No. 19-6050

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE VIZCARRONDO-CASANOVA — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOSE VIZCARRONDO-CASANOVA 34146-069
(Your Name)

FEDERAL CORRECTIONAL COMPLEX
(Address)

P.O. BOX 1034 / COLEMAN, FLORIDA 33521
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1) Whether' murder under Puerto Rico law categorical approach fails to qualify as a "crime of violence" under remaining force clause of 924(C)(3)(A), under United States v. Davis, 139 S.Ct. 2319 (2019).

2) Whether' was plain error to permit the Jury to convict Petitioner of 924 offenses, under United States v. Jones (No. 18-30256(5th Cir. August 12, 2019)) quoting, United States v. Davis, 139 S.Ct. 2319(2019). (Split among 1st Cir. and 5th Cir.)

LIST OF PARTIES

[x] 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:

JOSE VIZCARRANDO-CASANOVA 34146-069
FEDERAL CORRECTIONAL COMPLEX
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COLEMAN, FLORIDA 33521

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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

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[x] is unpublished.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[x] is unpublished.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[ ] is unpublished.

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

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[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was June 7th, 2019.

[ ] 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: August 13th, 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 _____ (date) on _____ (date) in Application No. 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 _____. A copy of that decision appears at Appendix _____.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1.) The Fifth Amendment of the Constitution.

2.) The Sixth Amendment of the Constitution.

3.) Under the Due Process Clause of the Fifth Amendment and the Notice and Jury Trial Guarantee's of Sixth Amendment.

REASONS FOR GRANTING THE PETITION

1.) This court should grant the writ of certiorari and use this case as a vehicle to resolve the split among the circuits. See; Supreme Court Rule 10.

In United States v. Davis, 139 S.Ct. (2019), narrowed the the scope of Title 18 U.S.C. Section 924(C)(3)(B)(A) to decriminalize certain individuals who would otherwise have been aggravated violators under Puerto Rican law categorically fails to qualify as a "crime of violence" under the remaining force clause of 924(C)(3)(A), it is unconstitutionally vague and a violation of due process. It alters the clause of person that the law punishes.

This Court should resolve the split among herein circuits, Whether' United States v. Davis is a plain error under categorical approach under Puerto Rican law. The Appeals Court for the First Circuit in United States v. Luis D. Rivera (Case No. 14-1582 N.14)(First Circuit, August 2, 2019) See, argument (Crime of Violence claim), (Footnote 14) held that:

Helpfully for appellants, after the completion of briefing here, the Supreme Court struck down the residual clause as unconstitutionaly vague, See, United States v. Davis, 139 S.Ct. 2319 (2019). And with the residual clause now out of way, they must convince us that a violation of Puerto Rico's murder statute cannot be a crime of violence under the force clause. They say they can because, in their words, Puerto Rico's murder statute "has no element requiring the intential use, attempted use, or

threatened use of violent physical force" - "killing," they write, "could encompass non-physical force."

Right off the bat, thought, appellants have a problem. Under a brief subheading titled "Defendants Meet the Plain Error Standard," appellants explain why they should get plain-error relief since a violation of Puerto Rico's murder statute cannot be a crime of violence under the residual clause-a point well taken, especially given the Supreme Court's hot-off-the-presses Davis decision. But (and it's a very big but) they do not explain why reliance on the force clause here is plain error - for example, they never say how any error (if error there was) is "plain," i.e., "an 'indisputable' error..., 'given controlling precedent.'" See United States v. Morosco, 822 F.3d 1, 21 (1st Cir. 2016)(quoting United States v. Correa-Osorio, 784 F.3d 11, 22 (1st Cir. 2015)).

United States v. Begay, No. 14-10080 (9th Cir., August 19, 2019), the panel affirmed a conviction for a second-degree murder (18 U.S.C. 1111 and 1153), reversed a conviction for discharging a firearm during a "crime of violence" (18 U.S.C. 924(c)(1)(A)), reversed a mandatory restitution order and remanded for resentencing. The panel held that because second-degree murder can be committed recklessly, it does not categorically constitute a "crime of violence" under the element's clause, 18 U.S.C. 924(c)(3)(A). Because in light of United States v. Davis, 139 S.Ct. 2319(2019), second-degree murder likewise cannot sonstitute a crime of violence under the residual clause, 18 U.S.C. 924(c)(3)(B), the panel concluded that the defendant's 924(c) conviction cannot stand. The panel held that

because second-degree murder is not categorically a crime of violence, the district court erred in imposing mandatory restitution under 18 U.S.C. 3663A.

See, United States v. Deloy Jones, case no. 18-30256 (5th Cir. August 12, 2019)(for plain error under, United States v. Davis, 139 S.Ct. 2319(2019)).

The Second Circuit held in an unpublished case that no plain error occurred where the appellant had "admitted to engaging in drug trafficking" at trial and "certain questions from the jury during deliberations indicate(d) that the jury was considering the drug trafficking predicate" instead of the crime of violence predicate. United States v. Ventura, 724 F. App'x 575, 578 (2d Cir. 2018), petition for cert. filed (U.S. Feb. 12, 2019).

For the reason given as well as those presented in the Petition, the Court should granted the Petitioner for a WRIT OF CERTIORARY.

STATEMENT OF THE CASE

On October 8, 2009,1 Petitioner, JOSE VIZCARRONDO-CASANOVA, was charged in a superceding indictment with a conspiracy to commit carjacking in violation of 18 U.S.C. 371, and conspiracy to injure, oppress, threaten, and intimidate a person in the free excercise and enjoyment of rights secured to him, in violation of 18 U.S.C. 241. While acting under Color of Law, depriving a person of Rights and Privileges, in violation of 18 U.S.C. 242, and other related charges **include Count Four title 18 U.S.C. 924(C)(1)(A(ii) and 2 in relation to a crime of violence.**

On September 19, 2011, following a Jury trial before the Honorable Francisco A. Besosa, guilty verdicts were returned against Petitioner on Counts (Conspiracy to commit carjacking), Two (Carjacking), Four in Relation to a Crime of Violence 924(C)(1)(A)(ii), Five (deprivation of constitutional rights by death) and six (deprvation of Rights acting under Color of Law). The First Circuit Court of Appeals affirmed Petitioner's conviction on August 18, 2014..

On or about October 6, 2015, Petitioner filed a 28 U.S.C. 2255 Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody and the District Court denied the 2255 petition. The Petitioner's appeal to the Court of Appeals for the First Circuit seeking a certificate of appealability ("COA") to appeal from the demial of his 28 U.S.C. 2255(a) Motion. At the time the petition was pending in the Appeals court, the Petitioner filed a Supplemental Authority of the Supreme Court pursuant to Federal Rule App 28(J) and on June 7, 2019, the application for COA was denied. Then, the Petitioner filed a Motion for Extension of Time to File a Petition

for Rehearing and Rehearing in banc, because Petitioner believed the panel decision is contrary to the following decision of the intervening change of the Law in the Supreme Court of the United States in the United States v. Davis[1], Case No. 18-431 (S. Ct.) June 24, 2019.

Now the Petitioner comes with the Petition for Rehearing and Rehearing EN Banc, in light of recent cases of intervening change of the Law applicable to the petitioner in United States v. Davis No. 18-431 (S. Ct. June 24, 2019) and Rosales-Mireles v. United States, 2018, U.S. Lexis 3690 (2018), on appeal, such errors not raised in the District Court may be remedied under Federal Criminal Procedure Rule 52(b), provided that as established in United States

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1.

In addition, §16 serves as the universal definition of "crime of violence" for all of Title 18 of the United States Code. Its language is incorporated into many procedural and substantive provisions of criminal law, including provisions concerning racketeering, money laundering, domestic violence, using a child to commit a violent crime, and distributing information about the making or use of explosives. See 18 U. S. C. §§25(a)(1), 842(p)(2), 1952(a), 1956(c)(7)(B)(ii), 1959(a)(4), 2261(a), 3561(b). Of special concern, §16 is replicated in the definition of "crime of violence" applicable to §924(c), which prohibits using or carrying a firearm "during and in relation to any crime of violence," or possessing a firearm "in furtherance of any such crime." §§924(c)(1)(A), (c)(3).

See, Dimaya at pg. 6 (quoting, United States v. Doe, 49 F.3d 859, 860 (CA2 1995)(United States v. Feola, 420 U.S. 671, 693(1975) (same)(18 U.S.C. §111 and §1114) see, Petitioner's indictment.

v. Olano, 507 U.S. 725(1993); (1) the error was not "intentionally relinquished or abandoned" (2) the error is plain, and (3) the error "affected the Defendant's substantial rights." Molina Marinez v. United States, 578 U.S. 725 (2016), if those conditions are met, (as Petitioner did now). "The Court of appeals should exercise its discretion to correct the forfeited unconstitutional error seriously affects the fairness, integrity, or public reputation of Judicial proceedings.

The Appeals court denied Petitioner petition for rehearing and rehearing En Banc, in light of recent cases of intervening change of the law applicable to Petitioner in United States v. Davis, 139 S.Ct. 2319(2019).

Now the Petitioner comes with the petition for a WRIT OF CERTIORARI with two questions under, United States v. Olano, 507 U.S. 725 (1993).

Murder under Puerto Rican law caregorically fails to qualify as a "crime of violence" under the remaining force clause of 924(c)(3)(A)

Murder under Puerto Rican law is "to kill another human being with intent." Art. 105 of the 2004 Penal Code.[2] Murder under Puerto Rican law categorically fails to qualify as a "crime of violence" under the remaining force clause of 924(c)(3)(A), because murder under Puerto Rican law has no element requiring the intentional use, attempted use, or threatened use of violent physical force, a conviction cannot be constitutionally sustained under 924(c).

To determine whether an offense is a crime of violence under the force clause, the Court begins with the "categorical approach" established in Taylor v. United States, 495 U.S. 575 (1990), to see whether the predicate offense necessarily had as an element "the use attempted use, or threatened use of physical force against the person or property of another," 924)c)(3)(A). This apprach 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)." Taylor, 495 U.S. at 600. (See also James v. United

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2 Murder in the first degree is constituted by:

(a) All murder carried out by poison, lying in wait or torture, or with premeditation.

(b) All murder committed as the natural consequence of the commission or attempt of some crime of aggravated firesetting, sexual assault, robbery, aggravated burglary, kidnapping, kidnapping of a minor, damage, poisoning of waters for public use, mayhem, escape, intentional abuse or abandonment of a minor.

(c) Any murder of a member of law enforcement... judge or correctional officer in their official capacity, committed when carrying out, attempting or hiding a felony. All other intentional death of a human being constitutes murder in the second degree. Art. 106 of the 2004 Penal Code.

States, 550 U.S. 192,202 (2007))(the 924(c)(3)(A) crime of violence determination must emply the "categorical" approach depending on the applicable alleged statute.)

Moreover, the verdict form and instructions at trial called for a general verdict as to the "crime of violence". Each 924(c) & (j) coint provided "As to (the specific count), of the Indictment (Use and Carry of a Firearm in Relation to a Crime of Violence): We, the Jury, find the (defendant) guilty or not guilty. See 1JA481A. No finding of force was required by the jury.

The First Circuit has not had occasion to consider the issue specifically as to 924(c)[3] but has made clear in ACCA 924(e) analysis that the proper approach in determining the applicability of 924(e)(2)(B)(i) is categorical. See e.g., United States v. Bauzo-Santiago, 867 F.3d 13, 25 (1st Cir. 2017)("We check whether the elements of the crime of conviction require the government to prove the use, attempted use, or threatened use of physical force in order to convict.").

This Circuit has also used that analysis in assessing whether an offense qualifies as a "crime of violence" under career offender guideline's force clause advising that a court must examine offense's elements, rather than conduct that a particular defendant engaged in during the offense. United States v. Ellison, 866 F.3d 32 (1st Cir. 2017)(finding federal bank robbery offense under 2113(a) met the definition of crime of violence under the criminal offender guidelines).

[3] Although the First Circuit has never expressly held that determinations under § 924(c)'s residual clause are made by employing the categorical approach, district courts have routinely assumed that to be the case. *See, e.g., United States v. Herr,*

In Welch v. United States, 136 S. Ct. 1257 (2016), which made Johnson retroactive, the Supreme Court emphasized the categorical approach's centrality to the Johnson holding in that it "cast no doubt on the many laws that 'require gauging riskiness of conduct in which an individual defendant engages on a particular occasion,'" but that the residual clause failed because it "required courts to assess the hypothetical risk posed by an abstract generic version of the offense." Id. at 1262 (emphasis in original)(quoting United States v. Davis, 588 U.S. 2019 WL 2649797)

The categorical 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 v. United States, 133 S. Ct. 2276, 2283 (2013); see also United States v. Moore, 286 F.3d 47, 49 (1st Cir. 2002)(internal citation omitted), quoting Taylor, 495 U.S. at 602 ("Under the categorial approach-which applies in ACCA cases-the sentencing court typically must limit its inquiry to 'the fact of conviction and the statutory definition of the prior offense.'"). As the First Circuit has explained, the "'(e)lements' are the "constituent parts" of a crime's legal definition- the things the 'prosecution must prove to sustain a conviction.' At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant." Taylor

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2016 WL 6090714 (Talwani, J. 2016) (D. Mass Oct. 18, 2016); *United States v. Rachal*, No. 16-10043-NMG, 2016 WL 7165712, at *2 (D. Mass. Dec. 7, 2016); *Chasse v. United States*, No. 15-cv-473-PB, 2016 WL 4926154, at *4 & n.7 (D.N.H. Sept. 15, 2016); *United States v. Williams*, 179 F. Supp. 3d 141, 145-146 (D. Me. 2016).

848 F.3d at 491-92, (citing Mathis v. United States,-U.S.---, 136 S.Ct. 2243, 2248, (2016)(quoting Black's Law Dictionary 634 (10th ed. 2014)).

Moreover, not just any application or threat of physical force will do. The offense must "contain an element that there be the intentional employment of physical force against a person or thing." Garcia v. Gonzales, 455 F.3d 465, 468 (4th Cir. 2006)(interpreting identical language in 18 U.S.C. 16). And "physical force" means vilent 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).

Some crimes are defined broadly enough to cover some conduct that meets the force clause definition and some conduct that does not. "For example, in Massachusetts, the broad definition of simple assault and battery encompasses both a devastating beating and a tap on the shoulder." See id. (citing United States v. Fish, 758 F.4d 1,5 (1st Cir. 2014)(A tap on the shoulder, of course, is not capable of causing physical pain or injury, and so does not require violent force.) See also Johnson, 559 U.S. at 140.

In this case murder is an intentional killing period. The statute then lists what types are considered first degree as opposed to second degree. No specific elements are required. The elements are an intentional killing. There is no requirement of a weapon, the use of force or the use of violent force and the statute is not divisible in terms of the elements. The statute is thus overbroad and killing could encompass non-physical force. Indeed the jury was instructed that murder was as defined only under Puerto

Rican law and that the definition is "intentionally causing the death of a person." See Jury Inst. Tr. at 33. There is no element of force, physical force, or violent physical force required. Under Puerto Rican murder statute, intentional abandonment of a minor that results in death constitutes first degree murder, as well as kidnapping and the very general term "damage" are forms of first degree murder. See Article 106(b). The statute also makes first degree murder where it is the natural consequence of the commision or attempt of some crime first degree murder however a number of those offenses have been determined not to be a crime of violence. In United States v. Castro-Vazquez,[4] the First Circuit determined that robbery under Puerto Rican law includes the slightest use of force and that the offense can be committed through violence or by intimidation, the latter of which does not constitute a crime of violence.

The generic definition of "murder does not satisfy the force clause, Other examples of "murders" that do not involve the intentional use, attempted use, or threatened use of violent physical force are numerous. See generally 2 Wayne R. LaFave, Substantive Criminal Law 14.2 (2d ed. 2003)(listing "opening, on a cold winter day, a widow

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[4] The judge did not instruct the jury on what constituted murder under 18 U.S.C. § 1111, the federal statute, and there were no jury instructions on what they needed to find with respect to the federal murder statute. Instead, the judge specifically advised that the federal offense of murder was not at issue. "It [murder] can be a Federal offense, too, but not under these circumstances. We're talking about Puerto Rico murders in this case." 3JA1380A. The jury was never called upon to make a particular finding that the murder was as defined under 18 U.S.C. § 1111. desnite inclusion of 18 U.S.C. § 1111 language in Counts 1, 2, 5, 6 in the indictment.

next to the bed of a helpless sick; a person;" "perjuring an innocent man into the electric chair;" "nagging another, whom he knows to have heart trouble, into some death-prducing exertion;" advising "a blind man at the edge of a precipice... that it is all clear ahead:" falsley shouting, "'Your son is dead' into the ears of a woman he knows to have a heart condition;" and a parent failing "to rescue his imperiled infant, such as one who is drowning face-down in the bathtub" as examples of murder).

Offenses that result in physical injury or death do not necessarilly require an element the use of violent physical force. See Whyte v. Lynch, 807 F.3d 463, 469 (1st Cir. 2015)("Common sense, moreover, suggests there exists a 'realistic probability' that under this statute, (the state) can punish conduct that results in 'physical injury' but does not require the 'use of physical force.'")(internal citation omitted), pet. for reh'g en banc denied, 815 F.3d 92 (1st Cir. 2016)(emphasis added).

The Supreme Court's decision in United States v. Castleman, 134 S.Ct. 1405 (2014) does not preclude this analysis. Castleman involved an entirely different definition of "physical force"; one that the Supreme Court expressly limited to the context of "misdemeanor crimes of domestic" violence under 18 U.S.C. 922(g)(9). Castleman, 134 S. Ct. at 1411 n.4 ("Nothing in today's opinion casts doubt on(Johnson v. United States, 559 U.S. 133 (2010)("Johnson I") and related) holdings, because-aswe explain-'domestic violence' encompasses a range of force broader than that which constitutes 'violence' simpliciter".) The definition of "physical force" which applies to "violent felony" in the ACCA, with respect to a misdeme-

anor crime of domestic violence, the definition of "physical force" included the common-law meaning of force, "namely, offensive touching." 134 S.Ct. at 1410.

The Second Circuit's decision in United States v. Barrett, 903 F.3d 166 (2nd Cir. 2018), was vacated by the Supreme Court in a GVR order on June 28, 2019, in light of United States v. Davis, 588 U.S.___, 2019 WL 2649797. Davis held, contrary to Barrett, that the residual clause of 924(c)(3)(B) is void for vagueness.

In light of the Supreme Court's order in Barrett, the Government has acknowledged that Hobbs Act conspiracy no longer qualifies as a crime of violence under 924(c) because it does not qualify under the "force" or "elements" clause. So 924(c) convictions based on a Hobbs Act conspiracy as the predicate "crime of violence" are invalid. Unfortunately, the Second Circuit held that substantive Hobbs Act robbery qualifies under the force clause in United States v. Hill, 890 F.3d 51 (2018).

Approach to determine whether Mr. Vizcarrondo's crime is "within the ambit of 18 U.S.C. 924(c)" Id. (quotation marks omitted) Davis adds only more doubt to the question of whether conspiracy, one of the possible predicate offenses, comes within 924(c)'s ambit. For that reason, the predicate offense supporting Mr. Vizcarrondo's conviction may be one that is not a crime of violence at all.

Because the 924(c) violation relied upon multiple counts, it is not clear from the verdict form whether the jury unanimously agreed that it related to any one of the underlying offenses. This court may not guess whether the conspiracy or the 18 U.S.C. 242 conviction serve as the predicate, and this court should emply the categorical and should be left for the District Court to resolve in the first instance.

CONCLUSION

The petition for WRIT OF CERTIORARI should be granted, the Judgement of the Court of Appeals vacated, and the case remanded for further proceedings in light of United States v. Davis, 139 S.Ct. 2319(2019).[5]

Respectfully Submitted,

JOSE VIZCARRONDO-CASANOVA

On this 13th day of September, 2019.

5.

Petitioner' proposed this in time to file a claim because he meets the statutory criteria of 2255(h) because "Davis" announced a new rule of Constitutional law and is retroactively applicable to cases on collateral review.

"The petitioner, makes a prima facie showing that the application satisfies the requirements of this subsection." Id. 2244(b)(3)(C). (Explaining that this court's determination that an applicant has made a prima facie showing that the statutory criteria has been met is simply a threshold determination).