No. 18-_____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

Hector Medina,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

SHOULD FIRST DEGREE ROBBERY WITH USE OF A DANGEROUS INSTRUMENT UNDER NEW YORK PENAL LAW § 160.15(3) QUALIFY AS A CRIME OF VIOLENCE FOR PURPOSES OF THE CAREER OFFENDER GUIDELINES?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Hector Medina respectfully petitions this Court for a writ of certiorari to review the judgment and Order of the United States Court of Appeals for the Second Circuit entered on May 24, 2018.

OPINION BELOW

By judgment dated June 20, 2017, following petitioner Hector Medina's entry of a plea of guilty to both counts in a two-count indictment charging narcotics distribution and conspiracy to distribute narcotics, Mr. Medina was sentenced to 240 months in prison. A. 8-13.

On May 24, 2018, a panel of the Second Circuit affirmed the Petitioner's conviction. *United States v. Medina,* No. 17-2047cr, 2018 WL 2339439 (2d Cir. May 24, 2018). A. 1.

JURISDICTION

The Court of Appeals' judgment affirming the petitioner's sentence was entered on May 24, 2018. Neither party filed a Petition for Rehearing. The 90-day period for filing this Petition for Certiorari would have expired on August 22, 2018. The petition is being filed by postmark on or before

that date. Rules 13.1, 13.3, 13.5, 29.2, 30.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Sentencing Guideline ("U.S.S.G." or the "Guidelines") § 4B1.1 provides that "[a] defendant is a career offender" subject to enhanced sentencing Guidelines if, *inter alia*, "the defendant has at least two prior felony convictions of [a narcotics crime or] a crime of violence."

U.S.S.G. § 4B1.2(a), in turn, provides that:

The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . has an element the use, attempted use, or threatened use of physical force against the person of another, or is . . . robbery . . . ."

STATEMENT OF THE CASE

This appeal centers on the relationship between Mr. Medina's two prior robbery convictions – the first a 2002 New York State court conviction for Robbery in the First Degree (the "State Court Robbery") and the second in the United States District Court for the Southern District of New York for

Hobbs Act robbery conspiracies (the "Federal Robbery Conspiracy"), which included a count of conspiracy to commit the State Court Robbery.

The District Court's Sentencing Determination

The district court, as affirmed by the Second Circuit, held that both the robbery and the conspiracy to commit the robbery each counted as a prior crime and therefore a separate strike for purposes of the U.S.S.G.'s 4B1.1's Career Offender Guidelines. Application of the three-strikes Guidelines more than doubled Mr. Medina's Guidelines sentencing range.

At sentencing, Mr. Medina's counsel raised to the district court that the State Court Robbery conviction should not qualify as a crime of violence for purposes of the Career Offender Guidelines. The district court nonetheless determined that the Career Offender Guidelines were appropriate and imposed a sentence of 240 months in prison – 20 months below the low-end of the Guidelines range calculated by the district court. A. 8.

The Court of Appeals' Decision

The United States Court of Appeals for the Second Circuit determined that the Guidelines require the substantive robbery conviction and the conspiracy conviction – a conspiracy with one object, to commit the same robbery – were to be treated as two separate strikes for purposes of the

Career Offender Guidelines' three-strikes-and-you're-out provision found in U.S.S.G. § 4B1.1. *United States v. Medina*, __ F. App'x __, 2018 WL 2339439, at *1-2 (2d Cir. May 24, 2018).

The Second Circuit held that this was so because the two separate convictions for the same robbery – one in state court and one in federal court – "were charged in different charging instruments, and the sentence for the convictions were imposed on different days." *Id.* at *2. "Section 4A1.2(a)(2), therefore, considers the convictions separate for purposes of determining criminal history points." *Id.*

Mr. Medina had argued in his appellate brief that, even if the Guidelines were correctly decided, they were nonetheless substantively unreasonable. Mr. Medina's argument was as follows. The factors for determining treatment of criminal history were intended to identify offenders with a greater criminal history and who pose a correspondingly greater likelihood of recidivism. *See* U.S.S.G. Ch. 4, Pt. A, Commentary ("The specific factors included in § 4A1.1 and § 4A1.3 are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior.").

There is no indication that the sentencing commission believed criminal history involving a substantive crime and an agreement to commit

the substantive crime, taken together, indicate a defendant posing a greater threat of recidivism (or one who is more dangerous society) than a defendant who was only previously charged or convicted of either the substantive crime of the conspiracy.

Mr. Medina therefore argued that counting both the robbery and the one-object conspiracy to commit the robbery as separate prior offenses – two separate strikes – for purposes of the Career Offender Guidelines' three-strikes-and-you're-out provision. That provision more than doubled Mr. Medina's Guidelines by deeming him a three-strikes offender because it treated the two convictions for the same crime as both the first and the second strikes.

In affirming the sentence, the Second Circuit did not address this issue. Instead, it determined that the district court's sentence was substantively reasonable because Mr. "Medina has a lengthy criminal history involving several violent crimes and controlled substances offenses." *Medina*, 2018 WL 2339439, at *3.

Mr. Medina's appellate brief did not make any argument that the State Court Robbery conviction ought not be treated as a "crime of violence" for purposes of applying the Career Offender Guidelines.

Changes in New York Law on Robbery in the First Degree

In November 2017, over one month after Mr. Medina filed his appellate brief in the United States Court of Appeals for the Second Circuit, the Second Department – the intermediate appellate court covering approximately half of the State of New York's population – issued a new ruling on the robbery statute under which Mr. Medina had been convicted. *See People v. Williams*, 64 N.Y.S.3d 294 (App. Div. 2017).

Williams addresses Robbery in the First Degree charged under New York Penal Law § 160.15(3). A person is guilty of Robbery in the First Degree under this subdivision if she or he "forcibly steals property and in the course thereof, uses or threatens the immediate use of a dangerous instrument." *Williams*, 64 N.Y.S.3d at 789,

In *Williams*, the Second Department held that duct tape is a "dangerous instrument" because, when placed over someone's mouth, it is "'readily capable of causing serious physical injury.'" 64 N.Y.S.3d at 297 (citation omitted). Although placing duct tape on someone's mouth may risk serious injury, it does not involve "*violent* force" that is essential to a "violent felony" as the term has been construed by the Supreme Court. *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original). That is because minor uses of force do not rise to the level of violence that

the ACCA requires. *United States v. Castleman*, __ U.S. __, 134 S. Ct. 2405 (2014).

Williams was an alteration of New York law. In fact, one judge on the intermediate appellate court's panel dissented because he believed it broke new legal ground to hold that "duct tape used to restrain the complainant constituted a 'dangerous instrument.'" 64 N.Y.S.3d at 298 (Barros, J., dissenting).

When "duct tape [i]s not shoved inside [a] mouth so as to injury choke or suffocate," *Williams*, 64 N.Y.S.3d at 299 (Barros, J., dissenting), and is instead merely placed over the person's mouth, no "*violent* force" is employed.

Thus, *Williams* establishes that a § 160.15(3) robbery is broader than a "violent felony" because it can be committed with less than "*violent* force." And without the § 160.15(3) conviction counting as a "violent felony," Mr. Medina lacks the two prior convictions necessary to subject him to the Career Offender Guidelines.

When Mr. Medina's state court robbery conviction in violation of § 160.15(3) is not treated as a crime of violence, Mr. Medina is not categorized as a career offender and his Guidelines are over one hundred months lower on both the high and low end.

Williams was decided after Mr. Medina's appellate brief was submitted to the Second Circuit but before the government's opposition brief was submitted. Mr. Medina's counsel did not file a Fed. R. App. P. 28(j) letter, nor did it do anything to bring *Williams* to the Court of Appeals' attention. Mr. Medina's counsel never made an argument to the Second Circuit, either based on *Williams* or any other authority, that Robbery in the First Degree is not a crime of violence as that term us defined in U.S.S.G. § 4B1.2.

REASON FOR GRANTING CERTIORARI

MR. MEDINA'S CRIMINAL HISTORY CANNOT QUALIFY HIM AS A CAREER OFFENDER WITHIN THE MEANING OF U.S.S.G. § 4B1.1

Mr. Medina was improperly sentenced pursuant to the Career Offender Guidelines.

The error that occurred was to conclude that the State Court Robbery conviction, which was under New York Penal Law § 160.15(3), qualified as a crime of violence.

"'Crime of violence' has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to §4B1.2." § 2K2.1 cmt. n.1.

Guideline 4B1.2(a), in turn, defines "crime of violence" as: ... any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

The first clause will be referred to herein as the "Elements Clause" and the second will be referred to as the "Offenses Clause." Finally, Application Note 1 to § 4B1.2 provides: "'Crime of violence' . . . include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."

A. Mr. Medina's Robbery Conviction Is Not Within the Offenses Clause

With respect to § 4B1.2(a)(2)'s enumerated offense of "robbery," this Court inquires whether Mr. Medina's prior offenses "correspond[] substantially to the 'generic meaning' of robbery." *Walker*, 595 F.3d at 446. *See Jones*, 2017 WL 4456719, at *6.

Generic robbery is "the taking of property from another person or from the immediate presence of another person by force or by intimidation." *Walker*, 595 F.3d at 446. Under the categorical approach, this Court looks "only to the statutory definitions of the prior offenses, and not to particular

facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600 (1990). A court "must 'consider the offense generically, that is to say, . . . in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" *United States v. Johnson*, 616 F.3d 85, 88 (2d Cir. 2010) (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)). "A defendant's actual conduct is irrelevant to the inquiry," because "the adjudicator must 'presume that the conviction rested upon nothing more than the least of the acts criminalized'" under the state statute. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015) (quoting *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013)).

Even though Application Note 1 provides that robberies are to be treated as crimes of violence, New York robbery is not generic robbery because it does not require that the taking be from another person or the immediate presence of another person. The "person or immediate presence" element is crucial to generic robbery. It appears in every class of source to which courts turn, including:

- **Legal dictionaries and treatises**. See, e.g., 67 Am. Jur. 2d Robbery § 12 ("from his or her person or in his or her presence") (cited in Walker, 595 F.3d at 446); Black's Law Dictionary 1443 ("from the person of another, or in the person's presence"); 3 LaFave, Substantive Criminal Law § 20.3(c), at 178 (2d ed. 2003); 4 Wharton's Criminal Law § 458 (15th ed. 2017) ("from the person or presence of another").

- **Federal-law definitions**. *See, e.g.*, 10 U.S.C. § 922 (UCMJ robbery) ("from the person or in the presence of another"); 18 U.S.C. § 1951(b)(1) (Hobbs Act robbery) ("from the person or in the presence of another"); 18 U.S.C. § 2113(a) (bank robbery) ("from the person or presence of another").

- **Case law**. *See, e.g.*, *United States v. Lockley*, 632 F.3d 1238, 1244 (11th Cir. 2011); *United States v. Santiesteban Hernandez*, 469 F.3d 376, 380 (5th Cir. 2006) ("The majority of states require property to be taken from a person or a person's presence by means of force or putting in fear.").

Because Robbery in the First Degree Robbery pursuant to NYPL § 160.15(3) can be accomplished by forcibly taking property *outside* of someone's presence, *e.g.*, *People v. Smith*, 79 N.Y.2d 309, 313 (1992), it is broader than the generic robbery described in the Offenses Clause. As a result, First Degree Robbery pursuant to NYPL § 160.15(3) is not a "crime of violence" within the meaning of the Offenses Clause found in § 4B1.2(2).

B. Mr. Medina's Robbery Conviction Is Not Within the Elements Clause

Mr. Medina's robbery conviction was also not a crime falling within the Elements Clause, which requires a crime with an element the actual, threatened, or attempted use of physical force. U.S.S.G. § 4B1.2(a)(1).

This Court has adopted a narrow construction of the term "physical force." "[T]he phrase 'physical force' means violent force, that is, force capable of causing physical pain or injury to another person." *Johnson*, 559

U.S. at 140. Not all force is "violent force," and "[m]inor uses of force may not constitute 'violence' in the generic sense." *United States v. Castleman*, 134 S. Ct. 1405, 1412 (2014). For example, "a squeeze on the arm that causes a bruise" is "hard to describe . . . as violence," *id.* (quoting *Flores v. Ash*croft, 350 F.3d 666, 670 (7th Cir. 2003)); so too "relatively minor" "physical assaults" such as "pushing, grabbing, shoving, slapping, and hitting," *id.* at 1411–12. Rather, the Guidelines term "crime of violence," in conjunction with § 4B1.2(a)(1)'s emphasis on physical force, "suggests a category of violent, active crimes." *Johnson*, 559 U.S. at 140 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004)). Crimes of violence are those "characterized by extreme physical force, such as murder" and "forcible rape." *Id.* (quoting Black's Law Dictionary 1188 (9th ed. 2009)).

As a result, to qualify under § 4B1.2(a)(1)'s Elements Clause, a crime must be "violent" and "active," must involve "violent force" "capable of causing pain or injury" and "strong enough to constitute 'power,'" and must entail "extreme physical force" akin to that involved in "murder" and "forcible rape." *Johnson*, 559 U.S. at 140–42.

Mr. Medina was convicted under subdivision 3 of New York's Robbery in the First Degree statute, NYPL 160.15(3). A person is guilty of Robbery in the First Degree under subdivision 3 of she or he "forcibly steals

property and in the course thereof, uses or threatens the immediate use of a dangerous instrument." *People v. Williams*, 64 N.Y.S.3d 294 (App. Div. 2017). The amount of force used need not be great and need not be violent. It could be accomplished by forming a human wall or a brief tugging before taking an object. *E.g.*, *Buie v. United States*, 2017 WL 3995597, at *6-7 (S.D.N.Y. Sept. 8, 2017) (explaining that "'forcibly stealing property' under New York law does not always require violence" and holding that first-degree robbery is not violent under Armed Career Criminal Act's elements clause).

Duct tape is a "dangerous instrument" for purposes of the statute. *Id.* at 297. Although placing duct tape on someone's mouth may risk serious injury, it does not involve "*violent* force" that is essential to a "violent felony" as the term has been construed by this Court in *Johnson*, 559 U.S. at 140.

When "duct tape [i]s not shoved inside [a] mouth so as to injury choke or suffocate," *Williams*, 64 N.Y.S.3d at 299 (Barros, J., dissenting), and is instead merely placed over the person's mouth, no "*violent* force" is employed. Because placing duct tape on someone during the forcible taking of property can violate § 160.15(3), the robbery defined by that statute

broader than a "violent felony" because it can be committed with less than "*violent* force." Thus, it does not fall within the Force Clause.

Without the § 160.15(3) conviction counting as a "violent felony," Mr. Medina lacks the two prior convictions necessary to subject him to the Career Offender Guidelines.

Respectfully submitted,

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