G. Zachary Terwilliger, United States Attorney, Daniel T. Young, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Judges: Before MOTZ, KING, and FLOYD, Circuit Judges. Judge Motz wrote the opinion, in which Judge King and Judge Floyd joined.

CASE SUMMARY Because the elements of attempted Hobbs Act robbery did not invariably require the use, attempted use, or threatened use of physical force, the offense did not qualify as a "crime of violence" under 18 U.S.C.S. § 924(c). Defendant's § 924(c) conviction was vacated and remanded for resentencing.

OVERVIEW: HOLDINGS: [1]-Contrary to the Government's assertion, an attempt to commit a crime of violence need not involve the attempted use of physical force as some crimes of violence could be accomplished merely though the threatened use of force, and attempted Hobbs Act robbery was just such a crime; [2]-But an attempt to threaten force did not constitute an attempt to use force as there was no attempt to use physical force, nor did it involve the use of physical force or the threatened use of physical force; [3]-Attempted Hobbs Act robbery was not categorically a crime of violence.

OUTCOME: Judgment vacated and remanded.

LexisNexis Headnotes

Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Elements
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Unarmed

Robbery > Elements
Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Penalties

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 18 U.S.C.S. § 924(c).

Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > Elements

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.S. § 924(c)(1)(A).

Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Elements

18 U.S.C.S. § 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. 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, a defendant's § 924(c) conviction may stand only if attempted Hobbs Act robbery constitutes a "crime of violence" under the force clause.

Immigration Law > Deportation & Removal > Grounds > Criminal Activity > Aggravated Felonies

To determine whether an offense constitutes a "crime of violence" under the force clause, courts must employ the categorical approach. Pursuant to the categorical approach, a court focuses on the elements of the prior offense rather than the conduct underlying the conviction. The appellate court must ask whether the elements of the underlying offense necessarily require the use, attempted use, or threatened use of physical force, 18 U.S.C.S. § 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.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Elements
Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Attempt > Elements
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Unarmed Robbery > Elements
Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Armed Robbery > Elements

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.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Elements
Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Penalties

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Attempt > Elements
Criminal Law & Procedure > Criminal Offenses > Racketeering > Extortion > Elements

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.S. § 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.S. § 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. This definition is consistent with the definition of attempt found in the Model Penal Code, which includes some nonviolent acts. While mere 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.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Elements
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Unarmed Robbery > Elements
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Armed Robbery > Elements

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. 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.

Wrong

Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Elements
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Unarmed Robbery > Elements
Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Penalties
Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Attempt > Elements
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Armed Robbery > Elements

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. 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 18 U.S.C.S. § 924(c)(3)(A) does not cover such conduct.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Attempt

When a substantive offense would be a violent felony under 18 U.S.C.S. § 924(e) and similar statutes,

an attempt to commit that offense also is a violent felony.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Bank Robbery > Elements
Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Elements
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Bank Robbery > Penalties
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Unarmed Robbery > Elements
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Armed Robbery > Elements

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.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Attempt > Elements

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. But an attempt to threaten force does not constitute an attempt to use force.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Attempt > Elements

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 18 U.S.C.S. § 924(c)(3).

Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Elements
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Unarmed Robbery > Elements
Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Penalties

Rather, Hobbs Act robbery criminalizes the unlawful taking or obtaining of personal property by means of actual or threatened force, 18 U.S.C.S. § 1951(b)(1) 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.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Elements
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Unarmed Robbery > Elements

Accordingly, attempted Hobbs Act robbery is not categorically a crime of violence.

Opinion

Opinion by: DIANA GRIBBON MOTZ

Opinion

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**{2020 U.S. App. LEXIS 2}** 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**{2020 U.S. App. LEXIS 3}** together to Richmond, Virginia. Upon their arrival in Richmond, Taylor instructed Sylvester to meet Taylor's coconspirator in a 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**{2020 U.S. App. LEXIS 4}** 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*, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (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, 194 L. Ed. 2d 387 (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, 204 L. Ed. 2d 757 (2019).

Notwithstanding these shifts in the legal landscape, the district court denied Taylor's second § 2255 motion. The court held that attempted**{2020 U.S. App. LEXIS 5}** 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 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**{2020 U.S. App. LEXIS 6}** 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, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (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**{2020 U.S. App. LEXIS 7}** 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**{2020 U.S. App. LEXIS 8}** 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**{2020 U.S. App. LEXIS 9}** 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**{2020 U.S. App. LEXIS 10}** 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{2020 U.S. App. LEXIS 11} 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**{2020 U.S. App. LEXIS 12}** 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{2020 U.S. App. LEXIS 13}* 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

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

Footnotes

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.

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).

3

In a post-argument letter, the Government contends that *Stokeling v. United States*, 139 S. Ct. 544, 202 L. Ed. 2d 512 (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, 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.*