19-6703

No. 19A340

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

SHONDOR JANELL ARCENEAUX — 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 NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SHONDOR JANELL ARCENEAUX
(Your Name) #26676-112 FCI MEMPHIS

P.O. BOX 34550
(Address)

MEMPHIS, TN 38184-0550
(City, State, Zip Code)

INCARCERATED N/A
(Phone Number)

QUESTION(S) PRESENTED

I.

If §924(c) applies to predicate crimes, whose Elements are no Broader than a Federal Generic Definition of that crime , is... remand required if a defendant is only convicted aiding abetting.. a bank robbery under §2113(a)(d) ?

II.

Is it Unconstitutional for a sentence under §924(c) to be applied as a penalty for a violation of §2113(a) "bank robbery" if the statute[§2113(a)] is broader than the federal generic definition of robbery, incompasing conduct outside the federal definition if robbery, includes taking of property as defined "larceny" ?

III.

When a statute is clearly not a crime of violence under the force clause of §924(c) is it Unconstitutional to sentence a defendant under §924(c)(3)(B)'s residual clause ?

IV.

Is a court required to give a jury instructions of "advance-knowledge" of a firearm being used and the government is required to prove a defendant had "advanced knowledge" before a jury can convict a defendant of aiding abetting in violation of 18 U.S.C. § 2 ?

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:

RELATED CASES

There are no related cases to be presented to this Hnonrable High Court to review.

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OTHER

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[X] is unpublished.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

[X] reported at 2019 U.S.Dist.LEXIS 65179(2019); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:** N/A

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

[ ] reported at N/A; 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 July 19, 2019.

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

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

[X] An extension of time to file the petition for a writ of certiorari was granted to and including November 16, 2019 (date) on Sept. 25, 2019 (date) in Application No. 19 A340.

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

[ ] For cases from **state courts**: N/A

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). N/A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution States:

> No person shall be held to answer for a capital,or otherwise infamous crime,unless on a presentment or indictment of a Grand Jury , except in cases arising in the land or naval forces,or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,or property without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

On or about February 2006 ,Mr. Arceneaux was convicted of three counts of bank robbery ,in violation of 18 U.S.C.2113(a)(d) by a jury for his role in aiding abetting under 18 U.S.C.§ 2 of others who actually robbed the bank . In addtion , because those who had robbed the bank brandished or used a friearm during the course of the robbery , Mr. Arceneaux was also convicted by the jury of three counts of using a firearm in violation of 18 U.S.C.§924(c) [Arceneaux had never been previously convicted of violating §924(c)] The district court sentenced Arceneaux to 977 months inprisonment, 293 months was imposed on the robbery counts of conviction , the court then imposed "684" months by"stacking"consecutive enhancements under §924(c).

On October 20, 2011 Mr. Arceneaux filed his original §2255, the district court held an evidentiary hearing on one of the grounds raised.

In June 2015 ,the United States Supreme Court issued its opinion in Johnson v. United States,135 S.Ct. 2551(2015) ,invalidating the ... residual clause of the ACCA §924(e)(2)(B)(ii) as being Unconstitutionally vague. The Johnson ruling was made retroactive by the Welch v. United States,136 S.Ct. 1257(2016) opinion of the Supreme Court holding Johnson rendered a "new substantive new rule of law".

On or about May 9,2016 , Mr. Arneaux filed in the court to amend his motion to include Johonson's Holding, However the court terminated the request due to Arceneaux being represented by counsel. The same day Counsel petitioned the court to expand his appointment to include the Johnson Supreme Court Ruling. On May 23,2016 the District Court

granted counsel's request.[case No. 2:11-cv-02781-MCE-EFB/2:03-cr-00371-MCE-EFB-6]. This Petition follows the denial of the §2255 motion and Certificate of Appealability by the 9th Circuit Court of Appeals [case No. 19-16011]. It is further noted that the Ninth Circuit did not consider this Honorable High Court's recent opinion of United States v. Davis,138 S.Ct. 2318(2019) that is relivant to this cases arguments and questions presented to the Supreme Court, that Title 18 U.S.C §2113(a) or (d) is not a crime of violance for the purposes of 18 U.S.C. §924(c)

REASONS FOR GRANTING THE PETITION

1. Section 924(c) Applies only to predicate crimes whose elements are no broader than the federal definition of that crime .

Bank robbery is not a crime of violence as it was made clear by the United States Supreme Court in Johnson 135 S.Ct. 2551(2015); Descamps v. United States 133 S.Ct. 2276,2283(2013); Shepard v. United States,544 U.S. 13.24 (2005) as it is defined by §924(c).

The reason asserted by Mr. Arceneaux is that bank robbery does not come within the provisions of §924(c) is the natural consequences of the purpose and scope of that statute intrpretation. Because §2113(a) is indivisible it is centeral to the categorical method and is the need for the court to distinguish between that of an element and facts. Mathis v. United States, 136 S.Ct. 2243,2248(2016). Because taking of"property"labels a bank robbery as "extortion" in §2113(a) a §924(c) cannot support an"indivisibale"statute. See United States v. Jennings,439 F.3d 604,612(9th Cir. 2006); United States v. Eaton, 934 F.2d 1077,1079(9th Cir. 1991). Here in both Jennings and Eaton support the conclusion that bank robbery §2113(a) is indivisible, as the court held in Eaton's bank robbery could be satisfied by an essential element through "intimidation" 934 F.2d at 1079. By this statement the court suggest the robbery statute is indivisible ,because a defendant can satisfy a single "essential -

element of §2113(a) through an act of intimidation", then it must also follow that intimidation is a means of satisfying that element. Mathis ,136 S.Ct. at 2249 (explaining that an indivisible statute sets out a "diverse means of satisfying a single element of a single crime"). Herein Mr. Arceneaux's case the esential element is the wrongful taking of property satisfied by the"force and violence" by extrotion ?.

In the Jennings Court , Jennings commented that §2113(a) covers not only individuals who take property from a bank by force and violence... but also those who obtain property from a bank by extortion and those who enter a bank with the intent to commit a felony therin . Here such a comment does not bear on whether a statute[§2113(a)] is divisible or indivisble, because every statute"covers" alternatively worded methods of incurring some liability.

Because §2113(a) is indivisible under the holding of Mathis,136 S.Ct-2243(2016) Arceneaux's convictions under §924(c) could only be applied by the courts use of the unconstitutional vague residual clause because the statute sweeps more broadly than the generic crime,.... a conviction under §924(c) cannot count as a predicate ,even if Arceneaux would have actually committed the bank robbery in its generic form. United States v. Acosta-Chavez,727 F.3d 903,907 (9th Cir. 2013). Quoting Descamps Supra: §924(c) Specifically.... excludes crimes which are broader in scope than their federal generic equivalents to make sure that the application of §924(c) is uniform and consistent.

2. Is it Unconstitutional for a sentence under §924(c) to be applied as a penality for a violation of §2113(a) "bank-robbery,if the statute [§2113(a)] is broader than the federal generic definition of robbery , incompasing conduct outside the federal definition , if robbery includes taken of property defined other wise as "larceny" ?

Section 2113(a) provides that whoever by force and violence ,or by intimidation,takes or attempts to take ,from the person ..any property or money ..belonging to any bank shall be fined under this title or imprisoned not more than twenty years ,or both.

In the Circuit of which Mr. Arceneaux was convicted , the Ninth Circuit held that the federal generic version of robbery is an "aggravated larceny" United States v. Velasquez-Bosque,601 F.3d 955,958(9th Cir. 2010); United State v. Dixion,805 F.3d 1193,1197(9th Cir. 2015). The federal ... definition of robbery Mr. Arceneaux argues requires proof involving .... immediate danger to a person, while §2113(a) requires no such proof. Therefore, rendering §2113(a) broader than the federal generic definition of bank robbery, because one can commit bank robbery without immediate danger to a person. Mr. Arceneaux was never in the bank when it was being robbed and his aiding abetting could not be construed as placing any person in immediate danger . United States v. Dixon Supra,805 F.3d 1197

In United States v. Mathis, 136 S.Ct.2243(2016) has held that "[w]hen a statute defines only a single crime with a single set of elements, an application of the categorical approach is straightforward. But when a statute defines multipal crimes by listing multiple, alternative elements, the elements-matching ,required by the categorical approach is more ....

difficult." Wherefore, to decide whether a conviction under such statute is for an enumerated offense ,a court must descern which of the alternative elements was integral to the defendant's conviction. Taylor v. United States, 495 U.S. 575,600-601,110 S.Ct. 2143,109 L.Ed 2d 607. "Elements"are the constituant parts of a crime's leagal.... definition, which must be proved beyond a reasonable doubt to sustain a conviction; they are distinct from "facts", which are mere real world things, extraneous to the crime's legal requirements and ignored by the categorical approach.

In Mr. Arceneaux's case at bar involves a different type of alternative worded statute [§2113(a)] one that defines only one crime, with one set of elements, but which lists alternative factual means by which a defendant can satisfy those elements. Arceneaux's case is resolved by the Supreme Court's precedents, which have repeatedly held, and in no uncertian terms, that a stutue cannot qualify if its elements are broader than those of a listed generic offense. Because the underlying brute facts of Arceneaux's case or by the means of which he committed his crime[aiding abetting] makes no difference, even if the conduct of Arceneaux fits within the definition of the generic offense, the mismatch of elements saves him from being enhanced udner §924(c). Taylor,495 U.S. at *602,110 S.Ct. 2143,109 L.Ed 2d 607; Richardson v United States,526 U.S. 813,817,119 S.Ct. 1707,143 L.Ed 2d 985(2016). For these reaons the Supreme Courts holding remains as strong as ever when a statute like §2113(a) lists alternative means of fulfilling one or more elements seriously violates the Sixth Amendment , because a jury ,not a judge may find facts that increase the maximum penalty Apprendi v. New Jersey, 530 U.S. 466,490,120 S.Ct. 2348,147 L.Ed 2d 435 and because the courts

used "non element facts"in error to apply a §924(c) enhancement to an overly-broad ,overinclusive ,indivisible statute[§2113(a)] remand is necessary to correct the complete miscarriage of justice that has become a circuit split in determining whether or not §2113(a) is a crime of violence fitting within the meaning of §924(c) "violent force".

3. When a statute is clearly not a crime of violence under "force" is it Unconstitutional to sentence a defendant under §924(c)(3)(B)'s Residual clause ?

Recently the United States Supreme Court ruled in favor of Davis in United States v. Davis, 138 S.Ct. 2319 (2019) holding the the residual clause of Title 18 U.S.C. §924(c)(3)(B) was unconstitutional. as it did in two other precedent cases before. United States v. Johnson,135 S.Ct. 2551(2015); Sessions v. Dimaya, 138 S.Ct. 1204(2018). In all of these cases presented to the Supreme Court the government has continously argued that the defendant's cases fell within the "force clause" rather than the residual clause. The High Court disagreed and found that in each case fell within the residual clause due to the vague statute of which each defendant was convicted. Mr. Arceneaux argues as those before him , that his Aiding Abetting a bank robbery under §2113(a) is indivisible and therefore could only be a crime of force under §924(c)'s unconstitutional residual clause.

Bank robbery cannot be a predicate crime under §924(c)'s force clause, because bank robbery as defined in §2113(a) sweeps more broadly than the federal definition of robbery. Descamps v. United States, 133 S.Ct. 2276 (2013).

Wherefore, if the statute [§2113(a)] does not fall within the meaning the "force clause" the residual clause of §924(c) is unconstituionally applied by a court in error because the element of the cirme cannot be satisfied. Under the force clause, the clause could only be satisfied by the "force capable of causing phyiscal pain or injury to another person not to property as §2113(a) includes. See united States v. Najera-Mendoza 670 F.3d 627,631(5th Cir. 2012); United States v. Miranda-Ortegon, 670 F.3d 661(5th Cir. 2012).

The question becomes clear that §2113(a) is indivisible and that it does not qualify under the force clause of §924(c) wherefore the.... government did not prove by a reasonable doubt nor the jury found Arceneaux guilty of committing a violent offense that includes "force" ,a requirement that the government must prove in order to convict Arceneaux . See Steiner v. United States, (no 17-15555)(11th Cir. 2019).

The reason that bank robbery does not come within the provisions of §924 (c) is due to the purpose and scope of that statutes application meant by congress law makers intentions of use. Rendering Mr. Arceneaux's sentence unconstitutional and requiring this Honorable Courts remand back to the Ninth Circuit for further considerations.

4. When Mr. Arceneaux went to trial , the district court instructed the jury that they could find defendant guilty of violating §924(c), as an aider and abettor, if the evidence showed that he knowingly and actively.... participated in the bank robbery crime, and knew that an accomlice used a firearm in the commission of a bank robbery offense. The jury based on the district courts instructions. However as in Steiner v. United States, (no. 17-15555)(11th Cir. 2019); The Supremem Court has held that the type of jury instructions were erroneous because they fail to require proof

that a defendant "knew in advance" that one of his cohorts would be armed. By the district court telling the jury to consider "merely" whether a defendant "knew his cohort used a firearm", the court did not direct the jury to determine"when a defendant obtained requisite knowledge" to determine whether the defedant knew about the gun in ... sufficient time to withdraw from the crime. Rosemond v. United States, 572 U.S. 65; 134 S.Ct. 1240,188 L.Ed 2d 248(2014).

The federal aiding abetting statute 18 U.S.C.§ 2 Requires the goverment to prove beyond a doubt...of the evidence that a defendant had "full-knowledge",with full "intent" of aligning him self with the crimes illegal scheme in its "entirety" including its use of a firearm with advanced knowledge, so as to enable a defendant to make a relevant legal and moral choice to back out or walk away. When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan of ,if unsuccessful,withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an armed offense. But Here Mr. Arceneaux knew nothing of a gun until it appeared at the scene, he may already have completed his act of assistance or even if not Arceneaux may at that late point had no realistic oppertunity to of quit the crime. Because of this, Arceneaux had not shown the requisite "intent" to assisted the bank robbery that involved a gun being used by others. Arceneaux was never present in the bank when it was being robbed and he was unarmed. An unarmed accomplice cannot aid and abet a violation of 18 U.S.C. §924(c) unless the government could prove "advance knowledge", and the government failed to present such evidence to the jury, leaving the jury to only consider the courts jury instructions. Wherefore, This Honorable High Court should remand this matter back to the Ninth Circuit Court of Appeals or vacate the §9924(c) conviction.

Mr. Arceneaux's argument's and questions before this Honorable High Court represents a complete miscarriage of justice, involving violations of ones constitutional protected rights protected by the Fifth, Sixth Amendment and if left without a ruling of this High court would jepordize the integerty and reputation of the criminal justice itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brandon Arceneaux

Date: 11-4-2019