

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2017

No.

DEANDRE ENOCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Mr. Enoch was convicted of 18 U.S.C. § 2114(a), robbery of government property. He was also convicted of 18 U.S.C. § 924(c), brandishing a firearm in furtherance of a crime of violence.

Enoch maintained that section 2114(a) is not a crime of violence and does not support a separate conviction under section 924(c).

Did the Seventh Circuit depart from this Court's required methodology when it considered the elements of section 924(c) and concluded that those elements made section 2114(a) a crime of violence?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Deandre Enoch respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming Enoch's conviction and sentence is reported at *United States v. Enoch*, 865 F.3d 575 (7th Cir. 2017) and is reprinted in the appendix to this petition. A. 1.

JURISDICTION

Enoch was convicted in the United States District Court for the Northern District of Illinois. He filed a timely appeal to the Seventh Circuit, which affirmed the convictions and sentence on July 28, 2017. A. 1. Enoch did not seek rehearing. Enoch filed a timely request to extend the due date for filing a petition for a writ of certiorari, and Justice Kagan granted leave to file the petition on or before December 25, 2017. *Enoch v. United States*,

No. 17A423. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 924(c)

(c)(1)(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.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

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

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

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term “drug trafficking crime” means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(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.

(4) For purposes of this subsection, the term “brandish” means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under 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 armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

18 U.S.C. § 2114(a)

(a) Assault.--A person who assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned not more than twenty-five years.

STATEMENT OF THE CASE

Mr. Enoch was charged with two felonies: putting life in jeopardy while robbing property belonging to the United States, 18 U.S.C. 2114(a), and use of a dangerous weapon in relation to a

crime of violence. 18 U.S.C. § 924(c). R. 13.¹ Count 1 alleged that Enoch and another individual robbed a person having custody of \$850 belonging to the United States and that, in effecting the robbery, they put the life of the custodian in jeopardy by the use of a dangerous weapon. Count 2 alleged that they brandished a dangerous weapon during the robbery. The theory behind Count 2 was that robbery was a crime of violence.

Enoch moved to dismiss Count 2, the weapon offense, on the theory that robbery, as set forth in section 2114(a), is not a crime of violence, and hence could not serve as a predicate for a conviction under section 924(c). After receiving briefs, the district court ruled that a section 2114(a) robbery is a crime of violence. The district court refused to dismiss Count 2. R. 36.

After the district court denied the motion to dismiss Count 2, Enoch pleaded guilty to both counts, reserving the right under F. R. Crim. P. 11(a)(2) to enter a conditional plea and to appeal the district court's ruling on the motion to dismiss Count 2. R. 43.

¹ "R. __" indicates a reference to a docket entry in the district court proceedings.

The district court sentenced Enoch to 24 months on Count 1 and a consecutive term of 84 months on Count 2. R. 59.

Enoch filed a timely notice of appeal. His appeal challenged the district court's decision not to dismiss Count 2. He argued that after *Johnson v. United States*, 135 S. Ct. 2551 (2015), the residual clause of section 924(c) could not support a finding that robbery of government property was a crime of violence. Nor was robbery of government property included within section 924(c)'s force clause. Even when the robber puts the victim's life in jeopardy, the crime does not come within section 924(c)'s force clause, he argued. Prior cases have upheld convictions under the jeopardy clause even when the robber did not brandish a gun and the victim was unaware that the robber was armed.

The Seventh Circuit affirmed the conviction and sentence on Count 2. It accepted as a given that section 924(c)'s residual clause did not survive *Johnson*, as it had previously held in *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016). It chose not to consider whether robbery, by itself, falls within section 924(c)'s force clause. It focused on the more aggravated

offense contained in section 2114(a), putting the victim's life in jeopardy. It held that a robbery that places the victim's life in jeopardy falls within the definition of section 924(c)'s force clause.

In reaching this conclusion, the Seventh Circuit ignored cases in which the defendant had done no more than possess a weapon during the robbery. Instead, the Court focused on the allegation in Count 2 that Enoch had brandished a weapon. In its view, his alleged brandishing a weapon made the robbery offense a crime of violence under section 924(c)'s force clause. “Enoch pleaded guilty to § 924(c)(1)(A)(ii)—brandishing a gun during commission of the crime. We cannot see how a defendant can brandish a gun in such a manner as to put the life of a victim in jeopardy without committing an offense that ‘has as an element the use, attempted use, or threatened use of physical force against the person or property of another.’ § 924(c)(3)(A).” 865 F.3d at 582.

Judge Ripple concurred in the result, but would have affirmed on the broader ground that robbery of government property (and, for that matter, robbery in general) categorically

satisfies section 924(c)'s force clause. The majority refused to accept Judge Ripple's approach, because it believed that the case could be decided on the more narrow ground that it employed.

REASONS FOR GRANTING THE PETITION

I. This Court has established a methodology for determining what is a crime of violence, and the decision below rejected that methodology.

The Seventh Circuit accepted as a premise that the residual clause of 18 U.S.C. § 924(c) is unconstitutional.² If Enoch was to receive a separate conviction under section 924(c), the robbery offense in 18 U.S.C. § 2114(a) had to satisfy section 924(c)'s force clause. The Seventh Circuit held that robbery of government property satisfies section 924(c)'s force clause. In reaching that conclusion, the Seventh Circuit employed a methodology condemned by this Court in a string of decisions

² That premise may or may not be affected by this Court's eventual resolution of *Sessions v. Dimaya*, No. 15-1948, which was reargued on October 2, 2017.

beginning with *Taylor v. United States*, 495 U.S. 575 (1990), and most recently confirmed in *Mathis v. United States*. 136 S. Ct. 2243 (2016). Under this Court’s precedents, the sentencing court is required to consider the elements of the anchor offense—in this case, section 2114(a)—and determine whether they categorically require force as defined in cases like *Johnson v. United States*, 559 U.S. 133 (2010).

In Enoch’s case, the Seventh Circuit did not perform the required analysis. It should have confined its inquiry to the elements of section 2114(a). Instead, the Seventh Circuit expanded its inquiry to the elements of section 924(c). Finding force as an element of section 924(c), the Seventh Circuit declared that section 2114(a) was a crime of violence. That approach is more than unprecedented; it is forbidden. The elements of section 2114(a), not the elements of section 924(c), are mandated to guide the force inquiry.

This Court has developed the relevant law in the context of the Armed Career Criminal Act, a different subsection of section 924. But the language of the two subsections are so closely

similar that the basic inquiry is the same. Section 924(c) defines “crime of violence” as a felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” Section 924(e) defines “violent felony” as a felony that “has as an element the use, attempted use, or threatened use of physical force against the person of another.”

This Court introduced the basic structure in *Taylor v. United States*, 495 U.S. 575, 600 (1990), mandating “a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.” Essentially, if the predicate offense sweeps more broadly than the terms of the sentencing enhancement, a conviction for the predicate offense cannot support enhancement. *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). This approach “look[s] only to the statutory definition of the predicate offense—i.e. the elements—of a defendant’s prior offenses and *not* to the particular facts underlying those convictions” to determine whether the conduct criminalized by the statute, including the

most innocent conduct, qualifies as a crime of violence. *Descamps*, 133 S. Ct. at 2283 (Court’s emphasis), quoting *Taylor*, 494 U.S. at 599.

In Enoch’s case, the Seventh Circuit radically strayed from the analysis demanded by this Court. The Seventh Circuit looked at the brandishing element of section 924(c) and concluded that brandishing a gun represented a threat to use force. That proposition is true enough as an abstract proposition. But the Seventh Circuit looked at the wrong statute. It should have asked whether the elements of section 2114(a) categorically required the use of force. That inquiry took no legitimate direction from the elements of section 924(c). Had the Seventh Circuit properly focused on the elements of section 2114(a), it would have concluded that one can jeopardize the victim’s life without using force.

Indeed, the Seventh Circuit itself had so held in *United States v. Rodriguez*, 925 F.2d 1049 (7th Cir. 1991), where the defendant was convicted of putting the robbery victim’s life in danger by use of a dangerous weapon. (In *Rodriguez*, the

defendant was not additionally charged under section 924(c).)

The defendant's accomplice possessed a gun, but did not draw it on the carrier. Nonetheless, the defendant was properly convicted of the jeopardizing offense in section 2114(a). "The government is not obliged to prove that a gun held by the perpetrator of a postal robbery is pointed at the victim, just as it is not obliged to prove 'that the gun was actually loaded or that the perpetrator of the crime was disposed to use the weapon. The use of a gun is per se sufficient cause to impose the enhanced sentence.'" 925 F.2d at 1053, quoting *United States v. Parker*, 542 F.2d 932, 934 (5th Cir.1976). *Rodriguez* emphasized that the robbers deserved the harsher penalty under §2114 because the gun emboldened them in their endeavors. *Accord*, *United States v. Ruiz*, 986 F.2d 905, 909 (5th Cir. 1993). Had the Seventh Circuit employed the methodology required by this Court, it would have focused on the elements of section 2114(a) and would have concluded, consistent with governing law, including its own, that one can place a robbery victim's life in jeopardy without using or threatening force as defined in federal law.

CONCLUSION

Wherefore, it is respectfully requested that this Court grant a writ of certiorari to review the decision below.

Dated December 21, 2017, at Chicago, Illinois.

Respectfully submitted,

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