No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL AARON STUKER,
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

Whether witness tampering under 18 U.S.C. § 1512(a)(2)(A) is a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A), where no element of the offense necessarily requires proof that the defendant used, attempted to use, or threatened to use violent force?

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CASES

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I. Petition for Certiorari

Petitioner Michael Aaron Stuker petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

II. Order Below

The Ninth Circuit Court of Appeals' unreported memorandum denying appellate relief for Mr. Stuker's motion to vacate under 28 U.S.C. § 2255 is attached in the Appendix: *United States v. Michael Aaron Stuker*, No. 21-35466, Dkt. 39-1 (9th Cir. 2022). App. A.

III. Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in Mr. Stuker's case on December 16, 2022. See App. A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely under Supreme Court Rule 13.3. as a petition for rehearing was denied by the Ninth Circuit Court of Appeals on March 8, 2023. App. C.

IV. Relevant Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 of the United States Code, Section 924(c)(3) defines "crime of violence" as:

> (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, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 1512 provides in relevant part:

> (a)
>
> . . .
>
> (2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—
>
> (A) influence, delay, or prevent the testimony of any person in an official proceeding;
>
> . . .
>
> shall be punished as provided in paragraph (3).
>
> (3) The punishment for an offense under this subsection is—
>
> (A) in the case of a killing, the punishment provided in sections 1111 and 1112 [18 USCS §§ 1111 and 1112];
>
> (B) in the case of—
>
> (i) an attempt to murder; or
>
> (ii) the use or attempted use of physical force against any person; imprisonment for not more than 30 years; and
>
> (C) in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.
>
> . . .
>
> (j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

18 U.S.C. § 1515 provides in relevant part:

> (a) As used in sections 1512 and 1513 of this title [18 USCS §§ 1512 and 1513] and in this section—
> . . .
> (2) the term "physical force" means physical action against another, and includes confinement;
> . . .

V. Reason for Granting the Writ

This Court should grant certiorari to resolve a question of exceptional importance: whether, after *United States v. Taylor*, 142 S.Ct. 1015 (2022), witness tampering under 18 U.S.C. § 1512(a)(2)(A), is a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A), when this offense fails to require the use, attempted use, or threatened use of violent physical force.

VI. Related Cases Pending in this Court

Counsel is not aware of any related cases currently pending before the Court.

VII. Statement of the Case

Mr. Stuker was convicted following a jury trial of the offenses of tampering with a witness, in violation of 18 U.S.C. §§ 1512(a)(2)(A) and possessing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c) and 2. Mr. Stuker was sentenced to serve 46 months for witness tampering with a consecutive 84-month sentence for possession of a firearm in furtherance of a crime of violence. The consecutive 84-month sentence was imposed based upon the district court's erroneous view that witness tampering qualifies as a crime of violence under § 924(c).

Mr. Stuker appealed. His conviction and sentence were affirmed. See *United States v. Stuker*, No. 12-30230 (9th Cir. Nov. 7, 2013) (unpublished mem. disp.) (Doc. 155). Mr. Stuker then filed a motion under 28 U.S.C. § 2255, which was also denied.

On October 1, 2019, Mr. Stuker applied to the Ninth Circuit Court of Appeals for leave to file a second motion under § 2255 following this Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), and leave was granted. Mr. Stuker's second § 2255 petition was denied by the district court, and he appealed that decision to the Ninth Circuit Court of Appeals. After Mr. Stuker filed his opening brief, but before filing his reply, this Court issued its decision in *United States v. Taylor*, 142 S.Ct. 1015 (2022). Mr. Stuker was given permission to address the impact of *Taylor* on his case and the government was given the opportunity to file a sur-reply, (*Stuker*, No. 21-35466, Clerk Order, 07/07/22), but did not do so. Although Mr. Stuker argued that this Court's decision in *Taylor* required his §924(c) conviction be vacated because witness tampering did not qualify as a crime of violence under the analysis therein, the panel did not address *Taylor* or its impact in Mr. Stuker's case. See App. A.

VIII. Argument

In *Taylor*, this Court held that an attempted Hobbs Act robbery is not a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) because it can be committed by an attempted threat of force, which does not necessarily require the use, attempted use, or threatened use of force. *Id*. at 2020-2021.

Witness tampering, in violation of 18 U.S.C. § 1512(a)(2)(A), is likewise not a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). Section 1512(a)(2)(A) contains, at most, two separate crimes: (1) the use or attempted use of physical force (the "force version") and (2) the threat or attempted threat of physical force (the "threats version"). Neither of these offenses qualifies as a "crime of violence" under the elements clause of 18 U.S.C. § 924(c), which requires the use, attempted use, or threatened use of violent physical force.

The threats version fails to qualify as a "crime of violence" for two independent reasons: First, it criminalizes attempted threats—conduct which the Supreme Court in *Taylor* held is excluded under the elements clause. Second, it criminalizes the threat of confinement—which does not require a threat of violent physical force.

The force version likewise fails to qualify as a "crime of violence," because it too can be committed by confinement, which does not require the use of violent physical force as required by the elements clause of §924(c).

Although this Court's decision in *Taylor* was decided prior to the Ninth Circuit's memorandum decision, the panel did not address the impact of *Taylor* in Stuker's case. Thus, this case presents a question of exceptional importance as the Ninth Circuit's panel decision is contrary to the rationale set forth in *Taylor*.

A. The threats version of 18 U.S.C. § 1512(a)(2)(A) is an indivisible offense that categorically fails to qualify as a "crime of violence" because it can be committed by an attempted threat of force—conduct excluded under the § 924(c) elements clause.

The witness tampering statute criminalizes "[w]hoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to. . . influence, delay, or prevent the testimony of any person in an official proceeding . . ." Therefore, the statute explicitly criminalizes the attempted threat of force, conduct which is not included under the § 924(c) elements clause. In *Taylor*, this Court addressed the issue of whether an attempted Hobbs Act robbery qualified as a crime of violence under § 924(c)(3)(A). 142 S.Ct. at 2020. To determine whether a federal felony may serve as a predicate for a conviction and sentence under the elements cause of §924(c), a lower court must apply the "categorical approach." *Id*. The categorical approach is required because the elements clause of § 924(c)(3)(A) poses the precise question of whether the federal felony at issue "has as an element the use, attempted use, or threatened use of physical force." *Id*. According to this Court in *Taylor*, "the only relevant inquiry is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force." *Id*. Answering that question "does not require—in fact, it precludes—an inquiry into how any particular defendant may commit the crime." *Id*.

To begin the analysis, a court must first identify the elements the government must prove to secure a conviction under the proposed predicate offense. For example, to win a conviction for a completed robbery under the Hobbs Act, the government is required to show that the defendant engaged in the "unlawful taking or obtaining of personal property from the person . . . of another, against his will, by

means of actual or threatened force." *Id.* To prove a case of attempted Hobbs Act robbery, however, the government is only required to prove (1) The defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a "substantial step" toward that end. *Id.*

Examining these elements, this Court concluded that "[w]hatever one might say about a completed Hobbs Act robbery, attempted Hobbs Act robbery does not satisfy the elements clause." *Id.* The Court explained:

> Yes, to secure a conviction the government must show an intention to take property by force or threat, along with a substantial step toward achieving that object. But an intention is just that, no more. And whatever a substantial step requires, it does not require the government to prove that the defendant used, attempted to use, or even threatened to use force against another person or his property.

Id. (emphasis added).

Importantly, this Court clarified that the elements clause does not ask whether the defendant committed a crime of violence *or attempted to commit a crime of violence.* It asks whether the defendant did commit such a crime—and proceeds to define a crime of violence as a felony that includes as an element the use, attempted use, or threatened use of force. 142 S.Ct. at 2022. As noted by this Court, if Congress had wanted to sweep in federal crimes that require as an element "the use or threatened use of force" and those "that constitute an attempt to commit an offense that has such an element[,]" it could have done so. *Id.* As succinctly concluded by Justice Gorsuch, "But that simply is not the law we have." *Id.*

Applying *Taylor* here, tampering with a witness under § 1512(a)(2)(A), which can be committed by an attempt to use threats of physical force, is not a "crime of violence" under the elements clause of § 924(c). Under the express terms of the statute, a conviction under §1512(a)(2)(A) can be won if the government proves, not just the use of physical force or the use of threats of physical force, but also, any "attempt[ ] to do so." The "attempt to do so" applied to the use of a threat of force, categorically disqualifies §1512(a)(2)(A) from serving as a predicate offense. As clarified in *Taylor* and looking just to the elements as §924(c)(3)(A) demands, Congress here could have included under 924(c)(3)(A) "crimes that required as an element the use or threatened use of force" and "those that constitute an attempt to commit an offense that has such an element," but it did not do so. A conviction under §1512(a)(2)(A) does not categorically require proof of the elements that the elements clause of §924(c) demands. Because Mr. Stuker's § 924(c) conviction rested on an invalid predicate, he is actually innocent of this offense, and his § 924(c) conviction must be reversed.

All attempts to commit a crime of violence are not a crime of violence. This argument was defeated by *Taylor*. See 142 S. Ct. at 2021. Justice Gorsuch rejected this argument because it "rests on a false premise." *Id*. at 2022. The elements clause does not ask whether the defendant committed a crime of violence or attempted to commit a crime of violence. *Id*. It asks whether the defendant did commit a crime of violence—and it proceeds to define a crime of violence as a felony that includes as an element the use, attempted use, or threatened use of force." *Id*.

The argument that attempts to commit crimes of violence are also crimes of violence is no longer valid after *Taylor*.

In the witness tampering statute, the "attempt" attaches to the use of physical force and the use of a threat of physical force. The statute clearly criminalizes not just the attempted use of physical force, but also the attempted use of a threat. The crime is doing the act with the intent to have an effect. Even without the attempt language, the statute would cover unsuccessful threats.

Section 1512(a)(2)(A) explicitly includes "physical force or the threat of physical force" or "attempts to do so[.]" Congress meant to criminalize "attempted threats" under § 1512(a)(2)(A).

And contrary to the panel's conclusion, an attempted threat to tamper with a witness can include more than a threat that is not communicated. See App. A at 3. *An attempted threat can be one that is communicated, but for whatever reason, not believed by the purported victim*. If the threat is made with the required criminal intent, it is still punishable under the statute regardless of whether the threat was believed by the purported victim. But an attempted threat is not a crime of violence.

Under the *Taylor* framework, the analysis in this case is simple. The elements of the threats version of § 1512(a)(2)(A) do not align with the elements of § 924(c) because tampering with a witness includes attempted threats. In other words, because the possibility exists that witness tampering can be committed with attempted threats, the inquiry ends, and the threats version of § 1512(a)(2)(A) categorically fails to qualify as a § 924(c) "crime of violence."

B. Even if the threats version of § 1512(a)(2)(A) requires an actual threat of force, the offense still fails to qualify as a § 924(c) "crime of violence" because it criminalizes the threat of physical confinement — which is not violent physical force necessary under the § 924(c) elements clause.

There is a second reason witness tampering cannot qualify as a crime of violence. The statute includes a unique definition of "physical force" that on its face, broadens the term "physical force" as used under the § 924(c) elements clause. The offense of tampering with a witness explicitly and uniquely expands the statutory definition of "physical force" to "physical actions against another, and includes confinement." 18 U.S.C. § 1515. The inclusion of "confinement" broadens the term physical force and so therefore includes an additional element beyond that which is required by the elements clause of § 924(c).

This Court was clear that *Taylor* limits the examination to just the elements of the predicate offense because that is what § 924(c)'s elements clause requires. The elements clause of §924(c) defines a crime of violence as a felony that has as an element the use, attempted use or threatened use of physical force against the person or property of another. Applying *Taylor*, the elements clause does not ask if the defendant committed an offense that has as an element—the use or threatened use of physical action against another—and includes confinement. Compare § 924(c)(3)(A) and § 1515. Again, adopting Justice Gorsuch's rationale in *Taylor*, if Congress had wanted to sweep within §924(c)'s terms a federal crime that required as an element "the use or threatened use of physical action and includes confinement" it could have easily done so. This simply is not the law.

The Fifth Circuit in *United States v. Picazzo-Lucas*, 821 Fed. Appx. 335 (5th Cir. 2020)(unpublished mem. disp.) recognized this mismatch. It directly held that confinement does not require a threat of violent physical force required under the § 924(c) elements clause. As explained in the case:

> A threat to continue to keep someone locked in a room does not necessarily contain an implicit threat of starvation or other bodily harm. What is necessarily implicit in the threat is this: the person will be stuck in a room. This is unlike threatening to poison someone. Implicit in that threat is death or bodily harm.

Id. at 340, FN 6.

"Physical action, which includes confinement" is not violent physical force as required to be a predicate offense under § 924(c). Mr. Stuker's conviction rests on an invalid predicate, he is actually innocent, and his § 924(c) conviction must be reversed.

C. The Ninth Circuit Court of Appeal's harmless error analysis was wrong for three reasons.

The Ninth Circuit Court of Appeals concluded that harmless error review precluded Stuker from receiving any relief. This conclusion was wrong for three reasons. First, this Court's categorical jurisprudence forbids a court from looking to the factual evidence in a case to determine which of two means (here attempted threats or actual threats) of a single, indivisible crime the defendant was convicted. *Taylor v. United States*, 495 U.S. 575, 600 (1990)(*Taylor* 1.) Indeed, any such factual inquiry would be an end run around the categorical approach, which forbids courts from looking at factual evidence in the trial.

If an end run were permitted, then the result in the more recent *Taylor* case would have been very different. *Taylor* was before this Court upon an appeal of the granting of a second or successive motion to vacate his sentence. 142 S.Ct. at 2019-20. Importantly, there was no question that violent physical force was used in the case, in fact, the victim was fatally shot. See *United States v. Taylor*, 979 F.3d 203, 205 (4th Cir. 2020) aff'd, 142 S. Ct. 2015 (2022). Yet, this Court still found that the offense of attempted Hobbs Act robbery categorically failed to qualify as a crime of violence because it could have been committed by an attempted threat. *Taylor*, 142 S. Ct. at 2022. Here, this same reasoning disqualifies the threats version of witness tampering under § 1512(a)(2)(A) from qualifying as a "crime of violence."

Second, even if the Court could consider the factual evidence of an actual threat of force, and from that conclude that Mr. Stuker's jury necessarily convicted him of this portion of the indivisible threats version of the offense, it would still make no difference. As explained earlier, even an actual threat of force under § 1512(a)(2)(A) fails to qualify as a "crime of violence" because it can be committed with a threat of confinement, which requires no violent physical force.

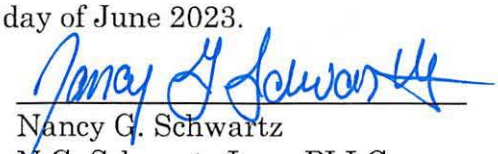
Third, the Ninth Circuit Court of Appeals panel decision incorrectly limited what could be penalized under the "attempted threat" version of the statute. (See App. A at 3.) The panel said that an "attempted threat" under the statute is one where the defendant attempted to reach the victim to carry out a threat but was unable to do so. (*Id.*) But attempted threats can include communicated, but not believed threats as well. So contrary to the conclusion of the panel, if the facts showed that Stuker relayed a threat, it did not mean the communication was a

completed witness tampering offense. Therefore, the inclusion of the attempt to threaten language in the jury instruction could not have been harmless.

IX. Conclusion

For the above reasons, Mr. Stuker asks the Court to grant a Writ of Certiorari.

Respectfully submitted this 6th day of June 2023.

By: 

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