No. _____

In the

Supreme Court of the United States

SYLAS BROWNRIDGE, 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

Whether Hobbs Act robbery under 18 U.S.C. § 1951 is a crime of violence under the force clause of 18 U.S.C. § 924(c)(3)(A), where the offense encompasses threats of future harm to intangible property and economic interests, and thus does not categorically require the use, attempted use, or threat of violent *physical* force?

Statement of Related Proceedings

- *United States v. Sylas Brownridge,*
  2:04-cr-00425-GHK-5 (C.D. Cal. Apr. 23, 2007)
- *Sylas Brownridge v. United States,*
  2:16-cv-04091-TJH (C.D. Cal. Jul. 27, 2017)
- *Sylas Brownridge. v. United States*,
  17-56129 (9th Cir. Oct. 1, 2020)

Table of Contents

Page(s)

Table of Authorities

Page(s)

Federal Cases

Table of Authorities

Page(s)

Federal Cases (continued)

Federal Statutes

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Petition for Writ of Certiorari

Sylas Brownridge petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability in his case.

Opinions Below

The Ninth Circuit's order denying Mr. Brownridge's application for a certificate of appealability ("COA") was not published. (App. 1a.) The district court issued a written order denying Mr. Brownridge's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, and denying his request for a certificate of appealability. (App. 2a-4a.)

Jurisdiction

The Ninth Circuit issued its order denying Mr. Brownridge a COA on October 1, 2020. (App. 1a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provision Involved

18 U.S.C. 1951 provides:

(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.

Introduction

In 2015, this Court held that the residual clause in the Armed Career Criminal Act was void for vagueness. *Johnson v. United States*, 576 U.S. 591 (2015). Within a year of that decision, thousands of inmates filed habeas petitions claiming that their convictions and sentences, though not based on the ACCA, were infected by the same ordinary-case analysis and ill-defined risk threshold that combined in *Johnson* to "produce[] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 576 U.S. at 598. Among that number was Sylas Brownridge. He argued that the

unconstitutional residual clause had infected his case, in that, following *Johnson*, Hobbs Act robbery was no longer a valid crime-of-violence predicate for purposes of § 924(c). With respect to that claim, the Ninth Circuit stayed Mr. Brownridge's case while the issue worked its way through the Court, and then declined to grant him a certificate of appealability after his argument was foreclosed by *United States v. Dominguez*, 954 F.3d 1251, 1255 (9th Cir. 2020) (holding that Hobbs Act robbery is categorically a crime of violence).

This Court should grant certiorari to reconsider *Dominguez*'s holding that Hobbs Act robbery remains a crime of violence after *Johnson*. Model jury instructions nationwide, and actual jury instructions given in the Ninth Circuit and elsewhere, establish that Hobbs Act robbery can be premised on a threat of future harm to economic interests and intangible property. That broad definition of property cannot be squared with the force clause, which requires the use or threatened use of *physical* force against property. The Ninth Circuit's contrary decision here should be revisited.

Statement of the Case

Mr. Brownridge pleaded guilty to the following offenses: (1) one count of conspiracy to interfere with commerce by robbery ("Hobbs Act conspiracy"), in violation of 18 U.S.C. § 1951(a) (Count 1); (2) interference with commerce by robbery ("Hobbs Act robbery"), in violation of 18 U.S.C. § 1951(a) (Counts 2 and 10); and (3) using, carrying, and brandishing a firearm during and in

relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count 3 and 11). On April 23, 2007, he was sentenced to 402 months imprisonment—18 months on the Hobbs Act robbery charges, plus a mandatory consecutive 384 months on Counts 3 and 11, the Section 924(c) convictions.

On June 9, 2016, Mr. Brownridge filed a timely motion to vacate his sentence under 28 U.S.C. § 2255. In it, he argued that his Section 924(c) conviction should be vacated under *Johnson* because Hobbs Act robbery was no longer a crime of violence. After full briefing, the district court denied Mr. Brownridge's claims, concluding that Hobbs Act robbery remained a crime of violence even after *Johnson*. It declined to grant a certificate of appealability as to his claim.

3. Petitioner filed a request for a certificate of appealability in the Ninth Circuit, supported by full briefing on the standard and the reasons for granting the COA. The Ninth Circuit denied it in an order citing *United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020), but not further analyzing the question. (App. 1a.) *Dominguez* is the Ninth Circuit's precedential decision finding Hobbs Act robbery to be a crime of violence after *Johnson*. *Dominguez*, 954 F.3d at 1255.

Reason or Granting the Writ

This Court Should Grant Certiorari to Decide Whether Hobbs Act Robbery Satisfies the Force Clause of Section 924(c).

The Court should grant the writ of certiorari to address the Ninth Circuit's conclusion that the Hobbs Act robbery has, as an element, the use, threatened use, or attempted use of physical force. It does not: Hobbs Act robbery can be premised on a threat of harm to intangible property and threats of economic harm. Given the heavy consequences that attach to a Section 924(c) conviction based on Hobbs Act robbery conviction, and the sheer number of these cases prosecuted federally, further guidance from this Court is necessary to bring this area of caselaw into order.

1. The categorical approach determines whether an offense is a crime of violence.

In *United States v. Davis*, 139 S. Ct. 2319 (2019), this Court struck the residual clause in 18 U.S.C. § 924(c)(3)(B) as unconstitutionally vague. As the government has conceded elsewhere and as the circuit courts have uniformly concluded, *Davis* is a substantive rule that applies retroactively to motions to vacate brought under 28 U.S.C. § 2255. *See*, *e.g.*, *King v. United States*, 965 F.3d 60, 64 (1st Cir. 2020) (noting government concession).

After *Davis*, only one portion of the crime-of-violence definition remains intact: the force clause. To qualify under the force clause, an offense must have "as an element the use, attempted use, or threatened use of physical

force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). An offense fails to satisfy that force clause unless it requires: (1) violent physical force capable of causing physical pain or injury to another person or property, *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)); and (2) a use or threatened use of force that is intentional and not accidental or negligent, *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

2. Hobbs Act robbery does not require violent physical force.

Hobbs Act robbery does not satisfy the force clause because it does not require violent physical force. The Hobbs Act prohibits "obstruct[ing], delay[ing], or affect[ing] commerce . . . by robbery." 18 U.S.C. § 1951(a). "Robbery" is defined 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).

Property, for purposes of the Hobbs Act, is defined broadly to 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). And fear of injury includes things like "anxiety . . . about economic loss or harm," *United States v. Brown*, 11-cr-334-APG, Dkt. 197 (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") or "worry over expected personal harm or business loss, or over financial or job security." *United States v. Nguyen*, 2:03-cr-00158-KJD-PAL, Dkt. 157, at 28 (D. Nev. Feb. 10, 2005). Because juries in the Ninth Circuit are actually instructed that such harms are cognizable forms of injury for purposes of Hobbs Act robbery, and because such threats do not constitute threats of *physical* force, the offense does not satisfy the force clause of § 924(c).

These Ninth Circuit cases are not an anomaly; in fact, there is a long history of broadly defining property for purposes of the Hobbs Act. The Third, Tenth, and Eleventh Circuits use pattern instructions that define 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) (economic) harm" and "[t]he term 'property' includes money and other tangible and intangible things of value")[1]; Tenth Circuit Criminal Pattern Jury Instructions, 2.70 (Feb. 2018)(providing definitions for Hobbs Act robbery: "'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.")[2]; Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (Feb. 2020) (defining terms in Hobbs Act robbery instruction: "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.")[3] And cases from both inside and outside those circuits have used a similar formulation of the jury instruction to charge juries. *See United States v. Kamahele*, No. 2:08-cr-00758-TC, Doc. 1112 at 42, 44-45 (D. Utah Oct. 6, 2011) (defining "property" as "money and other tangible and

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[1] Available https://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions.

[2] Available https://www.ca10.uscourts.gov/clerk/downloads/criminal-pattern-jury-instructions.

[3] Available https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsCurrentComplete.pdf?revDate=20200227.

intangible things of value," and "fear" to include "an apprehension, concern, or anxiety about . . . economic loss"); *United States v. Buck*, No. 4:13-cr-491, Dkt. 412-1, at 16 (S.D. Tex. Aug. 28, 2015); *United States v. Tibbs*, No. 2:14-cr-20154-BAF-RSW-1, Dkt. 34, at 20 (E.D. Mich. Aug. 29, 2014).

The Modern Federal Criminal Jury Instructions likewise define Hobbs Act robbery to include a fear of future harm to intangible property. 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." *See* 3 Modern Federal Jury Instructions-Criminal, § 50-4 (Nov. 2020). Robbery by "fear" is defined as "fear of injury, whether immediately or in the future," including "[t]he use or threat of force or violence . . . aimed at . . . causing *economic* rather than physical injury." *See* 3 Modern Federal Jury Instructions-Criminal, § 50-5 (Nov. 2020) (emphasis added). Moreover, the "fear of injury" exists where "a victim experiences anxiety, concern, or worry over expected personal harm or business loss, or over financial or job security." *See* 3 Modern Federal Jury Instructions-Criminal, § 50-6 (Nov. 2020).

As one district court of the Ninth Circuit recently held, such a broad reding of "property" and "injury" aligns with the best textual reading of § 1951. *United States v. Chea*, 2019 WL 5061085, at *9 (N.D. Cal. Oct. 2, 2019). The statute prohibits taking property "by means of actual or threatened force,

or violence" *or* "fear of injury. The latter phrase would be superfluous if "injury" were limited to physical injury—it is hard to imagine a use of threatened force or violence" that wouldn't also satisfy the "fear of injury" definition. To avoid surplusage, the injury clause should be read to encompass something more than physical injury, just as the above model instructions do.

In spite of these authorities, a number of Circuits have held that Hobbs Act robbery is a crime of violence. The uniformity in their conclusion is undermined by the lack of concurrence in their reasoning. Several of the courts did not consider any argument about intangible property or economic injury argument at all.[4] The Ninth Circuit explicitly refused to analyze intangible property or economic injury, finding that there was no realistic probability of Hobbs Act robbery conviction premised on economic injury. *Dominguez*, 954 F.3d at 1260; *see also United States v. García-Ortiz*, 904 F.3d 102, 106-09 (1st Cir. 2018) (reaching similar conclusion). The Fourth Circuit, on the other hand, found that the Hobbs Act did not distinguish between

[4] *See United States v. Jones*, 919 F.3d 1064, 1072 (8th Cir. 2019); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060-66 (10th Cir. 2018); *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2016); *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, 1340–41 (11th Cir. 2016).

threats of injury to tangible and intangible property—along the lines of the model instructions above—but concluded that § 924(c) likewise encompassed both tangible and intangible property.

Neither of these positions is tenable. No court until *Mathis* had ever suggested that § 924(c)'s definition of crime of violence includes threats of physical force to intangible property or to economic interests—nor did the Fourth Circuit explain how one could threaten to apply physical force to intangible property or economic interests.

But the Ninth Circuit's approach is equally wrong. The Ninth Circuit recognized: "Fear of injury is the least serious way to violate [Hobbs Act robbery], and therefore, the species of the crime that we should employ for our categorical analysis." *United States v. Dominguez*, 954 F.3d 1251, 1254, 1260 (9th Cir. 2020). Even so, it explicitly declined to analyze whether intangible economic interests would satisfy the force clause, "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." 954 F.3d at 1260. This ignores that prosecutors in the Ninth Circuit have sought and obtained convictions using jury instructions that authorize conviction under that theory. *See United States v. Brown*, No. 11-cr-334-APG, Dkt. 197 (D. Nev. July 28, 2015); *United States v. Nguyen*, 2:03-cr-00158-KJD-PAL, Dkt. 157 at 28 (D. Nev. Feb. 10, 2005). No

legal imagination is required to find a realistic probability of prosecution under a particular theory where juries are actually instructed that the theory is a cognizable one upon which to return a verdict. Indeed, the Ninth Circuit's own caselaw makes this point. *See United States v. Baldon*, 956 F.3d 1115, 1125 (9th Cir. 2020) (finding a realistic probability of prosecution where the theory is included in the state's model jury instruction).

The Hobbs Act robbery statute cannot mean one thing when a prosecutor tries to convict someone of the substantive offense, and another thing when a petitioner claims that the statute is overbroad—and yet that is the state of the law at this moment. Given the high stakes involved in imposing a Section 924(c) enhancement, this Court's intervention is necessary to correct the Circuit's inconsistent application of the law.

Conclusion

For the foregoing reasons, Mr. Brownridge respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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