No. 21-_____

IN THE
SUPREME COURT OF THE UNITED STATES

◆

LARRY DANIEL HARRIS and MICHAEL EUGENE STEWARD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

◆

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

◆

PETITION FOR WRIT OF CERTIORARI

◆

HEATHER E. WILLIAMS
Federal Defender

PEGGY SASSO*
Assistant Federal Defender
2300 Tulare Street, Suite 330
Fresno, California 93721
(559) 487-5561
Peggy_Sasso@fd.org
*Counsel of Record for Petitioner

QUESTIONS PRESENTED

1. Circuit courts, including the Ninth Circuit here, are analogizing the element of "intimidation" in 18 U.S.C. § 2113 with the element of "fear of injury" in the definition of robbery under 18 U.S.C. § 1951, and holding that because federal bank robbery qualifies as a crime of violence on the basis of the "intimidation" element, so must Hobbs Act robbery on the basis of the "fear of injury" element. Hobbs Act robbery, like the federal bank robbery statute, does not require proof that when the defendant acted he was aware that his conduct would be perceived as intimidating by anyone. The question presented is whether reasonable jurists can debate whether a conviction must necessarily establish that a defendant was more than negligent as to whether his intentional conduct could harm another before said conviction can serve as a predicate under § 924(c)(1) or whether, as the Ninth Circuit's analysis assumes, the limiting language "against the person of another" in 18 U.S.C. § 924(c)(3)(A) is mere surplusage?
2. Where the plain language of § 1951 extends Hobbs Act robbery to include injury to property without limitation, and a Hobbs Act robbery effected by placing someone in fear of a future injury to intangible property clearly does not require the use, threatened use or attempted use of physical force, does the "realistic probability" limitation this Court identified in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) apply such that the burden is on the defendant to

provide examples of the government applying the broad language of the statute in a particular case, or does the plain language of the statute control?

3. Whether a conviction for *attempted* Hobbs Act robbery necessarily establishes that a defendant used, attempted to use or threatened to use physical force against the person or property of another as required under § 924(c)(3)(A). [Harris only].

LIST OF PARTIES

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

LIST OF RELATED CASES PURSUANT TO SUPREME COURT RULE 15

Question One:

While the *mens rea* at issue in ***Borden v. United States***, **Case No. 19-5410**, is recklessness and the one at issue here is negligence, the reasoning, if not the holding, of this Court's decision in *Borden* may be dispositive. This Court granted *Borden*'s petition for Writ of Certiorari on March 2, 2020, and the case was argued on November 3, 2020.

Addressing the analogous statute of 18 U.S.C. § 2113(a):

Blake v. United States, No. 19-6354
Distributed for conference on May 28, 2020

Johnson v. United States, No. 19-7079
Distributed for conference on May 28, 2020

Rogers v. United States, 19-7320
Distributed for conference on June 11, 2020

Simpson v. United States, No. 19-7764
Distributed for conference on September 29, 2020

Northcutt v. United States, No. 20-5640
Distributed for conference on December 4, 2020

Question Two:

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Question Three:

Dominguez v. United States, No. 20-1000

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Larry Harris and Michael Steward respectfully petition this Court for a writ of certiorari to review the Ninth Circuit's orders denying their request for certificates of appealability to challenge the district court's denial of their 28 U.S.C. § 2255 motions to vacate and correct their sentence, and in so doing refusing to reconsider its previous decision in *United States v. Dominguez,* 954 F.3d 1251, 1255 (9th Cir. 2020), holding that (1) 18 U.S.C. § 1951 qualifies as a crime of violence under 18 U.S.C. § 924(c) even though an individual can be convicted of violating § 1951 without any awareness that his conduct could be perceived as intimidating; (2) notwithstanding the plain language of the statute with its expansive definition of property, the burden was on the defendant to provide examples of the government applying the plain language of the statute in its broadest terms, and (3) the elements necessary to establish the commission of substantive Hobbs Act robbery and attempted Hobbs Act robbery are indistinguishable such that if one qualifies as a crime of violence so does the other.

OPINIONS BELOW

The October 1, 2020 orders denying Harris' and Steward's requests for certificates of appealability to challenge the district court's denial of their 28 U.S.C. § 2255 motions to vacate and correct their sentences issued by the United States Court of Appeals for the Ninth Circuit are unpublished and reproduced in the

appendix to this petition at A1 and B1, respectively. There was no request for a rehearing.

The August 21, 2017 memorandum decision and order of the United States District Court for the Eastern District of California denying Harris' and Steward's motions to vacate and correct their sentences pursuant to 28 U.S.C. § 2255 is unpublished and reproduced in the appendix at C1-C13.

JURISDICTION

The orders of the United States Court of Appeals for the Ninth Circuit denying Harris' and Steward's request for certificates of appealability to challenge the district court's denial of their 28 U.S.C. § 2255 motions were filed on October 1, 2020. Appendix at A1 and B1. This Court therefore has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1); Supreme Court Rule 13.3; Order, 589 U.S. ___ (March 19, 2020). *See Hohn v. United States*, 524 U.S. 236 (1998) (holding the Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a court of appeals panel).

PROVISIONS OF LAW INVOLVED

The **Fifth Amendment** to the United States Constitution provides:

> 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.

Under **18 U.S.C. § 924(c)** any person who brandishes a firearm "during and in relation to any crime of violence or drug trafficking crime" is subject to an enhanced mandatory consecutive sentence. Section 924(c)(3) defines a "crime of violence" as "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

Hobbs Act robbery, **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.

STATEMENT OF THE CASE

The core question presented in this case was at the heart of the oral argument on November 3, 2020 in *Borden v. United States* (Case No. 19-5410): When a sentencing enhancement statute with draconian penalties that strip federal judges of their sentencing discretion under 18 U.S.C. § 3553(a) includes the limiting

language "against the person of another," is said language mere surplusage such that we look simply to the result of a defendant's conduct, as the Ninth Circuit contends, irrespective of whether the government had to prove as an element of the offense that the defendant was aware of the possibility that his conduct could result in harm to another? Pursuant to *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the answer is no. Harris and Steward request certiorari to provide much needed clarification regarding application of this Court's decision in *Leocal* in the context of determining whether a conviction that only requires proof that a defendant was negligent regarding the possibility that his intentional conduct could induce a fear of injury in another qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)(A).

Additionally, Harris and Steward request certiorari to provide much needed clarification regarding the reach of the "realistic probability" limitation this Court identified in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), which the Ninth Circuit, consistent with the other circuit courts, are applying very broadly to shift the burden to defendants to provide examples of the government previously electing to prosecute cases it is unequivocally permitted to pursue under the plain language of the statute, which in this case requires defendants to provide examples of the government previously prosecuting cases involving future injury to intangible property interests that under the plain language of the statute it is clearly entitled to do.

Finally, Harris requests certiorari to address the acknowledged circuit split over whether attempted Hobbs Act robbery categorically constitutes a "crime of

violence" for purposes of enhanced sentencing under 18 U.S.C. § 924(c). In its decision here, the Ninth Circuit followed the Seventh and Eleventh Circuits in holding that attempted Hobbs Act robbery is a "crime of violence" as defined by 18 U.S.C. § 924(c)(3)(A) simply because a completed Hobbs Act robbery is such a crime. Subsequently, the Fourth Circuit expressly disagreed with those circuits, correctly holding that attempted Hobbs Act robbery is not a crime of violence under a "straightforward application of the categorical approach," and observing that the Ninth, Seventh and Eleventh Circuits could only have concluded otherwise on the basis of "a rule of their own creation" that is irreconcilable with this Court's clear direction to look only at the elements the government necessarily established against a particular defendant in assessing whether an individual was convicted of a qualifying predicate under § 924(c)(3)(A). *United States v. Taylor*, 979 F.3d 203, 208 (4th Cir. 2020), *reh'g en banc denied*, No. 19-7616 (4th Cir. Dec. 11, 2020). This Court should grant review to confirm, as the Fourth Circuit understood and the Ninth Circuit, once again, did not, that when this Court has stated over and over again that when it comes to imposing the draconian sentencing enhancements that are governed by the categorical analysis, as this Court recently confirmed § 924(c) is, the only thing that matters is the elements that the government necessarily established beyond a reasonable doubt against the particular defendant.

A. Facts and Procedural History.

On June 22, 1995, the government filed a superseding indictment against Harris and Steward, as well as seven other individuals, in which Harris was

charged with 7 counts of substantive Hobbs Act robbery, 7 counts of aiding and abetting the use of a firearm during a crime of violence premised on the 7 substantive counts of Hobbs Act robbery, 1 count of attempted Hobbs Act robbery and 1 count of aiding and abetting the use of a firearm during a crime of violence premised on the attempted Hobbs Act robbery. Steward was charged with 4 counts of substantive Hobbs Act robbery and 4 counts of aiding and abetting the use of a firearm during a crime of violence premised on the 4 substantive counts of Hobbs Act robbery.

Of the nine defendants charged only Harris and Steward elected to take the case to trial in 1996. When their trial began on May 15, 1996, they were 20 and 23 years old respectively. On the eighth day of trial the jury returned with guilty verdicts against both Harris and Steward. Specifically, the jury found Harris guilty of 4 counts of Hobbs Act robbery and 1 count of using a firearm during a crime of violence and 3 counts of aiding and abetting the use of a firearm during a crime of violence premised on the 4 substantive Hobbs Act robbery convictions. Additionally, the jury found Harris guilty of 1 count of attempted Hobbs Act robbery and 1 count of aiding and abetting the use of a firearm during the attempted Hobbs Act robbery. Appendix at F2-F3. The jury found Steward guilty of 3 counts of Hobbs Act robbery and 1 count of using a firearm during a crime of violence and 2 counts of aiding and abetting the use of a firearm during a crime of violence premised on the 3 substantive Hobbs Act robbery convictions. E1.

The court sentenced Harris to 121 months concurrent on the Hobbs Act robbery and Attempted Hobbs Act robbery counts, and then sentenced him to 60 months for the first § 924(c) conviction, and 20 years on each of the 4 remaining § 924(c) convictions, including the one premised on attempted Hobbs Act robbery. The sentences imposed on the § 924(c) counts all ran consecutive to each other and to the sentences on the substantive counts, for a total sentence in excess of 95 years (1141 months). Appendix at D2.

The court sentenced Steward to 57 months concurrent on the Hobbs Act robbery counts, and then sentenced him to 60 months for the first § 924(c) conviction, and 20 years on each of the 2 remaining § 924(c) convictions. The sentences imposed on the § 924(c) counts all ran consecutive to each other and to the sentences on the substantive counts, for a total sentence that was just under 50 years (597 months).[1] Appendix at E2.

On June 26, 2015 this Court issued *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"), which held that the residual clause of 18 U.S.C. § 924(e)(2)(B) defining a "crime of violence" in the context of the Armed Career Criminal Act was unconstitutionally vague. On June 22 and 23, 2016, respectively, Harris and Steward filed 28 U.S.C. § 2255 motions in the Eastern

[1] Notably, even if Harris' and Steward's convictions in violation of 18 U.S.C. § 924(c) were not unconstitutional, having served over 25 years each in custody, they have served more time on those convictions than Congress ever intended as it clarified in the First Step Act when it explained that subsequent § 924(c) convictions obtained in the same prosecution merit a 5-year sentencing enhancement, not the 20-year enhancement on each conviction that Harris and Steward received. First Step Act, P.L. 115-391, 132 Stat. 5194, § 403(a) (Dec. 21, 2018).

District of California court to vacate and correct their sentences on the basis that following *Johnson II* their convictions for using a firearm during and in relation to a crime of violence are unconstitutional.

On August 21, 2017, the district court issued its decision denying both Harris' and Steward's § 2255 motion on the merits on the basis of the Ninth Circuit's unpublished decision in *United States v. Howard*, 650 F. Appx. 466, 468 (9th Cir. 2016), holding that because the Ninth Circuit had previously held that bank robbery by intimidation is a crime of violence in *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990), any argument that Hobbs Act robbery effected by placing someone in fear of injury lacked the requisite *mens rea* to qualify as a crime of violence under 18 U.S.C. § 924(c)(A) was "foreclosed." Appendix at C6-C7. The district court noted that the "federal bank robbery statute shares the same essential elements as Hobbs Act robbery," and thus if willful conduct that results in placing a reasonable person in fear of bodily harm renders bank robbery a crime of violence, it follows that Hobbs Act robbery is likewise a crime of violence. Appendix at C7-C8, C11-C12. Additionally, the court refused to consider Harris' and Steward's argument that the plain language of the statute reached conduct that unequivocally did not require the use of physical force—placing someone in fear of future damage to intangible properly—on the basis of the Petitioners' failure to overcome what it believed was the "realistic probability" limitation articulated in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185, 127 S. Ct. 815, 818 (2007). Appendix at C9.

Harris and Steward filed timely notices of appeal with the Ninth Circuit on August 31, 2017, and requested that the Ninth Circuit grant them certificates of appealability to challenge the district court's denial of their § 2255 motions arguing that their convictions under § 1951 did not qualify as crimes of violence under § 924(c)(3)(A). On January 24, 2018, the Ninth Circuit issued orders in both Harris and Steward, holding their cases in abeyance pending its final resolution in *United States v. Dominguez*, No. 14-10268.

On April 7, 2020, the Ninth Circuit issued a published decision in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020) *reh'g en banc denied*, No. 14-10268 (9th Cir. Aug. 24, 2020), *petition for certiorari filed*, No. 20-1000 (Jan. 21, 2021). *Dominguez* foreclosed all of Harris' and Steward's arguments. Specifically, the Ninth Circuit relied on the same unpublished decision the district court had relied on, *United States v. Howard*, and the analogy to federal bank robbery by intimidation, to conclude that so long as a person engaged in willful conduct that happened to result in placing someone in fear of injury to their person or property, that was sufficient to qualify a conviction of as a crime of violence under § 924(c) regardless of whether the defendant was aware that his conduct could have that effect on another. *Dominguez*, 954 F.3d at 1260-61. Additionally, consistent with the district court in this case, the *Dominguez* court refused to consider the reality that pursuant to the plain language of the statute, which permits a conviction for Hobbs Act robbery premised on placing someone in fear of future injury to intangible property, a conviction for committing Hobbs Act robbery does not

necessarily require proof that the defendant used, threatened to use or attempted to use violent physical force. *Id.* The *Dominguez* court reasoned that it was at liberty to refuse to engage in the requisite statutory analysis on the basis that because the defendant had failed to provide specific examples of the government electing to prosecute Hobbs Act robbery to the full extent permitted by the plain language of the statute, the defendant had failed to satisfy the burden this Court created in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), seemingly believing that the plain language of a statute does not create a sufficiently "realistic possibility" that the government will exercise the power with which Congress has provided it. *Id.*

Finally, over a dissent, the *Dominguez* court held that because it had concluded that Hobbs Act robbery is a crime of violence, it must follow that an *attempt* to commit Hobbs Act robbery is likewise a crime of violence. *Id.* at 1261-62. In so holding, the Ninth Circuit applied a principle found nowhere in the statute or this Court's precedent, that any attempt to commit a crime of violence necessarily involves an attempt to use "physical force." *Id.* As the Ninth Circuit recognized a conviction for attempted Hobbs Act robbery merely requires proof of two elements: (1) the intent to commit a robbery that affects interstate commerce; and (2) a substantial step toward the completion of that goal. *Id.* at 1257. The first element simply sets forth the *mens rea* and does address a defendant's conduct, and as the Ninth Circuit correctly acknowledged the "substantial step" element likewise does not require proof that the defendant used, attempted use, or

threatened to use force. *Id.* at 1255. The Ninth Circuit then proceeded to conflate intent with attempt, reasoning that an offense could qualify as a crime of violence under § 924(c)(A)(3) so long as the defendant intended to commit a crime of violence and took a non-violent, but substantial step towards the completion of said offense. In so doing, the Ninth Circuit dispensed with the requirement that before a sentencing judge can be stripped of his/her sentencing discretion under 18 U.S.C. § 3553(a) and an individual subjected to the draconian sentencing enhancements provided for under § 924(c), the defendant's conviction on the underlying offense must necessarily have required the government to prove that the specific defendant had used, attempted to use, or threatened to use physical force against the person or property of another.

In reliance on *Dominguez*, on October 1, 2020, the Ninth Circuit denied Harris' and Steward's request for certificates of appealability. Where the reasoning of the Ninth Circuit is clearly irreconcilable with (1) the reasoning of this Court's decision in *Leocal v. Ashcroft,* 543 U.S. 1 (2004) requiring proof that a defendant was more than merely negligent regarding the possibility that his conduct could harm another, (2) the "realistic probability" limitation this Court articulated in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), and (3) this Court's decisions in *Descamps v. United States*, 570 U.S. 254 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016) reiterating over and over again that application of the categorical analysis requires a court to look at the elements the government necessarily proved beyond a reasonable doubt to obtain the conviction

against the specific defendant, and nothing else. Harris and Steward, therefore, request certiorari to clarify that the Ninth Circuit, along with at least ten other circuits, are improperly applying this Court's jurisprudence when determining what constitutes a crime of violence as that term is defined under § 924(c)(3)(A).

REASONS FOR GRANTING THE WRIT

Because the Ninth Circuit denied Harris and Steward certificates of appealability, this Court should grant their petitions for certiorari if it is merely debatable whether a defendant's conviction for violating § 1951 necessarily establishes that he is someone who was more than negligent regarding whether his conduct would be construed as a threat of violent physical force against another, and/or the "realistic probability" limitation this Court articulated in *Duenas-Alvarez* permits a defendant to rely on the plain language of the statute, and/or a non-violent act sufficient to sustain a conviction for attempted Hobbs Act robbery satisfies the requirement that a defendant used, attempted to use or threatened to use violent physical force. *See, e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (explaining that a certificate of appealability should issue under 28 U.S.C. § 2253(c)(2) when the request presents a "question of some substance" that "is debatable among jurists of reason"). Indeed, as this Court has explained, "a COA determination is a separate proceeding, one distinct from the underlying merits." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003). Accordingly, the only question

presented here is "the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.*

A. Just Like the Analogous Statute, 18 U.S.C. § 2113, a Defendant Can Be Convicted of Hobbs Act Robbery in Violation of 18 U.S.C. § 1951 Even If He Was Merely Negligent Regarding the Possibility that His Conduct Could Be Perceived By Another as Threatening Injury, Yet, Contrary to This Court's Clear Directive in *Leocal v. Ashcroft*, the Circuit Courts Are Unanimously Treating Hobbs Act Robbery as a Crime of Violence.

When the requisite definition of a crime of violence or violent felony includes the limiting language "against the person of another," we look not to the fact that the defendant intentionally used force, but instead ask whether, when the defendant engaged in said conduct, did he act with more than negligence with respect to the possibility that his conduct could harm another? *Leocal*, 543 U.S. at 9. Indeed, as this Court has subsequently explained, when the relevant statutory language simply requires proof of the use of force, that *can* be satisfied by the "knowing or intentional application of force," *United States v. Castleman*, 134 S. Ct. 1405, 1409, 1415 (2014), or even by the reckless use of force given that nothing in the word "use" alone "applies exclusively" to conduct that one knows or intends will harm another. *Voisine v. United States*, 136 S. Ct. 2272, 2278-79 (2016). The analysis is different, however, when the narrowing language "against the person or property of another" is added. *Leocal*, 543 U.S. at 9. *See, e.g.*, *United States v. Harper*, 875 F.3d 329, 331 (6th Cir. 2017) (bemoaning that its hands were tied by a previous panel that had gotten the analysis wrong, the Sixth Circuit explained that unlike the definition of "crime of violence" at issue in *Voisine* which defined a crime

of violence as "'the use . . . physical force' *simpliciter*," the definition at issue is substantively different when it "requires 'the use . . . of physical force *against the person of another*'") (emphasis in original).

The issue presented here is not whether the defendants are guilty of a serious crime that put innocent people in harm's way, and it is not whether the defendants intentionally engaged in conduct that a reasonable person would construe as threatening, but whether a defendant's conviction for committing Hobbs Act robbery necessarily establishes that he is someone who was more than negligent regarding whether his conduct would be construed as a threat of violent physical force *against another* such that it is appropriate to strip sentencing judges of their discretion under 18 U.S.C. § 3553(a) and mandate severe sentencing enhancements on top of the already harsh sentences defendants receive for committing the underlying offense. The answer to that question is clearly "no" under this Court's decision in *Leocal v. Ashcroft*, yet the Ninth Circuit, and every other circuit court to consider the issue, is getting the answer wrong.

In *Leocal* this Court held that when a defendant engaged in the intentional conduct of driving while under the influence, which *resulted* in serious harm to another, the offense did not qualify as a crime of violence because the conviction did not require proof that when the defendant acted, he was aware that his conduct could result in harm to another.[2] *Leocal*, 543 U.S. at 3, 9. The *Leocal* court

[2] In *Leocal* this Court addressed the definition of a crime of violence codified at 18 U.S.C. § 16. The elements clause codified at § 16(a) is substantively identical to the elements clause codified at 18 U.S.C. § 924(c)(3)(A).

explained, that when the definition of a crime of violence includes the language "against the person or property of another," what matters is not the defendant's intentional use of force but rather the defendant's awareness that said intentional use of force might impact the person of another. *Id.* at 9. As straightforward as that seems, circuit courts across the country are erratically applying this Court's reasoning in *Leocal*, resulting in "a Rube Goldberg jurisprudence of abstractions piled on top of one another in a manner that renders doubtful anyone's confidence in predicting what will pop out at the end." *United States v. Tavares*, 843 F.3d 1, 19 (1st Cir. 2016).

Substantive Hobbs Act robbery effected by placing someone in fear of injury to their person or property does not demand any greater awareness of the harm to another caused by one's conduct than required by the statute addressed in *Leocal*.[3] Just like in *Leocal*, a defendant can be convicted of Hobbs Act robbery so long as he engaged in intentional conduct that happened to result in harm to another (where the harm in this case is the perception of a threat of injury by another) without any proof that the defendant was aware his conduct could be perceived as threatening or result in harm to another. Ninth Circuit Model Jury Instruction 8.143A.

The reality is that when someone enters your store to steal from you, as polite as they may be, the fact that they are there to steal from you is sufficient to

[3] As is relevant here, Hobbs Act robbery can be committed by taking property from another through "actual or threatened force, or violence, or fear of injury." 18 U.S.C. § 1951(b)(1). Because the categorical approach looks at the "minimum conduct criminalized" by a statute, *Moncrieffe v. Holde*r, 133 S. Ct. 1678, 1685 (2013), the inquiry here is limited to Hobbs Act robbery in which the victim is placed in "fear of injury."

induce a fear of injury and be perceived by another as a threat of violence regardless of whether the defendant intended to make any such threat. The same is true of bank robbery by intimidation, and thus it is not surprising that the Ninth Circuit, as well as other circuits, have concluded that Hobbs Act robbery is a crime of violence on the basis that they have previously determined bank robbery by intimidation to be a crime of violence.

Specifically, in holding that Hobbs Act robbery qualifies as a crime of violence, the Ninth Circuit relied on the fact that in *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990), it had previously held that the "analogous federal bank robbery statute, which may be violated by 'intimidation,' qualifies as crime of violence," and bolstered its decision with a citation to its unpublished decision in *United States v. Howard*, 650 F. App'x 466, 468 (9th Cir. June 24, 2016). *Dominguez*, 954 F.3d at 1260. Tellingly, in *Howard*, the Ninth Circuit held that any argument that a Hobbs Act robbery could not qualify as a crime of violence because a conviction would be sustained so long as a reasonable person experienced a fear of injury to their person or property regardless of whether the defendant was aware his conduct would cause such fear, was "foreclosed by *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990)" in which "we held that the analogous federal bank robbery statute. . . qualifies as a crime of violence." *Howard*, 650 F. App'x at 468.

Revealing the *Dominguez* court also attempted to bolster its holding with a citation to *United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017), which analyzed the federal carjacking statute codified at 18 U.S.C. § 2119. *Dominguez*,

954 F.3d at 1260. Critically, however, § 2119 only penalizes conduct that a defendant engaged in "with the intent to cause death or serious bodily injury." 18 U.S.C. § 2119. In other words, a defendant's conviction for violating § 2119 necessarily stands for the proposition that he acted with the intent to use violent physical force against the person of another. It is precisely that language that is missing in the Hobbs Act robbery and federal bank robbery statutes that is dispositive under *Leocal*.

Notably, the Ninth Circuit is not the only circuit truncating its analysis into whether Hobbs Act robbery qualifies as a crime of violence on the basis of a prior decision holding that bank robbery by intimidation qualifies as a crime of violence. Every circuit to have been presented with the argument has done the same.

For example, in holding that Hobbs Act robbery is a crime of violence, the Fourth Circuit explained that its decision was "guided by our decision in [*United States v.*] *McNeal*, 818 F.3d 141" in which the court had held that federal bank robbery by intimidation qualified as a crime of violence on the basis that "intimidation, as proscribed by the bank robbery statute, necessarily involves the threat to use physical force." *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019) (internal quotations and alternations omitted). The Fourth Circuit went on to opine that "[a]lthough the bank robbery statute, Section 2113, refers to use of 'intimidation,' rather than 'fear of injury,' we see no material difference between the two terms for purposes of determining whether a particular type of robbery qualifies as a crime of violence." *Id.*

Similarly, in holding that Hobbs Act robbery is a crime of violence, the First Circuit relied on its previous analysis of bank robbery by intimidation to conclude that Hobbs Act robbery resulting in someone experiencing a fear of injury had the same "implicit *mens rea* of general intent," and thus qualified as a crime of violence, ignoring the reality that neither a conviction for bank robbery by intimidation or Hobbs Act robbery by fear of injury requires proof that when the defendant acted he was aware that he conduct could place another in fear of injury. *United States v. García-Ortiz*, 904 F.3d 102, 108-09 (1st Cir. 2018). *Accord*, *United States v. Anglin*, 846 F.3d 954, 965 (7th Cir. 2017) (referencing its previous decision in *United States v. Armour*, 840 F.3d 904 (7th Cir. 2016) holding federal bank robbery by intimidation is a crime of violence to conclude that Hobbs Act robbery is similarly a crime of violence).

In other words, both with respect to federal bank robbery and Hobbs Act robbery the circuit courts are simply looking at the resulting harm—someone felt intimidated or feared bodily harm would ensue from the defendant's conduct—and utterly failing to inquire whether the government was required to prove that the defendant was anything but negligent regarding the possibility of harm to another when he acted, as they are required to do under *Leocal*.

Notably, when defining the contours of the element of "intimidation" in the context of federal bank robbery, which the Ninth Circuit has repeatedly opined is analogous to the element "fear of injury" in the context of Hobbs Act robbery, the Ninth Circuit has established that whether the defendant "specifically intended to

intimidate [the victim] is irrelevant." *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993). In other words, the element of "intimidation," or the equivalent "fear of injury," is established so long as the defendant willfully engaged in conduct "that would put an ordinary, reasonable person in fear of bodily harm," regardless of whether the defendant understood that his conduct would be perceived as intimidating by the ordinary person, let alone that the defendant intended to intimidate anyone. *Selfa*, 918 F.2d at 751. *Accord*, *United States v. Armour*, 840 F.3d 904, 909 (7th Cir. 2016) (explaining that the government's burden of proof to establish bank robbery by intimidation is "low" given that all the government need establish is that a "bank employee can reasonably believe that a robber's demands for money to which he is not entitled will be met with violent force"); *United States v. Kelley*, 412 F.3d 1240, 1245-46 (11th Cir. 2005) (explaining that "intimidation occurs when an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts," and thus "[w]hether a particular act constitutes intimidation is viewed objectively . . . and a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating") (internal quotations omitted); *United States v. Yockel*, 320 F.3d 818, 823-24 (8th Cir. 2003) (agreeing with the Ninth Circuit that "intimidation is measured. . . under an objective standard, whether or not [the defendant] intended to intimidate the teller is irrelevant in determining his guilt"); *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) ("[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate. . . . The intimidation

element of § 2113(a) is satisfied if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts, whether or not the defendant actually intended the intimidation.") (internal quotations omitted); *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987) ("[N]either the plain meaning of the term 'intimidation' nor its derivation from a predecessor statute supports Higdon's argument that a taking 'by intimidation' requires an express verbal threat or a threatening display of a weapon").

In other words, a conviction under either § 2113 or § 1951 will be sustained so long as the defendant had the general intent to take something of value whether or not he/she had the specific intent to intimidate anyone. Where, however, the elements of "intimidation" (§ 2113) and "fear" (§ 1951) turn not on what the defendant intends, thinks or believes, but on whether an ordinary person would have recognized that the natural and probable consequences of the defendant's conduct would probably result in a bodily injury—that is a negligence standard. *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015). And negligence regarding the possibility of physical harm to another is not sufficient here—a "crime of violence" requires proof beyond a reasonable doubt that when the defendant engaged in the intentional use of force that he was more than merely negligent regarding the possibility that he would harm another (or place another in fear of injury). *Leocal*, 543 U.S. at 9.

Of course, to recognize that a conviction for Hobbs Act robbery requires nothing more than a showing of negligence with respect to the element of placing

another in fear of injury is not to say that Hobbs Act robbery is a crime of negligence. Of course it isn't. Complex statutes, such as Hobbs Act robbery, have multiple material elements each of which may have a distinct *mens rea*. *United States v. Bailey*, 444 U.S. 394, 403-06 (1980). The *mens rea* pertaining to the actual taking in Hobbs Act robbery is different from the *mens rea* pertaining to placing another in fear.

The circuit courts are failing to reach this issue under the mistaken assumption that all that is required to qualify an offense as a crime of violence is knowing or willful conduct. *See, e.g.*, *Dominguez*, 954 F.3d at 1261, *Mathis*, 932 F.3d at 266, *García-Ortiz*, 904 F.3d at 108-09. The fact that the taking was knowing or willful is not the issue under *Leocal*. The driving of the car that caused the serious injuries in *Leocal* was also intentional, but as this Court explained, what matters is the defendant's awareness of whether his intentional conduct could harm another, not simply his intentional conduct that resulted in harm to another. *Leocal*, 543 U.S. at 9.

When decades of an individual's life is at stake, that distinction matters—the fact that a defendant intentionally engaged in conduct that resulted in harm to another does not stand for the proposition "that the offender is the kind of person who might deliberately point the gun and pull the trigger," *Begay v. United States*, 553 U.S. 137, 145-46 (2008), overruled on other grounds by *Johnson II*, 135 S. Ct. at 2558-59 (explaining that where the definition of a crime of violence includes the limiting language "against the person of another," Congress is targeting a narrow

class of defendants who have a certain callousness towards others, those who, at the very least, perceive the risk of harm to others but act anyway).

Following the reasoning of *Leocal*, the analysis should be whether the defendant's conviction for Hobbs Act robbery necessarily establishes that he is someone who was more than negligent regarding whether his intentional conduct could harm another such that it is appropriate to strip a sentencing judge of his/her discretion under 18 U.S.C. § 3553(a) and subject the individual to severe sentencing enhancements on top of the sentence he would otherwise receive for committing the underlying offense—which in Harris' and Steward's cases amounted to a total of an extra 130 years in custody.

Pursuant to *Leocal*, it cannot be that an offense that requires intentional conduct without any proof that the defendant was aware that his conduct could result in harm to another is a crime of violence when the requisite definition includes the limiting language "against the person of another," as § 924(c)(3)(A) does. Yet, that is what is happening across the circuits in the context of convictions under both 18 U.S.C. §§ 1951 and 2113. This case, therefore, presents a question of exceptional importance that requires this Court's guidance.[4] Either *Leocal* does not

[4] It is possible this Court's decision in *Borden v. United States* (Case No. 19-5410) (cert. granted) will be instructive here. The question presented in *Borden* is whether the definition of a violent felony under the Armed Career Criminal Act can be satisfied by a conviction that necessarily establishes that when the defendant acted he was recklessness regarding whether his conduct could harm another. While the issue here is negligence, not recklessness, in reaching the holding, *Borden* almost certainly will require this Court to clarify whether the relevant *mens rea* is the one that modifies simply the use of force, as the Ninth Circuit contends, or whether a prior conviction must categorically establish that when the defendant

mean what it appears to say, or else federal courts across the country are imposing extremely harsh sentencing enhancements under 18 U.S.C. §§ 924(c) and 924(e), for convictions that lack the requisite *mens rea* to qualify as a crime of violence. Thus, the consequences viewed from either the individual perspective or at a systematic level are substantial. Certiorari is necessary to ensure all circuits appropriately exclude offenses that do not require proof that a defendant was anything but negligent with respect to whether his use or threatened use of force could harm another.

B. The "Realistic Probability" Test Articulated by This Court in *Gonzales v. Duenas-Alvarez* Should Not Apply to Statutes that By Their Plain Language Reach Conduct that Does Not Require Proof of the Use, Attempted Use, or Threatened Use of Physical Force.

Additionally, this case presents an excellent vehicle for this Court to clarify the contours of the "realistic probability" test it articulated in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) where every circuit to consider the issue in the context of Hobbs Act robbery has shifted the burden to the defendant to provide concrete examples of the government's decision to pursue prosecutions to the fullest extent authorized by the plain language of the statute before considering whether the statute proscribes conduct that does not necessarily require proof that the defendant used, threatened to use, or attempted to use physical force against the person or property of another.

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intentionally used force he had some awareness that his conduct could result in harm to another.

Pursuant to the plain language of the statute, Hobbs Act robbery criminalizes a threat of "injury, immediate or future, to [another's] person or property." 18 U.S.C. § 1951(b)(1). In other words, "Hobbs Act robbery criminalizes conduct involving threats to property," and "reaches conduct directed at 'property' because the statute specifically says so." *United States v. O'Connor*, 874 F.3d 1147, 1154, 1158 (10th Cir. 2017). The definition of "property" is not limited by the statute. "When interpreting a statute, we must give words their 'ordinary or natural' meaning." *Leocal*, 543 U.S. at 9. "Property" is defined as "[c]ollectively, the rights in a valued resource such as land, chattel, or an intangible." PROPERTY, Black's Law Dictionary (11th ed. 2019).

The plain language of the statute likewise does not require the use or threats of violent physical force, as defined by *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019). Specifically, robbery is defined as taking property through "actual or threatened force, *or* violence, *or* fear of injury, immediate or future, to [the victim's] 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) (emphasis added). Notably, the canons of statutory interpretation require giving each word meaning such that "Judges should hesitate . . . to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every

clause and word of a statute.") (internal quotations removed). Accordingly, proof of robbery by "fear of injury" must require proof of something distinct from conduct involving violence or the actual or threatened use of force; failure to do so would render superfluous the other alternative means of committing Hobbs Act robbery.

Under the plain language of the statute, therefore, Hobbs Act robbery can be committed by causing a fear of future injury to intangible property. Indeed, the circuit courts have long been in accord, unanimously interpreting Hobbs Act "property" to broadly include "intangible, as well as tangible, property." *United States v. Local 560 of the Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985) (collecting cases) (describing the circuits as "unanimous" on this point). Notably, the Third, Fifth, Tenth, and Eleventh Circuits use pattern Hobbs Act jury instructions defining Hobbs Act robbery to include fear of future injury to intangible property. *See* Third Circuit Model Criminal Jury Instructions, 6.18.1951-4 and 6.18.1951-5 (Jan. 2018) (defining "fear of injury" as when "a victim experiences anxiety, concern, or worry over expected personal physical or economic harm" and "[t]he term 'property' includes money and other tangible and intangible things of value"); Fifth Circuit, Pattern Jury Instructions (Criminal Cases) 2.73A (2019) ("The term 'property' includes money and other tangible and intangible things of value."); Tenth Circuit Criminal Pattern Jury Instructions, 2.70 (Feb. 2018) ("'Property' includes money and other tangible and intangible things of value. 'Fear' means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances."); Eleventh

Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (Feb. 2020) ("'Property' includes money, tangible things of value, and intangible rights that are a source or element of income or wealth. 'Fear' means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.").

Similarly, the Modern Federal Criminal Jury Instructions define Hobbs Act robbery as fear of future harm to intangible property. *See* 3 Modern Federal Jury Instructions-Criminal, § 50-2 (Nov. 2020). Specifically, the Modern Instructions define "property" as "includ[ing] money and other tangible and intangible things of value which are capable of being transferred from one person to another." Modern Federal Jury Instructions-Criminal, § 50-4. Robbery by "fear" is defined as "fear of injury, whether immediately or in the future," and explains "[t]he use or threat of force or violence might be aimed at . . . causing economic rather than physical injury." Modern Federal Jury Instructions-Criminal, § 50-5. And, the "fear of injury" sufficient for Hobbs Act robbery "exists if a victim experiences anxiety, concern, or worry over expected personal harm or business loss, or over financial or job security." Modern Federal Jury Instructions-Criminal, § 50-6. *See also*, *United States v. Brown*, No. 11-cr-334-APG, Dkt. 197, at 15 (D. Nev. July 28, 2015) (providing Hobbs Act robbery jury instruction that "property" includes "money and other tangible and intangible things of value" and fear as "an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm"); *United States v. Major*, No. 1:07-cr-00156-LJO, Dkt 318, at 54 (E.D. Cal., Dec. 23,

2009) (instructing the jury that Hobbs Act robbery includes the taking of property "threatening or actually using force, violence, or fear of injury, immediately or in the future, to person or property," with "property" defined as "money and other tangible and intangible things of value"); *United States v. Nguyen*, No. 2:03-cr-00158-KJD-PAL, Dkt. 157, at 28 (D. Nev. Feb. 10, 2005) (providing Hobbs Act robbery jury instruction that "fear" includes "worry over expected personal harm or business loss, or over financial or job security").

Because intangible property—by definition—cannot be in the victim's physical custody, this preempts any argument that the fear of injury to property necessarily involves a fear of injury to the victim (or another person) by virtue of the property's proximity to the victim or another person. *See, e.g.*, *United States v. Camp*, 903 F.3d 594, 602 (6th Cir. 2018) (noting that Hobbs Act robbery can be committed by "threats to property alone" and such threats "whether immediate or future—do not necessarily create a danger to the *person*"), *cert. denied*, 139 S. Ct. 845 (2019) (emphasis in original). And, because Hobbs Act robbery can be committed via non-violent threats of future harm to an intangible property interest, by definition, Hobbs Act robbery does not require proof that the defendant necessarily used, threatened to use, or attempted to use violent physical force, and thus a conviction for Hobbs Act robbery cannot qualify as a predicate conviction under § 924(c). *Moncrieffe*, 569 U.S. at 190-91 (explaining that the categorical approach "presume[s] that the conviction rested upon nothing more than the least of the acts criminalized") (internal quotations and alterations omitted).

The circuit courts, however, are not reaching this issue under the mistaken belief that pursuant to *Gonzales v. Duenas-Alvarez* they can ignore the plain language of the statute so long as a defendant is unable to provide an example of the government exercising the full extent of its authority under the statute.

For example, the *Dominguez* court, as well as the district court here, failed to reach the dispositive issue, refusing to address the "intangible asset prong" of Hobbs Act robbery because the defendant had failed "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 (citing *Duenas-Alvarez*, 549 U.S. at 193).

The Ninth Circuit is not alone in invoking *Duenas-Alvarez* as the basis for abstaining from analyzing the full breath of the conduct proscribed by the Hobbs Act robbery statute as defined by its plain language. *See Garica-Ortiz*, 904 F.3d at 107 (reasoning that "the Supreme Court has counseled that we need not consider a theorized scenario unless there is a 'realistic probability' that courts would apply the law to find an offense in such a scenario"); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1061 (10th Cir. 2018) ("In applying the categorical approach, we follow the Supreme Court's instruction that there must be 'a realistic probability, not a theoretical possibility,' that the statute at issue could be applied to conduct that does not constitute a crime of violence."); *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017) (observing that "a hypothetical nonviolent violation of the statute, without evidence of actual application of the statute to such conduct, is insufficient

to show a 'realistic probability' that Hobbs Act robbery could encompass nonviolent conduct"); *United States v. Hill*, 890 F.3d 51, 56 (2d Cir. 2016) ("Critically, the Supreme Court has made clear in employing the categorical approach that to show a predicate conviction is not a crime of violence 'requires more than the application of legal imagination to [the] . . . statute's language.'") (quoting *Duenas-Alvarez*, 549 U.S. at 193).

The circuit courts' deployment of *Duenas-Alvarez*'s "realistic probability" limitation is misplaced here where the plain language of the statute permits prosecutions for robberies effected by placing someone in fear of future damage to their property, which by definition does not require the use, threatened use, or attempted use of physical force. The fact that to date the government may not have elected to prosecute any such case is beside the point; all that matters is that the government is authorized to do so under the plain language of the statue. The "realistic probability" limitation applies only when the breadth of the statute is not evident from its plain text. *Duenas-Alvarez*, 549 U.S. at 193 (instructing that courts cannot find a statute is overbroad based on "legal imagination").

There is no legal imagination needed here—the plain language of the statute reaches property broadly defined. When a statute's plain statutory language includes conduct broader than the crime of violence definition, "the inquiry is over" because the statute is facially overbroad. *Descamps*, 570 U.S. at 265. Because it is clear from the plain language of the statute that Hobbs Act robbery does not necessarily require proof that the defendant used, threatened to us or attempted to

use violent physical force, it does not qualify as a crime of violence under § 924(c)(3)(A), yet circuit courts are reaching the opposite conclusion by abstaining from the requisite analysis in a misplaced reliance on *Duenas-Alvarez*. Clarification is, therefore, needed by this Court to ensure that individuals such as Harris and Steward do not spend their lives in custody on the basis of convictions that do not necessarily establish that they used violent physical force.

C. In Concluding that Inchoate Offenses Such as Attempt Qualify as Predicates under 18 U.S.C. § 924(c)(3)(A), the Seventh, Ninth and Eleventh Circuits Have Abandoned the Categorical Approach in Favor of a Rule of Their Own Creation That Looks Beyond the Elements of Conviction.

Finally, Harris additionally requests certiorari to resolve an acknowledged circuit split regarding whether attempted Hobbs Act robbery qualifies as a predicate crime of violence under § 924(c)(3)(A). The Seventh, Ninth, and Eleventh Circuits hold that it is—not because any of its elements involve the use, attempted use, or threatened use of physical force but merely because the elements of the distinct offense of completed Hobbs Act robbery do. The Fourth Circuit, by contrast, has concluded that attempted Hobbs Act robbery is not a crime of violence under a "straightforward application of the categorical approach" because it "does not invariably require the use, attempted use, or threatened use of physical force." *Taylor*, 979 F.3d at 208. The Fourth Circuit is correct, while the Seventh, Ninth and Eleventh Circuits are misapplying the categorical approach, undermining the consistency it was designed to create.

As the Ninth Circuit recognized, attempted Hobbs Act robbery has two elements: (1) the intent to commit Hobbs Act robbery and (2) a substantial step toward the completion of said robbery. *Dominguez*, 954 F.3d at 1255. The Ninth Circuit also recognized that neither element necessarily involves the use of force. *Id*. The first element simply addresses intent, not conduct, while the second element can be satisfied by, among other things, walking towards a location while in possession of a weapon (*United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990)), or simply gathering weapons and waiting (*United States v. Muratovic*, 719 F.3d 809, 816 (7th Cir. 2013); *United States v. Chapdelaine*, 989 F.2d 28, 30-31, 33 (1st Cir. 1993)). In other words, neither element necessarily requires the use, attempted use, or threatened use of physical force, and that should be the end of the analysis. *Mathis*, 136 S. Ct. at 2248 (stressing that the categorical analysis begins and ends with the elements the government had to prove beyond a reasonable doubt to secure the conviction).

In holding that attempted Hobbs Act robbery nevertheless qualified as a crime of violence, the Ninth Circuit "rest[ed] [its] conclusion on a rule of [its] own creation," and one that is irreconcilable with the clear directives repeated issued by the Supreme Court. *Taylor,* 979 F.3d at 208. Eschewing the requisite elements analysis, the *Dominguez* court opined that all that matters is that the defendant "specifically intended to commit a crime of violence and took a substantial step toward committing it," and that it was irrelevant whether the substantial step taken was "itself a violent act or even a crime." *Dominguez*, 954 F.3d at 1255.

Judge Nguyen dissented, correctly observing that where attempted Hobbs Act "can be committed without any actual use, attempted use, or threatened use of physical force. . . it plainly does not fit the definition of a crime of violence under the elements clause." *Id.* at 1262-63.

Likewise, in *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), the Eleventh Circuit held that attempted Hobbs Act robbery is categorically a crime of violence even though the substantial step required for an attempted robbery conviction can fall short of "actual or threatened force." *Id.* at 353. Like the Ninth Circuit, the court reasoned that what matters is that the defendant intended to commit a crime of violence and took a substantial, albeit possibly non-violent, step towards its completion. *Id.* The Eleventh Circuit denied rehearing en banc over a dissent by Judge Pryor, joined by two other judges, who correctly observed that the court's holding was made possible "only by converting intent. . . into attempt," recognizing that simply because someone desires to commit a crime of violence and takes a substantial step in making that desire a reality, does not require proof by the government that the individual used, attempted to use, or threatened to use violent physical force. *United States v. St. Hubert*, 918 F.3d 1174, 1212 (11th Cir. 2019) (J. Pryor, J., dissenting from denial of rehr'g en banc).

Finally, the Seventh Circuit reached the same result, similarly reasoning that because (1) completed "Hobbs Act robbery constitutes a crime of violence" and (2) "the attempt offense requires proof of intent to commit all elements of the completed crime," it therefore follows that attempted Hobbs Act robbery is

categorically a crime of violence. *United States v. Ingram*, 947 F.3d 1021, 1025-26 (7th Cir. 2020).

As the Fourth Circuit has subsequently explained, the Seventh, Ninth and Eleventh Circuits' reasoning in holding attempted Hobbs Act robbery is a crime of violence is directly at odds with the clearly established precedent of this Court. As the Fourth Circuit correctly observed, "[w]here a defendant takes a nonviolent substantial step toward threatening to use physical force—conduct that undoubtedly satisfies the elements of attempted Hobbs Act robbery—the defendant has not used, attempted to use, or threatened to use physical force. Rather, the defendant has merely attempted to threaten to use physical force. The plain text of § 924(c)(3)(A) does not cover such conduct." *Taylor,* 979 F.3d at 208. The Fourth Circuit observed that the other circuit courts holding to the contrary were relying on the "flawed premise" that "an attempt to commit a 'crime of violence' *necessarily* constitutes an attempt to use physical force." *Id.* (emphasis in original). Of course, the intent to do something is not the same thing as doing it—and the application of the draconian sentencing enhancements under § 924(c) requires a defendant to actually use, threaten to use or attempt to use violent physical force.

Moreover, "certain crimes of violence—like Hobbs Act robbery, federal bank robbery, and carjacking—may be committed without the use or attempted use of physical force because they may be committed merely by means of threats." *Id.* (emphasis in original). Notably, "an attempt to *threaten* force does not constitute an attempt to *use* force." *Id.* at 209 (emphasis in original). For example, a

defendant who attempts Hobbs Act robbery "may case the store that he intends to rob, discuss plans with a coconspirator, and buy weapons to complete the job. But none of this conduct involves an attempt to use physical force, nor does it involve the use of physical force or the threatened use of physical force. In these circumstances, the defendant has merely taken nonviolent substantial steps toward threatening to use physical force. The plain text of § 924(c)(3)(A) does not embrace such activity." *Id.*; *see also Dominguez*, 954 F.3d at 1263 (Nguyen, J., dissenting in relevant part) (observing that because the substantial step can be accomplished, by among other things, planning a robbery, buying the necessary gear, driving toward the target and then turning away after seeing police in the vicinity, "attempted Hobbs Act robbery does not qualify as a crime of violence under the elements clause" of § 924(c)).

A straightforward application of the categorical approach—which looks only at the *elements of the offense of conviction* and thus in the case of an attempt conviction looks only at the elements of attempt not the completed offense—unequivocally establishes that attempted Hobbs Act robbery is not a crime of violence. Yet three of the four circuits to have considered the issue have gotten it wrong by relying on a rule of their own creation that is irreconcilable with this Court's clearly established directive that the categorical approach must look only at the elements of the offense of conviction and nothing else. *Mathis*, 136 S. Ct. at 2248 (reiterating that when conducting the requisite categorical analysis, a court may look only to "the things the prosecution must prove to sustain a conviction");

see, e.g., *Descamps*, 570 U.S. at 262-63. This circuit conflict is resulting in unfair and disparate treatment of countless defendants based simply on the jurisdiction in which they are sentenced. Moreover, the disparity is currently extending beyond just the Fourth, Seventh, Ninth and Eleventh Circuits, as district courts across the country are likewise reaching inconsistent results. *Compare*, *e.g.*, *Wallace v. United States*, 458 F. Supp. 3d 830, 837 (M.D. Tenn. 2020), and *Crowder v. United States*, 2019 WL 6170417, at *2 (S.D.N.Y. Nov. 20, 2019) (each holding that attempted Hobbs Act robbery is a crime of violence), *with, e.g.*, *United States v. Culbert*, 453 F. Supp. 3d 595, 598-601 (E.D.N.Y. 2020), and *Lofton v. United States*, 2020 WL 362348, at *5-9 (W.D.N.Y. Jan. 22, 2020) (each holding the opposite). Because courts below are abandoning the categorical approach when it comes to inchoate offenses such as attempt, urgent action is needed by this Court to confirm that when it has said over and over again that the categorical approach looks only at the elements of the offense of conviction, it meant that and nothing more.

CONCLUSION

For these reasons, Harris and Steward respectfully request that the Court grant their petitions for a writ of certiorari.

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Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender

PEGGY SASSO
Assistant Federal Defender
Eastern District of California
Counsel of Record for Petitioner

2300 Tulare Street, Suite 330
Fresno, CA 93721
(559) 487-5561
peggy_sasso@fd.org