

IN THE
Supreme Court of the United States

TAHJI ANTONIO ELEY, MICHAEL EMANUEL PRYOR, STANLEY ANDREA CLYBURN, JR.,
BOBBY RAY LAMBERT, RONNIE DONTE RAND, CHRISTOPHER DAVID FRAZIER, AHMAD
LEE BANKS, JOHNNY DRAUGHN, SHANIQUA SHONTA BURRELL, MARVIN RASHAAD
CUMMINGS, RANDOLPH LEVY HYMAN, JR., THOMAS LAMONT JONES, RAPHAEL
DAVONNE POWELL, JOSHUA HUNT, MARCUS HYDE, KENDRICUS MARQUELL WILLIAMS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Hobbs Act Robbery in violation of 18 U.S.C. § 1951 is a “crime of violence” as defined by 18 U.S.C. § 924(c)(3).

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

Every petitioner filed a motion under 28 U.S.C. § 2255 in the district court for the Eastern District of North Carolina moving to vacate a conviction under 18 U.S.C. §924(c), arguing that the conviction was improperly premised on Hobbs Act Robbery, 18 U.S.C. § 1951, as the predicate crime of violence. The district court dismissed each petitioner's motion and denied a Certificate of Appealability. Every petitioner timely appealed. The Fourth Circuit denied a Certificate of Appealability and dismissed the appeal in every case:

Respondent	EDNC Case Number	Fourth Circuit Case Number	Location of Materials in Petition Appendix
Tahji Eley	5:10-cr-196-FL-3	20-7846	1a
Michael Pryor	5:11-cr-279-FL-4	20-7850	7a
Stanley Clyburn, Jr.	7:10-cr-36-FL-1	20-7852	13a
Bobby Ray Lambert	7:09-cr-57-FL-1	20-7853	20a
Ronnie Rand	5:08-cr-329-FL-1	20-7854	26a
Christopher Frazier	7:11-cr-38-FL-1	20-7856	32a
Ahmad Banks	5:08-cr-329-FL-1	20-7858	38a
Johnny Draughn	5:09-cr-201-FL-2	20-7865	44a
Shaquina Burrell	5:10-cr-196-FL-2	20-7869	50a
Marvin Cummings	5:12-cr-353-BO-2	20-7560	56a
Randolph Hyman, Jr.	2:13-cr-19-FL-1	20-6985	62a
Thomas Jones	5:09-93-FL-1	20-7568	68a
Raphael Powell	5:08-cr-328-FL-1	20-7573	74a
Joshua Hunt	7:09-cr-33-FL-1	20-7591	80a
Marcus Hyde	7:11-cr-38-FL-2	20-7598	86a
Kendricus Williams	5:08-cr-174-FL-1	20-7599	92a

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UNITED STATES OF AMERICA,
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**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit. All petitioners raise the same legal issue, so a joint petition under Supreme Court Rule 12.4 is proper.

OPINIONS BELOW

The Fourth Circuit issued two consolidated unpublished opinions. The opinion denying a Certificate of Appealability and dismissing the cases of petitioners Eley, Pryor, Clyburn, Jr., Lambert, Rand, Frazier, Banks, Draughn, and Burrell is reproduced at Pet. App. 98a. The opinion denying a Certificate of Appealability and dismissing the cases of petitioners Cummings, Hyman, Jr., Jones, Powell, Hunt, Hyde, and Williams is produced at Pet. App. 108a.

JURISDICTION

The district court had jurisdiction over the original criminal prosecutions under 18 U.S.C. §§ 924(c), 3231. It had jurisdiction over the motion to vacate the petitioners' sentences under 28 U.S.C. § 2255. The district court denied each motion and did not grant a Certificate of Appealability. Each petitioner timely appealed to the United States Court of Appeals for the Fourth Circuit and moved for a Certificate of Appealability. The unpublished opinion and judgment denying a Certificate of Appealability and dismissing the cases of petitioners Eley, Pryor, Clyburn, Jr., Lambert, Rand, Frazier, Banks, Draughn, and Burrell was issued on **April 27, 2021**, and is reproduced at Pet. App. 100a-109a. The unpublished opinion and judgment denying a Certificate of Appealability and dismissing the cases of petitioners Cummings, Hyman, Jr., Jones, Powell, Hunt, Hyde, and Williams was issued on **July 23, 2021**, and is produced at Pet. App. 110a-118a.

This Court's jurisdiction is proper under 28 U.S.C. § 1254(1). This joint petition is timely under this Court's March 19, 2020 Order extending the deadline to file any petition for a writ of certiorari to 150 days from the date of the lower court judgment.

STATUTORY PROVISIONS INVOLVED

(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. § 924(c).

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951.

STATEMENT

Petitioners are sixteen of the hundreds of criminal defendants who are serving—or will serve—5, 7, or 10 year mandatory minimum sentences under 18 U.S.C. § 924(c) for carrying or using a firearm in connection with on in furtherance of a crime that, after this Court’s decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), should no longer be a predicate crime of violence under that statute.

Each petitioner was convicted in the Eastern District of North Carolina of violating Section 924(c) by carrying or using a firearm in connection with or in furtherance of a crime of violence. The predicate crime of violence in each case was

Hobbs Act Robbery, 18 U.S.C. § 1951. After their convictions and sentences were final, this Court held in *Johnson v. United States* that the Armed Career Criminal Act's residual clause was unconstitutionally vague. 135 S. Ct. 2551 (2015). This court later held that *Johnson* announced a new substantive rule applying retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1267 (2016). Finally, in 2019 in *United States v. Davis*, this Court applied *Johnson* and held that Section 924(c)'s residual clause was also unconstitutional. 139 S.Ct. 2319 (2019).

Each petitioner moved in the district court, relying on *Johnson* and later supplemented with *Davis*, under 28 U.S.C. § 2255 to vacate their Section 924(c) convictions, arguing that without the residual clause, Hobbs Act Robbery does not meet the Section 924(c) crime of violence definition.

The district court, relying on the Fourth Circuit's published decision in *United States v. Mathis*, dismissed the motions and denied a Certificate of Appealability. 932 F.3d 242 (4th Cir. 2019). Each petitioner timely appealed. The Fourth Circuit denied a Certificate of Appealability and dismissed the appeal in each case.

This joint petition follows.

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to address "an important question of federal law that has not been, but should be, settled by this Court:" Whether Hobbs Act

Robbery is a crime of violence for purposes of Section 924(c) after *Davis*. Sup. Ct. R. 10(c).

A. Resolution of this question is important and requires this Court's review.

This question is important because Section 924(c) contains some of the harshest penalties in federal criminal law: 5, 7, or 10 year mandatory minimum sentences consecutive to any other sentence received. Because of the length of these sentences, individuals who stand wrongly convicted under this statute can have decades of their lives improperly taken away. Because of the mandatory nature of these sentences, district judges lack the discretion to ameliorate these penalties in individual cases. The one-size-fits-all nature of mandatory sentences is troublesome in normal cases. It becomes devastating when the defendant should not be guilty of the crime in the first place.

The question is important because it is not going away. Petitioners come to this Court having moved under Section 2255 to vacate their improper convictions. And they stand similarly situated to hundreds of others who filed Section 2255 motions after *Johnson* and *Davis*. But collateral attacks on prior sentences are not the only problem presented by Hobbs Act Robbery and Section 924(c). As long as the government thinks that Hobbs Act Robbery is a Section 924(c) crime of violence, it will continue to charge and prosecute these crimes. Which means that a steady stream of these prosecutions will continue unless and until this Court intervenes and fully clarifies the law. This question is important, and this Court's review is necessary.

B. The Circuit courts misread the Hobbs Act Robbery statute to hold that it is a Section 924(c) crime of violence.

1. Hobbs Act Robbery is a Section 924(c) crime of violence if and only if it categorically involves the threat or use of violent force.

Section 924(c) provides a mandatory minimum punishment on someone who uses or carries a firearm in relation to a federal “crime of violence” or who possesses a firearm in furtherance of a federal “crime of violence.” 18 U.S.C. § 924(c)(1)(A). The statute defines a crime of violence as any felony offense that “(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.” *Id.* § 924(c)(3). This broad definition previously captured a large host of federal crimes. But, in 2019, this Court significantly narrowed it, holding that the “by its nature” residual clause was unconstitutional.

Davis, 139 S. Ct. at 2336.

Thus, a federal offense must have “as an element the use, attempted use, or threatened use of physical force against the person or property of another” in order to be a predicate crime of violence under Section 924(c). 18 U.S.C. § 924(c)(3)(A).

This Court has placed two significant restrictions on this definition. First, the “force” involved cannot be slight force; it must be “violent force,” which necessarily “connotes a substantial degree of force.” *Johnson v. United States*, 559 U.S. 133, 140 (2010) (interpreting a similar use of “force” in the force clause of the Armed Career Criminal Act); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (similarly

interpreting the meaning of force in 18 U.S.C. § 16). Second, the “has as an element” language of the force clause requires courts to look at potential Section 924(c) predicates categorically, focusing on the elements of the crime and not how an individual defendant may have committed it. *See, e.g., Davis*, 139 S. Ct. at 2328.

So Hobbs Act Robbery is a “crime of violence” if and only if it categorically involves the application of “violent force” to the person and property of another. As explained below, it does not.

2. **Hobbs Act Robbery does not categorically involve the threat or use of violent force because it can be committed through the threat or use of minimal or no force to tangible or intangible property.**

The Hobbs Act Robbery statute states in relevant part that

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951.

Hobbs Act robbery 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.” By its plain language, Section 1951(b)(1) encompasses “fear of

injury, immediate or future, to . . . property.” 18 U.S.C. § 1951(b)(1). Nothing in the statute requires that the fear of injury be injury sustained through violent force.

See United States v. Chea, 2019 WL 5061085 at *8; 2019 U.S. Dist. LEXIS 177651 at *21-*22 (N.D. Cal. 2019), *overruled by United States v. Dominguez*, 954 F.3d 1251, 1260 (9th Cir. 2020). And, in fact, the statute’s structure separates the “use of force” from the “fear of injury” to property, revealing Congress’s intent that these represent distinct concepts. *Id. at* 2019 WL 5061085 at *8, 2019 U.S. Dist. LEXIS 177651 at *22-*23.

“Where 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.” *Id. at* 2019 WL 5061085 at *8; 2019 U.S. Dist. LEXIS 177651 at *22. This sort of fear of injury could apply to, for instance, a threat to attack a computer system or delete a database. “Even tangible property 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.*

Circuit model jury instructions further demonstrate the breadth of Hobbs Act robbery. The Third, Fifth, Tenth, and Eleventh Circuits use pattern Hobbs Act jury instructions defining Hobbs Act robbery to include fear of future injury to intangible property. *See* Third Circuit Model Criminal Jury Instructions, 6.18.1951-4 and 6.18.1951-5 (Jan. 2018)¹ (defining “fear of injury” as when “a victim experiences

¹ Available at <https://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions> (last visited September 23, 2021).

anxiety, concern, or worry over expected personal physical or economic harm” and “[t]he term ‘property’ includes money and other tangible and intangible things of value”); Fifth Circuit, Pattern Jury Instructions (Criminal Cases) 2.73A (2019)² (“The term ‘property’ includes money and other tangible and intangible things of value.”); Tenth Circuit Criminal Pattern Jury Instructions, 2.70 (Feb. 2018)³ (“‘Property’ includes money and other tangible and intangible things of value. ‘Fear’ means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances.”); Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (Feb. 2020)⁴ (“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.”).

The Modern Federal Criminal Jury Instructions also define Hobbs Act robbery as fear of future harm to intangible property. *See* 3 Modern Federal Jury Instructions-Criminal, § 50-2 (Nov. 2020). Specifically, the Modern Instructions define “property” as “includ[ing] money and other tangible and intangible things of

² Available at <http://www.lb5.uscourts.gov/viewer/?/juryinstructions/fifth/crim2019.pdf> (last visited September 23, 2021).

³ Available at <https://www.ca10.uscourts.gov/sites/ca10/files/documents/downloads/Jury%20Instructions%202021%20Version.pdf> (last visited September 23, 2021).

⁴ Available at <https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsCurrentComplete.pdf> (last visited September 23, 2021).

value which are capable of being transferred from one person to another.” *See* 3 Modern Federal Jury Instructions-Criminal, § 50-4 (Nov. 2020). Robbery by “fear” is defined as “fear of injury, whether immediately or in the future,” and explains “[t]he use or threat of force or violence might be aimed at . . . causing *economic* rather than physical injury.” *See* 3 Modern Federal Jury Instructions-Criminal, § 50-5 (Nov. 2020) (emphasis added). And, the “fear of injury” sufficient for Hobbs Act robbery is further defined as “[f]ear exists if a victim experiences anxiety, concern, or worry over expected personal harm or business loss, or over financial or job security.” *See* 3 Modern Federal Jury Instructions-Criminal, § 50-6 (Nov. 2020).

Hobbs Act Robbery is a broad statute. It does not require the use or threat of violent force.

3. The Circuit courts ignore the broad nature of Hobbs Act Robbery to hold that it is a crime of violence.

The Circuits erroneously hold that Hobbs Act Robb is a Section 924(c) crime of violence. They reach this holding by ignoring the broad definition of the crime that they apply when the government prosecutes it. Instead, for purposes of categorically interpreting it in the context of Section 924(c), they unduly narrow it to limit it to conduct involving violent physical force. *See United States v. Dominguez*, 954 F.3d 1251, 1260 (9th Cir. 2020); *Mathis*, 932 F.3d at 266; *United States v. Jones*, 919 F.3d 1064, 1072 (8th Cir. 2019); *United States v. García-Ortiz*, 904 F.3d 102, 106–09 (1st Cir. 2018); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060–66 (10th Cir. 2018); *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2016); *United States v. Fox*, 878 F.3d 574, 579 (7th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 292 (6th

Cir. 2017); *United States v. Buck*, 847 F.3d 267, 275 (5th Cir. 2017); *Hill*, 890 F.3d at 60; *In re St. Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016).

As noted above, these holding are simply not compatible with the language of the statute or how courts across the country interpret it. This Court’s review is necessary to correct this situation.

C. This petition is a good vehicle to address this question.

Each petitioner filed for relief in the district court and timely appealed to the Fourth Circuit. The Fourth Circuit addressed this question on its merits. The number of petitioners in this case ensures that even if later developments cause procedural issues with some petitioners, other petitioners will remain in the case to ensure that this Court can address the question.

This petition also comes to this Court in time for this Court to address this question now and aid judicial efficiency. Each petitioner brought his claim in a Section 2255 motion. But the United States continues to prosecute individuals under Section 924(c) using Hobbs Act Robbery as a predicate—and it will continue to do so for the indefinite future. Thus, the longer this Court waits to correct the erroneous holdings of the Circuit courts, the more defendants will build up in the system who will then bring Section 2255 motions based on what would be a change in the law when that correction happens. By addressing this question soon after *Davis*, this Court can reduce the burden on the courts by reducing the number of future prosecutions subjected to collateral attack.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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