

22-5970 ORIGINAL

FILED
OCT 25 2022

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

David Antoine Luster — PETITIONER
(Your Name)

vs.

WARDEN R.M. WOLFE — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David Antoine Luster
(Your Name)

P.O.Box 6000
(Address)

Glenville, West Virginia 36251
(City, State, Zip Code)

904-574-6136
(Phone Number)

QUESTION(S) PRESENTED

Question of Law: In light of *Borden v. United States*, 141 S.Ct. 1821 (2021), under the categorical approach the [§ 924(c)(1)(A)(i) and (ii) convictions] 18 U.S.C. § 2113(d), is the [recklessness] [mens rea] element narrow enough to be deemed a “crime of violence” under subsection 924 (c) (3) (A) element clause.

Question of Law: § 924 (c) (3) (A)’s element clause language. Did Mr. Luster’s Trial and Sentencing Judge, Defendant Attorney and Defendant have the correct understand of the nature of §924(c)(3)(A) at the time of the acceptance of his plea??

Legal Question is: Whether the Armed Bank Robbery charged as a predicate to Mr. Luster’s §924(c)(1)(A)(i) and (ii) convictions [include] a mens rea of [recklessness] or instead [require] purpose or knowledge.

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:

RELATED CASES

Borden v. United States, 141 S.Ct. 1821 (2021)

Rudolph v. United States, 2021 U.S. Dist. Lexis 141805 (5th Cir. July 29, 2021)

Toki v. United States, 23 F4th 1277 (10th Cir. February 12, 2022)

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
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STATUTES AND RULES

[REDACTED]

[REDACTED]

924(c)(3)(A) element clause

OTHER

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A 4th Cir. APPEALS order, Petition for Rehearing En Banc
DENIAL

APPENDIX B Petition for Rehearing En Banc, Petition in Support
And Clarification of En Banc

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

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 A. 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 July 1, 2022.

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: Oct. 11, 2022, and a copy of the order denying rehearing appears at Appendix A.

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

Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) and (b) – steal or purloin – of this section, assault any person, or puts in jeopardy the life of any person by use of a dangerous weapon or device.

“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.

STATEMENT OF THE CASE

- 1.) 18 U.S.C. § 2113(d) uses the element of "assault" as a constituent part of the statute. In light of *Borden v. United States*, use of the categorical approach and "assault" is the least culpable criminalized act in 18 U.S.C. § 2113(d), has the mens rea of recklessness, that is broader than § 924 (c) (3) (A)'s element clause, which refers solely to "intentional" conduct, because "assault any person" encompass both "intentional" and "reckless" conduct.
- 2.) § 924 (c) (3) (A)'s element clause requires proof that "physical force was used against the person or property of another" but the least of the acts criminalized by the 18 U.S.C. § 2113(d) distinctive statute includes "offensive touching." (Spitting on someone) Armed Bank robbery cannot serve as a predicate for a conviction and sentence for § 924 (c) (1).

Borden v. United States, 141 S.Ct. 1821 (2021), being properly understood to establish a substantial rule, because it interpreted the language of ACCA's elements clause - which is materially identical to 18 U.S.C. § 924(c) (3) (A) element clause - and has been deemed retroactive by the authority placed in the 10th Cir. and 5th Cir.

REASONS FOR GRANTING THE PETITION

Your Honor, a straight forward analysis under the Categorical Approach, using § 2113(d) "assault any person" and § 924(c)(3)(A) shows the same conclusion the Court came to in the Borden case. Congress knows what it is doing when creating a Statute.

The Fourth Circuit Appeals Court interpret § 2255(e) save clause in a manner that nullifies the use of the savings clause. The standard is "narrow the reach of the statute" not "decriminalize the conduct." This standard stops a human being like me from using my right to a habeas corpus.

When the Supreme Court makes a substantial new rule of statutory law that results in a new statutory construction that in some regards narrow the reach of the statute, that I or any other individual convicted and sentenced before this interpretation and understanding could not invoke in a Direct Appeal or Initial § 2255, and is not cognizable in second or successive applications and the implications of the new statutory construction demonstrates a manifest injustice creates a compelling reason for the Court's discretionary jurisdiction when the Circuit Courts standard is "decriminalize conduct" rule deny's this right.

It was erroneous of the District Court and Appeals Court to argue the "decriminalizing of the conduct." The Supreme Court has set out a standard for the §2255(e) savings clause, "narrow the reach of the statute."

In Rudolph and Toki, The Court decided Borden applied to the material identical language in §924(c)(3)(A)'s and the ACCA's element clause was an intentional conduct language, then used the categorical approach analysis in an "Assault" case and Use of an Explosive Devise case with Maliciousness found these elements encompass both "intentional conduct" and "reckless conduct." Neither the Assault in Borden nor Assault any person in Luster, explicitly express anything other than "simple assault." In Toki, assault in VICR was found to be "simple assault" that does not reach "intentional conduct."

For these reasons please grant this petition. Specifically for, meeting the savings clause under section 2255(e) and merit of case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ David A. Luster

Date: Oct. 19, 2022