IN THE SUPREME COURT OF THE UNITED STATES

FRANCISCO MELGAR-CABRERA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
AFTER DIRECT APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO,
THE HONORABLE WILLIAM P. JOHNSON,
UNITED STATES DISTRICT JUDGE,
CASE NO. 09-CR-2962-WJ,
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT,
NO. 16-2018

PETITIONER FRANCISCO MELGAR-CABRERA'S AMENDED PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Francisco Melgar-Cabrera respectfully prays that a writ of certiorari issue to review the order and judgment below.

QUESTION PRESENTED FOR REVIEW

Whether Hobbs Act robbery as set forth as a predicate felony offense in Count 4 of the Second Superseding Indictment qualifies as a "crime of violence" within the meaning of 18 U.S.C. § 924(c).

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Tenth Circuit appears at Appendix A to this petition. *See* Appendix A, ***United States v. Melgar-Cabrera***, 892 F.3d 1053 (June 8, 2018, 10th Cir.).

The judgment in a criminal case of the United States District Court for the District of New Mexico appears at Appendix B to this petition.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit decided Petitioner's appeal on June 8, 2018. *See* Appendix A. A timely petition for writ of certiorari was filed in this Court on September 6, 2018; insofar as the opinion of the Tenth Circuit and the judgment of the district court were not appended to the certiorari petition, this Court returned for re-submission with these two lower

court opinions/orders appended. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

FEDERAL STATUTORY PROVISIONS INVOLVED

The relevant portion of 18 U.S.C. § 924, provides as follows:

A "crime of violence" is defined as "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.

See 18 U.S.C. § 924(c)(3).

STATEMENT OF THE CASE

This case arises from an armed robbery of two restaurants in Albuquerque, New Mexico in 2009. After being indicted on various charges connected with the robbery, Petitioner Melgar moved to dismiss the count in which the Government alleged a violation of 18 U.S.C. § 924(c), using Hobbs Act robbery as the predicate offense. After briefing and oral argument on the motion, the district court entered an order denying the motion.

At trial, Petitioner Melgar was convicted of three counts. In Count 1, as read to the jury at trial, the Government alleged that "[o]n or about June 13, 2009, in Bernalillo County, in the District of New Mexico, [Petitioner Melgar and two co-defendants] did unlawfully obstruct, delay and effect commerce . . . and the

movement of articles and commodities in such commerce by robbery . . . and . . . unlawfully take and obtain personal property consisting of United States currency from the presence of Brent Hager, then employed by the Lone Star Steakhouse & Saloon, against his will be means of actual and threatened force, violence, and fear of injury to his person---that is, the Defendants threatened him with a firearm," in violation of 18 U.S.C. § 1951(a) and 18 U.S.C. § 2. This corresponds to Count 13 of the Second Superseding Indictment.

In Count 2, the Government alleged that Petitioner Melgar, with two co-defendants, "did unlawfully obstruct, delay, and effect commerce . . . in the movement of articles and commodities in such commerce by robbery . . . and that the Defendants did unlawfully take and obtain personal property consisting of United States currency from the presence of Jacob Marshall and Jimmie Eaton, then employed by Denny's Restaurant, against their will by means of actual and threatened force, violence, and fear of injury to their persons---that is, the Defendants threatened them with a firearm," in violation of 18 U.S.C. § 1951(a) and 18 U.S.C. § 2. This corresponds to Count 3 of the Superceding Indictment.

In Count 3, the Government alleged that Petitioner Melgar, with two co-defendants, "did use a firearm during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, namely interference with commerce by robbery, as charged in Count 2 of this Indictment, and in using the firearm, the Defendants caused the death of Stephanie Anderson is felony

murder as defined in [18 U.S.C. § 1111], and that the murder was committed in the perpetration of a robbery," in violation of 18 U.S.C. § 924(j), 18 U.S.C. § 1111, and 18 U.S.C. § 2. This corresponds to Count 4 of the Superseding Indictment.

After trial, the district court sentenced Petitioner Melgar to a term of imprisonment of 240 months as to each of Counts 1 and 2 above---*viz.*, those corresponding to Counts 3 and 13 of the Second Superseding Indictment. The district court also sentenced Petitioner Melgar to a term of life in prison as to Count 3 above, which corresponds to Count 4 of the Superseding Indictment. Petitioner Melgar filed a timely notice of appeal on February 1, 2016, after the original judgment and sentence were entered on January 18, 2016.

Petitioner Melgar appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed the conviction, holding that Hobbs Act robbery is a crime of violence for purposes of § 924(c).

REASONS FOR GRANTING THE PETITION

Petitioner's petition for writ of certiorari should be granted because the United States Court of Appeals for the Tenth Circuit's published opinion conflicts with decisions of this Court interpreting and applying 18 U.S.C. § 924(c)(3).

1. The "residual" clause of 18 U.S.C. § 924(c)(B) is invalid under the logic of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The residual clause under § 924(c) was invalidated by implication in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the residual clause under 18 U.S.C. § 924(e). The robbery in Petitioner Melgar's case is not a predicate offense under § 924(c) under the force clause found in § 924(c)(3)(A). Although § 924(c)(3)(B) is not identical to the residual clause invalidated in § 924(e), it suffers from the same two defects that animated the holding in *Johnson*, 135 S. Ct. at 2557-58.

First, like the ACCA's residual clause, the clause at issue in § 924(c) requires judges to measure "risk" posed by imagining the ordinary case of a particular offense, not by looking to the facts of any particular case. Although the risk at issue in the ACCA is a risk of injury, and the risk at issue in § 924(c) is a risk that force will be used, this difference is immaterial to the due process problem and has no impact on the *Johnson* decision. *See Jimenez- Gonzales v. Mukasey*, 548 F.3d 557, 562 (7th Cir. 2008) (noting that, "[d]espite the slightly

different definitions," the Supreme Court's respective analyses of the ACCA and § 16(b) "perfectly mirrored" each other). *See also United States v. Gomez-Leon*, 545 F.3d 777 (9th Cir. 2008); *United States v. Coronado-Cervantes*, 154 F.3d 1242, 1244 (10th Cir. 1998); *United States v. Kirk*, 111 F.3d 390, 394 (5th Cir. 1997); *United States v. Bauer*, 990 F.2d 373, 374 (8th Cir. 1993) (describing the differences between the statutes as "immaterial" and that interpreting U.S. Sentencing Guidelines § 4B1.1, which uses the ACCA language, "is controlled by" a decision interpreting 18 U.S.C. § 16(b)).

This Court's holding in *Johnson* did not turn on the type of risk, but rather how a court assesses and quantifies the risk. Of course, many federal and state criminal laws include "risk" standards that employ adjectives similar to those in the ACCA and § 924(c), such as "substantial," "grave," and "unreasonable." And this Court in *Johnson* said it did not mean to call most of these into question. But, as Justice Scalia's majority opinion observed, that is because the vast majority of such statutes require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion; in other words, applying such a standard to "real-world conduct." By contrast, the ACCA's residual clause, and § 924(c)(3) too, require it to be applied to "an idealized ordinary case of the crime," and "abstract inquiry" that "offers significantly less predictability." *Johnson*, 135 S. Ct. at 2558.

This inquiry is the same under the ACCA and § 924(c). Both the ACCA and § 924(c)(3)(B) require courts to discern what the ordinary case of a crime is by examining the elements using a categorical approach. *See, e.g., United States v. Butler*, 496 Fed. Appx. 158, 161 n. 4 (3rd Cir. 2012) (unpublished); *Evans v. Zych*, 644 F.3d 447, 453 (6th Cir. 2011); *Serafin*, 562 F.2d at 1108; *United States v. Green*, 521 F.3d 929, 932 (8th Cir. 2008); *United States v. Acosta*, 470 F.3d 132, 134 (2nd Cir. 2006); *United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995). Courts may not consider the factual means of committing any given offense, but must consider the nature of the offense in the "ordinary case," regardless of whether the ACCA, § 924(c)(3)(B), or § 16(b) is at issue. Both statutes require courts first to picture the "ordinary case" embodied by a felony, and then decide whether it qualifies as a crime of violence by assessing the risk posed by the "ordinary case."

Section 924(c)(3)(B), like the ACCA residual clause, requires the "ordinary case" analysis to assess the risk involved in a predicate offense, and how risky that ordinary case is. *United States v. Avila*, 770 F.3d 1100, 1107 (4th Cir. 2014); *United States v. Ayala*, 601 F.3d 256, 267 (4th Cir. 2010); *Van Don Nguyen v. Holder*, 571 F.3d 524, 530 (6th Cir. 2009); *United States v. Sanchez-Garcia*, 501 F.3d 1208, 1213 (10th Cir. 2007). Since this is the identical analytical step that brought down the ACCA's residual clause, § 924(C)(3)(B) cannot survive

constitutional scrutiny under the due process principles reaffirmed in *Johnson*. As a consequence, the residual clause cannot be used to support a conviction under § 924(c).

Under the logic of *Johnson*, the residual clause found in § 924(c)(3)(B) is invalid. *See United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015); *United States v. Edmundson*, 2015 WL 9311983 (D. Md. 2015). Insofar as these courts have noted that the language in 18 U.S.C. § 16(b) is unconstitutionally vague and is identical to the language in § 924(c)(3)(B), the residual clause in § 924(c)(3)(B) cannot withstand scrutiny after *Johnson*. Consequently, Petitioner Melgar's conviction is invalid.

2. Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c)(3)(A), the "force" clause.

Petitioner Melgar's conviction under 18 U.S.C. § 1951(a) is unconstitutional under *Johnson*. The plain language of the statute reveals that Hobbs Act robbery is not a violent felony under the ACCA. 18 U.S.C. § 1951 provides for criminal penalties for anyone who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . 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." 18 U.S.C. § 1951(a).

As used in § 1951, robbery means "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining." 18 U.S.C. § 1951(b).

The jury was instructed as follows with respect to the meaning of robbery for purposes of this count:

> Robbery is the unlawful taking of personal property from another against his or her will. This is done by threatening or actually using force, violence, or fear of injury, immediately or in the future, to person or property. "Property" includes money and other tangible and intangible things of value. "Fear" means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances.

The robbery committed by Petitioner Melgar does not qualify as a violent felony. The question whether an offense is a crime of violence for purposes of § 924(c) is determined by application of the categorical approach. *See Serafin*, 562 F.3d at 1108; *United States v. Munro*, 394 F.3d 865, 870 (10th Cir. 2015); *United States v. McNeal*, 2016 WL 1178823, *8 (4th Cir. 2016); *United States v. Ivazaj*, 568 F.3d 88, 97 (2nd Cir. 2009); *United States v. Velazquez-Overa*, 100 F.3d 418, 420 (5th Cir. 1996); *United States v. Aragon*, 983 F.2d 1306, 1312 (4th Cir. 1993); *United States v. Springfield*, 829 F.2d 860, 862-63 (9th Cir. 1987).

Under the categorical approach, "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions," *Taylor v. United States*, 495 U.S. 575, 600 (1990), Hobbs Act robbery is not a crime of violence because it does not have as an element the use, attempted use, or threatened use of physical force against the person of another. In *Johnson v. United States*, 599 U.S. 133, 139 (2010), this Court stated that a crime of violence contemplates "violent force---that is, force capable of causing physical pain or injury to another person." A person can commit Hobbs Act robbery without using such force.

Hobbs Act robbery is common-law robbery that affects interstate commerce. *See United States v. Peterson*, 236 F.3d 848, 851 (7th Cir. 2001); *United States v. Harrington*, 108 F.3d 1460, 1471 (D.C. Cir. 1997); *United States v. Nedley*, 255 F.2d 350, 357 (3rd Cir. 1958). At common law, no particular "degree of force" was required; all that was required was that the force "overcome [any] resistance" to the taking. 4 Wharton's Criminal Law § 460 (15th ed. & 2015 update). Wrenching a pocketbook out of a victim's hand was sufficient force to constitute a robbery, even if the victim suffered no pain or injury. *See, e.g., Williams v. Commonwealth*, 50 S.W. 240 (Ky. Ct. App. 1899) ("It is not necessary that a blow should be struck or the party be injured."). Moreover, common-law courts held that, if an item was fastened to a piece of clothing, the clothing offered "resistance" and the act of

pulling the item off the clothing was "force" sufficient to sustain a robbery conviction. *See, e.g., People v. Campbell*, 84 N.E. 1035, 1036-37 (Ill. 1908). Because common-law robbery could be committed without violent force, and Hobbs Act robbery is equivalent to common-law robbery, Petitioner Melgar's conviction is not a crime of violence under the "force" clause.

Federal case law confirms that Hobbs Act robbery can be committed without violent force. The following are examples where the defendant was found to have committed Hobbs Act robbery, but the conduct did not constitute a crime of violence:

- Pushing someone out of the way. In *United States v. Smith*, 141 Fed. Appx. 83 (4th Cir. 2005) (unpublished), the defendant was convicted of Hobbs Act robbery when the only "force" he used was pushing someone out of the way.

- Threatening to arrest someone. In *United States v. Pledge*, 51 Fed. Appx. 911 (4th Cir. 2002), the defendant, a police officer, was convicted of Hobbs Act robbery where he took property form drug dealers by threatening to arrest them if they did not submit.

- Handcuffing someone, placing him in the back of a squad car, and blocking him from getting out. In *United States v. Snell*, 432 Fed. Appx. 80, 85 (3rd Cir. 2011), the court held that a police officer used sufficient force for conviction of

Hobbs Act robbery when he handcuffed a motorist, took money from the motorist's pocket, placed the motorist in the back of a squad car, and blocked him from getting out.

- Taking keys attached to the victim's clothing. In *United States v. Rodriguez*, 925 F.2d 1049, 1052 (2nd Cir. 1991), the court found sufficient force for conviction under a federal statute prohibiting robbery of postal workers---which statute also incorporate the common-law definition of robbery---where the defendant took keys attached to the victim's clothing by pulling the keys away from the victim's clothing.

None of these cases involved use of "*violent* force . . . capable of causing physical pain or injury." *Johnson*, 599 U.S. at 139. *See also United States v. Gardner*, 2016 WL 2893881 (4th Cir. 2016) (robbery under North Carolina law was not a crime of violence under the force clause because it required only force "sufficient to compel the victim to part with his property"); *United States v. Parnell*, 2016 WL 163367 (9th Cir. 2016) (Massachusetts armed robbery did not meet the force clause because under Massachusetts law "the degree of force is immaterial so long as it is sufficient to obtain the victim's property against his will"); *In re Sealed Case*, 548 F.2d 1085 (D.C. Cir. 2008) (D.C. robbery was not a crime of violence because it can be committed with application of only "a minimal level of force").

Hobbs Act robbery can be committed by causing the victim to part with his property due to "fear of injury" by means other than physical force. Under recent Tenth Circuit case law, *see, e.g., United States v. Perez-Vargas*, 414 F.3d 1282, 1285 (10th Cir. 2005); *United States v. Rodriguez-Enriquez*, 518 F.3d 1192, 1194 (10th Cir. 2004), if an offense can be committed by causing injury by, for instance, "intentionally exposing someone to hazardous chemicals," 518 F.3d at 1195, but without a mechanical impact akin to being struck "by a fist, a bat, or a projectile," 518 F.3d at 1194, it is not a crime of violence under the force clause at issue here. This is so because robbery by such means does not have as an element of the offense the threatened use of physical force against the person of another. *See, e.g., Hartman v. State*, 403 So. 2d 1030, 1030 (Fla. Ct. App. 1981); *State v. Lawson*, 501 S.W.2d 176, 179 (Mo. Ct. App. 1973).

For these two reasons Hobbs Act robbery cannot be used as a predicate offense under § 924(c), and Petitioner Melgar's conviction under §§ 1951 and 924(c) are invalid under *Johnson*, 135 S. Ct. 2551.

As a result of the invalidity of the conviction under Count 4 of the Superseding Indictment, the conviction should be reversed, and this matter remanded to the Tenth Circuit with instructions to remand to the district court for re-trial, without Count 4. In the alternative, the conviction should be reversed, and this matter remanded to the Tenth Circuit with instructions to remand to the

district court for re-sentencing on the remaining counts.

CONCLUSION

For the foregoing reasons, Petitioner Melgar respectfully requests that this Court grant this amended petition for writ of certiorari, and reverse the Tenth Circuit's published opinion.

Respectfully submitted,

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