

In The Supreme Court Of The United States

Brian Fierro, Kacy Sapp, Damir Vucic, Bailey Aaron Hall, and Mati Sefo,

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

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Table of Contents

Table of Contents	ii
Table of Authorities	iii
Reply Brief in Support of Petition for Certiorari.....	1
I. The Hobbs Act robbery statute's plain language is overbroad.....	2
II. This Court's recent interpretation of the physical force clause in <i>Borden</i> further demonstrates the need for review.....	4
III. The government does not dispute that proper interpretation of 18 U.S.C. § 924(c) is of exceptional, national importance.	6
Conclusion	7
Appendix	

Table of Authorities

	Page(s)
Federal Constitution	
U.S. Const. amend. V	1
Federal Cases	
<i>Borden v. United States</i> , 141 S. Ct. 1817 (2021)	4, 5, 6
<i>Descamps v. United States</i> , 570 U.S. 254 (2013)	3
<i>Izumi v. U.S. Philips Corp.</i> , 510 U.S. 27 (1993)	4
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016)	3
<i>United States v. Davis</i> , 139 S. Ct. 2319 (2019)	1, 3
<i>United States Dominguez</i> , 954 F.3d 1251 (9th Cir. 2020), <i>pet. for cert. pending</i> , No. 20-1000 (filed Jan. 21, 2021)	2, 3, 4
<i>United States v. García-Ortiz</i> , 904 F.3d 102 (1st Cir. 2018)	5
<i>United States v. Gray</i> , 260 F.3d 1267 (11th Cir. 2001)	6
<i>United States v. Grisel</i> , 488 F.3d 844 (9th Cir. 2007) (en banc)	2, 3
<i>United States v. Stitt</i> , 139 S. Ct. 399 (2018)	3
<i>United States v. Taylor</i> , 979 F.3d 203 (4th Cir. 2020), <i>cert. granted</i> , 141 S. Ct. 2882 (U.S. July 2, 2021) (No. 20-1459)	3
Federal Statutes	
18 U.S.C. § 924	<i>passim</i>
18 U.S.C. § 1951	1, 3, 4, 6

18 U.S.C. § 3559	6
18 U.S.C. § 3583	6

Supreme Court Rules

Supreme Court Rule 24.1(a)	4
----------------------------------	---

Other

Brief for the United States in Opposition, <i>Steward v. United States</i> , No. 19-8043 (U.S. May 21, 2020)	2, 3, 5
Ninth Circuit Manual of Model Criminal Jury Instructions, § 8.143A Hobbs Act—Robbery (Mar. 2021)	5
U.S. Sent. Comm'n, <i>Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses</i> (May 2021)	6

Reply Brief in Support of Petition for Certiorari

Petitioners Brian Fierro, Kacy Sapp, Damir Vucic, Bailey Aaron Hall, and Mati Sefo 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 this Court’s decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), which holds 18 U.S.C. § 924(c)’s 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’. *See* U.S. Const. amend. V; Government’s Memorandum in Opposition (Gov. Mem.).

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 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 16-23. In response, the government instead relies on the Ninth Circuit’s holding in *United States v. Dominguez*, 954 F.3d 1251, 1260 (9th Cir. 2020), *pet. for cert. pending*, No. 20-1000 (filed Jan. 21, 2021)) that Hobbs Act robbery nonetheless constitutes a crime of violence under § 924(c)’s physical force clause. *See* Gov. Mem. at 2 (incorporating Brief for the United States in Opposition, *Steward v. United States*, No. 19-8043, at 8-12 (U.S. May 21, 2020) *cert. denied*, 141 S. Ct. 167 (2020) (“Gov. *Steward Brief*”)). The government specifically relies on the 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. Mem. at 2 (incorporating Brief for the United States in Opposition, *Steward v. United States*, No. 19-8043, at 8-12 (U.S. May 21, 2020) *cert. denied*, 141 S. Ct. 167 (2020) (“Gov. *Steward Brief*”)).

But the government, like the Ninth Circuit’s decision in *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 19-23 (citing, among other cases, *Descamps v. United States*, 570 U.S. 254, 265 (2013), 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.

Here, 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 16-18. The government, moreover, does not claim that Hobbs Act robbery is divisible. *See* Gov. Mem.; Gov. *Steward* Brief at 6-12. An overbroad, indivisible offense cannot categorically be a crime of violence. *Mathis v. United States*, 136 S. Ct. 2243, 2251-52 (2016).

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—an issue upon which this Court recently granted review in *United States v. Taylor*, 979 F.3d 203 (4th Cir. 2020), *cert. granted*, 121 S. Ct. 2882 (U.S. July 2, 2021) (No. 20-1459) (oral argument scheduled for Dec. 7, 2021). Gov. Mem. at 3. 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* Sup. Ct. R. 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.

II. This Court’s recent interpretation of the physical force clause in *Borden* 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).

In *Borden*, this Court 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. Relying on its pre-*Borden* briefing in *Stewart*, the

government does not address whether Hobbs Act robbery requires the intentional use of force required by 18 U.S.C. § 924(c). Gov. Mem. at 2-4; Gov. *Steward* Brief at 6-12.

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. 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, supplying 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 robbery, however, 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.

III. 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 remain in prison serving mandatory sentences under 18 U.S.C. § 924(c). Petitioner Vucic will complete his mandatory sentence on December 5, 2021, and all Petitioners will serve longer supervised release terms than would otherwise be imposed, due solely to the § 924(c) convictions.¹

And § 924(c) convictions continue unabated nationwide. Pet. at 23-24 (citing U.S. Sent. Comm’n, *Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses* (May 2021)). 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

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).

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.

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