

NO. \_\_\_\_\_

---

IN THE SUPREME COURT OF THE UNITED STATES

---

JONATHAN MOTA,

*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**

---

HANNI M. FAKHOURY  
*Counsel of Record*  
MOEEL LAH FAKHOURY LLP  
2006 Kala Bagai Way, Suite 16  
Berkeley, CA 94704  
(510) 500-9994  
hanni@mlf-llp.com

## **QUESTIONS PRESENTED FOR REVIEW**

1. Does the Ninth Circuit's rule that issues raised and rejected on direct appeal are not reviewable in a 28 U.S.C. § 2255 petition conflict with the general rule announced by this Court that claims not raised on direct appeal may not be raised on collateral review?
2. Was the Ninth Circuit correct to deny a certificate of appealability to review the district court's conclusion that a Fifth Amendment constructive amendment claim raised by Mr. Mota on direct appeal was the same as the Sixth Amendment categorical analysis challenge raised by Mr. Mota post-conviction?

## **INTERESTED PARTIES**

Petitioner is Jonathan Mota, an inmate at the United States Penitentiary in Florence, Colorado. Mr. Mota was the defendant and petitioner in the district court and the appellant and petitioner below. Respondent is the United States.

**RULE 14.1(b)(iii) STATEMENT**

There are no proceedings directly related to the case in this Court.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	v
INTRODUCTION .....	1
ORDERS BELOW .....	1
JURISDICTION .....	1
STATUTES INVOLVED .....	1
STATEMENT OF THE CASE .....	3
I.    Mr. Mota is convicted and sentenced to life imprisonment .....	3
II.    Mr. Mota’s motion to vacate is denied .....	4
III.    The Ninth Circuit denies a certificate of appealability .....	6
REASONS FOR GRANTING THE WRIT .....	7
I.    This Court should permit review of the district court’s conclusion that Mr. Mota was barred from re-litigating the issue of whether he was convicted of Hobbs Act extortion .....	8
A.    The Ninth Circuit’s rule that a petitioner is precluded from raising claims decided on direct appeal in a § 2255 petition conflicts with decisions of this Court requiring a petitioner exhaust their claims .....	10
B.    Because Mr. Mota raised a different claim on direct appeal, the re-litigation bar did not apply in any event .....	11
CONCLUSION .....	14

## TABLE OF AUTHORITIES

### Cases

<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983).....	7
<i>Belford v. United States</i> , 975 F.2d 310 (7th Cir. 1992) .....	10
<i>Brown v. United States</i> , 2020 WL 437921 (W.D.N.C. Jan. 28, 2020) .....	10
<i>Capozzi v. United States</i> , 531 F. Supp. 3d 399 (D. Mass. 2021) .....	9
<i>Dall v. United States</i> , 957 F.2d 571 (8th Cir. 1992) .....	10
<i>Descamps v. United States</i> , 570 U.S. 254 (2013).....	9, 13
<i>Finch v. United States</i> , 2022 WL 2392928 (M.D. Tenn. Jul. 1, 2022) .....	10
<i>Hohn v. United States</i> , 524 U.S. 236 (1998).....	1
<i>Massaro v. United States</i> , 538 U.S. 500 (2003).....	11
<i>Mathis v. United States</i> , 579 U.S. 500 (2016).....	8, 9, 13, 14
<i>Medrano v. United States</i> , 315 F.2d 361 (9th Cir. 1963) .....	11
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003).....	7
<i>Munoz v. United States</i> , 2020 WL 9219149 (S.D. Fla. Dec. 29, 2020) .....	10
<i>Murchu v. United States</i> , 926 F.2d 50 (1st Cir. 1991) .....	10

<i>Odom v. United States</i> , 455 F.2d 159 (9th Cir. 1972) .....	11
<i>Shepard v. United States</i> , 544 U.S. 13 (2005).....	13
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000).....	7
<i>Stein v. United States</i> , 390 F.2d 625 (9th Cir. 1968) .....	11
<i>Taylor v. United States</i> , 495 U.S. 575 (1990).....	8
<i>United States v. Currie</i> , 589 F.2d 993 (9th Cir. 1979) .....	6, 10, 11, 14
<i>United States v. Davis</i> , 588 U.S. 445 (2019).....	8
<i>United States v. Frady</i> , 456 U.S. 152 (1982).....	11
<i>United States v. Greene</i> , 834 F.2d 1067 (D.C. Cir. 1987).....	10
<i>United States v. Kalish</i> , 780 F.2d 506 (5th Cir. 1986) .....	10
<i>United States v. Mota</i> , 753 Fed. Appx. 470 (9th Cir. Feb. 20, 2019) .....	4, 12, 13
<i>United States v. Warner</i> , 23 F.3d 287 (10th Cir. 1994) .....	10
<i>United States v. White</i> , 510 F. Supp. 3d 443 (W.D. Tx. 2020) .....	10

#### Statutes

18 U.S.C. § 922.....	4
18 U.S.C. § 924.....	<i>passim</i>
18 U.S.C. § 1111.....	2

18 U.S.C. § 1951.....	1
28 U.S.C. § 1254.....	1
28 U.S.C. § 2253.....	3, 7
28 U.S.C. § 2255.....	<i>passim</i>

## INTRODUCTION

Jonathan Mota respectfully petitions this Court for a writ of certiorari, seeking to vacate the order of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability (“COA”), and requesting this Court grant a COA and remand to the Ninth Circuit to review the Northern District of California’s denial of Mr. Mota’s motion to vacate under 28 U.S.C. § 2255.

## ORDERS BELOW

The Ninth Circuit’s order denying Mr. Mota a COA is unreported and included in the Appendix at 20a. The Northern District of California’s June 24, 2024 order denying Mr. Mota’s motion to vacate and request for a COA is unreported and included in the Appendix at 1a.

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236, 253 (1998). The Ninth Circuit entered its order denying a COA on March 7, 2025. This petition is thus timely. Sup. Ct. R. 13.3.

## STATUTES INVOLVED

Title 18 U.S.C. § 1951 states, in part:

(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.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Title 18 U.S.C. § 1111(a) states:

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

Title 18 U.S.C. § 924(c) states, in part:

...any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Title 18 U.S.C. § 924(j)(1) states, in part:

A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

- (1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life...

Title 28 U.S.C. § 2255(a) states:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Title 28 U.S.C. § 2253(c) states:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

### **STATEMENT OF THE CASE**

#### **I. Mr. Mota is convicted and sentenced to life imprisonment.**

On January 18, 2013, a man ran into a convenience store in Kelseyville, California with a handgun, and demanded money. An employee, Forrest Seagrave, tried to intervene, but was shot by the suspect, and ultimately died. Law enforcement concluded Mr. Mota was the robber and shooter, and he was arrested in February 2013.

On June 27, 2013, the operative superseding indictment issued in the Northern District of California charging Mr. Mota with violating the Hobbs Act, in violation of 18 U.S.C. § 1951(a) (Count One), use or possession of a firearm during a crime of

violence, in violation of 18 U.S.C. § 924(c) (Count Two), murder caused by a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(j) (Count Three), and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count Four).

Mr. Mota represented himself at trial with the assistance of standby counsel. Count Four was severed, and Mr. Mota was tried before a jury that found him guilty on Counts One, Two, and Three. On Count Three, charging use of a firearm causing death, the jury found the government had proven only second-degree murder, not first-degree murder. After the verdict, the government dismissed Count Four. The district court ultimately imposed a sentence of life imprisonment on Mr. Mota as a result of his conviction on Count Three on October 28, 2016.

Mr. Mota was appointed counsel on appeal and the Ninth Circuit vacated the § 924(c) conviction and sentence on Count Two as multiplicitous of the § 924(j) conviction and sentence on Count Three, but otherwise affirmed the judgment. *United States v. Mota*, 753 Fed. Appx. 470 (9th Cir. Feb. 20, 2019). This Court denied a petition for writ of *certiorari* on January 27, 2020. *Mota v. United States*, 140 S. Ct. 962 (Jan. 27, 2020). The District Court issued an amended judgment on September 21, 2020, vacating the sentence on Count Two, and reimposing a life sentence on Count Three.

## **II. Mr. Mota's motion to vacate is denied.**

Mr. Mota's appellate attorney filed a motion to vacate under 28 U.S.C. § 2255 on Mr. Mota's behalf on April 30, 2021, and then an amended motion to vacate on

October 4, 2021. On January 3, 2022, the government filed its opposition to Mr. Mota’s amended motion to vacate, raising both procedural and substantive challenges to the motion. On March 30, 2022, this Court granted Mr. Mota’s appellate attorney’s motion to withdraw and appointed new counsel to represent Mr. Mota. With new counsel, Mr. Mota filed a reply to the government’s opposition on August 5, 2022 and requested leave to file a second amended motion, a request the district court granted over the government’s objection on May 25, 2023.

The operative second amended motion to vacate raised six claims. Relevant here is Ground One, which argued that the § 924(j) conviction must be vacated because Mr. Mota was not convicted of a “crime of violence.” More specifically, the predicate “crime of violence” underlying Count Three was the Hobbs Act violation charged in Count One. Although the First Superseding Indictment and the Amended Judgment both referred to “Hobbs Act robbery,” Mr. Mota argued the jury was only instructed on the elements of Hobbs Act *extortion*. App. 4a-5a. He argued the § 924(j) conviction could not stand because numerous district courts have found that Hobbs Act extortion is not categorically a “crime of violence” under the “force” or “elements” clause of § 924(c)(3)(A).

Mr. Mota also requested the Court order an evidentiary hearing to resolve factual disputes necessary to resolve the motion, and issue a COA if it ultimately denied the motion to vacate. The government opposed, raising procedural objections and responded substantively to all of Mr. Mota’s arguments.

On June 24, 2024, the district court denied Mr. Mota’s motion to vacate, along with his requests for an evidentiary hearing and a COA. It found several claims procedurally defaulted because they had not been raised on direct appeal, and rejected the argument that any procedural default was excused by ineffective assistance of appellate counsel. The district court rejected other claims on the merits.

As to Claim One, the district court refused to consider Mr. Mota’s argument that he had not been convicted of Hobbs Act robbery but instead had been convicted of Hobbs Act extortion, finding the issue had been “raised, and disposed of, on direct appeal.” App. 5a. It relied on the Ninth Circuit’s prior decision in *United States v. Currie*, 589 F.2d 993 (9th Cir. 1979), which held that “[i]ssues disposed of on a previous direct appeal are not reviewable in a subsequent § 2255 proceeding.” *Currie*, 589 F.2d at 995; *see* App. 5a.

Mr. Mota filed a timely notice of appeal on July 6, 2024.

### **III. The Ninth Circuit denies a certificate of appealability.**

On August 12, 2024, Mr. Mota filed a motion for a COA with the Ninth Circuit. On March 7, 2025, the Ninth Circuit denied a certificate of appealability in a brief one paragraph order. It found Mr. Mota “has not shown that ‘jurists of reason would find it debatable whether the [28 U.S.C. § 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.’” App. 20a (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

## REASONS FOR GRANTING THE WRIT

A federal prisoner seeking appellate review of an order denying a motion to vacate his conviction under 28 U.S.C. § 2255 must first obtain a certificate of appealability. 28 U.S.C. § 2253(c). The “showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*, 529 U.S. at 484. That standard can be satisfied not only by showing “reasonable jurists could debate” whether the “petition should have been resolved in a different manner,” but also where the “the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Id.* at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). “A COA does not require a showing that the appeal will succeed” and “a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief.” *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Because the issue raised by Mr. Mota in Ground One of his second amended motion to vacate is “debatable” and meets the low standard for a COA established by this Court, a writ of certiorari should issue, a COA should be granted, and the case remanded to the Ninth Circuit. *See Miller-El*, 537 U.S. at 348 (remanding to appeals court when Court found “COA inquiry” revealed “District Court’s decision was debatable”).

I. This Court should permit review of the district court's conclusion that Mr. Mota was barred from re-litigating the issue of whether he was convicted of Hobbs Act extortion.

Under 18 U.S.C. § 924(j) a defendant who, “in the course of a violation of subsection (c), causes the death of a person through the use of a firearm” can be punished with death or up to life in prison. Section 924(c), in turn, provides for the punishment of “any person who, during and in relation to any crime of violence...uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm.” 18 U.S.C. § 924(c)(1)(A). A “crime of violence” is defined as a felony offense that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A).<sup>1</sup>

In determining whether a predicate offense is a “crime of violence,” “[h]ow a given defendant actually perpetrated the crime...makes no difference.” *Mathis v. United States*, 579 U.S. 500, 510 (2016). Instead, courts must use the categorical approach laid out in *Taylor v. United States*, 495 U.S. 575 (1990).

Under this approach, courts must “compare the elements of the statute forming the basis of the defendant’s conviction with the elements of the ‘generic’ crime.” *Descamps v. United States*, 570 U.S. 254, 257 (2013). An offense may “categorically” qualify as a generic offense “only if the statute’s elements are the same as, or narrower than, those of the generic offense.” *Id.* “All that counts” under categorical

---

<sup>1</sup> Section 924(c) has a second definition of “crime of violence,” defined as an offense “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)(B). But in *United States v. Davis*, 588 U.S. 445 (2019), this Court held that this second definition was unconstitutionally vague.

analysis are “the elements of the statute of conviction;” the “label” assigned to a crime, “the particular facts” of the crime, or “the means by which the defendant, in real life, committed his crimes” have “no relevance to whether that offense” is a crime of violence. *Mathis*, 579 U.S. at 509-10.

Claim One in Mr. Mota’s second amended petition raised a constitutional claim challenging his conviction and life sentence on Count Three for causing the death of a person through the use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(j). The predicate “crime of violence” underlying Count Three was the Hobbs Act violation charged in Count One. Although the First Superseding Indictment and the Amended Judgment both referred to “Hobbs Act robbery,” Mr. Mota argued the jury was only instructed on the elements of Hobbs Act *extortion*. App. 4a-5a.

As a result, Mr. Mota’s § 924(j) conviction could not stand because numerous courts have found that Hobbs Act extortion is not categorically a “crime of violence” under the “force” or “elements” clause of § 924(c)(3)(A). *See Capozzi v. United States*, 531 F. Supp. 3d 399, 405 (D. Mass. 2021) (“[T]he Court concludes that Hobbs Act extortion can be committed without ‘the use, attempted use or threatened use of physical force’ because it can be committed by fear of economic harm.”); *United States v. White*, 510 F. Supp. 3d 443, 447-48 (W.D. Tex. 2020) (“Although Hobbs Act robbery is a crime of violence under § 924(c)(3)(A), extortion is not.”).<sup>2</sup>

---

<sup>2</sup> *See also Finch v. United States*, 2022 WL 2392928, at \*4 (M.D. Tenn. Jul. 1, 2022) (“The offense of attempted Hobbs Act extortion does not satisfy § 924(c)’s elements clause”); *Munoz v. United States*, 2020 WL 9219149, at \*1 (S.D. Fla. Dec. 29, 2020)

The district court here, however, refused to consider this argument finding the issue had been “raised, and disposed of, on direct appeal.” App. 5a. It relied on the Ninth Circuit’s prior decision in *Currie*, which held that “[i]ssues disposed of on a previous direct appeal are not reviewable in a subsequent § 2255 proceeding.” *Currie*, 589 F.2d at 995; *see* App. 5a (citing *Currie*). Other Circuits have established a similar rule. *See Murchu v. United States*, 926 F.2d 50, 55 (1st Cir. 1991); *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986); *Belford v. United States*, 975 F.2d 310, 313 (7th Cir. 1992); *Dall v. United States*, 957 F.2d 571, 572 (8th Cir. 1992); *United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994); *United States v. Greene*, 834 F.2d 1067, 1073 (D.C. Cir. 1987). There are both legal and factual problems with that conclusion, requiring this Court to grant certiorari and issue a COA.

A. The Ninth Circuit’s rule that a petitioner is precluded from raising claims decided on direct appeal in a § 2255 petition conflicts with decisions of this Court requiring a petitioner exhaust their claims.

The rule in *Currie* that the district court relied on to deny Mr. Mota’s petition—that an issue disposed on direct appeal is not reviewable in a § 2255 proceeding—conflicts with “the general rule that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice.” *Massaro v. United States*, 538 U.S. 500, 504 (2003) (citing *United States v. Frady*, 456 U.S. 152, 167-68 (1982)). Tellingly, none of the cases cited by the Ninth Circuit in *Currie*

---

(“The government has conceded that Hobbs Act extortion is not a crime of violence”); *Brown v. United States*, 2020 WL 437921, at \*2 (W.D.N.C. Jan. 28, 2020) (“The offense underlying Petitioner’s § 924(c) convictions was Hobbs Act extortion which the Government correctly concedes is not a crime of violence under § 924(c)’s force clause.”).

for its contrary rule, or any cases cited by the other circuits adopting a similar rule, relied on any cases by *this* Court. Instead, *Currie* relied on a string of prior Ninth Circuit cases from the 1960s, none of which relied on Supreme Court precedent. *See Currie*, 589 F.2d at 995 (citing *Odom v. United States*, 455 F.2d 159, 160 (9th Cir. 1972), *Stein v. United States*, 390 F.2d 625, 626 (9th Cir. 1968), *Medrano v. United States*, 315 F.2d 361, 362 (9th Cir. 1963)).

Requiring a petitioner to both raise a claim on direct appeal to defeat procedural default, but then deem the claim non-cognizable in a § 2255 proceeding disadvantages petitioners and makes the remedies established by Congress in § 2255 unavailable and meaningless. The entire purpose of procedural rules is “to induce litigants to present their contentions to the right tribunal at the right time.” *Massaro*, 538 U.S. at 504 (quotations and citations omitted). The Ninth Circuit’s rule entices petitioners to not raise claims on direct appeal, only to then have the claim deemed unexhausted once raised for the first time in post-conviction proceedings.

Because the Ninth Circuit’s rule conflicts with the longstanding precedent of this Court, a writ of certiorari should issue to clarify that a claim previously raised and resolved on direct appeal may be raised in a § 2255 petition.

**B. Because Mr. Mota raised a different claim on direct appeal, the re-litigation bar did not apply in any event.**

The district court was also factually wrong.

On direct appeal, Mr. Mota argued the jury was incorrectly instructed on the elements of Hobbs Act extortion, not Hobbs Act robbery, which resulted in a constructive amendment of the indictment, in violation of the Fifth Amendment.

Reviewing for plain error, the Ninth Circuit on direct appeal concluded that “even if the jury instructions for Count One permitted the jury to convict for Hobbs Act extortion, rather than robbery (the conduct charged in the indictment)...the jury could not have found that Forrest Seagrave consented to Mota taking property.” *Mota*, 753 Fed. Appx. at 471; *see also* App. 4a. Thus, under the re-litigation bar as interpreted by the Ninth Circuit in *Currie*, Mr. Mota could not, in his § 2255 proceeding, relitigate whether the indictment was constructively amended in violation of the Fifth Amendment.

But that was not the claim Mr. Mota was raising post-conviction. He was raising a different claim involving a different legal right: that his conviction under the Hobbs Act—as demonstrated by the jury instructions—was not a predicate “crime of violence” under the *Taylor* categorical approach that can support a § 924(j) conviction. This Court has repeatedly emphasized that categorical analysis is rooted in the Sixth Amendment right to have facts that increase punishment determined by a jury. *See Mathis*, 579 U.S. at 511 (explaining one reason for categorical analysis’ focus on elements is to avoid “serious Sixth Amendment concerns”); *Descamps*, 570 U.S. at 269 (noting “categorical approach’s Sixth Amendment underpinnings”); *Shepard v. United States*, 544 U.S. 13, 24 (2005) (finding court in *Taylor* “anticipated the very rule later imposed for the sake of preserving the Sixth Amendment rights”).

The district court conflated Mr. Mota’s appellate challenge to the jury instructions with the categorical challenge raised in his § 2255 proceedings by finding the issue of whether Mr. Mota had been convicted of extortion instead of robbery was

raised on direct appeal because “the Ninth Circuit found that the jury could not have convicted Mota of extortion, as the jury ‘*could not* have found’ the required element of consent on the evidence presented to them.” App. 5a (quoting *Mota*, 753 Fed Appx. at 471) (emphasis in original).

But the Ninth Circuit never addressed that issue directly, and certainly not within the rubric of categorical analysis. The district court recognized that on direct appeal, and after he had filed his opening brief, Mr. Mota requested leave of this Court to file a supplemental brief challenging whether a Hobbs Act violation was a “crime of violence.” App. 5a. The Ninth Circuit denied that request and the issue was never addressed by this Court on direct appeal. *See United States v. Mota*, Ninth Cir. No. 16-10468, Dkt. 62, Order.

Nor would the facts of the offense have been relevant for the categorical analysis Mr. Mota attempted to raise post-conviction. “All that counts” under categorical analysis are “the elements of the statute of conviction;” the “label” assigned to a crime, or “the particular facts” of the crime, “the means by which the defendant, in real life, committed his crimes” have “no relevance to whether that offense” is a crime of violence. *Mathis*, 579 U.S. at 509-10. The Ninth Circuit’s focus on the facts of the offense in disposing of Mr. Mota’s Fifth Amendment constructive amendment claim on direct appeal necessarily meant it was not considering the Sixth Amendment elements based challenge under *Taylor* that Mr. Mota presented to the district court post-conviction.

The Sixth Amendment based categorical challenge raised in Mr. Mota's § 2255 motion was not the same "issue, couched in different language" of the Fifth Amendment constructive amendment claim he raised on direct appeal. *Currie*, 589 F.2d at 994. Because the claims were separate and independent of one another, and involved different constitutional rights and analysis, Mr. Mota was not precluded from re-litigating the issue post-conviction.

Because this issue is at least debatable, the Ninth Circuit should have issued a COA to allow for appellate review. Thus, this Court should grant a writ of certiorari, issue a COA and remand to the Ninth Circuit to consider in the first instance whether Mr. Mota could raise Ground 1 of his second amended motion to vacate.

### CONCLUSION

The petition for a writ of certiorari should be granted, a COA issued, and the case remanded to the Ninth Circuit for further proceedings.

Dated: June 4, 2025

HANNI M. FAKHOURY  
*Counsel of Record*  
MOEEL LAH FAKHOURY LLP  
2006 Kala Bagai Way, Suite 16  
Berkeley, CA 94704  
(510) 500-9994  
hanni@mlf-llp.com