No.

IN THE SUPREME COURT OF THE UNITED STATES

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MARTEL VALENCIA-CORTEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

_____

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

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PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether a "deadly or dangerous weapon" for purposes of 18 U.S.C. § 111(b) includes a natural object that was not designed to be a weapon, such as a rock.

STATEMENT OF RELATED CASES

- *United States v. Martel Valencia-Cortez*, No. 16CR00730-H, U.S. District Court for the Southern District of California. Judgment entered August 28, 2017 and amended July 16, 2019.

- *United States v. Martel Valencia-Cortez*, No. 17-50330, U.S. Court of Appeals for the Ninth Circuit. Judgment entered April 24, 2019, cert. denied November 25, 2019.

- *United States v. Martel Valencia-Cortez*, No. 19-50246, U.S. Court of Appeals for the Ninth Circuit. Judgment entered August 13, 2020, rehearing denied November 9, 2020.

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The Ninth Circuit's opinions can be found at *United States v. Valencia-Cortez*, 816 Fed. Appx. 204 (9th Cir. Aug. 13, 2020) and *United States v. Valencia-Cortez*, 769 Fed. Appx. 419 (9th Cir. Apr. 24, 2019).

JURISDICTION

The court of appeals filed its memorandum on August 13, 2020 and denied a petition for rehearing and rehearing *en banc* on November 9, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

18 U.S.C. § 111. Assaulting, resisting, or impeding certain officers or employees

(a) In general. – Whoever –

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaging in or on account of the performance of his official duties; or

(2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisonment not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced penalty. – Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a

defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT OF THE CASE

The government proceeded to trial against petitioner on one count of assault on a federal officer with a deadly weapon, 18 U.S.C. § 111(a),(b), and three counts of bringing in aliens for financial gain, 8 U.S.C. § 1324(a)(2)(B)(ii). ER 28-31.[1] The evidence against petitioner as to the assault charge was weak. On the night of November 15, 2015, Border Patrol agents spotted a group of suspected aliens moving north in a rocky area near the United States – Mexico border. ER 97-112. As they were about to apprehend the aliens, Agent Jason Parco claimed that he was struck with a rock. ER 113. He did not see who threw the rock, but, despite poor visibility, he identified petitioner as the "guide" of the group. ER 104-13. Parco did not see a doctor or go to the hospital as a result of the incident. ER 115.

A single witness, Rey David Martinez-Hernandez, tentatively identified petitioner as the person who tossed the rock, and his testimony was far from compelling. ER 65. Martinez-Hernandez testified that he was a Mexican citizen and was paying $7,000 to be crossed into the United States on the night in question. ER 65-67. He said that there were two guides of the group, and he

[1] "ER" refers to the Excerpts of Record submitted in the Ninth Circuit, "CR" refers to the Clerk's Record, and "App" refers to the Appendix.

eventually saw one of the guides toss two rocks. ER 78. The second rock was larger and he tossed it underhanded. *Id.* at 79, 89. After he was arrested on November 15, he was shown a photo array with petitioner's picture, but he did not identify him. ER 80, 88, 90. A year later, agents arrested Martinez-Hernandez, who had illegally reentered the country and was working at a restaurant. ER 90-93. He was again shown a photo array and tentatively identified petitioner as the guide who tossed the rock, but he was not certain given the difficult visibility. ER 81-85. The government allowed him to live in the United States pending his testimony and did not charge him with illegal re-entry. ER 91-92.

The jury returned guilty verdicts but, with respect to the assault charge, rejected the government's allegation that Agent Parco sustained bodily injury, and therefore the only basis for a § 111(b) verdict was that a deadly weapon was used. ER 28-31. At an initial sentencing hearing, the district court calculated a base offense level of 26 for the assault conviction under the United States Sentencing Guidelines. ER 49-52. The district court arrived at this calculation under U.S.S.G. § 2A2.2 by applying: a base offense level of 14; a 4-level increase for use of a deadly weapon; a 2-level increase for a § 111(b) conviction; and a 6-level "official victim" adjustment under U.S.S.G. § 3A1.2. *Id.* Pursuant to the grouping provision of the guidelines, U.S.S.G. § 3D1.4, the district court added one level

for the three alien smuggling counts of conviction, arriving at a total offense level of 27. *Id.* After calculating a Criminal History Category III, the guideline range was 87-108 months, and the district court imposed the low end. ER 52-53.

In a first appeal, the Ninth Circuit affirmed petitioner's convictions but reversed the sentence, holding that the grouping increase should not have applied. CR 160. On remand, petitioner contended that the district court should strike the § 111(b) deadly weapon enhancement and treat his assault conviction as a misdemeanor because the alleged rock used did not constitute a deadly weapon as a matter of law. CR 164; ER 4-15. Without explanation, the district court rejected his claim. ER 19-22. The district court did, however, correct the grouping calculation and therefore reduced the sentence to 78 months. ER 22-24.

In a second appeal arising from the resentencing, petitioner contended that the district court erred by failing to strike the § 111(b) enhancement because a rock does not constitute a deadly weapon. The Ninth Circuit rejected his challenge, reasoning: "Otherwise 'innocuous' objects can be deadly or dangerous if they are used in a manner that is capable of causing death or serious injury." App. 2. The Ninth Circuit also explained: "Contrary to Valencia-Cortez's argument, *Bond v. United States*, 572 U.S. 844 (2014), is not 'clearly irreconcilable' with our precedent interpreting § 111(b)." *Id.*

ARGUMENT

Under 18 U.S.C. § 111, an assault can constitute a misdemeanor with a 1-year maximum sentence, a felony with an 8-year maximum sentence, or an enhanced felony with a 20-year maximum sentence. The indictment charged the enhanced penalty, alleging that petitioner committed an assault either by use of "a deadly or dangerous weapon" or by inflicting "bodily injury" in violation of § 111(b). ER 116. The jury rejected the "bodily injury" allegation, and therefore the basis for the § 111(b) finding was on a "deadly or dangerous weapon" theory due to petitioner's alleged toss of a rock at the border agent. The Ninth Circuit's conclusion that a rock can constitute a "deadly or dangerous weapon" under § 111(b) conflicts with the plain language of the statute and this Court's opinion in *Bond v. United States*, 572 U.S. 844 (2014). Accordingly, this Court should grant review. *See* S. Ct. R 10(c).

The statutory language, which obviously should be the starting point of the inquiry, *see, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004), modifies the term "deadly or dangerous weapon" as "including a weapon intended to cause death or danger but that fails to do so by reason of a defective component[,]" 18 U.S.C. § 111(b), thereby clarifying that the *design* of the instrument must be for the purpose of causing death or danger. In *Bond*, this Court held that a defendant's use of irritating chemicals to burn her husband's lover did not constitute use of a weapon,

explaining that "the use of something as a 'weapon' typically connotes 'an instrument of offensive or defensive combat,' Webster's Third New International Dictionary 2589 (2002), or 'an instrument of attack or defense in combat, as a gun, missile, or sword, American Heritage Dictionary 2022 (3d ed. 1992)." *Bond*, 572 U.S. at 861.

Bond rejected the Ninth Circuit's expansive view of a "weapon," which "would have [the Court] brush aside the ordinary meaning and adopt a reading . . . that would sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room." *Id.* at 862. A rock, a part of nature, is not an "instrument" and is certainly not an instrument of combat like a gun, missile, or sword. The Ninth Circuit reasoned that "[o]therwise 'innocuous' objects can be deadly or dangerous if they are used in a manner that is capable of causing death or serious injury." App. 2. Of course that is true, but that rationale does not address whether an object is a "weapon."

Moreover, the statute should be read narrowly and in accordance with the Rule of Lenity so as to avoid sweeping in all objects as deadly or dangerous weapons. *See Yates v. United States*, 574 U.S. 528, 547-48 (2015). Like *Bond*, this Court narrowly interpreted the federal criminal statute in *Yates*, which used the even broader term "tangible object," so that it would not "sweep within its reach physical objects of every kind," or cover "all objects in the physical world."

Id. at 536-40. This Court looked to the "words immediately surrounding" the term "tangible object" in the statute and determined that they "cabin[ed] the contextual meaning of that term." *Id.* at 543. The surrounding words in § 111(b) cabin the meaning of a "deadly or dangerous weapon," and this Court should conclude that "an aggressive interpretation of [the statute] must be rejected[,]" *Yates*, 574 U.S. at 546, and that a rock does not qualify under the statute.

In addition to the fact that a rock is not a "weapon" under *Bond*, the modifying words "deadly or dangerous" further demonstrate that not every object that could possibly be used to hurt someone qualifies. The surrounding language in the statute explains the term as "including a weapon intended to cause death or danger but that fails to do so by reason of a defective component[,]" 18 U.S.C. § 111(b), thereby clarifying that the *design* of the instrument must be for the purpose of causing death or danger; the term does not cover any object that could cause such a result.

It is particularly clear that Congress intended such a limited definition of the term "deadly or dangerous weapon" because it has used a different and broader term in another related context. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983). The aggravated offense of armed bank robbery applies when a defendant "assaults any person, or puts in jeopardy the life of any person by the use of a *dangerous weapon or device* . . . ." 18 U.S.C. § 2113(d) (emphasis

added). Thus, a "device," which is a broader term, can trigger the aggravated offense under § 2113(d), whereas aggravated assault under § 111(b) requires a "weapon." If Congress had desired non-weapons to trigger the increase under § 111(b), it would have at least used the language that it used in § 2113(d). Furthermore, § 111(b) uses the term "*deadly or* dangerous weapon," not just "dangerous weapon," and the additional "deadly" language should not be rendered mere surplusage and indicates that the statute only applies to highly dangerous weapons, not ordinary objects. *See, e.g.*, *Begay v. United States*, 553 U.S. 137, 142-43 (2008).

At least some judges on the lower courts have suggested an interpretation of the statute consistent with *Bond*, reasoning that a defendant must use "an object designed to injure someone through the use of force, not an object – like a shoe or a pot or a chair [or a rock] – that could seriously injure someone but is not meant for or likely to be used for that purpose." *United States v. Smith*, 561 F.3d 934, 942-43 n.1 (9th Cir. 2009) (*en banc*) (Berzon, J., dissenting). In other words, a "'weapon' describes a specific kind of object, not any object that can injure someone." *Id.* "Congress's purpose in providing an enhancement for use of a dangerous weapon . . . was to deter possession of, access to, and use of objects particularly dangerous in themselves, not the use of everyday objects that are not meant as objects of violence but can be used for that purpose." *Id.*

Finally, this case is a good vehicle for review because the issue is well preserved and is of significant consequence to petitioner. At the very least, the § 111(b) conviction resulted in two additional points under the Sentencing Guidelines that would have been eliminated. *See* U.S.S.G. § 2A2.2(b)(7). Furthermore, the jury did not make any findings to sustain a felony under § 111(a). *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). Thus, the conviction only constituted a simple assault with a one-year maximum sentence, *see* 18 U.S.C. § 111(a), which also could have triggered an entirely different guideline section with much lesser penalties. *Compare* U.S.S.G. § 2A2.2 *with* § 2A2.4.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of *certiorari*.

Dated: January 29, 2021

Respectfully submitted,

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