No. 22-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

CARMELITA BARELA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

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Appendix Table of Contents

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CARMELITA BARELA, Defendant-Appellant.	No. 21-10231 D.C. Nos. 3:20-cr-00254-CRB-1 MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted October 18, 2022
San Francisco, California

Before: CLIFTON, BEA, and NGUYEN, Circuit Judges.

Carmelita Barela timely appeals her jury conviction on one count of Hobbs Act robbery in violation of 18 U.S.C. § 1951. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Barela argues that the district court erred in instructing the jury that "[t]hreatening to infect another person with a disease can amount to threatened

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

force, violence or fear of injury, immediate or future, to that person" because the instruction was unsupported by law, improperly emphasized the government's theory of the case, and failed to require findings that the threat was made knowingly or intentionally and was a threat of violent force. We review "de novo whether jury instructions omit or misstate elements of a statutory crime or adequately cover a defendant's proffered defense." *United States v. Kaplan*, 836 F.3d 1199, 1214 (9th Cir. 2016) (cleaned up). We review the wording of jury instructions for abuse of discretion. *Id.*

Because the parties are familiar with the facts, we need not recount them in detail here. We conclude that the district court did not err in its "threatened force" instruction. Barela's threat to expose Walgreens employees to COVID-19 could have easily put the store clerks in "fear of injury." *See, e.g.*, Black's Law Dictionary at 939 (11th ed. 2019) (defining injury as "[a]ny harm or damage" and defining bodily harm as "[p]hysical pain, *illness*, or impairment of the body" (emphasis added)); *see also Johnson v. United States*, 559 U.S. 133, 138 (2010) (attributing the "ordinary meaning" to undefined words in the statute, meaning reliance on dictionary definitions). By threatening to infect someone with an illness known to cause bodily harm, as Barela did, one could certainly put another in "fear of injury" under the Hobbs Act. The district court's jury instruction also did not improperly adopt the government's theory nor improperly deemphasize the

defense's theory. The instruction left the jury to determine whether Barela threatened anyone with a disease and, if she did, whether such a threat amounted to threatened force, violence, or fear of injury, immediate or future.

The district court also properly gave the Ninth Circuit Model Jury Instruction on Hobbs Act robbery and did not err by rejecting Barela's request to insert the word "intentional" in the instruction.[1] The jury necessarily found that Barela threatened to expose the Walgreens employees to COVID-19, which fulfills the required intent for Hobbs Act robbery, as threatening someone denotes intentionality. *See* Ninth Circuit Model Jury Instruction 9.8 cmt. (stating that Hobbs Act robbery has "criminal intent—acting 'knowingly or willingly'—[a]s an implied and necessary element that the government must prove for a Hobbs Act violation") (citing *United States v. Dominguez*, 954 F.3d 1251, 1261 (9th Cir. 2020)); *cf. United States v. Henry*, 984 F.3d 1343, 1358 (9th Cir. 2021) ("[T]he word 'assault' used in [defendant]'s indictment denotes intentionality."). Additionally, the district court's jury instruction for Hobbs Act robbery, which

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[1] Barela requested the addition of the italicized word in the Ninth Circuit Model Jury Instruction below:

> "Robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against their will, by *intentional* means of actual or threatened force, or violence or fear of injury, immediate or future, to his person or property, or to property in his custody or possession, or to 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.

largely conformed to the Ninth Circuit Model Jury Instruction, adequately conveyed the force required for a conviction and did not need the addition of a "violent force" instruction as argued by Barela for the first time on appeal. *See United States v. Still*, 857 F.2d 671, 672 (9th Cir. 1988) (holding no plain error where "the court's instructions conformed almost entirely with federal model jury instructions").

2. Barela's challenges to the sufficiency of the evidence as to the force and affects-commerce elements of Hobbs Act robbery lack merit. Viewing the evidence in the light most favorable to the government, *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979), we hold that there was sufficient evidence to support the verdict. The jury heard testimony from the Walgreens store manager that she saw Barela cough and heard her say "I have COVID" as she loaded her purse with store merchandise and again as she walked out of the store, and the jury saw video footage of Barela walking out while the store manager stepped back to keep away from her and took a photograph that depicts a smiling Barela walking out with her bags full. A rational trier of fact could have found from this evidence that Barela's conduct amounted to threats to infect the employees with COVID-19, made with intent to keep them from interfering with her theft of merchandise. Regarding the affects-commerce element, Barela stipulated to "the element of the offense which requires that it have an impact on interstate commerce," and the jury was so

advised. Barela's stipulation provided sufficient evidence as to that element. *See Old Chief v. United States*, 519 U.S. 172, 186 (1997); *United States v. Merino-Balderrama*, 146 F.3d 758, 762 (9th Cir. 1998).

3. We review de novo whether the admission of evidence violated the Confrontation Clause, and for abuse of discretion a district court's decision to admit evidence under the Federal Rules of Evidence. *United States v. Johnson*, 875 F.3d 1265, 1278 (9th Cir. 2017). The district court's admission of a portion of a 911 call by a non-testifying witness did not violate the Confrontation Clause and was not an abuse of discretion under the Federal Rules of Evidence. The primary purpose of the portion of the 911 call was for facilitating police assistance, such that the statements were made for primarily nontestimonial purposes. *See United States v. Fryberg*, 854 F.3d 1126, 1134–35 (9th Cir. 2017). And the portion of the 911 call did not violate the rule against hearsay because the witness was reporting present sense impressions. *See* Fed. R. Evid. 803(1). In any event, even if part of the call was erroneously admitted, any error was harmless, as there was more than enough evidence for the jury to convict Barela without the non-testifying witness's statements from the 911 call. *See United States v. Shayota*, 934 F.3d 1049, 1052 (9th Cir. 2019).

AFFIRMED.

Hobbs Act robbery, and I could just go through the elements.

THE COURT: This is the opportunity.

MR. FINE: Thank you.

So first, the first element is that the Defendant knowingly obtained property or money from or in the presence of the Walgreens Pharmacy. I'm not even really sure that's disputed. She took the property. She took the --

THE COURT: That's not disputed.

MR. FINE: Sure.

THE COURT: It's not disputed that there isn't sufficient evidence from which one could conclude that that's what occurred. Okay.

MR. FINE: Fair enough.

So the second element is that the Defendant did so by means of robbery. And we have our definition of "robbery" in the Ninth Circuit model Jury Instructions, which means taking personal property by intentional means of actual or threatened force or violence or fear of injury, immediate or future.

THE COURT: And that's what's in dispute, the second part of it?

MR. ARCHER: Absolutely.

MR. FINE: Correct, Your Honor.

So I think a rational jury could find that when the Defendant coughed and said she had COVID, there was an implied threat. The threat was that if you try and interfere with this

robbery, you might get COVID. And that certainly could cause a fear of injury to a Walgreens employee, the injury being infection with COVID.

And it doesn't have to be an immediate injury. It says "immediate or future." Clearly, based on what we know about COVID, it can take a little bit to manifest.

And so I think certainly a rational jury could find, looking at this evidence, that when the Defendant coughed and said she had COVID, that there was an implied threat.

MR. ARCHER: Your Honor, I mean, this is stretching so far beyond the bounds of what robbery is. To say that there is an implied threat when there is no direct interaction between the -- the purported victim here and my client, that there is an allegation that she said "COVID" at some point and coughed. Again, there is no threat -- there's no --

THE COURT: Wait. You say that, but I'm trying to figure out, really, what you're saying.

You're saying -- I think what you are saying is there is insufficient evidence in the record from which a reasonable juror could conclude that she issued a threat. Isn't that the word? Isn't that what you're saying?

MR. ARCHER: That is correct.

THE COURT: Okay. So let's take a different case. Let's take the case of a person going into a pharmacy and saying: I have a gun. I have a gun. Says it in an audible

way.

So, I mean, there is -- it's not a mumble under her breath, but says so that a reasonable -- so that somebody could hear her saying: I have a gun. And then walks out with the property.

Is that a Hobbs Act violation? I know you would say yes, but --

MR. FINE: Well, I think the Defense's perspective --

THE COURT: I'm asking the Government. What?

MR. FINE: It might depend on what the store's policies are, Judge.

THE COURT: I don't think so.

MR. ARCHER: I mean --

THE COURT: Just take that hypothetical. If a Defendant walks into a store and says: I have a gun. And then in the course of which -- during the course of which she is taking property and putting it in her purse, is that a Hobbs Act, a potential -- can a jury conclude, a reasonable jury conclude that she is obtaining this property by fear of violence in that she has said she has a gun?

She didn't say she would use the gun. She didn't say it's loaded. All she -- and she didn't show it. All she said is: I have a gun. I have a gun. I have a gun. What about it?

MR. FINE: I think that clearly meets the elements of Hobbs Act.

THE COURT: I do. What do you think?

MR. ARCHER: That's not our scenario.

THE COURT: Whether it meets -- meets me. What is the standard?

MR. ARCHER: The standard? No rational juror.

THE COURT: Why wouldn't a rational juror think that -- that somebody hearing the words "I have a gun" believe that that's a threat?

As a matter of fact, most bank robberies occur with a person saying "I have a gun." That's how most bank robberies occur.

Now, I will say bank robbers are generally unsuccessful, but in -- in apprehension, but those are robberies. Those are bank robberies.

I think it's the same thing. I think that the argument is, you can say, well, the evidence is not sufficient, if that's what your argument is, that she issued a threat; that she said she had COVID. You can say that. I don't know. The jury will conclude that you're right or wrong and maybe you have some other arguments.

But if it's a marriage between the act of taking merchandise and the statement "I have COVID" and that was a statement that was communicated, I think that a reasonable juror -- I know that's -- whatever the testimony is, it defeats a Rule 29 in my view.

Okay. So, denied.

Let's talk about Jury Instructions. Okay?

MR. ARCHER: Sure.

MR. FINE: Certainly, Your Honor.

THE COURT: You want to take five minutes, ten minutes and then reassemble?

MR. FINE: Sure.

MR. ARCHER: Yes, please. Thank you.

THE COURT: Let's be in recess for 15 minutes.

(Whereupon there was a recess in the proceedings from 3:37 p.m. until 3:55 p.m.)

THE COURT: Let the record reflect all parties are present. Jury is not.

So let me go through instructions that I intend to give and have a discussion about any that are an issue.

Okay. Are we ready?

MR. FINE: Yes, Your Honor.

MR. ARCHER: Ready.

THE COURT: 3.1, duties of jury to find facts and follow the law.

3.2, charge against Defendant not evidence. Presumption of proof -- presumption of innocence, burden of proof.

3.3, Defendant in a criminal case, constitutional right not to testify.

3.5, reasonable doubt.

charge, the Government must prove each of the following elements beyond a reasonable doubt.

First, the Defendant knowingly obtained money or property from or in the presence of Walgreens Pharmacy.

Second, the Defendant did so by means of robbery.

Third, the Defendant believed that Walgreens Pharmacy parted with the money or property because of the robbery.

And fourth, the robbery affected interstate commerce.

This element, being the fourth element, has been established by way of stipulation.

Robbery means the unlawful taking or obtaining of personal property from the person or in the presence of another against their will by means of actual or threatened force or violence or fear of injury, immediate or future, to their person or to the person of a relative or member of their family or anyone -- or of anyone in their company at the time of the taking or obtaining. Threatening to infect another person with a disease can amount to threatened force, violence or fear of injury, immediate or future, to that person.

An act is done knowingly if the Defendant is aware of the act and does not act through ignorance, mistake or accident. The Government is not required to prove that the Defendant knew her acts or omissions were unlawful.

You may consider the evidence of the Defendant's words, act or omissions, along with all of the other evidence, in

So I leave that off and I just say:

"Evidence can be direct or circumstantial. You can consider both kinds."

And the reason you even give that is because there is a myth that people have: Oh, no you can't convict somebody on circumstantial evidence. No, no. That's not any good. Circumstantial? No. Well, that's what this is about.

3.9, credibility of witnesses.

Now, activities not charged. There is no evidence of any other activities, is there?

MR. FINE: I don't believe so, Your Honor.

THE COURT: I don't think so.

MR. ARCHER: No, Your Honor.

THE COURT: Okay. On or about. We don't need to do that.

Statements by Defendant. Don't need to do that.

Other crimes or acts. Don't need to do that.

Knowingly. Here we go. You do need that, but I'm not sure -- no, I'm going to give the -- the next one I'm going to give is not the knowingly one, but the Hobbs Act one, which is 8.143A.

And I'm giving the Government's version. So it will read:

"Robbery," in the last paragraph, "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 to property in his custody or possession."

You know, I can modify that. This is not a -- this is not a threat to property, is it?

MR. ARCHER: No.

MR. FINE: No, Your Honor.

THE COURT: So it really should be:

"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," period. "To his person." "To his person or to the person" -- well, huh.

"...or to the person of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. Threatening to inflict another person with a disease can amount to threatened force, violence or fear of injury, immediate or future, to that person."

MR. ARCHER: So the Defense certainly objects to that, Your Honor. That basically codifies the Government's perspective on this.

I mean, it's codifying their closing argument in this case. It's contrary to *Dominguez* and *Johnson*, and I think it would be -- I don't understand why giving the model instruction would be -- would be inappropriate in this case.

The Government is always welcome to argue that this would be -- you know, that the facts are sufficient.

But this is not -- this is not the model instruction. They have added:

> "Threatening to infect another person with a disease can amount to threatened force, violence or fear of injury, immediate or future, to that person."

As we have argued, we briefed this issue. The reliance on *Castleman* is inappropriate. I mean, *Dominguez*, 954 F.3d, at 1260, you know, distinguishes *Castleman* in that respect.

And so I -- we absolutely object to it. We think -- I'm sort of at a loss as to why the model instruction wouldn't be given when it's the Government's burden to prove what would be a threat, what would be a threat of harm, injury or violence.

To then state effectively the Government's position in a Jury Instruction would be extraordinarily prejudicial to the Defense.

MR. FINE: Your Honor --

THE COURT: 143A.

MR. FINE: If I may respond, Your Honor?

THE COURT: Yeah, sure.

MR. FINE: Obviously, that last sentence is not in the model instruction.

THE COURT: Right.

MR. FINE: We think it's an important clarification based on the pretty clear case law as we see it that we've cited right here.

I think the jury is naturally going to ask, because this is not your typical case with a gun, as Your Honor described earlier. This is a case where someone was threatening -- or at least the Government thinks threatening to infect someone with a disease.

The jury will probably naturally wonder whether, you know -- if that was the intent of the Defendant, whether that could qualify as Hobbs Act robbery. And I think this case law makes clear that it would. And this is a clarification that I think is especially helpful for this case.

MR. ARCHER: Is *Castleman* a robbery case?

THE COURT: Pardon?

MR. ARCHER: I'm just asking the Government: Is *Castleman* a robbery case? They have cited *Castleman* as the basis for this. Is it a robbery case? Is it a case dealing with Hobbs Act robbery?

MR. FINE: If I may respond, Your Honor.

We cite *Castleman* in literally the next sentence:

"Several District Courts have held that

Castleman's use of force definition applies in a Hobbs Act context."

And we have lots of cites to Courts that have applied *Castleman* --

THE COURT: Well, this seems to me -- it seems to me it makes sense.

You're not arguing this is an incorrect statement of the law. You're arguing that it's unnecessary for me to give it.

MR. ARCHER: I'm also arguing that it's an incorrect statement of the law --

THE COURT: Is it?

MR. ARCHER: -- under *Johnson* and *Dominguez*.

THE COURT: In other words, if I threaten to make somebody sick, that's not -- that threat can't be considered in the context of a Hobbs Act?

MR. ARCHER: It can be considered, but that's for the Government to argue. But it's not -- what I'm saying is defining that as sufficient is inappropriate.

THE COURT: I can add a sentence:

"It is for you to determine whether or not there was a threat to infect another person."

I mean, I don't want to take -- I'm not -- I don't want the sentence to assume within it that the Court finds that the threat occurred. I want the sentence to reflect that if the jury finds it did occur, it, as a matter of law, is -- is a use

of force.

MR. ARCHER: So I guess where I am having a problem here is why there is an effort to wrap in the Government's theory in this case, which is that a shoplifting wrapped in a threat or an implied threat, as they have now acknowledged -- there is no explicit threat -- would be something that needs to be then put into a Jury Instruction. I don't understand why the model instruction would be insufficient in this case when -- I mean, the Government is --

THE COURT: Well, the reason is because of the involvement of -- of this type of injury.

First of all, it may not have been contemplated or -- I don't know whether there are any cases on the Spanish flu epidemic, but the question is for jurors to understand that threatening a person with a communicable fatal disease is a threat of harm.

MR. ARCHER: So what I'm saying is --

THE COURT: You're not arguing that that's not the case. You're arguing -- you're arguing why am I putting that in.

It's because if somebody said, "I'm going to shoot my gun at you," you don't need a definition. Shooting a gun at a person in which a bullet would possibly travel into the person's heart or brain is use of force, is a threatened use of force. No, everybody knows that. But people may not know that

the threat of infecting you is a use of force.

Now, you say -- and is it your argument that that is really a jury determination; that is to say, assuming it even happened, whether it was a threat of force -- whether it's a threat of force, I don't know. I'm sort of lost in this. I don't understand your argument.

MR. ARCHER: So I think -- and I think Mr. Reichmuth just made a good point, which I was pondering as well.

Why is it not in the jury's purview to determine whether a threat of the disease would be an injury? Because, I mean, a threat of -- threat of any communicable disease wouldn't necessarily result in an injury.

I mean, that is -- there is a threshold for the jury --

THE COURT: There is no evidence, by the way, is there in this record?

I mean, actually, actually, you objected to the one piece of evidence that might very well have established the communicable -- the dangerousness of the disease.

I don't think you can have it both ways. You objected to the shelter-in-place order in which there were multiple findings of the dangerousness of COVID. You said: No, I don't want any that in. It's too prejudicial. Okay. That's fine. It didn't come in.

But now on the other hand to argue that COVID is -- that the Government failed to prove that COVID is a dangerous

disease is contrary to what I had understood the issues of the case to be and the Government's proof. They wanted to prove how dangerous it was. That's what they started out by doing, and then you said, no, it's not necessary because it's too prejudicial.

MR. ARCHER: So --

THE COURT: I mean, they could have had two weeks of statistics, of showing 500,000 people died, the State of California closing down.

But, you know, the jury knows a lot of this anyway, but it's not in the record. I agree with you, it's not in the record, because you kept it out.

MR. ARCHER: But that's my job. I mean --

THE COURT: No, no, no. No. Your job -- yes, your job can be you kept it out.

MR. ARCHER: Correct.

THE COURT: Your job is not: I kept it out and, therefore, they can't argue the opposite when they offered testimony to which you objected on the grounds that it was prejudicial. You can't get it every way.

MR. ARCHER: I think the Court has hit it right on the head there. They are not precluded in any way from arguing this. What should --

THE COURT: There is nothing in the record.

MR. ARCHER: Sorry?

THE COURT: There is nothing in the record. There is no record of what COVID does.

MR. ARCHER: That's not a failing on the Defense's part.

THE COURT: No. You objected to it coming in.

MR. ARCHER: Sure.

THE COURT: Well, okay. Okay. You've got your -- if there is a conviction, you have your appellate point. I would be very interested in what an appeals court would say in light of the way this record has been developed.

MR. FINE: Your Honor --

THE COURT: You know what I could do? I could allow them -- if you're going to argue that, I will allow them to open up their case tomorrow and put on all this stuff so there is plenty in the record of how dangerous COVID is.

That's the option. If you're going to argue it, then I'm going to let them reopen their case.

Don't look at me like I'm crazy. The fact of the matter is, you can't have it every way and then say: Well, that's my job.

The fact of the matter is that if you have taken an issue by objection out of the -- out of the trial, which I believe you did when you objected to the shelter-in-place order and all the findings therein, I took that to mean that that was not going to be contested. That is, you're not going to contest

the issue as to whether or not COVID is a dangerous disease which can be communicated by way of air transmissions through a cough. I believed you weren't going to argue that.

If you want to argue it -- I'm not saying you can't -- just tell me. If you're going to argue it, I'm allowing them to reopen their case and put in all evidence that they want to that's relevant on the issue of the dangerousness of COVID.

MR. ARCHER: My request is that the model instruction be given because the Government is -- this is effectively aiding the Government and stretching the boundaries of Hobbs Act robbery by giving them a definition within the instruction that includes their fact pattern. So that's my --

THE COURT: As a matter of fact, Mr. Archer, I don't think anybody who has been a witness to these proceedings to date thinks I'm aiding the Government.

MR. ARCHER: What I'm saying is that inclusion of this instruction would aid their efforts to --

THE COURT: Well, I don't want to be flip. I know that's what you're saying. That's a nice way of sidestepping what I just said.

What I have just said, so it's clear, and I'll be listening to your argument, because it may -- I may do it right in the middle, is that if you are going to make an issue, say that the Government has failed to show that COVID is the -- is a threat to the health of an individual and failed to show that

violence or fear of injury, immediate or future, to that person. So that's why it's there, because they may have to prove it.

They -- I mean, they have to prove that the words that were uttered, if they were uttered, if they were communicated or intended to be communicated, they may have to prove all of that.

What they don't have to prove is the dangerousness of COVID, unless you challenge that. If you challenge it, then I'm going to let them reopen their case.

You don't have to decide now, but that's what I'm going to do. Meanwhile, I'm leaving this instruction in because I think it addresses that point.

Okeydoke. So 8143 goes in as suggested by the Government.

As to affecting interstate commerce, I will simply say that the element of the offense -- the robbery affected interstate commerce has been -- that the impact -- that the Defense is not -- I have to --

MR. FINE: The Defense agrees that the Government has proven beyond a reasonable doubt that -- or maybe hasn't proven, but the Defense agrees that --

THE COURT: The taking of property -- taking of the property that's the subject of this prosecution affected interstate commerce as that term is defined in the Hobbs Act, something like that.

it can be communicated by way of air transmissions, they failed that, and absent that, they haven't been able to show that this was a threat of harm within the meaning of the Hobbs Act -- that's what you're going to argue -- I'm going to allow them to reopen. Because I kept it out. Because it is so prejudicial. It comes right in, if that's your argument.

Now, if you want to argue that there's insufficient evidence that she communicated a threat; that is -- I mean, it's like saying -- if -- if you're going to challenge whether a gun is dangerous, I'm going to allow evidence in of guns. If you're going to challenge whether COVID is dangerous, I'm going to allow in evidence of COVID. If you're going to challenge whether the person communicated a threat about a gun, if you're going to challenge, I'm -- I'm going to -- you're going to challenge the issue whether the Government has proven that she issued a threat of COVID, that's a different story. You certainly are free to do that.

You made it in your Rule 29 motion, and you can argue it -- you can argue it because it's an element of the offense.

I know it's also an element of the offense with respect to whether it's a threat of harm, but I had -- I had accepted, by virtue of the way the case was posited, that that was not going to be contested.

And that's really what this is. Threatening to infect another person with a disease can amount to threatened force,

DEFENSE PROPOSED INSTRUCTION No. 30 [DISPUTED]

HOBBS ACT—

ROBBERY (COUNT ONE)

The defendant is charged in Count One the indictment with robbery in violation of Section 1951 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly obtained money or property from or in the presence of Walgreens Pharmacy;

Second, the defendant did so by means of robbery;

Third, the defendant believed that Walgreens Pharmacy parted with the money or property because of the robbery; and

Fourth, the robbery affected interstate commerce.

"Robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against **their** will, by **intentional** means of actual or threatened force, or violence [or fear of injury, immediate or future, to his person or property, or to property in his custody or possession, or to 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].

NINTH CIRCUIT MODEL JURY INSTRUCTION NO. 8.143A, ***United States v. Dominguez*, 954 F.3d 1251, 1261 (9th Cir. 2020); *United States v. Woodruff*, 296 F.3d 1041, 1048-48 (11th Cir. 2002)**

GOVERNMENT PROPOSED INSTRUCTION No. 30 [DISPUTED]

HOBBS ACT—

ROBBERY (COUNT ONE)

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"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 to property in his custody or possession, or to 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]. **Threatening to infect another person with a disease can amount to threatened force, violence, or fear of injury, immediate or future, to that person.**

Authority

NINTH CIRCUIT MODEL JURY INSTRUCTION NO. 8.143A, 18 U.S.C. § 1951; ***United States v. Castleman*, 572 U.S. 157, 170-71 (2014).**

The Supreme Court has clearly held that infecting a person with a disease constitutes the use of "force":

> But as we explained in *Johnson*, "physical force" is simply "force exerted by and through concrete bodies," as opposed to "intellectual force or emotional force." And the common-law concept of "force" encompasses even its indirect application. "Force" in this sense "describ[es] one of the elements of the common-law crime of battery," and "[t]he force used" in battery need not be applied directly to the body of the victim." ***A battery may be committed by administering a poison or by infecting with a***

> *disease, or even by resort to some intangible substance*, such as a laser beam.
>
> ...
>
> The "use of force" in Castleman's example is not the act of "sprinkl[ing] the poison; it is the act of knowingly employing a device to cause harm. That the harm occurs indirectly rather than directly (as with a kick or punch) does not matter. Under Castleman's logic, after all, one could say that pulling the trigger on a gun is not a "use of force" because it is the bullet, not the trigger, that actually strikes the victim.

United States v. Castleman, 572 U.S. 157, 170-71 (2014) (emphasis added) (internal citations and quotation marks omitted).

Several district courts have held that *Castleman*'s "use of force" definition applies in the Hobbs Act context. *See Cancel-Marrero v. United States*, 333 F. Supp. 3d 40, 43 (D. PR. 2018) ("Finally, the 'fear of injury' in Hobbs Act robbery encompasses a fear of injury produced by physical force that is one step removed from, but caused by, the physical force of the offender. As such, a person that commits Hobbs Act robbery by instilling onto his victim the fear of being poisoned, exposed to chemicals, or locked in a hot car is necessarily threatening to use physical force."); *see also United States v. Williams*, 179 F.Supp.3d 141, 152 (D. Me. 2016); *United States v. Pena*, 161 F.Supp.3d 268, 279 (S.D.N.Y. 2016) (stating that "the text, history, and context of the Hobbs Act compel a reading of the phrase "fear of injury" that is limited to fear of injury from the use of force."); *United States v. Herstch*, 2017 WL 4052383 at *5 (E.D.V.A. Sept. 12, 2017) (discussing *Castleman* and holding that "in the Hobbs Act robbery context, even 'fear of injury' stemming from a threat of indirect physical force constitutes a crime of violence.").

In the bank robbery context, the Ninth Circuit has held that taking property "by intimidation" satisfies the force element of the bank robbery statute. *See United States v. Alsop*, 479 F.2d 65, 66-67 (9th Cir. 1973) ("Now, to take 'by intimidation' means wilfully to take by putting in fear of bodily harm. Such fear must arise from the wilful conduct of the accused, rather than from some mere temperamental timidity of the victim; however, the fear of the victim need not be so great as to result in terror, panic, or hysteria. A taking 'by intimidation' must be established by proof of one or more acts or statements of

the accused which were done or made, in such a manner, and under such circumstances, as would produce in the ordinary person fear of bodily harm."). The Ninth Circuit has also applied this taking "by intimidation" standard to the Hobbs Act context. *United States v. Howard*, 650 Fed. Appx. 466 (9th Cir. 2016) ("Because bank robbery by "intimidation"—which is defined as instilling fear of injury—qualifies as a crime of violence, Hobbs Act robbery by means of "fear of injury" also qualifies as crime of violence.") (citing *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990)).

GOVERNMENT OBJECTION TO DEFENSE PROPOSED INSTRUCTION No. 30

The government objects to the defense's addition of the word "intentional" into the definition of "Robbery" in its proposed instruction no. 30. The defense's cited authority does not actually support the addition of "intentional" to the model instruction. Instead, both cases stand for the unobjectionable proposition that a robbery cannot be accomplished by mere negligence or recklessness. Instead, the robbery must be committed knowingly or willfully. In fact, the model instruction already requires that the taking be committed "knowingly" (see first element), and a separate model instruction proposed by the parties specifically defines "knowingly." (5.7). Accordingly, the government does not believe the defense's proposed departure from the model instruction is necessary or supported by precedent. The defense's proposed language is also clunky and more likely to confuse the jury than to help clarify the law. In fact, from the government's research, the phrase "intentional means of actual or threatened force" does not appear to have ever been used in a federal case anywhere in the country.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CARMELITA BARELA, Defendant-Appellant.	No. 21-10231 D.C. Nos. 3:20-cr-00254-CRB-1 3:20-cr-00254-CRB Northern District of California, San Francisco ORDER

Before: CLIFTON, BEA, and NGUYEN, Circuit Judges.

Judge Nguyen has voted to deny the petition for rehearing en banc, and Judge Clifton and Judge Bea have so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for rehearing en banc is denied.