

No. 21-____

In the
Supreme Court of the United States

RICHARD RICCARDI,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the exception to the procedural default rule of *Yates v United States*, 354 U.S. 298 (1957) applies where this Court has held declared a theory of law invalid and given the invalid theory retroactive effect on collateral review of judgments, because it falls within a substantive change of law and not procedural.

Did the Second Circuit err in determining petitioner did not meet the burden of establishing an exception to the procedural rule, precluding collateral review of the verdict after this Court's decisions in *Johnson v United States*, 576 U.S. 591 (2015) and *United States v. Davis*, 588 U.S. ____ (2019).

Whether Petitioner's § 924 convictions must be set aside because the general verdict form fails to show whether those convictions were premised on the charged Hobbs Act robbery conspiracy, which is not a valid predicate, or in the perpetration of a robbery, which would be a valid predicate.

PARTIES TO THE PROCEEDING

The parties to the instant case are the United States of America and petitioner Richard Riccardi. Co-defendant at trial and on the direct appeal was Louis Grasso.

RELATED CASES

United States v. Riccardi and Grasso, 620 F. App'x. 11 (2d Cir. 2015)

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

Petitioner, RICHARD RICCARDI, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, *Riccardi v United States*, 859 F. App'x 590 (2d Cir 2021) and filed on June 21, 2021.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit in *Riccardi v. United States* is reported at 859 F. App'x (2d Cir. 2012), reproduced at A1. Petitioner and Grasso were convicted at trial and their convictions were affirmed by the United States Court of Appeals for the Second Circuit, *United States v. Riccardi and Grasso*, 620 F. App'x 11 (2d Cir. 2015)

Petitioner was granted a certificate of appealability by order of the United States District Court, Eastern District of New York, (Korman, U.S.D.J) on May 20, 2020 on the issue of whether convictions for both the Hobbs Act (18 U.S.C. §1951) and Hobbs Act Conspiracy (18 U.S.C § 1951(a) can form the basis of enhanced sentencing under 18 U.S.C. § 924, to run consecutively to any other sentence when using and carrying a firearm during a crime of violence in light of *Johnson v United States*, 576 U.S. 5911 (2015) and *United States v Davis*. 588 U.S.____ (2019).

The United States Supreme Court decided that case on June 26, 2015, the same day Second Circuit decided the direct appeal of the trial verdict.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The decision of the Second Circuit was filed on June 21 2021. The petition is timely.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 1951(a)

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section-

(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.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term “commerce” means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45.

18 U.S.C. § 924 (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years;
- and
- (iii) if the firearm is discharged, be sentenced to

a term of imprisonment of not less than 10 years.

18 U.S.C. §924(j)(1)

j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

STATEMENT OF THE CASE

A. Introduction

By judgment of the United States District Court for the Eastern District of New York (Gleeson, J.), rendered August 5, 2014, petitioner was convicted, upon a jury verdict of the crimes of Hobbs Act (18 U.S.C. §1951) and Hobbs Act Conspiracy (18 U.S.C § 1951(a), Unlawful Use of a Firearm ad Causing Death through the use of a firearm.

The conviction stems from allegations that petitioner acted in concert with Louis Grasso and two others in the commission of a robbery, during which the victim, James Donovan died of his injuries after being shot in the leg during a chase by the participants in the commission of the crime.

B. The Underlying Case

The Government's case against petitioner was primarily based on testimony from the government

cooperator, with a lengthy criminal record, who was the shooter and committed many types of these crimes previously. After being arrested, the sole shooter, cooperated with the Government and testified the petitioner planned the robbery and provided the guns

The bulk of the government's evidence against Riccardi consisted of the accomplice testimony of Hector Pagan, the man who fatally shot Donovan. According to Pagan, petitioner who was familiar with Donovan, told Grasso that Donovan carried large amounts of cash and checks around the Gravesend neighborhood of Brooklyn because he cashed checks for auto-body shops. Pagan testified that Grasso and petitioner planned to rob Donovan. Grasso and Riccardi then recruited him and a third accomplice named Nicky DeCarlo. Pagan testified that, prior to the day of the robbery, he, Grasso, DeCarlo and petitioner had surveyed two auto-body shops where Donovan was known to cash checks. The plan according to Pagan, was on the day of the robbery, to stake out one of the two locations to wait for Donovan to arrive. According to Pagan, Petitioner had anticipated that the robbery would take place at about one o'clock in the afternoon because that was when Donovan generally reached the auto-body shop. On July 2, 2010, the day of the robbery, Pagan met DeCarlo and Grasso at a location not far from the auto-body shop that was to be the site of the robbery. DeCarlo drove to a parking lot across and down the street from the auto body shop. Pagan's testimony was they petitioner there in his car. According to Pagan, "[Riccardi] came over [to DeCarlo's car], brought us the guns and he said he was going to go to the other location to see what's going on." The

phrase “other location” was in reference to a second auto body shop where Donovan was known to cash checks. According to Pagan, petitioner handed the accomplices a bag that contained three or four guns. Pagan chose a nine-millimeter and testified that he believed that the rest of the guns were 38-calibers. While petitioner was gone, the evidence showed that Grasso kept in touch with him by cell phone. Not long after petitioner returned to the parking lot, Donovan’s car drove past the lot and approached the auto-body shop. DeCarlo backed out of his parking spot and pulled out of the lot in pursuit of Donovan’s car. Id. DeCarlo pulled his car up next to Donovan’s, which had just stopped in front of the shop, and Pagan and Grasso got out of the car. Pagan ran up to Donovan, who was exiting his car, pointed the gun at him, and, as he grabbed Donovan, said, “Stay right here.” Grasso began gathering Donovan’s bag containing the cash and the checks. Donovan freed himself from Pagan’s grip and ran down the street. Pagan shot Donovan as he escaped. The wound would be fatal. Immediately after the shooting, Grasso and Pagan ran back to DeCarlo’s car and fled. Pagan testified that Riccardi was to act as the crash car driver. He explained that petitioner would follow DeCarlo’s car in his own vehicle and block traffic going to the auto-body shop. However, Pagan explained that Riccardi never showed up. Because Riccardi did not drive the crash car, DeCarlo said: “He shouldn’t get anything. He didn’t come.” After DeCarlo drove about a half-mile, Grasso spotted his uncle seated on his parked car. DeCarlo stopped to let Grasso and Pagan out. Although Pagan testified: “I heard a gunshot first, and then I shot him,” there was no evidence that anyone but Pagan fired a gun during

the incident, and the government also did not adopt this version of events in summation. Pagan and Grasso and dropped them off at a house in Brooklyn. Pagan and Grasso descended to the basement of that house to count the money in the stolen bag. There was \$200,000 in cash and checks in Donovan's bag by Pagan's count, which Pagan, DeCarlo, Grasso and Riccardi split evenly. According to Pagan, Grasso collected the guns used in the robbery and said he was going to melt the murder weapon. No statement regarding the guns was ever attributed to petitioner, before or after the robbery. The government presented non-accomplice evidence that, it maintained, tended to show that petitioner had aided and abetted the armed robbery of Donovan or had joined a conspiracy to do so.

The Government contended petitioner gave a statement to the homicide detective in charge of the investigation into Donovan's death. Petitioner's statement did not implicate himself in the planning of the robbery or his participation.

After being shown a still photo taken from a surveillance video of the parking lot from July 2, 2010, Petitioner told the detective that he had indeed been in his car in the parking lot on that day. He said that he sometimes waited in the parking lot for his brother, who lived nearby, and that he sometimes sold marijuana there. Petitioner also told the detective that he had seen DeCarlo and another person in DeCarlo's car that day.

Second, the government presented evidence that petitioner and Grasso had contacted each other, by phone call or text message, 268 times in the month

preceding July 2, 2010, and that petitioner and Pagan had contacted each other 87 times during that time. The government presented no evidence of the number of contacts between those people during any other time period.

Third, the Government offered cell site data showed that petitioner's cell phone accessed the same cell towers as the phones of DeCarlo, Grasso and Pagan at approximately the same times, including the day of the robbery and the Friday before. On cross-examination, the cell-site data expert testified that cell phones can access towers as much as two miles away from it and that phones can switch between towers throughout the call. The expert also testified that there may be areas of Brooklyn where cell towers are farther than one mile apart. Fourth, a surveillance video of the parking lot from July 2, 2010, roughly supported Pagan's version of the events of that day, including that petitioner did not act as the crash car driver.

Petitioner's arrest and the search of His Home on November 3, 2011, sixteen months after Donovan's death, members of various law enforcement agencies executed a search warrant at petitioner's residence. Among the property seized from the home were two guns. A317. One was a Smith and Wesson 38 Special revolver, and the other was a nine-millimeter. The officers also found live ammunition for these guns.

A vehicle registered to his wife was in a parking lot of a store several blocks from the robbery and that the petitioner was to be the driver of a "crash car". The role of the person driving a "crash car" is to block the street from the police responding to a crime scene after the

commission to enable the participants to flee from the police. There was no evidence that a “crash car” was used in the commission of the crime. There was evidence that petitioner would deal marihuana from that lot.

C. The Verdict

Following a jury trial before then Judge John Gleeson, Petitioner and his co-defendant, Louis Grasso, were convicted of robbery conspiracy and robbery, see 18 U.S.C. § 1951(a), and related firearms offenses causing death, 18 U.S.C. § 943(c)(1)(A), (j)(1), in connection with the robbery and death of one James Donovan. He was sentenced to a total of 36 years imprisonment, counts one two and four were ran concurrent for a total of 26 years and count three (10 years) ran consecutively. The judgment of conviction was affirmed in a summary order. *United States v. Riccardi*, 620 F. App'x 11 (2d Cir. 2015).

D. This Proceeding

In his petition, Petitioner contended, insofar as now pertinent, that his convictions for unlawful use of a firearm in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (count three of the indictment) and causing death through the use of a firearm in violation of 18 U.S.C. § 924(j)(1) (count four of the indictment) must be vacated because of intervening Supreme Court authority holding portions of section 924 unconstitutionally vague.

The Magistrate Judge agreed with Petitioner, but concluded that the error was harmless because he was also convicted of the Hobbs Act robbery.

Judge Korman accepted the report, but was troubled by the harmless error claim, observing:

I adopt the reasoned Report and Recommendation. I address here the objection Riccardi has filed. Specifically, he objects to the R&R on the ground that Count 3 of the indictment potentially encompasses two crimes, Conspiracy to commit Hobbs Act Robbery, and Hobbs Act Robbery. His argument continues that because of this alleged “duplicity,” it is unclear whether the jury verdict finding him guilty of Count 3, his 924(c) conviction, rested on Count 1 or Count 2. Nonetheless, I agree with Judge Reyes that Riccardi’s conviction under § 924(c)(1)(A)(iii) is valid “because the jury found that a firearm was discharged during the actual robbery,” 209 at 9, as evidenced by the fact that the jury found him guilty on Count 4, causing death by a firearm in the commission of the crime underlying Count 3. Stated alternatively, Riccardi’s conviction on Count 2, substantive Hobbs Act Robbery, must have led to his conviction on Count 3. Accordingly, the R&R is adopted and Riccardi’s motion to vacate his sentence his denied.

Judge Korman granted a certificate of appealability on that issue.

E. Relevant Facts in this Proceeding

The superseding indictment in this case charged Petitioner as follows:

- Count One: Conspiracy to Commit Hobbs Act Robbery (18 U.S.C. § 1951(a)).
- Count Two: Hobbs Act Robbery (18 U.S.C. § 1951(a)); and aiding and abetting (18 U.S.C. § 2);
- Count Three: Using and Carrying a Firearm in Relation to a Crime of Violence, i.e. the Crimes Charged in Counts One and Two. (18 U.S.C. § 924(c)(1)(i), (ii) and (iii) and aiding and abetting (18 U.S.C. § 2).
- Count Four: Causing Death Through Use of a Firearm, i.e. the Crime Charged in Count Three in the perpetration of a Robbery. (18 U.S.C. § 924(j)(1), and Aiding and Abetting. (18 U.S.C. § 2).

At trial, the Court instructed the jury with regards to Counts three and four as follows:

Count Three charges the defendants with using a firearm in committing the robbery or in conspiring to rob James Donovan. So it charges them with using a firearm during and in relation to the crimes charged in Counts One or Two. For that reason, you are only going to consider Count Three if the defendant you are considering is found guilty of Count One or Count Two or Both.” (Tr 1207). The Court also charged the jury “that the defendant you are considering or someone he aided and abetted robbed James Donovan or conspired to rob James Donovan.” (Tr: 1207). The Court further

charged the jury as to the second element of § 924(c), “that the defendant you’re considering or someone he aided and abetted used or carried a firearm during and in relation to that crime or crimes of violence.” (Tr: 1207).

Count Four charges each defendant or someone he aided and abetted caused the death of James Donovan through the use of a firearm while committing the crime charged in Count Three. So, in other words, you’re only going to consider Count Four against the defendant if you have already found him guilty of Count Three.” (Tr: 1208).

The jury found Riccardi guilty on all counts. The verdict sheet provided as follows:

Count Three (Using or Carrying a Firearm During and in Relation to the Crime of Violence Charged in Count One and Count Two).

NOTE: Only consider Count Three if you have found the defendant you are considering Guilty of Count One or Count Two (or both).

Richard Riccardi:

Not Guilty

Guilty X

Count Four (Causing Death While Using a Firearm to Commit the Crime Charged in Count Three).

NOTE: Only consider Count Four if you have found the defendant you are considering Guilty of Count Three.

Richard Riccardi:

Not Guilty

GuiltyX

A sentencing hearing was held before former Judge Gleeson, who sentenced Riccardi to thirty-six years' incarceration: concurrent terms of 20 years on Counts One and Two, a concurrent term of 26 years on Count Four, and a consecutive term of 10 years on Count Three.

F. Second Circuit Affirms Conviction

In affirming the conviction, the Second Circuit, *inter alia*, held petitioner did not object to the district court's instructions. Applying a plain error review of the jury instructions, the Second Circuit held,

“Defendants submit that the district court failed explicitly to define “robbery” by reference to two statutory elements: (1) that personal property was unlawfully taken or obtained from the person or in the presence of another; and (2) that the property was taken or obtained against the victim's will, by actual or threatened force, violence, or fear of injury. See 18 U.S.C. § 1951(b)(1). Instead, the district court instructed the jury that “to prove the crime of robbery charged in Count Two, the government must establish two elements beyond a

reasonable doubt. First, that the defendant or someone he aided and abetted robbed James Donovan at gunpoint. Second, that the robbery in some way obstructed or affected interstate commerce.” Riccardi App. 458-59.”

G. Second Circuit Affirmance of Denial of 28 U.S.C. §2255

The Second Circuit ruled petitioner procedurally defaulted his claim of error under *Yates* by neither raising this issue on direct appeal or arguing he is actually innocent. The Court held, “[petitioner] failed to avoid the procedural bar to the collateral attack, because it was not shown there was (1) cause for failing to raise his challenge on direct appeal and (2) actual prejudice resulting from. See *Gupta v United States*, 913 F.3d.81, 84 (2d Cir. 2019).” 859 F. App’x 590 (2021).

**REASONS WHY THE WRIT SHOULD BE
GRANTED**

POINT I

IN LIGHT OF JOHNSON V UNITED STATES, 135 S. CT. 2551 (2015) AND YATES V UNITED STATES, 354 U. S. 298, 77 S. CT. 1664 (1957), THE CONVICTIONS FOR UNLAWFUL USE OF A FIREARM 18 U.S.C. § 924(C)(1)(A)(III) AND 18 U.S.C. § 924(J)(1), RESPECTIVELY MUST BE VACATED BECAUSE THE JOHNSON CASE HAD NOT BEEN DECIDED WHEN THE PETITIONER'S BRIEF ON DIRECT APPEAL, THERE WAS PREJUDICE RESULTING THEREFROM, BECAUSE THE DIRECT PROOF OF PETITIONER'S INVOLVEMENT WAS PROVIDED BY A COOPERATING GOVERNMENT WITNESS WHO WAS THE SHOOTER THAT LED TO VICTIM'S DEATH AND IN THE ALTERNATIVE THE PROCEDURAL DEFAULT BAR STANDARD HAS BEEN MET BY PETITIONER

Petitioner's contention is that since this Court has held that a Hobbs Act Conspiracy is no longer a categorical a categorical crime of violence that can support a conviction under 18 U.S.C. § 924 (see *Johnson v United States*, supra). Since the *Johnson* decision had not been decided at the time of the direct appeal, there was cause for failing to raise such a challenge on direct appeal. Moreover, as contended infra petitioner has established cause and prejudice. It is argued the procedural bar is inapplicable because this Court invalidated a legal theory which resulted in an enhanced sentence. In the alternative, the procedural bar standards have been established.

Challenges that have been made to convictions to declared invalid theories of prosecution when the only basis for conviction was on an invalid theory, and the jury could have relied upon that invalid theory to convict him. *Fordham v. United States*, 706 F.3d. 1345 (11 Cir. 2013) (Analysis of conviction not based on an invalid theory of honest services fraud, after *Skilling v United States* decision but based on a bribery which had not been declared invalid and was the basis for the honest services conviction).

The Second Circuit relied upon its holding in *Gupta v United States*, 913 F.3d. 81 (2d Cir. 2016) in determining petitioner has not met its burden. The Second Circuit held “[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, *or failed to raise the claim despite recognizing it*, constitute cause for a procedural default.” *Murray v. Carrier*, 477 U.S. at 486. (emphasis added).”

Contrary to the Second Circuit’s decision, Petitioner has shown “some objective factor external to the defense”. The theory underpinning Petitioner’s conviction had not been declared invalid by this Court. At the time of default the claim was not available at all”. *United States v. Gupta*, 913 F. 3d.81,85. Neither *Johnson* nor *Davis* had been decided when the Second Circuit decided the direct appeal.

Significantly, by giving *United States v. Johnson*, supra retroactive effect, *Welch v. United States*, this Court has recognized the problem of extended sentences of imprisonment based on invalid theories of law.

This Court in *Welch v United States* held:

“The Johnson Court held the residual clause unconstitutional under the void-for-vagueness doctrine, a doctrine that is mandated by the Due Process Clauses of the Fifth Amendment (with respect to the Federal Government) and the Fourteenth Amendment (with respect to the States). The void-for-vagueness doctrine prohibits the government from imposing sanctions “under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” *Id.*, at ____ (slip op., at 3). Johnson determined that the residual clause could not be reconciled with that prohibition. The vagueness of the residual clause rests in large part on its operation under the categorical approach. The categorical approach is the framework the Court has applied in deciding whether an offense qualifies as a violent felony under the Armed Career Criminal Act. See *id.*, at ____ (slip op., at 4). Under the categorical approach, “a court assesses whether a crime qualifies as a violent felony ‘in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.’” *Ibid.* (quoting *Begay*, *supra*, at 141). For purposes of the residual clause, then, courts were to determine whether a crime involved a “serious potential risk of physical injury” by considering not the defendant’s actual conduct but an

“idealized ordinary case of the crime.” 576 U. S., at ___ (slip op., at 12).

During oral arguments in *Welch*, several Justices expressed concern about an enhanced sentence which may have been based upon an invalid theory of prosecution

For example, Justice Ruth Bader Ginsburg expressed the “effects” view early on, and in dramatically succinct terms: “How can it not be substantive when, under one rule, the sentence range goes minimum 15 years up to life, and the other reading, it’s zero to ten years? I can’t imagine anything more substantive than five extra ... years in prison.”

Oral argument revealed a consensus among the Justices in the majority opinion that the change in law in *Johnson*, was a substantive change. Even the Chief Justice commented, in questioning the amicus defending the judgment below, that a rule is only “properly categorized as procedural if there’s some people who could be convicted . . . legitimately.”

Johnson’s invalidation of the residual clause, though an enforcement of the Constitution’s guarantee of fair notice (a procedural right), was a substantive rule, because it produced a class of persons whose sentences were illegitimate, i.e., who received a sentence that the law no longer provided.

Justice Stephen Breyer reacted similarly. When counsel for *Welch* told him that people convicted “many years ago” under a statute the Court later declares unconstitutional don’t “get out,” his reaction too was visceral: “Well, that amazes me.”

Chief Justice Roberts also noted that *Johnson* creates a “problem” of some complexity, since prior decisions of the Court had definitively applied the residual clause to specific types of crimes and the Court must “think *Johnson* suggests those decisions were not clear.”

Recognizing a collateral challenge may not do service for an appeal, *United States v. Frady*, 456 U.S. 152 (1982), this Court should grant certiorari where the substantive rule allows for retroactive application of a change in substantive law.

Petitioner has also established actual prejudice
under the exception to the *Yates* standard

The evidence against petitioner was based primarily on Pagan’s testimony and the conviction based upon an invalid theory of law worked to petitioner’s substantial disadvantage.

The jury was primarily presented with evidence from Pagan about a conspiracy, and the evidence the attempted corroboration was focused on Petitioner ‘s guilt as a conspirator of committing a Hobbs Act violation. This included defendant’s admission of his presence at a nearby parking lot in his wife’s car, dealing marihuana, cell phone records, cell tower analysis of records and his possession of guns when he was placed under arrest. Those weapons were not tied to the robbery and there are no admissions made by Petitioner about the crime.

POINT II**BECAUSE IT IS IMPOSSIBLE TO ASCERTAIN
FROM THE GENERAL VERDICT WHETHER
THE SECTION 924 ENHANCEMENTS ARE
PREDICATED UPON A CONSTITUTIONALLY
VALID BASIS THE COUNTS MUST BE SET
ASIDE BASED UPON *YATES* ERROR**

The district court was undoubtedly correct in concluding that a Hobbs Act conspiracy is not a crime of violence. See, e.g., *United States v. Davis*, 139 S. Ct. 2319 (2019); *United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018); *United States v. Wright*, 807 F. App'x 31 (2d Cir. 2020); *United States v. Delcid*, 779 F. App'x 779 (2d Cir. 2019); Thus, the only question is whether there is so-called *Yates* error. See *Yates v. United States*, 354 U.S. 298 (1957).

Yates error occurs “where disjunctive theories of culpability are submitted to a jury that returns a general verdict of guilty, and ‘[one] of the theories was legally insufficient.’” *United States v. Agrawal*, 726 F.3d 235, 250 (2d Cir. 2013) (quoting *United States v. Garcia*, 992 F.2d 409, 416 (2d Cir.1993)). “In such circumstances, ‘it is impossible to tell which ground the jury selected,’ the legally sufficient ground or the insufficient one.” *Id.* (quoting *Yates*, 354 U.S. at 312).

It is important to emphasize that *Yates* error concerns a challenge to legal insufficiency, not factual insufficiency, precisely the challenge made in this case. “The difference between factual and legal challenges is significant because ‘when disjunctive theories are submitted to the jury and the jury renders a general

verdict of guilty, appeals based on evidentiary deficiencies must be treated differently than those based on legal deficiencies.” *United States v. Desnoyers*, 637 F.3d 105, 109 (2d Cir. 2011) (quoting *Garcia*, 992 F.2d at 416). “If the challenge is evidentiary, as long as there was sufficient evidence to support one of the theories presented, then the verdict should be affirmed. However, if the challenge is legal and any of the theories was legally insufficient, then the verdict must be reversed.” *Id.* at 109-110. This is so because “[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law . . .” *Id.* (quoting *Griffin v. United States*, 502 U.S. 46, 59 (1991)). The challenge in this case is upon legal insufficiency and the general verdict of guilty manifests legal error because: “(1) ‘disjunctive theories of culpability’ were submitted to the jury; (2) ‘it is impossible to tell which ground the jury selected’, and (3) ‘[one] of the theories were legally insufficient’”. *United States v Vasquez*, 672 Fed. Appx. 56 (2nd Cir. 2016) citing *United States v. Agrawal*, *supra*.

This is precisely the problem here and the district court’s analysis improperly ignores the jury’s instruction. Specifically, the court told the jury in count three that it was not to consider the 924 enhancement unless it first found Riccardi “guilty of Count One *or* (emphasis supplied) Count Two or Both.” Since Count Two concerned the Hobbs Act conspiracy, which would not be a basis for the enhancement, the district court agreed that the enhancement could not be sustained on that basis.

Nonetheless, it looked to count four and concluded that the enhancement could be upheld on that basis. The difficulty with that analysis is that count four incorporates count three, and the jury was told “in other words, you’re only going to consider Count Four against the defendant if you have already found him guilty of Count Three.” *Yates* error looks to the jury instructions, which it is assumed the jury followed. See *United States v. Hodge*, 558 F.3d 630, 634 (7th Cir. 2009) (“The jury was told that it could convict if it concluded that Kolby spent money on advertising, or rent, or utilities, or almost anything else, in order to carry on the business. As a matter of law, a brothel’s expenditures on rent and utilities do not come from net proceeds and so do not violate § 1956(a)(1), which means that a general verdict cannot stand.”). The verdicts under counts three and four cannot be sustained on any other legal basis for it cannot be determined whether the jury convicted of the Hobbs Act robbery or the Hobbs Act conspiracy. (DOC 158)

In short, if the verdict on count three is ambiguous, so is the verdict on count four.

CONCLUSION

For the reasons expressed, a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit should be granted.

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Respectfully submitted,

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