19-6707

ORIGINAL

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

N°

RICKY LEE TYNDALL,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

RICKY LEE TYNDALL, PRO SE LITIGATE

RICKY L. TYNDALL

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QUESTION(S) PRESENTED

18 U.S.C. § 924(c)(3)(A)'s FORCE CLAUSE requires the use of "physical force" (i.e: "violence force" meaning "force capable of causing PHYSICAL PAIN or injury" as clearly defined by this Court in Johnson and reiterated in Dimaya) against the person OR PROPERTY of another. How is any court meant to determine what constitutes enough "physical force against property" to equate to what might result in "physical pain or injury to a person," since property cannot itself sustain an injury causing "pain."... Could § 924(c)(3)(A) also be "unconstitutionally vague" due to the included [use of physical force against "property,"] a term that was NOT used in any of the other definitions provided for a "crime of violence" under 18 U.S.C. § 924(e)(B)(2), 18 U.S.C. § 16, USSG § 4B1.2, or USSG § 2L1.2...

LIST OF PARTIES

PETITIONER, RICKY LEE TYNDALL, FCI McKean, P.O. Box# 8000, Bradford, PA 16701.

RESPONDENT, SOLICITOR GENERAL FOR THE UNITED STATES, Department of Justice, Room# 5614, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001.

RESPONDENT, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, 1100 E. Main St., Richmond, VA 23219-3525.

RESPONDENT, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA, 600 Granby Street, Norfolk, VA 23510-1915.

RESPONDENT, UNITED STATES ATTORNEY OFFICE, 101 W. Main St., Norfolk, VA 23510-1624.

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DECISIONS BELOW

The decision for the United States Court of Appeals for the Fourth Circuit is unpublished. (See. United States v. Tyndall, No. 17-6038). A copy of the Forth Circuit's Judgment is attached as Appendix A to this Petition. (See. Appendix A). A copy of the Order of the United States District Court for the Eastern District of Virginia, Norfolk Division is attached in Appendix B. (See. Appendix B).

JURISDICTION

The judgment for the United States Court of Appeals for the Fourth Circuit was entered on August 26, 2019. (See. Appendix A). Jurisdiction is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTES PROVISIONS INVOLVED

The case involves the Fifth Amendment pillars of Due Process and the Separation of Powers of the United States Constitution, which provides:

> **FIFTH AMENDMENT**: The Amendment to the United States Constitution, part of the Bill of Rights, that establishes certain protections for citizens from actions of the government by providing (1) that a person shall not be required to answer for a capital or other infamous crimes unless an indictment or presentment is first issued by a grand jury, (2) that no person will be placed in double jeopardy, (3) that no person shall be required to testify against himself or herself, (4) that neither life, liberty nor property may be taken without due process of law, and (5) that private property may not be taken for public use, without payment of just compensation.
>
> **DUE PROCESS OF LAW**: A phrase introduced into American jurisprudence in the Fifth and Fourteenth Amendments to the U.S. Constitution.
>
> **SEPARATION OF POWER**: The doctrine prohibiting one branch of government, at any level, federal, state or local, from infringing or encroaching upon or exercising the powers belonging to another branch.
>
> **18 U.S.C. § 924(c)(3)(A)**: has as an element the use, attempted

use, or threatened use of physical force against the person or PROPERTY of another.

STATEMENT OF THE CASE

On March 8, 2011, the Petitioner pled guilty to Counts Two, Three, and Five of the thirteen-count Superseding Indictment. Count Two charged him with interference with Commerce by Means of Robbery, in violation of 18 U.S.C. § 1951(a) and 2; and Counts Three and Five charged him with Use of a Short-barreled Shotgun During a Crime of Violence, in violation of 18 U.S.C §§ 924(c)(1)(A),(B)(i) and 2. ECF No. 26. On June 14, 2011, the Court sentenced Petitioner to a total term of four hundred twenty-six (426) months of imprisonment. ECF No. 87. The Petitioner appealed, and the Court of Appeals for the Fourth Circuit affirmed the convictions and sentence on October 12, 2012. ECF Nos. 120, 121. The Petitioner's Attorney did not file for a writ of certiorari from the United States Supreme Court.

The Petitioner has previously filed four habeas corpus petitions pursuant to 28 U.S.C. § 2255, ECF Nos. 125, 137, 165, 186, and one motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedures, ECF No. 176, all of which challenged the §924(c), and were denied See ECF Nos. 126, 166, 180, 188. On June 15, 2016, the Fourth Circuit issued an order granting authorization to the Petitioner to file the instant § 2255 Motion. ECF No. 190, which was dismissed with the Court delining to issue a certificate of appealability.

BASIS FOR FEDERAL JURISDICTION

This case raises the question(s) of if this Court ruling in United States v. Davis, 139 S. Ct. 2319 (2019), has implicitly overruled the Fourth Circuit in United States v. Mathis, No. 16-4633, F.3d , 2019WL 3437626, at *16 (4th Cir. July 31, 2019)(holding that "hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)").

RESONS FOR GRANTING THE WRIT

A. The Decision(s) of This Court Disqualified the "Hobbs Act Robbery" as a "Crime of Violence" Under § 4B1.2 (Nor § 2L1.2, § 924(e)(2)(B), or 16) but Still Somehow Qualify ONLY Under § 924(c)(3)(A).

The lower Courts still holds, that "Hobbs Act robbery" is a "crime of violence" pursuant to 18 U.S.C. § 924(c)(3)(A), even after this Court has invalidated the same type of conduct described in a number other other statutes.

B. Importance of the Question Presented.

This case presents a fundamental question of the validation of the "Hobbs Act robbery" as a "crime of violence" pursuant to 18 U.S.C. § 924(c)(3)(A), when the same conduct described in the "Hobbs Act robbery" has been invalidated in a number of other statutes. The question presented is of **great importance,** because its the difference between a defendant/Petitioner getting an "enhanced sentence," which would in turn, add a number if not decades to an individual's sentence. In view of the recent rulings in this Court, the "Hobbs Act robbery" can **not** still be considered a "crime of violence" for the purposes of an enhanced sentence. the § 924(c)(3)(A) statute can **not** be squared with this Court's precedent cases nor the Fifth Amendment of the United States Constitution.

1. Statutory Definitions Under §924(c) and the Hobbs Act

18 U.S.C § 924(c) prohibits the use of a firearm and in relation to any crime of violence or drug tracking crime as set forth previously, "crime of violence" is defined as any felony offense that:

(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 use in the course of committing the offense.

18 U.S.C. § 924(c)(3). Davis held the residual clause (subsection (B)) unconstitution vague, leaving only the element-of-force clause (subsection (A)). See. Davis, 139 S. Ct. at 2327-33 (2019)(extending Johnson to §924(c)).

The Hobbs Act provides as follows:

(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 to 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 then 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 threaten 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 threaten force, violence, or fear, or under color of official right.

18 U.S.C. § 1951.

"Property," as used in § 1951, includes intangible as well as tangible property. See, e.g. Scheidler v. National Organization for Women, Inc., 537 U.S. 393, 404-05 (2003)("property" includes exclusive control of business assets); United States v. Local 560 of the Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, 708 F.2d 267, 281 (3d Cir. 1986)(explaining unanimous view that "language of the Hobbs Act makes no such distinction between tangible and intangible property"). Indeed, the model criminal jury instructions are explicit on the point:

Hobbs Act - Property Defined

The term "property" includes money and other tangible and intangible things

of value.

The only requirement is that the property-- whether tangible or intangible-- be tranferable. See. Sekhar v. United States, 570 U.S. 729, 734 (2013).

While Seheidler and Local 560 involved Hobbs Act extortion, the term "property" has only one meaning in § 1951. See. e.g., Cf. Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 570 (1995)("[T]he normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." (Internal quotation marks omitted)). That is confirmed by model jury instructions, which does not distinguish between robbery and extortion and is routinely given in Hobbs Act robbery case.

2. Hobbs Act robbery is not categorically a crime of violence under the element-of-force clause.

The categorical approach requires courts to "look only to the statutory definitions--i.e., the elements--of a defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a predicate for a federal criminal prohibition. Descamps v. United States. Furthermore, courts "look to the elements of the [predicate] offense 'to ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute.'" United States v. Dahl, 833 F.3d 345, 350 (3d Cir. 2016)(quoting Hernandez--Cruz v. Attorney Gen., 764 F. 3d 281, 285 (3d Cir. 2014)).

An offense therefore qualifies as a predicate only if the most innocent conduct triggering liability under the statue defining the offense falls within the definition of the predicate for the federal criminal prohibitions. See. Dahl, 833 F.3d 349-50. "If the [offense] statue 'sweep more broadly' than a federal definition, a conviction under it is not a [federal] predicate even if the defendant actually committed the offense in a way that [meets

the federal definition]." United States v. Burns-Johnson, 864 F. 3d 313, 316 (4th Cir. 2017)(citing Descamps, 133 S. Ct. at 2283).

Here, that means the Court should look to the elements of Hobbs Act robbery to determine whether the least culpable conduct hypothetically necessary to sustain a conviction meets the definition of "crime of violence" in § 924(c)(3)(A), i.e., whether it necessarily involves "the use, attempted use, or threatened use of physical force against a person or property of another." If it does not, Hobbs Act robbery lacks the requisite element of force and is not a § 924(c) predicate.

The key to this inquery lies in two definitions: 'property' under the Hobbs Act and "physical force" under § 924(c)(3)(A). "Property," as discussed above, includes intangible property. And "physical force" "plainly refers to force exerted by and through concrete bodies." Johnson v. United States, 559 U.S. 133, 138 (2010)(construing 18 U.S.C. § 924(e)(2)(B)(i); accord Stokeling v. United States, 139 S. Ct. 544, 552 (2019). The question, then, is whether the least culpable conduct hypothetically necessary to support a Hobbs Act robbery conviction necessarily involves force exerted by and through concrete bodies. Clearly, it does not.

The least culpable Hobbs Act robbery would be a nonconsensual taking from the presence of the victim by placing him in fear of injury to his intangible property. 18 U.S.C. § 1951(b)(1). Someone makes a restauranteur empty the cash register-- or forgive a check--by threatening to scream "rat" in front of his customers. Someone makes a shareholder in a publically held company hand over his wallet by threatening to start a boycott of the company on social media. Both of these people are, by the letter of the law, Hobbs Act robbers. The restaurant thief has obtained the money in the presence of the owner by threatening to ruin his business. The mugger has obtained money

in the presence of the victim by threatening to devalue his stock holdings. And neither has threatened physical force-it is impossible to use force against an intangible object, which by definition is **not** a "concrete body."

Any opposing counsel will have two basic responses: this type of conduct is Hobbs Act extortion rather than robbery, and even if technically robbery it has **never** been prosecuted as such. Neither response has merit. First, this is robbery because property is being taken in the presence of the victim against his will by threat or injury to his property. And even if it could be prosecuted as extortion as well, that does **not** mean it fails to satisfy the definition of robbery. Traditionally, robbery and extortion were differentiated by the immediacy and severity of the threat-- a threat of lesser or future harm was extortion. See. 3 Wayne R. LaFave, Criminal Law § 20.4(a)-(b)(6th Cir. 2017): United States v. Camp, 903 F.3d 594, 601-02 (6th Cir. 2018)(discussing generic robbery). By expanding robbery to include threats of future injury to any sort of PROPERTY, the Hobbs Act simply includes within the definition of robbery some conduct traditionally viewed as extortion.

> "Robbery and extortion are also nominally differentiated by consent (taking against the will versus with coerced consent), but that distinction has correctly been recognized as illusory. See. e.g., United States v. Becerril-Lopez, 514 F.3d 881, 892 n.9 (9th Cir. 2008): 3 LaFave, Criminal Law, § 20.4(b) ("It is sometimes said that robbery differs from statutory extortion... in that in the former the taking of the PROPERTY must be "against the will" of the victim, while the latter the taking must be "with the consent" of the victim induced by the other's unlawful threat; but, in spite of the different expressions, there is no difference here, for both crimes equally require that the defendant's threats induce the victim to give up his property, something which he would not otherwise have done.").

Second, it does not matter whether the government has ever prosecuted a taking by threat of injury to intangible property as Hobbs Act robbery. The government often attempts to demand such proof, citing the so-called "realistic probability" test. See Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)(cautioning that categorical approach is not invitation to apply "legal imagination"). But lower Courts have made it clear that defendants need not shoulder the "under burden" of identifying a specific prosecution when the text of the statue "plainly encompasses a broader range of conduct than a federal offense." Salmoran v. Attorney General, 909 F.3d 73, 80-82 (3d Cir. 2018). See also, Zhi Fei Liao v. Attorney Genderal, 910 F.3d 714, 723-724 (3d Cir. 2018). That is the case here, since the text of the Hobbs Act-- as authoritatively interpreted by the this Court and memorialized in the lower Court's model jury instructions-- plainly encompasses threat of injury to intangible property. See Mathis v. United States, 136 S. Ct. 2243, 2256 (2016)(judicial decisions may be consulted to identify elements of offense); Sekhar v. United States, 570 U.S. 729, 133 S. Ct. 2720, 186 L. Ed. 2d 794 (2013)(Model federal jury instructions relevant).

3. The Same Conduct described in 18 U.S.C. § 924(c)(3)(A) Has Been Disqualified as a Crime of Violence in Several Other Statutes.

In the Syllabus of Davis v. United States, 139 S. Ct. 2319 (2019), this Court asserted that, "in its constitutional order, a vague law is no law at all. The vagueness doctrine rests on the twin constitutional pillars of due process and separation of powers. This Court has recently applied the doctrine in two cases involving statutes that bear more than a passing resemblance to § 924(c)(3)(B)'s residual clause-Johnson v. United Stated, 576 U.S. , 135 S. Ct. 2551, 192 L. Ed. 2d 569, which addressed the residual clause of the Armed Career Criminal Act ("ACCA"), and Sessions v. Dimaya,

which addressed the residual clause of 18 U.S.C. § 16. The residual clause in each case required judges to use a "categorial approach" to determine whether an offense qualified as a violent felony or crime of violence. Judges had a disregard how the defendant actually committed the offense and instead imagine the degree of risk that would attend the idealized "'ordinary case'" of the offense Johnson, 576 U.S., at , 135 S. Ct. 2551, 192 L. Ed. 2d 569, 580. The Court held in each case that the imposition of criminal punishments cannot be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined "ordinary case." The government and lower courts have long understood § 924(c)(3)(B) to require the same categorial approach. Now, the government asks this Court to abandon the traditional categorial approach and hold that the statute commands a case-specific approach that would look at the defendant's actual conduct in the predicate crime. The government's case-specific approach would avoid the vagueness problems that doomed the statutes in Johnson and Dimaya and would not yield the same practical and Sixth Amendment complications that a case-specific approach under the ACCA and §16 would, but this approach finds no support in § 924(c)'s text, context, and history. Pp. 2325 - 2328, 204 L. Ed. 2d 757."

With § 924(c)'s residual clause invalidated by Davis, Hobbs Act robbery qualifies as a predicate crime of violence only if it has as an element the use, attempted use, or threated use of physical force against the person or property of another. 18 U.S.C. § 924(c)(3)(A). It doe not. As defined in 18 U.S.C § 1951(a), Hobbs Act robbery includes takings accomplished by placing someone in fear of injury to intangible property. Because that requires no physical force whatsoever, Hobbs Act robbery is not categorically a crime of violence for the purposes of § 924(c).

This Court's decision in Davis not only invalidated § 924(c)(3)(B)'s

"residual clause," but it also invalidated the "conduct-specific approach" adopted by many of the lower courts in wake of Johnson II (2015) the lower courts must now return to the well-established "categorical approach" whenever assessing whether or not an offense qualifies as a "crime of violence" under the remaining "elements clause" of § 924(c)(3(A). Inevitably the government will now, in turn, attempt to "seek an inconsistent advantage by pursuing an incompatible theory," claiming Hobbs Act robbery falls under § 924(c)(3)(A)'s "elements clause" when assessed using the (historical) approach," but this subsequent flip-flopping only further erodes their credibility. See Davis, Opinion of the Court referencing 18B Charles Alan Wright et al., Federal Practice and Procedure 4477 ("Absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.").

If the government has previously believed that Hobbs Act robbery qualified as a "crime of violence" under § 924(c)(3)(A)'s "elements clause" using the "categorical approach" they would not have resorted to using the remedial, more laborious, "conduct-specific approach" after Johnson II (2015).

For example, a substantive Hobbs Act Robbery may be committed using conduct that induces a perceived threat of future injury (damage) to the property of a non-blood-related family member. Clearly, this type of high attenuated threat falls far short of the "violent force" standard articulated in Johnson II (2015). Furthermore, such a drastic temporal expansion to include conduct that **may** result in damage or injury at some **future** point in time runs counter to the Court's more recent guidance in Dimaya stating that "in the ordinary case, the riskiness of a crime arises from the events occurring **during** its commission, not events occurring later." Dimaya, 138 S. Ct. at

1221 (internal emphasis added).

"[T]o consign 'thousands' of defendants to prison for years - potentially decades, **not because** it is certain or even likely that Congress ordained those penalties, but because it is merely 'possible' Congress might have done so," would constitute a grave injustice. "In our republic, a speculative possibility that a man's conduct violated the law should never be enough to justify taking his liberty.: Davis, 588 U.S. 2319 (2019).

To summarize, this Court's ruling here in Davis requires lower courts to now compare the scope of conduct covered by the elements of a crime to § 924(c)'s definition of a "crime of violence," and determine whether or not a defendant can be subjected to the additional mandatory minimum penalties prescribed by § 924(c). Only those statutes that "ha[ve] as an element the use, attempted use, or threatened use of "violent force - i.e., force capable of causing physical pain or injury to another person," (Johnson, 599 U.S. at 134) will qualify as a "crime of violence" under § 924(c)(3)(A)'s remaining "elements clause." Those statutes, such as Hobbs Act robbery, that cover conduct which exceeds the breadth and reach of the "elements clause," **will no longer be able to serve as predicate offense for §924(c) charges/convictions.**

"[T]he rule of lenity teach[es] that ambiguities about the breadth of a criminal statute should be resolved on the defendant's favor. That rule ... is found on 'the tenderness of the law for the rights of the individuals' to fair notice of the law 'and on the plain principle that the power of punishment is vested in the legislative, not the judicial department." See. United States v. Davis.

Thus, Hobbs Act robbery is **NOT** a "crime of violence," and **any** §924(c) conviction that was attached to a [predicate] Hobbs Act robbery MUST BE VACATED!

C. CONCLUSION

For the foregoing reasons, Petitioner respectfully request that this case be "granted a writ of certiorari" to address this issue of the way the lower Court's have applied the "Hobbs Act robbery" under the 18 U.S.C. § 924(c)(3)(A), because of the **vagueness** of the statute. Or for this Court to "Grant, reverse, and remand ("GVR") to the Fourth Circuit Court of Appeals, with instructions to resentence the Petitioner without the sentence enhancement of § 924(c)."

Date: October 31, 2019

Respectfully Submitted,

Ricky Lee. Tyndall

R. Tyndall

CC: File

United States Supreme Court.

Solicitor General for the United States.

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