

No: _____

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC KAMAHELE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

SCOTT KEITH WILSON
Federal Public Defender
BENJAMIN C. McMURRAY
Counsel of Record
46 West Broadway, Suite 110
Salt Lake City, UT 84101
Tel. (801) 524-4010
Benji_McMurray@fd.org
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

QUESTIONS PRESENTED

1. Model jury instructions define Hobbs Act robbery, 18 U.S.C. § 1951, to include takings caused by fear of future economic harm to “intangible property.” While such conduct could be a “crime of violence” under the residual clause of 18 U.S.C. § 924(c), this Court struck down the residual clause in *United States v. Davis*, 139 S.Ct. 2139 (2019).

Is Hobbs Act robbery categorically a “crime of violence” under § 924(c)’s “force clause”?

2. Petitioner Eric Kamahele was convicted of § 924(c) based on Hobbs Act robbery. Following the Tenth Circuit pattern jury instructions, the court instructed the jury that Hobbs Act robbery was a “crime of violence” under 18 U.S.C. § 924(c) and that it could be committed by causing fear of future economic harm to “intangible property.”

Did the court violate Mr. Kamahele’s due process rights when it told the jury he was guilty of § 924(c) if he committed Hobbs Act robbery by threatening future harm to intangible property?

3. Mr. Kamahele was also convicted of § 924(c) based on a crime of violence that could be committed recklessly.

Does a crime that can be committed recklessly qualify categorically as a “crime of violence” under the force clause of § 924(c)?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
INDEX TO APPENDIX	ii
TABLE OF AUTHORITIES	iii
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW.....	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	4
I. Hobbs Act robbery.....	5
II. VICAR	6
REASONS FOR GRANTING THE WRIT	7
I. The circuits have created a split of authority regarding the scope of Hobbs Act robbery that this Court must resolve.....	7
II. By ignoring the jury instructions that <i>it</i> promulgated, the Tenth Circuit has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court’s supervisory power.....	12
III. The Court should grant certiorari to resolve a circuit split about whether an offense that can be committed recklessly is categorically a crime of violence under the force clause of § 924(c).....	16
IV. This case is an excellent vehicle to resolve these questions.	16
CONCLUSION.....	17

INDEX TO APPENDIX

Decision of the Tenth Circuit Court of Appeals, <i>United States v. Kamahele</i> , Case No. 17-4154, 822 Fed.Appx. 848 (10th Cir. Aug. 11, 2020)	A1
Selected Jury Instructions given at trial <i>United States v. Kamahele</i> , Case No. 2:08-cr-758 (D. Utah Oct. 6, 2011)	A20

TABLE OF AUTHORITIES

Federal Cases

<i>De Leon v. Lynch</i> , 808 F.3d 1224 (10th Cir. 2015)	8
<i>Descamps v. United States</i> , 570 U.S. 254 (2013)	7
<i>Johnson v. United States</i> , 135 S.Ct. 2551 (2015)	4
<i>United States v. Hamilton</i> , 889 F.3d 688 (10th Cir. 2018)	7
<i>United States v. Angelos</i> , 345 F. Supp. 2d 1227 (D. Utah 2004)	15
<i>United States v. Bowen</i> , 936 F.3d 1091 (10th Cir. 2019)	7
<i>United States v. Davis</i> , 139 S.Ct. 2139 (2019)	<i>passim</i>
<i>United States v. Hopper</i> , 723 Fed. App'x 645 (10th Cir. 2018)	8
<i>United States v. Kamahele</i> , Case No. 17-4154, 822 Fed.Appx. 848 (10th Cir. Aug. 11, 2020)	1
<i>United States v. Libby</i> , 880 F.3d 1011 (8th Cir. 2018)	8
<i>United States v. Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America</i> , 780 F.2d 267 (3d Cir. 1986) .	8
<i>United States v. Mann</i> , 899 F.3d 898 (10th Cir. 2018)	6, 16
<i>United States v. Melgar-Cabrera</i> , 892 F.3d 1053 (10th Cir. 2018)	5, 6, 13
<i>United States v. Orona</i> , 923 F.3d 1197 (9th Cir. 2019)	16
<i>United States v. Orona</i> , 942 F.3d 1159 (9th Cir. 2019)	16
<i>United States v. Orona</i> , 987 F.3d 892 (9th Cir. Feb. 18, 2021)	16
<i>United States v. Titties</i> , 852 F.3d 1257 (10th Cir. 2017)	8
<i>United States v. Torres-Miguel</i> , 701 F.3d 165 (4th Cir. 2012)	8

Federal Statutes

18 U.S.C. § 924	<i>passim</i>
18 U.S.C. § 1951.....	2, 4, 8, 9
18 U.S.C. § 1959	4, 6
18 U.S.C. § 3553	15
28 U.S.C. § 1254	1
28 U.S.C. § 2255	4, 5, 6, 17

Other

Sup. Ct. R. 10(a).....	12
Tenth Circuit, Crim. Pattern Jury Inst. §2.70 (2021)	10, 13
<i>Too Severe?: A Defense of the Federal Sentencing Guidelines (And a Critique of Federal Mandatory Minimums)</i> , 56 Stan. L. Rev. 1017, 1044-48 (2004). 56 Stan. L. Rev. 1017 (2004)	15
USSG §2B3.1	15
USSG §2K2.4	15

PETITION FOR WRIT OF CERTIORARI

Petitioner Eric Kamahale respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The Tenth Circuit's unpublished decision is available at 822 Fed.Appx. 848 (10th Cir. Aug. 11, 2020) and is attached in the Appendix at A1.

STATEMENT OF JURISDICTION

The Tenth Circuit entered its decision on August 11, 2020, and denied Petitioner's request for rehearing on November 13, 2020. On March 19, 2020, this Court extended the filing deadline for all cases to 150 days as a result of the COVID pandemic. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

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

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

(c)(3) For purposes of this subsection, the term “crime of violence” means an offense that is a felony and –

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

18 U.S.C. § 1951. Interference with commerce by threats or violence.

(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 family or anyone in his company at the time of the taking or obtaining.

Tenth Circuit Pattern Jury Instruction 2.70

[ROBBERY] [EXTORTION] BY FORCE, VIOLENCE, OR FEAR 18
U.S.C. § 1951(a) (HOBBS ACT)

The defendant is charged in count ___ with a violation of 18 U.S.C. section 1951(a), commonly called the Hobbs Act.

This law makes it a crime to obstruct, delay or affect interstate commerce by [robbery] [extortion].

To find the defendant guilty of this crime you must be convinced that the government has proved beyond a reasonable doubt that:

First: the defendant obtained [attempted to obtain] property from another [without][with] that person's consent;

Second: the defendant did so by wrongful use of actual or threatened force, violence, or fear; and

Third: as a result of the defendant's actions, interstate commerce, or an item moving in interstate commerce, was actually or potentially delayed, obstructed, or affected in any way or degree;

[Robbery is the unlawful taking of personal property from another against his or her will. This is done by threatening or actually using force, violence, or fear of injury, immediately or in the future, to person or property.]

[Extortion is the obtaining of or attempting to obtain property from another, with that person's consent, induced by wrongful use of actual or threatened force, violence, or fear. The use of actual or threatened force, violence, or fear is "wrongful" if its purpose is to cause the victim to give property to someone who has no legitimate claim to the property.]

"Property" includes money and other tangible and intangible things of value that are transferable – that is, capable of passing from one person to another.

"Fear" means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances.

"Force" means an act capable of causing physical pain or injury to another person. This requires more than the slightest offensive touching, but may consist of only the degree of force necessary to inflict pain.

"Obstructs, delays, or affects interstate commerce" means any action which, in any manner or to any degree, interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in interstate commerce.

The defendant need not have intended or anticipated an effect on interstate commerce. You may find the effect is a natural consequence

of his actions. If you find that the government has proved beyond a reasonable doubt that the defendant intended to take certain actions—that is, he did the acts charged in the indictment in order to obtain property—and you find those actions actually or potentially caused an effect on interstate commerce, then you may find the requirements of this element have been satisfied.

STATEMENT OF THE CASE

Petitioner Eric Kamahele was prosecuted for his involvement in the Tongan Crip Gang (TCG). Among other things, he was convicted of two counts of violating 18 U.S.C. § 924(c). These convictions were for possessing a firearm during (1) Hobbs Act robbery in violation of 18 U.S.C. § 1951 and (2) assault with a dangerous weapon in violation of 18 U.S.C. § 1959(a)(3) (Violent Crimes in Aid of Racketeering, or VICAR). As a result of the two § 924(c) convictions, Mr. Kamahele was sentenced to 30 years in prison: 5 years for the first § 924(c) conviction, 25 years for the second, and no additional time for the other counts of conviction.

After an unsuccessful appeal, Mr. Kamahele filed a timely pro se § 2255 motion attacking his conviction on various grounds. While that petition was still pending, this Court issued its decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015). With the help of appointed counsel, Mr. Kamahele argued in an amended petition that his § 924(c) convictions violated due process because they were based on the unconstitutionally vague residual clause. The district court denied these claims as untimely. The Tenth Circuit stayed the appeal pending this court’s decision in *United States v. Davis*, 139 S.Ct. 2139 (2019). And following the *Davis* decision, the government asked the court to deny Mr. Kamahele’s due process claims on the merits.

I. Hobbs Act robbery

With respect to Hobbs Act robbery, Mr. Kamahale argued in the Tenth Circuit that the district court violated due process when it instructed the jury that Hobbs Act robbery was a “crime of violence” under § 924(c). At trial, the district court had instructed the jury that to convict Mr. Kamahale of Hobbs Act robbery, it must find:

First: the particular Defendant obtained or attempted to obtain property from another without that person's consent as alleged in the particular Count;

Second: the particular Defendant did so by wrongful use of actual or threatened force, violence, *or fear*.

(App. A22, JI 38.) The court further instructed the jury that “property” was “money and other tangible and *intangible things of value*.” (App. A20, JI 36 (emphasis added).) And “fear” included “an apprehension, concern, or anxiety about . . . economic loss.” *Id.* Thus, the jury was permitted to convict Mr. Kamahale if it found that he had caused anxiety about economic loss caused by future economic harm to intangible things of value.

With the residual clause in force, the court instructed the jury that Hobbs Act robbery was a crime of violence. (App. A24, JI 43.) However, Mr. Kamahale argued in his § 2255 motion that this broad understanding of the Hobbs Act took it beyond the reach of § 924(c)’s force clause. Thus, his conviction violated due process inasmuch as it was necessarily based on the unconstitutionally vague residual clause.

Without analyzing the breadth of the Hobbs Act robbery, the Tenth Circuit relied uncritically on its prior decision in *United States v. Melgar-Cabrera*, 892 F.3d

1053 (10th Cir. 2018), which had held that Hobbs Act robbery is categorically a crime of violence under § 924(c). (App. A7-A8.) The court “acknowledged that *Melgar-Cabrera* did not address the argument that Hobbs Act robbery is not a crime of violence because it can be accomplished by threatening injury to intangible property,” but it nevertheless concluded that *Melgar-Cabrera* controlled. (App. A8.)

II. VICAR

Mr. Kamahele also argued that his VICAR conviction was not categorically a crime of violence under § 924(c) because it could be committed recklessly. To establish a VICAR crime, the government must prove that the defendant committed a violent state crime. 18 U.S.C. § 1959(a). Here, the VICAR predicate was Utah aggravated assault. In his § 2255 motion, Mr. Kamahele argued that because Utah aggravated assault could be committed recklessly, the VICAR conviction did not qualify categorically as a crime of violence under § 924(c)’s force clause, so the § 924(c) conviction was necessarily based on the residual clause, violating due process.

There was no dispute that the underlying state assault—and therefore VICAR—could be based on reckless conduct. However, by the time the case was argued, the Tenth Circuit had held that reckless conduct *could* establish a § 924(c) violation in *United States v. Mann*, 899 F.3d 898 (10th Cir. 2018), and Mr. Kamahele conceded that the court was bound by that decision.

REASONS FOR GRANTING THE WRIT

Mr. Kamahale now asks this Court to review the denial of these two claims. Supreme Court review is necessary to resolve a circuit split about the scope of Hobbs Act robbery. And because the Tenth Circuit ignored the fact that *it* had promulgated the instructions used in Mr. Kamahale’s case, this Court must exercise its supervisory power to address this important question. The Court should also grant review to resolve a circuit split as to the mens rea required by § 924(c)’s force clause.

I. The circuits have created a split of authority regarding the scope of Hobbs Act robbery that this Court must resolve.

The outcome of the first issue presented depends on the reach of Hobbs Act robbery, a question that circuit courts have divided on. In determining whether an offense fits within the force clause of § 924(c), courts employ a “categorical approach,” under which they consider only “the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction.” *United States v. Bowen*, 936 F.3d 1091, 1102 (10th Cir. 2019). Under the categorical approach, the court must “look only to the statutory definitions”—*i.e.*, the elements—of a defendant’s [offense] and *not* ‘to the particular facts underlying [the offense]’” in determining whether the offense qualifies as a “crime of violence.” *Descamps v. United States*, 570 U.S. 254, 261 (2013) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)).

Model jury instructions are one of the primary sources for determining a statute’s reach in the categorical approach. *See, e.g., United States v. Hamilton*, 889

F.3d 688, 693 (10th Cir. 2018) (“[U]niform jury instructions provide useful guidance on the content of state law.”); *United States v. Hopper*, 723 Fed. App’x 645, 646 (10th Cir. 2018) (relying on Tenth Circuit pattern jury instructions to hold that 18 U.S.C. § 1201(a) was broader than the force clause of § 924(c)); *United States v. Libby*, 880 F.3d 1011, 1015-16 (8th Cir. 2018) (relying on pattern jury instructions, among other things, to conclude that Minnesota robbery falls within the ACCA’s force clause); *United States v. Titties*, 852 F.3d 1257, 1270 (10th Cir. 2017) (“Oklahoma’s Uniform Jury Instructions provide an additional source of state law guidance.”); *De Leon v. Lynch*, 808 F.3d 1224, 1231 n.9 (10th Cir. 2015) (“[T]he uniform jury instructions have often guided both the [Oklahoma Court of Criminal Appeals] and our court in defining the bounds of Oklahoma criminal law.”).

Under the categorical approach, a prior offense can qualify as a “crime of violence” only if *all* the conduct proscribed by a statute, “including the most innocent conduct,” matches or is narrower than the “crime of violence” definition. *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012). If the most innocent conduct penalized by a statute does not constitute a “crime of violence,” then the statute categorically fails to qualify as a “crime of violence.” Hobbs Act robbery has such breadth.

Hobbs Act robbery can be committed with a threat of injury to property. 18 U.S.C. §1951(b)(1). As used in the Hobbs Act, circuit courts have long held that the term “property” includes “intangible, as well as tangible property.” *United States v.*

Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, 780 F.2d 267, 281 (3d Cir. 1986) (describing the circuits as “unanimous” on this point). “The concept of ‘property’ under the Hobbs Act is an expansive one” that includes “*intangible assets*, such as rights to solicit customers and to conduct a lawful business.” *United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999) (emphasis added) (citing 18 U.S.C. §1951(a)), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.* 537 U.S. 393, 401 n.8 (2003); *see also United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction for threat “to slow down or stop construction projects unless his demands were met”). Thus, a defendant may commit a Hobbs Act robbery via threats to harm some intangible economic interest like a stock option or a contract right. Injury to intangible property is not necessarily accomplished through the use of physical force as required by §924(c)(3)(A).

Following these precedents, several circuits—including the Tenth— promulgated pattern jury instructions that extended Hobbs Act robbery to conduct that cause anxiety about future economic harm to intangible property. For example, in the Tenth Circuit, the “fear” required for Hobbs Act robbery may be fear of injury “immediately *or in the future*,” and the court defines “property” to include other

“intangible things of value.” 10th Cir., Crim. Pattern Jury Instr. §2.70 (2021).¹ This “fear” required for robbery is not limited to a fear of violence but includes “anxiety about . . . economic loss.” *Id.*

Similarly, the Fifth and Eleventh Circuits also adopted pattern jury instructions that extend Hobbs Act robbery to situations where the defendant causes fear of future injury to intangible property. 5th Cir., Pattern Jury Instr. (Crim. Cases), 2.73A (2015 ed.);² 11th Cir., Pattern Jury Instr. (Crim. Cases), O70.3 (2020).³ And a leading jury instruction treatise also includes intangible property for both Hobbs Act robbery and extortion. 3-50 Leonard B. Sand et al., Modern Fed. Jury Instr. Crim. ¶ 50.03 (2007).

To be sure, not all circuits have explicitly included intangible property in their model jury instructions for Hobbs Act robbery. The most interesting data point on this question is the Fifth Circuit, which recently promulgated a model definition of

¹ Available at <https://www.ca10.uscourts.gov/sites/default/files/clerk/Jury%20Instructions%202021%20Version.pdf> (last accessed Apr. 12, 2021).

² Available at <http://www.lb5.uscourts.gov/juryinstructions/Fifth/crim2015.pdf> (last accessed Apr. 12, 2021). The Note following Instruction 2.73A explains that for robbery cases, the instruction should be modified in the second element to replace “extortion” and its definition for “robbery” and its definition, but it calls for no change to the definition of “property” in the first element.

³ Available at <https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsCurrentComplete.pdf?revDate=20200227> (last accessed Apr. 12, 2021).

Hobbs Act robbery that requires injury to tangible property. 5th Cir., Pattern Jury Instr. (Crim. Cases), 2.73B (2019 ed.).⁴ But this new instruction does not take away from the significance of the old instruction that, like the Tenth Circuit’s instruction, explicitly extended Hobbs Act robbery to intangible property. The Fifth Circuit’s new instruction creates a split of authority about the breadth of Hobbs Act robbery that this court must resolve.

These pattern instructions show that Hobbs Act robbery extends beyond the limits of § 924(c)’s force clause, at least in some circuits. *See Davenport v. United States*, No. 16-15939, Order at 6-7 (11th Cir. Mar. 28, 2017) (Martin, J.) (granting COA on whether Hobbs Act robbery is an offense that categorically meets § 924(c)’s force clause, given the breadth of Eleventh Circuit pattern jury instruction). And for many years, federal district courts around the country used these instructions in Hobbs Act robbery trials. *See, e.g., United States v. Baker*, 2:11-cr-20020, Doc. 53 at 20 (D. Kan Sep. 15, 2011) (allowing conviction based on causing anxiety about future harm to intangible property); *United States v. Hennefer*, 1:96-cr-24 DS, Doc. 195 at 32, 35, 36 (D. Utah Jul. 9, 1997) (same); *United States v. Nguyen*, 2:03-cr-158 Doc. 157 at 28 (D. Nev. Feb. 10, 2005) (same); *United States*, 1:11-cr-20678, Doc. 229 at 12-13 (S.D. Fl. Feb. 6, 2012) (same); *United States*, 1:11-cr-94, Doc. 211 at 142 (D. Md. Jan. 29, 2013) (same); *United States*, 11-cr-334-APG, Doc. 197 at 15 (D. Nev.

⁴ Available at <https://www.lb5.uscourts.gov/viewer/?/juryinstructions/Fifth/crim2019.pdf> (last accessed Apr. 12, 2021).

July 28, 2015) (same). The fact that federal courts around the country for years have defined Hobbs Act robbery to include threats to harm intangible property establishes that Hobbs Act robbery does not fall categorically within the force clause of §924(c).

This Court should grant certiorari to resolve the split between those circuits that have given Hobbs Act robbery such breadth and those that have not. In light of the breadth several circuits have given to Hobbs Act robbery through their model jury instructions, and given that these instructions have actually been used in Hobbs Act robbery trials around the country, this Court should grant certiorari to decide whether this breadth takes Hobbs Act robbery beyond the reach of § 924(c)'s force clause.

II. By ignoring the jury instructions that *it* promulgated, the Tenth Circuit has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Even if this Court were ultimately unpersuaded that Hobbs Act robbery can be established by threats of future harm to intangible property going forward, the Court should grant certiorari because the Tenth Circuit has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Sup. Ct. R. 10(a). Rightly or wrongly, Mr. Kamahele was convicted under a version of the Hobbs Act that undeniably fell outside § 924(c)'s force clause, and it resulted in the mandatory imposition of 30 years in prison. This outcome was a result of the Tenth Circuit's pattern instruction, yet the Tenth Circuit

avoided responsibility for the error without providing any explanation for dodging the issue.

As noted above, the instructions given *in this case* permitted the jury to convict Mr. Kamahele if it found that he had caused anxiety about economic loss caused by future economic harm to intangible things of value. Consistent with the Tenth Circuit pattern instructions, the district court told the jury that to convict Mr. Kamahele of Hobbs Act robbery, it must find:

First: the particular Defendant obtained or attempted to obtain property from another without that person's consent as alleged in the particular Count;

Second: the particular Defendant did so by wrongful use of actual or threatened force, violence, *or fear*.

(App. A21, JI 38.) The court further instructed the jury that “property” was “money and other tangible and *intangible things of value*.” (App. A20, JI 36 (emphasis added).) And “fear” included “an apprehension, concern, or anxiety about . . . economic loss.” *Id.*

Despite the fact that these instructions tracked its own pattern instruction §2.70, the Tenth Circuit avoided discussing the contours of Hobbs Act robbery by taking refuge in *Melgar-Cabrera*, 892 F.3d 1053. It did so even though it “acknowledged that *Melgar-Cabrera* did not address the argument that Hobbs Act robbery is not a crime of violence because it can be accomplished by threatening injury to intangible property.” (App. A8.) For years, the Tenth Circuit had directed the lower courts through its pattern jury instructions that “property” threatened by a Hobbs

Act robbery can be an intangible economic interest. The Tenth Circuit’s refusal to consider how that breadth was unconstitutionally used to impose a mandatory 30-year prison sentence calls for this Court to exercise its supervisory authority and grant certiorari.

This Court should not be concerned that it could jeopardize the validity of § 924(c) convictions based on Hobbs Act robbery. For one thing, the problem here is the result of *the courts’* broad construction of the Hobbs Act. It would hardly be fair for courts to broadly construe the Hobbs Act when defendants go to trial, but then suddenly reverse course when they realize that this broad crime cannot then be used constitutionally as a § 924(c) predicate. To allow the Tenth Circuit to ignore what it “has understood [Hobbs Act robbery] to mean” for all these years “would indeed be ‘surprising’ and ‘extraordinary.’” *See Davis*, 139 S. Ct. at 2333.

Furthermore, the unavailability of § 924(c) in Hobbs Act robbery prosecutions does not undermine the government’s ability to seek long sentences for Hobbs Act robbery defendants who possess a firearm. The Sentencing Commission did not need congressional intervention to provide enhanced penalties for possessing a firearm during a robbery. USSG §2B3.1(b)(2). Although this enhancement does not apply if a defendant is also convicted of § 924(c), USSG §2K2.4, cmt. n.4, the mandatory penalties under § 924(c) drastically overstate the “value” the Sentencing Commission assigned to the gun in §2B3.1(b)(2). Courts and commentators have long recognized that mandatory minimums disrupt the rational application of the

federal sentencing Guidelines. *See, e.g.*, Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (And a Critique of Federal Mandatory Minimums)*, 56 Stan. L. Rev. 1017, 1044-48 (2004). In particular, § 924(c) and its mandatory stacking can result in sentences far greater than what 18 U.S.C. § 3553(a) requires. *See, e.g.*, *United States v. Angelos*, 345 F. Supp. 2d 1227, 1245-46, Table I (D. Utah 2004) (comparing sentences under “stacked” § 924(c) counts with some of the most serious violent crimes). In those rare cases where a sentence within the guideline range is not enough, the government can always ask the court to vary upward.

The constitutional error raised here—convicting Mr. Kamahele under the residual clause of § 924(c)—resulted in the mandatory imposition of decades in prison. This error occurred because the district court followed the Tenth Circuit’s definition of Hobbs Act robbery. Yet the Tenth Circuit has given no reason for deviating from it always “has understood [Hobbs Act robbery] to mean.” *See Davis*, 139 S. Ct. at 2333. Even if this Court ultimately were “to give [Hobbs Act robbery] a new meaning different from the one it has borne for the last three decades,” it would be “surprising” and “extraordinary” for this Court to allow the lower courts to quietly do so by judicial fiat and without any explanation. *See id.* This Court must grant certiorari to resolve the inconsistency in their definitions of Hobbs Act robbery.

III. The Court should grant certiorari to resolve a circuit split about whether an offense that can be committed recklessly is categorically a crime of violence under the force clause of § 924(c).

In addition to reviewing the scope of Hobbs Act robbery, this Court should grant certiorari to resolve a circuit split about whether § 924(c)'s force clause can be satisfied by crimes that are committed recklessly. *Compare, e.g., United States v. Orona*, 923 F.3d 1197 (9th Cir. 2019),⁵ with *United States v. Mann*, 899 F.3d 898 (10th Cir. 2018). Mr. Kamahele conceded below that the court was bound by the Tenth Circuit's decision in *Mann*. In the face of a circuit split, the Court should grant certiorari. Indeed, it has already granted certiorari and heard argument on a related issue in *Borden v. United States*, 19-5410 (argued Nov. 23, 2020). If the Court decides *Borden* in favor of the petitioner, it should remand this case to the Tenth Circuit or grant certiorari so this Court can decide whether § 924(c)'s force clause can be satisfied by an offense that can be committed recklessly.

IV. This case is an excellent vehicle to resolve these questions.

This case is an ideal vehicle to resolve the conflict. The questions presented were preserved below, and there are no procedural hurdles to this Court's review of those questions. The statutory definitions at issue here have been in force for decades, and it is only in the wake of *Davis*—when lower courts recognized the § 924(c)

⁵ The Ninth Circuit granted rehearing en banc in *Orona*. 942 F.3d 1159 (9th Cir. 2019). It then stayed the case pending a decision from this Court in *Borden*, but when the petitioner in *Orona* died, it dismissed the appeal as moot. 987 F.3d 892 (9th Cir. Feb. 18, 2021).

implications of their broad construction of the Hobbs Act—that they have rejected petitioners' claims for relief without even acknowledging the breadth they created prior to *Davis*.

This case is also an excellent vehicle because Mr. Kamahele was convicted at trial, and the jury was explicitly instructed that it should convict him if it found he had caused anxiety about future harm to intangible property. In contrast to cases where the defendant pleaded guilty, here it is not merely a theoretical possibility that Mr. Kamahele could be convicted under the residual clause of § 924(c). The jury was specifically charged in a way that could be sustained *only* under the residual clause of § 924(c). As a matter of law, he should be entitled to relief.

The fact that Mr. Kamahele's case comes before this court on a § 2255 motion shows that this is not a recent aberration from precedents that were settled against him. The use of similar instructions in cases old and new from around the country demonstrate the great need for this Court to address the constitutionality of using such convictions as § 924(c) predicates under the force clause.

CONCLUSION

The Court should grant the writ to resolve these important questions.

Respectfully submitted,

SCOTT KEITH WILSON
FEDERAL PUBLIC DEFENDER

/S/ **Benjamin C. McMurray**

Assistant Federal Public Defender,
District of Utah
Counsel of Record for Petitioner
46 West Broadway, Suite 110
Salt Lake City, UT 84101

Salt Lake City, Utah
April 12, 2021

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC KAMAHELE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF SERVICE

Benjamin C. McMurray, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Noel Francisco
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530-001

It is further attested that the envelope was deposited with the United States Postal Service on April 12, 2021, and all parties required to be served have been served.

S/ Benjamin C. McMurray
Assistant Federal Public Defender,
District of Utah
Counsel of Record for Petitioner
46 W Broadway Ste, 110
Salt Lake City, UT 84101

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC KAMAHELE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF MAILING

Benjamin C. McMurray, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

It is further attested that the envelope was deposited with the United States Postal Service on April 12, 2021, and all parties required to be served have been served.

/S/ Benjamin C. McMurray
Assistant Federal Public Defender
Counsel of Record for Petitioner
46 West 300 South, Suite 110
Salt Lake City, UT 84101
(801) 524-4010