

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JUSTIN LOPER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JAMIE J. RESCH
Resch Law, PLLC
2620 Regatta Dr., #102
Las Vegas, Nevada 89128
Ph: (702) 483-7360
Email: Jresch@convictionsolutions.com

Counsel for Petitioner Justin Loper

QUESTION PRESENTED.

WHETHER THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL WHERE THE CONVICTION AND SENTENCE WERE UNCONSTITUTIONAL BECAUSE HOBBS ACT ROBBERY IS NOT A “CRIME OF VIOLENCE” UNDER §924(c)(3)(A) WHEN IT CAN BE COMMITTED THROUGH MERE FEAR OF FUTURE INJURY TO PROPERTY.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Loper believes his co-defendant had an ongoing appeal before the Ninth Circuit Court of Appeals (USA v. Kenneth Hall, 17-10390). It is believed Mr. Hall may also file a petition for writ of certiorari with this Court which would likely raise a similar issue.

The dismissal of Loper's appeal rested on the Ninth Circuit's decision in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020) (Docket #14-10268). The time for seeking review has not yet expired in that matter.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below, and/or that this Court grant, vacate and reverse the opinion below.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit appears at 1a to the appendix to the petition and is unpublished.

The judgment of the United States District Court for the District of Nevada appears at 3a to 11a of the appendix.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit decided this case on October 28, 2020. No petition for rehearing was filed in this case.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS.

Constitutional Provisions

Fifth Amendment to the U.S. Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutory Provisions

18 U.S.C. § 924(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

18 U.S.C. § 924(c)(1)(A)(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

18 U.S.C. § 924(c)(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

FORCE CLAUSE:

18 U.S.C. § 924(c)(3)(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

RESIDUAL CLAUSE:

18 U.S.C. § 924(c)(3)(B)

that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 1951 Interference with commerce by threats or violence (Hobbs Act)

18 U.S.C. § 1951(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.

18 U.S.C. § 1951(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.

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

STATEMENT OF THE CASE

Proceedings in Lower Courts.

Justin Loper pled guilty, pursuant to a written plea agreement, to interfering with commerce by robbery ("Hobbs Act robbery"), in violation of 18 U.S.C. § 1951(a), using and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c), and conspiracy to interfere with commerce by robbery, in violation of 18 U.S.C. § 1951. The district court sentenced Loper to 100 months concurrent for the conspiracy and Hobbs Act charges, and to 84 months of imprisonment for brandishing a firearm during a crime of violence, to be served consecutively. App. at 3a.

Loper appealed his § 924(c) conviction, arguing that Hobbs Act robbery is not a crime of violence as defined in § 924(c). The government moved to dismiss the appeal pursuant to an appellate waiver contained in Loper's plea agreement, which was granted by the Ninth Circuit.

The gravamen of Loper's appeal was that Hobbs Act robbery is not a crime of violence, and he therefore cannot be convicted of brandishing a firearm in furtherance of a crime of violence. He argued that this claim is outside of the scope of his appellate waiver because it concerns the district court's jurisdiction and he is actually innocent of the § 924(c) offense.

The brandishing statute contains two independent clauses that define a crime of violence: the "force clause" in 18 U.S.C. § 924(c)(3)(A), and the "residual clause" in 18 U.S.C. § 924(c)(3)(B). In *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), this Court held that the residual clause of §924(c) is unconstitutionally vague. The force clause, however, remains valid, and the Ninth Circuit recently held, post-*Davis*, that Hobbs Act robbery is a crime of violence for purposes of § 924(c)(3)(A) because it requires at least the "implicit threat" to use violent physical force as defined in *Johnson v. United States*, 559 U.S. 133 (2010). See *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020). Citing *Dominguez*, the Ninth Circuit dismissed Loper's appeal.

In *Dominguez*, the Ninth Circuit noted in passing, and never attempted to challenge, this Court's prior holding that § 924(c)(3)(B)'s "so-called 'residual clause' is unconstitutionally vague..." *Dominguez*, 954 F.3d at 1258. But the court found that the force/elements clause remained valid. Because that was so, said the Ninth Circuit, Hobbs Act robbery remained a crime of violence under § 924(c)(3)(A).

In Loper's case, the Ninth Circuit seemed to implicitly acknowledge circuit precedent which held that a sentence imposed in violation of the Constitution is

unaffected by a purported appeal waiver. *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016). That said, the court found no need to apply that precedent, because it concluded Loper's conviction and sentence "are not unconstitutional," citing *Dominguez*. App. at 1a.

Statement of Underlying Facts.

Mr. Loper and two other individuals were convicted of robbing various Las Vegas businesses in the summer of 2014. A plea agreement was entered in the district court where Mr. Loper would plead guilty to five counts in the indictment. According to the plea agreement, the brandishing charge was accomplished by committing the "crime of violence charged in the superseding indictment." The brandishing charge was Count 13 in the indictment, which referred back to Count 12 of the indictment which was a charge of Hobbs Act robbery. There was no particular mention of the force clause or residual clause in the plea agreement, the transcript of the change of plea proceeding, or at the time of sentencing.

REASONS FOR GRANTING THE PETITION.

I. The Court Should Address The Ongoing Question Of Whether Hobbs Act Robbery Is A Crime Of Violence.

The main issue presented here is the fact the Ninth Circuit, like other circuits, determined Hobbs Act robbery is categorically a crime of violence under the force clause of § 924(c). *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020). The Ninth Circuit's decision was wrongly decided, and if the aggrieved party in that

matter does not seek review from this Court, then Loper requests this Court grant this petition to determine the correctness of *Dominguez* in light of *Johnson v. United States*, 559 U.S. 133 (2010).

The plain language of the statute prevents Hobbs Act robbery from qualifying as a crime of violence under § 924(c)'s force clause because that clause requires violent (i.e., strong) physical force against a person or property. Still, property can be injured without the use of violent force, or even any force at all. As a means of compelling a victim to surrender valuable property against his will, a threat to deface a victim's valuable car or to destroy valuable property, could be as or even more effective as a threat of bodily harm. Each involves a clear "threat of injury" and thus each would satisfy the elements of Hobbs Act robbery, but only the threat of bodily harm to the victim involves the use of violent physical force. In short, although the threats to property described above involve physical actions, they do not involve physical force within the meaning of this Court's precedents. See *Johnson*.

With the Hobbs Act, at least three circuits have adopted pattern jury instructions that extend this crime to conduct that does not necessarily require the use of any force at all. See Tenth Circuit, Criminal Pattern Jury Instructions § 2.70 (2018); Fifth Circuit, Pattern Jury Instructions (Criminal Cases), 2.73A (2015 ed.); Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (2016); see also 3-50 Leonard B. Sand et al., *Modern Federal Jury Instructions Criminal 50.03* (2007). These pattern instructions show the broad definition of property is not

limited to extortion cases and that Hobbs Act robbery does not fit categorically within the force clause of § 924(c). As a result, a Hobbs Act violation does not require any force: taking a person's "intangible rights" by causing fear of a "financial loss" is not calculated to cause physical harm to any person, or to property.

While the Ninth Circuit's decision in *Dominguez* contradicts these arguments, at least one court within the Ninth Circuit previously reached a contrary conclusion. In *United States v. Chea*, the district court concluded that "Hobbs Act robbery is not categorically a crime of violence under the elements clause of § 924(c)(3), because the offense can be committed by causing fear of future injury to property, which does not require "physical force" within the meaning of § 924(c)(3)." *United States v. Chea*, No. 98-cr-20005-1, 2019 WL 5061085, at *1 (N.D. Cal. Oct. 2, 2019).

Analyzing the elements of the offense, the court explained the plain language of the statute meant that "robbery by causing fear of future injury to property does not involve the use or threats of violent physical force required by Johnson I." *Id.* at *8. In addition, "nothing in the plain language of § 1951(b)(1) suggests that the 'property' that the victim fears could be injured needs to be in the victim's physical custody or possession, or even proximity, at the time the Hobbs Act robbery is committed." *Id.* at *9. This removes any assumption that the fear of injury to property necessarily involves a fear of injury to the person, because the property does not have to be taken from the person's immediate presence.

The Ninth Circuit’s decision in *Dominguez* dispenses with these arguments against property with a sweeping declaration that there is no “realistic scenario” where a robber would ever place “his victim in fear of injury to an intangible economic interest.” *Dominguez*, 954 F.3d at 1260. But the court in *Chea* addressed this as well; finding that looking beyond the statutory definition of the predicate offense is incompatible with the categorical approach. *Chea*, 2019 WL 5061085 at *34, *citing Descamps v. United States*, 570 U.S. 254 (2013).

These issues have been repeatedly raised to this Court, and will continue to be raised until this Court provides a definitive answer to the Ninth Circuit and other circuits application of the categorical approach. Judicial economy is further supported by resolving the matter once and for all.

II. This Court Should Hold This Petition Pending Any Application Or Grant Of Review In *Dominguez*. If Review Is Granted in *Dominguez*, This Matter Could be Granted, Vacated And Remanded For Further Consideration.

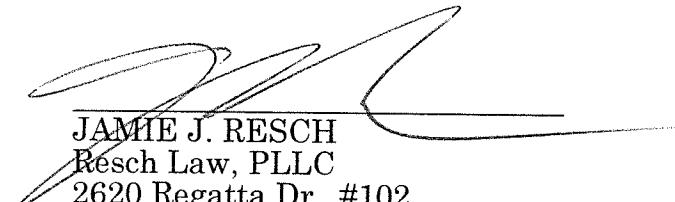
If the Court does not grant this petition for consideration on its own merits, it should hold it for further review pending the filing of any petition for certiorari in *Dominguez*. The time for seeking this Court’s review in *Dominguez* has not yet expired. If this Court is asked to review, and grants review in that matter, the instant case would be a prime candidate to be held for possible reversal after *Dominguez* is decided by this Court.

Loper requests this Court consider holding this petition in abeyance pending the resolution of any request for certiorari in *Dominguez* or any other case that raises the ongoing § 924(c) issue.

CONCLUSION

The Court should grant this petition and review the Ninth Circuit's dismissal of Loper's appeal, or hold this petition pending the filing and resolution of any petition in *Dominguez* so that this matter may be reversed and remanded in light of the Court's ultimate decision therein.

Respectfully submitted,



JAMIE J. RESCH
Resch Law, PLLC
2620 Regatta Dr., #102
Las Vegas, Nevada 89128
Ph: (702) 483-7360
Email: Jresch@convictionsolutions.com

Counsel for Petitioner Justin Loper

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