NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

MARK DUBARRY,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In three circuits, pattern jury instructions extend Hobbs Act robbery (18 U.S.C. § 1951(b)) to an offense committed by causing fear of harm to intangible property. Because fear of economic harm can be caused without the use or threat of violent force, is Hobbs Act robbery categorically a "crime of violence" under the "force clause" of 18 U.S.C. § 924(c)(3)(A)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 7

OPINION BELOW 8

STATEMENT OF JURISDICTION 8

STATUTORY PROVISIONS INVOLVED 8

STATEMENT OF THE CASE 9

REASONS FOR GRANTING THE WRIT 12

I. The Tenth Circuit decision is contrary to the rules in at least three circuits that extend Hobbs Act robbery to offenses committed without the use of violent force at all. This decision has far reaching impact because its reasoning applies to cases arising under § 924(c), the ACCA, and the Sentencing Guidelines. 12

CONCLUSION 21

APPENDIX

Decision of the Tenth Circuit Court of Appeals,
United States v. Dubarry, Case No. 16-4067, 2018 WL 3342275 (10th Cir. July 9, 2018) A-2

Indictment, *United States v. Dubarry,*
No. 2:09-cr-680 DAK (D. Utah Sep. 9, 2009) A-5

Plea Agreement, *United States v. Dubarry,*
No. 2:09-cr-680 DAK (D. Utah Nov. 2, 2009) A-9

Judgment and Commitment, *United States v. Dubarry,*
No. 2:09-cr-680 DAK (D. Utah Jan. 6, 2009) A-16

Tenth Circuit Pattern Instruction 2.70 (Hobbs Act Robbery/Extortion) A-23

Fifth Circuit Pattern Jury Instruction A-27

Eleventh Circuit Pattern Instruction O70.1 (Hobbs Act Extortion); O70.3 (Hobbs Act Robbery); A-31

Eighth Circuit Model Instruction 6.18.1951B ("Interference With Commerce By Means of Committing or Threatening Physical Violence) (18 U.S.C. § 1951) (Hobbs Act) A-38

Jury Instructions (partial), *United States v. Kamahele*, No. 2:08-cr-758 TC (D. Utah Oct. 6, 2011) A-42

Jury Instructions (partial), *United States v. Buck*, No. 4:13-cr-491 (S.D. Tex. Aug. 28, 2015) A-46

Jury Instructions (partial), *United States v. Tibbs*, No. 2:14-cr-20154 BAF (E.D. Mich. Aug. 29, 2014)) A-59

Jury Instructions (partial), *United States v. Moody*, No. 8:09-cr-234 (M.D. Fla. Feb. 25, 2010) A-63

Table of Authorities

Gonzales v. Duenas-Alvares, 549 U.S. 183 (2007) 12

In re Hernandez, 857 F.3d 1162 (2017) 10

Johnson v. United States, 135 S.Ct. 2551 (2015) 4

Sessions v. Dimaya, 138 S.Ct. 1204 (2018) 4

States v. Melgar-Cabrera, 892 F.3d 1053 (10th Cir. 2018) 5, 10

United States v. Arena, 180 F.3d 380 (2d Cir. 1999) 7

United States v. Buck, 847 F.3d 267 (5th Cir. 2017) 10

United States v. Dubarry, Case No. 16-4067, 2018 WL 3342275 (10th Cir. July 9, 2018) ..... iii, 1, 5, 8

United States v. Garcia-Ortiz, -- F.3d --, 2018 ..... 10, 11-12

United States v. Gooch, 850 F.3d 285 (6th Cir. 2017) 10

United States v. Hill, 890 F.3d 51 (2d Cir. 2018) 10, 12

United States v. Hopper, 723 Fed. App'x 645 (10th Cir. May 25, 2018) 6

United States v. House, 825 F.3d 381 (8th Cir. 2016) 10

United States v. Iozzi, 420 F.2d 512 (4th Cir. 1970) 7

United States v. Libby, 880 F.3d 1011 (8th Cir. 2018) 6

United States v. Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, 780 F.2d 267 (3d Cir. 1986) . 7

United States v. Robinson, 844 F.3d 137 (3d Cir. 2016) 10, 12

United States v. Salas, 889 F.3d 681 (10th Cir. 2018) 5

United States v. St. Hubert, 883 F.3d 1319 (11th Cir. 2018) 10, 12

United States v. Torres-Miguel, 701 F.3d 165 (4th Cir. 2012) 6

Federal Statutes

18 U.S.C. §1951 ..... 7, 8

18 U.S.C. § 16 5

18 U.S.C. § 924 ..... *passim*

18 U.S.C. § 1951 ..... i, iv, 2, 3

28 U.S.C. § 1254 2

28 U.S.C. § 2255 ..... 4, 5

Other

Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (2016) 6

Fifth Circuit, Pattern Jury Instructions (Criminal Cases), 2.73A (2015 ed.) 6

Leonard B. Sand et al., Modern Federal Jury Instructions Criminal ¶ 50.03 (2007). 6

Tenth Circuit, Criminal Pattern Jury Instructions §2.70 (2018) 6

USSG §4B1.2 14

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for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Mark A. Dubarry ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The Tenth Circuit's opinion affirming Petitioner's convictions and sentence, *United States v. Dubarry*, Case No. 16-4067, 2018 WL 3342275 (10th Cir. Jul. 9, 2018), is included in the Appendix at A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming Petitioner's convictions and sentence was entered on July 9, 2018. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

> **(c)(1)(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, 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;
> > . . .
>
> **(c)(3)** For purposes of this subsection, the term "crime of violence" means an offense that is a felony and –
>
> > **(A)** has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . . .

18 U.S.C. § 1951. Interference with commerce by threats or violence.

(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 family or 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.

STATEMENT OF THE CASE

The Criminal Conviction

Petitioner Mark A. Dubarry ("Petitioner") was charged in a multi-count indictment with two counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951 (Counts 1, 3) and two counts of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (Counts 2, 4). Under § 924(c)(1)(C)(i), the stacked § 924(c) charges would have carried a mandatory minimum of 30 years in prison had he been convicted of both counts.

At the time of Petitioner's original prosecution, the "residual clause" of § 924(c) extended that statute to any felony 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). Under the residual clause, there could be no argument that § 924(c) did not apply to Hobbs Act robbery, and Petitioner negotiated a plea agreement. Under this agreement, he pleaded guilty to one count of Hobbs Act robbery and one count of § 924(c) (Counts 1 and 2). Pursuant to Criminal Procedure Rule 11(c)(1)(C), the plea carried a stipulated sentence of 15 years in prison. Petitioner did not appeal.

Post-Conviction Motion Pursuant to 28 U.S.C. § 2255

In 2015, this Court held that the residual clause of the Armed Career Criminal Act (ACCA) was unconstitutionally vague. *Johnson v. United States*, 135 S.Ct. 2551 (2015). Within a year of *Johnson*, Petitioner filed a pro se motion pursuant to 28 U.S.C. § 2255, arguing that he was unconstitutionally convicted and sentenced under the residual clause of § 924(c). The district court denied the motion, reasoning that *Johnson* did not apply to the residual clause of § 924(c). It also denied a certificate of appealability.

Petitioner appealed to the Tenth Circuit. On appeal he argued that *Johnson* invalidated the residual clause of § 924(c)(3)(B). Without the residual clause, Hobbs Act robbery could not be a crime of violence under § 924(c) because it did not qualify as a crime of violence under the "force clause" of § 924(c)(3)(A), which applies to predicate offenses that have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." Among other things, Petitioner argued that Hobbs Act robbery did not qualify categorically as a crime of

violence under the force clause because it could be committed by causing fear of harm to intangible property, which did not necessarily require the use of violent force. He was, therefore, innocent of that offense, and his conviction should be vacated.

While that appeal was pending, this Court issued its decision in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), which held that *Johnson* invalidated the residual clause in 18 U.S.C. § 16(b). Following *Dimaya*, the Tenth Circuit held that the identical residual clause in 18 U.S.C. § 924(c)(3)(B) was also unconstitutionally vague. *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018).

Notwithstanding these new precedents, the Tenth Circuit denied a certificate of appealability and affirmed. The Tenth Circuit acknowledged that it had already decided in *Salas* "that § 924(c)(3)(B)'s definition of *crime of violence* is unconstitutional under *Sessions v. Dimaya*." 2018 WL 3342275 at *2. However, another recent decision—*United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018)—had held that Hobbs Act robbery was categorically a crime of violence under the "force clause" of § 924(c)(3)(A). *Id.*

Nevertheless, while *Melgar-Cabrera* had considered and rejected the majority of Petitioner's arguments, the court below recognized that Petitioner had raised "one argument not addressed in *Melgar-Cabrera* or elsewhere by this court: that Hobbs Act robbery does not satisfy § 924(c)(3)(A) 'because it can be accomplished by threatening injury to intangible property, which does not require the use of force at all.'" *Id.* However, it rejected this argument about the breadth of Hobbs Act robbery because it believed the cases cited by Petitioner "concern[ed] Hobbs Act *extortion*, not

Hobbs Act robbery." *Id.* Accordingly, they "do not call into question *Melgar-Cabrera's* holding that Hobbs Act robbery is categorically a crime of violence." *Id.* Based on this reasoning, the Tenth Circuit denied a certificate of appealability and affirmed the denial of the § 2255 motion.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit decision is contrary to the rules in at least three circuits that extend Hobbs Act robbery to offenses committed without the use of violent force at all. This decision has far reaching impact because its reasoning applies to cases arising under § 924(c), the ACCA, and the Sentencing Guidelines.

The question presented in this case is very narrow—does Hobbs Act robbery categorically require the use of force when three circuits have adopted pattern jury instructions that extend it to crimes based on fear of harm to intangible property (economic loss)? Under the categorical approach, a prior offense can qualify as a "crime of violence" only if all the conduct proscribed by a statute, "including the most innocent conduct," matches or is narrower than the "crime of violence" definition—in this case the force clause of § 924(c)(3)(A). *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012). To make this assessment, courts routinely look at jury instructions to see how broadly statutory language is applied in actual cases. *See, e.g., United States v. Hopper*, 723 Fed. App'x 645, 646 (10th Cir. May 25, 2018) (relying on Tenth Circuit pattern jury instructions to hold that 18 U.S.C. § 1201(a) was broader than the force clause of § 924(c)(3)(A)); *United States v. Libby*, 880 F.3d 1011, 1015-

16 (8th Cir. 2018) (relying on pattern jury instructions, among other things, to conclude that Minnesota robbery falls within the ACCA's force clause). With Hobbs Act, at least three circuits have adopted pattern jury instructions that extend this crime to conduct that does not necessarily require the use of any force at all. Tenth Circuit, Criminal Pattern Jury Instructions §2.70 (2018) (Appendix A-23); Fifth Circuit, Pattern Jury Instructions (Criminal Cases), 2.73A (2015 ed.) (Appendix A-27); Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (2016) (Appendix A-31); *see also* 3-50 Leonard B. Sand et al., Modern Federal Jury Instructions Criminal ¶ 50.03 (2007).

Under the plain language of the statute, Hobbs Act robbery can be committed by causing "fear of injury, immediate or future, to . . . property." 18 U.S.C. §1951(b)(1). Courts have broadly interpreted the term "property," as used in the Hobbs Act, to "protect intangible, as well as tangible property." *United States v. Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 780 F.2d 267, 281 (3d Cir. 1986) (describing the circuits as "unanimous" on this point). "The concept of 'property' under the Hobbs Act is an expansive one" that includes "intangible assets, such as rights to solicit customers and to conduct a lawful business." *United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999) (emphasis added) (citing 18 U.S.C. §1951(a)), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003); *see also United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction for threat "to slow down or stop construction projects unless his demands were met"). Thus, under this

broad definition of property, a defendant may commit a Hobbs Act robbery via threats to harm some intangible economic interest like a stock option, a contract right, or a financial holding. These types of threats involve no threats or the actual use of physical force—let alone *violent* physical force as required under §924(c)(3)(A).

The Tenth Circuit below recognized this argument as a possible source of breadth that would take Hobbs Act robbery outside the force clause, but it rejected the argument because it believed the broad definition of "property" did not apply outside the context of Hobbs Act extortion. 2018 WL 3342275 at *2. This belief is unfounded, however, because there is no authority to support the conclusion that "property" should be interpreted differently from one subsection of §1951 to another. "Property"—as used in the Hobbs Act for both robbery and extortion—includes "intangible property," and the fear of future injury to intangible property is not necessarily caused by the threat of violent force.

More importantly, pattern jury instructions adopted in at least three circuits, including the Tenth, use this definition in the context of Hobbs Act robbery. For example, in the Tenth Circuit, the "fear" required for Hobbs Act robbery may be of injury "immediately or in the future," and it defines "property" to include other "intangible things of value." Tenth Circuit, Criminal Pattern Jury Instructions §2.70 (2018) (Appendix A-24). The "fear" required for robbery is not categorically limited to a fear of violence but includes "anxiety about . . . economic loss." *Id.* The use of this broad language undermines the conclusion below that only extortion, and not robbery, is subject to such breadth.

The Tenth Circuit is not alone in extending Hobbs Act robbery so broadly. The Fifth, and Eleventh Circuits have also adopted pattern jury instructions that extend Hobbs Act robbery to situations where the defendant causes fear of future injury to intangible property. Fifth Circuit, Pattern Jury Instructions (Criminal Cases), 2.73A (2015 ed.) (Appendix A-27); Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (2016) (Appendix A-31). Similarly, a leading treatise on jury instructions includes intangible property for both Hobbs Act robbery and extortion. 3-50 Leonard B. Sand et al., Modern Federal Jury Instructions Criminal ¶ 50.03 (2007).

In the Eleventh Circuit, Pattern Instruction O70.3 (Hobbs Act robbery) provides:

> It's a Federal crime to acquire someone else's property by robbery . . .
>
> The Defendant can be found guilty of this crime only if all the following facts beyond a reasonable doubt.
>
> > (1) the Defendant knowingly acquired someone else's personal property;
> >
> > (2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence or causing the victim to *fear harm*, either immediately or in the future; ...
>
> "Property" includes money, tangible things of value, *and intangible rights that are a source or element of income or we*alth.
>
> "Fear means a state of anxious concern, alarm, or anticipation of harm. *It includes the fear of financial loss as well as fear of physical violence.*

(Emphasis added) (Appendix A-35).

According to this instruction, a defendant's threat to harm intangible rights (such as a stock option, or the right to conduct business) by causing a victim to simply "fear" a financial loss – but without causing the victim to fear *any* physical violence – is a plausible means of committing a Hobbs Act robbery. Indeed, one judge on the Eleventh Circuit relied on the pattern instructions to conclude that Hobbs Act robbery might not categorically require the use of violent force in every case because "'causing the victim to fear harm' can include causing fear of 'financial loss,' which 'includes . . . intangible rights that are a source or element of income or wealth.'" *Davenport v. United States*, No. 16-15939, Order at 6 (11th Cir. Mar. 28, 2017) (Martin, J.) (granting certificate of appealability on whether Hobbs Act robbery is an offense that categorically meets §924(c)'s force clause); *see also In re Hernandez*, 857 F.3d 1162, 1166-67 (2017) (Martin, J., joined by Jill Pryor, J. concurring in result) (noting that under the same definition of "fear" in the pattern Hobbs Act extortion instruction, "the plausible applications of attempted Hobbs Act extortion might not "all require the [attempted] use or threatened use of force").

These pattern instructions show that the broad definition of property is not limited to extortion cases and that Hobbs Act robbery does not fit categorically within the force clause of §924(c). Under these instructions, a Hobbs Act violation does not require the *any* force—taking a person's "intangible rights" by causing fear of a "financial loss" is not calculated to cause physical harm to any person, or to property.

Notwithstanding these jury instructions, several circuit courts have concluded that Hobbs Act robbery is categorically a crime of violence under the force clause of

§ 924(c) and the identical force clauses in the ACCA and Sentencing Guidelines. *See, e.g., United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018); *United States v. Garcia-Ortiz*, -- F.3d --, 2018 WL 4403947 (1st Cir. 2018); *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018); *United States v.* Robinson, 844 F.3d 137 (3d Cir. 2016); *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017); *United States v. Gooch*, 850 F.3d 285 (6th Cir. 2017); *United States v. Rivera*, 847 F.3d 847 (7th Cir. 2017); *United States v. House*, 825 F.3d 381 (8th Cir. 2016)); *United States v. St. Hubert*, 883 F.3d 1319 (11th Cir. 2018). However, these courts reach this conclusion without addressing the broad reach of Hobbs Act robbery under the pattern jury instructions, so they are not persuasive in resolving the specific "crime of violence" challenge Petitioner raises here.

It does not matter to Petitioner's claim that the Eighth Circuit has a model instruction specifying that a Hobbs Act robbery can only be committed by committing or threatening "physical violence." *See* Eighth Circuit Model Jury Instruction 6.18.1951B (2017, ed.) (Appendix A-40). If just one circuit had an instruction informing juries they could convict a defendant simply for causing fear of a financial loss, not personal violence, "violent force" would still not be an "element" of *every* Hobbs Act crime. But indeed, the fact that courts in three circuits (covering Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) routinely instruct juries in all Hobbs Act robbery cases that this offense does not necessitate the use, threat, or fear of physical violence,

underscores the error by the court below in finding that a Hobbs Act robbery by "fear of injury" was categorically violent.

Although no court has included the pattern jury instructions in its analysis, some courts have considered whether a threat to harm intangible financial interests would take Hobbs Act robbery outside § 924(c)'s force clause. These courts, like the Tenth Circuit below, have generally concluded that a threat to intangible property could occur only in an extortion case, and they conclude that the threat to injure intangible property is implausible in a robbery case, absent a citation to an actual case where Hobbs Act robbery was extended so far. *United States v. Garcia-Ortiz*, -- F.3d --, 2018 WL 4403947 at *3 (1st Cir. 2018); *United States v. St. Hubert*, 883 F.3d 1319, 1336 (11th Cir. 2018); *United States v. Hill*, 890 F.3d 51, 57 n.9 (2d Cir. 2018).[1]

For example, in *Garcia-Ortiz*, the First Circuit concluded that a threat to "devalue some intangible economic interest like a stock holding or contract right" . . . "sounds to us like Hobbs Act extortion" that could not plausibly be charged as Hobbs Act robbery. *Garcia-Ortiz* at *3. *Garcia-Ortiz* said it would "not consider a theorized scenario unless there is a 'realistic probability' that courts would apply the law to find an offense in such a scenario." *Id.* This Court has explained that "[t]o show that realistic probability," an offender must "point to his own case or other cases in which

[1] The Third Circuit acknowledged the argument that Hobbs Act robbery might be applied to non-violent offenses, but it concluded that the "brandishing" requirement in a different subsection of § 924(c) supplied the element of force that would be missing under the scenarios presented here. *United States v. Robinson*, 844 F.3d 137, 144 (3d Cir. 2016). Interestingly, it did so only after acknowledging that this analytical move would not normally be allowed under the categorical approach. *Id.*

the . . . courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Gonzales v. Duenas-Alvares*, 549 U.S. 183, 193 (2007).

In reality, the application of Hobbs Act robbery to crimes against intangible property are not merely hypothetical, for such cases do exist. For example, in *United States v. Kamahele*, 2:08-cr-758 TC (D. Utah Oct. 6, 2011), the defendants were charged with Hobbs Act robbery and § 924(c). The court told the jury it could convict the defendants of Hobbs Act robbery if it found they "attempted to obtain property from another" by use of "fear of injury, immediately or in the future, to . . . property." (Appendix A-45.) The instructions defined "property" as "money and other tangible and intangible things of value." (*Id.* at 43.) And "fear" included "an apprehension, concern, or anxiety about . . . economic loss." *Id.* These instructions allowed the jury to convict based on a finding that the defendants caused anxiety about economic loss caused by future harm to intangible things of value.

This instruction is hardly unique, and similar instructions have been used in Hobbs Act robbery trials around the country. Consistent with the pattern instructions, these cases instruct jury that "property" includes intangible property that can be injured without the use of violent force. *See, e.g., United States v. Buck*, No. 4:13-cr-491 (S.D. Tex. Aug. 28, 2015) (Appendix A-46); *United States v. Tibbs*, 2:14-cr-20154 BAF (E.D. Mich. Aug. 29, 2014) (Appendix A-59); *United States v. Moody*, 8:09-cr-234 (M.D. Fla. Feb. 25, 2010) (Appendix A-63). These wide range of dates for these cases show that this broad application in actual cases is both longstanding and recent. That these cases can be found not only in the Fifth, Tenth,

and Eleventh Circuits shows that it is not geographically limited. These cases undercut the conclusion that such broad application is merely hypothetical.

Under the categorical approach, it does not matter that most Hobbs Act robberies are committed with the use of violent force. Rather, the central question is whether Hobbs Act robbery *categorically* requires the use of violent force as an element. The Hobbs Act's protections have long been understood to apply broadly, even to "intangible" property. And by adopting these pattern jury instructions for Hobbs Act robbery, circuit courts have made clear that this is the case even for Hobbs Act robbery—as a matter of law, it extends to non-forcible threats of injury to intangible property. The use of these pattern instructions in actual criminal prosecutions shows that this breadth is not merely hypothetical. The decisions by the Tenth Circuit below and by other circuits that find Hobbs Act robbery to be categorically within the force clause are in tension with these longstanding rules that extend this crime to those based on fear of economic harm. As such, Hobbs Act does not fall categorically within the force clause of § 924(c).

To be sure, the circuits are not divided in the way that we typically envision a "circuit split." The conflict here is between those circuits that have expanded Hobbs Act robbery through their pattern jury instructions (and the district courts that have been using these instructions for many years) and one side, and the courts that say this breadth is merely hypothetical on the other. This Court should grant certiorari to resolve the tension between the recent decisions and the longstanding, widely used

jury instructions that extend Hobbs Act robbery to threats of injury to intangible property.

This issue has far-reaching importance because it is not limited to § 924(c). The force clause in § 924(c)(3)(A) is virtually identical to the force clause in the ACCA and the Sentencing Guidelines. 18 U.S.C. § 924(e)(2)(B)(i); USSG §4B1.2(a)(1). As such, this appeal will impact hundreds, if not thousands, of cases nationwide.

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

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FEDERAL PUBLIC DEFENDER

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AFFIDAVIT OF SERVICE

Benjamin C. McMurray, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Noel Franscisco
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530-001

It is further attested that the envelope was deposited with the United States Postal Service on October 9, 2018 and all parties required to be served have been served.

/S/ Benjamin C. McMurray
Benjamin C. McMurray
Assistant Federal Public Defender,
District of Utah
Counsel of Record for Petitioner
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STATE OF UTAH)

) ss
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this ____ day of October, 2018.

_____

Notary Public

My Commission Expires:

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AFFIDAVIT OF MAILING

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Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

It is further attested that the envelope was deposited with the United States Postal Service on October 9, 2018, and all parties required to be served have been served.

/S/ Benjamin C. McMurray
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Salt Lake City, UT 84101
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STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this 9th day of October, 2018.

_____

Notary Public

My Commission Expires: