

No. _____

In the
Supreme Court of the United States

Edward Monet Knight,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for Writ of Certiorari

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Questions Presented for Review

Petitioner Edward Knight asks this Court to address two questions:

1. Whether allowing a seated juror to appear virtually via Zoom in a federal felony trial is structural error violating the Fifth and Sixth Amendment rights to public, in-person felony trials and due process.
2. Whether Hobbs Act robbery, 18 U.S.C. § 1951(a), is a qualifying crime of violence under 18 U.S.C. § 924(c).

Related Proceedings

Petitioner Edward Knight was charged and convicted by a jury on four counts: Interference with Commerce by Robbery (Counts 1, 3); and Brandishing a Firearm During and in Relation to a Crime of Violence (Counts 2, 4). App. C, G. The district court imposed a 169-month prison sentence on June 28, 2021. App. C. The Ninth Circuit affirmed the convictions and sentence on January 4, 2023. App. A, B. Knight remains in federal custody with an estimated release date of August 25, 2031.

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Petition for Writ of Certiorari

Edward M. Knight petitions for a writ of certiorari to review judgments of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The opinion of the Ninth Circuit is published in the Federal Reporter at *United States v. Knight*, 56 F.4th 1231 (9th Cir. 2023). App. A. An additional memorandum of the Ninth Circuit is unpublished, but reprinted at *United States v. Knight*, No. 21-10197, 2023 WL 34698 (9th Cir. Jan. 4, 2023) (unpublished). App. B.

The district court's order denying dismissal is unpublished but reprinted at *United States v. Knight*, No. 3:19-cr-00038-MMD-CLB, 2020 WL 2128659 (D. Nev. May 5, 2020). App. E. The judgment, jury instructions, trial proceedings, and indictment in the district court are unpublished. *United States v. Knight*, No. 3:19-cr-00038-MMD-CLB, Dkts. 205, 187, 14 (D. Nev.). App. C, D, E, F, G.

Jurisdiction

The Ninth Circuit Court of Appeals entered its final order on January 4, 2023. App. A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely per Sup. Ct. R. 13.1.

Constitutional and Statutory Provisions

1. U.S. Const. art. III, § 2, cl. 3:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Title 18, United States Code, Section 924(c), provides in relevant part:

(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, 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.

4. Title 18, United States Code, Section 1951, provides in relevant part:

(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.

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Introduction

The Ninth Circuit is the first appellate court to allow a seated juror to participate remotely from his home, via Zoom, in a felony trial. The opinion below sets a dangerous path of moving the public jury trial system to a remote process, undermining the reliance of jury verdicts and integrity of the criminal justice system. To prevent erosion of the public trial right and protect the reliability of jury verdicts, review is necessary.

Knight also asks this Court to clarify that Hobbs Act robbery (18 U.S.C. § 1951(a)) does not qualify as a crime of violence under 18 U.S.C. § 924(c). A district court now holds Hobbs Act robbery does not qualify as a crime-of-violence under § 924(c), given *United States v. Taylor*, 142 S. Ct. 2015 (2022). This inter-district split requires resolution by this Court.

Knight asks this Court to grant certiorari, vacate his convictions, and remand for new trial.

Statement of the Case

Two retail stores were robbed in Sparks, Nevada in June 2019: PJ's Discount Liquor and Rainbow Market. No eyewitness ever identified Knight as a robbery suspect in or out of court. Knight was nonetheless charged with the robbery in a four-count indictment: Hobbs Act robbery of PJ Liquor (Count 1), Hobbs Act robbery of Rainbow Market (Count 3), and two 18 U.S.C. § 924(c) counts for brandishing a firearm during the robberies (Counts 2 and 4). App. G: 161a–163a.

Knight moved to dismiss the § 924(c) counts because Hobbs Act robbery fails to qualify as a crime of violence. The district court denied the motion. App. F: 159a–160a. The district court later instructed the jury that Hobbs Act robbery included “fear of future injury, immediate or future, to his person or property.” App. D: 131a–134a. The district court also instructed the jury that Hobbs Act robbery was a crime of violence. App. D: 132a–134a.

The first day of trial proceedings consisted of voir dire. Juror C. was seated as a non-alternate juror, and later elected as the jury foreperson. The second day of proceedings began with the district court stating that Juror C. called to report his wife was experiencing COVID symptoms and he was possibly infected. App. E: 139a. The district court proposed several options, including permitting Juror C. to attend remotely via the video conferencing platform Zoom. App. E: 139a–140a.

The government objected, asking that Juror C. be replaced with one of the two alternate jurors, articulating several constitutional problems with remote juror participation. App. E: 140a–141a; 150a–152a. Defense counsel agreed to Juror C.

attending via Zoom. App. 3: 141a–142a; 152a–155a. The court was unsure if Knight’s consent was necessary, and the parties disputed whether consent would preclude appellate review of remote juror participation. App. E: 143a; 152a–156a. Deciding it “would like for Mr. Knight’s consent,” the court asked Knight if he consented to Juror C. attending by Zoom, but failed to explain the panoply of constitutional rights affected or whether consent waived appellate review. App. E: 143a–144a. Overruling the government’s objection, the district court permitted Juror C. to attend trial via Zoom. App. E: 144a.

The parties reiterated concerns at the close of the first remote juror day. App. E: 150a–158a. Defense counsel reiterated that Knight was not “waiving his right to challenge the proceedings” on appeal “because of some defect that arises because of remote participation by [Juror C.].” App. E: 154a. Defense counsel also argued that the government, by seeking an appellate waiver, “is trying to . . . insulate the proceedings entirely from appellate review.” App. E: 154a. The district court conducted a second colloquy of Knight, but again did not require Knight to provide an appellate waiver. App. E: 156a. In fact, the court noted that challenging whether an in-person juror is “a right that cannot be waived” was a challenge that “Mr. Knight may raise.” App. E: 155a.

Juror C. ultimately attended two days of trial remotely, during which the government presented the core of its case. Saying his wife had recovered, Juror C. attended the last four days of trial and deliberations in-person.

During his remote participation, the record does not evince that Juror C. was able to adequately view or hear the witnesses or exhibits, except for one—a firearm. The district court noted there had been connectivity issues during trial resulting in “a pause” of the Zoom feed, and that the court only “periodically” checked the Zoom screen. App. E: 157a–158a.

The jury convicted Knight of all counts, with Juror C. as the foreperson. The district court sentenced Knight to: 30-day concurrent imprisonment on the Hobbs Act robbery counts; an 84-month mandatory consecutive sentence on the first § 924(c) count; and an 84-month mandatory consecutive sentence on the second § 924(c) count, for a total 169-months of imprisonment, followed by a five-year supervision term. App. D: 122a–123a.

Knight appealed his convictions and sentence, raising several issues, including Juror C’s appearance by zoom as non-waivable structural error and that Hobbs Act robbery is not a § 924(c) crime of violence. The Ninth Circuit affirmed Knight’s convictions and sentence in a bifurcated opinion. First, in a published opinion, the Ninth Circuit approved Juror C’s remote participation, attaching the Ninth Circuit’s 2020 Annual Report as support, App. A: 1a–122a, which noted “five remote *civil* trials” were well-received by participating attorneys. App. A: 44a (emphasis added). Second, in an unpublished opinion, the Ninth Circuit summarily found Hobbs Act robbery to be a § 924(c) crime of violence, relying on a prior Ninth Circuit decision vacated by this Court. App. B: 117a.

Knight asks this Court to grant certiorari and reverse his convictions.

Reasons for Granting the Petition

I. Certiorari review is necessary to preserve the integrity of felony trials by ensuring verdict reliability through an in-person jury—an issue of exceptional, national importance.

This case presents the first instance of a remote juror in a federal criminal felony trial. The Constitution guarantees Knight’s right to public jury trial and due process protections in criminal proceedings. U.S. Const. art. III, § 2, cl. 3; U.S. Const. amends. V, VI. “It is difficult to envision a constitutional rule that more fundamentally implicates the fairness of the trial—the very integrity of the fact-finding process.” *Brown v. Louisiana*, 447 U.S. 323, 334 (1980) (retroactively applying jury unanimity rule) (citation omitted). These trial rights serve “the determination of truth, and it is the jury to whom we have entrusted the responsibility for making this determination in serious criminal cases. Any practice that threatens the jury’s ability properly to perform that function poses a similar threat to the truth-determining process itself.” *Id.* at 334. !The Ninth Circuit’s determination that Zoom criminal trials are inherently constitutional undermines the integrity and reliability of felony trials.

The jury foreperson in Knight’s trial, Juror C., attended the first two days of the government’s case-in-chief remotely via Zoom, over the government’s objection, because his wife was experiencing COVID symptoms. App. E: 156a–158a. As the jury foreperson, the remote juror controlled deliberations and ultimately issued the verdict. Permitting a remote juror, as the government argued below, threatens the heightened “constitutional issues and concerns” in “criminal trials” and may amount to “structural error.” App. E: 150a–152a. This Court recognizes the

fundamental importance of public jury trials, finding the denial of a public trial is structural error. *Waller v. Georgia*, 467 U.S. 39, 50 (1984) (finding denial of public-trial guarantee is structural error). Upholding the integrity of criminal felony trials is essential to maintaining public trust of judicial proceedings. Remote juror participation in Knight's trial undermined certainty in the jury's integrity and fairness, constituting structural error.

The Ninth Circuit affirmed, however, relying on a handful of *civil* trials conducted remotely in the Western District of Washington, summarily noted in the Ninth Circuit's 2020 Annual Report, which the panel attached to its opinion. App. A: 11a; 44a. The incorporated note states in full:

The district has completed five remote civil jury trials. After each trial, the district debriefs jurors, who consistently praise the process and note their relief in not having to travel to the courthouse or appear in person in the midst of the pandemic. Anecdotally, the court noted an increase in participation and fewer requests to be excused. Juror age or economic status do not appear to have factored into juror participation.

The attorneys participating in remote trials largely commend the process. They also report favorable cost savings relative to in-person trials. Lawyers are now accepting the process without objection. The judges report that the ZoomGov platform allows them to see the witness up close and to assess body language and demeanor. Unlike an in-person trial, the judge can actually see the face of a witness. The district has shared its work by sponsoring a nationwide seminar for federal judges and staff.

App. A: 11a; 44a.

An annual report describing anecdotal experiences in civil trials does not override a criminal defendant's constitutional protections. And a defendant's constitutional right simply cannot depend on whether jurors prefer appearing

virtually. Courts must ensure the reliability and integrity of the felony trial process as protected by the Constitution, not abandon a centuries-proven process to new, untested technology.

Much of this Court’s precedent reiterates the constitutional protections afforded criminal felony trials, but not civil trials. *See, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989) (discussing differing rights to remain silent, due process protections, discovery rules). Here, however, the Ninth Circuit failed to recognize that *civil* trials are afforded far less protection than *criminal* jury trials—never discussing this distinction. App. A: 10a–11a. The criminal felony trial safeguards include, but are not limited to: right to public trial by jury; right to a fair and impartial jury; right to be present for trial; right to effective counsel; Sixth Amendment right to a fair and impartial jury; right to in-person confrontation of witnesses; right to a representative cross-section of the community on the jury; right to equal protection of the laws; and right to unanimous verdict based solely on the evidence presented at trial beyond a reasonable doubt. *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (“Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.”); *Irvin v. Dowd*, 366 U.S. 717, 721 (1961) (“In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors. The failure to accord an accused a fair hearing violates even the

minimal standards of due process . . . [a juror's] verdict must be based upon the evidence developed at the trial.”).

Even the Western District of Washington, which the Ninth Circuit cited as support, did not conduct remote criminal trials during the pandemic: “criminal trials were being held live.” *Steele v. Nat'l RR Passenger Corp.*, 599 F. Supp. 3d 1039, 1043 (W.D. Wash. 2022) (denying motion for new trial where civil trial was held remotely); *see also id.* at 1042 n.1 (describing live criminal jury trial held in 2021, while civil trials were held remotely). And not all participants in the Western District agree with remote trials. A sitting judge and former chief judge for the Western District of Washington opposes remote trials due their inherent unreliable nature. *See* District Judge John C. Coughenour, Opinion, *What gets lost when Zoom takes over the courtroom*, THE SEATTLE TIMES (June 1, 2021).¹

The Ninth Circuit failed to heed its own warning of the dangers in remote proceedings. *United States v. Carter*, 907 F.3d 1199, 1207 (9th Cir. 2018). *Carter* held a defendant’s right to “physical, face-to-face confrontation at trial” may be compromised by a remote video procedure only upon a “case-specific finding” that: the denial of physical confrontation “is necessary to further an important public policy,” and “the reliability of the testimony is otherwise assured.” *Id.* at 1205–06. Neither requirement was met here. While *Carter* addressed Confrontation Clause rights where a witness testifies remotely, its reasoning is instructive for remote

¹ Available at <https://www.seattletimes.com/opinion/what-gets-lost-when-zoom-takes-over-the-courtroom/>.

jurors. Other Circuits agree that “a video monitor is not the same as physical face-to-face confrontation. As sister circuits have recognized, the two are not constitutionally equivalent.” *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) (citing cases). Thus, remote juror participation violates the inalienable right to in-person felony trials.

A. Violating the right to an in-person jury for felony trials is structural error.

The structural error doctrine insists on certain basic, constitutional guarantees that define the framework of any criminal trial. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017); *Neder v. United States*, 527 U.S. 1, 8 (1999). Errors that compromise either the jury process or the adjudicator’s impartiality undermine trial mechanisms intended to ensure reliability, resulting in structural error. *Neder*, 527 U.S. at 8 (citing *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge)).

This Court holds that violations of the right to public jury trial and a fair and impartial jury are structural errors. *Neder*, 527 U.S. at 8; *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021). Structural errors share “at least three broad rationales,” depending on the right involved: (1) “the right at issue is not designed

to protect the defendant from erroneous conviction but instead protects some other interest *** Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error” (listing the “defendant’s right to conduct his own defense” as an example); (2) “the effects of the error are simply too hard to measure[,] *** the precise ‘effect of the violation cannot be ascertained,’” (listing denial of choice of counsel as an example); or (3) “the error always results in fundamental unfairness,” although “[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case. *Weaver*, 137 S. Ct. 1907–908; *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–49 (2006) (discussing common structural error features). These common features “are not rigid” however, and “more than one of these rationales may be part of the explanation for why an error is deemed to be structural.” *Weaver*, 137 S. Ct. at 1908.

Despite this case presenting an issue of national first impression to the Ninth Circuit, the Ninth Circuit denied relief because Knight could not provide matching caselaw or prejudice: “Knight asks us to presume that the remote participation of a juror will always render a trial unfair and the judgment unreliable, but there is no case law or record evidence to support such a presumption.” App. A: 10a–11a. The Ninth Circuit’s demand for an error to “always” render a trial unreliable to be structural, and that the record show prejudice, gravely ignores this Court’s structural error precedent.

This Court rejects the Ninth Circuit’s assertion that structural errors must “always render a trial unfair and unreliable.” App. A: 10a–11a. In *Gonzalez-Lopez*, this court rejected as “inconsistent with the reasoning of our precedents” the idea that structural errors “always or necessarily render a trial fundamentally unfair and unreliable.” *Gonzalez-Lopez*, 548 U.S. at 149 n.4. In *Weaver*, this Court specifically clarified that for structural error purposes “one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case.” *Weaver*, 137 S. Ct. at 1908.

Not having a juror present in open court not only raises due process concerns, but also violates the public-trial right. This Court has explained the unique nature of public-trial violations, which is structural error despite not “render[ing] a trial fundamentally unfair in every case.” *Weaver*, 137 S. Ct. at 1910. First, in a public-trial violation there is “difficulty of assessing the effect of the error.” *Id.* Second, the “public-trial right also protects some interests that do not belong to the defendant . . . [such as] the rights of the public at large, and the press, as well as the rights of the accused.” *Id.* Third, the constitutional and historical importance of public trials is fundamental to the criminal justice system: “while the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real.” *Waller*, 467 U.S. at 50 (finding denial of public-trial guarantee is structural error).

In contrast, non-structural errors can readily be assessed for harm by examining the overall strength of the evidence and do not affect adjudicator impartiality. *Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991). That is not the case here. The evidence presented when Juror C. was present in court was inextricably intertwined with the evidence presented when Juror C. appeared remotely, precluding quantitative assessment. This alone warrants deeming Juror C.’s remote participation structural error. *See Weaver*, 137 S. Ct. at 1908.

Moreover, the remote juror was never questioned about his remote participation. The government identified several unique factors of video conferencing that undermine remote juror reliability. App. E: 150a–152a. These factors include, but are not limited to: credibility assessments; missing information; extraneous information; distraction and “Zoom fatigue;” and connectivity problems. The record does not establish the internet capability, size, or quality of the video conferencing program, or the equipment Juror C. used for Knight’s trial. Opening Brief of Appellant, *United States v. Knight*, No. 21-10197, Dkt. 12 p. 22, 2022 WL 533691 (9th Cir. filed Feb. 18, 2022) (“Op. Br.”). We do not know if Juror C. watched Knight’s trial from a small iPhone screen or a large computer screen. And regardless of the equipment Juror C. used, a typical Zoom video call only shows the participant from the shoulders up, hindering the ability to see broader nonverbal communication of the witnesses and parties in the courtroom. Thus, remote juror participation undermines the jury’s uniquely important role of assessing credibility. The record also does not establish that Knight or defense counsel could see Juror C.

on a remote screen thereby restricting the defense's ability to observe the juror for inattention or misbehavior. And though the district court appears to have presumed, without support, that Juror C. had a confidential, private personal space in which to observe trial, Op. Br. at 23, multiple screens and other sources of information may be visible at one time, permitting a remote juror to easily access extrinsic material during trial proceedings.

Thus, while prejudice is not required for structural errors, Knight still established (in the alternative) prejudice. During the two days of remote juror participation, the parties presented opening statements, and the government presented the bulk of its case-in-chief: nine witnesses and 72 exhibits. Op. Br. at 15. Several of these witnesses were key to the government's case, including the two robbery victims; Knight's girlfriend whose testimony contradicted her earlier statements to police; the first responding officers; the officers who conducted searches and interviews; and the officer who allegedly saw a black male adult with dreadlocks driving a car near a robbery. Op. Br. at 15. The 72 exhibits published on these days were critical to the government's case, consisting of surveillance video, audio, and photograph exhibits. Op. Br. at 15.

The district court did not note on the record how the exhibits were relayed to Juror C. via Zoom, nor whether Juror C. was able to properly view and hear these witnesses and exhibits. The record brings this ability into question, as the court twice asked Juror C. whether he wanted to be shown the firearm before Juror C. nodded in assent. Op. Br. at 7. While no trial judge can ensure jurors are always

paying attention, the difficulty of this task is multiplied several times over by remote juror participation—particularly where the district court admitted it only “periodically” checked the Zoom screen. Op. Br. at 24.

Remote juror participation also risks interruption by technical errors and glitches, including freezing, buffering, imperfect audio, and pixelated video, with varying internet connection strength. Here, for example, the district court noted “there was a pause when [Juror C.] indicated that his battery was running out and he replaced the battery.” Op. Br. at 25. And at least once during trial neither the court nor the clerk could see Juror C. on the screen. Op. Br., at 25. When the court finally saw Juror C. reappear, it failed to find out whether Juror C. could see and hear the proceedings when he was offscreen. Op. Br. at 25. Instead, the court erroneously placed the onus on Juror C. to proactively inform the clerk of “any technology issue occur[ing] that interferes with his viewing and his participation remotely to this trial.” Op. Br. At 25. The record thus confirms defects in the remote juror process.

The Ninth Circuit failed to analyze whether permitting remote juror participation was the least restrictive burden on the defendant’s trial rights. In considering whether a burden imposed on a constitutional right is narrowly tailored, this Court considers “different methods that other jurisdictions have found effective” in addressing the problem “with less intrusive tools.” *McCullen v. Coakley*, 573 U.S. 464 (2014). The district court itself noted other options were available, such as social distancing, reasonable mask precautions, or dismissing

Juror C. and replacing him with an alternate juror as the government requested.

App. E: 140a–141a.

The error compromised the jury mechanism constitutionally mandated to ensure a fair and reliable trial, and its effect cannot be quantitatively analyzed. Due to the inherent limitations of video conferencing, permitting remote juror attendance in a criminal trial undermines a fair and reliable trial, requiring clarification from this Court that such error is structural.

B. The fundamental right to an in-person jury for felony trials is non-waivable.

While the law generally presumes the availability of waiver, some protections “are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably discrediting the federal courts.” *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (cleaned up); *see also United States v. Olano*, 507 U.S. 725, 732–74 (1993). This Court has not addressed whether a defendant may waive the in-person presence of a juror during criminal trial. Here, it is not just the defendant’s rights that are affected. The integrity and public confidence of the criminal jury system is at stake. And jurors have the right and the obligation to fully participate in person to fulfill their civic duties under the Constitution.

Without resolving the issue, the district court noted that Knight “may raise” on appeal whether an impartial adjudicator is “a right that cannot be waived.” App. E: 155a. The Ninth Circuit found the error non-structural and thus waivable, without discussing whether structural errors can be waived. App. A: 11a. Other circuit courts note the right is likely not waivable: “No doubt there are limits to

waiver; if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept." *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985).

"Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Olano*, 507 U.S. at 733. It is an affront on our criminal justice system to permit waiver of the right to a present, impartial jury. Nor can defense counsel waive this right for a criminal defendant. *Taylor v. Illinois*, 484 U.S. 400, 417 n.24 (1988).

Knight did not waive his right to challenge remote juror participation on appeal. *See also Olano*, 507 U.S. at 733 (Waiver is the "intentional relinquishment or abandonment of a known right."). "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights" and must "not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). For fundamental constitutional rights, the defendant must personally make an express, informed waiver. *Taylor*, 484 U.S. at 417–18 n.24. The government bears a "heavy burden" to prove waiver of constitutional rights. *Berghuis v. Thompkins*, 560 U.S. 370, 383–84 (2010).

Here, the Ninth Circuit inexplicably found waiver, App. A: 12a–13a, despite noting in its factual recitation that the district court declined to seek the explicit

waiver of appellate rights to challenge remote juror participation. App. A: 12a–13a. For instance, the opinion notes “[defense counsel] declined to waive his client’s right to attempt to vitiate that consent on appeal,” App. A: 7a, then finds Knight’s argument that he preserved appellate rights “unavailing.” App. A: 12a. The Ninth Circuit undermined its waiver holding by acknowledging: “The district court recognized that there might be challenges raised on appeal, such as an assertion that the waiver was not knowing and voluntary or an argument that the asserted right to an in-person jury cannot be waived.” App. A: 7a.

The parties disputed the need for appellate waiver, with the government requesting appellate waiver and defense counsel declining to “waive[] any right to challenge [juror] participation by video.” App. E: 154a. The district court canvassed Knight for his consent but did *not* include a waiver of appellate challenge in its colloquy. App. E: 143a–144a. The parties reiterated concerns at the close of the day. App. E: 150a–156a. Objecting to any attempt to “insulate the proceedings entirely from appellate review,” defense counsel stated Knight’s consent to remote juror participation did not include waiver of appellate review. App. E: 154a–155a. Defense counsel also argued that the government, by seeking an appellate waiver, “is trying to . . . insulate the proceedings entirely from appellate review.” App. E: 154a. The district court conducted a second colloquy of Knight, but again did not require Knight to provide an appellate waiver. App. E: 156a. Instead, the court noted that challenging whether an in-person juror is “a right that cannot be waived” was one that “Mr. Knight may raise.” App. E: 155a. Knight did not

expressly waive the right to appeal this issue; he affirmatively objected to such waiver, and the district court did not ask for or require such a waiver.

Review is necessary to preserve the integrity of felony trials by ensuring verdict reliability through an in-person jury. Knight asks this Court to grant review, reverse his convictions, and remand for new trial.

C. The need to protect in-person criminal felony trials is of exceptional, national importance.

Felony convictions are the most serious deprivation of liberty, and in many cases life, that law imposes. These convictions result in lengthy prison sentences, or even a death sentence. And felony convictions have far-reaching collateral consequences, as this Court has often emphasized. *See, e.g., Blackledge v. Perry*, 417 U.S. 21, 28 n.6 (1974) (“conviction of a ‘felony’ often entails more serious collateral consequences than those incurred through a misdemeanor conviction.”) (citing study); *Baldwin v. New York*, 399 U.S. 66, 69 n.8 (1970) (listing loss of civil rights such as the right to vote and the right to hold public office). The staggering amount of collateral consequences for felony convictions now has its own treatise. Margaret Colgate Love, Jenny Roberts, and Wayne A. Logan, *Collateral Consequences of Criminal Conviction: Law Policy and Practice* (Thomson Reuters Nov. 2021).¹¹

While the Ninth Circuit’s opened door to remote trials will no doubt affect state trials, the impact on federal felony trials alone is of national importance. Over 1,600 federal criminal trials took place in fiscal year 2022. U.S. Sent. Comm’n, *Sourcebook of Federal Sentencing Statistics 2022*, p. 56, Table 11 (2023). For

offenders with multiple charges under § 924(c), the average sentence is over 20 years in prison. U.S. Sent. Comm'n, *Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses*, Fiscal Year 2021 (June 2022) (average sentence for those convicted of multiple § 924(c) counts is 256 months). In the federal system, nearly 30% of all cases carry a mandatory minimum. U.S. Sent. Comm'n, *Quick Facts: Federal Offenders in Prison* (Jan. 2022). In cases with multiple charges carrying mandatory minimum sentences, the prosecution may opt not to accept a plea to lesser charges, thus forcing the defendant to trial to avoid pleading to a life-equivalent sentence and waiving appellate rights.

Given the vast number of criminal trials, felony convictions, and the central legal importance of reliable and just public trials to our criminal justice system, this Court's intervention is necessary. Knight asks this Court to grant review, vacate his convictions, and remand for further proceedings.

II. Certiorari is necessary to ensure predicates meet this Court's requirements of intentional, violent physical force under 18 U.S.C. § 924(c)(3)(A).

At least one district court finds the Hobbs Act robbery statute is categorically overbroad and is not a crime of violence under 18 U.S.C. § 924(c) because its plain language includes inducing fear of injury to intangible property, such as financial loss. *United States v. Louis*, No. 21-cr-20252, 2023 WL 2240544, * 2. (S.D. Fla. Feb. 27, 2023). Knight's jury received a jury instruction similar to that presented in *Louis*, allowing commission of Hobbs Act robbery through "fear of injury, immediate or future, to [another's] person or property, or to property in [another's] custody or possession." App. D: 131a; 133a. Thus, the Hobbs Act robbery statute permits

conviction via “*the fear of financial loss as well as fear of physical violence.*”

Louis, 2023 WL 2240544, at *1 (emphasis in original).

In *United States v. Taylor*, 142 S. Ct. 2015 (2022), this Court clarified that categorical analysis of § 924(c) is restricted to a statute’s plain elements. Before *Taylor*, circuits misinterpreted Hobbs Act robbery, which used to be caged within the residual clause, to make the offense “fit” within the elements clause.² Now, post-*Taylor*, the few Circuits issuing published opinions as to Hobbs Act robbery continue their misinterpretations without new analysis.³ This Court should grant review to resolve the important federal question of whether the Hobbs Act robbery statute, by its plain language, qualifies as a crime of violence under § 924(c). Sup. Ct. R. 10(c).

² See *United States v. García-Ortiz*, 904 F.3d 102, 106–09 (1st Cir. 2018); *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2016); *United States v. Walker*, 990 F.3d 316, 325–26 (3d Cir. 2021), vacated and remanded by 142 S. Ct. 2858 (2022); *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019); *United States v. Buck*, 847 F.3d 267, 275 (5th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017); *United States v. Fox*, 878 F.3d 574, 579 (7th Cir. 2017); *United States v. Jones*, 919 F.3d 1064, 1072 (8th Cir. 2019); *United States v. Dominguez*, 954 F.3d 1251, 1260 (9th Cir. 2020), vacated by 142 S. Ct. 2857 (2022); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060–66 (10th Cir. 2018); *In re St. Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016)

³ See *United States v. McCoy*, 58 F.4th 72, 74–75 (2d Cir. 2023) (reinstating pre-*Taylor* ruling Hobbs Act robbery qualifies as a § 924(c) crime of violence, erroneously holding defendant must present “hypothetical case” in which “fear of injury” could not be violent physical force); *United States v. Stoney*, 62 F.4th 108, 113 (3d Cir. 2023) (adopting pre-*Taylor* ruling Hobbs Act robbery qualifies without new analysis of fear of injury); *United States v. Ivey*, 60 F.4th 99, 117 (4th Cir. 2023) (same); *United States v. Hill*, -- F.4th --, 2023 WL 2596748, at *19 (5th Cir. Mar. 22, 2023) (same); *United States v. Worthen*, 60 F.4th 1066, 1068–69 (7th Cir. 2023) (same); *United States v. Baker*, 49 F.4th 1348, 1360 (10th Cir. 2022) (same).!

Section 924(c) provides for graduated, mandatory, consecutive sentences for using a firearm during and in relation to a crime of violence or a drug trafficking offense. The term “crime of violence” is defined by two clauses: the elements clause and the residual clause. 18 U.S.C. § 924(c)(3)(A) and (B). But the residual clause in § 924(c)(3)(B) is unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319 (2019). Thus, an offense may only qualify as a crime of violence under the remaining elements clause.

The elements clause requires the offense to have “as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A). This means the offense must require (1) violent physical force capable of causing physical pain or injury to another person or property, *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019); and (2) the use of force must be intentionally directed at another and cannot merely be reckless or negligent, *Borden v. United States*, 141 S. Ct. 1817 (2021).

Hobbs Act robbery fails to qualify under § 924(c)’s force clause for at least two reasons: (1) the Hobbs Act robbery statute’s plain language categorically fails to require violent physical force because it can be committed by invoking fear of future injury to intangible property; and (2) the Hobbs Act robbery statute is indivisible as to completed and attempted Hobbs Act robbery, with this Court finding in *Taylor* that attempted Hobbs Act robbery does not qualify as a § 924(c) crime of violence.

A. The Hobbs Act robbery statute does not require violent physical force, and is categorically overbroad under *Taylor*.

A § 924(c) crime of violence must require the use, attempted use, or threatened use of violent physical force whether its object is a person or property. *Stokeling*, 139 S. Ct. at 554. Hobbs Act robbery lacks the violent physical force required because it can be committed by future fear of injury to property—including intangible property such as economic harm. 18 U.S.C. § 1951(b)(1). Hobbs Act robbery thus fails to qualify as a § 924(c) “crime of violence.”

Before *Taylor*, several circuit decisions, including the now-vacated Ninth Circuit decision in *Dominguez*, 954 F.3d at 1260,⁴ rejected defendants’ intangible property argument, holding no realistic probability exists the government would prosecute a Hobbs Act robbery case based on threats to intangible property. *García-Ortiz*, 904 F.3d at 106–09; *Hill*, 890 F.3d at 60; *Gooch*, 850 F.3d at 292. But *Taylor* squarely foreclosed reliance on the realistic probability test to determine whether statutes qualify as § 924(c) crimes of violence. *Taylor*, 142 S. Ct. at 2024–25. The realistic probability test contravenes the categorical approach, which is limited to

⁴ This Court vacated and remanded *Dominguez*, which held attempted Hobbs Act robbery was a crime of violence, in light of *Taylor*’s holding abrogating the Ninth Circuit’s decision. *United States v. Dominguez*, 954 F.3d 1251, 1254 (9th Cir. 2020) (“*Dominguez I*”), vacated by, 142 S. Ct. 2857 (2022).

On remand, the Ninth Circuit issued a new opinion, *United States v. Dominguez*, 48 F.4th 1040 (9th Cir. 2022) (unpublished) (“*Dominguez II*”). The *Dominguez II* opinion vacated the § 924(c) charges based on conspiracy or attempted Hobbs Act robbery, but reaffirmed a § 924(c) conviction based on completed Hobbs Act robbery “for the reasons explained in [*Dominguez I*.]” *Id.* at 1040. The Ninth Circuit did not revisit its categorical analysis of Hobbs Act robbery given *Taylor*’s rejection of the “reasonable probability” standard *Dominguez I* employed.

analyzing statutory elements. *Id.* It is an error to look beyond the elements and “say[] that a defendant must present evidence about how his crime of conviction is normally committed or usually prosecuted.” *Id.*

The federal circuits have long been in accord with the overbroad interpretation of Hobbs Act robbery, unanimously interpreting Hobbs Act “property” to include “intangible, as well as tangible, property.” *United States v. Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985) (collecting cases and describing the Circuits as “unanimous” on this point). But threats to intangible property do not require violent physical force, and thus fail the categorical analysis required by *Taylor. Louis*, 2023 WL 2240544, at *2.

The district court in *Louis* explained “the categorically overbroad nature of Hobbs Act robbery” stemmed from “allowing the jury to convict Mr. Louis for ‘fear of financial loss as well as fear of physical violence.’” *Id.* at *1. The Eleventh Circuit had already noted the “potential infirmity” of the Hobbs Act robbery instruction. *Id.* at *2 (citing *Davenport v. United States*, No. 16-15939, Dkt 11, pp. 6–8 (11th Cir. Mar. 28, 2017) (putting future litigants on notice that the Eleventh Circuit’s pattern jury instructions may overextend the elements of Hobbs Act robbery under the categorial approach)). Knight’s jury received a similar instruction as the *Louis* case by allowing the commission of Hobbs Act robbery by “fear of injury, immediate or future, to his person or property, or to property in his custody or possession,” App. D: 131a; 133a, rendering the offense categorically overbroad.

In addition, the Hobbs Act robbery statute expressly provides alternative, indivisible means of committing the offense that encompass violent force: “actual or threatened force, or violence.” 18 U.S.C. § 1951(b)(1). Canons of statutory interpretation require giving each word meaning: “Judges should hesitate . . . to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense.” *Ratzlaf v. United States*, 510 U.S. 135, 140–41 (1994); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty to give effect, if possible, to every clause and word of a statute.” (cleaned up)). “When interpreting a statute, we must give words their ‘ordinary or natural’ meaning.” *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). To interpret “fear of injury” as requiring the use or threat of violent physical force would render superfluous the other means of committing Hobbs Act robbery—“actual or threatened force or violence.”

Because Hobbs Act robbery can be committed non-violently by fear of future injury to intangible property—conduct which is not a threat of physical force required under § 924(c)’s elements clause—it fails to qualify as a crime of violence.

B. The Hobbs Act robbery statute is indivisible, and thus categorically overbroad under *Taylor*.

Hobbs Act robbery at 18 U.S.C. § 1951(a) is an indivisible offense with alternative means—attempted Hobbs Act robbery and completed Hobbs Act robbery. *See Mathis v. United States*, 579 U.S. 500, 518 (2016) (distinguishing between the elements and means of a crime for divisibility analysis); *Descamps v. United States*, 570 U.S. 254, 258 (2013) (setting divisibility test). Because this

Court holds one of these means—attempted Hobbs Act robbery—is not a § 924(c) crime of violence, *Taylor*, 142 S. Ct. at 2025, and the Hobbs Act statute is indivisible, the statute categorically fails to qualify as a crime of violence.

By bundling alternative means within a single sentence, the Hobbs Act statute is indivisible. *See United States v. McKibben*, 878 F.3d 967, 975 (10th Cir. 2017). Section § 1951(a) is a “one sentence proscription” that joins several acts as a disjunctive series. *Id.*

(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 commit 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.

18 U.S.C. § 1951(a). Besides the bundling, the penalty is the same for all means of violating the Hobbs Act statute—whether by completed robbery or attempted robbery. This bundling and same penalty combination confirm the statute is indivisible with alternative means. *Mathis*, 579 U.S. at 518.

Because *Taylor* held that one of the means within this indivisible statute—attempted Hobbs Act robbery—is not a crime of violence under 18 U.S.C. § 924(c), the whole of § 1951(a) categorically fails to qualify as a § 924(c) crime of violence, and Knight’s § 924(c) convictions are void. *Taylor*, 142 S. Ct. at 2025.

C. The proper application and interpretation of 18 U.S.C. § 924(c) is of exceptional, national importance.

Because of the Ninth Circuit’s failure to correctly apply categorical analysis per *Taylor*, Knight will serve over 14 years in prison including consecutive

mandatory sentences under 18 U.S.C. § 924(c). App. C, p. 122a. After completion of the prison terms, Knight will also serve a longer supervised release term than would otherwise be imposed, only because of the § 924(c) convictions.⁵ App. C, p. 123a.

Knight is just one of the thousands of defendants currently serving consecutive mandatory minimum sentences for § 924(c) convictions. Over 17,000 individuals (12.9% of the federal prison population) are serving a § 924(c) mandatory sentence. U.S. Sent. Comm'n, *Quick Facts: Federal Offenders in Prison* (Jan. 2022). In Fiscal Year 2021, nearly 2500 individuals were convicted of a § 924(c) offense, at least 25% of which involved a robbery offense, with an average sentence of 136 months (about 11½ years) in prison. U.S. Sent. Comm'n, *Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses*, Fiscal Year 2021 (June 2022).

Given the vast number of defendants' lives affected by the Circuits' misinterpretation of Hobbs Act robbery and 18 U.S.C. § 924(c), this Court's intervention is necessary. Knight asks this Court to review the Ninth Circuit's misapplication of the categorical approach to ensure compliance with the Constitution and this Court's precedent.

⁵ Without the § 924(c) convictions, Knight would be subject to a 3-year supervision term, rather than a 5-year supervision term. Because 18 U.S.C. § 924(c) carries a statutory imprisonment maximum of life imprisonment, it is a Class A felony with a 5-year maximum supervised release term. In contrast, Hobbs Act robbery carries a 20-year imprisonment statutory maximum, a Class C felony, thus carrying a 3-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).

Conclusion

For these reasons, this petition for a writ of certiorari should be granted.

Dated: April 4, 2023.

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