IN THE SUPREME COURT OF THE UNITED STATES

HERBERT ISAAC PERKINS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
AFTER DIRECT APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO,
THE HONORABLE KEA W. RIGGS,
UNITED STATES DISTRICT JUDGE,
CASE NOS. 16-CV-0714-KWR/JHR, 07-CR-1010-KWR
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT,
NO. 22-2043

PETITIONER HERBERT ISAAC PERKINS' PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Herbert Isaac Perkins respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Tenth Circuit denying a certificate of appealability under 28 U.S.C. § 2253(c).

QUESTIONS PRESENTED FOR REVIEW

Whether reasonable jurists could debate whether the district court should have resolved the procedural issue differently and addressed the merits of Petitioner Perkins' motion under 28 U.S.C. § 2255 on grounds that Hobbs Act robbery is not categorically a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A).

Whether reasonable jurists could debate whether the district court should have set aside Petitioner Perkins' conviction and sentence on grounds that Hobbs Act robbery is not categorically a crime of violence of purposes of 18 U.S.C. § 924(c)(3)(A).

Whether reasonable jurists could debate whether the district court should have set aside Petitioner Perkins' conviction and sentence on grounds that he had not been convicted of three more violent felonies within the meaning of 18 U.S.C. § 924(e)(2)(B)(i).

OPINIONS BELOW

The order denying certificate of appealability of the United States Court of Appeals for the Tenth Circuit appears at Appendix A to this petition.

The order from the Tenth Circuit authorizing a second or subsequent motion pursuant to 28 U.S.C. § 2255 appears at Appendix B to this petition.

The district court's order denying a certificate of appealability appears at Appendix C to this petition.

The magistrate judge's proposed findings and recommended disposition appear at Appendix D to this petition.

The district court's memorandum opinion and order appears at Appendix E to this petition.

The district court's final judgment appears at Appendix F to this petition.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit denied a certificate of appealability regarding Petitioner's appeal on October 5, 2022. *See* Appendix A. A petition for writ of certiorari is timely if filed on or before January 3, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

FEDERAL STATUTES INVOLVED

The relevant portion of 18 U.S.C. § 924(c)(3)(A) provides as follows: "For purposes of this subsection the term 'crime of violence' means an offense that is a felony and . . . has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . . ."

The relevant portion of 18 U.S.C. § 924(e)(2)(B)(i) provides as follows: "As used in this subsection . . . the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another . . . ."

The relevant portion of 28 U.S.C. § 2253(c)(1) provides as follows: "Unless a circuit judge or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . the final order in a proceeding under section 2255."

STATEMENT OF THE CASE

On March 5, 2008, Petitioner Perkins was convicted of one count of interference with commerce by threats or violence under 18 U.S.C. §§ 1951 & 1952 (Count 1), two counts of discharging a firearm during and in relation to a crime of violence under 18 U.S.C. §§ 924(c)(1)(A)(iii) & 924(c)(1)(C)(i) (Counts 2 and 3), and one count of felon in possession of ammunition under 18 U.S.C. §§ 922(g)(1) & 924(e) (Count 6). He was sentenced to a term of life in prison as to Count 1, ten years as to Count 2, twenty-five years as to Count 3, and 780 months as to Count 6.

Petitioner Perkins appealed to the Tenth Circuit, which affirmed his convictions on August 21, 2009. This Court denied a petition for writ of certiorari on January 15, 2010.

On October 15, 2010, Petitioner Perkins filed a *pro se* 2255 motion, which was denied on March 30, 2011. *See* App. F.

On the basis of this Court's ruling in *Johnson v. United States*, 576 U.S. 591 (2015), Petitioner Perkins sought relief by filing a second 2255 motion. The district court transferred the case to the Tenth Circuit for authorization pursuant to 28 U.S.C. § 2255(h). On September 26, 2019, the Tenth Circuit ordered Petitioner Perkins to address this Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), and the Tenth Circuit's decision in *United States v. Bowen*, 935 F.3d 1091 (10th Cir. 2019). Petitioner Perkins filed a brief addressing those

decisions. On May 15, 2020, the Tenth Circuit granted authorization for Petitioner Perkins to file a second 2255 motion. *See* App. B.

The Tenth Circuit described the three challenges brought by Petitioner Perkins in his 2255 motion as follows:

> Movant, Herbert Isaac Perkins, proceeding through counsel, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion in the district court so he may challenge [1] his convictions and sentence under 18 U.S.C. § 924(c), [2] the enhancement of his sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), and [3] the enhancement of his sentence under the career offender sentencing guideline, U.S. Sentencing Guidelines Manual § 4B1.1 (U.S. Sentencing Comm'n 2007).

App. B at 1.

The Court went on to describe each of the three challenges. *See* App. B at 1-2. The first challenge is described as follows:

> Movant was convicted under § 924(c) of two counts of discharging a firearm during and in relation to a crime of violence. He alleges his convictions are invalid because the underlying offense qualified as a "crime of violence" only as that term is defined in § 924(c)(3)'s residual clause.

App. B at 1. The underlying offense referred to on the first page of the Tenth Circuit's order is Hobbs Act robbery. The district court also recognized that Petitioner Perkins' two 924(c) counts were predicated on the Hobbs Act robbery. In the indictment, Count 2 alleged that Mr. Perkins "did use a firearm, namely, a .45 caliber pistol, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, namely Interference with Commerce by

Threats or Violence, as charged in Count 1 of this indictment." The offense in Count 1 is Hobbs Act robbery. Count 3 contains allegations that are identical to those in Count 2, but naming a different victim. Both Count 2 and Count 3 are expressly predicated on the commission of Hobbs Act robbery as alleged in Count 1 of the indictment.

The Tenth Circuit stated that the residual clause in § 924(c)(3)(B) was invalidated by this in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). *See* App. B at 1.

The Tenth Circuit described the second claim advanced by Petitioner Perkins in his motion for authorization to file a second § 2255 motion. *See* App. B at 2. The Court described the issue as follows:

> Movant was also convicted of a firearms offense in violation of 18 U.S.C. § 922(g). He alleges that his sentence for that offense was enhanced under the ACCA based on his having three qualifying prior convictions, *see* 18 U.S.C. § 924(e)(1), at least one of which was a violent felony. Movant alleges that the enhancement of his sentence under the ACCA is invalid because one or more of his prior offenses qualified as a "violent felony" only as that term was defined in the ACCA's residual clause. The Supreme Court invalidated that provision as unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

App. B at 2.

The Tenth Circuit then briefly described the third claim advanced by Petitioner Perkins as follows: "Similarly, Movant alleges that the enhancement of

his sentence under the career offender guideline, which has an identically worded residual clause as that in the ACCA, is invalid under *Johnson*." App. B at 2.

The Tenth Circuit concluded that the first two claims advanced by Petitioner Perkins were supported by a prima facie showing satisfying the gatekeeping requirements under 28 U.S.C. § 2255(h), and § 2244(b)(3)(C). *See* App. B at 2-3.

With respect to the first challenge, the Tenth Circuit "conclude[d] that Movant has made the required prima facie showing to challenge his § 924(c) convictions under *Davis*. The Supreme Court announced a new rule of constitutional law in *Davis* and the Court has made *Davis* retroactive to cases on collateral review through the combination of its holdings in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016), and *Davis*. *See In re Mullins*, 942 F.3d 975, 979 (10th Cir. 2019)." App. B at 3.

With respect to the second claim, this Court "conclude[d] that movant has made the required prima facie showing to challenge the sentencing enhancement under the ACCA based on *Johnson*. The Supreme Court announced a new rule of constitutional law in *Johnson* and made it retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. at 1265." App. B at 3.

The Tenth Circuit denied authorization for Mr. Perkins' challenge to the guideline enhancement under the career offender provision in U.S. Sentencing Guidelines § 4B1.1. The Tenth Circuit stated its reasoning as follow:

> In *Beckles v. United States*, 137 S. Ct. 886, 890 (2017), the Supreme Court rejected the argument that the career offender guideline's residual clause, like that in the ACCA, is void for vagueness under *Johnson*. The Court held that the advisory guidelines are not subject to vagueness challenges under the Due Process Clause. *Id.* Accordingly, movant's challenge to the enhancement of his sentence under the career offender guideline does not rely on *Johnson*. We therefore deny movant authorization to file a second or successive § 2255 motion that includes a challenge to the enhancement of his sentence under the career offender guideline.

App. B at 3-4.

The only part of the authorization requested by Mr. Perkins that was denied by the Tenth Circuit was the challenge to the guideline enhancement under U.S. Sentencing Guidelines § 4B1.1. The other challenges under statutes that had been the subject of this Court's holdings in *Johnson* and *Davis* were authorized. *See* App. B at 1-4.

Pursuant to the authorization granted by the Tenth Circuit, Petitioner Perkins filed a renewed 2255 motion.

On October 26, 2021, the magistrate judge proposed findings and recommended denial of the 2255 motion. *See* App. D (PFRD).

On November 23, 2021, Petitioner Perkins filed timely objections to the magistrate's PFRD.

On March 21, 2022, the district court denied Petitioner Perkins' requested relief, issuing a memorandum opinion and order, *see* App. E, and a final judgment,

see App. F. On April 14, 2022, the district court also denied a certificate of appealability. *See* App. C.

Petitioner Perkins appealed to the Tenth Circuit, which denied a certificate of appealability on October5, 2022. *See* App. A.

This petition seeks review of the denial of certificate of appealability.

REASONS FOR GRANTING THE PETITION

Petitioner Perkins' petition for writ of certiorari should be granted because the United States Court of Appeals for the Tenth Circuit's order denying certificate of appealability conflicts with decisions of this Court interpreting and applying 18 U.S.C. § 924(c)(3)(A), 18 U.S.C. § 924(e)(2)(B)(i), and 28 U.S.C. § 2253(c)(1).

The Tenth Circuit authorized Petitioner Perkins, as part of his challenge to his § 924(c) convictions, to challenge the predicate for these convictions—*viz.*, the underlying Hobbs Act robbery conviction. The only part of the authorization request that was denied by the Tenth Circuit was the challenge to a sentence enhancement under the U.S. Sentencing Guidelines, because that challenge was foreclosed by this Court's decision in *Beckles*, 137 S. Ct. 886. There is no logical reason for the Tenth Circuit to have barred Petitioner Perkins' challenge to the Hobbs Act robbery conviction. Furthermore, because it is a predicate for the § 924(c) convictions, authorization to challenge the § 924(c) conviction in light of *Davis*, 139 S. Ct. 2319, necessarily and automatically includes Mr. Perkins' challenge to the underlying offense. *See* discussion *infra* Part 1.

Although the Tenth Circuit has ruled in previous cases that Hobbs Act robbery is categorically a "crime of violence" under 18 U.S.C. § 924(c)(3)(A),

and that New Mexico armed robbery under NMSA 1978, § 30-16-2, and New Mexico aggravated battery under NMSA 1978, § 30-3-5(C) are "violent felon[ies]" under 18 U.S.C. § 924(e)(2)(B)(i), this Court has not yet ruled on these issues. *See* discussion *infra* Parts 2 & 3.

For these reasons, this Court should issue a writ of certiorari to review the Tenth Circuit's denial of a certificate of appealability.

1. Petitioner Perkins' challenge to the conviction for Hobbs Act robbery was necessarily included in the Tenth Circuit's authorization order.

The denial of a certificate of appealability by the Tenth Circuit should be reversed because "'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.'" *Welch*, 578 U.S. at 127 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

The district court disallowed Mr. Perkins' challenge to his Hobbs Act convictions on grounds that the Tenth Circuit did not authorize the review of the Hobbs Act robbery conviction.

But the only part of Petitioner Perkins' § 2255 motion that was denied authorization by the Tenth Circuit is the challenge to the career offender sentencing enhancement, an argument foreclosed by *Beckles*, 137 S. Ct. 886. *See* App. B at 3. Mr. Perkins' challenge to his Hobbs Act robbery conviction is not at all connected with or predicated on the argument rejected in *Beckles*.

On the contrary, the Hobbs Act robbery is inextricably intertwined with both of the § 924(c) convictions. The magistrate judge acknowledged twice in the PFRD that the § 924(c) convictions are predicated on the Hobbs Act robbery. *See* App. D at 2, 4. Insofar as the district court adopted the PFRD, *see* App. E at 1, 5, the district court embraced the recognition that Mr. Perkins' Hobbs Act robbery conviction in Count 1 forms a necessary basis for both the § 924(c) convictions in Counts 2 and 3.

The § 924(c) convictions cannot stand if the Hobbs Act robbery conviction is invalid; the § 924(c) convictions cannot be separated from the Hobbs Act robbery count.

Petitioner Perkins connected the Hobbs Act robbery to the § 924(c) counts in his original petition. *See, e.g.,* Doc. 1 (No. 16-CV-0714) at 1 ("His conviction under 18 U.S.C. §§ 924(c), 1951 & 1952 are unconstitutional under *Johnson*."). *Davis* had not yet been decided in 2016 when Petitioner Perkins brought his § 2255 motion.

The district court incorrectly resolved this procedural issue by concluding that the Tenth Circuit did not authorize Mr. Perkins' challenge to the predicate crime without which the § 924(c) convictions cannot stand.

The district court did not address or even quote the Tenth Circuit's analysis in the authorization order. *See* App. E at 2-3. It only quoted part of one sentence, in which the Tenth Circuit summarized its order to the district court. *See* App. B

at 4. But the Tenth Circuit, in the authorization order divided Petitioner Perkins' § 2255 into three claims or grounds: (1) the challenge to the § 924(c) convictions "because the underlying offense qualified as a 'crime of violence' only as that term is defined in § 924(c)(3)'s residual clause," which was invalidated in *Davis*, App. B at 1; (2) the challenge to the § 924(e) sentence enhancement because Mr. Perkins' three predicate crimes qualified as violent felonies only under § 924(e)(2)(B)(ii), which was invalidated in *Johnson*, *see* App. B at 2; and (3) the challenge to the guidelines sentence enhancement under the career offender provision in U.S. Sentencing Guidelines § 4B1.1. *See* App. B at 2.

The Tenth Circuit analyzed each of the three claims and concluded that two of them were authorized for a successive § 2255 motion, while one of them was not. *See* App. B at 3-4. The first claim is the challenge to the § 924(c) convictions in light of *Davis*. *See* App. B at 3. The second claim is the challenge to the § 924(e) conviction in light of *Johnson*. *See* App. B at 3. And the third claim is the challenge to the career offender sentence enhancement. *See* App. B at 3-4.

Whereas the first and second claims are supported by a prima facie showing sufficient to authorize a successive filing of a § 2255 motion, as required by § 2255(h), the third claim was not supported by a prima facie showing, because of the *Beckles* opinion. *See* App. B at 3-4.

The only denial of authorization by the Tenth Circuit refers to the guidelines enhancement challenge that was rendered nonviable by *Beckles*. *See* App. B at 3-4

("We therefore deny movant authorization to file a second or subsequent § 2255 motion that includes a challenge to the enhancement of his sentence under the career offender guideline."). There is no similar language anywhere in the Tenth Circuit's order denying authorization for Mr. Perkins' challenge to the predicate crime for the § 924(c) convictions in light of *Davis*. *See* App. B. On the contrary, the Court expressly acknowledged that the first claim, for which it authorized a successive motion, was a challenge to the § 924(c) convictions "because the underlying offense qualified as a 'crime of violence' only as that term is defined in § 924(c)(3)'s residual clause." App. B at 1.

There can be no doubt that "the underlying offense" referred to by the Tenth Circuit on Page 1 of its order is the Hobbs Act robbery conviction in Count 1. *See* App. B at 1. The district court expressly acknowledged that the underlying offense for both of the § 924(c) convictions is the Hobbs Act robbery conviction: "Perkins was originally convicted of . . . two counts of Discharging a Firearm During and in Relation to a Crime of Violence in violation of 18 U.S.C. § 924(c) (each predicated on the Hobbs Act robbery)." App. D at 2. The district court adopted the PFRD. *See* App. E at 1, 5.

The error by the district court is not harmless. Both of Petitioner Perkins' § 924(c) convictions rest on the presumed validity of the predicate offense—*viz.*, the Hobbs Act robbery. Petitioner Perkins' life sentence must be vacated because his Hobbs Act robbery conviction is invalid. Furthermore, both § 924(c) convictions

and the resulting sentence of 35 years (10 years for Count 2 and 25 years for Count 3) would be vacated. The consequences for Petitioner Perkins cannot be overstated.

The merits of Petitioner Perkins' challenge to the Hobbs Act robbery was not denied authorization by the Tenth Circuit. The plain language of the Tenth Circuit's order shows no denial of authorization for the challenge to the predicate offense of the § 924(c) counts. *See* App. B. The authorization to proceed with the challenge to the § 924(c) convictions necessarily includes his challenge to the predicate for both § 924(c) counts. Logically, it makes sense to allow Petitioner Perkins to proceed with this aspect of his § 924(c) challenge insofar as if the Hobbs Act robbery conviction is invalid, then *ipso facto*, both § 924(c) counts are equally invalid. Furthermore, while the challenges predicated on *Davis* and *Johnson* are allowed to proceed because of the recent decisions by this Court affecting the residual clauses of § 924(c) and § 924(e), the guidelines-based challenge was not allowed to proceed because of this Court's decision in *Beckles*. *See* App. B at 3-4. Nothing about Petitioner Perkins' challenge to the Hobbs Act robbery depends for its efficacy on the guidelines. And nothing in *Beckles* affects Petitioner Perkins' challenge to the Hobbs Act robbery conviction.

The Tenth Circuit erred in denying a certificate of appealability, and this Court should issue a writ of certiorari to review the district court's erroneous resolution of the procedural issue, which resulted in its not considering the merits

of Petitioner Perkins' challenge to the Hobbs Act robbery conviction, upon which both § 924(c) counts—not mention a life sentence, a 10-year sentence, and a 25-year sentence—rest.

2. Hobbs Act robbery is not a crime of violence as defined in § 924(c)(3)(A).

The Tenth Circuit's denial of a certificate of appealability merits review by this Court because "'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.'" *Welch*, 578 U.S. at 127 (quoting *Slack*, 529 U.S. at 484).

In the Tenth Circuit, Petitioner Perkins acknowledged circuit authority contrary to his position with respect to the issue whether Hobbs Act robbery is a crime of violence under the elements clause in § 924(c)(3)(A). *See, e.g., United States v. Melgar-Cabrera*, 892 F.3d 1053, 1065 (10th Cir. 2018) 1065. Petitioner Perkins also acknowledged circuit authority precluding a panel from diverging from prior precedent of another panel of the Tenth Circuit "absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993).

Nevertheless, this Court has not addressed the question presented by Petitioner Perkins' case, even in its most recent decision in *Taylor v. United States*, 142 S. Ct. 2015 (2022), which held that attempted Hobbs Act robbery is not

a crime of violence under § 924(c). Petitioner Perkins maintains that Hobbs Act robbery is not categorically a crime of violence under § 924(c)(3)(A).

The Hobbs Act provides, in 18 U.S.C. § 1951, for criminal penalties for anyone who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . 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." 18 U.S.C. § 1951(a).

As used in § 1951, 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." 18 U.S.C. § 1951(b).

The robbery committed by Petitioner Perkins does not qualify as a violent felony under § 924(c)(3)(A). The question whether an offense is a crime of violence for purposes of § 924(c)(3)(A) is determined by application of the categorical approach. *See United States v. Serafin*, 562 F.3d 1105, 1108 (10th Cir. 2009); *United States v. Munro*, 394 F.3d 865, 870 (10th Cir. 2015); *United States v. McNeal*, 2016 WL 1178823, *8 (4th Cir. 2016); *United States v. Ivazaj*, 568 F.3d 88, 97 (2nd Cir. 2009); *United States v. Velazquez-Overa*, 100 F.3d 418, 420 (5th

Cir. 1996); *United States v. Aragon*, 983 F.2d 1306, 1312 (4th Cir. 1993); *United States v. Springfield*, 829 F.2d 860, 862-63 (9th Cir. 1987).

Under the categorical approach, "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions," *Taylor v. United States*, 495 U.S. 575, 600 (1990), Hobbs Act robbery is not a crime of violence because it does not have as an element the use, attempted use, or threatened use of physical force against the person of another. In *Johnson v. United States*, 599 U.S. 133, 139 (2010), this Court stated that a crime of violence contemplates "violent force---that is, force capable of causing physical pain or injury to another person." A person can commit Hobbs Act robbery without using such force.

Hobbs Act robbery is common-law robbery that affects interstate commerce. *See United States v. Peterson*, 236 F.3d 848, 851 (7th Cir. 2001); *United States v. Harrington*, 108 F.3d 1460, 1471 (D.C. Cir. 1997); *United States v. Nedley*, 255 F.2d 350, 357 (3rd Cir. 1958). At common law, no particular "degree of force" was required; all that was required was that the force "overcome [any] resistance" to the taking. 4 Wharton's Criminal Law § 460 (15th ed. & 2015 update). Wrenching a pocketbook out of a victim's hand was sufficient force to constitute a robbery, even if the victim suffered no pain or injury. *See, e.g., Williams v. Commonwealth*, 50 S.W. 240 (Ky. 1899) ("It is not necessary that a blow should be struck or the party be injured."). Moreover, common-law courts held that, if an item was

fastened to a piece of clothing, the clothing offered "resistance" and the act of pulling the item off the clothing was "force" sufficient to sustain a robbery conviction. *See, e.g., People v. Campbell*, 84 N.E. 1035, 1036-37 (Ill. 1908). Because common-law robbery could be committed without violent force, and Hobbs Act robbery is equivalent to common-law robbery, Mr. Perkins' conviction is not a crime of violence under the elements clause.

Hobbs Act robbery can be committed without violent force. For example, in *United States v. Smith*, 141 Fed. App'x. 83 (4th Cir. 2005) (unpublished), the defendant was convicted of Hobbs Act robbery when the only "force" he used was pushing someone out of the way. In *United States v. Pledge*, 51 Fed. App'x. 911 (4th Cir. 2002) (unpublished), the defendant, a police officer, was convicted of Hobbs Act robbery where he took property from drug dealers by threatening to arrest them if they did not submit. And, in *United States v. Snell*, 432 Fed. App'x. 80, 85 (3rd Cir. 2011) (unpublished), the court held that a police officer used sufficient force for conviction of Hobbs Act robbery when he handcuffed a motorist, took money from the motorist's pocket, placed the motorist in the back of a squad car, and blocked him from getting out. Finally, in *United States v. Rodriguez*, 925 F.2d 1049, 1052 (2nd Cir. 1991), the court found sufficient force for conviction under a federal statute prohibiting robbery of postal workers---which statute also incorporates the common-law definition of robbery---where the defendant took keys attached to the victim's clothing by pulling the keys away from the victim's

clothing. None of these cases involved use of "*violent* force . . . capable of causing physical pain or injury." *Johnson*, 599 U.S. at 139. *See also United States v. Gardner*, 2016 WL 2893881 (4th Cir. 2016) (robbery under North Carolina law was not a crime of violence under the elements clause because it required only force "sufficient to compel the victim to part with his property"); *United States v. Parnell*, 2016 WL 163367 (9th Cir. 2016) (Massachusetts armed robbery did not meet the elements clause because under Massachusetts law "the degree of force is immaterial so long as it is sufficient to obtain the victim's property against his will"); *In re Sealed Case*, 548 F.2d 1085 (D.C. Cir. 2008) (D.C. robbery was not a crime of violence because it can be committed with application of only "a minimal level of force").

Hobbs Act robbery can be committed by causing the victim to part with his property due to "fear of injury" by means other than physical force. Under *United States v. Perez-Vargas*, 414 F.3d 1282, 1285 (10th Cir. 2005), *overruled as recognized in United States v. Ontiveros*, 875 F.3d 533, 536 (10th Cir. 2017), and *United States v. Rodriguez-Enriquez*, 518 F.3d 1192, 1194 (10th Cir. 2004), *overruled as recognized in Ontiveros*, 875 F.3d at 536, if an offense can be committed by causing injury by, for instance, "intentionally exposing someone to hazardous chemicals," 518 F.3d at 1195, but without a mechanical impact akin to being struck "by a fist, a bat, or a projectile," 518 F.3d at 1194, it is not a crime of violence under the force clause at issue here. This is so because robbery by such

means does not have as an element of the offense the threatened use of physical force against the person of another. *See, e.g., Hartman v. State*, 403 So. 2d 1030, 1030 (Fla. Ct. App. 1981); *State v. Lawson*, 501 S.W.2d 176, 179 (Mo. Ct. App. 1973).

Petitioner Perkins acknowledged in the Tenth Circuit that the logic of *Perez-Vargas* and *Rodriguez-Enriquez* has been undermined or explicitly rejected by subsequent decisions in similar contexts. *See, e.g., United States v. Muskett*, 970 F.3d 1233, 1239 (10th Cir. 2020); *United States v. Castleman*, 134 S. Ct. 1405, 1409 (2014). Nevertheless, there is no directly on-point case from this Court holding that Hobbs Act robbery is a "crime of violence" for purposes of § 924(c). And the Tenth Circuit's resolution of the Hobbs Act robbery issue in *Melgar-Cabrera* was based on an extension of the reasoning of this Court's opinion in *Castleman*, 134 S. Ct. 1405, *see* 892 F.3d at 1062-64, which pertained to a different statute and a slightly different legal question. Accordingly, Petitioner Perkins's case presents an opportunity for this Court to resolve the question whether Hobbs Act robbery is categorically a "crime of violence" for purposes of § 924(c).

The Tenth Circuit's and the district court's denial of a certificate of appealability was in error and reasonable jurists could debate whether Petitioner Perkins' petition should have been resolved in a different manner. *See Welch*, 578 U.S. at 127; *Slack*, 529 U.S. at 484. This Court should issue a writ of certiorari,

reverse the denial of the certificate of appealability and vacate both § 924(c) convictions due to the invalidity of the predicate Hobbs Act robbery conviction.

4. Petitioner Perkins has not been convicted of three or more violent felonies within the meaning of § 924(e).

The Tenth Circuit's denial of a certificate of appealability should be reversed because "'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.'" *Welch*, 578 U.S. at 127 (quoting *Slack*, 529 U.S. at 484).

In the Tenth Circuit, Petitioner Perkins acknowledged that *Manzanares*, 956 F.3d at 1226, is contrary to his position on the issue whether the convictions under NMSA 1978, § 30-16-2 and § 30-3-5(C) satisfy the elements clause under the ACCA. Petitioner Perkins also acknowledged his awareness that a panel of the Tenth Circuit may not diverge from prior precedent of another panel "absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d at 724.

Petitioner Perkins also acknowledged in the Tenth Circuit that his position is contrary to that circuit's unpublished decision in *United States v. Ybarra*, 827 Fed. App'x 896, 899 (10th Cir. 2020) (unpublished). But *Ybarra* pertained to statutes not at issue in Petitioner Perkins' case, *viz.*, NMSA 1978, § 30-3-16 and § 30-3-2(A). The predicate offenses at issue in Petitioner Perkins' case are NMSA 1978, § 30-3-5(C) and § 30-16-2. *See* Doc. 1 at 14-17. Even if *Ybarra* had been a

published precedential opinion, it still would not settle the question whether Petitioner Perkins' prior convictions under §§ 30-3-5(C) and 30-16-2, qualify as predicates for enhancement under the ACCA, § 924(e).

Furthermore, neither of these statutes have been held by this Court to constitute violent felonies for purposes of § 924(e)(2)(B)(i). The district court did not cite any authority from this Court conclusively settling these legal questions. Accordingly, Petitioner seeks review by this Court of these questions of first impression.

CONCLUSION

For the foregoing reasons, the Tenth Circuit's denial of a certificate of appealability is in conflict with *Slack*, § 2253(c)(1), § 924(c)(1)(A) and § 924(e)(2)(B)(i). Reasonable jurists could debate whether or agree that Petitioner Perkins' § 2255 motion should have been resolved differently. Petitioner Perkins respectfully requests that this Court grant this petition for writ of certiorari, and reverse the Tenth Circuit's denial of a certificate of appealability.

Respectfully submitted,

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