01No. _____

In The
SUPREME COURT OF THE UNITED STATES

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EMORY WATKINS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (DN:15-3292)

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QUESTIONS PRESENTED

The questions presented in this application is:

(1) Whether the residual clause at 18 USC Sec. 924 (c) (3) (B) is void for vagueness, a question that divides seven Court of Appeals?

2. Whether the Hobbs Act conspiracy automatically can be characterized as a categorical crime of violence?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Petitioner Emory Watkins and Appellee United States of America.

TABLE OF CONTENTS

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Petitioner, Emory Watkins, petitions for a Writ of Certiorari to review the order of the United States Court of Appeals for the Second Circuit, entered on December 3, 2018 (A.1-5).

OPINION BELOW.

The opinion of the United States Court of Appeals for the Second Circuit appears at Appendix A.1-5.

STATEMENT OF JURISDICTION AND TIMELINESS

Petitioner seeks review of the opinion of the Second Circuit Court of Appeals determination rendered on December 3, 2018. This Court's jurisdiction is

invoked under 28 USC Sec. 1254 (1) by the timely filing of this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

Section 924 (c) (3)(B) of Title 18 of the United States Code 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 be used in the course of committing the offense."

STATEMENT OF THE CASE

By decision dated December 3, 2018, the Second Circuit (Jacobs, Pooper, and Wesley) affirmed Watkins' conviction. Watkins had appealed to the Second Circuit from a judgment of the United States District Court for the Eastern District of New York, rendered September 25, 2015 re-sentencing him to a modified sentence of three years on his conviction of conspiracy to commit robbery [18 USC Sec. 1951 (a)] and four years on his conviction on the use of a firearm in relation to a crime of violence [18 USC Sec. 924 (c)(1)(A)(1)]. The 3 year term was directed to run consecutively with the 4 year term and was specifically directed to run concurrently to a state sentence previously imposed on petition. An 8 year term of

supervised release to follow his federal term of imprisonment was also imposed (Wexler).

A. INDICTMENT

Petittioner and his co-defendants (Duane Costa, Terenton Drew, Frank Myers, and Gary France) were charged in a two count indictment with the crimes of conspiring to commit a robbery of the owners, employees and patrons of an illegal gambling operation in Hicksville, New York (Title 18, USC §§ 1951 (a) and 3551 et seq.) and use of a firearm (Title 18, USC, §§ 924 (c)(1)(A)9i), 2 and 3551 et seq.).

B. PLEA PROCEEDINGS

On March 12, 2012, petitioner appeared before Magistrate Gary A. Brown at which time he agreed to plead guilty to the two crimes charged in the indictment. The government explained the nature of the charges. According to the government, between January 8th and January 9th of 2011, petitioner with his four co-defendants conspired to rob an illegal gang gambling operation in Hicksville, New York (min. of 3-12-12, 8). Further, in connection with this robbery, the defendants carried one or more firearms (id. at 8-9). The government, pursuant to the Magistrate's inquiry, acknowledged that the weapon charge referred only to use and carrying and not brandishing or discharging (id. at 9). Petitioner said that he understood the charges, discussed the charges with his attorney, and was aware of the maximum sentence

that could be imposed upon him (id. at 9-10). The Magistrate interjected, stating that with respect to count one the maximum term was 20 years and with respect to count two the maximum term was life imprisonment. Further, with respect to the weapon charge, there was a five year minimum sentence which must be applied consecutively to count one (id. at 10).

Petitioner pleaded guilty to both counts one and two (id. at 13-14). Petitioner admitted that on January 9, 2010, "I conspired with others to rob an illegal gambling spot. I also carried multiple handguns in that attempt (id. at 14). The government in turn represented that its proof at trial would consist of the following:

> "The government would present the recordings, telephone calls, the meetings, which would show the existence of the conspiracy. The Defendant was also arrested along with – there were two cars with all the defendants in them on route to the illegal gaming establis(sic). Incident to that arrest, two loaded firearms were recovered. And in addition Mr. Watkins made post arrest statements admitted his involvement as well."

Whereupon, the Magistrate stated that he would recommend to Judge Wexler that the plea be accepted (id. at 15).

C. Pre-Sentence Report

The pre-sentence report first set forth the nature of the charges (¶¶1-14). Because the defendants had been arrested before entering the gambling establishment, no robbery actually occurred and thus, there was no impact on the

intended victims (¶ 15). It was also acknowledged that right after his arrest, appellant admitted his involvement in the instant offenses (¶ 16).

D. Sentencing Proceedings

On June 5, 2013, petitioner appeared for the imposition of sentence before the Hon. Leonard D. Wexler. The court set forth that the Guideline range was 151 to 188 months and that petitioner was a career offender (min. of 6-5-13. 4). Counsel pointed out that there was a mandatory 60 month consecutive sentence because petitioner pled guilty to the weapon count. According to counsel, it was the government's policy that any co-operating defendant should plead guilty to the most serious offense that they are charged with in order to enhance their credibility with the jury should they have to testify at trial. Counsel explained that petitioner was put in that situation when he entered the 924 (c) plea and that is why his guideline sentence is higher than the previously sentenced co-defendant (id. at 4-5). The court stated that it would downwardly depart but it could not buy appellant's excuses which it hears in every case. The court remarked that it had to protect the public. The court said: "I am going to depart because you did co-operate you did bring the whole case down but, still, you're the guy who gave them the guns. They knew to contact you. You didn't resist that. You gladly gave them the guns. You were involved just as everybody else." (id. at 16).

The court sentenced petitioner to three years on the robbery conspiracy count and three years supervised release. With respect to the firearm charge, the court sentenced him to five years which has to run concurrently and five years supervised released. The government corrected the court and said that it said concurrently rather than consecutively. The court then said that under the law it's consecutive. Therefore, petitioner was being sentenced to a total of eight years with credit for time served, said sentences to run concurrently with the state sentence.(id. at 17).

E. RE-SENTENCING

Petitioner appeared for the imposition of re-sentence pursuant to the Second Circuit's decision on September 25, 2015. The Second Circuit directed the district court to address whether it had the authority and discretion to downwardly depart with respect to Count Two, the gun charge 924(c).

The government essentially stated that aside from the 5K letter and "notwithstanding the . . any applicable statutory mandatory minimum sentence scheme or the 924 (c) conviction, it would rest on the court's discretion (id. at 6-7).

The court then asked petitioner what happened with the state sentence that he was serving. Petitioner responded "I will be released on the state sentence in

the middle of October of this year." (id. at 7).[1] Whereupon, the court re-sentenced petitioner to three years on the robbery conspiracy charge and downwardly departed from five to four years on the gun charge with the latter sentence to run consecutively to the former (a total of 84 months). The court again specifically directed this sentence to run concurrently with the state sentence (id. at 8-9).[2]

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[1] Though all parties, including the court, believed that petitioner would indeed be released in October and that the directive of a concurrent federal sentence would run concurrently with the state sentence, all parties were wrong. Because petitioner did not begin to serve his state sentence before the imposition of the federal sentence, the state subsequently refused to adhere to this directive.

[2] On March 22, 2017, pursuant to present counsel's request, the parties, including petitioner, appeared before Judge Wexler with the hope of resolving the court's re-sentencing intent that the aforesaid federal sentence run concurrently with the state sentence since petitioner did not receive state credit while serving his federal sentence (min. of 3-22-17, 2). The parties acknowledged that petitioner would complete the federal portion of his imprisonment sentence on April 12, 1017 and then be released to the state authorities to serve his sentence there (id. at 3). However, no attorney representing petitioner checked to determine whether in fact his federal sentence could run concurrently with this state sentence at either his sentence or re-sentence (which raised a Strickland issue). The problem was for whatever reason the imposition of the federal sentence was repeatedly delayed and the state sentence was imposed first, making it impossible for it to run concurrently with the federal sentence since he did not begin serving his state sentence (id. at 5-7).

Counsel stated that one of the solutions to implement Judge Wexler's intent of concurrent sentences, was to recognize that the consecutive sentence imposed pursuant to the 924 (C) charge be vacated. According to counsel, the Hobbs act conspiracy is not a crime of violence that would justify conviction of the 924 (C) conviction under United States v. Johnson. Therefore, instead of correcting this error on appeal or collaterally, the court could address this clear issue at the present time (id. at 7-9). Further, counsel asserted that there is also a clear error in adjudicating petitioner a career offender since the catalyst for this adjudication was a robbery conspiracy in the state court that could not be used to enhance the

F. Re-Sentencing Appeal to the Second Circuit

Petitioner appealed his re-sentence to the Second Circuit, raising the following argument:

"THE 924 (C) CHARGE SHOULD HAVE BEEN DISMISSED SINCE THERE IS NO PROOF IN THIS RECORD THAT THIS CRIME WAS COMMITTED IN FURTHERANCE OF A CRIME OF VIOLENCE; UNDER JOHNSON APPELLANT CANNOT BE DEEMED A CAREER OFFENDER AS CONSPIRACY TO COMMIT A ROBBERY IS NOT A VIOLENT FELONY; and THE INSTANT APPEAL SHOULD BE HELD IN ABEYANCE PENDING THE SUPREME COURT'S DETERMINATION OF THESE ISSUES IN DIMAYA V. LYNCH, 803 F.3D 1110 (9TH CIR, 2015), CERT GRANTED, 137 S.CT. 31 (2016)**."**

Subsequent to the filing of petitioner's appeal, the Second Circuit rendered a decision in United States v. Barrett, 903, F.3d 166 (2d Cir. 2018). Before oral argument, the Second Circuit directed the parties to address the applicability of United States v. Barrett, _ F.3d_ (2d Cir. 9/10/18).

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sentence under the career adjudication Guideline (id. at 9). Finally, the failure of both his sentencing counsel to raise this issue before the court raises a clear ineffective assistance of counsel issue (id.at 9-10).

The government opposed petitioner's request, stating primarily it is a matter that should now be corrected in the state courts (id. at 11-12).

The court denied petitioner's application, stating the problem is with the state courts (id. at 19).

For this Court's information, with the assistance of counsel, appellant was in fact released from state imprisonment shortly after he began serving that sentence.

G. Decision of the Second Circuit

On December 3, 2018, in a summary order, the United States Court of Appeals for the Second Circuit affirmed petitioner's conviction of re-sentence (A.1-6). The Court justified its affirmance by declaring that a Hobbs Act conspiracy, pursuant to its precedent in United States v. Hill, 890 F.3d 51 (2d Cir. 2018), to be a *per se* crime of violence. Though the government did not raise the issue at any time, the Second Circuit justified its holding by stating that even if a *Dimaya* error had been committed, this error was harmless. The Circuit, without any corroborating facts before it, held that the error was harmless since petitioner would still have pleaded guilty to the 924 (c) count. There is nothing in this record that supports this unsolicited opinion. The issue was not presented to the Circuit by any party. Therefore, petitioner had no opportunity to brief or address this point. In determining the merits of this petition, it is respectfully requested that this Court disregard this unwarranted portion of the Second Circuit's decision.

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS THE BEST FACTUAL SCENARIO OF ALL SEVEN CIRCUIT CASES IN CONTENTION TO RESOLVE ALL REMAINING QUESTIONS REGARDING THE APPLICATION OF DIMAYA TO THE VALIDITY OF 924 (C) (3) (B).

There is a deep split in the Circuits regarding the frequently raised issue whether 924(c)(3)(B)'s residual clause definition of "crime of violence" is constitutionality defective. Presently, four Circuits have embraced this Court's decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018) while three Circuits have rejected the Dimaya rationale of the categorical approach in favor of the "case specific" approach. In other words, the battle of words centers on what do the actual facts of the case portray rather than just applying the statutory terms to the ordinary case.[3] This Court has granted the government's petition for certiorari in United States v. Davis, F.3d (5th Cir. 9-7-2018), cert. granted 1-4-19) to settle this issue once and for all. It will not settle the critical constitutional issues in this case.

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[3]Four Circuits have held that Sec 924 (C0 (3)(B) is unconstitutional in light of Dimaya: United States v. Davis, 903 F.3d 483 (5th Cir. 2019); United States v. Eshetu, 898 F.3d 36 (D.C. Cir. 2018); United States v. Salas, 889 F.3d 681 (10th Cir. 2018) and now United States v. Simms, No. 15-4640 (4th Cir. 2019 (*en banc*). Three Circuits have upheld the residual clause: United States v. Douglas, 907 F.3d 1 (1st Cir. 2018); United States v. Ovales, 905 F.3d 1231 (11th Cir. 2018); ; United States v. Barrett. 903 F.3d 166 (2d Cir. 2018). Certiorari petitions are pending in these cases.

This Court should therefore grant review expeditiously in this case so that petitioner Watkins can join the respondents in Davis to address the wide spread disagreement whether *Johnson* and *Dimaya* in fact require the constitutional invalidation of Section 924 (c)(3)(B).

Of all cases under consideration for review by this Court, this case is the best vehicle to assess the constitutional issue fairly and dispassionately. This is the only case of the seven circuit cases where no actual violence was committed by petitioner. He was charged solely with the Hobbs Act conspiracy (along with the 924 charge) and was apprehended before the commission of any substantive crimes. More important, as opposed to all other cases under consideration, the Government conceded that petitioner never brandished any weapon or threatened anyone with any weapon. No person was actually harmed or even threatened by the use of a weapon by petitioner. Petitioner never made an admission of violence during his plea colloquy.

The present case thus differs dramatically from Davis, which will be heard by this Court. In Davis, supra, the record established without any doubt that the substantive charged robberies were indeed violent. The defendants brandished weapons and threatened harm to the robbery victims. In Barrett, supra, despicable acts of violence were employed including the murder of one of the victims; in Douglas,supra, the victims were tied and beaten bloody with a crow bar, in Ovales,

supra, a ten year old child was struck during the robbery. Hence, these Circuits had before it vicious substantive crimes underlying the predicate convictions. These cases depicted real world conduct. It could be deemed reasonable for those Circuits to base their interpretation of 924 (c) on the actual conduct of the defendants, rather than having to rely on a categorical approach that encompassed only the particular elements of the underlying conviction.

Given the sharply divergent fact patterns between Davis (and all other Circuit cases raising this issue) and this case ------ cases where violence permeated the case and the instant case where no violence was committed by granting review in this case (alongside Davis), the Court's ruling on 924 will be both final and comprehensive. The conviction here is infirm under the "case specific" mandate given that petitioner committed no act of violence and is similarly infirm under the categorical approach. Only the Watkins case clearly presents both these issues of concern in Dimaya. It is thus the best vehicle for deciding Section 924 (C) (3) (B)'s meaning and constitutionality in all respects. This case therefore does not fall under the umbrella of any of the seven conflicting Circuit opinions. Resolving this case together with Davis will resolve all Dimaya related issues.

2. THE HOBBS ACT CONSPIRACY IS NOT A CRIME OF VIOLENCE

To justify its affirmance in this case, the Second Circuit relied on its prior decision of United States v. Hill, 890 F.3d 1 (2d Cir. 2018) wherein the Circuit held

that the substantive Hobbs act robbery to be a categorical crime of violence within the definition of 924 (c). That characterization is not disputed. What is seriously disputed is the Second Circuits' gigantic leap of logic in Barrett, supra, when it held that based on Hill, supra, a Hobbs act conspiracy must then also be construed as a categorical crime of violence. Dimaya made clear that a conspiracy to commit a Hobbs Act robbery does not fit the force clause since "[C]onspiracy's elements are met as soon as the participants have made an agreement." 138 S. Ct. At 1219. *Accord,* United States v. Hubbard 825 F.3d 224 (4th Cir. 2016); United States v. Cardena, 824 F.3d 959 (7th Cir. 2016); United States v. Gore, 636 F.3d 728 (5th Cir, 2011). Accordingly, the proper inquiry is whether a particular defined offense in the abstract, is a crime of violence. The conspiracy offense does not necessarily require proof that a defendant used or threatened to use force. This Court should determine, the sister issue in these cases; to wit; whether a Hobbs Act conspiracy can be *per se* characterized as an act of violence.

The resounding answer should be no ! The Hobbs Acts Conspiracy is not per se a crime of violence. As already demonstrated, no violence was committed in this case. There is only the *agreement* to rob a gambling establishment. An agreement does not automatically contain the risk of violence. The Dimaya Court specifically warned that the courts cannot consider reputed risks arising after the offenses commission is over. For example, even assuming conspiracy may be a crime of

violence, it cannot consider facts after the conspiracy is concluded. Conspiracy is just an agreement to commit illegal acts. Here, the conspiracy concluded upon Watkins' arrest. No violence was used up to that point. With respect to the gun charge, as already pointed out, there is no allegation that petitioner brandished or used the weapons during the course of the conspiracy. Put simply, these are the facts the courts can consider — facts occurring only as the crime is being committed. It cannot assume or speculate as to the imaginary facts that might have occurred following the completion of the crime. To hold otherwise would be to sanction additional punishment on a "what if" basis, which standard clearly violates constitutional prohibitions of statutory vagueness. Judge Gorsuch put it succinctly: "[T]he statute here seems to require a judge . . . to guess whether a "substantial risk of "physical force attends its commission . . . *Johnson* held that a law that asks too much of courts while offering them so little by way of guidance is unconstitutionally vague." 135 S. Ct, at 15-16 (Gorsuch slip opinion).

Given these considerations, to automatically hold, as does the Second Circuit, that the Hobbs Act conspiracy is a crime of violence employees a standard of guessing as to what could possibly happen if a substantive crime was committed as well. *Dimaya* forbids this result. Significantly, the Second Circuit did not have to speculate in Barrett, supra, whether the charged Hobbs Act conspiracy (accompanied by substantive Hobb Act robberies) constituted a crime of violence.

In Barrett not only were the victims injured but a man was actually murdered during the commission of the Hobbs Act robbery. Here, as opposed to Barrett, the Second Circuit had no choice but to engage in a "judicially imagined ordinary case of a crime" to reach the conclusion that the Hobbs Act conspiracy in this case was a violent crime. The real world facts are just not present in this case. Moncriffe. V. Holder, 569 U.S. 184 (2013).

Finally, in accordance with Dimaya, supra, to be construed as an act of violence that element must either be admitted in a plea or proven beyond a reasonable doubt by a jury. Otherwise, a Sixth Amendment violation is implicated. And here, petitioner made no admission of the commission of violence of any kind ---- a far cry from the facts of Davis, Barrett, Douglas, and Ovalles,

This Court should therefore grant certiorari to determine whether the Second Circuits' conclusions in both Barrett and the present case that a Hobbs Act conspiracy is to be automatically considered a crime of violence violates the spirit and intent of Dimaya.

CONCLUSION

FOR THE REASONS GIVEN ABOVE, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: February 11, 2019

Respectfully Submitted,

/s/

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CERTIFICATION WORD COUNT

I certify that this brief contains 3834 words, according to the Word Count facility of Word Perfect, not including the Tables and the Relevant Statutes preceding the brief, and that the typeface, Times New Roman, 14 point font, conforms to the Rule of Court.

Dated: February 11, 2019

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/s/JULIA PAMELA HEIT

APPENDIX