

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN DECOITO,
Petitioner

v.

UNITED STATES,
Respondent

**MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI
OUT OF TIME**

Petitioner, Brian DeCoito, moves, through undersigned counsel, for leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit out of time.

In support of this motion, undersigned counsel states the following:

1. Mr. Decoito's petition for a writ of certiorari was due to be filed on or before July 3, 2019.

2. Mr. Decoito's petition was one of three petitions with the same deadline that undersigned counsel was preparing for filing. Counsel was also preparing petitions in an additional three cases with a filing deadline of July 5, 2019.

3. The petition in this case was finalized on July 3, 2019 and filed electronically in this Court on that date. Paper copies were made on that date. However, counsel was unable to bring the paper copies to the post office on July 3, 2019 for timely filing.

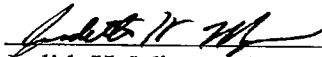
4. Counsel was attempting to complete the other two petitions with the same filing deadline in order to bring all three to the post office in a single trip. By the time the third petition was completed, the post office was closed.

5. Counsel's office was short-staffed on July 3, 2019 due to the impending holiday, adding to the difficulty of completing the petitions and preparing the paper copies as there were other filings to be prepared and work to be done in addition to the preparation of undersigned counsel's petitions.

6. Counsel's efforts to complete the petition for timely filing were also hampered by her need to address unanticipated, time-sensitive issues on July 1 and 2, 2019 with a client counsel is representing in his pending appeal from a death sentence.

Wherefore, undersigned counsel requests that this Court grant leave to file Mr. Decoito's petition for a writ of certiorari out of time.

Respectfully submitted,
Brian Decoito
By his attorney



Judith H. Mizner, AFPD
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Dated: July 6, 2019

United States Court of Appeals For the First Circuit

No. 16-2436

BRIAN DECOITO,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

Before

Howard, Chief Judge,
Lynch and Barron, Circuit Judges.

JUDGMENT

Entered: April 4, 2019

Petitioner appeals from the district court's denial of a 28 U.S.C. § 2255 motion featuring a challenge to one or more 18 U.S.C. § 924(c) convictions under Johnson v. United States, 135 S. Ct. 2551 (2015) (Johnson II), and related precedent. The court entered an order to show cause citing recent precedent from this court holding that various federal offenses, including potentially the offense(s) anchoring petitioner's § 924(c) conviction(s), categorically satisfy the force clause at § 924(c)(3)(A), rendering any challenge to the residual clause at § 924(c)(3)(B) irrelevant. Petitioner was directed to show cause why relief should not be denied in this case in light of the precedent cited. Petitioner has responded to that order to show cause, and we have considered carefully any arguments sufficiently developed in that response and any supplemental or amended response. We conclude, after review of those arguments and relevant portions of the record, that the district court's denial of § 2255 relief was not erroneous. See Parsley v. United States, 604 F.3d 667, 671 (1st Cir. 2010) (standard of review).

With his counseled response to the order to show cause, petitioner suggests that the § 924(c) offense was based on conspiracy to commit Hobbs Act robbery. However, the operative superseding information reads, "[Hobbs Act] robbery and conspiracy to commit [Hobbs Act] robbery," when identifying the predicate offense(s). 1:10-cr-00095-JD-1 Dkt. 39. The recitation of the facts in the plea agreement, which petitioner admitted the government could prove and the

truth of which petitioner admitted at the plea colloquy, described a very much completed Hobbs Act robbery in addition to a conspiracy. 1:10-cr-00095-JD-1 Dkt. 41 at 5-6 (plea agreement); 56 at 11-14 (plea colloquy transcript). Thus, there were alternative bases for the § 924(c) conviction: a conspiracy offense and a completed offense. Petitioner pleaded guilty to both and has failed to explain why we are not at liberty to affirm based on the completed offense alone. We therefore need not address at this time the status of conspiracy to commit Hobbs Act robbery post-Johnson II.

Accordingly, any previously imposed stay is lifted, and the judgment of the district court is affirmed. Any remaining pending motions are denied as moot.

By the Court:

Maria R. Hamilton, Clerk

cc:

Judith H. Mizner
Bjorn R. Lange
Brian Decoito
Seth R. Aframe

**Additional material
from this filing is
available in the
Clerk's Office.**
