No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEITH LAMAR LOTT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

QUESTION PRESENTED

Whether the Court should grant, vacate, and remand this case to permit the lower court to consider whether a conviction for Hobbs Act robbery under 18 U.S.C. § 1951 qualifies as a "crime of violence" in light of *Borden v. United States*, No. __ S. Ct. __, 2021 WL 2367312 (2021)?

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Lott*, 834 F. App'x 370 (9th Cir. 2021), 17-55187 (memorandum disposition affirming district court's denial of habeas petition, issued January 26, 2021);

- *United States v. Lott*, 95-CR-72, 16-CV-1575, S.D. Ca. (district court's denial of habeas petition, issued February 9, 2017);

- *United States v. Nelson*, 137 F.3d 1094 (9th Cir. 1998), 96-50396, (opinion denying direct appeal of conviction after jury trial, February 26, 1998);

- *United States v. Lott*, 95-CR-72 (judgment and commitment after jury trial, July 10, 1996).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes

IN THE SUPREME COURT OF THE UNITED STATES

KEITH LAMAR LOTT,
Petitioner,

- v. -

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Keith Lamar Lott respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on January 26, 2021.

OPINION BELOW

The district court denied Mr. Lott's petition for a writ of habeas corpus under 28 U.S.C. § 2255 (attached here as Appendix A). The Court of Appeals affirmed this denial. *See United States v. Lott,* 834 F. App'x 370 (9th Cir. 2021) (attached here as Appendix B).

JURISDICTION

On January 26, 2021, the Court of Appeals affirmed the denial of Mr. Lott's habeas petition. *See* Appendix B. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND SENTENCING GUIDELINE INVOLVED

The federal statute criminalizing Hobbs Act robbery states:

> (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.

The federal statute criminalizing use of a firearm during a crime of violence defines a "crime of violence" as a felony that:

> (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.

18 U.S.C. § 924(c)(3).

STATEMENT OF THE CASE

In 1996, a jury found Mr. Lott guilty of two counts of aiding and abetting interference with commerce by robbery (also known as "Hobbs Act robbery"),

in violation of 18 U.S.C. § 1951, and two counts of using and carrying and aiding and abetting the use and carrying of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2. Under § 924(c)(1)(C), Mr. Lott's first firearm count carried a consecutive mandatory minimum sentence of five years, and his second firearm count carried a consecutive mandatory minimum sentence of twenty years. The district court imposed a sentence of 123 months' custody on the robbery counts and the mandatory minimum sentence of twenty-five consecutive years on the § 924(c) counts.

In 2015, this Court held in *Johnson v. United States*, 576 U.S. 591 (2015), that the "residual clause" of the Armed Career Criminal Act was void for vagueness. Within one year of *Johnson*, Mr. Lott filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 arguing that the nearly-identical "residual clause" of § 924(c)(3)(B) was similarly unconstitutional.

The district court denied Mr. Lott's habeas petition in part because it found that Hobbs Act robbery under § 1951 remained a crime of violence under the alternative "elements clause" at § 924(c)(3)(A). *See* Appendix A at 8–10. Although prior Ninth Circuit case law had only held that § 1951 was a crime of violence under the § 924(c) "residual clause," the district court relied on the unpublished decision in *United States v. Howard*, 650 Fed. App'x. 466, 468 (9th Cir. 2016), which had explicitly held that Hobbs Act robbery involved the "use, attempted use, or threatened use of physical force" under § 924(c)(3)(A). *See* Appendix A at 9–10.

Although it denied his petition, the district court granted Mr. Lott a certificate of appealability.

On appeal to the Ninth Circuit, Mr. Lott argued that Hobbs Act robbery fell only under the residual clause, rather than the elements clause. The Ninth Circuit disagreed, citing its recently-issued decision in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020). *See* Appendix B. Although it acknowledged Mr. Lott's argument that *Dominguez* was wrongly decided, the Ninth Circuit explained that as a three-judge panel, it was "bound by circuit precedent unless that precedent is 'clearly irreconcilable' with intervening higher authority." *See* Appendix B (quoting *Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir. 2003) (en banc)). This petition for a writ of certiorari follows.

SUMMARY OF THE ARGUMENT

In *Borden*, this Court recently held that statutes with a mens rea of "recklessness" do not qualify as "violent felonies" for purposes of the elements clause of the Armed Career Criminal Act in 18 U.S.C. § 924(e)(2)(B)(i). Because Hobbs Act robbery—like crimes with a mens rea of recklessness—only requires a defendant to know that he is committing the acts in question—not what the *consequences* of those acts will be, it lacks the necessary mens rea to be a crime of violence. Accordingly, the Court should grant Mr. Lott's petition, vacate the lower court's order, and remand with instructions for the lower court to apply *Borden* to the crime of Hobbs Act robbery.

REASONS FOR GRANTING THE PETITION

I.

The Court should issue a GVR order to provide the lower court an opportunity to apply *Borden* to Hobbs Act robbery in the first instance.

C. This Court frequently issues GVR orders to apply its intervening authority.

This Court has frequently issued GVR orders when its own intervening decisions cast doubt on the legal premises used by lower courts to render a given decision. *See, e.g.,* L*awrence v. Chater,* 516 U.S. 163, 166–67 (1996); *Stutson v. United States*, 516 U.S. 193, 195–96 (1996). Such orders, the Court has observed, have the advantage of: (i) assisting the lower court by flagging an issue that might not have received due consideration; (ii) assisting this Court by permitting the lower court to weigh in prior to granting plenary review; and (iii) conserving this Court's scarce resources. *See Lawrence*, 516 U.S. at 167. A GVR order is particularly appropriate when "intervening developments reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a determination may determine the ultimate outcome of the matter." *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (citation and internal punctuation omitted).

This Court has frequently issued GVR orders in light of its own decisions construing certain federal criminal statutes. *See Johnson v. United States*, 576 U.S. 591 (2015) (holding that the ACCA residual clause is unconstitutionally vague); *Mathis v. United States*, 136 S. Ct. 2243 (2016) (explicating the proper use of the categorical and modified categorical approaches). Here, the Court's recent decision

in *Borden* clarifying the mens rea necessary to satisfy the force clause applies to other criminal statutes; thus, a GVR order will permit the lower court to apply *Borden*'s rationale in analogous contexts and conserve this Court's limited resources.

D. Because Hobbs Act robbery only requires knowledge of one's *actions*—rather than their *consequences*—it does not satisfy the elements clause under *Borden*.

In *Borden*, a plurality of the Court began by "setting out four states of mind" that give rise to criminal liability: "purpose, knowledge, recklessness, and negligence." 2021 WL 2367312, at *4. The first two—purpose and knowledge—are the "most culpable levels in the criminal law's mental-state hierarchy." *Id.* (quotations omitted). A person acts purposefully when "he consciously desires a particular result" and acts knowingly when "he is aware that a result is practically certain to follow from his conduct, whatever his affirmative desire." *Id.* (quotations and alterations omitted). In both situations, the person is aware—not only of his actions—but also the *outcome* or *result* that will follow from these actions, i.e., that he will "injure[] another knowingly." *Id.* In other words, the person "makes a deliberate choice with full awareness of consequent harm." *Id.*

By contrast, recklessness and negligence "involve insufficient concern with a risk of injury." *Id.* For instance, a person acts recklessly when "he consciously disregards a substantial and unjustifiable risk attached to his conduct, in gross deviation from accepted standards." *Id.* (quotations omitted). And a person acts negligently if "he is not but should be aware of such a substantial and unjustifiable

risk, again in gross deviation from the norm." *Id.* (quotations omitted). But neither mental state requires "anywhere close to a likelihood" that someone will *actually* be injured as a result of the acts. *Id.* Rather, both mental states only require a "substantial and unjustifiable risk" of injury and either a "conscious disregard" of that risk or the "failure to perceive" it. *Id.*

Five justices held that while the two "most culpable levels" of purpose and knowledge satisfy the force clause, recklessness and negligence do not. *See id.* at *6 (plurality of four justices); *id.* at *12 (Thomas, J., concurring). While relying on different words in the text, the plurality and Justice Thomas ultimately agreed that, at minimum, the elements clause in statutes such as ACCA, 18 U.S.C. § 16(a), and § 924(c)(3)(A) requires the accused to know that force would be applied to another person. *See id.* at *5 (requiring that the defendant "direct his action at, or target, another individual") (plurality opinion); *id.* at *12 (explaining that the force clause applies "only to intentional acts designed to cause harm") (Thomas, J., concurring) (quotations omitted). Thus, the conscious or unconscious disregard of a mere *risk* that force would be applied to another—particularly where such risk is not "anywhere close to a likelihood"—cannot satisfy the elements clause. Indeed, such "risk" in the context of the categorical approach is precisely the language of the residual clause that *Johnson* struck down as unconstitutionally vague. *See* 18 U.S.C. § 924(e)(2)(B)(ii) (stating that a violent felony "involves conduct that presents a serious potential risk of physical injury to another"); *Borden*, 2021 WL 2367312, at *12 (stating that "although the elements clause does not make petitioner an armed

career criminal, the residual clause would" but arguing that *Johnson* was wrongly decided) (Thomas, J., concurring).

Borden carries important repercussions for the crime of Hobbs Act robbery. Hobbs Act robbery requires a taking by "actual or threatened force, or violence, or fear of injury, immediate or future," to one's person or property. 18 U.S.C. § 1951(b)(1). But courts have interpreted this language to require that the defendant only have a mens rea of knowledge "as to the actus reus of the offense." *United States v. Garcia-Ortiz*, 904 F.3d 102, 108 (1st Cir. 2018). In other words, the defendant need only know that he is committing the acts in question—not what the *consequences* of those acts will be. Thus, as with crimes with a mens rea of recklessness or negligence, a person who commits Hobbs Act robbery does not have a "full awareness of consequent harm," *Borden*, 2021 WL 2367312, at *4.

The Model Jury instructions confirm this. The first element of the Ninth Circuit Model Jury instructions requires that the defendant "knowingly" obtain money or property from another. Manual of Model Criminal Jury Instructions, Ninth Circuit, 2010 ed. (updated March 2021). But the second element contains no mens rea—only that the defendant commit an "unlawful" taking by means of force, violence, or fear of injury. *Id.* If a "knowing" scienter applied to all elements of the offense, the Ninth Circuit would presumably have placed that word in the introductory paragraph or else inserted the word "knowingly" into each of the four elements. Because it did not, a jury instructed with this language would logically believe that "knowingly" applies only to the *actus reus* of obtaining money or

property from another—not whether it is done with force, violence, or a fear of injury.

The lower court's decision in this case cited no persuasive authority to the contrary. The Ninth Circuit affirmed by citing *Dominguez*, 954 F.3d at 1260, a case rejecting the defendant's argument that Hobbs Act robbery may be "predicated on gross negligence or reckless conduct." *See* Appendix B; *Lott,* 834 F. App'x at 370. But *Dominguez* merely stated that "'criminal intent—*acting 'knowingly or willingly'*—is an implied and necessary element that the government must prove for a Hobbs Act conviction.'" *Dominguez*, 954 F.3d at 1261 (quoting *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999)) (emphasis added). But "acting 'knowingly or willingly" means exactly that—the defendant knowingly and willingly *acted* but did not necessarily know the *consequences* of those actions. Just as the Ninth Circuit's model jury instructions apply "knowingly" to the act of a taking but not the element of force, this precedent fails to require that defendants have a "full awareness of consequent harm," *Borden*, 2021 WL 2367312, at *4, to be convicted of Hobbs Act robbery.

Although Mr. Lott argued that *Dominguez* was wrongly decided, the Ninth Circuit panel asserted that it was bound by *Dominguez* unless "that precedent is 'clearly irreconcilable' with intervening higher authority." *Id.* (quoting *Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir. 2003) (en banc)). That day has now come, as *Dominguez* is "clearly irreconcilable" with *Borden*'s holding that mere knowledge of one's actions—and not the "consequent harm" of those actions, *Borden*, 2021 WL

2367312, at *4—does not satisfy the elements clause. Thus, the Court should grant Mr. Lott's petition for certiorari, vacate the decision, and remand for the Ninth Circuit to apply *Borden* to Hobbs Act robbery in the first instance.

CONCLUSION

For these reasons, Mr. Lott respectfully requests that the Court grant his petition for a writ of certiorari, vacate the decision, and remand for the Ninth Circuit to apply *Borden*.

Respectfully submitted,

Date: June 23, 2021

s/ Kara Hartzler

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner