

19-7334
No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

EDGARDO DIAZ-CESTARY — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

John Joseph Moakley U.S. Courthouse

United States Court of Appeals for the First Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

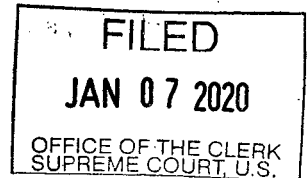
PETITION FOR WRIT OF CERTIORARI

Edgardo Diaz-Cestary
(Your Name)

Federal Correctional Institution Bennetttsville
(Address) PO BOX 52020

Bennetttsville, South Carolina 29512
(City, State, Zip Code)

N/A
(Phone Number)



QUESTION(S) PRESENTED

- I. WHETHER FORCE REQUIRED TO COMMIT HOBBS ACT ROBBERY SATISFIES THE PHYSICAL FORCE STANDARD OF JOHNSON I TO CATEGORICALLY QUALIFY THE ELEMENTS CLAUSE OF 924(c).
- II. WHETHER 924(c)(3)(A) FORCE CLAUSE FALLS OUTSIDE ~~THE~~ THE SCOPE OF JOHNSON I's STANDARD

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:

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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,
☐ is unpublished.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,
☐ is unpublished.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☐ is unpublished.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☐ is unpublished.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

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 10, 2019.

☒ 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 _____.

☐ 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

I. 924(c)(3) For the 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.

II. 18 u.s.c. 1951(b)(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 anyone in his company at the time of the taking or obtaining.

STATEMENT OF THE CASE

On October 10, 2019, The First Circuit Court of Appeals denied Edgardo Diaz-Cestary based on Hunter v United States, 873 F.3d 388 (1st cir. 2017) and rejected his claim based on Johnson II. However The First Circuit Court of Appeals did not address whether force required to commit Hobbs Act robbery satisfies the physical force standard of Johnson I to categorically qualify the elements clause of 924(c), nor have any circuit court addressed whether 924(c)(3)(A) force clause falls outside the scope of Johnson I's standard. Therefore the Supreme Court should address both issues due to split decisions between judges from other circuits as to whether Hobbs Act qualifies the " physical force " needed to fall under the force clause.

REASONS FOR GRANTING THE PETITION

Due to the reasons stated below The Supreme Court should grant this petition and due to conflict between the First Circuit Court of Appeals and other district and circuit courts, on the two questions stated in this petition, that the Supreme Court never addressed.

If Hobbs Act robbery can be accomplished without the use of " physical force " then its elements are too broad to match up with the appropriate " crime of violence " term in 924(c) under the categorical approach as explained by The Supreme Court in Mathis, 136 S. Ct. 2243 (2016). The categorical approach is the same whether one is dealing with 924(c), as here or with 924(e), as in Mathis. When applying the categorical approach a court presumes " the conviction rested on the least serious acts that could satisfy the statute, " United States v Armour, 840 F.3d 904, 908 (7th Cir. 2016), and that the least serious act would be fear of future injury to property. This approach requires that the courts " look only to the statutory definitions - i.e., the elements of a defendant's [offense] and not to the petitioner facts underlying [the offense] " in determining whether the offense qualifies as a crime of violence. Descamps, 570 u.s. 254, 260, 133 S. Ct. 2276 (2013).

The " rule of lenity " instructs that, where a statute is ambiguous, courts should not interpret the statute so as to increase the penalty that it places on the defendant. See Albernaz v United States, 450 u.s. 333, 342, 101 S. Ct. 1137 (1981). Courts had agreed that ambiguity must be resolved in [petitioner's] favor under the rule of lenity. See United States v Santos, 533 u.s. 507, 514, 128 S. Ct. 2020 (2008). The court's holding in Beckles did not address the rule of lenity, but instead, addressed whether guidelines provisions are subject to vagueness challenges under the Due Process Clause. The court held that they are not, because guidelines do not define criminal offenses or fix the permissible range of sentence, 137 S. Ct. 892.

Furthermore, 924(c)(3)'s residual clause, post Johnson, Dimaya, and Davis, is constitutionally incapable of supporting a conviction due to vagueness. The Ninth Circuit stated Nevada's robbery statute 200.380, sweeps more broadly than the element clause of 4b1.2(a) and is not a categorical match under the enumerated offense because "generic robbery" requires danger to the person, not merely danger to property. See United States v Edling, 891 F.3d 1190 (9th Cir. 2018). Both Nev. Rev. Stat. 200.380 and Hobbs Act robbery share the same elements, in which if Nevada's robbery is not consider a crime of violence, nor can Hobbs Act robbery.

Nev. Rev. Stat. 200.380 :

Unlawful the " taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery. "

18 u.s.c. 1951(b) robbery :

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 anyone in his company at the time of the taking or obtaining. "

Force and physical force are distinguished from one another because as stated, physical force means violent force - that is, "capable of causing physical pain or injury to another person," Johnson v United States, 599 U.S. 133, 140, 130 S. Ct. 1265 (2010), force directed against property is not covered. Force on the other hand, as stated in numerous circuit courts such as The Fourth Circuit, is defined as "power, violence, or pressure directed against a person or thing" (i.e., property). "Power in turn, is defined as dominance, control, or influence," these definitions are helpful in analysis and support the proposition that [the committed offense] maybe accomplished in the absence of "physical force." This is so because although the use of force necessarily involves a degree of compulsion, it can be effected through power or pressure, which do not necessarily have physical components. See United States v Chacon, 553 F.3d 250, 257 (4th Cir. 2008).

In Haynes v United States, Case No. 4:16-CV-4106 (7th Cir. 2017), the district court stated:

"Compelling a victim to surrender valuable property against his will, a threat to deface a victim's picasso painting with a magic marker pen, to block out lines in rare documents, or to flush drugs down a toilet is likely to be as or more effective as a threat to punch a victim in the face. Each involves a clear threat of injury and thus each would satisfy the elements of Hobbs Act robbery, but only the threat to property described above involve physical actions, they do not involve physical force within the meaning of Johnson."

The Tenth Circuit considered whether a prior offense of federal witness retaliation committed by damage to a victim's property could serve as a predicate crime of violence under the elements clause of 924(c)(3). The court of appeals concluded that this offense did not meet Johnson I's Standard and therefore was not a crime of violence under the elements clause of 924(c)(3) because the offense could be committed without the use of violent physical force. See United States v Bowen, Case No. 17-1011 (10th Cir. 2019). Recently the Ninth Circuit in United States v Chea, Case Nos. 98-CR-20005-1 CW, 98-CR-40003-2 CW (9th Cir. 2019), stated that " the elements clause of 924(c) defines a crime of violence as an offense that is a felony and ' has as an element the use, attempted use, or threatened use of physical force against the person or property of another. ' 18 u.s.c. section 924(c)(3)(A). Section 924(c)(3) does not define the term ' physical force. ' " Also the court stated The Supreme Court never addressed the question of " Whether Hobbs Act robbery by causing fear of future injury to property satisfies the violent physical force standard of Johnson I. "

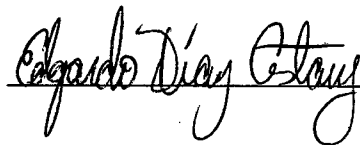
Lastly, intimidation as used in the federal bank robbery statute and fear of future injury as used in Hobbs Act robbery, does not coincide with one another, because intimidation under the federal bank robbery statute means, " to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm, " but Hobbs Act robbery can put a person in " fear of future injury to property, " therefore Hobbs Act robbery cannot qualify as a crime of violence under the force clause because it can be done without violent physical force.

If force to property can be accomplished without physical force as stated in Johnson I and 924(c)(3)(A), then the force clause must be revised because physical force to property violates the Johnson I's standard. The force clause of 924(c)(3)(A) is a combination of contradictory words such as "physical force to property," in which physical force means violent force - that is, "capable of causing physical pain or injury to another" force directed against property is not covered. Throughout the guidelines, "physical injury" is used to refer to injury to a person, other terms like "damage or destruction" are used to refer to injury to property. Section 5k2.2 applies to "physical injury," and it makes clear by referring to injury or disability suffered by "the victim" that it covers injury to a person, not injury to property. Section 5k2.5, by contrast, covers injury to property, which it labels "Property Damage or Loss." See e.g., 2C1.1(c)(3) ("physical injury or property destruction"), 2J1.2(b)(1)(B) ("physical injury to a person or property damage"), 5k2.12 ("physical injury, substantial damage to property or similar injury").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

Date: January 6, 2020