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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

PIYARATH KAYARATH - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

PIYARATH KAYARATH

REG. NO. 08083-031

UNITED STATES PENITENTIARY

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QUESTION(S) PRESENTED

1. Whether Court of Appeals fulsome review of potential meritorious claims in COA application overstep the bounds of 28 U.S.C. § 2253(c)(1)?
2. Whether Court of Appeals was correct in its procedural ruling that denied Petitioner's Rule 60(b)(4)'s due process violation claim as an unauthorized successive § 2255?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

1. United States v. Chanthadara et al., No. 6:94-CR-10128-
WEB-2 (D. Kan.). Judgment entered April 11, 1997.
2. United States v. Kayarath, 962 F. Supp. 1399 (D. Kan.
1997). Judgment entered April 11, 1997.
3. United States v. Kayarath, 149 F.3d 1192; WL 327682, at *1
(10th Cir. 1998). Judgment entered June 19, 1998.
4. United States v. Nguyen, 155 F.3d 1219 (10th Cir. 1998).
Judgment entered September 3, 1998.
5. United States v. Chanthadara, 230 F.3d 1237 (10th Cir.
2000). Judgment entered November 1, 2000.
6. United States v. Kayarath, 41 F. App'x 255 (10th Cir.
2002). Judgment entered April 29, 2002.

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STATUTES AND RULES

18 U.S.C. § 1951

18 U.S.C. § 924(c)

18 U.S.C. § 924(j)

28 U.S.C. § 2253(c)(1)

28 U.S.C. § 2253(c)(2)

28 U.S.C. § 2255

Federal Rules of Civil Procedure, 60(b)(4)

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 is unpublished.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 2020 U.S. Dist LEXIS 66896; 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 is unpublished.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 July 30, 2020.

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

U.S. Constitution, amend V

U.S. Constitution, amend VI

18 U.S.C. § 1951

18 U.S.C. § 924(c)

18 U.S.C. § 924(j)

28 U.S.C. § 2253(c)(1)

28 U.S.C. § 2253(c)(2)

28 U.S.C. § 2255

STATEMENT OF THE CASE

Mr. Piyarath Kayarath was charged in 1997 for Hobbs Act robbery and attempt perpetration of robbery affecting interstate commerce, in violation of 18 U.S.C. § 1951 (Count 1), and aiding and abetting the use of a firearm, during a crime of violence, that resulted in death, in violation of 18 U.S.C. §§ 924(c), 924(j), and 2. He was convicted following a jury trial and sentenced to life imprisonment.

Mr. Kayarath appealed his conviction and sentenced, and the judgment was affirmed by the Tenth Circuit Court of Appeals in United States v. Kayarath, 149 F.3d 1192; 1998 WL 327682, at *1 (10th Cir. 1998). Mr. Kayarath pursued a habeas petition under 28 U.S.C. § 2255 which was denied. Both the district court and Tenth Circuit Court of Appeals denied the application for a COA.

Following the U.S. Supreme Court's decision in United States Johnson, 135 S. Ct. 2551 (2015), Mr. Kayarath filed a second or successive application in the Tenth Circuit Court of Appeals seeking authorization to file a habeas petition. The Tenth Circuit abated Mr. Kayarath's application pending the outcome of Sessions v. Dimaya. While the motion was in abated status, the Tenth Circuit overturned United States v. Battle, 289 F.3d 661 (10th Cir. 2002), with United States v. Melgar-Cabrera, 892 F.3d 1053 (10th Cir. 2018). Mr. Kayarath thereafter filed a Motion to Reopen the Judgment under Rule 60(b)(4) of Fed. R. Civ. P., based on Melgar-Cabrera.

Then on June 24, 2019, the U.S. Supreme Court decided United States v. Davis, 139 S. Ct. 2319 (2019). Mr. Kayarath

filed another application in the Tenth Circuit Court of Appeals to pursue a successive § 2255 motion to challenge his conviction and life sentence under § 924(c) and § 924(j).

The Tenth Circuit granted authorization and a § 2255 petition was filed in the district court, raising the claims, (1) that based on Tenth Circuit rule in United States v. Bowen, fear of injury to property is not categorically a crime of violence under § 924(c) elements clause; and (2) applying the categorical approach to Hobbs Act robbery's plain language, § 1951 can be violated in the least way which is not a crime of violence under the elements clause.

The district court combined Kayarath's Rule 60(b) motion and his successive § 2255, concluded that it lacked jurisdiction to adjudicate the Rule 60(b) motion, denied relief in both motions, and denied the issuance of a COA. See Appendix B. A timely notice of appeal was filed, followed by an application for a COA in the Tenth Circuit Court of Appeals.

The Court of Appeals conducted a full review of the merits of Mr. Kayarath's § 2255 claims, and concluded that the Rule 60(b) (4) motion was an unauthorized second or successive § 2255. The Court of Appeals denied the issuance of a COA and dismiss the appeal. See Appendix A.

REASONS FOR GRANTING THE PETITION

The writ of certiorari should be granted in light of Rule 10(a), Supreme Court Rule, to chastise the Court of Appeals for conducting a fulsome review of the merits of Mr. Kayarath's § 2255 claims in the absence of jurisdiction. An exercise of this Court's supervisory power is necessary here as it was done in *Buck v. Davis*, 580 U.S. __, 137 S. Ct. 759 (2017), because Court of Appeals are still exceeding the bounds of 28 U.S.C. § 2253(c)(1) regarding pro se litigants COA applications.

I. The Court of Appeals Inappropriately Conducted a Full Merits Review Without Jurisdiction.

In conducting a fulsome review of the merits of Kayarath's claim, the Court of Appeals did the exact thing this Court consistently warned not to do. In *Buck v. Davis*, this Court noted that "full consideration of the factual or legal bases adduced in support of the claims" is not appropriate in evaluating a request for a COA. But that is exactly what the Court of Appeals did regarding Mr. Kayarath's COA application.

II. Kayarath had Raised a Substantial Showing of Denial of Constitutional Right on Issue of §§ 924(c) and 924(j) that Warranted Appellate Review

Kayarath argued in his § 2255 that the plain language of § 1951(b)(1) shows that Hobbs Act robbery can be committed by "causing fear of future injury to property," which does not involve the "physical force" required for it to qualify as a crime of violence under the elements clause of § 924(c)(3) and *Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson I*). In conducting the categorical approach analysis, the Supreme Court held that the lower courts must presume that the conviction rested upon nothing more than the least of the acts criminalized by the statute, and then determine whether even those acts are encompassed by the crime of violence definition. See *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013).⁴

Kayarath's argument depended on two premises: (1) that Hobbs Act robbery can be committed by causing fear of future injury to property; and (2) by causing fear of future injury to property fails to meet the *Johnson I* standard that the prior offense involve actual or threatened physical force that is violent. The first premise is supported by the plain language of 18 U.S.C. § 1951(b)(1).

That statute, as described above, defines "robbery" under the Hobbs Act as 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]... " (emphasis added). Numerous Circuits conceded to this fact. *United States v. Camp*, 903 F.3d 594, 602 (6th Cir. 2018) (noting that Hobbs Act robbery can be committed by

"threats to property alone" and that such threats "whether immediate or future-do not necessarily create a danger to the person"); United States v. Buck, 847 F.3d 267, 275 (5th Cir. 2017) (holding that Hobbs Act robbery by "threatening some future injury to property of a person who is not present" is not a crime of violence because other courts "have held that the Hobbs Act definition of robbery describes a crime of violence under § 924(c)(3)(A), " without more); see also United States v. O'Connor, 874 F.3d 1147, 1158 (10th Cir. 2017) (holding that "Hobbs Act robbery criminalizes conduct involving threats to property," and that "Hobbs Act robbery reaches conduct directed at 'property' because the statute specifically says so") (citing 18 U.S.C. § 1951(b)(1)).

The second premise, that Hobbs Act by causing fear of future injury to property does not involve the use or threats of violent physical force required by Johnson I, also is supported by the statute's plain language. The phrases "fear of injury," "future," and "property," are not defined in § 1915(b)(1), so the Court should give them their ordinary meaning. See Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.") (citation omitted).

Nothing in the ordinary meaning of these phrases suggests that placing a person in fear that his or her property will suffer "future injury" requires the use or threatened use of any physical force, much less violent physical force. Where the property in question is intangible, it can be injured without the use of any physical contact at all; in that context, the use of violent physical force would be an

impossibility. Even tangible property can be injured without using violence force. For example, a vintage car can be injured by a mere scratch, and a collector's stamp can be injured by tearing it gently.

Section 1951(b)(1) lists alternative scenarios in which a victim can be placed in fear of injury to property, and one of these alternatives requires only that the "fear of injury" be "to his person or property," without requiring that the property be in any particular location. See 18 U.S.C. § 1951(b)(1) ("...fear of injury, immediate or future, or his person or property, or property in his custody or possession...") (emphasis added). Thus, the plain language of § 1951(b)(1) clearly supports the notion that committing Hobbs Act robbery by causing fear of future injury to property does not require the use or threatened use of any physical force, much less the violent physical force required by Johnson I. This form of Hobbs Act robbery can be committed with threatened de minimis force or no force at all with respect to the property, and without any actual or threatened physical contact with a person.

A proper appellate review was necessary so that Kayarath could have raised unexplored arguments in support of his Davis claim that: (1) Hobbs Act robbery can be committed in the least way without the use of force against property, and (2) Count 2 conviction and sentence is unconstitutional.

III. Jurists of Reason Could Disagree with the District Court's Resolution of Kayarath's Constitutional Claims

At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759 (2017) (slip op., at 13) (quoting *Miller El v. Cockrell*, 537 U.S. 322, 327 (2003)).

Mr. Kayarath had cited *United States v. Chea*, 2019 U.S. Dist LEXIS 177651 (N.D. Cal., Oct. 2, 2019), in his § 2255 petition and COA application in which a judge agreed that § 1951 ("Hobbs Act robbery) can be committed in the least way without use, attempted use or threatened use of physical force. However, in denying Kayarath's § 2255, the district court failed to recognize that the judge's findings in *Chea* supported Kayarath's position.

IV. Kayarath had Raised a Substantial Showing of Denial of Constitutional Right in Rule 60(b) Motion on Issue of Due Process Violation

The requirement of 28 U.S.C. § 2253(c)(2) that a COA should issue only upon a substantial showing of the denial of a constitutional right does not mean that no appeal can be taken if the district court relies on procedural grounds to dismiss a petition. Mr. Kayarath had satisfactorily met the standard for which a court can reopen a judgment under Rule 60(b)(4).

A judgment is void under Rule 60(b)(4) only in the rare instance where [the] judgment is premised either on a certain

type of jurisdictional error, or on a violation of due process that deprives a party of notice or the opportunity to be heard. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010). If voidness is found, relief is not a discretionary matter; it is mandatory.

Kayarath argued in his Rule 60(b)(4) petition that he was deprived of fair notice because *United States v. Battle*, 289 F.3d 661 (10th Cir. 2002), was Tenth Circuit's controlling precedent on the interpretation of § 924(j) prior to his trial, during his appeal and first § 2255 motion. In Kayarath's superseding indictment, both §§ 924(c) and 924(j) are listed in Count 2 in a duplicitous manner. But prior to Tenth Circuit's decision in *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018), that overturned *Battle*, a duplicitous claim was harmless error. Yet, after *Battle* was overturned, the duplicitous issue along with other constitutional violations regarding Count 2 came to light. This includes: (1) a due process violation of deprivation of notice and meaningful opportunity to be heard; (2) a Stromberg violation from the general verdict; and (3) a Sixth Amendment violation under *Alleyne v. United States*, 133 S. Ct. 2151 (2013). At this juncture of the case, it is impossible to determine whether all 12 jurors unanimously rested Count 2 verdict on § 924(c), § 924(j), or both. As per the *Alleyne* violation, § 924(c) carries three mandatory minimums of 5, 7, and 10 years, but the court imposed a term of life imprisonment.

A duplicitous count poses three dangers under the constitution: (1) "A jury may convict a defendant without

unanimously agreeing on the same offense; (2) A defendant may be prejudiced in a subsequent double jeopardy defense; and (3) A court may have difficulty determining the admissibility of evidence."

Kayarath's Rule 60(b)(4) Motion was appropriate to seek reopening of the judgment on due process violation grounds (e.g. deprivation of notice). Rule 60(b)(4) allows a party to seek relief from judgment if the judgment was void. This Court held that, "[A] void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final," and is uncommon. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010). Thus, Kayarath's 60(b)(4) Motion was not an unauthorized successive petition. The lower courts were incorrect in their procedural ruling that the Rule 60(b)(4) was an unauthorized § 2255, and denying the issue of a COA. Thus, this Court's supervisory powers is needed to correct this abuse of § 2253(c) requirement when assessing pro se litigants COA applications.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

P. Rayarath

Date: 10/13/20