

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2019

DEXTER FISHER,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT**

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QUESTION PRESENTED

Whether Mr. Fisher's § 924(c) convictions for brandishing a firearm during a crime of violence must be vacated because the Hobbs Act robbery offenses underlying the § 924(c) convictions categorically fail to qualify as crimes of violence within the meaning of § 924(c)(3)(A)?

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT
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Petitioner, DEXTER FISHER, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit, issued on November 25, 2019, affirming the Petitioner's convictions and sentences.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit appears in the Appendix to this Petition at page 1.

JURISDICTION

1. The Southern District of Indiana originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States.

2. Thereafter, Petitioner timely appealed his conviction and sentence to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

3. Petitioner seeks review in this Court of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming his sentence pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 924(c) states as follows:

(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.

Title 18 U.S.C. § 1951 provides, in relevant part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery

... 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.

STATEMENT OF THE CASE

I. Factual Background and Preliminary Proceedings.

In summer and fall of 2014, multiple pharmacies in Indianapolis were robbed at gun point and prescription opioids were stolen. (App. at 1-2.) Petitioner Dexter Fisher was eventually arrested and charged with several of the robberies. (App. at 1.) On August 16, 2017, Mr. Fisher was charged by superseding indictment with Hobbs Act Robbery on August 4, 2014, in violation of 18 U.S.C. § 1951(a) (Count 1); brandishing a firearm during and in relation to the August 4, 2014, robbery in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count 2); Hobbs Act Robbery on August 18, 2014, in violation of 18 U.S.C. § 1951(a) (Count 3); brandishing a firearm during and in relation to the August 18, 2014, robbery in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and (C)(i) (Count 4); Hobbs Act Robbery on September 9, 2014, in violation of 18 U.S.C. § 1951(a) (Count 5); brandishing a firearm during and in relation to the September 9, 2014, robbery in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and (C)(i) (Count 6); attempted Hobbs Act Robbery on October 29, 2014, in violation of 18 U.S.C. § 1951(a) (Count 7); using and carrying a firearm during and in relation to the October 29, 2014, attempted robbery in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and (C)(i) (Count 8); and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

II. Jury Trial.

The jury found Mr. Fisher guilty of three counts of Hobbs Act Robbery (Counts 1, 3, 5), three counts of brandishing a firearm during and in relation to a crime of violence (Counts 2, 4, 6), and one count of being a felon in possession of a firearm. (Count 9.) The jury found Mr. Fisher not guilty of attempted Hobbs Act Robbery and the § 924(c) charge associated with the attempted robbery (Counts 7 and 8.) (App. at 3.)

III. Sentencing and Judgment in a Criminal Case.

The district court held a sentencing hearing on August 13, 2018. The district court imposed a sentence of one day on Counts 1, 3, 5, and 9 (the robberies and felon in possession offenses); a sentence of seven years on Count 2; a sentence of 25 years on Count 4; and a sentence of 25 years on Count 6, all running consecutively to each other. (App. at 4.) The total sentence was 684 months (57 years), plus one day. Mr. Fisher filed a timely notice of appeal on August 14, 2018.

IV. The Appeal and the Seventh Circuit's Opinion.

Mr. Fisher raised various issues on appeal including a challenge to his three convictions under 18 U.S.C. § 924(c)(1)(A)(ii) for brandishing a firearm during a crime of violence. (App. at 8-9.) He argued that Hobbs Act Robbery, the crime underlying his § 924(c) charges, does not categorically qualify as a

crime of violence under § 924(c)(3)(A). (App. at 9.) The Court of Appeals held:

Fisher acknowledges that this issue is well settled in our circuit and that he raises it primarily for possible Supreme Court review. Indeed, we have repeatedly held that a Hobbs Act robbery is a crime of violence within the meaning of § 924(c)(3)(A). *See, e.g., United States v. Anglin*, 846 F.3d 954, 965 (7th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 126 (2017); *United States v. Rivera*, 847 F.3d 847, 849 (7th Cir. 2017); *United States v. Allen*, 702 Fed. Appx. 457, 459 (7th Cir. 2017). We see no reason to revisit our prior holdings, so Fisher's § 924(c) convictions stand under this circuit's precedent.

(App. at 9.)

REASONS FOR GRANTING THE WRIT

Mr. Fisher’s § 924(c) convictions for brandishing a firearm during a crime of violence must be vacated because the Hobbs Act robbery offenses underlying the § 924(c) conviction categorically fail to qualify as crimes of violence within the meaning of § 924(c)(3)(A).

Mr. Fisher was convicted of three counts of Hobbs Act robbery and three § 924(c) counts. The government alleged the underlying “crimes of violence” for the § 924(c) counts was Hobbs Act robbery in violation of 18 U.S.C. § 1951. However, the government cannot meet the elements of the § 924(c) charges in this case because Hobbs Act robbery categorically fails to qualify as a crime of violence.

Section 1951 states, in relevant part:

(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 to do so, 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.

18 U.S.C. § 1951(a)-(b).

Section 924(c) provides, as is relevant to both counts, “any person who,

during and in relation to any crime of violence . . . 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 . . . if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years.” 18 U.S.C. § 924(c)(1)(A)(ii). Section 924(c) goes on to define a crime of violence 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. 18 U.S.C. § 924(c)(3)(A)-(B).

Mr. Fisher’s convictions on Counts 2, 4, and 6 must be vacated because the predicate offenses Hobbs Act robbery under § 1951(a) do not qualify as crimes of violence as a matter of law. Hobbs Act robbery offense fails to qualify as a crime of violence under the “elements clause” in § 924(c)(3)(A) because it does not have as an element the use or threat of use of violent physical force against persons or property and does not require the intentional threat of the same.

This Court should grant certiorari in this case under Supreme Court Rule 10(a) because the Seventh Circuit’s opinion conflicts with the decision of at least one other federal court. A district court in the Northern District of California held that “Hobbs Act robbery is not categorically a crime of violence under the

elements clause of § 924(c)(3), because the offense can be committed by causing fear of future injury to property, which does not require physical force.” *United States v. Chea*, 2019 U.S. Dist. LEXIS 177651, *1-*2 (N.D. Cal. Oct. 2, 2019.) The Court should also grant certiorari under Supreme Court Rule 10(c) because whether Hobbs Act robbery is a categorical crime of violence under § 924(c)(3)(A) is an important question of federal law that has not been settled by this Court and the various circuit court decisions holding that it is are in conflict with relevant decisions from this Court. Specifically, the lower circuit courts have failed to correctly apply the categorical approach to the text of 18 U.S.C. § 1951 as required by *United States v. Davis*, 139 S. Ct. 2319 (2019) and other opinions.

1. Hobbs Act robbery under § 1951 does not qualify as a crime of violence under § 924(c)(3)(A).

To determine whether a predicate offense qualifies as a crime of violence under § 924(c), courts use the categorical approach. *Descamps v. United States*, 570 U.S. 254, 260 (2013); *United States v. Rogers*, 804 F.3d 1233, 1236 (7th Cir. 2015). This approach requires that courts “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 crime of violence. *United States v. Taylor*, 630 F.3d 629, 632-33 (7th Cir. 2010). This Court recently reaffirmed this line of cases in *Mathis v. United States*, 136 S. Ct. 2243 (2016). *Mathis* made clear that this inquiry is into the elements of the crime, not into the

means of committing an element of the crime. *Id.* at 2248.

Elements are the “constituent parts” of a crime’s legal definition; the things that the government must prove to sustain a conviction. *Id.* “Facts, by contrast, are mere real-world things - extraneous to the crime’s legal requirements. They are circumstances or events having no legal effect or consequence.” *Id.* (citations omitted). A list of “means” contained in a statute specifies diverse means of satisfying a single element of a single crime; in other words, it spells out various factual ways of committing some component of the offense. *Id.* at 2249. The Supreme Court gave the example of a statute that requires the use of a “deadly weapon” as an element of a crime and further provides that the deadly weapon can be a knife, gun, bat, or similar weapon. *Mathis*, 136 S. Ct. at 2249. The list of types of deadly weapons constitutes the means and not the elements of the offense. *Id.*

Davis continued the holding of *Mathis* as applied to § 924(c). Under *Davis*, a federal offense may only be a crime of violence under § 924(c) if it satisfies the statute’s elements clause which applies if the crime “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A); *Davis*, 139 S. Ct. at 2131-35.

The elements the government is required to prove in a Hobbs Act robbery case are: (1) the defendant knowingly obtained money or property from or in the

presence of the victim; (2) the defendant did so by means of robbery; (3) the defendant believed that the victim parted with the money or property because of the robbery; and (4) the robbery affected interstate commerce. Pattern Criminal Jury Instructions of the Seventh Circuit, 2012 Ed., p. 492. The statute further defines robbery as “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will. 18 U.S.C. § 1951(b)(1). The subsection goes on to say that the element of taking property against the victim’s will may be accomplished by a list of means - “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).

Following the logic in *Mathis* and *Davis*, the element is the taking or obtaining property against the victim’s will, the means are the various ways the taking can be accomplished. Like a deadly weapon can be a knife or a gun, taking or obtaining can be by actual force, threatened force, violence, fear of immediate injury to person, fear of immediate injury to property, fear of future injury to person, or fear of future injury to property. In addition, the “person” referred to is either the victim, the relative of the victim, a family member of the victim, or anyone in the victim’s company at the time. Furthermore, the

“property” referred to is either the victim’s property, property in the victim’s custody or possession, or property belonging to a relative, family member, or anyone in the victim’s company at the time. A jury could convict someone of robbery even if some of the jurors concluded the defendant took or obtained property by actual force and some of the jurors conclude the defendant took obtained property by fear of future injury. *See Mathis*, 136 S. Ct. at 2249-50. The “means” in § 1951 are different ways a defendant can take something against a victim’s will. *Mathis*, 136 S. Ct. at 2249 (“[A] statute might . . . itemize the various places that crime could occur as disjunctive factual scenarios rather than separate elements, so that a jury need not make any specific findings (or a defendant admissions) on that score.”)

Mathis provides one reason why Hobbs Act robbery cannot qualify as a crime of violence. Subsection 924(c)(3)(A) requires that has *as an element* the use of force against a person or property. The use of force in Hobbs Act robbery is not an element; it is a way of committing an element of the offense - the means of committing it. The element is “a taking against his will” which does not necessarily mean “use of force” because, as argued below, it can be accomplished by merely putting someone in fear without the use of force.

Importantly, Hobbs Act robbery can also be accomplished by placing someone in fear of injury to his property. This fear of injury does not require

“violent force” against property under § 924(c)(3)(A) because it can be accomplished by many means short of strong physical force. “The concept of property under the Hobbs Act is an expansive one” that includes “intangible assets, such as rights to solicit customers and to conduct a lawful business.” *United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999) (citing 18 U.S.C. § 1951(a) and interpreting robbery definition that includes threats against persons or property); *United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining conviction under Hobbs Act when boss threatened to slow down or stop construction projects unless his demands were met). Such threats to economic interests are certainly not threats of violent force. Even injury to tangible property does not require the threat of violent force.

2. Hobbs Act robbery can be committed by threatening future harm to property and does not qualify as a crime of violence under § 924(c)(3)(A).

In its recent decision, the *Chea* court addressed the question of whether Hobbs Act robbery qualifies as a crime of violence under the elements clause of § 924(c)(3). *Chea*, 2019 U.S. Dist. LEXIS 177651 at *16-*36. The court compared the Hobbs Act robbery statute to the crime of violence definition in § 924(c)(3)(A) and concluded that Hobbs Act robbery sweeps more broadly than the elements clause’s crime of violence definition. *Chea*, 2019 U.S. Dist. LEXIS 177651 at *26

First, the court found that the plain language of § 1951(b)(1) provides that Hobbs Act robbery may be committed by means of causing a fear of future injury to property. *Chea*, 2019 U.S. Dist. LEXIS 177651 at *24. Second, the court concluded that “Hobbs Act robbery by causing fear of future injury to property does not involve the use or threats of violent physical force required by [*Johnson v. United States*, 559 U.S. 133 (2010) (‘*Johnson I*’)].” *Id.* In reaching this conclusion, the *Chea* court gave the ordinary meaning to the terms fear of injury, future, and property. “Nothing in the ordinary meaning of these phrases suggests that placing a person in fear that his or her property will suffer future injury requires the use or threatened use of any physical force, much less violent physical force.” *Id.* at *22. The court held, “the plain language of § 1951(b)(1) clearly supports the notion that committing Hobbs Act robbery by causing fear of future injury to property does not require the use or threatened use of any physical force, much less the violent physical force required by *Johnson I*. *Chea*, 2019 U.S. Dist. LEXIS 177651 at *22.

3. In finding that Hobbs Act robbery satisfies the elements clause, the circuit courts have misapplied the categorical approach and this Court’s precedent.

The *Chea* court noted that no binding authority precluded its holding, since the circuit courts have not addressed whether the availability of the “fear of future injury to property” means takes Hobbs Act robbery outside the scope of §

924(c)(3)(A). *Chea*, 2019 U.S. Dist. LEXIS 177651 at *25. The Tenth Circuit has found the availability of damage to property as a means of committing federal witness retaliation to place that crime outside of § 924(c)(3)(A)'s reach. *Chea*, 2019 U.S. Dist. LEXIS 177651 at *25, *citing United States v. Bowen*, 936 F.3d 1091, 1104 (10th Cir. 2019). All of the federal circuit courts have held that Hobbs Act robbery is a categorical crime of violence under § 924(c)(3)(A). *See United States v. Garcia-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018); *United States v. Walker*, 789 Fed. Appx. 241, 245 (2d Cir. 2019); *United States v. Allen*, 2020 U.S. App. LEXIS 2094, *2 (4th Cir. Jan. 23, 2020); *Lewis v. McConnell*, 783 Fed. Appx. 442, 443 (5th Cir. 2019); *United States v. Richardson*, 2020 U.S. App. LEXIS 2480, *13-*14 (6th Cir. Jan. 27, 2020); *Haynes v. United States*, 936 F.3d 683, 694 (7th Cir. 2019); *United States v. Lewis*, 775 Fed. Appx. 260, 261 (8th Cir. 2019); *United States v. Howard*, 650 Fed. Appx. 466, 468 (9th Cir. 2016); *United States v. Myers*, 786 Fed. Appx. 161, 162 (10th Cir. 2019); *United States v. Henderson*, 2020 U.S. App. LEXIS 285, *4 (11th Cir. Jan. 7, 2020).

However, these decisions misapply the categorical approach and do not reconcile their holdings with the statutory text permitting Hobbs Act robbery to be committed by placing the victim in fear of future injury to property. For example, in *Myers*, the Tenth Circuit relied on *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018) to hold that his Hobbs Act robberies qualified as

predicate crimes of violence under § 924(c)(3)(A). However, this was based on the court only considering whether generic robbery – rather than the specific statutory elements of Hobbs Act robbery – require the use of such force. *Melgar-Cabrera*, 892 F.3d at 1063.

The Seventh Circuit has made similar mistakes in application of the categorical approach. In *United States v. Rivera*, 847 F.3d 847, 848-49 (7th Cir. 2017), the court concluded without further analysis that because one cannot commit Hobbs Act robbery without using or threatening physical force, it satisfies § 924(c)(3)(A). *Rivera*, 847 F.3d at 849. In violation of *Mathis*, the court claimed that the means-versus-elements distinction does not dictate which parts of a statute matter in a predicate offense analysis. *Id.* The court did not explain how it distinguished *Mathis*, and any such holding does not survive *Davis*. *See Davis*, 139 S. Ct. at 2334-35.

Other circuits' similar decisions also turn on a failure to adhere strictly to the categorical approach in deciding whether Hobbs Act robbery satisfies § 924(c)(3)(A), or to undertake a meaningful analysis of the statute's text. The Eleventh Circuit has relied on the fact that the defendant was convicted of brandishing a firearm, rather than on the statutory text of Hobbs Act robbery to find that it satisfies the elements clause. *See United States v. Robinson*, 844 F.3d 137, 141-44 (3d Cir. 2016). A split of authority exists as to whether Hobbs Act

Robbery is a “crime of violence” under 18 U.S.C. § 924(c)(3)(A). This is a question of federal law affecting hundreds of criminal cases across the country, which this Court should resolve.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the United States Court of Appeals for the Seventh Circuit's opinion affirming Mr. Fisher's convictions and sentences.

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