No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

Jose A. Garcia Ortiz,
Petitioner,
v.
United States of America,
Respondent.

PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

In three circuits, pattern jury instructions extend Hobbs Act robbery (18 U.S.C. § 1951(b)) to an offense that can be committed by causing fear of harm to intangible property. At least one other circuit has a contrary set of instructions, while the First Circuit's pattern instructions are ambiguous. Because fear of economic harm can be caused without the use or threat of violent force, does this split of authority preclude Hobbs Act robbery as a categorical "crime of violence" under the "force clause" of 18 U.S.C. § 924(c)(3)(A)?

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Jose A. Garcia-Ortiz ("Petitioner") respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit affirming the judgment against him.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit affirming Petitioner's conviction was handed down on September 17, 2018, and has been reported as *United States v. Garcia-Ortiz*, 904 F.3d 102 (1st Cir. 2018). It is attached as **Appendix A**.

JURISDICTIONAL GROUNDS

Petitioner requests review of the judgment of the First Circuit entered on September 17, 2018, affirming his conviction. Supreme Court jurisdiction is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed pursuant to Supreme Court Rule 13.1.

RELEVANT STATUTORY PROVISIONS

This petition concerns certain provisions of 18 U.S.C. § 924(c) (incorporated by 18 U.S.C. § 924(j)) and 18 U.S.C. § 1951.

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

> (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.

The Hobbs Act, 18 U.S.C. § 1951(b), in pertinent part, provides:

> (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.

STATEMENT OF THE CASE

2001-2016: District and Appellate Determinations

The Petitioner was convicted, after trial, in connection with the robbery of a food warehouse on December 9, 2000. **Count One** charged him with a Hobbs Act violation, 18 U.S.C. § 1951(a). **Count Two** charged a violation of 18 U.S.C. § 924(c) and **Count Three** charged the death of an accomplice during the course of that robbery in violation of 18 U.S.C. § 924(j). Mr. Garcia-Ortiz was convicted on all counts and sentenced to concurrent life terms as to Counts One and Three, and a consecutive 10-year term as to Count Two. The three convictions were upheld on initial appeal, *United States v. Garcia-Ortiz*, 528 F.3d 74 (1st Cir.), *cert. denied*, 555 U.S. 910 (2008) (*"Garcia-Ortiz I")*, but the matter was remanded to the district court for re-sentencing.

Following the First Circuit remand, the district court reduced Mr. Garcia's penalty; he was re-sentenced to a total of 240 months as to Counts One and Three, along with a consecutive 60-month sentence as to Count Two. On appeal for the second time, the First Circuit vacated the consecutive sentence for Count Two pursuant to the Double Jeopardy Clause. *United States v. Garcia-Ortiz*, 657 F.3d 25 (1st Cir. 2010) (*"Garcia-Ortiz II")*.

In 2013, on remand from the second appeal, the district court considered Mr. Garcia-Ortiz' post-sentence rehabilitation and reduced the sentence to twenty-three years imprisonment. For the first time, a $60,000 restitution order was imposed. Following another appeal, *United States v. Garcia-Ortiz*, 792 F.3d 184 (1st Cir. 2015) (*"Garcia-Ortiz III"*), the matter was again remanded for re-sentencing, "to allow the court to properly address restitution." 792 F.2d at 192.

That re-sentencing took place in March, 2016. Mr. Garcia-Ortiz addressed four matters to the district court: (1) the restitution order; (2) his mitigating role in the offense; (3) consecutive versus concurrent sentences; and (4) additional and significant post-arrest rehabilitation in support of a lower sentence. The government asserted that the circuit's limited remand precluded consideration of anything but restitution.

Ultimately, based on the additional post-arrest rehabilitation, Mr. Garcia-Ortiz was re-sentenced to a total of 21 years in prison. The court also imposed restitution in a lower amount, $30,000.

Following the imposition of sentence and the filing of the Notice of Appeal, Mr. Garcia-Ortiz filed a *pro se* Motion to Preserve Johnson Claim, contending that his Count One Hobbs Act conviction does not qualify as a crime of violence pursuant to *Johnson v. United States ("Johnson*

II"), 135 S.Ct. 2551 (2015), consequently invalidating his conviction as to Count Three. That motion was never addressed at the district court level.

2016-2018: Appellate Proceedings

On appeal after the 2016 re-sentencing, Mr. Garcia-Ortiz attacked Count Three based on *Johnson II*. He asserted that the conviction failed to qualify under both § 924(c)'s force clause and residual clause. Following this Court's determination in *Sessions v. Dimaya*, ___ U.S. ___, 138 S.Ct. 1204 (2018), the circuit ordered supplemental briefing as to the impact of that case.

In its opinion, Appendix A, the circuit addressed only the applicability of a Hobbs Act robbery conviction to the force clause - 18 U.S.C. § 924(c)(3)(A). The court rejected Mr. Garcia-Ortiz' argument that a threat to harm an intangible economic interest was punishable under as a Hobbs Act robbery, glibly asserting: "This sounds to us like Hobbs Act extortion." 904 F.3d at 107 (emphasis in original). The court also refused to consider "theorized scenario[s]" and declared itself "unpersuaded that a threat to devalue an intangible economic interest constitutes the type of 'injury' described in the Hobbs Act robbery provision" particularly because of the Petitioner's inability to point to any convictions for Hobbs Act robbery based upon threats to devalue intangible property." 904 F.3d at 107.

REASONS FOR GRANTING THE WRIT

I. BECAUSE PATTERN JURY INSTRUCTIONS IN AT LEAST THREE CIRCUITS EXTEND HOBBS ACT ROBBERY TO OFFENSES COMMITTED WITHOUT THE USE OF VIOLENT FORCE AT ALL, THE FIRST CIRCUIT'S DECISION CANNOT STAND.

Under the categorical approach, a predicate 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—found in this case in the force clause, 18 U.S.C. § 924(c)(3)(A). *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012).[1]

Bolstering the contention that the Hobbs Act does not qualify under the force clause at issue, the plain language of the statute indicates that Hobbs Act robbery can be committed by causing "fear of injury, immediate or future, to . . . property." 18 U.S.C. §1951(b)(1). And 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 (3rd Cir. 1986) (describing the circuits as "unanimous" on this point). "The concept of 'property' under the Hobbs Act is an expansive one"

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[1]Consistent with this Court's determinations and with other circuits, the Fourth Circuit found that "[a]n offense that *results* in physical injury, but does not involve the use or threatened use of force, simply does not meet the Guidelines definition of crime of violence." 701 F.3d at 168. *See also United States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010) (making a criminal threat is not a crime of violence); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 193-195 (2nd Cir. 2003) (Connecticut third degree assault does not qualify as a "crime of violence" under the force clause in 18 U.S.C. § 16(b); "human experience suggests numerous examples of intentionally causing physical injury without the use of force such as a doctor who deliberately withholds vital medicine from a sick patient."); *United States v. Perez-Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005) (Colorado assault statute requiring bodily injury was not categorically a crime a violence under U.S.S.G. § 2L1.2 because "imposing that injury does not necessarily include the use or threatened use of physical force as required by the Guidelines.")

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)), *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"). Under the Hobbs Act, "[t]he term 'property' includes money and other tangible and intangible things of value which are capable of being transferred from one person to another." Sand & Siffert, Modern Federal Jury Instructions Criminal 50-4 and 50-5 ("The use of threat of force or violence might be aimed at . . . causing economic rather than physical injury").

Under this broad definition of property, then, 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 the violent physical force required under §924(c)(3)(A). *Johnson v. United States ("Johnson I"),* 559 U.S. 133, 140 (2010).

Furthermore, courts routinely look at jury instructions to see how broadly statutory language is applied in actual force clause cases. *See e.g., United States v. Tavares,* 843 F.3d 1 (1st Cir. 2016) (considering Model Jury Instructions, among other things, to determine whether a modality of the Massachusetts assault statute was a crime of violence); *United States v. Hopper*, 723 Fed. App'x 645, 646 (10th Cir. 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 the Hobbs Act in particular, 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 B**); Fifth Circuit, Pattern Jury Instructions (Criminal Cases), 2.73A (2015 ed.) (**Appendix C**); Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (2016) (**Appendix D**); see also 3-50 Leonard B. Sand et al., Modern Federal Jury Instructions Criminal ¶ 50.03 (2007). As a result, Hobbs Act robbery cannot categorically require the use of force.

The First Circuit rejected the Petitioner's argument because it believed the broad definition of harm to property that included intangible economic loss did not apply outside the context of Hobbs Act extortion. 904 F.3d at 107. An analysis of the pattern instructions, however, demonstrates that this belief is unfounded. There is no authority to support the conclusion that "property" should be interpreted differently from one subsection of §1951 to another.

In the Tenth Circuit, for example, 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 B**). The "fear" required for robbery is not categorically limited to a fear of violence but includes "anxiety about . . . economic loss." **Appendix B**. Critically, the instruction is broadly drafted and not limited to the extortion modality of the Hobbs Act.

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 C**); Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (2016) (**Appendix D**). 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).

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 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.*

Appendix D (Emphasis added).

Importantly, according to this instruction, a defendant's threat to harm intangible rights 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 6-8 (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 "plausible" - not imagined - applications of the instructions in the Eleventh Circuit run counter to the First Circuit's conclusion that harm to intangible rights only relate to Hobbs Act extortion.

Several appellate courts have nevertheless 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. In addition to the First Circuit, *see e.g., United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018); *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018); *United States v. Robinson*, 844 F.3d 137 (3rd 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.

While it is true 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 E**), that is of no consequence to this petition. Nor are the First Circuit's instructions, supported by a Comment seeming to conflate both the robbery and extortion modalities. Appendix F. 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. 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.

Stated simply, the First Circuit wrongly 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. 902 F.3d at 107. The existence of contrary patter jury instructs in districts and circuits that span the court 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 First and 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.

The "circuit split" here, then, 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) on 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 jury instructions that extend Hobbs Act robbery to threats of injury to intangible property.

CONCLUSION

For the reasons expressed above, this Court should grant this Petition for *Certiorari*.

Respectfully submitted,

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