

No. _____

In the Supreme Court of the United States

TRAVIS THOMAS (ALSO KNOWN AS TREVIS THOMAS),
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- (1) Whether the District Court's failure to conduct the analysis required by the Supreme Court in *Johnson v. U.S.*, 135 S.Ct. 2551 (2015) before determining that Mr. Thomas was a career offender violated due process and was not a harmless error, as the Court of Appeals found.
- (2) Whether the District Court's reliance upon an out-of-context jailhouse call at sentencing to rebut expert reports submitted by Mr. Thomas was improper and violated Mr. Thomas's due process rights.

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding below.

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OPINIONS BELOW

The opinion of the court of appeals is unreported. A copy of the opinion is attached in Appendix B. The court of appeals' denial of Petitioner's motion for rehearing and motion for rehearing *en banc* is also unreported. A copy of this denial is attached in Appendix C.

JURISDICTION

On September 11, 2018, the Court of Appeals for the Third Circuit denied Mr. Travis Thomas's appeal of his Judgment of Conviction and Sentence on one count of violating 21 U.S.C §846, and seven counts of violating 21 U.S.C. §§841 (a)(1) and (b)(1)(C) and 18 U.S.C. § 2. App. 2b. On November 27, 2018, the Court of Appeals for the Third Circuit denied Mr. Thomas's petition for rehearing and rehearing *en banc*. App. 1c. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution which states that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, ***nor be deprived of life, liberty, or property, without due process of law***; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V (emphasis added).

18 U.S.C. §3553(a), which states in relevant part:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.

STATEMENT

This petition is prompted by the Third Circuit’s finding that the District Court committed “harmless error”, [App. 7b], by failing to conduct the analysis required by *Johnson v. United States*, 135 S. Ct. 2551 (2015) before determining that Mr. Thomas had previously committed a “crime of violence” and was thus a career offender for sentencing purposes. App. 7b. In so finding, the Third Circuit usurped the District Court’s sentencing authority by conducting the required analysis itself—without the benefit of oral argument. This usurpation violated Mr. Thomas’s due process rights. This petition is also prompted by the District Court’s reliance upon an out-of-context recording of a jailhouse phone call to rebut expert reports submitted by Mr. Thomas.

Mr. Thomas, who pled guilty without a plea agreement (i.e. an “open plea”), appealed the District Court’s sentence of 210 months. In denying his appeal, the Third Circuit found that the District Court committed “harmless error” by not conducting the *Johnson* analysis at sentencing. App. 7b. On November 06, 2018, Mr. Thomas filed a petition for rehearing and rehearing *en banc* as to the finding of “harmless error” as well as the District Court’s reliance on the jailhouse call. Mr. Thomas’s petition was denied on November 27, 2018. App. 1c.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari To Clarify The Process The District Court Must Take On The Record When Categorizing A Defendant As A Career Criminal

It is the District Court’s responsibility to impose a sentence that is “sufficient, but not greater than necessary.” 18 U.S.C. §3553 (a). Part of the responsibility to determine a sufficient sentence, is determining the applicability of the Sentencing Guidelines and then considering whether the Guidelines’ recommendations call for a sentence that is sufficient but not more than necessary. *See generally, U.S. v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004). To do this, a District Court must evaluate a defendant’s history and the circumstances and severity of his past criminal conduct. An appellate court is not the proper forum for this analysis. By performing such an analysis, the appellate court usurps the District Court of its proper—and legally mandated—role of imposing sentences. Yet that is precisely what happened here.

The District Court, by all accounts (including the Third Circuit’s), failed to conduct the analysis required by the United States Supreme Court (*see, e.g., Johnson v. U.S.*, 135 S.Ct. 2551 (2015)) when it determined that Mr. Thomas had committed a prior crime of violence and was thus a career offender under the Sentencing Guidelines. App. 7b. Instead of recognizing the failure to conduct a *Johnson* analysis as the deprivation of due process that it is, the Third Circuit substituted its judgment for that of the District Court; reviewed, in a vacuum, Mr. Thomas’s prior judgment of conviction; concluded that Mr. Thomas was a career offender; and found that the

District Court's failure to perform its obligatory duties was a "harmless" error. App.

7b. This conclusion misses the point.

Even if it was likely that the District Court would ultimately conclude that Mr. Thomas was a career offender, the process of reaching that determination would further educate the Court about Mr. Thomas, who had not received any jail time for his two career offender qualifying offenses. This process would have assisted the Court in imposing a sentence that was not greater than necessary. *See U.S. v. Booker*, 543 U.S. 220, 234 (2005). Thus, by taking from the District Court the responsibility to conduct the *Johnson* analysis, the Third Circuit also deprived the District Court of the opportunity to learn more about Mr. Thomas, which, in turn, violated due process, the right to be sentenced based on accurate information, and the mandate that a sentence not be greater than necessary. *U.S. v. Berry*, 553 F.3d 273, 280 (3d Cir. 2009) (stating that the Court's discretion is not boundless and cannot go beyond the limitations of fairness and due process); *United States v. Nappi*, 243 F.3d 758, 763 (3d Cir. 2001) (Defendant has the right to be sentenced based on accurate information).

In the case at bar, Mr. Thomas's Presentence Report indicated—without citing a specific subsection of New Jersey's assault statute—that Mr. Thomas' conviction of Aggravated Assault in state court qualifies as a crime of violence. Aggravated Assault, however, can encompass a wide variety of conduct, including conduct that is merely reckless. *See N.J.S.A. 2C:12-1(b)(1)*. In such situations, the Supreme Court

has held that due process requires an analysis of the statutory elements of an offense and sometimes the circumstances of the qualifying offense when considering whether a prior state court conviction was a crime of violence. *Johnson v. U.S.*, 135 S.Ct. 2551 (2015); *Sessions v. Dimaya*, 138 S.Ct. 1204, 1213-1214 (2018).

Here, the District Court failed to conduct this constitutionally required analysis. The Third Circuit recognized this in its Opinion. App. 7b. However, the Court found that this error was harmless. *Id.* It was not. To reach the determination of whether Mr. Thomas was a career offender, the District Court was required to determine whether a conviction pursuant to New Jersey's assault statute is a crime of violence. App. 6b. In doing so, the District Court would have looked beyond the statute to "documents such as the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judgment to which the defendant assented to identify the specific statutory provision that served as the basis for the defendant's earlier conviction." *United States v. Abdullah*, 905 F.3d 739, 744 (3d Cir. 2018) (citations omitted). Although the "central feature" of the modified categorical approach is an examination of the crime's elements rather than its facts, *United States v. Brown*, 765 F.3d 185, 189–90 (3d Cir. 2014), in practice, the analysis would have afforded Mr. Thomas an opportunity to bring forward the context of his crime and circumstances of his plea. The issue is not whether the Court would ultimately have determined that Mr. Thomas's conviction involved a crime of violence. Rather, the issue is whether the failure to engage in this analytical step,

which foreclosed even the slightest awareness of the facts and context of his prior conviction, could have contributed to the sentence imposed. In order to provide for Mr. Thomas's due process rights, the Panel should have remanded the case for resentencing before the District Court. *See, eg. United States v. Dawn*, 685 F.3d 790 (8th Cir. 2012) (Remanding case for resentencing because the District Court did not provide "an opportunity to proffer evidence" as to whether the Defendant's prior second-degree battery conviction was for a crime of violence).

It is well-established that when reviewing a sentencing error, the appellate court must determine whether the error contributed to the sentence imposed. *United States v. Lewis*, 802 F.3d 449, 456 (3d Cir. 2015) ("Harmless-error review for a sentencing error turns on whether an error did or did not contribute to the [sentence] obtained. In other words, harmless-error review for a sentencing error requires a determination of *whether the error would have made no difference to the sentence.*" (emphasis added) (citations omitted) (quotation marks omitted); *See also United States v. Langford*, 516 F.3d 205, 215 (3d Cir. 2008) ("For the error to be harmless, *it must be clear that the error did not affect the district court's selection of the sentence imposed.*" (emphasis added) (*quoting Williams v. United States*, 503 U.S. 193, 203 (1992))).

Here, the application of the career offender enhancement clearly affected the court's selection of the sentence imposed. Indeed, absent the career offender enhancement, Mr. Thomas's sentencing range would have been 57-71 months, about

a quarter of the 210 months that he received. Thus, the application of the career offender enhancement clearly affected Mr. Thomas’s sentence. And because the District Court erred by failing to engage in the *Johnson* analysis before applying the career offender enhancement, this error was not “harmless.”

Moreover, the process of determining whether a predicate offense is a crime of violence matters, even if the offense is determined to be a crime of violence. This is because determining whether a crime of violence occurred requires a Court to deeply consider the nature and circumstances of the statutory offense, which, in turn, informs the exercise of the sentencing court’s discretion when imposing a sentence that is sufficient but not more than necessary. This may have changed Mr. Thomas’s sentence. Indeed, rather than just declaring Mr. Thomas a career offender, the Court would have been required to consider that Mr. Thomas received no jail time for his career offender predicate offenses, and it would have been forced to consider Mr. Thomas’s role in his alleged crime of violence, as well as the circumstances of his plea. As a result, the Court may have chosen to exercise its authority to impose a sentence not greater than necessary and sentence Mr. Thomas to a jail term less than the 210 months he received. The determination—based on accurate information—in the first instance of the applicability of the career offender enhancement was the District Court’s responsibility to make, not the Third Circuit’s. Accordingly, due process requires that this Court grant this petition and ultimately remand Mr. Thomas’s case for resentencing.

II. The Court Should Grant Certiorari Because The District Court Committed Reversible Error By Relying On A Jailhouse Phone Call In Which The Defendant Discussed The Government's Plea Offer To Rebut Expert Reports.

In upholding the District Court's decision to allow the Government to play a single, out-of-context jailhouse call (out of thousands of calls made by Mr. Thomas) to rebut expert reports submitted by Mr. Thomas, the Third Circuit incorrectly stated that the recording of Mr. Thomas was made after his conviction. App. 9b. It was not. The recording was made months before Mr. Thomas entered a guilty plea and involved Mr. Thomas's thought processes during plea negotiations. Such information is ordinarily barred by Fed. R. Evid. 408 and Fed. R. Crim. P. 11(f) and should have been barred here for the same rationale. *See generally Affiliated Mfrs., Inc. v. Aluminum Co. of Am.*, 56 F.3d 521 (3d Cir. 1995) (internal memoranda prepared for the purposes of compromise negotiations but never communicated to the other side were eligible for exclusion under FRE 408).

The District Court further abused its discretion by considering the tape an adequate rebuttal to the expert reports offered by Mr. Thomas. App. 8b-9b. Without support from any mental health expert, the tape was offered by the Government to rebut two expert reports, written by two different experts more than a decade apart, both of which concluded that Mr. Thomas suffered from severe mental and emotional health issues and mental retardation. *Id.* It is, and was, an abuse of discretion to allow a single phone call, taken out of context, to be introduced as a rebuttal to

thorough, consistent reports written by qualified professionals. Although sentencing courts have broad discretion to consider a variety of information presented at sentencing, that discretion must still adhere to principles of due process and fairness. *U.S. v. Berry*, 553 F.3d at 280 (Stating that the court's discretion is not boundless and cannot go beyond the limitations of fairness and due process). Here, playing a single, out-of-context phone call in response to reports from experts is hardly fair.

Therefore, Certiorari should be granted and Mr. Thomas's sentence vacated and remanded for resentencing.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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