No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

TRACEY L. BROWN, *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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QUESTIONS PRESENTED

1. Did the Ninth Circuit err by finding that there was sufficient evidence for interstate commerce when the underlying acts did not have even a "*de minimus*" effect on interstate commerce.

2. Did the Ninth Circuit err by finding that the pretrial identification of Mr. Brown was not unnecessarily suggestive and conducive when Mr. Brown was the sole suspect, in handcuffs, surrounded by police officers.

3. Did the Ninth Circuit err when it sentenced Mr. Brown to a career offender guideline obtained through an *Alford* plea, and Nevada robbery was recently ruled as not qualifying as a predicate crime of violence.

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I.

PRAYER FOR RELIEF

Mr. Tracey L. Brown respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision dismissing his appeal. The basis of this petition is that the Ninth Circuit erroneously dismissed Mr. Brown's appeal.

A. As to the applicability of interstate commerce, the Ninth Circuit Panel's decision conflicts with the decisions of the First and Eleventh Circuits that have addressed the same important matter, including *United States v. Paredes*, 139 F.3d 840 (11th Cir. 1998); *United States v. Guerra*, 164 F.3d 1358 (11th Cir. 1999); and *United States v. Jimenez-Torres*, 435 F.3d 3 (1st Cir. 2006).

B. As to the improper pretrial identification, other circuits have rightly identified that the practice of showing a single suspect to a person for the purpose of identification, and not as part of a line-up of suspects, has been "widely condemned," because such a practice is to be avoided whenever there is no "overriding necessity for their use." *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992).

C. As to the *Alford* plea forming the basis for a predicate offense for a career offender finding, the Ninth Circuit Panel's decision conflicts with the decisions of the Second and Fourth Circuits that have addressed this same important matter, including *United States v. Savage*, 542 F.3d 959,

and *United States v. Alston*, 611 F.3d 219, 228 (4th Cir. 2010).

In the alternative, the Ninth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. This includes the recent decision in *United States v. Edling*, 891 F.3d 1190 (9th Cir. 2018), finding that Nevada robbery is not a crime of violence under the elements or enumerated offenses clauses of U.S.S.G. § 4B1.2.

II.

OPINION BELOW

A three-judge panel of the Ninth Circuit entered judgment in a memorandum that was final and unpublished, affirming the prior rulings and sentencing of the district court. *United States v. Tracey L. Brown*, No. 16-10365 (9th Cir. March 21, 2018). *Appendix A.*

III.

BASIS FOR JURISDICTION

On March 21, 2018, a Panel of the Court of Appeals for the Ninth Circuit delivered an unpublished memorandum that dismissed Mr. Brown's appeal. *Appendix A.* This is the final judgment for which a writ of certiorari is sought. On April 24, 2018, Mr. Brown filed a timely petition for panel rehearing. On May 4, 2018, a three-judge panel of the Ninth Circuit subsequently denied Mr. Brown's petition for panel rehearing. *United States v. Tracey L. Brown*, No. 16-10365 (9th Cir. May 4, 2018). *Appendix B.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

The relevant portion of Title 18 United States Code Section 1951 as to Hobbs Act Robbery states:

> (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—
> …
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

United States Sentencing Guideline (U.S.S.G.) § 4B1.1 for application of a career offender enhancement in a criminal case states as follows:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.
>
> (b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

V.

STATEMENT OF THE CASE

A. Jurisdiction of the Courts of First Instance.

The district court had jurisdiction under 18 U.S.C. § 3231. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

B. Facts Material to the Questions Presented.

This case is about a robbery that took place at a Las Vegas, Nevada gas station convenience store in July of 2011. Mr. Brown was convicted following a jury trial of the following counts:

a. Interference with Commerce by Robbery pursuant to 18 U.S.C. § 1951 and 18 U.S.C. § 2,
b. Brandishing a Firearm During a Crime of Violence pursuant to 18 U.S.C. 924(c)(1)(A)(ii) and 18 U.S.C. § 2, and
c. Felon in Possession of a Firearm pursuant to 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

a. Pretrial and Trial Motions to Dismiss as to Interstate Commerce.

Mr. Brown filed a pretrial motion to dismiss, arguing that the charged acts do not substantially affect interstate commerce. Trial counsel specifically noted at a hearing on the motion that the gas station convenience store:

a. is a business that operates only in Nevada, servicing in-state customers;
b. is not near the interstate highway;
c. is not a intended to bring in out-of-state money and out-of-state individuals, and instead a purely local business intended for purely local customers.

The magistrate found in part that whether the convenience store engages in interstate

commerce is to be determined at trial. The district court subsequently accepted the findings and recommendation in their entirety.

At trial, the store clerk testified that: (a) the gas station/convenience store is on the corner of surface streets Charleston and Rainbow Boulevard in Las Vegas, Nevada, and (b) the assailant obtained between approximately $200.00 and $300.00 in cash from the register, as well as tobacco products by the store clerk placing the items in a plastic store bag. On the second day of trial, a district manager of the gas station/convenience store testified that the convenience store:

a. obtains its gum, candy, cigarettes and medicine through the delivery of the items from a truck that originates in Arizona;
b. obtains its gasoline from California, through being piped in from California and then picked up from a terminal in Nevada;
c. obtains its motor oil via being transported from California; and
d. accepts all major credit cards;

On cross-examination, the district manager admitted that she was not aware of how much gum, candy, gasoline, motor oil or cigarettes were sold during the time of the incident, or at a similar time of 1:00 a.m. at that particular location.

Trial counsel later moved to dismiss all charges, arguing that the government had not established "that the crime in question affected interstate commerce." The district court noted "based upon the evidence that has been presented," there was a "basis for a rational trier of fact to find guilt beyond a reasonable doubt with regard to interstate commerce." The district court denied the motion, finding it as an "issue the jury will have to decide."

The jury started to deliberate, and it became clear that they were struggling

with the concepts of commerce and interstate commerce, including an early note that inquired: "[w]hy does the jury instructions refer to quote 'interstate commerce,' close quote, and the verdict form simply quote 'commerce,' close quote?" The district court suggested to tell the jury that the verdict form simply uses the formal title of the charge while the jury instructions contain each of the elements that must be proven for that charge. Defense counsel wanted to make sure that there was not a false impression given that the jury did not have to find interstate commerce versus regular commerce. The parties agreed on a response. The jury subsequently asked three questions through more jury notes:

> "What is the legal definition of commerce?"
> "What is the legal definition of interstate commerce?"
> "What is the difference between commerce and interstate commerce?"

The district court acknowledged the relative difficulty that the jury was having:

> The jury instructions mention interstate commerce, but I don't know that it defines what commerce and interstate commerce are. It talks about obstructing the flow and how you interfere with, but it doesn't define commerce or interstate commerce.

The district court and counsel proceeded to confer on the note and scheduling further deliberations. Defense counsel indicated he was "a little disadvantaged" given he could not run to his office and do legal research. The district court agreed, saying it was not going to submit the definition now, but instead was going to send a note back asking what time the next day they could resume deliberations.

Defense counsel again noted that he was at a disadvantage and could not do legal research, but that the case law "seems to indicate" that the district court should

be doing something to define interstate commerce. He wanted to provide his own definition, but needed time. The government disagreed, stating that under the case law the district court has an obligation to clear away any confusion. The district court and counsel proceed to discuss a proposed definition of commerce, and interstate commerce.

Mr. Brown's trial counsel then raises two additional objections as to proposing definitions without the ability to do legal research. Instead of accepting the definition, the jury said "[k]eep your definition. We're done." The district court and counsel further confer and agree to give *Allen* charge with new verdict form to fill in, with an advisement to the jury that if it cannot agree then to leave it blank. The jury then found Mr. Brown guilty of Counts 3 through 5, with blanks left for Counts 1 and 2.

b. Pretrial Motion and Trial Testimony as to Identification.

Mr. Brown filed a pretrial motion to suppress as to the identification of Mr. Brown as the passenger in the motor vehicle and the assailant in the convenience store robbery. The magistrate judge found that the circumstances under which the store clerk identified Mr. Brown were not so "unduly suggestive as to create a very substantial likelihood of irreparable identification." Mr. Brown filed an objection, and the district court later adopted the report and recommendation in its entirety.

The store clerk testified at trial that he was afraid at the time of the incident. At the time he looked at the assailant's face, the store clerk had a shotgun "pointed at his midsection." The store clerk said the focus of his attention was on both the gun and the assailant, even though the gun was pointed at his midsection the entire time, and

the barrel of the gun was within five or six inches from his body. The store clerk was then told to go behind a wall, lie on the floor face down, and count to ten. The store clerk did not see assailant leave, or the assailant's method of getaway.

The store clerk testified that the assailant was: (a) a black male, (b) wearing a "ball cap" with "yellow lettering," blue jeans, work boots in a "yellowish-orangeish color," and a "long-sleeve grayish-colored pull-over shirt." Two hours later, the store clerk was asked to identify the assailant by being driven to another location for a one-on-one identification. Mr. Brown was in handcuffs, bloodied from a law enforcement dog bite, and surrounded by police officers. At the time of the one-on-one identification, the store clerk was one hundred percent sure it was the assailant, however at the time of trial the store clerk did not identify Mr. Brown.

During the second day of trial, a police officer that attended the one-on-one identification stated that the store clerk was approximately thirty (30) feet away from Mr. Brown, and the only other people around Mr. Brown were police officers in uniform. The officer agreed that Mr. Brown looked "significantly different than everybody else around him," and was the only person in custody.

c. Sentencing; Career Offender Finding.

Mr. Brown was sentenced in August of 2016 to 360 months (30 years) of imprisonment, specifically 240 months as to Count Three, 36 months as to Count Five, consecutive to Count Three, and 84 months as to Count Four, consecutive to Counts Three and Five. The district court further found that Mr. Brown's prior conviction

based upon an *Alford* plea was a valid predicate offense for a career offender status.

VI.

REASONS SUPPORTING ALLOWANCE OF THE WRIT

This writ should be granted to allow this Court to correct the Ninth Circuit Panel's decision erroneously dismissing Mr. Brown's appeal. The Ninth Circuit erred by finding there was sufficient evidence for interstate commerce when the robbery of a local convenience store did not have even a "*de minimus*" effect on interstate commerce. The Ninth Circuit also erred by finding that the pretrial identification of Mr. Brown was not unnecessarily suggestive and conducive when Mr. Brown was subject to a one-on-one lineup without exigent circumstances as the sole suspect, bloodied, in handcuffs, surrounded by police officers.

The Ninth Circuit erred by sentencing Mr. Brown to a career offender guideline obtained through an *Alford* plea. Finally, Nevada robbery was recently ruled as not qualifying as a predicate crime of violence, and thus Mr. Brown's career offender finding should be overturned when it is based upon a Nevada robbery. As these material points of fact were overlooked by the Ninth Circuit, and by default the district court, it is respectfully requested that Mr. Brown's petition for writ of certiorari be granted.

A. The Petition for Certiorari Should have been Granted When the Underlying Acts Did not Have a "*De Minimus*" Effect on Interstate Commerce.

In its March of 2018 memorandum, the Ninth Circuit Court of Appeals found that the jury "rationally found that the [subject] robbery affected interstate commerce" through the stolen cigarettes that were shipped in from out of state, as well as the store being closed and at least one customer being turned away. (*Appendix A*, at page 2.) The Ninth Circuit also found that pursuant to *United States v. Rodriguez*, 360 F.3d 949, 955 (9th Cir. 2004), only a *de minimus* effect on interstate commerce was enough to find for federal court jurisdiction. (*Appendix A*, at page 2.)

Even though language in the Hobbs Act is "unmistakably broad," interstate commerce cannot be implicated in every potential scenario. *United States v. Culbert*, 435 U.S. 371, 373 (1978). Cases from other jurisdictions focus on whether the particular store was part of one of two scenarios: (1) whether the store was part of a nationwide chain, or (2) if it was not part of a nationwide chain, the particular store that purchased merchandise from outside of the state and was forced to stop engaging in interstate commerce or suffered a depletion of assets as a result of the robbery. *United States v. Paredes*, 139 F.3d 840 (11th Cir. 1998); *United States v. Guerra*, 164 F.3d 1358 (11th Cir. 1999); *United States v. Jimenez-Torres*, 435 F.3d 3 (1st Cir. 2006).

Here, the subject convenience store was not part of a nationwide chain, forced to stop engaging in interstate commerce, or depleted assets to the point that should be deemed significant. A few stolen tobacco products were shipped in from out of state, as

well as the store being closed and at least one customer being turned away after the act was completed was not enough to equal interstate jurisdiction under either/any of the cases from other jurisdictions.

Additional facts also support the idea that interstate commerce is not implicated. The subject gas station is owned and operates only in Nevada, servicing Nevada customers. The subject gas station is further not near the interstate or border to another state, and instead a local business intended for local customers. The subject gas station is not "directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce" and the charges should have been dismissed on this basis. *United States v. Robertson,* 514 U.S. 669, 672 (1995).

The idea that there is a limit to the commerce clause was identified in the dissent in the United States Supreme Court case of *Taylor v. United States*, 136 S.Ct. 2074 (2016). Justice Thomas wrote in the dissent that the Hobbs Act should not be expanded beyond an express grant of federal criminal authority, and if the limitations of the Hobbs Act are not "respected, [then] Congress will accumulate the general police power that the Constitution withholds." *Id.*, at 2083. Justice Thomas notes that the Hobbs Act uses "active verbs" such as 'obstructs,' 'delays,' or 'affects' to describe how a robbery not just should, but "must" relate, and in turn "affect" commerce. *Id.*, at 2084. Mr. Brown thus respectfully requests that his petition for certiorari be granted on this basis.

B. The Petition for Certiorari Should be Granted When the Post-Arrest Show Up Identification of Mr. Brown was Unnecessarily Suggestive and Conducive When he was the Sole Suspect, in Handcuffs, Surrounded by Police Officers.

In its March of 2018 memorandum, the Ninth Circuit Court of Appeals found that "even if the show-up was impermissibly suggestive, the totality of the circumstances indicates that the identification was sufficiently reliable." The Ninth Circuit further found that the store clerk had "accurately described [the suspect] in a written statement after the robbery and confidently identified him shortly thereafter." (*Appendix A*, at pages 4-5.)

Here, the one-on-one identification was both impermissibly suggestive, and this suggestiveness led to a "substantial likelihood of irreparable misidentification" under the totality of the circumstances. *United States v. Bagley*, 772 F.2d 482 (9th Cir. 1985). A two-step test exists to determine the admissibility of identification testimony:

> 1. Defendant bears the burden of showing that the identification procedure used was impermissibly suggestive.
> 2. Whether, under the totality of the circumstances, the suggestiveness leads to a substantial likelihood of irreparable misidentification.

Id. The approach is to determine the reliability of the testimony. *Manson v. Brathwaite*, 432 U.S. 98 (1977). To determine reliability, courts consider the following factors:

> 1. The witness's opportunity to view the criminal at the time of the crime;
> 2. The witness's degree of attention at the time of the crime;
> 3. The accuracy of the witness's prior description of the defendant;
> 4. The witness's level of certainty when identifying the suspect at the confrontation;

5. The length of time elapsed between the crime and the confrontation. *Manson, id.* The reliability of identification testimony is determined by balancing the *Biggers* factors against the corrupting effect of the suggestive identification itself. *Manson*, 432 U.S. at 114.

Other circuits have rightly identified that the practice of showing a single suspect to a person for the purpose of identification, and not as part of a line-up of suspects, has been "widely condemned," because such a practice is to be avoided whenever there is no "overriding necessity for their use." *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992). A one-to-one confrontation generally is thought to present greater risks of mistaken identification than a line up." *Moore v. Illinois*, 434 U.S. 220, 229 (1977). In addition to the suggestiveness inherent in a one-on-one identification, "cross-racial" identifications are much less likely to be accurate than same race identifications. *Arizona v. Youngblood*, 488 U.S. 571 (1988).

Further, the totality of the circumstances demonstrate that the identification was unreliable. Law enforcement personally escorted the convenience store clerk to the location on the street where Mr. Brown was viewed from as far as thirty (30) feet away, already in custody, in handcuffs, bloodied, and surrounded by police officers. The store clerk was distracted and in fear for his life during the incident, calling into question his ability to identify an assailant when he had a shotgun "pointed at his midsection." Further, pursuant to the standards as outlined in *Arizona v. Youngblood*, the store clerk is the sole identifying witness of an African American suspect, and the

identification is thus even more suspect.

Finally, an identification procedure is unnecessarily suggestive when its use is "not imperative." *United States v. Montgomery*, 150 F.3d 983, 992 (9th Cir. 1988). No exigent circumstances existed in this case such that the officers could not wait and conduct a less prejudicial and less suggestive line-up for identification purposes. While it may have been convenient for the convenience store clerk to be escorted the evening of the incident for the identification, there was no overriding necessity for the identification to take place the same evening after the store clerk had been through a traumatic event. Mr. Brown's petition for certiorari is respectfully requested to be granted on this basis.

C. Mr. Brown's Petition for Certiorari Should be Granted When Mr. Brown's Prior Nevada Robbery Conviction is Insufficient for a Predicate Offense Finding Due to an *Alford* Plea and Recent Ninth Circuit Case Law Finding Nevada Robbery not to be a Crime of Violence.

a. *Mr. Brown's 2005 Nevada robbery conviction should not have qualified as a "crime of violence" for a career offender finding when the conviction was the result of an Alford plea.*

Mr. Brown had the minimum number of two prior convictions that qualified him as a career offender, one for a 2000 Nevada burglary conviction, and another for a 2005 Nevada robbery conviction. Mr. Brown's 2005 robbery conviction was the result of a plea agreement under *North Carolina v. Alford*, 400 U.S. 25 (1970).

In its March of 2018 memorandum, the Ninth Circuit Court of Appeals found that pursuant to *United States v. Guerrero-Velasquez*, 434 F.3d 1193, 1997 (9th Cir. 2006), Mr. Brown's *Alford* plea did not alter its analysis. (*Appendix A*, at page 9.)

Specifically, the Ninth Circuit found that under *Guerrero-Velasquez*, the inquiry is whether a defendant has a "conviction" for a "crime of violence," and not necessarily whether a defendant has admitted to guilt for said crime. (*Appendix A*, at page 9.)

The court in *Guerrero-Velasquez* also noted that there was only one other federal court of appeals, the United States Court of Appeals for the Second Circuit, to have issued a published opinion that addressed a similar question. *Id.* (citing *Abimbola v. Ashcroft*, 378 F.3d 173 (2d. Cir. 2004)). The only other agreeing circuit, the Second Circuit, four years later seemed to indicate otherwise, finding in *United States v. Savage*, 542 F.3d 959, 966 (2d. Cir. 2008) that it is generally "inappropriate" to rely on an *Alford* plea colloquy that contained "no factual admissions." In *Savage*, the case was vacated and remanded for resentencing when the plea colloquy did not establish with certainty that the defendant pleaded guilty that he had exchanged drugs for money in a case where the predicate offense at issue was a "controlled substance offense." *Id.*, at 967.

Here, Mr. Brown did not factually admit to any basis for the plea agreement in his prior conviction, and said offense should not be counted as a predicate offense as held in *United States v. Alston*, 611 F.3d 219, 228 (4th Cir. 2010). This appeared to be an unavailing argument in the Ninth Circuit pursuant to *United States v. Powell*, 441 Fed. Appx. 502, 506-07 (9th Cir. 2011), but *Powell* is distinguishable insofar as the defendant in *Powell* pleaded guilty to a generically limited charging document, which was deemed "sufficient to prove that his prior conviction is a predicate offense." *Id.*, at

507.

In this case, there is even less than the court found as insufficient in *Savage* when Mr. Brown has no charging document related to his conviction. Pursuant to *Savage*, it is "inappropriate" to rely on not even a plea colloquy that contains "no factual admissions." Mr. Brown did not plead guilty to a charging document in his 2005 robbery case, and instead the state gave an offer of proof, and the Nevada state court "incorporated" a transcript of the preliminary hearing as its factual basis for the plea. Pursuant to *Powell*, the lack of a charging document or similar facts is not "sufficient to prove that [Mr. Brown's] prior conviction is a predicate offense." Mr. Brown thus respectfully requests his petition for certiorari be granted on this basis.

b. *Mr. Brown's 2005 Nevada robbery conviction should not have qualified as a predicate offense when the Ninth Circuit Court of Appeals recently ruled that Nevada robbery is not a crime of violence*.

On June 8, 2018, the Ninth Circuit Court of Appeals ruled in *United States v. Edling*, 891 F.3d 1190, that robbery under Nevada Revised Statutes § 200.380 is not a crime of violence under the elements or enumerated offenses clauses of U.S.S.G. § 4B1.2. The Ninth Circuit further found that Nevada robbery did not qualify as "extortion" under the enumerated offenses clause when an August 1, 2016 amendment narrowed the definition by requiring the wrongful use of force, fear, or threats be directed against the person of another, not the property of another.

The Ninth Circuit finally found that to the extent there is any ambiguity as to whether the new definition of extortion includes threats of injury to property, the

ambiguity must be resolved in the defendant's favor under the rule of lenity. The Ninth Circuit, clarifying its ruling in light of *Beckles v. United States*, 137 S.Ct. 886 (2017), found that the rule of lenity applies to the Sentencing Guidelines.

Mr. Brown's case is directly impacted by the *Edling* ruling. If Mr. Brown's 2005 robbery conviction is set aside under the precedent of *Edling*, then a career offender finding would not apply to Mr. Brown. Mr. Brown's sentence would be drastically reduced without a career offender finding. As *Edling* is new case law that directly impacts Mr. Brown's case, certiorari should be granted in Mr. Brown's favor.

VII.

CONCLUSION

For the foregoing reasons, Mr. Tracey L. Brown respectfully asks this Court to grant this petition for writ of certiorari.

Dated: August 1, 2018.

Respectfully submitted,

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