

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ARISTIDES DUARTEZ, JR.,
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 WRIT OF CERTIORARI

LISA A. PEEBLES
Counsel of Record
Federal Public Defender
Northern District of New York
4 Clinton Square, 3rd Floor
Syracuse, New York 13202
Telephone: (315) 701-0080

Counsel for Petitioner

JAMES P. EGAN
Assistant Federal Public Defender

QUESTION PRESENTED

Whether Hobbs Act robbery qualifies as a “crime of violence” under the elements clause of 18 U.S.C. § 924(c)(A).

PARTIES TO THE PROCEEDING

All parties to petitioner's Second Circuit proceedings are named in the caption of the case before this Court.

TABLE OF CONTENTS

Questions Presented.....	i
Parties to the Proceeding	ii
Table of Authorities	iv
Decision Below	1
Jurisdiction	1
Statutory Provisions Involved.....	1
Statement of the Case	1
Reasons for Granting the Petition	8
Hobbs Act Robbery Does Not Qualify as a “Crime of Violence” Under the Elements Clause of 18 U.S.C. § 924(c)(A).	
Conclusion.....	13

TABLE OF AUTHORITIES

Cases

<i>Davis v. United States</i> , No. 18-431, 2019 WL 98544 (Jan. 4, 2019)	17
<i>Descamps v. United States</i> , 570 U.S. 254 (2013)	12
<i>Gonzalez v. Duenas-Alvarez</i> , 549 U.S. 183 (2007)	15
<i>Jean-Louis v. Attorney General</i> , 582 F.3d 462 (3d Cir. 2009)	16
<i>Johnson v. United States</i> , 135 S.Ct. 2551 (2015)	10
<i>Johnson v. United States</i> , 559 U.S. 133 (2010)	10, 13
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004)	14
<i>Matter of Ferreria</i> , 26 I. & N. Dec. 415 (BIA 2014)	16
<i>Moncrieffe v. Holder</i> , 133 S.Ct. 1678 (2013)	13
<i>North Carolina v. Covington</i> , 137 S.Ct. 1624 (2017)	17
<i>Ramos v. Attorney General</i> , 709 F.3d 1066 (11th Cir. 2013)	16
<i>Sessions v. Dimaya</i> , — U.S. —, 138 S.Ct. 1204 (2018)	12
<i>Stokeling v. United States</i> , 139 S.Ct. 544 (2019)	13
<i>Swaby v. Yates</i> , 847 F.3d 62 (1st Cir. 2017)	15
<i>Sylton v. Sessions</i> , 897 F.3d 57 (2d Cir. 2018)	15-16
<i>United States v. Castillo-Rivera</i> , 853 F.3d 218 (5th Cir. 2017) (en banc)	16
<i>United States v. Duartez</i> , 744 Fed.Appx. 34 (2d Cir. Dec. 6, 2018)	iii
<i>United States v. Grisel</i> , 488 F.3d 844 (9th Cir. 2007) (en banc)	16
<i>United States v. Hill</i> , 890 F.3d 51 (2d Cir. 2018)	14, 15
<i>United States v. Titties</i> , 852 F.3d 1257 (10th Cir. 2017)	16
<i>United States v. Torres-Miguel</i> , 701 F.3d 165 (4th Cir. 2012)	13

Statutes

18 U.S.C. § 924	<i>passim</i>
18 U.S.C. § 1951	8, 9-10

28 U.S.C. § 1254	8
28 U.S.C. § 1291	8

Other

Black's Law Dictionary 1216 (6th ed. 1990)	14
--	----

PETITION FOR WRIT OF CERTIORARI

Petitioner Aristides Duartez, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

DECISION BELOW

The summary order of the Court of Appeals is available at 744 Fed.App. 34. A 1.

JURISDICTION

The judgment of the Court of Appeals, which had jurisdiction pursuant to 28 U.S.C. § 1291, was entered on December 6, 2018. A 1. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Hobbs Act, 18 U.S.C. § 1951(a), states in part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires to do so, 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.

“Robbery” under the Hobbs Act is defined at § 1951(b)(1):

(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 any one in his company at the time of the taking or obtaining

Section 924(c)(1)(A) of Title 18 of the U.S.C. states in part:

[A]ny person who, during and in relation to a crime of violence . . . 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, [violates this section]

Section 924(c)(3) defines “crime of violence”:

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

- (A) has 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.

STATEMENT OF THE CASE

On May 8, 2015, a federal grand jury returned a two-count indictment charging Duartez with Hobbs Act robbery, in violation of 18

U.S.C. § 1951(a), and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

On March 15, 2016, Duartez filed a motion to dismiss count two of the indictment, which charged a violation of § 924(c). Relying on *Johnson v. United States*, 135 S.Ct. 2551 (2015), Duartez argued that the residual clause of § 924(c)(3)(B) was unconstitutionally vague. Moreover, Duartez contended that Hobbs Act robbery is not a crime of violence under § 924(c)(3)(A), the so-called “force” or “elements” clause (herein “elements clause”). Therefore, Duartez argued, because Hobbs Act robbery is no longer a crime of violence, he could not be convicted of brandishing a firearm in furtherance of a crime of violence, and the count charging a violation of § 924(c) should be dismissed.

The district court denied Duartez’s motion in a Decision and Order on April 26, 2016. Although agreeing that § 924(c) requires application of the categorical approach, the district court found that Hobbs Act robbery satisfies the elements clause of § 924(c)(3)(A). In doing so, the district court gave the word “force” its “ordinary meaning,” instead of the level of force required by the Supreme Court in *Johnson v. United States*, 559 U.S. 133 (2010). Finding that Hobbs Act robbery satisfies the

elements clause, the district court expressly declined to consider the constitutionality of the residual clause of § 924(c)(3)(B).

After the district court denied Duartez's motion to dismiss the indictment, he pled guilty on May 24, 2016 to both counts pursuant to a plea agreement preserving his right to appeal the court's denial of his motion to dismiss. On October 11 & 31, 2016, the district court imposed a sentence of 180 months' imprisonment, consisting of consecutive terms of 96 months on the Hobbs Act robbery offense and 84 months on the 924(c) offense, three years' supervised release, a \$200 special assessment, and ordering \$119,274.20 in restitution.

On December 6, 2018, the Court of Appeals for the Second Circuit issued a summary order affirming Duartez's conviction. In doing so, the Court of Appeals held that Duartez's argument that Hobbs Act robbery is not a crime of violence was "squarely foreclosed by Second Circuit precedent holding that Hobbs Act robbery does, in fact, categorically qualify as a 'crime of violence' under the 'force clause' of § 924(c)(3)(A)." A 1 (citing *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018)). Holding that "Duartez's conviction under § 924(c) may stand on that ground alone," the Court of Appeals declined to "address his second argument

that the [residual clause] is unconstitutionally void for vagueness under *Sessions v. Dimaya*, — U.S. —, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018).” A 2. Duartez did not seek rehearing.

REASONS FOR GRANTING THE PETITION

A defendant convicted of using or carrying a firearm during a “crime of violence” faces a minimum consecutive prison sentence of 5 years and a maximum of life. 18 U.S.C. § 924(c). Section 924(c)(3)(A) defines “crime of violence” as a felony offense that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” a provision referred to herein as the elements clause.

To determine whether a predicate offense qualifies as a “crime of violence” under § 924(c), courts use the categorical approach. *See Descamps v. United States*, 570 U.S. 254 (2013). This approach requires that courts “look only to the statutory definitions – i.e., the elements – of a defendant’s [offense] and not to the particular facts underlying [the offense]” in determining whether the offense qualifies as a “crime of violence.” *Descamps*, 570 U.S. at 261 (citation omitted). In addition, under the categorical approach, a prior offense can only qualify as a

“crime of violence” if all of the criminal conduct covered by a statute – “including the most innocent conduct” matches or is narrower than the “crime of violence” definition. *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012). *See also Moncrieffe v. Holder*, 133 S.Ct. 1678, 1685 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (“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 th[e] acts’ criminalized, and then determine whether even those acts are encompassed by the generic federal offense.”). If the most innocent conduct penalized by a statute does not constitute a “crime of violence,” then the statute categorically fails to qualify as a “crime of violence.”

As a result, post-*Descamps*, for Hobbs Act robbery to qualify as a “crime of violence” under the elements clause of § 924(c)(3) the offense must have an element of “physical force.” And “physical force” means “*violent* force” – that is “strong physical force,” which is “capable of causing physical pain or injury to another person.” *Johnson v. United States*, 559 U.S. 133, 140 (2010) (2010 *Johnson*) (emphasis in original); *Stokeling v. United States*, 139 S.Ct. 544 (2019).

Hobbs Act robbery, as defined by § 1951, does not meet this requirement. The statute can be accomplished by putting someone in fear of future injury to his person or property. “Property” is “something that is or may be owned or possessed,” *see Webster’s Third New International Dictionary* 1818 (1961), and is “commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal: everything that has an exchangeable value” *Black’s Law Dictionary* 1216 (6th ed. 1990). *See also Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (“When interpreting a statute, we must give words their ‘ordinary or natural’ meaning.”). Accordingly, a defendant may commit Hobbs Act robbery by, among other ways, causing the victim to fear economic loss to an intangible asset without the use of any force. Because the text of the statute covers conduct that does not require the use, attempted use, or threatened use of any force, it is more broad than the elements clause and cannot be a crime of violence under § 924(c)(3)(A).

In rejecting Duartez’s arguments, the court below relied on its earlier decision in *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018). In that case, the Court of Appeals held that Hobbs Act robbery satisfies the

elements clause. As relevant here, the court rejected the argument that Hobbs Act robbery does not satisfy the elements clause because one can commit an offense by “putting a victim in fear of economic injury to an intangible asset without the use of physical force.” 890 F.3d at 57 n.9. Relying on this Court’s decision in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), the *Hill* Panel held that a statute will only be deemed overly broad when a defendant presents an “actual case” in which someone was prosecuted for Hobbs Act robbery by causing the victim to fear economic loss to intangible assets. 890 F.3d at 57 n.9. Because the defendant in *Hill* was unable to do so, the court held that Hobbs Act robbery categorically satisfied the elements clause.

However, Courts of Appeals have held that a predicate statute will be deemed categorically overbroad based on the text alone, even when a defendant is unable to point to an instance in which the law was actually given an overly broad application. *See Swaby v. Yates*, 847 F.3d 62, 65-66 (1st Cir. 2017) (holding *Duenas-Alvarez* is implicated only where state law is “ambiguous” and has “no relevance” when statutory language is facially overbroad); *Sylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) (“The realistic probability test is obviated by the working of the state

statute, which on its face extends to conduct beyond the definition of the corresponding federal offense.”); *Jean-Louis v. Attorney General*, 582 F.3d 462, 481 (3d Cir. 2009) (holding *Duenas-Alvarez* irrelevant when “elements” of state law “are clear”); *United States v. Grisel*, 488 F.3d 844, 849 (9th Cir. 2007) (*en banc*) (“Where, as here, a state statute explicitly defines a crime more broadly than the [federal] definition, no ‘legal imagination’ is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the [federal] definition The state statute’s greater breadth is evident from its text.”); *United States v. Titties*, 852 F.3d 1257, 1274 (10th Cir. 2017) (same); *Ramos v. Attorney General*, 709 F.3d 1066, 1072 (11th Cir. 2013) (same).

Other courts have required an “actual case” even when the text establishes a statute’s overbreadth. *See United States v. Castillo-Rivera*, 853 F.3d 218, 222-23 (5th Cir. 2017) (*en banc*); *Matter of Ferreria*, 26 I. & N. Dec. 415, 417 (BIA 2014).

In light of this split of authority, this Court should grant the petition for certiorari and make clear that overbreadth may be established by a statute’s text alone. Because the text of the Hobbs Act robbery

statute is categorically broader than the elements clause of § 924(c)(3)(A), this Court should further hold that it is not a “crime of violence.”

That there is an alternative basis for Hobbs Act robbery to qualify as a crime of violence under the so-called residual clause of § 924(c)(3)(B) is no impediment to review. The court below ruled only that Hobbs Act robbery fell within the elements clause. This Court may resolve a predicate issue and then remand the case to the Court of Appeals to address any remaining issues, and should do so here. *See, e.g., North Carolina v. Covington*, 137 S.Ct. 1624, 1626 (2017) (resolving the question presented and remanding the case for the lower court to conduct “proceedings consistent with this opinion”). Moreover, this Court will soon address whether § 924(c)(3)(B)’s residual clause survives *Dimaya*. *See Davis v. United States*, No. 18-431, 2019 WL 98544 (Jan. 4, 2019) (granting certiorari in case presenting the question as to “whether the subsection-specific definition of “crime of violence” in 18 U.S.C. 924(c)(3)(B), which applies only in the limited context of a federal criminal prosecution for possessing, using, or carrying a firearm in connection with acts comprising such a crime, is unconstitutionally vague”).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held for *Davis*.

Respectfully submitted,

/s/

LISA A. PEEBLES

Counsel of Record

Federal Public Defender

Northern District of New York

Counsel for Petitioner

4 Clinton Square, 3rd Floor

Syracuse, New York 13202

Telephone: (315) 701-0080

JAMES P. EGAN

Assistant Federal Public Defender

MARCH 4, 2019