No. 20-_____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

LANCE LAMONT LAVERT,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

David J. Zugman
Burcham & Zugman
402 West Broadway, Suite 1130
San Diego, CA 92101
Tel: (619) 699-5931
Email: dzugman@gmail.com
Attorney for Lavert

Question Presented

Should this Court mend the circuit split about whether a Hobbs Act robbery is necessarily violent as the Ninth and eight other circuits have held, or is Hobbs Act robbery overbroad because it can be attempted without violence, and because Hobbs Act robbery reaches future threats to intanglibe property?

List of Parties

[X] All parties appear in the caption of the case on the cover page.

[] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

List of Directly Related Proceedings

1. United States District Court for the Southern District of California, *United States v. Lavert,* 18cr3584-LAB. The district court entered the judgment on September 26, 2019. *See* Appendix C.

2. United States Court of Appeals for the Ninth Circuit, *United States v. Lavert* No. 19-50299. *See* Appendix A. The Ninth Circuit entered judgment on December 9, 2020, and denied a petition for rehearing and suggestion for rehearing en banc, on April 9, 2021. *See* Appendix B.

3. No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

Table of Contents

Table of Authorities

Federal Cases

Statutes

Rules

United States Sentencing Guidelines

Internet Sources

NO. 20-_____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

LANCE LAMONT LAVERT,

Petitioner,

- V -

UNITED STATES OF AMERICA,

Respondent.

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

Petitioner, Lance Lamont Lavert, asks for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered December 9, 2020.

Opinion Below

The memorandum decision of the court of appeals, *United States v. Lavert*, 830 F. App'x 894 (9th Cir. 2020), appears at Appendix A to this petition and is unpublished.

Jurisdiction

The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc on April 9, 2021. *See* Attachment B. This petition is being filed within ninety days. The Court has jurisdiction under 28 U.S.C. § 1254(1).

Involved Federal Law

The Hobbs Act, 18 U.S.C. § 1951, and the use of a firearm during a crime of violence, 18 U.S.C. § 924(c), are set out in Appendix D.

Statement of the Case

On July 9, 2018, Lance Lavert robbed a Motel-6 in Carlsbad, California. Two days later, Lavert tried to enter Mexico but was sent back to the United States. Lavert still had the gun from the robbery on him. With a parole violation warrant waiting for him in the system, he was arrested at the San Ysidro Port of Entry, and the gun from the robbery was taken from his person.

The United States charged Lavert with three offenses: Hobbs Act robbery, discharging the firearm during the robbery, and felon-in-possession of a firearm. The jury found Lavert guilty on all counts except for the allegation that Lavert shot the firearm during the offense. At sentencing, the district court applied a serious bodily injury enhancement, U.S.S.G. Section 2B3.1(b)(3)(B), because Lavert pistol-whipped a motel employee, an older woman. Lavert was sentenced to 189 months of custody.

Lavert argued to the the Ninth Circuit that his Hobbs Act robbery was not a

categorical crime of violence, but right after the filing of his opening brief, the Ninth Circuit issued *United States v. Dominguez*, 954 F.3d 1251, 1256, 1260-61 (9th Cir. 2020)

2020), which squarely held that Hobbs Act robbery in all its forms is a crime of violence. Lavert conceded that *Dominguez* controlled his case, but he did point the Ninth Circuit to the published decision of the Fourth Circuit expressly rejecting *Dominguez*'s Hobbs Act analysis. *United States v. Taylor*, 979 F.3d 203 (4th Cir. 2020) (finding that there were ways to violate the statute which do not involve the use or threatened use of physical violence).

Reasons to Grant the Writ

Congress intended consistency in the application of 18 U.S.C. § 924. *Shular v. United States*, 140 S. Ct. 779, 787 (2020). Lavert's case is on one side of the deep and persistent circuit split on this frequently prosecuted federal offense, Hobbs Act robbery.[1] Lavert asked the Ninth Circuit to take his case en banc to consider the views of the dissenting circuits, but that request was declined. *See* Appendix B. The circuit courts are unlikely to resolve this inequity of criminal law by themselves. And inconsistency in the law is disreputable. *See, e.g.*, *Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923) (certiorari review is

[1] 1825 cases in 2019, and 1316 in 2020 according to the United States Sentencing Commission. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf (last accessed June 22, 2021).

appropriate because real conflicts in the law are embarrassing). This Court is the forum for resolving these conflicting circuit court interpretations of law. *Johnson v. United States*, 576 U.S. 591, 629, 135 S. Ct. 2551, 2576 (2015) (Alito, J. dissenting).

Supreme Court Rule 10 identifies split circuits as being a sufficient ground to justify certiorari review; this case has all the earmarks of an appropriate vehicle. The issue is preserved and consequential. The Section 924 conviction imposed a minimum mandatory sentence of at least seven years of confinement to be served consecutively to the robbery sentence. Should Lavert prevail, the district court would have to resentence him.

Here are the two sides to the split. Siding with the Ninth Circuit and holding that Hobbs Act robberies are categorical crimes of violence:

First Circuit:	*United States v. García-Ortiz*, 904 F.3d 102 (1st Cir. 2018);
Third Circuit:	*United States v. Walker*, 990 F.3d 316 (3d Cir. 2021);
Fifth Circuit:	*United States v. Buck*, 847 F.3d 267, 274-75 (5th Cir. 2017);
Sixth Circuit:	*Porter v. United States*, 959 F.3d 800, 804 (6th Cir. 2020);
Seventh Circuit:	*United States v. Hammond*, 996 F.3d 374, 398 (7th Cir. 2021);
Eighth Circuit:	*United States v. Jones*, 919 F.3d 1064, 1072 (8th Cir. 2019);
Eleventh Circuit:	*United States v. St. Hubert*, 909 F.3d 335, 349 (11th Cir. 2018);

On the other side of the split:

Second Circuit:	*United States v. Barrett (Barrett II)*, 937 F.3d

126, 129-30 (2d Cir. 2019);

Fourth Circuit: *United States v. Taylor*, 979 F.3d 203 (4th Cir. 2020);

Tenth Circuit: *United States v. Bowen*, 936 F.3d 1091 (10th Cir. 2019).

Bowen is not a Hobbs Act robbery case, but it does find that some injuries to property are nonviolent, such as "spray-painting another's car damages that person's property" but that sort of injury to property does not require violent force. *United States v. Bowen*, 936 F.3d at 1107-08.

Lavert acknowledges that his argument is different than one debated between the Ninth Circuit's *Dominguez* decision and the Fourth Circuit's *Taylor* case, both of which agree that a completed Hobbs Act robbery is a crime of violence.[2] Those cases assume that there is a legal difference between what is required to prove an attempted Hobbs Act robbery versus a completed Hobbs Act robbery. But this division is not supported by the plain language of the Hobbs Act which does not distinguish them in terms of what is needed to prove one or the other nor do they differ in punishment. The attempt and the substantive crime are reflexive of one another as they have the same elements except for the actual completion of the offense.[3] They are indivisible as the Eleventh Circuit explained in *United States v.*

---

[2] *United States v. Taylor*, 979 F.3d at 208 (finding that all completed Hobbs Act robbery requires, at a minimum, the "threatened use of physical force" so they qualify as violent crimes but finding attempt does not have to be violent); *Dominguez*, 954 F.3d at 1262 (Nguyen, dissenting) (agreeing with majority that a completed Hobbs Act robbery is is violent).

[3] "[A]n element of attempted force operates the same as an element of completed force. . .." *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017).

St. Hubert, 909 F.3d 335, 348 (11th Cir. 2018) ("The definition of 'robbery' in § 1951(b)(1) is indivisible because it sets out alternative means of committing robbery, rather than establishing multiple different robbery crimes.") (citing *Mathis v. United States*, 136 S. Ct. 2243, 2247-49 (2016); and *United States v. McGuire*, 706 F.3d 1333, 1336-37 (11th Cir. 2013)).

This Court's recent decision in *Borden v. United States*, 28 Fla. L. Weekly Fed. S. 835 (U.S. 2021), confirms the view that if any part of a statute is overbroad, then the statute is simply overbroad and fails the categorical test: "If any—even the least culpable—of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the federal standard, and so cannot serve as an ACCA predicate. *See Johnson v. United States*, 559 U. S. 133, 137, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010)."

Mathis explained that the categorical approach is an elements-only inquiry. 136 S. Ct. 15 2252. Elements-only means parsing the statute into the necessary factual and mental ingredients required for conviction without looking at the particular facts of the defendant's specific conviction. Under the categorical approach for determining whether a prior conviction is violent, the question is whether the statute can be violated in a non-violent way. Here is how *Mathis* explained it in the context of deciding whether an Iowa burglary qualified:

> Consider if Iowa defined burglary as involving merely an unlawful entry into a 'premises'—without any further elaboration of the types of premises that exist in the world (e.g., a house, a building, a car, a boat). Then, all agree, ACCA's elements-focus would apply. No matter that the record of a prior conviction clearly indicated that the defendant burgled a house at 122 Maple Road—and that the jury

> found as much; because Iowa's (hypothetical) law included an element broader than that of the generic offense, the defendant could not receive an ACCA sentence."

Mathis v. United States, 136 S. Ct. at 2255. An attempted Hobbs Act robbery does not have any different punishment than a completed Hobbs Act robbery. *Cf. Id.* at 2256 (noting that differences in punishment denote different offenses). Instead, the Hobbs Act describes several different methods of how to commit robbery: "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.'" 18 U.S.C. § 1951(B)(1).

Under 18 U.S.C. § 924(c)(3), for a Hobbs Act robbery to qualify as a crime of violence it either

> **(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.

The Hobbs Act definition of property includes threats to intangible property which cannot be threatened by physical force. *See United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019) (finding Hobbs Act robbery violent but acknowledging that there is no "basis in the text of either statutory provision for creating a distinction between threats of injury to tangible and intangible property for purposes of

defining a crime of violence.") Intangible things cannot be physically hurt so they cannot be the subject of violence. *Leocal v. Ashcroft*, 543 U.S. 1, 5, 125 S. Ct. 377, 380 (2004) (requirements for a crime of violence); *Moncrieffe v. Holder*, 569 U.S. 184, 133 S. Ct. 1678 (2013) (minimum real conduct test: whether a crime is overbroad is determined by examining the minimum conduct required to commit the crime that is actually prosecuted.)

There is a clear conflict in the law regarding whether damaging property is violent or not. This Court should settle the law on whether the categorical approach is the final arbiter of the viability of the Hobbs Act as a crime of violence. If it is, then the clear language of the statute allows for conviction without violence as explained in *United States v. Taylor*, 979 F.3d 203 (4th Cir. 2020). If the Fourth Cirucit is wrong and the Ninth Circuit is correct, then this Court should so say so that settle the question for , then the Ninth Circuit's *Dominguez* decision is an evasion of the categorical approach as the Fouth Circuit explained in *Taylor*.

Conclusion

A writ of certiorari is warranted to resolve this conflict in the circuits.

Respectfully submitted,

Dated: June 25, 2021

s/David J. Zugman
David J. Zugman
Burcham & Zugman
402 West Broadway, Suite 1130
San Diego, CA 92101
Tel: (619) 699-5931
Email: dzugman@gmail.com
Attorney for Lavert