No. 17 –

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2017

Xing Lin,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was sentenced to a term of life in prison without the possibility of release following a conviction for a violation of 18 U.S.C. § 924(j), which authorizes such a sentence when a firearm has been used during and in relation to a "crime of violence" as defined by 18 U.S.C. § 924(c)(3) and causes the death of another. The "crime of violence" that formed the predicate for purposes of that conviction was a Hobbs Act extortion. Instead of applying the categorical approach devised in the context of the Armed Career Criminal Act, the Second Circuit held that extortion, a crime that can be – and regularly has been – committed solely on the basis of threats of economic harm or economic injury, in the "ordinary case" presents a substantial risk of the use of physical force. The questions presented by this petition are:

1. Must the analysis of whether a predicate act constitutes a "crime of violence" under the language of 18 U.S.C. § 924(c)(3)(B) comport with this Court's jurisprudence regarding the Armed Career Criminal Act's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), as the Third, Seventh and Ninth Circuits have held, in contrast to conflicting rulings from the Second, Sixth, Eighth and Eleventh Circuits.

2. Did the "ordinary case" methodology survive *Johnson v. United States*, 135 S. Ct. 2552 (2015), for purposes of statutes other than the Armed Career Criminal Act, 18 U.S.C. § 924(e)?

3. Whether this Court should hold petitioner's case for a ruling on the constitutionality of 18 U.S.C. § 16(b) in *Sessions v. Dimaya* (pending before this Court for reargument in the October 2017 term), given that the definition in the statute at issue in *Dimaya* is, as the government has acknowledged, "materially identical" to the definition of a "crime of violence" in 18 U.S.C. § 924(c)(3)(B), which formed the basis of petitioner's conviction?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Xing Lin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the conviction and life sentence imposed upon him by the United States District Court for the Southern District of New York. Petitioner also asks this Court to hold his petition for disposition pending a decision in *Sessions v. Dimaya* (No. 15-1498), *cert. grd.*, 137 S. Ct. 131 (Sept. 29, 2016), and then grant certiorari, vacate the judgment of the United States Court of Appeals for the Second Circuit, and remand the case for further proceedings in light of *Dimaya*.

OPINIONS BELOW

The relevant opinion of the United States Court of Appeals for the Second Circuit was not published in the federal reporter but can be found at 683 Fed. App'x 41 (2d Cir. 2017), and appears here at Pet. App. 1A *et seq.* and the order denying petitioner's motion for reconsideration and reconsideration *en banc* appears at Pet. App. 8A.[1]

JURISDICTION

On March 20, 2017, the United States Court of Appeals for the Second Circuit entered judgment and affirmed a conviction and life sentence imposed by the United States District Court for the Southern District of New York. Pet. App. 1A - 7A. On May 31, 2017, the United States Court of Appeals for the Second

[1] References to petitioner's appendices are indicated by "Pet. App." Followed by the page number and letter corresponding to the appendix, as listed in the table of contents.

Circuit denied petitioner's petition for panel rehearing or rehearing *en banc*. Pet. App. 8A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provision involved in this petition is the Sixth Amendment, which provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS INVOLVED

Sections of the statutory provisions relevant to this petition can be found in their entirety at Pet. App. 1B *et seq.*

STATEMENT OF THE CASE

For the past decade, this Court has worked to devise a constitutionally permissible method for determining whether a prior conviction was a "violent felony" for purposes of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). The ACCA has three alternate definitions for crimes of violence: (1) the "force clause" in subsection 924(e)(2)(B)(i) (for a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another"); (2) the enumerated crimes provision in subsection 924(e)(2)(B)(ii); and (3) the "residual clause" in subsection 924(e)(3)(2)(B)(ii) (for a felony that "involves conduct that presents a serious potential risk of physical injury to another.") The firearm crime set forth in the related provision found at subsection (c) of 18 U.S.C. § 924

defines crimes of violence only under a "force clause" and a "residual" or "risk-of-force" clause, the language of both of which are largely similar – though not identical – to the ACCA provisions.

In interpreting the constitutionality of the ACCA, this Court has held that a predicate crime must be assessed "'in terms of how the law defines the offense and not in terms of how an individual might have committed it on a particular occasion." *Johnson v. United States*, 135 S.Ct.2551, 2557 (2015) ("*Johnson* (2015)"), quoting *Begay v. United States*, 553 U.S. 187 (2008). In any ACCA case, then, for a prior conviction to qualify as a "violent felony" the crime in its least serious incarnation (not in the "ordinary case") must present a risk of "*violent* force – that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 141 (2010) (emphasis in original).

Determining whether a prior conviction fell within the ACCA residual clause's vague definition of a felony presenting a "serious potential risk of physical injury to another" proved to be a highly problematic exercise. After five separate cases over the course of a decade that attempted to read the ACCA residual clause constitutionally, this Court two years ago concluded that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Johnson* (2015), 135 S.Ct. at 1560. Thus, in *Johnson* (2015), the ACCA's residual clause was officially laid to rest. Rising from its ashes, however, is the residual clause found at 18 U.S.C. § 924(c)(3)(B).

Section 924(c) – deployed by federal prosecutors at much higher rates than the ACCA and, indeed, the statute that results in the most federal firearm convictions in any given year – imposes a mandatory minimum, mandatory consecutive sentence on an offender who uses a firearm during and in relation to a "crime of violence." 18 U.S.C. § 924(c)(1)(A). Under the residual clause of Section 924(c), a "crime of violence" is defined as a felony offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of the crime." 18 U.S.C. § 924(c)(3)(B). The "substantial risk" definition labors under the same unconstitutional uncertainties as the ACCA, while being constitutionally weakened further by virtue of the standard practice among the district courts of not putting the question of whether a predicate offense – not conviction (as in the ACCA) – is a "crime of violence" to the jury, thus raising additional Sixth Amendment concerns.

This case thus presents an urgent question that recurs with great frequency in federal criminal prosecutions: whether the second definition of a "crime of violence" in 18 U.S.C. § 924(c)(3)(B), which imposes enhanced penalties on defendants for their use of a firearm in relation to a crime that involves a substantial risk that physical force will be used, is unconstitutionally vague. It also requires this Court to face the question of whether the discredited "ordinary case" analysis can be resurrected in the 18 U.S.C. § 924(c) context. These questions are critically important because 18 U.S.C. § 924(c) convictions outnumber ACCA convictions by a factor of five.

Courts of Appeals are divided as to whether Section 924(c)(3)(B) must be rendered unconstitutional on the force of *Johnson* (2015) and whether the "ordinary case" analysis survives outside of the ACCA. This conflict on critical and recurring issues directly impacting the administration of the federal criminal justice system can only be – and must be –resolved by review in this Court.

Factual and Procedural History

1. a. In connection with a dispute arising out of competition over bus lines running to and from New York City's Chinatown, a subordinate of petitioner shot and killed two individuals at a karaoke bar on the night of July 29, 2004. Petitioner fled New York for Canada, where he was found and extradited to the United States on a 2011 indictment. Though offered a plea to discharging a weapon in violation of 18 U.S.C. § 924(c), which carried a mandatory minimum sentence of ten years in prison, petitioner was not able to allocute the elements of the crime to the satisfaction of the district court. The government then filed a superseding indictment charging petitioner with five counts, including, among other things, a Hobbs Act extortion in violation of 18 U.S.C. § 1951 (Count Four) and a conspiracy to commit that crime (Count Five), and one count of causing the death of a person through the use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(j) (Count Three). Section 924(j) looks to the definitions in 18 U.S.C. § 924(c) for the element of "crime of violence." The predicate "crimes of violence" here were the Hobbs Act extortion acts. A Hobbs Act extortion does not have "force" in any form as an element of the crime, so whether those predicate acts

constituted "crimes of violence" depended on whether they "by [their] nature, involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)((B).

b. Petitioner proceeded to trial. At trial, the prosecution introduced evidence that petitioner had used threats of various sorts to maintain an interest in the income from the Chinatown bus lines. During jury instructions, the district court set forth the elements of Count Three which, as relevant here, included: (1) that petitioner committed a crime of violence, which the jury was told by the district court judge was either the extortion or the extortion conspiracy in Counts Four and Five; and (2) that petitioner used or aided and abetted the use of the firearm during and in relation to one of those predicate acts of extortion. After a day of deliberations, the jury returned a verdict of guilty on all counts but the extortion conspiracy. The district court later sentenced petitioner to a term of life in prison.

2. On direct appeal, petitioner raised several issues, including whether a Hobbs Act extortion constitutes a "crime of violence" for purposes of 18 U.S.C. § 924(c)(3)(B), (j) and whether the "residual clause" in 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague. Rejecting both arguments, the Second Circuit, employing the test that this Court had fashioned prior to *Johnson* (2015) for determining whether a prior conviction was a violent felony under the ACCA, held that because it was "far from clear that the 'ordinary case' of Hobbs Act extortion would not entail a substantial risk of the use of physical force," petitioner was not entitled to

relief. Pet. App. 4A. The Second Circuit further held that the definition of a crime of violence under 18 U.S.C. § 924(c)(3)(B) was not unconstitutionally vague. Pet. App. 4A.

REASONS FOR GRANTING THE WRIT

After repeated efforts to breathe constitutional life into the Armed Career Criminal Act's residual clause definition of a "violent felony," this Court finally concluded that its efforts had been a "failed exercise" and declared the ACCA residual clause irredeemably and unconstitutionally vague. *Johnson* (2015), 135 S.Ct. at 2560. Nevertheless, the Courts of Appeals are divided as to whether the fate of the ACCA's residual clause calls for the demise of the similar but differently phrased 18 U.S.C. § 924(c)(3)(B) definition of a "crime of violence." This split is premised on a fundamental and critically important question – must the analysis of whether a predicate act is a "crime of violence" for purposes of 18 U.S.C. § 924(c) comport with this Court's jurisprudence regarding the Armed Career Criminal Act? It further requires courts to decide whether this Court's "ordinary case" analysis, discredited in the ACCA context, should be applied to other statutes.

1. **The Circuits Are Intractably Split as to Whether this Court's Analysis of the ACCA Residual Clause Applies to Other Statutes and the Court Should Grant Certiorari Here to Resolve that Question**

Sections 924(c) and (j) of Title 18 of the United States Code impose graduated prison penalties for anyone convicted of using a firearm "during or in relation to" a "crime of violence" – 5 years for possession, 7 years for brandishing, 10 years for discharging and up to life for use of the firearm that results in a death. 18 U.S.C. §

924(c)(1)(A)(i) – (iii), (j). Section 924(c) defines a "crime of violence," for purposes of both subsection (c) and subsection (j), as relevant here, as a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B).

Appearing two subsections later in the same section of Title 18, the Armed Career Criminal Act imposes a 15-year prison term for any person possessing a firearm who had "three prior convictions ... for a violent felony." 18 U.S.C. § 924(e)(1). The residual clause of the ACCA defines a "violent felony" as an offense that "involves conduct that presents a serious potential risk of serious injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). This Court has addressed the ACCA nine times over the past ten years. *See Mathis v. United States*, 136 S.Ct. 2243 (2016); *Welch v. United States*, 136 S.Ct. 1257 (2016); *Johnson* (2015), 135 S. Ct. 2551; *Descamps v. United States*, 133 S.Ct. 2276 (2013); *Sykes v. United States*, 564 U.S. 1 (2011); *Johnson v. United States*, 559 U.S. 133 (2010) ("*Johnson* 2010"); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay*, 553 U.S. 137; *James v. United States*, 550 U.S. 192 (2007); *see also Taylor v. United States*, 495 U.S. 575 (1990). Ultimately, two years ago, this Court ruled that the residual clause of the ACCA was irredeemably vague and held that it could not be applied constitutionally. *Johnson* (2015), 135 S.Ct. 2551.

Prior to *Johnson* (2015), in its earliest analysis of the ACCA, this Court, in *Taylor*, 495 U.S. 575, directed lower courts to use a framework known as the

"categorical approach" to decide if an offender's prior conviction fit into one of the ACCA definitions. Under the categorical approach, a court was to assess whether a crime qualified as a "violent felony" for the ACCA "in terms of how the law define[d] the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay*, 553 U.S. at 141. Prior to *Johnson* (2015), when using the categorical approach for purposes of determining whether crimes fell within the ACCA residual clause, a court was required to "picture the kind of conduct that the crime involve[d] in the 'ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Johnson* (2015), 135 S.Ct. at 2557, citing *James*, 550 U.S. at 208. The "ordinary case" analysis was necessary for the residual clause because that provision "ask[ed] whether the [prior] crime '*involves conduct*' that presents too much risk of physical injury." *Id.* (emphasis in original). Ultimately, after repeated efforts to establish a workable, constitutional standard for application of the residual clause, this Court looked to its "repeated attempts and repeated failures" and waved the white flag, declaring the ACCA's residual clause hopelessly indeterminate and thus unconstitutionally vague. *Id.* at 2558.

While the unconstitutionality of the ACCA's residual clause is thus settled law, the question of the ongoing viability of other similar provisions in federal law has been percolating among the Courts of Appeals, with the circuits split.

Two of the provisions that have been addressed by the lower appellate courts are 18 U.S.C. § 924(c)(3)(B) and 18 U.S.C. § 16(b). Both define a "crime of violence"

identically. A "crime of violence" is defined as a felony offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of the crime." 18 U.S.C. § 924(c)(3)(B); 18 U.S.C. § 16(b). The definition in those provisions (identical to each other) is similar though not identical to the ACCA residual clause. While all quantify a risk level, those levels are different – a "serious potential risk" in the case of the ACCA and a "substantial risk" in the case of 18 U.S.C. §§ 924(c)(3) and 16(b). And where the ACCA is concerned with the risk of "physical injury", 18 U.S.C. §§ 924(c)(3) and 16(b) speak to "physical force." Last, both §§ 924(c)(3)(B) and 16(b) but not the ACCA include the risk to property as well as to persons.[2]

The Second Circuit rejected petitioner's vagueness challenge, brought in light of this Court's reasoning in *Johnson* (2015). Pet. App., 3A – 4A.[3] The Second Circuit has been joined by the Fifth, Sixth, Eighth and Eleventh Circuits, which have all held that despite the strong similarities between the critical aspects of the ACCA

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[2] The "presumption of consistent usage" applies "'when Congress uses the same language in two statutes having similar purposes'" and is "most commonly applied to terms appearing in the same enactment." *United States v. Castleman*, 134 S.Ct. 1405, 1417 (2014) (Scalia, J. concurring), quoting *Smith v. City of Jackson*, 544 U.S. 228, 233 (1973) (*per curiam*). Here, given their appearance in the same statutory section and their similar purposes – to enhance penalties for firearm crimes – the presumption of consistent usage should apply and the residual clause of § 924(c)(3)(B) should be interpreted consistently with the residual clause of § 924(e)(2)(B)(ii).

[3] Because prior to briefing the Second Circuit rejected a vagueness challenge to § 924(c)(3)(B), petitioner directly addressed the question of whether a Hobbs Act extortion in the "ordinary case" qualified as a crime of violence under the residual clause while also preserving his argument that the definition was also unconstitutionally vague. *See United States v. Hill*, 832 F.3d 135 (2d Cir. 2016), motion for rehearing and rehearing *en banc* pending.

residual clause that rendered it unduly vague – the indeterminate quantum of risk and the absence of any methodological guidance for how to measure that risk – and the language in the 18 U.S.C. § 924(c)(3)(B) residual clause, the former is unconstitutional while the latter is not. *See Ovalles v. United*, 861 F.3d 1257 (11th Cir. 2017) (*Johnson* (2015) does not invalidate § 924(c)(3)(B) "risk-of-force" clause); *United States v. Pricket*, 839 F.3d 637 (8th Cir. 2016) (§ 924(c)(3)(B) not unduly vague); *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (§ 16(b) not unduly vague); *United States v. Taylor*, 814 F.3d 340, 375 – 76 (6th Cir. 2016) (rejecting the argument that *Johnson* (2015) "compels the conclusion" that the residual/risk-of-force clause in 924(c)(3)(B) is void for vagueness).

Splitting from those cases, the Seventh Circuit has struck the residual clause of 18 U.S.C. § 924(c)(3)(B) while the Third, Ninth and Tenth Circuits have struck the residual clause of 18 U.S.C. § 16(b) all on the force of *Johnson* (2015). Most recently, the Seventh Circuit held in *United States v. Jackson*, --- F.3d --- (7th Cir. Aug. 4, 2017), that the "residual clause of § 924(c)(3)" was not "sufficiently distinguishable from ... the ACCA's residual clause" and thus was, like the ACCA residual clause, unconstitutionally vague. *Id.* Similarly, in the context of § 16(b), the Ninth Circuit, in *Lynch v. Dimaya*, 803 F.3d 1110 (9th Cir. 2015), presently before this Court and listed for re-argument in the October 2017 Term, concluded that this Court's reasoning in *Johnson* (2015) rejecting the "ordinary case" analysis as constitutionally sufficient for the ACCA residual clause applied "with equal force to the similar statutory language and identical mode of analysis used to define a

crime of violence" in § 16(b). It therefore held 18 U.S.C. § 16(b) to be "void for vagueness." *Id.*, at 1115. Likewise, the Third Circuit recently ruled that the language of § 16(b) "calls for the exact analysis that the [Supreme] Court implied was unconstitutionally vague – the application of the 'substantial risk' inquiry to the '*idealized ordinary case*' of a crime." *Baptiste v. Attorney General*, 841 F.3d 601, 619 (3d Cir. 2016) (emphasis in original);*See also Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016) (ruling that § 16(b) definition of crime of violence is unconstitutionally vague.)[4]

The Courts of Appeals are thus intractably split on the applicability of this Court's ruling in *Johnson* (2015) to other federal statutes, namely, those found at 18 U.S.C. §§ 924(c)(3)(B) and 16(b), which ask if a predicate act "by its nature, involves a substantial risk that physical force" will be used. This split can only be resolved by granting a writ of certiorari here.

2. The "Ordinary Case" Analysis Cannot Survive *Johnson* (2015) and the Second Circuit was Wrong to Employ it in the 18 U.S.C. § 924(c) Context

In *Johnson* (2015), this Court struck the residual clause in the Armed Career Criminal Act holding that the "ordinary case" analysis previously fashioned to determine if a prior conviction fit within the residual clause "produces more

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[4] Though the 18 U.S.C. § 16(b) issue is litigated frequently in the context of removal proceedings, as it provides the definition for the sort of conduct that constitutes an aggravated felony, if anything, the constitutional scrutiny of the "crime of violence" definition in the context of criminal prosecutions – as every case arising under 18 U.S.C. § 924(c)(3)(B) necessarily is – is greater than the § 16(b) cases. *See, e.g., Sessions v. Dimaya*, No. 15-1498, Oral Arg. Tr., pp. 40 – 41 (discussing different standards in criminal and immigration cases.)

unpredictability and arbitrariness than the Due Process Clause tolerates." 135 S.Ct. at 2558.

When reviewing the residual clause in *Johnson* (2015), this Court began its analysis by explaining that analysis under the ACCA residual clause had previously "require[d] a court to picture the kind of conduct that the crime involve[d] 'in the ordinary case,' and to judge whether that abstraction presents a serious risk of potential injury." *Johnson*, 135 S.Ct. at 2557 (citation omitted). This Court traced the "ordinary case" framework to *James*, 550 U.S. 192. There, the Supreme Court had held that

> We do not view [the ordinary case] approach as requiring that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony. . . . Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.

James, 550 U.S. at 208 (citations omitted). This Court had, post-*James*, affirmed the ordinary case approach in *Sykes v. United States*, in holding that Indiana's offense of vehicular flight from a law-enforcement officer was a violent felony under the ACCA residual clause because it covered "conduct that *in the ordinary case* – not in every conceivable case – poses serious risk of physical injury and is purposeful, violent, and aggressive." 564 U.S. 1, 40 (2011) (Kagan, J., dissenting) (emphasis in original) (agreeing with majority's definition of the ordinary case analysis.)

In *Johnson* (2015), however, this Court expressly overruled *James* and *Sykes*, concluding that the process of determining what is embodied in the "ordinary case"

left "[g]rave uncertainty" surrounding the method of "determin[ing] the risk posed by the "judicially imagined 'ordinary case.'" *Johnson*, 135 S. Ct. at 2557. This was so because "[t]he residual clause offers no reliable way to choose between . . . competing accounts of what 'ordinary' . . . involves." *Id.* at 2558. The Court considered different means by which one might envision the hypothetical "ordinary case" and rejected "statistical analysis of reported cases, surveys, expert evidence, Google, and gut instinct" as all being equally unreliable in determining the "ordinary case" of any given crime. *Id.* at 2557 (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, J., dissenting from denial of rehearing en banc)). *Johnson* (2015) concluded that these previously employed methods "failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition." *Id.* at 2559 (referring to *Chambers*, 555 U.S. 122 and *Sykes*, 564 U.S. 1).

This Court also examined a related problem that amplified the constitutional infirmity of the ordinary case analysis – the absence of a meaningful gauge for determining when the quantum of risk under the "ordinary case" of a particular statute is enough to constitute a "serious potential risk of physical injury." *Johnson*, 135 S.Ct. at 2558. Although the level of risk required under the residual clause had to be similar to the ACCA enumerated offenses, *Johnson* (2015) rejected the notion that comparing a putative ACCA predicate violent felony's ordinary case to the risk posed by certain enumerated offenses could cure the constitutional problem. *Id.*

Thus, *Johnson* (2015) not only invalidated the ACCA residual clause, but it invalidated the ordinary case methodology, as the analysis itself was impossible to apply in a constitutional manner, "combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony." *Id.*

In this case, however, the Second Circuit concluded that a Hobbs Act extortion constituted a crime of violence under 18 U.S.C. § 924(c)(3)(B) because it was "far from clear that the 'ordinary case' of Hobbs Act extortion would not entail a substantial risk of the use of physical force." Pet. App. 4A. This is directly contrary to the ruling in *Johnson* (2015), which expressly rejected the ordinary case analysis.

The reach of 18 U.S.C. § 924(c)(3)(B) embraces any felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." But, as with the ACCA, identifying the ordinary case of a predicate crime (here, the ordinary case of a Hobbs Act extortion) and estimating the risk of such an ordinary case to determine whether "physical force against the person or property of another" will be used is unduly – and unconstitutionally – arbitrary, unpredictable and indeterminate.

"[H]ow much risk it takes" to deem a predicate offense a "crime of violence" is as uncertain under 18 U.S.C. § 924(c)(3)(B) as it is under the ACCA residual clause and thus presents the same constitutional problems that caused this Court to strike the ACCA residual clause. *Johnson* (2015), 135 S.Ct. at 2558. Just as this

Court in *Johnson* (2015) found it impossible to intelligibly apply the ACCA's "imprecise 'serious potential risk' standard to ... a judge-imagined abstraction," so is it impossible to do so for the 18 U.S.C. § 924(c)(3)(B) "substantial risk" standard. *Id.*

The differences in language between "risk of injury" (in § 924(e)) and "risk that force will be used" (in § 924(c)(3)(B)) as well as between "serious potential risk" (in §924(e)) and "substantial risk" (in § 924(c)(3)(B)), are of no moment. The ACCA "residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense. . . . [T]he 'indeterminacy of the wide-ranging inquiry' made the residual clause more unpredictable and arbitrary in its application than the Constitution allows." *Welch*, 136 S. Ct. at 1262.[5]

Nor does the enumerated offenses language in the ACCA meaningfully distinguish its ordinary case analysis from such an analysis under 18 U.S.C. § 924(c)(3)(B). The enumerated offenses were not the problem with the ACCA, this Court explained in *Johnson* (2015). "Common sense has not even produced a consistent conception of the degree of risk posed by each of the four enumerated offenses; there is no reason to expect it to fare any better with respect to thousands of unenumerated crimes." 135 S. Ct. at 2559. If anything, the lack of listed crimes makes 18 U.S.C. § 924(c)(3)(B) "*more* vague than the [ACCA's] residual clause ... . [The] ACCA's enumerated examples . . . provide at least *some* guidance as to the

[5] Fundamentally, the problem may lie with the word "risk" itself, as a "risk" is by its very nature uncertain and indeterminate. In economics and insurance, for example, a risk is a probability, not an absolute.

sort of offenses Congress intended for the provision to cover. Section [924(c)(b)], by contrast, provide[s] no such guidance at all." *Dimaya*, 803 F.3d at 1118 n.13 (first emphasis added; citation omitted).

As a final matter, the constitutionality of an "ordinary case" analysis to a predicate act charged as part of §924(c)(3)(B) is further imperiled by the fact that, as in this case, courts routinely *assume* even in the absence of a prior conviction, that an act, charged or uncharged, is a "crime of violence." That is, though the use of a firearm must be "during and in relation to ... a crime of violence" and so the "crime of violence" is an element of the 924(c) act, courts remove consideration of "crime of violence" from the province of the jury, in violation of an offender's Sixth Amendment right to trial by jury. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000); *see also Alleyne v. United States*, 133 S.Ct. 2151 (2013) (whether firearm was used, brandished or discharged is a "fact" that increases the mandatory minimum sentence for crime and is thus an "element" of crime that must be submitted to jury); *United States v. O'Brien*, 560 U.S. 218 (2010) (fact that firearm was a machinegun was an element of the offense to be proved to the jury beyond a reasonable doubt, rather than a sentencing factor). This is a problem not present in the ACCA analysis, which looked to prior convictions, the only "element" of a crime not subject to an *Apprendi* analysis. In Section 924(c) charges, however, the "crime of violence" need not even be charged, and routinely is not premised on a previously established conviction. The regular practice, then, of lower courts simply assuming that the "ordinary case" of the underlying conduct constitutes a "crime of violence"

creates even greater constitutional problems than did the use of prior convictions under the ACCA.

The constitutional problems with shoehorning a Hobbs Act extortion into 18 U.S.C. §924(c)(3)(B) by way of an ordinary case analysis are evident when looking at how juries are routinely (that is, "ordinarily") instructed that a defendant can commit the elements of the crime. Juries are routinely told in Hobbs Act extortion cases that the "actual or threatened force, violence, or fear" element of the crime can be satisfied by proof of "economic rather than physical harm." *See* Third Circuit Model Jury Instruction § 6.18.1951-4 ("Fear exists if a victim experiences anxiety, concern, or worry over expected personal (physical) (economic) harm."); Ninth Circuit Manual of Model Criminal Jury Instructions § 8.142A ("Hobbs Act Extortion or Attempted Extortion by Nonviolent Threat") ("First, the defendant [[induced] [intended to induce]] [*name of victim*] to part with property by wrongful threat of [economic harm] [*specify other nonviolent harm*]"); United States District Court for the District of Maine, 2017 Revisions to Pattern Criminal Jury Instructions for the District Courts of the First Circuit, § 4.18.1951 ("to prove extortion by fear, the government must show: (1) that the victim believed that economic loss would result from failing to comply with [defendant's] demands and (2) that the circumstances made the fear reasonable. Economic loss may include the possibility of lost business opportunities. But the loss feared must be a particular economic loss, not merely the loss of a potential benefit.)

So, for example, "economic pressure aimed at" eliminating "competitive bidding" establishes a Hobbs Act extortion. *United States v. Gigante*, 39 F.3d 42, 46 (2d Cir. 1994), *vacated and superseded in part on denial of reh'g,* 94 F.3d 53 (2d Cir. 1996). As does an offer to cease publishing derogatory articles in exchange for monetary payment constitutes a Hobbs Act extortion as the threat of publication "prey[ed] on [the victim's] fear of economic harm." *United States v. Granados,* 142 F.3d 1016, 1020 (7th Cir. 1998); *see also United States v. Tomblin*, 46 F.3d 1369, 1385 (5th Cir. 1995) (affirming Hobbs Act extortion conviction based on victims' fear that they would lose a financial investment.)

The Second Circuit's statement that these "examples" of Hobbs Act extortion premised on fear of economic injury provided by petitioner are "not necessarily the 'ordinary case,'" despite the fact that courts routinely, in "ordinary" Hobbs Act extortion cases, charge juries that fear of economic injury is sufficient, illuminates the very problem that this Court in *Johnson* (2015) ruled was fatal to the ACCA residual clause – the indeterminacy of the analytical framework itself.

Whether the "ordinary case" methodology that this Court struck as unconstitutionally vague in the ACCA context can be constitutionally applied in connection with other criminal statutes has divided the circuits, as addressed in the cases cited in Section 2, *supra*. And because, as discussed below, Section 924(c) is frequently employed in federal criminal prosecutions, it is critical for this Court to address the constitutionality of the "ordinary case" analysis outside the confines of the ACCA.

3. This Question is Critically Important to the Administration of Justice in the Federal Criminal System

The question of whether *Johnson* (2015) applies to 18 U.S.C. § 924(c) cases in is a critically important and recurring matter of federal criminal administration. The federal government prosecutes 18 U.S.C. § 924(c) charges aggressively, and the presence of such a count with its mandatory minimum (and mandatory consecutive) sentencing consequences in an indictment can be the pressure point that convinces a criminal defendant to accept a guilty plea in a case that might otherwise be tested at trial. In Fiscal Year 2015, ten percent of all federal criminal convictions involved firearms and 25 percent of those firearm convictions were for 18 U.S.C. § 924(c) offenses. *See United States Sentencing Commission Overview of Federal Criminal Cases FY 2015*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf, last accessed Aug. 25, 2017 ("Quick Facts Federal Criminal Cases). That amounts to 2,119 convictions in one year for 18 U.S.C. § 924(c) violations. *See* United States Sentencing Commission, Quick Facts, Section 924(c) Firearms. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Section_924c_FY15.pdf, last accessed Aug. 25, 2017. By contrast, convictions for violations of 18 U.S.C. § 924(e) accounted for fewer than 450 convictions during the same time period. *See* Quick Facts Federal Criminal Cases, pp. 11-12. Clearly, then, this Court's consideration on the question of Section 924(c)'s vagueness is urgently necessary and will have far greater impact

than the substantial attention already devoted to the related analysis in the Section 924(e) context.

4. This Court Should Hold Petitioner's Case for a Ruling on the Constitutionality of 18 U.S.C. § 16(b) in *Lynch v. Dimaya*

This Court granted a writ of certiorari in *Lynch v. Dimaya* (now captioned *Sessions v. Dimaya*) to determine "[w]hether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague." *See* 137 S.Ct. 31 (2016); Docket No. 15-1498.

Section 16(b), within the "general provisions" section of Title 18 of the United States Code, states that "[t]he term 'crime of violence' means... any ... offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Section 924(c)(3)(B) of Title 18, the section that provided the definition for the "crime of violence" underlying petitioner's Count Three conviction, states that a "'crime of violence' means an offense that is a felony and ... that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." That is, the two provisions are identically worded. Indeed, as the federal government stated in asking this Court to grant a writ of certiorari in the *Dimaya* case, the two provisions are "materially identical" such that resolution of the vagueness challenge of one will necessarily impact the constitutionality of the other. *See* United States Government Petition for a Writ of Certiorari, *Dimaya v. Sessions*, 15-1498, pp. 11,

24 – 25. Should a decision in *Dimaya* render Section 16(b) unconstitutionally vague, petitioner asks that this Court grant his petition, vacate his conviction for Count Three, which rested on a materially identical definition, and remand the case to the Second Circuit for reconsideration in light of this Court's action in *Dimaya*.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari. In the alternative, petitioner asks this Court to hold the case for disposition pending its decision in *Sessions v. Dimaya*, No. 15-1498, *cert. grd.*, 137 S.Ct. 31, and then grant certiorari, vacate the judgment of the United States Court of Appeals for the Second Circuit, and remand the case for further proceedings in light of *Dimaya*.

Dated: August 28, 2017

Respectfully submitted,

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Attorney for Petitioner Xing Lin

PETITIONER'S APPENDIX A

14-4133
United States v. Xing Lin

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of March, two thousand seventeen.

PRESENT: JON O. NEWMAN,
DENNIS JACOBS,
Circuit Judges,
LEWIS A. KAPLAN,*
District Judge,

- -X
UNITED STATES OF AMERICA,
Appellee,

-v.- 14-4133**

XING LIN,
Defendant-Appellant.
- -X

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* Judge Lewis A. Kaplan, of the United States District Court for the Southern District of New York, sitting by designation.

** We respectfully direct the Clerk of Court to amend the caption.

FOR APPELLANT: MEGAN WOLFE BENETT, Kreindler & Kreindler LLP, New York, NY.

FOR APPELLEE: JENNIFER E. BURNS (with Michael Ferrara on the brief), for Preet Bharara, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Cedarbaum, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED.**

Xing Lin appeals from the judgment of the United States District Court for the Southern District of New York (Cedarbaum, J.). A jury convicted Lin of extortion, racketeering, conspiracy to commit racketeering, and murder through the use of a firearm during and in relation to a crime of violence, but acquitted him of conspiracy to commit extortion. The district court sentenced Lin principally to life in prison on the murder and racketeering offenses, and to a concurrent twenty-year sentence on the substantive extortion offense. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

1. Lin argues that the district court improperly rejected his attempt to plead guilty. At Lin's first attempted plea allocution, the district court was unconvinced that Lin had adequately pleaded to all elements of the charged crime. Near the end of that proceeding, the district court stated: "I will accept the plea, but I would really like to hear another allocution." App'x at 84. The district court requested additional legal authorities and a further allocution the following day. However, when Lin appeared the next day, his counsel immediately informed the district court that Lin was "not prepared to go forward with his plea of guilty that we attempted to enter yesterday." App'x at 91.

We review a district court's decision to accept or reject a guilty plea for abuse of discretion, United States v. Severino, 800 F.2d 42, 46-47 (2d Cir. 1986). The district court did not abuse its discretion in asking the

parties to reappear the next day to explain the legal and factual basis for the plea. The district court did not improperly "reject" Lin's guilty plea; Lin only attempted to enter a plea the previous day, the district court said it "will" accept it after further allocution, but Lin then decided not to enter a plea.

2.a. Lin was convicted of using a firearm "in relation to a crime of violence." See 18 U.S.C. § 924(c)(1)(A), (j). Lin argues that the predicate crime, Hobbs Act extortion, is not a "crime of violence." In relevant part, § 924 defines a "crime of violence" as a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Id. § 924(c)(3)(B). After Lin's trial, the Supreme Court provided guidance on how to construe a similar statutory provision: "[d]eciding whether the . . . clause covers a crime . . . requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." Johnson v. United States, 135 S. Ct. 2552, 2557 (2015). Lin argues that the "ordinary case" of Hobbs Act extortion does not involve a substantial risk of the use of physical force.

Because Lin did not raise this argument below, it is reviewed for plain error. See Fed. R. Crim. P. 52(b). Plain error review requires the defendant to show: "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." United States v. Vilar, 729 F.3d 62, 70 (2d Cir. 2013) (quoting United States v. Marcus, 560 U.S. 258, 262 (2010)).

"For an error to be plain, it must, at a minimum, be clear under current law." United States v. Whab, 355 F.3d 155, 158 (2d Cir. 2004) (quotation marks omitted) (quoting United States v. Weintraub, 273 F.3d 139, 152 (2d Cir. 2001)). "We typically will not find such error where the operative legal question is unsettled, including where there is no binding precedent from the Supreme Court or this Court." Id. (quotation marks omitted).

It is far from clear that the "ordinary case" of Hobbs Act extortion would not entail a substantial risk of the use of physical force. Although Lin cites several Second Circuit cases indicating that fear of economic harm can be *sufficient* for Hobbs Act extortion, these examples are not necessarily the "ordinary case." Therefore, even if the district court did err, such error was not "clear or obvious."[1]

b. Lin asserts error in the aiding and abetting instructions on his 18 U.S.C. § 924(c) count. After Lin's trial, the Supreme Court decided Rosemond v. United States, 134 S. Ct. 1240, 1251-52 (2014), which held that a defendant may not be convicted for aiding and abetting use of a firearm in relation to a crime of violence unless the district court instructs the jury that the defendant had "advance knowledge of a firearm's presence." The district court did not do so, and the government concedes that Rosemond renders the instructions erroneous.

We review for plain error and affirm Lin's conviction because there is not a "reasonable probability that the error affected the outcome of the trial." United States v. Prado, 815 F.3d 93, 102 (2d Cir. 2016) (quoting United States v. Marcus, 628 F.3d 36, 42 (2d Cir. 2010)).

Lin argues that he did not know his bodyguard was carrying a weapon when Lin and his bodyguard entered a nightclub in July 2004; this bodyguard shot three people, killing two. However, two witnesses testified that Lin verbally ordered his bodyguard to "shoot" one of the victims, which would support an inference of foreknowledge. App'x at 308, 640. Lin attacks the credibility of these witnesses and argues that there is no other evidence to suggest Lin's advance knowledge. However, a third witness testified that, in a phone call after the murder, Lin said he had only intended his bodyguard "to shoot [the victim] on his arms or legs." App'x at 511. The testimony of these three witnesses defeats any "reasonable probability" that

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[1] Lin also asserts for the first time on appeal that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. We rejected that argument in United States v. Hill, 832 F.3d 135, 145 (2d Cir. 2016).

the erroneous jury instruction would have affected the trial's outcome.[2]

3. Lin's racketeering convictions required a jury finding of at least two acts of racketeering activity. See 18 U.S.C. §§ 1962(c) & (d); 1961(5). The special verdict listed five acts of racketeering activity: murder in violation of state law, extortion, and three acts of conducting an illegal gambling operation. Lin contends that there is insufficient evidence to support the findings as to gambling because the government failed to introduce evidence that he conducted games of chance as defined by state law.

Assuming Lin is correct, the jury still would have found that Lin engaged in two acts of racketeering (murder and extortion). Although two predicate acts can justify a racketeering conviction, Lin argues that the jury might have acquitted him if it had to rely only on the murder and extortion charges. In at least two instances, we have declined to uphold racketeering convictions after invalidating several of the predicate acts, notwithstanding two or more remaining valid predicate acts. See United States v. Biaggi, 909 F.2d 662, 693 (2d Cir. 1990); United States v. Delano, 55 F.3d 720, 728-29 (2d Cir. 1995). However, in those cases, we emphasized that the invalidated predicate acts "represented the bulk of th[e] [racketeering] prosecution, eclipsing all else." Delano, 55 F.3d at 729. It cannot be said that issues related to gambling "eclipsed" discussion of murder and extortion. Most of the government's closing argument dealt with the murders and other violence associated with Lin. We decline to vacate Lin's racketeering convictions.

4. Lin requests a new trial based on the government's purportedly improper summation. "[A] defendant who seeks to overturn his conviction based on alleged prosecutorial misconduct in summation bears a heavy burden," and must show that the allegedly improper comments, "in the context of the entire trial, [were] so severe and significant as to have

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[2] We would reach the same conclusion regardless of whether the government or Lin bears the burden of establishing prejudice (or the lack thereof). Accordingly, we need not consider whether the "modified plain error rule," which places the burden on the government, remains good law. See Prado, 815 F.3d at 102.

substantially prejudiced him, depriving him of a fair trial." United States v. Farhane, 634 F.3d 127, 167 (2d Cir. 2011) (quotation marks and citations omitted).

Lin asserts that the government summation improperly shifted the burden of proof to the defense, disparaged defense counsel, and vouched for the government's witnesses. We disagree. When read in context, the prosecutor's comments fairly responded to Lin's attack on the credibility of the government witnesses. "The government is ordinarily permitted to respond to arguments impugning the integrity of its case." United States v. Bautista, 23 F.3d 726, 733 (2d Cir. 1994) (quotation marks and citation omitted). In any event, Lin has not sustained his "heavy burden" of showing that the comments were so severe in the context of the entire proceeding as to deprive Lin of a fair trial. Farhane, 634 F.3d at 167.

5. Lin challenges his sentence as procedurally and substantively unreasonable. Lin did not raise these challenges below, so they are reviewed for plain error. United States v. Gamez, 577 F.3d 394, 397 (2d Cir. 2009).

a. Lin argues that the sentencing range was miscalculated because his racketeering guideline range was pegged to first-degree murder rather than second-degree murder. Lin points to no precedent indicating this was error. Indeed, we have held in a similar case that first-degree murder could be the proper reference, at least in some circumstances. See United States v. Minicone, 960 F.2d 1099, 1110 (2d Cir. 1992). If there was error, it was not "clear," and therefore not plain. See Whab, 355 F.3d at 158.

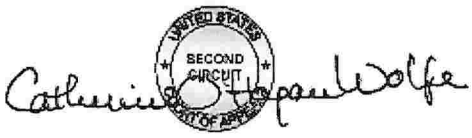
b. Lin contends that the district court's brief explanation of the sentence was insufficient to ensure that the district court adequately considered the appropriate sentencing factors. However, the district court acknowledged the seriousness of Lin's crime, mentioned his personal traits, stated that she reviewed all of the parties' filings, listened to Lin's sentencing statement, and adopted the findings contained in the Presentence Report. Lin has failed to show that the brevity of the court's explanation "seriously affects the fairness, integrity or public reputation of judicial proceedings." Vilar, 729 F.3d at 70. Consequently, there is no plain error.

c. Lin alludes to the possibility that his ethnicity affected his sentence. The comments that Lin cites do not come close to suggesting that the district court's sentencing was improperly influenced by race.

d. Lin argues his life sentence is substantively unreasonable. But Lin was responsible for his subordinate purposefully killing one person and inadvertently killing a bystander. Lin also engaged in racketeering and extortion. His sentence was "within the range of permissible decisions," and we do not disturb it. United States v. Rigas, 490 F.3d 208, 238 (2d Cir. 2007) (quoting United States v. Fuller, 426 F.3d 556, 562 (2d Cir. 2005)).

For the foregoing reasons, and finding no merit in Lin's other arguments, we hereby **AFFIRM** the judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of May, two thousand seventeen.

United States of America,

Appellee,

v.

Xing Lin,

Defendant - Appellant.

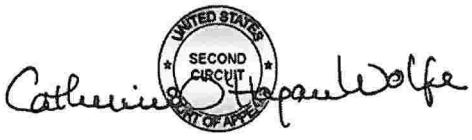
ORDER

Docket No: 14-4133

Appellant, Xing Lin, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



PETITIONER'S APPENDIX B

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 44. Firearms (Refs & Annos)

18 U.S.C.A. § 924

§ 924. Penalties

Effective: October 6, 2006
Currentness

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

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

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

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

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

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

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

(D) Notwithstanding any other provision of law--

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

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

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

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

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

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

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

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

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner

or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title 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, and,

notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) 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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

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

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

(k) A person who, with intent to engage in or to promote conduct that--

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) Penalties relating to secure gun storage or safety device.--

(1) In general.--

(A) Suspension or revocation of license; civil penalties.--With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing--

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) Review.--An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) Administrative remedies.--The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

CREDIT(S)

(Added Pub.L. 90-351, Title IV, § 902, June 19, 1968, 82 Stat. 233; amended Pub.L. 90-618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1223; Pub.L. 91-644, Title II, § 13, Jan. 2, 1971, 84 Stat. 1889; Pub.L. 98-473, Title II, §§ 223(a), 1005(a), Oct. 12, 1984, 98 Stat. 2028, 2138; Pub.L. 99-308, § 104(a), May 19, 1986, 100 Stat. 456; Pub.L. 99-570, Title I, § 1402, Oct. 27, 1986, 100 Stat. 3207-39; Pub.L. 100-649, § 2(b), (f)(2)(B), (D), Nov. 10, 1988, 102 Stat. 3817, 3818; Pub.L. 100-690, Title VI, §§ 6211, 6212, 6451, 6460, 6462, Title VII, §§ 7056, 7060(a), Nov. 18, 1988, 102 Stat. 4359, 4360, 4371, 4373, 4374, 4402, 4403; Pub.L. 101-647, Title XI, § 1101, Title XVII, § 1702(b)(3), Title XXII, §§ 2203(d), 2204(c), Title XXXV, §§ 3526, 3527, 3528, 3529, Nov. 29, 1990, 104 Stat. 4829, 4845, 4857, 4924; Pub.L. 103-159, Title I, § 102(c), Title III, § 302(d), Nov. 30, 1993, 107 Stat. 1541, 1545; Pub.L. 103-322, Title VI, § 60013, Title XI, §§ 110102(c), 110103(c), 110105(2), 110201(b), 110401(e), 110503, 110504(a), 110507, 110510, 110515(a), 110517, 110518(a), Title XXXIII, §§ 330002(h), 330003(f)(2), 330011(i), (j), 330016(1)(H), (K), (L), Sept. 13, 1994, 108 Stat. 1973, 1998, 1999, 2000, 2011, 2015, 2016, 2018, 2019, 2020, 2140, 2141, 2145, 2147; Pub.L. 104-294, Title VI, § 603(m)(1), (n) to (p)(1), (q) to (s), Oct. 11, 1996, 110 Stat. 3505; Pub.L. 105-386, § 1(a), Nov. 13, 1998, 112 Stat. 3469; Pub.L. 107-273, Div. B, Title IV, § 4002(d)(1)(E),

Div. C, Title I, § 11009(e)(3), Nov. 2, 2002, 116 Stat. 1809, 1821; Pub.L. 109-92, §§ 5(c)(2), 6(b), Oct. 26, 2005, 119 Stat. 2100, 2102; Pub.L. 109-304, § 17(d)(3), Oct. 6, 2006, 120 Stat. 1707.)

AMENDMENT OF SECTION

<Pub.L. 100-649, § 2(f)(2)(B), (D), Nov. 10, 1988, 102 Stat. 3818, as amended Pub.L. 101-647, Title XXXV, § 3526(b), Nov. 29, 1990, 104 Stat. 4924; Pub.L. 105-277, Div. A, § 101(h) [Title VI, § 649], Oct. 21, 1998, 112 Stat. 2681-528; Pub.L. 108-174, § 1, Dec. 9, 2003, 117 Stat. 2481; Pub.L. 113-57, § 1, Dec. 9, 2013, 127 Stat. 656, provided that, effective 35 years after the 30th day beginning after Nov. 10, 1988 [see section 2(f)(1) of Pub.L. 100-649, set out as a note under 18 U.S.C.A. § 922], subsec. (a)(1) of this section is amended by striking "this subsection, subsection (b), (c), or (f) of this section, or in section 929" and inserting "this chapter"; subsec. (f) of this section is repealed; and subsecs. (g) through (o) of this section are redesignated as subsecs. (f) through (n), respectively.>

VALIDITY

<The United States Supreme Court has held that the imposition of an increased sentence under the residual clause of the Armed Career Criminal Act (18 U.S.C.A. § 924 (e)(2)(B)(ii)), violates the Constitution's guarantee of due process, see Johnson v. U.S., U.S. June 16, 2015, ___ U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569, 2015 WL 2473450. >

Notes of Decisions (3720)

18 U.S.C.A. § 924, 18 USCA § 924
Current through P.L. 115-45. Title 26 current through 115-52.

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 95. Racketeering (Refs & Annos)

18 U.S.C.A. § 1951

§ 1951. Interference with commerce by threats or violence

Currentness

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

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

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

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

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 793; Pub.L. 103-322, Title XXXIII, § 330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

Notes of Decisions (1760)

18 U.S.C.A. § 1951, 18 USCA § 1951
Current through P.L. 115-45. Title 26 current through 115-52.

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