No._____

In the
SUPREME COURT OF THE UNITED STATES

ADAM GARCIA, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to
the United States Court of Appeals for the Tenth Circuit

Petition for Writ of Certiorari

MARGRET KATZE
Federal Defender

Emily P. Carey
J.K. Theodosia Johnson

Counsel of Record
Office of the Federal Defender
District of New Mexico
111 Lomas Blvd., NW, Suite 501
Albuquerque, N.M. 87102

Telephone: (505) 346-2489
Facsimile: (505) 346-2494
E-mail: Emily_Carey@fd.org
E-mail: Theodosia_johnson@fd.org

QUESTION PRESENTED

I. The definition of "crime of violence" for 18 U.S.C. § 924(c) requires immediacy and physical force. Hobbs Act robbery, 18 U.S.C. § 1951(b)(1), requires neither immediacy nor physical force. Can Hobbs Act robbery serve as the underlying felony for a § 924(c) conviction?

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

In the
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ADAM JASON GARCIA,

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v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari

Adam Garcia petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

OPINIONS BELOW

The Tenth Circuit's decision in *United States v. Adam Jason Garcia*, is unpublished and is attached as Appendix A. The district court's memorandum opinion is attached as Appendix B.

STATEMENT OF JURISDICTION

On April 21, 2021, the Tenth Circuit issued its opinion. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.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;
>
> . . .

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

> **(A)** has as an element the use, attempted use, or threatened use of physical force against the person or property of another …

18 U.S.C. § 1951. 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 family or 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.

INTRODUCTION

Eight years ago, then Judge Gorsuch observed, "Few statutes have proven as enigmatic as 18 U.S.C. § 924(c). Everyone knows that, generally speaking, the statute imposes heightened penalties on those who use guns to commit violent crimes or drug offenses. But the details are full of devils." *United States v. Rentz*, 777 F.3d 1105, 1106 (10th Cir. 2015). Here again another devil raises its head. Is the threat "unless you give me all your money now, you'll need to watch the tabloids because I'll tell everyone you're a pedophile" a crime of violence? It constitutes Hobbs Act robbery.

Courts have ducked this question by groundlessly asserting that such a threat to intangible property "sounds to us like Hobbs Act extortion." *United States v. Garcia-Ortiz*, 904 F.3d 102, 107 (1st Cir. 2018). But there is no textual reason that property as used in 18 U.S.C. § 1951(b)(1) only reaches tangible property but somehow expands in § 1951(b)(2) to encompass intangible property.

Further, Hobbs Act robbery can be achieved "by means of actual or threatened force, or violence, or fear of injury**,** *immediate or future*…" 18 U.S.C. § 1951(b)(1) (emphasis added). Only the Sixth Circuit has

even considered the parameters of timing but dismissed any concern by concluding that "Section 924(c)(3)(A) requires only the 'threatened use of physical force,' which does not provide [a] temporal limitation." *United States v. Robinson*, 708 Fed. Appx. 272, 274 (6th Cir. 2017). But certainly, to be a crime of violence, the violence must be imminent.

This Court should grant Mr. Garcia's petition because, by striking down half of § 924(c)'s crime-of-violence definition as unconstitutionally vague, *Davis*[1] created a hole in the statute through which Hobbs Act robbery has fallen. The lower courts have insisted on ignoring § 1951's text and plain meaning to save the statute as an elements-clause predicate. Consequently, it is left to this Court to recognize that Hobbs Act robbery is not a § 924(c) predicate in light of *Davis*. Then, the proper branch of government— Congress, not the courts—may address the matter through legislation as it sees fit.

[1] *United States v. Davis*, ___U.S. ___, 139 S. Ct. 2319 (2019).

STATEMENT OF THE CASE

In 2009, a grand jury indicted Mr. Garcia on one count of Hobbs Act robbery, one count of using and carrying a gun in furtherance of a crime of violence, and one count of being a felon in possession of a firearm. He pleaded guilty to being a felon in possession of a firearm and using that firearm in furtherance of a crime of violence. His felon in possession conviction was enhanced under the Armed Career Criminal Act (ACCA). On April 13, 2011, the district court sentenced Mr. Garcia to a total of 264 months of imprisonment to be followed by three years of supervised release.

Mr. Garcia filed a motion under 28 U.S.C. § 2255 alleging ineffective assistance of counsel in March of 2012. The district court found that Mr. Garcia failed to show that, but for his counsel's alleged ineffectiveness, there was a reasonable probability that he would not have pleaded guilty and instead would have gone to trial. Four years later, Mr. Garcia filed a *pro se* motion in the Tenth Circuit seeking permission to file a second or subsequent 2255 motion challenging his ACCA enhancement. The Tenth Circuit granted the motion. The district court appointed counsel to Mr. Garcia. After the appointment of

counsel, Mr. Garcia sought to add an argument challenging his 924(c) conviction; he returned to the Tenth Circuit requesting permission to expand the previous order allowing him to file a second or subsequent 2255 motion. The matter was stayed pending decision in *Davis*. After this Court's decision in *Davis*, the Tenth Circuit lifted its stay, allowed amendment of Mr. Garcia's 2255 petition to add the 924(c) claim, and remanded the matter to the district court for argument and decision.

The district court denied Mr. Garcia's amended petition on January 29, 2021, but granted a certificate of appealability. Mr. Garcia appealed the district court's denial, but the Tenth Circuit held his case in abeyance pending a decision in *United States v. Baker*, 49 F.4th 1348 (10thCir. 2022). *Baker*, in turn, was stayed pending a decision from this Court in *United States v. Taylor*, ___U.S.___, 142 S. Ct. 2015 (2022).

The Tenth Circuit decided *Baker* in a published opinion holding Hobbs Act robbery is *categorically* a crime of violence "*regardless of what might have happened had other arguments been made to the panel that decided the issue first.*" 49 F.4th 1348, 1358 (10th Cir. 2022) (emphasis in original). In a footnote it observed that Mr. Baker's contention that Hobbs Act robbery could be committed by threats to

intangible property had been rejected by the Fourth Circuit in *United States v. Mathis*, 932 F.3d 242, 265 (4th Cir. 2019), and by the Third Circuit in an unpublished case, *United States v. Monroe*, 837 Fed. Appx. 898, 900 (3d Cir. 2021), *cert. denied sub nom. Copes v. United States*, 211 L. Ed. 2d 111, 142 S. Ct. 247 (2021).

Relying on its holding in *Baker* that Hobbs Act robbery was categorically a crime of violence, the Tenth Circuit summarily dismissed Mr. Garcia's contentions.

REASONS FOR GRANTING THE WRIT

A crime of violence requires a threat of immediate harm to tangible property. Hobbs Act robbery can be committed by threatening harm at some undetermined point in the future to intangible property. In this it diverges from its common law roots of robbery and extortion. Hobbs Act Robbery cannot categorically be a crime of violence.

A. Canons of construction support that "crime of violence" as used in Section 924(c) requires that any use of force or threatened use of force must be immediate.

Section 924(c)(3)(A) defines a "crime of violence" as an offense that "has as an element the use, attempted use, or threatened use of

physical force against the person or property of another." Subsection A is known as the elements clause and echoes the definition of "crime of violence" in 18 U.S.C. § 16(a), except that § 924(c) limits crimes of violence to felonies.

Courts have grappled with the meaning of "use" and "physical force" and "use of force." This Court abides by the "fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (cleaned up). "Dictionaries consistently define the noun 'use' to mean the 'act of employing' something." *Voisine v. United States*, 136 S. Ct. 2272, 2278 (2016) (internal citations omitted). This Court explained, that for over a century, it has understood "use" to require active employment. *Id*. at 2279 n.3.

In construing "crime of violence" in § 16, this Court explained that focusing only on "use" was not enough. *Leocal v. Ashcroft,* 543 U.S. 1 (2004). "The critical aspect of § 16(a) is that a crime of violence is one involving the 'use ... of physical force against the person or property of another.' As we said in a similar context in *Bailey,* 'use' requires active

employment." *Id*. at 9 (internal citation and emphasis omitted). Ultimately, the *Leocal* Court concluded that, "The ordinary meaning of [crime of violence], combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, *active* crimes …" *Id.* at 11 (emphasis added).

This Court has acknowledged that "in the criminal law the word 'threat' and its cognates usually denote "[a] communicated intent to inflict physical or other harm on any person or on property.' Of course, threats can be communicated verbally or nonverbally." *Taylor*, 142 S. Ct. at 2022. It has not decided the parameters of threatened use of force in the context of a crime of violence. This case provides an ideal vehicle to do so.

Threat, then, as used in § 924(c) must communicate an intent to use force rather than just merely be a statement that force may be used at some point in the future. *Cf. Taylor,* 142 S.Ct. at 2023. In other words, threat must be of instant harm; in this it is like the definition of threat used for a duress defense. To qualify for an instruction on duress, the defendant must show that he "was under an unlawful and *present,*

imminent and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury to himself [or a family member, or others]." *United States v. Dixon*, 901 F.3d 1170, 1176 (10th Cir. 2018) (*quoting* Tenth Circuit, Criminal Pattern Jury Instruction § 1.36 (2011)) (emphasis added). To be a crime of violence, the threat must be the figurative equivalent of a gun to the head (which, of course, is clearly a threat) – there must be some immediacy to the threat.

For example, in *United States v. Becerra*, 992 F.2d 960, 964 (9th Cir. 1993), *overruled on other grounds by United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021), the defendant believed the court should have instructed the jury on duress because a co-defendant "threatened to 'take care of' LaRizza's family if the deal did not go through." LaRizza believed this meant his co-defendant would kill his family. The Ninth Circuit Court of Appeals held he was not entitled to a duress defense. "He may have legitimately feared that [the co-defendant] would harm him or his family, but that is not enough. He did not show an immediate threat." *Id.* So, too, with threatened use of force for a crime of violence. It must be an immediate threat. A veiled threat of future

harm may induce an individual to part with money but would not warrant a duress defense, and so is not a crime of violence.

B. The distinction between Hobbs Act robbery and Hobbs Act extortion does not replicate the distinction between generic robbery and generic extortion.

Both robbery and extortion sprout from larceny. It is the use of force which elevates larceny to robbery. *See Stokeling v. United States*, ___U.S.___, 139 S. Ct. 544, 550-52 (2019). The force could be actual or threatened against the person, or by threatening to burn or tear down another's house. W. Clark & W. Marshall, Law of Crimes 556 (H. Lazell ed., 2d ed. 1905)[2]. "If a man threatens to accuse another of an unnatural crime,—sodomy,—and there by obtains property from him, the law regards it as robbery." *Id.* Generally, however, obtaining another's property by a threat to reputation or character was insufficient to constitute robbery – including "obtain[ing] money from a woman by threatening to accuse her husband of indecent assault." *Id.* at 556-57. So too threats to property other than the home were insufficient to constitute robbery. This comports with generic robbery as used today.

[2] Available at https://www.nationallibertyalliance.org/sites/default/files/a_treatise_on_the_law_of_crimes_clark_and_marshall_1900.pdf

See Stokeling,139 S.Ct. at 551-52 (holding robbery consists of taking property from a person using sufficient force to overcome the victim's resistance.)

The problem with this formulation of robbery was that other effective threats that separated a victim from their property went unpunished. As a result, the crime of extortion evolved to close this gap. "Extortion is 'closely related to the crime of robbery, having in fact been created in order to plug a loophole in the robbery law by covering sundry threats which will not do for robbery.'" *United States v. Harris,* 916 F.3d 948, 955 (11th Cir. 2019) (quoting Wayne R. LaFave, *Criminal Law* § 20.4, 1335–36 (6th ed. 2017)).

Originally common law extortion required the property to be obtained under "color of office, that is, under the pretense that the officer was entitled thereto by virtue of his office. The money or thing received must have been claimed or accepted in right of office, and the person paying must have yielded to official authority." *McCormick v. United States*, 500 U.S. 257, 279 (1991)(quoting 3 R. Anderson, Wharton's Criminal Law and Procedure 790–791 (1957)). *See also*, *Harris,* 916 F.3 at 954 *("*At common law, the offense concerned public

officials who used their office to corruptly obtain money not owed to them." *See* 4 Charles E. Torcia, *Wharton's Criminal Law* § 654 (15th ed. 2018) (collecting cases). Under this formulation, individuals gave up their property consensually if reluctantly.

Extortion then has two formulations: coercive extortion where the property is obtained by a fear ("the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear") and official extortion ("the obtaining of property from another … under color of official right"). Both retain the element of obtaining property "with consent." But the distinction between obtaining property "with consent" and obtaining it "against one's will" is chimerical.

As the Second Circuit recognized, "undeniably, the victim of an extortion acts from fear, whether of violence or exposure." *United States v. Zhou*, 428 F.3d 361, 371 (2d Cir. 2005). "So 'in spite of the different expressions' that robbery must be against the victim's will while extortion must be with his consent, 'both crimes equally require that the defendant's threats induce the victim to give up his property, something which he would not otherwise have done'." *Harris*, 916 F.3d

at 955 (*quoting* LaFave, *Criminal Law* § 20.4, at 1336). The Seventh Circuit agreed that the difference between induced consent and against the will was a "superficial" difference that had no true significance. *United States v. Hatley*, 61 F.4th 536, 540 (7th Cir. 2023). Where the victim gives up property because of violence or the threat of violence, the question of consent or lack of consent becomes largely academic.

Instead, the significant difference between extortion and robbery becomes the immediacy of the threat. The common law definition of robbery "embraced only threats of immediate bodily harm to the victim." *Harris,* 916 F.3d at 955 (quoting LaFave, *Criminal Law* § 20.4, at 1332). "The distinction traditionally drawn between robbery by intimidation and blackmail or extortion is that a person commits robbery when he threatens to do *immediate* bodily harm, whereas he commits blackmail or extortion when he threatens to do bodily harm *in the future*." James Lindgren, "Blackmail and Extortion," in 1 *Encyclopedia of Crime and Justice* 102, 102 (Joshua Dressler ed., 2002). The Fifth Circuit explained that the element of "immediate danger" distinguishes robbery from extortion. *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380 (5th Cir. 2006), *abrogated on other*

grounds by United States v. Rodriguez, 711 F.3d 541 (5th Cir. 2013). The Sixth Circuit followed suit, holding, "Generic robbery, in sum, constitutes the 'misappropriation of property under circumstances involving *immediate danger* to the person.'" *United States v. Yates*, 866 F.3d 723, 734 (6th Cir. 2017) (quoting *Santiesteban-Hernandez*, 469 F.3d at 380). Approaching it from the extortion side, the Ninth Circuit concluded "generic extortion contains no requirement that the threat be of immediate harm; a threat of future harm will suffice." *United States v. Becerril-Lopez*, 528 F.3d 1133, 1143 (9th Cir. 2008), *opinion amended and superseded on denial of reh'g,* 541 F.3d 881 (9th Cir. 2008). The phrasing of the Hobbs Act robbery statute overlaps with generic robbery and generic extortion. Hobbs Act robbery reaches the act of taking another's property by threatening future injury to the property of an absent family member. Hobbs Act robbery, then, does not require that the threat be of active immediate violence. A crime of violence under § 924(c) requires such immediacy. Thus, Hobbs Act robbery is not categorically a crime of violence.

C. Applying the canons of statutory construction, the definition of "property" for Hobbs Act robbery necessarily encompasses intangible property.

"Property" in the Hobbs Act "protect[s] intangible, as well as tangible property." *United States v. Local 560 of the Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.*, 780 F.2d 267, 281 (3d Cir. 1986) (describing the circuits as "unanimous" on this point); *see also United States v. Arena,* 180 F.3d 380, 392 (2d Cir. 1999) (citing 18 U.S.C. § 1951(a)), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003) ("The concept of 'property' under the Hobbs Act is an expansive one" that includes "intangible assets, such as rights to solicit customers and to conduct a lawful business.");*United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction for threat "to slow down or stop construction projects unless his demands were met"). Although these defined "property" in Hobbs Act extortion cases, the same meaning should apply to "property" in the Hobbs Act robbery context because both are criminalized in the same statute. 18 U.S.C. § 1951(a) and (b)(1) and (b)(2). "A standard principle of statutory construction provides that identical words and phrases within the same

statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007).

Indeed, the Pattern Jury Instructions in the Tenth and Eleventh Circuits state that Hobbs Act robbery can be committed by causing fear of future injury to intangible property. *See* Tenth Circuit, Criminal Pattern Jury Instructions § 2.70 (2021) ("fear" may be fear of injury "immediately or in the future" and includes "anxiety about . . . economic loss"; "property" includes other "intangible things of value"); Eleventh Circuit, Criminal Pattern Jury Instructions, § 070.3 (2022) ("'Property' includes money, tangible things of value, and intangible rights that are a source or elements of income or wealth." "'Fear' means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.").

And a leading jury instruction treatise also includes intangible property in its Hobbs Act robbery instructions. 3.50 Leonard B. Sand et al., Modern Federal Jury Instructions Criminal ¶ 50.05 (2022) ("[t]he use or threat of force or violence might be aimed at a third person, or at causing economic rather than physical injury"); Modern Federal Jury Instructions Criminal ¶ 50.06 (2022) ("fear exists if a victim experiences

anxiety, concern, or worry over expected personal harm or business loss, or over financial or job security").

Trial courts around the country have used similar instructions. *See*, *e.g., United States v. Baker,* No. 2:11-CR-20020, ECF No. 53 at 20 (D. Kan. Sept. 15, 2011) (allowing conviction based on causing anxiety about future harm to intangible property); *United States v. Hennefer,* No. 1:96-CR-24, ECF No. 195 at 32, 35, 36 (D. Utah Jul. 9, 1997) (same); *United States v. Nguyen* No. 2:03-CR-158, ECF No. 157 at 28 (D. Nev. Feb. 10, 2005) (same); *United States v. Lowe,* No. 1:11-CR-20678, ECF No. 229 at 12, 13 (S. D. Fla. Feb. 6, 2012) (same); *United States v. Graham,* No. 1:11-CR-94, ECF No. 211 at 142 (D. Md. Jan. 29, 2018) (same); *United States v. Brown,* No. 11-CR-334-APG, ECF No. 197 at 15 (D. Nev. Jul. 28, 2015) (same).

Nonetheless, the First Circuit has explicitly concluded that threats to intangible property do not properly fit under Hobbs Act robbery. The sum-total of the First Circuit's conclusion was that threats to intangible property such as an "economic interest like a stock holding or contract right … sounds to us like Hobbs Act extortion." *United States v. Garcia-Ortiz*, 904 F.3d 102, 107 (1st Cir. 2018). It then

bolstered its bare bones conclusion with the realistic probability test: "García points to no actual convictions for Hobbs Act robbery matching or approximating his theorized scenario." *Monroe* too relies on the realistic probability test to dismiss any concern that Hobbs Act robbery could be committed by threats to intangible property such as reputation or economic harm. 837 Fed. App'x. at 900. The Fourth Circuit acknowledged there was no "basis in the text of either statutory provision for creating a distinction between threats of injury to tangible and intangible property." *Mathis*, 932 F.3d at 266. Still, it concluded that Hobbs Act robbery was a crime of violence. The totality of its analysis was to cite to *Garcia-Ortiz*.

But in *Taylor* this Court disavowed the realistic probability test. There, one of the government's central arguments was that no realistic probability exists that the government would prosecute anyone for attempted Hobbs Act robbery based on an attempted threat of force—conduct which this Court ultimately held is not a "crime of violence." 142 S. Ct. at 2024. The government argued that an attempted threat was an exercise in legal imagination because the defense did not cite to a solitary case in which a defendant was prosecuted for attempted

Hobbs Act robbery based only on an attempted threat of force. *Id.* Thus, according to the government, attempted Hobbs Act robbery was a "crime of violence" despite the plain language of the statute it could be committed by an attempted threat of force. *Id.*

This Court, however, firmly rejected the government's argument and, in so doing, threw out the realistic probability test altogether for federal offenses. This Court acknowledged a myriad of problems with the test including the "oddity of placing a burden on the defendant to present empirical evidence about the government's own prosecutorial habits" and "the practical challenge such a burden would present" when most cases end in pleas and are not available on Westlaw or Lexis. *Id.*

But the most damning problem was that the realistic probability test contravenes the categorical approach, which merely looks at "whether the government must prove, as an *element* of its case, the use, attempted use, or threatened use of force." *Id.* (emphasis in original). As this Court held, § 924(c) "asks only whether the elements of one federal law align with those prescribed in another." *Id.* It is error to look beyond the elements and "say[] that a defendant must present evidence

about how his crime of conviction is normally committed or usually prosecuted." *Id.*

Under the *Taylor* framework, the elements of Hobbs Act robbery do not align with the § 924(c) force clause because the offense includes threats against intangible property (as the Fourth Circuit acknowledged in *Mathis,* 932 F.2d at 266), but the force clause does not. Because the possibility exists that a Hobbs Act robbery offense can be committed with threats of economic harm or to reputation, the inquiry ends, and the statute categorically fails to qualify as a § 924(c) "crime of violence."

Under the plain language of the statute, Hobbs Act robbery can be committed by "threatened force, … or fear of injury, immediate or future, to his person or property…" 18 U.S.C. §1951(b)(1). While a vague threat of future injury to one's reputation may convince someone to give up their property, it cannot be a crime of violence.

CONCLUSION

This Court should grant Mr. Garcia's petition for certiorari because 1) Hobbs Act robbery categorically fails to qualify as a "crime

of violence" because it criminalizes future threats of harm where a crime of violence requires immediate threat of harm 2) Hobbs Act robbery is not a "crime of violence" because it criminalizes threats of economic harm excluded under the § 924(c) force clause, and 3) Hobbs Act robbery is not a "crime of violence" because it criminalizes threats of de minimis force against the property of another, also excluded under the force clause.

Respectfully submitted,

DATED: May 9, 2023.

s/ Emily P. Carey
Emily P. Carey
Assistant Federal Defender

s/ J.K. Theodosia Johnson
J.K. Theodosia Johnson
Research and Writing Specialist

Attorneys for the Petitioner
Counsel of Record
Office of the Federal Defender
District of New Mexico
111 Lomas Blvd., NW, Suite 501
Albuquerque, N.M. 87102

Telephone: (505) 346-2489
Facsimile: (505) 346-2494
E-mail: Emily_Carey@fd.org
E-mail: theodosia_johnson@fd.org