

No. _____

IN THE
Supreme Court of the United States

JEFFREY SCOTT FINNEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court erred in denying Jeffrey Finney's post-*Johnson* motion for relief pursuant to 28 U.S.C. § 2255

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

Petitioner, Jeffrey Scott Finney, respectfully prays that a writ of certiorari issue to review the published decision of the United States Court of Appeals for the Ninth Circuit, entered on June 15, 2018. (App. 1-3).

OPINIONS AND ORDERS BELOW

On September 7, 2011, a grand jury returned a three-count Indictment charging Mr. Finney with unlawful possession and sale of a stolen firearm and unlawful possession and disposition of a stolen firearm, in violation of 18 U.S.C. § 922(j) (Counts 1 and 2); and felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g) (Count 3).

Mr. Finney ultimately agreed to plead guilty to Counts 1 and 2 of the indictment, in order to avoid a then-applicable mandatory minimum fifteen year sentence pursuant to the Armed Career Criminal Act (“ACCA”). As part of the plea agreement, Mr. Finney was permitted to request a sentence of no less than eleven years while the Government would seek no more than fifteen years. The parties agreed that each would sentence run consecutive to the other, in order to allow for a sentence over the ten-year statutory maximum.

The District Court sentenced Mr. Finney to a term of imprisonment of 137 months, the high-end of the Guideline. In order to achieve a sentence greater than ten

years, the District Court sentenced Mr. Finney to 68 months on Count 1 and 69 months on Count 2 to run consecutively.

Post-*Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Finney filed a §2255 Motion challenging his sentence, arguing that ACCA eligibility formed the basis of his sentence. The District Court ultimately denied the motion and granted a certificate of appealability on August 18, 2017.

On appeal, the Ninth Circuit rejected Mr. Finney's argument that ACCA eligibility formed the basis of his sentence and affirmed the denial of his §2255 Motion. (App. 1-3).

STATEMENT OF JURISDICTION

The Court of Appeals affirmed the District Court's judgment and sentence in this matter. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a

probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term “serious drug offense” means—

(i) an offense under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

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

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

STATEMENT OF THE CASE

On September 7, 2011, a grand jury returned a three-count Indictment charging Mr. Finney with unlawful possession and sale of a stolen firearm and unlawful possession and disposition of a stolen firearm, in violation of 18 U.S.C. § 922(j) (Counts 1 and 2); and felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g) (Count 3). (Although a violation of § 922(g) typically carries a

statutory maximum term of ten years' imprisonment, at the time of his arrest, Mr. Finney had two Washington convictions for residential burglary, which were then considered "violent felonies" under the residual clause of the Armed Career Criminal Act ("ACCA"), and one conviction for a serious drug offense. Thus, at the outset of his case, the Government provided Mr. Finney with notice that he was facing a mandatory minimum of fifteen years, if convicted.

Mr. Finney ultimately agreed to plead guilty to Counts 1 and 2 of the indictment, thereby avoiding the mandatory minimum term of imprisonment applicable to a violation of § 922(g), as set forth in the ACCA at § 924(e). He entered this plea pursuant to a written plea agreement. As part of the plea agreement, Mr. Finney was permitted to request a sentence of no less than eleven years while the Government would seek no more than fifteen years.

In order to circumvent the ten-year statutory maximum applicable to each charge, the plea agreement provided that the parties would recommend that each sentence run consecutive to the other, despite the statutory presumption that the sentences run concurrent. 18 U.S.C. § 3584 ("Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively.") Given the Government's ACCA bargaining chip, however, Mr. Finney had little choice. As part of the plea agreement,

the parties' also agreed that Mr. Finney would face an enhanced Guideline range as a result of his prior convictions.

Prior to sentencing, the U.S. Probation Office disclosed the ("PSR"). That document calculated Mr. Finney's base offense level at 24, as the parties had anticipated. This was based on the belief that Mr. Finney had committed the offense subsequent to sustaining at least two convictions for a crime of violence; specifically, Washington residential burglary. The USPO issued the final PSR on March 7, 2012. The final calculations included a Base Offense Level of 24, a two-level increase for the number of firearms, a two-level increase because the firearms were stolen, and a three-level reduction for acceptance of responsibility. The resulting total adjusted offense level was 25. With a criminal history category of VI, the Guideline range was 110 to 137 months.

Mr. Finney's ACCA exposure was discussed in the defense sentencing materials. ("Although[] Mr. Finney has avoided the mandatory 15-year minimum sentence required by the Armed Career Criminal Act enhancement, this was only possible because the Government agreed to dismiss the count of the indictment that would have triggered the enhancement in the first place."). It was also outlined orally by defense counsel at the sentencing hearing. ("The government agreed...as plea negotiations, they are willing to dismiss that charge at sentencing in exchange for Mr.

Finney's plea...to the possession of the stolen firearms. This way, Mr. Finney avoids the 15-year mandatory minimum ACCA."').

At sentencing, the District Court concluded that the calculations contained within the PSR were accurate. The Court sentenced Mr. Finney to a term of imprisonment of 137 months, the high-end of the Guideline. In order to achieve a sentence greater than ten years, the District Court sentenced Mr. Finney to 68 months on Count 1 and 69 months on Count 2 to run consecutively. The judgment issued on March 22, 2012. Mr. Finney did not file a direct appeal.

Post-*Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Finney filed a §2255 Motion. The District Court directed the government to respond. The government filed its response. Mr. Finney replied. After stay proceedings while *Beckles v. United States*, 137 S.Ct. 886 (2017), was pending were concluded, the District Court authorized the filing of an amended motion. Mr. Finney filed an Amended Motion. The government responded and Mr. Finney replied. The District Court filed an order denying the motion and granting a certificate of appealability on August 18, 2017.

Mr. Finney filed a timely notice of appeal on August 23, 2017. On appeal, the Ninth Circuit rejected Mr. Finney's argument that ACCA eligibility formed the basis of his sentence and affirmed the denial of his §2255 Motion. (App. 1-3).

REASONS FOR GRANTING THE WRIT

I. This Court's decisions in *Johnson* and *Welch* supported Mr. Finney's claim for relief

"If an individual is convicted under 18 U.S.C. § 922(g) (felon in possession of a firearm), the Armed Career Criminal Act ('ACCA') requires courts to impose a sentence of not less than 15 years on specified defendants who have three previous convictions for a violent felony or a serious drug offense or both. 18 U.S.C. § 924(e)(1)." *United States v. Terrell*, — F. Supp. 3d —, 2016 WL 6582993, at *2 (E.D. Wash. 2016). "Section 924(e)(2)(B) defines 'violent felony' to include a 'any crime punishable by imprisonment for a term exceeding one year' that '(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]' *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)).

"In June 2015, the Supreme Court struck the thirteen word so-called 'residual clause' (underlined text) of ACCA for being unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. *Id.* (citing *Johnson v. United States*, 135 S. Ct. 2551, 2555–57 (2015)). "The void-for-vagueness doctrine prohibits the government from imposing sanctions 'under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so 00000 that it invites arbitrary enforcement.'" *Id.* (internal quotation marks omitted). "On April 18, 2016,

the Supreme Court held in *Welch v. United States* that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review.” *Terrell*, 2016 WL 6582993, at *3 (citing *Welch v. United States*, 136 S. Ct. 1257, 1264–65 (2016)).

II. The consideration of Mr. Finney’s now-unconstitutional ACCA exposure formed the basis of the decision to adopt the parties’ agreement and impose consecutive imprisonment terms

When Mr. Finney was sentenced in 2012, *Johnson* had yet to be decided. At that time, Mr. Finney had three Washington burglary convictions that qualified as violent felonies under the residual clause. It was against this backdrop that Mr. Finney accepted the plea bargain. It was either the chance to argue for eleven years or the certainty that he would serve at least fifteen.

“A district court may generally consider a wide variety of information when imposing sentence so long as that sentence is not based on misinformation of constitutional magnitude.” *Terrell*, 2016 WL 6582993, at *8 (citing *United States v. Monaco*, 852 F.2d 1143, 1149 (9th Cir. 1988)). If a Court “relies on materially false or unreliable information in sentencing,” then it violates an individual’s due-process rights. *Id.* (citing *United States v. Safirstein*, 827 F.2d 1380, 1385 (9th Cir. 1987)). “To establish a due process violation at sentencing, defendant must ‘must establish the challenged information is (1) false or unreliable, and (2) demonstrably made the basis

for the sentence.” *Id.* (citing *United States v. Vanderwerfhorst*, 576 F.3d 929, 935–36 (9th Cir. 2009)).

Here, the false or unreliable information upon which the Court relied was Mr. Finney’s ACCA exposure. Were Mr. Finney sentenced today, he would not be facing the decision between his plea agreement or a fifteen-year mandatory minimum under the ACCA. Post-*Johnson*, he is simply not ACCA-qualified.

Additionally, as the District Court previously concluded, the fact that Mr. Finney was ACCA qualified and avoiding a fifteen-year mandatory minimum sentence by entering the plea agreement was a necessary consideration in its analysis under 18 U.S.C. § 3553(a) and appears to have formed the basis of the sentence.

First, it was detailed in the PSR:

150. At the time of sentencing, the government agreed to move to dismiss Count 3 of the indictment which charges the defendant with Felon in Possession of a Firearm and Ammunition, in violation of 18 U.S.C § 922(g)(1). Given the defendant’s criminal history, had Jeffery Finney been convicted of count 1 of the indictment, he would have met the statutory definition of an Armed Career Criminal. Such a conviction would have resulted in a mandatory minimum sentence of imprisonment of 15 years.
151. However, in the plea agreement, pursuant to the provisions of Fed.R.Crim.P. 11(c)(1)(C), the parties agree to recommend that the Court impose a term of incarceration within a sentencing range of 11 to 15 years as an appropriate disposition of this case. To accomplish this sentence, the parties agree to recommend that the terms of imprisonment the Court imposes for Counts 1 and 2 be ordered to run consecutively.

Second, the PSR offered the ACCA threat as a justification to impose a sentence outside of the Guideline range:

157. Pursuant to the provisions of Fed.R.Crim.P. 11(c)(1)(C), in the plea agreement the parties agree to recommend that the Court impose a term of incarceration of between 11 and 15 years. Given the defendant's criminal history, had Jeffery Finney been convicted of count 1 of the indictment, Felon in Possession of a Firearm and Ammunition, in violation of 18 U.S.C. § 922(g)(1), he would have met the statutory definition of an Armed Career Criminal. Such a conviction would have resulted in a mandatory minimum sentence of imprisonment of 15 years.

And, third, Mr. Finney's defense counsel noted the impact that the threat of ACCA had on the plea bargain in its sentencing pleading when urging the Court to adopt the defense's position:

Although[] Mr. Finney has avoided the mandatory 15-year minimum sentence required by the Armed Career Criminal Act enhancement, this was only possible because the Government agreed to dismiss the count of the indictment that would have triggered the enhancement in the first place.

The record here evinces that Mr. Finney's now-unjustified ACCA exposure was an influential factor in the District Court's decision to impose consecutive sentences in order to reach the parties' proposed sentencing range, despite the typical presumption of concurrent sentences. *See* 18 U.S.C. § 3584. And, again, much like in *Terrell*, “[y]ears later, *Johnson* dictates that this highly influential sentencing factor [i.e., Mr. Finney's ACCA exposure] is erroneous, in fact unconstitutional, and it would not apply if Mr. [Finney] were sentenced under constitutional considerations today.”

Terrell, 2016 WL 6582993, at *7.

In discussing what an appropriate sentence would be, Mr. Finney's counsel began:

Regarding the plea agreement, the PSIR, taking everything into account Your Honor – and I won't reiterate everything that was said in the sentencing memorandum – but Mr. Finney was originally charge with felon in possession of a firearm, which would have triggered the Armed Career Criminal Act mandatory minimum of 15 years. The government agreed to amend in order – as far as plea negotiations, they are willing to dismiss that charge at sentencing in exchange for Mr. Finney's plea of guilty to the possession of the stolen firearms. This way, Mr. Finney avoids the 15-year mandatory minimum ACCA.

This paragraph made clear that the Rule 11(c)(1)(C) plea agreement, and the resulting stipulated range, was entirely based on a potential ACCA sentence. Thus, the range within which the Court was deciding was based upon ACCA. Counsel added, "But the fact that he is able to plead to a charge where the Court is not in a position and handcuffed by a mandatory [ACCA] minimum speaks volumes."

Mr. Finney's status arose again:

Mr. Finney does have criminal history that triggers ACCA. And as the Court knows, under the ACCA enhancement, there's no washout provision. If you have a felony that serves as a predicate for ACCA, it doesn't matter if it happened 20 years ago, 30 years ago, 10 years ago; it's going to count and you're going to go away for 15 years.

Counsel also noted that the advisory guidelines approximated 11 years. Based on the considerable reference to ACCA, it is difficult to imagine that ACCA did not color the sentencing hearing.

III. Mr. Finney was prejudiced by the erroneous belief that he had multiple violent felonies and crimes of violence in his criminal history

In essence, the District Court and the Ninth Circuit determined that any conclusion by the parties and the Court that Mr. Finney had at least three violent felonies or drug trafficking convictions in his criminal history was not prejudicial at sentencing. The District Court noted that it had broad discretion in determining whether to sentence consecutively or concurrently, and that its sentence was within the guideline range. (A careful review of the guidelines as applied shows that Mr. Finney was prejudiced by the conclusion that he was ACCA eligible, and the manipulation of the guidelines which occurred in this case.

As an initial matter, the guideline calculations were flawed. A review of the PSR shows that the PSR concluded that Mr. Finney had at least two convictions for qualifying crimes of violence and/or controlled substance offenses, based on three Washington residential burglary convictions and one Washington delivery of a controlled substance conviction. Based on having two or more such convictions, the PSR set the base offense level at 24.

In fact, Mr. Finney had no qualifying convictions. Post-*Johnson*, Washington burglary offenses do not qualify for enhancement, as they are overbroad and indivisible. *See, e.g., United States v. Cloud*, 197 F.Supp.3d 1263 (E.D. Wa. 2016). *See also United States v. Wenner*, 351 F.3d 969 (9th Cir. 2003). A recent decision of the Ninth Circuit has also determined that Washington delivery of controlled substance convictions are overbroad and indivisible. *See United States v. Valdivia-Flores*, --- F.3d ---, 2017 WL 6044232 (9th Cir. December 7, 2017). Thus, none of the convictions used in the PSR to set the base offense level were predicate convictions qualifying for enhancement. His base offense level should have been 14 and not 24. A total of four levels would be added based on the number of firearms and the fact that at least one was stolen. The adjusted offense level would thus have been 18. Subtracting three levels off for timely acceptance of responsibility would lead to an adjusted offense level of 15 and not 25. In Criminal History Category VI, his guideline range at an offense level of 15 would have been 41 to 51 months, and not the 110 to 137-month range set forth. Even fully consecutive sentencing would have called for a guideline range of 82 to 102 months, which was far below the 132-180 month range called for in the plea agreement.

To the extent that the District Court justified its denial of Mr. Finney's motion on the guideline range, that justification is dubious. The guideline range was affected by *Johnson*, error. That error shows that the prior erroneous conclusion that Mr. Finney

was ACCA-eligible was prejudicial, since the District Court's decision to accept that plea agreement and sentence within the agreed-upon range was based on an erroneous guideline computation.

This erroneous guideline calculation was important because it served as a basis for justifying consecutive sentences. The PSR noted that the statutory maximum was 10 years on each count. And yet, the guideline range was listed at 110 to 137 months, with the high-end exceeding the statutory maximum by 17 months. The only way to approximate this (now-recognized-as-erroneous) range was to sentence consecutively. As discussed above, however, that approximation was erroneous, since the guideline range should actually have been 41 to 51 months. That range includes the two level enhancement based upon the number of firearms involved. Thus, absent the *Johnson* errors present here, the guideline range provided no basis for sentencing consecutively.

It is also noteworthy that the counts should have been grouped, which thus decreases the need for any separate punishment per offense. U.S.S.G. §3D1.1(a) provides that the sentencing court shall group counts into distinct "Groups of Closely Related Counts" as set forth in U.S.S.G. §3D1.2. U.S.S.G. §3D1.2(d) provides:

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

...

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

U.S.S.G. §3D1.2 specifically enumerates U.S.S.G. §2K2.1 as an example of offenses “to be grouped under this section.”

The indictment charged in three counts the unlawful possession of five separate firearms. The PSR grouped the offenses, and applied a two-level enhancement based upon the possession of at least three, but less than eight, firearms. Thus, these were not the type of offenses which would normally call for separate punishment based on each separate count. Instead, they are understood as representing an aggregate harm, based on the total number of firearms involved. The enhancement for the number of firearms is recognized as providing appropriate incremental punishment. As discussed *ante*, the appropriate range was 41 to 51 months, after application of the number of firearms enhancement.

Conclusion

Based on the arguments discussed herein, it is requested that this Court grant this Petition for Writ of Certiorari, reverse the Ninth Circuit’s decision affirming the

District Court's denial of Mr. Finney's motion, reverse the judgment and remand for a new sentencing hearing consistent with this court's decision.

Dated: August 31, 2018

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