

No. _____

18-9258

IN THE
SUPREME COURT OF THE UNITED STATES

BERNARD SHAW — PETITIONER
(Your Name)

FILED
MAR 23 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

vs.
UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS/PETITION RE-HEARING EN BANC
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BERNARD SHAW REGISTER #23392-076
(Your Name)

FCI MEMPHIS P.O. Box 34550
(Address)

Memphis, Tennessee 38184-0550
(City, State, Zip Code)

N/A
(Phone Number)

1). **QUESTION(S) PRESENTED**

"Whether the lower court(s) erred in its interpretation as to the "vagueness challenge" of Section §924(c)(3)(B), and the meaning as to what is considered a crime of violence and the "use, attempted use, or threatened use of force against another person."

2).

"Whether the court violated the petitioner's Constitutional right under the Fifth Amendment right to "Due Process" concerning the misapplication of §924(c)(3)(B).

3).

"Whether the lower court violated the petitioner's "Double Jeopardy" rights by his being charged in a multiple type indictment by both the charge of §2119 "Carjacking" and §924(c)(3)(B) "Use of a firearm during the commission of a violent crime."

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Shaw v. United States

Bernard Shaw challenges the United States of America as to the lower Courts denial of his motion(s) concerning "Use of Force" interpretation(s) and the meaning of the definition as to what defines the "use, attempted use, or threatened use of force against another individual."

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix "B" to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____ N/A; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ N/A court appears at Appendix _____ to the petition and is

[] reported at _____ N/A; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

[] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 28, 2018.

[] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 4th, 2019, and a copy of the order denying rehearing appears at Appendix A.

[] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[] For cases from **state courts**:

The date on which the highest state court decided my case was N/A. A copy of that decision appears at Appendix N/A.

[] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The defendant is guaranteed the right to all aspects of "Due Process" in the legal proceedings. The right to adequate legal counsel that will not allow his/her client to be taken advantage of by unfair and/or duplicitous or multiplicitous charges. The right to not be charged and convicted under what is termed "Double Jeopardy" of the charges he faces and is to stand under indictment. Under the Sixth Amendment right to competent legal counsel.

The Fifth Amendment Constitutional right to legal "Due Process." The Sixth Amendment right to adequate legal representation of a trained or licensed attorney, in protection of the accused rights to not be convicted by use of a duplicitous charge and indictment, nor convicted as to "Double Jeopardy."

STATEMENT OF THE CASE

The petitioner was convicted as to a three count indictment for being a felon in possession of a firearm in violation of Title 18 U.S.C. §922(g), Count One. Armed Carjacking in violation of Title 18 U.S.C. §2119, Count Two. Brandishing a firearm during and in relation to a crime of violence in violation of Title 18 U.S.C. §924(c)(3)(B).

The petitioner was convicted after agreeing to a plea of guilty to all counts charged in the indictment on January 13, 2011 to a term of 105 months as to counts one and two, and a term of 84 months on the §924(C)(3)(B) to be served consecutively for a total of 189 months.

Petitioner brings this petition for a Writ of Certiorari due to the total disparity between the circuits as to what actually constitutes a crime of violence concerning the third count of the petitioner's plea of the indictment. See United States v. Davis, 903 F.3d 483 (5th Cir.2018); also United States v. Salas, 889 F.3d 681 (10th Cir.2018); and finally United States v. Douglas, 907 F.3d (1st Cir.2018).

The Supreme Court has granted argument under Writ of Certiorari to the above named arguments. The fact that there is complete disparity as to the circuit courts as to which charge is considered a "crime of violence" for a constitutional-in-line-sentence by use of the statutory provision concerning §924(c)(3)(B), and to remedy the misapplication of this charge in all of the districts that are applying it differently. Some circuits are using this charge to enhance and give dramatically more severe sentences based upon this charge. The petitioner would ask the court to grant his motion to be reviewed with the case(s) already before this court as to Davis,

Salas, and Douglas.

The casue of the circuit court splits as to the meaning of the defined crime of §924(c)(3)(B) and as to how to sentence and rule under the "Use of Force Clause," makes the petitioner's sentence unconstitutionally vague in light of Sessions v. Dimaya, 138 S.Ct. 1204, 200 L.Ed.2d 549, (2018 WL). The petitioner originally filed his motion under the issue concerning the residual clause in Johnson v. United States, 135 S.Ct. 2551 (2015). This court ruled that Johnson was retroactive and that the meaning of the "residual clause" was vague in meaning.

In petitioner's matter before the court and as to his argument concerning the application of the charge in the indictment and what he pled to in §924(c)(3)(B), along comes the decision in Sessions v. Dimaya, 138 S.Ct. 1202, 1216 (2018) and the new meaning of what is acceptable in the courts as to Section §16(b) and its definition as to "Use of Force Clause." The petitioner was charged in this indictment and sentenced based upon the charge and sentence by use of §924(c)(3)(B) and "Brandishing a firearm" during and in relation to a crime of violence. Hence, the meaning of a "crime of violence."

The use of "identical language" in the Supreme Court's holding in Dimaya, and the rejection in the Sixth Circuit Court of Appeals denial of the petitioner's case based solely on the meaning in United States v. Taylor, 814 F.3d 340, 379 (6th Cir.2016), and other circuits that read the same charge in an entirely different meaning, create the disparity of all circuits. The Eleventh denies that the reading is vague in its ruling in United States v. Ovalles, 861 F.3d at 1265 (11th cir. 2018).

The interpretation of some circuits to make the ruling constitutional,

while others rule it unconstitutional. The Eleventh, First, and Second Circuits hold that the residual clause in 18 U.S.C. §924(c)(3)(B) does not require application of the categorical approach and is not unconstitutionally vague. While in complete contrast, the Fifth, Tenth and the D.C. Circuits have held that, applying the categorical approach, the residual clause in §924(c) is unconstitutionally vague.

SECTION §924(c)(3)(B) IS UNCONSTITUTIONALLY VAGUE

In Sessions v. Dimaya, 138 S.Ct. 1204, 200 L.Ed.2d 549, 2018, the Supreme Court held that 18 U.S.C. §16(b)'s definition of a "crime of violence" is unconstitutionally vague in light of its reasoning in Johnson v. United-States, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), which invalidated the similarly worded residual definition of a "violent felony" in the Armed Career Criminal Act (ACCA). See also Golicov v. Lynch 837 F.3d 1065, 1072 (10th Cir.2016)(ruling that §16(b) "must be deemed unconstitutionally vague in light of Johnson"). The Dimaya court explained that the same two features rendered the clauses unconstitutionally vague: they "'required[] a court to picture the kind of conduct that the crime involves "in the ordinary case," and to judge whether that abstraction presents' some not-well-specified-yet-sufficiently-large degree of risk." Dimaya, 200 L.Ed.2d 549 2018 WL (quoting Johnson, 135 S.Ct. 2551, at 2557). The court also rejected several reasons for distinguishing §16(b) from the ACCA, namely that §16(b) requires a risk that force be used in the course of committing the offense, focuses on the use of physical force rather than physical injury, does not contain a confusing list of enumerated crimes, and does not share the ACCA's history of interpretive failures. 200 L.Ed.2d 549, [WL] at *12-16.

In the case of United States v. Salas, 889 F.3d 681 (10th Cir.2018) Mr. Salas argues that §924(c)(3)(B)'s definition of a "crime of violence," which is identical to §16(b)'s is likewise unconstitutionally vague. Indeed, the court has previously noted the similarity between the two provisions and consequently held that "cases interpreting [§16(b)] inform our analysis" when interpreting §924(c)(3)(B). United States v. Serafin, 562 F.3d 1105, 1108 and n.4 (10th Cir.2009). Other circuits interpret §16(b) and §924(c)(3)(B) similarly, as well. See in re: Hubbard, 825 F.3d 225, 230 n.3 (4th Cir.2016) ("'[T]he language of §16(b) is identical to that in §924(c)(3)(B), and the court has previously treated precedent respecting one as controlling analysis of the other.'"). In fact, the Seventh Circuit has faced the same scenario that we face now: it ruled that §16(b) was unconstitutionally vague in United States v. Vivas-Ceja, 808 F.3d 719 (7th Cir.2015), and then addressed the constitutionality of §924(c)(3)(B) in United States v. Cardena, 842 F.3d 959 (7th Cir.2016). In Cardena, the Seventh Circuit ruled that §924(c)(3)'s residual clause was "the same residual clause contained in [§16(b)]" and accordingly held that "§924(c)(3)(B) is also unconstitutionally vague." Cardena, 842 F.3d at 996.

The governments contention that makes this case similar and in tune with Davis, Salas, Serafin, Douglas and Cardena, is that the charge of crimes at issue now before the Supreme Court all hold the same meaning of what is and is not considered a "crime of violence." In support of §924(c)(3)(B)'s constitutionality, the government "submits that §924(c)(3)(B) [is] distinguishable from the ACCA's residual clause for the same reasons it argued that §16(b) was distinguishable." That is, §924(c)(3)(B) requires the risk that force be used in the course of committing the offense, which

the ACCA does not; §924(c)(3)(B) focuses on the use of the physical force rather than the physical injury. §924(c)(3)(B) does not contain the confusing list of enumerated crimes that the ACCA does; and, unlike the ACCA, §924(c)(3)(B) does not have a history of interpretive failures. Dimaya, however, explicitly rejected all of these arguments. 200 L.Ed.2d 549, 2018 WL 1800371, at *12-16.

The crime of §2119 "Carjacking" is a crime of serious importance and one of such high profile, it in itself by the charge of the crime carries severe ramifications. Here, the government charged the petitioner with not only being a "Felon in Possession," a charge that gives the possession of the firearm, while the crime of "Armed Carjacking" can and sometimes does carry all the way to a "Capital Crime." When the petitioner was indicted by the three counts, it was multiplicitous in the charge(s) it chose to list in the indictment. §2119 "Armed Carjacking" carries the severest penalties in itself. It states in the charging document that there was a crime committed by use of some sort of weapon. Be it a firearm, knife, a rock, etc.....

Then the charging document lists the person charged in the indictment as being a "Felon in possession of a firearm," and then comes back in the third count of the indictment as to "Brandishing a firearm during and in relation to a 'crime of violence.'"

The fact that the petitioner has been equally charged in the first count with a capital equivalent crime, and then faces the same gun used in the first count by being a felon in possession. The third count of the indictment makes it duplicitous and multiplicitous as to the same firearm.

What constitutes a "crime of violence" in this instance makes the argument one that would require the High court to make a final and clear

ruling to define the disparity between the circuits.

If the petitioner were in the Seventh circuit or the Tenth circuit or even the District of Columbia circuit, he would be able to take the high ground. As it is, because he is simply in a different demographic location within the confines of the United States, he is forced to accept his failure as to his circuits ruling concerning what is defined as a "crime of violence" allowed to be used to enhance his sentence.

The ruling in Dimaya, while changing the meaning as to whether or not it is confusing as to a crime that falls into the "enumerated offense." The meaning of what is actually allowed to be interpreted concerning as to the actual actions of the crime, makes it unconstitutional to defendants whom never committed actual "crimes of violence." Just being guilty of a crime that is interpreted as an eligible "enumerated offense" while the crime itself cannot meet the basic criteria except it is in one circuit or another is tantamount to turmoil.

DIMAYA MAKES THE "RISK OF FORCE CLAUSE" UNCONSTITUTIONAL

In Dimaya, the court makes it clear that to define certain crimes as "crimes of violence" without there being any type of circuit uniformity as to how to determine what actually is a "crime of violence." In United States v. Davis, 903 F.3d 483 (5th Cir.2018); United States v. Eshetu, 898 F.3d 36,37 (D.C.Cir.2018) and United States v. Salas, 889 F.3d 681 (10th Cir.2018), these case(s) are ones that must have made some difference to have gotten a ruling that the §924(C)(3)(B) definition of a "crime of violence" did not hold judicial merit in those circuits. What was the difference?

The difference was the fact that one judge interpreted it to be one way, and another in another circuit ruled in the exact opposite because of the way that judge interprets the rule of law.

It has to be defined and clarified in the high court to be definitive in its decision as to whether or not certain basic crimes that do not have the "use, attempted use, or threatened use of force, necessary to be considered a 'crime of violence.'"

The Solicitor General filed petitions to have this court hear the petitions for a Writ of Certiorari in the above listed case(s) that bolster this motion and its argument that the crime the petitioner was charged with and pled guilty to does [not] meet the criteria of a crime of violence. Not only does it not meet the criteria, the indictment overcharged the petitioner as to the same use of the same firearm in all three counts.

The only issue of the Constitutional violations concerning the petitioner as to his right to "Due Process " under the Fifth Amendment and his Sixth Amendment right to "Adequate legal counsel, competent to represent him" against any constitutional violations against him.

CONCLUSION

In 2016 the Sentencing Commission changed and deleted certain crimes in the memorandum listed as "Amendment to the Sentencing Guidelines." In it, it makes certain crimes one listed as crimes that met the so called "Enumerated Offenses" to ones that would no longer be held accountable under that same provision. In the very opening of the changes, it states clearly in the very first paragraph on page 1. "In particular, the Commission has received extensive comment, and is aware numerous court opinions, expressing a view that the definition of "crime of violence" is complex and

unclear. This comes about due to the ruling at the time as to Johnson. The amendment made several changes to the definition of "crime of violence" at 4B1.2.

The court knows what it ruled in Johnson. It also knows what the ruling was in Dimaya. Now comes the decision that will once and for all clear up as to circuit disparity what actually defines a "crime of violence," for sentencing purposes and to have the same rule of law in all similar circuits and it can once and for all decide whether or not it takes the "categorical approach," or the "modified categorical approach." This has to be the same in the Tenth, Eleventh, Second, Eighth circuits. One clear and definitive ruling that makes it clear as to the crime involved and as to it being eligible to be used to dramatically enhance a defendant's sentence.

Petitioner did not commit a crime of violence under the interpretation of §924(c)(3)(B) and he would ask this court to rule favorably as to his indictment and his constitutional violation of "due process" as to the sentence he received. He would ask this Honorable Court to include this case and motion for a definitive ruling along with Davis and Salas. The petitioner asks the court to make the correct ruling that because of Dimaya, the court ruled that his crime as to the "Brandishing" of a firearm in relation and during a crime of violence, is not allowable because of the criteria needed as in Dimaya, stating the "use, attempted use, or threatened use of force, during a crime of violence."

The fact that the same gun was charged in all three counts of the indictment and the sentence, consists of a "double jeopardy" violation. Defendant's cannot be charged under both 18 U.S.C. §2119 (carjacking statute), where a firearm statute requires proof no additional facts not re-

quired by carjacking statute, and anyone who is proven to have committed the crime of carjacking must necessarily have violated firearm statutes at the same time. Where carjacking statute does not mention a cumulative punishments where firearm is used but rather definition of carjacking requires the use of firearm, because to sentence a defendant under both statutes would violate double jeopardy clause. United States v. Smith, (1993 ED Va.) 831 F.Supp. 549.

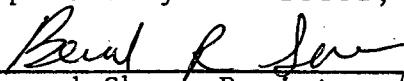
Accused carjackers are entitled to dismissal of indictment counts also charging them with a violation of §924(c)(1), where conviction for carjacking in violation of Title 18 U.S.C. §2119, by definition, establishes §924 (c) violation, because Double Jeopardy Clause will not permit separate prosecutions for crimes which would impose cumulative punishments for the same offense. United States v. Hill, 1995 U.S. App. LEXIS 7592 (CA9 Cal).

Therefore, the petitioner would seek this courts ruling as to the crime of violence not meeting the criteria required to be deemed a violation of the meaning of a "violent crime."

RELIEF REQUESTED

Petitioner seeks this courts ruling dismissing the third count in his indictment concerning the enhanced sentence he received as to §924(c)(3)(B) and to order his lower court to remand for resentencing as to a reduction in sentence. He asks this of this Honorable Court and any other relief that this court deems appropriate.

Respectfully submitted,



Bernard Shaw Register #23392-076

REASONS FOR GRANTING THE PETITION

Because the issue merits a corrective ruling whether a crime fits the 18 U.S.C. §924(c)(3)(B) definition of a "crime of violence" is a question of law, and a court employs the categorical approach to §924(c)(3)(B), meaning the court determines whether an offense is a crime of violence, without inquiring into the specific conduct of this particular offender. Consequently, §924(c)(3)(B), like 18 U.S.C. §16(b), requires a court to ask whether the ordinary case of an offense poses the requisite risk. Regardless of whether a jury must find the defendant guilty of §924(c) beyond a reasonable doubt, then, this ordinary-case requirement and an ill-defined risk threshold combines in the same constitutionally problematic way as §16(b) and necessarily devolves into guesswork and intuition, invites arbitrary enforcement, and fails to provide fair notice.

Ultimately, §924(c)(3)(B) possesses the same features as the ACCA's residual clause and §16(b) that combine to produce more unpredictability and arbitrariness than the Due Process tolerates, and the U.S. Supreme Court's reasoning for invalidating §16(b) applies equally to §924(c)(3)(B). Section §924(c)(3)(B) is likewise unconstitutionally vague.

That is why the court should grant this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD SHAW

Date: March 23rd, 2019