No. 18-6914

In the

Supreme Court of the United States

DANIEL ROJAS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Reply Brief in Support of Petition for Writ of Certiorari

STEPHEN P. MCCUE*
Federal Public Defender
111 Lomas Blvd., NW, Suite 501
Albuquerque, New Mexico 87102
Telephone: (505) 346-2489
Facsimile: (505) 346-2494

Attorney for the Petitioner
* Counsel of Record

Table of Contents

Table of Authorities

Table of Authorities (continued)

Reply Argument

In his petition, Rojas argued that threatening to devalue another's intangible assets constitutes Hobbs Act robbery and does not require violent force. The government counters that it is unlikely that Hobbs Act robbery can ever be committed by threats of future harm to intangible property interests. Br. in Opp. 3-5. It concludes, therefore, that Hobbs Act robbery does qualify as a crime of violence as defined in 18 U.S.C. § 924(c)(3)(A)'s force clause. Here, Rojas explains why the government is incorrect.

A. It is unreasonable to conclude that a threat of injury to property under the Hobbs Act robbery statute – which can be broadly accomplished by threat of future harm against intangible property – equals a threat of violent physical force against a person.

The government unreasonably intimates that a threat of injury to property under the Hobbs Act robbery statute – which can be accomplished by a threat of future economic harm – always constitutes a threat of force against a person. The government has a heavy burden to prove that even the "most innocent" way of threatening injury to property will automatically include a threat of violent physical force, i.e., strong physical force, against a person. *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012). In other words, the government must prove that "the minimum conduct" encompassed under the Hobbs Act robbery statute will always involve violent physical force. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013). The

government cannot meet this burden.

The most innocent way of completing a Hobbs Act robbery is by placing someone in fear of injury to his intangible property. The government is not convinced "property" as a component of Hobbs Act robbery includes intangible property. Yet, numerous circuits say otherwise.

"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) (citing 18 U.S.C. § 1951(a) and interpreting robbery definition to includes threats against property), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003). In *United States v. Iozzi*, 420 F.3d 512, 514 (4th Cir. 1970), the Fourth Circuit likewise interpreted the term "property" in the Hobbs Act statute to include "intangible property." As Rojas pointed out in his petition, other circuits also have adopted this meaning. *See United States v. Debs*, 949 F.2d 199, 201 (6th Cir. 1991) (concept of property in Hobbs Act not limited to tangible property, also includes intangible 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) (Hobbs Act makes no distinction between tangible and intangible property); *United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980) (in Hobbs Act, property refers to

tangible and intangible property); *United States v. Nadaline*, 471 F.2d 340, 344 (5th Cir. 1973) (intangible property protected by Hobbs Act). According to these circuits then, Hobbs Act robbery can be perpetrated when one impliedly threatens future injury to another's economic interests or business reputation.

Still, the government dismisses the above-referenced cases as inapposite by suggesting that they were all decided in the context of Hobbs Act extortion. Br. in Opp. 3-4. Even if that is so, the government's argument overlooks the principles of statutory construction. It is a fundamental canon of statutory construction that when an identical word appears in different parts of the statute, it must be assigned the same meaning unless Congress indicates otherwise. *See Gustafen v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning"). Therefore, the term "property" which is used in both the Hobbs Act robbery subsection (18 U.S.C. § 1951(b)(1)) as well as the extortion subsection (18 U.S.C. § 1951(b)(2)) must be given the same meaning. The government has not pointed to any authority holding to the contrary.

Additionally, the pattern jury instructions for Hobbs Act robbery, which Rojas referenced in his petition, explain to juries that the offense can be perpetrated by threatening injury to intangible property. For example, in the

Tenth Circuit, the instruction specifically provides that Hobbs Act robbery – not just extortion – can be carried out by threatening injury to intangible property (i.e, "economic harm"). The jury is told the law allows it to convict the accused even if the unlawful property taking is done by threatening "fear of injury, immediately or in the future, to person or property." And the jury is instructed that, 'property' includes "money and other tangible and intangible things of value"; and that 'fear' can be "apprehension or concern about physical violence or harm or economic loss or harm that is reasonable under the circumstances." Tenth Circuit Criminal Pattern Jury Instruction § 2.70 (2d Ed. 2015).[1] The government does not dispute that a jury which convicts will have used these definitions of property and fear.

Consequently, the government cannot say that categorically, threats as described in these instructions necessarily involve an intention to inflict violent physical force on another. It is evident, that they describe instead

---

[1] *See also* Eleventh Circuit Criminal Pattern Jury Instruction § O70.3 (Hobbs Act robbery) (In a robbery, "[p]roperty' includes money, tangible things of value, and intangible rights that are a source or element of income or wealth . . . . 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."); Fifth Circuit Criminal Pattern Jury Instruction § 2.73A (Extortion by Force Violence, or Fear 18 U.S.C. § 1951(a) (Hobbs Act)) (noting that when robbery is charged it should replace 'extortion' in the instruction and for both offenses the "term 'property' includes money and other tangible and intangible things of value"; the "term 'fear' includes fear of economic loss or damage, as well as fear of physical harm.").

express threats against property. In the Fifth, Eighth and Tenth Circuits, therefore, an accused who threatened the value of another's corporation by promising the release of compromising information unless the person turned over certain personal property, could be found guilty of Hobbs Act robbery. A threat of violent physical force against the person is not a necessary component of that conviction.

That the law allows the jury to convict an accused for Hobbs Act robbery guided by these definitions demonstrates that the government's argument is unfounded. By its terms, a threat to injure another's intangible property does not involve violent physical force against that person. In other words, with the evidence to support it, a jury's guilty verdict will have found that the accused caused another to fear future economic loss without using or threatening violent physical force. Thus, Hobbs Act robbery categorically fails to qualify as a "crime of violence" under § 924(c)(3)(A)'s "force" clause.

B. A realistic probability exists that Hobbs Act robbery can be violated by threatening injury to property rather than a person because the statute says so.

Despite § 1951(b)'s explicit inclusion of threats against property, the government contends that no "realistic probability" exists that Hobbs Act robbery can be accomplished without the use, attempted use, or threatened use of violent physical force against a person. Br. in Opp. 4.

The government misunderstands the "realistic probability" test derived from *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). As the Fourth Circuit held in *Torres-Miguel*, 701 F.3d at 170, the "realistic probability" test does not apply to the "force" clause, but rather only applies when determining whether an offense qualifies as a "generic offense" under the enumerated offenses clause: "[B]y its own terms, [*Duenas-Alvarez*] 'applies only to determinations of whether a 'state statute creates a crime outside the generic definition of a listed crime[.]'" *Torres-Miguel*, 701 F.3d at 170. As a result, under the terms of *Torres-Miguel*, if any possibility exists, no matter how slim, that an offense can be committed without the use, attempted use, or threatened use of violent physical force against another person, then the offense does not satisfy the force clause. *Id.* at 171.

In *Torres-Miguel*, the defendant did not cite to a single case in which any one had, in fact, been prosecuted for conduct under the relevant offense (California terroristic threats) that did not equal a threat of violent physical

force; yet, the court still found that the offense failed to satisfy the force clause because the possibility existed that it could be violated without the threat of violent physical force. *Id.* That same possibility exists here because the face of the Hobbs Act robbery statute provides that the offense can be committed by threat of injury to property. 18 U.S.C. § 1951(b).

Even if the "realistic probability" test does apply here, it is satisfied because, again, the text of the Hobbs Act robbery itself provides that the offense can be violated by a threat of injury to "property." *See United States v. O'Connor*, 847 F.3d 1147, 1154 (10th Cir. 2017) (Hobbs Act robbery perpetrated by using force against property). No more is required. Indeed, where as here, a statute explicitly defines a crime more broadly than the force clause, no "legal imagination" is required to hold that a realistic probability exists that the government can apply the statute to conduct that falls outside the force clause. *United States v. Titties*, 852 F.3d 1257, 1273-74 (10th Cir. 2017).[2] The statute's greater breadth is evident then from its text. *Id.*; *see also United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (same); *Jean-Louis v. Attorney General*, 582 F.3d 462, 481 (3d Cir. 2009) (realistic probability was satisfied where state statute's greater breadth was evident from the text of the statute).

[2] The Tenth Circuit's pattern instruction § 2.70, *supra*, reinforces the probability that a Hobbs Act robbery prosecution will rest on non-violent conduct.

Conclusion

This Court should grant certiorari to decide the important question of whether Hobbs Act robbery, which can be committed by threatening to devalue another's intangible assets, necessarily requires in every case, the use of violent physical force as that term is defined in 18 U.S.C. § 924(c)(3)(A)'s force clause.

Respectfully submitted,

STEPHEN P. MCCUE
Federal Public Defender

DATED: February 20, 2019

By: *s/ Stephen P. McCue*
Stephen P. McCue*
Federal Public Defender
Attorney for the Petitioner
* Counsel of Record

No. 18-6914

In the

Supreme Court of the United States

DANIEL ROJAS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Certificate of Service

I, Stephen P. McCue, hereby certify that on February 20, 2019, a copy of the petitioner's Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice,

Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

STEPHEN P. MCCUE
Federal Public Defender

DATED: February 20, 2019

By: *s/ Stephen P. McCue*
Stephen P. McCue*
Federal Public Defender
111 Lomas Blvd., Suite 501
Albuquerque, New Mexico 87102
Telephone: (505) 346-2489
Facsimile: (505) 346-2494

Attorney for the Petitioner
* Counsel of Record