No. 21-

In the Supreme Court of the United States

MARCUS WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), is a "crime of violence" under 18 U.S.C. § 924(c)(1)(A), meaning that it "has *as an element* the use, attempted use, or threatened use of physical force against the person or property of another."

This Court granted review on this issue in *United States* v. *Taylor*, No. 20-1459, cert. granted July 2, 2021.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

1. United States District Court (E.D. Pa.):
   A. *United States* v. *Barber*, No. 2:13-cr-00391-GAM (consolidated docket for criminal cases against Raquien Barber, Marcus Walker, and Dominick Clements).
   B. *Raquein Barber*, No. 2:13-cr-00391-GAM-1 (Dec. 16, 2014) (criminal judgment entered against Raquien Barber; appeal filed and later dismissed, No. 15-1068).
   C. *Marcus Walker*, No. 2:13-cr-00391-GAM-2 (Dec. 16, 2015) (criminal judgment against Marcus Walker; appeal filed, No. 15-4062).
   D. *Dominick Clements*, No. 2:13-cr-00391-GAM-3 (May 24, 2016) (sealed criminal judgment against Dominick Clements).
2. United States Court of Appeals (3d Cir.):
   A. *United States* v. *Walker*, No. 15-4062 (appeal docketed Dec. 31, 2015; case held C.A.V. pending *Lynch* v. *Dimaya*, No. 15-1498 on Nov. 1, 2016; case held C.A.V. pending *United States* v. *Monroe*, No. 16-4384 & *United States* v. *Copes*, No. 19-1494, on Oct. 11, 2019; non-precedential opinion entered June 5, 2019; rehearing granted Sept. 6, 2019 in light of *United States* v. *Davis*, 139 S. Ct. 2319 (2019); precedential opinion and judgment entered Mar. 5, 2021)
   B. *United States* v. *Barber*, No. 15-1068 (appeal dismissed Apr. 21, 2015).

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PETITION FOR A WRIT OF CERTIORARI

This case presents the same issue as *United States* v. *Taylor*, No. 20-1459, which this Court agreed to hear in the upcoming Term. As with *Taylor*, this case poses what should be a straightforward question of statutory interpretation: whether attempted Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)(1)(A), such that defendants who commit that offense are subject to substantially enhanced criminal penalties when the attempt involves using or carrying a firearm. The answer to this question has profound consequences for thousands of criminal defendants nationwide.

The text of 18 U.S.C. § 924(c)(3)(A) and 18 U.S.C. § 1951 makes apparent that attempted Hobbs Act robbery is not categorically a crime of violence: The offense does not have the "attempted use" of force "as an element." Six courts of appeals have nevertheless twisted themselves in knots to avoid that obvious answer. As a result of those contortions, innumerable criminal defendants—like petitioner here—will languish in federal prison for *years* pursuant to a sentencing enhancement that textually does not apply to them. That is intolerable. The reading of the statute proffered by those courts is clearly wrong.

Because the Court has already granted review in *Taylor* to resolve this question, the Court should hold this case until it has decided *Taylor*, and then should dispose of it in accordance with that decision.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–25a) is reported at 990 F.3d 316. The district court's judgment (Pet. App. 38a–48a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Relevant provisions of 18 U.S.C. §§ 924(c) and 1951 are reproduced in the appendix. Pet. App. 49a–53a.

STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner Marcus Walker was convicted of conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), attempt 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). Pet. App. 38a–39a. The district court sentenced petitioner to a 72-month term of imprisonment on the conspiracy and attempt counts, as well as a consecutive 60-month term on the § 924(c) count. *Id.* at 40a.

A. Section 924(c)'s Categorical Approach

Section 924(c) subjects any defendant found to have used a firearm in connection with commission of certain federal crimes to a mandatory term of imprisonment, with the additional sentence to be imposed consecutively to any sentence imposed for the underlying offense. As relevant here, the statute imposes a mandatory five-year term of imprisonment on a defendant who "uses or carries" a firearm "during and in relation to," or who "possesses" a firearm "in furtherance of," a federal "crime of violence." 18 U.S.C. § 924(c)(1)(A)(i).

The statute defines the term "crime of violence" in two ways. The first, referred to as the "elements" clause, provides that a "crime of violence" is any "offense that 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). The second, commonly referred to as the "residual" clause, provides that a "crime of violence" also encompasses any "offense that is a felony * * * 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 *United States* v. *Davis*, 139 S. Ct. 2319 (2019), however, this Court held that the residual clause is unconstitutionally vague, meaning that the elements clause provides the sole valid definition of a qualifying crime of violence under § 924(c).

In deciding whether an offense qualifies as a "crime of violence," sentencing courts must apply the "categorical approach." *Davis*, 139 S. Ct. at 2329. That approach requires the court to focus exclusively on the "elements of the statute of conviction," rather than "the facts of [the] defendant's conduct," in making its determination. *Taylor* v. *United States*, 495 U.S. 575, 600–601 (1990). As this Court has explained, a sentencing court applying the categorical approach must "presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by" the definition provided by § 924(c)(3)(A). *Moncrieffe* v. *Holder*, 569 U.S. 184, 190–191 (2013) (cleaned up). As this Court affirmed yet again this Term, under the categorical approach, "the facts of a given case are irrelevant." *Borden* v. *United States*, 141 S. Ct. 1817, 1822 (2021) (plurality opinion); see *id.* at 1835 (Thomas, J., concurring in the judgment). As a result, an offense is a crime of violence under the elements clause if—and *only* if—the use, attempted use, or threatened use of physical force "was necessarily found" by the jury, or admitted to by the defendant, based

on the statutorily enumerated elements of the offense. *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016).

B. Attempted Hobbs Act Robbery

A defendant is liable for substantive Hobbs Act robbery if the jury finds that he "in any way * * * obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery * * * or attempts or conspires so to do." 18 U.S.C. § 1951(a). "Robbery," as used in the Act, 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." 18 U.S.C. § 1951(b)(1). But inchoate forms of Hobbs Act robbery have distinct elements and must be analyzed separately. Conspiracy to commit Hobbs Act robbery, for example, is not a crime of violence, a fact the Government concedes, because it does not have the use of force—actual, threatened, or attempted. See Pet. App. 11a n.10; see also *United States* v. *Dominguez*, 954 F.3d 1251, 1265 (9th Cir. 2020) (Nguyen, J., concurring in part and dissenting in part) ("[T]he government concedes that conspiracy to commit Hobbs Act robbery is not a crime of violence").

The federal courts, following the Model Penal Code definition, have held that liability for an *attempted* offense arises when the defendant has the requisite intent to commit the completed offense and has made "an overt act that constitutes a substantial step toward completing the offense." *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 107 (2007); see, *e.g.*, *United States* v. *Tykarsky*, 446 F.3d 458, 469 (3d Cir. 2006) (citing *United States* v. *Hsu*, 155 F.3d 189, 202 & 203 n.19 (3d Cir. 1998) (adopting Model Penal Code elements of attempt)).

To be held liable for attempted Hobbs Act robbery, then, a defendant must be found (1) to have the intent to

commit a completed robbery as defined under the Act; and (2) to have taken an overt act—of any kind—sufficient to constitute a substantial step toward completion of the Hobbs Act robbery. The intent element is a typical criminal *mens rea*, requiring the "specific intent" to complete the acts constituting the offense. *United States* v. *Bailey*, 444 U.S. 394, 405 (1980); see *United States* v. *Inigo*, 925 F.2d 641, 651 (3d Cir. 1991). The "substantial step" element—the entire *actus reus* of the offense—broadly encompasses any "objective act," whether lawful or not, that "mark[s] the defendant's conduct as criminal in nature." *United States* v. *Cruz-Jimenez*, 977 F.2d 95, 101 (3d Cir. 1992).

On their face, neither of those elements necessarily includes any use of force, whether actual, threatened, or attempted.

C. Proceedings Below

The government charged petitioner with the three counts described above for his role in serving as a lookout during a robbery. Pet. App. 3a. Petitioner remained in a car while his accomplices undertook the robbery. A jury convicted petitioner on all three counts. See *id.* at 38a.

As relevant here, petitioner challenged his conviction under 18 U.S.C. § 924(c) on appeal, arguing that neither conspiracy to commit Hobbs Act robbery nor attempted Hobbs Act robbery fits within the statutory definition of a "crime of violence." See Pet. App. 35a–36a. In June 2019, before this Court's decision in *Davis*, the court of appeals rejected petitioner's challenges and affirmed his convictions. *Id.* at 37a. Following this Court's decision in *Davis*, however, petitioner petitioned for panel rehearing or rehearing *en banc.* The court of appeals granted panel rehearing, vacated its initial opinion, and ordered the parties to provide supplemental briefing on the impact of *Davis*. *Id.* at 26a–27a.

The court of appeals issued a new opinion affirming the district court's judgment and sentence. Pet. App. 2a–3a. Analyzing whether attempted Hobbs Act robbery satisfies the elements clause of § 924(c), the court of appeals first acknowledged that the categorical approach necessarily applied. *Id.* at 12a. Applying the categorical approach, the court of appeals concluded that *completed* Hobbs Act robbery was a crime of violence within the scope of the elements clause. *Id.* at 13a–16a. In so holding, the court concluded that a completed Hobbs Act robbery "necessarily has as an element the use, attempted use, or threatened use of physical force against the person or property of another and is therefore categorically a crime of violence." *Id.* at 16a.

The court of appeals then concluded that *attempted* Hobbs Act robbery was also categorically a crime of violence. The court reasoned that "because § 924(c) explicitly includes 'attempted use' of physical force in the definition of a crime of violence, a conviction for attempt to commit a crime of violence is necessarily sufficient to serve as a predicate under § 924(c)." Pet. App. 17a. The panel cited the four then-published decisions of other circuits that had concluded the same. See *Dominguez*, 954 F.3d at 1261; *United States* v. *St. Hubert*, 909 F.3d 335 (11th Cir. 2018), reh'g denied, 918 F.3d 1174 (11th Cir. 2019); *United States* v. *Ingram*, 947 F.3d 1021 (7th Cir. 2020); see also *United States* v. *Smith*, 957 F.3d 590 (5th Cir. 2020) (holding as a general matter that an attempt to commit an offense that, if completed, was categorically a crime of violence also was necessarily a crime of violence).[*]

[*] The Second Circuit's decision in *United States* v. *McCoy*, 995 F.3d 32 (2021), had not yet been issued when the court of appeals announced the decision below.

The Third Circuit acknowledged that the Fourth Circuit had reached the opposite conclusion in *United States* v. *Taylor*, 979 F.3d 203 (4th Cir.), cert. granted, No. 20-1459 (July 2, 2021), holding that "attempted Hobbs Act robbery does not invariably require the use, attempted use, or threatened use of physical force" because the necessary "substantial step" toward completion of the offense "need not be violent," *id.* at 208. The court of appeals rejected the Fourth Circuit's holding and joined the other courts of appeals in adopting the blanket rule that any attempt to commit a crime of violence is itself categorically a crime of violence, even though it acknowledged that a defendant could commit the crime "without actually committing a violent act and with only the intent to do so." Pet. App. 3a. The panel first stated that the inclusion of "attempted use of force" as a criterion in the elements clause of § 924(c) indicated a congressional intent to capture attempts to complete an offense that, if completed, involves the use of force. *Id.* at 20a–22a. The panel stated that Congress's use of "attempted use" of force in the statute "plainly" showed that "lawmakers wanted to categorically include attempt crimes in the statutory definition." *Id.* at 23a. In further support of this proposition, the panel cited the federal criminal code's "interweav[ing]" of "prohibitions on attempted crimes within the statutes defining the underlying substantive offenses." *Id.* at 21a–22a.

In light of its reading of the elements clause as encompassing any attempt to commit a crime of violence, the panel held that petitioner's conviction for attempted Hobbs Act robbery could serve as a predicate crime of violence for his conviction pursuant to § 924(c) and affirmed the judgment and sentence accordingly. Pet. App. 23a, 25a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that attempted Hobbs Act robbery is categorically a "crime of violence" within the meaning of § 924(c)(1)(A). On July 2, 2021, this Court granted the government's petition for a writ of certiorari in *United States* v. *Taylor*, No. 20-1459, to address that very issue. The Court accordingly should hold this petition pending its decision in *Taylor* and then should dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Taylor*, No. 20-1459, and then should be disposed of as appropriate in light of that decision.

Respectfully submitted.

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APPENDIX