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In the

Supreme Court of the United States

Mario Devant Cheers,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
from the United States Court of
Appeals for the Fifth Circuit

Fifth Circuit Case No. 17-60668

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

L In *Johnson v. United States*, 135 S. Ct. 2551 (2015) this Court initiated a twisting journey by holding unconstitutional the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) based upon a lack of due process. The Fifth Circuit recently held that § 924(c)'s residual clause is unconstitutionally vague in *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018), currently before this Court, in light of the Supreme Court case *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which held the residual clause in 18 U.S.C. § 16(b)'s unconstitutionally vague. Mr. Cheers seeks to have this Court determine whether the § 924(c) count should be invalidated and whether the Fifth Circuit misapplied *Beckles* to Mr. Cheers's pre-*Booker* sentence his case in light of Supreme Court precedent.

PARTIES TO THE PROCEEDING

Petitioner is Mario Cheers, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

COURT PROCEEDINGS

United States v. Mario Cheers, 3:03-CR-009 Northern District of Mississippi; Original Judgment entered June 2, 2003.

United States v. Mario Cheers, 3:16-CV-125 Northern District of Mississippi.

United States v. Mario Cheers, Fifth Circuit Case Number 17-60668, (2019), 2019 WL 237020 (5th Cir. Jan. 16, 2019).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mario Cheers seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The petitioner, Mr. Mario Cheers, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on January 16, 2019. The Opinion and Judgment are attached hereto as composite Appendix 1. The unpublished opinion of the Court of Appeals for the Fifth Circuit can be found in the Westlaw electronic database at *United States v. Mario Cheers*, 2019 WL 237020 (5th Cir. Jan. 16, 2019). A copy of the unpublished Opinion is attached as Appendix 3.

The district court entered its original Judgment reflecting this sentence on June 2, 2003. A copy of the Judgment is attached hereto as Appendix 2.

JURISDICTION

Petitioner, Mario Cheers, entered a plea of guilty to Title 18, United States Code, §§ 2113 and 924(c). Mr. Cheers was sentenced to 403 months' imprisonment by the Honorable Michael P. Mills, United States District Judge for the Northern District of Mississippi. After the Supreme Court case *Johnson* was handed down, Mr. Cheers sought relief. The Federal Public Defender's office filed a Motion to Correct Sentence Under 28 U.S.C. § 2255 on June 23, 2016. The Government responded in opposition on October 6, 2016. The Federal Public Defender's office filed a Petition to Amend Motion to Correct Sentence under 28 U.S.C. § 2255, which included a request for relief under the Supreme Court case *Beckles v. United States*, 137 S.Ct. 886 (2017). The district court denied relief, but granted a Certificate of Appealability on September 11, 2017.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment in an unpublished opinion filed on January 16, 2019. No petition for rehearing was sought.

This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit Judgment, as required by Rule 13.1 of the Supreme Court Rules. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

This petition involves one federal statute: 18 U.S.C. § 924:

18 U.S.C. § 924

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime -

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and -

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

STATEMENT OF THE CASE

Mr. Mario Cheers was indicted January 16, 2003 on a multi-count Indictment for various gun and robbery charges in violation of 18 U.S.C. §§ 922(g), 924(c), and 2113.

Pursuant to a plea agreement filed February 25, 2003, Mr. Cheers pleaded guilty to two counts of armed bank robbery and a charge of brandishing a firearm in furtherance of a crime of violence, i.e. bank robbery, in violation of 18 U.S.C. §§ 2113 and 924(c). On May 22, 2003, the district court sentenced Mr. Cheers to 403 months' imprisonment.

The district court found Mr. Cheers to be a career offender after adopting the finding of the presentence report that his instant offense was a "crime of violence" and that he had at least two prior convictions that qualified as "crimes of violence" necessary to support a U.S.S.G. § 4B1.1 career offender enhancement. Specifically, the Court found that Mr. Cheers's Tennessee convictions for aggravated robbery qualified as "crimes of violence" under the career offender provision.

The Court's application of the career offender enhancement subjected Mr. Cheers to a Sentencing Guidelines range of 272 to 319 months' imprisonment (corresponding to offense level 31 and criminal history category VI), coupled with an imprisonment range of 84 months to be served consecutively in regard to the § 924(c) gun count. The Court sentenced Mr. Cheers to 403 months' imprisonment. Without a career offender finding and gun enhancement, Mr. Cheers's Guidelines

range would have been 120 to 150 months' imprisonment (offense level 26, criminal history category VI).¹

On June 26, 2015, the Supreme Court issued its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Court invalidated the ACCA's residual clause because it denied fair notice and invited arbitrary enforcement; therefore, it was void for vagueness under the Due Process Clause. Based upon *Johnson*, Mr. Cheers challenged the identical residual clause in the career offender guideline as also void for vagueness. Thus, Mr. Cheers's prior convictions no longer qualify as a "crimes of violence," and Mr. Cheers is not a career offender.

The Federal Public Defender's office filed a Motion to Correct Sentence Under 28 U.S.C. § 2255 on June 24, 2016. The Government filed a response in opposition on October 6, 2016. Approximately eleven months later, the Supreme Court of the United States issued *Beckles v. United States*, 137 S. Ct. 886 (2017), holding that the vagueness rulings set forth in *Johnson* do not apply to the residual clause in the advisory Sentencing Guidelines. Defense counsel filed a Petition to Amend Motion to Correct Sentence Under 28 U.S.C. § 2255, which included analysis under *Beckles* and a pre-*Booker* Guidelines argument. The district court issued an Order on September 11, 2017 denying Mr. Cheer's Petition, but granted a Certificate of Appealability.

An appeal to the Fifth Circuit followed, challenging the district court's denial of *Johnson* and *Beckles* as applicable to his case. On January 16, 2019, the Fifth Circuit affirmed the district court's denial of relief to Mr. Cheers, relying on another Fifth Circuit decision which is currently pending before this Court, *United States v. Davis*, 903 F.3d 483, 485-86 (5th Cir. 2018), *cert. granted*, No. 18-431, 2019 WL 98544 (Jan. 4, 2019). In addition, the Fifth Circuit affirmed Mr. Cheers's career

¹ If this were the case, Mr. Cheers would have been released from the Bureau of Prisons in approximately 2016.

offender status based on his five prior Tennessee convictions for aggravated robbery pursuant to Tenn. Code Ann. §§ 39-13-401 and 402, finding this statute satisfied the crime of violence definition.

Mr. Cheers, Petitioner, now seeks review by this Court to determine whether the § 924(c) count should be invalidated and whether the Fifth Circuit misapplied *Beckles* to Mr. Cheers's pre-*Booker* sentence.

REASONS FOR GRANTING THIS PETITION

I. This Court should address the pre-*Booker* mandatory Guidelines issue left open by this court in *Beckles*.

The Fifth Circuit acknowledged that the issue of whether *Beckles* should apply to pre-*Booker* Guidelines's sentences has not yet been foreclosed by precedent. *United States v. Mario Cheers*, 2019 WL 237020 *2 (5th Cir. Jan. 16, 2019) (“Section 4B1.2(a) of the 2002 Guidelines contained a residual clause identical to the one invalidated by *Johnson*. Cheers was sentenced under the pre-*Booker* mandatory Guidelines, so his challenge is not strictly foreclosed by the determination that advisory Guideline sentences are not subject to challenges for vagueness”).

A. Because *Beckles* only applied to the advisory Guidelines, Mr. Cheers's sentence must be vacated as he was sentenced pre-*Booker*, when the Guidelines were mandatory.

This Court held in *Beckles* “only that the advisory Sentencing Guidelines, including § 4B1.2(a)’s residual clause, are not subject to a challenge under the void-for-vagueness doctrine,” 137 S. Ct. at 896, and only because “the advisory Guidelines do not fix the permissible range of sentences,” *id.* at 892, not because the Guidelines’ residual clause is any less vague than the ACCA’s. *See id.* at 890 (“This Court held in [*Johnson*] that the identically worded residual clause. . . was unconstitutionally vague.”).

The identical language found in the career offender Sentencing Guidelines’ provision under §§ 4B1.1 and 4B1.2 was found, however, to not be void for vagueness because the Guidelines do not fix the range of sentences allowed, but instead only guide the court’s discretion in determining the appropriate sentence. *Beckles*, 137 S. Ct. at 892. Accordingly, this Court held that the “advisory Sentencing Guidelines, including § 4B1.2(a)’s residual clause, are not subject to a challenge under the void-for-vagueness doctrine.” *Id.* Importantly though, and the subject of this appeal, this Court did not address the issue of whether its holding applied to sentences imposed

under the mandatory guideline scheme pre-*Booker*. In *Beckles*, Justice Sotomayor acknowledged that a door was left open for such future challenges:

The Court’s adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in *Booker* – that is, during the period in which the Guidelines did “fix the permissible range of sentences,” ante, at 892 – may mount vagueness attacks on their sentences. That question is not presented by this case and I, like the majority, take no position on its appropriate resolution.

Beckles, 137 S.Ct. 903 n.4.

This Court expressly and repeatedly limited its holding to the “advisory” Guidelines. “We hold *only* that the *advisory* Sentencing Guidelines, including § 4B1.2(a)’s residual clause, are not subject to a challenge under the void-for-vagueness doctrine.” *Id.* at 896 (emphasis added); *see also* *Id.* at 890 (“Because we hold that the *advisory* Guidelines are not subject to vagueness challenges under the Due Process Clause, we reject petitioner’s argument.”) (emphasis added); *id.* at 895 (“[W]e hold that the *advisory* Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)’s residual clause is not void for vagueness.”) (emphasis added); *id.* at 897 (“Because the *advisory* Sentencing Guidelines are not subject to a due process vagueness challenge, § 4B1.2(a)’s residual clause is not void for vagueness.”) (emphasis added).

Thus, unlike the advisory Guidelines, the mandatory Guidelines “fix[ed] the permissible range of sentences.” *Beckles*, 137 S. Ct. at 892. As explained in *Booker*, “binding rules set forth in the Guidelines limited the severity of the sentence that the judge could lawfully impose,” *Booker*, 543 U.S. at 226, mandating the maximum and minimum sentence authorized, *id.* at 227 (guidelines “mandated that the judge select a sentence between 360 months and life imprisonment”); *id.* at 236 (“judge’s finding increased the maximum sentence” in *Booker*’s case “from 210 months to a life sentence,” and in Fanfan’s “from 78 months to 235 months”). Courts were *not* “bound only by the

statutory maximum,” *id.* at 234, and there was no difference between the guideline maximum and “the prescribed statutory maximum.” *Id.* at 238. Nor was there any difference between the guideline minimum and a statutory mandatory minimum. *See Alleyne v. United States*, 133 S. Ct. 2151, 2162–63 (2013).

As other circuits have recognized, the Guidelines, no less than statutes, set the minimum and maximum terms authorized. “Before *Booker*, the guidelines were the practical equivalent of a statute. Departures were permitted on specified grounds, but in that respect the guidelines were no different from statutes, which often specify exceptions.” *Hawkins v. United States*, 706 F.3d 820, 822 (7th Cir. 2013)². A “sentence imposed under mandatory guidelines (subsequently lowered by retroactive Supreme Court precedent)” and a “sentence imposed above the statutory maximum” are both “beyond what is called for by law.” *Hill v. Masters*, 836 F.3d 591, 599 (6th Cir. 2016). However, this Court has recognized that *Johnson* did not address Section 4B1.2(a)(2) of the Guidelines. *In re Arnick*, 826 F.3d 787, 788 (5th Cir. 2016). Further, even if *Johnson* does implicate Section 4B1.2(a)(2), it has not been addressed whether this arguably new rule of criminal procedure applies retroactively to cases on collateral review. *Id.*

Because the mandatory Guidelines had “legal force,” an erroneous career offender designation under the mandatory guidelines was greater than the “maximum authorized by law.” *United States v. Foote*, 784 F.3d 931, 942 (4th Cir. 2015). “[T]here is no doubt” that the mandatory guidelines were “law” and that an erroneous career offender designation “results in a sentence substantively not authorized by law.” *United States v. Doe*, 810 F.3d 132, 160 (3d Cir. 2015). *See also In re Hubbard*, 825 F.3d 225, 234-35 (4th Cir. 2016) (rejecting government’s argument that mandatory guidelines “do not change the range of legally permissible outcomes”); *In re Patrick*,

² *See also Brown v. Caraway*, 719 F.3d 583, 588 (7th Cir. 2013) (“For a prisoner serving a sentence imposed when the guidelines were mandatory, . . . the guidelines had the force and effect of law.”).

833 F.3d 584, 588-89 (6th Cir. 2016) (same); *but see United States v. Brown*, No. 16-7056, 2017 WL 3585073 (4th Cir. Aug. 21, 2017) (holding that a § 2255 petition can succeed only if a Supreme Court precedent has rendered the motion timely by recognizing a new right entitling relief).

District courts, likewise, have been addressing this issue recently, and holding that pre-*Booker* mandatory Guidelines' cases are subject to reconsideration under *Johnson/Beckles'* challenges. *See e.g.*, *United States v. Walker*, 2017 WL 3034445 (N.D. Ohio 2017) (holding that the *advisory* Guidelines *are not* subject to challenges under *Johnson* and that the *mandatory* Guidelines *are* subject to challenges under *Johnson*); *United States v. Reid*, 2017 WL 2221188 (D. Mass. 2017) (finding *Johnson* precedents make clear now that the court's employment of the Career Offender provisions of the pre-*Booker* Guidelines violated Due Process); *United States v. Tunstall*, 2017 WL 2619336 (S.D. Ohio 2017) (holding that sentences ordered pre-*Booker* are subject the vagueness analysis stated in *Johnson*). In *Walker*, the court noted that while the Sixth Circuit had not ruled on the issue left open by *Beckles*, it had, prior to *Beckles*, ruled that "the rationale of *Johnson* applies equally to the residual clause of the Guidelines." 2017 WL 3034445 at *3-4 (citing *United States v. Pawlak*, 822 F.3d 902, 911 (6th Cir. 2016)).

In sum, unlike the *advisory* Guidelines, the *mandatory* Guidelines "fix[ed] the permissible range of sentences." *Beckles*, 137 S. Ct. at 892. Unless the career-offender guideline applied, the court did *not* have "discretion to impose the enhanced sentence." *Id.* at 894. The due process concern with providing notice is clearly implicated, *see Burns v. United States*, 501 U.S. 129, 131 (1991) (holding that a court "may not . . . depart upward" from a *mandatory* guideline range "without first notifying the parties" that it intends to do so), as is the concern with preventing arbitrary enforcement by judges, *see Johnson* at 2557, 2560 (2015) (analyzing four guidelines cases to demonstrate that the residual clause "invites arbitrary enforcement by judges" because

“it has proved nearly impossible to apply consistently”) (internal citation omitted). *Johnson* thus renders the mandatory career offender guideline’s residual clause unconstitutionally vague.

B. Mr. Cheers is not a career offender based upon his previous conviction because Tennessee aggravated robbery is not a crime of violence.

Mr. Cheers contends that he is entitled to have his sentence vacated because the career offender enhancement was predicated on the residual clause in the Sentencing Guidelines. *See* U.S.S.G. § 4B1.2. Because the new rule established in *Johnson*, made retroactive by *Welch*, applies to the residual clause of the career offender guideline, Mr. Cheers’s sentence should be vacated and his case should remanded for resentencing.

Mr. Cheers acknowledges that the Sixth Circuit found that the underlying statute, Tennessee Code § 39-13-402, qualified as a violent felony under the force clause in the Armed Career Criminal Act. *Jackson v. United States*, No. 16-6363, 2017 WL 3976627, at *2 (6th Cir. Apr. 6, 2017) (The district court also determined that the prior convictions for aggravated robbery, under Tennessee Code Annotated § 39–13–402, qualified as violent felonies under the ACCA’s use-of-force clause. *See United States v. Mitchell*, 743 F.3d 1054, 1059–60 (6th Cir. 2014). *Jackson* has not established that the Supreme Court’s holding in *Mathis* altered this court’s determination that Tennessee convictions for aggravated robbery qualify as violent felonies under the ACCA’s use-of-force clause.

However, no court has yet addressed whether Tenn. Code § 39–13–402 is a crime of violence under the career offender guidelines. *But see United States v. Lester*, 719 Fed. App’x 455 (6th Cir. 2017) (addressing same statute in Armed Career Criminal context). This presents a novel issue before this court.

Robbery is defined under Tennessee law as the intentional or knowing theft of property from the person of another by violence or putting the person in fear. Tenn. Code § 39-13-401.

Aggravated robbery is (1) robbery accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon, or (2) robbery where the victim suffers serious bodily injury. Tenn. Code § 39-13-402. Under the plain language of the statute, a person may be convicted of robbery simply by placing someone in fear. The statute does not even require that the victim be specifically in fear of bodily injury. Under the aggravated robbery statute, a person may be convicted simply by putting a person in fear through brandishing a weapon or making a person believe that he has a weapon, or by causing serious bodily injury.

First, placing someone in general fear plainly does not require the intentional use of violent, physical force; nor does the brandishing of a weapon. Further, causing bodily injury does not require, as a necessary element, the use of violent force. That bodily injury occurs, and that the defendant's conduct is the proximate cause of said injury, does not require that the defendant used violent force. *See, e.g., United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004).

The Sixth Circuit Court of Appeals has previously held that the Tennessee aggravated robbery statute does qualify as a “crime of violence” for career offender purposes, but the ruling was based on the language of the residual clause, not the elements clause. *See United States v. Walker*, 181 F.3d 774, 780-81 (6th Cir. 1999). Because the Supreme Court has now declared the residual clause unconstitutional, and because aggravated robbery under Tennessee law does not have as necessary elements the use, attempted use, or threatened use of violent physical force, Mr. Cheers's prior Tennessee aggravated robbery convictions do not qualify as “crimes of violence” for career offender purposes.

CONCLUSION

This Court should grant review for two compelling reasons: first to clarify *Beckles*'s application to pre-*Booker* Guidelines cases, and second to determine whether Tennessee Aggravated Robbery qualifies as a crime of violence under the elements clause. Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument.

Respectfully submitted,

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