No. 20-_____

In the

SUPREME COURT of the UNITED STATES

IVAN SOTO-BARRAZA and
JESUS LIONEL SANCHEZ-MEZA
Petitioners,

vs.

UNITED STATES OF AMERICA
Respondent.

On Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

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August 21, 2020

QUESTION PRESENTED

The Hobbs Act defines extortion, in relevant part, as requiring the wrongful use of violence or fear in order to induce a person to consent to part with property to which the aggressor has no right. 18 U.S.C. § 1951(a), (b)(2). In contrast, robbery occurs against the will of the rightful property owner. 18 U.S.C. § 1951(b)(1). This Court has held that the Hobbs Act uses the phrase "with his consent," to distinguish extortion from robbery, and "'consent' simply signifies the taking of property under circumstances falling short of robbery." *Ocasio v. United States*, 136 S. Ct. 1423, 1435 (2016).

The question presented, on which the Ninth Circuit conflicts with the plain text of the Hobbs Act and this Court's holding in *Ocasio v. United States* is:

Can a conviction for conspiracy to commit robbery and attempted interference with commerce by robbery stand if the jury was instructed on the elements of Hobbs Act extortion instead of Hobbs Act robbery, thus fatally amending the indictment?

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PETITION FOR A WRIT OF CERTIORARI

This petition presents a conflict between the Ninth Circuit and this Court regarding the essential elements of Hobbs Act extortion and robbery. This in turn creates a split between the Ninth and Fourth Circuits on the question of whether constructive amendment occurs when the district court, through its jury instructions, amends essential elements of a charged crime.

Expressly disagreeing with this Court's interpretation of extortion in *Ocasio v. United States*, 136 S. Ct. 1423 (2016), the court below held that using a jury instruction defining Hobbs Act extortion, which omitted robbery's essential element of "against his will" and substituted inducement or "consent", was only "slightly different" than the required Hobbs Act robbery instruction. *United States v. Soto-Barraza*, 947 F.3d 1111, 1118-19 (9th Cir. 2020), App. 12-13. *Ocasio* explicitly clarified that those phrases are the distinguishing factors between two distinct crimes under the Hobbs Act. The end result of this conflict is a first-degree murder conviction which unjustly stands on a conviction for extortion. Extortion is not a predicate offense for felony murder.

Furthermore, the lower court's refusal to recognize the distinct elements between Hobbs Act extortion and robbery cannot be reconciled with the plain text of the Act and creates a split with the Fourth Circuit which has found constructive amendment when a jury instruction amends an essential element of a charged crime. The decision below, holding that the extortion instruction did not constructively amend the grand jury's indictment, expands the definition of robbery

beyond what the statutory text permits and destroys the fine line between robbery and extortion which the Hobbs Act created and this Court upheld in *Ocasio v. United States.*

OPINIONS BELOW

The opinion of the court of appeals is reported at 947 F.3D 1111. *See* App. 1-21.

JURISDICTION

The court of appeals rendered its decision on January 17, 2020. A timely petition for rehearing was denied on March 26, 2020. On March 19, 2020, this Court issued an order extending the deadline to file any petition for a writ of certiorari to 150 days from the date of the order denying a timely petition for rehearing. The extended time to file the petition is up to and including Monday, August 24, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Hobbs Act, 18 U.S.C. § 1951, provides in relevant part:

> (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 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

Petitioners were charged, *inter alia*, with first degree murder and conspiracy to interfere with commerce by robbery and attempted interference with commerce by robbery under the Hobbs Act. Tracking the language of 1951(b)(1), the government specifically charged attempted robbery:

> [Petitioners] unlawfully attempted to interfere with the movement of drugs through the unlawful taking and obtaining of property from a person and in the presence of another, against his will, by means of actual and threatened force, violence and fear of injury, immediate and future, to his person and property and to anyone in his company at the time of the taking and obtaining[.] App. 27-28

At trial, however, the district court instructed the jury on the elements of Hobbs Act extortion. App. 11-13. In a published opinion, the court of appeals rejected petitioners' claims that this jury instruction constructively amended their indictment. App. 11-16.

1. In September 2010, the United States Border Patrol Tactical Unit (BORTAC) launched Operation Huckleberry, targeting "rip crews," armed groups who stole marijuana from drug traffickers. App. 4. In December 2010, in a remote desert basin named Mesquite Seep, the on duty BORTAC team was alerted to a group of five individuals walking towards them in a wash. Some of the group appeared to be armed with weapons at the "ready position." App. 5. The encounter occurred at night and the BORTAC team could see the group through a thermal monocular; the rip-crew could not see the BORTAC team in the dark. App. 5. As the group approached, one BORTAC agent yelled, "Policía" and fired at the group using non-

lethal bullets. App. 5. Caught by surprise, the group splintered, some fleeing while others attempted to return fire. *Id*. One member of the BORTAC group, Agent Brian Terry, was hit by a gunshot and later died of his wound. App. 6.

The petitioners Jesus Sanchez-Meza and Ivan Soto-Barraza were linked to the scene by DNA and fingerprint analysis. Both Petitioners later confessed to being members of the group and being present in Mesquite Seep that night. App. 6-7.

The trial commenced in September 2015. App. 8. At that time, the Ninth Circuit Model Instructions did not provide an instruction for Hobbs Act robbery or attempted robbery. App. 12 n.4. Instead, the government requested and the district court utilized the Ninth Circuit Model Instruction 8.142, entitled "Hobbs Act Extortion or Attempted Extortion by Force." App. 12. As its title suggests, the instruction detailed the elements of Hobbs Act extortion. The actual jury instruction used at trial read, "First, the Defendants intended to induce drug smugglers to part with property by the wrongful use of actual or threatened force, violence, or fear." App. 12 n.5. The petitioners' counsel failed to object. App. 11. The jury returned a guilty verdict on all nine counts. As to counts three and four, the jury effectively convicted the petitioners of conspiracy to commit and attempted Hobbs Act extortion." App. 6; *see* 18 U.S.C. § 1951(2).

The district court sentenced the petitioners to life imprisonment on Count 1, murder; concurrent 240 months sentences on Counts 3, 6, 7, and 8 and a consecutive sentence of 120 months for Count 9. App. 8.

2. Mr. Sanchez-Meza and Mr. Soto-Barraza filed a joint appeal, and argued,

inter alia, that the district court's jury instruction constructively amended the indictment because it allowed the petit jury to convict them based on the elements of a different crime—Hobbs Act extortion. App. 13. The petitioners argued that the evidence at trial could have supported an attempted extortion conviction, particularly because of the inchoate nature of the alleged crime. In a published opinion the court of appeals rejected this argument and affirmed petitioners' convictions. App. 1-21.

The decision below held that although the jury instructions defined robbery in a "slightly different manner" from the Hobbs Act (using the Hobbs Act extortion instruction, thereby omitting the element of "against his will"), the government had "presented overwhelming evidence" that the defendants had intended to take drugs from smugglers "against their will." App. 12-13. The lower court categorically rejected the constructive amendment claim because the government "d[id] not introduce evidence at trial 'that would enable the jury to convict the defendant for conduct with which he was not charged.'" App. 14.

Instead, the opinion below deemed the defendants' claims to be a challenge to the jury instructions. This allowed the conclusion that the differences between the statutory definition of robbery and the court's instructions to the jury did not constitute plain error. App. 14.

However, the statutory language for Hobbs Act robbery requires proof of the essential elements, "*against his will*, by means of actual or threatened force, violence or *fear of injury, immediate or future*, to his person or property." 18 U.S.C.

§§ 1951(b)(2) (emphasis on different language).

3. Following the trial in this case, the Ninth Circuit Jury Instructions Committee briefly adopted the jury instruction used here as the model instruction for Hobbs Act attempted robbery, such that for a short period both Hobbs Act extortion and robbery jury instructions were identical in direct conflict with the statutory text and this Court's interpretation of extortion and robbery in *Ocasio*. The Committee soon thereafter reversed course to correct the instruction to include the element of "against his will" and remove the phrases "attempted to induce" or "induced." App. 12 n.4.

REASONS FOR GRANTING THE PETITION

The court of appeal's decision explicitly conflicts with this Court's interpretation of the essential elements of Hobbs Act extortion and robbery. The jury instruction and decision below untethers petitioners' convictions from the statutory text and creates a conflict with the Fourth Circuit's framework of what constitutes a constructive amendment.

I. The Ninth Circuit's Decision Is Inconsistent with the Supreme Court's Interpretation of the Hobbs Act.

The opinion below holds that the extortion instruction was only slightly different from the statutory definition of robbery and therefore not reversible error. However, this Court's interpretation of Hobbs Act robbery and extortion demonstrates that the slightest difference makes a significant impact, constituting an entirely different crime.

This Court held,

> As used in the Hobbs Act, the phrase "with his consent" is designed to distinguish extortion ("obtaining of property from another, with his consent," 18 U.S.C. §1951(b)(2) (emphasis added)) from robbery ("obtaining of personal property from the person or in the presence of another, against his will," §1951(b)(1) (emphasis added)). Thus, "consent" simply signifies the taking of property under circumstances falling short of robbery.

Ocasio v. United States, 136 S. Ct. 1423, 1435 (2016). The Ninth Circuit 8.142 instruction, "Hobbs Act Extortion or Attempted Extortion by Force" instructed exactly what it was labeled to instruct: Hobbs Act extortion. Model Crim. Jury Instr. 9th Cir. 8.142 (2010 ed.) (2015). The instruction substituted the word inducement for "with his consent." Thus, the instructions permitted the jury to return guilty verdicts for conspiracy and attempting to take property based on the definition of Hobbs Act extortion. Petitioners were effectively convicted of obtaining "property under circumstances falling short of robbery." *Ocasio*, 136 S. Ct. at 1435. The jury instruction constructively amended the indictment and vitiated the government's burden of proving Hobbs Act robbery.

Ignoring this Court's interpretation of Hobbs Act extortion and robbery allowed the opinion below to characterize the issue as a jury instruction challenge, avoiding *per se* reversal. However, the jury instruction was not a "misleading or inadequate" instruction. App. at 14-15. To the contrary, the 8.142 instruction was completely adequate for a Hobbs Act extortion charge. But the grand jury did not indict the defendants for extortion. As such, the 8.142 instruction "destroyed the defendant's substantial right to be tried only on charges presented in an indictment and returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless

error." *Stirone v. United States*, 361 U.S. 212, 217 (1960).

II. The Ninth Circuit's decision is inconsistent with the plain text of the Hobbs Act.

In order to satisfy the plain text of the Hobbs Act, a robbery or attempted robbery occurs when, the perpetrator must have taken (or would have taken but for intervening circumstances) (i) "property from the person or in the presence of another," (ii) "against his will," and, among other means, (iii) through "fear of injury." 18 U.S.C. § 1951(b)(1). A similar parsing of the jury instruction demonstrates how the it obliterated the line between robbery and extortion.

First, the court instructed the jury that it could return a verdict of guilty if petitioners "intended to induce drug smugglers to part with property by wrongful use of actual or threatened force, violence, or fear." That language is straight from 1951(b)(2), where Congress defined extortion.

Second, the district court used the word "induced," a word not found anywhere in the indictment or in the statutory subsection defining robbery. "Induce" is part of the definition of extortion under 1951(b)(2), and is an essential element when a private citizen is charged with extortion. *See Evans v. United States*, 504 U.S. 255, 265 (1992) ("In the case of the private individual, the victim's consent must be 'induced by wrongful use of actual or threatened force, violence or fear.' In the case of the public official, however, there is no such requirement").

Third, immediately following "induce" is the phrase "to part with property." Inducing someone through violence, threats of violence, or instilling "fear" "to part with property" suggests the property was obtained with consent (albeit reluctantly),

which is classic extortion.

Fourth, the district court instructed the jury that the use or threatened use of force must be "wrongful." The wrongful use of force is an element of extortion, not robbery.

Fifth, the jury should have been instructed that the taking of property must be accomplished "by means of actual or threatened force, violence or fear of injury." Instead, they were instructed that the government can satisfy its burden by proving Petitioners intended to obtain the property by the wrongful use of actual or threatened force, violence, or (the nearly boundless) "fear"—language that comes from 1951(b)(2).

Congress provided specific definitions for "robbery" and "extortion." The district court's instruction rendered meaningless the statutory distinctions between those offenses. This failure to follow the plain text of the Hobbs Act constructively amended the indictment. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[.]" U.S. Const. Amend. V. The Fifth Amendment guarantees a criminal defendant the right to stand trial only on charges made by a grand jury in its indictment. *Id*. If an indictment could be changed so easily, then "the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." *Ex parte Bain*, 121 U.S. 1, 10 (1887). "Ever since *Ex parte Bain* . . . was decided in 1887, it has been

the rule that after an indictment has been returned, its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States*, 361 U.S. 212, 215-16 (1960). The Petitioners were "convicted on a charge the grand jury never made against them. This was fatal error." *Id*. at 219.

III. The Court of Appeals Decision Conflicts with the Fourth Circuit as to whether Jury Instructions can effectively create a Constructive Amendment.

The Fifth Amendment guarantees a criminal defendant the right to stand trial only on charges made by a grand jury in its indictment. In *Stirone*, the Court's unanimous opinion held that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him, and therefore that "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." 361 U.S. at 215-17; *see Russell v. United States*, 369 U.S. 749, 770 (1962) (citing *Bain* for the "settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form").

The Fourth Circuit holds that if a district court, through its jury instruction, introduces a new element that is a different offense from the indictment, then a conviction must be reversed. *United States v. Randall*, 171 F.3d 195, 208 (4th Cir. 1999), *see United States v. Redd*, 161 F.3d 793, 795 (4th Cir. 1998). In *Randall*, the government charged two defendants under Section 924(c), Title 18 of the United States Code, which prohibits a person from using or carrying a firearm "during and in relation to any crime of violence or a drug trafficking crime . . . ." 171 F.3d at 198.

The indictment named one Section 924(c) predicate crime, "distribution of a narcotic controlled substance," but the jury instruction constructively amended the indictment by allowing proof of a different, alternate Section 924(c) predicate crime, "possession with intent to distribute drugs." *Id*. Substituting one predicate offense for another predicate offense by jury instruction was a constructive amendment, even though either crime would have sufficed, or neither. *Id*. at 205. Although the government was not required to name the predicate crime in the indictment, because it did so, it was limited to that offense. *Id*. In rendering this decision, the Fourth Circuit recognized that a jury instruction alone is sufficient to constructively amend the indictment.

On the other hand, the Ninth Circuit has held that a determination of constructive amendment requires "sensitivity to both the jury instructions as a reflection of the indictment, and to the nature of the proof offered at trial." *United States v. Ward*, 747 F.3d 1184, 1191 (9th Cir. 2014). *Ward* involved a scheme to defraud a bank and its customers. *Id.* at 1186. Among other offenses, Ward was charged with aggravated identity theft. *Id*. The statute required proof that the victim was a real person. *Id*. at 1192. Ward was indicted as to two named persons but the jury heard testimony that he victimized three additional individuals. *Id*. at 1192. The jury was instructed that it could convict Ward if he stole the identity of "a real person," without specifying which victim. *Id.* Ward's conviction was overturned because it was impossible to know if the jury based the conviction solely on the victims named in the indictment. "Ward may have been 'convicted on a

charge the grand jury never made against him,' so a constructive amendment necessarily occurred here." *Id.* (quoting *Stirone v. United States*, 361 U.S. 212, 219 (1960)).

The lower decision misapplied *Ward*. *Ward* should have been read to support the Petitioners' claim. First, to the extent that *Ward* was laying down a two-part test, the first prong—"sensitivity . . . to the jury instructions as a reflection of the indictment" unquestionably points to constructive amendment. *Ward*, 747 F.3d at 1191. *Ward* should have also been read as applicable where an indictment is *broadened* to include charged as well as uncharged conduct. Second, it is appropriate to examine the trial evidence to determine if the conviction was based on an offense never approved by the grand jury.

Here, the court's Hobbs Act robbery instruction did not provide an *alternative* means of convicting the Defendants. The district court only instructed the jury on extortion, not extortion and/or robbery. The basis for petitioners' liability under the extortion instruction was completely *changed*, rather than broadened to include indicted and unindicted conduct. When the court instructed the jury only on extortion, petitioners were in fact, "convicted on a charge the grand jury never made against [them]." *Ward*, 747 F.3d at 1192.

A constructive amendment is a fatal variance because the indictment is altered "to change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment." *United States v. Schnabel*, 939 F.2d 197, 203 (4th Cir. 1991). A constructive amendment

violates the Fifth Amendment right to be indicted by a grand jury and is error *per se*. *Id*. It must be corrected on appeal even when the defendant did not preserve the issue by objection. *See United States v. Floresca*, 38 F.3d 706, 712-13 (4th Cir. 1994) (*en banc*); *United States v. Willoughby*, 27 F.3d 263, 266 (7th Cir. 1994) (holding a constructive amendment under similar facts).

Although similar in approach, the Ninth Circuit framework utilizes a two-prong approach while the Fourth Circuit only requires a change to the elements of the offense charged. The Ninth Circuit approach allowed the decision below to ignore that the instruction was for a wholly separate offense despite the plain text of the Hobbs Act and this Court's holding in *Ocasio*.

The Ninth Circuit was confronted with essentially the same facts in *Randall* but refused to hold that an instruction for a wholly different crime constructively amended the indictment requiring *per se* reversal. App. 11-16. The decision below rejected the constructive amendment claims because the government did not introduce evidence at trial "that would enable the jury to convict the defendant for conduct with which he was not charged." *Ward*, 747 F.3d at 1191.

However, the Ninth Circuit's reliance on the evidence of robbery does not vitiate the constructive amendment nor insulate this case from *per se* reversal. The same evidence, given the similarity of the elements between Hobbs Act robbery and Hobbs Act extortion, could have been relied upon by the petit jury to convict the defendants of Hobbs Act extortion as instructed.

Because the offense was inchoate in nature, the jury was asked to imagine

what a future, unconsummated confrontation between the Defendants' rip-crew and drug traffickers might have looked like. The evidence presented at trial could just as much have supported an attempted extortion in which a drug-trafficker voluntarily abandons his property and flees upon seeing an armed rip-crew. This meets the elements of extortion. *See* § 1951(b)(2). Because the government was unable to identify the target victim of the attempted crime, the jury's potential conception of how exactly the attempted crime would unfold was understandably broad. There are no facts on the record about the would-be victims, such as the number of people trafficking drugs, or whether or not they would be armed. No drug traffickers were found or known to have been in Mesquite Seep at the time of BORTAC's operation which might have been the potential victims of the alleged attempted robbery.

The facts are analogous to *Randall*. The petitioners were convicted of a charge that the grand jury never made against them. As such, since *Randall* stands for the proposition that a jury instruction alone can amend the indictment, this case would have resulted in a fatal variance in the Fourth Circuit but not in the Ninth Circuit. The decision below conflicts with the Fourth Circuit's jurisprudence on constructive amendment.

Although the crimes of robbery and extortion are closely related, it is *per se* reversible error to conflate them because it violates the Fifth Amendment and results in two significantly varying consequences: natural life or the future possibility of release. Only Hobbs Act robbery is an enumerated predicate offense

for felony murder. 18 U.S.C 1111(a).

IV. The Question Presented is Cleanly Presented and Important.

The opinion below cannot be reconciled with the plain text of the Hobbs Act, this Court's precedent and other Circuits' authoritative decisions. The Court should grant the petition to resolve the conflict with the Hobbs Act, *Ocasio* and the subsequent conflict created between the Circuits. The opinion below dismissed the consent element of Hobbs Act extortion as insignificant, contrary to *Ocasio*'s careful explanation that the Hobbs Act uses the phrase "with his consent," to distinguish extortion from robbery. 136 S. Ct. at 1434.

To dismiss the plain and prejudicial error as insignificant expands the definition of Hobbs Act robbery beyond what the statutory text permits and undermines precedential authority on constructive amendments. The jury instruction error invokes the petitioners' Fifth Amendment right be tried only on those charges for which they were indicted. To let this conviction stand deprives the petitioners of that basic constitutional right.

The petitioners have a life altering reason for obtaining reversal of the attempted Hobbs Act robbery conviction. Hobbs Act robbery is the only predicate offense charged in the indictment under 18 U.S.C § 1111 (First Degree Murder). First degree murder requires a life sentence. If the Hobbs Act robbery conviction is reversed because the petitioners were convicted of extortion, the murder conviction must also be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. IVAN SOTO-BARRAZA, *Defendant-Appellant.*	No. 15-10586 D.C. No. 4:11-cr-00150- DCB-BPV-3

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JESUS LIONEL SANCHEZ-MEZA, AKA Leonel Meza-Portillo, AKA Lionel Meza-Portillo, AKA Leonel Portillo-Meza, AKA Lionel Portillo-Meza, AKA Jesus Leonel Sanchez-Meza, *Defendant-Appellant.*	No. 15-10589 D.C. No. 4:11-cr-00150- DCB-BPV-5 OPINION

Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

Argued and Submitted October 17, 2017
Submission Vacated January 24, 2018
Resubmitted January 17, 2020
San Francisco, California

Filed January 17, 2020

Before: Sandra S. Ikuta and Andrew D. Hurwitz, Circuit Judges, and Michael J. McShane,* District Judge.

Opinion by Judge Ikuta

SUMMARY**

Criminal Law

The panel affirmed two defendants' convictions for first-degree murder of a Border Patrol agent, conspiracy to interfere with and attempted interference with commerce by robbery in violation of the Hobbs Act, and assault on a U.S. Border Patrol Agent; and vacated the defendants' convictions for carrying and discharging a firearm in furtherance of a crime of violence.

* The Honorable Michael J. McShane, United States District Judge for the District of Oregon, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the defendants were properly extradited in accordance with the United States's treaty with Mexico.

The panel held that the district court's jury instructions for the Hobbs Act offenses were not plainly erroneous, and rejected the defendants' argument that the instructions constituted a constructive amendment of the indictment that allowed them to be convicted of extortion.

The panel held that the district court properly denied the defendants' motion for judgment of acquittal as to attempted robbery because the evidence was sufficient to establish that the defendants took a substantial step toward commission of the robbery.

In a concurrently filed memorandum disposition, the panel accepted the government's concession that conspiracy to commit Hobbs Act robbery is not a crime of violence and thus vacated the defendants' convictions under 18 U.S.C. § 924(c).

COUNSEL

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David D. Leshner (argued), Special Attorney for the United States; Jeff Sessions, Attorney General; Office of the United States Attorney, San Diego, California; for Plaintiff-Appellee.

OPINION

IKUTA, Circuit Judge:

Ivan Soto-Barraza and Jesus Lionel Sanchez-Meza appeal their convictions for the first degree murder of United States Border Patrol Agent Brian Terry; conspiracy to interfere with and attempted interference with commerce by robbery in violation of the Hobbs Act; assault on a U.S. Border Patrol Agent; and carrying and discharging a firearm in furtherance of a crime of violence. We conclude that the defendants were properly extradited in accordance with the terms of the United States's treaty with Mexico. We hold that the jury instructions for the Hobbs Act offenses were not plainly erroneous, and reject defendants' argument that the instructions constituted a constructive amendment of the indictment. And we conclude that the evidence was sufficient to establish that the defendants took a substantial step toward commission of the robbery offense.[1] For the reasons below and in our concurrently-filed memorandum disposition, ___ Fed. App'x ___ (9th Cir. 2020), we vacate defendants' convictions on Count 9 and affirm in all other respects.

I

In September 2010, the United States Border Patrol Tactical Unit (BORTAC) for the Tucson sector launched Operation Huckleberry. The goal of Operation Huckleberry was to apprehend gangs that preyed on drug smugglers in the Arizona Mesquite Seep.

[1] We also deny defendants' motion to strike the government's letter pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure.

The Mesquite Seep is an area of rough terrain, covered with canyons, cliffs, and steep hills, about 11 miles north of the Mexican border. At the time Operation Huckleberry commenced, except for two foot trails, the area was accessible only by all-terrain vehicles. The Mesquite Seep was well known as part of a drug trafficking corridor. Bands of eight to twelve men would carry 45 or more pounds of marijuana in homemade backpacks as they traveled northbound from Mexico into the Seep, and then east to Interstate 19. This smuggling corridor was also well known to "rip crews," small gangs of bandits armed with assault weapons who stalked the smugglers to steal their marijuana. Operation Huckleberry was aimed at stopping rip crew activity in the Seep.

In December 2010, six BORTAC agents were deployed to the Mesquite Seep for a 48-hour operation. The team consisted of Agents William Castano (the team leader), Gabriel Fragoza, Timothy Keller, Brian Terry, Christopher Conner, and Charles Veatch. The agents were deployed in an area commonly used for smuggling.

Near the end of the 48 hours, the Nogales station alerted the team to potential traffic moving east towards the team's position. Three agents moved to a line above a wash. Using a thermal monocular, Agent Castano saw armed men approaching. At least two of the men had weapons in the "ready position," aimed forward and ready to fire. As they approached, Agent Castano yelled "Policia!" Some of the men ran; others stopped, turned towards the agents, and raised their weapons. In response, Agent Fragoza fired his non-lethal shotgun, while announcing in Spanish: "get down, get down." The agents saw multiple muzzle flashes from the

guns in the wash, and returned fire. Agent Terry was hit by a gunshot from the wash, and later died of the wound.

At the crime scene, the FBI recovered two AK-47-style assault rifles and five shell casings, but could not determine whether either of the rifles fired the bullet that killed Agent Terry. The FBI also found five backpacks containing food, water, and ammunition. Fingerprint and DNA analysis linked the rifles, backpacks, and the backpacks' contents to Soto-Barraza and Sanchez-Meza.

A grand jury indicted Soto-Barraza, Sanchez-Meza, and the four other rip crew members on nine counts, charging the defendants with murder of Agent Terry; Hobbs Act conspiracy to interfere and attempted interference with commerce by robbery; assault on four Border Patrol officers; and carrying and discharging a firearm in furtherance of a crime of violence.[2]

Almost a year and a half later, Mexican authorities arrested Sanchez-Meza and transported him to Mexico City, where he was interviewed by an FBI agent. After being advised of his *Miranda* rights, Sanchez-Meza confessed to his involvement in the Mesquite Seep incident. He admitted that he entered Arizona from Sonora, obtained AK-47-style weapons from a hidden cache, and began searching for

[2] This indictment was ultimately replaced by a Fifth Superseding Indictment (the operative pleading here), but the counts remained the same. The counts at issue here are: Count 1, first-degree murder of United States Border Patrol Agent Brian Terry, 18 U.S.C §§ 1111, 1114; Count 3, conspiracy to interfere with commerce by robbery, 18 U.S.C. § 1951; Count 4, attempted interference with commerce by robbery, 18 U.S.C. § 1951; and Count 9, carrying and discharging a firearm in furtherance of a crime of violence, 18 U.S.C. § 924(c)(1)(A)(i), (iii).

marijuana traffickers in order to rob them at gunpoint. When shown photographs of assault rifles recovered at the crime scene, Sanchez-Meza stated they were "similar types to the weapon he carried." Sanchez-Meza signed a written declaration acknowledging his confession.

A year later, Mexican authorities arrested Soto-Barraza. Two FBI agents interviewed Soto-Barraza in Spanish in a Mexican prison during the following month. After being advised of his *Miranda* rights, Soto-Barraza also admitted his involvement in the events surrounding the shooting. Like Sanchez-Meza, Soto-Barraza admitted that he entered the United States on foot from Sonora into Arizona; obtained weapons from a hidden cache of firearms; and planned to rob marijuana smugglers. He also admitted to carrying a loaded assault rifle and stated that a photograph of one of the rifles found in the wash was similar to the weapon he carried that night.

The government requested extradition of the defendants and Mexico granted the requests. The orders from the Mexican Department of Foreign Affairs stated that: "the formal international extradition request made by the government of the United States of America, regarding the person sought, adheres to the postulates contained in the Extradition Treaty between the United Mexican States and the United States of America and that the extradition of the aforementioned requested person is warranted; therefore the Department determines that there are sufficient elements to grant, and does grant, the extradition" of both defendants. The orders stated that each defendant could be prosecuted in district court for all the charges listed in the indictment, and that the offenses stated in each count met the statutory

definitions contained in Mexico's Federal Penal Code, in effect at the time of the events.[3]

Soto-Barraza moved to dismiss the indictment, arguing that his extradition was unlawful because Mexico did not have equivalent offenses. He later moved for a declaratory judgment on the same ground. Sanchez-Meza subsequently joined the motion, which the district court denied.

The seven-day trial began in September 2015. After the government rested, the defense moved for a directed verdict, contending that the rip crew's preparations did not constitute a "substantial step" necessary for an attempted robbery. The court denied the motion.

The jury returned guilty verdicts on all nine counts. The court denied the defense's post-conviction motion for a judgment of acquittal and sentenced Soto-Barraza and Sanchez-Meza to life imprisonment for Count 1; concurrent 240-month sentences for Counts 3, 6, 7, and 8; and consecutive sentences of 120 months for Count 9. This appeal followed.

II

We first address defendants' claim that the district court erred in denying their motion to dismiss the indictment and

[3] The orders established that Count 1 (first degree murder) met the statutory definition in §§ 302 and 307 of Mexico's Federal Penal Code; Count 3 (conspiracy) met the statutory definition in § 164 of Mexico's Federal Penal Code; Count 4 (attempted robbery) met the statutory definition in §§ 367 and 371 of Mexico's Federal Penal Code; and Counts 5, 6, 7, and 8 (assault against a federal official) met the statutory definition of §§ 288 and 293 of Mexico's Federal Penal Code.

for declaratory relief on the ground that their extradition violated the Mexico-United States Extradition Treaty.

"The right to demand and obtain extradition of an accused criminal is created by treaty." *United States v. Van Cauwenberghe*, 827 F.2d 424, 428 (9th Cir. 1987) (quoting *Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir. 1986)) (internal quotation marks omitted). The Treaty, effective January 25, 1980, imposes two requirements relevant to defendants' motions.

First, Article 17 of the Treaty incorporates the "rule of specialty," which precludes the requesting country from prosecuting a defendant for any offense other than that for which the surrendering country consented to extradite, unless surrendering country approves. *See United States v. Iribe*, 564 F.3d 1155, 1158 (9th Cir. 2009). Article 17 states: "A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State," absent certain exceptions not relevant here.

Second, Article 2 incorporates the principle of "dual criminality," that "an accused person can be extradited only if the conduct complained of is considered criminal by the jurisprudence or under the laws of both the requesting and requested nations." *Quinn*, 783 F.2d at 783. Article 2(1) provides that "[e]xtradition shall take place, subject to this Treaty, for wilful acts which fall within any of the clauses of the Appendix and are punishable in accordance with the laws of both Contracting Parties by deprivation of liberty the maximum of which shall not be less than one year." The Appendix to the Treaty lists 31 categories of offenses,

including murder and robbery. Article 2(3) provides that "[e]xtradition shall also be granted for wilful acts which, although not being included in the Appendix, are punishable, in accordance with the federal laws of both Contracting Parties, by a deprivation of liberty the maximum of which shall not be less than one year."

We "defer to a surrendering sovereign's reasonable determination that the offense in question is extraditable." *United States v. Saccoccia*, 58 F.3d 754, 766 (1st Cir. 1995); *see also Van Cauwenberghe*, 827 F.2d at 429 (courts should accord "proper deference" to "a surrendering country's decision as to whether a particular offense comes within a treaty's extradition provision"). But we review de novo the "district court's decision that an offense is an extraditable crime." *Van Cauwenberghe*, 827 F.2d at 428. We likewise review de novo the district court's "[i]nterpretation of an extradition treaty, including whether the doctrines of dual criminality and specialty are satisfied." *United States v. Anderson*, 472 F.3d 662, 666 (9th Cir. 2006).

In their motions to dismiss and for declaratory relief, Soto-Barraza and Sanchez-Meza argued that their extradition for felony murder, assault, and conspiracy (or attempt) to interfere with commerce by robbery violated the Treaty because Mexico does not criminalize these exact offenses and they are not listed in the Treaty. Relying on expert testimony of a law professor, the defendants argue that the Mexican statutes listed in the Treaty criminalize only simple homicide, and felony murder is not "punishable in accordance with the laws" of Mexico. They also argue that Mexican law does not punish interference with commerce by robbery of an illegal substance, and does not recognize the crime of assault on a federal official unless the official was physically injured or

feared for his life. Finally, defendants argue that the Treaty precludes the government from imposing a true life sentence for their offenses, because life sentences in Mexico last no more than 70 years.

Their arguments fail. In its extradition orders, Mexico listed the United States federal charges at issue, and stated that extradition for these charges conformed to the Treaty's terms. The orders also identified analogous statutory provisions under Mexico's Federal Penal Code for each of the offenses in the indictments. The principle of dual criminality does not require that the crimes be identical; rather, only the "'essential character' of the acts criminalized by the laws of each country" must be the same, and the laws "substantially analogous." *Manta v. Chertoff*, 518 F.3d 1134, 1141 (9th Cir. 2008) (quoting *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1404 (9th Cir. 1988)). Because Mexico elected to extradite the defendants on all charges listed in the indictment, the Treaty's principles of specialty and dual criminality are satisfied. *See Iribe*, 564 F.3d at 1160; *Van Cauwenberghe*, 827 F.2d at 428–29.

III

We next address defendants' claim that the district court erred in instructing the jury on conspiracy to interfere with and attempted interference with commerce by robbery, in violation of 18 U.S.C. § 1951 (the Hobbs Act). Because defendants did not object to these instructions at trial, we review for plain error. *See United States v. Reza-Ramos*, 816 F.3d 1110, 1123 (9th Cir. 2016).

We first turn to the district court's instruction for Count 4, attempted interference with commerce by robbery. Both

parties requested that the district court give Ninth Circuit Model Instruction 8.142, entitled "Hobbs Act Extortion or Attempted Extortion by Force."[4] The district court gave the proposed instruction, which included the following element: "First, the Defendants intended to induce drug smugglers to part with property by the wrongful use of actual or threatened force, violence, or fear."[5] The Hobbs Act defines robbery in

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[4] At the time, the Ninth Circuit model instructions did not have an instruction for Hobbs Act robbery. In December 2016, the committee added a new instruction for Hobbs Act robbery. Model Crim. Jury Instr. 9th Cir. 8.143A (2010 ed.), http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2017_9.pdf (last updated Sep. 2017) [hereinafter 2017 Instructions]. The committee most recently modified the instructions for Hobbs Act robbery in April 2019. *See* Model Crim. Jury Instr. 9th Cir. 8.143A (2010 ed.), http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2019_12_0.pdf (last updated Dec. 2019); Manual of Model Criminal Jury Instructions, http://www3.ce9.uscourts.gov/jury-instructions/model-criminal (stating that Instructions 8.143A was last modified in April 2019).

[5] The full instruction read:

> The defendants are charged in Count 4 of the indictment with attempted interference with commerce by robbery in violation of Section 1951 of Title 18 of the United States Code. In order for the defendants to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant intended to induce drug smugglers to part with property by the wrongful use of actual or threatened force, violence, or fear;
>
> Second, the defendants acted with the intent to obtain property;

a slightly different manner as "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." 18 U.S.C. § 1951(b)(1). The instruction differs from the statutory definition, in that it omits the language that the defendant took property from the victim "against his will" by means of "fear of injury," not just "fear."

Soto-Barraza and Sanchez-Meza now argue that the court's instruction is closer to the definition of "extortion" under the Hobbs Act, which is "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." 18 U.S.C. § 1951(b)(2). According to the defendants, the court's failure to provide instructions that included the phrases "against his will" and "fear of injury" resulted in a constructive amendment of the indictment that allowed them to be convicted of extortion, which is a per se reversible error.

Third, commerce from one state to another would have been affected in some way; and

Fourth, the defendants did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

We disagree. A constructive amendment "occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them," *United States v. Ward*, 747 F.3d 1184, 1189 (9th Cir. 2014) (quoting *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984)), such as "where (1) there is a complex of facts [presented at trial] distinctly different from those set forth in the charging instrument, or (2) the crime charged [in the indictment] was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved." *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002) (alterations in original) (internal quotation marks omitted). Neither of those errors is present here. The government indicted the defendants for Hobbs Act robbery and adduced evidence to prove that offense, offering no evidence that the defendants engaged in extortion. We reject constructive amendment claims when the government does not introduce evidence at trial "that would enable the jury to convict the defendant for conduct with which he was not charged." *Ward*, 747 F.3d at 1191.

The defendants' claims are better interpreted as a challenge to the jury instructions. *Compare United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005) (reviewing a claim that the jury instruction misstated material elements of a statute), *with Ward*, 747 F.3d at 1191–92 (reviewing whether defendant was convicted of a crime not charged in the indictment). Viewing the defendants' claim in this light, we conclude that the slight differences between the court's instructions to the jury and the statutory definition of robbery do not constitute plain error. *See Reza-Ramos*, 816 F.3d at 1123. The omission of the phrases "against his will" and "fear of injury" did not make the instruction "misleading or

inadequate to guide the jury's deliberation." *See United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010) (quoting *United States v. Frega*, 179 F.3d 793, 806 n.16 (9th Cir. 1999)); *see also United States v. Tavakkoly*, 238 F.3d 1062, 1066 (9th Cir. 2001) ("Improper jury instructions will rarely justify a finding of plain error.") (quoting *United States v. Marin-Cuevas*, 147 F.3d 889, 893 (9th Cir. 1998)). Our conclusion that any error was not "plain" is further supported by the fact that the seven judges who comprise the Ninth Circuit Jury Instructions Committee adopted identical language to that used by the district court here for model instructions on Hobbs Act attempted robbery: "the defendant [attempted to induce][induced] [name of victim] to part with property by the wrongful use of actual or threatened force, violence, or fear." 2017 Instructions 8.142A, 8.143A; *see also Hofus*, 598 F.3d at 1174–75 (no error when district court's instruction "mirrored" the model instruction).[6]

Moreover, even if the omission of the two phrases ("against his will" and "fear of injury") qualified as an error that was plain, these defendants' substantial rights were not affected. Because the government presented overwhelming evidence that the rip crew members intended to take marijuana from the smugglers by force and against their will, including Soto-Barraza's and Sanchez-Meza's confessions, there is no significant possibility that the jury might have acquitted the defendants if the instruction had included the omitted language. *See United States v. Brooks*, 508 F.3d 1205, 1208 (9th Cir. 2007) (holding that a jury instruction is not plainly erroneous if there is not "a significant possibility

[6] While the committee more recently revised Instruction 8.143A, *supra* note 4, the district court's instruction was not plain error because the committee previously used the same language as the court.

the jury might have acquitted if it had considered the matter") (quoting *United States v. Steward*, 16 F.3d 317, 320 (9th Cir. 1994)).[7]

IV

Finally, we consider Soto-Barraza and Sanchez-Meza's challenge to the district court's denial of their motion for judgment of acquittal as to attempted robbery. We review de novo whether sufficient evidence supports a guilty verdict. *United States v. Rosales-Aguilar*, 818 F.3d 965, 970 (9th Cir. 2016). We "assess the evidence in the light most favorable to the prosecution, determining whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 971 (quoting *United States v. Stewart*, 420 F.3d 1007, 1014–15 (9th Cir. 2005)).

"[A]n attempt conviction requires evidence that a defendant intended to violate the statute and took a substantial step toward completing the violation." *United States v. Mincoff*, 574 F.3d 1186, 1195 (9th Cir. 2009) (alterations in original) (quoting *United States v. Meek*, 366 F.3d 705, 720 (9th Cir. 2004)). "Mere preparation" is not a substantial step, *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1102 (9th Cir. 2011), but we have acknowledged that "[t]he

[7] For the same reason, we reject defendants' argument that the district court plainly erred in omitting the phrases "against his will" and "fear of injury" from its instruction on conspiracy to interfere with commerce by robbery, Count 3, which stated that "there was an agreement between two or more persons to induce drug smugglers to part with property by the wrongful use of actual or threatened force, violence, or fear." Sanchez-Meza and Soto-Barraza repeatedly conceded their guilt to conspiracy in their opening statements and closing arguments. *See Brooks*, 508 F.3d at 1208.

difference between making preparations and taking a substantial step toward the commission of a crime is one of degree," *Walters v. Maass*, 45 F.3d 1355, 1359 (9th Cir. 1995). "The line between mere preparation and a substantial step is inherently fact specific; conduct that would appear to be mere preparation in one case might qualify as a substantial step in another." *United States v. Villegas*, 655 F.3d 662, 669 (7th Cir. 2011). While acknowledging that it is difficult to identify "the point at which the defendants' activities ripen into an attempt," *United States v. Harper*, 33 F.3d 1143, 1148 (9th Cir. 1994), we have generally characterized that point as when a defendant's actions demonstrate "that the crime will take place unless interrupted by independent circumstances." *Mincoff*, 574 F.3d at 1195 (quoting *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007)).

In addressing this fact-specific inquiry, courts generally focus on factors such as whether defendants planned to commit an offense, *see United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990), and whether defendants equipped themselves with the items needed to commit the offense, *see United States v. Muratovic*, 719 F.3d 809, 816 (7th Cir. 2013); *United States v. Snell*, 627 F.2d 186, 188 (9th Cir. 1980) (per curiam). The key question is whether "the crime will take place unless interrupted by independent circumstances." *Mincoff*, 574 F.3d at 1195 (quoting *Goetzke*, 494 F.3d at 1237).

In addition to these general factors, courts also focus on the type of crime at issue. In bank robbery cases, courts frequently consider whether the defendant approached the targeted building to commit the offense. *See Moore*, 921 F.2d at 209 (holding that a defendant took a substantial step when he walked towards a bank wearing a ski mask,

holding gloves, and carrying a concealed loaded gun, combined with an informant's details about the planned offense); *see also Rumfelt v. United States*, 445 F.2d 134, 135–37 (7th Cir. 1971) (defendant took a substantial step by standing in front of a bank while wearing a ski mask and using a rifle to intimidate a passerby into trying to open the door to the bank) (cited with approval in *United States v. Buffington*, 815 F.2d 1292, 1302 (9th Cir. 1987)). If the defendants did not move toward the targeted bank, but merely conducted surveillance in its vicinity, defendants may not have taken a substantial step. *See Buffington*, 815 F.2d at 1303; *see also Harper*, 33 F.3d at 1147 (holding there was no substantial step where defendants "never made a move toward the victims or the Bank to accomplish the criminal portion of their intended mission"); *United States v. Still*, 850 F.2d 607, 610 (9th Cir. 1988) (holding there was no substantial step where the facts "do not establish either actual movement toward the bank or actions that are analytically similar to such movement").

In cases involving attempted robberies of armored trucks, courts have similarly focused on whether the defendants laid in wait where the truck was expected. *See Muratovic*, 719 F.3d at 816 (holding that the defendant took a substantial step towards robbery of an armored car where the defendant had gathered everything necessary to rob the armored car, waited for the car in a parking lot with the intention of following the car to a highway rest stop and robbing it, and failed to carry through only because he saw activities indicating that "the truck's driver had seen his surveillance"); *United States v. Chapdelaine*, 989 F.2d 28, 30–31, 33 (1st Cir. 1993) (holding that the defendant took a substantial step toward robbery of an armored car when he gathered the necessary weapons and planned the robbery; drove to a

parking lot to lay in wait for the car; but aborted the plan at the last minute when the armored car left the parking lot just as the defendant arrived).

And in cases involving planned offenses against individual victims, courts have focused on whether defendants had begun traveling to the location where the victim was expected to be found. *See United States v. Washington*, 653 F.3d 1251, 1266 (10th Cir. 2011) (holding that a defendant took a substantial step towards attempted murder-for-hire when he equipped himself with a pair of latex gloves to avoid fingerprints and traveled towards "a city in which he had no apparent business beyond the planned hit" with "the person who had facilitated the murder-for-hire agreement."); *United States v. Young*, 613 F.3d 735, 743 (8th Cir. 2010) (holding that defendant took substantial step towards enticement of a minor when he traveled to a motel where he expected to meet the victim); *United States v. Khalil*, 279 F.3d 358, 368–69 (6th Cir. 2002) (holding that a defendant took a substantial step toward committing a violent crime by participating with motorcycle club members who "organized themselves, armed themselves, and traveled in groups to locations where they expected to find their intended victims," and aborted their efforts only "due to police interference"); *see also* Model Penal Code § 5.01(2)(a) ("lying in wait, searching for or following the contemplated victim of the crime" can constitute a substantial step).

In this case, taking the evidence in the light most favorable to the government, a reasonable jury could conclude that Soto-Barraza and Sanchez-Meza took a substantial step toward robbery of marijuana smugglers because they equipped themselves with assault-style weapons (as well as packing food, water and ammunition) and traveled

to an area where they expected to find the intended victims. *See Khalil*, 279 F.3d at 368. Given that the defendants admitted that they entered the Mesquite Seep to search for marijuana smugglers and to rob them at gunpoint, and given their preparations for doing so, a reasonable jury could conclude that defendants would have carried out the crime once the opportunity presented itself and failed to do so only because they were interrupted by the BORTAC agents.

The defendants argue that there was insufficient evidence to establish they had taken a substantial step because there was no evidence that marijuana smugglers were actually present in their immediate vicinity or that a robbery was imminent. In making this argument, defendants rely primarily on cases considering whether defendants had taken a substantial step toward robbing a store or bank. *See Hernandez-Cruz*, 651 F.3d at 1102–03; *Harper*, 33 F.3d at 1147; *Still*, 850 F.2d at 610; *Buffington*, 815 F.2d at 1303. But here the defendants were targeting individual victims, not a building. In these circumstances, courts place greater weight on other factors, such as whether the defendants are lying in wait for the intended victim, *see Muratovic*, 719 F.3d at 816, or have begun traveling to the location where the victims may be found, *see Khalil*, 279 F.3d at 368. Because the central inquiry is whether the evidence is sufficient to demonstrate that the defendants will carry through with the offense unless interrupted, "there is no requirement that the actions constituting the attempt have a particular geographic proximity to the object of the substantive offense." *United States v. Turner*, 501 F.3d 59, 69 (1st Cir. 2007); *see also Villegas*, 655 F.3d at 669 (defendant took substantial step towards attempted robbery of armored car even though he was a mile away from the location of the planned robbery). Nor need a criminal act be imminent. *See Mincoff*, 574 F.3d

at 1190–91, 1195 (holding that there was a substantial step even though the attempted drug transaction took place over the phone across a ten-day period); *see also United States v. Sanchez*, 615 F.3d 836, 844 (7th Cir. 2010) (finding a substantial step made even though crime was at least a week away).

Because a reasonable jury could have concluded that Soto-Barraza and Sanchez-Meza did all they could to prepare to rob marijuana smugglers they would encounter and would have followed through with the crime had the BORTAC agents not intervened, the district court correctly denied defendants' motion for judgment of acquittal. *See Mincoff*, 574 F.3d at 1195.[8]

AFFIRMED IN PART AND VACATED IN PART

[8] As discussed in the concurrently filed memorandum disposition, ___ Fed. App'x ___ (9th Cir. 2020), we accept the government's concession that conspiracy to commit Hobbs Act robbery is not a crime of violence and thus vacate defendants' convictions on Count 9.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 26 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. IVAN SOTO-BARRAZA, Defendant-Appellant.	No. 15-10586 D.C. No. 4:11-cr-00150-DCB-BPV-3 District of Arizona, Tucson ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JESUS LIONEL SANCHEZ-MEZA, AKA Leonel Meza-Portillo, AKA Lionel Meza-Portillo, AKA Leonel Portillo-Meza, AKA Lionel Portillo-Meza, AKA Jesus Leonel Sanchez-Meza, Defendant-Appellant.	No. 15-10589 D.C. No. 4:11-cr-00150-DCB-BPV-5 District of Arizona, Tucson

Before: IKUTA and HURWITZ, Circuit Judges, and McSHANE,* District Judge.

* The Honorable Michael J. McShane, United States District Judge for the District of Oregon, sitting by designation.

The panel has unanimously voted to deny appellants' petition for panel rehearing. Judge Ikuta and Judge Hurwitz voted to deny the petition for rehearing en banc and Judge McShane so recommended. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

VICTIM CASE

UNITED STATES OF AMERICA,

Plaintiff,

v.

(2) JESUS ROSARIO FAVELA-ASTORGA,
aka "Jesus Rosario Fabela Astorga,"
(Counts 1-9, Forfeiture Allegation)

(3) IVAN SOTO-BARRAZA,
(Counts 1-9, Forfeiture Allegation)

(4) HERACLIO OSORIO-ARELLANES,
aka "Laco,"
(Counts 1-9, Forfeiture Allegation)

(5) LIONEL PORTILLO-MEZA,
aka "Lionel Meza-Portillo"
aka "Leonel Portillo-Meza"
aka "Leonel Meza-Portillo"
aka "Jesus Leonel Sanchez-Meza"
(Counts 1-9, Forfeiture Allegation)

(7) ROSARIO RAFAEL BURBOA-ALVAREZ,
aka "El Pariente"
aka "Chayito"
(Counts 1-4, Forfeiture Allegation)

Defendants.

Case No. CR-11-0150-TUC-DCB-BPV

FIFTH
SUPERSEDING INDICTMENT

Violations:

18 U.S.C. § 1111 and § 1114 (First Degree Murder); Count 1

18 U.S.C. § 1111 and § 1114 (Second Degree Murder); Count 2

18 U.S.C. § 1951 (Conspiracy to Interfere with Commerce by Robbery); Count 3

18 U.S.C. § 1951 (Attempted Interference with Commerce by Robbery); Count 4

18 U.S.C. § 111 (Assault on a Federal Officer); Counts 5,6,7 & 8

18 U.S.C. § 924(c) (Use and Carrying a Firearm During a Crime of Violence); Count 9

18 U.S.C. § 924(d)
28 U.S.C. § 2461(c)
Forfeiture Allegation

THE GRAND JURY CHARGES:

COUNT 1

On or about December 14, 2010, within the District of Arizona, during an attempt to interfere with commerce by robbery, as alleged in Count Four of this Fifth Superseding Indictment and incorporated herein by reference, defendants Manuel Osorio-Arellanes, aka "Manuel Arellanes," aka "Paye," (charged elsewhere), JESUS ROSARIO FAVELA-ASTORGA, aka "Jesus Rosario Fabela Astorga," IVAN SOTO-BARRAZA, HERACLIO OSORIO-ARELLANES, aka "Laco," LIONEL PORTILLO-MEZA, aka "Lionel Meza-Portillo," aka "Leonel Portillo-Meza," aka "Leonel Meza-Portillo," aka "Jesus Leonel Sanchez-Meza," and ROSARIO RAFAEL BURBOA-ALVAREZ, aka "El Pariente," aka "Chayito," did unlawfully kill with malice aforethought United States Border Patrol Agent Brian Terry while Agent Terry was engaged in and on account of the performance of his official duties; in violation of Title 18, United States Code, Sections 1111 and 1114 and Pinkerton v. United States, 328 U.S. 640 (1946).

COUNT 2

On or about December 14, 2010, within the District of Arizona, defendants Manuel Osorio-Arellanes, aka "Manuel Arellanes," aka "Paye," (charged elsewhere), JESUS ROSARIO FAVELA-ASTORGA, aka "Jesus Rosario Fabela Astorga," IVAN SOTO-BARRAZA, HERACLIO OSORIO-ARELLANES, aka "Laco," LIONEL PORTILLO-MEZA, aka "Lionel Meza-Portillo," aka "Leonel Portillo-Meza," aka "Leonel Meza-Portillo," aka "Jesus Leonel Sanchez-Meza," and ROSARIO RAFAEL BURBOA-ALVAREZ, aka "El Pariente," aka "Chayito," did unlawfully kill with malice aforethought United States Border Patrol Agent Brian Terry while Agent Terry was engaged in and on account of the performance of his official duties; in violation of Title 18, United States Code, Sections 1111 and 1114 and Pinkerton v. United States, 328 U.S. 640 (1946).

COUNT 3

Beginning at a date unknown and continuing up to and including December 14, 2010, within the District of Arizona and elsewhere, defendants Manuel Osorio-Arellanes, aka "Manuel

Arellanes," aka "Paye," (charged elsewhere), JESUS ROSARIO FAVELA-ASTORGA, aka "Jesus Rosario Fabela Astorga," IVAN SOTO-BARRAZA, HERACLIO OSORIO-ARELLANES, aka "Laco," LIONEL PORTILLO-MEZA, aka "Lionel Meza-Portillo," aka "Leonel Portillo-Meza," aka "Leonel Meza-Portillo," aka "Jesus Leonel Sanchez-Meza," "Jesus Leonel Sanchez-Meza," Rito Osorio-Arellanes, (charged elsewhere), and ROSARIO RAFAEL BURBOA-ALVAREZ, aka "El Pariente," aka "Chayito," did knowingly and intentionally conspire with each other and with other persons known and unknown to the grand jury to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, as defined in Title 18, United States Code, Section 1951, by robbery, in that the defendants unlawfully conspired to interfere with the movement of drugs through the unlawful taking and obtaining of property from a person and in the presence of another, against his will, by means of actual and threatened force, violence and fear of injury, immediate and future, to his person and property and to anyone in his company at the time of the taking and obtaining; in violation of Tile 18, United States Code, Section 1951.

MANNER AND MEANS

1. Defendant ROSARIO RAFAEL BURBOA-ALVAREZ, aka "El Pariente," aka "Chayito," recruited defendants Manuel Osorio Arellanes, aka "Manuel Arellanes," aka "Paye," (charged elsewhere), JESUS ROSARIO FAVELA-ASTORGA, aka "Jesus Rosario Fabela Astorga," IVAN SOTO-BARRAZA, HERACLIO OSORIO-ARELLANES, aka "Laco," LIONEL PORTILLO-MEZA, aka "Lionel Meza-Portillo," aka "Leonel Portillo-Meza," aka "Leonel Meza-Portillo," aka "Jesus Leonel Sanchez-Meza," and Rito Osorio-Arellanes (charged elsewhere) to travel from Mexico to the United States for the purpose of robbing marijuana from others.

2. Defendants Manuel Osorio Arellanes, aka "Manuel Arellanes," aka "Paye," (charged elsewhere), JESUS ROSARIO FAVELA-ASTORGA, aka "Jesus Rosario Fabela Astorga," IVAN SOTO-BARRAZA, HERACLIO OSORIO-ARELLANES, aka "Laco," LIONEL PORTILLO-MEZA, aka "Lionel Meza-Portillo," aka "Leonel Portillo-Meza," aka "Leonel Meza-Portillo," aka "Jesus Leonel Sanchez-Meza," and Rito Osorio-Arellanes (charged

elsewhere), traveled from the Republic of Mexico to the United States for the purpose of robbing marijuana from others.

3. Upon unlawfully entering the United States from the Republic of Mexico, defendants Manuel Osorio Arellanes, aka "Manuel Arellanes," aka "Paye," (charged elsewhere), JESUS ROSARIO FAVELA-ASTORGA, aka "Jesus Rosario Fabela Astorga," IVAN SOTO-BARRAZA, HERACLIO OSORIO-ARELLANES, aka "Laco," LIONEL PORTILLO-MEZA, aka "Lionel Meza-Portillo," aka "Leonel Portillo-Meza," aka "Leonel Meza-Portillo," aka "Jesus Leonel Sanchez-Meza," and Rito Osorio-Arellanes (charged elsewhere) planned to arm themselves with firearms.

4. Defendants Manuel Osorio Arellanes, aka "Manuel Arellanes," aka "Paye," (charged elsewhere), JESUS ROSARIO FAVELA-ASTORGA, aka "Jesus Rosario Fabela Astorga," IVAN SOTO-BARRAZA, HERACLIO OSORIO-ARELLANES, aka "Laco," LIONEL PORTILLO-MEZA, aka "Lionel Meza-Portillo," aka "Leonel Portillo-Meza," aka "Leonel Meza-Portillo," aka "Jesus Leonel Sanchez-Meza," and Rito Osorio-Arellanes (charged elsewhere) intended to use the firearms to obtain marijuana from others by committing or threatening to commit physical violence against the individuals being robbed.

All in violation of Title 18, United States Code, Section 1951.

COUNT 4

On or about December 14, 2010, within the District of Arizona, defendants Manuel Osorio-Arellanes, aka "Manuel Arellanes," aka "Paye," (charged elsewhere), JESUS ROSARIO FAVELA-ASTORGA, aka "Jesus Rosario Fabela Astorga," IVAN SOTO-BARRAZA, HERACLIO OSORIO-ARELLANES, aka "Laco," LIONEL PORTILLO-MEZA, aka "Lionel Meza-Portillo," aka "Leonel Portillo-Meza," aka "Leonel Meza-Portillo," aka "Jesus Leonel Sanchez-Meza," Rito Osorio-Arellanes, (charged elsewhere), and ROSARIO RAFAEL BURBOA-ALVAREZ, aka "El Pariente," aka "Chayito," attempted to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, as defined in Title 18, United States Code, Section 1951, by robbery, in that the defendants unlawfully attempted to interfere with the movement of drugs through the unlawful taking and obtaining of property from

a person and in the presence of another, against his will, by means of actual and threatened force, violence and fear of injury, immediate and future, to his person and property and to anyone in his company at the time of the taking and obtaining; in violation of Tile 18, United States Code, Section 1951, Title 18, United States Code, Section 2 and and Pinkerton v. United States, 328 U.S. 640 (1946).

COUNT 5

On or about December 14, 2010, within the District of Arizona, defendants Manuel Osorio-Arellanes, aka "Manuel Arellanes," aka "Paye," (charged elsewhere), JESUS ROSARIO FAVELA-ASTORGA, aka "Jesus Rosario Fabela Astorga," IVAN SOTO-BARRAZA, HERACLIO OSORIO-ARELLANES, aka "Laco," and LIONEL PORTILLO-MEZA, aka "Lionel Meza-Portillo," aka "Leonel Portillo-Meza," aka "Leonel Meza-Portillo," aka "Jesus Leonel Sanchez-Meza," did intentionally and forcibly assault, resist, oppose, impede, intimidate and interfere with United States Border Patrol Agent Brian Terry, an officer of the United States, with a deadly and dangerous weapon, to wit, a firearm, while said officer was engaged in and on account of the performance of his official duties; in violation of Title 18, United States Code, Sections 111(a) and 111(b) and Pinkerton v. United States, 328 U.S. 640 (1946).

COUNT 6

On or about December 14, 2010, within the District of Arizona, defendants Manuel Osorio-Arellanes, aka "Manuel Arellanes," aka "Paye," (charged elsewhere), JESUS ROSARIO FAVELA-ASTORGA, aka "Jesus Rosario Fabela Astorga," IVAN SOTO-BARRAZA, HERACLIO OSORIO-ARELLANES, aka "Laco," and LIONEL PORTILLO-MEZA, aka "Lionel Meza-Portillo," aka "Leonel Portillo-Meza," aka "Leonel Meza-Portillo," aka "Jesus Leonel Sanchez-Meza," did intentionally and forcibly assault, resist, oppose, impede, intimidate and interfere with United States Border Patrol Agent William Castano, an officer of the United States, with a deadly and dangerous weapon, to wit: a firearm, while said officer was engaged in and on account of the performance of his official duties; in violation of Title 18, United States Code, Sections 111(a) and 111(b) and Pinkerton v. United States, 328 U.S. 640 (1946).

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COUNT 7

On or about December 14, 2010, within the District of Arizona, defendants Manuel Osorio-Arellanes, aka "Manuel Arellanes," aka "Paye," (charged elsewhere), JESUS ROSARIO FAVELA-ASTORGA, aka "Jesus Rosario Fabela Astorga," IVAN SOTO-BARRAZA, HERACLIO OSORIO-ARELLANES, aka "Laco," and LIONEL PORTILLO-MEZA, aka "Lionel Meza-Portillo," aka "Leonel Portillo-Meza," aka "Leonel Meza-Portillo," aka "Jesus Leonel Sanchez-Meza," did intentionally and forcibly assault, resist, oppose, impede, intimidate and interfere with United States Border Patrol Agent Gabriel Fragoza, an officer of the United States, with a deadly and dangerous weapon, to wit, a firearm, while said officer was engaged in and on account of the performance of his official duties; in violation of Title 18, United States Code, Sections 111(a) and 111(b) and Pinkerton v. United States, 328 U.S. 640 (1946).

COUNT 8

On or about December 14, 2010, within the District of Arizona, defendants Manuel Osorio-Arellanes, aka "Manuel Arellanes," aka "Paye," (charged elsewhere), JESUS ROSARIO FAVELA-ASTORGA, aka "Jesus Rosario Fabela Astorga," IVAN SOTO-BARRAZA, HERACLIO OSORIO-ARELLANES, aka "Laco," and LIONEL PORTILLO-MEZA, aka "Lionel Meza-Portillo," aka "Leonel Portillo-Meza," aka "Leonel Meza-Portillo," aka "Jesus Leonel Sanchez-Meza," did intentionally and forcibly assault, resist, oppose, impede, intimidate and interfere with United States Border Patrol Agent Timothy Keller, an officer of the United States, with a deadly and dangerous weapon, to wit, a firearm, while said officer was engaged in and on account of the performance of his official duties; in violation of Title 18, United States Code, Sections 111(a) and 111(b) and Pinkerton v. United States, 328 U.S. 640 (1946).

COUNT 9

On or about December 14, 2010, within the District of Arizona, defendants Manuel Osorio-Arellanes, aka "Manuel Arellanes," aka "Paye," (charged elsewhere), JESUS ROSARIO FAVELA-ASTORGA, aka "Jesus Rosario Fabela Astorga," IVAN SOTO-BARRAZA, HERACLIO OSORIO-ARELLANES, aka "Laco," and LIONEL PORTILLO-MEZA, aka "Lionel Meza-Portillo," aka "Leonel Portillo-Meza," aka "Leonel Meza-Portillo," aka "Jesus

Leonel Sanchez-Meza," did knowingly and intentionally use and carry a firearm during and in relation to a crime of violence, to wit, the offenses alleged in Counts One through Eight of this Fifth Superseding Indictment and incorporated herein by reference, and did possess, brandish and discharge a firearm in furtherance of said crime of violence; in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), 924(c)(1)(A)(ii) and 924(c)(1)(A)(iii) and Pinkerton v. United States, 328 U.S. 640 (1946).

FORFEITURE ALLEGATION

Upon conviction of Counts One through Nine of this Fifth Superseding Indictment, defendants Manuel Osorio-Arellanes, aka "Manuel Arellanes," aka "Paye," (charged elsewhere), JESUS ROSARIO FAVELA-ASTORGA, aka "Jesus Rosario Fabela Astorga," IVAN SOTO-BARRAZA, HERACLIO OSORIO-ARELLANES, aka "Laco," LIONEL PORTILLO-MEZA, aka "Lionel Meza-Portillo," aka "Leonel Portillo-Meza," aka "Leonel Meza-Portillo," aka "Jesus Leonel Sanchez-Meza," Rito Osorio-Arellanes, (charged elsewhere), and ROSARIO RAFAEL BURBOA-ALVAREZ, aka "El Pariente," aka "Chayito," shall forfeit to the United States pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c), any firearms and ammunition involved in the commission of said offenses, including, but not limited to:

1. Two (2) 7.62 x 39 mm Romanian assault rifles, model GP WASR 10/63, bearing serial numbers, 1971CZ3775 and 1983AH3977, and seventy-five (75) 7.62 x 39 mm rounds of ammunition;
2. One (1) box of PMC Bronze .45 B 50 cartridges;
3. Two (2) boxes of PMC bronze .223 B 20 cartridges per box;
4. One (1) box of Golden Tiger, 7.62 x 39mm B 10 cartridges; and
5. Four (4) boxes of Brown Bear, 7.62 x 39mm B 20 cartridges per box.

If any of the property described above, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to 21 U.S.C. § 853(p), as incorporated by Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of said defendants up to the value of the above forfeitable property, including, but not limited to, all property, both real and personal, owned by the defendants.

All pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c).

A TRUE BILL:

/s/
Presiding Juror

AUG 06 2014

LAURA E. DUFFY
United States Attorney

By: /s/
Todd W. Robinson
David D. Leshner
Fred A. Sheppard
Special Attorneys

REDACTED FOR PUBLIC DISCLOSURE