

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

ISHMAEL ABDULLAH
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Ishmael Abdullah, pursuant to Supreme Court of the United States Rule 39 and 18 U.S.C. §3006A(d)(7), requests leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner was represented by counsel appointed under 18 U.S.C. §3006A(b) and (c) in the United States District Court of the District of New Jersey and on appeal by the United

States Court of Appeals for the Third Circuit, and consistent with Supreme Court of the United States Rule 39, no Affidavit is required to be filed in support of this motion.

Respectfully submitted,

A handwritten signature in cursive script, reading "David E. Schafer".

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in affirming the District Court's holding that New Jersey Statute §2C:12-1(b)(2), one of the subsections of New Jersey aggravated assault, satisfies the elements clause of the "crime of violence" definition of §4B1.2(a)(1) of the federal sentencing guidelines.

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Petitioner Ishmael Abdullah respectfully requests that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on October 2, 2018.

OPINION BELOW

On October 2, 2018, a panel of the United States Court of Appeals for the Third Circuit issued a precedential opinion affirming petitioner's sentence. This opinion is appended at 1a to 23a.

JURISDICTION

The judgment and opinion of the Third Circuit was filed on October 2, 2018. This petition has been filed within 90 days after entry of the judgment. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, "No person shall be deprived of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

On August 16, 2017, Abdullah pled guilty to conspiring to distribute heroin, in violation of 21 U.S.C. §846, and possession of a firearm by a convicted felon, in violation of 18 U.S.C. §922(g).

On January 10, 2018, Abdullah was ruled a career offender under the federal sentencing guideline provision, U.S.S.G. §4B1.1, due to two prior New Jersey felony convictions. The first resulted from selling two-fifths of a gram of heroin to an undercover Trenton police officer when he was eighteen. The second, which is the issue in this petition, was a conviction of third-degree aggravated assault, in violation of N.J.S.A. §2C:12-1.b(2). He was sentenced to 176 months in prison.

REASONS FOR GRANTING THE WRIT

1. This Court should grant review of the lower courts' holdings that New Jersey Statute §2C:12-1(b)(2), one of the subsections of New Jersey aggravated assault, satisfies the elements clause of the "crime of violence" definition of U.S.S.G. §4B1.2(a)(1)

The only issue in this petition is whether Abdullah meets the third prong of the career offender enhancement of the federal sentencing guidelines, U.S.S.G. §4B1.1(a), which requires that "(3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." Abdullah's petition is further narrowed by his acquiescence that his 2010 conviction in New Jersey state court was a "controlled substance offense" that met the criteria for one of these two prior felony convictions (4a, f. n. 2). The sole question is whether his 2015 conviction in New Jersey state court for aggravated assault with a deadly weapon was a "crime of violence." (4a, f. n. 3).

Abdullah's petition is further restricted to the first section of the 2015 guidelines' definition of "crime of violence." This section is referred to by the courts as the "elements clause," U.S.S.G. §4B1.2(a)(1), which earmarks an offense punishable by imprisonment for a term over a year that "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another" (7a).

In a nutshell, Abdullah submits that no element of the New Jersey

aggravated assault subsection of which he was convicted denotes the use, attempted use, or threatened use of "physical force," and New Jersey's definition of "deadly weapon" is subjective to the victim's thought process and much broader than the objective definition of the Commonwealth of Pennsylvania cases upon which the lower courts relied.

The New Jersey third-degree aggravated assault subsection of which Abdullah was convicted states:

2C:12-1. Assault

....

b. Aggravated assault. A person is guilty of aggravated assault if he:

....

(2) Attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon;

(4a, f. n. 3; 9a to 13a, f. n. 9).

The lower courts held that, if there was bodily injury, there had to have been physical force:

The term "physical force" has been interpreted by the Supreme Court to mean "force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010).

(16a).

In N.J.S.A. §2C:11-1, New Jersey distinguishes three types of "injury"—bodily injury, serious bodily injury and significant bodily injury:

- a. "Bodily injury" means physical pain, illness or any impairment of physical condition;
- b. "Serious bodily injury" means bodily injury which creates a risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;...
-
- d. "Significant bodily injury" means bodily injury which creates a temporary loss of the function of any bodily member or organ or temporary loss of any one of the five senses.

(16a to 17a).

The Third Circuit relied upon *United States v. Castleman*, 134 S. Ct. 1405 (2014), in its most recent *Pennsylvania* aggravated assault case, *United States v. Ramos*, 892 F. 3d. 599 (3d Cir. 2018), in holding that bodily injury necessarily involves the use of physical force: "First, a 'bodily injury' must result from 'physical force.'" *Castleman* at 1414.

However, *Castleman* used a *modified* categorical approach (as opposed to the categorical, elemental analysis used in the instant case) to determine whether Castleman's Tennessee indictment "entail(ed) the elements necessary to constitute the *generic federal offense*" of a misdemeanor crime of domestic violence. *Ibid* (emphasis added). *Castleman* narrowly interpreted Congress's intent when it enacted 18 U.S.C. §921 (a)(33)(A), and its holding should relate only to that specific federal statute:

(W)e hold that Congress incorporated *the common-law meaning of "force"—namely, offensive touching*—in §921(a)(33)(A)'s definition of a "misdemeanor crime of domestic violence."

Id. at 1410 (citations omitted; emphasis added).

"Physical force" has a presumptive common-law meaning, and the question is simply whether that presumptive meaning makes sense defining "a misdemeanor crime of domestic violence."

....

It is impossible to cause bodily injury without applying force *in the common law sense*.

Id. at 1412, 1415 (emphasis added).

Castleman discussed degrees of force defined under common law; it did not analyze the intent of the stste legislature, a task reserved for the categorical approach and an elemental analysis.

There is no indication that the New Jersey legislature concluded, "if there is bodily injury, there *must have been force used*," when drafting either the original or an amended version of its aggravated assault statute (*see* N.J.S.A. §2C:12-1, Comment, *especially* sections 1. ("History; prior law") and 3. ("Bodily injury")).

Its intent was the opposite. Despite the Third Circuit's agreement with the District Court that *United States v. Martinez-Flores*, 720 F.3d 293 (5th Cir. 2013) should be distinguished because it dealt with the enumerated clause rather than the elements clause of another third-degree subsection of New Jersey's aggravated

assault statute, (*see* N.J.S.A. §2C:12-1.b.(7), 21a, f. n. 13, and *Martinez-Flores* at 295-296), the Fifth Circuit described how a federal court should interpret a state statute, deferring to a state legislature's statutory construction whether the federal court is dissecting a state statute under the elements or the enumerated clause:

Although it is a question of federal law whether an offense constitutes a crime of violence under §2L1.2, "*we look to state law to determine (the offense's) nature and whether its violation is a crime of violence under federal law.*"

Id. at 297 (emphasis added; citations omitted). The Third Circuit's view that the Fifth Circuit's opinion was "inapposite because it addressed ... a different guideline," (21a, f. n. 13), countered its own precedent that "crime of violence" determinations are similar under the INA, ACCA, and career offender enhancements. *United States v. Hopkins*, 577 F. 3d 507, 511 (3d Cir. 2009); *Baptiste v. Attorney General*, 841 F.3d 601, 607-608 (3d Cir. 2016).

When we say the New Jersey legislature's intent was the opposite of "if there was bodily injury, there *must have been force used*" when drafting Abdullah's aggravated assault subsection, one only has to look at New Jersey's robbery statute:

2C:15-1. Robbery

a. Robbery defined. A person is guilty of robbery if, in the course of committing a theft, he:

(1) Inflicts bodily injury *or* uses force upon another, or

The Third Circuit brushed aside this argument despite the obvious familiarity of the New Jersey legislature with the terms "bodily injury" and "use of force." (18a-8 to 19a-12). By the New Jersey legislature's deliberate use of the disjunctive "or," Third Circuit precedent holds that it distinguished "inflicting bodily injury" as having a different meaning than "using force." *United v. Brannan*, 74 F.3d 448, 453 (3d Cir. 1996) ("We view 'or' as a disjunctive, connecting phrases with different meanings"). *See, also, United States v. Parson*, 955 F. 2d 858, 866 (3d Cir. 1992): "At first blush, the difference in phrasing appears trivial because *most* physical injury comes from the use of physical force" (emphasis added). Likewise, Third Circuit precedent would view the absence of the term "using force" in Abdullah's aggravated assault subsection as meaning that the New Jersey legislature purposefully omitted it as an element:

It is a canon of statutory construction that the inclusion of certain provisions implies the exclusion of others. The doctrine of *inclusion unius est exclusion alterius* "informs a court to exclude from operation those items not included in a list of elements that are given effect expressly by the statutory language."

United States v. McQuilkin, 78 F.3d 105, 108 (3d Cir. 1996). *See, also, Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2344 (f. n. 36) (1997):

Where Congress included particular language in one section of a statute *but omits it in another section of the same Act*, it is generally presumed that Congress acts intentionally and

purposely in the disparate inclusion and exclusion.
(Emphasis added).

New Jersey robbery is a first or second-degree crime, whereas Abdullah's aggravated assault was third-degree, a possible reason for the New Jersey legislature to leave out the element of the "use of force." The Third Circuit's concession that "it stretches the imagination to think 'a person could ... attempt to injure, another person with a deadly weapon without engaging in ... forceful conduct,'" (20a-1 to 5), leaves open that it could happen.

As noted above, the Third Circuit relied heavily on its recent decision in *Ramos*, *supra* at 606 (8a-13to14), which in turn repeatedly cited the reasoning of *Castleman*, *supra* at 1410 to 1415 (*supra* at pages 5 and 6) (17a-24 to 18a-7). However, the Third Circuit noted that *Castleman* made no decision on whether "bodily injury" necessarily entailed "violent force" because *Castleman* addressed only common-law force (18a, f. n. 12). The Third Circuit bridged that "gap" by relying on the "'deadly weapon' requirement in §2C:12-1 (b) (2)" (*Ibid*). Yet New Jersey's "deadly weapon" statute is much broader than Pennsylvania's "deadly weapon" statute that was at issue in *Ramos*.

Pennsylvania's "deadly weapon" statute, 18 Pa. C.S.A. §2301, states:

"Deadly weapon." Any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury,

or any other device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or bodily injury.

New Jersey's "deadly weapon" statute, N.J.S.A. §2C:11-1.c., states:

"Deadly weapon" means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or intended to be used, is known to be capable of producing death or serious bodily injury, or which in the manner it is fashioned *would lead the victim reasonably to believe it to be capable* of producing death or serious bodily injury; ... (emphasis added).

There is a "realistic probability" that a man, who was familiar to law enforcement as a trouble-maker, could be convicted for New Jersey aggravated assault for swinging and missing ("Attempts to cause," N.J.S.A. 2C:12-1 b. (2)) a woman in a dark alley behind a bar with a whiffle-ball bat that the victim reasonably believed was a wooden bat capable of not only "bodily injury," but of seriously injuring or killing her and was traumatized. This New Jersey victim's subjectivity establishing an element of aggravated assault with a deadly weapon distinguishes it from Pennsylvania's aggravated assault with a deadly weapon noted in the Third Circuit's *Ramos* and takes it out of the realm of common-law domestic battery described in *Castleman*.

In fact, the New Jersey legislature's reliance on the subjectivity of the victim

makes Abdullah's aggravated assault subsection broader than the generic offense of aggravated assault and out of the category of a crime of violence:

For more than 25 years, our decisions have held that the prior crime qualifies as an ACCA predicate if, but only if, its elements are *the same as, or narrower than*, those of the generic offense.

Mathis v. United States, 136 S. Ct. 2243, 2247 (2016) (emphasis added). *See, also*, *Montcrieffe v. Holder*, 133 S. Ct. 1678, 1684-1685 (2013) (citations omitted):

Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon (nothing) more than the least of the) acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense.

....

(O)ur focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'

CONCLUSION

For the above reasons, Petitioner Ishmael Abdullah respectfully requests that the Court grant his Petition for a Writ of Certiorari so that he is not ruled a career offender under the federal sentencing guideline provision, U.S.S.G. §4B1.1.

Respectfully submitted,



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