No.

IN THE

Supreme Court of the United States

LAVELLE HATLEY,

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 A WRIT OF CERTIORARI

F. ANDREW HESSICK
160 Ridge Road
Chapel Hill, NC 27599

JOHANNA M. CHRISTIANSEN
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
401 Main Street, Suite 1500
Peoria, IL 61602

RICHARD A. SIMPSON
Counsel of Record
MORGAN L. CHINOY
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
(202) 719-7314
rsimpson@wiley.law

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Counsel for Petitioner

QUESTION PRESENTED

Under the mandated categorical approach, a prior conviction falls within the Armed Career Criminal Act's ("ACCA") definition of "violent felony" only if the elements of that conviction "are the same as, or narrower than," the predicate crime listed in the ACCA enhancement. *Descamps v. United States*, 570 U.S. 254, 257 (2013). The elements of Hobbs Act robbery involving the use of force against property are broader than those of the ACCA's enumerated crime of "extortion." Does a prior conviction for Hobbs Act robbery qualify as a "violent felony" under the ACCA?

RELATED PROCEEDINGS

The following is a list of all directly related proceedings:

- *United States v. Hatley*, No. 21-2534 (7th Cir.) (opinion issued and judgment entered March 6, 2023).
- *United States v. Hatley*, No. 2:20-CR-15-PPS-JEM (N.D. Ind.) (judgment entered June 22, 2021).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Lavelle Hatley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a-14a) is reported at 61 F.4th 536. The opinion of the United States District Court for the Northern District of Indiana (Pet. App. 15a-25a) is unreported but is available at 2021 WL 2549332.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its decision on March 6, 2023 (Pet. App. 1a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT GUIDELINES PROVISIONS

Title 18 U.S.C. section 922(g) provides:

> It shall be unlawful for any person . . . (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or

> ammunition which has been shipped or transported in interstate or foreign commerce.

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years.

18 U.S.C. § 924(e)(1). It further provides:

> the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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[.]

U.S.C. § 924(e)(2)(B).

The Hobbs Act, 18 U.S.C. § 1951, provides:

> 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). It further provides:

> 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.

18 U.S.C. § 1951(b)(1).

STATEMENT OF THE CASE

Before the prosecution in this case, Hatley had been convicted under Indiana state law for both robbery and criminal battery. Pet. App. 2a. In addition, Hatley had been convicted of eight counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951. *Id.*

In January of 2020, police officers stopped Hatley's vehicle for speeding, failing to wear a seatbelt, and failing to signal a turn. Pet. App. 16a. During the stop, the officers recovered a revolver. *Id.* Hatley said he carried the gun to protect his family because they had received death threats. *Id.*

Based on recovery of the revolver, the government charged Hatley with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Pet. App. 2a. The government also sought an enhanced sentence of at least fifteen years under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), on the ground that Hatley had three previous qualifying convictions for violent felonies. *Id.*

The ACCA defines "violent felony" to mean "any crime punishable by imprisonment for a term exceeding one year . . . 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 . . .." 18 U.S.C. § 924(e)(2)(B). As recognized by the Seventh Circuit, subpart (i) of the definition of "violent felony" is referred to as the "force

clause," and subpart (ii) is referred to as the "enumerated clause." Pet. App. 5a-6a.

All parties agreed that Hatley's prior convictions for state law robbery and battery qualified as two "violent felonies" for purposes of the ACCA. Pet. App. 2a. They disagreed, however, about whether his convictions for Hobbs Act robbery qualify as the necessary third "violent felony" under the ACCA. Pet. App. 16a.

The district court held that Hobbs Act robbery qualifies as a "violent felony" and, accordingly, imposed the fifteen-year minimum sentence prescribed by the ACCA. Pet. App. 3a, 25a.

The Seventh Circuit affirmed. It acknowledged that this Court's decision in *Taylor v. United States*, 495 U.S. 575 (1990), mandates a categorical approach for determining whether a previous offense falls within the ACCA's definition of "violent felony" so as to trigger the sentencing enhancement. Pet. App. 3a.

Under the categorical approach, a prior conviction qualifies as a predicate offense "'only if the statute's elements [of the prior offense] are the same as, or narrower than,' the predicate crime listed in the ACCA enhancement." Pet. App. 3a-4a (quoting *Descamps v. United States*, 570 U.S. 254, 257 (2013)). The Seventh Circuit acknowledged that this inquiry focuses on "whether the least serious acts satisfying the elements of the prior crime would also satisfy the

elements of the predicate crime under ACCA." Pet. App. 4a (citing *Johnson v. United States*, 559 U.S. 133, 137 (2010)). The Seventh Circuit further recognized that this holds true even if the defendant's actual conduct would satisfy the elements of the predicate offense. *Id.*

Accordingly, as the Seventh Circuit recognized, if there is any way in which one can commit a Hobbs Act robbery without also committing a "violent felony" within the meaning of the ACCA, there is no categorical match and the ACCA's sentencing enhancement does not apply. *Id.* The actual facts underlying Hatley's convictions for Hobbs Act robbery are thus irrelevant. *Id.*

The Seventh Circuit next compared the elements of Hobbs Act robbery with those of a "violent felony" under the ACCA. Pet. App. 5a. Hobbs Act robbery is defined 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.

18 U.S.C. § 1951(b)(1).

As the Seventh Circuit noted, if Hobbs Act robbery consisted solely of the use of force against a person, it would be a categorical match for the force clause of the ACCA's definition of "violent felony." Pet. App. 6a. But Hobbs Act robbery can also be committed by the use or threat of use of force against property, which the Seventh Circuit acknowledged does not fit within the force clause. *Id.*

The Seventh Circuit further reasoned that Hobbs Act robbery involving the actual or threatened use of force against property constitutes "extortion" within the meaning of the enumerated clause, and thus concluded that Hobbs Act robbery qualifies as a "violent felony" for purposes of the ACCA. Pet. App. 7a-8a.

In reaching this result, the Seventh Circuit held that, because the ACCA does not define "extortion," it would look to the generic definition, which requires "obtaining something of value from another *with his consent* induced by the wrongful use of force, fear, or threats." Pet. App. 8a (emphasis added) (quoting *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 410 (2003)). The Seventh Circuit acknowledged that the definition of Hobbs Act robbery differs from the generic definition of "extortion." *Id.* Specifically, instead of requiring induced consent like extortion, Hobbs Act robbery requires "an 'unlawful taking or obtaining of personal property from the person . . . *against his will*, by means of actual or threatened

force' to property." *Id.* (emphasis added) (citing 18 U.S.C. § 1951(b)(1).

The Seventh Circuit characterized the difference between "against his will" and "with his consent" as "superficial." Pet. App. 8a-9a. It stated that "the question we ask ourselves is whether there is a 'realistic probability' that someone could commit a Hobbs Act robbery by using force against property without also committing generic extortion." *Id.* Finding no such "realistic probability[,]" the Seventh Circuit held that Hobbs Act robbery categorically qualifies as a "violent felony" for purposes of the ACCA. *Id.*

The Seventh Circuit stated that its holding was "broadly consistent with three other circuits[,]"[1] but

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[1] Two of the three cases cited by the Seventh Circuit as "broadly consistent" with its holding in *Hatley* did not address whether the state law crimes at issue in those cases were categorical matches for the enumerated offense of extortion in the ACCA. Instead, those cases held that the state law crimes at issue qualified as "crime[s] of violence" for purposes of § 2L1.2 of the United States Sentencing Guidelines, which provides a sentencing enhancement for crimes involving unlawfully entering or remaining in the United States. *See United States v. Becerril-Lopez*, 541 F.3d 881, 889 (9th Cir. 2008) (decided under predecessor version of sentencing guidelines); *United States v. Montiel-Cortes*, 849 F.3d 221, 223 (5th Cir. 2017). Notably, as discussed further below, the Ninth Circuit reached the opposite conclusion when considering whether the same California state

acknowledged that other circuits have "adopted a different approach." Pet. App. 9a-10a.

REASONS FOR GRANTING THE PETITION

I. There is a circuit split about whether crimes based on non-consensual takings of property are categorical matches for the enumerated offense of extortion in the ACCA.

The Seventh Circuit's decision in this case deepens a split among the circuits about whether a defendant convicted of a crime based on a non-consensual taking of property has committed a "violent felony" within the meaning of the ACCA. The Seventh and Tenth Circuits, on the one hand, have held that crimes based on non-consensual takings involving the use or threatened use of force against property categorically match the enumerated offense of extortion in the ACCA. The Fourth, Sixth, and Ninth Circuits, on the other hand, have held that crimes involving the same types of non-consensual takings can be based on conduct that does not fall within the enumerated

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law robbery crime at issue in *Becerril-Lopez* qualified as a "violent felony" under the ACCA. *See United States v. Dixon*, 805 F.3d 1193, 1196-98 (9th Cir. 2015) (holding that not all violations of California robbery statute would constitute extortion, and thus California state law robbery was not a categorical match for the ACCA's definition of "violent felony").

offense of extortion and thus do not trigger the ACCA's sentencing enhancement.

This split means that identically situated defendants may receive drastically different sentences depending on the circuit in which the crime was committed. In some circuits, a defendant is deemed an armed career criminal based on prior convictions for Hobbs Act robbery or other crimes involving non-consensual takings of property, and consequently faces a mandatory minimum sentence of fifteen years pursuant to the ACCA, regardless of the sentencing range that would otherwise apply under the United States Sentencing Guidelines. In other circuits, the same defendant would not face that mandatory minimum. This Court should grant review to resolve this fundamental disagreement and ensure uniformity of sentencing.

A. The Fourth, Sixth, and Ninth Circuits have all held that crimes based on non-consensual takings of property are not categorical matches for the enumerated offense of extortion in the ACCA.

The Fourth, Sixth, and Ninth Circuits have held that crimes that can be based on a non-consensual taking of property—often defined as taking "against a person's will"—do not qualify as the enumerated offense of extortion under § 924(e)(2)(B)(ii) of the ACCA.

The Fourth Circuit's decision in *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016), is illustrative. There, the court held that a conviction for North Carolina common law robbery did not constitute a violent felony under the ACCA, rejecting the argument that common law robbery necessarily constitutes extortion. 823 F.3d at 802 n.5. In doing so, the court reasoned that "North Carolina common law robbery does not categorically match the crime of extortion listed in the enumerated" clause because it "involves the *non-consensual* taking of money or property from another, while the generic crime of extortion is defined as 'obtaining something of value from another *with his consent* . . . .'" *Id.* (quoting *Scheidler*, 537 U.S. at 409).[2] The court explained that extortion requires consent while robbery does not, and that the "element of consent 'is the razor's edge that distinguishes extortion from robbery.'" *Id.* (quoting *United States v. Zhou*, 428 F.3d 361, 371 (2d Cir. 2005)).

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[2] In *Gardner*, the Fourth Circuit also held that North Carolina common law robbery was not a "violent felony" under the ACCA's force clause. 823 F.3d at 804. The Fourth Circuit subsequently recognized in *United States v. Dinkins*, 928 F.3d 349 (4th Cir. 2019), that this aspect of *Gardner* was abrogated by this Court's decision in *Stokeling v. United States*, 139 S. Ct. 544 (2019). *Dinkins*, 928 F.3d at 352. *Stokeling* did not address whether robbery could qualify as extortion for purposes of the ACCA, however, and thus left undisturbed the conclusion that North Carolina common law robbery would not match generic extortion in the ACCA's enumerated clause.

Similarly, in *Raines v. United States*, 898 F.3d 680 (6th Cir. 2018), the Sixth Circuit held that crimes based on non-consensual takings are broader than extortion under the ACCA. In particular, the court held that a conviction for violating a federal law prohibiting collecting credit by extortionate means, 18 U.S.C. § 894(a)(1), does not constitute extortion for purposes of the ACCA. *Id.* at 689–90. It reasoned that "whereas a generic extortion offense requires a taking with the victim's (induced) consent, [the federal collecting credit statute] encompasses non-consensual takings." *Id.* at 689. The court further explained that "[t]he difference between a taking against a victim's will and a taking with the victim's consent may not be a 'meaningful one' . . . but a difference nevertheless exists that suffices under the Supreme Court's teachings on how we must interpret the ACCA." *Id.* at 689–90 (quoting and disagreeing with *United States v. Castillo*, 811 F.3d 342, 348 (10th Cir. 2015)).

The Ninth Circuit has taken the same approach. In *Dixon*, the court held that California state law robbery, which criminalizes non-consensual takings, "fail[ed]" to meet "the definition of generic extortion." 805 F.3d at 1197. The court reasoned that "[g]eneric extortion, which is an enumerated offense included in the ACCA's definition of 'violent felony,' is defined broadly enough to encompass many violations of [California robbery], but not all." *Id.* at 1196. In particular, the court noted that extortion would not encompass robbery where "the taking is not

consensual." *Id.* at 1197. Accordingly, because robbery did not categorically constitute generic extortion, the Ninth Circuit held that a conviction for robbery under California law does not constitute a conviction for a "violent felony" under the ACCA. *Id.* at 1197–98.

Thus, the Fourth, Sixth, and Ninth Circuits have all held that crimes based on non-consensual takings do not qualify as extortion within the meaning of the ACCA. If Hatley had been convicted in one of these circuits, he would not have been subject to the fifteen-year mandatory minimum sentence he received in the Seventh Circuit.

B. The Seventh and Tenth Circuits have held that crimes based on non-consensual takings of property are categorical matches for the enumerated offense of extortion in the ACCA.

In direct conflict with the Fourth, Sixth, and Ninth Circuits, the Seventh Circuit in the decision below held that a conviction for Hobbs Act robbery is a categorical match for the enumerated crime of extortion in the ACCA, notwithstanding that it can be based on a non-consensual taking of property.

As discussed above, the Seventh Circuit held that Hobbs Act robbery committed through the use of force against property is a categorical match for extortion under the ACCA. Pet. App. 8a. The court

acknowledged that, unlike extortion, Hobbs Act robbery can be based on a non-consensual taking. *Id.* In doing so, the Seventh Circuit also acknowledged that there is a difference between a taking "against his will" as required for Hobbs Act robbery, and a taking "with his consent" induced by force or threat as required for generic extortion. *Id.* Nevertheless, unlike the decisions of the circuits discussed above, the court deemed the distinction unimportant, reasoning that robbery involving the use of force against property categorically constitutes generic extortion because the difference between the extortion and robbery is "superficial." Pet. App. 9a (quoting *United States v. Turner*, 47 F.4th 509, 514 (7th Cir. 2022)).

The Tenth Circuit has followed the same approach. In *United States v. Castillo*, 811 F.3d 342 (10th Cir. 2015), the court held that a conviction under a state robbery statute that outlaws taking property against the victim's will constitutes the enumerated offense of extortion under U.S.S.G. § 2L1.2 by "follow[ing] the same approach . . . for determining whether a prior conviction was for a violent felony under the Armed Career Criminal Act." *Castillo*, 811 F.3d at 348 (quoting *United States v. Ventura-Perez*, 666 F.3d 670, 673 (10th Cir. 2012). The court reaffirmed this holding in upholding a sentencing enhancement under the ACCA in *United States v. Duran*, 754 F. App'x 739 (10th Cir. 2018). In doing so, it reasoned that there is "no meaningful difference in this context

between a taking of property accomplished against the victim's will and one where the victim's consent is obtained through force or threats," notwithstanding that the state itself "treats the victim's consent as the distinguishing characteristic between robbery and extortion." *Duran*, 754 F. App'x at 746 (quoting *Castillo*, 811 F.3d at 348).

The Seventh and Tenth Circuits have thus held that crimes based on non-consensual takings of property are categorical matches for the enumerated offense of extortion and therefore qualify as "violent felonies" for purposes of the ACCA. Consequently, defendants in those circuits may be deemed armed career criminals subject to a fifteen-year mandatory minimum sentence based on prior convictions for Hobbs Act robbery, even though defendants convicted of the same crimes in other circuits would not be subject to this sentencing enhancement.

II. The lower court erred in holding that Hobbs Act robbery is a "violent felony" for purposes of the ACCA's sentencing enhancement.

Under the categorical approach mandated by this Court's decisions, a prior crime 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*, 570 U.S. at 257. Accordingly, neither "'the particular facts underlying the prior convictions' nor 'the label a State assigns to

the crimes'" determines whether a prior crime qualifies as a predicate offense. *Shular v. United States*, 140 S.Ct. 779, 783 (2020) (quoting *Mathis v. United States*, 579 U.S. 500, 509-10 (2016). If there is any possibility that a person could be convicted of the prior crime without having engaged in conduct constituting a "violent felony" under the ACCA, the prior crime does not constitute a predicate offense. The Seventh Circuit failed to follow the categorical approach prescribed by this Court.

A. Although the Seventh Circuit rightly acknowledged that Hobbs Act robbery is not a categorical match for the force clause of the ACCA, Pet App. 6a, it erred in concluding that Hobbs Act robbery involving the use or threatened use of force against property is a categorical match for the enumerated offense of extortion. That conclusion departs from this Court's bright-line rule that a prior conviction is a 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 that the defendant also committed the enumerated predicate offense.

As this Court has explained, the offenses identified in the ACCA's enumerated clause refer to their "generic versions." *Mathis*, 579 U.S. at 503. Here, as the Seventh Circuit acknowledged, the elements of Hobbs Act robbery and the elements of the generic offense of extortion are different. Pet. App. 8a-9a.

This Court has defined generic extortion as "obtaining something of value from another *with his consent* induced by the wrongful use of force, fear, or threats." *Scheidler*, 537 U.S. at 409 (emphasis added) (quoting *United States v. Nardello*, 393 U.S. 286, 290 (1969)). In contrast, Hobbs Act robbery prohibits taking property from 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." 18 U.S.C. § 1951(b)(1) (emphasis added).

The elements thus differ. The very essence of extortion is obtaining consent; the victim must affirmatively agree to part with something of value because of the threatened consequences if she does not consent. Hobbs Act robbery does not require affirmative consent (or any consent at all) by the victim, but rather turns on the broader concept of a taking of property "against the will" of the victim.

The Seventh Circuit dismissed the distinction between these concepts as "superficial," holding that the distinction does not matter because the court saw no "realistic probability" that a person could be convicted of Hobbs Act robbery involving the use of force against property without also having committed generic extortion. Pet. App. 9a. But under the categorical approach, the fact that the elements are different, and thus one could commit Hobbs Act robbery without also committing extortion, means there is no categorical match, period. This Court's

decisions do not permit courts to disregard distinctions between the elements of the prior crime and those of the predicate offense as the Seventh Circuit did here. All that matters is that the elements of Hobbs Act robbery involving the use of force against property are not "the same as, or narrower than," those of generic extortion.[3] *Descamps*, 570 U.S. at 257.

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[3] In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), this Court held that "to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language." 549 U.S. at 193. "It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* This Court subsequently clarified in *United States v. Taylor*, 142 S. Ct. 2015 (2022), that this holding of *Duenas-Alvarez* does not apply to federal statutes—and in particular the Hobbs Act. The Court explained that *Duenas-Alvarez* was based on federalism concerns raised by a federal court construing a state statute, as well as the fact that "the elements of the relevant state and federal offenses [at issue in *Duenas-Alvarez*] clearly overlapped and the only question the Court faced was whether state courts also 'applied the statute in a special (nongeneric) manner.'" 142 S. Ct. at 2025 (quoting *Duenas-Alvarez*, 549 U.S. at 193). Because neither of these considerations were presented by the question of whether attempted Hobbs Act robbery was a categorical match for the definition of "crime of violence" under 18 U.S.C. § 924(c)(3)(A), this Court concluded that this "ends the inquiry, and nothing in *Duenas-Alvarez* suggests otherwise." *Id.*

Moreover, the Seventh Circuit was wrong to conclude that the difference between Hobbs Act robbery and generic extortion is not meaningful. Although the space between the two concepts—taking by coerced consent and taking against the victim's will—may be narrow, it is real. Consider for example a case in which a night watchman at a rental car company is tasked with processing returned rental cars and placing the keys in a lock box under his watch. While the watchman is distracted or has fallen asleep, another person uses a crowbar to break open the lock box and steals a car. In that case, the elements of Hobbs Act robbery would be satisfied because there is (1) an unlawful taking, (2) of personal property in the watchman's custody, (3) from or in his presence, (4) against his will, (5) by means of force to that person's property.[4] That conduct would not,

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This case similarly does not involve the construction of a state statute, and the elements of Hobbs Act robbery do not "clearly overlap[]" with those of generic extortion. As such, there is no need to consider whether there is a "realistic probability" that the government would apply the Hobbs Act's definition of robbery to conduct that falls outside of the generic definition of extortion. *Id*. The Seventh Circuit erred in doing so.

[4] The Hobbs Act also requires that the offense affect interstate commerce, or other commerce over which the United States has jurisdiction. 18 U.S.C. § 1951(a); 18 U.S.C. § 1951(b)(3). As this Court has previously held, the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate

however, constitute extortion because the taking would not be with the consent of the victim.

Because there is a gap between Hobbs Act robbery and generic extortion, Hobbs Act robbery does not qualify as a predicate offense under the ACCA. A person could commit Hobbs Act robbery through the use of force against property without also committing extortion. That should be the end of the inquiry.

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commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.'" *Stirone v. United States*, 361 U.S. 212, 215 (1960) (citing 18 U.S.C. § 1951(a)) (noting that the Hobbs Act's interstate commerce requirement would be satisfied where the disruption to the victim's business due to extortion may have disrupted the business's purchase of materials of production from out of state). This requirement would be satisfied in the hypothetical case set forth above if the rental car agency made its vehicles available for rent to out-of-state travelers or purchased fleet vehicles from other states. *See, e.g.*, *United States v. Harrington*, 108 F.3d 1460, 1469 (D.C. Cir. 1997) (finding interstate commerce element of Hobbs Act established in robbery of local restaurant where restaurant's cash receipts were regularly transported to bank in different state and restaurant purchased inventory from other states); *United States v. Tuan Ngoc Luong*, 965 F.3d 973, 982 (9th Cir. 2020) (finding sufficient evidence to satisfy interstate commerce element of Hobbs Act where defendant lured victim by posting vehicle sale listing on local Craigslist site because Craigslist allows users to search local sites across state lines and prospective purchasers may search listings in other states).

B. Two other considerations support this conclusion. First, the Hobbs Act itself recognizes a distinction between extortion and robbery. The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear . . . ," 18 U.S.C. § 1951(b)(2), which mirrors the generic definition of extortion discussed above. If the use of "actual or threatened force, or violence . . . [to] property" were construed as a form of generic extortion, it would render this portion of the Hobbs Act's definition of "robbery" superfluous in the face of the Hobbs Act's separate definition of "extortion." Such a construction would violate the canon against surplusage, which "is strongest when an interpretation would render superfluous another part of the same statutory scheme." *City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 591 (2021) (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015)); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012) (no provision "should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence") (boldface deleted). Hobbs Act robbery therefore must constitute something different from generic extortion.

One key difference between extortion (either generic extortion or Hobbs Act extortion) and Hobbs Act robbery is that Hobbs Act robbery extends beyond circumstances in which the perpetrator directs "force,

violence or fear" *toward the person* to also include circumstances in which the perpetrator directs force *toward property*. But the ACCA defines "violent felony" as a qualifying crime that "has as an element the use, attempted use, or threatened use of physical force *against the person of another*" or "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). As such, the ACCA's definition of "violent felony" is directed to crimes involving violence against other persons. Many Hobbs Act robberies fall into that category, but some do not.

Second, the rule of lenity counsels against interpreting "extortion" in the ACCA to include Hobbs Act robbery. That rule holds that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). This principle of construction means that courts "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (quoting *Whalen v. United States*, 445 U.S. 684, 695, n. 10 (1980)).

Here, the rule of lenity weighs heavily in favor of applying the categorical approach strictly. No one could seriously contend that Hobbs Act robbery unambiguously constitutes generic extortion. The Seventh Circuit itself acknowledged that "the analysis is difficult, and the issue is close." Pet. App. 8a. Because the ACCA does not unambiguously establish that Congress intended to include Hobbs Act robbery involving the use of force against property as a type of "extortion" under the ACCA, the rule of lenity demands that courts construe the ACCA to resolve any ambiguity in favor of the criminal defendant.

III. The question presented is of critical importance.

The issue of whether a conviction for Hobbs Act robbery (or a state law crime similarly based on a non-consensual taking of property against the victim's will) qualifies as extortion, and thus as a predicate offense under the ACCA, is critically important.

"The Hobbs Act is used to prosecute a wide range of criminal conduct." *Federal Robbery: Prevalence, Trends, and Factors in Sentencing,* U.S. Sent'g Comm'n, at 5 (Aug. 2022), *available at* www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220818_Robbery.pdf. In 2021, 1,393 federal offenders were convicted of a robbery offense. *Id.* at 11. Of these, 54.2%—or approximately 755 individuals—were convicted of Hobbs Act robbery. *Id.* at 2. Moreover,

convictions for Hobbs Act robbery are increasing as a percentage of federal robbery convictions, from 35.5% in 2012 to 54.2% in 2021. *Id.*

And, of course, defendants are often convicted of state law crimes that likewise can be based on a non-consensual taking of property against the victim's will but without the victim's consent, as illustrated by the cases discussed above. *See supra* at 12-15.

The conflict between the approach taken by the Fourth, Sixth, and Ninth Circuits, on the one hand, and that taken by the Seventh and Tenth Circuits, on the other, results in significantly different sentencing schemes in these circuits. In the former, a conviction for a non-consensual taking of property, including but not limited to Hobbs Act robbery, does not constitute a basis for a sentencing enhancement under the ACCA. But in the latter, it does. This disparity has a significant, real-world impact given the number of offenders convicted of Hobbs Act robbery each year.

The ACCA imposes a mandatory minimum sentence of fifteen years, and thus can have a dramatic effect on the length of sentence that a defendant receives. In this case, if Hatley's prior convictions for Hobbs Act robbery do not qualify as violent felonies under the ACCA, the United States Sentencing Guidelines would provide a sentencing range of 57 to 71 months. Pet. App. 15a. Instead, Hatley was sentenced to fifteen years—180 months—

under the ACCA, roughly a decade longer than the range recommended by the guidelines. Pet. App. 3a.

This Court should grant review to clarify whether a conviction for Hobbs Act robbery (or a state law crime similarly based on a non-consensual taking of property) qualifies as a "violent felony" within the meaning of the ACCA. Review is essential to ensure that the ACCA's sentencing enhancement is applied uniformly and appropriately.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

F. ANDREW HESSICK
160 Ridge Road
Chapel Hill, NC 27599

JOHANNA M. CHRISTIANSEN
OFFICE OF THE FEDERAL PUBLIC DEFENDER
401 Main Street, Suite 1500
Peoria, IL 61602

RICHARD A. SIMPSON
Counsel of Record
MORGAN L. CHINOY
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
(202) 719-7314
rsimpson@wiley.law

June 2, 2023

Counsel for Petitioner

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED MARCH 6, 2023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 21-2534

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAVELLE HATLEY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 2:20-cr-15 — **Philip P. Simon**, *Judge.*

Argued September 13, 2022 —Decided March 6, 2023

Before Flaum, Brennan, and Scudder, *Circuit Judges.*

Scudder, *Circuit Judge.* Once again we find ourselves asking what qualifies for enhanced sentencing under the Armed Career Criminal Act. This time around we assess whether Hobbs Act robbery constitutes a "violent felony" within the meaning of 18 U.S.C. § 924(e). The district court answered in the affirmative and so do we, leaving us to affirm.

Appendix A

I

Police officers discovered a gun in Lavelle Hatley's possession during a traffic stop in Gary, Indiana, in January 2020. Hatley's criminal record at the time included multiple state and federal felony convictions. Federal charges followed and led to Hatley pleading guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), which ordinarily carries a statutory maximum of 10 years. See 18 U.S.C. § 924(a)(2).

At sentencing the government contended that Hatley's criminal history exposed him to an enhanced sentence of at least 15 years under the Armed Career Criminal Act or (for short) ACCA—in particular under 18 U.S.C. § 924(e). The enhancement applies to offenders with "three previous convictions ... for a violent felony ... committed on occasions different from one another." 18 U.S.C. § 924(e)(i). The central question before the district court was whether Hatley had at least three predicate felonies to qualify for the enhancement.

Hatley's criminal history included convictions for both robbery and criminal battery under Indiana law. Everyone agreed that those two Indiana crimes qualified as violent felonies within the meaning of § 924(e). But ACCA requires at least three. Hatley also had eight separate convictions in federal court for Hobbs Act robberies committed on eight different occasions. He contended that these robbery convictions did not qualify as "violent felonies" and thus that he was ineligible for the § 924(e) enhancement.

The district court rejected Hatley's position, found him to be an armed career criminal, and sentenced him to the 15-year minimum term mandated by § 924(e). Hatley now appeals his sentence.

II

A

In answering whether Hobbs Act robbery qualifies as a violent felony, we draw upon substantial instruction supplied by the Supreme Court beginning in its decision in *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). *Taylor* and its progeny require us to apply the categorical approach by comparing the prior offense of conviction with the sentencing enhancement statute. See *id.* at 602; see also *Shular v. United States*, 140 S. Ct. 779, 783, 206 L. Ed. 2d 81 (2020). We have explained and applied this approach many times before. See, *e.g., United States v. Campbell*, 865 F.3d 853, 855-57 (7th Cir. 2017); *Bridges v. United States*, 991 F.3d 793, 800-02 (7th Cir. 2021).

Under the categorical approach, the only question is whether the elements of the defendant's prior crime (here, Hobbs Act robbery) fit within the elements of the predicate crime in the enhancement statute (here, § 924(e)). See *Descamps v. United States*, 570 U.S. 254, 257, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013). By elements we mean the "statutory definitions" of the crime. *Bridges*, 991 F.3d at 800. A defendant's prior conviction qualifies as an ACCA predicate, the Supreme Court has explained, "only if the

statute's elements are the same as, or narrower than," the predicate crime listed in the ACCA enhancement. *Descamps*, 570 U.S. at 257.

By focusing on the elements of the prior offense of conviction rather than the facts, we ask whether the least serious acts satisfying the elements of the prior crime would also satisfy the elements of the predicate crime under ACCA. See *Johnson v. United States*, 559 U.S. 133, 137, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010). Put another way, if there is any way to commit Hobbs Act robbery without also committing a "violent felony" under § 924(e), there is no categorical fit—meaning Hobbs Act robbery is not a violent felony under ACCA. That conclusion holds even if Hatley's *actual* offense conduct for any of his eight prior Hobbs Act robbery convictions involved violent force. See *Descamps*, 570 U.S. at 261.

B

The starting point with the categorical approach, then, is to assess whether the elements of Hobbs Act robbery under 18 U.S.C. § 1951 fit within ACCA's definition of a violent felony. The Hobbs Act is divisible into two separate offenses: robbery and extortion. See *King v. United States*, 965 F.3d 60, 69 (1st Cir. 2020) (collecting cases treating the Hobbs Act as divisible). All of Hatley's convictions are for Hobbs Act robbery, so we focus only on whether the statutory elements of Hobbs Act robbery (and not Hobbs Act extortion) fit within § 924(e). See *Descamps*, 570 U.S. at 261-64; see also *Bridges*, 991 F.3d at 799-802 (treating Hobbs Act robbery separately from Hobbs Act extortion

under the categorical approach). Both parties agree with this analytical approach.

Next we compare the elements of Hobbs Act robbery with the elements of a violent felony under ACCA. Congress defined 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, 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.

18 U.S.C. § 1951(b)(1). As for the sentencing enhancement imposed by ACCA, Congress defined "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year ... 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 ....

18 U.S.C. § 924(e)(2)(B). Everyone refers to the first clause of the definition—the one in subparagraph (i)—as the

"force clause" or the "elements clause" and the second as the "enumerated clause." See, *e.g., United States v. Dowthard*, 948 F.3d 814, 818-19 (7th Cir. 2020).

The language Congress used in § 1951(b)(1) tells us that defendants can commit Hobbs Act robbery by using force against either a person or property. To qualify as a violent felony under ACCA, then, *both* ways of committing Hobbs Act robbery must fit within ACCA. See *Descamps*, 570 U.S. at 261 (explaining that a crime constitutes a predicate offense within the meaning of § 924(e) only if every person convicted under the predicate offense is necessarily guilty of an offense under § 924(e)).

All agree that a Hobbs Act robbery committed by using force against a person fits within ACCA's force clause. Both statutes require actual or threatened physical force against another person: the Hobbs Act provides for "actual or threatened force, or violence, or fear of injury, immediate or future, to [another's] person," with ACCA's force clause likewise covering "the use, attempted use, or threated use of physical force against the person of another." 18 U.S.C. §§ 1951(b)(1), 924(e)(2)(B).

But the other way of committing Hobbs Act robbery—by using force against property—does not fit within ACCA's force clause. The force clause in § 924(e) only provides for committing force against *persons*, not property. As a result, we have to look beyond the force clause to determine if Hobbs Act robbery committed using force against property qualifies as a violent felony under some other provision of ACCA.

That inquiry takes us to ACCA's enumerated clause. That clause expressly lists extortion as a violent felony. See 18 U.S.C. § 924(e)(2)(B)(ii). The question then becomes whether a conviction of Hobbs Act robbery for using force against property fits within ACCA extortion. Because ACCA does not define extortion, we import the generic definition from the common law. See *Mathis v. United States*, 579 U.S. 500, 503, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016) (explaining that enumerated offenses are given their generic meaning). Generic extortion, the Supreme Court has explained, requires "obtaining [] something of value from another with his consent induced by the wrongful use of force, fear, or threats." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 410, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003).

A careful reader may be pausing at this point and questioning why we are using the generic definition of extortion to interpret ACCA's enumerated clause when the Hobbs Act provides its own, similar definition. See 18 U.S.C. § 1951(b)(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."). But remember the question we are trying to answer and the analysis that the categorical approach requires. We look to the Hobbs Act only to understand the elements of Hobbs Act robbery, the prior conviction at issue here. Once we understand those elements, our focus turns to ACCA, the statute under which Hatley received an enhanced sentence. We assess whether each way of committing Hobbs Act robbery fits within ACCA's definition of "violent

felony" in § 924(e)(2)(B). Put most simply, the Hobbs Act does not tell us what constitutes extortion under ACCA. That answer has to come from ACCA itself. See *Descamps*, 570 U.S. at 261 (applying the categorical approach and considering whether "the relevant statute has the same elements as the 'generic' ACCA crime").

Now we can turn to the final step of our analysis and decide whether generic extortion within the meaning of § 924(e)(2)(B)(ii) encompasses Hobbs Act robbery committed using force against property. Admittedly, the definitions of each offense differ. Generic extortion means "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats." *Scheidler*, 537 U.S. at 409. Hobbs Act robbery, on the other hand, requires an "unlawful taking or obtaining of personal property from the person ... against his will, by means of actual or threatened force" to property. 18 U.S.C. § 1951(b)(1). The core disagreement between the parties is whether taking something from someone "with his consent induced by the wrongful use of force" against property encompasses taking something from someone "against his will" by means of force against property.

In our view, generic extortion encompasses Hobbs Act robbery using force against property. Make no mistake, the analysis is difficult, and the issue is close. Wrongfully induced consent is one of only a few elements that sets generic extortion and Hobbs Act extortion apart from Hobbs Act robbery. The Supreme Court has said that induced consent is therefore "designed to distinguish" extortion from robbery. *Ocasio v. United States*, 578 U.S. 282, 297, 136 S. Ct. 1423, 194 L. Ed. 2d 520 (2016).

But Hatley cannot show a categorical mismatch simply by pinpointing a textual difference, especially when that difference proves to be "superficial" in the specific context of Hobbs Act robbery using force against property. *United States v. Turner*, 47 F.4th 509, 514 (7th Cir. 2022). Neither can he show a categorical mismatch by invoking a "purely abstract possibility" that Hobbs Act robbery using force against property may somehow be broader than generic extortion. *United States v. Jennings*, 860 F.3d 450, 460 (7th Cir. 2017). Instead, the question we ask ourselves is whether there is a "realistic probability" that someone could commit a Hobbs Act robbery by using force against property without also committing generic extortion. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007). Hatley has not identified any examples, let alone one rising above a "fanciful hypothetical[]." *United States v. Maxwell*, 823 F.3d 1057, 1062 (7th Cir. 2016). Neither have we, after conducting our own independent review.

Our conclusion is broadly consistent with three other circuits and a leading criminal law treatise. See *United States v. Becerril-Lopez*, 541 F.3d 881, 891-92, 892 n.9 (9th Cir. 2008) ("The 'with consent' element of generic extortion is not inconsistent with the 'against the will' element of a Cal. Penal Code § 211 conviction for a taking involving threats to property."); *United States v. Castillo*, 811 F.3d 342, 348 (10th Cir. 2015) ("We see no meaningful difference in this context between a taking of property accomplished against the victim's will and one where the victim's consent is obtained through force or threats."); *United States v. Montiel-Cortes*, 849 F.3d 221, 228 (5th Cir. 2017) (concluding that consent

wrongfully induced by force "is against the victim's will" for purposes of Nevada's robbery statute); 3 Wayne R. LaFave, *Substantive Criminal Law*, § 20.4(b) (3d ed. 2022) (explaining that "there is no difference" between taking property against a victim's will and doing so with wrongfully induced consent). True enough, *Becerril-Lopez* no longer controls following amendments to the Sentencing Guidelines' definition of extortion. See *United States v. Bankston*, 901 F.3d 1100, 1103 (9th Cir. 2018). But the underlying rationale of *Becerril-Lopez* has survived. See *id.* at 1104-05 (continuing to apply *Becerril-Lopez* to defendants sentenced before the amendments to the Guidelines' definition of extortion).

By contrast, the Sixth Circuit has adopted a different approach. See *Raines v. United States*, 898 F.3d 680, 689-90 (6th Cir. 2018) (per curiam). The Fourth Circuit did as well in a case later overruled on a different ground. See *United States v. Gardner*, 823 F.3d 793, 802 n.5 (4th Cir. 2016), *overruled by United States v. Dinkins*, 928 F.3d 349, 355-56 (4th Cir. 2019). In both cases, the court found a categorical mismatch based partly on the same discrepancy between a nonconsensual taking and a taking with a victim's wrongfully induced consent. See *Raines*, 898 F.3d at 689-90 (concluding that 10 No. 21-2534 credit extortion under 18 U.S.C. § 894(a)(1) does not fit within generic extortion); *Gardner*, 823 F.3d at 802 n.5 (determining that generic extortion does not encompass North Carolina common law robbery).

Raines and *Gardner* do not persuade us to change course. Neither case identified an example of a

nonconsensual taking that did not involve the victim's induced consent, let alone an example that would apply to Hobbs Act robbery committed using force against property. Instead, *Raines* explained how a defendant could commit credit extortion without committing generic extortion based on a *different* discrepancy between the two offenses. See *Raines*, 898 F.3d at 690. For its part, *Gardner* leaned heavily on the fact that the state and federal government each had separate laws for extortion and robbery. See *Gardner*, 823 F.3d at 802 n.5. But the Supreme Court has warned against fixating on "technical definitions and labels" in applying the categorical approach. *Taylor*, 495 U.S. at 590.

In the end, the approach we employ aligns with our prior decisions. Consider, for example, our 2021 decision in *Bridges v. United States*, 991 F.3d 793. There we analyzed whether Hobbs Act robbery is a "crime of violence" within the meaning of the Sentencing Guidelines' career offender provisions. And there, as here, we focused on Hobbs Act robbery, not Hobbs Act extortion. See *id.* at 801. There, too, we looked at the realistic and probable ways that a defendant could commit Hobbs Act robbery and determined whether each of those ways fits within the definition of "crime of violence" in U.S.S.G. § 4B1.2. See *id.* at 801-02. Like ACCA, the Guidelines' career offender provision has both a force clause and an enumerated clause. But the Guidelines define extortion more narrowly than the generic definition we apply here, allowing a defendant to commit Hobbs Act robbery without committing extortion under the Sentencing Guidelines. See *id.* at 802. We therefore concluded in *Bridges* that Hobbs Act

robbery was not a crime of violence for purposes of the Sentencing Guidelines. See *id.*

We have applied the exact same analytical approach here. That we have reached a different conclusion reflects only the differences in how the enumerated clause of § 924(e) and the Guidelines' career offender provision define extortion.

C

Hatley urges a different course of reasoning. He observes that under the district court's analysis, Hobbs Act robbery qualifies as a violent felony because every way of committing the offense *either* fits within the force clause *or* the enumerated clause of § 924(e). He believes that by using this "either/or" analysis, the district court improperly treated Hobbs Act robbery as a divisible offense, consisting of the *separate* crimes of robbery against persons and robbery against property. As he sees it, Hobbs Act robbery is a violent felony only if the different ways of committing the offense all fit under the same clause of ACCA.

But the district court never suggested that a Hobbs Act offense, while generally divisible between robbery and extortion, was further sub-divisible between robbery committed by using force against persons and robbery committed by using force against property. Instead, the district court considered the different ways to commit the same, single offense of Hobbs Act robbery. From there the district court compared those ways to the force clause and

to the enumerated clause under ACCA. That is exactly what a proper application of the categorical approach requires and what we have done here.

III

One final matter requires our attention. Recall that the ACCA sentencing enhancement applies only if the prior violent felonies were "committed on occasions different from one another." 18 U.S.C. § 924(e)(i). The district court found that Hatley met the separate occasions requirement because his eight prior Hobbs Act convictions involved different victims and were separated over time and place. Hatley now argues that the Sixth Amendment requires a jury, rather than a judge, to make this finding beyond a reasonable doubt. But Hatley did not raise these arguments below, so our review is only for plain error. See Fed. R. Crim. P. 52(b).

Hatley's position is foreclosed by precedent. In *United States v. Elliott*, 703 F.3d 378 (7th Cir. 2012), we determined that a sentencing judge may make a separate occasions finding for purposes of applying the ACCA enhancement. See *id.* at 382. We grounded our holding in longstanding Supreme Court precedent allowing a sentencing judge to find facts related to the existence of prior crimes. See *id.* at 381-82 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998)). In terms fully applicable here, we underscored in *Elliott* that we would not revisit our holding "unless and until the Supreme Court overrules *Almendarez-Torres* or confines it solely to the fact of a prior conviction." *Id.* at 383.

The Supreme Court has not overruled or limited *Almendarez-Torres*. The Court recently reversed a sentencing judge's separate occasions finding but expressly reserved the Sixth Amendment issue. See *Wooden v. United States*, 142 S. Ct. 1063, 1068 n.3, 1071, 212 L. Ed. 2d 187 (2022). The Court did not reconsider or otherwise question *Almendarez-Torres*. And in *Wooden*'s wake, other circuits have continued to recognize the propriety of sentencing judges making this finding. See, *e.g.*, *United States v. Belcher*, 40 F.4th 430, 432 (6th Cir. 2022); *United States v. Reed*, 39 F.4th 1285, 1296 (10th Cir. 2022). We do the same.

For these reasons, we AFFIRM.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FILED JUNE 22, 2021

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Cause No. 2:20-CR-15-PPS-JEM

UNITED STATES OF AMERICA,

Plaintiff,

v.

LAVELLE HATLEY,

Defendant.

OPINION AND ORDER

A difficult sentencing issue of first impression is presently before me, and the stakes are exceedingly high for the defendant, Lavelle Hatley. Mr. Hatley pleaded guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). Hatley was previously convicted in this court of eight Hobbs Act robberies. The issue is whether Hobbs Act robbery is a violent felony under the Armed Career Criminal Act (ACCA). If it is, then Hatley faces a mandatory minimum of 15 years (180 months) in prison. If the answer is no, then the United States Sentencing Guidelines yield a range of imprisonment of 57-71 months. I asked the parties to submit briefing and provide oral argument regarding the issue of whether a Hobbs Act

robbery is a violent felony under 18 U.S.C. § 924(e). The parties briefed the issue and presented oral arguments to the court on April 20, 2021. [DE 55.] Supplemental briefing followed. [DE 56, 61.] After much consideration, I find that a Hobbs Act robbery is a violent felony under § 924(e).

BACKGROUND

The facts are straight-forward: on January 9, 2020, officers stopped Hatley for speeding, failing to wear a seatbelt, and failing to signal a turn. [DE 50 at 2-3.] Hatley fled and upon being apprehended, police recovered a Smith & Wesson revolver from his waistband. *Id.* at 3. Hatley admitted he carried the gun to protect his family after receiving death threats. *Id.*

On November 5, 2020, Hatley pleaded guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), which has a statutory maximum sentence of ten years. [DE 33.] The government argues that the ACCA applies because Hatley has eight prior Hobbs Act robbery convictions, which stem from a multi-count indictment, plea, and judgment in a 2012 case before Judge Moody. [DE 48]; *United States v. Elmore, et al*, 2:12-CR-76-JTM-JEM. After pleading guilty in the earlier case to the eight robbery counts, Hatley was sentenced by Judge Moody to 108 months, each count running concurrently. [DE 48 at 2, 11.] The parties do not dispute these prior convictions. Rather, as noted above, they disagree whether the convictions qualify as "violent felonies" under the ACCA.

Appendix B

DISCUSSION

The ACCA imposes an enhanced sentence when a defendant possesses three prior convictions for "violent felonies." 18 U.S.C. § 924(e). If this enhancement applies, Hatley's sentencing range jumps from a maximum of ten years to a range of fifteen years to life. In determining whether a Hobbs Act robbery qualifies as a "violent felony" under the Armed Career Criminal Act, I use the categorical approach outlined by the Supreme Court. *Descamps v. United States*, 570 U.S. 254, 261, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013); *Bridges v. United States*, 991 F.3d 793, 800 (7th Cir. 2021). The categorical approach requires me to keep a myopic focus only on the statutory definitions of the prior convictions, without considering any underlying facts. *Descamps*, 570 U.S. at 261; *Bridges*, 991 F.3d at 800.[1] This approach "presumes that a conviction rests on the least serious acts that would satisfy the statute, regardless of the offender's actual conduct." *Bridges*, 991 F.3d at 800 (citing *United States v. Campbell*, 865 F.3d 853, 856 (7th Cir. 2017) and *Johnson v. United States*, 559 U.S. 133, 137, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010)). As many courts have recognized, this daffy area of the law can lead to some confounding results.

In all events, because this exercise requires an analysis of whether the recidivist statute (the ACCA) is a categorical fit with the underlying crime (Hobbs Act

1. The Hobbs Act is divisible between robbery and extortion. *United States v. Gooch*, 850 F.3d 285, 291 (6th Cir. 2017). But everyone agrees that Hatley was not convicted of Hobbs Act extortion so we can ignore that provision for present purposes.

robbery), I start by reviewing the statutory language. First, the ACCA defines a "violent felony" as:

> [A]ny crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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). As can be seen, the ACCA has two clauses: the force clause and the enumerated clause. The force clause under § 924(e)(2)(B)(i) requires a showing that the underlying offense includes an element of physical force against the "person of another." The enumerated clause under § 924(e)(2)(B)(ii) includes the crimes of burglary, arson, extortion, or ones involving the use of explosives. While § 924(e)(2)(B)(ii) also includes "otherwise involves conduct" language, commonly referred to as the "residual clause," the Supreme Court has held that this language is unconstitutionally vague. *Johnson v. United States*, 576 U.S. 591, 598, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). Just to clarify, the residual clause is beside the point in this case because the focus is only on the force

clause and the definition of "extortion" in the enumerated clause.

As noted above, the only prior convictions at issue here are the eight convictions for Hobbs Act robbery. *See* Presentence Report at ¶31. To do a side by side comparison with the ACCA, I consider the relevant language from the Hobbs Act, which states:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery (violates this provision).
>
> (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.

18 U.S.C. § 1951. Thus, under § 1951(b)(1) a robbery can be committed by threatening force against either (1) a person or (2) property.

So, in comparing the elements of a Hobbs Act robbery against the definition of "violent felony" in the ACCA's force clause, Hatley's argument is straight-forward: Because the ACCA is limited to crimes involving physical force against the person of another, and because a Hobbs Act robbery can be committed by physical force against the person *or property* of another, the Hobbs Act offense is broader. Therefore, the argument goes, Hobbs Act robbery is not a violent felony under the ACCA. But it's not that simple.

The ACCA also has enumerated felonies that automatically qualify as a predicate offenses, and extortion is one of them. 18 U.S.C. § 924(e)(2)(B)(ii). The question becomes whether a Hobbs Act robbery can be considered an "extortion" under the ACCA's enumerated clause. Framing the issue this way is admittedly odd since the Hobbs Act can itself be violated by acts of extortion. When, for example, a building inspector tells a contractor he isn't getting a building permit unless he ponies up with some cash, this is a Hobbs Act extortion. But, to repeat, I am not concerned with Hobbs Act extortion in this case; my focus is on Hobbs Act *robbery*, because that is the crime Hatley was convicted of. (As I said earlier, there is nothing intuitive about any of this). Anyway, when trying to decide if a Hobbs Act robbery can be an "extortion" under the ACCA, I am to consider whether "the relevant statute has the same elements as the 'generic' ACCA crime." *Descamps*, 570 U.S. at 261; *see also Mathis v. United States*, 136 S. Ct. 2243, 2248, 195 L. Ed. 2d 604 (2016) (providing that enumerated offenses are given their generic meaning).

Appendix B

Generic "extortion" is the "obtaining of something of value from another with his consent induced by the wrongful use of force." *Scheidler v. Nat'l Org. for Women, Inc.* 537 U.S. 393, 410, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003) (citing the Model Penal Code). The force can include threats to property. So, for example, when a person says to another, "give me a $ 1,000 or I'll slash your tires," that is an extortion in the generic sense. In other words, it is the obtaining of property of another (the $ 1,000 in my example) induced by the wrongful use of force (the threat to slash the tires). The fact that the force being applied is against property is neither here nor there. *See United States v. Becerril-Lopez*, 541 F.3d 881, 891-92 (9th Cir. 2008); *see United States v. Castillo*, 811 F.3d 342, 346-47 (10th Cir. 2015) ("the majority view [is] that the unlawful taking of property of another by threats to property falls within the definition of extortion." (citing 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.4 n.16 (2d ed. 2003) (collecting statutes)); *see also United States v. Bankston*, 901 F.3d 1100, 1103 (9th Cir. 2018) (the crime of generic extortion involves threats to property).

The takeaway is from all of this is that under the ACCA, a Hobbs Act robbery necessarily falls under *either* the force clause *or* under the enumerated crime of generic extortion. If the robbery is committed by using force against another, then it meets the force clause under § 924(e)(2)(B)(i), and if the crime is committed by making threats against property, then it is an "extortion" under § 924(e)(2)(B)(ii). In other words, I can conceive of no way for a defendant to commit a Hobbs Act robbery that isn't either a generic extortion (under the enumerated clause)

or involves the use of force against the person of another (the force clause). Therefore, the commission of a Hobbs Act robbery is always a "violent felony" under the ACCA.

This "either/or" approach has been used by several courts, albeit in slightly different contexts. In 2008, the Ninth Circuit considered whether a conviction under a California robbery statute constituted a "crime of violence" and whether the district court properly enhanced the defendant's sentence by applying the career offender enhancement under the Guidelines. *Becerril-Lopez*, 541 F.3d at 889. It is true that the Ninth Circuit later abrogated *Becerril-Lopez* in *Baldon* based on amendments made to the Guidelines, which narrowed the definition of extortion by excluding threats against property from the definition. *United States v. Baldon*, 956 F.3d 1115, 1122 (9th Cir. 2020) (finding that the definition of the prior crime was broader than the definition of "crime of violence" in the Guidelines). But that is beside the point for these purposes because I am considering the ACCA not the career offender provisions of the Guidelines, and no change has been made to the generic definition of "extortion" under the ACCA. So, while *Becerril-Lopez* was later abrogated, it is nonetheless helpful guidance, at least by analogy.

The California robbery statute analyzed in *Becerril-Lopez* defined 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." *Becerril-Lopez*, 541 F.3d at 890 (citing Cal. Penal Code § 211). And under California's statute, "[f]ear is defined as either the fear of an unlawful

injury to the person or property" of another. *Id.* at 890-91. As the court stated, this means that "Section 211 . . . encompasses mere threats to property, such as 'Give me $ 10 or I'll key your car' or 'Open the cash register or I'll tag your windows.'" *Id.* at 891. Thus, a conviction under the California robbery statute was a qualifying conviction either as a robbery or as a generic extortion (prior to the Guidelines Amendment in 2016). *See also United States v. Harris*, 572 F.3d 1065 (9th Cir. 2009) (same).

The Tenth Circuit in *Castillo* considered a similar issue—whether California's robbery statute was categorically a crime of violence under an earlier version of guideline § 2L1.2. *Castillo*, 811 F.3d at 345. Using the "either/or" approach as I'm calling it, the court held that § 211 of the California Penal Code is categorically a crime of violence under § 2L1.2 as "either a robbery or extortion." *Id.* at 347. In other words, the court recognized that a violation of § 211 achieved through threats to a person meets the generic robbery definition, while a violation of § 211 based on a threat to property corresponds to generic extortion. *Id.* at 348-49; *see also United States v. O'Connor*, 874 F.3d 1147, 1152 (10th Cir. 2017) (briefly discussing *Castillo*).

The "either/or" approach was also used in *United States v. Montiel-Cortes*, 849 F.3d 221, 227-29 (5th Cir. 2017) where the court considered the Nevada robbery statute in the context of the 2015 version of Guideline § 2L1.2(b)(1)(A). The court held that in situations where the commission of an offense is either a robbery or an extortion, then the prior is countable. *Id.* "In sum, we

conclude that a conviction under the Nevada robbery statute . . . necessarily is a crime of violence under the categorical framework. Any Nevada robbery involving an immediate danger would satisfy the generic, contemporary definition of robbery, while any Nevada robbery involving a future danger would satisfy the generic, contemporary definition of extortion." *Id.* at 229 (citing *Harris*, 572 F.3d 1065).

This case is different from the Seventh Circuit's recent holding in *Bridges* where the court considered whether a Hobbs Act robbery is a crime of violence under the career offender sentencing guidelines. *See* U.S.S.G. § 4B1.2. The court held that Hobbs Act robbery does not qualify as a "crime of violence" under the Guidelines, because a "Hobbs Act robbery criminalizes threats against property, and both generic robbery and guideline extortion reach only threats against persons. Hobbs Act robbery is not a categorical fit, so Bridges was not convicted of a crime of violence *as the Guidelines define that phrase.*" *Bridges v. United States*, 991 F.3d 793 (7th Cir. 2021) (emphasis added). *Bridges* focuses on the definition of a "crime of violence" in the recently amended U.S.S.G. § 4B1.2. It held that the term "extortion" as used in the Guidelines is limited to physical injury to a person. *Id.* at 802. Therefore, a Hobbs Act robbery and the career offender guidelines are not a categorical fit. *Id.* at 802. In other words, the Guidelines use a narrower version of the term "extortion" than generic extortion in the ACCA at issue in this case. *See also Bankston*, 901 F.3d at 1103-04 (discussing the amended Guidelines definition of extortion as "obtaining something of value from another by the wrongful use of (A)

force, (B) fear of physical injury, or (C) threat of physical injury." (citing U.S.S.G. § 4B1.2 cmt. n.1 (2016); U.S.S.G. Supp. Appx. C, Amend. 798 (Aug. 1, 2016))).

In sum, Hatley's eight Hobbs Act robbery convictions were either against a person of another, and thus met the elements clause of the ACCA, or were against the property of another thus meeting the requirement for generic extortion under the ACCA. As such, this convoluted area of law has ensnared Mr. Hatley; he is an armed career criminal.

CONCLUSION

For the foregoing reasons, the Hobbs Act robbery qualifies as a "violent felony" under § 924(e) of the Armed Career Criminal Act.

SO ORDERED on June 22, 2021.

/s/ Philip P. Simon
PHILIP P. SIMON, JUDGE
UNITED STATES DISTRICT COURT