

18-9760

ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

FILED

JAN 08 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Andrew Dixon

(Your Name)

-- PETITIONER

vs.

United States of America

-- RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals 11th Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Andrew Dixon #17813-021

(Your Name) F.C.I.

2680 Hwy 301 South

(Address)

Jesup Ga 31599

(City, State, Zip Code)

NONE - UNKNOWN

(Phone Number)

RECEIVED

JAN 15 2019

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SUPREME COURT, U.S.

Question(s)

Ground (2):

Did the court error denying claims that the residual clause didn't apply to defendant by using Post-Johnson precedent claims and raising elements clause accusations that were not raised at court?

Ground (1):

Did the court err affirming/denying claim of 2 predicate priors that do not qualify for the ACCA sentence enhancement?

LIST OF PARTIES

- [] All parties appear in the caption of the case on the cover page.
- [✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows.

United States Court of Appeals
For the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Judge William T. Moore
Southern District of Georgia
Waycross Division

Table of Authorities Cited

Cases

- Allenge v. United States, NO. 11-9335 (2013) — 5
- Apprendi v. New Jersey, 120 S. Ct. 2238 — 5
- Bmw of North America v. Gore, 517 U.S. 559 (1996) — 10
- Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) — 6, 8
- Descamps — 7, 10
- Johnson, v. United States, 539 U.S. 130 S.Ct. 176 L.Ed. 2d (2010) — 8
- Johnson v. United States U.S. 13, 7120 (June 2015) — 6-9-10
- Jones v United States, 135 S. Ct. (2014) — 5
- Jones v State, 276 Ga. App. 46 S.E. 2d (Ga. Ct. App. 2005) — 7
- Mathis — 6, 10
- Moncrieffe v Holder, 133 S.Ct. 1678, 1684, 185 L.Ed. 2d 727 (2013) — 9, 10
- Montgomery v. Louisiana, 577 U.S. at 136 S. Ct. 718 193 L. Ed. (2016) — 10
- Nelson v Colorado, 581 U.S. —, —, n.1 (2017) — 9
- Ochoa-Cruz, 422 F.3d at 867 — 7
- Pearson v State, 224 Ga. App. 468, S.E. 2d 911 — 7
- Sessions v. Dimaya, 584 U.S. 138 S.Ct. 1204 (2018) — 5, 6, 8, 9, 10
- Shepard v. U.S., 544 U.S. 125 S.Ct. 161 L.Ed. 2d (2005) — 7, 10
- Textualism as Fair Notice, 123 Harv. L. Rev 542, 543 — 8
- Taylor v. United States, 495 U.S. 575, 109 2d L.Ed. 607 110 S.Ct. 2143 — 8
- United States vs. Baptiste, 436 Fed. Appx 964, 965 (11th Cir 2011) — 5
- United States vs. Brown, 805 (11th Cir 2015) — 7, 8, 9, 6
- United States vs. Gezo, 870 F.3d at 895 — 6
- United States v. Flores-Cordero, 723 F.3d (11th Cir 2013) — 6
- United States v Lee No. 16-6288 (10 Cir 2017) — 6
- United States v Nix 428 F.3d 1341, 1342 (11th Cir 2010) — 6

Welch — 6

Williams v. Pennsylvania, 579 W.S. — (2016) — 10

Williams v State, NO. 97A1796 (1997) — 7

States and Rules

ACCA 4B1.2 residual clause —

Arizona Rev. Stat. § 13-2508(A)(1) — 6, 8, 9

Federalist No. 78 at 465 (A. Hamilton) — 9

Fla. Stat. Ann § 843.01 — 6, 8, 9

Ga. Code Ann § 16-15-23(A)(1) — 7

Ga Code Section 16-10-24(b)(1998) — 7, 8, 9, 10

Ga Code Section 16-13-30 (c) — 10

18 U.S.C § 924(e)(2)(B)(i) — 7,

TABLE OF CONTENTS

OPTIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5-16
CONCLUSION	17

INDEX OF APPENDICIES

APPENDIX A: Report and recommendation of Magistrate Judge of the
Southern District Court of Georgia, Waycross
Division.

APPENDIX B: Order of dismissal by the Honorable Judge W.T. Moore
Jr. of the Southern District Court of Georgia,
Waycross Division.

APPENDIX C: Decision of the Eleventh Circuit Court of Appeals.

APPENDIX D: Sentencing transcripts.

APPENDIX E: Order Denying rehearing-reconsideration en banc.

APPENDIX F:

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix C to the petition and is

☒ reported at UNKNOWN; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix A & B to the petition and is

☐ reported at UNKNOWN; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix N/A to the petition and is

☐ reported at N/A; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the N/A court appears at Appendix N/A to the petition and is

☐ reported at N/A; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 20, 2018.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Oct 9, 2018, and a copy of the order denying rehearing appears at Appendix E.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was N/A.
A copy of that decision appears at Appendix N/A.

☐ A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Constitutional and Statutory Prov. Involved

First Amendment:

Right to petition for redress the use of state prior Georgia
Obstruction of Law Enforcement Officer Without Violence.

Fifth Amendment:

Constitutional Confrontation Clause against multiple
punishment for one crime, Due process and the right to confront
nature of use of Georgia Obstruction on Law Enforcement Officer.

Sixth Amendment:

Right to Effective Assistance of Counsel during every phase
of the Judicial process that was denied or not honored as the
district court denied petitioner's request for counsel.

STATEMENT OF CASE

On or about December 9, 2011, I was arrested by local officials for possession of cocaine, possession of marijuana and possession of a firearm.

I was at the home of a friend at the time I was arrested. The local police were serving a warrant for the arrest of the so called friend, and in the process of executing the warrant, they searched the house and found drugs and a gun. I would be charged with the same thing as the friend who's house at the time I was at.

Several months later, we would appear in State Court where the friend, under oath, admitted that the drugs that were found at the house were his. About ten months after the original charge, the ATF picked up the case.

after being sentenced under the ACCA provision I would research my status after being denied on direct appeal. after Johnson II was decided and my prior predicates met the requirements that the Supreme Court ruled invalid dealing with the residual clause 924(e)(2)(B)(ii) of the ACCA enhancement. I filed a 2255 motion seeking relief in light of Johnson II deeming that my sentence was unconstitutional because I was enhanced under the residual clause which is now invalid. my 2255 would be denied because the 11th Cir and the Court of Appeals for the 11th Cir both ruled that my claims were either moot or meritless. I filed a petition for reconsideration-rehearing en banc asking that the Court would acknowledge the circuit split dealing with different defendants getting relief for identical cases as mine. that motion would be denied.

Reason for Granting the Petition

Because the Supreme Court has held the use of priors to increase a sentence from its prescribed range must be determined by a jury, not a judge. (Please see, Jones v. United States, 135 S.Ct. (2014). The legality prescribed range is the penalty affixed to the crime.... it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense (see also Appendix supra!) (Alleyne v. U.S., U.S. No. 11-9335 6-17-13) fact is to use a prior as a separate ingredient of an entirely different offense already completed.

It is Petitioner's contention because both the Southern District of Georgia, Waycross Division District Court and the Eleventh Circuit of Appeals reliance on the residual clause of the ACCA 4B1.2 to enhance Petitioner's sentence beyond the prescribed/recommended guideline range of the base offense level 24 Criminal History Category 3. After minus 3 for acceptance of responsibility, because of what could have happened at the time Petitioner committed the offense of Georgia Obstruction of a Law Enforcement officer is not unconstitutionally vague only, it's violating the Six Amendment, also violating the Supreme Court's holding in Dimaya which says today's laws inviting the exercise of arbitrary power all the same by leaving people in the dark about what the law demands and allowing prosecutors and the courts to make it up. (Sessions v. Dimaya, 584 U.S. — 138 S.Ct. 1204 (2018)).

In the instant offense, if Petitioner had knowledge of which clause the Government was using at the time of sentencing, Petitioner could have objected. At no point did the government mention which clause they were using giving Petitioner's counsel only one notion that the Government was following prior cases that were all enhanced under the now invalid residual clause which were precedent cases at the time of Petitioner's sentence. (See United States v. Baptiste, 436 Fed. Appx. 964, 965 (11th Cir. 2011) (unpub.))

finding Fla. Stat. Ann § 843.01 to be a career offender "crime of violence" when in fact, Arizona Rev. Stat. § 13-2508 (A)(1) and Florida statute § 843.01 both which have not survived as an ACCA predicate under the elements clause because the conduct did not constitute the use, attempted use, or threatened use of physical force, that was violent force against the person of another.

The plain language of Georgia Statute is vague in light of Dimaya and demands the most basic due process's customary protections of fair notice. (See Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). where the Government fails to show which clause was being used at sentencing, but now takes its second bite at the apple making elements clause accusations when in fact the 10th Cir and 9th Cir. are just a few who have found that identical statutes do not categorically fit under the ACCA's elements clause. (See United States v. Lee, NO. 16-4288, 2017 U.S.C App. Lexis 11680, 2017 WL 2829372 (10th Cir. 6-30-2017). See also United States v. Flores-Cordero, 723 F.3d 1065, 1067-88 (9th Cir 2013) These cases alone carves a split between the circuits that must be address and Petitioner be granted relief.

The Gov/Courts denying Petitioner's relief in light of Johnson NO. 13-7120 (June 2015) is plain error and unconstitutional. The use of United States v Brown, 805 (11th Cir 2015) which is post Johnson NO. 13-7120 (June 2015) should have never been used against Petitioner when in fact Petitioner's 2255 was pending before Brown, 805 (11th Cir 2015), case was decided and should not effect Petitioner's Johnson claim, Petitioner filed petition for panel rehearing and/or rehearing en banc which also was denied. Petitioner brought to the attention of Court of Appeals for the 11th Cir. the 9th Circuit decision United States v Geo205, 670 F.3d at 895 and showed the framework how to address ACCA enhancements imposed before Johnson and Welch were decided.

In Answering to Grounds / Questions 1, Petitioner from the beginning has claimed that his prior convictions no longer qualify as ACCA predicates following their decision in Johnson v. United States, U.S. NO. 13-7120 (June 26, 2015) and the 11th Circuit Courts of Appeals denial, using United States v. Nix, 628 F.3d 1341, 1342 (11th Cir. 2010) case law is contrary to the decision in Johnson II and this Court's decision in Dimaya, Mathis

and Descamps where specific requirements are necessary to determine whether a prior conviction is a crime of violence, the lower court's use of the residual clause is clearly unconstitutional in this case, and their desire to make claim of the element clause is proof of an attempt at a second bite to maintain the enhancement. The Eleventh Circuit used the United States v. Nix 626, case which at the time of Petitioner's sentence was precedent to validate the 924(e)(2)(B)(ii) enhancement which is the residual clause that is now invalid and unconstitutional, Petitioner's sentence is clear error, illegal and unconstitutional.

Under Shepard, the district court is not permitted to rely on a P.S.R.'s characterization of a defendant's prior offense for enhancement purposes. If the Government's attorney had relied solely on approved Shepard documents, it is clear the Georgia Obstruction of Law Enforcement Officer could not have been determined a crime of violence. As the government went beyond that which is authorized retrieving said information in the PSR from the police report, an unapproved Shepard document (Shepard v. U.S., 544 U.S. 13, 16 125 S.Ct. 1254, 161 L.Ed. 2d. 205 (2005)) when the court relies on the PSR alone, it makes an error that is clear and obvious (Ochoa-Cruz, 422 F.3d at 867)

Petitioner shows how this sentence is unconstitutional and violates due process in the showing of the way the categorical approach in the Brown case which is now precedent in the Eleventh Circuit. In Brown, the Eleventh Circuit conducted the categorical approach using Jones v. State, 276 Ga App. 66, 622 S.E. 2d 425, 427 (Ga. Ct. App. 2005), the problem with Jones is that it does not represent the least acts criminalized under statute that the Georgia Supreme Court has ruled is enough to sustain a conviction under 16-10-24(b). In Williams v. The State, No. 97A1796 (1997), the Georgia Supreme Court held that Obstruction Of a police officer can arise out of the same facts and circumstances as a simple battery charge, so as to support an obstruction conviction." Pearson v. State, 224 Ga. App. 467, 468 S.E. 2d 911. Thus, the offense of felony obstruction could be committed by merely knowing and willfully resisting, obstructing or opposing the law enforcement officer while the latter is in lawful discharge of his official duties, and by offering or doing violence, such as, a simple battery on the officer, see Pearson v. State Ga. Ann § 16-15-23(a)(1),

In Johnson v. United States, 559 U.S. (2010) Hereinafter Johnson I, the Supreme Court held that, "in the context of a statutory definition of 'violent felony' the phrase 'physical force' means violent force capable of causing physical pain or injury to another person." It refers to "strong physical force" a substantial degree of force" or "powerful force." It suggest "violent, active crimes". It does not include the "slightest offensive touching" that might sustain a conviction for common law battery. Johnson I identifies specifically which conduct is not considered a violent felony. "The slightest offensive touching and common-law battery". The conduct Georgia charges under felony obstruction, Johnson I clearly says is not a violent felony conduct. Taylor v. United States, 495 U.S. 575, 109 L.Ed. 2d 607, 110 S.Ct. 2143 mandates when applying the categorical approach, the court must, A.) "Look only to the fact of conviction," and B.) "the statutory definition of the predicate offense." Using the fact of conviction, the statutory definition of the offense, and how Georgia interprets the statute to conduct the categorical approach. The amount of violence required to sustain a conviction for felony obstruction in Georgia does not rise to the requisite amount of "physical force" required by Johnson I and therefore, 16-10-24 (b), felony obstruction does not categorically fit under the ACCA's elements clause and cannot be considered a crime of violence for ACCA's enhancement purposes. The Georgia statute 16-10-24 (b) is substantively the same as Arizona Rev. Stat. § 13-2508(A)(1) and Florida Statute § 843.01, both of which have not survived as an ACCA predicate because the conduct did not constitute the use, attempt use, or threatened use of physical force, that was violent force, against the person of another. Contrary to the 11th Circuit's precedent in Brown calling the Georgia law a violent felony, the plain language of the Georgia statute is vague post Dimaya and demands the most basic due process's customary protections of fair notice, See: Connally v. General Constr. Co., 269 U.S. 365 391 (1926); see also Note, Textualism as Fair Notice, 123 Harv. L. Rev 542, 543 (2009) ("from the inception of Western Culture, fair notice been recognized as an essential element of the rule of law")

There cannot be precise and sufficient certainty for the common man, if despite the previous conclusion in Brown by the 11th Cir, if so many other courts have disagreement under the categorical approach. The 11th Circuit assumes that the Georgia state conviction "rested upon nothing more than the least of acts criminalized!" Moncrieffe v. Holder, 133 S.Ct. 1678, 1684, 185 L.Ed.2d 727 (2013) (internal quotation marks and brackets omitted).

Judicial interpretations should be consistent; and therefore, Dimaya demands review of Georgia statute 16-10-24(b). Much of the guarantee of fair notice in the DUE PROCESS CLAUSE demands "equal debt to the separation of powers".

Dimaya Id. p.8. "All legislative Powers in our federal Government to Congress, Art. I, Section 1." It is for the people, through their elected representatives, to choose the rules that will govern their future conduct. See the Federalist NO. 78, at 465. (A. Hamilton).

Furthermore, even in Justice Roberts's dissent in Dimaya (Id. pages 2-3) "§1b covers a particular category of state crimes... hopelessly indeterminate!"

Johnson, 576 U.S. at — (slip op. at 7.) (internal quotation marks omitted)

The provisions of the Georgia statute 16-10-24(b) and its similar statutes in other states gives rise to "intractable uncertainty", Id. 4. Petitioner humbly ask this court to consider whether Georgia statute 16-10-24(b), defined without regard to the facts of the conviction, poses a specific risk due to its vagueness. Due Process "requires only that our Government... proceed... accordingly to written constitutional and statutory provision[s] before depriving someone of life, liberty or property." Nelson v. Colorado, 581 U.S. —, —, n.1 (2017) (Thomas dissenting) (slip op. at 2, n.1) (internal quotation marks omitted). The rule of lenity is a tool of statutory construction which means states can abrogate it which lends credence to the similarities and differences among statutes in Georgia, Florida, Arizona and Oklahoma, among others. However, the modern vagueness doctrine strikes at the essence of "DUE PROCESS" in the name of the "Liberty of Contract" and in the name of the "right to privacy." See Johnson 576 U.S. at — — (opinion of Thomas J.).

The vagueness challenge provides Courts with "open-ended authority to oversee [legislative] choices" as appropriate in the Petitioner's request for relief in challenging Georgia statute 16-10-24 (b). Petitioner ask this honorable Court to avoid the denial of petitioner's right to DUE PROCESS to constitutional rules, such as in Johnson II and Dimaya and it's progeny that were traditionally left to the democratic process. See Williams v. Pennsylvania, 579 U.S. ____ (2016); Bmw of North America v Gore, 517 U.S. 559 (1996); Montgomery v. Louisiana, 577 U.S. at 136 S.Ct. 718 193 L.Ed. (2016).

Also, the Government continues to deny relief on Petitioner's 1998 Poss w/intent of 24 grams claim, that is not a serious drug offense in light of Moncrieffe v. Holder, 133 (2013), the arrest warrant in 1998 shows the facts, the 24 grams of marijuana was in a single plastic bag, not individually bagged for sell, and Petitioner was also caught smoking a marijuana cigarette at the time of arrest that shows clearly that Petitioner was in poss. of the marijuana for recreational use only. Again, the shepard documents would have showed these important facts. (See also mathis and Descamps).

CONCLUSION

In light of the concerns emphasized in Johnson v. United State, 2015 WL 2473450 (2015), Alleyne v U.S., and Apprendi Supra! the fairness and integrity of the judicial proceeding in the instant case is affected by the miscarriage of justice and petitioners loss of liberty resulting from erroneous increase from recommended guideline range of 63-78 to 188-225 as an armed career offender without requisite jury finding.

Petitioner asked this honorable court ^{to} grant this petition, reverse and remand resentencing petitioner without Career Offender or Armed Career enhancement in light of this courts ruling in Johnson WL 2473450 (2015) ; Alleyne, 133 S.Ct 2151 (2013) also Jones 135 Ct. 8 (2014)