No. _____

IN THE
Supreme Court of the United States

DWAINE COLLYMORE
Petitioner,

vs.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether attempted Hobbs Act robbery, which may be completed through an attempted threat alone, *see* 18 U.S.C. § 1951(a), falls outside the definition of a "crime of violence" in 18 U.S.C. § 924(c)(3)(A).

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PETITION FOR CERTIORARI

Petitioner Dwaine Collymore respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit was filed in a summary order on May 20, 2021. A three-judge panel of the Second Circuit issued a summary order (the "decision") affirming the judgment of the district court. *See United States v. Collymore*, 856 Fed. App'x 345 (2d Cir. 2021). The decision is attached as Appendix A.

On June 6, 2021, Mr. Collymore filed a petition for rehearing and suggestion for rehearing *en banc*. The Second Circuit denied his petition on July 22, 2021. That order is attached as Appendix B.

JURISDICTION

On May 20, 2021, a three-judge panel for the Second Circuit denied Petitioner's appeal. Subsequently, on July 22, 2021, the Second Circuit denied Mr. Collymore's petition for rehearing and suggestion for rehearing *en banc*. [1] This Court has jurisdiction to review the Second Circuit's decision pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS

18 U.S.C. § 924 – Penalties [excerpted in relevant part]

[1] The time to file a petition for a writ of *certiorari* runs from the date a timely petition for rehearing is denied. Sup. Ct. R. 13(3). A petition for a writ of *certiorari* is timely when filed within 90 days. Sup. Ct. R. 13(1). The petition for rehearing in this case was denied on July 22, 2021, making the petition for writ of *certiorari* due on October 20, 2021. A petition is timely filed if mailed on the date for filing. Sup. Ct. R. 29.2. For the reasons set forth in the accompanying motion, however, the undersigned requests permission to file the petition today.

* * * * *

(c) (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 1951 - Interference with commerce by threats or violence

(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.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101– 115, 151–166 of Title 29 or sections 151–188 of Title 45.

I.

STATEMENT OF THE CASE

Collymore appealed from a judgment of conviction following his guilty plea to four criminal charges stemming from an attempted robbery, during which Collymore fatally shot a man. Specifically, Collymore pleaded guilty to (1) conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951; (2) attempted Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951 and 2; (3) using, brandishing, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i), (ii), (iii), and 2; and (4) killing a person with a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(j)(1) and 2. Following his guilty plea, Collymore was sentenced to 525 months' imprisonment. On appeal, Collymore argued that his firearms convictions must be vacated because they derive from his conviction for attempted Hobbs Act robbery, which is not categorically a crime of violence, relying primarily on this Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). After the case was submitted, the Second Circuit decided *United States v. McCoy* which held that "Hobbs Act attempted robbery qualifies as a crime of violence under § 924(c)." 995 F.3d 32, 57 (2d Cir. 2021). Thereafter, the Second Circuit denied Collymore's claimed relying on *McCoy*.

Collymore petitioned for panel hearing and rehearing *en banc*. Collymore argued that the decision, relying on *McCoy*, incorrectly decided that attempted Hobbs Act robbery was a "crime of violence." Collymore argued that the Fourth Circuit's contrary decision in *Taylor* provided further support for his argument that because

attempted Hobbs Act robbery may be completed through an attempted threat alone, *see* 18 U.S.C. § 1951(a), it is outside the definition of a "crime of violence" in 18 U.S.C. § 924(c)(3)(A). *United States v. Taylor*, 979 F.3d 203, 206 (4th Cir. 2020), *cert. granted*, No. 20-1459. Second, Collymore argued that the decision conflicted with this Court's precedent requiring courts to use the rule of lenity when examining a statute lending itself to multiple contradictory interpretations. The decision and *McCoy* failed to consider the rule of lenity despite grappling with opposing interpretations of what constitutes a "crime of violence." The Second Circuit denied Collymore's petition for rehearing.

II.

ARGUMENT

A. *McCoy* was wrongly decided because, as recognized by the Fourth Circuit in *Taylor*, attempted Hobbs Act robbery may be completed through an attempted threat alone.

The Hobbs Act creates criminal liability for any person "who[] in any way … obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery … or attempts or conspires to do so." 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).

A conviction for attempted Hobbs Act robbery requires the government to prove that (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. *McCoy*, 995 F.3d at 56.

The first element, "intent," does not involve the use, attempted use, or threatened use of force. Intent is not an act at all. The second element, "a substantial step" is an act that is strongly corroborative of the defendant's criminal purpose. *United States v. Jackson*, 560 F.2d 112, 120 (2d Cir. 1977).

Sentencing courts determine whether an offense constitutes a crime of violence using the "categorical approach." *United States v. Davis*, 139 S. Ct. 2319, 2329 (2019). Under that approach, courts "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [a crime of violence], while ignoring the particular facts of the case." *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). "Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Id.* (quotation marks omitted). Consequently, an offense qualifies as a crime of violence only if, in light of the statutory elements of the offense, the use, attempted use, or threatened use of physical force "was necessarily found [by the jury] or admitted" by the defendant. *Id.* at 2249.

A straightforward application of the categorical approach demonstrates why attempted Hobbs Act robbery does not constitute a "crime of violence" under Section 924(c)'s elements clause. Putting these two elements together, the government can obtain a conviction for attempted Hobbs Act robbery by showing that the defendant (1) intended to commit robbery by means of a *threat* to use physical force; and (2) took

a substantial step corroborating that intent. The elements clause of § 924(c), however, require the use, attempted use, or threatened use of physical force.

In *McCoy*, the Second Circuit followed the Third, Seventh, Ninth, and Eleventh Circuits in holding that attempted Hobbs Act robbery is a "crime of violence" simply because a *completed* Hobbs Act robbery is such a crime. *McCoy*, 995 F.3d at 56 (citing *United States v. Dominguez*, 954 F.3d 1251,1262 (9th Cir. 2020), *cert. pending*, No. 20-1000; *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); and *United States v. Walker*, 990 F.3d 316, 325 (3d Cir. 2021)). Like the majority circuit view, *McCoy* reached this conclusion by focusing on the elements of a *completed* Hobbs Act robbery rather than the elements of *attempted* Hobbs Act robbery. It did so by applying a principle found nowhere in the statute or in Supreme Court precedent—that any attempt to commit a crime of violence necessarily involves an attempt to use "physical force." *McCoy* adopted this new rule without considering that the text of the elements clause excludes attempted threats. *McCoy* brushed aside meaningful categorical analysis altogether. *McCoy* at 995 F.3d at 56 (citing *Dominguez*, 954 F.3d at 1262; *Ingram*, 947 F.3d at 1026; *St. Hubert*, 909 F.3d at 351–53) and *Walker*, 990 F.3d at 325)).

By contrast, in *Taylor*, a unanimous panel of the Fourth Circuit considered *Dominguez*, *Ingram*, *St. Hubert*, and *Walker* and held that attempted Hobbs Act robbery is not a categorical crime of violence. *United States v. Taylor*, 979 F.3d 203, 206 (4th Cir. 2020), *cert. granted*, No. 20-1459. *Taylor* found that "a straightforward application of the categorical approach to attempted Hobbs Act robbery yields a

different result" from that reached by the Seventh, Ninth, and Eleventh Circuits. 979 F.3d at 208. Responding to the other circuits' analysis, the Fourth Circuit explained that the fact that *completed* Hobbs Act robbery necessarily entails the use, attempted use, or threatened use of physical force does not mean that every *attempt* at Hobbs Act robbery involves an attempt to use force. For example, attempts can instead involve an attempt to threaten force, "[b]ut an attempt to threaten force does not constitute an attempt to use force." *Taylor*, 979 F.3d at 209.

The logic of the majority circuit view is flawed because those courts applied "a rule of their own creation," rather than "the categorical approach—as directed by the Supreme Court." *Id.* at 209. Like the majority view, *McCoy* misapplied the categorical approach, undermining the consistency it was designed to create. The contrary authority, *Taylor* explained, uses a "flawed premise" that "an attempt to commit a 'crime of violence' *necessarily* constitutes an attempt to use physical force." *Taylor,* 979 F.3d at 208 (emphasis in original).

Brushing aside the statutory language (which expressly permits conviction for conduct that includes attempted threat of force), *McCoy* instead relies on this Court's decision in *Gonzales v. Duenas-Alvarez,* 549 U.S. 183, 193 (2007). *McCoy*, 995 F3d at 57. In *Gonzalez v. Duena-Alvarez*, this Court reasoned that to fall outside the definition of a crime of violence under the categorical approach, there must be "a realistic probability, not a theoretical possibility," that an offense encompasses conduct not entailing the use, attempted use, or threatened use of force. *Duenas-Alvarez,* 549 U.S. at 183. *McCoy* suggests that there is no such realistic probability

that the offense encompasses conduct including a "threatened use of force." *McCoy*, 995 F3d at 57. It points out that it was unaware of any case that proceeded on such a theory. *Id*. However, in *Dominguez*, a case upon which *McCoy* expressly relies, Mr. Dominguez's conviction did not rest on conduct involving the use, attempted use, or threatened use of force. *Dominguez,* 954 F.3d at 1254-55. In *Dominguez*, the defendant did not make any threats, draw any weapons, or fire any shots. *Id*. All Mr. Dominguez did was drive toward a warehouse intending to rob an armored car. *Id*. While en route to the warehouse, however, Mr. Dominguez received a phone call. *Id*. After the phone call, he terminated the plan to rob the armored car because of unusual law enforcement activity near the warehouse. *Id*. Mr. Dominguez drove within about a block or so of the warehouse before turning around. *Id*. Mr. Dominguez was arrested the following day and charged, among other things, with attempted Hobbs Act robbery of the armored car. *Id*; s*ee also*, *United States* v. *Wrobel,* 841 F. 3d 450, 453 (7th Cir. 2016) (defendants made plans to travel to New York to commit a diamond robbery via threats of force, with no intent to harm victim, but were arrested before they reached New York); *United States* v. *Muratovic*, 719 F.3d 809, 816 (7th Cir. 2013) (defendants planned to rob a truck, conducted surveillance, and gathered supplies for the robbery but abandoned the plan when they believed that the truck driver knew what they were planning to do).

A conviction for attempted Hobbs Act robbery can be supported by nothing more than "surveillance of the object of a crime and the assemblage of the necessary instruments." *United States* v. *Prichard*, 781 F.2d 179, 182 (10th Cir. 1986). For

example, substantial steps could include a defendant's surveillance of the target location and then proceeding toward that location with a mask, a toy gun, or a note falsely claiming to have a gun—harmless tools intended to make an empty threat to use force. *See, e.g.*, *United States* v. *Korte*, 918 F.3d 750, 752-753 (9th Cir. 2019) (upholding convictions for robbery by "force and violence[] or by intimidation" of one defendant who demanded money while wearing a mask and another who did so with a toy gun); *United States* v. *Perry*, 991 F.2d 304, 307-308, 310-311 (6th Cir. 1993) (upholding conviction for robbery by intimidation of a defendant who carried a wooden gun). These cases show that attempted robbery can be committed by merely *attempting to threaten* to use force. Such conduct does not fall within the definition of "crime of violence" under § 924(c)(3)(A).

B. The decision conflicts with this Court's precedent requiring the rule of lenity when interpreting an ambiguous statute.

There is an indisputable inter-circuit split, and until *McCoy*, a robust intra-circuit conflict in the Second Circuit[2] over whether attempted Hobbs Act robbery categorically constitutes a "crime of violence" for purposes of enhanced sentencing under 18 U.S.C. § 924(c). There is confusion because the statute lacks clarity about the breadth of conduct it punishes causing vigorous disagreement among distinguished federal judges nationwide.

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2 *See*, *United States v. Halliday*, 2021 WL 26095, (D. Conn. Jan. 4, 2021) (attempted Hobbs Act robbery is not a crime of violence); *United States v. Tucker*, 2020 WL 93951 (E.D.N.Y. Jan. 8, 2020) (same); *United States v. Cheese*, 2020 WL 705217 (E.D.N.Y. Feb. 12, 2020) (same); *United States v. Pica*, 08-cr-559 (E.D.N.Y. Mar. 17, 2020) (same); *United States v. Culbert*, 453 F.Supp.3d 595 (E.D.N.Y. 2020) (same); *Negron v. United States.*, 2021 WL 633817 (E.D.N.Y. Feb. 18, 2021) (same); *FNU LNU (Ramos) v. United States*, 2020 WL 5237798 (S.D.N.Y. Sept. 2, 2020) (same); *Lofton v. United States*, 2020 WL 362348 (W.D.N.Y. Jan. 22, 2020) (same).

This Court requires that criminal statutes give clear notice and warning of the conduct that will be punished. *United States v. Bass*, 404 U.S. 336, 347-48 (1971). In the absence of sufficient clarity, this Court requires that any ambiguity must be interpreted in favor of the defendant per the rule of lenity. *United States v. Santos*, 553 U.S. 507, 514 (2008). The rule of lenity likewise "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997).

The rule of lenity has particular importance when mandatory sentences are imposed for crimes in which they do not clearly apply. "[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27, (1931); *see also Bass*, 404 U.S. at 348.

The decision, *McCoy,* and the cases upon which both rely failed to consider the rule of lenity despite confronting conflicting interpretations about what constitutes a "crime of violence." As noted by this Court in *Davis*:

> Employing the canon as the government wishes would also sit uneasily with the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor. That rule is "perhaps not much less old than" the task of statutory "construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820) (Marshall, C.J.). And much like the vagueness doctrine, it is founded on "the tenderness of the law for the rights of individuals" to fair notice of the law "and on the plain principle that the power of punishment is vested in the legislative, not in the judicial

> department." *Ibid.*; see *Lanier*, 520 U.S. at 265–266, and n. 5, 117 S.Ct. 1219. Applying constitutional avoidance to narrow a criminal statute, as this Court has historically done, accords with the rule of lenity. By contrast, using the avoidance canon instead to adopt a more expansive reading of a criminal statute would place these traditionally sympathetic doctrines at war with one another.

Davis, 139 S. Ct. at 2333 (2019).

C. This Court should grant *certiorari* because the decision involves an issue of exceptional importance.

The decision, McCoy, and the cases upon which they rely have broad implications in other contexts. Other criminal statutes, such as the Armed Career Criminal Act, 18 U.S.C. § 924(e), and the INA, 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16(a), each use a test nearly identical to that for § 924(c) to determine what constitutes a crime of violence for purposes of punishing repeat offenders and, as to the INA, finding noncitizens removable. *See, e.g.*, *Taylor*, 979 F.3d at 206 n.6 ("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.") (quotation marks and brackets omitted)). The Second Circuit's flawed reasoning will impact an enormous number of cases beyond just attempted Hobbs Act robbery—in both the criminal and immigration contexts—that turn on whether other attempt offenses are also crimes of violence.

III.

CONCLUSION

For the foregoing reasons, the petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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