No. 21-2849

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DERREK PANNELL,	)	
Petitioner-Appellant,	)	**On Appeal from the**
	)	**United States District Court**
v.	)	**Eastern District of New York**
	)	
UNITED STATES OF AMERICA,	)	**Hon. Nina Gershon**
Respondent-Appellee.	)	

PETITIONER-APPELLANT DERREK PANNELL'S REPLY IN SUPPORT OF HIS MOTION FOR CERTIFICATE OF APPEALABILITY

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Petitioner-Appellant Derrek Pannell ("Pannell") has met the standard for a certificate of appealability ("COA"), which, as the Government is aware, requires showing only that "reasonable jurists could debate" the correctness of the district court's ruling. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Indeed, the Government's voluminous opposition to Pannell's Motion for a COA only confirms that Pannell has met this standard, for three reasons.

First, the Government filed a 173-page opposition and appendix, the majority of which comprises factual narrative and trial-transcript excerpts that cast Pannell in a negative light by focusing on his role in the underlying robbery. But as the Government itself states in its opposition, applying the categorical approach to determine whether Pannell's convictions count as crimes of violence requires that "courts look only to the statutory definitions . . . of [the] . . . offense, and not to the particular [underlying] facts." Gov't Opp. at 21 (quoting *United States v. Hill*, 890 F.3d 51, 55 (2d Cir. 2018)).

The facts of this robbery cannot prove whether the postal robbery *statute* is categorically a crime of violence. Of course, the facts of Pannell's case can provide useful context for illustrating the scope of the elements of the postal robbery statute—*e.g.*, to illustrate that the elements permit conviction for substantive armed postal robbery even if only a co-conspirator wields a weapon during the robbery. *See* Pannell's Motion at 10-11 (explaining that once a court determines the elements of

a predicate conviction, it may look to facts of the defendant's case or other cases to determine whether there is a realistic probability that the minimum conduct that satisfies those elements does not constitute a crime of violence). But rather than challenging Pannell's rightly hypothetical explanation of how "a defendant" could "be convicted of substantive postal robbery even if the defendant never committed any overt act himself, let alone used (or attempted or threatened to use) physical force against another," Pannell's Motion at 14, the Government relitigates *Pannell's own conduct* in the robbery. This is flatly contrary to how the categorical approach works. *See Descamps v. United States*, 570 U.S. 254, 263 (2013) ("[The modified categorical approach] retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime."). If it were truly the case that no reasonable jurist could side with Pannell, then one wonders why the Government would need to resort to a 173-page fact-laden character attack rather than simply articulating why Pannell's position is incorrect—a position expressly and thoughtfully adopted by a United States District Judge in *United States v. Rodriguez*, No. 94-Cr-313, 2020 U.S. Dist. LEXIS 66715, at *46-49 (S.D.N.Y. Apr. 15, 2020).

Second, the Government makes little effort to justify the district court's rejection of Pannell's primary argument, which is that his conviction for postal robbery is not a crime of violence because the minimum conduct required for conviction is satisfied by co-conspirator liability. Pannell's Motion at 14. The

Government simply reiterates the district court's use of this Court's unpublished summary order in *United States v. Blanco*, 811 F. App'x 696, 701 n.2 (2d Cir. 2020) (summary order), a case in which Pannell's issue was never even briefed. *See* Pannell's Motion at 16-18. In doing so, the Government recycles the district court's straw man, acting like Pannell has made a "transformation argument," Gov't Opp. at 18, in which Pannell's substantive robbery conviction is somehow transformed into a conspiracy conviction, as the defendant in *Blanco* intimated at oral argument in that case.

But Pannell has never made that argument. Pannell does not claim that his substantive robbery conviction was "transformed" into a conspiracy conviction. Rather, he claims that the "minimum conduct" necessary to be convicted of *substantive* robbery, as charged in his case, did not require any actual, attempted, or threatened use of violent force, and thus his *substantive* robbery conviction was not a crime of violence under 18 U.S.C. § 924(c)(3). The reason why his substantive robbery conviction did not require actual, attempted, or threatened use of violent force is that co-conspirator liability was sufficient to sustain the conviction. *See* Pannell's Motion at 13-14. But that argument does not entail any "transformation" of his substantive robbery count into a conspiracy count.

Third, the Government's reliance on other district court cases only further highlights the disagreement among the district courts concerning Pannell's issue for

appeal. The Government cites several cases that, it claims, have ruled contrary to *United States v. Rodriguez*, 2020 U.S. Dist. LEXIS 66715, such as *Sessa v. United States*, No. 92-CR-351 (ARR), 2020 U.S. Dist. LEXIS 110794 (E.D.N.Y. June 24, 2020); *Abouhalima v. United States*, No. 93-CR-180 (LAK), 2020 U.S. Dist. LEXIS 106973 (S.D.N.Y. June 18, 2020); and *United States v. Gomez*, No. 97-CR-696 (SHS), 2021 U.S. Dist. LEXIS 153945 (S.D.N.Y. Aug. 16, 2021).

But *Sessa* did not analyze the minimum conduct necessary for the defendant's predicate offense; rather, the court there simply stated, *ipso facto*, that "[a] substantive conviction of a categorical crime of violence involving a firearm is a valid predicate for a § 924(c) conviction, regardless of what theory of liability it proceeds on." *Sessa*, 2020 U.S. Dist. LEXIS 110794, at *15. Likewise with *Abouhalima*: rather than identifying the minimum conduct necessary for conviction, as required by the categorical approach, the court rejected a "transformation" argument that Pannell does not make: "the *Pinkerton* instruction does not transform movant's conviction for assaulting a federal official into a conspiracy to do so." *Abouhalima*, 2020 U.S. Dist. LEXIS 106973, at *5. And so, too, with *Gomez*: the court repeated *Abouhalima*'s transformation argument and adopted a theory—completely at odds with the Supreme Court's categorical-approach jurisprudence—that a defendant "constructively" commits a crime of violence when the defendant is convicted of a crime of violence based on *Pinkerton* liability. *Gomez*, 2021 U.S.

Dist. LEXIS 153945, at *10.

None of these cases directly engage with Pannell's "minimum conduct" argument, and none provide such cogent grounds for rejecting the *Rodriguez* Court's position as to permit a conclusion that reasonable jurists could not even debate the correctness of the district court's ruling in Pannell's case.

In sum, Pannell has satisfied the requirements for a COA. Pannell asks that the COA issue so that he may appeal the district court's denial of his petitions for relief under 28 U.S.C. § 2255.

Date: February 2, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was electronically filed on February 2, 2022. Notice of this filing was sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. A paper copy of this filing was sent to Appellant by U.S. Mail on February 2, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing reply complies with Fed. R. App. P. 27 and 32 because it contains 1,280 words and was typed in 14-point Times New Roman font.

/s/ Kyle Singhal
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