
No.

in the
Supreme Court
of the
United States

Term,

TERRENCE A. JOHNSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

In *Johnson v. United States*, -- U.S. ---, 135 S.Ct. 2551 (2015), this Court held that the so called “residual clause” contained in 18 U.S.C. § 924(e)(2)(B) was unconstitutionally vague. 18 U.S.C. § 924(c)(3), which defines what constitutes a proper “crime of violence” for use as a predicate offense for purposes of an 18 U.S.C. § 924(c) conviction, contains an almost identical residual clause. This residual clause suffers from identical constitutional infirmities; therefore, Johnson’s Hobbs Act conviction, which relied on that residual clause, cannot be a predicate qualifying offense.

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The Petitioner, Terrence A. Johnson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on November 30, 2017.

OPINION BELOW

The Sixth Circuit's opinion in this matter was unpublished, and is attached hereto in Appendix 1. The district court's order denying Johnson's 28 U.S.C. § 2255 petition was unpublished, and is attached as Appendix 2.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on November 30, 2017. This

petition is timely filed. The Court's jurisdiction is invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1951(a) states:

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.

18 U.S.C. § 924(c)(3) defines crime of violence as

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.

STATEMENT OF THE CASE

On January 10, 2005, Petitioner Terrence Johnson pled guilty to conspiracy to commit Hobbs Act robberies, two substantive Hobbs Act robberies and two 18 U.S.C. § 924(c) charges, which predicates were the aforementioned Hobbs Act violations. Petitioner Johnson admitted as a factual basis for these pleas that on July 21, 2004, he and another individual robbed a beauty salon while armed. In addition, Jonson admitted that on August 25, 2004, and another individual robbed a jewelry store, again while possessing a firearm. On May 2, 2005, the court sentenced Johnson to 240 months incarceration, with 5 years of supervised release to follow.

On June 22, 2016, Johnson filed a 28 U.S.C. § 2255 petition, alleging that his sentence and convictions under 18 U.S.C. § 924(c) were void pursuant to this Court's decision in *Johnson v. United States*. -- U.S. ---, 135 S.Ct. 2551 (2015). Johnson made two claims: (1) his 18 U.S.C. § 924(c) convictions were void because 18 U.S.C. § 924(c)(3)(b) has a residual clause almost identical to that found unconstitutionally vague in *Johnson*, and (2) Johnson was found to be a Career Offender under the Guidelines based upon a residual clause which was identical to that found unconstitutionally vague in *Johnson*. The district court initially held the matter in abeyance pending this Court's decision in *Beckles v. United States*. --- U.S. ---, 137 S.Ct. 886 (2017). On March 10, 2017, the district court determined that under *Beckles*, Johnson was not entitled to relief and dismissed his motion to vacate. The

district court did not address Johnson's 18 U.S.C. § 924(c) argument in this denial. (Appendix 2)

Petitioner Johnson then filed a motion for certificate of appealability to the Sixth Circuit Court of Appeals. Johnson, in light *Beckles*, abandoned his challenge to the Guidelines sentence argument, but continued to argue that in light of *Johnson*, his Hobbs Act offenses did not categorically qualify as crimes of violence pursuant to 18 U.S.C. § 924(c)(3)(B). On November 30, 2017, the Sixth Circuit denied review, finding that pursuant to its precedent, Hobbs Act had, as an element, the use of force, and that in any event, the residual clause of 18 U.S.C. § 924(c)(3)(B) was not invalidated by *Johnson*. (Appendix 1, p.3)

REASONS FOR GRANTING THE WRIT

1. **Because Hobbs Act crimes can be committed in manners which do not meet the statutory definition a “crime of violence” under the residual clause in 18 U.S.C. § 924(c)(3), they cannot constitute predicate offenses under 18 U.S.C. § 924(c)**

Johnson’s 18 U.S.C. § 924(c) convictions are predicated upon his federal Hobbs Act convictions. However, federal Hobbs Act does not have, as element, the use of physical force. Further, pursuant to this Court’s decision in *Johnson v. United States*, -- U.S. ---, 135 S.Ct. 2551 (2015), the residual clause set forth in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. Therefore, Hobbs Act violations cannot qualify as proper predicate offenses under 18 U.S.C. § 924(c). Johnson’s two 18 U.S.C. § 924(c) convictions must therefore be vacated.

A conviction under 18 U.S.C. § 924(c) requires that the underlying offense (in which the weapon is used) be a “crime of violence”, which is defined as

an offense that is a felony and-- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3).

Petitioner Johnson submits that his underlying convictions – Hobbs Act robberies, do not have as an element the use or threatened use of force; therefore,

they cannot qualify as crimes of violence under subsection (A). The elements of a federal Hobbs Act violation are set forth in 18 U.S.C. § 1951 as follows:

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.

18 U.S.C. § 1951

“A Hobbs Act crime, then, has two elements: (1) robbery or extortion, and (2) interference with commerce.” *United States v. Taylor*, 754 F.3d 217, 222 (4th Cir. 2014); accord *United States v. Robinson*, 119 F.3d 1205, 1212 (5th Cir. 1997).

Petitioner Johnson was convicted of Hobbs Act robbery. 18 U.S.C. § 1951 defines robbery as:

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.

United States v. O'Connor, 874 F.3d 1147, 1150 (10th Cir. 2017).

This Court must first determine whether this definition of robbery has, as an element, the use or threatened use of force, so as to be a crime of violence within 18 U.S.C. § 924(c)(3)(A). This Court has held that some statutes list “multiple

elements disjunctively” while others “enumerate[] various factual means of committing a single element.” *Mathis v. United States*, -- U.S. ---, 136 S. Ct. 2243, 2249, 195 L. Ed. 2d 604 (2016). “*Mathis* offers three ways to distinguish elements and means. First, ‘if the statutory alternatives carry different punishments ... [the alternatives] must be elements.’ [] But if a list within a statute ‘is drafted to offer illustrative examples,’ the examples are means. [] Second, state-court decisions may answer the question for state statutes. [] Third, courts can look to the indictment and the jury instructions: if either includes the statute's alternative terms, this ‘is as clear an indication as any that each alternative is only a possible means of commission, not an element.’” *United States v. Kendall*, 876 F.3d 1264, 1268 (10th Cir. 2017).

Under this test, the definition of robbery set forth in 18 U.S.C. § 1951 cannot categorically be a crime of violence. A prior offense can only qualify as a “crime of violence” if the 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 statute categorically fails to qualify as a “crime of violence.”

Here, the definition of robbery includes: the taking of property “in the presence of another.” It includes the “future” “fear of injury” to a person’s property. It includes the “property of a relative or member of his family or of anyone in his

company at the time of the taking or obtaining.” By contrast, “generic robbery is defined as the ‘misappropriation of property under circumstances involving [immediate] danger to the person.’” *United States v. Gattis*, 877 F.3d 150, 156 (4th Cir. 2017). The definition set forth in 18 U.S.C. § 1951 extends far beyond the generic definition, as well as the definition set forth in 18 U.S.C. § 924(c)(3)(A), and therefore, cannot qualify as a crime of violence under the “use of force” provision of the statute.

Because federal Hobbs Act does not have, as an element, the use or attempted use of force as to every iteration, it only could have qualified as a crime of violence under the residual clause of 18 U.S.C. § 924(c)(3)(B). However, in light of recent Court precedent, that residual clause violates fair notice provisions of the Due Process clause.

On June 26, 2015, this Court decided *Johnson v. United States*, -- U.S. ---, 135 S.Ct. 2551 (2015), holding the residual clause of the Armed Career Criminal Act to be unconstitutionally vague. The Court found that “[w]e are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law.” 135 S.Ct. at 2557. The Court found that two factors conspired to make the clause unconstitutionally vague: (1) “the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime;” and (2) “the residual clause leaves

uncertainty about how much risk it takes for a crime to qualify as a violent felony.”
Id. at 2558.

The residual clause of 18 U.S.C. § 924(c)(3)(B) is similarly deficient. The differences in language between § 924(c)(3)(B) and the ACCA residual clause are negligible, and lead to similar inconsistent application among district courts. Indeed, the Seventh Circuit has so held. In *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016), the Seventh Circuit determined that the analysis in *Johnson* required a finding that § 924(c)(3)(B)’s residual clause suffered from the same fair notice problems, and thus was unconstitutionally vague. *Id.* at 996.

Others circuits have come to a different conclusion. For instance, the Sixth Circuit has found that:

several factors distinguish the ACCA residual clause from § 924(c)(3)(B). First, the statutory language of § 924(c)(3)(B) is distinctly narrower, especially in that it deals with physical force rather than physical injury. Second, the ACCA residual clause is linked to a confusing set of examples that plagued the Supreme Court in coming up with a coherent way to apply the clause, whereas there is no such weakness in § 924(c)(3)(B). Third, the Supreme Court reached its void-for-vagueness conclusion only after struggling mightily for nine years to come up with a coherent interpretation of the clause, whereas no such history has occurred with respect to § 924(c)(3)(B). Finally, the Supreme Court was clear in limiting its holding to the particular set of circumstances applying to the ACCA residual clause, and only some of those circumstances apply to § 924(c)(3)(B).

United States v. Taylor, 814 F.3d 340, 376 (6th Cir. 2016).

Other circuits have followed the Sixth Circuit's lead on this matter, finding § 924(c)(3)(B) not to be unconstitutionally vague. See, for example, *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016); *United States v. Prickett*, 839 F.3d 697, 699 (8th Cir. 2016).

Johnson submits that this Court should grant certiorari to resolve the circuit split as to this issue. Further, Johnson would note that this Court currently has in front of it the issue of whether 18 U.S.C. § 16(b), which has an almost identical residual clause as 18 U.S.C. § 924(c)(3)(B), is void for vagueness. See *Sessions v. Dimaya*. Case No. 15-1498. That case was re-argued on October 2, 2017, and may resolve this issue.

Johnson's Hobbs Act convictions do not support additional convictions under 18 U.S.C. § 924(c), as those underlying convictions are not crimes of violence, and the "residual clause" of § 924(c)(3)(B) is void for vagueness. This Court should grant certiorari to resolve the circuit conflict on this issue, and/or hold this petition in abeyance pending the outcome of *Sessions v. Dimaya*.

CONCLUSION

Johnson requests that this Court grant certiorari, reverse the Sixth Circuit's decision, and remand for resentencing.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEALS ORDER November 30, 2017
2. DISTRICT COURT ORDER March 10, 2017

No. 17-3494

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED Nov 30, 2017 DEBORAH S. HUNT, Clerk

TERRENCE A. JOHNSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Terrence A. Johnson, a federal prisoner represented by counsel, applies for a certificate of appealability (“COA”) to appeal the district court’s order denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. *See* 28 U.S.C. § 2253(c)(1)(B).

In 2005, Johnson pleaded guilty in accordance with a plea agreement to conspiracy to commit Hobbs Act robbery, *see* 18 U.S.C. § 1951, two counts of Hobbs Act robbery, *see id.*, and two counts of knowingly carrying and brandishing a firearm during and in relation to a crime of violence, *see* 18 U.S.C. § 924(c)(1)(A)(ii), the crimes of violence being the Hobbs Act robberies. In calculating Johnson’s advisory sentencing range under the United States Sentencing Guidelines, the district court determined that he qualified for the career-offender enhancement because he had at least two prior felony convictions that were “crime[s] of violence,” USSG § 4B1.1(a). The district court sentenced him to 240 months of imprisonment. He did not appeal.

In 2016, Johnson filed this § 2255 motion, arguing that his sentence was invalid in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). In that case, the Supreme Court declared the residual clause of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B), to be unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563; *see also Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (holding that *Johnson* applies retroactively to cases on collateral

review). In his § 2255 motion, Johnson argued that that precedent also rendered unconstitutional relevant parts of the career-offender guideline and § 924(c), because both contain similar language to that in the ACCA's now-defunct residual clause.

The district court held Johnson's motion in abeyance until the Supreme Court decided a then-pending case that dealt with the career-offender-guideline portion of Johnson's argument, *Beckles v. United States*. In *Beckles*, the Supreme Court held that the career-offender guideline was not void for vagueness. *Beckles v. United States*, 137 S. Ct. 886, 890 (2017). Consequently, the district court dismissed Johnson's § 2255 motion. Johnson requested a COA, which the district court denied. In his COA application here, Johnson raises his § 924(c) argument only.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.'" *Welch*, 136 S. Ct. at 1263 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Section 924(c) imposes a mandatory minimum sentence for brandishing a firearm "during and in relation to any crime of violence." A "crime of violence" is a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B).

Similarly, the ACCA provides for enhanced sentencing if a person is convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g) and had three previous convictions that were "violent felon[ies]." 18 U.S.C. § 924(e)(1). A "violent felony" is an offense punishable by at least one year in prison that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B) (emphasis added). The emphasized language is

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known as the residual clause, and, as stated, the Supreme Court struck it down as unconstitutionally vague. *See Johnson*, 135 S. Ct. at 2563.

In his COA application here, Johnson argues that, because the Supreme Court held that the language in the ACCA's residual clause defining a "violent felony" was unconstitutionally vague, his conviction under the comparable language in § 924(c)(3)(B) defining a "crime of violence" should be vacated. But, as Johnson notes in his COA application, we have already held that *Johnson* did not invalidate the definition of a "crime of violence" in § 924(c)(3)(B). *United States v. Taylor*, 814 F.3d 340, 375-79 (6th Cir. 2016), *petition for cert. filed*, (Oct. 6, 2016) (No. 16-6392). Johnson cites a Seventh Circuit case holding that § 924(c)(3)(B) is unconstitutionally vague, *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016), *cert. denied*, ___ S. Ct. ___, 2017 WL 3184728 (Oct. 2, 2017), and notes that the Supreme Court has granted certiorari in a case about an immigration law containing a similar definition of "crime of violence," *Lynch v. Dimaya*, 137 S. Ct. 31 (2016) (mem.). But, because of this court's binding precedent in *Taylor*, no reasonable jurist could debate the district court's denial of this claim. Moreover, this court has held that Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A), because it "has as an element the use . . . of physical force against the person or property of another." *United States v. Gooch*, 850 F.3d 285, 291-92 (6th Cir.), *cert. denied*, 137 S. Ct. 2230 (2017).

Accordingly, we **DENY** Johnson's COA application.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TERRENCE A. JOHNSON,

Petitioner,

v.

CASE NO. 2:16-CV-575

CRIM. NO. 2:04-CR-00144

JUDGE JAMES L. GRAHAM

Magistrate Judge Elizabeth A. Preston Deavers

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER

Petitioner, a federal prisoner, has filed a *Motion to Vacate under 28 U.S.C. § 2255*. (ECF No. 209.) Petitioner asserts that he was improperly sentenced as a career offender under § 4B1.1 and § 4B1.2 of the United States Sentencing Guidelines. As support for his claim, he argues that the Supreme Court's decision in *Johnson v. United States*, -- U.S. --, 135 S. Ct. 2551 (2015), which held that "residual clause" of 18 U.S.C. § 924(e)(2)(B)(ii) of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague, implied that similar, if not identical, language which appears in in those sections of the Sentencing Guidelines is also unconstitutionally vague, and that he should be resentenced without regard to those portions of the Guidelines.

On October 20, 2016, the Court granted Respondent's motion to hold proceedings in abeyance pending a decision in *Beckles v. United States*, 136 S.Ct. 2510 (2016) (granting the petition for a writ of *certiorari*), which raised the issue of whether *Johnson* invalidates the career offender provisions of the United States Sentencing Guidelines – the same issue raised in Petitioner's motion to vacate.

On March 6, 2017, the United States Supreme Court held that the United States Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause,

and that the residual clause in § 4B1.2(a)(2) therefore is not void for vagueness. *Beckles v. United States*, 580 U.S. —, 2017 WL 855781 (2017). The Supreme Court reasoned that “[u]nlike the ACCA, however, the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range. Accordingly, the Guidelines are not subject to a vagueness challenge under the Due Process Clause.” *Beckles*, 580 U.S. —, —, 2017 WL 855781 at *6.

Based on the Supreme Court's *Beckles* decision, it now appears to the Court that “the moving party is not entitled to relief.” See Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts. Under these circumstances, Rule 4(b) states that “the judge must dismiss the motion” Consequently, for the reasons stated in this *Opinion and Order*, the motion to vacate (Doc. 209) is **DISMISSED**.

IT IS SO ORDERED.

Date: March 10, 2017

s/James L. Graham
JAMES L. GRAHAM
United States District Judge