No. _____

In the
Supreme Court of the United States

DEVAUGHN DORSEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A. Whether Petitioner's conviction for using a firearm during a crime of violence must be vacated because the predicate conviction for witness tampering, under 18 U.S.C. § 1512(a)(1), is not a "crime of violence" under 18 U.S.C. § 924(c)(3)'s elements clause.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the prosecution of Dorsey in the United States District Court for the Western District of Washington, United States v. Dorsey, 2:08-cr-00245. Dorsey was originally convicted of witness tampering, in violation of 18 U.S.C. § 1512(a)(1), and discharging a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A). Final judgment was issued by the district court on September 24, 2010. The Ninth Circuit Court of Appeals affirmed the convictions in a final judgment on April 30, 2012, United States v. Dorsey, 677 F.3d 944 (9th Cir. 2012). The United States Supreme Court denied certiorari on June 24, 2013. Dorsey v. United States, 133 S.Ct. 285 (2013).

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The United States District Court for the Western District of Washington entered a final appealable order on November 12, 2021, dismissing Petitioner's motion under 28 U.S.C. § 2255. See Dorsey v. United States, 2:14-cv-00938-RSL (WD Wash 2021), ECF 74 Order; Apx at 17. The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's dismissal in a published opinion dated August 11, 2023. See Dorsey v. United States, 76 F.4th 1277 (9th Cir. 2023); Apx at 1. Petition for rehearing en banc was denied on October 24, 2023. See Dorsey v. United States, No. 22-35030 (9th Cir. Oct. 24, 2023), Order; Apx at 67.

STATEMENT OF THE BASIS FOR JURISDICTION

The district court originally had jurisdiction because Petitioner was charged and convicted of crimes under the United States Code, including witness tampering, in violation of 18 U.S.C. § 1512(a)(1)-(2); and discharging a firearm during and relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). The district court re-obtained jurisdiction when Petitioner filed a motion under 28 U.S.C. § 2255 within a year of the date his conviction became final. See 28 U.S.C. § 2255(f)(1). The United States Court of Appeals for the Ninth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742 because Petitioner filed a timely notice of appeal from the district court's final order and judgment denying the § 2255 motion. ECF 74 Order; Apx at 17; ECF 78 Notice of Appeal. See Fed. R. App. P. 4(a)(1)(A). The Ninth Circuit affirmed the district court's decision in a

published opinion on August 11, 2023, Dorsey v. United States, 76 F.4th 1277 (9th Cir. 2023), and denied petition for rehearing en banc on October 24, 2023. Apx at 67. This Court has jurisdiction under 28 U.S.C. § 1254(1) because the instant petition is filed within 90 days from that decision.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(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).

18 U.S.C. § 1512(a)(1)-(2)

(a) As used in sections 1512 and 1513 of this title and in this section—

. . .

(2) the term "physical force" means physical action against another, and includes confinement;

18 U.S.C. § 1515(a)(2)

* * * 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—

* * *

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A)(iii)

> 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. § 924(c)(3)

STATEMENT OF THE CASE

In 2008, Petitioner was charged by way of a Second Superseding Indictment in the United States District Court for the Western District of Washington with the following offenses:

> Ct 1: Conspiracy to commit trafficking in motor vehicles or motor vehicle parts, in violation of 18 U.S.C. § 2321(a) and 18 U.S.C. § 371;
>
> Ct 2-3: Operating a chop shop, in violation of 18 U.S.C. §§ 2322(a)(1) and (b);
>
> Cts 4-20: Trafficking in motor vehicles, in violation of 18 U.S.C. § 2321(a) and (2);
>
> Ct 21: Witness tampering, in violation of 18 U.S.C. § 1512(a)(1)(A) and (C) and (a)(2)(A) and (C), and Section 2, and;

> Ct 22: Discharging a firearm during & in relation to a crime of violence, violating 18 U.S.C. § 924(c)(l)(A).

See, United States v. Dorsey, No, 08-CR-245-RSL, Crim.Dkt. 166, Second Superseding Indictment

Petitioner pleaded guilty to Counts 1 thru 20, but proceeded to trial on Counts 21 and 22, the witness tampering and discharging a firearm in relation to a crime of violence charges. See United States v. Dorsey, 677 F.3d 944, 950 (9th Cir. 2012). Petitioner was convicted after a jury trial on both of those counts. Id. Petitioner was sentenced to 30 years' imprisonment on Count 21, witness tampering, and a mandatory consecutive term of 18 years' imprisonment on Count 22, the firearm count, for a total of 48 years' imprisonment. Id. The Ninth Circuit Court of Appeals affirmed his convictions and sentence in a published decision. Id.

In 2014, Petitioner timely filed a motion to vacate his convictions under 28 U.S.C. § 2255. See, Dorsey v. United States, Civil No. 14-CV-938-RSL; Dkt#1, § 2255 Motion. Over the following seven years, Petitioner filed several motions to amend attacking his § 924(c) conviction based on changes in law with respect to the "crime of violence" determination. See, Dkt#74 Order p 12; Apx at 20. In an omnibus order, the district court denied Petitioner's original motion, denied several motions to amend, and struck the remainder of his motions to amend. See, Dkt#74 Order p 12; Apx at 20. Relevant to this appeal, the district court denied Petitioner's claim that witness tampering is not a crime of violence under § 924(c) solely on the ground that

Petitioner's claim could not succeed on the merits, holding that "committing witness tampering by attempting to kill a person is categorically a 'crime of violence' under § 924(c)(3)'s elements clause." Id.

The Ninth Circuit granted certificate of appealability with respect to one issue: "whether witness tampering is a qualifying crime of violence under 18 U.S.C. § 924(c)." See Opinion, Dorsey v. United States, 76 F.4th 1277 (9th Cir. 2023); Apx at 1-16. After full briefing and oral argument, the Ninth Circuit issued a published opinion affirming the district court's decision to dismiss Petitioner's § 2255 motion. Id. The court held that attempting to kill a witness, in violation of § 1512(a)(1), is a crime of violence under § 924(c) because it has the required element of force, and it satisfies § 924(c)'s mens rea requirement because it requires proving that the defendant intentionally used or attempted to use physical force against another. Id, Opinion p 10-13; Apx at 10-14. Petition for rehearing en banc was denied on October 24, 2023. See Order Dorsey v. United States, 22-35030; Apx at 67.

STATEMENT OF FACTS

The following facts are taken directly from the Ninth Circuit's opinion affirming Petitioner's convictions on direct appeal, United States v. Dorsey, 677 F.3d 944 (9th Cir. 2012):

> Between July of 2007 and May of 2008, Dorsey led a conspiracy to traffic in stolen motor vehicles. To steal motor vehicles, Dorsey and his co-conspirators did "key switches" at auto dealerships. Members of the conspiracy would

ask an auto salesperson to start a vehicle. One person would distract the salesperson while another would switch the key in the vehicle with a key from a similar vehicle. The members would later return to the dealership and use the real key to drive the vehicle off the lot. After stealing vehicles, Dorsey and his co-conspirators removed their vehicle identification numbers ("VIN") and replaced them with other VINs gained from wrecking yards. They then registered the stolen vehicles with the Washington Department of Licensing using fraudulent documents, and finally either sold for profit or abandoned the vehicles.

As part of this conspiracy, Dorsey enlisted Martine Fullard to help falsely register a stolen Buick LaCrosse. At Dorsey's direction, Fullard registered the LaCrosse in her name at the Department of Motor Vehicles. Dorsey gave Fullard about $200 and told her the car would be registered in her name no longer than two weeks. Fullard saw the LaCrosse only once.

In January of 2008, Seattle police began an investigation of the vehicle-trafficking conspiracy. Dorsey learned of the investigation, and sometime after Fullard registered the LaCrosse in her name, Dorsey called Fullard and told her that the police would probably contact her. The police in fact interviewed Fullard in March of 2008. On May 7, 2008, Fullard was served with a grand jury subpoena in connection with the vehicle-trafficking

investigation. She was scheduled to appear before the grand jury on May 15, 2008.

Dorsey knew that Fullard had been served with a grand jury subpoena. A few days before Fullard's scheduled grand jury appearance, Dorsey told William Fomby that Fullard was going to testify before the grand jury and said, "Man, I got to do something, man. I'm about to go back to Cali." Dorsey had previously been convicted of conspiracy to traffic in stolen motor vehicles and operating a chop shop and had served his sentence at a federal prison in California. Dorsey also told Diamond Gradney that Fullard and Tia Lovelace had received subpoenas and accused Gradney of being subpoenaed and not telling him. And, presumably referring to Fullard, Dorsey said to Shawn Turner, "That bitch better not testify against me."

On the night of May 13, 2008, two days before Fullard's scheduled grand jury appearance, Fullard was cooking in the kitchen of her West Seattle apartment. At about 10:29 pm, seven shots were fired into the apartment through a window over the kitchen sink. Fullard's boyfriend, mother, and two children, then ages eight and ten, were also in the apartment. Three bullets struck Fullard and one struck her older son. Then two more shots were fired through a different window near the front door; they did

> not strike anyone. The gunshot wounds of Fullard and her son were not fatal.

Dorsey, 677 F.3d at 948-49.

REASONS FOR GRANTING THE WRIT

Under Supreme Court Rule 10, the Court will review a United States Court of Appeals decision for compelling reasons. A compelling reason exists when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a).

Here, Petitioner's conviction for witness tampering under 18 U.S.C. § 1512(a)(1), is not a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3) because the government was not required to prove as an element "the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). Therefore, Petitioner's conviction under § 924(c) must be vacated. The Ninth Circuit's holding that witness tampering, under § 1512(a)(1) is always a "crime of violence" under § 924(c)(3) is directly contrary to recent Supreme Court precedent and must be corrected. In reaching the decision, the Ninth Circuit misapplied the modified categorical approach and issued a decision that directly contradicts this Court's precedent in Taylor. Therefore,

Petitioner asks that this Honorable Court exercise its authority under Supreme Court Rule 10 and grant certiorari with respect to the following claim.

A. Petitioner's conviction for using a firearm during a crime of violence must be vacated because the predicate convictions for witness tampering, under 18 U.S.C. § 1512(a)(1), does not qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)'s elements clause.

A conviction under § 1512(a) is a "crime of violence" under § 924(c)(3)(A) only if the witness tampering crime "necessarily 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another.'" United States v. Buck, 23 F.4th 919, 924 (9th Cir. 2022)(quoting § 924(c)(3)(A)). The force required under the elements clause must be "violent physical force—that is, force capable of causing physical pain or injury to another person." Id. See also, Johnson v. United States, 559 U.S. 133, 143 (2010). "If any—even the least culpable—of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the federal standard." Borden v. United States, 141 S. Ct. 1817, 1822 (2021) (plurality opinion).

Here, the Ninth Circuit found that attempting to kill another person in violation of § 1512(a)(1) is a crime of violence under § 924(c)(3)(A). Dorsey, 76 F.4th at 1283. Relying on precedent decided prior to Taylor, the court made the following conclusion:

> We have held that attempted first-degree murder under Washington state law qualifies as a crime of violence under 18 U.S.C. § 16(a) because it "ha[s] as an element the intentional use, threatened use, or attempted use of physical force against a person." United States v. Studhorse, 883 F.3d 1198, 1206 (9th Cir. 2018). Although Defendant was convicted of attempted killing under a different law, the same reasoning applies here: "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. Id at 1206.

As discussed here, the Ninth Circuit misapplied Supreme Court precedent because it fails to acknowledge that the "substantial step" element of the attempt crime must require violent physical force in order to constitute a crime of violence. United States v. Taylor, 142 S. Ct. 2015, 2020-21 (2022). In doing so, the court incorrectly applied the modified categorical approach and failed to address the jury instructions addressing the "substantial step" element of attempted killing under § 1512(a)(1). Although required under the modified categorical approach,[1] the Ninth Circuit failed to look to relevant documents to determine if witness tampering by attempting to kill a witness, under § 1512(a)(1), "necessarily 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another.'" Buck, 23

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[1] Shepard v. United States, 544 U.S. 13, 16, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)

F.4th at 924 (quoting § 924(c)(3)(A)). Instead, the opinion relied Ninth Circuit precedent[2] created years prior to Taylor to create a bright line rule that an "attempted killing," under § 1512(a)(1) is always a crime of violence because the end result of the crime is a purposeful killing that requires force. However, as confirmed in Taylor, the fact that the completed killing would have required violence is not relevant, and the decision otherwise must be corrected to conform with Supreme Court precedent. Id.

In determining whether an offense under § 1512(a) demands the type of force required by § 924(c)(3), a court is to apply a categorical approach and look only to the elements of the offense. See Johnson v. United States, 559 U.S. 133 (2010); Descamps v. United States, 570 U.S. 254 (2013) United States v. Begay, 33 F.4th 1081, 1090 (9th Cir. 2022). "[T]he facts of a given case are irrelevant," and the focus is "whether the elements of the statute of conviction meet the federal standard." Borden, 141 S.Ct at 1822. Unless the least culpable act criminalized in the witness tampering statute entails that force, the statute is not a categorical match with the elements clause, and it does not qualify as a crime of violence. Id.

The first task is to identify the relevant elements of the offense under the witness tampering statute: 18 U.S.C. § 1512. This statute is divisible, "i.e., comprises multiple, alternative versions of the crime." Descamps, 570 U.S. at 262. Section 1512(a)(1) requires proof that a defendant "kills or attempts to kill another person,"

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[2] United States v. Studhorse, 883 F.3d 1198, 1206 (9th Cir. 2018)

whereas Section 1512(a)(2) requires proof that a defendant "uses physical force or the threat of physical force against any person, or attempts to do so." When, like the instant case, the witness tampering statute is divisible, a court must engage in a modified categorical approach and "consult a limited class of documents . . . to determine which alternative formed the basis of the defendant's prior conviction." Descamps, 570 U.S. at 263 n 2. These documents include the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." Shepard v. United States, 544 U.S. at 16, 125 S. Ct. 1254, 161 L. Ed. 2d 205; see also, Almanza-Arenas v. Lynch, 815 F.3d 469, 478-479 (9th Cir. 2016) (citing Descamps). In reviewing these documents, "the modified approach must 'retain[] the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime.'" United States v. Marcia-Acosta, 780 F.3d 1244, 1250-51 (9th Cir. 2015) (citing Descamps, 133 S.Ct at 2285). Unless the least culpable act found by the jury requires violent physical force, "the statute is not a categorical match with the elements clause, and it does not qualify as a crime of violence." Begay, 33 F.4th at 1091 (citing Borden, 141 S. Ct. at 1822).

Here, the jury was instructed on the elements of witness tampering under § 1512(a):

> (1) Whoever **kills or attempts to kill** another person, with intent to—
>
> > (A) prevent the attendance or testimony of any person in an official proceeding . . . .

> (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 . . .
>
> [is guilty of witness tampering].

Dkt#74 Order, p 26 (emphasis supplied); Apx at 60-61. Consistent with these elements, the jury instructions permitted a conviction for witness tampering under one of two theories: Theory 1–the attempt to kill Fullard; or Theory 2–the use of physical force against Fullard. Dkt#74 Order, p 24-26; Apx at 56-61.

With respect to attempting to kill a witness under § 1512(a)(1), the jury was instructed that each of the following elements must be proved:

> "First, the defendant intended to kill Martine Fullard; and
>
> Second, the defendant knowingly did something which was a substantial step toward committing the crime of killing Martine Fullard.
>
> *To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.*"

See Crim.Dkt#382 Instruction 21 (emphasis added).

As recognized in Descamps, jury instructions are the Shepard approved documents listing the elements of the offense and a court should look to the jury instructions in order to avoid making a "disputed" determination about "what the jury must have accepted as the theory of the crime." Decamps, 570 U.S. at 269 (citing Shepard, 544 U. S., at 25, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (plurality opinion). However, the Ninth Circuit did not address the jury instructions in its opinion. Had the Ninth Circuit correctly addressed the jury instructions, it would have revealed that the government was not required to prove an element of the use of physical force.[3] Instead, the instructions demonstrate that the "substantial step" element for "attempting to kill" a witness under § 1512(a)(1) does not require proof of violent physical force. See Taylor, 142 S.Ct. at 2020-21 ("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").

The government was required to prove that Petitioner intended to kill the witness under § 1512(a)(1), and took a "substantial step" toward killing a witness. A "substantial step" toward killing a witness need not involve force but was defined as something "more than mere preparation" demonstrating that the crime will take place "unless interrupted by independent circumstances." Crim.Dkt#382 Jury Instructions, Instruction No. 21.

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[3] Defined as force capable of causing physical pain or injury to another person Johnson, 559 U.S. at 143.

See Taylor, 142 S.Ct at 2021-24. As confirmed by the statute and instructions to the jury, the crime of attempted killing of a witness under § 1512(a)(1) contains no express element requiring the use or attempted use of physical force. Indeed, there is no reference to force at all as the legislature did not restrict the manner of attempting to kill in subsection (a)(1). Simply put, because the "substantial step" element for the attempt under § 1512(a)(1) does not require proof of violent physical force, it cannot be a "crime of violence" under § 924(c)(3). Taylor, 142 S.Ct at 2021-24.

In holding that "attempting to kill another person in violation of § 1512(a)(1) is a crime of violence under § 924(c)(3)(A)," the Ninth Circuit reasoned that an element that requires proof of a bodily injury, such as killing a witness under § 1512(a)(1), equates to "physical force" as defined by federal law. Dorsey, 76 F.4th at 1283-84. The court reasons that, because the completed crime of killing would always require violence, an "attempted killing" is a crime of violence. Id. The import of the decision is that the attempted killing of a witness cannot result except through the application of "physical force" as stated under § 924(c)(3). In reaching the decision, the court failed to "focus on the elements" of the crime and instead focused on the fact the completed crime would involve the killing of a witness. Descamps, 133 S.Ct at 2285. The court did not acknowledge the elements with respect to an "attempted killing" and issued a decision that plainly conflicts with Taylor. Respectfully, the panel's decision must be corrected.

In Taylor the Court pointed out that, although the crime of Hobbs Act robbery is a crime of violence, "attempted" Hobbs Act robbery is not a crime of violence. The Ninth Circuit recognizes this, but concludes that the basis for the decision in Taylor was that an "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.'" Dorsey, 76 F.4th at 1283 (quoting Taylor, 142 S.Ct at 2021). The Ninth Circuit then attempts to distinguish Taylor concluding that, unlike attempted Hobbs Act robbery, witness tampering by attempting to kill a witness cannot be accomplished through an attempted threat of force, and is always a crime of violence. Id at 1284 ("mere attempted threat of force is not a valid ground for a § 1512(a)(1) conviction of attempted killing).

The court's reliance on United States v. Studhorse, 883 F.3d 1198, 1206 (9th Cir. 2018), and attempt to distinguish Taylor falls flat. First, the decision in Studhorse came years prior to the Supreme Court's decision in Taylor and is misplaced. More importantly, the term underlined in the Dorsey opinion, "attempted threat," is not found in Taylor and the focus on this term led to a misinterpretation of Taylor. It is true that an attempted threat of force is not a categorical match with § 924(c), but that is not the only example the Taylor Court provided for finding that attempted Hobbs Act robbery is not a crime of violence. Instead, the Court primarily found that the "substantial step" element of the attempt crime does not require physical force under Johnson, and therefore, it was not a crime of violence. Taylor, 142 S. Ct. at 2020–21. Accordingly,

finding that "attempting to kill another person" in violation of § 1512(a)(1) is always a crime of violence under the elements clause of § 924(c)(3)(A) cannot withhold scrutiny in light of the Supreme Court's decision in Taylor.

"The elements clause does not ask whether the defendant committed a crime of violence or attempted to commit one." Taylor, 142 S.Ct at 2022. Instead, elements clause 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 elements clause under "§ 924(c)(3)(A) doesn't ask whether the crime is sometimes or even usually associated with the actual or attempted use of force or threats of force." Taylor, 142 S.Ct at 2024. Instead, it "asks whether the government must prove, as an element of its case, the use, attempted use, or threatened use of force." Id.

Here, the government was not required to prove, "as an element of its case, the use, attempted use, or threatened use of force." Instead, it had to prove that Petitioner took a "substantial step" toward the completed crime. Because the "substantial step" element could have been committed without the use, attempted use, or threatened use of violent physical force, the attempt crime is not a crime of violence. Taylor, 142 S.Ct at 2020-24. If Congress wanted the elements clause to apply to attempt crimes, it could have said so. "[I]t might have swept in those 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.' But that simply is not the law we have." Taylor, 142 S.Ct at 2022.

Petitioner's claim is supported by this Court's logic in Taylor. There, the Court found the crime of attempted Hobbs Act robbery required proof of the following elements: (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." Taylor, 142 S.Ct at 2020. The Court then observed, "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." Taylor, 142 S.Ct. at 2020.[4] The Court then presented the following hypothetical to demonstrate that a "substantial step" for an attempted robbery does not require violent force:

> "Suppose Adam tells a friend that he is planning to rob a particular store on a particular date. He then sets about researching the business's security measures, layout, and the time of day when its cash registers are at their fullest. He buys a ski mask, plots his escape route, and recruits his brother to drive the getaway car. Finally, he drafts a note—"Your money or your life"—that he plans to pass to the cashier. The

[4] The United States even conceded this fact in Taylor, stating that a substantial step must be "unequivocal," and "significant," though it "need not be violent." Taylor, 142 S.Ct. at 2020 (citing Brief for United States at 22).

> note is a bluff, but Adam hopes its implication that he is armed and dangerous will elicit a compliant response. When the day finally comes and Adam crosses the threshold into the store, the police immediately arrest him. It turns out Adam's friend tipped them off."

Taylor, at 2021.

The above facts were all that was necessary to convict Adam of attempted Hobbs Act robbery. Id. Although the completed robbery would require proof of physical force, the substantial step element of attempted robbery did not require physical force. Thus, the Taylor Court found that attempted Hobbs Act robbery is not a crime of violence. Id. That same reasoning applies here, where Petitioner is convicted of witness tampering by attempting to kill a witness, in violation of § 1512(a)(1). Although the completed offense under § 1512(a)(1) would require violent physical force, the "substantial step" required for the attempt does not require violent physical force. Taylor 142 S.Ct. at 2020.[5] Thus, "attempted killing" of a witness under § 1512(a)(1), is not a crime of violence.

A district court in the Eastern District of North Carolina addressed a similar issue in Bullis v. United States, 628 F. Supp. 3d 613 (E.D. NC 2022). Like the instant case, the defendant in Bullis filed a § 2255 motion attacking a § 924(c) conviction after the decision in Taylor. The question for the court in Bullis was whether the conviction under 18 U.S.C. § 1716, for

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[5] Citing Brief for United States at 22 where government concedes that a substantial step "need not be violent."

mailing a nonmailable matter "with intent to kill or injure another," qualifies as a crime of violence. Id. The court found that a conviction under § 1716 required the following elements to be proved: "1) 'First the Government must prove that the package in question contained a nonmailable item'; 2) 'Second, the defendant must knowingly deposit that package for mailing'; and 3) 'Third, the defendant must intend to kill or injure another.'" Bullis, 628 F.Supp.3d at 620-621. The court then set out to answer "whether mailing a nonmailable matter with intent to kill or injure another constitutes an 'attempted use' of physical force." Id at 621.

In deciding the issue, the court noted Taylor's holding that attempted robbery could be accomplished without the attempted use of physical force required under § 924(c)(3)(A), and was therefore not a crime of violence. Bullis, 628 F.Supp.3d at 621 (citing Taylor, 142 S. Ct. at 2020-21). The court then applied that reasoning to find that Bullis' conviction for violating § 1716 was not a crime of violence:

> Similar to the Taylor examples, law enforcement may know in advance that the defendant placed the bomb in the mail, and could intercept and defuse it before it has any chance of reaching the intended target. See id. at 2020-21. Alternatively, the defendant may be part of a law enforcement sting operation that allowed him to place a small amount of explosiveness in the mail that is incapable of causing physical pain or injury to another, or an inert bomb that is incapable of detonating. See id. *Taylor dictates*

> *that these scenarios do not establish attempted use of physical force.*

Id at 622 (emphasis added).

The hypothetical situations presented in Taylor and the Bullis decision apply equally to the crime of witness tampering by "attempting to kill" under § 1512(a)(1). For example, suppose a defendant made a plan to kill a witness with the intent to keep that witness from testifying. The defendant researches to find where the witness lives and works, the witness' habits, and the time of day when the witness was most vulnerable. The defendant buys a disguise and equipment, plots an escape route, and recruits his friend to assist by helping to find a firearm. Hoping to avoid blame for the killing, the defendant drafts a note to make it look like the witness committed suicide. When the day comes and the defendant arrives at the location to kill the witness, the police immediately arrest him because his friend had tipped them off.

The scenario illustrates why an "attempt to kill a witness" under § 1512(a)(1) does not qualify as a crime of violence under the elements clause. As with the hypothetical situations in Taylor and Bullis, all of the elements necessary for the attempt crime are present, but none require the use or attempted use of physical force. See Taylor, 142 S. Ct. at 2020-21; Bullis, 628 F.Supp.3d at 622. The government was required to prove only that Petitioner intended to kill a witness and his actions constituted a substantial step toward that goal. But like analysis in Taylor and Bullis, government was not required to prove that Petitioner did use or attempt to use physical force to commit the

crime. Because no element of the attempted killing of a witness required proof that the defendant used, attempted to use, or threatened to use force, it cannot be a crime of violence.

In sum, the opinion in Dorsey fails to look to the relevant Shephard documents to determine if the offense had as an element, the required use of physical force. Instead, the opinion created a bright line rule to find that an "attempted killing," under § 1512(a)(1) is always a crime of violence because the end result of the crime is a purposeful killing that requires force. But the jury instructions and the jury verdict show that the government was not required to prove an element of violent physical force. Instead, the government was required to prove that Petitioner intended to kill the witness under § 1512(a)(1), and took a substantial step toward killing a witness. A "substantial step" toward killing a witness need not involve force but is defined as something more than mere preparation and must demonstrate that the "[killing] will take place unless interrupted by independent circumstances." Doc. 382 Jury Instructions, Instruction No. 21.

The opinion fails to address the jury instructions addressing the attempt crime and misapplies Taylor because it fails to acknowledge that in order for the attempt to be a crime of violence, the actions constituting a "substantial step" towards the commission of the offense, must require violent physical force. Taylor, 142 S.Ct. at 2020-21 ("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"). Under Taylor, the fact that the completed offense would have required violence is not relevant to this determination.

Like Taylor, the offense of witness tampering by attempting to kill another person is not a crime of violence because the government was not required to "prove beyond a reasonable doubt that the defendant used, attempted to use, or even threatened to use force" to commit the attempted crime. Taylor, 142 S.Ct. at 2020-21. Instead, the government was required to prove Petitioner took a substantial step toward the commission of a killing. As pointed out in Taylor, an attempt to commit an otherwise violent crime does not require, as an element, proof of the use or threatened use of physical force, and proof of such force was not required as an element of the offense in this case. Therefore, Petitioner's conviction under § 1512(a)(1) is not a crime of violence.

CONCLUSION

In assessing the "substantial step" element of attempt crimes, this Court held "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." Taylor, 142 S.Ct. at 2020-21. Like Taylor, one element of the crime of witness tampering by attempting to kill a witness under § 1512(a)(1), is that the defendant take a "substantial step" toward to commission of the completed offense. Like Taylor, the "substantial step" element of attempting to kill a witness under § 1512(a) 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." And like in Taylor, the crime of witness tampering by attempting to kill a witness, cannot be a "crime of violence" under § 924(c).

Because the Ninth Circuit's finding in Dorsey, is contrary to the plain reading of Taylor, Petitioner has demonstrated compelling reasons to grant writ of certiorari so that the Ninth Circuit's decision can be corrected to conform with Supreme Court precedent in Taylor.

Respectfully Submitted,

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