
NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

Kevin Doran Chapman - Petitioner,

vs.

United States of America - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether *Gonzales v. Duenas-Alvarez*, 549 U.S. 189 (2007), requires that a defendant point to a specific state case where the statute was applied in an overbroad manner when the plain language of a state statute is broader than the generic definition of an offense?

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IN THE SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 2017

Kevin Doran Chapman - Petitioner,

vs.

United States of America - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Kevin Chapman, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 17-1224, entered on January 16, 2018. Mr. Chapman's petition for rehearing en banc and petition for rehearing by the panel were denied on February 16, 2018.

OPINION BELOW

On January 16, 2018, a panel of the Court of Appeals entered its ruling affirming the judgment of the United States District Court for the Southern District of Iowa. The decision is unpublished and available at 2018 WL 501408.

JURISDICTION

The Court of Appeals entered its judgment on January 16, 2018, and denied Mr. Chapman's petition for rehearing en banc and petition for rehearing by the panel on February 16, 2018. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Iowa Code § 708.1

1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Iowa Code § 708.2(1)

A person who commits an assault, as defined in section 708.1, with the intent to inflict a serious injury upon another, is guilty of an aggravated misdemeanor.

Iowa Code § 702.18

1. "Serious injury" means any of the following:
 - a. Disabling mental illness.
 - b. Bodily injury which does any of the following:
 - (1) Creates a substantial risk of death.
 - (2) Causes serious permanent disfigurement.
 - (3) Causes protracted loss or impairment of the function of any bodily member or organ.

- c. Any injury to a child that requires surgical repair and necessitates the administration of general anesthesia.
2. “Serious injury” includes but is not limited to skull fractures, rib fractures, and metaphyseal fractures of the long bones of children under the age of four years.

STATEMENT OF THE CASE

Mr. Chapman was indicted in the Southern District of Iowa on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) & 924(a)(2). (DCD 15).¹ Mr. Chapman pled guilty to the sole count. (DCD 30).

As relevant to this petition, the presentence investigation report (“PSR”) prepared in advance of sentencing indicated that Mr. Chapman’s base offense level should be increased because he had a prior felony conviction for a crime of violence: Iowa assault with a weapon and Iowa assault with intent to cause serious injury. (PSR ¶ 13, 26); USSG § 2K2.1(a)(4). After other enhancements, the PSR calculated Mr. Chapman’s guideline range at 77 to 96 months of incarceration, based on a total offense level of 21 and criminal history category VI. (PSR ¶ 109).

Mr. Chapman objected to the PSR’s increase to his base offense level. (DCD 35, 38). In particular, he asserted that after *United States v. Mathis*, 136 S. Ct. 2243 (2016), his Iowa assault convictions did not constitute crimes of violence because the relevant statutes are indivisible and overbroad. (DCD 38). Mr.

¹ In this petition, the following abbreviations will be used:

“DCD” - district court clerk’s record, followed by docket entry and page number, where noted;

“PSR” - presentence report, followed by the page number of the originating document and paragraph number, where noted; and

“Sent. Tr.” – Sentencing hearing transcript, followed by page number.

Chapman argued that both Iowa assault convictions failed to satisfy the “force clause” under USSG § 4B1.2(a)(1), and that both were broader than the generic definition of aggravated assault under § 4B1.2(a)(2). (DCD 38). At sentencing, the district court overruled the objection to his base offense level. (Sent. Tr. p. 10). The court sentenced Mr. Chapman to 77 months of imprisonment. (Sent. Tr. p. 20).

On appeal, Mr. Chapman maintained the challenge to his base offense level. As to his Iowa assault with intent to inflict serious injury conviction, Mr. Chapman argued it was not a crime of violence under the force clause and the enumerated offense clause for the same reason: Iowa Code § 702.18 defines “serious injury” to include “disabling mental illness.” Section 702.18 states:

1. “Serious injury” means any of the following:
 - a. Disabling mental illness.
 - b. Bodily injury which does any of the following:
 - (1) Creates a substantial risk of death.
 - (2) Causes serious permanent disfigurement.
 - (3) Causes protracted loss or impairment of the function of any bodily member or organ.
 - c. Any injury to a child that requires surgical repair and necessitates the administration of general anesthesia.
2. “Serious injury” includes but is not limited to skull fractures, rib fractures, and metaphyseal fractures of the long bones of children under the age of four years.

However, the generic definition of the enumerated offense of “aggravated assault” requires intent to cause bodily injury. Because Iowa assault with intent to inflict serious injury can be committed with the intent to inflict “disabling mental illness” based on the plain language of the statute, Mr. Chapman argued the statute was broader than the generic offense.

The Eighth Circuit rejected Mr. Chapman’s argument that his base offense level was improperly increased. *United States v. Chapman*, No. 17-1224, 2018 WL 501408, at * 1 (8th Cir. Jan. 16, 2018). The panel did not address whether his Iowa assault with a weapon conviction was a crime of violence. *Id.* at *1 n. 2. Instead, the panel found that his Iowa assault with intent to inflict serious injury conviction qualified under USSG § 4B1.2(a)(2) as the enumerated offense of aggravated assault.

The Eighth Circuit specifically rejected the argument that “serious injury” was overbroad because Iowa Code § 702.18 defines “serious injury” to include “disabling mental illness.” *Id.* at *1. The panel acknowledged that the generic definition of aggravated assault requires the intent to inflict serious bodily injury, and that Iowa’s statutory definition of “serious injury” includes “disabling mental illness.” *Id.*

Nonetheless, the panel rejected the argument that the statute was overbroad because it could “not f[ind] a single case in which a defendant was charged with aggravated assault under § 708.2(1) based solely on intent to inflict disabling mental illness.” *Id.* Relying on *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), the panel found that the language of the statute was not enough to establish overbreadth; rather, the defendant must find a case where the statute was applied in an overbroad manner, despite the fact that the plain language of the statute would clearly allow such a prosecution. *Id.* The panel held that without a specific

case, there was only a “mere ‘theoretical possibility,’ rather than a ‘realistic probability,’ that Iowa would apply its aggravated assault statute, § 708.2(1), to criminalize assault with intent to inflict disabling mental illness alone.” Slip op. at 3. Based upon this interpretation of *Duenas-Alvarez*, the panel affirmed Mr. Chapman’s sentence.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for writ of certiorari to address a growing circuit conflict. Below, the Eighth Circuit rejected the argument that Iowa’s assault with intent to inflict serious injury statute is broader than the generic definition of aggravated assault. The panel acknowledged that the generic definition of aggravated assault requires intent to cause bodily injury. The panel also acknowledged that the Iowa statute explicitly states that “serious injury” includes “disabling mental illness.” Despite the plain language of the Iowa statute, the panel nonetheless held that *Gonzales v. Duenas-Alvarez*, 549 U.S. 189, 193 (2007), requires that a defendant point to a specific state case where the statute was applied in an overbroad manner.

Since *Taylor v. United States*, 495 U.S. 575 (1990), this Court has clearly and consistently stated that the starting point of the categorical approach is comparing the elements of the offense of conviction with the elements of the generic offense. The Eighth Circuit’s decision ignores this fundamental principle, and instead adopts a warped interpretation of *Duenas-Alvarez* that would require courts to act like the plain language of a statute simply does not exist.

The First, Third, Sixth, Ninth, Tenth, and Eleventh Circuits have all rejected the panel’s interpretation of *Duenas-Alvarez*. These courts note that when the statutory language is clearly overbroad, a defendant is not required to point to a specific case where the statute was applied in an overbroad manner. Instead, these courts recognize that when the language of the statute itself is overbroad, the “legal

imagination” concerns of *Duenas-Alvarez* are not present. However, both the Eighth and Fifth circuits have held that the plain language of the statute alone is not enough to establish overbreadth. This Court should grant the petition for writ of certiorari to correct the Eighth and Fifth circuit’s flawed interpretation of this Court’s precedent and address the growing circuit split.

A. Requiring defendants to point to a specific case to show a statute is overbroad, when the statutory language is clearly overbroad, is an incorrect application of U.S. Supreme Court precedent.

In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), this Court stated:

[T]o find that a state statute creates a crime outside the generic definition of a listed crime . . . requires more than the application of legal imagination to a state statute’s language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

This principle was reaffirmed in *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

Duenas-Alvarez’s requirement of pointing to a specific case only comes into play if the statutory language itself is not clearly overbroad. Since its first robust articulation in *Caminetti v. United States*, this Court has always started with the “plain meaning rule” when interpreting a statute’s meaning: “Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise.” 242 U.S. 470, 485 (1917). Along with the plain meaning rule comes the so-called “surplusage canon,” which simply counsels that no words in a statute should

be ignored. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-79 (2012) (“The surplusage canon holds that it is no more the court’s function to revise by subtraction than by addition.”). The Eighth Circuit’s interpretation of *Duenas-Alvarez* violates both canons.

In *Duenas-Alvarez*, this Court was concerned with a defendant who sought to establish a statute as overbroad in an unlikely way, through “the application of legal imagination.” 549 F.3d at 193. In many instances, as in *Duenas-Alvarez*, a concrete example dissipates concerns over fanciful argumentation. But in other instances, no legal imagination is required because the plain language of the statute of prior conviction is overbroad on its face. It is in these instances that a hyper-rigid interpretation of the *Duenas-Alvarez* rule serves no purpose but to limit a defendant’s ability to defeat an erroneous sentencing enhancement.

From its inception in *Taylor v. United States*, the categorical approach has been rooted in text over application, focusing first and foremost on “the elements of the statute of conviction.” 495 U.S. 575, 601 (1990). *Duenas-Alvarez* should not be used to make the statute of conviction narrower than it is on its own terms, but that is exactly what the panel’s interpretation does: if a defendant cannot locate a nongeneric example of the statute’s application, the Eighth and Fifth circuits will simply treat the nongeneric portion of the statute of conviction as if it were absent. But it will still be there, on the page, in concrete terms, rather than in the realm of “legal imagination.”

If, for example, a statute of prior conviction defines “burglary” as “unlawful entry, with intent to commit a crime therein, of a building or occupied structure,” and the state defines “occupied structure” to expressly include cars and boats, courts should not be permitted to ignore the “cars and boats” portion of the statute under any circumstances. But the Eighth Circuit’s interpretation of *Duenas-Alvarez* would require courts to ignore “cars and boats” unless or until the defendant can identify a case where a court has applied the statute to a car or a boat. Likewise in this case, the Eighth Circuit’s interpretation of *Duenas-Alvarez* would require courts to ignore the Iowa statute’s explicit definition of assault until such a time as a defendant—most likely by spending innumerable hours sifting through myriad records at a district court clerk’s office—finds an Iowan who was convicted for this crime for intending to cause a disabling mental illness. The practicalities of such an approach would be virtually insurmountable. Elizabeth Y. McCuskey, *Submerged Precedent*, 16 Nev. L.J. 515, 520 (2016) (noting that there are “a mass of reasoned opinions available only on court dockets, and not available on Westlaw, or Lexis. These putative precedents are essentially submerged from public view and therefore excluded from consideration among the body of precedential law.”).

What if the defendant is representing him - or herself and does not have access to court records in other cases? What if the statute is newly enacted? What about the inconsistencies that would surely result when one defendant’s prior

conviction is counted as a crime of violence because he cannot point to case law applying the statute in a specified way, but a year later, a state case does, in fact, apply the statute in the specified way, allowing subsequent defendants to make the *Duenas-Alvarez* demonstration that the first defendant could not? Left standing, the Eighth and Fifth circuit's holdings place an undue burden on defendants that this Court did not envision in *Taylor*, *Duenas-Alvarez*, or elsewhere.

B. The Eighth Circuit's decision conflicts with the First, Third, Sixth, Ninth, Tenth, and Eleventh circuits. Only the Fifth circuit agrees that the plain language of a statute alone is insufficient to establish it is overbroad.

The overwhelming majority of circuits have rejected the Eighth Circuit's reading of *Duenas-Alvarez*, finding the defense is not required to point to a case where a statute was applied in an overbroad manner when the statutory language is explicitly overbroad. The panel's holding directly conflicts with the First, Third, Sixth, Ninth, Tenth, and Eleventh Circuits.

In *Swaby v. Yates*, the First Circuit considered the categorical breadth of the Rhode Island drug schedules in comparison to the federal drug schedules. *Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017). The court held that the Rhode Island statute was broader on its "plain terms," "whether or not there is a realistic probability that the state actually will prosecute offenses involving that particular drug." *Id.* In *Singh v. Attorney General*, the Third Circuit held that when the elements of a crime of conviction are different, on their face, from the elements of a generic federal offense, a court errs by conducting a "realistic probability inquiry." 839 F.3d 273,

286 (3d Cir. 2016). In *Mendieta-Robles v. Gonzales*, the Sixth Circuit held that the Government’s interpretation of the *Duenas-Alvarez* rule, which was the same as that applied here by the panel, failed because “it requires us to ignore the clear language” of a statute. *Mendieta-Robles v. Gonzales*, 226 F. App’x 564, 572 (6th Cir. 2007) (unpublished).

In *United States v. Grisel*, the Ninth Circuit, sitting en banc, provided perhaps the most well-put articulation of its interpretation of the *Duenas-Alvarez* rule: “Where . . . a state statute explicitly defines a crime more broadly than the generic definition, no ‘legal imagination’ is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime.” 488 F.3d 844, 850 (9th Cir. 2007) (en banc). The Tenth Circuit recently followed this reasoning when analyzing Hobbs Act robbery, stating:

[The government] contends [the defendant] failed to demonstrate that the government has or would prosecute threats to property as a Hobbs Act Robbery. . . . But he does not have to make that showing. Hobbs Act robbery reaches conduct directed at “property” because the statute specifically says so. See 18 U.S.C. § 1951(b)(1). We cannot ignore the statutory text and construct a narrower statute than the plain language supports.

United States v. O’Connor, 874 F.3d 1147, 1154 (10th Cir. 2017). Similarly, in *Vassell v. United States*, the Eleventh Circuit held: “*Duenas-Alvarez* does not require this showing when the statutory language itself, rather than ‘the application of legal imagination’ to that language, creates the ‘realistic probability’

that a state would apply the statute to conduct beyond the generic definition.”

Vassell v. U.S. AG, 839 F.3d 1352, 1362 (11th Cir. 2016).

The Fifth Circuit is the only circuit to analyze *Duenas-Alvarez* in a manner consistent with the Eighth Circuit. *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc). In a deeply divided en banc decision, the Fifth Circuit held that even if a statute was plainly overbroad, a defendant was still required to provide a case as an example of when the statute was applied in an overbroad manner. *Id.* at 222-24. The majority, like the panel here, relied upon *Duenas-Alvarez* to reach this holding. *Id.* A seven-judge dissent noted, however, that “*Duenas-Alvarez* is concerned with the defendant who tries to demonstrate that a statute is overbroad by hypothesizing that it might be applied in some fanciful or unlikely way—through the ‘application of imagination.’” *Id.* at 239 (Dennis, J., dissenting). The dissent believed that when the statutory language is clear, there is no “legal imagination” to be had. *Id.* This Court should correct the flawed reasoning from the Eighth and Fifth circuits and grant review to adopt the rationale applied by the First, Third, Sixth, Ninth, Tenth, and Eleventh circuits.

Even if the panel’s interpretation of *Duenas-Alvarez* was correct, the Eighth Circuit’s decision is additionally erroneous to the extent it states that no Iowa case illustrates that the Iowa statute has been applied in a nongeneric manner. 2018 WL 501408, at *1. In the briefing, Mr. Chapman identified a case in which the Iowa Supreme Court held that “serious injury” under Iowa Code § 702.18 does not

require bodily injury: *State v. White*, 668 N.W.2d 850, 857 (Iowa 2003). In *White*, the Iowa Supreme Court held that “torture” under Iowa law does not require an element of physical injury, and specifically pointed to the definition of “serious injury” in Iowa Code § 702.18, noting that because it defined serious injury as including a “[d]isabling mental illness,’ or extensive bodily injury,” it supported a conclusion that the legislature intended the word torture to encompass[] mental anguish unaccompanied by physical injury,” just as the phrase “serious injury” does. *White*, 668 N.W.2d at 857.

Further, in *State v. Thompson*, a defendant was charged with kidnapping, which required proof that he had the “intent to inflict serious injury upon [the victim], or to subject [the victim] to sexual abuse.” *State v. Thompson*, No. 0-744, 2000 WL 1868961 (Iowa Ct. App. Dec. 22, 2000). The defendant objected to the trial court’s decision to provide an instruction on “serious injury” to the jury as an alternative means of committing the offense, arguing that the victim’s therapist testified only that she had PTSD, and the symptoms thus did not constitute a “serious injury.” *Id.* The Court of Appeals rejected the defendant’s arguments, finding that “evidence of the victim’s mental and emotional status demonstrates that she suffers from ‘serious injury,’” which was defined by the instructions as including a “disabling mental illness; or condition which cripples, incapacitates, weakens or destroys a person’s normal mental functions” *Id.* Because *Thompson* relied on precisely the same definition of “serious injury” as does the

Iowa assault statute, the argument that Iowa assault is overbroad is not simply “legal imagination.”

Finally, the inclusion of “disabling mental illness” makes the statute overbroad because definition of “serious injury” in § 702.18 is internally indivisible. Iowa case law supports that the definition of serious injury is indivisible. *See, e.g., State v. McKee*, 312 N.W.2d 907, 912 (Iowa 1981) (“Four possible kinds of serious injury are included in the section 702.18 definition[.]”); *Houk v. State*, 898 N.W.2d 202, 2017 WL 514402, at *3 (Iowa Ct. App. 2017) (approving a definition of serious injury that included “disabling mental illness . . . and/or bodily injury”); *State v. Carter*, 843 N.W.2d 477, 2014 WL 69755, at *2 (Iowa Ct. App. 2014) (“Serious injury” is a term of art in Iowa criminal law. It is defined as either “disabling mental illness” or “bodily injury which does any of the following” (emphasis added)). Because the term “serious injury” is indivisible, it was irrelevant to Mr. Chapman’s conviction whether his intent at the time was to cause a disabling mental illness or to cause a bodily injury. Therefore, the statute is broader than the generic definition of aggravated assault, and the panel erred in finding it qualified as a crime of violence under § 4B1.2(a)(2).

CONCLUSION

For the foregoing reasons, Mr. Chapman respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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