No. _____

In the

Supreme Court of the United States

YVETTE CRYSTAL WADE, 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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QUESTION PRESENTED FOR REVIEW

Whether Hobbs Act robbery under 18 U.S.C. § 1951 is a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A), where the offense encompasses threats of harm to intangible property and economic interests, and thus does not categorically require the use, attempted use, or threat of violent physical force.

Statement of Related Proceedings

- *Yvette Crystal Wade v. United States,*
  17-55425 (9th Cir. Feb. 17, 2023)

- *Yvette Crystal Wade. United States,*
  2:16-cv-06515-CAS (C.D. Cal. Mar. 16, 2017)

- *Yvette Crystal Wade v. United States,*
  03-6098 (*Cert Denied*, S.Ct. Oct. 6, 2003)

- *Yvette Crystal Wade v. United States,*
  03-55616 (9th Cir. Jun. 20, 2023)

- *Yvette Crystal Wade. United States,*
  2:02-cv-05277-LGB (C.D. Cal. Feb. 28, 2003)

- *Yvette Crystal Wade v. United States,*
  00-50027 (9th Cir. Apr. 18, 2001)

- *United States v. Yvette Crystal Wade,*
  CR-99-00257-LGB-03B (C.D.. Dec. 21, 1999)

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Yvette Crystal Wade petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit granting the government's motion for summary affirmance.

I. OPINIONS BELOW

The Ninth Circuit issued an unpublished order summarily affirming the district court's denial of Ms. Wade's motion to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. § 2255. (App. 1a) The district court issued a written order denying Ms. Wade's motion to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. § 2255, but granting a certificate of appealability; that order was likewise unreported. (App. 3a, 5a)

II. JURISDICTION

The Ninth Circuit issued its order granting summary affirmance on February 17, 2023. (App. 1a) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES PROVISIONS INVOLVED

18 U.S.C. § 1951 provides:

(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.

18 U.S.C. § 924(c)(3)(A) provides:

(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[.]

IV. INTRODUCTION

In 2015, this Court held that the residual clause in the Armed Career Criminal Act ("ACCA") was void for vagueness. *Johnson v. United States*, 576 U.S. 591 (2015). Within a year of that decision, thousands of inmates filed habeas petitions claiming that their convictions and sentences, though not based on the ACCA, were infected by the same ordinary-case analysis and ill-

defined risk threshold that combined in *Johnson* to "produce[] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 598. Among that number was Yvette Crystal Wade. She argued that, following *Johnson*, Hobbs Act robbery was no longer a valid crime-of-violence predicate for purposes of 18 U.S.C. § 924(c). The Ninth Circuit ultimately issued a memorandum disposition summarily affirming the denial of Ms. Wade's § 2255 motion, finding that her argument was foreclosed by *United States v. Dominguez*, 954 F.3d 1251, 1255 (9th Cir. 2020) (holding that Hobbs Act robbery is categorically a crime of violence).

Dominguez, however, relied on a mode of analysis that was later undermined by this Court's decision in *United States v. Taylor*, 142 S. Ct. 2015 (2022). In *Dominguez*, the Ninth Circuit relied on this Court's decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), to conclude that Hobbs Act robbery was a crime of violence in part because the appellant failed to identify a "realistic scenario" in which an individual could commit such a robbery by threatening injury to an intangible economic interest. *Dominguez*, 954 F.3d at 1260. In *Taylor*, however, this Court reiterated that the categorical approach requires courts to examine only the *elements* of a statute. *Taylor*, 142 S. Ct. at 2020. The Court also held that the "realistic probability test," which focused on empirical data on how individuals are

prosecuted under a statute, does not apply to the categorical analysis of federal statutes under § 924(c). *Id.* at 2024–25.

After issuing its decision in *Taylor*, this Court vacated the Ninth Circuit's opinion in *Dominguez* and remanded for reconsideration in light of *Taylor*. *Dominguez v. United States*, 142 S. Ct. 2857 (2022). The Ninth Circuit reinstated portions of its original *Dominguez* decision, but it did not address the portion of *Taylor* that undermined *Dominguez*'s holding as to Hobbs Act robbery. *United States v. Dominguez*, 48 F.4th 1040 (9th Cir. 2022). And other courts, viewing circuit precedent similar to *Dominguez* in light of *Taylor*, have held that Hobbs Act robbery is not a crime of violence. *See* Order, *United States v. Louis*, No. 1:21-cr-20252-KMW, Dkt. 185 at 2–4 (S.D. Fla. Feb. 27, 2023) (striking § 924(c) convictions based on Hobbs Act robbery, despite Eleventh Circuit law saying that Hobbs Act robbery is a crime of violence, because jury, which was instructed in line with Eleventh Circuit model instructions, could have rested its verdict on threat to cause economic injury).

This Court should grant certiorari to reconsider *Dominguez*'s holding that Hobbs Act robbery remains a crime of violence after *Johnson* and *Taylor*. Model jury instructions nationwide, and actual jury instructions given in the Ninth Circuit, establish that Hobbs Act robbery can be premised on a threat of harm to economic interests and intangible property. That broad definition

of property cannot be squared with the elements clause, which requires the use or threatened use of *physical* force against property. The Ninth Circuit's contrary decision here should be revisited.

V. STATEMENT OF THE CASE

Ms. Wade was convicted, following a jury trial, of nine counts: one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951; four counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951; and four counts of using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). Each of the § 924(c) counts was premised on the substantive Hobbs Act robberies. On December 21, 1999, she was sentenced to 877 months' imprisonment—97 months on the Hobbs Act robbery counts, and a mandatory consecutive 780 months on the § 924(c) convictions.

On April 27, 2016, Ms. Wade filed an application for authorization to file a second or successive motion under 18 U.S.C. § 2255 in the Ninth Circuit. The Ninth Circuit issued an order on August 19, 2016, finding a *prima facie* case for relief under *Johnson* and authorizing Ms. Wade to proceed on the § 2255 motion she had previously filed in the district court.

In that motion, Ms. Wade argued that her § 924(c) convictions should be vacated under *Johnson* because Hobbs Act robbery was no longer a crime of violence. After full briefing, the district court denied Ms. Wade's § 2255

motion, concluding that Hobbs Act robbery was a categorical match to the elements clause of § 924(c)(3)(A). (App. 11a-20a) More specifically, the district court found that Hobbs Act robbery required both intentional conduct and violent force. (App. 13a-19a) Acknowledging "that the legal landscape is still developing in the wake of *Johnson*," however, the district court issued a separate order granting Ms. Wade a certificate of appealability. (App. 3a-4a)

Ms. Wade appealed to the Ninth Circuit from the district court's denial of her § 2255 motion. The government filed a motion for summary affirmance, which the Ninth Circuit granted. (App. 1a-2a) The Ninth Circuit found that Ms. Wade's argument is foreclosed by its prior decision in *Dominguez*, 954 F.3d at 1260–61, *cert. granted and judgment vacated*, 142 S. Ct. 2857 (2022), *reinstated in part*, 48 F.4th 1040 (9th Cir. 2022), holding that Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A). (App. 1a-2a)

VI. REASONS FOR GRANTING THE WRIT

This Court Should Grant Certiorari to Decide Whether Hobbs Act Robbery Satisfies the Elements Clause of § 924(c)

This Court should grant the writ of certiorari to address the Ninth Circuit's conclusion that Hobbs Act robbery has as an element the use, threatened use, or attempted use of physical force. It does not: Hobbs Act robbery can be premised on a threat of harm to intangible property and threats of economic harm. Given the heavy consequences that attach to a

§ 924(c) conviction based on a Hobbs Act robbery conviction, and the sheer number of these cases prosecuted federally, further guidance from this Court is necessary to bring this area of caselaw into order.

A. The categorical approach determines whether an offense is a crime of violence.

In *United States v. Davis*, 139 S. Ct. 2319 (2019), this Court struck the residual clause in 18 U.S.C. § 924(c)(3)(B) as unconstitutionally vague. As the government has conceded elsewhere and as the circuit courts have uniformly concluded, *Davis* is a substantive rule that applies retroactively to motions to vacate brought under 28 U.S.C. § 2255. *See*, *e.g.*, *King v. United States*, 965 F.3d 60, 64 (1st Cir. 2020) (noting government concession).

After *Davis*, only one portion of the crime-of-violence definition remains intact: the elements clause. To qualify under the elements clause, an offense must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). An offense fails to satisfy that elements clause unless it requires: (1) violent physical force capable of causing physical pain or injury to another person or property, *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)); and (2) a use or threatened use of force that is intentional and not accidental or negligent, *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). This Court recently

reaffirmed that the categorial approach is used "[t]o determine whether a federal felony may serve as a predicate for a conviction and sentence under the elements clause[.]" *United States v. Taylor*, 142 S. Ct. 2015, 2020 (2022).

B. Hobbs Act robbery does not require violent physical force.

Hobbs Act robbery does not satisfy the elements clause because it does not require violent physical force. The Hobbs Act prohibits "obstruct[ing], delay[ing], or affect[ing] commerce . . . by robbery." 18 U.S.C. § 1951(a). "Robbery" is defined as:

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

18 U.S.C. § 1951(b)(1).

Property, for purposes of the Hobbs Act, is defined broadly to include "intangible, as well as tangible, property." *United States v. Local 560 of the Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985) (collecting cases) (describing the circuits as "unanimous" on this point). And fear of injury includes things like "anxiety . . . about economic loss or harm," *United States v. Brown*, No. 11-cr-334-APG, Dkt. 197 (D. Nev. July 28, 2015) (providing Hobbs Act robbery jury instruction that "property" includes "money and other tangible and intangible things of value," and fear as "an apprehension,

concern, or anxiety about physical violence or harm or economic loss or harm"), or "worry over expected personal harm or business loss, or over financial or job security," *United States v. Nguyen*, 2:03-cr-00158-KJD-PAL, Dkt. 157, at 28 (D. Nev. Feb. 10, 2005). Because juries in the Ninth Circuit are actually instructed that such harms are cognizable forms of injury for purposes of Hobbs Act robbery, and because such threats do not constitute threats of *physical* force, the offense does not satisfy the elements clause of § 924(c).

These cases within the Ninth Circuit are not anomalies; in fact, there is a long history of broadly defining property for purposes of the Hobbs Act. The Third, Tenth, and Eleventh Circuits use pattern instructions that define Hobbs Act robbery to include fear of future injury to intangible property. *See* Third Circuit Model Criminal Jury Instructions 6.18.1951-4 and 6.18.1951-5 (Jan. 2018) (defining "fear of injury" as when "a victim experiences anxiety, concern, or worry over expected personal (physical) (economic) harm," and "[t]he term 'property' includes money and other tangible and intangible things of value")[1]; Tenth Circuit Criminal Pattern Jury Instructions, 2.70 (2021) (providing definitions for Hobbs Act robbery: "'Property' includes

[1] Available at https://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions.

money and other tangible and intangible things of value[.] . . . 'Fear' means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances.")[2]; Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (Mar. 2022) (defining terms in Hobbs Act robbery instruction: "'Property' includes money, tangible things of value, and intangible rights that are a source or element 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.")[3] A recent case from Florida reflects that such instructions are common in the Eleventh Circuit as well. *See* Order*, United States v. Louis*, No. 1:21-cr-20252-KMW, Dkt. 185 at 2–4 (S.D. Fla. Feb. 27, 2023). And cases from both inside and outside those circuits have used a similar formulation of the jury instruction to charge juries. *See United States v. Kamahele*, No. 2:08-cr-00758-TC, Dkt. 1112, at 42, 44–45 (D. Utah Oct. 6, 2011) (defining "property" as "money and other tangible and intangible things of value," and "fear" to include "an apprehension, concern, or anxiety about … economic loss"); *United States v. Buck*, No. 4:13-cr-491, Dkt. 412-1, at 16 (S.D.

[2] Available at https://www.ca10.uscourts.gov/form/criminal-pattern-jury-instructions.

[3] Available at https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsRevisedMAR2022.pdf

Tex. Aug. 28, 2015); *United States v. Tibbs*, No. 2:14-cr-20154-BAF-RSW-1, Dkt. 34, at 20 (E.D. Mich. Aug. 29, 2014).

The Modern Federal Criminal Jury Instructions likewise define Hobbs Act robbery to include a fear of future harm to intangible property. Specifically, the Modern Instructions define "property" as "includ[ing] money and other tangible and intangible things of value which are capable of being transferred from one person to another." *See* 3 Modern Federal Jury Instructions-Criminal, § 50-4 (Nov. 2020). Robbery by "fear" is defined as "fear of injury, whether immediately or in the future," including "[t]he use or threat of force or violence . . . aimed at . . . causing *economic* rather than physical injury." *See* 3 Modern Federal Jury Instructions-Criminal, § 50-5 (Nov. 2020) (emphasis added). Moreover, the "fear of injury" exists where "a victim experiences anxiety, concern, or worry over expected personal harm or business loss, or over financial or job security." *See* 3 Modern Federal Jury Instructions-Criminal, § 50-6 (Nov. 2020).

As one district court of the Ninth Circuit held, such a broad reading of "property" and "injury" aligns with the best textual reading of § 1951. *United States v. Chea*, Nos. 98-cr-20005-1 CW, 98-cr-40003-2 CW, 2019 WL 5061085, at *9 (N.D. Cal. Oct. 2, 2019). The statute prohibits taking property "by means of actual or threatened force, or violence" *or* "fear of injury." 18 U.S.C. § 1951(b)(1). The latter phrase would be superfluous if "injury" were limited

to physical injury—it is hard to imagine a use of "threatened force or violence" that would not also satisfy the "fear of injury" definition. To avoid surplusage, the injury clause should be read to encompass something more than physical injury, just as the above model instructions do. And, under this Court's recent decision in *Taylor*, this conclusion "ends the inquiry." *Taylor*, 142 S. Ct. at 2025, and should result in a finding that Hobbs Act robbery is categorically not a crime of violence.

A number of circuits have held, however, that Hobbs Act robbery is a crime of violence. The uniformity in their conclusion is undermined by the lack of concurrence in their reasoning. Several of the courts did not consider any argument about intangible property or economic injury argument at all.[4] The Ninth Circuit explicitly refused to analyze intangible property or economic injury, finding that there was no realistic probability of a Hobbs Act robbery conviction premised on economic injury. *Dominguez*, 954 F.3d at 1260; *see also United States v. García-Ortiz*, 904 F.3d 102, 106–09 (1st Cir.

[4] *See United States v. Jones*, 919 F.3d 1064, 1072 (8th Cir. 2019); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060–66 (10th Cir. 2018); *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2016); *United States v. Fox*, 878 F.3d 574, 579 (7th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017); *United States v. Buck*, 847 F.3d 267, 275 (5th Cir. 2017); *In re St. Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016).

2018) (reaching similar conclusion). The Fourth Circuit, on the other hand, found that the Hobbs Act did not distinguish between threats of injury to tangible and intangible property—along the lines of the model instructions above—but concluded that § 924(c) likewise encompassed both tangible and intangible property. *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019).

Neither of these positions is tenable. No court until *Mathis* had ever suggested that § 924(c)'s definition of crime of violence includes threats of physical force to intangible property or to economic interests—nor did the Fourth Circuit explain how one could threaten to apply physical force to intangible property or economic interests.

But the Ninth Circuit's approach is equally wrong. The Ninth Circuit recognized: "Fear of injury is the least serious way to violate [Hobbs Act robbery], and therefore, the species of the crime that we should employ for our categorical analysis." *Dominguez*, 954 F.3d at 1254, 1260. Even so, it explicitly declined to analyze whether intangible economic interests would satisfy the force clause, "because Dominguez fail[ed] to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest." *Id.* at 1260. This ignores that prosecutors in the Ninth Circuit have sought and obtained convictions using jury instructions that authorize conviction under that

theory. *See Brown*, No. 11-cr-334-APG, Dkt. 197; *Nguyen*, No. 2:03-cr-00158-KJD-PAL, Dkt. 157, at 28. No legal imagination is required to find a realistic probability of prosecution under a particular theory where juries are actually instructed that the theory is a cognizable one upon which to return a verdict. Indeed, the Ninth Circuit's own caselaw makes this point. *See United States v. Baldon*, 956 F.3d 1115, 1125 (9th Cir. 2020) (finding a realistic probability of prosecution where the theory is included in the state's model jury instruction).

In any event, this Court's recent decision in *Taylor* undermines this insistence upon empirical evidence. In *Taylor*, the government argued that the defendant could not point to a single attempted Hobbs Act robbery prosecution that, as a factual matter, did not involve the attempted use of force. *Taylor*, 142 S. Ct. at 2024–25. This Court rejected that argument, finding the defendant's failure to identify such a prosecution legally irrelevant. *Id.* at 2025.

Putting aside "the oddity of placing a burden on the defendant to present empirical evidence about the government's prosecutorial habits," and "the practical challenges such a burden would present in a world where most cases end in plea agreements, and not all of those cases make their way into easily accessible commercial databases," there was "an even more

fundamental problem" with the government's realistic probability theory: it "cannot be squared with the statute's terms." *Id.* at 2024. More specifically,

> To determine whether a federal felony qualifies as a crime of violence, § 924(c)(3)(A) doesn't ask whether the crime is *sometimes* or even *usually* associated with communicated threats of force (or, for that matter, with the actual or attempted use of force). It asks whether the government must prove, as an *element* of its case, the use, attempted use, or threatened use of force. . . .
>
> Attempted Hobbs Act robbery does not require proof of *any* of the elements § 924(c)(3)(A) demands. That ends the inquiry, and nothing in [*Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007)] suggests otherwise. . . .
>
> In § 924(c)(3)(A), Congress did not . . . mandate an empirical inquiry into how crimes are usually committed, let alone impose a burden on the defendant to present proof about the government's own prosecutorial habits.
>
> Congress tasked the courts with a much more straightforward job: Look at the elements of the underlying crime and ask whether they require the government to prove the use, attempted use, or threatened use of force.

Id. at 2024–25 (emphasis in original).

The Court's task, thus, is to interpret the breadth of the Hobbs Act statute, based on the elements required for conviction rather than empirical data of past prosecutions. The statute cannot mean one thing when a prosecutor tries to convict someone of the substantive offense, and another thing when a petitioner claims that the statute is overbroad—and yet that is the state of the law at this moment. Given the high stakes involved in

imposing a § 924(c) enhancement, this Court's intervention is necessary to correct the circuits' inconsistent application of the law.

VII. CONCLUSION

For the foregoing reasons, Ms. Wade respectfully requests that this Court grant her petition for writ of certiorari.

Respectfully submitted,

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DATED: May 18, 2023

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