

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROZELLE SUMMERISE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KRISTI A. HUGHES
Law Office of Kristi A. Hughes
P.O. Box 141
Cardiff, California 92007
Telephone: (858) 215-3520

Counsel for Petitioner

QUESTION PRESENTED

Can reasonable jurists debate whether Hobbs Act robbery, *see* 18 U.S.C. § 1951, is a crime of violence under the elements clause of 18 U.S.C. § 924(c) because Hobbs Act robbery doesn't require the use, attempted use, or threatened use of violent physical force, and can instead be committed by threats to harm property in the future?

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Petitioner, Rozelle Summerise, respectfully prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The order denying Petitioner's certificate of appealability is unpublished, and a copy is attached to this Petition in the Appendix. *See App-1.*

The district court's order denying habeas relief was also unreported. A copy of this order is also included in the Appendix. *See App-2 to App-7.*

JURISDICTION

The Ninth Circuit's order denying Petitioner's certificate of appealability was filed on October 21, 2021. App-1. This Court therefore has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3. *See Hohn v. United States*, 524 U.S. 236 (1998) (holding Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a court of appeals panel).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. const. amend v

18 U.S.C. § 924 (c)(3)

18 U.S.C. 1951

28 U.S.C. § 2553

The **Fifth Amendment to the Constitution** provides, in pertinent part, that no person shall “be deprived of life, liberty, or property, without due process of law.”

18 U.S.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.

The “Hobbs Act robbery” statute, **18 U.S.C. § 1951**, reads, in pertinent 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 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.

28 U.S.C. § 2253 governs an appeal from the denial of habeas relief, and provides, in part:

(a) In a habeas corpus proceeding ... before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

...

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

...

(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.

STATEMENT OF THE CASE

Petitioner was convicted of nine counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951, and one count of brandishing a firearm in relation to a “crime of violence,” in violation of 18 U.S.C. § 924 (c)(1). One of the Hobbs Act robbery convictions was alleged in the indictment to be a predicate “crime of violence” for the § 924(c) charge. Petitioner pleaded guilty pursuant to a plea agreement that included appellate and collateral attack waivers, and the parties agreed to a total sentence of 360 months.

For the Hobbs Act robbery convictions, Petitioner was sentenced to 240 months in custody. For the § 924(c) conviction, he received a 360-month sentence. Part of this sentence was imposed pursuant to 18 U.S.C. § 924(c)(1)(A)(ii), which required a mandatory-minimum consecutive sentence of 84 months because a gun was brandished during and in relation to a “crime of violence.” The sentences were run concurrent.

Four years later, this Court decided *United States v. Davis*, 139 S. Ct. 2319 (2019), striking the “residual clause” of § 924(c)(3)(B) as unconstitutionally vague. Petitioner filed a motion under 28 U.S.C. § 2255 seeking to vacate, set aside, or correct his sentence, citing *Davis*. Petitioner argued that under *Davis* his Hobbs Act robbery convictions could not be § 924 (c)(3)(A) predicate crimes of violence. Hobbs Act robbery can be committed by future threats to intangible property, which did not require using or threatening violent physical force against a person, as § 924 (c)(3) required.

The district court denied relief, relying on Ninth Circuit authority, *see United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020), that held Hobbs Act robbery is a crime of violence under the elements clause of § 924 (c)(3). *See App-5* to *App-6*. The court denied a certificate of appealability. *See App-6*.

Petitioner filed a timely notice of appeal and a request for a certificate of appealability with the Ninth Circuit, arguing that Hobbs Act robbery did not contain the required violent physical force element because it could be committed by threatening future injury to intangible property. On October 21, 2021, the Ninth Circuit denied Petitioner's request for a certificate of appealability because he had not made a substantial showing of the denial of a constitutional right. *See App-1*.

REASONS FOR GRANTING THE PETITION

I. Hobbs Act Robbery is not a categorical match for a § 924(c) “crime of violence.”

To determine whether a predicate offense is a crime of violence, this Court applies the familiar categorical approach. *See, e.g., Moncrieffe v. Holder*, 569 U.S 184, 190 (2013). Under this approach, the defendant's actual conduct is “quite irrelevant,” *see id.*, and the Court “ignor[es] the particular facts of the case.” *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Instead the Court looks to the “minimum conduct criminalized by the [predicate] statute,” and presumes the prior conviction rested upon nothing more than this minimum conduct. *Moncrieffe*, 569 U.S. at 190-91. If the statute of conviction “covers more conduct than the generic offense”—here a §924(c)

crime of violence—then the prior conviction is not a qualifying predicate offense. *See Mathis*, 136 S. Ct. at 2248.

For § 924(c), the generic definition of a “crime of violence” is “an offense that is a felony” and 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). “Physical force” must be applied intentionally and cannot be used recklessly or negligently. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004).

Just last term, in *Borden v. United States*, 141 S. Ct. 1817, 1834 (2021), the Court addressed whether an offense could be a “violent felony” under ACCA if it could be committed recklessly; it held it could not. Instead, a violent felony under 18 U.S.C. § 924(e)—which is an offense that has as “an element the use, attempted use, or threatened use of physical force against the person of another”—required a higher *mens rea* than recklessness or negligence, and required the “active employment of force against another person.” *See id.* at 1834. A violent felony requires a mental state that is deliberate, purposeful, or knowing. *See id.* at 1830.

Additionally, the physical force must be must be “violent” physical force that is “capable of causing physical pain or injury.” *See, e.g., Stokeling v. United States*, 139 S. Ct. 544, 553-54 (2019) (physical force is force capable of causing physical injury) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010) (“*Johnson I*”)); *Johnson I*, 559 U.S. at 140-41 (construing “physical force” in definition of “violent felony” to mean “force capable of causing physical pain or injury to another person”).

Applying these principles here, the Court should grant the Petition. It is at least fairly debatable whether Hobbs Act robbery is a § 924(c) crime of violence because the crime can be committed by future threats to injure someone's intangible property, like a business reputation. This means the statute does not have as an element the use, attempted use, or threatened use of force, and it does not require the intentional use of violent physical force, as § 924(c)(3) requires.

Further, the case that underlay the district court's and Ninth Circuit's decision to deny Petitioner's COA request—*Dominguez*—is currently pending before this Court, as Dominguez's cert petition has been pending and re-listed since last term. *See Monico Dominguez v. United States*, Supreme Court Case No. 20-1000. This makes the issue in Petitioner's case at least “debatable,” and a COA is appropriate.

A. Hobbs Act robbery does not have as an element the use, attempted use, or threatened use of force because it can be committed by threatening future harm to property.

By the plain terms of the statute, Hobbs Act robbery can be committed, at a minimum, by threatening “future” “fear of injury” to “property.” *See* 18 U.S.C. § 1951(b)(1) (defining robbery). This explicitly allows someone to commit Hobbs Act robbery by threatening to harm another's property in the future.

Further, the statute doesn't limit the “future” “fear of injury” to tangible property, meaning that a defendant can threaten to harm someone's intangible property in the future, and still come within the statute's reach. For instance, a defendant could commit Hobbs Act robbery by threatening to harm another's

business or economic interests in the future as a means of unlawfully taking or obtaining property.

Yet threatening to harm another's business in the future does not satisfy the level of violent physical force this Court has said is required for a predicate "crime of violence." A defendant must actively employ force against another person. *See, e.g., Borden*, 141 S. Ct. at 1834. And the physical force must be "violent" physical force that is "capable of causing physical pain or injury." *Stokeling*, 139 S. Ct. at 553-54.

Threatening to harm someone's economic interests in the future, as a way of committing robbery, does not necessarily require the active employment of force. Nor does it necessarily require the threatened or actual use of violent physical force. Because the harm is not to a person, but rather to an intangible business interest, the injury can be accomplished without violent physical force. And because it does not necessarily require the force this Court has said is required for a crime of violence under § 924 (c), Hobbs Act robbery is not a crime of violence under the elements clause. *See, e.g., Mathis*, 136 S. Ct. at 2248.

At the very least, based on the plain language of § 1951, which allows for threats to harm intangible property in the future, it is at least fairly "debatable" whether Hobbs Act robbery has the element of a threatened use of force. And without this element, it is not a categorical match for a § 924 (c) crime of violence. Given this, the standard for a certificate of appealability—whether jurists of reason would find it "debatable" that the petition states a valid claim of the denial of a constitutional right, *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)—was met. Petitioner did not need

to “show that he should prevail on the merits,” *see Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983), but only needed to demonstrate below a “substantial showing of the denial of a constitutional right” to receive a certificate of appealability. 28 U.S.C. § 2253(c)(2). Petitioner met that standard in light of § 1951’s plain text showing that threatening to use violent physical force capable of harming another is not required for a Hobbs Act robbery conviction. Allowing his §924(c) conviction and sentence to stand, even though it was not based on a predicate crime of violence, violated his Fifth Amendment right to Due Process. *See, e.g., In re Winship*, 397 U.S. 358, 364 (1970) (due process clause requires proof beyond a reasonable doubt of each element of the crime). The Court should grant the Petition and order the issuance of a certificate of appealability.

B. In denying Petitioner’s COA request, the district court relied on caselaw that this Court is currently reexamining, meeting the standard for raising a claim that is “fairly debatable.”

In the district court’s order denying Petitioner habeas relief, the court relied on the Ninth Circuit’s decision in *United States v. Dominguez* for its decision. *See App-5* (citing *United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020)). In *Dominguez*, the Ninth Circuit addressed whether the defendant’s Hobbs Act robbery conviction could serve as a predicate crime of violence for his § 924(c) convictions. *See id.* at 1259. The court held that the robbery conviction satisfied § 924(c)’s crime of violence definition under the elements clause because Hobbs Act robbery required at least an implicit threat to use the type of violent physical force necessary

for a crime of violence. *Id.* at 1260. Though the Ninth Circuit denied Petitioner’s request for a COA without discussion, *see* App-1, it more than likely did so because of this binding circuit precedent.

But the defendant in *Dominguez* filed a petition for a writ of certiorari to this Court, and the petition is currently pending. *See* Docket for *Dominguez v. United States*, Supreme Court Case No. 20-1000. Not only did the United States file a response to the petition and the Petitioner replied, but this Court relisted the petition several times last term; it remains pending. This is most likely because the petition raises the same question as the petition in *United States v. Taylor*—whether attempted Hobbs Act robbery is a § 924(c) crime of violence under the elements clause. *See* Petition, Supreme Court Case No. 21-1459. The Court granted certiorari in *Taylor*, and the case was argued in December.

While the Ninth Circuit held in *Dominguez* that attempted Hobbs Act robbery *is* a § 924(c) crime of violence, the Fourth Circuit in the *Taylor* case reached the opposite conclusion, holding that a conviction for attempted Hobbs Act robbery does not necessarily involve the threatened use of violent physical force, so it is not a crime of violence. *See* 979 F.3d 203 (4th Cir. 2020). The fact that there is a circuit split on this issue makes it at least debatable whether Petitioner’s Hobbs Act conviction is a predicate crime of violence. And that this Court granted certiorari and the issue is currently pending furthers the point. Petitioner should have been granted a COA so that he could have at least had the chance to raise further argument. This Court has said that granting a COA is appropriate when the issues are “adequate to deserve

encouragement to proceed further.” *Slack*, 529 U.S. at 483-84. Given that the status of Hobbs Act robbery and attempted Hobbs Act robbery as a § 924 (c) crime of violence is currently being litigated, a COA was warranted so that Petitioner could have “proceed[ed] further” on the issue. *See id.*

Moreover, the fact that the district court relied on caselaw that may be reexamined by this Court in *Dominguez*, and which may result in a narrowing of § 924(c)’s reach regarding Hobbs Act robbery, satisfies the standard for granting a COA. It is at least “fairly debatable” whether Hobbs Act robbery is a categorical match for a § 924(c) crime of violence. The standard for a certificate of appealability was therefore met, *see Slack*, 529 U.S. at 484, and this Court should grant the Petition and order the issuance of a certificate of appealability.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Dated: January 14, 2022

Respectfully submitted,



KRISTI A. HUGHES
Law Office of Kristi A. Hughes
P.O. Box 141
Cardiff, California 92007
Telephone: (858) 215-3520

Counsel for Petitioner