23-6686
No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

_____

CLARENCE DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

_____

On Appeal from the United States Court of Appeals for the Tenth Circuit

_____

PETITION FOR WRIT OF CERTIORARI

_____

Clarence Davis
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QUESTION TO BE REVIEWED

Question 1: In a proceeding timely filed under 28 U.S,C. 2255(f)(3) does Attempted Bank Robbery qualify as a crime of violence under § 924(c)'s residual clause or elements clause construed with this co courts precedent in Taylor and Davis in order for 924(c) and the Armed Career Criminal Statute to be applicable?

(2) Does Attempted Bank Robbery always require the gaternment to prove - beyond a reasonable doubt as an element the use, attempted use or threatened use of force?

(3) Does Attempted Bank robbery serve as a "Crime of Violence" as the instant offense to trigger the Career Criminal Act?

(4) Does the Supreme Court have to definitively state that it's decision is retroactive in order for the lower courts to apply it as such?

(5) Did the District Court Commit error by instructing the Jury that Attempted Bank Robbery is a Crime of Violence?

PARTIES JUDGMENT TO BE REVIEWED

District Court judge CLAIRE V. EAGAN, and Appeals Court judges MATHESON, BACHARACH, and ROSSMAN are the judges who's judgment is to be reviewed.

CORPORATE DISCLOSURE STATEMENT

No corporate disclosure statement is necessary for this petition.

PROCEEDINGS RELATED

The initial 2255 proceeding in the United States District Court for the Northern District of Oklahoma is 4:23-cv-00190-CVE-JFJ which was decided May 16, 2023, and cited as United States v. Davis, 2023 U.S. Dist. LEXIS 85139 (2023). The appeal to the United States Court of Appeals for the Tenth Circuit is 23-5063 which was decided August 30, 2023, and cited as United States,v. Davis, 2023 U.S. App. LEXIS 22918 (2023).

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OPINIONS OF COURTS

In the United States District Court for the Northern District of Oklahoma cites as United States v. Davis, 2023 U.S. Dist. LEXIS 85139 (2023). The opinion of the court was concluded as such:

"This matter has come before the Court for consideration and an Opinion and Order (Dkt. #284) dismissing defendant's Motion to Challenge the Sentence for Attempted Armed Bank Robbery under 28 U.S.C. 2255(f)(3) which was the Predicate for the Unconstitutional Enhancement under 18 U.S.C. 924(c)(1)(A) (Dkt. #284) for lack of jurisdiction has been entered. A judgment of dismissal of defendant's motion is hereby entered."

In the United States Court of Appeals for the Tenth Circuit cited as United States v. Davis, 2023 U.S. App. LEXIS 22918 (2023). The opinion of the court was concluded as such:

"Mr. Davis does not dispute that he filed successive 2255 motion. Instead, he argues that he needed no authorization because he is entitled to relief based on the Supreme Court in United States v. Taylor, 142 S. Ct. 2015, 213 L. Ed. 2d 349 (2022), and 2255 (f)(3) provides that a 2255 motion is considered timely filed if it is filed within one year of a Supreme Court decision that creates a newly recognizable right made retroactively applicable to cases on collateral review. Mr. Davis cites no authority for his assertion that no authorization is required for a motion filed under 2255(f)(3), Indeed, the language and structure of 2255 make clear that the authorization requirement of section 2255(h) applies to any second or successive 2255 motion, including those filed in

reliance on subsection (f)(30.

We deny a COA and dismiss this matter."

STATEMENT OF JURISDICTION

The order of the Court of appeals was made August 30, 2023 wh hich was the date of the final judgment on such case. Less than 90 days from such date the clerk of this court recieved such petition for writ of certiorari postmarked November 17, 2023 and recieved november 28, 2023. The clerk returning such documents to be corree cted,gave an extension of 60 days to be submitted construing jurie sdiction in this Court in pursuance with 28 U.S.C. 1254.

PROVISIONS RELIED UPON

The provisions to be relied upon in this case are 18 U.S.C. § 924(c)(3)(A) and (B) U.S.C.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and-

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Further provision to be relied upon is 28 U.S.C. 2255(f)(3):

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

STATEMENT OF CASE

Petitioner in 2004 was charged in a four count superseding indictment which charged:

Count one- Conspiracy to commit an offense against the United States, 18 U.S.C. 371, in which counts two, three, and four are in violation of.
Count two- Attempted Armed Bank Robbery.
Count three- Use of a firearm during and in relation to a "crime of violence."
Count four- Felon in possesion of a firearm 18 U.S.C. 922(g)(1) and 924(a).

Petitioner opted to go to trial and the jury found that he was guilty of all counts. The district court erred when instructing the jury that petitioner could be found guilty of 18 U.S.C. 924(c) due to Attempted Armed Bank Robbery being a crime of violence.

Upon filing of a motion in pursuance with 28 U.S.C. 2255 a redress of grievances was made construed with 28 U.S.C. 2255(f)(3) in accordance with the precedent of this Court pursuant to Taylor but was denied by the district Court.

An appeal to the Tenth Circuit was made in order to further find relief pursuant to this Courts precedent but was further denied due to not presenting authority to proceed under 28 U.S.C. 2255(f)(3) and it being deemed that Taylor is not applicable in this instance.

Petitioner hereby presents substantial showing that he is in

compliance with 28 U.S.C. 2255(f)(3) due to the precedent of this court and others due to meeting the requirements of the statute. Further, substantial showing shall be made that Attempted Armed Bank Robbery does not amount to that of completed Armed Bank Robbery and thus cannot trigger the Armed Career Criminal statute to apply.

This case should be vacated with neither the charge of 18 U.S.C. 924(c) or ACCA being applied to resentencing.

ARGUMENT

Question 1: In a proceeding timely filed under 28 U.S.C. 2255(f)(3) does Attempted Bank Robbery qualify as a crime of violence under 924(c)'s residual clause or elements clause construed with this courts precedent in Taylor and Davis in order for 924(c) and the Armed Career Criminal Statute to be applicable?

It would seem that petitioner may not have been lawfully convicted and sentenced under 18 U.S.C.S. 924(c) because 924(c)(3)(A) asks whether the defendant committed a crime of violence. In Taylor v. United States, 213 L. Ed., 2d, 349 (2022), "Taylor asked this Court to apply "Davis" 139 S. Ct. 2319, 2336 (2019) and vacate his 924(c) sentence and conviction. Due to Hobbs Act Robbery not qualifying as a crime of violence under 924(c)(3)(A) in "Davis" this court held that 924(c)(3)(B)'s residual clause was unconstitutionally vague. See Davis 588 U,S. 139 S. Ct. 2319.(

Petitioner also asks does attempted Bank Robbery always require the government to prove beyond a reasonable doubt, as an element of it's case the use, attempted use, or threatened use of force.

This Court has long understood similarly worded statutes to demand similarly categorical inquiries. See e.g. Borden v. United States, 593 U.S. 141, S. Ct. 1817. In "Borden" this court ruled this Court ruled that it did not reach "predicate" that could be committed recklessly.

New substantive rules announced by the Supreme Court generally apply retroactive substantive rules include decisions that narrows the scope of a criminal statute by interpretation. See Bousley v. United States, 523 U.S. 614 (1998). This decision held that

the rule announced in Bailey v. United States, 516 U.S. 137 (1995) , which narrowed the scope of "use" in 924(c) applies retroactively. It should also be understood that the "Taylor" decision establishes a substantive rule due to interpreting the language of 924((c)'s elements clause, and held that it did not reach "predicate" crimes involving Attempted Hobbs Act Robbery which analogous to attempted Bank Robbery. United States v. Taylor, 596 U.S. ____(2022)(Whatever one might say about completed Hobbs Act robbery, attempted Hobbs Act robbery does not satisfy the elements clause.).

Petitioner asks this court to vacate his 924(c) sentence and conviction due to Attempted Bank Robbery not qualifying as a crime of violence under 924(c)(3)(A)'s elements clause, which was the le one predicate for the sentence and conviction. Attempted Bank Robbery does not satisfy the elements clause because the government must prove that the defendant intended to complete the offense and the defendant took a substantial step towards that end. As this Court stated in "Taylor" an intention is just that and no more, It does not require the government to prove that the defendant used, attempted to use, or even threatened to use force against another person or his property, and that no matter what one has to say about a completed Hobbs Act Robbery, andattempted Hobbs Act Robbery does not satisfy 924(c)'s elements clause. Before "Taylor" the Tenth Circuit has ruled that since the completed robbery satisfies the elements clause it also stands an attempt to commit said crime necessarily satisfies the elements clause, as have other Circuits.

However, after "Taylor" that reasoning can no longer stand.

Courts are no longer allowed to treat the attempted crime as the c completed crime. Several courts have ruled that "Taylor" should be applied to cases in a 2255(h)(2) and 2255(f)(3) proceeding. See Un United States v. Quirk, 2023 U.S. Dist. LEXIS 16245 (2023). The co ourt ruled that "Taylor" applies retroactively, because the decis ion in "Taylor" forbids punishment under 18 U.S.C.S. 924(c) for th hose who only engage in Attempted Hobbs Act Robbery. "Taylor" is a new substantive rule that prohibits criminal punishment of certain primary conduct. See Pedro v. United States, No. 03-cr-0346, 2022 (S.D.N.Y. Nov. 30, 2022)(Holding that "Taylor" applies retroactive United States v. Craig, No. 1:14-CR-0032, 2022 (N.D. Fla. Sept. 26 , 2022). "Taylor" would be retroactively applicable to a challenge of a 924(c) sentence, because in that context the case would be a new substantive rule under "Teague". See 2022 U.S. Dist. Lexis 192 2802, (N.D. Fla. Sept. 19, 2022) reversing a 924(c) conviction on 2255 review based on "Taylor".

Justice O'Connor explained in her concurrence in Tyler how the Supreme Court can be said to have made a new rule retroactive through the holdings in multiple cases.

If we hold in case one that a particular type of rule applies retroactively to cases on collateral review, and hold in case two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on col lateral review. In such circumstances we can be said to have "made " the given rule retroactive to cases on collateral review, 121 S. Ct. at 688-89 (O'Connor, J. Concurring). She cautioned , however, that the relationship between the conclusion, that a new rule is

retroactive and the holdings that make this rule retroactive must be strictly logical i.e. the holdings must dictate the conclusion and not merely provide principles from which one may conclude that the rule applies retroactively. Id at 699 (Second alteration in original). In other words, the Supreme Court makes a new rule retroactive through multiple cases "only where the courts holdings logically permit no other conclusion than that the rule is retroactive."

The required logical relationship is relatively easy to see when considering a new substantive rule, i.e. one that places certain kinds of primary, private individuals conduct beyond the power of the criminal law-making authority to proscribe. Id. (Quoting Teague v. Lane 498 U.S. 288 (1989) The Supreme Court has held that such a rule should be applied retroactively to cases on collateral review when a court holds a new rule in a subsequent case that a particular species of primary, private individual conduct is beyond the criminal lawmmaking authority to proscribe, it necessarily follows that this Court has made that new rule retroactive to cases on collateral review. See Tyler, 533 U.S. at 669 (O'Connor J. concurring).

After "Davis" a criminal conviction qualifies as a predicate "crime of violence" under 18 U.S.C.S. 924(c) only if it meets the terms of clause (A) the elements clause, but "only" if it has an element the use, attempted use, or threatened use of physical force. Neither attempted Hobbs Act Robbery or Attempted Bank Robbery meets the terms of clause (A) the elements clause, which askssif the defendant dis commit a crime of violence.

Lower courts have long understood that the Supreme Court does not have to definately state that its ruling should be applied retroactively in order for the lower Courts to apply it in a 2255(ff)(3) motion or a second and successive 2255 or on direct appeal. As petitioner's motion was timely filed under 2255(f)(3) one year limitation after this Courts decision in "Taylor", Which recognized for the first time a substantive right made retroactive to cases on collateral review. See Borden, 141 S. Ct. 1825.(It was understood that "Borden" established a substantive rule, becasue it interpreted the language of ACCA's elements clause, which is materially identical to 924(c)'s elements clause.

Career offender status attaches when (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense, (2) the instant offense of conviction is a felony that is either a "crime of violence' or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either "a crime of violence' or a controlled substance offense. U.S. Sentencing Guidelines manual 4B1.1(a).

Petitioner should not have been designated a carrer offender due to attempted Bank Robbery being the instant offense which generated a floor of 30 and a ceiling of life in prison. See In re Leonard Brown, No. 22-12838-F (Eleventh Cir. Sept. 22, 2022 Decided).BBrown was permitted to file a successive motion becasue attemped armed bank robbery being the sole predicate did not qualify as a "crime of violence" under 924(c)(3)'s elements clause. See Jose Barriera-Vera v. United States, No. 23-cv-1333-SCB-TGW, Fla. Tampa Divison (July 10, 2023 Decided). Theecourt ruled that Taylors hold

ding applies equally to attempted bank robbery. See United States v. Hogue, No. 20-30043 (9th Cir. Sept. 14, 2023). Such court also ruled that taylor applies equally to attempted bank robbery, and t that "Hogue" should not have been classified as a Career Offender.

CONCLUSION

Petitioner hereby request that this case be vacated and resentenced accordingly without the charge of 18 U.S.C. 924(c) and the Armed Career Criminal enhancement construed with the facts and law provided herein.

Date: 1-18-2024

Respectfully

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