No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KIELAN BRETT FRANKLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Dated June 23, 2022

QUESTIONS PRESENTED

(1) Is substantive reliability required under the due process clause of the Fifth Amendment to the Constitution of the United States when a district court relies on hearsay statements to enhance a person's sentencing Guideline range.

(2) Is aiding and abetting Hobbs Act robbery, 18 U.S.C. § 1951, a "crime of violence," 18 U.S.C. § 924(c) meaning that it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," *id.* 18 U.S.C. § 924(c)(3)(A).

RULE 14.1(b) CERTIFICATE

Petitioner Certifies as follows:

(i) Parties. The parties who appeared before the United States District Court for the District of Montana, Helena Division in the proceedings that resulted in the judgment from which a writ of certiorari is sought were Petitioner Kielan Brett Franklin and Respondent the United States of America. Case 6:19-cr-00006-SEH. Gerald Allen Hiler, Arielle Rose Cowser, and Morgan Victor Pitsch were co-defendants in the prosecution.

(ii) Corporate disclosure statement. No corporation was before the court.

(iii) Related Cases. Co-defendant Arielle Rose Cowser appealed to the Ninth Circuit Court of Appeals. *United States v. Cowser*, No. 20-30131, 2021 U.S. App. LEXIS 34806 (9th Cir. Nov. 23, 2021). Co-defendant Gerald Allen Hiler appealed to the United States Court of Appeals and petitioned the Court for a Writ of Certiorari which was denied. *United States v. Hiler*, No. 20-30060, 2020 U.S. App. LEXIS 36868 (9th Cir. Nov. 19, 2020); Docket No. 21-5340.

United States v. Taylor, 979 F.3d 203 (4th Cir. 2020) holding attempted Hobbs Act robbery is not a crime of violence under 18 U.S.C. §§ 924(c). The Court affirmed on June 21, 2022. *United States v. Taylor*, No. 20–1459, Slip Opinion, (U.S. Supreme Court, June 21, 2022). Mr. Franklin immediately filed a request for extension of time to file his Petition for a Writ of Certiorari.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kielan Brett Franklin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The court of appeals published its opinion denying Mr. Franklin's request for appellate relief. *United States v. Franklin*, 18 F.4th 1105 (9th Cir. 2021). Appendix A.

JURISDICTION

The court of appeals published its opinion on November 23, 2021. Appendix A. Mr. Franklin's timely request for rehearing *en banc* was denied on January 24, 2022. Appendix B. The Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit, extended Mr. Franklin's time to file his petition for writ of certiorari to June 23, 2022. Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The case involves the Fifth Amendment to the Constitution of the United States. Appendix D.

STATEMENT OF THE CASE

Plea bargaining "is the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (internal quotation marks omitted). Once a defendant decides to plead guilty, the sentencing hearing is the most important part of the criminal proceeding. Sentencing hearings, consequently, often turn into mini trials about sentencing Guideline enhancements.

The Due Process Clause is implicated at sentencing. *See Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197 (1977). A constitutional due process violation occurs if hearsay is relied upon at sentencing without adequate indicia of reliability. *See Townsend v. Burke*, 334 U.S. 736 (1978). Mr. Franklin's Fifth Amendment right

to due process was violated when the district court enhanced his sentencing Guideline range under U.S.S.G. § 3C1.1 Adjustment for Obstruction of Justice. The district court relied on unsworn, unconfronted, uncorroborated, and unreliable hearsay from uncredible co-defendants hoping to curry favor with the government.

The Ninth Circuit opinion developed a new disjunctive test under which a hearsay statement may form the basis of a defendant's sentence if it is either "procedurally reliable" or "substantively reliable." *Franklin*, 18 F.4th at 1125. Mr. Franklin respectfully requests the Court conclude substantive reliability, at minimum, is required and order a conjunctive test requiring both substantive reliability and procedural reliability.

Mr. Franklin secondly argues aiding and abetting Hobbs Act robbery is not a crime of violence. Mr. Franklin maintained the issue foreclosed by Ninth Circuit precedent as the only way to carry the claim to the Supreme Court on a petition for certiorari. *See McKnight v. General Motors Corp.*, 511 U.S. 659, 660 (1994). Mr. Franklin drafted his petition respectfully requesting the issue be stayed pending decision of a directly related issue in *Taylor*. The Court decided *Taylor* on June 21, 2022, holding attempted Hobbs Act Robbery is not a crime of violence. *United States v. Taylor*, No. 20–1459, Slip Opinion, (U.S. Supreme Court, June 21, 2022). Mr. Franklin immediately requested an extension of time to file his petition but has not yet received an order.

PRIOR PROCEEDINGS

On September 5, 2019, the government filed an indictment charging Mr. Franklin, Arielle Rose Cowser, Morgan Victor Pitsch, and Gerald Allen Hiler with:

Count I - Conspiracy to Commit Robbery Affecting Commerce, in violation of 18 U.S.C. § 1951(a).

Count II - Robbery Affecting Commerce, and aiding and abetting the same, in violation of 18 U.S.C. §§ 1951(a) and 2.

Count III - Possession of a Firearm in Furtherance of a Crime of Violence, in violation of 18 U.S.C. §§924(c)(1)(A)(i) and (ii), and 2.

On October 25, 2019, Mr. Franklin entered into a plea agreement intending to plead guilty to Counts II and III of the Indictment. A Change of Plea Hearing was held on October 29, 2019. Mr. Franklin made statements related to offense conduct but the change of plea failed and the hearing did not result in change of plea. Mr. Franklin's not guilty pleas were maintained. A Superseding Indictment was then filed which added two new allegations of violation of 18 U.S.C. § 1512 (b)(1) , Attempted Tampering with a Witness.

After switching counsel, Mr. Franklin successfully plead guilty to Count II - Robbery Affecting Commerce in violation of 18 U.S.C. § 1951(a), and aiding and abetting the same, and Count III - Possession of a Firearm in Furtherance of a Crime of Violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and (ii) and 2. The government dismissed Count I and the new Attempted Tampering with a Witness

counts. Mr. Franklin reserved his right to appeal the Court's denial of his pretrial motion to dismiss the § 924(c) count which argued Hobbs Act robbery is not a crime of violence.

A presentence investigation report (PSR) was prepared. The PSR contained a two-level enhancement pursuant to U.S.S.G. § 3C1.1, Adjustment for Obstruction of Justice. After counsel of record took a new position, the undersigned was appointed, and Mr. Franklin filed objections to the U.S.S.G. § 3C1.1 enhancement prior to sentencing. The objections put the government on notice unreliable hearsay should not be relied upon by the district court at sentencing.

Mr. Franklin appeared for sentencing on June 17, 2020. The Court overruled Mr. Franklin's objection that a two-level enhancement pursuant to U.S.S.G. § 3C1.1, Adjustment for Obstruction of Justice was based on unreliable hearsay of co-defendants. The court imposed a sentence of 55 months imprisonment on Hobbs Act robbery and 84 months imprisonment for Possession of a Firearm in Furtherance of a Crime of Violence.

Mr. Franklin timely appealed. After briefing and oral argument, the Ninth Circuit developed a disjunctive test under which a hearsay statement may form the basis of a defendant's sentence if it is either "procedurally reliable" or "substantively reliable." *Franklin*, 18 F.4th at 1125. Mr. Franklin's timely request for rehearing en banc was denied on January 24, 2022, wherein he argued substantive reliability,

at minimum, is required and a conjunctive test with both substantive reliability and procedural reliability is necessary under the Fifth Amendment to the Constitution of the United States.

This petition follows.

FACTUAL BACKGROUND

In the early morning hours of March 8, 2019, Mr. Franklin was involved in the commission of a Robbery Affecting Commerce in violation of 18 U.S.C. § 1951(a). The crime began over a perceived drug debt.

Mr. Fanklin, co-defendant Hiler, and co-defendant Pitsch were all in custody and housed at the Cascade County Detention Center in Great Falls, Montana. After accepting a plea agreement, Hiler was interviewed at Cascade County Detention. Hiler claimed Mr. Franklin was in an adjacent pod and they could communicate. Hiler alleged Mr. Franklin contacted him and asked him to change his testimony regarding the pistols involved in the robbery. Hiler stated Mr. Franklin asked him to (1) testify that Mr. Franklin did not have knowledge of anyone possessing a pistol during the commission of the offense and (2) testify that Mr. Franklin advised both Pitsch and Hiler to stay in the vehicle. Hiler produced two handwritten notes, alleging one was from Mr. Franklin and the second was Hiler's response. Hiler further alleged he was "jumped" by other inmates in the Cascade County Detention Facility at the direction of Franklin and sustained minor injuries in his mouth.

Pitsch was interviewed on the same date at the Cascade County Detention Center. Pitsch stated Mr. Franklin was being housed in the pod adjacent to him and contacted him. According to Pitsch, Mr. Franklin informed Pitsch he was going to be labeled a snitch, which would follow him wherever he went. Pitsch said Mr. Franklin wanted him to be cautious because paper follows you around.

Mr. Franklin objected to the U.S.S.G. § 3C1.1, Adjustment for Obstruction of Justice and argued the co-defendant statements were unreliable, out-of-court hearsay statements that did not have minimal indicia of reliability. *United States v. Pimentel-Lopez*, 859 F.3d 1134 (9th Cir. 2017). The government argued Pitsch and Hilers statements were consistent with each other, were corroborated by the note produced by Hiler, and were consistent with Mr. Franklin's statements at his failed change of plea hearing.

The government did not produce Hiler or Pitsch at sentencing, instead calling FBI Special Agent Jason Bowen, lead investigator in the case, to relay the hearsay statements. On cross examination, SA Bowen testified:

Q	Special Agent Bowen, when you spoke with Mr. Pitsch, did he tell you that Mr. Franklin asked him to change his testimony?
A	No.
Q	So, that does not corroborate what Mr. Hiler told you; does it?
A	Correct.

Q And Mr. Franklin simply said: “Be cautious, because paper follows you around”?

A Yes.

Q Now, when you interviewed Mr. Hiler, he also relayed that Mr. Franklin told him he was not upset that he was testifying; correct?

A I don't recall whether or not he stated that to me verbally, but it is contained in this note.

Q And that he understood why he was changing his plea?

A Yes. Again, contained in the note.

Q And you, in fact, got another note sent to you as part of this investigation; correct?

A I believe -- I believe Mr. Hiler also drafted a note.

Q Do you recall the substance of that note?

A I don't.

***

Q (BY MR. SCHULTE) Special Agent Bowen, do you recognize this letter?

A I do.

Q And if you look at the -- I believe it's lines 4 and 5, what does it say about his plea being pulled?

A Where would you like me to begin?

Q If you'll start: "When my attorney."

A "When my attorney told him he threatened to pull my plea, I said I wouldn't talk to you anymore. That's all I know. Then all this."

Q And is this a true and accurate copy of the note that you received as part of your investigation?

A Yes, it is.

***

Q (BY MR. SCHULTE) So, Mr. Hiler is actively concerned about his benefit for cooperation; correct?

A He indicates that in this note, yes.

Q And he indicates that he is worried about his plea being pulled?

A That is correct.

THE COURT: Well, counsel, at some point in this hearing, I want someone to explain what that phrase "my plea being pulled" means. Because it doesn't tell me anything about how that set of words may relate to this case. I understand it means something to the writer, and perhaps means something -- the same or different to the recipient, but I don't know what it means, because it's not clear from the language used in the document.

MR. SCHULTE: Certainly, Your Honor. Thank you.

Q (By MR. SCHULTE) Special Agent Bowen, have you ever had discussions with defendants in your investigations about pleas being pulled?

A No, I haven't. Mr. Hiler spoke about that during the interview in which I took custody of this note.

Q And what did Mr. Hiler say about his plea being pulled?

A He told me that he said that to get Kielan off of his back, because he was worried about reprisals in the facility.

Q What does it mean to have your plea pulled, as Mr. Hiler explained it to you?

A That he would no longer receive any benefit from the plea agreement, which he had previously entered into with the government.

Q Is he also talking about getting benefit for cooperation?

A I'm sure that he would be.

Q Now, in terms of this alleged assault, this information is only from Mr. Hiler; correct?

A That's correct.

Q And no other interviews were done?

A That is correct.

Q And we have no corroboration whatsoever related to the assault?

A Correct.

Q What other reasons exist for Mr. Hiler to be assaulted?

A In a detention facility, anything.

Q So there could be countless reasons, if he was assaulted, why it happened?

A Yes.

Q Thank you.

The district court did not take argument and, after a 10-minute recess, overruled Mr. Franklin's objection.

REASONS TO GRANT THE PETITION

1. Substantive Reliability is Required when Relying on Hearsay.

The Due Process Clause is implicated at sentencing. *See Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197 (1977). A constitutional due process violation occurs if hearsay is relied upon at sentencing without adequate indicia of reliability. *See Townsend v. Burke*, 334 U.S. 736 (1978). Federal courts apply inconsistent standards in determining whether hearsay is sufficiently reliable to use at sentencing. The due process rights of persons convicted of crimes do not end after change of plea and must be protected at sentencing.

98.3% of federally charged offenders pleaded guilty in fiscal year 2021. This rate has been consistent for more than 20 years. United States Sentencing Commission, *Overview of Federal Cases*, Fiscal Year 2021, page 8. Whether it be the incredible leverage the government can bring to bear through mandatory minimum sentencing or prosecuting cases with little to no defenses, trials are rare

and plea bargaining "is the criminal justice system." *Missouri v. Frye*, 566 U.S. at 144. Sentencing hearings are the new trial paradigm and clarity on reliance upon hearsay to enhance Guideline ranges at sentencing hearings is vital to the integrity of the federal criminal justice system.

The Ninth Circuit requires hearsay statements to bear some indicia of reliability. *See, e.g., United States v. Pimentel-Lopez*, 859 F.3d 1134, 1144 (9th Cir. 2016). The Second Circuit held hearsay can be used at sentencing if the sources are sufficiently independent and similar to corroborate the hearsay evidence. *United States v. Carmona*, 873 F.2d 569, 575 (2d Cir. 1989. In evaluating sufficient indicia of reliability, the Third Circuit held the totality of the circumstances showed hearsay declarations to be reasonably trustworthy and were also corroborated by other witnesses. *United States v. Paulino*, 996 F.2d 1541, 1548 (3d Cir. 1993). The Third Circuit has held this standard [sufficient indicia of reliability] should be applied rigorously. *United States v. Miele*, 989 F.2d 659, 664 (3d Cir. 1993).

The First Circuit found sufficient indicia of reliability and relied upon hearsay because there was nothing inherently unreliable about the hearsay statement and it was corroborated, inter alia, by a lie the defendant told to a guard. *United States v. Cash*, 266 F.3d 42, 44 (1st Cir. 2001). The Tenth Circuit, in evaluating minimal indicia of reliability of hearsay statements, found unsworn hearsay statements made by an unobserved witness and unsupported by other evidence formed an insufficient

predicate for a sentence enhancement. *United States v. Fennell*, 65 F.3d 812, 814 (10th Cir. 1995).

The Seventh Circuit follows a rule that hearsay is permitted in the sentencing context, so long as (1) the evidence is reliable and (2) the defendant is afforded the opportunity to rebut the evidence. *United States v. Campbell*, 985 F.2d 341, 348 (7th Cir. 1993). "The determination of whether hearsay is sufficiently reliable to warrant credence for sentencing purposes necessarily depends upon the particular circumstances of each case." *United States v. Wise*, 976 F.2d 393, 403 (8th Cir. 1992) (en banc), *cert. denied*, 123 L. Ed. 2d 157, 113 S. Ct. 1592 (1993).

When the government offers out-of-court statements to prove facts that significantly increase sentences, the Third Circuit applies a more rigorous degree of scrutiny, requiring sentencing courts to "exercise particular scrutiny of factual findings relating to amounts of drugs involved in illegal operations." *United States v. Brothers*, 75 F.3d 845, 848–49 (3d Cir. 1996). The Seventh Circuit has suggested a heightened form of review is necessary to determine whether hearsay may be used to calculate drug quantities that dramatically impact Guideline ranges. *See United States v. Robinson*, 164 F.3d 1068, 1070–71 (7th Cir. 1999). In vacating and remanding, the Seventh Circuit said it might not be a terribly bad idea to hear from witnesses under oath and noted, "information came to the judge, untested by cross-examination, through the presentence report. And [the witness] statements,

considering the gravity of their consequences, give us pause. *Robinson*, 164 F.3d at 1070.

After examining development of the minimal indicia of reliability case law, the Ninth Circuit developed a new disjunctive test, holding if a hearsay statement is procedurally reliable or substantively reliable, then the hearsay statement may be considered at sentencing. *Franklin*, 18 F.4th at 1125. Procedural reliability standing alone violates due process. Substantive reliability, at minimum, is required and a conjunctive test requiring procedural reliability and substantive reliability is required to rely on hearsay statements at sentencing.

The opinion highlighted the exceptionally important requirement of substantive reliability in its analysis. After enumerating a disjunctive test and finding procedural reliability was met, the majority still considered substantive reliability in its analysis. *Id.* at 1127 Justice Berzon's concurrence emphasizes substantive reliability precedent permeating Ninth Circuit case law, starting with *Weston*.

> "For example, the majority points to *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971), as "stand[ing] for the proposition that if the sentencing process effectively puts the burden of proof on the defendant to refute a damaging hearsay allegation, particularly when the factual basis for believing such a charge is practically nonexistent, that process is legally flawed." [*Franklin*, 18 F.4th at 1118] But, as the majority acknowledges, the reason we were concerned about putting the burden on the defendant in *Weston* to refute the hearsay statements in the presentence report is that we doubted the statements' substantive reliability: "the factual basis for believing the charge was almost nil."

> 448 F.2d at 633. In other words, the government had failed to produce substantive indicia of reliability to support the hearsay statements, instead leaving it to the defendant to refute them."

Id. at 1128

The majority outlines the development of procedural reliability; however, substantive reliability is still prevalent within the cited cases. In *Huckins*, the Ninth Circuit noted the co-defendant's statements were made in the context of plea negotiations with the government in which he "may very well have been hoping to curry favor with law enforcement officials by implicating his accomplice." *United States v. Huckins*, 53 F.3d 276, 279 (9th Cir. 1995). In *Garcia-Sanchez*, substantive reliability was forefront when a case agent testified as to his conclusions of the extent of cocaine conspiracy. The Court highlighted the substantive reliability concerns of the agent having no first-hand knowledge of the conspiracy's sales, no explanation of how the agent arrived at his estimates, the hearsay upon which the agent relied was not revealed, and no reports were produced. *United States v. Garcia-Sanchez*, 189 F.3d 1143, 1148 (9th Cir. 1999).

United States v. Petty, 982 F.2d 1365 (9th Cir. 1993), is the only Ninth Circuit case purported to support procedural reliability, standing alone, providing minimal indicia of reliability to utilize hearsay statements at sentencing. The concurrence again cuts to the meat of the issue.

> "Although it does appear that in *Petty* the defendants had an opportunity to test some of the extrinsic evidence by cross-examination

> (such as the trial testimony), we did not rely on that circumstance to decide the case. Instead, we concluded, albeit with scant reasoning, that the extrinsic evidence "corroborat[ed]" the hearsay statements "sufficiently" to establish their substantive reliability, or at least that the district court did not err in so finding. 982 F.2d at 1369. If we had concluded that the extrinsic evidence did not corroborate the hearsay statements (as Judge Noonan, in dissent, suggested it did not, 982 F.2d at 1372), I do not see how we could have deemed the hearsay statements reliable, regardless whether the extrinsic evidence was subject to cross-examination."
>
> *Id.*, at 1129

The majority's procedural reliability analysis applying the law to Mr. Franklin's facts fundamentally relies on substantive reliability. Cross-examination is the "gold standard" of procedural reliability. *Murdoch v. Castro*, 609 F.3d 983, 1003 (9th Cir. 2010) (en banc) (Kozinski, C.J., dissenting). Mr. Franklin did have the opportunity to cross examine FBI Special Agent Jason Bowen, however, it had no substantive value as there was no investigation and he was simply repeating the hearsay statements of co-defendants Hiler and Pitsch. Cross examination of a case agent regarding co-defendant hearsay statements that were not even investigated does nothing to increase indicia of reliability, highlighting how critical substantive reliability is in evaluating reliability even when elements of procedural reliability exist.

The hearsay statements utilized to enhance Mr. Franklin's sentence were not substantively reliable. A note produced by co-defendant Hiler, based upon a public change of plea hearing, cannot be used to corroborate his own hearsay statements.

Hiler is the only person that claims the note is from Mr. Franklin. There are no marks on the note that identify the author, and the note, and his response, were produced by Hiler prior to receiving any benefit for cooperation. Hiler cannot corroborate his own hearsay statements by producing additional hearsay, i.e., handwritten notes of unknown origin.

Consistency between the note and statements made at Mr. Franklin's failed change of plea do not create substantive reliability. Hiler likely knew the details of the failed change of plea hearing. The hearing occurred on October 29, 2019, and the note was produced on November 13, 2019. The majority of case information is known within the jail populations, the hearing was open to the public, and Hiler had an interest in its outcome due to his cooperation. The Ninth Circuit addressed a similar issue in *McGowan* holding corroboration of a hearsay statement through knowledge of location of the defendant's house was rejected because the declarant had squatted in the home. *United States v. McGowan*, 668 F.3d 601, 607–608 & n.3. (9th Cir. 2012). Similarly, the information contained in the note was available to anyone with an interest in the case after Mr. Franklin's failed change of plea hearing.

Mr. Franklin not having a handwriting analysis completed between disclosure of the PSR applying the enhancement and sentencing does nothing to increase the reliability of the note produced by Hiler. Relying on a lack of handwriting analysis

provided by Mr. Franklin is putting the burden on him to "prove a negative." Sufficient procedural protections did not exist in the face of the hearsay allegations presented by the government.

Hiler's claim he was "slapped around" and the minor injuries in his mouth do not corroborate the hearsay as it was uninvestigated, unconfirmed, and, if he was slapped around, could have resulted for countless other reasons. FBI Special Agent Jason Bowen testified:

Q	Now, in terms of this alleged assault, this information is only from Mr. Hiler; correct?
A	That's correct.
Q	And no other interviews were done?
A	That is correct.
Q	And we have no corroboration whatsoever related to the assault?
A	Correct.
Q	What other reasons exist for Mr. Hiler to be assaulted?
A	In a detention facility, anything.
Q	So there could be countless reasons, if he was assaulted, why it happened?
A	Yes.

Lastly, co-defendant Hiler and Pitsch's hearsay statements do not corroborate each other. Pitsch's hearsay statement was that Mr. Franklin said, "Be cautious, because paper follows you around," while Hiler's hearsay statement was that Mr. Franklin sent him a note trying to get him to testify to specifics and that he was later slapped around. SA Bowen confirmed at sentencing the hearsay statements did not corroborate each other. The statements are similar only in that Mr. Franklin, Hiler, and Pitsch were all housed at Cascade County Detention Center and allegedly had some form of contact with each other. The district court relied upon unsworn, unconfronted, uncorroborated, and unreliable hearsay from uncredible co-defendants to apply the U.S.S.G. § 3C1.1, Adjustment for Obstruction of Justice.

Hearsay statements used at sentencing to increase a defendant's sentencing Guideline range is a question of exceptional importance that impacts every district court across the country. Substantive reliability, at minimum, is required prior to consideration of hearsay statements at sentencing. A conjunctive test calling for substantive reliability and procedural reliability is constitutionally required.

2. Aiding and Abetting Hobbs Act robbery is not a crime of violence.

Mr. Franklin argues aiding and abetting Hobbs Act robbery is not a crime of violence. Mr. Franklin maintained the issue foreclosed by Ninth Circuit precedent as the only way to carry the claim to the Supreme Court on a petition for certiorari. *See McKnight v. General Motors Corp.*, 511 U.S. 659, 660 (1994). Mr. Franklin's

petition was ready to file respectfully requesting the Hobbs Act question presented be stayed pending decision of a directly related issue in *Taylor*. The Court decided *Taylor* on June 21, 2022, holding attempted Hobbs Act robbery is not a crime of violence. *United States v. Taylor*, No. 20–1459, Slip Opinion, (U.S. Supreme Court, June 21, 2022). Mr. Franklin immediately requested an extension of time but has not yet received an order.

No element of attempted Hobbs Act robbery requires the government to prove that Mr. Franklin used, attempted to use, or threatened force. *Taylor* continues the long understanding the "categorial approach" is used to determine whether a federal felony may serve as a predicate for a conviction and sentence under the elements clause of 924(c). *Taylor*, slip op., at 3.

The elements necessary to convict an individual under an aiding and abetting theory are (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense. *United States v. Sayetsitty*, 107 F.3d 1405, 1412 (9th Cir. 1997).

No element of attempted Hobbs Act robbery requires the government to prove that the defendant used, attempted to use, or threatened to use force. *Taylor*, slip

op., at 6. Just as in *Taylor*, no element of aiding and abetting Hobbs Act robbery requires the government to prove that the defendant used, attempted to use, or threatened to use force.

CONCLUSION

Mr. Franklin respectfully requests this Petition for a Writ of Certiorari be granted.

Respectfully submitted this 23rd day of June 2022.

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