No. 20 - _____

IN THE SUPREME COURT OF THE UNITED STATES

MELVIN LANDRY, JR.

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

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QUESTION PRESENTED

I. Whether Hobbs Act robbery as defined by Title 18 U.S.C. §1951(b)(1) is a "crime of violence" within the meaning of Title 18 U.S.C. § 924(c)(3)(a).

LIST OF PARTIES

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

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Petitioner, Melvin Landry, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The court of appeals affirmed the judgment of the United States District Court for the Northern District of California, convicting petitioner of Hobbs Act robbery and possession of a firearm during and in relation to a crime of violence in violation of Title 18 U.S.C. §§ 924(c) and 1951(a).

OPINION BELOW

The memorandum opinion of the court of appeals is attached as Appendix A.

JURISDICTION

The court of appeals entered its memorandum opinion on August 3, 2020. Appendix A. The court denied rehearing on November 19, 2020. Appendix B. This petition is timely.

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

STATUTORY PROVISIONS

Title 18 U.S.C. § 1951 states, 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.

Title 18 U.S.C. § 924(c) states, in relevant part:

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

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

. . .

(c)(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]

STATEMENT OF THE CASE

A. Trial

On July 29, 2014, the prosecution filed a fourth superseding indictment against petitioner and his co-defendants. United States v. Landry, N.D. Cal. Case No. 4:13-cr-00466-JSW-1, Docket Entry (DC-Doc) #191.

Petitioner was charged with: Racketeering and Racketeering Conspiracy (18 U.S.C. §1962(c)) (Counts One and Two); Robbery and Conspiracy to Commit Robbery Affecting Interstate Commerce (18 U.S.C. §1951(a) & 2) (Counts Three, Four, Five, Seven, Nine, Twelve, Fourteen, and Seventeen); Using/Possessing/ Brandishing a Firearm in Furtherance of a Crime of Violence (Robbery) (18 U.S.C. §§924(c) & 2) (Counts Six, Eight, Ten, Thirteen, Fifteen, and Eighteen); Money Laundering (18 U.S.C. §1956(a)(1)(b)(I)) (Counts Eleven); Bribing a Federal Official (18 U.S.C. §201(b)(1)) (Count Nineteen); and Conspiracy to Obstruct Justice and Obstruction of Justice (18 U.S.C. §371; 18 U.S.C. §1512(c)(1) & (2) (Counts Twenty and Twenty-One)). DC-Doc #191.

The prosecution elected not to proceed on the robberies alleged in Counts Four and Nine, for the use of a firearm alleged in Count Ten, and on a number of the racketeering acts. DC-Doc #424. These allegations were dismissed. October 13, 2015 Transcript.

Between June 8 and June 25, 2015, petitioner and co-defendant Dominique Martin were jointly tried before a jury.

On July 1, 2015, the jury acquitted petitioner of the robberies charged in Counts Five and Seven. July 1, 2015 Transcript. The jury acquitted both petitioner and Mr.

Martin of the robbery alleged in Count Seven. *Id.* The jury acquitted petitioner of the money laundering offense alleged in Count Eleven and the bribery, conspiracy to obstruct justice, and obstruction of justice offenses alleged in Counts Nineteen through Twenty-One. *Id.* The jury did not reach a verdict on the racketeering and racketeering Conspiracy offenses (Counts One and Two), and those charges were dismissed. *Id.*; October 13, 2015 Transcript.

The jury convicted petitioner of conspiracy to commit Hobbs Act robbery (Count Three), and three counts of Hobbs Act robbery (Counts Twelve, Fourteen, Seventeen). July 1, 2015 Transcript. The jury convicted petitioner of using and brandishing a firearm in those robberies (Counts Thirteen, Fifteen, and Eighteen). *Id.*

On October 13, 2015, the district court sentenced petitioner to 685 months in prison. He was sentenced to a term of one month for each robbery and for the conspiracy. Those terms run concurrently with each other. The court imposed a term of 84 months for the firearm in furtherance of a crime of violence. The court imposed a 300-month term for each of petitioner's subsequent convictions of using a firearm. The 300-month terms run consecutive to each other and to all other terms. October 13, 2015 Transcript.

B. Appeal

On September 14, 2016, petitioner filed the opening brief on appeal. United States v. Landry, 9th Cir. Case No. 15-10502, Docket ("Circuit-Doc") #15. In relevant part, the appeal raised the following issue: "Landry's convictions for use of a firearm must be reversed because a Hobbs Act robbery is not a crime a violence." *Id.* at 120–132.

On February 23, 2017, the government filed the answering brief. Circuit-Doc #34. On July 7, 2017, petitioner filed the reply brief. Circuit-Doc #57.

From March 5, 2018 to August 3, 2020, the case was withdrawn from submission pending the Ninth Circuit's decision in United States v. Dominguez, Case No. 14-10268. Circuit Docs ##69, 81.

On August 3, 2020, the court of appeals affirmed the judgment. Appendix A.

On October 28, 2020, petitioner filed a petition for rehearing. Circuit Doc #93. In relevant part, the petition argued: "The exceptionally important question of whether Hobbs Act robbery is a crime of violence should be reviewed *en banc*." *Id.* at 7–11.

On November 19, 2020, the court denied rehearing. Appendix B.

REASONS FOR GRANTING THE WRIT

A. Whether Hobbs Act Robbery Qualifies as a Crime of Violence Is an Important Question.

Each year, nearly 1,000 federal defendants are charged with robbery. *See* Department of Justice (DOJ), Federal Justice Statistics, 2016—Statistical Tables (Dec. 2020), available at https://www.bjs.gov/content/pub/pdf/fjs16st.pdf (last visited February 13, 2021) (noting 900 federal case in which robbery was the most serious charge filed in fiscal year 2016, the last year for which data is available). In 2011, 25.7% of robberies in the United States involved the use of a firearm. DOJ, Firearm Violence, 1993–2011 (May 2013), available at https://www.bjs.gov/content/pub/pdf/fv9311.pdf (last visited February 13, 2021) (last year for which data is available). Thus, as many as 250 federal defendants each year may face the question whether Hobbs Act robbery qualifies as a crime of

violence such that the firearm enhancement described in 18 U.S.C. §924(c) would apply.

Consistent with these numbers, a search on Westlaw for criminal cases in the last year involving "Hobbs Act robbery" and section 924(c) returns 615 results. And every circuit court has issued an opinion on the question whether Hobbs Act robbery qualifies as a crime of violence within the meaning of section 924(c). *See United States v. Dominguez*, 954 F.3d 1251, 1255 (9th Cir. 2020); *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019); *United States v. Jones*, 919 F.3d 1064, 1072 (8th Cir. 2019); *United States v. Garcia-Ortiz*, 904 F.3d 102, 106–109 (1st Cir. 2018); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060–1066 (10th Cir. 2018); *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018); *United States v. Fox*, 878 F.3d 574, 579 (7th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017); *United States v. Buck*, 847 F.3d 267, 275 (5th Cir. 2017); *In re St. Fleur*, 824 F.3d 1337, 1340–1341 (11th Cir. 2016); *United States v. Robinson*, 844 F.3d 137, 141–144 (3d Cir. 2016).[1]

Not only are a large number of defendants prosecuted for Hobbs Act robbery with section 924(c) enhancements alleged, but the potential consequences of the enhancement are extremely serious. Even following the passage of the First Step Act, defendants face a mandatory minimum consecutive term of five, seven, ten, or thirty years depending on

[1] This Court denied certiorari on this issue in at least four of those cases: *Garcia-Ortiz v. United States*, U.S. Case No. 18-7176; *Hill v. United States*, U.S. Case No. 18-6798; *Melgar-Cabrera v. United States*, U.S. Case No. 18-6302; *Fox v. United States*, U.S. Case No. 17-1338. The court denied certiorari in three other cases, although petitioner does not know what issues were raised in those petitions as they are not accessible from the Court's online docket. *Robinson v. United States*, U.S. Case No. 17-5139; *Buck v. United States*, U.S. Case No. 16-9520; *Gooch v. United States*, U.S. Case No. 16-9008.

whether the firearm is carried, brandished, or discharged and depending on the type of firearm used. 18 U.S.C. §924(c)(1). For repeat offenders, the enhancement carries a minimum term of 25 years or life in prison without parole. *Id.*

In contrast, the non-enhanced punishment for Hobbs Act robbery is "not more than twenty years" in prison. 18 U.S.C. §1951(a). Here, petitioner's Guidelines recommended sentence was 70 to 87 months. DC-Doc #643 at 22 ¶105. Yet, because of the §924(c) enhancements, he was sentence to more than fifty years in prison. DC-Doc #662.

Because of the number of defendants affected and the magnitude of the effect, the question whether Hobbs Act robbery qualifies as a crime of violence is important. The court below has decided that question in a way that conflicts with the relevant opinions of this Court. Accordingly, certiorari should be granted. Sup. Ct. R. 10(c).

B. The Decision Below Conflicts with This Court's Cases.

The Panel found that the district court "did not err in concluding that Hobbs Act robbery constitutes a 'crime of violence' under the force clause of 18 U.S.C. § 924(c)." Appendix A at 5 (citing *Dominguez*, 954 F.3d at 1255). The Panel did not provide its own independent analysis. *Id.* Accordingly, petitioner addresses the reasoning of *Dominguez* in the arguments below.[2] In short, *Dominguez* and this case were wrongly decided.

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[2] The defendant in *Dominguez* filed a petition for writ of certiorari before this Court, but that petition does not address whether simple Hobbs Act robbery qualifies as a crime of violence under section 924(c). Dominguez v. United States, U.S. Case No. 20-1000.

The decision in *Dominguez* conflicts with this Court's cases in two key respects. First, the court improperly applied this Court's opinion in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) by requiring petitioner to provide a realistic example of a Hobbs Act robbery prosecution not involving the use of force despite the plain language of the statute demonstrating that it can be committed without the use of force. Second, even assuming such an example was required, petitioner provided it and showed that Hobbs Act robbery does not qualify as a crime of violence.

1. The Court Mis-Applied *Duenas-Alvarez*.

To determine whether Hobbs Act robbery qualifies as a crime of violence under the definition contained in section 924(c)(3), courts must employ the categorical approach. *See Descamps v. United States*, 570 U.S. 254, 260–261 (2013) (applying categorical approach to determine whether a prior burglary offense qualifies as a predicate "violent felony" under the ACCA, 18 U.S.C. § 924(e)(2)(B)). The categorical approach requires a comparison of the elements of the prior offense with the elements of the definition of the predicate offense that can result in enhanced penalties. *Id.*

"The key" to the categorical approach "is elements, not facts." *Descamps*, 570 U.S. at 261. "Sentencing courts may look only to the statutory definitions—*i.e.*, the elements—of a[] [predicate] offense[], and not to the particular facts underlying" the conviction. *Id.* "Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction. . . . Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements." *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243, 2248 (2016) (quotations and citations

omitted). Where the scope of the offense, based on its elements, "does not correspond to" the scope of the predicate offense definition, "the inquiry is over." *Descamps*, 570 U.S. at 265.

Section 924(c)(3)(A) defines a "crime of violence" as an offense that is a felony and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[3] "Here 'physical force' is used in defining not the crime of battery, but rather the statutory category of '*violent* felony.' In that context, 'physical force' means *violent* force—*i.e.*, force capable of causing physical pain or injury . . . ." *Johnson v. United States*, 559 U.S. 133, 134 (2010) (defining "physical force" in context of 18 U.S.C. §924(e)); *see also Dominguez*, 954 F.3d at 1259 (applying *Johnson* to 18 U.S.C. §924(c)).

In comparison, the Hobbs Act robbery statute defines robbery 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, 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.

18 U.S.C. §1951(b)(1). Although the Hobbs Act statute includes taking property by "actual or threatened force, or violence," similar to the language of §924(c), it also explicitly includes taking property through "fear of [future] injury . . . [to] property[.]" *Id.*

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[3] The statute contains a second definition of "crime of violence" in the so-called residual clause. 18 U.S.C. §924(c)(3)(B). This Court has held that the residual clause is unconstitutionally vague. *United States v. Davis*, 588 U.S. ___, 139 S.Ct. 2319 (2019).

This Court has examined "the statutory language and the legislative history of the Hobbs Act" and concluded that "Congress intended to make criminal *all conduct* within the reach of the statutory language." *United States v. Culbert*, 435 U.S. 371, 380 (1978) (emphasis added); *accord Stirone v. United States*, 361 U.S. 212, 215 (1960) ("That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence."). Thus, courts have recognized that, based on its plain language, Hobbs Act robbery can be committed by threats to property. *See, e.g.*, *United States v. O'Connor*, 874 F.3d 1147, 1158 (10th Cir. 2017). And the courts of appeals have long been in accord that the definition of property used in the Hobbs Act encompasses intangible property. *See, e.g.*, *United States v. Local 560 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers of Am.*, 780 F.2d 267, 281 (3d Cir. 1985) ("[T]he language of the Hobbs Act makes no such distinction between tangible and intangible property.")(collecting cases).

A robbery accomplished by fear of future harm to intangible property is not accomplished by violent force as required by *Johnson*. *United States v. Chea*, No. 98-CR-20005-1 CW, 2019 WL 5061085 at *7 (N.D. Cal. Oct. 2, 2019)[4] ("[T]he plain language of § 1951(b)(1) shows that Hobbs Act robbery can be committed by causing fear of future injury to property, which does not involve the 'physical force' required for it to qualify as

[4] The Government appealed the district court's opinion in *Chea* that Hobbs Act robbery is not a crime of violence. United States v. Chea, 9th Cir. Case No. 19-10438. On May 1, 2020, the appeal was stayed pending "final resolution of United States v. Dominguez, No. 14-10268." *Id.* (Docket Entry #11).

a crime of violence under the elements clause of § 924(c)(3) in light of *Johnson v. United States*, 559 U.S. 133 (2010)[.]"). Indeed, it is not physically possible to do "violent" injury to intangible property such as an investment recommendation or the right to purchase a stock at a particular price. *See id.* at *9 ("This form of Hobbs Act robbery can be committed with threatened *de minimis* force or *no force at all* with respect to the property[.]") (emphasis added).

The court in *Dominguez* acknowledged that "[f]ear of injury is the least serious way to violate 18 U.S.C. § 1951, and therefore, the species of the crime that we should employ for our categorical analysis." *Dominguez*, 854 F.3d at 1260. But the court avoided deciding whether fear of future injury to property—including intangible property—would qualify under *Johnson* by finding that Dominguez had not provided an example of such a prosecution: "We need not analyze whether the same would be true if the target were 'intangible economic interests,' because Dominguez fails to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest." *Id.* (citing *Duenas-Alvarez*, 549 U.S. at 193). The court misapplied *Duenas-Alvarez* by requiring a specific example in this case.

In *Duenas-Alvarez*, this Court decided whether the term "theft offense" in 8 U.S.C. §1101(a)(43)(G) included the crime of aiding and abetting a theft offense under California Vehicle Code section 10851. The defendant argued that California's use of the Natural and Probable Consequences Doctrine meant that its vehicle theft statute applied to conduct not included in the generic definition of "theft offense" employed in the federal

statute. *Duenas-Alvarez*, 549 U.S. at 190. The Court noted that "many States and the Federal Government apply some form or variation of that doctrine, or permit jury inferences of intent in circumstances similar to those in which California has applied the doctrine[.]" *Id.* at 191. Thus, the Court held that "[t]o succeed, Duenas–Alvarez must show something special about California's version of the doctrine—for example, that California in applying it criminalizes conduct that most other States would not consider 'theft.'" *Id.* The Court explained that making the necessary showing "requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* at 193.

This case presents a far different context than *Duenas-Alvarez*. Petitioner is not relying on judicial gloss or a doctrine to show that Hobbs Act robbery is not a crime of violence. Instead, he is relying on the plain language of the statute itself. Hobbs Act robbery included robbery effectuated by "fear of [future] injury . . . to . . . property," including intangible property. 18 U.S.C. §1951(b)(1).

Requiring the showing described in *Duenas-Alvarez* is contrary to this Court's rule that "[s]entencing courts may look only to the statutory definitions—*i.e.*, the elements—of a[n] offense[]" and not the facts of the case in employing the categorical approach. *Descamps*, 507 U.S. at 261. Requiring such a showing is contrary to the rule that "the inquiry is over" once the court determines that the statute defining the prior offense covers conduct that is broader than the violent crime definition. *Id.* at 265; *O'Connor*, 874 F.3d at 1154 (rejecting government's argument that defendant was

required to "demonstrate that the government has or would prosecute threats to property as a Hobbs Act robbery" because the defendant "does not have to make that showing" under the categorical approach).

A holding that a robbery based on fear of future harm to property is not a "realistic scenario" is akin to finding that the language of the robbery statute addressing fear of future harm to property is surplusage. *See Nielsen v. Preap*, 586 U.S. ___, 139 S. Ct. 954, 969 (2019) ("[E]very word and every provision is to be given effect [and none] should needlessly be given an interpretation that causes it to . . . have no consequence.").

This is not a case in which a hypothetical must be concocted or legal imagination used to show how robbery could be committed without using violent force. The statue itself directly contemplates the scenario. As the drafters of the statute explained: "'We thought it better to make this bill explicit, and leave nothing to the imagination of the court.'" *Culbert*, 435 U.S. at 378 (quoting 91 Cong. Rec. 11904 (1945) (remarks of Rep. Hancock)). Under these circumstances, petitioner should not be made to find a perfect example in the caselaw of a defendant convicted of robbery solely based on putting the victim in fear of future economic harm.

The courts of appeals are split on the application of *Duenas-Alvarez* to cases in which a statute's plain language shows that it is broader than the corresponding federal statute under the categorical approach. *Compare Swaby v. Yates*, 847 F.3d 62, 65–66 (1st Cir. 2017) (*Duenas-Alvarez* is implicated only where statute is "ambiguous" and has "no relevance" when statutorylanguage is facially overbroad); *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) ("The realistic probability test is obviated by the wording of the

. . . statute, which on its face extends to conduct beyond the definition of the corresponding federal offense."); *Jean-Louis v. Attorney General*, 582 F.3d 462, 481 (3d Cir. 2009) (*Duenas-Alvarez* irrelevant when "elements" of law "are clear"); *United States v. Titties*, 852 F.3d 1257, 1274 (10th Cir. 2017) (same when law's "plain language" was overbroad); *Ramos v. Attorney General*, 709 F.3d 1066, 1072 (11th Cir. 2013) ("realistic probability" requirement satisfied by statutory language itself); *with United States v. Castillo-Rivera*, 853 F.3d 218, 222–225 (5th Cir. 2017) (*en banc*) (applying *Duenas-Alvarez* test even though statute was facially overbroad and concluding that defendant's conviction qualified as federal predicate because he failed to point to "actual case" where someone was prosecuted under overbroad portion of statute); *and Matter of Ferreira*, 26 I. & N. Dec. 415, 417 (BIA 2014) (same).

Indeed, the Ninth Circuit has previously held that *Duenas-Alvarez* does not apply when the statutory language is clear. *United States v. Grisel*, 488 F.3d 844, 849 (9th Cir. 2007) (*en banc*) ("Where, as here, a state statute explicitly defines a crime more broadly than the [federal] definition, no 'legal imagination' is required to hold that a realistic probability exists that the state willapply its statute to conduct that falls outside the [federal] definition . . . . The state statute's greater breadth is evidenced from its text.").

Unlike the courts of appeals, this Court has consistently applied the elements-based categorical approach since *Duenas-Alvarez* without addressing whether there was an actual case showing that a particular law was overbroad. For example, the Court held that Iowa's burglary law was broader than the federal definition of "burglary" because the law, on its face, criminalized the burglarizing of non-structures such as

boats or planes, which the federal statute did not. *Mathis*, 136 S. Ct. at 2250. In so holding, the Court "did not apply—or even mention—the 'realistic probability' test" or "seek or require instances of actual prosecutions"of individuals for burglarizing boats or planes. *Titties*, 852 F.3d at 1275. Similarly, in holding that a Kansas law was overbroad because it "include[d] at least nine substances not included in the federal list," the Court never asked whether Kansas actually prosecuted anyone for those nine substances. *Mellouli v. Lynch*, 575 U.S. 798 (2015).

Because the court below has "entered a decision in conflict with the decision of another United States court of appeals on the same important matter"—whether to apply *Duenas-Alvarez* when the plain language of the statute demonstrates its overbreadth—this Court should grant certiorari. Sup. Ct. R. 10(a).

2. The Court Improperly Defined "Crime of Violence."

The court in *Dominguez* adopted the reasoning of the Fourth Circuit Court of Appeals that, because sections 924(c)(3)(A) and 1951(b)(1) refer to threats against property, "[a]nd neither provision draws any distinction between tangible and intangible property . . . , we do not discern any basis in the text of either statutory provision for creating a distinction between threats of injury to tangible and intangible property for the purposes of defining a crime of violence." *Dominguez*, 854 F.3d at 1261 (quoting *Mathis*, 932 F.3d at 266). For the reasons discussed above, the court's reasoning is inconsistent with this Court's opinion in *Johnson*.

The Circuits are split on the question whether section 924(c)(3)(A) applies to non-violent injury to property. *See, e.g.*, *United States v. Bowen*, 936 F.3d 1091, 1103–1104

(10th Cir. 2019) ("[P]roperty crimes of violence under § 924(c)(3) are those that require violent force, not merely the force required to damage property.") (quotations and citations omitted) (holding that spray painting a car was not a crime of violence under section 924(c)(3)). Because the court below has "entered a decision in conflict with the decision of another United States court of appeals on the same important matter," this Court should grant certiorari. Sup. Ct. R. 10(a).

3. The Court Erred in Finding that No Realistic Example of Non-Violent Hobbs Act Robbery Exists.

As noted, the court of appeals in *Dominguez* found that it did not need to analyze whether a threat to "intangible economic interests" could satisfy Hobbs Act robbery because "Dominguez fails to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest." *Dominguez*, 954 F.3d at 1260. But petitioner made the showing that Dominguez did not make.

A fitting example is provided by *United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970). In *Iozzi*, the Fourth Circuit upheld a Hobbs Act conviction for embezzlement in which a union president obtained money by threatening "to slow down or stop construction projects unless his demands were met." *Id.* Although Iozzi was charged with Hobbs Act extortion rather than Hobbs Act robbery, his case nevertheless shows that the robbery statute encompasses non-violent behavior. Iozzi "demanded and received $10,000 in cash from the president of Morrow Brothers Construction Co." *Id.* Had he done so against the victim's will, rather than with the victim's consent, he would

have satisfied all the elements of Hobbs Act robbery. 18 U.S.C. §1951(b)(1). Thus, *Iozzi* provides a "realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest" the court of appeals found lacking in *Dominguez*.

Another example is shown in *United States v. Wilson*, 197 Fed.Appx. 359 (5th Cir. 2006). Wilson was found guilty of aiding and abetting the possession and transportation of stolen money. *Id.* at 359. "To support Wilson's conviction for aiding and abetting obstruction of interstate commerce, the Government had to establish that Wilson aided and abetted in the commission of a robbery and that the robbery interfered with interstate commerce." *Id.* at 360. The court found sufficient evidence establishing the robbery because "the defendants took the casino's money by threatening to use force or violence against the casino's property or its employees and patrons who were present at the time of the taking or obtaining of the property[.]" *Id.* Although *Wilson* involved threats against the employees and patrons as well, it is certainly a "realistic scenario" that the robbers in *Wilson* could have robbed the casino only by threatening its property.

Furthermore, in *United States v. Ivanov*, 175 F. Supp. 2d 367 (D. Conn. 2001), the defendant hacked into the victim's network and obtained root access to the victim's servers. He then proposed that the victim hire him as a "security expert" to prevent further security breaches, including the deletion of all of the files on the server. *Id.* The court held that Hobbs Act extortion would apply to this conduct. *Id.* at 374. Again, had the property at issue been taken against the victim's will, it would have violated the Hobbs Act robbery statute. This type of non-violent computer robbery is therefore a

realistic scenario of Hobbs Act robbery.

Finally, courts routinely look at jury instructions to see how broadly statutory language is applied in conducting the categorical approach. *See e.g.*, *United States v. Tavares*, 843 F.3d 1 (1st Cir. 2016) (considering Model Jury Instructions, among other things, to determine whether a modality of the Massachusetts assault statute was a crime of violence); *United States v. Hopper*, 723 Fed. App'x 645, 646 (10th Cir. 2018) (relying on Tenth Circuit pattern jury instructions to hold that 18 U.S.C. § 1201(a) was broader than the force clause of § 924(c)(3)(A)); *United States v. Libby*, 880 F.3d 1011, 1015–1016 (8th Cir. 2018) (relying on pattern jury instructions, among other things, to conclude that Minnesota robbery falls within the ACCA's force clause).

At least three circuits have adopted pattern jury instructions that extend Hobbs Act robbery to conduct that does not necessarily require the use of any force at all. 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). As a result, Hobbs Act robbery cannot categorically require the use of force.

If just one circuit had an instruction informing juries they could convict a defendant simply for causing fear of a financial loss, not personal violence, "violent force" would still not be an "element" of every Hobbs Act crime. The fact that courts in three circuits (covering Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) routinely instruct juries

in all Hobbs Act robbery cases that this offense does not necessitate the use, threat, or fear of physical violence, underscores the error by the court below.

CONCLUSION

Review of the decision below is necessary to prevent the unconstitutional application of severe sentencing enhancements to potentially hundreds of federal defendants each year. The court of appeals below relied on reasoning inconsistent with other courts of appeals and contrary to decisions of this Court to hold that Hobbs Act robbery is categorically a crime of violence under section 924(c).

Accordingly, petitioner respectfully requests that the Petition for Writ of Certiorari be granted. Sup. Ct. R. 10.

DATED: February 13, 2021

Respectfully submitted,

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MELVIN LANDRY, JR.
Counsel of Record

CERTIFICATE OF COMPLIANCE

PURSUANT TO Sup. Ct. R. 33.2(b)

Case No. 20 - _____

I certify that the foregoing petition for writ of certiorari is proportionally spaced, has a typeface of 12 points, is in Century font, is double-spaced, and is 19 pages long.

JAMES S. THOMSON