

NO. _____

In The
Supreme Court of the United States

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JIMMY LEE ALLRED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Clarification is needed to unite the Circuits in determining when to use the “Categorical Approach” defined in *Taylor v. United States*, 495 U.S. 575 (1990) or the “Modified Categorical Approach” as more recently set out in *Mathis v United States*, 136 S. Ct 2243 (2016). Specifically, whether a conviction for Witness Retaliation, in violation of 18 U.S.C. § 1513(a)(1)(1988), which states:

“[W]hoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for” being a witness, party or informant in federal proceedings may be fined and imprisoned for up to ten years,”

involves alternate elements or enumerates various factual means of committing a single element.

2. Whether every knowing or intentional causation of bodily injury necessarily involves the use of “violent force” sufficient to constitute a violent felony under Armed Career Criminal Act of 1984 (“ACCA”), 18 U.S.C. § 924(e)(2)(B)(i)? Specifically, whether a conviction for Witness Retaliation, in violation of 18 U.S.C. § 1513(a)(1)(1988), which states:

“[W]hoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for” being a witness, party or informant in federal proceedings may be fined and imprisoned for up to ten years,”

constitutes a violent felony under the force clause of the Armed Career Criminal Act of 1984 (“ACCA”), 18 U.S.C. § 924 (e)(2)(B)(i)? This causation issue was left unresolved in this Court’s ruling in *United States v. Castleman*, 572 U.S. 157, 170 (2014).

LIST OF PARTIES TO PROCEEDING BELOW

Petitioner, Jimmy Allred was the Defendant and Appellee below.

The United States of America was the Plaintiff and Appellant below.

CORPORATION DISCLOSURE STATEMENT

Petitioner is an individual and there are no corporate interests to disclose.

RELATED CASES

The following proceedings are directly related to this case:

United States v. Jimmy Lee Allred, 2:94-cr-00175-WO-1, judgment entered in the United States District Court for the Middle District of North Carolina on May 23, 1995. (J.A. 64).

United States v. Jimmy Lee Allred, 16-140 opinion of the United States Court of Appeals for the Fourth Circuit granting permission for Mr. Allred to seek a second or successive 28 U.S.C. § 2255 motion on May 5, 2016. (J.A. 68).

United States v. Jimmy Lee Allred, 1:16-cv-611 and 2:94-cr-00175-WO-1 Ordered in the United States District Court for the Middle District of North Carolina granted Mr. Allred's, Petitioner's, Motion and Amended Motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 on April 24, 2018. (J.A. 136). Final amended judgement was entered on June 13, 2018. (J.A. 143).

United States v. Jimmy Lee Allred, 18-6843 opinion of the United States Court of Appeals for the Fourth Circuit reversing the District Court on November 7, 2019. (Appendix p. 1a).

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**MANNER IN WHICH THE FEDERAL QUESTION
WAS RAISED AND DECIDED BELOW**

The United States Court of Appeals for the Fourth Circuit issued a Published Opinion in *United States v. Allred*, ___ F.3d ___ 18-6843 (4th Cir. 2019) (Appendix p. 1a), reversing the district court. The United States District Court of Appeals for the Fourth Circuit, ruled the “modified categorical approach” was the appropriate analysis to use to determine a violation of 18 U.S.C. § 1513(b)(1)(Previously codified as 18 U.S.C. § 1513(a)(1)), Witness Retaliation, and found it a crime of violence for purposes of predicate offenses under 18 U.S.C. § 924(e), Armed Career Criminal Act or “ACCA”.

JURISDICTIONAL GROUNDS

The Middle District of North Carolina had jurisdiction over this criminal case following a collateral attack pursuant to 28 U.S.C. § 2255(d). The United States Court of Appeals for the Fourth Circuit had jurisdiction over Petitioner’s appeal pursuant to 28 U.S.C. §§ 1291 and 2253(a). Final judgment was entered October 24, 2019. Petitioner did not request a rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented involves the Armed Career Criminal Act of 1984 (“ACCA”) 18 U.S.C. § 924(e) which states:

“In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend

the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term “serious drug offense” means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.”

The case also involves 18 U.S.C. § 1513(a)(1) Retaliating Against a Witness, Victim, or Informant. Congress later recodified the provision as 18 U.S.C. § 1513(b)(1), but the quoted portion of the statute remained unchanged which states:

“Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—

STATEMENT OF THE CASE

Allred was convicted by a jury of one count of possession of a firearm after a felony conviction in violation of 18 U.S.C. § 922(g)(1). (J.A. 154). On May 5, 1995, he was sentenced pursuant to the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(1) to 264-months imprisonment and to five years of supervised release. (J.A. 156, 64-67). Allred was subject to ACCA's enhanced penalties due to his three prior felony convictions: [1] a 1986 conviction for felony assault with a deadly weapon with intent to kill inflicting serious injury; [2] a 1990 conviction for felony possession with intent to sell and deliver cocaine; and [3] a 1989 conviction for felony Retaliating Against a Witness. (J.A. 169).

In order to qualify for the enhanced penalties under ACCA, the defendant must have three prior convictions for a violent felony or serious drug offenses or both, committed on occasions different from one another. In 2015 the United States Supreme Court announced a new rule of constitutional law in *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson* the U.S. Supreme Court struck down part of ACCA's definition of violent felony as unconstitutionally vague. ACCA had designated violent felonies as those that had as an element the use, attempted use or threatened use of physical force (force clause) against the person of another; or is burglary, arson, or extortion, involves the use of explosives (enumerated clause), or otherwise involves conduct that presents a serious risk of physical injury to another (residual clause). 18 U.S.C. §§ 924(e)(2)(B)(i) and (ii). *Johnson* struck down the residual clause as unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563.

Allred, having previously filed motions to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, sought and was granted authorization from the Fourth Circuit Court of Appeals (herein “Fourth Circuit”) to file a successive 28 U.S.C. § 2255 motion on May 5, 2016. (J.A. 68-69). After obtaining proper authorization Allred filed an Amended Motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (“Amended 2255”). (J.A. 70-71). Allred’s Amended 2255, asserted that pursuant to the United States Supreme Court’s ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015), a new rule of constitutional law caused his conviction of Felony Retaliating Against a Witness in violation of 18 U.S.C. § 1513(a)(1), to become insufficient to serve as one of the required three predicate ACCA felony conviction. On April 24, 2018, the district court in a well-reasoned opinion granted this motion finding the elements of Retaliation Against a Government Witness did not satisfy the force clause and thus was not a predicate conviction to satisfy ACCA. (J.A. 121-136). On June 13, 2018, the district court resentenced Allred to 120-months of imprisonment, with credit for time served, and three years of supervised release. (J.A. 143-149).

The government appealed. (J.A. 150). The Fourth Circuit in a published opinion reversed the district court. The Fourth Circuit held the statute as divisible and used the modified categorical approach as outlined in *Descamps v. United States*, 570 U.S. 254, 257 (2013) (Appendix pg. 7a). Citing this Courts holding in *Chambers v. United States*, 555 U.S. 122, 126 (2009) the Fourth Circuit, found that retaliation against a government witness could be accomplished by significantly differing

behavior underlying two separate statutory phrases. (Appendix pg. 10a). Specifically, the Fourth Circuit held “behavior typically underlying the causation of bodily injury “differs so significantly” from the underlying damage to property that those stated phrases cannot plausibly be considered alternative means. (Appendix pg. 11a).

After holding the statute was divisible the Fourth Circuit determined it did meet the requirement of the force clause. Relying on this Court’s ruling in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), the Fourth Circuit reiterated the term “physical force” has been interpreted to mean “*violent* force,” that is, “force capable of causing physical pain or injury to another person.” (Appendix pg. 15a). In interpreting this Court’s ruling in *United States v. Castleman*, 572 U.S. 157, 170 (2014), the Fourth Circuit did acknowledge this Court left open the question whether every knowing or intentional causation of bodily injury necessarily involves the use of “violent force” sufficient to constitute a violent felony under ACCA. (Appendix pg. 17a). Additionally, the Fourth Circuit recognized retaliation against a government witness did not specify a *mens rea* for the element of causation. (Appendix 18a). Nonetheless, the Fourth Circuit found 18 U.S.C. § 1513(b)(1) necessitates the use of violent force sufficient to bring it within ACCA’s elements clause.

REASONS FOR GRANTING THE PETITION

1. *Categorical Approach vs. Modified Categorical Approach*

Clarification is needed to unite the Circuits in determining when to use the “Categorical Approach” as originally stated in *Taylor v. United States*, 495 U.S. 575

(1990) or the “Modified Categorical Approach” as more recently outlined in *Descamps v. United States*, 570 U.S. 254 (2013) and *Mathis v United States*, 136 S. Ct 2243 (2016). In *Descamps v. United States* at 133, this Court clarified whether courts may apply the modified categorical approach to assess for predicate ACCA convictions. In doing so the trial court must determine the violent nature of a defendant's prior conviction under an indivisible criminal statute (*i.e.*, one that does not set out elements of the offense in the alternative, but which may nevertheless broadly criminalize qualitatively different categories of conduct). This Court explained that the modified categorical approach “serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction.” *Id.* at 2283. *Descamps* explained, offenses are divisible when they consist of alternative elements through which the offense may be proved. *Id.* at 2283. Elements are considered factual circumstances of the offense that the jury must find “unanimously and beyond a reasonable doubt.” *Id.* at 2288. In clarifying when to use each approach this Court in *Mathis*, held that the categorical approach is used when a statute enumerates various factual means of committing a single element. *Mathis*, gives the example of the element being “deadly weapon” and provides that “gun, knife, bat or similar weapon” would all qualify as diverse means of satisfying a single element of a single crime. *Id.* at 2250. Indeed, *Mathis* involved the Iowa's burglary statute and found unlawful entry into a “building or other structure [or] land, water, or air vehicle” as alternate means of satisfying the location element. *Id.* At 2250.

Interpreting the Witness Retaliation statute, 18 U.S.C. § 1513, in the instant case, the Fourth Circuit used the modified categorical approach and subsequently found Witness Retaliation is a predicate for ACCA purposes. However, in a published decision the United States Court of Appeals for the Tenth Circuit used the categorical approach without any contrary argument by the parties and achieved the exact opposite result. See *United States v. Bowen*, 17-1011 (10th Cir. 2019). Hence, guidance from this Court is necessary to allow all jurisdictions to properly understand when to apply the categorical approach or the modified categorical approach for such statutes.

2. *Causation*

In 2015 the United States Supreme Court announced a new rule of constitutional law in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (Herein “*Johnson 2*”). In *Johnson 2* the U.S. Supreme Court struck down part of ACCA’s definition of violent felony as unconstitutionally vague. ACCA had designated violent felonies as those that had as an element the use, attempted use or threatened use of physical force (force clause) against the person of another; or is burglary, arson, or extortion, involves the use of explosives (enumerated clause), or otherwise involves conduct that presents a serious risk of physical injury to another (residual clause). § 924(e)(2)(B)(i) and (ii). *Johnson 2* struck down the residual clause as unconstitutional vague. *Johnson 2*, 135 S. Ct. at 2563. Hence, Witness Retaliation is only a crime of violence under ACCA if it meets the elements set out in the force clause as it is not an enumerated offense.

In analyzing the force clause, this Court has previously held “physical force” is given the ordinary meaning: “force exerted by and through concrete bodies” as opposed to “intellectual force or emotional force.” *Johnson v. United States*, 559 U.S. 133, 138 (2010) (herein “*Johnson 1*”). In the context of “*violent felony*” the phrase “physical force” means violent force. *Johnson 2* at 140. Violent force “would not be satisfied by the merest touching,” as defined in common-law misdemeanor battery. *Johnson 1* at 139. This Court again interpreted “physical force” but in the context of a misdemeanor crime of domestic violence pursuant to 18 U.S.C. § 922(g)(9) and found “offensive touching” does meet the force requirement. see *United States v. Castleman*, 572 U.S. 157, 163 (2014). In so doing this Court reasoned in the context of domestic violence, “acts is not merely a type of “violence”; it is a term of art encompassing acts that one might not characterize as "violent" in a nondomestic context.” *Castleman* at 165. Finally, the Court did not decide the causation aspect of acts causing bodily injury. *Castleman* at 170.

In the instant case the district court determined even if the modified categorical approach is used Retaliation Against A Witness pursuant to 18 U.S.C. § 1513(b) is not a crime of violence. The district court reviewed the “plain language of § 1513(b), “[w]hoever knowingly engages in any conduct and thereby causes bodily injury to another person . . . with intent to retaliate against any person” for being a witness or informant is guilty of a felony,” and held the statute on its face did not require the use of violent force or any level of force, only “any conduct” which causes bodily injury. (J.A. 129). Focusing on the broad term “conduct” the district court held

the language used appeared broader than language limited to only uses of violent forces. (J.A. 120).

The Fourth Circuit disagreed and vacated the district court's ruling. In its opinion the Fourth Circuit found, "difficulty to imagine a realistic scenario in which a defendant would knowingly engage in conduct with the specific intent to retaliate against a witness and thereby only recklessly or negligently cause bodily injury." On this reasoning the Fourth Circuit reached the conclusion intentional retaliation causing bodily injury necessitates the use of violent force sufficient to bring it within the ACCA's elements clause. (Appendix pg. 19a-20a). Guidance from this Court is needed to determine if statutes without specific causation resulting in injury may be assumed to satisfy ACCA, as in the instant case of Witness Retaliation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

This the 16th day of January, 2020.

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