No. 22-7872

IN THE SUPREME COURT OF THE UNITED STATES

CARMELITA BARELA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly instructed the jury that knowingly threatening to infect a robbery victim with COVID-19 can constitute the "actual or threatened" use of "force, or violence, or fear of injury, immediate or future" to support petitioner's conviction for Hobbs Act robbery, in violation of 18 U.S.C. 1951(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is available at 2022 WL 17844173.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2022. A petition for rehearing was denied on March 29, 2023 (Pet. App. 29a). The petition for a writ of certiorari was filed on June 23, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on one count of Hobbs Act robbery, in violation of 18 U.S.C. 1951. Pet. App. 1a. She was sentenced to time served. Judgment 2. The court of appeals affirmed. Pet. App. 1a-5a.

1. In early April 2020, during the first weeks of the COVID-19 pandemic and while San Francisco was under a government-imposed shelter-in-place order in an effort to stem the disease's spread, petitioner and an accomplice robbed a Walgreens pharmacy of merchandise by inspiring fear that they would transmit the disease to store employees. C.A. S.E.R. 28, 31-36, 40, 55, 121. After entering the store without medical masks or other face coverings, petitioner and her accomplice helped themselves to store merchandise while keeping store employees at bay by coughing and stating that they were infected with COVID-19. Ibid.

Petitioner's accomplice coughed multiple times while the store manager, who had approached to offer assistance, directed the accomplice to the memory supplements. C.A. S.E.R. 29-31. The accomplice continued to cough even after a store security guard told her that if she was "feeling sick, [she] should be staying at home." Id. at 31. Petitioner, for her part, not only coughed repeatedly but also announced that "I have COVID" while taking body wash off the store shelf and putting it into her purse. Id. at 31-36, 55. The accomplice also announced that "I have COVID."

Id. at 35. The manager, understanding coughing to be a COVID-19 symptom, kept a distance because she feared coming into "contact[] with the virus." Id. at 36; see id. at 48.

As petitioner left the store with the merchandise, she smiled, continued coughing, and repeated that she had COVID-19. C.A. S.E.R. 48-49. The manager had to back up "to keep [a] safe distance," but photographed the women as they left and asked store employees to call 911. Id. at 48-54. Following the robbery, the manager feared she may have been exposed to COVID-19, and physically distanced for a week and a half from the family with whom she lived. Id. at 62-64.

2. A federal grand jury in the Northern District of California indicted petitioner on a single count of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a). Indictment 1-2. The Hobbs Act prohibits robbery or extortion that "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce," defining robbery as the "unlawful taking or obtaining" of personal property from another "by means of actual or threatened force, or violence, or fear of injury, immediate or future." 18 U.S.C. 1951(a) and (b)(1).

The district court instructed the jury that "[t]hreatening to infect another person with a disease can amount to threatened force, violence or fear of injury, immediate or future, to that person." Pet. App. 2a-3a; see C.A. S.E.R. 133-134. The jury found

petitioner guilty. C.A. E.R. 194. The court sentenced petitioner to time served. Judgment 2.

3. The court of appeals affirmed in an unpublished decision. Pet. App. 1a-5a.

The court of appeals rejected petitioner's claim that the district court erroneously instructed the jury that threatening to infect another person with a disease can amount to the threatened use of force, violence, or fear of injury. Pet. App. 1a-2a. The court observed that petitioner's threat to expose Walgreens employees to COVID-19 "could have easily put the store clerks in 'fear of injury.'" Id. at 2a.

The court also found that the instruction properly "left the jury to determine whether [petitioner] 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." Pet. App. 2a-3a. The court further determined that the district court did not err in declining to add the word "intentional" to the instruction, reasoning that "threatening someone denotes intentionality." Id. at 3a.

Finally, the court of appeals rejected petitioner's claim that the jury should have been instructed that Hobbs Act robbery must include the use of "violent force -- that is, force capable of causing physical pain or injury to another person," Pet. C.A. Br. 34 (quoting Curtis Johnson v. United States, 559 U.S. 133, 140 (2010)); see Pet. App. 3a-4a. The court observed that petitioner

had proffered that instruction "for the first time on appeal" and found it unnecessary, because the existing instructions "adequately conveyed the force required for a conviction," Pet. App. 3a-4a.

ARGUMENT

Petitioner renews her claim (Pet. 7-16) that the district court misinstructed the jury on her Hobbs Act robbery charge. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or of another court of appeals. In any event, this case would be an unsuitable vehicle for addressing the question presented. Further review is unwarranted.

1. The Hobbs Act defines robbery as the "unlawful taking or obtaining" of personal property from another "by means of actual or threatened force, or violence, or fear of injury, immediate or future." 18 U.S.C. 1951(b)(1). That definition codifies a federal version of common-law robbery; "Hobbs Act robbery is defined as common-law robbery that affects interstate commerce." United States v. Melgar-Cabrera, 892 F.3d 1053, 1064 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018).

As the text makes clear, a completed Hobbs Act robbery involves the use of force, threatened use of force, or both. Robberies in which the robber employs "actual * * * force" or "violence," 18 U.S.C. 1951(b)(1), involve the use of force, see Stokeling v. United States, 139 S. Ct. 544, 550 (2019) (noting

that "force" and "violence" are equivalent common-law terms). And those in which the robber employs "threatened force * * * or fear of injury," 18 U.S.C. 1951(b)(1), involve at least threatened use of force.

As this Court explained in United States v. Castleman, 572 U.S. 157 (2014), the phrase "use of force" can include both direct and indirect causation of physical harm, and "the common-law concept of 'force' encompasses even its indirect application." Id. at 170-171. There, in the context of a prosecution under 18 U.S.C. 922(g)(9), the Court considered whether a state misdemeanor assault offense requiring causation of bodily injury "ha[d], as an element, the use * * * of physical force," as required by the relevant definitional provision in 18 U.S.C. 921(a)(33). Castleman, 572 U.S. at 160-161 (quoting 18 U.S.C. 921(a)(33)(A)(ii)). The Court held that it did, explaining that force may be applied directly -- through immediate physical contact with the victim -- but also can be applied indirectly. Id. at 170.

The Court observed that, for instance, shooting a gun in the victim's direction, "'administering a poison,'" "'infecting [a victim] with a disease,'" or "'resort[ing] to some intangible substance,' such as a laser beam," would all constitute the "'use of force.'" 572 U.S. at 170-171 (citation omitted). The Court reasoned that when, for example, a person "sprinkles poison in a victim's drink" he or she has used force because the "'use of

force' in [that] example is not the act of 'sprinkl[ing]' the poison; it is the act of employing poison knowingly as a device to cause physical harm." Id. at 171 (citation omitted; second set of brackets in original).

A threat (e.g., "Your money or your life") is still a threat regardless of whether and how the threatener intends to carry it out. See, e.g., Virginia v. Black, 538 U.S. 343, 360 (2003) (recognizing that a "speaker need not actually intend to carry out [a] threat"). And the statutory text of the Hobbs Act makes clear that the threatened injury can be "future" injury; a robber need not threaten "immediate" injury. 18 U.S.C. 1951(b)(1).

2. The court of appeals correctly determined that, in the circumstances of this case, the district court permissibly instructed the jury that "threatening to infect someone with an illness known to cause bodily harm" could constitute threatened use of force or fear of injury. Pet. App. 2a; C.A. S.E.R. 133-134. As this Court made clear in Castleman, infecting a victim with a disease can be a use of force. 572 U.S. at 170. And the jury was entitled to determine whether petitioner's coughing, coupled with repeated statements that she was infected with COVID-19, constituted the threatened use of force.

a. Petitioner does not dispute that infection with COVID-19 can cause bodily harm and poses a threat of injury that may manifest in the future. And petitioner acknowledged at trial that the jury appropriately could "consider[]" whether the facts here

were "sufficient" to establish such a threat. C.A. S.E.R. 105, 107. As the court of appeals observed, the instruction "left the jury" to make the factual determination whether petitioner "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." Pet. App. 2a-3a. Petitioner identifies no sound basis for questioning the jury's factbound finding -- made in the context of a defendant who, in the early days of an unprecedented pandemic, threatened to infect her victims with a then-untreatable virus that was causing considerable numbers of widely reported deaths and leading to the adoption of extreme public-health measures -- much less a reason for this Court to review that finding.

Petitioner errs in suggesting (Pet. 2) that the inclusion of indirect use of force extends Hobbs Act robbery "beyond" the crime's "common-law definition." As the Court explained in Castleman, "the common-law concept of 'force' encompasses even its indirect application." 572 U.S. at 170. Petitioner cites no authority suggesting that common-law robbery offenses carried an alternative understanding of force. And the cases she cites (Pet. 8-9) expressly reject claims that robbery, including Hobbs Act robbery, cannot encompass the indirect use of force. See United States v. Hill, 890 F.3d 51, 58-59 (2d Cir. 2018) (rejecting claim that "placing a victim in fear of injury by threatening the indirect application of physical force is not sufficient"), cert.

denied, 139 S. Ct. 844 (2019); United States v. Burns-Johnson, 864 F.3d 313, 318 (4th Cir.) (reasoning that even if armed robbery "could be committed by use of poison," it "necessarily still would entail the use, attempted use, or threatened use of violent physical force"), cert. denied, 583 U.S. 978 (2017).[1]

Petitioner is also mistaken in asserting (Pet. 4-5, 8-11) that the inclusion of indirect force, or threats of it, under the Hobbs Act would undermine the uniform assessment of every court of appeals to consider the question that Hobbs Act robbery "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," and thus qualifies as a "crime of violence" under 18 U.S.C. 924(c). 18 U.S.C. 924(c)(3). Although Castleman reserved the question whether any crime that requires the causation of "bodily injury" would "necess[arily]" satisfy the similarly worded elements clause in the Armed Career Criminal Act of 1984 (ACCA), see 18 U.S.C. 924(e)(2)(B)(i), Castleman's determination that the phrase "use of physical force" encompasses indirect force did not depend on any considerations unique to Section 921(a)(33)(A). See 572 U.S. at 170-171. The courts of appeals have accordingly uniformly applied Castleman's

[1] In the third decision that petitioner cites, the Fourth Circuit made a passing suggestion that "it will be the rare bank robber who commits [armed bank robbery, in violation of 18 U.S.C. 2113(a)] with poison." United States v. McNeal, 818 F.3d 141, 156, cert. denied, 580 U.S. 876 (2016). But the decision did not consider whether the use of force can encompass indirect uses. And the Fourth Circuit has subsequently recognized that it can. See Burns-Johnson, 864 F.3d at 318.

logic to the "physical force" requirement of other provisions that employ that term.[2]

Contrary to petitioner's contention (Pet. 8), the decision below is not in tension with the Court's conclusion in Stokeling, supra, that "physical force" for purposes of the ACCA encompasses robbery offenses that require the offender to overcome the victim's resistance. Id. at 553. This Court held in Curtis Johnson v. United States, 559 U.S. 133 (2010), that an offense involves "physical force" when it requires "violent force -- that is, force capable of causing physical pain or injury to another person." Id. at 140. Applying that holding in Stokeling, the Court determined that "the force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by Johnson." 139 S. Ct. at 553. Nothing in Stokeling suggests that the "threatened" use of force differentiates between

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[2] See, e.g., United States v. Ellison, 866 F.3d 32, 37-38 (1st Cir. 2017); Hill, 890 F.3d at 58-60 (2d Cir.); United States v. Chapman, 866 F.3d 129, 134-136 (3d Cir. 2017), cert. denied, 138 S. Ct. 1582 (2018); United States v. Covington, 880 F.3d 129, 134-135 (4th Cir.), cert. denied, 138 S. Ct. 2588 (2018); United States v. Reyes-Contreras, 910 F.3d 169, 180-181 (5th Cir. 2018) (en banc); United States v. Verwiebe, 874 F.3d 258, 261 (6th Cir. 2017), cert. denied, 139 S. Ct. 63 (2018); United States v. Waters, 823 F.3d 1062, 1066 (7th Cir.), cert. denied, 580 U.S. 1021 (2016); United States v. Rice, 813 F.3d 704, 706 (8th Cir.), cert. denied, 580 U.S. 834 (2016); Hernandez v. Lynch, 831 F.3d 1127, 1131 (9th Cir. 2016), cert. denied, 581 U.S. 992 (2017); United States v. Ontiveros, 875 F.3d 533, 536-537 (10th Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018); United States v. Deshazior, 882 F.3d 1352, 1357-1358 (11th Cir. 2018), cert. denied, 139 S. Ct. 1255 (2019); United States v. Haight, 892 F.3d 1271, 1280 (D.C. Cir. 2018), cert. denied, 139 S. Ct. 796 (2019).

different types of physical force, such that it would encompass, say, threats to hit someone while excluding threats of the types of physical force described in Castleman -- like "infecting [a victim] with a disease," 572 U.S. at 170.

Finally, petitioner is incorrect in asserting (Pet. 10) that indirect force can qualify as "force" only when an offense requires proof of bodily injury. The Hobbs Act, Section 924(c), and the ACCA all specifically encompass not just the actual use of force, but also attempts and threats to use force. See 18 U.S.C. 1951(b)(1); 18 U.S.C. 924(c)(1)(A); 18 U.S.C. 924(e)(2)(B). Furthermore, as the Court explained in Stokeling, to constitute the use of physical force, an "altercation need not cause pain or injury or even be prolonged," so long as the offender uses, attempts to use, or threatens to use force that is "'capable of causing physical pain or injury.'" 139 S. Ct. at 553 (quoting Curtis Johnson, 559 U.S. at 140) (emphasis added); id. at 554 ("Johnson * * * does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality.").

b. Petitioner does not identify any conflict in the circuits on the Hobbs Act's, Section 924(c)'s, or the ACCA's coverage of indirect force.

Petitioner cites (Pet. 9-10) Whyte v. Lynch, 807 F.3d 463 (1st Cir. 2015), to suggest that the First Circuit has held that Castleman does not apply outside the context of 18 U.S.C.

922(g)(9). But Whyte did not consider the relevant passage in Castleman, see 807 F.3d at 468, 471, and in denying rehearing, the court made clear that the government's reliance on Castleman had been waived for that case only, see Whyte v. Lynch, 815 F.3d 92, 92-93 (1st Cir. 2016). The First Circuit later noted that Whyte did not foreclose the argument that Castleman applies in the ACCA context. See United States v. Edwards, 857 F.3d 420, 426 & n.11, cert. denied, 583 U.S. 903 (2017).

Petitioner also asserts (Pet. 9) that treating an indirect-force offense as a crime of violence would conflict with two Third Circuit decisions, which she reads as rejecting Castleman's application to the ACCA. Those decisions, however, considered only the application of force caused by a defendant's omission or inaction, which the court distinguished from indirect force, which it had addressed in a previous decision. United States v. Mayo, 901 F.3d 218, 226-230 (3d Cir. 2018); United States v. Harris, 68 F.4th 140, 146 (3d Cir. 2023); see Chapman, 866 F.3d at 134-136 (recognizing that the use of indirect force can constitute the use of force). In any event, the government sought rehearing en banc on the omission issue, see Pet. for Reh'g, Harris, supra (No. 17-1861) -- an issue on which the Court has previously denied certiorari. See Scott v. United States, 142 S. Ct. 397 (2021) (No. 20-7778); Peeples v. United States, 138 S. Ct. 2640 (2018) (No. 17-8863); Ontiveros v. United States, 138 S. Ct. 2005 (2018) (No. 17-8367).

3. a. The court of appeals also correctly determined (Pet. App. 3a-4a) that the jury instructions did not permit the jury to find her guilty of Hobbs Act robbery based on a mens rea of recklessness. A conviction for Hobbs Act robbery requires the government to show that the defendant acted knowingly or willingly. See, e.g., United States v. Dominguez, 954 F.3d 1251, 1261 (9th Cir. 2020) (determining that "criminal intent -- acting 'knowingly or willingly' -- is an implied and necessary element that the government must prove for a Hobbs Act conviction") (citation omitted), cert. granted, judgment vacated on other grounds, 142 S. Ct. 2857 (2022). And the jury instructions at petitioner's trial informed the jury that, to find her guilty, they had to find petitioner "knowingly obtained money or property * * * by means of robbery," and defined "knowingly" as requiring a finding that petitioner be "aware of the act" and not "act through ignorance, mistake, or accident." C.A. S.E.R. 133-134.

In affirming the resulting conviction, the unpublished decision below reasoned that "[t]hreaten[ing] to expose the Walgreens employees to COVID-19, * * * fulfills the required intent for Hobbs Act robbery, as threatening someone denotes intentionality." Pet. App. 3a. Petitioner takes issue (Pet. 12) with that statement, but fails to explain how a jury could find that a defendant "knowingly obtained money or property * * * by means of robbery," where "knowingly" is defined as "aware[ness] of the act" and not "act[ing] through ignorance, mistake, or

accident," C.A. S.E.R. 133-134, without finding (in a case involving a threat) that the defendant's threat was knowing or intentional. And she is accordingly incorrect in asserting (Pet. 11-16) that her conviction is inconsistent with the exclusion of crimes with a mens rea of recklessness from the ACCA's elements clause under this Court's decision in Borden v. United States, 141 S. Ct. 1817 (2021).

Petitioner again suggests (Pet. 11-16) that her conviction undermines the uniform consensus that completed Hobbs Act robbery is a "crime of violence," invoking the Court's decision in Borden, supra, which held that a state statute that allows conviction based on a reckless application of force does not qualify as a "violent felony" under the similarly-worded ACCA, 18 U.S.C. 924(e), 141 S. Ct. at 1834 (plurality opinion). But the instructions at petitioner's trial correctly informed the jury that it had to find that petitioner acted knowingly in threatening to infect her victims with a disease. Petitioner therefore is incorrect to claim (Pet. 13-14), that she threatened only "to act recklessly."

b. Petitioner identifies no conflict in the courts of appeals as to the mens rea required for a threat under the Hobbs Act. The courts of appeals have uniformly determined that a conviction for Hobbs Act robbery requires a showing that the defendant acted deliberately. See, e.g., United States v. Ivey, 60 F.4th 99, 116-117 (4th Cir. 2023) ("We agree with several of our sister circuits that * * * Hobbs Act robbery cannot be

committed recklessly but instead requires intentional conduct."), cert. denied, No. 22-7784 (Oct. 2, 2023); Dominguez, 954 F.3d at 1261 (9th Cir.); United States v. García-Ortiz, 904 F.3d 102, 108-109 (1st Cir. 2018); United States v. Gray, 260 F.3d 1267, 1283 (11th Cir. 2001), cert. denied, 536 U.S. 963 (2002).

Petitioner suggests (Pet. 12-16) that court of appeals decisions considering whether state statutes satisfy the ACCA's elements clause (and a similar provision of the Sentencing Guidelines) have held that certain robbery offenses involving threats can be committed with only a mens rea of recklessness. Those decisions, however, turn on particular aspects of each state statute, or a state court's construction of the statute, that differ in material ways from Hobbs Act robbery.[3] They do not cast

[3] See United States v. White, 58 F.4th 889, 896-897 (6th Cir. 2023) (Ohio aggravated robbery offense not a "violent felony" where state supreme court decision determined that strict liability applied to the element of "displaying, brandishing, indicating possession of, or using a deadly weapon"); United States v. Frazier, 48 F.4th 884, 885-887 (8th Cir. 2022) (Iowa intimidation with a dangerous weapon offense not a "crime of violence" for purposes of Sentencing Guidelines § 4B1.1 where statute encompassed shooting or threatening to shoot a deadly weapon into an occupied building but "d[id] not require that the defendant knowingly or intentionally target[ed] the person of another with [the] force or threatened force"); United States v. Quinnones, 16 F.4th 414, 417-422 (3d Cir. 2021) (Pennsylvania assault by prisoner using bodily fluids offense not a "crime of violence" for purpose of the Sentencing Guidelines where the statute required that the defendant only be negligent to fact that "the bodily fluid came from someone with a communicable disease"); United States v. Carter, 7 F.4th 1039, 1041, 1045 (11th Cir. 2021) (Georgia aggravated assault offense not a "violent felony" where it could be committed recklessly with no intent to injure); United States v. Williams, 24 F.4th 1209, 1212 (8th Cir. 2022) (per curiam) (Nebraska offense of making a terroristic threat not

doubt on the courts of appeals' consensus on the higher mens rea required for Hobbs Act robbery.

4. In any event, this case would not be a suitable vehicle for addressing the question presented. Petitioner's argument turns on what she perceives as the tension between the courts of appeals' interpretation of the Hobbs Act in this case, and the consensus among circuits -- including the court of appeals itself, United States v. Tuan Ngoc Luong, 965 F.3d 973, 990 (9th Cir. 2020), cert. denied, 142 S. Ct. 336 (2021) -- that the Hobbs Act qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3)(A). But this case does not present the latter question, as she was not charged with violating Section 924(c). Instead, the decision below -- which is unpublished -- concerns only whether the atypical circumstances of her particular case qualify as Hobbs Act robbery.

Those circumstances are, as petitioner effectively acknowledges (Pet. 16, 18), "unusual." She has not identified a similar one. And her threat must also be considered in the unusual

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"violent felony" where indivisible statute could be committed with "reckless disregard of the risk of causing * * * terror or evacuation") (quotation omitted).

Petitioner also cites (Pet. 15) Somers v. United States, 15 F.4th 1049 (11th Cir. 2021), but that case merely certified to the Florida Supreme Court a question regarding the mens rea necessary under a Florida aggravated assault statute. Id. at 1055-1056. After the Florida Supreme Court confirmed that the statute requires "that the actor direct the threat at a target, namely, another person," Somers v. United States, 355 So.3d 887, 891-893 (Fla. 2022), the Eleventh Circuit determined that the offense satisfied the ACCA's elements clause, Somers v. United States, 66 F.4th 890, 892 (11th Cir. 2023).

context of the early days of the global pandemic during which it was made. Petitioner suggests (Pet. 3) that the absence of similar prosecutions undermines application of the Hobbs Act to her conduct. But the lack of cases presenting similar circumstances -- a threat made to infect victims with a communicable disease for which there then existed no vaccination and during a period the locality had issued a stay-at-home order -- merely highlights the atypical nature of petitioner's offense, and the absence of a sound reason for further review of her conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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