No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LAMEL MILLER, 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 WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether "Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A), an important and recurring question left open after this Court's opinion in United States v. Taylor, 596 U.S. 845 (2022).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lamel Miller respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming his federal conviction.

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-4a) is reported at United States v. Morrison, __ Fed. Appx. __, 2024 U.S. App. Lexis 27378 (2d Cir. 2024).

JURISDICTIONAL STATEMENT

The Court of Appeals issued its opinion and entered judgment on October 29, 2024. Pet. App. 1a.

This Court has jurisdiction under 28 U.S.C. § 1254(1). The District Court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

18 U.S.C. § 924(c)(1)(A) is violated if someone, "during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, or [], in furtherance of any such crime, possesses a firearm."

A "'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).

Hobbs Act robbery is "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).

STATEMENT OF THE CASE

1. Petitioner was indicted as a participant in a robbery at Aqueduct Racetrack on March 7, 2020. A co-defendant was employed as a security guard at the track. As the "inside man," he provided information about cash collection and its delivery to a vault in a restricted area, and arranged for the other two robbers – including Petitioner – to gain access. Three men were held up, including the "inside man" who posed as one of the victims. Petitioner and the other co-defendant each displayed what appeared to be firearms during the robbery, but no one was injured.

Petitioner pleaded guilty to Hobbs Act robbery and Hobbs Act robbery conspiracy, but went to trial on the § 924 (c)(3)(A) firearm count: his defense was that the guns displayed were not real.

2. Before the District Court, and on appeal to the Second Circuit, Petitioner argued that a completed Hobbs Act robbery did not qualify as a "crime of violence." He relied on the test set forth in United States v. Taylor, 596 U.S. 845 (2022), and, tracking the statutory definition of robbery, 18 U.S.C. § 1951(b)(1), argued that it did not qualify in all instances. First, a robbery could be committed without the use or attempted or threatened use of force by instilling fear of future economic injury to intangible property. Second, a robbery did not necessarily require the threat of physical force against the person or property "of another," as § 924 (c)(3)(A) requires, since it can involve a threat of violence to the perpetrator himself.

3. The Second Circuit did not address the hypotheticals posed by Petitioner or apply the elements analysis mandated by Taylor. Instead, it held it was bound by its prior precedents that had ruled that a Hobbs Act robbery qualified as a crime of violence. Pet. App. 3a -4a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to consider a recurring and important question of federal law, using the test set forth in this Court's 2022 opinion in United States v. Taylor and left open by it: whether a completed Hobbs Act robbery qualifies as a "crime of violence" under 18 U.S.C. § 924 (c)(3)(A).

A conviction under 18 U.S.C. § 924(c) requires that the defendant employed a firearm during the commission of a "crime of violence." The latter is defined as a felony 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). In United States v. Hill, 890 F.3d 51, 56 (2d Cir. 2018), relying on Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007), the Court of Appeals concluded that a completed Hobbs Act robbery was a crime of violence. It used the following test: "there must be 'a realistic probability, not a theoretical possibility,' that the statute at issue could be applied to conduct that does not constitute a crime of violence. Id. To show that a particular reading of the statute is realistic, a defendant 'must at least 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.' Id. To that end, the categorical approach must be grounded in reality, logic, and precedent, not flights of fancy."

United States v. Taylor rejected this test. 596 U.S. 845, 857-60 (2022). Instead, to determine whether an offense qualifies as a "crime of violence," courts must look to the statutory definition of the offense, and 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." Taylor, 596 U.S, at 850 (emphasis added). A "hypothetical" can show that it does not (id. at 851-52), and if the offense does not qualify as a crime of violence in all cases, it cannot qualify in any. See Descamps v. United States, 570 U.S. 254, 268 (2013).

That is the case here. Petitioner posited two examples that tracked the elements of the statute, yet do not satisfy the definition of a "crime of violence." Without considering them, the Court of Appeals relied on two post-Taylor decisions to reject his claim (Pet. App. 3a-4a); neither had addressed these (or any other) hypotheticals. In United States v. McCoy, 58 F.4th 72, 74 (2d Cir. 2023), the Court noted that the defendant had not presented any hypothetical case at all in which a robbery could be committed without the use or attempted or threatened use of force against another person or his property. In United States v. Barrett, 102 F. 4th 60, 81-83 (2d Cir. 2024), the defendant did posit relevant hypotheticals – the same ones discussed below – but the Court refused to address them under

constraint of McCoy, which was binding precedent the panel was not free to overrule.

A petition for *certiorari* in the Barrett case is currently pending, Barrett v. United States, No. 24-774. The government has requested an extension of time to respond. We respectfully request this Court to consider on Petitioner's behalf, in addition to the arguments below, the arguments for granting *certiorari* already before it in Barrett, as well as any other pending matters raising the same or similar issues.

A. Hobbs Act robbery can be committed without force, by threatening nonphysical injury to intangible property.

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 way to commit robbery is to put someone in "fear of injury, immediate or future, to his . . . property." 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). "'[P]roperty' under the Act 'includes, in a broad sense, any valuable right considered as a source or element of wealth.'" Town of West Hartford v. Operation Rescue, 915 F.2d 92, 101 (2d Cir. 1990) (quoting Tropiano at 1075-76). Moreover, "property" is defined "expansive[ly]." 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." Id., quoting Stirone v. United States, 361 U.S. 212, 215 (1960). Property is not limited to "tangible things," but rather includes "intangible assets." United States v. Arena, 180 F.3d 380, 392 (2d Cir. 1999). The "rights to solicit customers and to conduct a lawful business" are examples. Id.

The defendant in United States v. Hill, 890 F.3d 51 (2d Cir. 2018), thus argued that Hobbs Act robbery is not a § 924(c) predicate given that 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 argued, 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, Docket Entry 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., Docket Entry 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. Notably, 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 Court of Appeals rejected Hill's argument solely because he had "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, citing Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007). Hill 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." But

Taylor has now clarified that the defendant bears no such burden, and that the "realistic probability" test does not apply to deciding whether a crime is a § 924(c) predicate. 596 U. S. 845, 857-60. The § 924(c) inquiry is instead 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." 596 U.S. at 860.

The answer in this case 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.'" United States v. Chappelle, 41 F.4th 102, 109 (2d Cir. 2022) (emphasis added; citation omitted). And proving a robbery was committed by instilling "fear" of "future" economic "injury" to intangible "property," per § 1951(b)(1), does not require proving any "use, attempted use, or threatened use of physical force." § 924(c)(3)(A). It suffices to show the robber obtained property by, for example, threatening to wage a defamatory online campaign against the victim's business. Robbery is not "normally committed or usually prosecuted" on such facts, but that is immaterial. Taylor, 596 U.S. at 858. Section "924(c)(3)(A) does not ask whether the crime is sometimes or even usually" committed in one way or another. Id. (emphasis in original). 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 850.

Notably, several District Courts have agreed with Petitioner's analysis. See United States v. Tejada, U.S. Dist. Lexis 117890 at *5-21 (E.D.N.Y. 2024) (acknowledging Second Circuit precedent finding Hobbs Act robbery a crime of violence [Hill, McCoy and Barrett, discussed ante] but granting certificate of appealability); United States v. Chea, 2019 U.S. Dist. Lexis 117651 at *19-25 (N.D. Cal. 2019), abrogated by United States v. Dominguez, 954 F. 3d 1251, 1260 (9th Cir. 2020) (relying on test in Gonzales v. Duenas-Alvarez, 549 U.S. at 193, which was rejected in Taylor as previously discussed). Haynes v. United States, 237 F. Supp. 3d 816, 826 (C.D. Ill. 2017) (but denying relief on constraint of Seventh Circuit precedent, id. at 827).

This Court should squarely consider Petitioner's hypothetical, which Courts of Appeals have thus far failed to do using the elements test mandated by Taylor.

B. Hobbs Act robbery can be committed by threatening harm to oneself, rather than to the person of "another" as § 924(c)(3)(A) requires.

Hobbs Act robbery not only criminalizes the use of force against the victim, but also against "the person or property of a relative or member of his family . . . ."

18 U.S.C. § 1951(b)(1). The victim's "relative," by definition, would include the robber himself. However, a "crime of violence" per 18 U.S.C. § 924(c)(3)(A) is limited to offenses which contain, as an element, the use of force "against the person or property of another" (emphasis added). Thus, if the defendant threatens to harm himself if his relative does not relinquish his property as demanded, the robbery would not qualify as a crime of violence.

This argument was raised in United States v. Nikolla, 950 F.3d 51, 54 (2d Cir. 2020): the defendant "argue[d] 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." This Court rejected the claim, on the same basis that it rejected the argument raised in Hill discussed in Part A – Nikolla did "not cite to any case that applied the Hobbs Act in this way" and had therefore failed to show "a realistic probability" that the offense did not meet the definition of a "crime of violence." Id. at 53-54.

As previously discussed, the Supreme Court rejected this analysis in United States v. Taylor, directing courts to instead "[l]ook at the elements" of the crime at issue. 596 U.S. at 860. Here, the robbery statute supports a conviction if the defendant threatens to harm himself. For example, it would apply to the following facts: The defendant, a drug addict, demands that his sister give him money to

purchase more drugs. When she refuses, the defendant pulls out a gun and says he will kill himself if she does not relinquish her cash. Against her will, she complies, forced to enable her relative's drug habit in order to prevent his self-inflicted death.

Since the robbery statute encompasses threats of injury to the robbery victim's relative, which could include the perpetrator himself, it does not categorically require proof of force against "another" as § 924(c) requires. No Court of Appeals has squarely addressed the point, but a District Court has endorsed Petitioner's position. Seale v. United States, 2022 U.S. Dist. Lexis 233917, at *9-10 (D. N.J. 2022).

This Court should definitively resolve whether a completed Hobbs Act robbery qualifies as a crime of violence, using the categorical elements test. The issue is a recurring one, presented in numerous prosecutions across the country, and the sentencing consequences to the criminal defendant are severe. In this case, as an example, Petitioner is serving a consecutive 84-month sentence for his firearm conviction, with Hobbs Act robbery serving as the underlying crime of violence.

CONCLUSION

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

Respectfully submitted,

Dated: November 26, 2024

Beverly Van Ness

BEVERLY VAN NESS
Attorney-at-Law
Counsel for Petitioner Lamel Miller

APPENDIX

Court of Appeals' Opinion, United States v. Morrison, No. 23-6806 (2d Cir. October 29, 2024)

23-6806-cr
United States v. Morrison (Miller)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of October, two thousand twenty-four.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
PIERRE N. LEVAL,
DENNY CHIN,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 23-6806-cr

LAFAYETTE MORRISON, KHALEEL WILLIAMS,

Defendants,

LAMEL MILLER,

Defendant-Appellant.

For Appellee: RACHEL A. SHANIES, Assistant United States Attorney, (Anthony Bagnuola, Matthew R. Galeotti, Assistant United States Attorneys, *on the brief*), *on behalf of* Breon Peace, United States Attorney for the Eastern District of New York, Brooklyn, New York.

For Defendant-Appellant: BEVERLY VAN NESS, Attorney for Defendant-Appellant, New York, New York.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Ann M. Donnelly, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Lamel Miller appeals from a judgment entered on July 20, 2023, in the United States District Court for the Eastern District of New York (Donnelly, *J.*), convicting him, after a jury trial, of possessing and/or brandishing a firearm during a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(i)-(ii). Prior to trial, Miller pleaded guilty to one count each of Hobbs Act robbery conspiracy, and substantive Hobbs Act robbery, both in violation of 18 U.S.C. § 1951(a). Following his conviction at trial, Miller was sentenced principally to a 24-month term of imprisonment for the Hobbs Act robbery and conspiracy counts and a consecutive 84-month term of imprisonment for the firearm offense. On appeal, Miller argues that his § 924(c) conviction must be vacated because it was predicated on his commission of a substantive Hobbs Act robbery, which he contends is not categorically a "crime of violence" under 18 U.S.C. § 924(c). We assume the parties' familiarity with the underlying facts and the record of prior proceedings, which we reference only as necessary to explain our decision to **AFFIRM**.

In *United States v. Taylor*, the Supreme Court held that an *attempted* Hobbs Act robbery does not constitute a categorical crime of violence under 18 U.S.C. § 924(c). 596 U.S. 845, 851 (2022). When it applied the categorical approach, the Supreme Court rejected the applicability of the proviso in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), that proposed conduct must be "more than the application of legal imagination to [the] . . . statute's language" but have a "realistic probability" that was based on the facts of a defendant's case or other existing cases. *Duenas-Alvarez*, 549 U.S. at 193; *see Taylor*, 596 U.S. at 858. Instead, the Supreme Court applied its own hypothetical in its categorical approach in *United States v. Taylor*. 596 U.S. at 851–52.

Miller argues that a completed Hobbs Act robbery cannot be categorically a crime of violence because it can be committed through a threat of harm to intangible property or by threat of harm to oneself, which would not satisfy the requirements of 18 U.S.C. § 924(c)(3)(A). He argues further that the Supreme Court's rejection of *Duenas-Alvarez* in *Taylor* implies a rejection of our holding in *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018), which relied on the rule in *Duenas-Alvarez*.

However, in *United States v. McCoy*, we held that "nothing in *Taylor*'s language or reasoning . . . undermines this Court's settled understanding that completed Hobbs Act robberies are categorically crimes of violence pursuant to section 924(c)(3)(A)." 58 F.4th 72, 74 (2d Cir. 2023). And in *United States v. Barrett*, in which the appellant advanced the same arguments as made here by Miller, we rejected the arguments based on our

conclusion that *McCoy* had established for this Circuit that a completed Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c). 102 F.4th 60, 82 (2d Cir. 2024). We are bound by our court's ruling in *Barrett*.

We have considered Miller's remaining arguments and find them to be without merit. Accordingly, the judgment of the District Court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk