

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2017

No.

JACOBI PICKETT,
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

Is robbery under the Hobbs Act, 18 U.S.C. § 1951, a crime of violence under 18 U.S.C. § 924(c)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jacobi Pickett 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 order of the United States Court of Appeals for the Seventh Circuit denying relief is reported at *Pickett v. United States*, 2017 WL 5899317 (7th Cir. Sep. 21, 2017), and is reprinted in the appendix to this petition. A. 1. The district court's opinion is found at *United States v. Pickett*, 2017 WL 1196954 (N.D. Ill. Mar. 31, 2017), and is reprinted in the appendix. A. 2.

JURISDICTION

Pickett sought post-conviction relief under 28 U.S.C. § 2255. The district court denied relief and denied a certificate of appealability. *United States v. Pickett*, 2017 WL 1196954 (N.D. Ill. Mar. 31, 2017). Pickett entered a timely appeal. The Court of

Appeals denied a certificate of appealability on September 21, 2017. *Pickett v. United States*, 2017 WL 5899317 (7th Cir. Sep. 21, 2017). Pickett filed no petition for rehearing. Pickett filed a timely request for an extension of time to file a petition for a writ of certiorari. On January 16, 2018, Justice Kagan granted permission to file on or before February 18, 2018. *Pickett v. United States*, No. 17A742. 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. § 1951

(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.

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term “commerce” means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

STATEMENT OF THE CASE

Pickett was charged with robbery offenses under the Hobbs Act, 18 U.S.C. § 1951, and use of a firearm in relation to a crime of violence under 18 U.S.C. § 924(c). He pleaded guilty to one robbery offense and one firearm offense. He was sentenced to 46 months on the robbery count, and a consecutive 84 months on the

firearm count, for a total of 130 months. He did not appeal the judgment.

After this Court's judgment in *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), Pickett sought relief under 28 U.S.C. § 2255. He alleged that after *Johnson* the residual clause of 18 U.S.C. § 924(c) was no longer valid and that Hobbs Act robbery was not a crime of violence as measured by section 924(c)'s force clause. The district court denied relief and denied a certificate of appealability.

Pickett took an appeal, and the Seventh Circuit denied a certificate of appealability, since the Circuit had already found that Hobbs Act robbery is a crime of violence. *United States v. Anglin*, 846 F.3d 954 (7th Cir. 2017).

REASONS FOR GRANTING THE PETITION

Hobbs Act robbery is not a crime of violence. The order below conflicts with decisions of this Court.

Section 924(c) has two alternative definitions of crime of violence. The predicate offense must have “as an element the use,

attempted use, or threatened use of physical force against the person or property of another.” This alternative is dubbed the force clause. Or the predicate offense “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.” This alternative is dubbed the residual clause.

In *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court invalidated the residual clause of 18 U.S.C. § 924(e). That holding applies with equal force to the residual clause of 18 U.S.C. § 924(c). *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016).

With the residual clause removed, the pertinent inquiry is whether Hobbs Act robbery fits within the force clause of section 924(c). 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.” *Descamps v. United States*, 570 U.S. 254, 261 (2013) (quotation marks and citation omitted).

In addition, under the categorical approach, a predicate offense can qualify 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. *Descamps*, 570 U.S. at 261.

An offense fits under the force clause only if the offense always, that is, categorically, requires the use of force as defined in federal law. In *Curtis Johnson v. United States*, 559 U.S. 133, 139 (2010), the Court defined “force,” as used in section 924(e), to mean “a degree of power that would not be satisfied by the merest touching.” Instead, “the phrase ‘physical force’ means violent force.” *Id.* at 141.

The Hobbs Act does not categorically require force as measured by *Curtis Johnson*. The Hobbs Act defines “robbery” as follows:

. . . 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 . . .

The statute sets out alternatives of “force,” “violence,” and “fear” as the means by which a defendant must obtain the victim’s property.

These alternatives are not separate elements of the offense. There is but one robbery offense, and force, violence, and fear are means to that end. Under *Mathis v. United States*, 136 S. Ct. 2243 (2016), if one of these means is broader than the force required under *Curtis Johnson*, then Hobbs Act robbery is not a crime of violence.

Force, as used in the Hobbs Act, does not equate with the force required under the *Curtis Johnson* test. The Hobbs Act copied New York’s definition of robbery for its definition of robbery. *United States v. Nedley*, 255 F.2d 350, 355 (3d. Cir. 1958). Adoption of the wording of a statute from another jurisdiction is generally presumed to carry with it the previous judicial interpretations of the wording. *Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944). In a similar fashion, when

Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word. *Morissette v. United States*, 342 U.S. 246, 263 (1952).

The force required for New York robbery and for robbery in general does not equate with the force required under *Curtis Johnson*. New York courts have explained that the “physical force” threatened or employed can be minimal, including a bump, a brief tug-of-war over property, or even the minimal threatened force exerted in “blocking” someone from pursuit by simply standing in their way. *See, e.g., People v. Lee*, 197 A.D.2d 378, 602 N.Y.S.2d 138, 139 (1993) (bumping victim); *People v. Bennett*, 219 A.D.2d 570, 631 N.Y.S.2d 834, 834 (1995) (“human wall” blocking pursuit); *People v. Patton*, 184 A.D.2d 483, 585 N.Y.S.2d 431, 431 (1992) (blocking pursuit); *People v. Safon*, 166 A.D.2d 892, 560 N.Y.S.2d 552, 552 (1990) (tug-of-war).

Decisions from other states similarly declare that robbery can consist of force not amounting to the level of force required by *Curtis Johnson*. *Butts v. State*, 53 P.3d 609, 613 (Alaska Ct. App. 2002) (tug-of-war over victim's purse); *People v. Burns*, 172 Cal. App. 4th 1251, 1259, 92 Cal. Rptr. 3d 51, 57 (2009) (same); *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. App. 2011) (same); *State v. Oksanen*, 311 Minn. 553, 554, 249 N.W.2d 464, 466 (1977) (defendant pushed victim while taking wallet).

This reading of the Hobbs Act is confirmed by its listing of violence as an alternative to force. This Court has adhered to the established principle that a court should give effect, if possible, to every clause and word of a statute. *Moskal v. United States*, 498 U.S. 103, 109 (1990). Since violence is an alternative, force, as used in the Hobbs Act, must convey a level of force that is not violent. On its face, then, the Hobbs Act permits conviction for use of force that does not amount to violence. Non-violent force does not satisfy the definition of force required by *Curtis Johnson*.

CONCLUSION

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

Dated February 2, 2018, at Chicago, Illinois.

Respectfully submitted,

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