No. 24-5774

In the
Supreme Court of the United States

Dwayne Barrett,

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Granting certiorari on the Double Jeopardy question is an easy call: this is a rare case where the split is undisputed and the Government agrees with Petitioner. This issue also won't go away: the judge has been ordered to impose two sentences for one act, and any motion to dismiss a count would be denied for defying both the Circuit's mandate and Congress's (supposed) directive to double-punish.

As for the Hobbs Act question, the Circuit's ruling does indeed "conflict with a[] decision of this Court." BIO 10. Judging if an offense is a "crime of violence" under 18 U.S.C. § 924(c) is a "straightforward job: Look at the elements." *United States v. Taylor*, 596 U.S. 845, 860 (2022). But the Circuit refused to do that, deferring to an earlier ruling, *United States v. McCoy*, 58 F.4th 72 (2d Cir. 2023), that also didn't examine the elements of Hobbs Act robbery or whether they invariably require the "use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). Barrett has shown why the answer is no, and the Government has not shown he's wrong.

True, there is no split. But there was barely one in *Taylor*, where only one circuit had held attempted Hobbs Act robbery is not a "crime of violence." Yet it was right, just as Barrett is right. And this case isn't just about him: the error here is made daily in courtrooms across the country, resulting in years upon years of unlawful prison time. This systemic malfunction in the administration of justice warrants review, especially as the circuits have tuned out. Now's the time for the Court to step in and correctly answer the weighty "question left open after *Taylor*." *United States v. Stoney*, 62 F.4th 108, 113 (3d Cir. 2023).

ARGUMENT

I. The Double Jeopardy Question Isn't Going Away

The Government does not dispute the split over this important question or that Barrett is right. *See* Pet. 8-12. It simply speculates that the judge might "structure the sentence," or the Government might "seek dismissal" of one count, to "avoid any constitutional violation or render it harmless." BIO 10.

But a Double Jeopardy violation is never harmless. *See* Pet. App. 64a n.35 (citing *Rutledge v. United States*, 517 U.S. 292, 301-02 (1996)). And the judge can't structure the sentence to avoid a violation. The Circuit has told him to "resentence [Barrett] on Count Seven following the sentencing regimen established by § 924(j)" and then "sentence Barrett on Count Six within the sentencing regimen established by § 924(c)." Pet. App. 66a. And that § 924(c) sentence may not "run concurrently with any other term of imprisonment." § 924(c)(1)(D)(ii). Thus, whatever mandatory-minimum or higher sentence the judge imposes for the § 924(c) count will be on top of the prison terms for the other counts. Those are years Barrett will never get back, and the sentences for Counts Six and Seven will undisputedly be two punishments for "the same offence." U.S. Const., Amend. V. *See* Pet. 12-16.

Further, the Government can't moot this issue by moving to dismiss a count. It hasn't even said it *will* so move, which is reason enough to ignore its musings.

But even humoring this possibility, the Government's basis for the motion would be its opinion that "Congress has not authorized separate convictions and punishments based on Sections 924(c) and (j) for a single homicide." *Lora v. United*

States, No. 22-49, Brief for the United States, 2023 WL 2186455, at *23. Yet the Circuit emphatically disagreed: "Congress's explicit intent for § 924(c) punishments to be consecutive to 'any other term of imprisonment' . . . extends to § 924(j) sentences." Pet. App. 57a-58a (citation omitted). "Nothing in the text of § 924(c) or § 924(j) suggests that Congress intended to abolish § 924(c)'s consecutive-sentence mandate for defendants convicted of a § 924(c)(1)(A)(i) count and a § 924(j) count." *Id*. at 63a n.34. "'When a defendant violates § 924(c), his sentencing enhancement under that statute must run consecutively to all other prison terms.' That includes a prison term imposed on a related § 924(j) count." *Id*. at 64a (citation omitted). The judge "must resentence [Barrett] on Count Seven" and then "must sentence Barrett on Count Six." *Id*. at 66a. Again: he "must impose separate sentences under § 924(c) on Count Six and under § 924(j) on Count Seven." *Id*. at 70a.

The Government ponders a motion to dismiss under "Federal Rule of Criminal Procedure 48(a)," BIO 12, but such dismissal requires "leave of court." And "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R. Co*., 334 U.S. 304, 306 (1948). A dismissal motion would therefore be denied, as the Circuit's mandate is to "impose separate sentences under . . . Count Six and . . . Count Seven." Pet. App. 70a.

And though there can be cases where a motion to dismiss might properly be granted despite an order to resentence, this case is not one of them. The motion wouldn't be based, for example, on the Government's waiting too long to bring the charge, or striking a deal for Barrett's cooperation, or insufficient evidence, or

because punishing Barrett would violate the Government's "*Petite* policy," per which it generally will not "prosecute [] the same act" a state court has already punished. *Rinaldi v. United States*, 434 U.S. 22, 28 (1977).

The motion would be based instead on the Government's view that "Congress has not authorized," *Lora*, Brief for the United States, 2023 WL 2186455, at *23, the double-punishment the Circuit ruled it was "Congress's explicit intent" to impose on people convicted of violating both § 924(c) and § 924(j). Pet. App. 57a. Given this (supposed) directive of Congress, which speaks for the public, a motion to dismiss one count would be "tainted with impropriety," as it would be aimed at thwarting Congress's will and thus "motivated by considerations . . . 'contrary to manifest public interest.'" *Rinaldi*, 434 U.S. at 30 (citation omitted). *See also, e.g., United States v. Hamm*, 659 F.2d 624, 630 (5th Cir. 1981) (en banc) (Motion must be denied where "'prosecutor is motivated to dismiss because . . . he personally dislikes the victim of the crime.'") (citation omitted); *United States v. Bernard*, 42 F.4th 905, 909 (8th Cir. 2022) (same if there is another "illegitimate motive" such as "'dissatisfaction with the jury impaneled'") (citation omitted).

In sum, the Circuit has ordered that Barrett receive two sentences for one act in violation of the Double Jeopardy Clause. Neither the judge nor Government can stop that from happening. And there's no reason to delay resolving the circuit split over this constitutional question, as such delay will only deepen the split and perpetuate a practice the Government rightly calls "insupportable." *Lora*, Brief for the United States, 2023 WL 2186455, at *26. Now's the time to settle this dispute.

II. The Hobbs Act Question Also Needs to be Answered

Now's also the time to remedy the widespread misreading of the Hobbs Act. "As the government points out," Hobbs Act "'robbery frequently serv[es] as a predicate offense for § 924(c) counts.'" *United States v. Thomas*, 2019 WL 1590101, at *2 (D.D.C. 2019) (citation omitted). And 2,864 people were sentenced for violating § 924(c) in the last fiscal year. *See* https://www.ussc.gov/research/quick-facts/section-924c-firearms. The average sentence was 145 months, *id.*, which may not "run concurrently with any other term of imprisonment." § 924(c)(1)(D)(ii). Thus, scores of people are subjected to years of extra prison time on the view that Hobbs Act robbery is a "crime of violence."

But as the Circuit acknowledged, Barrett has detailed "two hypotheticals" showing how "Hobbs Act robbery, like attempted Hobbs Act robbery, can be committed without 'the use, attempted use, or threatened use of physical force against the person or property of another,'" Pet. App. 36a (quoting § 924(c)(3)(A)), and so is not a "crime of violence." Yet the Circuit decided it was "bound by *McCoy*," which didn't analyze the offense elements or "consider[] the hypothetical Hobbs Act robberies he posits." *Id.* at 38a. The Circuit then refused to go en banc. *Id.* at 71a. Ten other circuits have also made plain they will not entertain "new arguments" that Hobbs Act robbery is not a § 924(c) predicate, *United States v. Crocker*, 2023 WL 4247255, at *3 (10th Cir. 2023), even if such arguments are right.

The *Crocker* court was presented, for example, with one of Barrett's scenarios: a person "can commit a Hobbs Act robbery by threatening to . . . spread

false information about [a] business and thereby depress[] its value." 10th Cir. 22-4120, Docket Entry 18-1 at 17. As Barrett put it, a robber tells a restaurateur: "'Give me the cash, or I'll flood the internet with claims your food made me sick.' This creates a 'fear of injury' in the 'future' to the victim's 'property,' § 1951(b)(1), without the 'use, attempted use, or threatened use of physical force.' § 924(c)(3)(A)." Pet. 25. And the *Crocker* court didn't disagree: it just refused to engage the issue. *See* 2023 WL 4247255, at *3 ("Crocker advances arguments . . . that we did not address in [a prior] case— for example, that Hobbs Act robbery does not satisfy the elements clause because it can be committed through a threat to intangible property." But "'we are bound to follow [the prior case].'") (citation omitted).

The Government says the "Hobbs Act would classify such conduct as the separate crime of 'extortion,' rather than 'robbery.'" BIO 19. Yet the "Federal Criminal Code is replete with provisions that criminalize overlapping conduct," *Pasquantino v. United States*, 544 U.S. 349, 358 n.4 (2005), and Barrett has shown how Hobbs Act robbery and extortion "are not mutually exclusive." Pet. 27.

The D.C. Circuit – the only one that *hasn't* held Hobbs Act robbery fits within § 924(c)(3)(A) – recently agreed with him. Rejecting the claim that "robbery and extortion were distinct crimes at common law, and Congress imported this 'old soil' [] into the Hobbs Act," *United States v. Burwell*, 122 F.4th 984, 992 (D.C. Cir. 2024), the court noted how robbery and extortion overlapped: "robbery could be induced by threats of something other than violence. As Blackstone explained, 'extorting money or [any] other thing of value by means of a charge of sodomy may be

robbery.'" *Id*. at 992-93 (citation omitted). Robbery also "encompass[ed] [other] threats because they would 'so injure a person,'" such as accusing him of a different "infamous crime." *Id*. at 993 (citations omitted). "The upshot of the common law is that some non-violent extortionate threats rose to the level of robbery." *Id*. And these "common law principles" were "brought into the Hobbs Act," *id*. at 994, and then expanded upon. *See also, e.g., United States v. Pena*, 161 F. Supp. 3d 268, 280 (S.D.N.Y. 2016) ("Hobbs Act robbery is modeled on common law robbery.").

For example, obtaining money by threatening "future" "injury" to "property" – "Give me the cash, or I'll flood the internet with claims your food made me sick" – is "robbery," § 1951(b)(1), even though "that degree of attenuation is characteristic of extortion." *United States v. Lynch*, 268 F. Supp. 3d 1099, 1106 (D. Mont. 2017). This reflects the "overlap between the Hobbs Act's definitions of traditionally violent robbery and traditionally non-violent or less-violent extortion." *Id*. Indeed, even if the threat above "describes classic extortion," it "also satisfies the basic elements of Hobbs Act robbery, which is our inquiry under the categorical approach." *United States v. O'Connor*, 874 F.3d 1147, 1153 (10th Cir. 2017).

This is a "straightforward job: Look at the elements." *Taylor*, 596 U.S. at 860. "The only relevant question is whether the federal felony at issue always requires the government to prove," *id*. at 850, the "use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). And a "hypothetical" can "illustrate" why the answer is no. *Taylor*, 596 U.S. at 851.

Barrett hypothesized two robberies, one committed by threatening the defamation above, and the other by threatening to harm oneself. "Picture a man confronting his cousin, who's just leaving her restaurant with the day's proceeds. The man puts a gun to his own head: 'Give me the cash, or I'll pull the trigger.' She complies. That's robbery, yet there's no actual, attempted or threatened force 'against the person or property of another.' § 924(c)(3)(A)." Pet. 22.

Such a robbery, as with the other above, fits easily within the capacious text of the Hobbs Act. Because "robbery" includes a taking from a person "by means of actual or threatened force . . . to . . . a relative or . . . anyone in his company," § 1951(b)(1), when someone is a person's "relative" or "in his company" and takes from him by threatening self-harm, that's "robbery."

The Government's response to this is notably weak. Citing nothing, it says these provisions are "most naturally read to refer to relatives and people in the company of the victim that are not the robber himself." BIO 19. But the Act doesn't say that. It says "robbery" can be committed by threatening the victim's "relative" or "anyone in his company." And those words mean what they say. "The language of the Hobbs Act is unmistakably broad," *Taylor v. United States*, 579 U.S. 301, 305 (2016), and its "words do not lend themselves to restrictive interpretation." *United States v. Culbert*, 435 U.S. 371, 373 (1978). "Congress intended to make criminal all conduct within the reach of the statutory language," *id.* at 380, and the conduct above is within that reach. "We cannot ignore the statutory text and construct a narrower statute than the plain language supports." *O'Connor*, 874 F.3d at 1154.

Anyway, the Government doesn't explain why Congress would punish a robbery affecting interstate commerce when the robber threatens to harm the victim, but not when the robber threatens to harm himself. Though committed differently, both robberies disrupt interstate commerce in the same way; and such disruption is what Congress outlawed in the Hobbs Act. *See also, e.g., Stirone v. United States*, 361 U.S. 212, 215 (1960) (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. The Act outlaws such interference 'in any way or degree.'") (quoting § 1951(a)).

Unable to show any textual or other justification for reading the Hobbs Act to exclude robberies committed by threatening self-harm, the Government invokes *Stokeling v. United States*, 586 U.S. 73 (2019). But *Stokeling* says nothing about the Hobbs Act. The case concerned Florida robbery, which cannot be committed by threatening self-harm given that it "requires 'resistance by the victim that is overcome by the physical force of the offender.'" *Id*. at 86 (quoting *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997)). Yet Hobbs Act robbery, as shown, can be committed without "overcom[ing] a victim's physical resistance"— and without any "physical confrontation and struggle" at all. *Id*. at 83.

The Court did say "the 'force' required for common-law robbery would be sufficient . . . under the [] elements clause" at § 924(e)(2)(B)(i), *id.* at 80, which almost mirrors § 924(c)(3)(A). And "Hobbs Act robbery is modeled on common law robbery." *Pena*, 161 F. Supp. 3d at 280. But it's not true that the "elements of

Hobbs Act robbery track the elements of common-law robbery." BIO 17.

Though "modeled on common law robbery," *Pena*, 161 F. Supp. 3d at 280, Hobbs Act robbery goes well beyond it. The common law generally "confine[d] robbery to the use or threat of force before, or simultaneous to, the assertion of dominion over property." *United States v. Jones*, 878 F.3d 10, 18 (2d Cir. 2017) (citations omitted). A "taking was merely larceny unless [it] involved "violence,'" *Stokeling*, 586 U.S. at 77 (quoting 2 J. Bishop, *Criminal Law* § 1156, p. 860 (J. Zane & C. Zollman eds., 9th ed. 1923)), which "was 'committed if sufficient force [was] exerted to overcome the resistance.'" *Id*. at 78 (quoting Bishop at 861). There was an "exception" – "'extortion of money by threatening to smirch a fair reputation [wa]s so atrocious a wrong that it [wa]s generally regarded as robbery,'" Bishop at 867 (citation omitted) – but robbery normally "require[d] either actual violence inflicted on the person robbed, or such demonstrations or threats as under the circumstances create[d] in him a reasonable apprehension of bodily injury." *Id.* at 864. Thus, the "common law offense [of] robbery" usually required that "the victim be moved by fear of violence when he parts with his money or property." *United States v. Loc. 807 of Int'l Brotherhood of Teamsters*, 315 U.S. 521, 533 (1942).

The Hobbs Act expanded this definition to include takings accomplished by threatening "injury" in the "future" to the victim's "property," § 1951(b)(1), such as threatening to defame his business, or by threatening "injury" to his "relative" or "anyone in his company," *id.*, who may be the robber himself. "The traditional concept of robbery is closely related to physical violence . . . '*against a robbery*

victim.' But the Hobbs Act's definition of robbery does not follow the traditional concept." *Lynch*, 268 F. Supp. 3d at 1106 (emphasis in *Lynch*; quoting *Johnson v. United States*, 559 U.S. 133, 139 (2010)). Indeed, just as "Congress has unquestionably *expanded* the common-law definition of extortion to include acts by private individuals" as stated "in the Hobbs Act," *Evans v. United States*, 504 U.S. 255, 261 (1992) (emphasis in original), Congress in that Act also expanded the common-law definition of robbery.

The Government considers it "implausible that Congress would have intended to exclude Hobbs Act robbery from Section 924(c)(3)." BIO 19. Agreed: Hobbs Act robbery "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." § 924(c)(3)(B). But "§ 924(c)(3)(B) is unconstitutionally vague." *United States v. Davis*, 588 U.S. 445, 470 (2019).

Finally, the Government notes the Court has "denied certiorari on th[is] question." BIO 20. Yet 11 circuits have now weighed in, and not only have they gotten the wrong answer; they've also made clear they're not interested in hearing "new arguments," *Crocker*, 2023 WL 4247255, at *3— including meritorious ones.

"Crime of violence" fatigue has made the lower courts tune out. It thus falls to this Court to step in. It did so in *Taylor* given a comparably lopsided misreading of the oft-invoked Hobbs Act. It should do so here given the circuits' wrong answer to the equally (if not more) consequential "question left open after *Taylor*." *Stoney*, 62 F.4th at 113.

III. If Nothing Else, the Petition Should be Held for *Delligatti*

The "Court often 'GVRs' a case – that is, grants the petition for a writ of certiorari, vacates the decision below, and remands for reconsideration by the lower court – when we believe that the lower court should give further thought to its decision in light of an opinion of this Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could possibly alter the decision." *Flowers v. Mississippi*, 136 S. Ct. 2157, 2157 (2016) (Alito, J., dissenting).

That's appropriate here, as the Court's forthcoming "crime of violence" ruling in *Delligatti v. United States*, No. 23-825, stands to "clarif[y] the governing legal principles in a way that could possibly alter the [Circuit's] decision." *Id.*

The Government opposes holding the petition only because *Delligatti* concerns crimes of omission and "Hobbs Act robbery can[not] be committed by an act of omission." BIO 20. Yet as the Government has said in a similar case, though a pending ruling "may not definitively resolve the question presented here, it is likely to shed substantial light on the proper analysis of that question. Under the Court's usual practice, such overlap justifies holding the petition." *Garland v. Range*, No. 23-374, Reply Brief for the Petitioners, 2023 WL 7276461, at *9.

So too here.

CONCLUSION

The petition for a writ of certiorari should be granted. Failing that, the petition should be held for the opinion in *Delligatti v. United States*, No. 23-825.

Respectfully submitted,

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January 31, 2025