No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

JUSTIN DOUGLAS JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A person can be convicted of robbery under the Hobbs Act, codified at 18 U.S.C. § 1951, by placing another in "fear of injury, immediate or future," to persons or property. In *United States v. Chea*, a district court held that Hobbs Act robbery does not meet the force clause of 18 U.S.C. § 924(c) because the offense can be committed by causing fear of future injury to property, which does not meet the physical force requirement of § 924(c)(3). No. 98-cr-40003-2 CW, 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019). The Ninth Circuit summarily reversed *Chea* based on *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), *petition for certiorari filed*, No. 20-1000 (U.S. Jan. 21, 2021), in which the Ninth Circuit held that attempted Hobbs Act robbery constitutes a "crime of violence" under § 924(c). *United States v. Chea*, No. 19-10438, Order (9th Cir. June 24, 2021). This Court requires that a certificate of appealability issue under 28 U.S.C. § 2253(c)(2) when reasonable jurists could debate whether "the petition should have been resolved in a different manner." *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Despite the reasoned opinion in *Chea*, the court below refused to issue a certificate of appealability. The question presented is:

> Should the Ninth Circuit have issued a certificate of appealability on the issue of whether conviction for Hobbs Act robbery qualified as a "crime of violence" to support an 84-month sentence enhancement imposed pursuant to 18 U.S.C. § 924(c)?

PARTIES TO THE PROCEEDINGS

Justin Jones is a federal prisoner serving the sentence imposed in the proceedings underlying this case.

RELATED PROCEEDINGS

There are no proceedings that should be deemed directly related.

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JUSTIN DOUGLAS JONES,

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For The Ninth Circuit

The petitioner, Justin Douglas Jones, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 14, 2021, denying the petitioner's request for a certificate of appealability.

1. Opinions Below

The Oregon district court entered an order denying relief under 28 U.S.C. § 2255 on March 9, 2021. Appendix 1. On March 14, 2021, the district court declined to issue a certificate of appealability. Appendix 4. On May 14, 2021, the Ninth Circuit denied Mr. Jones's request for issuance of a certificate of appealability. Appendix 6.

2. Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (2008).

3. Relevant Constitutional And Statutory Provisions

Congress authorizes mandatory minimum consecutive sentences for "crimes of violence" committed with a firearm:

> (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.

18 U.S.C. § 924(c)(1). The statutory definition of "crime of violence" includes a force clause and a residual clause:

> (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. § 924(c). Section 924(c) is set out in full in the Appendix at 7.

The Hobbs Act criminalizes robbery and extortion affecting interstate commerce:

> 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.

18 U.S.C. § 1951(a). The statute defines "robbery" and "extortion":

> (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.

18 U.S.C. § 1951(b). Section 1951 is set out in full in the Appendix at 9.

To appeal the denial of a motion to vacate sentence under 28 U.S.C. § 2255, the movant must obtain a certificate of appealability:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253(c). The statute is set out in full in the Appendix at 10.

4. Statement Of The Case

On November 13, 2017, Mr. Jones pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g) (Count One), Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (Count Two), and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (Count Three). The offense underlying the § 924(c) count is Count Two's Hobbs Act robbery charge. The district court sentenced Mr. Jones on March 20, 2018, to 71 months to be served concurrently on the felon-in-possession and Hobbs Act robbery counts, followed by a consecutive mandatory 84-month sentence on the § 924(c) count—totaling 155 months. Mr. Jones did not appeal.

On April 4, 2019, Mr. Jones timely filed for relief from his § 924(c) sentence pursuant to 28 U.S.C. § 2255. On June 24, 2019, this Court held that § 924(c)'s residual clause is unconstitutionally vague in violation of the Due Process Clause. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). On November 9, 2020, Mr. Jones amended his § 2255 petition to request relief under *Davis*. Mr. Jones argued that his conviction and sentence under 18 U.S.C. § 924(c) should be vacated because, given *Davis*, interference with commerce by robbery does not qualify as a § 924(c) crime of violence. The district court denied Mr. Jones's motion on February 8, 2021, citing to the Ninth Circuit's opinion in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020). Appendix 1.

Mr. Jones timely appealed the district court's denial of relief to the Ninth Circuit on February 22, 2021. On March 9, 2021, the district court denied Mr. Jones's request for a

certificate of appealability. Appendix 4. Consequently, Mr. Jones sought a certificate of appealability from the Ninth Circuit. 9th Cir. R. 22-1(d). On May 14, 2021, a Ninth Circuit panel denied Mr. Jones's request for a certificate of appealability in an unpublished order. Appendix 6.

5. Reasons For Granting The Writ

I. The Court Should Resolve The Substantial Question Whether Hobbs Act Robbery Is A "Crime Of Violence" Under 18 U.S.C. § 924(c).

Mr. Jones's § 924(c) conviction for use of a firearm during and in relation to a "crime of violence" should be invalidated because the "crime of violence" element is not satisfied by the charged predicate offense of Hobbs Act robbery. The Ninth Circuit erred in denying Mr. Jones's request for a certificate of appealability on this issue because the question remains subject to debate by "reasonable jurists." *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016).

Section 924(c) provides for graduated, mandatory consecutive sentences for using or carrying a firearm during and in relation to a crime of violence. 18 U.S.C. § 924(c)(1)(A), (B). Under § 924(c)(3), "crime of violence" is defined as:

> (3) For purposes of this subsection, the term "crime of violence" means an offense that is a felony and –
>
> > (A) has 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.

The first clause—§ 924(c)(3)(A) —is the force clause (also known as the elements clause). The other—§ 924(c)(3)(B)—is the residual clause, which was stricken as unconstitutionally vague in *Davis*.

Because *Davis* alters the offenses and class of persons punishable under § 924(c), it announced a "substantive" rule that applies retroactively to render Mr. Jones's § 2255 petition timely. *Welch*, 136 S. Ct. at 1264 (2016) (citing *Teague v. Lane*, 489 U.S. 288 (1989), and *Montgomery v. Louisiana*, 577 U.S. 190, 200 (2016)).[1] Substantive interpretations of criminal statutes implicate the constitutional right to be free from incarceration based on a statute that no longer covers the underlying conduct. *See Bousley v. United States*, 523 U.S. 614, 621 (1998) (retroactivity necessary where substantive decision may place conduct beyond the law's proscription); *Fiore v. White*, 531 U.S. 225, 228 (2001) (the Due Process Clause prohibits conviction "for conduct that [the State's] criminal statute, as properly interpreted, does not prohibit.").

For an offense to qualify under § 924(c)'s force clause, the offense must have "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). Thus, the offense must necessarily include two elements: (1) violent physical force capable of causing physical pain or injury to

[1] Every circuit to address this question in a published opinion agrees *Davis* applies retroactively. *See*, *e.g.*, *King v. United States*, 965 F.3d 60, 64 (1st Cir. 2020); *In re Matthews*, 934 F.3d 296, 301 (3d Cir. 2019); *United States v. Reece*, 938 F.3d 630, 634-35 (5th Cir. 2019); *In re Franklin*, 950 F.3d 909, 910-11 (6th Cir. 2019); *Cross v. United States*, 892 F.3d 288, 293-94 (7th Cir. 2018); *In re Mullins*, 942 F.3d 975, 977-79 (10th Cir. 2019); *In re Hammoud*, 931 F.3d 1032, 1039 (11th Cir. 2019).

another person or property, *Stokeling v. United States*, 139 S. Ct. 544, 553 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)); and (2) the use of force must be intentional and not merely reckless or negligent, *Borden v. United States*, 141 S. Ct. 1817, 1824-25 (2021) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)).

Davis confirmed that courts must apply the categorical approach to determine if an offense qualifies as a crime of violence under § 924(c). 139 S. Ct. at 2332-36. In applying the categorical approach, courts examine only the offense's statutory definition, not the underlying facts. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). The means by which a defendant committed the offense "makes no difference." *Id.* at 2251. When the statute underlying the conviction criminalizes conduct that does not require intentional, violent physical force against a person or property of another, the statute is categorically overbroad. *Id*. An overbroad, indivisible statute cannot be a crime of violence. *Id.* at 2248.

A. Hobbs Act Robbery Does Not Meet The Requirements Of § 924(c)(3)(A)'s Force Clause.

Hobbs Act robbery does not require as an element the use of intentional violent force against a person or property. The Hobbs Act prohibits "obstruct[ing], delay[ing], or affect[ing] commerce . . . by robbery." 18 U.S.C. § 1951(a). "Robbery" is defined as:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or *fear of injury, immediate or future, to his person or property*, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b)(1) (emphasis added).

The Ninth Circuit denied Mr. Jones's request for a certificate of appealability by citing to its opinion in *United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020). There, the Ninth Circuit held that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)'s force clause. *Id.* at 1262.[2] The panel in *Dominguez*, however, improperly applied the categorical approach, contradicting this Court's precedent. *Descamps v. United States*, 570 U.S. 254, 265 (2013).

Dominguez reached its ultimate holding by focusing on "placing a *victim* in fear of bodily injury," which it found categorically meets the force clause. 954 F.3d at 1260 (emphasis added). The *Dominguez* panel acknowledged it *did* "*not* analyze whether the same would be true if the target were 'intangible economic interests,' because *Dominguez* fails to point to any *realistic scenario* in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest.'" *Id.* (emphasis added).

This erroneous "realistic scenario" ruling conflicts with this Court's binding precedent because it ignores that federal circuits unanimously interpret Hobbs Act

[2] The Circuits have generally found Hobbs Act robbery qualifies as a crime of violence under § 924(c)'s force clause. *See Dominguez*, 954 F.3d at 1260; *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019); *United States v. Jones*, 919 F.3d 1064, 1072 (8th Cir. 2019); *United States v. Garcia-Ortiz*, 904 F.3d 102, 106-09 (1st Cir. 2018); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060–66 (10th Cir. 2018); *United States v. Fox*, 878 F.3d 574, 579 (7th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017); *United States v. Buck*, 847 F.3d 267, 275 (5th Cir. 2017); *United States v. Robinson*, 844 F.3d 137, 141-44 (3d Cir. 2016); *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2016); *In re St. Fleur*, 824 F.3d 1337, 1340-41 (11th Cir. 2016).

"property" to broadly include "intangible, as well as tangible, property." *United States v. Local 560 of the Int'l Bhd. Of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985). And when the plain statutory language includes conduct broader than the violent crime definition, as it does here, the statute is overbroad. *Descamps*, 570 U.S. at 265. The Ninth Circuit, by following *Dominguez* to deny Mr. Jones's request for a certificate of appealability, failed to apply the categorical approach that this Court mandated in *Descamps*.

Dominguez further ignored the Hobbs Act's plain language that a robbery can be committed by threats of future harm to intangible property. Such threats do not involve the violent physical force that § 924(c)(3)(A) requires. Where the statutory text itself includes conduct broader than the crime of violence definition, "the inquiry is over" because the statute is facially overbroad. *Descamps*, 570 U.S. at 265. Thus, controlling precedent from this Court demonstrates the statute's plain language is overbroad, so no further inquiry is appropriate.

B. In Any Event, The Courts Below Should Have Issued A Certificate Of Appealability Because A Reasonable Jurist Has Already Determined That Hobbs Act Robbery Does Not Qualify As A § 924(c) Crime Of Violence.

By treating *Dominguez* as determinative of the certificate of appealability, the lower courts failed to follow this Court's precedent on the correct standard for issuance of a certificate of appealability. The question is not whether the appellant should prevail: "Obtaining a certificate of appealability 'does not require a showing that the appeal will succeed,' and 'a court of appeals should not decline the application ... merely because it

believes the applicant will not demonstrate an entitlement to relief.'" *Welch*, 136 S. Ct. at 1263-64 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003)). Given the reasoned opinion in *United States v. Chea*, No. 98-cr-40003-2 CW, 2019 WL 5061085, at *8-13 (N.D. Cal. Oct. 2, 2019), the "reasonable jurist" standard is easily met because reasonable jurists would not consider the movant's position, adopted in a judge's opinion, "to be beyond all debate." *Id*. at 1264 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). In *Chea*, the district court thoroughly detailed how Hobbs Act robbery can be committed by causing fear of future injury to intangible property and, thus, does not qualify under § 924(c)'s force clause.

First, the Hobbs Act's plain language criminalizes a threat of "injury, immediate *or future*, to his person or property." 18 U.S.C. § 1951(b)(1) (emphasis added). Courts recognize that, based on its plain language, Hobbs Act robbery can be committed by threats to property. *See United States v. O'Connor*, 874 F.3d 1147, 1154, 1158 (10th Cir. 2017) ("Hobbs Act robbery criminalizes conduct involving threats to property," and "Hobbs Act robbery reaches conduct directed at 'property' because the statute specifically says so"). In the context of this Court's precedent, this type of future threat is far from the core of conduct covered by a "crime of violence." *Chea*, 2019 WL 5061085, at *8 ("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.").

Second, the Hobbs Act's plain language does not require the use or threats of violent physical force when causing fear of future injury to property. *Chea*, 2019 WL 5061085, at

*8 ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.") (citing *Leocal*, 543 U.S. at 9). "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." *Chea*, 2019 WL 5061085 at *22. This Court reinforced the need for physical force by its definition in *Stokeling*, 139 S. Ct. at 554. As in the "violent felony" context of *Borden*, "If any—even the least culpable—of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the federal standard, and so cannot serve as an ACCA predicate." 141 S. Ct. at 1822 (citing *Johnson*, 559 U.S. at 137).

Third, "fear of injury" to property includes not only fear of future physical damage to tangible property, but also a fear of future economic loss or damage to intangible property. *See*, *e.g.*, *United States v. Brown*, No. 11-cr-334-APG, ECF No. 197 (D. Nev. July 28, 2015) (providing Hobbs Act robbery jury instruction that "property" includes "money and other tangible and intangible things of value" and fear as "an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm"); *United States v. Nguyen*, 2:03-cr-00158-KJDPAL, ECF No. 157 at p. 28 (D. Nev. Feb. 10, 2005) (providing Hobbs Act robbery jury instruction that "fear" includes "worry over expected personal harm or business loss, or over financial or job security"). Federal circuits have long been in accord, unanimously interpreting Hobbs Act "property" to broadly include "intangible, as well as tangible, property." *Local 560*, 780 F.2d at 281; *see also United States v. Debs*, 949 F.2d 199, 201 (6th Cir. 1991) ("[T]he concept of property under the

Hobbs Act is not limited to tangible property, but also includes any valuable right considered as a source or element of wealth.") (internal quotation and citation omitted).

Fourth, "fear of injury" does not encompass violent force. Instead, the statute expressly provides other alternative means encompassing violent force: "actual or threatened force, or violence, or fear of injury, immediate or future." 18 U.S.C. § 951(b)(1). Canons of statutory interpretation require giving each word meaning: "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." *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *see 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.'") (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). Thus, "[i]nterpreting '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." *Chea*, 2019 WL 5061085, at *9.

Fifth, intangible property—by definition—cannot be in the victim's physical custody. This "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." *Chea*, 2019 WL 5061085 at *9 (citing *United States v. Camp*, 903 F.3d 594, 602 (6th Cir. 2018)) (noting Hobbs Act robbery can be committed by "threats to property alone" and such threats "whether immediate or future—do not necessarily create a danger to the person"). Therefore, an even less violent incident

than the type found insufficient in *Stokeling* results in criminal liability under the Hobbs Act.

Hobbs Act robbery can be committed by means of non-violent threats of future harm to an intangible property interest. Such threats are not threatening physical force—let alone violent physical force against a person or property as required by the § 924(c)(3)(A) force clause. Thus, Hobbs Act robbery is overbroad and cannot be a categorical "crime of violence" after *Davis*. The denial of the certificate of appealability should be vacated, and the certificate granted, in light of the powerful arguments – articulated already by a reasonable jurist – that a different result could be reached.

C. The Hobbs Act Robbery Statute Is Indivisible

The *Dominguez* panel, in a footnote, summarily stated § 1951(a) is "divisible" because it contains two separate offenses, robbery and extortion, but conducted no divisibility analysis. 954 F.3d at 1259 n.3. However, even if the predicate offense is Hobbs Act robbery, rather than extortion, the Hobbs Act defines "robbery" in overbroad terms that are indivisible.

Hobbs Act robbery is defined as an unlawful taking or obtaining "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1). The listed means of committing robbery—"actual or threatened force, or violence, or fear of injury"—are indivisible.

A statute is only "divisible" when it contains "multiple alternative elements" of functionally separate crimes. *Mathis*, 136 S. Ct. at 2249; *see also United States v. Dixon*,

805 F.3d 1193, 1198 (9th Cir. 2015) ("A statute is not divisible merely because it is worded in the disjunctive."). "[A] court must determine whether a disjunctively worded phrase supplies 'alternative elements,' which are essential to a jury's finding of guilt, or 'alternative means,' which are not." *Id.*; *see also Mathis*, 136 S. Ct. at 2248-50 (distinguishing alternative elements from alternative means of committing the offense under categorical divisibility analysis).

The Hobbs Act's definition of robbery is not divisible. The robbery definition plainly lists the alternative ways of committing the offense, provided explicitly as "means," stating the offense is committed "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1). The express use of "means" forecloses treatment as separate elements. *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end."). Accordingly, Hobbs Act robbery is not a "crime of violence" under the force clause because it is overbroad and indivisible.

Because Mr. Jones's conviction for Hobbs Act robbery cannot support his § 924(c) conviction, he met the standard for a certificate of appealability by making a "substantial showing of the denial of a constitutional right" within the meaning of § 2253(c)(2). The Ninth Circuit erred by denying a certificate simply based on its case rejecting the argument without analysis of whether reasonable jurists could disagree. Accordingly, the judgment

should be vacated and the case remanded for further proceedings consistent with this Court's grant of relief.

II. In The Alternative, Proceedings In This Matter Should Be Stayed Pending The Resolution Of The Pending *Dominguez* And *Taylor* Petitions For Writs Of Certiorari.

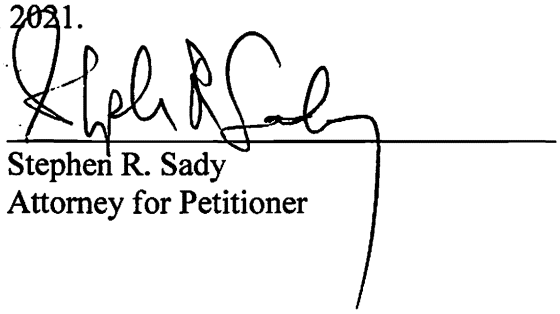
This Court has pending before it petitions involving the question whether attempted Hobbs Act robbery constitutes a "crime of violence" under the categorical approach. In *United States v. Taylor*, No. 20-1459, 2021 WL 2742792, at *1 (U.S. July 2, 2021), this Court granted a petition with the following issue presented: "whether attempted Hobbs Act robbery, 18 U.S.C. § 1951(a) (2018), categorically qualifies as a predicate crime of violence for purposes of § 924(c)." Similarly, in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), *petition for cert. pending*, No. 20-1000 (filed Jan. 21, 2021), this Court has pending the same issue in the case upon which the Ninth Circuit relied in summarily reversing the *Chea* district judge's opinion. The *Chea* opinion that was reversed based on *Dominguez* held that Hobbs Act robbery does not categorically constitute a "crime of violence" within the meaning of § 924(c).

The pendency of these cases supports issuance of a certificate of appealability as demonstrating that the scope of the Hobbs Act under the categorical approach involves an evolving area of the law. Further, the resolution of the cases on attempted robbery may illuminate issues raised in this case. For that reason, this Court should grant relief to Mr. Jones or, in the alternative, stay this case pending final resolution of *Taylor* and *Dominguez*.

6. Conclusion

Jurists of reason could, and do, debate whether Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c). Mr. Jones requests that this Court grant his petition, vacate the judgment below, and remand the case for issuance of a certificate of appealability and briefing on the merits of the movant's claims.

Dated this 24th day of September, 2021.



Stephen R. Sady
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA

Plaintiff,

v.

JUSTIN JONES,

Defendant.

No. 1:15-cr-00288-MC

OPINION AND ORDER

MCSHANE, Judge:

Defendant Justin Jones moves to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, arguing that his conviction of Hobbs Act robbery is no longer a "crime of violence" after the Court's decision in *United States v. Davis*. *See* 139 S. Ct. 2319 (2019) (finding that the residual clause of 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague). Because Hobbs Act robbery remains a "crime of violence," Mr. Jones's motion to vacate his sentence, ECF No. 91, is DENIED.

LEGAL STANDARD

A federal prisoner in custody under sentence may move the sentencing court to vacate, set aside, or correct the sentence on 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 . . . ." 28 U.S.C. § 2255(a). To warrant relief, a petitioner must demonstrate that an error of constitutional magnitude had a substantial and injurious effect or influence on the guilty plea or the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637

(1993); *see also United States v. Montalvo*, 331 F.3d 1052, 1058 (9th Cir. 2003) ("We hold now that *Brecht*'s harmless error standard applies to habeas cases under section 2255, just as it does to those under section 2254.").

DISCUSSION

As the Government noted in its response, the Ninth Circuit has already found that Hobbs Act robbery remains a crime of violence under the "elements clause" of 18 U.S.C. § 924. Gov.'s Resp. 5, ECF No. 100; *United States v. Dominguez*, 954 F.3d 1251, 1261 (9th Cir. 2020). Like Mr. Jones, Monico Dominguez also challenged his Hobbs Act robbery conviction as not qualifying as a crime of violence following *Davis*. *Id.* at 1258 (citing *Davis*, 139 S. Ct. at 2324). While Mr. Dominguez argued that he could not be convicted under the remaining constitutional part of the statute, the elements clause, the panel disagreed. *Id.* at 1260. Using the categorical approach, the *Dominguez* court instead found that "Hobbs Act robbery . . . is categorically a crime of violence under the elements clause, because it 'requires at least an implicit threat to use . . . violent physical force.'" *Id.* (quoting *United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017)).

Despite this precedent, Mr. Jones insists that *Dominguez* is not controlling because it ignores "the precise argument that Mr. Jones has raised in his petition." Def.'s Reply 2, ECF No. 104. From Mr. Jones's perspective, no court has ever considered his contention "that threats of future (rather than immediate) injury to property (rather than persons) can qualify as crimes of violence under the elements clause."[1] *Id.* at 2–3. (citations omitted). But the *Dominguez* court was clear in its categorical analysis that it was considering the "least serious" form of Hobbs Act robbery in its decision. 954 F.3d at 1260. And as noted in *Dominguez*, the categorical analysis does

[1] Mr. Jones points to *United States v. Chea*, No. 4:98-cr-40003-2-CW, 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019) as an on-point treatment of his argument, but *Chea* was decided without the benefit of *Dominguez*. Thus, Mr. Jones's reliance on *Chea* is unavailing.

not require a court to consider every possible set of facts. *Id.* ("We need not analyze whether the same would be true if the target were 'intangible economic interests,' because Dominguez *fails to point to any realistic scenario* in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest." (emphasis added)). The Court therefore agrees with the Government that this Court is bound by *Dominguez* and that Mr. Jones's argument must fail. *See In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) ("Under our law of the circuit doctrine, a published decision of this court constitutes binding authority which must be followed unless and until overruled by a body competent to do so." (quotations and citations omitted)).

Because the *Dominguez* decision is binding, Mr. Jones's conviction stands as a crime of violence under 18 U.S.C. § 924(c)(1)(A).

CONCLUSION

For these reasons, Mr. Jones's motion to vacate his sentence, ECF No. 91, is DENIED.

IT IS SO ORDERED.

DATED this 8th day of February, 2021.

s/Michael J. McShane
Michael J. McShane
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA

Plaintiff,

v.

JUSTIN JONES,

Defendant.

No. 1:15-cr-00288-MC

ORDER

MCSHANE, Judge:

Defendant Justin Jones's motion to vacate his sentence pursuant to 28 U.S.C. § 2255 was denied by this Court. ECF No. 109. The Court must now determine whether to grant or deny a certificate of appealability. *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

A final order in a § 2255 proceeding may be appealed only if a judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability may not be issued unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In *Slack v. McDaniel*, 529 U.S. 473 (2000), the Supreme Court explained that a certificate of appealability under § 2253(c) is warranted when a habeas prisoner makes "a demonstration that ... includes a showing that reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.* at 483–84 (internal quotation marks and citation omitted).

Here, Mr. Jones argued that Hobbs Act robbery was no longer a crime of violence, specifically arguing that no court has ever considered his contention "that threats of future (rather

than immediate) injury to property (rather than persons) can qualify as crimes of violence under the elements clause." Am. Mot. to Vacate or Correct Sent. 2–3, ECF No. 91 (citations omitted). But in *United States v. Dominguez*, this exact argument was considered. *See* 954 F.3d 1251, 1260–62 (9th Cir. 2020). And *Dominguez* was clear in its categorical analysis that it was considering the "least serious" form of Hobbs Act robbery in its decision. *Id.* at 1260. Ultimately, the *Dominquez* decision constitutes binding authority which must be followed by district courts in this circuit. *See In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) ("Under our law of the circuit doctrine, a published decision of this court constitutes binding authority which must be followed unless and until overruled by a body competent to do so." (quotations and citations omitted)).

Because the *Dominguez* decision is binding, and no reasonable jurists could debate whether Mr. Jones's motion to vacate should have been resolved in a different manner, the Court declines to issue a certificate of appealability.

IT IS SO ORDERED.

DATED this 9th day of March, 2021.

s/Michael J. McShane
Michael J. McShane
United States District Judge

FILED

MAY 14 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUSTIN DOUGLAS JONES, Defendant-Appellant.	No. 21-35143 D.C. Nos. 1:19-cv-00496-MC 1:15-cr-00288-MC-1 District of Oregon, Medford ORDER

Before: PAEZ and CALLAHAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020).

Any pending motions are denied as moot.

DENIED.

18 U.S.C. § 924(c)

§ 924. Penalties

(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-

(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.

(B) If the firearm possessed by a person convicted of a violation of this subsection-

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall-

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law-

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person,

including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(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.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under 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 armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section-

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition-

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

18 U.S.C. § 1951

§ 1951. Interference with commerce by threats or violence

(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.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45.

28 U.S.C. § 2255

§ 2255. Federal custody; remedies on motion attacking sentence

(a) 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, 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.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain-

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.