No. 22-1190

IN THE

Supreme Court of the United States

LAVELLE HATLEY,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

A. The circuits are split on whether crimes based on non-consensual takings of property are categorical matches for the enumerated offense of extortion under the ACCA.

The government asserts that there is no split because the decision below is the only court of appeals case addressing whether Hobbs Act robbery qualifies as a "violent felony" within the meaning of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Br. in Opp'n. 5, 9-12. In doing so, the government defines the issue far too narrowly.

Decisions addressing whether non-consensual takings of property are a categorical match for extortion in contexts other than Hobbs Act robbery are on point; there is no principled basis on which to treat Hobbs Act robbery differently from other crimes raising precisely the same issue regarding non-consensual takings of property. The Seventh Circuit itself recognized that point by analyzing cases not involving the Hobbs Act as authoritative precedent. What the government refers to as "tension" between the decision below and the decisions of other circuits is in fact a full-out split over an important legal issue.

The government concedes that the Sixth Circuit determined in *Raines v. United States*, 898 F.3d 680 (6th Cir. 2018), that crimes based on non-consensual

takings and those based on consensual takings can have meaningful differences. Br. in Opp'n. 10. As a result, in the Sixth Circuit, a conviction for Hobbs Act robbery or another crime involving a non-consensual taking of property "does not qualify as a generic extortion offense under the categorical approach," *Raines*, 898 F.3d at 690, and thus does not count as a "violent felony" for purposes of the ACCA. A conviction for the same crime in the Seventh Circuit would count as a "violent felony" and so would trigger the ACCA's sentencing enhancement.

Like the Sixth Circuit in *Raines*, the Fourth Circuit held in *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016), that non-consensual takings of property are distinct from generic extortion. *Gardner*, 823 F.3d at 802 n.5. Contrary to the government's suggestion, the Fourth Circuit has not reconsidered that conclusion. Rather, in *United States v. Dinkins*, 928 F.3d 349 (4th Cir. 2019), the Fourth Circuit recognized that *Gardner*'s alternative holding that North Carolina common law robbery is not a violent felony under the ACCA's *force* clause was abrogated by this Court's decision in *Stokeling v. United States*, 139 S. Ct. 544 (2019). Neither *Dinkins* nor *Stokeling* addressed whether robbery could qualify as extortion for purposes of the ACCA under the *enumerated* clause and thus left that aspect of *Gardner* undisturbed.

As the Seventh Circuit rightly recognized, the relevance of *Gardner's* key holding (that crimes

involving non-consensual takings of property do not qualify as extortion) has not changed. *See* Pet. App. 10a (acknowledging that the Fourth Circuit adopted a contrary view in *Gardner* but stating that "*Gardner* do[es] not persuade us to change course."). Thus, the conflict between the Seventh and Fourth Circuits remains regarding crimes, such as Hobbs Act robbery, that may encompass non-consensual takings committed without physical force against persons.

The government also cites *United States v. Becerril-Lopez*, 541 F.3d 881 (9th Cir. 2008), as somehow calling into question the Ninth Circuit's *subsequent on-point* holding in *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015), that California state law robbery, which criminalizes non-consensual takings, is not a match for generic extortion. Br. in Opp'n. 10-11. But *Becerril-Lopez* did not address whether a state law robbery conviction is a "violent felony" under the ACCA. Rather, it addressed whether the offense qualified as a "crime of violence" within the meaning of § 2L1.2 of the United States Sentencing Guidelines. *Becerril-Lopez*, 541 F.3d at 889. As the Ninth Circuit recognized in *Dixon* when concluding that *Becerril-Lopez* was not controlling, the Guidelines define "crime of violence" more broadly than "violent felony" under the ACCA. *Dixon*, 805 F.3d at 1196. *Dixon* is the law in the Ninth Circuit and directly conflicts with the decision below.

More generally, the government's assertion that these cases involve "differently situated defendants,

charged under different statutes," Br. in Opp'n. 9, misses the point that the underlying propositions of federal law in all of the decisions are the same. All the cases address whether offenses involving non-consensual takings of property through the use of force against property match the enumerated offense of extortion in the same federal law—the ACCA—under the categorical approach mandated by this Court. The Fourth, Sixth, and Ninth Circuits have held that crimes based on the non-consensual taking of property do not match the offense of extortion listed in the ACCA's enumerated clause. *See Gardner*, 823 F.3d at 802 n.5; *Raines,* 898 F.3d at 689; *Dixon*, 805 F.3d at 1196-98. The Seventh and Tenth Circuits have held the opposite. *See* Pet. App. 8a; *United States v. Castillo*, 811 F.3d 342, 348 (10th Cir. 2015).

Contrary to the government's argument, comparisons between the decision below and other circuits' rulings are appropriate because the crimes at issue in each case include the same elements on which the courts of appeals have based their conflicting decisions. The government does not question the elements of Hobbs Act robbery. *See* Br. in Opp'n. 3 (citing Pet. App. 19a and 18 U.S.C. § 1951(b)(1) to define Hobbs Act 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."). Nor does the government question that the state law crimes

at issue in the various circuit cases—including *Gardner* and *Dixon*—turn on precisely the same element as the one at issue here under the Hobbs Act's definition of "robbery." *See* Br. in Opp'n. 9-12; *see also Gardner*, 823 F.3d at 802 (defining North Carolina common law robbery as the "felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear") (citation omitted); *Dixon*, 805 F.3d at 1196 (defining California state law robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear") (citation omitted).

In short, it does not matter that other decisions do not address Hobbs Act robbery specifically. The quintessential test for identifying a circuit split is whether a particular case would come out differently in different circuits. The dispositive point here is that circuits disagree on whether non-consensual takings of property categorically constitute generic extortion under the ACCA. Based on clear circuit precedent, Hobbs Act robbery constitutes a "violent felony" for purposes of the ACCA in the Seventh and Tenth Circuits but does not in the Fourth, Sixth, and Ninth Circuits.

The government asserts that the Court should not grant review because it "reviews judgments, not statements in opinions." Br. in Opp'n. 9 (citing *Black*

v. Cutter Lab'ys, 351 U.S. 292, 297 (1956)). While that statement is, of course, true, it misses the point. A judgment itself says no more than which party prevailed. To determine whether there is a conflict warranting this Court's review, one must examine the rationales supporting the judgments. Here, the circuits have entered judgments that reflect a fundamental disagreement about whether an offense involving a non-consensual taking of property is a categorical match for the enumerated offense of extortion in the ACCA. Those conflicting and irreconcilable precedents mean that a defendant is subject to a 15-year mandatory minimum sentence under the ACCA in some circuits but not others.

B. The Seventh Circuit incorrectly held that Hobbs Act robbery is a categorical match for the ACCA's definition of "violent felony."

Under the categorical approach, a prior conviction qualifies as a predicate offense only if the "elements [of the prior offense] are the same as, or narrower than," the predicate offense listed in the ACCA. *Descamps v. United States*, 570 U.S. 254, 257 (2013).

The government recognizes that there are distinctions between Hobbs Act robbery and generic extortion—specifically, that Hobbs Act robbery requires property be taken "against [the victim's] will," whereas generic extortion requires obtaining something of value "with his [wrongfully induced] consent." Br. in Opp'n. 6 (citations omitted). But the

government claims these distinctions are not sufficiently significant to negate a match under the categorical approach because there is "substantial correspond[ence]" between the offenses. *Id.* (quoting *Quarles v. United States*, 139 S. Ct. 1872, 1877 (2019)).

To the extent the government is suggesting that the "substantial correspondence" language in *Quarles* softens the categorical approach, the government is wrong. This Court has consistently said that "if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate . . . ." *Descamps*, 570 U.S. at 261. "Substantial correspondence" signifies only that a prior offense need not use the same language as that of the predicate offense under the ACCA. Offenses will be treated as categorically the same if the substance of the offenses is the same but there are "minor variations in terminology." *Taylor v. United States*, 495 U.S. 575, 599 (1990).

Generic extortion is a substantively different offense from Hobbs Act robbery. Extortion requires the obtaining of something of value with the victim's acquiescence, while Hobbs Act robbery entails the taking of property against the victim's will. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003); 18 U.S.C. § 1951(b)(1). The former involves an affirmative act of consent; the latter does not.

The Hobbs Act itself incorporates this distinction in its definitions of "robbery" and "extortion." *See* 18 U.S.C. § 1951(b)(1), (2). Indeed, if extortion included takings against the victim's will through the actual or threatened use of force against property, there would be no need for the Hobbs Act to include such conduct in its definition of "robbery" because the conduct would already fall within its definition of "extortion." *See* 18 U.S.C. § 1951(b)(2). Therefore, Hobbs Act robbery involving the use or threatened use of force against property must be something distinct from "extortion."[1] *See City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.") (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015)).

The government complains that petitioner has not identified any actual prosecutions for Hobbs Act robbery for conduct that would not constitute generic extortion. Br. in Opp'n. 7-8. That argument is a red herring. The very purpose of the categorical approach is to look at the language of the statute instead of underlying facts to determine whether a prior

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[1] In support of its argument, the government relies heavily upon LaFave's comparison of the elements of generic robbery and extortion. Br. in Opp'n. 6 (citing 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.4(b) (3d. ed. 2017) (hereinafter LaFave)). But in doing so, the government ignores the fact that the cited passage of LaFave does not address the specifically defined offense of Hobbs Act robbery. *See id*; 3 LaFave § 20.4(b).

conviction constitutes a "violent felony" under the ACCA. *See Descamps*, 570 U.S. at 261 ("The key . . . is elements, not facts."). All that is necessary is the possibility, even hypothetical, that an individual could commit Hobbs Act robbery based on the use of force against property without also committing generic extortion.[2]

The government also quibbles with petitioner's hypothetical example of conduct that would constitute Hobbs Act robbery but would not constitute extortion. Notably, in doing so, the government does *not* dispute

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[2] The government also incorrectly relies on the "realistic probability" test of *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), which is irrelevant to the present inquiry. As multiple circuit courts have recognized, this Court clarified in *United States v. Taylor*, 142 S. Ct. 2015, 2025 (2022), that the "realistic probability" test does not apply when comparing federal statutes for purposes of the categorical approach because such an analysis does not present the federalism concerns that exist when a federal court construes a state statute. *See, e.g.*, *United States v. McDaniel*, 85 F.4th 176, 186 n.13 (4th Cir. 2023); *United States v. Eckford*, 77 F.4th 1228, 1234 (9th Cir. 2023).

This Court also confirmed in *Taylor* that the "realistic probability" test applies only when the elements of the state and federal statutes "clearly overlap[]" and a court is asked to consider whether the state "*also* 'appli[ed] the statute in [a] special (nongeneric) manner.'" *Taylor*, 142 S. Ct. at 2025 (quoting *Duenas-Alvarez*, 549 U.S. at 193). Because the elements of Hobbs Act robbery do not fully overlap with the ACCA's definition of "violent felony," "[t]hat ends the inquiry, and nothing in *Gonzales v. Duenas-Alvarez* . . . suggests otherwise." *Id.*

that taking the property from the lock box would not constitute generic extortion. Instead, the government argues that taking from the lock box would not constitute Hobbs Act robbery because it fails the requirement that the taking be from "the person or in the presence of another." Br. in Opp'n. 7. Specifically, the government asserts that the keys were not "in the presence of" the watchman if the watchman was distracted or asleep nearby when the thieves took the keys from the lock box. Br. in Opp'n. 7 (citing 3 LaFave § 20.3(c)). The government thus again misses the essential point.

In any event, a minor tweak to the hypothetical would negate the government's argument. For example, if the thieves had broken a window to gain entry into the watchman's office and then taken the keys from the watchman's pocket while he slept, the thieves would have stolen the keys "from the person" of the watchman. After all, if one can commit robbery by taking money from the dress of a deceased person, *see* 3 LaFave § 20.3(c) (citing *Carey v. United States*, 296 F.2d 422 (D.C. Cir. 1961)), surely one can also commit robbery by taking property from the pocket of someone who is merely sleeping. And yet this conduct still would not constitute extortion because the thieves would not have obtained the victim's consent.

Petitioner's argument that Hobbs Act robbery does not qualify as a "violent felony" under the ACCA is bolstered by the function of the ACCA, which targets

individuals with criminal histories reflecting a significant risk of harm to persons. As this Court has recognized, the ACCA looks at an offender's criminal history to determine "the kind or degree of danger the offender would pose were he to possess a gun." *Begay v. United States*, 553 U.S. 137, 146 (2008), *abrogated on other grounds by Johnson v. United States*, 576 U.S. 591 (2015). The inclusion of burglary and extortion in the ACCA's definition of "violent felony" is not inconsistent with this goal because the predicate crimes identified by the ACCA are those that "show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Id.* *See also Taylor*, 495 U.S. at 588 ("The legislative history [of the ACCA] also indicates that Congress singled out burglary (as opposed to other frequently committed property crimes such as larceny and auto theft) for inclusion as a predicate offense . . . because of its inherent potential for harm to persons.").[3]

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[3] The heightened risk of physical injury to persons posed by the offense of extortion is also reflected in other federal criminal statutes. For example, 21 U.S.C. § 841 provides mandatory minimum sentences for defendants who commit certain drug offenses and have one or more prior convictions for a serious violent felony. "Serious violent felony" is defined to include "an offense described in section 3559(c)(2) of title 18 for which the offender served a term of imprisonment of more than 12 months . . . ." 21 U.S.C. § 802(58)(A). Likewise, 18 U.S.C.

Looking at other provisions of 18 U.S.C. § 924 confirms that, when Congress intended to make a sentencing enhancement applicable based on prior convictions for crimes against property without regard for whether the crime posed a heightened risk of injury to persons, it knew how to do so. Thus, 18 U.S.C. § 924(c)(1) provides mandatory minimum sentences where a defendant uses or carries a firearm while committing a "crime of violence," which is defined as a felony offense 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) (emphasis added). And yet, when Congress amended the ACCA's definition of "violent felony" to its current form, it "rejected a broad proposal that would have covered *every* offense that involved a substantial risk of the use of 'physical force against the person or property of another.'" *Begay*, 553 U.S. at 144 (quoting *Taylor,* 495 U.S. at 583).

The government's argument, if accepted, would rewrite the categorical rule. A conviction is a

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§ 3559(c)(2) defines "serious violent felony" to include "extortion," which it defines in turn as "an offense that has as its elements the extraction of anything of value from another person *by threatening or placing that person in fear of injury to any person or kidnapping of any person* . . . ." 18 U.S.C. § 3559(c)(2)(C), (F)(i) (emphasis added).

categorical match for an enumerated predicate offense only if the elements of the prior crime are such that a conviction for that crime necessarily would mean the defendant also committed the predicate offense. If the elements differ, the analysis is complete: no categorical match. This Court has never permitted courts to disregard substantive distinctions between elements of the prior crime and those of the predicate offense as the Seventh Circuit did here.

CONCLUSION

The petition for a writ of certiorari should be granted.

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