No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JASON JAMES VEAL, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

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

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner, JASON JAMES VEAL by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, without prepayment of costs and to proceed *in forma pauperis*. Vicki Marolt Buchanan was appointed counsel for Mr. Veal in the court of appeals under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

* * *

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Dated: January 16, 2024

Respectfully submitted,

s/ Vicki Marolt Buchanan

_____

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Counsel for Petitioner
Jason James Veal

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QUESTION PRESENTED

After this Court's decision in *United States v. Taylor*, 596 U.S. 845 (2022) which held that attempted Hobbs Act robbery is not a crime of violence under the 18 U.S.C. § 924(c)(3)(A) elements/force clause, is attempted murder with the same elements as attempted Hobbs Act robbery also not a crime of violence?

PARTIES TO THE PROCEEDING

Petitioner, Jason James Veal, is an individual. The Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

JASON JAMES VEAL petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

On September 18, 2023, the Ninth Circuit Court of Appeals issued a Memorandum Opinion that affirmed Petitioner's Conviction and Sentence. (Appendix A.)

JURISDICTION

The Ninth Circuit Court of Appeals judgment is dated September 18, 2023. (Appendix A.) Petitioner timely filed a Petition for Rehearing and Rehearing En Banc that was denied on November 9, 2023. (Appendix B.) Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(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, 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.A. § 16

> The term "crime of violence" means—
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and 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.

STATEMENT OF THE CASE

Jurisdiction of the Court Below

The district court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

Background and District Court Proceedings

Mr. Veal was charged with Conspiracy to Possess with Intent to Distribute Methamphetamine in violation of 21 U.S.C. § 846. On November 2, 2021, he pleaded guilty to a single conspiracy count. On May 12, 2022, the court sentenced him to 120 months in prison.

Mr. Veal was subject to a mandatory minimum 120-month sentence. He argued he was entitled to the safety valve relief under *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021). *Lopez* holds that all three subsections of 18 U.S.C. § 3553(f)(1) must apply to a defendant before that section "bars him or her from safety-valve relief." *Id*. at 443-44, 447. In other words, the defendant does not have—

> (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
>
> (B) a prior 3-point offense, as determined under the sentencing guidelines; and
>
> (C) a prior 2-point violent offense, as determined under the sentencing guidelines;

Veal conceded he had criminal history points satisfying subsections (A) and (B). He also acknowledged that as of the time of the sentencing, his conviction for attempted murder under Cal. Penal Code § 187 was a crime of violence under 18 U.S.C. § 16. *Ibid*. Thus, he also had a conviction for a violent felony under subsection (C), disqualifying him from the safety valve.

The court indicated it would give a lower sentence if not bound by the mandatory minimum sentence. The court sentenced Mr. Veal to the mandatory 120-month sentence to run concurrently with the undischarged terms of imprisonment imposed in two Arkansas cases.

Decision Below

Petitioner appealed his conviction and sentence. On June 21, 2022, the law on whether attempt crimes are crimes of violence changed. In *United States v. Taylor*, 596 U.S. 845 (2022), this Court held that attempted Hobbs Act robbery is not a crime of violence under the 18 U.S.C. § 924(c)(3)(A) elements clause which is identical to 18 U.S.C. § 16(a) elements clause applicable in this case. On appeal, Mr. Veal argued that based on *Taylor,* his earlier conviction for attempted murder was not a crime of violence, and therefore, he was entitled to the safety valve.

After oral argument, the Ninth Circuit issued its opinion in *Dorsey v. United States,* 76 F.4th 1277 (9th Cir. 2023),[1] which limited *Taylor*'s holding to "attempted threats." Thus, *Dorsey* found that attempted murder as part of the witness tampering under 18 U.S.C. § 1512(a) was still a crime of violence after *Taylor*. Therefore, the Ninth Circuit found Mr. Veal's conviction for attempted murder was a crime of violence, precluding the application of the safety valve. (Appendix A)

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision Directly Contravenes this Court's Holding in *United States v. Taylor*, 596 U.S. 845 (2022).

In *United States v. Taylor*, 596 U.S. 845 (2022), this Court held that attempted Hobbs Act robbery was not a crime of violence under the elements/force clause of 18 U.S.C. 924(c)(3)(A). Under 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." *Id.* The

[1] On December 19, 2023, Devaughn Dorsey filed a Petition for Certiorari in his case which was placed on this Court's docket December 25, 2023 as No. 23-685.

same holding should apply to attempted murder under the identical elements/force clause of 18 U.S.C. § 16(a).

The elements of Hobbs Act Robbery compared to California attempted murder are as follows:

Hobbs Act Robbery requires the government to prove	California Attempted Murder requires
(1) the defendant intended to unlawfully take or obtain personal property by means of actual or threatened force and	(1) a specific intent to commit [Cal. Penal Code § 187 murder].
(2) he completed a substantial step toward that end.	(2) a direct but ineffectual act done toward its commission.
United States v. Resendiz-Ponce, 549 U.S. 102 (2007)	Cal. Penal Code § 21a

To determine whether these attempt crimes are a crime of violence, this Court applies the categorical approach, which requires a statute:

> "has *as an element* the use, attempted use, or threatened use of physical force." § 924(c)(3)(A) (emphasis added). And answering that question does not require—in fact, it precludes—an inquiry into how any particular defendant may commit the crime. The only relevant question 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.

Taylor, 596 U.S. at 850 (original emphasis).

Applying the categorical approach, *Taylor* held that:

> Whatever one might say about *completed* Hobbs Act robbery, *attempted* Hobbs Act robbery does not satisfy the elements clause. 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. [2]

596 U.S. at 851 (original emphasis). This Court stated, "Simply put, no element of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force." *Id*. at 852 (emphasis added).

The elements of attempted murder are similar to the elements of attempted Hobbs Act robbery. No element of attempted murder requires proof that the "defendant used, attempted to use, or threatened to use force against the person or his property." Regardless of whether completed Cal. Penal Code § 187 murders are crimes of violence under the elements clause, an attempt to commit those acts is not a crime of

[2] If the legislature wanted to make attempt crimes crimes of violence it could make it clear that a "substantial step" requires the use, attempted use, or threatened use of force.

violence. Thus, under the California statute, attempted murder is not a crime of violence.

II. Certain Circuits, Including the Ninth Circuit, Have Refused to Honor *Taylor*'s Straightforward Holding and Have Distorted Its Holding and Reasoning Beyond Recognition.

Despite *Taylor*'s straightforward holding and its application to other attempt crimes, this Circuit joined a few other circuits and attributed a holding to *Taylor* that does not exist and ignored the holding that does.

For instance, the Ninth Circuit in *Dorsey* says that *Taylor* held that Hobbs Act robbery was not a crime of violence because "attempted threat of force is not a categorical match to § 924(c)'s requirement of 'proof that the defendant used, attempted to use, or threatened to use force.' *Id*. at 2021." *Dorsey*, 76 F.4th at 1283 (original emphasis). This Court never used the term attempted threat and certainly not when deciding whether attempted Hobbs Act robbery is a crime of violence. The discussion referenced in *Dorsey* is a hypothetical used to demonstrate that attempted Hobbs Act robbery can be accomplished without the use, attempted use, or threatened use of force and thus is not a crime of violence.

Next, *Dorsey* claims that *Taylor* does not undermine the conclusion in *United States v. Studhorse*, 883 F.3d 1198, 1206 (9th Cir. 2018) that "'even if [the defendant] took only a slight, nonviolent act with the intent to cause another's death, that act would pose a threat of violent force sufficient to satisfy' the definition of a crime of violence." *Dorsey*, 76 F.4th at 1283. Contrary to *Dorsey*'s claim, *Taylor* specifically addressed and rejected the above conclusion.

The government made the same argument in *Taylor* when it argued that a "threat" required "only an objective, if uncommunicated threat." *Taylor*, 596 U.S. at 856. Thus, the government argued, "anyone who takes a substantive step toward completing a Hobbs Act robbery always or categorically poses such a threat." *Taylor*, 596 U.S. at 855, (emphasis added). *Taylor* dismantled this argument.

First, as a matter of statutory interpretation, this Court noted when Congress uses the word "threat," they usually include words like "poses" or "represents" directly in the text. *Taylor*, 596 U.S. at 856. *Taylor* stated that the government's "interpretation would vastly expand the statute's reach by sweeping in conduct that poses an abstract risk." 596 U.S. at 856 (emphasis added). The government's

interpretation would defy the usual rules of statutory interpretation. *Ibid*.

In addition, *Taylor* discussed another reason why the "pose a threat" language, like in *Studhorse,* does not meet the requirements of the categorical approach.

> Beyond that clue [of statutory interpretation] lies another. Next door to the elements clause Congress included the residual clause. Under its terms, "crimes of violence" were defined to embrace offenses that, "by [their] nature, involv[e] a substantial risk that physical force ... may be used" against a person or property. § 924(c)(3)(B). Pretty plainly, that language called for an abstract inquiry into whether a particular crime, by its nature, poses or presents a substantial risk (or "threat") of force being used. *See Davis,* 588 U. S. at ___, 139 S. Ct. at 2325–2327. Of course, this Court eventually held the residual clause to be unconstitutionally vague. *Id*. at ___, 139 S. Ct. at 2336. But if the government's view of the elements clause caught on, it would only wind up effectively replicating the work formerly performed by the residual clause, collapsing the distinction between them, and perhaps inviting similar constitutional questions along the way. It's an outcome that would (again) defy our usual rules of statutory interpretation—this time because we do not lightly assume Congress adopts two separate clauses in the same law to perform the same work.

Taylor, 596 U.S. at 856-857 (emphasis added). Thus, contrary to the statement in *Dorsey*, *Taylor* undermines and invalidates the *Studhorse* holding.

The *Dorsey* court stated it would "join our sister circuits in concluding that *Taylor* does not require us to reconsider our precedent holding that attempted killing is a crime of violence." *Dorsey*, 76 F.4th at 1284.

Dorsey relied on *Alvarado-Linares v. United States*, 44 F.4th 1334, 1346-47 (11th Cir. 2022) and *United States v. States*, 72 F.4th 778, 787-88 (7th Cir. 2023). Both cases had precedents overturned by *Taylor*. *Alvarado-Linares* acknowledged that "*Taylor* overruled *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), which held that any attempt to commit a crime of violence necessarily qualifies as a crime of violence." *Alvarado-Linares*, 44 F.4th at 1346 n.2. *States* mentioned that *Taylor* abrogated its circuit's decision in *Hill v. United States*, 877 F.3d 717, 720 (7th Cir. 2017) that attempted murder is a crime of violence because a completed murder always requires the use of force. *States*, 72 F.4th at 787.

Alvarado-Linares "distinguished" *Taylor* by ignoring its holding. The court did not focus on the holding because *Alvarado-Linares* reasoned that "the completed crime of murder has as an element the use of force, the *attempt* to commit murder has an element the attempted use of force." *Id*. at 1347 (original emphasis). The above

reasoning is the opposite of what this Court said in *Taylor*. This Court made it clear that unlike "*completed* Hobbs Act robbery, *attempted* Hobbs Act robbery is not a crime of violence." *Taylor*, 596 U.S. at 851 (original emphasis). Similarly, unlike completed murder, attempted murder is not a crime of violence.

To "distinguish" *Taylor*, the Eleventh Circuit stated that "we read *Taylor* to hold that, where a crime may be committed by the threatened use of force, an attempt to commit that crime – i.e., an attempt to threaten – falls outside the elements clause." *Alvarado-Linares*, 44 F.4th at 1346. However, the Eleventh Circuit does not cite where this Court limited its holding to "an attempt to threaten." *Taylor* does not use the phrase "attempt to threaten" or similar language anywhere in its decision, let alone in its holding. This may be the source of *Dorsey*'s "attempted threat" language. In reaching its conclusion, the Eleventh Circuit relied on cases preceding *Taylor*, including the Fourth Circuit *Taylor* decision, not this Court's decision. *Id*. at 1346-1347. Although this Court affirmed the result of the circuit decision, it did not adopt its reasoning.

The other case *Dorsey* relied upon was *States*, 72 F.4th 778. *States* tries to avoid the conclusion mandated by *Taylor* that attempt

crimes, even those involving an underlying violent crime, are not crimes of violence under a categorical approach analysis of the elements clause unless they require the use, attempted use, or threatened use of force.

As discussed previously, the analysis of the elements clause of "crimes of violence statutes" such as 18 U.S.C. § 16 in this case or 18 U.S.C. § 924(c) in *States* requires that the court examine the elements of the crime of conviction. *States* was convicted of attempted murder under 18 U.S.C. §§ 1113 and 1114. "To be guilty of an attempted killing under 18 U.S.C. § 1114, [a person] must have taken a substantial step towards that crime and must also have had the requisite *mens rea*." *Braxton v. United States*, 500 U.S. 344, 248 (1991). *States* does not mention these elements in its decision. Instead, it relies on a tortured reading of what remained of *Hill* which was abrogated by *Taylor*. *States*, 72 F.4th at 787.

States found "*Taylor* abrogates *Hill* only to the extent *Hill* reasoned that '[w]hen a substantive offense would be a [crime of violence' …, an attempt to commit that offense also is a [crime of violence].'" 72 F.4th at 790. It then relied on what it claims remained of *Hill* to conclude that "murder always entails the use of physical force

against another person. It follows that an element of attempted murder is the "attempted use … of physical force the person or property of another." *State* at 791. Its "holding" ignores the actual elements of 18 U.S.C. §§ 1113 and 1114 outlined by this Court in *Braxton*. Its "holding" merely rewords the *Hill* holding abrogated by *Taylor*. This Court should make it clear that the circuit courts' tortured readings of *Taylor* are wrong. Crimes that only require an intent to commit a crime and a substantial step toward committing the crime that does not specifically require the use, attempted use, or threatened use of physical force against the person or property of another are not crimes of violence.

CONCLUSION

For these reasons, the Court should grant the petition and consider this case.

Dated: January 16, 2025

Respectfully submitted,

s/ Vicki Marolt Buchanan
Vicki Marolt Buchanan
Counsel for Petitioner
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