

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

MICHAEL JAY
Petitioner-Defendant-Appellant

- vs -

UNITED STATES OF AMERICA
Respondent-Plaintiff-Appellee

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

PETITIONER'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

&

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has said that a kidnapping offense, which is defined so broadly as to reach nothing more than demanding a ransom for the release of a kidnapped person, does not necessarily involve, in every instance of its commission, the use, attempted use, or threatened use of violent physical force required to count that kidnapping offense as a crime of violence under 18 U.S.C. §16(a)'s force clause. *Torres v. Lynch*, 136 S.Ct. 1619, 1629 (2016).

The question presented here is whether a robbery offense, which is defined so broadly as to reach nothing more than demanding money from another person, necessarily involves, in every instance of its commission, the use, attempted use, or threatened use of violent physical force required to count that robbery offense as a crime of violence under 18 U.S.C. §924(c)'s identically worded force clause.

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OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit's order denying rehearing en banc is appended to this petition at App. 1. The Ninth Circuit's unpublished memorandum opinion is attached at App. 2–3 and can be found at 705 Fed. Appx. 587, 2017 WL 5897267 (9th Cir. Nov. 30, 2017) (unpublished). A copy of the district court's order denying the petitioner's 28 U.S.C. §2255 motion is attached at App. 4–33.

JURISDICTION

The Ninth Circuit denied rehearing en banc on January 10, 2018. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §1291 and §2253. The district court had jurisdiction pursuant to 18 U.S.C. §3231 and 28 U.S.C. §2255.

STATEMENT OF THE CASE

On November 10, 2008, the petitioner brandished a short-barreled shotgun while robbing a bar, for which the government duly convicted him of Hobbs Act robbery (18 U.S.C. §1951), brandishing a short-barreled shotgun during a crime of violence (18 U.S.C. §924(c)), and possession of firearm by a felon (18 U.S.C. §922(g)). The record of his conviction does not indicate whether the petitioner's §924(c) conviction rested on §924(c)(3)'s force clause or the statute's residual clause. In 2016, the petitioner filed a 28 U.S.C. §2255 motion challenging his §924(c) conviction. He contended that §924(c)'s residual clause did not lawfully capture Hobbs Act robbery, because the statute's residual clause was, in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015) (*Johnson 2015*), void for vagueness. And he contended that his §924(c) conviction and sentence could not

be sustained under §924(c)'s force clause either. On this point, he argued that the statute's force clause did not lawfully pick up Hobbs Act robbery because the least of the acts that Hobbs Act robbery criminalized consisted of nothing more forceful than a calmly spoken, in some cases even meekly apologetic, demand for money. Both the district court and the Ninth Circuit relied on the Ninth Circuit's decision in *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990), to reject the petitioner's force clause argument and deny him relief, without reaching his residual clause argument.

REASON FOR GRANTING THE WRIT

1. This case is about *Moncrieffe v. Holder*, 569 U.S. 184 (2013). This Court there dealt with an aspect of the categorical approach that federal courts use to determine whether an offense is an aggravated felony, violent felony, and crime of violence under various federal immigration and criminal statutes and the Sentencing Guidelines. The categorical approach looks at the elements of the offense and compares them with the generic federal definition at issue. *Moncrieffe* clarifies that the baseline for that comparison is the "minimum conduct criminalized" by the elements of the offense. *Moncrieffe*, 569 U.S. at 191. In *Moncrieffe*, this Court accordingly turned to cases rejecting defendants' sufficiency of the evidence claims to find the minimum conduct criminalized by the offense at issue. *Moncrieffe*, 569 U.S. at 194 (turning to *Taylor v. State*, 581 S.E.2d 386, 388 (Ga. Ct. App. 2003), and *Hadden v. State*, 353 S.E.2d 532, 533–534 (Ga. Ct. App. 1987)).

When it comes to federal robbery offenses, the lower federal courts are refusing to do what *Moncrieffe* calls upon them to do. The Ninth Circuit's decision here is as

exemplary as any of what's going on. In Jay's case, the Ninth Circuit held that its prior decision in *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990) (a copy of *Selfa* is attached at App. 34–36), holding that federal robbery offenses that reach intimidation are crimes of violence, survived *Moncrieffe*. But the Ninth Circuit looked only at the legal definition of “intimidation” to hold that Hobbs Act robbery’s actus reus element necessarily, in every case, requires the use, attempted use, or threatened use of violent physical force and is, therefore, picked up by the force clause of 18 U.S.C. 924(c)(3)’s crime of violence definition. The Ninth Circuit did not look at any cases establishing the minimum conduct the government has successfully prosecuted as intimidation robbery. The *Moncrieffe* focal point, however, isn’t the legal definition of the offense’s actus reus. The *Moncrieffe* focal point is the conduct that has been successfully prosecuted, or for which there is a realistic probability of prosecution, as coming within the ambit of that legal definition.

Here, in its own words, is the Ninth Circuit’s mistaken analysis of the point:

Moncrieffe does no more than require us to look to the least of the conduct proscribed by the statute, not to the conduct the defendant actually committed, and determine “whether even those acts are encompassed by the generic federal offense.” *Moncrieffe*, 133 S.Ct. at 1684 (citations omitted); see also *Selfa*, 918 F.2d at 751 (holding “the elements of the crimes of which the defendant was previously convicted, and not the particular conduct of the defendant on the day the crimes were committed,” controls the Court’s analysis). Under *Selfa* and the language of the statute, Hobbs Act Robbery requires force or intimidation and does not countenance violation by means of conduct that is essentially passive. See 18 U.S.C. §1951(b)(1) (defining “robbery” as “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”); *Selfa*, 918 F.2d at 751 (“intimidation,” defined as willfully taking or attempting to

take in such a way “that would put an ordinary, reasonable person in fear of bodily harm,” meets the requirement of a “threatened use of physical force”) (internal quotation marks and citations omitted).

Jay, 705 Fed.Appx. at 587–588 (App. at 2). True enough, *Moncrieffe* does not require looking at Jay’s particular conduct. But *Moncrieffe* does require looking at more than the legal definition of the elements of the offense. It requires surveying cases to discover what conduct has been held sufficient proof of those elements. And *that*, the Ninth Circuit did not do in Jay’s case. Nor did it undertake the inquiry *Moncrieffe* requires in *Selfa*, nor has it done so in any other case discussing the question of whether the force clause picks up federal robbery offenses that reach intimidation.

The minimum conduct criminalized by federal robbery offenses that reach intimidation is nothing more than a calmly and apologetically spoken demand for money. *United States v. Hopkins*, 703 F.2d 1102 (9th Cir. 1983), set that baseline long ago in the Ninth Circuit, holding that Hopkins’ “demands for money provide sufficient evidence of intimidation,” even though “the evidence showed that Hopkins spoke calmly, made no threats, and was clearly unarmed.” *Hopkins*, 703 F.2d at 1103. Other Ninth Circuit cases confirm that baseline. *United States v. Friedman*, 1988 WL 109117 (9th Cir. Oct. 11, 1988) (unpublished) (“[i]n this circuit, an unequivocal written or verbal demand for money may qualify as intimidation; there is no requirement of more overt evidence such as express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapons” (quotation marks and citations omitted)); *United States v. Bingham*, 628 F.2d 548, 549 (9th Cir. 1980). Other circuits hold the same. *United States v. Ketchum*, 550 F.3d 363, 367 (4th Cir. 2008); *United States v. Higdon*, 832 F.2d 312, 315

(5th Cir. 1987); *United States v. Gilmore*, 282 F.3d 398, 403 (6th Cir. 2002); *United States v. Gordon*, 642 F.3d 596, 598 (7th Cir. 2011); *United States v. Smith*, 973 F.2d 1374, 1377 (8th Cir. 1992). And in the District of Hawaii, where the government prosecuted Jay, the government has successfully prosecuted not just calmly spoken demands for money, but meekly apologetic ones. *United States v. Inoshita*, No. 16-15931 (9th Cir.), DktEntry 13 at pp. 2–3 (government’s answering brief, filed 2/27/17), and DktEntry 21 at p. 20 (defendant’s reply brief, filed 4/10/17).

This Court has said that 18 U.S.C. §16’s identically-worded force clause does not pick up a kidnapping offense that reaches nothing more than a demand for ransom. *Torres v. Lynch*, 136 S.Ct. 1619, 1629 (2016). If the force clause doesn’t pick up demanding ransom in a kidnapping case, it doesn’t pick up demanding money in a robbery case.

2. The mis-application of *Moncrieffe* to federal robbery offenses is not just endemic to Hawaii or the Ninth Circuit. *All* of the circuits to have addressed the issue in recent years have held that the intimidation that federal robbery offenses reach constitutes the level of used, attempted, or threatened force that *Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson 2010*), requires. *United States v. Ellison*, 866 F.3d 32, 35–37 (1st Cir. 2017); *United States v. Wilson*, ___ F.3d ___, 2018 WL 444190 at *4 (3rd Cir. 2018); *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016); *United States v. Brewer*, 848 F.3d 711, 716 (5th Cir. 2017); *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016); *United States v. Campbell*, 865 F.3d 853, 854 (7th Cir. 2017); *United States v. Harper*, 869 F.3d 624, 626–627 (8th Cir. 2017); *United States v. Jenkins*, 651

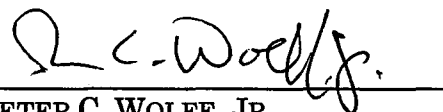
Fed.Appx. 920, 924 (11th Cir. June 3, 2016) (unpublished). None of these cases, however, explain how a simple demand for money suffices to threaten *Johnson 2010* level force, as opposed to something less violent and physical. Nor has *any* circuit reconciled holding a demand for money in robbery case counts with this Court's remark in *Torres* that a demand for ransom in a kidnapping case does not.

3. Given the universal mis-application of *Moncrieffe*, and the universal refusal to confront this Court's considered and on-point remarks in *Torres*, that is occurring in the lower federal courts, this Court's intervention is necessary on this important issue, an issue that implicates all federal criminal and immigration cases in which a federal robbery offense serves as a predicate force clause crime of violence, violent felony, or aggravated felony.

CONCLUSION

This Court should grant this petition to correct the circuit courts' mistaken application of *Moncrieffe* to federal robbery offenses.

DATED: Honolulu, Hawaii, January 23, 2018.


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