

No. _____

In The
Supreme Court of the United States

ALIJAH JAQUEZ MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Dated: September 25, 2020

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QUESTIONS PRESENTED

- I. IS A HOBBS ACT ROBBERY A CRIME OF VIOLENCE FOR PURPOSES OF 18 U.S.C. § 924(c)?**

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OPINION BELOW

The order of the Fourth Circuit dismissing the appeal, issued on April 28, 2020, is unpublished. The order is reprinted as Appendix A to this Petition. (Appendix A, *infra*).

STATEMENT OF SUPREME COURT JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1) to review the decision rendered by the United States Court of Appeals for the Fourth Circuit on April 28, 2020.

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1) provides:

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any 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;
(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years

18 U.S.C. § 924(c)(3) provides:

(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.

18 U.S.C. § 1951 states in pertinent 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 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.

STATEMENT OF THE CASE

In September, 2018, Mr. Daniel Thompson and Mr. Alijah Mitchell robbed a Murphy USA gas station in Fayetteville, N.C. (J.A. 75, 101). Mr. Thompson brandished a gun while committing the robbery. (J.A. 75, 101). The two of them fled after getting a few packets of cigarettes, some loose cigars, and less than \$200 in cash. (J.A. 75-76, 101-102).

Fayetteville police found surveillance footage of the robbery, identified both men, and obtained state arrest warrants. (J.A. 76, 102). In March, 2019, a grand jury sitting in the Eastern District of North Carolina indicted Mr. Thompson and Mr. Mitchell on one count each of committing a Hobbs Act robbery in violation of 18 U.S.C. § 1951(b)(1) (“Count One”), and one count of brandishing a firearm in furtherance of a crime of violence—the Hobbs Act robbery alleged in Count One—in violation of 18 U.S.C. § 924(c), or 18 U.S.C. § 2 (“Count 2”). (J.A. 11-12).

On June 19, 2019, both defendants pleaded guilty in separate Rule 11 hearings, with written plea agreements in both cases. (J.A. 15, J.A. 24). Each plea agreement contained a waiver of some of that defendant's appellate rights, stating that the defendant agreed "To waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal the conviction and whatever sentence is imposed on any ground, including any issues that relate to the establishment of the advisory Guideline range . . ." (J.A. 65, 89).

On September 27, 2019, the district court sentenced both defendants in separate hearings. Mr. Thompson was sentenced within his advisory Guidelines range to 27 months on Count One and 84 months consecutive on Count Two, for a total sentence of 111 months. (J.A. 54, 52). The same day, the district court conducted Mr. Mitchell's sentencing in a separate hearing to 41 months on Count One and 84 months on Count Two for a total of 125 months.¹

REASONS FOR GRANTING THE WRIT

I. THE ISSUE OF WHETHER A HOBBS ACT ROBBERY IS A PREDICATE OFFENSE FOR AN 18 U.S.C. § 924(C) CONVICTION IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Many federal cases each year involve the questions of whether a Hobbs Act robbery is a predicate offense for a mandatory sentence under 18 U.S.C. § 924(c). According to the U.S. Sentencing Commission in 2019, of the 8,475 defendants sentenced for firearms convictions, 4.9%, or 415 defendants were subject to the

¹ According to the U.S. Sentencing Commission in 2019, of the 8,475 defendants sentenced for firearms convictions, 4.9%, or 415 defendants were subject to the mandatory minimums sentenced required by 18 U.S.C. § 924(c) in 2019.

mandatory minimums sentenced required by 18 U.S.C. § 924(c) in 2019. As Defendant Mitchell argued below that a robbery under the Hobbs Act, 18 U.S.C. § 1951, is not a predicate offense for a § 924(c) conviction and therefore he was not guilty of a crime for which he is serving a 84 month sentence. While there are no Sentencing Commission statistics that readily identify the number of recent § 924(c) cases predicated on Hobbs Act robberies the number of reported decisions in recent years addressing this issue suggests that 924(c) cases are frequently predicated on Hobbs Act robberies.²

A. Statutory Definitions

Section 924(c) defines a crime of violence as “an offense that is a felony and has as an element the use, attempted use, or threatened use of **physical** force against the person or property of another.” *Id.* § 924(c)(3)(A). The indictment in this case identified a Hobbs Act robbery in violation of 18 U.S.C. § 1951(b)(1) as the crime of violence supporting Defendants’ Section 924(c) convictions.

² See e.g. the frequency of this is suggested by the number of cases decided in the last 18 months where the defendant has challenged a Hobbs Act robbery as a predicate offense for a § 924(c) offense. See *United States v. Chea*, 2019 U.S. Dist. LEXIS 177651, 2019 WL 5061085 (N.D. Cal. October 2, 2019); *United States v. White*, No. 16-CR-82 (VEC), 2020 U.S. Dist. LEXIS 158204 (S.D.N.Y. Aug. 31, 2020); *United States v. Lewis*, No. 10-CR-622 (ADS), 2020 U.S. Dist. LEXIS 93555 (E.D.N.Y. May 22, 2020); *United States v. Spears*, No. 0:18-1062-CMC, 2020 U.S. Dist. LEXIS 149422 (D.S.C. Aug. 17, 2020); *Summerise v. United States*, No. 1:18-CR-0008 AWI, 2020 U.S. Dist. LEXIS 105132 (E.D. Cal. June 15, 2020); *United States v. Hurtado*, No. 2:08-cr-00102-KJD, 2020 U.S. Dist. LEXIS 56539 (D. Nev. Mar. 31, 2020); *United States v. Fierro*, No. 2:09-cr-0240-KJD-PAL, 2020 U.S. Dist. LEXIS 56512 (D. Nev. Mar. 31, 2020); *United States v. Cole*, No. 2:14-cr-0344-KJD-PAL, 2020 U.S. Dist. LEXIS 54434 (D. Nev. Mar. 27, 2020); *United States v. Strain*, No. 3:97-cr-00004, 2019 U.S. Dist. LEXIS 232321 (D. Alaska Oct. 22, 2019); *United States v. Kayarath*, No. 94-10123, 2020 U.S. Dist. LEXIS 66896 (D. Kan. Apr. 15, 2020); *United States v. Sirvira*, No. 13-40115-04-JAR, 2020 U.S. Dist. LEXIS 43679 (D. Kan. Mar. 13, 2020); *In re May*, No. 20-11593-F, 2020 U.S. App. LEXIS 14344 (11th Cir. May 5, 2020).

Congress defines a Hobbs Act robbery this way:

(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.

18 U.S.C. §§ 1951(a), (b)(1).

B. For an Offense to Qualify as a Section 924(c) Crime of Violence, the “Most Innocent Conduct” Punished by that Offense must Categorically Involve the Use, Threatened Use, or Attempted Use of Violent Force.

To determine if an offense qualifies as a crime of violence, courts use the categorical approach, in which they “look only to the statutory definitions – i.e., the elements – of a defendant’s [offense] and not to the particular facts underlying [the offense]” to determine whether the offense qualifies as a crime of violence. *See e.g.* *United States v. Davis*, 139 S. Ct. 2319 (2019); *United States v. Royal*, 731 F.3d 333, 341-42 (4th Cir. 2014). Under the categorical approach, an offense qualifies as a crime of violence only if all of the criminal conduct covered by a statute – “including the most innocent conduct” matches, or is narrower than, the crime of violence definition. *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012). If the

most innocent conduct penalized by a statute does not constitute a crime of violence, then the offense categorically fails to qualify as a crime of violence.

Section 924(c)'s force clause does not specifically describe the degree of force required. Instead, "the statutory phrase 'physical force' has been interpreted to require the use of 'violent force' which necessarily connoting a substantial degree of force." *United States v. Evans*, 848 F.3d 242, 245 (4th Cir. 2017) (internal quotation omitted). Thus, for Hobbs Act robbery to qualify as a crime of violence, the most innocent conduct punished by the offense must categorically have as an element the use, attempted use, or threatened use of "violent force" – that is "strong physical force," that is "capable of causing physical pain or injury to another person."

Johnson v. United States, 559 U.S. 133, 140 (2010) (emphasis in original). As explained below, a Hobbs Act robbery does not the use of physical force.

C. Hobbs Act Robbery is not a Section 924(c) Crime of Violence Because Someone can Commit it Through the Threat of Non-Violent Force to Property.

A Hobbs Act robbery does not meet this requirement because it can be accomplished by putting someone in fear of future injury to his property, which does not require the use, attempted use, or threatened use of "violent force." By its plain language, section 1951(b)(1) encompasses "fear of injury, immediate or future, to . . . property." 18 U.S.C. § 1951(b)(1). Nothing in the statute requires that the fear of injury be injury sustained through violent force. And, in fact, the statute's structure separates the "use of force" from the "fear of injury" to property, revealing Congress's intent that these represent distinct concepts.

Recognizing this, one district court concluded that:

“Where the property in question is intangible, it can be injured without the use of any physical contact at all; in that context, the use of violent physical force would be an impossibility.” *United States v. Chea*, 2019 WL 5061085 at *8; 2019 U.S. Dist. LEXIS 177651 at *22. This sort of fear of injury could apply to, for instance, a threat to attack a computer system or delete a database. “Even tangible property can be injured without using violent force. For example, a vintage car can be injured by a mere scratch, and a collector’s stamp can be injured by tearing it gently.”

United States v. Chea, 2019 U.S. Dist. LEXIS 177651, 2019 WL 5061085 (N.D. Cal. October 2, 2019).

Another easily imagined example would involve confronting a business manager with a demand that he or she provide money to remove the ransomware that is encrypting the computer systems of the business. This scenario does not require the use of the “physical” force to commit the Hobbs Act crime.

In sum, the range of conduct covered by the Hobbs Act robbery statute is broader than the definition of crime of violence in § 924(c). Thus, the Hobbs Act is not a predicate for a Section 924(c) crime of violence.

D. The error affects Defendants’ substantial rights and affects the fairness, integrity, and public reputation of judicial proceedings.

Mr. Mitchell is serving an 84-month sentences on Count Two consecutive to the 41 month sentences on Count One. This additional time in jail affects his substantial rights. *See, e.g., United States v. Boykin*, 669 F.3d 467, 472 (4th Cir. 2012). Mr. Mitchell is serving this sentence because he pleaded guilty to a crime that does not exist. The idea that the government should punish people only for crimes strikes at the core of the public reputation of judicial proceedings. This Court

should grant this petition to correct this error. If a Hobbs Act robbery is not a predicate for a § 924(c) conviction, dozens or hundreds of defendant are being sentenced each year to long terms of imprisonment for crimes they did not commit.

E. Defendant's appeal waiver does not prevent the relief of the issues sought in this Petition.

Mr. Mitchell pleaded guilty to the indictment. A guilty plea normally “waives all nonjurisdictional defects in the proceedings conducted prior to entry of the plea” and limits the appellate issues to those about “the inadequacy of the plea.” *United States v. Fitzgerald*, 820 F.3d 107, 110 (4th Cir. 2016). Here, the defendant’s guilty plea does not bar him from raising the issue that the plea is invalid because the conduct to which he pleaded guilty is not a crime. *Accord Class v. United States*, 138 S. Ct. 798, 802 (2018) (holding that a guilty plea does not “bar[] a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal”).

Mr. Mitchell is not disputing the factual assertions that he committed a Hobbs Act Robbery and that he brandished a gun while doing it. Instead, each claims that Section 924(c) simply does not apply to a Hobbs Act robbery. Thus, the defendant’s plea does not bar addressing his § 924(c) conviction.

CONCLUSION

Petitioner Mitchell respectfully requests that the Supreme Court review this case in order to resolve this important question of federal law affecting numerous criminal defendants each year.

This the 25th day of September, 2020.

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