

SUPREME COURT OF THE UNITED STATES

Term Commencing October 2018

DESMOND CAMP, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

File No. _____

On Petition for Writ of Certiori
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Dated: November 19, 2018

Kenneth P. Tableman P27890
Kenneth P. Tableman, P.C.
Attorney for Petitioner
161 Ottawa Avenue, NW, Suite 404
Grand Rapids, Michigan 49503-2701
(616) 233-0455
tablemank@sbcglobal.net

QUESTION PRESENTED

1. May Hobbs Act robbery serve as a crime of violence for purposes of 18 U.S.C. § 924(c) when Hobbs Act robbery does not match the elements clause of Section 924(c) because it does not require violent physical force and the substantial risk clause of Section 924(c) does not apply because it is unconstitutionally vague?

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PETITION FOR CERTIORARI

Petitioner Desmond Camp respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was published. It is found at United States v. Camp, 903 F.3d 594 (6th Cir. 2018) (Pt. App. 1a).

JURISDICTION

The Sixth Circuit's opinion was filed on September 7, 2018. Camp filed a petition for rehearing which was denied on October 19, 2018. The Sixth Circuit's mandate issued on October 31, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the use of the Hobbs Act, 18 U.S.C. § 1951, as a crime of violence for purposes of 18 U.S.C. § 924(c). 18 U.S.C. § 924(c) imposes mandatory minimum sentences on persons who use firearms during and in relation to crimes of violence, including a 25-year consecutive mandatory minimum sentence for a person who has a second conviction under § 924(c). 18 U.S.C. § 924(c)(1)(C)(ii).

The case also involves the constitutional doctrine of vagueness which derives from the Fifth Amendment guarantee that “life, liberty or property” may not be taken “without due process of law.” Due process of law requires fair notice of what the law prohibits. Here, because the residual clause of 18 U.S.C. § 924(c) does not give fair notice it is unconstitutionally vague.

STATEMENT OF THE CASE

The government charged Camp with Hobbs Act robbery, use of a firearm during and in relation to a crime of violence, and with being a felon-in-possession of a firearm. (R. 9, Indictment, Page ID # 18–20).

Camp had entered a Family Dollar store in Detroit, Michigan, pointed a gun at employees of the store, and told them to give him money from a cash register. He got less than \$150. Camp also ordered an employee to unlock the store’s safe, but then a police officer entered the store. Camp ran, but the police quickly arrested him. (R. 1, Criminal Complaint, Page ID # 3–7).

Camp pled guilty to all the charges. He faced a 25-year mandatory minimum sentence on the charge of use of a firearm during and in relation to a crime of violence because he had violated the same statute before. (R. 46, Plea Tr., Page ID # 198–99).

At sentencing, notwithstanding his guilty plea, Camp said that his violation of the Hobbs Act was not a crime of violence so it could not serve as

a predicate for the charge of using a firearm in relation to a crime of violence nor permit scoring him as a career offender under the sentencing guidelines. He relied on *Johnson v. United States*, 559 U.S. 133 (2010) (“Johnson I”) and *Johnson v. United States*, 135 S. Ct. 2551 (2015) (“Johnson II”). (R. 39-1, Def.’s Brief and Objections, Page ID # 156–57; (Addendum to PSR, p. A-1, district court docket number and Page ID # unavailable).

The district court ruled that Hobbs Act robbery is a crime of violence for purposes of 18 U.S.C. § 924(c) and career offender scoring under the sentencing guidelines. The Court overruled Camp’s objections and sentenced him to serve 372 months in prison—72 months on the robbery and felon-in-possession convictions to run concurrently and 300 months to run consecutively for possessing a firearm during and in relation to a crime of violence. (R. 45, Sentencing Tr., Page ID # 177, 186).

Camp appealed. He argued that his guilty plea to Hobbs Act robbery did not support his conviction for violating 18 U.S.C. § 924(c) or his scoring as a career offender under the sentencing guidelines and required the vacating of his 924(c) conviction and re-sentencing. He argued that the district court’s rulings were wrong because a violation of the Hobbs Act does not necessarily require violent physical force. He also argued that the residual clause of § 924(c) is unconstitutionally vague.

The court of appeals rejected Camp's § 924(c) arguments. The court said that in *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017) it had held that Hobbs Act robbery is a crime of violence under § 924(c)'s use-of-force clause because a Hobbs Act robbery conviction "requires a finding of actual or threatened force, or violence, or fear of injury, immediate or future" to person or property and therefore "clearly has as an element the use, attempted use, or threatened use of physical force against the person or property of another as necessary to constitute a crime of violence under § 924(c)(3)(A)." (*Id.*, at 291–92). *United States v. Camp*, 903 F.3d at 957 quoting *United States v. Gooch*, 850 F.3d at 291–92.

The court went on to hold, however, that unlike § 924(c), the career offender guideline applied only to crimes against the person and not to crimes against property, so that Hobbs Act robbery could not serve as a crime of violence for purposes of the career offender guideline. *United States v. Camp*, 903 F.3d at 604.

Camp petitioned for re-hearing, but the court of appeals denied his petition.

REASONS FOR GRANTING THE WRIT

1. The Court should grant the petition in order to settle an important question of federal law. In holding that Hobbs Act robbery can serve as a crime of violence for purposes of § 924(c) the lower courts have overlooked that Hobbs Act robbery was adopted from New York law. Because New York robbery does not qualify as a crime of violence, neither does Hobbs Act robbery.

This case presents an important question of federal law that has not been, but should be, settled by the Court. Sup. Ct. R. 10(c). The Court should decide if Hobbs Act robbery can serve as a crime of violence for purposes of 18 U.S.C. § 924(c). Section 924(c) is a commonly charged offense. It makes the use of a firearm during a crime of violence a separate offense. According to the United States Sentencing Commission 2,075 offenders, representing 3.1 per cent of all reported cases, were convicted under 18 U.S.C. § 924(c) in fiscal year 2017. Quick Facts on Section 924(c) Firearms Offenses (18 U.S.C. § 924(c)) (USSC 2017). It is likely that many of these convictions relied on Hobbs Act robbery as the crime of violence.

The Court has not yet decided if Hobbs Act robbery counts as a crime of violence for purposes of § 924(c), or for purposes of other statutes that use the same or similar language.

Section 924(c) defines crime of violence as:

- (3) [A]n 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.

18 U.S.C. § 924(c)(3).

1. Categorical analysis applies.

18 U.S.C. § 924(c) speaks of a crime of violence as “an offense” with certain elements or that “by its nature” poses a “substantial risk.” This language invokes the familiar categorical analysis the Court has applied to the Armed Career Criminal Act (“ACCA”) which concerns “violent felonies” and to the Immigration and Nationality Act (“INA”) which incorporates the definition of crime of violence in 18 U.S.C. § 16. *Taylor v. United States*, 495 U.S. 575 (1990), *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Section 924(c) uses the same language as 18 U.S.C. § 16.

Categorical analysis compares the elements of the proposed predicate offense with the definition in the statute. If the elements of the crime cover conduct broader than the statute’s definition it does not apply, even if the actual facts of the prior conviction match. *Mathis v. United States*, 136 S. Ct. 2243, 2248–49 (2016). So, to determine if a conviction fits within the requirements of the ACCA or constitutes a crime of violence under the INA courts focus on the elements of the offense and ignore what actually

happened.

The lower courts have applied categorical analysis to § 924(c), but not unanimously. *Ovalles v. United States*, No. 17-10172, 2018 U.S. App. LEXIS 28144 at *120 n. 6 (collecting cases) (11th Cir. Oct 4, 2018) (Jill Pryor, J., dissenting). The Court should use this case to resolve this disagreement. Sup. Ct. R. 10(a).

The main reason for using categorical analysis here is that the plain language of § 924(c) supports it. Congress could have spelled out a conduct-specific approach but did not. It spoke in terms of the nature of the offense, not in terms of conduct. *Mathis v. United States*, 136 S.Ct. at 2552. When the language in a statute is clear there is no need to go beyond the language to interpret the statute. *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

2. Hobbs Act robbery does not require physical violence.

Camp's Hobbs Act conviction would count as a crime of violence if it fits under either subsection (c)(3)(A), the force clause, or subsection (c)(3)(B), the residual clause.¹

The Hobbs Act says that:

¹Some courts use the terms “elements clause” and “risk clause” when referring to these parts of 18 U.S.C. § 924(c) and their identical twins, 18 U.S.C. § 16(a) and (b). *See United States v. Taylor*, 814 F. 3d 340, 395 (6th Cir. 2016) White, J., dissenting.

(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.

18 U.S.C. § 1951(a).

It defines robbery as:

(1) ...[T]he 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)(1).

The Hobbs Act took New York’s definition of robbery for its definition of robbery. “Robbery under the Hobbs Act is ... robbery as defined by the New York Penal Laws and construed by the Courts of that State.” *United States v. Nedley*, 255 F.2d 350, 355 (3d. Cir. 1958) (comparing N.Y. Penal Laws, McKinney’s N.Y Consol. Laws c.40, 2120 with 18 U.S.C. § 1951(b)(1)).²

² N.Y. Penal Law, McKinney’s Consol. Laws, c. 40, 2120 defines robbery as ‘the unlawful taking of personal property, from the person or in the presence of another, against his will, by means of force, or violence, or fear of injury, immediate or future, to his person or property, or the person or property of a relative or member of his family, or of anyone in his company at the time of the robbery.’

N.Y. Penal Law, McKinney’s Consol. Laws, c. 40, 2120, See *United States v. Nedley*,

A person can commit New York robbery by using minor force like a bump, a brief tug-of-war over property, or blocking someone from pursuit by standing in their way. *People v. Lee*, 602 N.Y.S. 2d 138, 139 (N.Y. App. Div. 1st Dep’t 1993) (bumping), *People v. Bennett*, 631 N.Y.S. 2d 834 (N.Y. App. Div. 1st Dep’t 1995) (blocking pursuit), *People v. Safon*, 560 N.Y.S. 2d 552 (N.Y. App. Div. 4th Dep’t 1990) (tug-of-war). *United States v. Moncrieffe*, 167 F. Supp. 3d 383, 403 (E.D.N.Y. 2016) (collecting cases).³ These examples of minimal force fall below the amount of force needed to qualify as a crime of violence.

And “when one jurisdiction adopts the statute of another jurisdiction ... there is a presumption that the construction placed upon the borrowed statute by courts of the original jurisdiction is adopted along with the statute ...” *United States v. Aguon*, 851 F. 2d 1158, 1164 (9th Cir. 1988) (en banc).

If New York robbery only requires *de minimis* force and Congress adopted the New York definition of robbery when it enacted the Hobbs Act—

255 F.2d 355, n. 7.

³New York’s robbery statute was revised effective September 1, 1967.
NY CLS Penal § 160

The current New York statute includes forcible thefts not necessarily from the person or in the presence of the owner or victim. Otherwise, it retains the old definition of robbery. McKinney’s Consol. Laws of New York, Revised Penal Law, Commission Staff Comment, p. 286 (1967). The statute eliminates the threat of future injury, so it covers less conduct than its predecessor.

something the Sixth Circuit did not consider in *Gooch* — then it follows that Hobbs Act robbery can be violated the same way. Thus, under *Johnson I*, Hobbs Act robbery categorically fails to qualify as a crime of violence.

In *Johnson I* the Supreme Court held that the elements clause in the ACCA, 18 U.S.C. § 924(e), requires that for an offense to count as a violent felony it must have an element of violent physical force. De minimis force is not enough. *Johnson v. United States*, 559 U.S. at 140.

This requirement of violent physical force should apply to the elements clause of 18 U.S.C. § 924(c) because the language of § 924(e) and § 924(c) is almost the same.⁴ And the Court in *Johnson I* relied on *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004), which interpreted 18 U.S.C. § 16(a) and held that the term “crime of violence suggests a category of active, violent crimes ...”

Section 16(a) is worded the same as § 924(c)(1)(D)(ii)(2). Both say that a crime of violence is “[a]n offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another ...”

Hobbs Act robbery does not require violent physical force. It includes the taking of property by fear of future injury to the person or his property.

⁴18 U.S.C. § 924(e)(2)(B)(I) defines violent felony as a crime that “has as an element the use, attempted use or threatened use of physical force against the person of another ...” 18 U.S.C. § 924(c)(3)(A) defines crime of violence as a felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.”

Property means “money and other tangible and intangible things of value.” See Pattern Crim. Jury Instr., 11th Cir. O 70.3 (2016), Pattern Crim. Jury Instr., 5th Cir. 2.73A, Commentary, (2015). It includes “any valuable right considered as a source ... of wealth.” *United States v. Tropiano*, 418 F.2d 1069, 1075–76 (2d Cir. 1969).

So, a threat to inflict economic harm on an intangible asset (like the right to solicit customers) constitutes a threat to injure property under the Hobbs Act. See *United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999) abrogated in part on other grounds by *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 403 n. 8 (2003) (“while often the property involved is an existing physical asset, the concept [of injury to property] is not limited to tangible things, but includes intangible assets such as rights to solicit customers and to conduct a lawful business.”).⁵

Arena involved extortion but there is no reason why “property” would mean something different when applied to Hobbs Act robbery. Congress intended the Act to sweep broadly to punish interference with interstate commerce. *Stirone v. United States*, 361 U.S. 212, 215 (1961), *United States v. Tropiano*, 418 F.2d at 1075–76. And it is a standard principle of statutory

⁵*Arena* involved a butyric acid attack on a Planned Parenthood Clinic. Butyric acid creates a noxious and overpowering smell akin to vomit. *United States v. Arena*, 180 F.3d at 387.

construction “that identical words and phrases within the same statute should normally be given the same meaning.” *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007).

If property includes intangible property then Hobbs Act robbery can’t support a § 924(c) conviction because it is not possible to use violent physical force to injure intangible property.

The Hobbs Act’s definition of robbery does not follow the traditional concept of robbery or the contemporary generic definition of robbery which both require physical violence and involve “aggravated larceny, containing at least the elements of misappropriation of property under circumstances involving immediate danger to the person.” *United States v. Santiesteban-Hernandez*, 469 F.3d 276, 380 (5th Cir. 2006), quoted in *United States v. Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008). Hobbs Act robbery thus reaches conduct broader than generic robbery. It does not require danger to the person, nor does it require immediacy. *United States v. O’Connor*, 874 F.3d 1147, 1158–59 (10th Cir. 2017). Hobbs Act robbery reaches even to the act of taking property by threatening future injury to the property of an absent family member. See 18 U.S.C. § 1951(b)(1). This degree of attenuation traditionally speaks to extortion, not robbery. Wayne R. LaFare, *Substantive Criminal Law*, § 20.4(b) at 203–04 (2d ed. 2003), *United States v. Wright*, No.

CR11-17-M-DWM; CV16-85-M-DWM, 2017 U.S. Dist. LEXIS 119907 at *14–15 (D. Mont., July 31, 2017).

The lower courts that have held that Hobbs Act robbery is categorically a crime of violence under the elements clause ignore how the Hobbs Act’s definition of robbery combines robbery with extortion. Compare *United States v. Gooch*, 850 F.3d at 291–92 with *United States v. Wright*, 2017 U.S. Dist. LEXIS 119907 at *14–15 and n. 6.

And they ignore how the courts have analyzed similar state robbery offenses. Several courts of appeals say that because various state robbery offenses only require de minimis force, they fail to qualify as violent felonies under the elements clause of the ACCA or the career offender guideline.⁶ See *United States v. Yates*, 866 F. 3d 723 (6th Cir. 2017) (considering Ohio robbery); *United States v. Mulkern*, 854 F.3d 87, 93 (1st Cir. 2017) (considering Maine robbery); *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016) (considering Missouri second degree robbery); *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016) (considering North Carolina robbery); *United States v. Winston*, 850 F.3d 677, 684–85 (4th Cir. 2017) (considering Virginia robbery); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016)

⁶The career offender cases apply the career offender guideline before it was amended effective November 1, 2016.

(considering Massachusetts armed robbery); and *United States v. Eason*, 829 F.3d 633, 640 (8th Cir. 2016) (considering Arkansas robbery).⁷

Here, the district court erred when it based Camp’s 924(c) conviction on his Hobbs Act robbery because Hobbs Act robbery includes conduct that does not require violent physical force. The lower courts that have held to the contrary have overlooked the origins of the Hobbs Act.

3. The residual clause of § 924(c) is unconstitutionally vague.

The Sixth Circuit did not address the residual clause in deciding Camp’s appeal, but the Court should consider the residual clause because of an emerging circuit court split.

Camp says that Hobbs Act robbery does not qualify as a crime of violence under the residual clause of § 924(c) because that clause is unconstitutionally vague. It suffers from the same defects that Johnson II identified in the similarly worded residual clause in the ACCA and that the Court identified in *Sessions v. Dimaya* in the identically worded residual clause of 18 U.S.C. § 16(b): it asks the court to consider a crime that “by its nature” creates a substantial risk that physical force will be used without

⁷The Court granted certiorari in *Stockling v. United States*, No 17-5554, 138 S. Ct. 1438 (2018), to decide whether Florida’s robbery statute categorically describes a violent felony under the Armed Career Criminal Act. Florida’s robbery statute, like New York’s, has an element of overcoming victim resistance. The Court heard argument in *Stockling* on October 9, 2018.

telling the court how to determine what by its nature means and without telling the court how to apply the substantial risk standard to “an idealized ordinary case of the crime”. *Sessions v. Dimaya*, 138 S.Ct. at 1214–16.

The circuits are split on this issue. The Fifth Circuit agrees with Camp, but the Second Circuit does not. The Second Circuit says that the doctrine of constitutional avoidance should apply so that the courts should interpret the residual clause to apply to the facts of the case before it. Compare *United States v. Davis*, 903 F. 3d 493 (5th Cir. 2018) with *United States v. Barrett*, 903 F. 3d 166 (2nd Cir. 2018).

Advocates of the conduct-specific approach rely on the canon of constitutional avoidance to save the residual clause of § 924(c). But they are wrong. The canon of constitutional avoidance applies to avoid constitutional questions when interpreting ambiguous statutes, not to rewrite well-established law affected by subsequent jurisprudence. *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018). The Court does not interpret statutes to mean one thing when they are enacted yet another when the Court’s view of the Constitution changes. *Clark v. Martinez*, 543 U.S. 371, 382 (2005).

Even if the Court thinks section 924(c)’s residual clause is ambiguous, it should apply the rule of lenity to interpret it in a way that does not increase criminal liability. *Bass v. United States*, 404 U.S. 376 (1971). And that

means applying categorical analysis and not using case-specific analysis.

CONCLUSION

The Court should grant the petition for certiorari. The Court should vacate Camp's § 924 c) conviction and remand the case for further proceedings.

Dated: November 19, 2018

Respectfully submitted,

Kenneth P. Tableman
Attorney for Desmond Camp, Petitioner
Kenneth P. Tableman, P.C.
161 Ottawa Avenue, N.W., Suite 404
Grand Rapids, MI 49503-2701
(616) 233-0455
tablemank@sbcglobal.net

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18 U.S.C. § 1951 (excerpts)

§1951. Interference with commerce by threats or violence.

(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.

18 U.S.C. § 924(c) (excerpts)

(c)(1)(A) [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

...

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years;

...

(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.

U.S. Const. amend. V.

“No person shall ... be deprived of life, liberty, or property, without due process of law”