

IN THE SUPREME COURT OF THE UNITED STATES

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GREGORY A. MILTON, AKA G,  
PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly denied petitioner a certificate of appealability on his claim that robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), qualifies as a "crime of violence" within the meaning of 18 U.S.C. 924(c)(3)(A).

ADDITIONAL RELATED PROCEEDINGS

United States Supreme Court:

Milton v. United States, No. 15-8686 (Apr. 25, 2016)

Milton v. United States, No. 11-6729 (Feb. 21, 2012)

Milton v. United States, No. 06-8386 (Jan. 22, 2007)

Milton v. United States, No. 05-8484 (Feb. 21, 2006)

Milton v. United States, No. 02-6555 (Nov. 4, 2002)

Milton v. United States, No. 98-7162 (Jan. 11, 1999)

United States Court of Appeals (4th Cir.):

United States v. Milton, No. 21-7316 (June 30, 2022)

United States v. Milton, No. 16-9832 (July 14, 2016)

United States v. Milton, No. 15-6897 (Nov. 23, 2015)

United States v. Milton, No. 11-6729 (Oct. 5, 2011)

United States v. Milton, No. 09-8130 (Feb. 26, 2010)

United States v. Milton, No. 08-327 (Jan. 8, 2009)

United States v. Milton, No. 08-7473 (Oct. 20, 2008)

United States v. Milton, No. 06-6329 (May 24, 2006)

United States v. Milton, No. 05-6215 (July 28, 2005)

In re Milton, No. 05-188 (Apr. 7, 2005)

United States v. Milton, No. 1-7813 (Apr. 12, 2002)

United States v. Milton, No. 00-6858 (Oct. 19, 2000)

United States v. Milton, No. 96-4851 (Aug. 4, 1998)

United States District Court (W.D. Va.):

United States v. Milton, No. 95-cr-74 (Nov. 4, 1996)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unreported but is available at 2022 WL 2355508. The order of the district court is unreported but is available at 2021 WL 1554384.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2022. A petition for rehearing was denied on August 30, 2022 (Pet. App. C1). The petition for a writ of certiorari was filed on October 12, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted on one count of conspiring to distribute cocaine base, in violation of 21 U.S.C. 841 (1994) and 846; one count of Hobbs Act robbery, in violation of 18 U.S.C. 1951; and one count of using a firearm to commit murder during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1), (3), and (i) (1) (1994). Judgment 1. The district court sentenced petitioner to two concurrent terms of life imprisonment, to be followed by a further term of life imprisonment on the Section 924(c) count, and a five-year term of supervised release. Judgment 2, 4. The court of appeals affirmed, 153 F.3d 724, and this Court denied a petition for a writ of certiorari, 525 U.S. 1092.

In 2021, the district court granted in part and denied in part petitioner's successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. D. Ct. Doc. 425, at 1-3 (Apr. 20, 2021).<sup>1</sup> Neither the district court nor the court of appeals issued a certificate of appealability (COA), and the court of appeals dismissed petitioner's appeal. Pet. App. A2-A3.

1. Petitioner was "a member of an interstate drug dealing conspiracy" and transported drugs from New York to Virginia. 153 F.2d at 724. Petitioner eventually "fell into [an] argument" with

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<sup>1</sup> Because petitioner's appendix includes excerpts of the district court opinion in nonsequential order, this brief cites the district court docket entry throughout.

"the leader of the conspiracy" over his pay. Ibid. To collect what "he believed was [his] due," petitioner and several accomplices broke into the leader's home, robbed him, "tied [him] up, beat him, threw him onto a bed and shot him to death." Ibid.

A federal grand jury in the Western District of Virginia charged petitioner with one count of conspiring to distribute cocaine base, in violation of 21 U.S.C. 841 (1994) and 846; one count of using a firearm to commit murder during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1), (2), and (i)(1) (1994); one count of Hobbs Act robbery, in violation of 18 U.S.C. 1951; and one count of using a firearm to commit murder during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1), (3), and (i)(1) (1994). Third Superseding Indictment 1-5. A jury acquitted petitioner of using a firearm to commit murder during a drug-trafficking crime, but found him guilty on all other counts. Verdict Form 1.

Petitioner's Hobbs Act robbery conviction served as the predicate crime of violence for his Section 924(c) conviction. Third Superseding Indictment 5. That Hobbs Act count charged that petitioner and his co-defendants:

as principals and/or aiders and abettors, did unlawfully obstruct, delay and affect, and attempt and conspire to obstruct, delay and affect commerce \* \* \* by robbery \* \* \* in that [they] did unlawfully take and obtain personal property \* \* \* from the person and in the presence of [the drug conspiracy's leader], against his will by means of actual and threatened force, violence, and fear of injury \* \* \* to his person and the person of another.

Id. at 4. At trial, the evidence and jury instructions for the Hobbs Act and Section 924(c) counts focused solely on the completed Hobbs Act robbery that petitioner and his co-defendants committed. See 153 F.2d at 724; D. Ct. Doc. 398-5, at 68-69, 76-77 (June 13, 1996). The district court did not instruct the jury on attempting or conspiring to commit Hobbs Act robbery. D. Ct. Doc. 398-5, at 68-69, 76-77.

The district court sentenced petitioner to two concurrent terms of life imprisonment, to be followed by another term of life imprisonment on the Section 924(c) count. Judgment 2. The court also imposed a five-year term of supervised release. Judgment 4. The court of appeals affirmed, 153 F.3d 724, and this Court denied a petition for a writ of certiorari, 525 U.S. 1092.

2. Petitioner subsequently filed numerous motions for post-conviction relief. In 2016, 20 years after his original conviction, the court of appeals permitted petitioner to file a successive 2255 motion in the wake of Johnson v. United States, 576 U.S. 591 (2015), and Welch v. United States 578 U.S. 120 (2016). D. Ct. Doc. 325, at 1 (July 14, 2016). That motion was repeatedly amended and held in abeyance pending ongoing litigation before the Fourth Circuit and this Court.

In his second amended motion to vacate, petitioner sought (inter alia) to vacate his Section 924(c) conviction on the premise that his predicate Hobbs Act conviction no longer constituted a crime of violence under 18 U.S.C. 924(c)(3). D. Ct. Doc. 364, at

1-2 (March 4, 2020). Section 924(c)(3) defines a “crime of violence” as a felony offense that either “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), or, “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).

While petitioner’s motion was held in abeyance, this Court held in United States v. Davis, 139 S. Ct. 2319 (2019), that the second alternative definition is unconstitutionally vague. Id. at 2336. And the Fourth Circuit held in United States v. Simms, 914 F.3d 229, cert. denied, 140 S. Ct. 304 (2019), that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A). Id. at 233.

While petitioner’s motion was pending, the Fourth Circuit further held that attempted Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A). See United States v. Taylor, 979 F.3d 203, 208 (4th Cir. 2020), aff’d, 142 S. Ct. 2015 (2022). In his motion, petitioner argued that the operative indictment permitted the jury to convict him for attempting or conspiring to commit Hobbs Act robbery, thereby invalidating his Section 924(c) count. D. Ct. Doc. 364 at 1-2.<sup>2</sup>

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<sup>2</sup> The government initially agreed with petitioner that his Hobbs Act conviction must be vacated on that ground, D. Ct. Doc. 360, at 2-3 (Jan. 9, 2020), but upon further review it withdrew that concession with the district court’s permission, D. Ct. Doc. 425, at 2 n.1.



3. The district court ultimately granted petitioner's motion in part, concluding that his Hobbs Act robbery conviction does not qualify for mandatory life imprisonment under 18 U.S.C. 3559(c)(2)(F), and reducing his life sentence for conspiring to distribute cocaine base under the First Step Act of 2018, Pub. L. No. 115-391, Tit. IV, 132 Stat. 5221. D. Ct. Doc. 425, at 3. But the district court rejected petitioner's challenge to his Section 924(c) conviction, finding that petitioner's Hobbs Act conviction was for a completed Hobbs Act robbery and thus a crime of violence under Section 924(c)(3)(A). Id. at 2-3.

At petitioner's invitation, D. Ct. Doc. 383, at 6 (Oct. 6, 2020), the district court treated the Hobbs Act as creating divisible offenses for robbery, attempted robbery, and conspiracy to commit robbery, D. Ct. Doc. 425, at 4-7 & n.3. The court accordingly applied the modified categorical approach and reviewed relevant record documents to determine petitioner's crime of conviction under the Hobbs Act. Id. at 7-16. The court noted that the indictment had "plainly charge[d] actual Hobbs Act robbery" but "also charge[d] that [petitioner] and others did 'attempt and conspire to obstruct, delay and affect commerce . . . by robbery.'" Id. at 6 (citation omitted). But it observed that "the jury was not instructed on attempted Hobbs Act robbery or conspiracy to violate the Hobbs Act. Rather, the jury was only instructed as to the elements of actual Hobbs Act robbery." Id. at 11; see id. at 8-11 (reviewing jury instructions and

government's closing argument). And it explained that the jury's verdict form "simply asked the jury to find [petitioner] guilty or not guilty 'as charged in Count Three of the Indictment,'" and, "as to Count Three, the jury heard only argument and instruction about an actual robbery." Id. at 11 (citation omitted).

Based on its observation that the trial court "did not submit the issues of attempt or conspiracy to commit Hobbs Act robbery to the jury," the district court found that the jury instructions narrowed the charges in the indictment, such that the jury had found petitioner guilty "of Hobbs Act robbery alone." D. Ct. Doc. 425, at 12-13 (citing Griffin v. United States, 502 U.S. 46, 60 (1991) and United States v. Miller, 471 U.S. 130, 144-145 (1985)). The court therefore upheld petitioner's Section 924(c) conviction and accompanying life sentence. Id. at 18.<sup>3</sup>

4. The court of appeals dismissed petitioner's appeal. Pet. App. A2-A3. The court explained that it had "independently reviewed the record," and found that petitioner had not demonstrated "a substantial showing of the denial of a constitutional right," and it therefore denied him a COA. Ibid. (quoting 28 U.S.C. 2253(c)(2)).

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<sup>3</sup> The district court also explained that petitioner's completed Hobbs Act robbery conviction was a crime of violence even if based on aiding and abetting liability. D. Ct. Doc. 425, at 15-16, 18. Petitioner did not contest that aspect of the district court's decision on appeal, and does not challenge it in his petition for a writ of certiorari.

## ARGUMENT

Petitioner contends (Pet. 6-16) that the court of appeals erred in denying him a COA on his challenge to the classification of his Hobbs Act conviction as a crime of violence under 18 U.S.C. 924(c)(3)(A). That contention lacks merit. The district court correctly determined that his conviction rested on completed Hobbs Act robbery, which constitutes a crime of violence, and the lower courts did not err in declining to grant him a COA. The court of appeals' decision does not conflict with any decision of this Court or implicate a division of authority among the courts of appeals. This Court has repeatedly denied petitions for writs of certiorari challenging the classification of Hobbs Act robbery as a crime of violence, and it should do the same here.

1. Petitioner contends (Pet. 7-15) that the court of appeals erred in denying him a COA because completed Hobbs Act robbery is not divisible from attempted Hobbs Act robbery or conspiracy to commit Hobbs Act robbery and cannot constitute a crime of violence in light of United States v. Taylor, 142 S. Ct. 2015 (2022). But while Taylor held that attempted Hobbs Act robbery does not qualify as a crime of violence, id. at 2025, it did not cast doubt on the unanimous view of every court of appeals that completed Hobbs Act robbery constitutes a crime of violence.

The Hobbs Act "makes it a federal crime to commit, attempt to commit, or conspire to commit a robbery with an interstate component." Taylor, 142 S. Ct. at 2019. As petitioner

acknowledged before the district court, D. Ct. Doc. 383, at 6 (Aug. 6, 2020), the Hobbs Act thus defines three separate robbery-based offenses: completed Hobbs Act robbery; attempted Hobbs Act robbery; and conspiracy to commit Hobbs Act robbery. And each of those crimes has different elements that the government must prove to secure a conviction. See Taylor, 142 S. Ct. at 2020 (juxtaposing the different elements of completed Hobbs Act robbery with those of attempted Hobbs Act robbery).

As every court of appeals to have considered the issue has held,<sup>4</sup> the first of those crimes, completed Hobbs Act robbery, is categorically a crime of violence under Section 924(c)(3)(A). Hobbs Act robbery's requirements of taking of personal property "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), match Section 924(c)(3)(A)'s definition of a "crime of

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<sup>4</sup> See, e.g., United States v. Scott, 14 F.4th 190, 195 n.1 (3d Cir. 2021); United States v. Tuan Ngoc Luong, 965 F.3d 973, 990 (9th Cir. 2020), cert. denied, 142 S. Ct. 336 (2021); United States v. Richardson, 948 F.3d 733, 741-742 (6th Cir.), cert. denied, 141 S. Ct. 344 (2020); Brown v. United States, 942 F.3d 1069, 1075 (11th Cir. 2019) (per curiam); United States v. Mathis, 932 F.3d 242, 265-266 (4th Cir.), cert. denied, 140 S. Ct. 639, and 140 S. Ct. 640 (2019)); United States v. García-Ortiz, 904 F.3d 102, 109 (1st Cir. 2018), cert. denied, 139 S. Ct. 1208 (2019); United States v. Melgar-Cabrera, 892 F.3d 1053, 1060-1066 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018); United States v. Hill, 890 F.3d 57, 56-60 (2d Cir. 2018), cert. denied, 139 S. Ct. 844 (2019); United States v. Buck, 847 F.3d 267, 274-275 (5th Cir.), cert. denied, 137 S. Ct. 2231, and 138 S. Ct. 149 (2017); Diaz v. United States, 863 F.3d 781, 783 (8th Cir. 2017); United States v. Rivera, 847 F.3d 847, 848-849 (7th Cir.), cert. denied, 137 S. Ct. 2228 (2017).

violence” as a federal felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” See, e.g., United States v. Hill, 890 F.3d 51, 57 (2d Cir. 2018) (observing that the elements of Hobbs Act robbery “would appear, self-evidently, to satisfy” the definition of a “crime of violence” in Section 924(c)(2)(A)), cert. denied, 139 S. Ct. 844 (2019).

Petitioner errs in suggesting (Pet. 7-8, 10-11, 12) that Taylor implies that completed Hobbs Act robbery is not a crime of violence. To the contrary, Taylor recognized that, “to win a conviction for a completed robbery the government must show that the defendant engaged in the ‘unlawful taking or obtaining of personal property from the person . . . of another, against his will, by means of actual or threatened force.’” 142 S. Ct. at 2020 (citation and emphasis omitted). The requirement of “actual or threatened force” differentiates completed Hobbs Act robbery from attempted Hobbs Act robbery, and it eliminates any doubt that a conviction for completed Hobbs Act robbery is a conviction for a crime 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).

This Court has recently and repeatedly denied petitions for a writ of certiorari challenging the circuits’ consensus on the application of Section 924(c)(3)(A) to completed Hobbs Act

robbery.<sup>5</sup> It should follow the same course here. Indeed, to the extent that petitioner now claims that the Hobbs Act is not divisible into separate offenses, see Pet. 8-15, his recognition of the opposite in the district court would make this case a particularly unsuitable vehicle for review.

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<sup>5</sup> See, e.g., Felder v. United States, 142 S. Ct. 597 (2021) (No. 21-5461); Lavert v. United States, 142 S. Ct. 578 (2021) (No. 21-5057); Ross v. United States, 142 S. Ct. 493 (2021) (No. 21-5664); Hall v. United States, 142 S. Ct. 492 (2021) (No. 21-5644); Moore v. United States, 142 S. Ct. 252 (2021) (No. 21-5066); Copes v. United States, 142 S. Ct. 247 (2021) (No. 21-5028); Council v. United States, 142 S. Ct. 243 (2021) (No. 21-5013); Fields v. United States, 141 S. Ct. 2828 (2021) (No. 20-7413); Thomas v. United States, 141 S. Ct. 2827 (2021) (No. 20-7382); Walker v. United States, 141 S. Ct. 2823 (2021) (No. 20-7183); Usher v. United States, 141 S. Ct. 1399 (2021) (No. 20-6272); Steward v. United States, 141 S. Ct. 167 (2020) (No. 19-8043); Terry v. United States, 141 S. Ct. 114 (2020) (No. 19-1282); Hamilton v. United States, 140 S. Ct. 2754 (2020) (No. 19-8188); Diaz-Cestary v. United States, 140 S. Ct. 1236 (2020) (No. 19-7334); Walker v. United States, 140 S. Ct. 979 (2020) (No. 19-7072); Tyler v. United States, 140 S. Ct. 819 (2020) (No. 19-6850); Hilario-Bello v. United States, 140 S. Ct. 473 (2019) (No. 19-5172); Nelson v. United States, 140 S. Ct. 469 (2019) (No. 19-5010); Apodaca v. United States, 140 S. Ct. 432 (2019) (No. 19-5956); Young v. United States, 140 S. Ct. 262 (2019) (No. 19-5061); Durham v. United States, 140 S. Ct. 259 (2019) (No. 19-5124); Munoz v. United States, 140 S. Ct. 182 (2019) (No. 18-9725); Lindsay v. United States, 140 S. Ct. 155 (2019) (No. 18-9064); Hill v. United States, 140 S. Ct. 54 (2019) (No. 18-8642); Greer v. United States, 139 S. Ct. 2667 (2019) (No. 18-8292); Rojas v. United States, 139 S. Ct. 1324 (2019) (No. 18-6914); Foster v. United States, 139 S. Ct. 789 (2019) (No. 18-5655); Desilien v. United States, 139 S. Ct. 413 (2018) (No. 17-9377); Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248); Robinson v. United States, 138 S. Ct. 1986 (2018) (No. 17-6927); Chandler v. United States, 138 S. Ct. 1281 (2018) (No. 17-6415); Middleton v. United States, 138 S. Ct. 1280 (2018) (No. 17-6343); Jackson v. United States, 138 S. Ct. 977 (2018) (No. 17-6247); Garcia v. United States, 138 S. Ct. 641 (2018) (No. 17-5704).

2. Petitioner separately asserts (Pet. 16) that the court of appeals erred in denying him a COA because a reasonable jurist could find that "the jury was presented with both valid and invalid predicate [Hobbs Act] offenses" for his Section 924(c) conviction. That fact-bound assertion inherently would not warrant this Court's review, see Sup. Ct. R. 10, and is in any event incorrect.

Petitioner bears the burden on collateral review to affirmatively establish that his conviction rested on an invalid ground. See, e.g., Parke v. Raley, 506 U.S. 20, 31 (1992) (explaining that the "presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant" on collateral review). He cannot meet that burden. The district court correctly applied the modified categorical approach, consulted the charging documents and the jury instructions, and determined that petitioner's Section 924(c) conviction rested on completed Hobbs Act robbery.

The operative indictment specifically identified the relevant predicate crime of violence for petitioner's Section 924(c) charge as "robbery under Title 18, United States Code, Section 1951." Third Superseding Indictment 5 (emphasis added). And the Hobbs Act count itself alleged that petitioner and his accomplices violated the Hobbs Act because they "did unlawfully take and obtain personal property \* \* \* from the person and in the presence of [the drug conspiracy's leader], against his will by means of actual and threatened force, violence, and fear of injury \* \* \* to his

person and the person of another.” Ibid. Although the indictment also contained language that broadly parroted the Hobbs Act’s text, which stated that petitioner and his co-defendants, “as principals and/or aiders and abettors, did unlawfully obstruct, delay and affect, and attempt and conspire to obstruct, delay and affect commerce \* \* \* by robbery,” ibid., the fact-specific allegations in the indictment followed this language and clarified that petitioner’s offense was completed Hobbs Act robbery, see ibid.

The trial court’s jury instructions ensured that petitioner was convicted of completed Hobbs Act robbery. The jury instructions on the Hobbs Act and Section 924(c) counts made no mention of either attempted Hobbs Act robbery or conspiracy to commit Hobbs Act robbery. See D. Ct. Doc. 398-5 at 68-69, 76-77. Thus, even if the indictment had suggested that petitioner’s Section 924(c) conviction could rest on an attempt or conspiracy to commit Hobbs Act robbery, the jury instructions eliminated that possibility. Cf. Shepard v. United States, 544 U.S. 13, 17 (2005) (suggesting that jury instructions may “narrow” a state charging document’s overly broad definition of burglary to a definition matching the federal generic crime of burglary) (citation omitted); id. at 21 (noting that “the details of instructions could support [the] conclusion” that a conviction “‘necessarily’ rested on the fact identifying [a] burglary as generic”) (citation omitted). Accordingly, petitioner’s conviction on the Section



924(c) count rested on completed Hobbs Act robbery and is not invalid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2023