No. _____

In the

Supreme Court of the United States

DANIEL ROJAS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Petition for Writ of Certiorari

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Questions Presented For Review

Rojas pleaded guilty to one count of interference with interstate commerce by robbery in violation of 18 U.S.C. § 1951(a), and one count of using or carrying a firearm during a "crime of violence" in violation of 18 U.S.C. § 924(c)(1)(A)(iii). He filed a motion to correct the sentence under 28 U.S.C. § 2255 in which he argued that after *Johnson v. United States*, 135 S.Ct. 2551 (2015), his § 924(c) conviction for using or carrying a firearm during a crime of violence is no longer enforceable. The district court denied his motion and the Tenth Circuit Court of Appeals affirmed the decision. Rojas presents the following issues to this Court:

I. What amount of force satisfies this Court's definition of "physical force," that is, force capable of causing physical pain or injury to another person as described in *Johnson v. United States*, 559 U.S. 133, 140 (2010)?

II. When threatening to devalue another's intangible assets constitutes Hobbs Act robbery but does not require violent force, is the Tenth Circuit's decision that an element of such robbery is the use, attempted use, or threatened use of violent force that qualifies it as a 'crime of violence' under 18 U.S.C. § 924(c)(3)(A) in conflict with the express language of 18 U.S.C. § 1951 and the law in its own and other circuits' pattern jury instructions, which allow a conviction for merely threatening harm in the future?

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In the

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Petition for Writ of Certiorari

Daniel Rojas petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The Tenth Circuit's decision in *United States v. Daniel Rojas*, Case No. 17-2065, affirming the district court's denial of Rojas's 28 U.S.C. § 2255 motion challenging his 18 U.S.C. § 924(c) conviction and sentence, was not published.[1] The district court's memorandum opinion denying the motion was not published.[2]

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[1] App. 1a-5a. "App." refers to the attached appendix. "Vol." refers to the record on appeal which is contained in three volumes. Rojas refers to the documents and pleadings in those volumes as Vol. I-III followed by the page number found on the bottom right of the page (e.g. Vol. III at 89). "Doc." refers to the number of the document on the district court criminal docket sheet in No. 05-CR-1618 MCA, unless otherwise indicated.

[2] App. 6a-15a.

Jurisdiction

On September 4, 2018, the Tenth Circuit affirmed the district court's decision to deny Rojas's § 2255 motion challenging his 18 U.S.C. § 924(c) conviction and sentence.[3] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Pertinent Constitutional and Statutory Provisions

U.S. CONSTITUTION, Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C.§ 1951

(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.

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[3] App. 1a-5a.

18 U.S.C. § 924(c)(1)(A) & § 924(c)(3)

The other federal statutory provisions involved in this case are 18 U.S.C. § 924(c)(1)(A) and § 924(c)(3), which provide in part:

(c)(1)(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 (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) 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–

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years;

* * * * *

(c) (3) 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

Pursuant to Fed. R. Crim. P. 11(c)(1)(C), Rojas pleaded guilty, to one count of interference with interstate commerce by robbery, in violation of 18 U.S.C. § 1951(a) (Count 3), and one count of using and carrying a firearm during an "crime of violence," in violation of 18 U.S.C. § 924(c)(1)(A) (iii) (Count 4). Doc. 32 (plea agreement) ¶ 3, Vol. II, pp. 13, 14, 17, 18. The parties agreed on a fourteen year prison term for Count 3 and a ten year term for Count 4, to be served consecutively, for a total sentence of twenty-four years. *Id.* at ¶ 6, Vol. II, p. 18. Rojas waived only his right to appeal the sentence. *Id.* at ¶ 11, Vol. II, p. 20.

The district court followed the parties' agreement and sentenced Rojas to 24 years in prison. Doc. 40; Att. B. Rojas did not file a direct appeal.

A. 28 U.S.C. § 2255 Motion

According to 18 U.S.C. § 924(c)(1)(A)(iii), anyone who "during and in relation to any crime of violence" discharges a firearm will be sentenced to an imprisonment term of not less than 10 years. A "crime of violence" is a felony offense that:

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another [the force clause], 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 [the residual clause].

18 U.S.C. § 924(c)(3).

On June 26, 2015, this Court struck down the residual clause of the Armed Career Criminal Act (ACCA) as being unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*). Using 28 U.S.C. § 2255, Rojas filed a petition to vacate the § 924(c) conviction and sentence in light of *Johnson II*. He argued § 924(c)(3)(B)'s

residual clause is no longer valid and his predicate offense – Hobbs Act robbery – is not a crime of violence as defined by the force clause in § 924(c)(3)(A). Doc. 42; Vol. II at 32. The district court ruled that Rojas was not entitled to relief under *Johnson II* and dismissed his motion to vacate his sentence. App. at 15a. It decided that even if the residual clause of § 924(c)(3)(B) was invalid after *Johnson II*, Hobbs Act robbery is a "crime of violence" as defined in § 924(c)(3)(A)'s force clause. *Id.* at 12a-15a. Still, the court granted a certificate of appealability. *Id.* at 15a.

Before deciding Rojas's appeal, the Tenth Circuit Court of Appeals held in *United States v. Salas*, 889 F.3d 681, 684 (10th Cir. 2018), that the residual clause in 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague. Later, the court nevertheless affirmed Rojas's § 924(c) conviction and sentence. It ruled that Hobbs Act robbery is a crime of violence as described in § 924(c)(3)(A)'s force clause. Relying on earlier decisions, it summarily concluded that "the force element in Hobbs Act robbery 'can only be satisfied by violent force.'" App. 4a (quoting *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1065 (10th Cir. 2018)). The court overlooked that for more than fifty years, federal circuit courts have said that Hobbs Act robbery is merely a form of common-law robbery, with the added interstate commerce jurisdictional element. Consequently, it never addressed Rojas's argument that, like common-law robbery, the degree of force employed by an accused in Hobbs Act robbery is immaterial and thus can be committed without any threatened use of violent physical force against another person.

The court also dismissed Rojas's argument that because placing another in fear of injury to intangible property is the least offensive way to commit Hobbs Act robbery, the offense cannot include an element requiring the use of violent physical force against a person. 18 U.S.C. § 1951(a) and (b)(1), the Tenth Circuit's Criminal Pattern Jury Instruction 2.70, and instructions from other circuits all unequivocally state that the offense can be perpetrated by placing someone in fear of injury to their intangible

property. Frankly, the court's response is not easy to follow but it seems to contend that the statute is divisible and such fear applies only in Hobbs Act extortion - an offense Rojas did not commit. The court then cites the panel's decree from *United States v. Dubarry*, 2018 WL 3342275 (10th Cir. 2018), that Hobbs Act robbery is a crime of violence, to simply repeat the same finding. But both courts fail to address the substance of what it is Dubarry and Rojas actually argue. App. 5a.

The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and the Tenth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

Reasons for Granting the Writ

I. This Court should hold Rojas's petition pending its resolution of *Stokeling v. United States*.

A. Introduction

This case raises issues similar to those in *Stokeling v. United States*, *cert. granted*, 138 S.Ct. 1438 (April 2, 2018) (No. 17-5554). In *Stokeling*, this Court will decide whether a "state robbery offense that includes as an element the common law requirement of overcoming victim resistance is categorically a violent felony. . . if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance." As in *Stokeling*, this case raises the issue of whether a robbery statute has as an element the use or threatened use of "physical force" sufficient to satisfy this Court's definition of "physical force" in § 924(c)(3)(A)'s force clause, which this Court has described as "*violent force* – that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Johnson I*) (emphasis in original). As in *Stokeling*, the circuit court here, took an expansive view of what constitutes "physical force" under *Johnson I.*

This Court's decision in *Stokeling* will necessarily resolve how much force is "physical force." Consequently, if this Court rules in Stokeling's favor, it is reasonably

probable that the Tenth Circuit would be forced to reject its broad interpretation of *Johnson I* force that was the basis for its decision against Rojas and rule that Rojas is entitled to relief. It would then be an appropriate use of this Court's discretion to grant certiorari, vacate the Tenth Circuit's judgment, and remand for reconsideration (GVR) in light of *Stokeling*. Accordingly, this Court should hold this petition pending resolution of *Stokeling*.

B. "Physical force" for purposes of § 924(c)(3)(A)'s force clause means violent physical force and not the mere threat of some force that might cause bodily harm.

Shorn of its unconstitutional residual clause, 18 U.S.C. § 924(c)(3) defines a "crime of violence" 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." § 924(c)(3)(A) The issue presented here is whether Hobbs Act robbery in violation of 18 U.S.C. § 1951 is a crime of violence because it contains "an element of the use, attempted use, or threatened use of physical force against the person of another." An analysis of Hobbs Act robbery's elements and the cases interpreting those elements demonstrate that a conviction under § 1951 is not a 'crime of violence,' because the range of conduct it criminalizes encompasses non-violent means.

To determine whether Hobbs Act robbery satisfies the force clause, a court employs the categorical approach and examines only the elements of the offense, without regard to a defendant's specific conduct. *Descamps v. United States*, 570 U.S. 254, 260-61 (2013). Under that approach, this Court has emphasized, only the elements matter. *Mathis v. United States*, 136 S.Ct. 2243, 2249 (2016). And sentencing courts must presume the conviction "'rested upon [nothing] more than the least of th[e] acts' criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013)(quoting *Johnson I*, 559 U.S. at 137) (brackets supplied in *Moncrieffe*).

In *Johnson I*, the Court explained the statutory definition of 'violent felony' gave the phrase 'physical force' its context. 559 U.S. at 140. The statute's emphasis on 'violent' led the Court to conclude that 'physical force' in the ACCA's force clause meant "violent force." *Id.* It also said that "violent" in § 924(e)(2)(B) "connotes a substantial degree of force." *Id.* "When the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer," the Court explained. *Id.* It added that *Black's Law Dictionary*'s defined "violent felony" as "[a] crime characterized by extreme physical force." *Id.* at 140-41. And it cited to a definition of "violent" as "[c]haracterized by the exertion of great physical force or strength." *Id.* (quoting 19 *Oxford English Dictionary* 656 (2d ed. 1989).

In *United States v. Castleman*, 572 U.S. 157 (2014), the Court again discussed the significance of characterizing a crime as 'violent.' It said that certain conduct, although forceful would not be violent: "Minor uses of force," like "pushing, grabbing, shoving, slapping and hitting" may "not constitute 'violence' in the generic sense." *Id.* at 164-66. Noting that *Johnson I* cited *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003), with approval, the Court observed that it was "'hard to describe . . . as 'violence' 'a squeeze of the arm [that] causes a bruise.'" *Castleman*, 572 U.S. at 166 (quoting *Flores*, 350 F.3d at 670). Consequently, the use of 'physical force' must involve more than conduct capable of causing minor pain or injury. *See United States v. Walton*, 881 F.3d 768, 773 (9th Cir. 2018) ("mere potential for some trivial pain or slight injury will not suffice" as "physical force"). It must earn the "violent" designation. As Rojas explains, Hobbs Act robbery can be committed using a lesser degree of force than the violent force described in *Johnson I*.

C. A decision by this Court in favor of the petitioner in *Stokeling* will probably affect the outcome in Rojas's case.

In *Stokeling,* this Court granted certiorari on the question "[i]s a state robbery offense that includes 'as an element' the common law requirement of overcoming 'victim resistance' categorically a 'violent felony' under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i) (an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another'), if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance." Petition for Writ of Certiorari at ii, *Stokeling* (Aug. 4, 2017). Stokeling pointed out that Florida robbery can be committed by any degree of force that overcomes the victim's resistance; the amount of the force is immaterial. *Id.* at 14-19, 23-26; Reply to the Brief in Opposition at 1, *Stokeling* (Dec. 27, 2017); Petitioner's Brief at 13-14, 26-37, *Stokeling* (June 11, 2018). Stokeling noted many states have a similar robbery element and argued a decision in his case would have ramifications for the ACCA's application with respect to robbery convictions throughout the country. Petition for Writ of Certiorari at 14; Reply to the Brief in Opposition at 8-10.

Stokeling said the Eleventh Circuit had erroneously ruled Florida robbery has as an element the use of enough force to constitute "physical force" under *Johnson I* simply because Florida robbery requires enough force to overcome resistance. Petition for Writ of Certiorari at 11-12, 23; Reply to the Brief in Opposition 12-15; Petitioner's Brief at 32-33. During the certiorari process, the government maintained the Eleventh Circuit's decision was correct. It did not challenge Stokeling's description of Florida law. The parties disagreed about what amount of force satisfies the *Johnson I* "physical force" standard, including whether that standard is met in a purse tug-of-war or by bumping a victim. Stokeling said Florida robberies do not necessarily involve the use of *Johnson I*

force. The government disagreed. Petition for Writ of Certiorari at 24-26, *Stokeling*; United States' Brief in Opposition at 9, 12-13, *Stokeling* (Dec. 13, 2018); Petitioner's Reply to the Brief in Opposition at 2, 9-10, 14.

In Stokeling's opening brief, he suggested "physical force" is force "reasonably expected to cause pain or injury." Petitioner's Brief at 23-24, 43. Stokeling stressed the violent nature of *Johnson I*'s definition which does not include minor uses of force (as Rojas pointed out under Section B above). *Id.* at 3-5, 11-15, 18-21, 25-26. Stokeling criticized the government's interpretation of physical force because it unduly relied on the phrase "capable of causing physical pain." Accepting the government's view, he argued, would mean that virtually any force constitutes "physical force." *Id.* at 12, 22-25. Stokeling concluded that, since the amount of force used to commit Florida robbery is immaterial, Florida robbery is not a "violent felony" under the ACCA's force clause. *Id.* at 26-44. Stokeling pointed to several examples of Florida robberies that he contended did not involve sufficiently violent force, including robberies involving a purse tug-of-war, pushing and bumping. *Id.* at 29-31, 33-41.

Similarly, Rojas has consistently argued that Hobbs Act robbery, when committed "by means of actual force or threatened force, or violence" or by causing another to fear injury to his property, does not qualify as a crime of violence because: 1) the robbery can be committed with *de minimis* force or no force at all; and 2) the statute does not require that any use or threatened or attempted use of force be directed against the person of another because putting another person in fear of financial or reputational loss (i.e. intangible assets) completes the offense. Like the Eleventh Circuit in Stokeling's case, the Tenth Circuit seemingly rejected Rojas's argument by employing an expansive view of what constitutes "physical force." Relying on its decision in *Dubarry*, 2018 WL 3342275, at *2, the court perfunctorily concluded Hobbs Act robbery "'is categorically a crime of violence under the elements clause of § 924(c)(3)(A) because that clause

requires the use of violent force, and the force element in Hobbs Act robbery can only be satisfied by violent force.'" App. 4a.

In other words, in the Tenth Circuit's view, any force is violent physical force. This holding is untenable: It ignores the common-law origin of the Hobbs Act where any force, no matter how slight, necessary to accomplish the taking of the property, satisfied the force element.[4]

Congress derived the Act's elements from common-law robbery, and more specifically from New York's robbery statute. The definitions in the Hobbs Act "are copied from the New York Code substantially,"[5] which is why federal circuit courts have uniformly described the elements of Hobbs Act robbery "in terms consistent with the traditional common-law definition" of robbery. *United States v. Farmer*, 73 F.3d 836, 842 (8th Cir. 1996).[6] When the Hobbs Act was passed, the New York robbery statute

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[4] 77 C.J.S. *Robbery* § 23 (2016) ("The amount or degree of force requisite to robbery is such force as is actually sufficient to overcome the victim's resistance. If the force used is sufficient to overcome resistance, the particular degree of violence employed is immaterial as an element of the crime. . . . Thus, it has been said that any force, no matter how slight, which induces the victim to part with his or her property is sufficient to sustain a robbery conviction."); *see also* 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.3(d)(1) (2d ed.) (the pickpocket who "jostles the owner" or removes an item attached to the person's clothing has committed common-law robbery by force).

[5] *United States v. Nedley*, 255 F.2d 350, 355 (3d Cir. 1958).

[6] *See also United States v. Nedley*, 255 F.2d 350, 357 (3d Cir. 1958) ("'Robbery' under the Hobbs Act, is common law robbery."); *United States v. Peterson*, 236 F.3d 848, 851 (7th Cir. 2001), *abrogated on other grounds by Taylor v. United States*, 136 S. Ct. 2074 (2016) (stating that proof of interstate commerce element "differentiates Hobbs Act violations from common law robbery."); *United States v. Wiseman*, 172 F.3d 1196, 1214 (10th Cir. 1999), *abrogated on other grounds by Rosemond v. United States*, 134 S. Ct. 1240 (2014) (same); *United States v.*

stated that the "degree of force employed is immaterial." N.Y. Penal Law § 2122 (1946); *see also Thomas J. Atkins v. Mass. Bonding & Ins. Co.*, 128 N.Y.S. 2d 784, 788 (Mun. Ct. 1954) (setting out Penal Law §§ 2120, 2122), *reversed on other grounds,* 139 N.Y.S.2d 446, 447 (App. Term 1955).

"It is a well-established principle of statutory construction that when one jurisdiction adopts the statute of another jurisdiction as its own, there is a presumption that the construction placed upon the borrowed statute by the courts of the original jurisdiction is adopted along with the statute and treated as incorporated therein." *United States v. Aguon*, 851 F.2d 1158, 1164 (9th Cir. 1988) (en banc) (citations omitted). Thus, when Congress adopted New York's definition of robbery in passing the Hobbs Act, it adopted a definition that covers any forcible taking, which in New York, can be accomplished without the violent physical force essential to a "crime of violence."

In this sense, Rojas's argument mirrors Stokeling's - since the force required by New York's robbery statute is common law force and the amount of force used to commit a robbery there is immaterial, Hobbs Act robbery, which is an amalgam of both, is not a 'crime of violence' as defined in § 924(c)(3)(A)'s force clause. As Stokeling argued, court opinions prove this point; because the degree of force employed is immaterial, courts have found sufficient force in "bump[ing the] victim," *People v. Lee*, 602 N.Y.S.2d 138, 139 (App. Div. 1993), "shov[ing] the victim," *People v. Bennett*, 592 N.Y.S.2d 918, 918 (App. Div. 1993), forming a "human wall that block[s] the victim's path," *People v. Bennett*, 631 N.Y.S.2d 834, 834 (App. Div. 1995), or where the victim and robber "tug[] at each other until defendant's hand slip[s] out of the glove holding the money." *People v.*

Harrington, 108 F.3d 1460, 1471 (D.C. Cir. 1997) (Hobbs Act robbery does not "specify[] precisely when an individual robbery should be considered complete, and therefore we look to the common law of robbery to answer this question.").

Safon, 560 N.Y.S.2d 552, 552 (App. Div. 1990). Accordingly, at least one New York federal court has interpreted the state's common-law-based robbery statute as not requiring violent physical force. *United States v. Moncrieffe*, 167 F.Supp.3d 383, 404-05 (E.D.N.Y. 2016) (Weinstein, J.).

Additionally, numerous federal courts have now held that common-law robbery statutes, both state and federal, fail to satisfy *Johnson I*'s violent physical force requirement because common-law robbery may be accomplished by use of any amount of "force." *See, e.g., United States v. Winston*, 850 F.3d 677, 683-86 (4th Cir. 2017) (Virginia common law robbery, which is defined as the taking of another's personal property by "violence or intimidation", is not violent felony because violence element can be satisfied by any resistance).[7] Since Hobbs Act robbery is simply a form of common-law robbery, *see, e.g., Nedley*, 255 F.2d at 357, it follows then that the government does not have to prove the accused threatened violent physical force. Thus, contrary to the

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[7] Rojas's panel did not reconcile its decision with an earlier opinion in *United States v. Nicholas*, 686 F.3d App'x 570 (10th Cir. 2017) (unpub.). *Nicholas*, unlike *Rojas*, is consistent with other circuits which have held that state robberies proven by the use of minimal physical contact do not rise to the degree of violent physical force expected by the force clause. The *Nicholas* panel reviewed Kansas's robbery statute which, like Hobbs Act robbery, requires proof that "'the taking of property from the person or presence of another by force or by threat of bodily harm to any person.'" 686 F.3d at 574 (quoting Kan. Stat. § 21-3426 (1999)). It found that this force element could be established without proof of violent physical force. It said Kansas robbery fell outside the force clause because proof of even minimal physical contact, like bumping another's shoulder, yanking her purse, and engaging in a "slight struggle" over it was enough to prove the force element and so was not the level of force necessary to satisfy the "physical force" clause. *Nicholas*, 686 F.3d at 576. In contrast to the *Rojas* panel, the court expressly assessed the level of physical contact needed to prove the offense and found it wanting.

Tenth Circuit's decision, Hobbs Act robbery by "force" also fails to satisfy *Johnson I*'s violent physical force requirement.

In sum, this case and Stokeling's both turn on the assessment of what amount of force satisfies the force clause in the context of a robbery offense that appellate courts have held requires the use of no more force than necessary to separate the thing of value from the victim. Thus, if this Court rules in *Stokeling* that Florida robbery does not have as an element the use of sufficient force to constitute "physical force," a good chance exists that this ruling would undermine the basis of the Tenth Circuit's decision in Rojas's case: if only slight force to overcome resistance is not violent physical force then neither is the "actual or threatened force" that establishes a Hobbs Act robbery.

D. It is reasonably probable that the Court's resolution of *Stokeling* will impact the Tenth Circuit's decision against Rojas.

"Where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996); *see also Tyler v. Cain*, 533 U.S. 656, 666 n. 6 (2001) (noting the *Lawrence* standard). This Court's decision in the petitioner's favor in *Stokeling* would satisfy that GVR standard. For the reasons discussed in Section C above, there would be a reasonable probability that favorable decision would call into doubt the Tenth Circuit's reliance on a broad view of what constitutes "physical force" to hold Hobbs Act robbery is a crime of violence. Subverting that view would leave the Tenth Circuit with no choice but to grant Rojas's § 2255 motion, vacate his § 924(c) conviction and sentence and remand for resentencing without that conviction. No procedural issues would stand in the way of that outcome.

For these reasons, this Court should hold this petition pending its resolution in *Stokeling*. If this Court rules in the petitioner's favor in *Stokeling*, this Court should grant certiorari in this case, vacate the Tenth Circuit's judgment and remand to the Tenth Circuit for reconsideration in light of the *Stokeling* decision.

II. This case presents an important question of federal law which has not been, but should be, settled by this Court, specifically, whether the threat of injury to property under the Hobbs Act robbery statute – which can be broadly accomplished by threat of future harm against intangible property – equals a threat of violent physical force against a person.

A. Introduction

If the *Stokeling* decision does not justify a GVR, Rojas asks the Court to grant certiorari in his case to answer the following: Hobbs Act robbery can be committed when personal property passes from one person to another because of fear the property in their custody or possession may be injured. Such a robbery requires neither proof of violent physical force nor of the intentional use of such force against another. Rojas asks this Court, then, to examine whether the use, attempted use, or threatened use of physical force against the person or property of another is an element of Hobbs Act robbery that qualifies it as a 'crime of violence' under the force clause of 18 U.S.C. § 924(c)(3)(A).

B. The Tenth Circuit's decision that Hobbs Act robbery categorically is a crime of violence is incorrect because as 18 U.S.C. § 1951(b)(1) states, it can be committed by putting someone in "fear of injury, immediate or future, to his person or property," and thus does not require the use, attempted use, or threatened use of violent physical force against another.

A robbery statute that requires proof of *de minimis,* or even no physical force is not a crime of violence. Section 1951 (a) and (b)(1) do not require that any particular quantum of force be used, attempted or threatened. As Congress defined 'robbery' in § 1951(b)(1), it does not require proof of violent physical force, or the intentional use of force against another. Rather, it can be committed when a person - afraid the property they hold may be damaged or devalued - simply gives it to another.

For example, an implied threat may cause another to fear some future injury to his right to conduct a lawful business. But this threat does not fit the category of "active, violent crimes" that this Court has explained fall within the force clause. *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004). In other words, Hobbs Act robbery is so expansive that it can be accomplished by threatening to inflict future economic harm or to key a car or slash tires. Such threats directed at property are not the same as a threat of violent physical force directed at a person. Because it is possible to threaten injury to property without also threatening force against a person, the full range of conduct covered by the Hobbs Act will not always involve violent physical force against a person as required by § 924(c)(3)(A)'s force clause. *See Johnson I*, 559 U.S. at 140 (phrase 'physical force' in force clause means violent force, force capable of causing physical pain or injury to another). Therefore, the indivisible offense of Hobbs Act robbery is not a "crime of violence" and should not have been used to enhance Rojas's sentence under § 924(c)(1)(A).

1. By holding that a threat of injury to property is an element of Hobbs Act extortion but not robbery, the Tenth Circuit renders the word "property" in § 1951(b)(1)'s robbery definition superfluous in violation of the principles of statutory construction.

The Tenth Circuit held that even though the text of the Hobbs Act robbery statute expressly includes a threat of injury to property, such threat is exclusive to Hobbs Act extortion. App. 4a-5a. This ruling is contrary to the fundamental canon of statutory construction that courts "must give effect to every provision and word in a statute and avoid any interpretation that may render statutory terms meaningless or superfluous." *Scott v. United States*, 328 F.3d 132, 139 (4th Cir. 2003) (citing *Freytag v. Comm'r Internal Revenue*, 501 U.S. 868, 877 (1991)); *see also Loughrin v. United States*, 573 U.S. 351, 134 S.Ct. 2384, 2390 (2014) (courts must follow "the cardinal principle of

interpretation [and] . . . give effect, if possible, to every clause and word of a statute.") (internal quotation marks and citations omitted).

Section 1951(b)(1) provides that Hobbs Act robbery can be committed by putting another in fear of injury to his "person or property." But by treating this term as exclusive to the extortion offense in § 1951(b)(2), the court renders the word "property" utterly meaningless and thwarts Congress's intent. If Congress meant for the threat of injury to property to be solely an element of extortion, then it had no need to add threats against property to its definition of Hobbs Act robbery. *See United States v. O'Connor*, 847 F.3d 1147, 1154 (10th Cir. 2017) (rejecting government's argument that Hobbs Act robbery does not involve misconduct directed at property). However, because Congress made a clear and deliberate choice to include the term in the robbery definition, courts must give it effect. *Loughrin*, 134 S.Ct. at 2390-91.

Faithful application of that rule here means the Tenth Circuit could not ignore that, according to the statute, the least culpable way to commit Hobbs Act robbery is by placing someone in fear of injury to his intangible property.[8] This is the only plausible interpretation that aligns the text of the statute with congressional intent. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (Congress "says in a statute what it means, and means in a statute what it says there."). By disregarding the express language in the statute, the court never grapples with the fact that the most innocent way

[8] In other words, the court must be certain that "the minimum conduct" encompassed under the Hobbs Act robbery statute will always involve violent physical force. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013). That certainty cannot be established here. *See Mathias v. United States*, 136 S.Ct. 2243, 2257 (2016) (sentencing court must satisfy "'*Taylor*'s demand for certainty' when determining whether a defendant was convicted of a generic offense.") (quoting *Shepard v. United States*, 544 U.S. 13, 21 (2005)).

of completing a Hobbs Act robbery is by placing someone in fear of injury to his intangible property. Not only does the Tenth Circuit's opinion ignore well settled principles of statutory construction, but it unreasonably concludes that a threat of injury to property under the Hobbs Act robbery statute – which can be accomplished by a threat of future economic harm – always constitutes a threat of force against a person.

In *United States v. Iozzi*, 420 F.3d 512, 514 (4th Cir. 1970), the Fourth Circuit interpreted the term "property" in the Hobbs Act statute to include "intangible property." Other circuits have adopted this meaning as well. *See United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999) ("While often the property involved is an existing physical asset, the concept is not limited to tangible things, but includes intangible assets such as rights to solicit customers and to conduct a lawful business."), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n. 8 (2003); *United States v. Debs*, 949 F.2d 199, 201 (6th Cir. 1991) (concept of property in Hobbs Act not limited to tangible property, also includes intangible property); *United States v. Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 780 F.2d 267, 281 (3d Cir. 1986) (Hobbs Act makes no distinction between tangible and intangible property); *United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980) (in Hobbs Act, property refers to tangible and intangible property); *United States v. Nadaline*, 471 F.2d 340, 344 (5th Cir. 1973) (intangible property protected by Hobbs Act). Because threatening injury to intangible property does not equal physical force – let alone violent physical force – against a person, Hobbs Act robbery categorically fails to qualify as a crime of violence under § 924(c)(3)(A)'s force clause.

The Tenth Circuit brushes aside the above-referenced cases as inapposite by asserting that they were all decided in the context of Hobbs Act extortion. App. 5a. But in so doing, the court , again, ignores the principles of statutory construction. It is well settled

that when an identical word appears in different parts of the statute, it must be assigned the same meaning unless Congress indicates otherwise. *See Gustafen v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning"). Therefore, the term "property" which appears in both the Hobbs Act robbery subsection (18 U.S.C. § 1951(b)(1)) as well as the extortion subsection (18 U.S.C. § 1951(b)(2)) must be given the same meaning. The court did not point to any authority holding to the contrary.

Moreover, the Tenth Circuit's pattern jury instructions for Hobbs Act robbery, which the government routinely accepts as the law, reinforce that it can be perpetrated by threatening injury to intangible property. These instructions specifically provide that Hobbs Act robbery – not just extortion – can be carried out by threatening injury to intangible property (i.e, "economic harm"):

> Robbery is the unlawful taking of personal property from another against his or her will. This is done by threatening or actually using force, violence, or ***fear of injury, immediately or in the future, to person or property. "Property" includes money and other tangible and intangible things of value. "Fear" means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm*** that is reasonable under the circumstances. . . .

10th Cir. Crim. Pattern Jury Instruction § 2.70 (2d Ed. 2015) (emphasis added); *see also* Sand and Siffert, *3-50 Modern Federal Jury Instructions* – Criminal 50-5 (instructing jury in Hobbs Act prosecution that the threatened use of force, violence or fear "does not have to be directed at the person whose property was taken. The use or threat of force or violence might be aimed at a third person, or at causing economic rather than physical injury."). This authority upends the panel's argument.

Under these expansive terms, Hobbs Act robbery can be accomplished by threats such as "Give me $10 or I'll key your car [sometime in the future]" or "Open the cash register or I'll tag your windows [sometime in the future.]" *United States v. Becerril-Lopez*, 541 F. 3d 881, 891 (9th Cir. 2008) (noting ways of violating the

California robbery statute which, like Hobbs Act robbery, can be accomplished by threats to property). These threats, which can be part of a Hobbs Act robbery, cannot be characterized as threats of violent physical force against a person. Rather, they are express threats against property. In other words, within the Tenth Circuit, a jury could find that the defendant caused another to fear future economic loss without using or threatening violent physical force. Unquestionably, placing another in "fear of injury" to "his property" in the "future" would not, without exception, require the use or threatened use of violent, physical force against another.

Hobbs Act robbery then does not have an element of violent physical force. Like the Tenth Circuit, the Fifth and Eleventh Circuits agree that the robbery can be carried out by creating fear of injury to intangible property. Those circuits also have pattern instructions defining the "property" taken in a Hobbs Act robbery to include purely "intangible rights." Each specify that the offense may be committed by causing "fear" of purely economic harm. *See* Eleventh Circuit Criminal Pattern Jury Instruction § O70.3 (Hobbs Act robbery) (In a robbery, "[p]roperty' includes money, tangible things of value, and intangible rights that are a source or element of income or wealth . . . . Fear means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence."); Fifth Circuit Criminal Pattern Jury Instruction § 2.73A (Extortion by Force Violence, or Fear 18 U.S.C. § 1951(a) (Hobbs Act)) (noting that when robbery is charged it should replace 'extortion' in the instruction and for both offenses the "term 'property' includes money and other tangible and intangible things of value"; the "term 'fear' includes fear of economic loss or damage, as well as fear of physical harm."). These instructions demonstrate that according to the law in these

circuits, violent physical force is not something every accused must necessarily use to be guilty of Hobbs Act robbery.[9]

Although no other circuits have similar Hobbs Act robbery instructions, the number of circuits on either side of this divide does not matter under the categorical approach. Even if the Tenth Circuit were the only one with an instruction informing juries they could convict a defendant simply for causing fear of a financial loss, without using personal violence, 'violent force' still would not be an element of *every* Hobbs Act robbery. But the fact that courts in three circuits (which cover 12 states, namely, Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) now routinely instruct juries in all Hobbs Act robbery cases that this offense does not necessitate the use, threat, or fear of physical violence, underscores the error by the *Rojas* panel in ruling that a Hobbs Act robbery is categorically violent.

Given the unity of the pattern robbery and extortion instructions in the Tenth, Fifth and Eleventh Circuits, it is notable that this Court granted a petition for certiorari and then vacated and remanded (GVR'd) a § 924(c) case after *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), where the predicate "crime of violence" was Hobbs Act extortion, and the petitioner had specifically pointed out that courts "routinely" charge juries in Hobbs Act extortion cases "that fear of economic injury is sufficient." *See* Petition for Writ of Certiorari, *Xing Lin v. United States*, No. 17-5767, at 18-19 (Aug. 28, 2017); *Xing Lin v.*

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[9] Even injury to tangible property does not require the threat of violent force. One can threaten to injure another's property by throwing paint on his house, pouring chocolate syrup on his passport, or spray painting his car. These actions do not require the "violent force" – i.e., "strong physical force" - "capable of causing physical pain or injury to another person" – described by *Johnson I*. 559 U.S. at 140.

United States, 138 S.Ct. 1982 (June 15, 2018)(granting certiorari, vacating the judgment, and remanding the case for further consideration in light of *Dimaya*).

Because it is evident that Hobbs Act robbery can be completed by threatening injury to intangible property, it does not include an element requiring the use of violent physical force against a person. But even if this Court were to assume that Hobbs Act robbery can be committed only by threatening injury to tangible property, such a threat still does not incorporate a threat of violent physical force against a person. Additionally, any such threat lacks immediacy because § 1951(b) explicitly allows for a future threat of injury to property.

For these reasons, this case presents an important and compelling issue of federal law relevant to every case in which a district court (or jury) must decide whether an accused has violated 18 U.S.C. § 924(c). Since placing one in fear of future injury to his person or property is the least offensive way to commit Hobbs Act robbery and thus, no expectation of a threat to use violent physical force against another necessarily attaches, the offense does not come within § 924(c)(3)(A)'s crime of violence definition.

C. This Court should grant certiorari in this case.

The Tenth Circuit did not live up to its obligation to approve the severe penalties in § 924(c)(1)(A) only if it is certain the defendant has a conviction that necessarily satisfies § 924(c)(3)(A)'s crime of violence definition. That deficiency resulted in Rojas unjustly being convicted under § 924(c) and being order to serve a mandatory ten year consecutive prison term. This Court should grant certiorari to correct the Tenth Circuit's flawed analysis and provide direction to the lower courts on the important question of federal law this case clearly presents.

CONCLUSION

Under Point I, Rojas requests that this Court hold this petition pending *Stokeling*'s resolution, and upon that resolution, grant *certiorari* in this case, vacate the Tenth Circuit's decision, and remand for reconsideration in light of the decision in *Stokeling*. Under Point II, if a GVR is not appropriate after the decision in *Stokeling*, this Court should grant this Petition and review and reverse the Tenth Circuit's decision in Rojas's case.

Respectfully submitted,

DATED: November 30, 2018

By: *s/ Stephen P. McCue*
Stephen P. McCue*
Federal Public Defender

Attorney for the Petitioner
* Counsel of Record

Appendix

FILED
United States Court of Appeals
Tenth Circuit

September 4, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANIEL ROJAS,

Defendant - Appellant.

No. 17-2065
(D.C. Nos. 1:16-CV-00675-MCA-KBM
and 1:05-CR-01618-MCA-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **McKAY**, and **O'BRIEN**, Circuit Judges.

Daniel Rojas, a federal prisoner, seeks to challenge the district court's dismissal of his 28 U.S.C. § 2255 motion. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court.

BACKGROUND

On June 26, 2005, a federal grand jury indicted Rojas with two counts of robbery under the Hobbs Act, that is, interfering with commerce by threats or violence, in violation of 18 U.S.C. § 1951(a); two counts of using and carrying a

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii); and one count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). Rojas pleaded guilty to one count of Hobbs Act robbery, interfering with commerce by threats or violence, in violation of 18 U.S.C. § 1951(a), and one count of using and carrying a firearm during or in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). The government dismissed the remaining counts. The district court sentenced him to twenty-four years of imprisonment.

On June 24, 2016, Rojas filed a 28 U.S.C. § 2255 petition to set aside and correct his sentence. He asked the district court to set aside his 24-year prison term, which the district court had imposed "after finding that he discharged a firearm during an alleged crime of violence, a Hobbs Act robbery, in violation of 18 U.S.C. § 924(c)(1)(A)(iii)." R. vol. II at 32. He contended his prison term should be set aside because "Hobbs Act robbery [] qualif[ies] as a crime of violence only by using the definition in [18 U.S.C.] § 924(c)(3)(B)'s residual clause." *Id.* And under *Johnson v. United States*, 135 S. Ct. 2551 (2015), he contended, § 924(c)(3)(B)'s residual clause is unconstitutionally vague.

He also contended that Hobbs Act robbery doesn't qualify as a crime of violence under § 924(c)(3)(A), which requires that the predicate felony have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." It doesn't so qualify, he argued, (1) because Hobbs Act robbery is just common-law robbery that affects interstate commerce, and common-

law robbery can be committed without using violent force; (2) because Hobbs Act robbery can be committed by causing fear of injury without a threat of physical force, i.e. by exposing a victim to hazardous chemicals; and (3) because Hobbs Act robbery can be committed by creating fear of economic harm or other harm to intangible property, which would not entail the use or threatened use of violent physical force.

The district court denied Rojas's motion for two reasons. First, it refused to extend *Johnson*'s holding to invalidate § 924(c)(3)(B)'s residual clause. Second, it concluded that Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A), the elements (or force) clause. The district court granted Rojas a certificate of appealability, determining that he had made a substantial showing of a denial of a constitutional right. Rojas now appeals.

DISCUSSION

"We review de novo the district court's interpretation of § 924(c) and its legal conclusion that a particular offense constitutes a crime of violence." *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060 (10th Cir. 2018) (citing *United States v. Serafin*, 562 F.3d 1105, 1107 (10th Cir. 2009)). On appeal, Rojas contends: (1) that the district court erred when it found that Rojas pleaded guilty to a crime of violence under § 924(c)(3)(A); (2) that Hobbs Act robbery isn't a crime of violence under § 924(c)(3)(A), the elements clause, because Hobbs Act robbery "can be committed by putting someone in 'fear of injury, immediate or future, to his person or property,'" Appellant's Opening Br. at 12; and (3) that after *Johnson*, Rojas's

§ 924(c) conviction violates the Due Process Clause because § 924(c)(3)(B)'s residual clause is unconstitutionally vague.

We need only address Rojas's second argument.[1] In *Melgar-Cabrera*, we held that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A), the elements clause. 892 F.3d at 1064–66. Despite this holding, Rojas filed a letter contending that *Melgar-Cabrera* didn't address the fear-of-injury-to-property argument that he advances now. But a panel of this court recently applied *Melgar-Cabrera*'s holding to Rojas's property argument.

In *United States v. Dubarry*, 2018 WL 3342275, at *2 (10th Cir. July 9, 2018), a federal prisoner advanced Rojas's same argument. There, the prisoner contended "that Hobbs Act robbery does not satisfy § 924(c)(3)(A) 'because it can be accomplished by threatening injury to intangible property, which does not require the use of any force at all.'" 2018 WL 3342275, at *2. The *Dubarry* panel explained that *Melgar-Cabrera* "held that Hobbs Act robbery is categorically a crime of violence under the elements clause of § 924(c)(3)(A) because that clause requires the use of violent force, and the force element in Hobbs Act robbery 'can only be satisfied by violent force.'" *Id.* (quoting *Melgar-Cabrera*, 892 F.3d at 1065). And it explained that Hobbs Act robbery "is a divisible statute setting out two separate crimes—Hobbs Act robbery and Hobbs Act extortion." *Id.* (quoting *United States v. O'Connor*, 874 F.3d 1147, 1152 (10th Cir. 2017)). So, the panel determined, Hobbs Act robbery is

[1] In *United States v. Salas*, 889 F.3d 681, 687–88 (10th Cir. 2018), we invalidated § 924(c)(3)(B)'s residual clause as unconstitutionally vague.

categorically a crime of violence notwithstanding the prisoner's property argument. *Id.*

Like *Dubarry*, Rojas doesn't "argue that he was convicted of Hobbs Act extortion, and the cases he cites do not call into question *Melgar-Cabrera*'s holding that Hobbs Act robbery is categorically a crime of violence." *Id.* So we agree with the *Dubarry* and *Melgar-Cabrera* panels that Hobbs Act robbery is categorically a crime of violence under § 924(c)(3)(A).

CONCLUSION

We affirm the district court.

Entered for the Court

Gregory A. Phillips
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

vs.

No. CV 16-00675 MCA/KBM
No. CR 05-01618 MCA

DANIEL ROJAS,

Defendant-Movant.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court under rule 4(b) of the Rules Governing Section 2255 Proceedings on the Motion to Set Aside the Judgment and Correct the Sentence Pursuant to 28 U.S.C. § 2255 filed by Movant Daniel Rojas on June 24, 2016 (CV Doc. 1; CR Doc. 42). Rojas seeks to vacate and correct his sentence under *Johnson v. United States,* 578 U.S. ___, 135 S.Ct. 2551 (2015). The Court determines that Rojas is not eligible for relief under *Johnson* and will dismiss the Motion.

FACTUAL AND LEGAL BACKGROUND

Rojas was indicted on August 23, 2005 on five counts: Count 1 and Count 3—18 U.S.C. § 1951(a)(1) Interference with Commerce by Threats or Violence; Count 2 and Count 4—18 U.S.C. § 924(c)(1)(A)(ii) Using and Carrying a Firearm During and in Relation to a Crime of Violence; and Count 5—18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2) Felon in Possession of a Firearm and Ammunition. (CR Doc. 16). The Superceding Indictment stated:

> "Count 3 On or about 1st day of July, 2005, in Bernalillo County, State and District of New Mexico, the defendant, Daniel Rojas, did unlawfully obstruct, delay and affect, and attempt to obstruct, delay and affect,

> commerce . . .by robbery as that term is defined in Section 1951, in that the defendant did unlawfully take and obtain personal property consisting of cash form the presence of Emad Al-Sultan, who was operating the Better Deal Auto Sales, against his will by means of actual and threatened force, violence, and fear of injury, immediate and future, to his person, that is, by shooting him with a firearm at the Better Deal Auto Sales."
>
> "Count 4 On or about the 1st day of July, 2005, in Bernalillo County, State and District of New Mexico, the defendant, Daniel Rojas, did use and carry a firearm, that is, a pistol, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, namely Interference with Commerce by threats and violence as charge in Count 3 of this Indictment. . ."

(CR Doc. 16 at 2-3). On February 2, 2006, Rojas entered into a rule 11(c)(1)(C) Plea Agreement in which he pled guilty to Counts 3 and 4 of the Superceding Indictment and agreed to a 24-year term of imprisonment. (CR Doc. 32 at 2-3). Rojas was then sentenced to the agreed term of imprisonment of 24 years. (CR Doc. 40).

Rojas filed his Motion under 28 U.S.C. § 2255 on June 24, 2016. (CV Doc. 1; CR Doc. 42). Rojas contends that *Johnson* invalidates the residual clause of 18 U.S.C. § 924(c)(3)(B) and that Hobbs Act robbery is not a crime of violence as defined in the elements or force clauses of § 923(c). (CV Doc. 1 at 4-17; Cr Doc. 42 at 4-17).

APPLICABLE LAW ON *JOHNSON V. UNITED STATES* AND SECTION 2255 COLLATERAL REVIEW

Rojas seeks collateral review of his sentences in CR 07-02238 and CR 08-03048 under 28 U.S.C. § 2255. Section 2255 provides:

> "A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

28 U.S.C. § 2255(a). Because Rojas seeks collateral review more than a year after his sentences became final, he relies on a right newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review in *Johnson* and *Welch v. United States,* 578 U.S. ___, 136 S.Ct. 1257 (2016). See 28 U.S.C. § 2255(f)(3).

In *Johnson*, the Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA") is impermissibly vague and imposing an increased sentence under the residual clause of 18 U.S.C. § 924(e)(2)(B) violates the Constitution's guarantee of due process. 135 S.Ct. at 2562-2563. Under the ACCA, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a "violent felony." 18 U.S.C. § 924 (e)(2)(B). The Act defines "violent felony" to mean:

> "any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves the use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*."

18 U.S.C. § 924(e)(2)(B) (emphasis added). The *Johnson* Court struck down the italicized residual clause language of § 924(e)(2)(B)(ii) as unconstitutionally vague. 135 S.Ct. at 2555-2563. The language of § 924(e)(2)(B)(i), which defines "violent felony" to mean a crime that "has as an element the use, attempted use, or threatened use of physical force," is commonly referred to as the "element" or "force" clause. The "enumerated" clause is the language of § 924(e)(2)(B)(ii) that lists the crimes of burglary, arson, extortion, or the use of explosives as violent felonies. The Supreme Court expressly stated that its holding with respect to the residual clause does not call into question application of the Act to the four enumerated offenses or the

remainder of the definition of a violent felony in § 924(e)(2)(B). 135 S.Ct. at 2563. Therefore, the *Johnson* decision has no application to sentences enhanced under the force or element clause of § 924(e)(2)(B)(i) or the enumerated clause of § 924(e)(2)(B)(ii).

ANALYSIS OF MOVANT ROJAS' CLAIM

I. *JOHNSON* DOES NOT CLEARLY INVALIDATE THE RESIDUAL CLAUSE OF § 924(c):

Rojas' sentence was not enhanced under § 924(e)(2)(B) of the ACCA. Instead, Rojas argues that the *Johnson* ruling should be applied to the residual clause of 18 U.S.C. § 924(c). The question of whether *Johnson* applies to invalidate the residual clause language of § 924(c) is an unsettled question. In *Johnson,* the Supreme Court indicated that its ruling did not place the language of statutory provisions like the § 924(c)(3)(B) residual clause in constitutional doubt. 135 S.Ct. at 2561.The lower courts have divided on the question of application of the *Johnson* ruling to § 924(c) and similarly-worded provisions. Compare *United States v. Hill*, 832 F.3d 135, 146 (2nd Cir. 2016), *United States v. Taylor,* 814 F.3d 340, 375-79 (4th Cir. 2016), and *United States v. Prickett*, 839 F.3d 697, 699 (8th Cir. 2016) (declining to find § 924(c) void for vagueness) with *United States v. Vivas-Ceja,* 808 F.3d 719, 723 (7th Cir. 2015) (finding language similar to § 924(c) void for vagueness); *Dimaya v. Lynch,* 803 F.3d 1110, 1120 (9th Cir. 2015) (holding similar language in the Immigration and Nationality Act void); *In re Smith*, ___ F.3d ___, 2016 WL 3895243 at *2-*3 (11th Cir. 2016) (noting the issue but not deciding it in the context of an application for permission to file a second or successive § 2255 motion).

Courts have cited several grounds that distinguish the ACCA § 924(e)(2)(B) residual clause from § 924(c)(3)(B). First, the statutory language of § 924(c)(3)(B) more narrowly defines "crime of violence" based on physical force rather than physical injury. While the ACCA residual clause simply requires conduct "that presents a serious potential risk of physical injury

to another," § 924(c)(3)(B) requires the risk "that *physical force* against the person or property of another may be used *in the course of* committing the offense." 18 U.S.C. § 924(c)(3)(B) (emphasis added). By requiring that the risk of physical force arise "in the course of" committing the offense, the language of § 924(c)(3)(B) mandates that the person who may potentially use physical force be the charged offender. *See United States v. Taylor,* 814 F.3d at 376-77.

Moreover, § 924(c)(3)(B), unlike § 924(e)(2)(B), requires that the felony be one which "by its nature" involves the risk that the offender will use physical force. In *Johnson*, the Supreme Court was concerned with the wide judicial latitude permitted by the ACCA's residual clause language that did not limit a court's inquiry to the elements of the crime. 135 S.Ct. at 2557. Section 924(c)(3)(B), by contrast, does not allow a court to consider risk-related conduct beyond the elements of the predicate crime. The phrase "by its nature" restrains the court's analysis to the risk of force in the offense, itself. *See United States v. Amos,* 501 F.3d 524, 527 (6th Cir.2007), *United States v. Stout,* 706 F.3d 704, 706 (6th Cir.2013). *United States v. Serafin,* 562 F.3d 1105, 1109, 1114 (10th Cir.2009); see *also Leocal v. Ashcroft,* 543 U.S. 1, 10 (2004) (construing the language of 18 U.S.C. § 16(b)).

Second, the *Johnson* Court was concerned that the enumerated crimes in the ACCA, when paired with the residual clause, cause confusion and vagueness in the application of the residual clause. 135 S.Ct. at 2561. The lower courts have noted no similar concerns with § 924(c)(3)(B). The ACCA links the residual clause by the word "otherwise" to the four enumerated crimes. *Johnson,* 135 S.Ct. at 2558. The *Johnson* Court explained that by using the word "otherwise," "the residual clause forces courts to interpret 'serious potential risk' in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives." *Id.* Gauging the level of risk required was difficult because the four listed crimes

"are 'far from clear in respect to the degree of risk each poses.' " *Id.* (quoting *Begay v. United States,* 553 U.S. 137, 143, (2008)). Unlike the ACCA, § 924(c)(3)(B) does not link its "substantial risk" standard "to a confusing list of examples." *Johnson,* 135 S.Ct. at 2561.

The *Johnson* Court addressed the fact that the ACCA residual clause requires the application of a categorical approach to analysis of the predicate crime. *Johnson,* 135 S.Ct. at 2557–58. The Court refrained from invalidating the categorical analysis. *Id.* at 2561–62. Instead, the Court stated that the ordinary case analysis *and* the level-of-risk requirement "conspire[d] to make [the statute] unconstitutionally vague," and determined that the concern with the ACCA residual clause was that it combined an overbroad version of the categorical approach with other vague elements. *Id*. at 2557. Statutes like Section § 924(c)(3)(B)'s residual clause do not raise the same analytical concerns when combined with the categorical approach. *Id.* at 2561.

Third, the Supreme Court reached its void-for-vagueness conclusion only after deciding a number of cases calling for interpretation of the clause. *See e.g. James v. United States,* 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Sykes v. United States,* 564 U.S. 1 (2011). In *Johnson,* the Court recognized its "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause." 135 S.Ct. at 2558. In the nine years preceding *Johnson,* the Court had applied four different analyses to the residual clause. *See id.* at 2558–59. These inconsistent decisions led to "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." *Id*. at 2560. By contrast, the Supreme Court has not been called on multiple occasions to articulate a standard applicable to the § 924(c)(3)(B) analysis.

The question of whether the reasoning of *Johnson* should extend to the residual clause of

§ 924(c)(3)(B) remains unsettled. However, the Court need not determine in this case whether *Johnson* should apply to invalidate the residual clause of § 924(c)(3)(B). As set out, below, even if *Johnson* was extended to § 924(c), Rojas' predicate robbery crime comes within the force or element clause, not the residual clause, and he is not eligible for resentencing.[1]

II. HOBBS ACT ROBBERY IS A CRIME OF VIOLENCE UNDER THE "FORCE" OR "ELEMENT" CLAUSE OF § 924(c):

Under 18 U.S.C. § 924(c)(1)(A), a defendant who "uses or carries" a firearm "during and in relation to any crime of violence" faces a five-year mandatory minimum sentence, to run consecutively to any sentence for the underlying offense. *See United States v. Johnson,* 32 F.3d 82, 85 (4th Cir.1994). If, during the commission of the crime of violence, "the firearm is discharged," the mandatory minimum sentence increases to ten years. *See* § 924(c)(1)(A)(iii). Section 924(c)(3) defines "crime of violence" to mean:

> "[A]n offense that is a felony and—
> (A) has as an element the 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."

18 U.S.C. § 924(c)(3). Rojas contends that his Hobbs Act robbery conviction does not qualify as a crime of violence under the "force" or "element" clause of § 924(c)(3)(A) and, therefore, must come within the presumably invalid residual clause language of § 924(c)(3)(B). Contrary to Rojas' argument, the robbery crime charged against Rojas clearly has as an element the use, or threatened use of physical force against the person or property of another and support enhancement of his sentence under § 924(c) without resort to the residual clause language.

[1] There is also a question as to whether, in light of his 11(c)(1)(C) Plea Agreement to a specified term of imprisonment, Rojas was actually sentenced under § 924(c). See CR Doc. 32 at ¶ 6.a. However, because the Court concludes that, even if he was sentenced under § 924(c), Rojas would not be eligible for resentencing, the Court does not reach the 11(c)(1)(C) issue.

To determine whether a prior conviction constitutes a crime of violence under the force or element clause, the Court employs a categorical approach. *United States v. Perez–Jiminez,* 654 F.3d 1136, 1140 (10th Cir.2011). The Court looks only to the fact of conviction and the statutory definition of the prior offense, and does not generally consider the particular facts disclosed by the record of conviction. *United States v. Wray*, 776 F.3d 1182, 1185 (10th Cir. 2015). Where a statute defines multiple crimes by listing alternative elements, the Court utilizes a modified categorical approach, which permits the Court to look at the charging documents to determine the elements under which the defendant was charged and convicted. *See Mathis v. United States*, ___ U.S. ___, 136 S.Ct. 2243, 2248-49 (2016).

The Hobbs Act provides:

> "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 to or conspires 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 or imprisoned not more than twenty years, or both."

18 U.S.C. § 1951(a). The Hobbs Act defines "robbery" to mean:

> "The unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual of threatened force, or violence or fear of injury, immediate or future, to his person or property."

18 U.S.C. § 1951(b)(1).

The Circuit courts are in agreement that Hobbs Act robbery is a crime of violence under the force clause of § 924(c). *See Hill,* 832 F.3d 135, 144 (2nd Cir. 2016) ("[W]e agree ... that Hobbs Act robbery 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another.' "); *see also United States v. Howard*, 650 Fed. App'x 466, 468 (9th Cir. 2016) (explaining "that Hobbs Act robbery indisputably qualifies as a crime of violence under" § 924(c)(3)(A)) (internal quotes and brackets omitted); *see also In re*

Fleur, 824 F.3d 1337, 1341 (11th Cir. 2016) (holding that Hobbs Act robbery "meets the use-of-force clause of the definition of a crime of violence under § 924(c)(3)(A)"); *Cf. United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016) (concluding that defendant's Hobbs Act robbery conviction qualifies as a serious violent felony under 18 U.S.C. § 3559(c) because it "has as an element the use, attempted use, or threatened use of physical force against the person of another").

The courts have uniformly ruled that federal statutory crimes involving takings by force, violence, or intimidation, have as an element the use, attempted use, or threatened use of physical force. In *United States v. Boman,* 810 F.3d 534 (8th Cir.2016) the Eighth Circuit held that robbery in the special maritime and territorial jurisdiction of the United States under 18 U.S.C. § 2111 satisfied the similarly worded force clause in the Armed Career Criminal Act ("ACCA"), because it required a taking "by force and violence, or by intimidation." *Boman,* 810 F.3d at 542–43. The Second and Eleventh Circuits reached the same conclusion with respect to the carjacking statute, 18 U.S.C. § 2119. *See United States v. Moore,* 43 F.3d 568, 572–73 (11th Cir.1994); *United States v. Mohammed,* 27 F.3d 815, 819 (2d Cir.1994). The Fourth Circuit expressly stated in *Adkins,* that "armed bank robbery is unquestionably a crime of violence, because it 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another.' " *See* 937 F.2d at 950 n. 2 (quoting 18 U.S.C. § 924(c)(3)(A)). The courts have also consistently determined that a § 2113(a) bank robbery is a crime of violence under the force clause of Guidelines section 4B1.2, which contains force clause language nearly identical to the § 924(c)(3) force clause. *See Johnson v. United States,* 779 F.3d 125, 128–29 (2d Cir.2015); *United States v. Davis,* 915 F.2d 132, 133 (4th Cir.1990); *United States v. Maddalena,* 893 F.2d 815, 819 (6th Cir.1989); *United States v. Jones,* 932 F.2d 624, 625 (7th Cir.1991);

United States v. Wright, 957 F.2d 520, 521 (8th Cir.1992); *United States v. Selfa,* 918 F.2d 749, 751 (9th Cir.1990). Under the law, a robbery "by force and violence" entails the use of physical force.

Rojas points to the "fear of injury" language in the statute and contends that a conviction based on "fear of injury" is insufficient to constitute a crime of violence. However, Rojas was expressly charged with and pled guilty to robbery by means of actual and threatened force, violence, ***and*** fear of injury. (CR Doc. 16 at 2-3; Doc. 32 at 2). He was charged with and convicted of robbery by force as well as robbery by violence and fear of injury. Regardless of whether "fear of injury" has as an element the threatened use of physical force, Rojas was convicted of crimes that include an element that is the use, attempted use, or threatened use of physical force. *Hill,* 832 F.3d at 144. Rojas' sentence was properly enhanced under the force clause of § 924(c)(3)(A) and without resort to the residual clause of § 924(c)(3)(B), he is not entitled to relief, and the Court will dismiss his Motion under rule 4(b) of the Rules Governing Section 2255 Proceedings.

Under 28 U.S.C. § 2253(c)(1) and (3), the Court determines that Rojas has made a substantial showing of denial of a constitutional right. The Court will, therefore, grant a certificate of appealability. *See* rule 11(a) of the Rules Governing Section 2255 Proceedings.

IT IS ORDERED that the Motion to Set Aside the Judgment and Correct the Sentence Pursuant to 28 U.S.C. § 2255 filed by Movant Daniel Rojas on June 24, 2016 (CV Doc. 1; CR Doc. 42) is **DISMISSED** under rule 4(b) of the Rules Governing Section 2255 Proceedings; and a Certificate of Appealability is **GRANTED** under rule 11(a).

UNITED STATES DISTRICT JUDGE

No. _____

In the

Supreme Court of the United States

DANIEL ROJAS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Certificate of Service

I, Stephen p. McCue, hereby certify that on November 30, 2018, a copy of the petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614,

950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

DATED: November 30, 2018

By: *s/ Stephen P. McCue*

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