No. 20-8275

In The Supreme Court Of The United States

Paul Xavier Espinoza, Desmond Quinntrail Hayes,
Mitchell Pulido, and Adolph Vytautas Stankus,

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

Reply Brief for the Petitioners

RENE L. VALLADARES
Federal Public Defender
*Wendi L. Overmyer
*Amy B. Cleary
Assistant Federal Public Defenders
Office of the Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Wendi_Overmyer@fd.org
Amy_Cleary@fd.org
*Counsel for Petitioners

Dated: October 21, 2021

Table of Contents

Table of Authorities

Federal Constitution **Page(s)**

Federal Cases

Federal Statutes

Supreme Court Rules

Other

Reply Brief in Support of Petition for Certiorari

Petitioners Paul Xavier Espinoza, Desmond Quinntrail Hayes, Mitchell Pulido, and Adolph Vytautas Stankus have jointly petitioned for a writ of certiorari as to whether the federal Circuits now interpret Hobbs Act robbery, 18 U.S.C. § 1951(a), too narrowly and against its plain language by requiring violent physical force as an offense element. This question is pressing given *United States v. Davis*, 139 S. Ct. 2319 (2019), which holds the 18 U.S.C. § 924(c) residual clause is unconstitutionally vague, violating the Due Process Clause, and which the government does not dispute is retroactive to cases on collateral review like Petitioners'. U.S. Const. amend. V; Government Brief in Opposition (Gov. Brief) at 7-11.

Because only the physical force clause of 18 U.S.C. § 924(c) remains, Circuits now interpret offenses that used to be caged within the residual clause, such as Hobbs Act robbery, to make them "fit" within the physical force clause. The resulting unprecedented narrowing of Hobbs Act robbery to include only violent physical force—which the Circuits did not require of Hobbs Act robbery before *Davis*—requires review by this Court. The federal circuit consensus that Hobbs Act robbery necessarily requires the use, attempted use, or threatened use of violent physical force conflicts with the plain language of 18 U.S.C § 1951. It is imperative this Court decide the proper interpretation of Hobbs Act robbery so defendants are not mandatorily incarcerated for firearms offenses that do not truly fit the § 924(c) statutory definition.

I. The categorical approach renders the government's offense conduct recitation irrelevant to the Question Presented.

This Court, in both *Johnson* and *Davis*, specifically requires applying the categorical approach for crime-of-violence analysis, as established by *Taylor* and its progeny. *Johnson v. United States*, 576 U.S. 591, 596 (2015); *United States v. Davis*, 139 S. Ct. 2319, 2326-36 (2019); *See Taylor*, 495 U.S. at 602; *see also Descamps v. United States*, 570 U.S. 254, 263-64 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). In applying categorical analysis, courts neither examine the underlying facts nor make a sufficiency-of-the-evidence determination. *Mathis*, 136 S. Ct. at 2251-52 (reiterating rules for categorical and modified categorical analysis, prohibiting consideration of "the particular facts underlying the [] convictions"). How a defendant committed the offense "makes no difference" to the crime of violence determination. *Id.* at 2251.

Thus, the government's recitation of the underlying offense conduct in its oppositional brief is irrelevant to this Court's categorical analysis. Gov. Brief at 3-5. Only the *statute* underlying the offense is relevant to categorical analysis of the Petitioners' 18 U.S.C. § 924(c) convictions and sentences, not the *conduct* underlying that offense. *Davis*, 139 S. Ct. at 2328-36 (explaining long-standing rule limiting categorical analysis to statutory elements, not the particular facts of an offense); *see also Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) ("[W]e examine what the [] conviction necessarily involved, not the facts underlying the case. . . .") (internal citations omitted). The Court should thus disregard the government's recitation of offense conduct when determining whether to grant review.

II. The Hobbs Act robbery statute's plain language is overbroad.

Hobbs Act robbery plainly encompasses causing fear of future injury to property—either tangible or intangible. *See* Petition for Certiorari (Pet.) at 14-22. In response, the government does not dispute that threats to intangible property can be made without violent physical force; it instead relies on the Ninth Circuit's holding that Hobbs Act robbery nonetheless constitutes a crime of violence under § 924(c)'s physical force clause. Gov. Brief at 8-12 (citing *United States Dominguez*, 954 F.3d 1251 (9th Cir. 2020), *pet. for cert. pending*, No. 20-1000 (filed Jan. 21, 2021)). The government also incorporates the Ninth Circuit's erroneous finding that there is no "realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest." *See* Gov. Brief at 8-9 (incorporating Brief for the United States in Opposition at 10, *Steward v. United States*, No. 19-8043 (U.S. May 21, 2020) (quoting *Dominguez*, 954 F.3d at 1260), *cert. denied*, 141 S. Ct. 167 (2020) ("Gov. *Steward* Brief")).

But the government, like *Dominguez*, misapplies the categorical approach. When a "statute explicitly defines a crime more broadly" than the crime of violence definition, "no 'legal imagination' is required to hold that a realistic probability [of prosecution] exists"—the "statute's greater breadth is evident from its text." *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc), *abrogated on other grounds by United States v. Stitt*, 139 S. Ct. 399 (2018).

Dominguez does not bind this Court. And *Dominguez* was also wrongly decided, conflicting with both this Court's and the Ninth Circuit's precedent. Pet. at

18-22 (citing, among other cases, *Descamps*, 570 U.S. at 261, and *Grisel*, 488 F.3d at 850). In addition, the "rule of lenity's teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 139 S. Ct. at 2333.

Therefore, Hobbs Act robbery under 18 U.S.C. § 1951(a) is overbroad because it can be committed by causing "fear of injury" to intangible property, rather than requiring the violent physical force necessary under § 924(c)'s physical force clause. Pet. at 14-18. The government, moreover, does not claim that Hobbs Act robbery is divisible. *See* Gov. Brief at 7-10; Gov. *Steward* Brief at 6-12. An overbroad, indivisible offense cannot categorically be a crime of violence. *Mathis*, 136 S. Ct. at 2251-52.

The defendant in *Dominguez* has requested review of the Ninth Circuit's attempted Hobbs Act robbery holding relative to § 924(c)'s physical force clause, which remains pending—an issue upon which this Court granted review in *United States v. Taylor*, No. 20-1459 (oral argument scheduled for Dec. 7, 2021). Gov. Brief at 7 n.1, and 10. But review of attempted Hobbs Act robbery under § 924(c)'s physical force clause does not foreclose review of *substantive* Hobbs Act robbery here. And this Court may grant a writ of certiorari in *Dominguez* on any question presented by the record and law, even if not raised by a petitioner. *Izumi v. U.S. Philips Corp.*, 510 U.S. 27, 32-33 and n.6 (1993) (noting that a question presented "does not limit our power to decide important questions not raised by the parties.") (listing cases); *see also* Supreme Court Rule 24(1)(a) ("At its option, however, the

Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.").

The Ninth Circuit's error in *Dominguez* and in the other Circuits as to substantive Hobbs Act robbery under § 924(c)'s physical force clause remain binding on the courts below, and the Petitioners present this Court the opportunity to correct those errors here. Because Hobbs Act robbery is both overbroad and indivisible, a conviction under 18 U.S.C. § 1951 cannot qualify as a predicate offense under 18 U.S.C. § 924(c)'s physical force clause. The Ninth Circuit's contrary holding is legally erroneous and requires correction by this Court.

III. The government's response fails to acknowledge this Court's recent interpretation of the physical force clause in *Borden*, which further demonstrates the need for review.

Whether a predicate offense qualifies under § 924(c)'s physical force clause is a question that must be examined under the law in place today—including this Court's recent clarification that the force clause requires the intentional use of force. *Borden v. United States*, 141 S. Ct. 1817 (2021).

Two days after Petitioners filed their petition for a writ of certiorari, this Court issued *Borden* that held the use of force must be intentional for an offense to qualify under a physical force clause—settling a circuit split on this issue. *Borden*, 141 S. Ct. at 1826. By relying on pre-*Borden* Circuit cases in its response, the government neither acknowledges *Borden* nor the now open issue of whether Hobbs Act robbery requires the intentional use of force required by 18 U.S.C. § 924(c). Gov. Brief at 8-9.

Hobbs Act robbery lacks the specific intent to use force, thus failing to qualify as a crime of violence under *Borden*. *Borden* explains it is insufficient under the physical force clause's mens rea requirement for an offense to merely require intentional performance of a particular act. *Borden*, 141 S. Ct. at 1826. Both the *Borden* plurality and concurring opinions agreed that, to satisfy the physical force clause, the offense elements must require a *specific intent to harm* another. *Id.* at 1825-27 (plurality opinion), 1834 (Thomas, J., concurring). Thus, *Borden* requires intentional use of force—there must be a "conscious object (not the mere recipient) of the force." *Id.* at 1826. What is dispositive under the physical force clause, the plurality underscored, is not that a defendant's prior actions *did cause harm*, but that–when he acted–he *intended to harm* another. *Id.* at 1831 & n.8. Justice Thomas, who supplied the fifth vote, agreed with the plurality on that critical point: the elements clause only captures intentional conduct "designed to cause harm" to another. *Id.* at 1835 (Thomas, J., concurring).

Hobbs Act thus robbery lacks *Borden*'s specific intent requirement. Hobbs Act robbery requires only the general intent to take money or property from a person or in the person's presence. Ninth Circuit Manual of Model Criminal Jury Instructions, § 8.143A Hobbs Act—Robbery (Mar. 2021); *see also United States v. García-Ortiz*, 904 F.3d 102, 108-09 (1st Cir. 2018) (noting Hobbs Act robbery includes "an implicit mens rea element of general intent . . ."); *United States v. Gray*, 260 F.3d 1267, 1283 (11th Cir. 2001) (rejecting a requirement

of specific intent to commit Hobbs Act robbery). Hobbs Act robbery requires no specific intent to harm another person or property.

Given *Borden*, this Court's review is necessary as Hobbs Act robbery can be violated with unintentional force. It does not require that force, attempted force, or threatened force to be intentionally directed against another person or property.

IV. The government does not dispute that proper interpretation of 18 U.S.C. § 924(c) is of exceptional, national importance.

Because of the Circuits' misapplication of categorical analysis to the elements of Hobbs Act robbery, Petitioners Hayes and Pulido remain in prison serving mandatory sentences under 18 U.S.C. § 924(c). Petitioners Espinoza and Stankus have completed their mandatory sentences, but remain serving longer supervised release terms than would otherwise be imposed, because of the § 924(c) convictions.[1]

And § 924(c) convictions continue unabated nationwide. In fiscal year 2020, over 2500 individuals were convicted of a § 924(c) offense, at least 22% of which involved a robbery offense, with an average sentence of 138 months (11½ years) in prison. U.S. Sent. Comm'n, *Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses* (May 2021).[2]

---

[1] Petitioners' convictions under § 924(c) led to higher supervision terms than would have been imposed for Hobbs Act robbery. Because 18 U.S.C. § 924(c) carries a statutory imprisonment maximum of life imprisonment, it is a Class A felony with a five-year maximum supervised release term. In contrast, Hobbs Act robbery, with a 20-year imprisonment statutory maximum, is a Class C felony and carries a three-year maximum supervised release term. *See* 18 U.S.C. § 1951(a); 18 U.S.C. § 3559(a) (felony classifications); 18 U.S.C. § 3583(b) (authorized terms of supervised release).

[2] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY20.pdf.

Given the vast numbers of defendants' lives affected by the Circuits' interpretation of 18 U.S.C. § 924(c), this Court's intervention is necessary. Petitioners ask this Court to review the Circuit's misapplication of the categorical approach to the Hobbs Act robbery statute to ensure compliance with the Constitution and Supreme Court post-*Davis* precedent.

Conclusion

Petitioners request the Court grant this joint petition for a writ of certiorari.

Dated: October 21, 2021.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Wendi L. Overmyer
Wendi L. Overmyer
Assistant Federal Public Defender
Office of the Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Wendi_Overmyer@fd.org

/s/ Amy B. Cleary
Amy B. Cleary
Assistant Federal Public Defender
Office of the Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Amy_Cleary@fd.org