No. 22-____

In the
Supreme Court of the United States

Jesus Mendez,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), qualifies as a "crime of violence" capable of sustaining a conviction under 18 U.S.C. § 924(c), punishing those who use a firearm during a crime of violence, in light of United States v. Taylor, 142 S. Ct. 2015 (2022).

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OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 2022 WL 17684586 (2d Cir. Dec. 15, 2022) and appears at Pet. App. 01-04.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 2255 and entered an order denying Mendez's § 2255 motion on June 2, 2021. The Second Circuit had jurisdiction under 28 U.S.C. §§ 1291 & 2253 and affirmed on December 15, 2022.

The Second Circuit extended the time to petition for rehearing to January 30, 2023. Mendez filed a rehearing petition, seeking both panel and en banc rehearing on the question presented here, on January 24, 2023.

The Second Circuit denied rehearing without explanation on February 24, 2023. Ninety days from that date is May 25, 2023.

This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition, filed May 24, 2023, is timely under Supreme Court Rule 13.1.

RELEVANT STATUTORY PROVISIONS

The **Hobbs Act, 18 U.S.C. § 1951**, states in relevant part:

> (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. § 924(c)(1) states in relevant part:

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, . . . be sentenced to a term of imprisonment of not less than 5 years . . . .

18 U.S.C. § 924(c)(3) states in relevant part:

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.

STATEMENT OF THE CASE

1. The trial

Jesus Mendez and Ricardo Morales were charged with crimes arising from their participation in a Bronx street gang. After a jury trial in the Southern District of New York in 1997, Mendez was convicted of seven counts:

Count 5:	conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951;
Count 6:	Hobbs Act robbery, in violation of § 1951;
Count 7:	conspiracy to commit Hobbs Act robbery, in violation of § 1951;
Count 8:	Hobbs Act robbery, in violation of § 1951;
Count 13:	using and carrying a firearm during a crime of violence, to wit the conspiracy and substantive robbery charged in Counts 5 and 6, in violation of § 924(c);
Count 14:	using and carrying a firearm during a crime of violence, to wit the conspiracy and substantive robbery charged in Counts 7 and 8, in violation of § 924(c); and
Count 21:	felon in possession of a firearm, in violation of § 922(g).

As relevant here, Counts 5 and 6 concern the robbery of the Franklin Grocery on January 3, 1996. Counts 7 and 8 concern the robbery of an individual named Bryan Wilson on February 25, 1996. And Count 13 concerns the use of a gun during the conspiracy and robbery of the grocery, while Count 14 concerns the use of a gun during the conspiracy and robbery of Wilson.

The district court instructed jurors that using a gun during just one of the two predicates sufficed for conviction on the § 924(c) counts. The court also told

them that both predicates, conspiracy and substantive Hobbs Act robbery, qualify as "crimes of violence" as a matter of law: "I instruct you that the underlying crimes of violence alleged in each of Counts Twelve through Nineteen are crimes of violence for which [the defendants] may be prosecuted in a court in the United States."

The jury convicted Mendez on these counts.

The verdict form only asked the jury to check "guilty" or "not guilty" for each count. The jury thus did not indicate which predicate it settled on in Counts 13 and 14.

2. Subsequent history

On direct appeal, the Second Circuit vacated and dismissed the defendants' RICO and RICO-related convictions for insufficiency. United States v. Morales, 185 F.3d 74 (2d Cir. 1999). It affirmed the other counts and remanded for resentencing.

At the 2001 resentencing, the court sentenced Mendez to 20 years on each of the four robbery counts; five years on the first § 924(c) count; 20 years on the second § 924(c) count; and five years on the felon-in-possession count, all to run consecutively, for a total of 110 years' imprisonment.[1]

The Second Circuit affirmed. United States v. Diaz, 25 F. App'x 27 (2d Cir. 2001). Mendez thereafter filed at least two motions seeking to vacate his sentence on grounds unrelated to the instant motion, all of which were denied.

[1] Mendez is 54 years old. His projected release date from BOP custody is September 24, 2091.

A. *Johnson* (2015)

In June 2015 this Court decided Johnson v. United States, 135 S. Ct. 2551 (2015), which struck down the residual clause of the Armed Career Criminal Act ("ACCA") as unconstitutionally vague under the Due Process Clause. Johnson concluded that "imposing an increased sentence under the residual clause . . . violates the Constitution's guarantee of due process." Id. at 2563.

B. This § 2255 motion

In light of Johnson, Mendez filed a motion in the Second Circuit under 28 U.S.C. § 2255(h)(2) seeking permission to file a successive § 2255 motion in the district court to vacate his two § 924(c) convictions. See 2d Cir. No. 16-1658. Because the residual clause in § 924(c)'s definition was not identical to the residual clause invalidated in Johnson, however, the court stayed consideration of that motion until several relevant cases were decided.

The first was United States v. Hill, 890 F.3d 51 (2d Cir. 2018), holding that substantive Hobbs Act robbery qualifies as a crime of violence under the elements (or force) clause in § 924(c)(3)(A) and is thus unaffected by Johnson. The second is United States v. Davis, 139 S. Ct. 2319 (2019), which held that the residual clause at § 924(c)(3)(B), like its close cousin in the ACCA, was unconstitutionally vague. Following a remand in light of Davis, the Second Circuit then held in United States v. Barrett, 937 F.3d 126 (2d Cir. 2019), the third case, that because conspiracy to

commit Hobbs Act robbery qualifies as a § 924(c) crime of violence only under the residual clause, it cannot serve as a predicate offense in a § 924(c) prosecution.

After those decisions, the Second Circuit granted Mendez permission to file a successive § 2255 motion in the district court.

In the district court, Mendez moved to vacate the two § 924(c) counts and for resentencing on the remaining counts. He contended that the 25-year sentences on those counts were "imposed in violation of the Constitution or laws of the United States," in light of Johnson and Davis.

The Government conceded that the trial court erred in instructing the jury on the § 924(c) counts. But it contended that the error did not prejudice Mendez because the jury would have convicted him on the alternative predicate, substantive Hobbs Act robbery, which remains a valid predicate in light of the Second Circuit's decision in Hill.

The district court denied the motion. While acknowledging that it erred in telling jurors that they could convict Mendez on the § 924(c) counts based on his use of a gun during a robbery conspiracy, the court agreed with the Government that the defendant could not show that he was harmed by the error in light of the overall verdict: "Mendez has not shown any prejudice from the jury instruction, as he was separately convicted on both the Hobbs Act conspiracy counts (Counts Five and Seven) and both the substantive Hobbs Act robbery counts (Counts Six and Eight). The latter are clearly valid predicates."

3. The panel's decision

A panel of the Second Circuit affirmed on the same ground. Pet. App. 01-04. In a summary order issued December 15, 2022, the panel acknowledged that "the district court erred by instructing the jury that both conspiracy to commit Hobbs Act robbery and substantive Hobbs Act robbery were crimes of violence, and that, therefore, the jury could rely on the conspiracy or the substantive robbery count to find Mendez guilty of Counts Thirteen and Fourteen." Id. at 02. But the error was harmless in light of "the jury's guilty verdicts, the language of the indictment, and the evidence at trial." Id. at 03. On this record, the panel explained, "[w]e are [] confident that, had the jury been instructed that the only valid predicates for convicting Mendez of Counts Thirteen and Fourteen were Counts Six and Eight (charging substantive Hobbs Act robbery), [] it would still have convicted Mendez of Counts Thirteen and Fourteen." Id.

4. The rehearing petition based on *Taylor*

Mendez timely sought panel and en banc rehearing. By that time, this Court had decided United States v. Taylor, 142 S. Ct. 2015 (June 21, 2022), holding that attempted Hobbs Act robbery did not qualify as a crime of violence for purposes of § 924(c).

Decided after Davis struck the residual clause, Taylor ruled that attempted robbery did not fall within the remaining elements clause at § 924(c)(3)(A) because it failed the critical test: "[W]hether the elements of one federal law align with those

prescribed in another." 142 S. Ct. at 2025. Answering this question is a "straightforward job: Look at the elements of the underlying crime and ask whether they require the government to prove the use, attempted use, or threatened use of force." Id.

Taylor specifically rejected the use of the "realistic probability" test, originating in Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007), for answering this question. And as discussed below, the Second Circuit specifically relied on this test to hold, in Hill, that Hobbs Act robbery constitutes a crime of violence under the elements clause.

Mendez thus sought rehearing on the ground that Hobbs Act robbery also does not qualify as a crime of violence under Taylor's elements-centered approach. He argued that its elements failed to "align with" the elements clause of § 924(c) in two ways – one can commit Hobbs Act robbery without deploying (1) physical force (2) against the person of another. See infra.

The Second Circuit denied the petition without explanation on February 24, 2023.

REASONS FOR GRANTING THE WRIT

Hobbs Act robbery is perhaps the most commonly enlisted predicate in § 924(c) prosecutions nationwide. The Court should therefore grant the writ -- whether this offense actually qualifies as a "crime of violence" in the wake of Davis

and Taylor is implicated in thousands of past, pending, and future federal criminal cases. Moreover, the Second Circuit got the answer wrong.

Hobbs Act robbery is not a crime of violence after Davis invalidated the residual clause and under Taylor's "straightforward" approach to the elements clause. See Sup. Ct. R. 10(c). As we show here, the "elements of the underlying crime" – here, Hobbs Act robbery – do not "require the government to prove the use, attempted use, or threatened use of force" "against the person or property of another."

The Second Circuit erred in invoking Duenas-Alvarez's "realistic probability" test to conclude otherwise. Taylor rejects this inquiry as inappropriate – and irrelevant – when determining whether a federal offense qualifies as a § 924(c) predicate under the elements clause.

A. The elements clause and the Hobbs Act

To count as a § 924(c) crime of violence after Davis (2019) struck the residual clause at § 924(c)(3)(B) as unconstitutionally vague, an offense must qualify under the remaining elements clause. And to fall within this clause, an offense must be a felony and have "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 Hobbs Act punishes anyone who "obstructs, delays, or affects commerce . . . by robbery . . . ." Id. § 1951(a). It defines "robbery" as "the unlawful taking or obtain 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 to 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." Id. § 1951(b)(1).

The question, as Taylor puts it, is "whether the elements of one federal law" – § 1951, proscribing Hobbs Act robbery – "align with those prescribed in another" – § 924(c)(3)(A), the elements clause.

The answer is that it does not, in two ways.

B. Hobbs Act robbery is broader than the elements clause because it can be committed by threatening non-physical injury to property

Courts employ "the categorical approach to determine whether Hobbs Act robbery qualifies as a predicate 'crime of violence.'" United States v. Chappelle, 41 F.4th 102, 108 (2d Cir. 2022). "This analytical framework requires us to look 'not to the facts of the particular . . . case,' but to the statutory definition of the crime of conviction." Id. (citation omitted). "If 'the least culpable conduct that is punishable under the Hobbs Act' would not be a crime of violence . . . , then any 'conviction under that law cannot count as a crime of violence.'" Id. (cleaned up).

As noted, 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, 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(b)(1).

Thus, one can commit this crime by putting someone in "fear of injury, immediate or future, to his . . . property." Id. And the "concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, is not limited to physical or tangible property." United States v. Tropiano, 418 F.2d 1069, 1075 (2d Cir. 1969). "The Act 'speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence.'" Town of West Hartford v. Operation Rescue, 915 F.2d 92, 101 (2d Cir. 1990) (quoting Stirone v. United States, 361 U.S. 212, 215 (1960)). "'[P]roperty' under the Act 'includes, in a broad sense, any valuable right considered as a source or element of wealth.'" Id. (citation omitted). The "rights to solicit customers and to conduct a lawful business" are examples. United States v. Arena, 180 F.3d 380, 392 (2d Cir. 1999). The "concept of 'property' under the Hobbs Act is an expansive one" that includes "intangible assets." Id.

As such, Hobbs Act robbery can be committed by threatening to wage a defamatory campaign against the victim's business. That does not involve the use, attempted use, or threatened use of "physical force against" the victim or his property, as the elements clause requires. 18 U.S.C. § 924(c)(3)(A).

The defendant in Hill thus argued Hobbs Act robbery did not qualify as a § 924(c) predicate, because a "perpetrator could successfully commit [it] by putting a

victim in fear of economic injury to an intangible asset without the use of physical force." 890 F.3d at 57 n.9. As the crime can "plainly be accomplished by placing someone in fear of injury to her property," Hill said, it can be committed using "threats to cause a devaluation of an economic interest such as a stock holding or a contract right." 2d Cir. 14-3872, ECF 66 at 28-29. Hill also cited the model jury instructions, which say "property" under the Act "'includes . . . intangible things of value,'" and thus that robbery can be committed by threatening "'economic rather than physical injury.'" Id., ECF 76 at 27 (quoting 3 Leonard B. Sand et al., Modern Federal Jury Instructions, Instr. 50-4 and 50-5).

An "injury" to nonphysical property, § 1951(b)(1), is necessarily nonphysical. As such, the "'cases interpreting the Hobbs Act have repeatedly stressed that the element of "fear" required by the Act can be satisfied by putting the victim in fear of economic loss.'" United States v. Capo, 817 F.2d 947, 951 (2d Cir. 1987) (citation omitted). Robbery can be committed by using "fear[] to unlawfully obtain the property. Fear exists if a victim experiences anxiety, concern, or worry over . . . business loss, or over financial or job security." Sand, Instr. 50-6. "It is widely accepted that instilling fear of economic harm is sufficient." Id., cmt. (citing, among other authorities, United States v. Garcia, 907 F.2d 380 (2d Cir. 1990)).

The Second Circuit nonetheless ruled against Hill. Citing Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), it said he "failed to show any realistic probability that a perpetrator could effect [] a robbery in the manner he posits."

Hill, 890 F.3d at 57 n.9. He did not "point to his own case or other cases in which the [] courts in fact did apply the statute in the [] manner for which he argues." Duenas-Alvarez, 549 U.S. at 193.

But Taylor has now clarified that the "realistic probability" test is irrelevant for determining whether a crime is a § 924(c) predicate. The Court thus refused to administer that test in deciding if attempted Hobbs Act robbery is "violent" under § 924(c). The same refusal is warranted here – with the same result.

The "statute at issue in Duenas-Alvarez required a federal court to make a judgment about the meaning of a state statute," but "no such federalism concern is in play here," 142 S. Ct. at 2025, as § 924(c) is limited to crimes that "may be prosecuted in a court of the United States." 18 U.S.C. § 924(c)(1)(A). The question here is "only whether the elements of one federal law align with those prescribed in another." 142 S. Ct. at 2025.

Thus, the § 924(c) inquiry is a very "straightforward job: Look at the elements of the underlying crime and ask whether they require the government to prove the use, attempted use, or threatened use of force." Id.

The answer here is no. "The plain text of the Hobbs Act robbery definition makes clear that it will apply to force or threats against property, even in the absence of 'proximity between the person from whom the taking occurs and the threat to property.'" Chappelle, 41 F.4th at 109 (emphasis added; citation omitted). Proving that a robbery was committed by instilling "fear" of "future" economic

"injury" to intangible "property," as § 1951(b)(1) allows, does not require proving any "use, attempted use, or threatened use of physical force," as § 924(c)(3)(A) demands. Thus, the robber who obtains his loot by threatening to wage a defamatory online campaign against the victim's business violates the Hobbs Act, but has not committed a § 924(c) predicate.

Robbery is not "normally committed or usually prosecuted" on such facts, but that's immaterial under Taylor. 142 S. Ct. at 2024. Section "924(c)(3)(A) doesn't ask whether the crime is sometimes or even usually" committed in one way or another. Id. The inquiry is "categorical," and the "only relevant question is whether the federal felony at issue always requires the government to prove – beyond a reasonable doubt, as an element of its case – the use, attempted use, or threatened use of force." Id. at 2020.

Determining whether a federal offense constitutes a crime of violence for § 924(c) is a "straightforward job: Look at the elements." 142 S. Ct. at 2025. Because the elements of Hobbs Act robbery permit conviction based on "fear" of "future" nonphysical "injury" to intangible "property," they permit conviction without proof of any actual, attempted or threatened physical force — and thus without "proof of any of the elements § 924(c)(3)(A) demands. That ends the inquiry." Id.

C. Hobbs Act robbery is broader than the elements clause because it can be committed by threatening harm to oneself

Hobbs Act robbery is also committed when there is a "taking" from a "person . . . by means of actual or threatened force . . . to . . . a relative or member of his

family." § 1951(b)(1). The Act thus covers robberies committed by threatening the victim's "relative" — who may be the robber himself.

That, however, is beyond the scope of § 924(c)(3)(A), which is limited to crimes of force "against the person or property of another." Therefore, Hobbs Act robbery is not a crime of violence for this reason as well.

One may scratch her head at the thought of such a robbery, but Taylor says that this line of inquiry is irrelevant. See supra.

In any event, the Government's concession on this point is telling.

Besides robbers, the Hobbs Act applies to "[whoever . . . commits or threatens physical violence to any person or property in furtherance of a plan or purpose to" violate the Act. § 1951(a). In 2020 the Second Circuit held that this crime is a § 924(c) predicate. United States v. Nacelle, 950 F.3d 51, 53 (2d Cir. 2020). Nacelle "argued] that the § 1951(a) offense does not necessarily involve the threat of physical force 'against the person or property of another,'" as it can involve "a threat of violence to the defendant himself," but Nacelle did "not cite to any case that applied the Hobbs Act in this way." Nacelle, 950 F.3d at 54. Thus, relying on "Duenas-Alvarez," this Court "hailed that the offense specified in the clause of 18 U.S.C. § 1951(a) . . . is categorically a 'crime of violence' under . . . 18 U.S.C. § 924(c)(3)." Id.

But now that Taylor has rejected using Duenas-Alvarez and its "realistic probability" test in § 924(c) cases – directing courts to instead "[look at the

elements" of the crime at issue, 142 S. Ct. at 2025 – the Government concedes the § 1951(a) offense is not a § 924(c) predicate.

In United States v. Morley, E.D.N.Y. 19-cr-221, for example, the Government recently said it "can no longer defend the viability of Count Three," a § 924(c) count, "insofar as it is predicated on the 'violence clause' of the Hobbs Act offense alleged in Count Two, in violation of 18 U.S.C. § 1951(a) ('Whoever . . . 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' punished). The government therefore consents to vacatur of the sentence on Count Three." Morley, Docket Entry 356 at 1.

Likewise, in United States v. Chatham, E.D.N.Y. 21-cr-422, the Government recently said it "does not intend to proceed on Count Three, alleging a violation of Section 924(c), insofar as it is predicated on the 'violence clause' offense alleged in Count Two, in violation of Section 1951(a) ('Whoever . . . 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' punished). The government therefore moves to dismiss Count Three." Chatham, Docket Entry 41.

The Government made these concessions "[i]n accordance with recent guidance from the Department of Justice." Id. They weren't the acts of a rogue prosecutor. And the Department's about-face is striking: two years after arguing successfully in Nacelle that the § 1951(a) crime is a § 924(c) predicate, it now

admits the opposite. The reason is clear: Taylor rejects the point-to-a-case requirement Nacelle relied on. And as Hill relied on the same thing, § 1951's text must now control here too.

Because the Hobbs Act covers threats to a robbery victim's "relative," § 1951(b)(1), a person may rob his relative by threatening harm to himself. Such robberies are doubtlessly rare, but Taylor makes clear that doesn't matter: "Look at the elements of the underlying crime." 142 S. Ct. at 2025. As shown, the elements of Hobbs Act robbery do not categorically require the deployment of force against another person. This offense therefore does not qualify as a crime of violence for purposes of § 924(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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