No. _____

IN THE

Supreme Court of the United States

CARLOS TORRES,

Petitioner,

vs.

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 A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a completed Hobbs Act robbery under 18 U.S.C. § 1951 categorically qualifies as a predicate "crime of violence" under 18 U.S.C. § 924(c)(3)(A) to support a conviction under § 924(c)(1).

RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the District of Arizona and in the United States Court of Appeals for the Ninth Circuit:

United States v. *Torres*, No. 4:05-cr-00672-JGZ-JR (D. Ariz. Mar. 20, 2007);

United States v. *Torres*, No. 4:16-cv-00406-JGZ (D. Ariz. Mar. 23, 2017); and

United States v. Torres, No. 17-15820, 834 Fed. Appx. 382 (9th Cir. 2021).

No other proceedings in state or federal trial or appellate courts, or in this Court, are "directly related" within the meaning of Supreme Court Rule 14.1(b)(iii).

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The memorandum disposition of the court of appeals is unpublished. *United States v. Torres*, No. 17-15820, 834 Fed. Appx. 382 (9th Cir. 2021). (App. 1a.)

JURISDICTION

The court of appeals entered judgment on January 26, 2021. (App. 1a.) This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely.

STATUTORY PROVISIONS INVOLVED

Section 924(c) of Title 18 of the United States Code provides, in relevant part:

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

Section 1951 of Title 18 of the United States Code provides, in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

STATEMENT OF THE CASE

On October 18, 2006, Carlos Torres entered into a plea agreement in which he pleaded guilty to four counts of interference with commerce by robbery, in violation of 18 U.S.C. §§ 1951(a) and (b)(1), and one count of brandishing a firearm during a "crime of violence," i.e., robbery under 18 U.S.C. §§ 1951(a) and (b)(1), in violation of 18 U.S.C. § 924(c)(1)(A)(ii). (D.Ct. No. 4:05-cr-00672-JGZ, Doc. 167.) The plea agreement provided for a sentencing range of 180 to 360 months in prison and the dismissal of the remaining counts of carjacking and conspiracy to commit carjacking, in violation of 18 U.S.C. § 2119(1), as well as a second violation of 18 U.S.C. § 924(c) for brandishing a firearm during a carjacking. (*Id.* at 4.)

At sentencing on March 13, 2007, the district court imposed concurrent terms of imprisonment of 168 months for each robbery count and a consecutive term of 120 months for the § 924(c) violation. (D.Ct. No. 4:05-cr-00672-JGZ, Doc. 210.)

On January 9, 2009, the Ninth Circuit dismissed Mr. Torres's direct appeal based on the appeal waiver in his plea agreement. *United States v. Torres*, 309 Fed. Appx. 94 (9th Cir. 2009). He did not file a petition for certiorari and his conviction became final on April 9, 2009. *See Clay v. United States*, 537 U.S. 522, 527 (2003).

On June 24, 2016, within one year after this Court in *Johnson v. United States*, 576 U.S. 591 (2015), struck down the residual clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), Mr. Torres filed a first petition under 28 U.S.C. § 2255 that challenged the constitutionality of his 2007 conviction and 10-year sentence under § 924(c)(1)(A)(ii) for brandishing a firearm during a "crime of violence," i.e., Hobbs Act robbery. (D.Ct. No. 4:16-cv-00406-JGZ, Doc. 1.) He argued

that *Johnson*'s rule applied equally to the residual clause in the "crime of violence" definition in § 924(c)(3)(B) and that his predicate offense of Hobbs Act robbery did not categorically qualify under the force clause of § 924(c)(3)(A). (*Id.* at 2-14.)

On March 23, 2017, the district court ruled that the § 2255 petition was untimely under 28 U.S.C. § 2255(f)(3) because this Court had not yet applied *Johnson*'s rule to § 924(c)(3)(B). (D.Ct. No. 4:16-cv-00406-JGZ, Doc. 17 at 3.) The district court granted a certificate of appealability on "whether [the] conviction and sentence under § 924(c)(1)(A)(ii) violates due process in light of *Johnson*." (*Id.* at 6.)

Mr. Torres appealed. (9th Cir. No. 17-15820, DktEntry: 3.)

On June 24, 2019, while his appeal was pending, this Court in *United States v. Davis*, 139 S. Ct. 2319 (2019), struck down the residual clause in § 924(c)(3)(B).

On November 18, 2020, the government deliberately waived the limitations defense in light of *Davis*. (9th Cir. No. 17-15820, DktEntry: 30 at 6.) Instead, it argued that intervening circuit precedent in *United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020), *petition for cert. filed*, 2021 WL 276504 (U.S. Jan. 21, 2021) (No. 20-1000), established that Hobbs Act robbery under § 1951 categorically qualifies as a crime of violence under the force clause of § 924(c)(3)(A). (*Id.* at 7.) Mr. Torres argued that *Dominguez* was wrongly decided because the robbery statute facially penalizes threats of future harm to property and because district courts have instructed juries in Hobbs Act robbery trials that the crime encompasses causing a fear of economic loss to the value of property, which does not require a use or threat of violent physical force. (9th Cir. No. 17-15820, DktEntry: 27 at 7-10.)

On January 20, 2021, the Ninth Circuit affirmed the district court's judgment denying Mr. Torres's § 2255 petition. (App. 1a.) The court of appeals reasoned that its ruling in *Dominguez* "foreclosed" the contention that Hobbs Act robbery under § 1951 is not a crime of violence under § 924(c)(3)(A). (App. 2a.)[1]

REASONS FOR GRANTING THE PETITION

I. The decision below is incorrect.

Section 924(c) sets out mandatory minimum sentences for using or carrying a firearm "during and in relation to any crime of violence or drug trafficking crime" or for possessing a firearm "in furtherance of any such crime." 18 U.S.C. § 924(c)(1)(A). In determining whether an offense constitutes a predicate "crime of violence," the categorical approach applies. *Davis*, 139 S. Ct. at 2329 (voiding § 924(c)(3)(B)).

Section 924(c)(3)(A) defines a "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." This Court has interpreted the term "physical force" to mean "violent force—that is, force capable of causing physical pain or injury." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) (under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i)); *accord Stokeling v. United States*, 139 S. Ct. 544, 553-55 (2019) (holding that "physical force" under § 924(e)(2)(B)(i) includes force against the person necessary to overcome a victim's physical resistance to the

[1] The pending petition for a writ of certiorari in *Dominguez* presents whether an *attempted* Hobbs Act robbery under 18 U.S.C. § 1951 qualifies as a "crime of violence" under § 924(c)(3)(A). Petition for a Writ of Certiorari at i, *Dominguez v. United States*, No. 20-1000 (U.S. Jan. 21, 2021), 2021 WL 276504, at *i.

taking). The *Curtis Johnson* standard applies to the similarly worded force clause of § 924(c)(3)(A). *See, e.g.*, *United States v. Watson*, 881 F.3d 782, 784 (9th Cir. 2018).

A. The robbery statute is overbroad because it encompasses causing a fear of physical "injury" to "property."

The court of appeals concluded that the "least serious way" to commit Hobbs Act robbery is by causing "fear of bodily injury." *Dominguez*, 954 F.3d at 1260-61. The text of the Hobbs Act, however, facially defines "robbery" to include takings by means of "fear of injury, immediate or future, to [a] person or property." 18 U.S.C. § 1951(b)(1). Based on that plain statutory text, the least serious way to commit robbery, as defined in the Hobbs Act, is by causing a "fear" of "future" "injury" to "property." *See id.* Placing someone in fear of future injury to property does not categorically require an actual or threatened use of physical force that is "violent." *United States v. Chea*, Nos. 4:98-cr-20005-CW-1 & 4:98-cr-40003-CW-2, 2019 WL 5061085, at *8 (N.D. Cal. Oct. 2, 2019), *appeal docketed*, Nos. 19-10437, 19-10438 (9th Cir. Dec. 10, 2019). The district court in *Chea* explained:

> Where the property in question is intangible, it can be injured without the use of any physical contact at all; in that context, the use of violent physical force would be an impossibility. Even tangible property can be injured without using violent force. For example, a vintage car can be injured by a mere scratch, and a collector's stamp can be injured by tearing it gently.

Id. (footnote omitted).

Nothing in § 1951(b)(1) suggests that the "property" must be in the victim's physical custody, possession, or proximity when the robbery is committed. The fear of injury to property thus does not necessarily involve a fear of injury to the victim (or another person) by virtue of the property's proximity to the victim or another

person. *See 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").

At least one court of appeals that has considered the applicability of § 924(c)(3) to offenses involving injury to property has reached a similar conclusion. In *United States v. Bowen*, 936 F.3d 1091, 1107 (10th Cir. 2019), the Tenth Circuit concluded that an offense of federal witness retaliation committed by causing damage to property could not serve as a predicate "crime of violence" under the force clause of § 924(c)(3)(A) because it could be committed without a use or threat of violent physical force. The *Bowen* court reasoned:

> [a]s with force applied against or towards people, not all force applied against property is "inherently violent." . . . [T]here is not inherent violence in, for example, spray-painting another's car . . . or "threatening to throw paint on [another's] house . . . or . . . to pour chocolate syrup on his passport[.]" Nothing about those actions is inherently violent, so the mere fact that they damage property cannot make them crimes of violence under § 924(c)(3).

Id. (internal citations omitted).

Therefore, placing someone in fear of physical harm to property during a Hobbs Act robbery does not categorically require a use or threat of violent force.

B. The robbery statute is overbroad because it has been applied to encompass causing a fear of loss to the value of property.

The court of appeals found no "realistic probability" that courts would apply the robbery statute in a non-generic manner to "intangible economic interests," including to a fear of loss to the value of property. *Dominguez*, 954 F.3d at 1260-61 (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). In demonstrating

categorical overbreadth, a petitioner may point to "other cases" in which courts have applied the statute in a non-generic manner. *Duenas-Alvarez*, 549 U.S. at 193.

District courts have affirmatively instructed juries that Hobbs Act robbery—not extortion—encompasses causing a fear of future injury to tangible or intangible property, including anxiety of economic loss. *See, e.g.*, *United States v. Buck*, No. 4:13-cr-491, Doc. 412 at 12, 16, 22 (S.D. Tex. Aug. 28, 2015); *United States v. Tibbs*, No. 2:14-cr-20154-BAF-RSW-1, Doc. 34 at 20 (E.D. Mich. Aug. 29, 2014); *United States v. Kamahele*, No. 2:08-cr-00758-TC, Doc. 1112 at 42 (D. Utah Oct. 6, 2011). In *Kamahele*, for example, for several defendants charged with Hobbs Act robbery and § 924(c), the district court's jury instructions defined Hobbs Act robbery as "attempt[ing] to obtain property from another" by "wrongful use of actual or threatened force, violence, or fear," which the court defined to include "fear of injury, immediately or in the future, to . . . property." *Id.* at 44-45 (Instruction No. 38). The district court further defined "property" as "money and other tangible and intangible things of value" and "fear" to include "an apprehension, concern, or anxiety about . . . economic loss." *Id.* at 42 (Instruction No. 36). These instructions allowed the jury to convict for causing anxiety about future harm or economic loss to tangible or intangible property.

In sum, Hobbs Act robbery may be committed with only de minimis force or with no force at all with respect to the property, and without any actual or threatened physical contact with a person. These features mean that Hobbs Act robbery is not a categorical crime of violence under § 924(c)(3)(A).

II. The question presented is recurring and important.

The prevalence and importance of the issue warrants this Court's attention. Of the 144,121 offenders currently in federal prison for a federal conviction, 13.7 percent—or 19,744 people—were convicted under § 924(c). U.S. Sent. Comm'n, *Quick Facts: Federal Offenders in Prison* (June 2020), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_June2020.pdf.

In fiscal year 2019 alone, 3,142 offenders were convicted under § 924(c). U.S. Sent. Comm'n, *Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses* at 1 (May 2020), *available at* https://www.ussc.gov/research/quick-facts/section-924c-firearms. All but one of those was sentenced to prison, with an average sentence of 138 months, and 27 percent of those were also convicted of "robbery." *Id.* at 1-2.

Therefore, the question is recurring and important. It has not been, but should be, settled by this Court.

III. This case is an ideal vehicle.

This case is an ideal vehicle for consideration of the question presented because Mr. Torres presented the question to the court of appeals and this Court's resolution of the issue would affect the outcome of his case.

In addition, a circuit split has developed over whether an *attempted* Hobbs Act robbery categorically qualifies under § 924(c)(3)(A). Petition for a Writ of Certiorari at 2, *Dominguez v. United States*, No. 20-1000 (U.S. Jan. 21, 2021), 2021 WL 276504, at *2. The Seventh, Ninth, and Eleventh Circuits have held that attempted Hobbs Act robbery is a "crime of violence" under § 924(c)(3)(A) simply

because a completed Hobbs Act robbery is such a crime. *United States v. Ingram*, 947 F.3d 1021, 1025-26 (7th Cir.), *cert. denied*, 141 S. Ct. 323 (2020); *Dominguez*, 954 F.3d at 1261; *United States v. St. Hubert*, 909 F.3d 335, 349-52 (11th Cir. 2018). The Fourth Circuit disagreed and held that an attempted Hobbs Act robbery is not a crime of violence, even if a completed Hobbs Act robbery would otherwise qualify. *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). If this Court chooses to resolve the circuit split, it should address and resolve the underlying question of whether a completed Hobbs Act robbery categorically qualifies a crime of violence under § 924(c)(3)(A). If the Court believes that *Dominguez* or another pending case presents a better vehicle to do so, Mr. Torres asks that the Court hold his case pending resolution of the common issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 9th day of March, 2021.

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NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS TORRES, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 17-15820 D.C. Nos. 4:16-cv-00406-JGZ 4:05-cr-00672-JGZ-JR-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Jennifer G. Zipps, District Judge, Presiding

Submitted January 20, 2021**

Before: McKEOWN, CALLAHAN, and BRESS, Circuit Judges.

Federal prisoner Carlos Torres appeals from the district court's judgment denying his 28 U.S.C. § 2255 motion to vacate his conviction and sentence. We have jurisdiction under 28 U.S.C. § 2253. Reviewing de novo, *see United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014), we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Torres challenges his conviction and sentence under 18 U.S.C. § 924(c)(1)(A)(ii) for brandishing a firearm during a crime of violence. Torres's contention that Hobbs Act robbery, 18 U.S.C. § 1951, is not a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A) is foreclosed. *See United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020) (reaffirming that Hobbs Act robbery is a crime of violence under the elements clause of § 924(c)(3)). Torres asserts that *Dominguez* was wrongly decided, but as a three-judge panel, we are bound by the decision. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (three-judge panel is bound by circuit precedent unless that precedent is "clearly irreconcilable" with intervening higher authority). The district court therefore properly denied Torres's § 2255 motion. *See Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006) (en banc) (court "may affirm on any ground supported by the record, even if it differs from the rationale used by the district court").

AFFIRMED.