

No. ____

IN THE
Supreme Court of the United States

ROBERT E. FOX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should overturn *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and require the government to charge and prove the fact of a prior conviction to a jury beyond a reasonable doubt.

2. Whether a Hobbs Act robbery qualifies as a “crime of violence” element under 18 U.S.C. § 924(c), applying the categorical approach set forth by this Court in *Taylor v. United States*, 495 U.S. 575 (1990).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert E. Fox respectfully submits this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinion affirming the jury conviction is reported at *United States v. Fox*, 878 F.3d 574 (7th Cir. 2017), and is reprinted in the appendix to this Petition. (Pet. App. 1a–11a.) The judgment following conviction was entered on July 7, 2016, in the United States District Court for the Southern District of Indiana and is also reprinted in the appendix to this Petition. (Pet. App. 12a–26a.)

JURISDICTION

The Seventh Circuit denied relief on December 22, 2017. (Pet. App. 1a–11a.) This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Section 1951 of title 18 provides:

(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.

Section 924(c)(1)(A) of title 18 of the United States Code provides in relevant part:

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.

Section 924(c)(1)(C) of title 18 of the United States Code provides in relevant part:

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[.]

Section 924(c)(3) of title 18 of the United States Code provides in relevant part:

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.¹

STATEMENT OF THE CASE

Following a single jury trial, Mr. Fox was convicted of using a gun to rob a White Castle restaurant on July 30, 2014, and a Speedway gas station on August 5, 2014. No one was injured in either robbery and each robbery obtained less than \$200. (Pet. App. 2a, 4a.) *See also* Brief & Required Short Appendix of Robert E. Fox at 2–3, *United States v. Fox*, No. 16-2892 (7th Cir. May 17, 2017), ECF No. 27.

¹ The Seventh Circuit has held that section (B) is unconstitutionally vague. *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016). The government did not rely on section (B) at Mr. Fox’s trial or in his appeal.

The jury convicted Mr. Fox of two counts of Hobbs Act robbery under 18 U.S.C. § 1951(a), and two counts of brandishing a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c). (Pet. App. 4a; Pet. App. 12a-13a.) In addition to restitution and conditions of post-confinement supervisory release, the district court sentenced Mr. Fox to 435 months (36 years, 3 months) of incarceration, which included 51 months for the two Hobbs Act robbery convictions. The 435-month sentence also included two consecutive mandatory-minimum sentences: 84 months (seven years) for the first gun conviction based on the events of July 30, 2014, under § 924(c)(1)(A)(ii); and 300 months (25 years) for “a second or subsequent” gun conviction based on the events six days later on August 5, 2014, under § 924(c)(1)(C)(i). (Pet. App. 15a, *see* Pet. App. 12a-13a.)

But none of the indictments against Mr. Fox mentioned § 924(c)(1)(C)(i), the statute forming the basis for the 25-year mandatory minimum sentence for a “second or subsequent” gun conviction. Nor did the government submit any evidence to prove to the jury beyond a reasonable doubt the fact of a prior conviction, which triggered that section’s lengthier 25-year minimum sentence. Instead, the government charged and proved only two violations of § 924(c)(1)(A)(ii), which carried only seven-year minimum sentences.

Mr. Fox appealed his conviction and sentence, making four arguments. First, Mr. Fox argued that he was denied counsel of his choice. Second, he argued that he is entitled to a resentencing under this Court’s recent decision in *Dean v. United States*, 137 S. Ct. 1170 (2017). Third, he argued that the government failed to charge

him with a second or successive use of a gun during a crime of violence, or to prove the fact of the prior conviction to the jury beyond a reasonable doubt. Fourth, he argued that a Hobbs Act robbery is not a “crime of violence” under 18 U.S.C. § 924(c). Mr. Fox raises only the last two of these arguments in his Petition.

On appeal, the Seventh Circuit agreed that Mr. Fox was entitled to resentencing, remanding the case to the district court. (Pet. App. 9a–11a.) The resentencing proceedings have been stayed pending this Petition. Order to Stay Resentencing Proceedings, *United States v. Fox*, No. 1:15-cr-00025-JMS-DKL-1 (S.D. Ind. Feb. 5, 2018), ECF No. 158. The Seventh Circuit rejected the remaining arguments, affirming Mr. Fox’s convictions on December 22, 2017. (Pet. App. 1a–11a.)

REASONS FOR GRANTING THE WRIT

Mr. Fox raises two grounds for granting a writ of certiorari. First, Mr. Fox requests this Court overturn its precedent in *Almendarez-Torres*. Second, Mr. Fox argues that Hobbs Act robberies are not crimes of violence for purposes of 18 U.S.C. § 924(c).

I. This Court Should Overturn *Almendarez-Torres* And Hold That The Government Must Charge And Prove The Fact Of A Prior Conviction To A Jury Beyond A Reasonable Doubt.

On appeal, Mr. Fox argued that his indictment was insufficient because it failed to charge or prove a second or subsequent violation under 18 U.S.C. § 924(c)(1)(C)(i). (Pet. App. 9a.) Consequently, the underlying fact of a prior conviction was never charged or proved, violating

Mr. Fox’s rights to due process and a jury trial under the Fifth and Sixth Amendments to the United States Constitution. (*Id.*) Mr. Fox highlighted to the Seventh Circuit that the arc of precedent has been bending toward requiring that every fact increasing a punishment be both charged and proved. But the Seventh Circuit rejected Mr. Fox’s argument as foreclosed by this Court’s precedent in *Almendarez-Torres v. United States*, which holds that prior convictions need not be included in an indictment or proved to a jury. 523 U.S. 224, 227 (1998).

The Seventh Circuit recognized the merit of Mr. Fox’s argument, noting that “there is some tension between [subsequent Supreme Court decisions] and *Almendarez-Torres*.” (Pet. App. 9a–10a n.2) (quoting *United States v. Lomax*, 816 F.3d 468, 477–78 (7th Cir. 2016)). The Seventh Circuit also highlighted that *Almendarez-Torres* is “vulnerable to being overruled,” speculating that the precedent “may be on its last legs.” (Pet. App. 9a–10a n.2) (citing *United States v. Elliott*, 703 F.3d 378, 381 n.2 (7th Cir. 2012); *United States v. Browning*, 436 F.3d 780, 782 (7th Cir. 2006)). Acknowledging its powerlessness to overturn this Court’s precedent, the Seventh Circuit concluded that only this Court can determine the continuing validity of *Almendarez-Torres*. (Pet. App. 10a n.2.)

Almendarez-Torres depended in part on prior convictions being considered “sentencing factors,” rather than “elements” of the crime. 523 U.S. at 241–42. But since deciding *Almendarez-Torres*, this Court has corrected this view and eroded the distinction between sentencing factors and elements. This Court held in

Apprendi v. New Jersey, 530 U.S. 466, 494 (2000), that “the relevant inquiry is one . . . of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” If it does, then due process and the right to a jury trial require that it must be charged and proved to a jury beyond a reasonable doubt. *Id.* at 490. The *Apprendi* Court also recognized that “the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted.” 530 U.S. at 489 n.15 (quoting *United States v. Reese*, 92 U.S. 214, 232–233 (1875)).

In *Apprendi*, this Court acknowledged *Almendarez-Torres* as precedential, but also noted its weakness; this Court characterized the *Almendarez-Torres* decision as “at best an exceptional departure from the historic practice” of trial by jury at common law. 530 U.S. at 487. This Court went so far as to say that “it [wa]s arguable that *Almendarez-Torres* was incorrectly decided,” only two years after the decision. *Id.* at 489. But because the petitioner in *Apprendi* had not asked this Court to revisit the *Almendarez-Torres* decision, it declined to do so.

In the years since *Apprendi*, this Court has examined the validity of other closely-related precedents, measuring them against *Apprendi*, and determining that they must fall. In *Ring v. Arizona*, 536 U.S. 584, 604–05 (2002), this Court again affirmed that the question was not whether a particular fact could be characterized as a sentencing factor or an element. Rather, the question was “who decides”: judge or jury. *Id.* This Court read *Apprendi* to mean “that the characterization of a fact or

circumstance as an ‘element’ or a ‘sentencing factor’ is not determinative of the question ‘who decides,’ judge or jury.” *Id.* at 605. Because the precedent that upheld Arizona’s capital sentencing scheme, *Walton v. Arizona*, 497 U.S. 639 (1990), gave the wrong answer to that very question of who decides, judge or jury, thus violating the right to a jury, this Court in *Ring* overruled *Walton*. 536 U.S. at 588–89.

This Court further extended the reasoning of *Apprendi* in *Alleyne v. United States*, 570 U.S. 99, 102 (2013). *Alleyne* repeated that “[a]ny fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.” *Id.* (quoting *Apprendi*, 530 U.S. at 483 n.10). Because “[m]andatory minimum sentences increase the penalty for a crime,” any fact that increases a mandatory minimum is an element of the crime. *Id.* In so holding, this Court overturned another recent precedent as irreconcilable: *Harris v. United States*, 536 U.S. 545 (2002). In *Alleyne*, this Court again declined to revisit the “narrow exception” of *Almendarez-Torres* “[b]ecause the parties d[id] not contest that decision’s vitality.” 570 U.S. at 112 n.1.

The continued vitality of *Almendarez-Torres* as a lone carve-out is untenable. This Court has repeatedly highlighted the unresolved tension between *Almendarez-Torres* and the *Alleyne/Apprendi* line of cases. See, e.g., *Monge v. California*, 524 U.S. 721, 741 (1998) (Scalia, J., dissenting) (“[T]he Court’s holding in *Almendarez-Torres*. . . . was in my view a grave constitutional error affecting the most fundamental of rights.”); *Jones v. United States*, 526 U.S. 227, 254 (1999)

(Kennedy, J., dissenting) (stating that the majority’s “sweeping constitutional discussion” “contradicts” and “[d]epart[s] from” *Almendarez-Torres*); *Ring*, 536 U.S. at 619 (O’Connor, J., dissenting) (“*Apprendi*’s rule. . . . directly contradicts. . . . *Almendarez-Torres*”); *Dretke v. Haley*, 541 U.S. 386, 395–96 (2004) (considering whether *Almendarez-Torres* should be overruled, but not resolving the question); *Shepard v. United States*, 544 U.S. 13, 27–28 (2005) (Thomas, J., concurring in part and concurring in the judgment) (“*Almendarez-Torres* . . . has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.”); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1202 (2006) (Thomas, J., dissenting from denial of certiorari) (stating that “[i]t is time for this Court to do its part”); *Mathis v. United States*, 136 S. Ct. 2243, 2259 (2016) (Thomas, J. concurring) (“I continue to believe that the exception [for the fact of a prior conviction] in *Apprendi* was wrong, and I have urged that *Almendarez-Torres* be reconsidered.”).

Virtually every circuit court, like the Seventh Circuit below, has similarly recognized that *Almendarez-Torres* is out of line with *Apprendi*. See, e.g., *United States v. Jiménez-Beltre*, 440 F.3d 514, 520 (1st Cir. 2006) (en banc) *abrogated by Rita v. United States*, 551 U.S. 338 (2007); *Portalatin v. Graham*, 624 F.3d 69, 92 (2d Cir. 2010); *United States v. Vargas*, 477 F.3d 94, 105 (3d Cir. 2007), *abrogated on other grounds by United States v. Arrelucea-Zamudio*, 581 F.3d 142, 149 (3d Cir. 2009); *United States v. McDowell*, 745 F.3d 115, 124 (4th Cir. 2014); *United States v. Pineda-Arellano*, 492 F.3d 624, 626 (5th Cir. 2007); *United States v. Mack*, 729 F.3d 594,

609 (6th Cir. 2013); *United States v. Lomax*, 816 F.3d 468, 477–78 (7th Cir. 2016); *United States v. Davis*, 260 F.3d 965, 969 (8th Cir. 2001); *Butler v. Curry*, 528 F.3d 624, 643 (9th Cir. 2008); *United States v. Moore*, 401 F.3d 1220, 1224 (10th Cir. 2005); *United States v. Gibson*, 434 F.3d 1234, 1246–47 (11th Cir. 2006); *United States v. Smith*, 640 F.3d 358, 369 (D.C. Cir. 2011).

It is time to correct this inconsistency. Permitting indictments that fail to notify defendants of the charges and penalty range they face, and allowing judges—rather than juries—to find facts that increase the punishment for a crime violates the Fifth and Sixth Amendments to the Constitution. This Court has already said so several times, leaving only a single exception for prior convictions. As Justice Scalia pointed out in his dissent in *Almendarez-Torres*, “there is no rational basis for making recidivism an exception.” 523 U.S. at 258 (Scalia, J., dissenting) (emphasis removed).

Each of the indictments against Mr. Fox omitted any mention of a second or subsequent conviction as an element of a charge under § 924(c)(1)(C)(i), or the potential effect of that section on Mr. Fox’s sentence. See *United States v. Fox*, No. 1:15-cr-00025-JMS-DKL (S.D. Ind.) Indictment (Feb. 11, 2015), ECF No. 11; Superseding Indictment (May 13, 2015), ECF No. 30; Second Superseding Indictment (Jan. 20, 2016), ECF No. 66. Nor did these indictments mention that Mr. Fox had or could have any prior convictions under § 924(c) that could trigger this mandatory *25-year* sentence enhancement. *Id.* Despite this, Mr. Fox received a sentence that was 18 years longer than it otherwise

would have been, due only to the fact of his “prior conviction.”

This case therefore provides an excellent vehicle for this Court to re-examine whether *Almendarez-Torres* remains sound and reconcilable with subsequent case law. The issue has been preserved on appeal, and is ripe for consideration.

II. A Hobbs Act Robbery Should Not Qualify As A “Crime Of Violence” Element Under 18 U.S.C. § 924(c), Applying The Categorical Approach.

This Court should also consider whether Mr. Fox’s Hobbs Act robbery convictions satisfied the “crime of violence” element of 18 U.S.C. § 924(c)(3), to support Mr. Fox’s § 924(c)(1)(A)(ii) convictions for brandishing a gun “during and in relation to any crime of violence.” Because a Hobbs Act robbery may be committed non-violently, this Court should hold that it cannot be a predicate crime under § 924(c)(3) to support the very heavy mandatory minimum sentences that section carries.

To determine whether an offense is a crime of violence, this Court has directed the lower courts to apply the “categorical approach.” *Taylor v. United States*, 495 U.S. 575, 600 (1990); *see also Mathis*, 136 S. Ct. at 2248–49. Under this Court’s categorical approach, courts analyze statutory language to identify the minimum criminal conduct necessary to satisfy the elements for conviction, “while ignoring the particular facts of the case.” *Mathis*, 136 S. Ct. at 2248. Courts then assume that the jury rested any convictions “on the least serious acts that could satisfy the statute.” *United States v. Armour*, 840 F.3d 904, 908 (7th Cir. 2016).

Section 924(c)(3)(A) defines a “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.” The Hobbs Act prohibits obstructing commerce by robbery or by using or threatening “physical violence to any person or property.” 18 U.S.C. § 1951(a). Under the statute, “robbery” means taking property “by means of actual or threatened force, or violence, or fear of injury, immediate or future, to . . . person or property.” § 1951(b)(1).

Thus, a Hobbs Act robbery could be accomplished with only the “future” “fear of injury” “to . . . property” by whatever means, and not necessarily by the use or threat of physical force. For example, one could commit a Hobbs Act robbery by threatening someone that unless they hand over money (against their will), the robber will later injure their property, perhaps by touching that person’s rare and pristine baseball card, marking it with fingerprints, and thereby devaluing it. *See, e.g., Haynes v. United States*, 237 F. Supp. 3d 816, 826 (C.D. Ill. 2017), *appeal dismissed*, 873 F.3d 954 (7th Cir. 2017) (explaining this very example). In that example, the robber would never need to use or threaten violence or force against the person, no more than a mere touch of their property. These acts would violate the Hobbs Act, yet they fall short of § 924(c)(3)(A)’s requisite use or threat of physical force.

Accordingly, because the statutory language authorizing conviction for a Hobbs Act robbery may be based solely upon the fear of injury to property, it does not categorically fit as a crime of violence under

§ 924(c)(3)(A). Yet, unless this Court declares that Hobbs Act robberies may not serve as predicate offenses for § 924(c)(3)(A), many defendants, like Mr. Fox, will face severe mandatory minimum sentences under that section.

Because Mr. Fox's Hobbs Act robbery convictions cannot satisfy the crime of violence element necessary to convict him under § 924(c)(1)(A)(ii), those convictions should be reversed.

CONCLUSION

For the foregoing reasons, Mr. Fox respectfully asks that the Honorable Court grant this Petition for a Writ of Certiorari to review the judgment of the Seventh Circuit Court of Appeals.

Dated: March 22, 2018

Respectfully submitted,

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APPENDIX

1a
Appendix A
In the

United States Court of Appeals
For the Seventh Circuit

No. 16-2892

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT E. FOX,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:15-cr-00025 — **Jane Magnus-Stinson**, *Judge*.

ARGUED OCTOBER 26, 2017 — DECIDED DECEMBER 22, 2017

Before FLAUM, RIPPLE, and MANION, *Circuit Judges*.

MANION, *Circuit Judge*. Robert Fox was convicted of two Hobbs Act robberies. Because he used a firearm to commit the robberies, he was subject to 18 U.S.C. § 924(c)(1)'s mandatory sentencing add-on and was sentenced to 435 months' imprisonment. On appeal, he principally argues that he is entitled to a new trial because the district court denied him his right to be represented by counsel of his choice. We affirm his conviction. The district court was well within its discretion to deny Fox's morning-of-trial motion for a continuance when there was no indication Fox was particularly close to retaining new counsel.

Fox also raises three other arguments. He admits that the first two, which challenge parts of his conviction, are foreclosed by controlling precedent. He simply wishes to preserve them for Supreme Court review. But the government concedes that Fox is correct on his final argument, agreeing that he is entitled to resentencing in light of *Dean v. United States*, 137 S. Ct. 1170 (2017). We agree. *Dean* permits district courts to take into account the sentencing add-on when fashioning a just sentence for the predicate robberies, so the district court may impose a less severe sentence on remand. Therefore, we vacate Fox's sentence and remand for resentencing.

I. Background

Fox was charged with robbing a White Castle restaurant and a Speedway gas station in southern Indiana. He was indicted in federal court under the Hobbs Act in January 2015 and appointed counsel on account of his indigence. Fox had some conflict with his

appointed counsel and twice wrote to the district judge—in July and September of 2015—requesting new counsel. But at his November 3 competency hearing, Fox did not object to continued representation by appointed counsel and made no representations that he or his family were attempting to retain private counsel. Indeed, his appointed counsel told the court that Fox wanted to resolve the case but wanted more time to prepare. The district court set trial to begin on February 16, 2016.

At the final pre-trial conference on January 20, 2016, Fox requested a continuance and claimed that his family was speaking with potential new representation. The district judge noted that she expected a superseding indictment to be returned and was inclined to grant a continuance, but she also warned that Fox's case had been pending for a long time, so if he planned to retain new counsel, "that needs to happen." Yet five days later, at the initial hearing on the superseding indictment (which was almost entirely unchanged from the original), Fox reversed himself and indicated that he wanted to proceed on February 16 after all. As such, he declined to exercise his right to have 30 days between the date of the superseding indictment and trial.

On the morning trial was to begin, Fox changed his position again. He requested a continuance, arguing that his family was attempting to retain private counsel. The district judge held a short hearing on the request. Fox's uncle testified that the family had talked to an attorney and was "in the process of trying to get the money," but didn't "have it right now." He also said that Fox's family had been unaware that trial was to start that morning,

even though it had been scheduled since early November. Fox's appointed counsel testified that he had spoken to the private attorney and that the latter had no plans to make an appearance in the case. The district judge denied the motion for a continuance, concluding that: (1) Fox had changed his position several times, indicating a desire to proceed less than a month before trial; (2) there was no indication that the private attorney would actually make an appearance; and (3) the lawyers were prepared to proceed and the court had summoned witnesses and jurors to be ready for trial that morning.

Fox proceeded to trial and the jury convicted him of both robberies and the accompanying counts of using a firearm in connection with crimes of violence.¹ He was sentenced to 435 months' imprisonment due to the mandatory consecutive sentences for using a firearm in connection with the robberies. *See* 18 U.S.C. § 924(c)(1). Fox timely appealed his conviction and sentence.

II. Analysis

A. Denial of Motion for a Continuance

Generally “[w]e will reverse the district court’s denial of a motion for a continuance only for an abuse of discretion and upon a showing of actual prejudice.” *United States v. Shields*, 789 F.3d 733, 748 (7th Cir. 2015). Yet the denial of the right to be represented by counsel of the defendant’s choice, assuming the

¹The court declared a mistrial on the fifth count, which charged Fox with being a felon in possession of a firearm.

defendant can afford such counsel, is a structural error warranting reversal irrespective of prejudice. *United States v. Sellers*, 645 F.3d 830, 834 (7th Cir. 2011). Nevertheless, district courts still “have broad discretion to grant or deny a continuance to substitute new counsel.” *Id.* We will reverse only if the district judge’s denial of the motion amounted to “an unreasoning or arbitrary insistence on expeditiousness in the face of a justifiable request for delay.” *Id.* (quoting *United States v. Carrera*, 259 F.3d 818, 825 (7th Cir. 2001)).

Our decisions in *Sellers* and *United States v. Sinclair*, 770 F.3d 1148 (7th Cir. 2014), are particularly relevant. The facts in *Sellers* are strange but instructive. The defendant retained an attorney, but for some reason that attorney never filed an appearance and instead designated a “secondary counsel” to represent the defendant. That counsel missed several filing deadlines and improperly relied on a schedule issued by the magistrate judge that assumed the district judge would grant a continuance. Despite secondary counsel’s several representations to the court that the defendant’s actual counsel of choice would file an appearance soon, it never happened. So on the Friday before trial, the defendant told the district court that he wished to fire secondary counsel and was in contact with two additional attorneys, one of whom he planned to hire. The court said it was unlikely to grant a continuance, so the defendant reluctantly agreed to continue with secondary counsel. Yet on the morning of trial, the defendant appeared with the secondary counsel *and* his new counsel of choice. The new counsel said he’d file an appearance only if the court granted a continuance to

give him time to prepare, but the court denied the request on the ground that it had already made several attempts to accommodate the situation and the promises of original counsel of choice to appear had not come to fruition. The defendant proceeded with secondary counsel “under protest” and was convicted.

We held that the district court unreasonably denied the defendant the right to be represented by his counsel of choice. We determined that the district court had failed to inquire of either counsel “how long substitute counsel would need to prepare adequately for trial,” which “evidence[d] a failure to actually balance the right of choice of counsel against the needs of fairness, and suggest[ed] that the district court unreasonably viewed any delay as unacceptable.” *Sellers*, 645 F.3d at 837. We also found it troubling that the district court might have denied the motion in part because it was annoyed with the secondary counsel’s failure to meet filing deadlines, or possibly annoyed by eleventh-hour continuance motions more generally. *Id.* at 838. In the end, “legitimate considerations must be balanced against the reasons in support of the motion for a continuance to accommodate new counsel.” *Id.* at 838-39. Failure to perform that balancing warranted reversal.

Contrast those facts with *Sinclair*. There, six days before the trial was to begin, the defendant sent a letter to the district court seeking a continuance because his family was planning to retain a private attorney with their tax refund money. The judge held a hearing the day before trial, and the defendant reiterated that as soon as the refund money came through, his family would retain the new attorney. The defendant also stated vague

complaints about the federal defender who had represented him in his suppression hearing. The judge denied the continuance request, pointing out that (1) it was made at the last minute and no reason was given for the delay; (2) jurors and witnesses had already been summoned for trial; and (3) the retention of the new attorney was still quite uncertain.

We affirmed the denial of the continuance motion. Particularly, we observed that the defendant's family's plans to hire substitute counsel were "at best preliminary and highly contingent." *Sinclair*, 770 F.3d at 1155. Given that uncertainty, "[t]he preferred lawyer's failure to appear in support of a defendant's continuance motion is a significant factor weighing against granting a continuance." *Id.* at 1156. We also noted that the district judge properly considered the inconvenience to jurors and witnesses, which constitute "real costs for real people (not to mention the sunk public resources)." *Id.* at 1155. In short, the judge's decision was "neither unreasoned nor arbitrary." *Id.* at 1156.

Our case bears little resemblance to the situation in *Sellers*, but is quite similar to *Sinclair*. Like the defendant in *Sinclair*, Fox sought a continuance very near the trial date, had no reason to wait that long, and had an uncertain plan to retain new counsel. Indeed, Fox waited longer than the *Sinclair* defendant to make his motion, and his plan to hire an attorney was even more speculative than was Sinclair's. Fox's uncle didn't specify when the family would have the money together to retain new counsel, the new counsel didn't appear before the court, and there was no guarantee that the new counsel would take the case even if the money did

materialize. Moreover, like the district judge in *Sinclair*, the judge here properly recognized that granting a continuance on the morning of trial would impose costs on jurors, witnesses, and the court.

To be sure, Fox had previously sought new counsel several times in the months leading up to trial. These requests, however, were always followed by waffling. Fox changed his mind several times about whether he wanted new counsel, and when he was warned at the final pre-trial hearing to hire new counsel as quickly as possible, he decided a few days later to proceed with the original trial date anyway. The judge heard no more on the subject of new counsel until the morning of trial, so she was entitled to treat the motion as if it were an eleventh-hour request. In effect, that's what it was. *Sinclair* counsels that such a request is properly denied when the plan to hire new counsel is too speculative and no new counsel actually appears before the court.

In *Sellers*, on the other hand, the defendant sought a continuance for the same reason several times in the weeks leading up to trial, that reason was legitimate, and the defendant showed up the morning of trial with his newly retained counsel. The court denied the motion for a continuance even though it knew that the defendant's original choice of counsel had been frustrated, his secondary counsel had performed poorly, and new counsel was present and ready to take the case. All of those factors counseled in favor of granting a continuance. None exists in this case.

We conclude that the district court was well within its discretion to deny Fox's last-minute motion for a

continuance. The judge properly weighed the reasons for and against granting relief and reasonably concluded that a continuance was not warranted. Therefore, we affirm the denial of the motion. Fox is not entitled to a new trial.

B. Issues Raised for Preservation

Fox raises two arguments that he admits are foreclosed by controlling precedent, but seeks to preserve them for Supreme Court review. First, he argues that the indictment in this case was insufficient because it did not refer to the 25-year mandatory add-on sentence for a second or subsequent conviction for using a firearm in a crime of violence. 18 U.S.C. § 924(c)(1)(C)(i). Our decision in *United States v. Cardena*, 842 F.3d 959, 1000 (7th Cir. 2016), is conclusive on that point. We observed there that the Supreme Court’s decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 244-47 (1998), “held that recidivism is not an ‘element’ of an offense, and so it need not be found by a jury.” Because the recidivism add-on is not an element of the predicate offense, it did not have to be included in the indictment. See Fed. R. Crim. P. 7(c)(1) (“The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged”).²

² We recognize, as we have before, that “there is some tension between [*Alleyne v. United States*, 133 S. Ct. 2251 (2013)] and *Almendarez-Torres*,” but that tension is “for the Supreme Court to resolve.” See *United States v. Lomax*, 816 F.3d 468, 477–78 (7th Cir. 2016). *Alleyne* held that any fact that increases the mandatory

Second, Fox argues that Hobbs Act robberies are not “crimes of violence” under 18 U.S.C. § 924(c)(3)(A). We held otherwise earlier this year in *United States v. Anglin*, 846 F.3d 954, 965 (7th Cir. 2017), vacated on other grounds by 138 S. Ct. 126 (2017). Our sister circuits which have confronted the question agree. *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017); *United States v. Hill*, 832 F.3d 135, 140–44 (2d Cir. 2016); *In re St. Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016); *United States v. Howard*, 650 F. App’x 466, 468 (9th Cir. 2016). We reaffirm today that Hobbs Act robberies are crimes of violence under Section 924(c)(3)(A). Therefore, we affirm Fox’s conviction.

C. Sentencing

Although we decline to disturb Fox’s conviction, we conclude that a remand for resentencing is appropriate in light of *Dean v. United States*, 137 S. Ct. 1170 (2017). The parties agree on this point. *Dean* abrogated prior

minimum sentence is an “element” of a crime rather than a “sentencing factor,” and therefore must be found by a jury. *Alleyne*, 133 S. Ct. at 2155. And even before *Alleyne*, we had suggested that *Almendarez-Torres* is “vulnerable to being overruled.” See *United States v. Elliott*, 703 F.3d 378, 381 n.2 (7th Cir. 2012); *United States v. Browning*, 436 F.3d 780, 782 (7th Cir. 2006). So *Almendarez-Torres* may be on its last legs. See *Shepard v. United States*, 544 U.S. 13, 27 (2005) (Thomas, J., concurring in the judgment) (“*Almendarez-Torres* ... has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.”). But “the continued authority of *Almendarez-Torres* is not for us to decide.” *Browning*, 436 F.3d at 782.

Seventh Circuit precedent that required district courts to “determine the proper sentence for the [predicate offenses] entirely independently of the section 924(c)(1) add-on.” *United States v. Roberson*, 474 F.3d 432, 437 (7th Cir. 2007). In other words, before *Dean*, district courts had to sentence defendants for predicate offenses as if the significant add-on sentence did not exist. Now, in fashioning a just sentence, the court may take into account the mandatory 384-month add-on to Fox’s sentence for the two robberies. Because this may result in a less severe sentence, we vacate Fox’s sentence and remand the case for resentencing.

III. Conclusion

For the reasons stated above, we conclude that the district court did not abuse its discretion by denying Fox’s motion for a continuance to find new counsel on the morning of trial. Therefore, we AFFIRM his conviction. However, we VACATE Fox’s sentence and REMAND this case for resentencing in light of the Supreme Court’s decision in *Dean*.

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Appendix B
**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA**

UNITED
STATES OF
AMERICA

**JUDGMENT IN A
CRIMINAL CASE**

Case Number: 1:15CR00025-001

v.

USM Number: 12612-028

ROBERT E. FOX

Julie L. Smith and Kenneth L.
Riggins
Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.
- ☒ was found guilty on count(s) 1, 2, 3, and 4
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title and Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1951 (a)	Hobbs Act Robbery	7/30/2014	1

	13a		
18 U.S.C. § 924(c)(1) (A)(ii)	Using, Carrying, or Possessing a Firearm During and in Relation to a Crime of Violence	7/30/2014	2
18 U.S.C. § 1951(a)	Hobbs Act Robbery	8/5/2014	3
18 U.S.C. § 924(c)(1) (C)(i)	Using, Carrying, or Possessing a Firearm During and in Relation to a Crime of Violence	8/5/2014	4

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☒ Count(s) 5 ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

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6/28/2016

Date of Imposition of Judgment



Jane Magnus-Stinson

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Date: July 7, 2016

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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 435 months

Counts 1 & 3: 51 months, concurrent, Count 2: 84 months, consecutive, Count 4: 300 months, consecutive.

- ☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed as close to Indianapolis at the lowest appropriate security level and that he be allowed to participate in the following programs: anger management, Thinking for a Change, substance abuse treatment, mental health treatment (to address childhood trauma), classes in communication, vocational training, and educational training.

- ☒ The defendant is remanded to the custody of the United States Marshal.

- ☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

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- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years on each count, concurrent.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any

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unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (*Check, if applicable.*)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (*Check, if applicable.*)
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16913, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (*Check, if applicable.*)
- ☐ The defendant shall participate in an approved program for domestic violence. (*Check, if applicable.*)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the conditions listed below:

CONDITIONS OF SUPERVISION

1. You shall report to the probation office in the district to which you are released within 72 hours of release from the custody of the Bureau of Prisons.
2. You shall report to the probation officer in a manner and frequency directed by the court or probation officer.
3. You shall permit a probation officer to visit you at a reasonable time at home, or another place where the officer may legitimately enter by right or consent, and shall permit confiscation of any contraband observed in plain view of the probation officer.
4. You shall not knowingly leave the judicial district without the permission of the court or probation officer.
5. You shall answer truthfully the inquiries by the probation officer, subject to your 5th Amendment privilege.
6. You shall not meet, communicate, or otherwise interact with a person you know to be engaged, or planning to be engaged, in criminal activity. You shall report any contact with persons you know to be convicted felons to your probation officer within 72 hours of the contact.
7. You shall reside at a location approved by the probation officer and shall notify the probation

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officer at least 72 hours prior to any planned change in place or circumstances of residence or employment (including, but not limited to, changes in residence occupants, job positions, job responsibilities). When prior notification is not possible, you shall notify the probation officer within 72 hours of the change.

8. You shall not own, possess, or have access to a firearm, ammunition, destructive device or dangerous weapon.
9. You shall notify the probation officer within 72 hours of being arrested, charged, or questioned by a law enforcement officer.
10. You shall maintain lawful full time employment, unless excused by the probation officer for schooling, vocational training, or other reasons that prevent lawful employment.
11. You shall make a good faith effort to follow instructions of the probation officer necessary to ensure compliance with the conditions of supervision.
12. You shall provide the probation officer access to any requested financial information and shall authorize the release of that information to the U.S. Attorney's Office for use in connection with the collection of any outstanding fines and/or restitution.

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13. You shall participate in a substance abuse or alcohol treatment program approved by the probation officer and abide by the rules and regulations of that program. The probation officer shall supervise your participation in the program (provider, location, modality, duration, intensity, etc.).
14. You shall submit to the search by the probation officer of your person, vehicle, office/business, residence, and property, including any computer systems and hardware or software systems, electronic devices, telephones, and Internet-enabled devices, including the data contained in any such items, whenever the probation officer has a reasonable suspicion that a violation of a condition of supervision or other unlawful conduct may have occurred or be underway involving you and that the area(s) to be searched may contain evidence of such violation or conduct. Other law enforcement may assist as necessary. You shall submit to the seizure of contraband found by the probation officer. You shall warn other occupants these locations may be subject to searches.
15. You shall pay the costs associated with the following imposed conditions of supervised release/probation, to the extent you are financially able to pay: substance abuse treatment. The probation officer shall determine your ability to pay and any schedule of payment.

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I understand that I and/or the probation officer may petition the Court to modify these conditions, and the final decision to modify these terms lies with the Court. If I believe these conditions are being enforced unreasonably, I may petition the Court for relief or clarification; however, I must comply with the directions of my probation officer unless or until the Court directs otherwise. Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the condition of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

Defendant

Date

U.S. Probation Officer/
Designated Witness

Date

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 400.00	\$	\$ 282.46

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
White Castle	\$ 130.46	\$ 130.46	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Speedway Gas Station	\$ 152.00	\$ 152.00	

TOTALS	\$ <u>282.46</u>	\$ <u>282.46</u>
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- ☐ Restitution amount ordered pursuant to plea agreement \$_____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☒ the interest requirement is waived for the
☐ fine ☒ restitution.
- ☐ the interest requirement for the ☐ fine
☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A** ☐ Lump sum payment of _____
due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance ☐ C ☐ D ☐ E, or ☐ G
below; or
- B** ☒ Payment to begin immediately (may be
combined with ☐ C, ☐ D, or ☐ G below);
or
- C** ☐ Payment in equal _____ (*e.g., weekly,*
monthly, quarterly) installments of \$____
_____ over a period of _____ (*e.g.*
months or years), to commence _____
(*e.g., 30 or 60 days*) after the date of this
judgment; or
- D** ☐ Payment in equal _____ (*e.g., weekly,*
monthly, quarterly) installments of \$
_____ over a period of _____
(*e.g., months or years*), to commence ____
_____ (*e.g., 30 or 60 days*) after release
from imprisonment to a term of
supervision; or
- E** ☐ Payment during the term of supervised
release will commence within _____
(*e.g., 30 or 60 days*) after release from
imprisonment. The court will set the
payment plan based on an assessment of

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the defendant's ability to pay at that time;
or

- F** ☒ If this case involves other defendants, each may be held jointly and severally liable for payment of all or part of the restitution ordered herein and the Court may order such payment in the future. The victims' recovery is limited to the amount of loss, and the defendant's liability for restitution ceases if and when the victims receive full restitution.
- G** ☒ Special instructions regarding the payment of criminal monetary penalties.

Any unpaid restitution balance during the term of supervision shall be paid at a rate of not less than 10% of the defendant's gross monthly income.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

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Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

<u>Defendant</u> <u>Name</u>	<u>Case</u> <u>Number</u>	<u>Joint & Several</u> <u>Amount</u>
---------------------------------	------------------------------	---

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s): _____
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.