**No. _____**

IN THE
**SUPREME COURT OF THE UNITED STATES**

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**KENNETH H. BURKE JR.,**

***Petitioner*,**

**v.**

**UNITED STATES OF AMERICA,**

***Respondent*.**

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

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Mr. Burke was convicted of knowingly carrying a firearm during and in relation to a "crime of violence," in violation of 18 U.S.C. § 924(c). The "crime of violence" underlying his § 924(c) conviction was, presumably, conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a).

The question presented is whether Mr. Burke's § 924(c) conviction is invalid in light of this Court's recent decision in *United States v. Davis*, 139 S. Ct. 2319 (2019).

## LIST OF PARTIES

Petitioner, Kenneth H. Burke Jr., was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

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## PETITION FOR A WRIT OF CERTIORARI

Kenneth H. Burke Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINION AND ORDER BELOW

The Eleventh Circuit originally reversed the district court's denial of Mr. Burke's 28 U.S.C. § 2255 motion to vacate his sentence in an unpublished opinion. Appendix B. Eight days later, the Eleventh Circuit sua sponte vacated that opinion and replaced with another unpublished opinion that affirmed the denial of his § 2255 motion. Appendix C. Mr. Burke petitioned for rehearing en banc, but that was denied. Appendix D.

## JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Burke's criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under 28 U.S.C. § 2255. On July 28, 2016, the district court denied Mr. Burke's § 2255 motion. Appendix A. On February 27, 2017, the Eleventh Circuit granted Mr. Burke certificate of appealability (COA). On November 27, 2018, the Eleventh Circuit affirmed the district court's denial of Mr. Burke's § 2255 motion. Appendix C. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY AND GUIDELINES PROVISIONS

18 U.S.C. § 924(c) provides in pertinent part:

> (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—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

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

. . .

(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.

18 U.S.C. § 1951(a) provides in pertinent part:

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.

## STATEMENT OF THE CASE

On December 2, 2011, a jury found Mr. Burke guilty of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count one), attempted Hobbs Act robbery, in violation of § 1951 (count two), brandishing and discharging a firearm during a "crime of violence," in violation of § 924(c) (count three), and possession of ammunition by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (count four). The "crime[s] of violence" referenced in count three were the conspiracy and attempted offenses alleged in counts one and two. On February 24, 2012, he was sentenced to 355 months' imprisonment—235 months on counts one, two, and four, to run concurrently, and 120 months on count three, to run consecutive to the other counts.

On May 27, 2016, Mr. Burke applied with the Eleventh Circuit for permission to file a second or successive § 2255 motion. In his application, Mr. Burke raised two claims. First, he claimed that his sentence on count four was improperly enhanced based on the residual clause of the Armed Career Criminal Act ("ACCA"). Second, he claimed that his conviction on count three was improperly based on § 924(c)'s residual clause. Both claims relied on the new rule of constitutional law announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*).

The Eleventh Circuit granted the application in part. The court denied Mr. Burke's first claim, holding that he failed to make a *prima facie* showing that *Samuel Johnson* affects his ACCA sentence. However, the court granted Mr. Burke authorization on his second claim, stating:

Burke's application and the record indicate that his § 924(c) conviction

> was based on his convictions for conspiracy and attempt to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a). In light of [*In re Pinder*, 824 F.3d 977 (11th Cir. 2016),] grant of an application in a case involving conspiracy to commit Hobbs Act robbery as a companion crime under § 924(c)(3)(A), Burke has made a *prima facie* showing that he may be entitled to relief under the rule announce in [*Samuel*] *Johnson* as to his conviction and sentence under § 924(c).

Based on the Eleventh Circuit's authorization, Mr. Burke moved in the district court for relief under § 2255, arguing that his § 924(c) conviction must be vacated in light of *Samuel Johnson*. Without requiring a response from the government, the district court denied the motion, stating that Mr. Burke failed to meet the procedural requirements for filing a second or successive motion under § 2255(h) because *Samuel Johnson* does not apply to § 924(c). Appendix A. The district court also denied Mr. Burke a COA. *Id.*

Mr. Burke filed a timely notice of appeal, and on February 22, 2017, the Eleventh Circuit granted Mr. Burke a COA on these issues:

> (1) Whether the district court erred, under 28 U.S.C. § 2244(b)(4), by finding that Burke had not met the requirements to file a second or successive § 2255 motion.
>
> (2) Whether Burke's § 924 conviction is now unconstitutional based on [*Samuel Johnson*].

On November 19, 2018, the Eleventh Circuit vacated the district court's denial of Mr. Burke's § 2255 motion and remanded this case for further proceedings. Appendix B. Notably, the Eleventh Circuit stated:

> Until recently, this Court used the same categorical approach to decide whether a particular offense counts as a crime of violence under § 924(c)(3)(B). *See United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013) (O'Connor, J.), *overruled by Ovalles v. United States*, 905 F.3d 1231 (2018). However, *Ovalles*, which is a "successor" to *Johnson*,

abandoned the categorical approach for purposes of deciding whether an offense counts as a crime of violence under § 924(c)(3)(B). 905 F.3d 1231, 1233–1235. In an effort to avoid the constitutional problems identified in *Johnson*, this Court adopted instead what we called a "conduct-based" approach to § 924(c)(3)(B). *Id.* at 1233–1235. Rather than imagine an ordinary case in the abstract, *Ovalles* now requires us to ask whether a defendant's actual conduct "by its nature[ ] involve[s] a substantial risk" of physical force. 18 U.S.C. § 924(c)(3)(B); *Ovalles*, 905 F.3d at 1253–54. Because this is a factual determination that increased punishment, *Ovalles* recognized that juries, not judges, must decide whether a defendant's conduct involved such a substantial risk. *See* 905 F.3d at 1249–51. Importantly for this case, *Ovalles* recognized that the use of the categorical approach under § 924(c)(3)(B) implicates the same vagueness problems at issue in *Johnson*. *Id.* at 1233.

It seems likely that the conspiracy to commit robbery and attempted robbery charges were categorically treated as crimes of violence here. The jury was instructed they could find Burke guilty of the § 924(c) charge only if they found beyond a reasonable doubt that Burke "committed either or both of the crimes of violence charged in Counts One or Two." Counts One and Two charged conspiracy to commit robbery and attempted robbery. This instruction appears to have told the jury that the crimes charged were crimes of violence, rather than ask the jury to decide whether Burke's conduct made those counts crimes of violence. If the jury was instructed that conspiracy to commit robbery and attempted robbery were to be treated as crimes of violence under § 924(c)(3)(B), Burke may well have stated a *Johnson* claim. As a result, he may be entitled under *Ovalles* to have a jury decide whether his offenses posed a substantial risk that force would be used. We leave it to the district court to reconsider its decision to deny Burke's § 2255 petition and to decide in the first instance what relief, if any, Burke is entitled to in light of *Ovalles*.

*Id.*

Then, about a week later, the Eleventh Circuit *sua sponte* vacated its decision:

We *sua sponte* vacate our earlier opinion in this case and affirm the district court's judgment denying Kenneth Burke's motion to vacate his conviction and sentence under 28 U.S.C. § 2255.

Burke says the Supreme Court's decision in *Johnson v. United States*, – — U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), invalidated his conviction for carrying a firearm during and in relation to a crime of

> violence in violation of 18 U.S.C. § 924(c). Section 924(c) defines a crime of violence in part as any felony "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." *Id.* § 924(c)(3)(B). *Johnson* held similar language in 18 U.S.C. § 924(e)(2)(B)(ii) unconstitutionally vague. 135 S. Ct. at 2557. This Court recently ruled in *In re Garrett*, 908 F.3d 686 (11th Cir. 2018), that neither *Johnson* nor *Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018), invalidate § 924(c). *Garrett* thus forecloses Burke's argument.

Appendix C.[1] Mr. Burke petitioned for rehearing en banc, but his petition was denied on February 19, 2019. After denying Mr. Burke's petition, the Eleventh Circuit stayed the appellate proceedings. This Court then granted Mr. Burke a 60-day extension to file this petition.

## REASONS FOR GRANTING THE WRIT

After the Eleventh Circuit affirmed the denial of Mr. Burke's § 2255 motion, this Court decided *United States v. Davis*, 139 S. Ct. 2319 (2019), invalidating § 924(c)'s residual clause as unconstitutionally vague under *Samuel Johnson*'s reasoning. In doing so, this Court abrogated the Eleventh Circuit's contrary

[1] Judge Rosenbaum concurred, stating that because one of Mr. Burke's companion offenses—attempted Hobbs Act robbery—qualifies under § 924(c)'s use-of-force clause, it is irrelevant whether § 924(c)'s residual clause is unconstitutionally vague. However, two judges refused to join that reasoning. Moreover, as explained in Mr. Burke's initial brief in the Eleventh Circuit, his § 924(c) count was duplicitous because it relied on two predicate offenses—attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery. Initial Brief at 17–20. Because the count was duplicitous, it must be presumed that Mr. Burke's § 924(c) conviction is based on the least culpable offense—conspiracy to commit Hobbs Act robbery. *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016). In other words, whether attempted Hobbs Act robbery qualifies as a predicate offense is of no moment here. That said, Mr. Burke maintains that attempted Hobbs Act robbery does not qualify as a "crime of violence."

precedent in *Ovalles* and *Garrett*. Therefore, the only remaining question is whether conspiracy to commit Hobbs Act robbery is a "crime of violence." In light of *Davis*, this Court has granted, vacated, and remanded several similar cases for consideration of this issue.[2] The same result is warranted here.

## I. Conspiracy to commit Hobbs Act robbery does not have as an element "the use, attempted use, or threatened use of physical force against the person of property of another."

Without the residual clause, the only way conspiracy to commit Hobbs Act robbery may qualify as a "crime of violence" is under § 924(c)'s force clause. 18 U.S.C. § 924(c)(3)(A). Whether conspiracy to commit Hobbs Act robbery qualifies as a "crime of violence" under the force clause is a question that must be answered categorically—that is, by reference to the elements of the offense, and not the actual facts of the defendant's conduct. *See United States v. St. Hubert*, 909 F.3d 335, 347–53 (11th Cir. 2018). Pursuant to this categorical approach, if conspiracy to commit Hobbs Act robbery may be committed without "the use, attempted use, or threatened use of physical force," then that crime may not qualify as a "crime of violence" under § 924(c)'s force clause. The term "physical force" under the elements clause "connotes a substantial degree of force." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*). It means "violent force . . . force that is capable of causing physical pain or injury to another person." *Id.* Conspiracy to commit Hobbs Act

[2] *Jefferson v. United States*, 2019 WL 2649796 (U.S. June 28, 2019); *Barrett v. United States*, 2019 WL 2649797 (U.S. June 28, 2019); *Douglas v. United States*, 2019 WL 176716 (U.S. June 28, 2019); *Watkins v. United States*, 2019 WL 653249 (U.S. June 28, 2019); *Mann v. United States*, 2019 WL 2649802 (U.S. June 28, 2019); *Rodriguez v. United States*, 2019 WL 2649795 (U.S. June 28, 2019).

robbery may be committed without the use of violent "physical force." Therefore, it does not qualify as a "crime of violence" under § 924(c)'s force clause.

"To convict on a Hobbs Act conspiracy, the government must show that (1) two or more people agreed to commit a Hobbs Act robbery; (2) that the defendant knew of the conspiratorial goal; and (3) that the defendant voluntarily participated in furthering that goal." *United States v. Ransfer*, 749 F.3d 914, 929 (11th Cir. 2014); *see also United States v. Verbitskaya*, 406 F.3d 1324, 1335 (11th Cir. 2005) (quoting *United States v. Pringle*, 350 F.3d 1172, 1176 (11th Cir. 2003)). Critically, however, there is no requirement that the defendant engage in an overt act in furtherance of the conspiracy. *United States v. Pistone*, 177 F.3d 957, 959–60 (11th Cir. 1999). Nor is there any requirement that the defendant was "even capable of committing" the underlying Hobbs Act offense. *Ocasio v. United States*, 136 S. Ct. 1423, 1432 (2016). Rather, "[i]t is sufficient to prove that the conspirators agreed that the underlying crime be committed by a member of the conspiracy who was capable of committing it." *Id.* (emphasis omitted).

Thus, under the least-culpable act rule, this Court must presume that Mr. Burke's conspiracy offense was committed by a verbal or written agreement to commit Hobbs Act robbery. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *see, e.g.*, *Pistone*, 177 F.3d at 959 (upholding conviction for conspiracy to commit Hobbs Act robbery where defendant did no more than agree and plan to commit robbery, but took no overt act). Committing the offense in this way clearly lacks the use, attempted use, or threatened use of violent, physical force. As a result, conspiracy

to commit Hobbs Act robbery is categorically overbroad and cannot qualify as a "crime of violence."

Several courts have agreed, and so has the government. *See, e.g.*, *United States v. Simms*, 914 F.3d 229, 233 (4th Cir. 2019) (en banc) ("Simms's offense—conspiracy to commit Hobbs Act robbery—does not categorically qualify as a crime of violence under the elements-based categorical approach, as the United States now concedes."); *United States v. Ledbetter*, --- F.3d ---, 2019 WL 2864359, at *14 (6th Cir. July 3, 2019) ("[T]he parties agree that conspiracy to commit Hobbs Act robbery qualifies only if it meets § 924(c)(3)(B)'s residual definition."); *United States v. Douglas*, 907 F.3d 1, 6 n.7 (1st Cir. 2018*), cert. granted, judgment vacated*, No. 18-7331, 2019 WL 176716 (U.S. June 28, 2019), and *abrogated by United States v. Davis*, 139 S. Ct. 2319 (2019) ("[T]he Department of Justice's position is that a conspiracy offense does not have '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. Edmundson*, 153 F. Supp. 3d 857, 859 (D. Md. 2015); *United States v. Baires-Reyes*, 191 F. Supp. 3d 1046, 1049 (N.D. Cal. 2016); *United States v. Luong*, No. CR 2:99-00433 WBS, 2016 WL 1588495, at *3 (E.D. Cal. Apr. 20, 2016).

In sum, this case should be remanded back to the district court for further consideration in light of *Davis*.

## CONCLUSION

For the above reasons, Mr. Burke respectfully requests that this Court grant his petition, vacate the decision below, and remand this case for further proceedings in light of *Davis*.

Respectfully submitted,

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