No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANDRA GREEN

Petitioner

v.

UNITED STATES

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Mr. Green is serving a life sentence after pleading guilty to a single count of using a firearm during a crime of violence under 18 U.S.C. § 924(c). His only predicate crime is Hobbs Act robbery. The question presented is whether Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. § 924(c).

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Petition for Writ of Certiorari

Petitioner respectfully asks that a writ of certiorari issue to review the judgment below.

Opinions Below

The opinion of the Fourth Circuit Court of Appeals appears on pages 1a–13a of the Appendix and is published at 67 F.4th 657. The opinions of the United States District Court for the Eastern District of Virginia appear on pages 14a–47a of the Appendix and are unpublished.

Statement of Jurisdiction

The judgment of the Fourth Circuit Court of Appeals was issued on May 16, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Introduction and Statement of the Case

Mr. Green's Plea and Sentence. In October 2011, Mr. Green pled guilty to 2 counts in a 36-count indictment. (App. at 3a-4a). The first count—Count 29—charged him with using a firearm during a crime of violence under 18 U.S.C. § 924(c)(1)(A) and 2. (*Id.*). For the underlying crime of violence, it referenced Counts 27 and 28. (*Id.*). Count 27 charged conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951. (*Id.*). Count 28 charged attempted Hobbs Act robbery under 18 U.S.C. § 1951. (*Id.*).

Similarly, the second count in Mr. Green's plea deal—Count 34—charged him with using a firearm during a crime of violence under 18 U.S.C. § 924(c)(1)(A) and 2. (*Id.*). For the underlying crime of violence, it referenced Counts 32 and 33. (*Id.*). Count

32 charged conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951. (*Id.*). Count 33 charged Hobbs Act robbery under 18 U.S.C. § 1951. (*Id.*).

In January 2012, the district court gave Mr. Green a life sentence for each count to be served concurrently. (*Id.*). At the time of sentencing, the government moved to dismiss the other counts of the indictment, which the district court did. (*Id.*). Mr. Green did not appeal. (*Id.*).

Mr. Green's § 2255 Motion. Roughly three years later, in June 2015, this Court decided *Johnson v. U.S.*, 135 S. Ct. 2551 (2015) (holding that the definition of "violent felony" in the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(c)(2)(B), was unconstitutionally vague). Within a year of that decision, Mr. Green filed a pro se motion under 28 U.S.C. § 2255 to vacate his two § 924(c) convictions. (App. at 14a). In "ground one" of his motion, he cited *Johnson* and asked for "[r]elief of my sentence [e]nhancements." (App. at 17a).

In response, the district court issued a show cause order asking Mr. Green to explain why his motion was timely. (App. at 27a-29a). It explained that AEDPA imposes a one-year statute of limitations that begins running on one of the four possible dates listed in § 2255(f). (App. at 28a). Because the first possible date was the date that Mr. Green's convictions became final, which was more than three years before the motion, the court stated that his motion "appears to be untimely." (App. at 27a). Then it asked Mr. Green to address whether its initial impression was incorrect, warning that his motion would be dismissed as untimely unless he could demonstrate that it was filed within the proper time period under § 2255(f). (App. at 29a).

To that end, Mr. Green's response argued that his motion should not be time barred because he lacked access to "proper documents" and "legal assistance." (App. at 30a). In other words, his response was unresponsive on the § 2255(f) timeliness issue. Even so, because Mr. Green had presented *Johnson* as the basis for ground one for his motion, and because one of § 2255(f)'s trigger dates for the statute of limitations is "the date on which the right asserted was initially recognized by the Supreme Court," the district court addressed whether *Johnson* made his motion timely, ultimately finding that it did not. (App. at 33a-34a). Specifically, the court found that because *Johnson* invalidated the residual clause in § 924(c), the decision did not affect Mr. Green's convictions under § 924(c) and therefore could not be used as the § 2255(f) trigger date for the one-year statute of limitations. (*Id.*). Because of that, it dismissed his motion and declined to issue a certificate of appealability. (App. at 34a).

Shortly thereafter, Mr. Green filed two motions that he labeled "Exten[s]ion to Dismissal Order." (App. at 35a, 40a). Each requested extra time to respond to the dismissal order, explaining that his facility had been on lockdown. (*Id.*). The second also attached an "affidavit" from Mr. Green stating that § 924(c)'s residual clause was "no longer valid" after *Johnson*. (App. at 41a). The affidavit concluded by saying that his § 2255 motion was timely because he filed it within a year of when *Johnson* was decided. (*Id.*).

Addressing those motions, the district court stated that Mr. Green already had a chance, prior to his facility's lockdown, to address the §2255(f) timeliness question.

(App. at 46a). It stated, too, that Mr. Green was "not entitled to respond" to the dismissal order. (*Id.*). Because the deadline for appealing that order had passed, though, it granted Mr. Green an extension to file a notice of appeal. (App. at 47a). Then it reiterated that it was denying a certificate of appealability for the reasons outlined in its dismissal and show cause orders. (*Id.*).

Mr. Green filed a timely notice of appeal, again raising the *Johnson* claim, and the Fourth Circuit placed his case in abeyance. (App. at 5a). Shortly thereafter, this Court decided *U.S. v. Davis,* 139 S. Ct. 2319 (2019), where it declared that § 924(c)'s residual clause was unconstitutionally vague. After that, Mr. Green and the United States filed informal briefs with the Fourth Circuit. The Fourth Circuit then appointed counsel for Mr. Green and granted a certificate of appealability on two issues: whether Mr. Green's § 2255 motion was timely; and if so, whether, following *Davis*, Mr. Green's convictions are infirm. (App. at 5a).

On those issues, the Fourth Circuit decided the first in Mr. Green's favor, finding that his motion was timely. (App. at 5a-7a). It also invalidated his Count 29 conviction because it was based on conduct that does not qualify as a "crime of violence." (App. at 5a). It affirmed his Count 30 conviction, though, based on procedural default, finding that Mr. Green did not challenge that conviction during his plea proceedings or on direct appeal. (App. at 7a). In doing that, the court analyzed the cause and prejudice grounds for excusing procedural default, finding that he had cause for not raising this claim before. (App. at 8a). But then it found that he could not show prej-

udice because his predicate offense of Hobbs Act robbery "qualifies as a crime of violence under the elements clause" of 18 U.S.C. § 924(c). (App. at 9a-11a). In other words, it addressed the merits of his argument that Hobbs Act robbery is not a crime of violence, rejecting the argument based on circuit precedent stating that Hobbs Act robbery satisfies the "physical force" requirement of the elements clause because it involves "the potential risk of pain or injury to persons." (App. at 10a-11a). Mr. Green timely petitioned this Court to review that decision.

Reasons for Granting the Petition

This Court should review Mr. Green's case for three reasons. First, Hobbs Act robbery does not qualify as a crime of violence under 18 U.S.C. § 924(c), and the elements clause in Section 924(c) is unconstitutionally vague. Second, courts are split on whether Hobbs Act robbery is a crime of violence after *U.S. v. Taylor*, 142 S. Ct. 2015 (2022) (finding that *attempted* Hobbs Act robbery is not a crime of violence). Finally, this is a timely and recurring question, as shown by the number of cases addressing it after this Court left it open in *Taylor*.

I. Hobbs Act robbery does not qualify as a crime of violence under 18 U.S.C. § 924(c), (j)(1), and the elements clause in Section 924(c) is unconstitutionally vague.

The Fourth Circuit first decided that Hobbs Act robbery is a crime of violence in *U.S. v. Mathis*, 932 F.3d 242, 265-66 (4th Cir. 2019). In doing so, the court acknowledged that Hobbs Act robbery can be committed by causing fear of future injury to intangible property. Put differently, it acknowledged that Hobbs Act robbery can be committed by threatening economic harm. *Id.* at 266 (recognizing that the statute does not distinguish "between threats of injury to tangible and intangible property");

see also 3.50 Leonard B. Sand et al., Modern Federal Jury Instructions Criminal, *Obstruction of Interstate Commerce by Robbery—The Hobbs Act*, ¶ 50.01 (2022) ("The use or threat of force or violence might be aimed at a third person, *or at causing economic rather than physical injury*.") (emphasis added). That matters because the definition of crime of violence in § 924(c)'s elements clause is not that broad. It just defines crime of violence as any 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) (emphasis added). Because physical force cannot be used against intangible property, Hobbs Act robbery does not align with the definition of crime of violence under the elements clause. That being the case, Hobbs Act robbery does not qualify as a crime of violence. *See Taylor*, 142 S. Ct. at 2020 (instructing that the "only relevant question is whether the federal felony at issue *always* requires the government to prove . . . the use, attempted use, or threatened use of force") (emphasis added).[1]

Even so, the Fourth Circuit continues to treat Hobbs Act robbery as a crime of violence, showing, in the process, that the elements clause is unconstitutionally vague. *U.S. v. Melaku*, 41 F.4th 386, 401 (4th Cir. 2022) (recognizing that the Fourth Circuit's attempts to give meaning to the "physical force" language in Section 924(c)

[1] Consider the following hypothetical: "Hand over $5,000 now or I'll claim on every review website and social media platform that your restaurant's food made me sick." This violates the Hobbs Act by instilling a "fear of injury" to the restaurateur's "property," 18 U.S.C. § 1951(b)(1), but it threatens no "physical force" against anyone or anything, § 924(c)(3)(A). *See Taylor*, 142 S. Ct. at 2012, 2025 ("A hypothetical helps illustrate the point.").

have "raise[d] serious vagueness concerns") (Diaz, J., dissenting). *Melaku*, for instance, proves the point. There, the majority concluded that "willfully injuring or committing depredation against government property, with damage exceeding $1,000" did not qualify as a crime of violence under § 924(c). 41 F.4th at 388. To reach that conclusion, it reasoned that the offense "can be committed in a non-violent manner" by using de minimis force against government property, while § 924(c) requires "violent, physical force against the property." *Id.* at 388, 392-95 (explaining that the offense could be committed, for example, by spray painting a rock in a national park). That, to the majority, showed that the statute in question did not "*require*" the level of "physical force" contemplated by § 924(c). *Id.* at 395 (emphasis in original). Consequently, the statute did not satisfy § 924(c)'s crime of violence definition. *Id.* at 393, 395 ("We decline to hold that the language in § 924(c)(3)(A) regarding the use of 'physical force' against the 'property of another' encompasses all felonious injury to property under Section 1361. Were we to do so, we would be reading out of the statute Congress's directive that such qualifying predicate offenses must be 'crimes of violence.'") (cleaned up).

That matters because, in drawing that conclusion, the majority had to deal with *Mathis* (which was written by the same judge who wrote *Melaku*) and its holding that Hobbs Act robbery is a crime of violence. *Id.* at 393-94. Recall that Hobbs Act robbery includes taking from another by instilling fear of injury to another's property. 18 U.S.C. § 1951(b)(1). That means someone can be convicted of Hobbs Act robbery by, for example, taking property under the threat of spray painting the victim's car.

See id. In other words, Hobbs Act robbery can be committed by threatening to use the exact type of force that the majority found did not qualify as "violent, physical force" in *Melaku*, 41 F.4th at 394-95.

Still, the majority in *Melaku* swept that concern away by saying that Hobbs Act robbery is different because it "is not a pure property crime." *Id.* at 394. In particular, the majority reasoned that Hobbs Act robbery involves the presence of another person and therefore falls into a category of property crimes that "involve the *potential* risk of pain or injury to persons." *Id.* at 393-94 (emphasis added). The problem with that, though, is that it invites courts to estimate the degree of risk posed by the "ordinary case" of a particular crime when examining whether it qualifies as a crime of violence. In other words, it invites courts to undertake the same inquiry that doomed § 924(c)'s residual clause. *Id.* at 401-02 (Diaz, J., dissenting) ("My colleagues' focus on whether a property crime risks pain or injury to a person invites into § 924(c)'s force clause the same constitutional infirmity that doomed the residual clause.").

In the end, when *Mathis* and *Melaku* are read together, they show that § 924(c)'s elements clause is unconstitutionally vague, because the Fourth Circuit has interpreted it in a way that allows a defendant to be convicted for using or threatening to use de minimis force against the property of another if, in the ordinary case, that conduct creates a risk of injury to someone nearby. *See Melaku*, 41 F.4th at 392-95. Put differently, the way the court reads the elements clause means that it is "effectively replicating the work formerly performed by the residual clause, collapsing

the distinction between them." *Taylor*, 142 S. Ct. at 2023. That being the case, we respectfully ask the Court to grant this petition and recognize that the elements clause, like the residual clause before it, is unconstitutionally vague.

II. Courts are split over whether Hobbs Act robbery is a crime of violence.

This Court decided in *Taylor* that *attempted* Hobbs Act robbery is not a crime of violence. *Taylor*, 142 S. Ct. at 2020-21 ("Simply put, no element of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force."). Since then, courts have split over whether *completed* Hobbs Act robbery should be viewed the same way.

Post-*Taylor*, for example, the Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits have stated that Hobbs Act robbery qualifies as a crime of violence. *See U.S. v. Stoney*, 62 F.4th 108, 112-13 (3d Cir. 2023); *U.S. v. Green*, 67 F.4th 657, 667-71 (4th Cir. 2023); *U.S. v. Hill*, 63 F.4th 335, 363 (5th Cir. 2023); *U.S. v. Worthen*, 60 F.4th 1066, 1068-69 (7th Cir. 2023); *U.S. v. Moore*, No. 22-1899, 2022 WL 4361998, at *1 (8th Cir. Sept. 21, 2022); *U.S. v. Baker*, 49 F.4th 1348, 1360 (10th Cir. 2022). Sometimes these courts address and dismiss the argument that physical force cannot be used against intangible property, like the Fourth Circuit did here. *Green*, 67 F.4th at 668-69. But often they just state that Hobbs Act robbery always involves physical force without addressing *Taylor* or explaining how they reached that conclusion. *See, e.g., Stoney*, 62 F.4th at 113 ("The key inquiry in applying the categorical approach here is whether a completed Hobbs Act robbery requires proof of 'the use, attempted use, or threatened use of physical force.' It does. This is the crucial difference between

attempted and completed robbery."). Either way, these courts are in the majority post-*Taylor* in stating that Hobbs Act robbery is a crime of violence.

By contrast, Judge Kathleen Williams of the U.S. District Court for the Southern District of Florida found that Hobbs Act robbery is not a crime of violence after *Taylor*. *See U.S. v. Louis*, No. 1:21-cr-20252, 2023 WL 2240544 (S.D. Fla. Feb. 27, 2023). There, the defendant was charged with 6 counts of Hobbs Act robbery and 6 crimes of violence under 924(c). He was convicted of all counts at a jury trial where the court delivered the Eleventh Circuit pattern jury instruction on Hobbs Act robbery (defining property as including intangible rights, and "fear" as including fear of financial loss as well as physical violence). *Louis*, 2023 WL 2240544 at **1-2. After *Taylor* was decided, he moved to vacate those counts, explaining that the jury instruction and the text of the Hobbs Act make plain that robbery can be committed by "causing a victim to simply 'fear' a financial loss—but without causing the victim to fear *any* physical violence." (App. at 54a, 58a) (emphasis in original) (arguing that Hobbs Act robbery is "categorically overbroad vis-a-vis §924(c)'s elements clause because it can be committed by causing fear of purely economic harm to non-tangible property"). The district court ultimately agreed, stating it would decline to sentence him on the 924(c) counts because of the "categorically overbroad nature of the Hobbs Act robbery charges relative to § 924(c)(3)." *Louis*, 2023 WL 2240544 at *2; *see also* (App. at 72a) (Judge Williams stating during sentencing that Hobbs Act robbery is "fundamentally overbroad as understood by *Taylor*, and therefore it is incumbent upon me to find that I do not have jurisdiction to sentence under those counts").

In sum, *Taylor* left open the question of whether Hobbs Act robbery qualifies as a crime of violence under Section 924(c)'s elements clause, and, since then, courts are split on how to answer that question. Given the lower courts' disagreement, we respectfully ask this Court to grant Mr. Green's petition and resolve the split.

III. Whether Hobbs Act robbery is a crime of violence is a timely and recurring issue.

The conflict concerns an important and recurring issue. The FBI reports, for instance, that there were 267,988 robberies in the United States in 2019. *See* FBI, Uniform Crime Report, *Robbery*, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/robbery.pdf. That's relevant because the government frequently charges these robberies under the Hobbs Act and then adds firearm charges under Section 924(c). *See* United States Sentencing Commission, *Federal Robbery: Prevalence, Trends, and Factors in Sentencing*, at 3 ("A substantial proportion (40.6%) of robbery offenders sentenced in fiscal year 2021 also had a conviction under section 924(c) for using or carrying a firearm during the offense."), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220818_Robbery.pdf. That allows the government to seek Section 924(c)'s enhanced penalties, as illustrated by this case. *Id.* at 3 ("The average sentence imposed for robbery offenders also convicted under section 924(c) was 155 months of imprisonment, compared to an average sentence of 71 months for robbery offenders without a section 924(c) conviction."). Because of those increased penalties, and the frequency with which the government seeks them, we respectfully ask this

Court to grant Mr. Green's petition and address this important and recurring question.

Conclusion

Mr. Green pled guilty to committing a "crime of violence" under Section 924(c), with the only predicate offense being Hobbs Act robbery. After *Taylor*, courts are split on whether Hobbs Act robbery qualifies as a crime of violence. Because it does not, and because this is a timely and recurring question, Mr. Green respectfully asks this Court to grant his petition and review the Fourth Circuit's decision.

Respectfully submitted,

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