NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KALEB JERMAINE MYERS,
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

(1) Whether this Court should grant certiorari to resolve the conflict among the lower federal courts and decide the important legal question of whether Hobbs Act robbery under 18 U.S.C. § 1951(b)(1) is a crime of violence within the meaning of the "force" or "elements" clause of 18 U.S.C. § 924(c)(3)(A).

(2) Whether this Court should grant Mr. Myers a certificate of appealability because reasonable jurists could disagree – and have disagreed – about whether Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A).

PARTIES

The parties to this action are Kaleb Jermaine Myers and the United States of America.

CORPORATE DISCLOSURE STATEMENT

No corporations are involved in this case.

LIST OF DIRECTLY RELATED PROCEEDINGS

All proceedings appear under the caption United States v. Kaleb Jermaine Myers

Trial stage: Northern District of Oklahoma, case no. 4:12-cr-00196-CVE-2, judgment entered Apr. 24, 2013.

Direct appeal: Tenth Circuit, case no. 13-5048, judgment entered Feb. 26, 2014.

Post-conviction proceedings under 28 U.S.C. § 2255: Northern District of Oklahoma, case no. 4:12-cr-00196-CVE-2, judgment entered Sept. 13, 2018.

Appeal from denial of § 2255 motion: Tenth Circuit case no. 18-5109, judgment entered Nov. 27, 2019.

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Kaleb Jermaine Myers, respectfully petitions for a writ of certiorari and a certificate of appealability to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit is available at 786 F. App'x 161, and is reprinted at Pet. App. A. The district court's decision is unreported and is reprinted at Pet. App. B.

JURISDICTION

The Tenth Circuit entered judgment on November 27, 2019. This petition is filed less than 90 days thereafter, and therefore is timely under Supreme Court Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

> (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.

18 U.S.C. § 1951 provides, in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . 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.

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Northern District of Oklahoma, Petitioner Kaleb Jermaine Myers was convicted of five counts: two counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951, one count of conspiracy to commit Hobbs Act Robbery, and two counts of possessing and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). The § 924(c) counts identified Hobbs Act robbery as the predicate crime of violence. The charges were based on the robbery of two convenience stores in Tulsa, Oklahoma.

The district court sentenced Mr. Myers – then just 22 years old – to serve 476 months in prison. This sentence was largely driven by the 384-month mandatory consecutive term required for the two § 924(c) counts.

The Tenth Circuit affirmed Mr. Myers' conviction and sentence on direct appeal. *United States v. Myers,* 556 F. App'x 703 (10th Cir. Feb. 16, 2014). Mr. Myers then filed a timely motion for post-conviction relief under 28 U.S.C. § 2255. He asserted several claims of ineffective assistance of his trial counsel. He subsequently amended his petition to

include a claim that his § 924(c) convictions were invalid based on this Court's decision in *Johnson v. United States,* 135 S. Ct. 2551 (2015).

The district court denied Mr. Myers' § 2255 motion. The court concluded that while the residual clause of § 924(c)(3)(B) probably was void for vagueness under the reasoning in *Johnson,* Hobbs Act robbery qualified as a crime of violence under the statute's "force" or "elements" clause, § 924(c)(3)(A). Pet. App. B at 3-5. The district court denied a certificate of appealability.

Mr. Myers appealed to the Tenth Circuit and sought a certificate of appealability from that court. He argued that under this Court's recent decision in *United States v. Davis,* 139 S. Ct. 2319 (2019), and related Supreme Court jurisprudence defining crimes of violence, Hobbs Act robbery did not satisfy either the void residual clause or the remaining "force" or "elements" clause of § 924(c)(3)(A).

Relying on its existing precedent to the contrary, the Tenth Circuit held that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A) and denied Mr. Myers a certificate of appealability. Pet. App. A at 3. Mr. Myers now seeks a certificate of appealability and a grant of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

I. This Court should grant Mr. Myers a certificate of appealability because there is a disagreement among the federal courts about whether Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A).

To obtain a certificate of appealability, a petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court has explained that this standard requires a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983) (some internal quotation marks omitted)).

Mr. Myers can demonstrate that he is entitled to a certificate of appealability from this Court because reasonable jurists *have* reached different conclusions about precisely the issue his case presents: whether his convictions under § 924(c) are invalid because Hobbs Act robbery does not qualify as a categorical crime of violence under § 924(c)(3)(A). In *United States v. Chea,* 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019) (unpublished), the court reached the opposite conclusion from

that the Tenth Circuit reached in Mr. Myers' case, and held that Hobbs Act robbery is *not* a categorical crime of violence under § 924(c)(3)(A). If the Tenth Circuit's analysis is incorrect, and Mr. Myers has been wrongfully convicted of two invalid counts and sentenced to 384 months of mandatory, consecutive prison time for those invalid counts, there can be no doubt that his right to due process under the Fifth Amendment has been violated.

II. This Court should grant certiorari to resolve the conflict among the federal courts about whether Hobbs Act robbery is a categorical crime of violence under 18 U.S.C. § 924(c)(3)(A).

Certiorari is warranted under Supreme Court Rule 10(a) because the Tenth Circuit's decision conflicts with the decision of at least one other federal court as to whether Hobbs Act robbery is a categorical crime of violence under 18 U.S.C. § 924(c)(3)(A). As noted above, in *Chea,* the Northern District of California reached precisely the opposite conclusion from the one Tenth Circuit reached in Mr. Myers' case, holding that "Hobbs Act robbery is *not* categorically a crime of violence under the elements clause of § 924(c)(3), because the offense can be committed by causing fear of future injury to property, which does not

require 'physical force.'" *Chea,* 2019 WL 5061085 at *1 (emphasis added).

Certiorari also is warranted under Supreme Court Rule 10(c) because whether Hobbs Act robbery is a categorical crime of violence under § 924(c)(3)(A) is an important question of federal law that has not been, but should be, settled by this Court, and the circuit-court decisions holding that it is conflict with relevant decisions of this Court. Those lower-court decisions have failed to correctly apply the categorical approach to the text of 18 U.S.C. § 1915(b)(1), as required by *Davis* and related decisions.

A. *Davis* makes clear that the categorical approach governs whether Hobbs Act Robbery is a crime of violence under § 924(c)(3)(A).

During the tough-on-crime years of the 1990s and early 2000s, Congress passed numerous laws attaching harsh penalties to individuals convicted of "crimes of violence" or "violent felonies." The statute at issue here, 18 U.S.C. § 924(c), is one such law; it imposes mandatory, consecutive sentences when a federal "crime of violence" also involves a firearm in various specified ways.

In a series of decisions over the past decade, this Court has identified several guiding principles that must be followed in determining what crimes may qualify for this penalty-enhancing designation without exceeding constitutional and statutory boundaries. *See Davis,* 139 S. Ct. 2319; *Sessions v. Dimaya,* 138 S. Ct. 1204 (2018); *Mathis v. United States,* 136 S. Ct. 2243 (2016); *Johnson v. United States,* 135 S. Ct. 2551 (2015) (*Johnson II*); *Moncrieffe v. Holder,* 589 U.S. 184 (2013; *Descamps v. United States,* 570 U.S. 254 (2013); *Johnson v. United States,* 559 U.S. 133 (2010) (*Johnson I*). Most recently, in *Davis,* the Court invalidated as unconstitutionally vague the broad "residual clause" definition of "crime of violence" contained in § 924(c)(3)(B). *Davis,* 139 S. Ct. at 2331-36.

After Davis, a federal offense may be a "crime of violence" under § 924(c) only if it satisfies the statute's "elements" or "force" clause, which applies to a crime that "has *as an element* the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A) (emphasis added); *see Davis,* 139 S. Ct. at 2131-35. The "force" required under § 924(c)(3)(A) must be the kind of violent, physical force "capable of causing physical pain or injury

to another person." *Johnson I,* 559 U.S. at 140. And determining whether § 924(c)(3)(A) applies turns on a "categorical" analysis of the relevant statute. *Davis,* 139 S. Ct. at 2334-35. That approach turns on whether the elements of the crime, as defined by Congress, necessarily require the use, threatened use, or attempted use of violent physical force. *See id.;* see also *Taylor v. United States,* 495 U.S. 575, 601 (1990); *Mathis,* 136 S. Ct. at 2248.

The categorical approach also requires a court to determine whether the least culpable way of committing the crime meets the definition set out in § 924(c)(3)(A) *See Moncrieffe,* 589 U.S. at 190. That is, the court must "presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by" § 924(c)(3)(A). *Id.* at 190-91 (brackets and internal quotation marks omitted).

Certiorari is warranted here to resolve the federal courts' disagreement about whether Hobbs Act robbery qualifies as a "crime of violence" under this rubric. Certiorari also is warranted because the circuit-court decisions finding Hobbs Act robbery to qualify as a crime of

violence under § 924(c)(3)(A) reach that conclusion by misapplying the categorical approach and this Court's precedents.

B. Hobbs Act robbery may be accomplished by several means, including the threat of future injury to property.

Applying the categorical approach to a particular crime – here, Hobbs Act robbery – requires the court to identify and assess its elements. "Elements," this Court has explained, are "the constituent parts of a crime's legal definition – the things the prosecution must prove to sustain a conviction." *Mathis,* 136 S. Ct. at 2248 (citations and internal quotations omitted). That is, elements are the things the jury must find beyond a reasonable doubt at trial, or the defendant must admit in order to plead guilty. *Id.*

The Hobbs Act creates federal criminal liability for robbery that affects interstate commerce. It 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 or conspires so to do so, 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.

18 U.S.C. § 1951(a). And it defines "robbery" as:

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

Id., § 1951(b)(1) (emphases added).

In other words, the statute makes it a crime to (1) affect interstate commerce, (2) by unlawfully taking or obtaining personal property; (3) from the person or in the presence of someone else; (4) against that person's will. These are the *elements* of Hobbs Act robbery; none of them includes the actual, attempted, or threatened use of violent physical force.

The statute then provides that these elements may be accomplished "by means of" any of several alternative methods. Means, as opposed to elements, are different factual ways of committing a single element. *See Descamps,* 570 U.S. at 263-66. Means are not themselves elements of an offense, and therefore are not considered in deciding whether a statute is a categorical crime of violence. *See Mathis,* 136 S. Ct. at 2255; *Descamps,* 570 U.S. at 267-68 & n.3.

While one means of committing Hobbs Act robbery is through actual or threatened force or violence, another is by the fear of future injury to the property of the victim, a member of his family, or a member of his company. 18 U.S.C. § 1951(b)(1). The availability of this means led the Northern District of California to conclude that Hobbs Act robbery cannot categorically qualify as a crime of violence under § 924(c)(3)(A). In Mr. Myers' case and others, the Tenth Circuit reached the opposite conclusion, but without addressing the distinction between "elements" and "means" in § 1915(b)(1) and explaining how the statute can satisfy § 924(c)(3)(A) despite the fact that it can be violated by conduct involving no actual, threatened, or attempted use of violent physical force.

C. As the *Chea* court explained, because Hobbs Act robbery can be committed by means of threatening future property harm, it does not qualify as a crime of violence under § 924(c)(3)(A).

In is recent decision, the Northern District of California grappled comprehensively with the question of whether Hobbs Act robbery qualifies as a crime of violence under the part of § 924(c)(3) that survived *Davis*. *Chea,* 2019 WL 5061085. The court began by correctly recognizing that *Davis* required it to apply the categorical approach

only to the statutory text, and that "[t]he key to the categorical approach is elements, not facts," 2019 WL 5061085 at *7 (citations and internal quotations omitted). The court then compared the Hobbs Act robbery statute to the crime of violence definition in § 924(c)(3)(A) and concluded that "Hobbs Act robbery sweeps more broadly than the elements clause's 'crime of violence' definition." *Id.*

First, the court found that the plain language of § 1915(b)(1) provides that Hobbs Act robbery may be committed by means of causing a fear of future injury to property. *Id.* at *8. And second, the court concluded that "Hobbs Act robbery by causing fear of future injury to property does not involve the use or threats of violent physical force required by *Johnson I*."

Id.

In reaching this conclusion, the *Chea* court gave the "ordinary meaning" to the terms "fear of injury," "future," and "property." "Nothing in the ordinary meaning of these phrases," the court determined, "suggests that placing a person in fear that his or her property will suffer future injury requires the use or threatened use of

any physical force, much less violent physical force." *Id.* The court's cogent analysis merits quotation:

> Where the property in question is intangible, it can be injured without the use of any physical contact at all; in that context, the use of violent physical force would be an impossibility. Even tangible property can be injured without using violent force. For example, a vintage car can be injured by a mere scratch, and a collector's stamp can be injured by tearing it gently.
>
> Further, the fact that § 1951(b)(1) expressly sets forth other, potentially violent alternative means of accomplishing a Hobbs Act robbery, namely by means of "actual or threatened force, or violence," further supports the notion that "fear of injury" does not require the use or threats of violent physical force required by *Johnson I*. *See* 18 U.S.C. § 1951(b)(1) ("... by means of actual or threatened force, or violence, *or* fear of injury, immediate or future, to his person or property ...") (emphasis added). Interpreting "fear of injury" as requiring the use or threat of violent physical force would render superfluous the other, potentially violent alternative means of committing Hobbs Act robbery, specifically, by threatened force or violence. *See Ratzlaf v. United States,* 510 U.S. 135, 140–41 (1994) ("Judges should hesitate ... to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense."); *Duncan v. Walker,* 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (citations and internal quotation marks omitted). If Congress had intended "fear of injury" to mean "fear of violence or violent force," it could have said so expressly. It did not.
>
> Further still, nothing in the plain language of § 1951(b)(1) suggests that the "property" that the victim fears could be injured needs to be in the victim's physical custody

> or possession, or even proximity, at the time the Hobbs Act robbery is committed. This is important, because it preempts any argument that the fear of injury to property necessarily involves a fear of injury to the victim (or another person) by virtue of the property's proximity to the victim or another person. *See United States v. Camp,* 903 F.3d 594, 602 (6th Cir. 2018) (noting that Hobbs Act robbery can be committed by "threats to property alone" and that such threats "whether immediate or future—do not necessarily create a danger to the person"). Section 1951(b)(1) lists alternative scenarios in which a victim can be placed in fear of injury to property, and one of these alternatives requires only that the "fear of injury" be "to his person or property," without requiring that the property be in any particular location. *See* 18 U.S.C. § 1951(b)(1) ("... fear of injury, immediate or future, *to his person or property, or* property in his custody or possession ...") (emphasis added).

Id. at *8-9. "Thus," the court held, "the plain language of § 1951(b)(1) clearly supports the notion that committing Hobbs Act robbery by causing fear of future injury to property does not require the use or threatened use of any physical force, much less the violent physical force required by *Johnson I*." *Id.* at *9. That such a Hobbs Act robbery could be accomplished with either *de minimis* force or even "no force at all" precluded Hobbs Act robbery from serving as a predicate crime of violence under § 924(c)(3)(A). *Id.*

D. The circuit-court decisions finding that Hobbs Act robbery satisfies § 924(c)(3)(A) misapply the categorical approach and this Court's precedents.

Chea also noted that "no binding authority" precluded its holding, since neither this Court nor the Ninth Circuit has addressed whether the availability of the "fear of future injury to property" means takes Hobbs Act robbery outside the scope of § 924(c)(3)(A). *Id.* The court also noted that the Tenth Circuit, in a related context, had found the availability of damage to property as a means of committing federal witness retaliation to place that crime outside of § 924(c)(3)(A)'s reach. *Id.* (citing *United States v. Bowen,* 936 F.3d 1091, 1104 (10th Cir. 2019)).

Yet despite the plain text of § 1915(b)(1) and decisions such as *Bowen* addressing closely analogous circumstances, most federal courts have held that Hobbs Act robbery is a categorical crime of violence under § 924(c)(3)(A). These decisions, however, misapply the categorical approach and fail to reconcile their holdings with the statutory text permitting Hobbs Act robbery to be committed by placing the victim in fear of future injury to property.

In Mr. Myers' case, below, the Tenth Circuit relied on its own prior decision in *United States v. Melgar-Cabrera,* 892 F.3d 1053 (10th

Cir. 2018) to hold that his Hobbs Act robberies qualified as predicate crimes of violence under § 924(c)(3)(A). Pet. App. A at 3. In *Melgar-Cabrera,* the court acknowledged that *Johnson I* requires an element of violent physical force. 892 F.3d at 1062-63. But the court then proceeded to consider only whether generic robbery – rather than the specific statutory elements set forth in § 1915(b)(1) – require the use of such force. *Id.* at 1063. Using that misguided approach, the Tenth Circuit held that Hobbs Act robbery qualifies as a categorical crime of violence. *Id.* at 1064.

The decisions of other circuits similarly rely on misapplications of the categorical approach. In *United States v. Rivera,* 847 F.3d 847, 848-49 (7th Cir. 2017), for example, the 7th Circuit summarily concluded: "Because one cannot commit Hobbs Act robbery without using or threatening physical force," it satisfies § 924(c)(3)(A). *Id.* at 849. In brushing aside the defendant's argument that Hobbs Act robbery includes several means – including by fear of future property injury – and that its actual elements do not require the use or threat of violent physical force, the court claimed that the means-versus-elements distinction does not "dictate which parts of a statute matter in a

predicate offense analysis." *Id.* The court did not explain how it so easily distinguished *Mathis,* and in any event such a distinction cannot survive *Davis,* where this Court made clear that whether a predicate is a "crime of violence" under § 924(c) turns on precisely the same categorical approach applicable to prior convictions under the Armed Career Criminal Act. *See Davis,* 139 S. Ct. at 2334-35.

The Eleventh Circuit's approach also appears to misunderstand this rule. In holding that Hobbs Act robbery satisfies § 924(c)(3)(A), that court relied not on the statutory text alone, but on the specific indictment charging the defendant with a § 924(c) violation. *See in re Saint-Fleur,* 824 F.3d 1337, 1341 (11th Cir. 2016).

In a recent Fourth Circuit decision, the court purported to consider the different means provided for in § 1915(b)(1). *See United States v. Mathis,* 932 F.3d 242, 266 (4th Cir. 2019). The court acknowledged that Hobbs Act robbery may be accomplished by fear of future injury to property, yet entirely failed to address the fact that the statute does not require such injury to be caused through any force, let alone through violent physical force. *See id.* Similarly, the Sixth Circuit found Hobbs Act robbery to satisfy § 924(c)(3)(A) without even

mentioning that § 1915(b)(1) may be committed by means of placing the victim in fear of future injury to property. *See United States v. Gooch,* 850 F.3d 285, 291-92 (6th Cir. 2017).

It appears that other circuits' similar decisions also turn on a failure to adhere strictly to the categorical approach in deciding whether Hobbs Act robbery satisfies § 924(c)(3)(A), or to undertake a meaningful analysis of the statute's text. *See United States v. Robinson,* 844 F.3d 137 141-44 (3d Cir. 2016) (relying on the fact defendant was convicted of brandishing firearm, not just on the statutory text, to find that Hobbs Act robbery satisfies § 924(c)(3)(A)); *United States v. Hill,* 832 F.3d 135, 138-39 (2d Cir. 2016) (refusing to look only at the statutory text and requiring evidence of "actual application" of the statute to conduct outside the crime-of-violence definition); *United States v. House,* 825 F.3d 381, 387 (8th Cir. 2016).

* * *

Accordingly, a split of authority exists as to whether Hobbs Act Robbery is a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). This is an important question of federal law affecting hundreds of criminal cases across the country, which this Court has not but should answer.

And the lower-court decisions holding that Hobbs Act robbery is a "crime of violence" appear to conflict with this Court's precedents, including *Davis*. Certiorari therefore is warranted.

CONCLUSION

For the foregoing reasons, Mr. Myers' request for a certificate of appealability and petition for certiorari should be granted.

Respectfully submitted,

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On Petition for Writ of Certiorari
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CERTIFICATE OF SERVICE

I, Madeline S. Cohen, a member of the Bar of this Court, hereby certify that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and accompanying Motion for Leave to Proceed In Forma Pauperis were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, addressed to:

Solicitor General of the United States
Room 5616
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

I further certify that I deposited the envelope with FedEx in Boulder, Colorado 80305, on January 23, 2020, for overnight delivery, with all postage and fees prepaid.

I further certify that on January 23, 2020, I transmitted a copy of these documents electronically to counsel for the respondent at:

Leena.alam@usdoj.gov

Finally, I certify that all parties required to be served have been served.

I declare, under penalty of perjury, that the foregoing certification is true and correct.

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CERTIFICATE OF MAILNG

I, Madeline S. Cohen, a member of the Bar of this Court, hereby certify that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and accompanying Motion for Leave to Proceed In Forma Pauperis, along with all required copies, were sent by FedEx by placing them in a package addressed to:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

I further certify that this package was transmitted to FedEx in Boulder, Colorado on January 23, 2020, for overnight delivery, with all required postage and fees prepaid.

Finally, I certify that all parties required to be served have been served.

I declare under penalty of perjury that the foregoing certification is true and correct.

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APPENDIX A

United States v. Myers
Decision of the U.S. Court of Appeals for the Tenth Circuit
November 27, 2019

FILED
United States Court of Appeals
Tenth Circuit

November 27, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KALEB JERMAINE MYERS, a/k/a Gurillo,

Defendant - Appellant.

No. 18-5109
(D.C. Nos. 4:15-CV-00215-CVE-PJC &
4:12-CR-00196-CVE-2)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **BRISCOE**, **McHUGH**, and **MORITZ**, Circuit Judges.

Defendant Kaleb Jermaine Myers seeks a certificate of appealability ("COA") to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. *See* 28 U.S.C. § 2253(c)(1)(B) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255."). Myers also has an outstanding motion for remand. We deny the request for a COA and the motion for remand.

[*] This order 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.

A. The Certificate of Appealability

A jury convicted Myers of two counts of possessing and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c); each count alleged Hobbs Act robbery in violation of 18 U.S.C. § 1951 as the underlying crime of violence.

Myers, relying on *United States v. Johnson*, 576 U.S. ---, 135 S. Ct. 2551 (2015), challenges his conviction. He argues that Hobbs Act robbery is not a crime of violence under § 924(c)'s elements clause because it is "indivisible," and the least-culpable conduct does not meet the requirements of a crime of violence. *See* Aplt.'s Br. at 15–18. He requests this court issue a COA on this issue.

No "jurist[] of reason" would conclude that Myers' petition states a valid claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As Myers himself acknowledges, this court has previously held that Hobbs Act robbery satisfies § 924(c)'s elements clause. *See* Aplt.'s Br. at 19, citing *Melgar-Cabrera*, 892 F.3d 1053, 1064 (10th Cir. 2018). Myers argues that *United States v. Davis*, --- U.S. ---, 139 S. Ct. 2319 (2019) qualifies as "intervening Supreme Court authority" contrary to that prior decision, and that we may therefore reevaluate *Melgar-Cabrera*. Aplt.'s Br. at 20. Specifically, Myers argues that *Davis*, which also dealt with § 924(c) and Hobbs Act robbery, "appears to have suggested" that all of the defendants' § 924(c) convictions in *Davis* were in question. *Id.*

But *Davis* holds only that § 924(c)(3)(B)'s residual clause is unconstitutionally vague. It does not even "appear to suggest" that Hobbs Act robbery is *not* a crime of violence under the elements clause. An examination of the record in *Davis* makes clear that the Hobbs Act robbery count at issue there, Count 7, could be a predicate crime of

violence under § 924(c). *See United States v. Davis*, 903 F.3d 483, 485 (5th Cir. 2018) *aff'd in part, vacated in part* 139 S. Ct. 2319 (2019). However, aiding and abetting a conspiracy to commit Hobbs Act robbery was only covered by the residual clause. *Id.* Because one count was vacated, the defendants were entitled to a full resentencing. *Davis*, --- U.S. ---, 139 S. Ct. at 2336. This procedural posture does not cause us to read *Davis* as support for concluding that Hobbs Act robbery is not a crime of violence under § 924(c).

And even if *Davis* "appeared to suggest" that Hobbs Act robbery might not be a crime of violence under § 924(c)(3)(A), and we could reconsider *Melgar-Cabrera*, we would reach the same conclusion: Hobbs Act robbery is a crime of violence under the elements clause of § 924(c), and the "elements versus means" argument Myers puts forward does not change that analysis. *See, e.g.*, *United States v. Jefferson*, 911 F.3d 1290, 1296–98 (10th Cir. 2018) (rejecting the same argument Myers makes) *petition for cert. filed*, (U.S. May 17, 2019) (No. 18–9325) *and United States v. Nguyen*, 744 F. App'x 550, 552 (10th Cir. 2018); *see also United States v. Harris*, 761 F. App'x 852, 854 (10th Cir. 2019) (rejecting the argument that *Stokeling v. United States*, --- U.S. ---, 138 S. Ct. 1438 (2018) had any impact on *Melgar-Cabrera*, and denying a COA on those grounds); *accord United States v. Johnson*, 765 F. App'x 415, 416 (10th Cir. 2019). *Melgar-Cabrera* is still binding precedent on this court, and, therefore, Myers has not identified a viable constitutional challenge of his sentence.

B. The Motion for Remand

Myers has also filed a motion for remand, arguing: (1) that the district court should consider in the first instance whether *Davis* impacts the § 924(c) counts; (2) that the district court should consider the application of the First Step Act to Myers' § 924(c) counts; (3) that additional ineffective assistance of counsel claims may have been overlooked, and (4) appointing the same Federal Public Defender's Office to brief the § 924(c) issue that represented Myers at trial created a conflict of interest precluding amendment of Myers' § 2255 motion to include additional claims.

Whatever the merits of these arguments, we cannot remand what is not before us. Myers' request for a COA addressed the *Davis* issue, and we have properly considered it. That question need not return to the district court for it to examine in the first instance. The rest of Myers' arguments are not presented on appeal. His notice of appeal does include the district court's dismissal of his other ineffective assistance of counsel claims, but as the motion for remand acknowledges, its articulated claim is new; and on his conflict of counsel issue, nothing was presented to the district court.[1] *See Kibbe v. Williams*, 392 F. App'x 648, 651 (10th Cir. 2010) ("[w]e possess jurisdiction to address only those issues raised in the notice of appeal") (citing *Foote v. Spiegel*, 188 F.3d 1416, 1422 (10th Cir. 1997)); *see also United States v. VanDeMerwe*, 527 F. App'x 745, 749

[1] As to the First Step Act, we agree: the district court is the proper entity to consider modifying Myers' sentence. However, our remanding this matter is not the appropriate vehicle. *See* 18 U.S.C. § 3582(c)(1)(B); *see also United States v. White*, 765 F.3d 1240, 1244 (10th Cir. 2014) ("[a] district court is authorized to modify a Defendant's sentence only in specified instances where Congress has expressly granted the court jurisdiction to do so") (quoting *United States v. Blackwell*, 81 F.3d 945, 947 (10th Cir. 1996)).

(10th Cir. 2013) ("[The defendant] did not make these arguments before the district court. They may not, therefore, form the basis of a request for a COA."); *Parker v. Workman*, 149 F. App'x 753, 755 (10th Cir. 2005) ("[w]e . . . decline to issue a COA based on an argument that was not raised below").

For these reasons, Myers' request for a COA is DENIED, his motion for remand is DENIED, and this matter is DISMISSED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

APPENDIX B

United States v. Myers
Decision of the U.S. District Court,
Northern District of Oklahoma
September 13, 2018

Attachment 2

Judgment of the District Court
September 13, 2018
ECF # 180; ROA Vol. 1 at 430

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 12-CR-0196-02-CVE**
	)	**(15-CV-0215-CVE-PJC)**
KALEB JERMAINE MYERS,	)	
	)	
Defendant.	)	

OPINION AND ORDER

Now before the Court is defendant's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (Dkt. # 124), as well as defendant's reply (Dkt. # 142), in which he added a claim under Johnson v. United States, 135 S. Ct. 2551 (2015).[1] Section 2255 provides that "[a] prisoner in custody under 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 . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a).

I.

On December 18, 2012, a jury found defendant guilty of five counts, including two counts of Hobbs Act robbery and aiding and abetting in violation of 18 U.S.C. §§ 1951 and 2(a), and two counts of possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and (c)(1)(C)(i). Dkt. ## 66, 90. On April 23, 2015, defendant filed a motion under

[1] The Supreme Court issued its decision in Johnson after defendant had filed his § 2255 motion. Defendant filed his reply containing his Johnson claim within the one-year limitations period for such claims.

28 U.S.C. § 2255, asserting five grounds of ineffective assistance of counsel (Dkt. # 124). In his reply (Dkt. # 142), defendant added a sixth claim for relief, arguing that the underlying offenses of Hobbs Act robbery and aiding and abetting are not crimes of violence under 18 U.S.C. § 924(c) based on the Supreme Court's decision in Johnson. Id. at 74. On August 24, 2016, this Court denied defendant's claims of ineffective assistance of counsel (Dkt. # 143), but stayed defendant's Johnson claim pending a decision by the Tenth Circuit Court of Appeals in United States v. Hopper, No. 15-2190, as to the impact of the Johnson decision on § 924(c)(3).[2] Id. at 16-18. Thereafter, the Tenth Circuit addressed the impact of Johnson on one subpart of § 924(c)(3) in United States v. Salas, 889 F.3d 681 (10th Cir. 2018), and found § 924(c)(3)(B) to be unconstitutionally vague based on Supreme Court precedent. Id. at 686. On June 6, 2018, this Court lifted the stay, appointed counsel for defendant, and ordered plaintiff to file a supplemental response addressing the impact of Salas on defendant's Johnson claim (Dkt. # 175). Two days later, the Tenth Circuit specifically addressed whether Hobbs Act robbery is a crime of violence under the remaining subpart of § 924(c)(3), in United States v. Melgar-Cabrera, 892 F.3d 1053 (10th Cir. 2018), and held that it does in fact constitute a crime of violence under § 924(c)(3)(A). Id. at 1066.

II.

Defendant argues that his convictions under § 924(c) are unconstitutional pursuant to the Supreme Court's decision in Johnson, and thus should be vacated or set aside. Specifically, defendant argues that his underlying offenses of Hobbs Act robbery and aiding and abetting fail to

[2] Section 924(c)(3) is the subsection of the statute that defines "crime of violence" for the purposes of § 924(c).

qualify as crimes of violence under § 924(c). For the purpose of a conviction under § 924(c), § 924(c)(3) defines "crime of violence" as 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. § 924(c)(3). Section 924(c)(3)(A) is known as the "elements clause," and § 924(c)(3)(B) is known as the "residual clause."

As both parties acknowledge in their supplemental briefs, in Salas the Tenth Circuit held that the definition of "crime of violence" under the residual clause of § 924(c)(3) is unconstitutionally vague.[3] Salas, 889 F.3d at 686. Thus, pursuant to Tenth Circuit precedent, the Court finds that the residual clause of § 924(c)(3) cannot provide the basis for qualifying defendant's underlying offenses as crimes of violence.

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[3] The Tenth Circuit relied on Johnson and Sessions v. Dimaya, 138 S. Ct. 1204 (2018). In Johnson, the Supreme Court invalidated the residual clause of § 924(e)(2)(B), defining "violent felony," and found it to be unconstitutionally vague. Johnson, 135 S. Ct. at 2556-57. In Dimaya, the Court relied on its Johnson decision to find that the similarly worded residual clause of 18 U.S.C. § 16(b), defining "crime of violence," is also unconstitutionally vague. Dimaya, 138 S. Ct. at 1210. In deciding Salas, the Tenth Circuit determined that the Supreme Court's reasoning in Dimaya applies equally to § 924(c)(3)(B), whose language is identical to § 16(b), and thus held that § 924(c)(3)(B) is unconstitutionally vague. Salas, 889 F.3d at 686. Shortly thereafter, the Tenth Circuit issued its decision in Hopper, stating that its decision in Salas resolved the case. United States v. Hopper, 723 F. App'x 645, 646 (2018).

The only remaining basis for treating defendant's underlying offenses as crimes of violence is the elements clause, § 924(c)(3)(A).[4] Defendant argues that his underlying offenses of Hobbs Act robbery and aiding and abetting fail to constitute crimes of violence under § 924(c)(3)(A). However, the Tenth Circuit's recent holding in Melgar-Cabrera, which is binding precedent on this Court, forecloses that argument.[5] Specifically, the Tenth Circuit held that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A).[6] Melgar-Cabrera, 892 F.3d at 1066. Here, although defendant was convicted of both Hobbs Act robbery and aiding and abetting, such a distinction has no bearing on the Court's conclusion. In United States v. Deiter, 890 F.3d 1203 (10th Cir. 2018), the Tenth Circuit rejected the argument that aiding and abetting under 18 U.S.C. § 2 must be analyzed separately from the underlying crime in determining whether a prior conviction is a violent felony

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4 The Tenth Circuit's determination that § 924(c)(3)(B) is unconstitutionally vague does not affect this Court's analysis under § 924(c)(3)(A). See Melgar-Cabrera, 892 F.3d at 1060 n.4 (stating that Salas does not affect Court's conclusion that Melgar-Cabrera's underlying offense is a crime of violence under the elements clause).

5 Defendant's counsel seems to acknowledge as much. Defendant's supplemental brief does not dispute–and, in fact, it concedes–that this Court must reject defendant's Johnson claim under the controlling precedent. Rather, defendant's argument, which he submits in order to preserve it for a possible appeal, is that the Tenth Circuit decided Melgar-Cabrera incorrectly. This Court is bound by Tenth Circuit precedent, however, and thus does not address this argument.

6 The Tenth Circuit's decision in United States v. O'Connor, 874 F.3d 1147 (10th Cir. 2017), does not impact this conclusion. In O'Connor, the court held that Hobbs Act robbery was not a crime of violence under U.S.S.G. § 4B1.2(a)(1); however, the Court noted that, while § 4B1.2(a)(1) has language similar to § 924(c)(3)(A), it is not identical. Id. at 1158. Thus, the Tenth Circuit explicitly limited its holding in O'Connor: "There is nothing incongruous about holding that Hobbs Act robbery is a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A), which includes force against a person or property, but not for purposes of U.S.S.G. § 4B1.2(a)(1), which is limited to force against a person." Id. In Melgar-Cabrera, the Tenth Circuit reaffirmed its conclusion that O'Connor has no bearing on § 924(c)(3)(A), stating "we see no inconsistencies between our opinion here and O'Connor." Melgar-Cabrera, 892 F.3d at 1066 n.7.

under § 924(e)(2)(B). Deiter, 890 F.3d at 1214. Rather, in noting that "'it is well established that aiding and abetting is not an independent crime under 18 U.S.C. § 2'" and that it "'simply abolishes the common-law distinction between principal and accessory,'" the Tenth Circuit held that the proper approach is to look to the underlying statute of conviction to decide whether the elements clause of § 924(e)(2)(B) is satisfied. Id. at 1214-16 (quoting United States v. Cooper, 375 F.3d 1041, 1049 (10th Cir. 2004)). The Tenth Circuit suggested that the same approach applies in the context of determining whether an underlying offense satisfies the elements clause of § 924(c)(3). See id. at 1215-16 (discussing, as support for its holding, Eleventh Circuit and Sixth Circuit case law holding that aiding and abetting Hobbs Act robbery is a crime of violence under § 924(c)(3) because Hobbs Act robbery is a crime of violence). Thus, pursuant to Tenth Circuit precedent, the Court finds that defendant's underlying offenses of Hobbs Act robbery and aiding and abetting constitute crimes of violence under the elements clause of § 924(c)(3). Accordingly, the Court finds that defendant's § 2255 motion (Dkt. ## 124, 142) should be denied.

III.

Pursuant to 28 U.S.C. § 2253, a defendant is required to obtain a certificate of appealability before appealing a final order in a proceeding under 28 U.S.C. § 2255. Section 2253(c) instructs that the court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right," and the court "indicates which specific issue or issues satisfy [that] showing." A defendant can satisfy that standard by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Slack v. McDaniel, 529 U.S. 473 (2000) (citing Barefoot v. Estelle, 463 U.S. 880, 893 (1983)). After considering the record in this case, the Court concludes

that a certificate of appealability should not issue because defendant has not made a substantial showing of the denial of a constitutional right. The Court determines that Johnson had no impact on defendant's sentence, because defendant's underlying offenses qualify as crimes of violence under the elements clause of § 924(c)(3). The Court does not find that the issues raised by defendant are debatable among jurists or that the Tenth Circuit would resolve the issues differently, especially in light of the Tenth Circuit's recent decisions in Salas, Melgar-Cabrera, and Deiter. Therefore, defendant has not made a substantial showing of the denial of a constitutional right.

IT IS THEREFORE ORDERED that defendant's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (Dkt. ## 124, 142) is **denied**. A separate judgment is entered herewith.

IT IS FURTHER ORDERED that a certificate of appealability should not be issued because defendant has not made a substantial showing of the denial of a constitutional right.

DATED this 13th day of September, 2018.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE