IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017
CASE No. ____________________

CORTEZ DEONTE MOULTRIE,
PETITIONER,

-vs-

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cortez Deonte Moultrie
Petitioner in *pro per*
Reg. NO. 50977-039
U.S.P. Allenwood
P.O. Box 3000
White Deer, PA 17887

QUESTION PRESENTED

I. WAS PETITIONER's COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO SENTENCING ON 924(c) COUNTS BECAUSE THEY DID NOT ATTACH TO CRIMES OF VIOLENCE?

LIST OF PARTIES

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

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OPINIONS BELOW

The judgment of the District Court is attached at Appendix 1. The opinion of the United States Court of Appeals for the Sixth Circuit denying a Certificate of Appealability is attached at Appendix 2.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 18, 2017. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment:

No person shall be... deprived of life, liberty, or property without due process of law...

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense.

STATEMENT OF THE CASE AND FACTS

Cortez Deonte Moultrie, (hereinafter "Petitioner"), acting in pro per, pleaded guilty, pursuant to a Rule 11 plea agreement, to three counts of bank robbery, in violation of 18 U.S.C. Section 2113(a); and two counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. Section 924(c).

On June 22, 2016, the District Court sentenced Petitioner to: 87 months on counts 1, 3, and 5, (bank robbery), to be served concurrently to 84 months on count 4 (18 U.S.C. 924(c)), to run consecutive to counts 1, 3, and 5; and to 300 months on count 6, (18 U.S.C 924(c)), to run consecutive to counts 1, 3, 4, and 5, for a total of 471 months of imprisonment and four years of supervised release. Petitioner did not file a direct appeal.

On October 28, 2016, Petitioner filed a motion with the district court seeking to vacate his sentence pursuant to 28 U.S.C. Section 2255 on the ground that the District Court should not have convicted him under 18 U.S.C. Section 924(c) because Section 924(c) contains a residual clause similar to the residual clause in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. Section 924(e), which was invalidated by Johnson v. United States, 135 S. Ct. 2551 (2015). The District

Court denied the motion on the merits, including an ineffective assistance of counsel claim relating to the Johnson issue, and declined to issue a certificate of appealability. (Exhibit 1).

Petitioner filed a notice of appeal and moved for a certificate of appealability in the Sixth Circuit Court of Appeals. Petitioner also requested the Sixth Circuit to hold this case in abeyance pending a ruling by this Court in Lynch v. Dimaya, 137 S.Ct. 31 (Sept. 29, 2016) (granting certiorari). The Sixth Circuit denied Petitioner's request for a certificate of appealability and also denied Petitioner's request to hold this case in abeyance pending a ruling by this Court in Lynch v. Dimaya. (Exhibit 2). Petitioner now moves for certiorari in this Court.

REASON FOR GRANTING THE WRIT

I. Petitioner's Counsel Was Ineffective For Failing To Object To Sentencing On 924(c) Counts Because They Did Not Attach To Crimes Of Violence.

Petitioner argued that his lawyer was ineffective for failing to object to the 924(c) counts in this case because they do not attach to a crime of violence after the recent Supreme Court ruling in Johnson v. United States, 135 S.Ct. 2551 (2015).

The District Court denied this issue by claiming that Johnson did not invalidate the residual clause of 18 USC Section 924(c), relying on United States v. Taylor, 814 F.3d 340 (6th Cir. 2016). Also see United States v. McBride, 2016 WL 3209496 (June 10, 2016, Sixth Circuit).

A defendant commits bank robbery when "by force and violence, or by <u>intimidation</u>, [he] takes, or attempts to take, from the person or presence of another, or obtains, or attempts to obtain by extortion any property or money or any other thing of value belonging to a bank", or "enters or attempts to enter any bank... with the intent to commit in such bank... any felony affecting such bank." 18 U.S.C. Section 2113(a) (emphasis added). A person commits the more serious crime of armed bank robbery by assault[ing] any person, or put[ting] in jeopardy the life of any person by use of a dangerous weapon or device" while committing or attempting to commit bank robbery. 18 U.S.C. Section 2113(d).

The Supreme Court has held that the term "physical force" as used in Section 924(c)(3)(A) requires "violent force" which means "strong physical force" or force "capable of causing physical pain or injury to another person." <u>Curtis Johnson v. United States</u> 559 U.S. 133, 139 (2010). Of course, Petitioner's actual crime may have involved "physical force" as described by <u>Curtis Johnson.</u> But, as the Supreme Court has instructed us, what Petitioner actually did is irrelevant for purposes of determining whether the crime he was convicted of is a "crime of violence" under Section 924(c)'s elements clause. Whether a crime is "within the ambit of 18 U.S.C. Section 924(c)... is a question... we must answer 'catergorically' —that is by reference to the elements of the offense, and not the actual facts of [the defendant's] conduct." <u>United states v. Mcguire</u>, 706 F.3d 1333, 1336 (11th Cir. 2013)(O'Connor, J.)(citation omitted).

If bank robbery can be committed without "the use, attempted use, or threatened use of physical force," then that crime obviously cannot have "as an element the use, attempted use, or threatened use of physical force." And as the statue says, bank robbery may be committed "by force and violence, or by intimidation." 18 U.S.C. Section 2113(a)(emphasis added). Intimidation, for this purpose, "occurs when an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." United States v. Kelly 412 F.3d 1240, 1244 (11th Cir. 2005). The Eleventh Circuit has held that simply presenting a demand letter to a bank teller can support a conviction for bank robbery through intimidation. See United States v. Cornillie, 92 F.3d 1108, 1110 (11th Cir. 1996)(per curiam). Presenting a demand letter does not require any physical force, let alone "strong physical force" or force "capable of causing physical pain or injury to another person." Curtis Johnson 559 U.S. at 139.

Beyond that, bank robbery may also be committed "by extortion," which requires only threat of economic harm. See United States v. Vallejo, 297 F.3d 1154, 1165 (11th Cir. 2002)(holding that extortion can be committed by putting someone in "fear of economic loss"); see also United States v. Golay, 560 F.2d 866, 869 (8th Cir. 1977) ("[I]t is possible for a defendant using extortionate tactics to be convicted of bank robbery"). If bank robbery by intimidation does not meet Section 924(c)'s force element, then surely bank robbery by extortion does not.

It is true, of course, that Petitioner was charged with armed bank robbery. A defendant may be convicted of this offense so long as he "put in jeopardy the life of any person by the use of a dangerous weapon or device" during a bank robbery. 18 U.S.C Section 2113(d)(emphasis added). However, the inclusion of this conduct element does not necessarily render Petitioner's crime a "crime of violence."

Specifically, "the use of a dangerous weapon or device" may be defined so broadly that it does not satisfy Curtis Johnson's violent-physical-force requirement. In Bailey v. United States, 516 U.S. 137, 148 (1995), the Supreme Court defined "use" in reference to Section 924(c)'s requirement that a defendant "use[] or carr[y] a firearm" during a crime of violence or drug trafficking crime. 18 U.S.C. Section 924(c)(1)(A). The Supreme Court held there that "use" includes "brandishing, displaying, bartering striking with, and most obviously, firing or attempting to fire, a firearm." Id. The Court said, "that even an offender's reference to a firearm in his possession could satisfy the 'use' requirement." Id. (emphasis added). Under this definition of "use," a defendant could be convicted of armed bank robbery for mentioning a firearm that he never displayed or even possessed during the crime. See United States v. Jones, 84 F.3d 1206, 1211 (9th Cir. 1996) (Defendant's reference to a gun "no one ever saw" was sufficient to establish the use of a dangerous weapon). This being the case, the offense Petitioner was charged with could certainly be committed without the type of force contemplated by Section 924(c).

Finally, Section 2113(a) also criminalizes "enter[ing] or attempt[ing] to enter any bank ... with intent to commit in such bank ...any felony affecting such bank." That language could easily cover many nonviolent felonies. For example, a defendant might "enter [a] bank" with the intent to commit loan fraud, which is certainly "[a] felony affecting such bank." Section 2113(a) is phrased in the disjunctive; that is, a defendant may be charged with "tak[ing], or attempt[ing] to take...any property or money ...of [] any bank or enter[ing] or attempt[ing] to enter any bank...with intent to commit in such bank...any felony affecting such bank." The use of "or" could be read to create divisible elements. But "our" inquiry cannot end with simply looking [to see] whether the statute is written disjunctively (with the word "or"). The test of a statute will not always tell us if a statute is listing alternative means or definitions, rather than alternative elements." United States v. Lockett, 810 F.3d 1262, 1268 (11th Cir. 2016).

Mathis v. United States tells us what to do when faced with an alternatively phrased statute:

> "The first task for a sentencing court... is [] to determine whether its listed items are elements or means. If they are elements, the court should do what we have previously approved; review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime. But if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution.

136 S.Ct. 2243 (2016). Mathis examined the distinction between the elements which defined a crime and the means by which it can be committed in reference to a statute's use of the word "burglary." But this distinction may even be more significant for Section 924 (c)'s "elements clause." The "elements clause" expressly requires a particular kind of "element"— the use, attempted use, or threatened use of physical force against the person or property of another. The law has long been clear that alternative means in a federal criminal statute are not alternative "elements." See, e.g., Richardson v. Unitd States, 526 U.S. 813, 817 (1999). And again, whether a crime is "within the ambit of 18 USC Section 924 (c)... is a question...we must answer 'categorically'—that is, by reference to the elements of the offense. McGuire, 706 F.3d at 1336 (emphasis added).

The law is unsettled on whether the rule announced in Johnson invalidates sentences under the residual clause of Section 924(c) and there appears to be disagreement among the circuit courts. The Sixth Circuit held that Section 924(c)'s residual clause is not unconstitutionally vague under Johnson. United States v. Taylor, 814 F.3d 340, 375-79 (6th Cir. 2016). The Seventh and Ninth Circuits have concluded that 18 USC Section 16(b), which contains language identical to Section 924(c)(3)(B), is unconstitutionally vague under the reasoning of Johnson. United States v. Vivas-Ceja, 808 F.3d 719, 720 (7th Cir. 2015); Dimaya v. Lynch, 803 F.3d 1110, 1111 (9th Cir. 2015).

In Shuti v. Lynch, 838 F.3d 440 (6th Cir. 2016), the Sixth Circuit agreed with the Seventh and Ninth Circuits that Johnson does apply to 18 USC Section 16(b)—a statute with a definition of "crime of violence" identical to that of Section 924(c). Id. at 446. Shuti recognized tht this language and the language of the ACCA addressed in Johnson, "[w]hile not a perfect match," nevertheless "undeniably bear a textual resemblance." Id. It also noted that both residual clauses "require a categorical approach to prior convictions," and thus "[a]n imprecise analysis of the possible risk of harm posed by this abstraction ensues" in both statutes. Id. at 446-47.

Shuti distinguished Taylor in two ways. First, it limited Taylor's holding to reading it "as applying Johnson's real-word conduct exception to uphold the constitutionality of 18 USC Section 924(c)(3)(B)," because in Taylor the jury found that Taylor committed his murder "in the course of committing two crimes of violence." Id. at 450 (citing Taylor, 814 F.3d at 376). In other words, the jury made a factual determination regarding whether the prior offense was a crime of violence. Second, Shuti held that Taylor's holding was effectively "undercut by the Supreme Court's intervening decision in Welch [v. United States], 136 S.Ct. 1257 (2016)," because the court "did not have the benefit of the Court's guidance" regarding the nature of a Johnson claim. Id. According to Shuti, the Welch opinion clarified that Johnson based its holding on the fact that "the ACCA's vagueness 'rests in large part on its operation under the categorical approach,'" and presumably not on the slight textual definitions that the Taylor opinion relied on. Id. (quoting Welch, 136 S.Ct. at 1262).

Thus, Shuti offers two ways to distinguish Taylor in this case. First, Taylor simply got it wrong because it did not have the benefit of Welch, as Shuti expressly recognized. Section 16(b) and the Armed Career Criminal Act are both unconstitutionally vague because of the interaction of their definitional language with the modified categorical approach, not because of their precise definitional language. Therefore, Johnson does apply to Section 924(c)'s language, which is identical to Section 16(b) both in language and in its use of the categorical approach. See Taylor, 814 F.3d at 378 ("[T]he ACCA residual clause, like Section 924(c)(3)(B), requires the application of a categorical approach, which requires courts to look at the ordinary case of the predicate crime.").

Second, no jury would have been required to determine whether Petitioner's underlying bank robbery offenses were "crimes of violence." Although Shuti distinguishes Taylor by asserting that the jury in Taylor must have found that Taylor committed his murder "in the course of committing two crimes of violence," Shuti 2016 WL 3632539, at 450 (citing Taylor 814 F.3d at 376), this is not technically correct. The question of whether a predicate offense under Section 924(c) is a "crime of violence" is a legal question to be addressed by the courts. See United States v. Morgan, 748 F.3d 1024, 1034 (10th Cir. 2014) ("Whether a crime fits the Section 924(c) definition of a 'crime of violence' is a question of law."); see also United States v. Franklin, 298 F. App'x 477, 479 (6th Cir. 2008) (noting that whether a Molotov cocktail is a "destructive device" under Section 924(c) is a question of law, not of fact). Sixth Circuit Pattern Jury instruction 12.02 makes clear that a jury would only reach a superficial conclusion that any given predicate is a "crime of violence," but without the benefit of the statute's definition of a crime of violence. In other words, the only party determining whether a given offense fits the statutory definition – either through the "elements clause" or the now-unconstitutional "residual clause" – is the court.

In short, Sixth Circuit case law appears to demonstrate that Johnson now applies to Section 924(c) claims. Further, there is currently a split among the circuits regarding the issue of Johnson's retroactive application to claims arising under Section 924(c) and Section 16(b). Among the courts wrestling with this question, the Sixth Circuit is the only one to have so blurred the line between the identical langauge of Section 16(b) and Section 924(c) through a vague and often contradictory comparison. In the wake of this circuit split, this Court recently granted certiorari to examine the statutory language of Section 16(b). Lynch v. Dimaya, 137 S.Ct. 31 (Sept. 29, 2016) (granting certiorari). In deciding Dimaya, this Court may very well address Section 924(c)'s identical language and/or could provide analysis at odds with the Sixth Circuit's reasoning in Taylor.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted or this case should be held in abeyance until this Court rules on Lynch v. Dimaya, 137 S.Ct. 31 (Sept. 29, 2016) (granting certiorari).

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing this 14th day of December, 2017, was served Upon the following:

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Cortez Moultrie

Cortez Deonte Moultrie.

A P P E N D I X