No. _____

IN THE
Supreme Court of the United States

WARREN BAKER.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Hobbs Act Robbery in violation of 18 U.S.C. § 1951(b) is a predicate "crime of violence" for purposes of 18 U.S.C. § 924(c).

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit:
United States v. *Baker* (Case No. 22-4582, January 31, 2024).
United States v. Baker (Case No. 18-4638, August 23, 2021).

United States District Court for the Eastern District of North Carolina:
United States v. *Baker*, No. 5:17-CR-165-D-1

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Petitioner Warren Baker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's unpublished opinion is reported at 2024 U.S. App. LEXIS 2129 and 2024 WL 368327 and is produced in the appendix to this petition.

JURISDICTION

The district court had jurisdiction over the criminal prosecution under 18 U.S.C. §§ 924, 3231. Mr. Baker timely appealed the district court's final judgment. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291 over that timely appeal from a final order. The Fourth Circuit issued its opinion affirming Mr. Baker's conviction on January 31, 2024. This petition is being timely filed on April 30, 2024. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

. . . [A]ny person who, during and in relation to any crime of violence . . . 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—

> (i)be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii)if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii)if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A).

For purposes of this subsection the term "crime of violence" means an offense that is a felony and 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) 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.

18 U.S.C. § 1951.

STATEMENT

In May 2017, a grand jury sitting in the Eastern District of North Carolina indicted Petitioner Mr. Warren Baker on one count of Hobbs Act Robbery in violation of 18 U.S.C. § 1951; one count of brandishing a firearm in furtherance of that robbery in violation of 18 U.S.C. § 924(c); and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He pleaded guilty to all three counts without a written plea agreement. In August 2018, the district court sentenced him to 108 months concurrently on the robbery and gun possession counts and 300 months consecutive to that on the Section 924(c) count, for a total sentence of 408 months of imprisonment. It also imposed a five-year term of supervised release.

Mr. Baker appealed, and the parties jointly moved to vacate the sentence and remand for resentencing because of issues related to Mr. Baker's term of supervised release. The Fourth Circuit granted the motion, vacated the sentence, and remanded for resentencing.

At the September 2022 resentencing, the district court again imposed a 108-month sentence on Counts One and Three and a consecutive 300-month sentence on Count Two for a total sentence of 408 months plus five years of supervised release.

Mr. Baker timely appealed, arguing, among other things, that the district court plainly erred in convicting him under Section 924(c) because Hobbs Act Robbery is not a predicate "crime of violence." Relying on prior circuit precedent, the Fourth Circuit affirmed his conviction.

This petition follows.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

Section 924(c) prohibits the brandishing of a firearm "during and in relation to any crime of violence . . ." 18 U.S.C. § 924(c)(1)(A). Relevant to our purposes, the statute defines a "crime of violence" as a felony offense 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).

Courts employ the categorical approach to determine whether an offense is a crime of violence under the force clause. *United States v. Taylor,* 142 S. Ct. 2015, 2020 (2022). "And answering that question does not require—in fact, it precludes—an inquiry into how any particular defendant may commit the crime. 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.*

1. **The Hobbs Act statute (18 U.S.C. § 1951(a)) fails to qualify as a "crime of violence" under 18 U.S.C. Section 924(c) because it is an indivisible offense with alternative means—at least one (attempted Hobbs Act robbery) of which falls outside of the "crime of violence" definition.**

Section 1951(a) is an indivisible and overbroad statute that categorically fails to qualify as a § 924(c) "crime of violence."

A statute is only divisible for purposes of a categorial analysis when it has alternative elements rather than alternative means. *Descamps v. United States*, 570 U.S. 254, 278 (2013). "[E]lements," are statutory phrases that a jury must find "unanimously and beyond a reasonable doubt" to convict the defendant. *Id.*; *see also Mathis v. United States,* 579 U.S. 500, 504 (2016) (same). "Means," by contrast, are statutory phrases that a jury need not unanimously find. *Id.* Thus, when a statute has two disjunctive statutory phrases, they are alternative "means" if under state law, "it is enough that each juror agree only that one of the two occurred without settling on which." *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013). In other words, if a statute does not require the jury to select one statutory phrase to the exclusion of the other in order to find guilt, then the terms are alternative means rather than elements.

The government must prove that a statute is divisible under these terms. If the law does not "speak plainly" on whether an offense is divisible, "a sentencing judge will not be able to satisfy [the Supreme Court's] demand for certainty] when determining whether a defendant was convicted of" a "crime of violence." *Mathis,* 579 U.S. at 519. Thus, "[i]f [the court] cannot say with certainty that the statute is divisible" the statute is not divisible and the court cannot apply the modified-

categorical approach. *United States v. Cantu*, 934 F.3d 924, 929 (10th Cir. 2020) (citation omitted). *See also United States v. Degeare,* 884 F.3d 1241, 1248 (10th Cir. 2020) ("unless we are certain that a statute's alternatives are elements rather than means, the statute isn't divisible and we must eschew the modified categorical approach").

Applying this law here, the government cannot meet its heavy burden of proving with certainty that Section 1951(a) is divisible.

To begin, when a statute bundles alternative terms within a single sentence, this is a good indication that the statute is indivisible. *See United States v. McKibbon*, 878 F.3d 967, 975 (10th Cir. 2017). The Hobbs Act statute does exactly that. Section 1951(a) is a "one sentence proscription" that joins a number of acts as a disjunctive series. *Id.*

> (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 commit 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.

18 U.S.C. § 1951(a).

On top of the bundling, the penalty is the same for all the different ways of violating the Hobbs Act statute—whether by completed robbery or attempted robbery. This bundling and same penalty combination strongly indicates that statute is indivisible with alternative means. *See Degeare,* 884 F.3d at 1253 (citing *Mathis*, 579 U.S. at 518).

Moreover, counsel has not found a single case interpreting the statute to require jury unanimity as to one modality of the Hobbs Act statute to the exclusion of the others. The lack of case law reinforces that the statute is a single, indivisible offense with alternative means.

And because at least one of the means within this indivisible statute—attempted Hobbs Act robbery—is not a "crime of violence" under 18 U.S.C. § 924(c), then Section 1951(a) categorically fails to qualify as a Section 924(c) "crime of violence," and Mr. Baker's Section 924(c) conviction is void. *Taylor*, 142 S. Ct. at 2021. This Court must grant review to correct the Fourth Circuit opinion holding otherwise.

2. Hobbs Act robbery is not a "crime of violence" because it can be committed by threatening economic harm—which is not a threat of physical force required under the § 924(c) force clause.

Even if this Court assumes arguendo that the Hobbs Act statute is divisible with the alternative crimes of completed Hobbs Act robbery and attempted Hobbs Act robbery, and it concludes under the modified categorical approach that Mr. Baker was convicted of completed Hobbs Act robbery, his Section 924(c) conviction is still void because Hobbs Act robbery is not a "crime of violence." The statute can be committed by threatening injury to intangible property (for example by threatening to devalue a stock option or contract right) whereas the Section 924(c) force clause, in relevant part, requires a threat of physical force. This categorical mismatch disqualifies Hobbs Act robbery as a "crime of violence."

Section 1951 "protect[s] intangible, as well as tangible property." *United States v. Local 560 of the Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.*, 780 F.2d 267, 281 (3d Cir. 1986) (describing the circuits as "unanimous" on this point); *see also United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction for threat "to slow down or stop construction projects unless his demands were met");.[1]

A leading jury instruction treatise also includes intangible property in its Hobbs Act robbery instructions. 3.50 Leonard B. Sand et al., Modern Federal Jury Instructions Criminal ¶ 50.05 (2022) ("[t]he use or threat of force or violence might be aimed at a third person, or at causing economic rather than physical injury"); Modern Federal Jury Instructions Criminal ¶ 50.06 (2022) ("fear exists if a victim experiences anxiety, concern, or worry over expected personal harm or business loss, or over financial or job security").

Similar instructions have been used in trials around the country. *See*, *e.g., United States v. Baker,* No. 2:11-CR-20020, ECF No. 53 at 20 (D. Kan. Sept. 15, 2011) (allowing conviction based on causing anxiety about future harm to intangible property); *United States v. Hennefer,* No. 1:96-CR-24, ECF No. 195 at 32, 35, 36 (D. Utah Jul. 9, 1997) (same); *United States v. Nguyen* No. 2:03-CR-158, ECF No. 157

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[1] Although these defined "property" in Hobbs Act extortion cases, the same meaning should apply to "property" in the Hobbs Act robbery context because they are criminalized in the same statute. 18 U.S.C. § 1951(a) and (b)(1) and (b)(2). "A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007).

at 28 (D. Nev. Feb. 10, 2005) (same); *United States v. Lowe,* No. 1:11-CR-20678, ECF No. 229 at 12, 13 (S. D. Fla. Feb. 6, 2012) (same); *United States v. Graham,* No. 1:11-CR-94, ECF No. 211 at 142 (D. Md. Jan. 29, 2018) (same); *United States v. Brown,* No. 11-CR-334-APG, ECF No. 197 at 15 (D. Nev. Jul. 28, 2015) (same).

Taylor proves instructive. In *Taylor*, one of the government's central arguments was that no realistic probability exists that the government would prosecute anyone for attempted Hobbs Act robbery based on an attempted threat of force—conduct which this Court ultimately held does not constitute a "crime of violence." 142 S. Ct. at 2024. The government argued as such upon asserting that the defense did not cite to a single case in which a defendant was prosecuted for attempted Hobbs Act robbery based solely on an attempted threat of force. *Id.* Thus, according to the government, attempted Hobbs Act robbery is a "crime of violence" even if a theoretical possibility exists that it can be committed by an attempted threat of force. *Id.*

This Court, however, firmly rejected the government's argument and, in so doing, threw out the realistic probability test altogether for federal offenses. This Court described multiple problems with the test including the "oddity of placing a burden on the defendant to present empirical evidence about the government's own prosecutorial habits" and "the practical challenge such a burden would present" when most cases end in pleas and are not available on Westlaw or Lexis. *Id.*

But the most damning problem for the Court was that the realistic probability test contravenes the categorical approach, which merely looks at

"whether the government must prove, as an *element* of its case, the use, attempted use, or threatened use of force." *Id.* (emphasis in original). As this Court held, Section 924(c) "asks only whether the elements of one federal law align with those prescribed in another." *Id.* It is error to look beyond the elements and "say[] that a defendant must present evidence about how his crime of conviction is normally committed or usually prosecuted." *Id.*

Therefore, in *Taylor*, this Court wiped out the realistic probability test from existence in "crime of violence" analysis—at least for federal offenses. In so doing, the Court acknowledged that it previously applied a limited version of the realistic probability test in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 185-189 (2007), to determine whether a prior *state* offense qualified as a generic theft, but the Court explained that *Duenas-Alvarez* arose of out of federalism concerns not relevant to interpretation of federal statutes: "[I]t made sense to consult how a state court would interpret its own State's laws. . . . Meanwhile no such federalism concern is in play here. The statute before us [§ 924(c)(3)(A)] asks only whether the elements of one federal law align with those prescribed in another." *Taylor*, 142 S. Ct. at 2025.

Under the *Taylor* framework, the elements of Hobbs Act robbery do not align with the Section 924(c) force clause because the offense includes threats against intangible property, but the force clause does not. In other words, because the possibility exists that a Hobbs Act robbery offense can be committed with threats of

economic harm, the inquiry ends, and the statute categorically fails to qualify as a Section 924(c) "crime of violence."

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The Fourth Circuit is, simply, wrong. More importantly, the Fourth Circuit is wrong in a way that flies in the face of this Court's *Taylor* decision. Review is necessary to ensure adherence to this Court's decisions.

CONCLUSION

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

Respectfully submitted,

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