

No.

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**In the  
Supreme Court of the United States**

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TYRONE FELDER,

*Petitioner,*

– against –

UNITED STATES OF AMERICA,

*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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JESSE M. SIEGEL  
*Counsel of Record*  
233 Broadway, Suite 707  
New York, New York 10279  
(212) 207-9009  
jessemsiegel@aol.com

*Attorney for Petitioner Tyrone Felder*

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## **QUESTION PRESENTED FOR REVIEW**

Whether New York youthful offender adjudications qualify as adult convictions for purposes of the Federal Sentencing Guidelines career offender provision, U.S.S.G. section 4B1.1.

## **PARTIES TO THE PROCEEDING**

In addition to the parties named in the caption of this petition, the following individuals were parties to the original proceeding before the district court that issued the judgment we petition the Court to review: Kareem Martin, Nicomedes Frasqueri, Fredrick Allen, Angel Amerzquit, Kevin Anthony, Kelvin Douglas, Derrick Felder, Anthony Givens, Keri Givens, Brian Hall, Elijah Hubbad, Terrell Johnson, Tyrone Margwood, Shanequea Mascall, Lamont Obey, Tommy Smalls, George Stone, Jerome Thomas, and Johna Thomas.

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October Term, 2018**

**TYRONE FELDER,**  
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**ON PETITION FOR A WRIT OF CERTIORARI TO  
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**PETITION FOR A WRIT OF CERTIORARI**

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Petitioner Tyrone Felder respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 24, 2019.

**OPINIONS BELOW**

The opinion of the Second Circuit dated January 24, 2019, attached hereto as Appendix A, is reported at *United States v. Tyrone Felder, AKA Meme, AKA*

*Manman*, 760 Fed.App'x. 74. The order of the Court of Appeals of March 29, 2019, denying rehearing and rehearing *en banc*, attached hereto as Appendix B, is unreported.

## **JURISDICTION**

This petition for certiorari is being filed within 90 calendar days of the order denying rehearing and rehearing *en banc*. This Court's jurisdiction is invoked under Title 28, United States Code, section 1254(1).

## **STATUTORY PROVISIONS INVOLVED**

United States Sentencing Guidelines section 4B1.1(a) provides:

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. section 4B1.2, Application Note 1 provides:

*"Prior felony conviction"* means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the

defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

New York Criminal Procedure Law Article 720, entitled "Youthful Offender Procedure," is set forth at Appendix D.

## **STATEMENT OF THE CASE**

### **A. The Conviction and Sentence.**

Mr. Felder was convicted, after trial, of one count of conspiring to possess and distribute controlled substances, to wit, cocaine base, cocaine, and marijuana, in violation of Title 21, United States Code, sections 846 and 841(b)(1)(A), and one count of brandishing firearms during and in relation to a drug trafficking crime, in violation of Title 18, United States Code, sections 924(c)(1)(A)(i) and (ii) and 2.

At sentencing, the district court found Mr. Felder had convictions for two prior crimes of violence and was, therefore, a career offender, pursuant to U.S.S.G. section 4B1.1. One of the predicate "convictions" was a New York State youthful offender adjudication that replaced a conviction for robbery. As a career offender, Mr. Felder's advisory sentencing guidelines range was 360 months to life. He also

faced a mandatory consecutive sentence of at least seven years, or 84 months, for the gun offense.

The district court sentenced Mr. Felder to consecutive terms of imprisonment of 216 months for the narcotics offense and 96 months for the gun offense, and concurrent five-year terms of supervised release. He is serving that sentence.

### **B. The Appeal.**

On May 11, 2018, Mr. Felder appealed to the Second Circuit on several issues, including the applicability of the Career Offender Guideline. The Panel hearing the appeal found it was bound by the Circuit's prior decision in *United States v. Jones*, 415 F.3d 256 (2d Cir. 2005), holding that a New York State youthful offender adjudication constitutes an adult criminal conviction under the criminal offender guideline, and could not overrule *Jones* unless its rationale had been implicitly or explicitly overruled by the Supreme Court or by the Court sitting *en banc*. (Appendix A at 3.) The Panel did not otherwise address the merits of Mr. Felder's arguments.

The Panel denied Mr. Felder's petition for rehearing, and the Circuit as a whole denied his petition for rehearing *en banc*. (Appendix B.)

## **REASONS FOR GRANTING THE PETITION**

Whether youthful offender adjudications in New York, Massachusetts, Alabama, and other states, constitute adult criminal convictions under the Career Offender Guideline, U.S.S.G. § 4B1.1, is an issue that has dramatic sentencing consequences for a large number of criminal defendants. It is also an issue on which there is a split among the circuits, with the Second, Third, Sixth and Eleventh Circuits finding such adjudications constitute adult convictions and the First Circuit finding they do not.

Therefore, reviewing the judgment will allow the Court to decide an issue that has a significant impact on sentences imposed on a large number of people, and about which there is a split among the circuits.

### **I. The Issue is of Substantial Importance Due to the Large Number of People Affected and the Dramatic Effects on Sentences.**

Every year, thousands of defendants below the age of 18 are adjudicated youthful offenders. For example, in 2011, 5510 defendants under 18 were adjudicated youthful offenders in New York<sup>1</sup>, and, in 2012, 333 such defendants were adjudicated youthful offenders in Massachusetts.<sup>2</sup>

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<sup>1</sup> Warren A. Reich, et al., Center for Court Innovation, “The Criminal Justice Response to 16- and 17-Year-Old Defendants in New York” at 10 (2014), *available at* [http://www.courtinnovation.org/sites/default/files/documents/ADP%20Y2%C20Report%](http://www.courtinnovation.org/sites/default/files/documents/ADP%20Y2%C20Report%20Final.pdf)

As discussed below, by design, youthful offender adjudications have a profound effect on the defendants involved, in terms of the length of the possible prison terms they face – *i.e.*, shorter than for adults convicted of the same crimes – and the future consequences of the adjudications.

The Career Offender Guideline, U.S.S.G. section 4B1.1, affects large numbers of federal defendants yearly. In fiscal year (“FY”) 2017, the most recent year for which statistics are available, 1593 federal defendants were found to be career offenders (a drop from 2268 career offenders in FY 2013).<sup>3</sup> Of these, 61.6% were Black, and more than three-quarters (77.1%) were sentenced for drug trafficking offenses.<sup>4</sup>

The Career Offender Guideline increases advisory sentencing guideline ranges by providing that all career offenders be deemed to be in criminal history category (“CHC”) VI, the highest of six possible categories, and that the final offense level (“FOL”) for a career offender be the greater of that provided by the

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20\_Final.pdf (showing that, of the 39,357 case dispositions for 16 and 17-year-old defendants statewide, 14% concluded with a “YO Finding”).

<sup>2</sup> Citizens for Juvenile Justice, “Data Points: Who Does the Massachusetts Juvenile Justice System Serve?” at 5 (2012), *available at* <http://cfjj.org/pdf/Data%20Points%202012%20Part%20I.pdf>.

<sup>3</sup> United States Sentencing Commission, “Quick Facts: Career Offenders” (May 2018), *available at* [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Career\\_Offender\\_FY17.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY17.pdf).

<sup>4</sup> *Id.*

Career Offender Guideline or the FOL otherwise applicable for the offense of conviction. U.S.S.G. § 4B1.1(b).

In FY 2017, the Career Offender Guideline increased both the CHC and FOL of almost half (48.4%) of the career offenders; the average CHC was increased from IV before application of the Guideline to the mandated VI with it, while the average FOL was 23 before application of the Guideline and 31 as the result of it.<sup>5</sup> Thus, an average defendant found to be a career offender in FY 2017 saw his advisory sentencing guidelines range increase from a range of 70 to 87 months to one of 188 to 235 months.

Nearly one-third (30.8%) of defendants found to be career offenders had the same CHC but a significantly higher FOL as the result of the Career Offender Guideline; the average FOL was 22 without application of the Guideline and 31 with it, an increase of 9 levels.<sup>6</sup> The advisory sentence guidelines range more than doubled for such a defendant due to the Guideline, from a range of 84 to 105 months to one of 188 to 235 months.

Overall, in FY 2017, 91.8% of defendants found to be career offenders experienced an increase in their advisory sentencing guidelines ranges as a result. The average sentence imposed on career offenders in FY 2017 was 144 months<sup>7</sup>.

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

This was below their average advisory sentencing guidelines ranges determined by the Career Offender Guideline - it included defendants who received credit for providing substantial assistance to the government - but substantially above the average sentencing ranges that would have applied absent the Guideline (70 to 87 and 84 to 105 months).

Thus, many thousands of state defendants are adjudicated youthful offenders each year. Almost 1600 federal defendants were found to be career offenders in the last year for which statistics are available. And, defendants experienced dramatic increases in their advisory sentencing guidelines ranges and resulting sentences as the result of being found to be career offenders.

While we do not have statistics for how many career offender findings rely upon youthful offender adjudications as predicate convictions, the frequency with which this occurs can be gauged by the number of cases in which the circuit courts – especially the Second Circuit - have been called upon to decide whether youthful offender adjudications constitute prior convictions in various contexts. *See, for example, United States v. Cuello*, 357 F.3d 162, 164 (2d Cir. 2004) (youthful offender adjudication counted as conviction for calculating base offense level under U.S.S.G. section 2K2.1); *United States v. Reinoso*, 350 F.3d 51, 52-53 (2d Cir. 2003) (youthful offender adjudication counted as conviction for determining base offense level under section 2L1.2); *United States v. Driskell*, 277 F.3d 150,

151 (2d Cir. 2002) and *United States v. Matthews*, 205 F.3d 544, 545 (2d Cir. 2000) (youthful offender adjudications counted as prior convictions in calculating criminal history categories under section 4A1.1); *United States v. Sampson*, 385 F.3d 183 (2d Cir. 2004) (youthful offender adjudication could be used to increase statutory mandatory minimum sentence in a drug case, pursuant to 21 U.S.C. § 841(b)); *Wallace v. Gonzales*, 463 F.3d 135 (2d Cir. 2006) (immigration judge could consider youthful offender adjudication in application for adjustment of status); *United States v. W.B.H.*, 664 F.3d 848 (11<sup>th</sup> Cir. 2011) (youthful offender adjudication counted as conviction under the Sex Offender Registration and Notification Act, 42 U.S.C. § 16901, *et seq.*); *Frazier v. Golson*, No. 11 Civ. 16, 2013 WL 789175 (M.D. Ala. Feb. 1, 2013) (consistent with due process, youthful offender adjudications could be maintained in prison records and used for classification of inmates); *United States v. Adams*, No. 11 Civ. 46, 2011 WL 1490340 (S.D. Ala. April 19, 2011) (youthful offender adjudication was not a prior conviction under 18 U.S.C. § 922(g)(1), which makes it illegal to possess or receive firearms after being convicted of crimes punishable by more than one year in prison); and *In re Devison-Charles*, 22 I.&N. Dec 1362 (BIA 2000) (youthful offender adjudication was not a conviction within the meaning of section 1101(a)(48)(A) of the Immigration and Nationality Act for purposes of deportation).

In a case both further illustrating the substantial importance of the issue, and demonstrating there may be a split even within the Second Circuit, the Court found a youthful offender adjudication does *not* constitute an adult criminal conviction for purposes of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(1), in *United States v. Sellers*, 784 F.3d 876 (2d Cir. 2015.) The Second Circuit held that a prior “drug conviction under New York law that was replaced by a [youthful offender] adjudication is not a qualifying predicate conviction under [ACCA] because it has been ‘set aside’ within the meaning of 18 U.S.C. § 921(a)(20) and New York law.” 784 F.3d at 879. This distinguished ACCA from the guidelines and statutes at issue in cases in which the Second Circuit found that youthful offender adjudications constitute adult convictions, on the basis that those provisions, unlike the ACCA, do not exclude convictions that have been “set aside.”

The number of defendants affected, dramatic effect on sentences, and frequency with which it arises in appeals, show that the question of whether youthful offender adjudications constitute adult criminal convictions is of substantial importance and should be decided by the Court.

## **II. The Circuit Courts Are Divided as to Whether Youthful Offender Adjudications Constitute Adult Criminal Convictions.**

In *United States v. Jones*, 415 F.3d 256, 261 (2d Cir. 2005), the Second Circuit decided that youthful offender adjudications were “‘classified as’ adult convictions under New York law for the purposes of the Career Offender guideline.” The Court noted a series of cases where it had approved consideration of youthful offender adjudications as adult convictions under the sentencing guidelines. *Id.* (Citing *United States v. Cuello*, 357 F.3d 162, 164 (2d Cir. 2004); *United States v. Reinoso*, 350 F.3d 51, 52-53 (2d Cir. 2003); and *United States v. Driskell*, 277 F.3d 150, 151 (2d Cir. 2002) and *United States v. Matthews*, 205 F.3d 544, 545 (2d Cir. 2000)). But, the Court noted, “the language specifically at issue in this case, ‘classified as an adult conviction under [New York law],’ was only considered in *Cuello* (Citations omitted),” and acknowledged the “definitions of ‘conviction’ in the guidelines at issue in *Matthews*, *Driskell*, and *Reinoso* did not explicitly refer to New York law in any way.” *Id.*

*Jones* rejected the argument that, since New York did not permit using youthful offender adjudications as predicate convictions for its laws providing enhanced sentences for defendants with prior convictions, they should not be used in the analogous context in federal sentencing. *Id.* at 261-62. Instead, the Court opted for the “pragmatic approach” it had used in prior cases, and, in particular,

reiterated in *Cuello*. This approach did not “look to whether New York calls it a conviction,” but rather looks “to the substance of the proceedings.” *Id.* at 263. The Court noted that in *Cuello*, it had held that the “defendant’s youthful offender adjudication was ‘classified’ as an adult conviction under the laws of New York because the defendant ‘was indisputably tried and convicted in an adult forum, and ... served his sentence in an adult prison.’” *Id.*

The *Jones* Court also noted its decision in *United States v. Sampson*, 385 F.3d 183 (2d Cir. 2004), which approved using a youthful offender adjudication “for purposes of increasing defendant’s statutory mandatory minimum” sentence in a drug case, pursuant to Title 21, United States Code, section 841(b). *Id.* at 264. “Once again, we looked to the substantive consequence of the criminal proceeding underlying the youthful offender adjudication and found that it was a final conviction as defendant was tried and convicted in an adult court and served his sentence in an adult prison. (Citation omitted.)” *Id.*

The Third and Sixth Circuits have adopted the Second Circuit’s approach of focusing on the “substance of the proceedings,” and reached the same result. *See, United States v. Wallace*, 663 F.3d 177, 181 (3<sup>rd</sup> Cir. 2011); *United States v. Miller*, 562 Fed.Appx. 272, 308 (6<sup>th</sup> Cir. 2014); *see also, United States v. Elliott*, 732 F.3d 1307 (11<sup>th</sup> Cir. 2013.)

The First Circuit rejected this approach, and reached a contrary decision, based on the admonition in U.S.S.G. section 4B1.2, App. Note 1 that a “conviction for an offense committed prior to age eighteen is an adult conviction *if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted* ....” (Emphasis added.)

In *United States v. McGhee*, 651 F.3d 153 (1<sup>st</sup> Cir. 2011), the First Circuit found that a Massachusetts youthful offender adjudication for armed robbery could not be considered a predicate conviction under the career offender guideline, and rejected the view it had taken only three years earlier in *United States v. Torres*, 541 F.3d 48 (1<sup>st</sup> Cir. 2008), cert. denied, U.S., 129 S.Ct. 1987, 173 L.Ed.2d 1090 (2009).

The First Circuit described the interplay of U.S.S.G. sections 4A1.1 and 4A1.2, which “are concerned with counting and weighting sentences of imprisonment to establish a defendant’s criminal history category,” and section 4B1.1, governing career offender status. The Court noted, “Although the maze of provisions is assuredly confusing, there is now a consensus that *Torres* misread them.” *McGhee*, 651 F.3d at 156 (footnote omitted).

*McGhee* rejected the approach taken by the Second Circuit in *Jones* and the Eleventh Circuit in *United States v. Pinion*, 4 F.3d 941, 944-45 (11<sup>th</sup> Cir. 1993), which “sought to decide whether ‘an adult conviction’ took place by applying

solely objective criteria, framed by the federal courts, to the circumstances surrounding a state conviction, including the events underlying the conviction and factors such as the forum, procedure, sentence, and time served.” 651 F.3d at 157.

“However,” the First Circuit held,

the language of the commentary to the guideline in this instance does place more emphasis than has occurred in other contexts on whether the conviction is “classified” as an adult offense “under the laws of the jurisdiction” of conviction, U.S.S.G. § 4B1.2 cmt. n. 1, undermining any presumption in favor of a federal standard that disregards state labels. *See Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119–20, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983); *United States v. Turley*, 352 U.S. 407, 411, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957).

*Id.*

Thus, the First Circuit’s view is in direct conflict with that of the Second, Third, Sixth and Eleventh Circuits.

### **III. The Approach Taken by the Second, Third, Sixth and Eleventh Circuits Renders the Requirement that a Predicate Conviction Be Classified as an Adult Conviction under the Laws of the Jurisdiction in which the Defendant was Convicted Meaningless.**

A person adjudicated a youthful offender in New York does not have a criminal conviction – adult or otherwise - under New York law. New York Criminal Procedure Law section 720.10(4) states that a “‘Youthful offender finding’ means a finding, *substituted for the conviction* of an eligible youth,

pursuant to a determination that the eligible youth is a youthful offender.”

(Emphasis added.) As the Practice Commentary to section 720.10 explains,

The youthful offender procedure authorized in this article provides an avenue for the court to exercise discretion upon conviction of certain young offenders to: a) avoid branding a youth with the lifelong stigma of a criminal conviction; and b) eschew imposition of certain mandatory sentences of imprisonment. This ameliorative device has existed by statute in one form or another in New York for many years (see L.1944, c. 632).

Preiser, Practice Commentary, McKinney’s Cons Laws of NY, Book 11A, Criminal Procedure Law § 720.10.

Similarly, New York Criminal Procedure Law section 720.20(3) states, “Upon determining that an eligible youth is a youthful offender, the court must direct that the conviction be deemed *vacated* and *replaced* by a youthful offender finding; and the court must sentence the defendant pursuant to section 60.02 of the penal law.” (Emphasis added.) Section 60.02 sets forth lower sentences for youthful offenders than apply for adults. Thus, “The granting of youthful offender treatment is a very valuable benefit, since it not only precludes imposition of a criminal conviction with the accompanying stigma and disabilities, but also limits the severity of the sentence that can be imposed.” Preiser, Practice Commentary, McKinney’s Cons Laws of NY, Book 11A, Criminal Procedure Law § 720.20.

Putting to rest any argument that New York classifies youthful offender adjudications as adult criminal convictions, New York Criminal Procedure Law section 720.35(1) explicitly states,

A youthful offender adjudication *is not a judgment of conviction for a crime or any other offense*, and does not operate as a disqualification of any person so adjudged to hold public office or public employment or to receive any license granted by public authority but shall be deemed a conviction only for purposes of the transfer of supervision and custody pursuant to section two hundred fifty-nine-m of the executive law [which addresses “Compacts with other states for out-of-state parolee supervision”].

(Emphasis added.) Again, the Practice Commentary is instructive:

A youthful offender adjudication is not deemed to be a conviction of a criminal offense. Thus, this section specifies that a person so adjudicated is not to suffer any of the disabilities that follow upon conviction. Accordingly, a youthful offender adjudication cannot even be utilized to impeach the credibility of the offender as a witness at a subsequent trial, although he or she can be questioned as to the underlying conduct for that purpose (*see People v. Cook*, 1975, 37 N.Y.2d 591, 376 N.Y.S.2d 110, 338 N.E.2d 619; but *see Davis v. Alaska*, 1974, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347).

Also, a youthful offender adjudication that has replaced a felony conviction cannot be utilized as a prior conviction for multiple offender sentencing (*People v. Carpentier*, 1968, 21 N.Y.2d 572, 289 N.Y.S.2d 615, 236 N.E.2d 580) and an out-of-state youthful offender adjudication will receive the same treatment in New York, if that state provides for the same exemptions.

Preiser, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, Criminal Procedure Law § 720.35.

In *Jones*, the Second Circuit described its approach focusing on the substance of the proceedings as “pragmatic.” However, it seems less pragmatic than arbitrary. For no compelling reason, it emphasizes two factors – the court in which proceedings take place and the location where a sentence is served – at the expense of more pertinent considerations: that, under New York law, youthful offender adjudications do not constitute criminal convictions, may not be used as predicate convictions for enhanced sentencing purposes, do not expose youthful offenders to the same sentences as adults, and relieve them of mandatory minimum sentences.

*Jones* disregards the fact that, while there are some ways in which New York treats youthful offenders the same as adults, there are important ways in which it treats them differently. Yet, because New York law treats youthful offenders differently than adults *in at least some significant respects*, it manifestly does not classify youthful offender adjudications as adult convictions. In this context, it is the differences that matter, not the similarities.

This case illustrates this perfectly. As a youthful offender, Mr. Felder was sentenced to five years' probation, a sentence that was not available to adults convicted of the crime to which he pled guilty, robbery in the second degree.

Adults convicted of that crime, a class C violent felony, were subject to a determinate sentence of between 3½ and 15 years in prison. New York C.P.L. § 70.02(3)(b). As a youthful offender, Mr. Felder could not receive a sentence greater than an adult would have faced for an E felony, with no mandatory minimum and a maximum prison term of 1 and 1/3 to 4 years. New York C.P.L. § 60.02(2).

Far from classifying youthful offender adjudications as adult convictions, New York does not classify them as convictions at all. It provides lower sentences for youthful offenders than for adults convicted of the same offenses. When *Jones* concludes that New York classifies youthful offender adjudications as adult convictions, it renders the requirement imposed by section 4B1.2, App. Note 1, meaningless.

In contrast, the approach taken by the First Circuit in *McGhee* is based on, and gives meaning to, that very requirement.

#### **IV. *Jones* Ignores the Temporal Requirement that a Career Offender Have Two Predicate Convictions When Sentenced.**

Those circuits finding that youthful offender adjudications constitute criminal convictions – including, especially, the Second Circuit in *Jones* - did not consider the temporal requirement that a career offender have, *at the time of*

*sentencing*, two prior adult convictions for crimes of violence or controlled substance offenses. This is especially significant in light of the Second Circuit’s finding, in *United States v. Sellers*, *supra*, that a youthful offender adjudication under New York law “sets aside” an underlying conviction. Once an underlying conviction is set aside, a defendant no longer has the conviction, and it cannot later serve as a predicate conviction for purposes of the Career Offender Guideline.

The temporal requirement is set forth in the Career Offender Guideline. “As in all statutory construction cases, we begin with ‘the language itself [and] the specific context in which that language is used.’ ” *McNeill v. United States*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2218, 2221, 180 L.Ed.2d 35 (2011) (alteration in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)). The Career Offender Guideline applies where “the defendant *has* at least two prior felony convictions of either a crime of violence or a controlled substance offense.” U.S.S.G. § 4B1.1(a)(3) (emphasis added.) Clearly, “has” in this context means at the time the defendant is sentenced; the guideline does not say, “has or had.”

In this respect, the Career Offender Guideline is different from the other contexts in which the Second Circuit and other courts have found youthful offender adjudications constitute prior convictions, which all provide for increases in sentences, offense levels, or criminal history points “after” or “subsequent” to

the defendant sustaining a prior conviction or sentence. *See United States v. Cuello, supra*, 357 F.3d at 164 (involving U.S.S.G. section 2K2.1, which provides enhanced penalties when a defendant commits a firearms offense “subsequent to” sustaining predicate convictions); *United States v. Reinoso, supra*, 350 F.3d at 52-53 (involving section 2L1.2, which increases offense levels when a person illegally enters or remains in the United States “after” a predicate conviction); *United States v. Driskell, supra*, 277 F.3d at 151 and *United States v. Matthews, supra*, 205 F.3d at 545 (involving section 4A1.1, which awards criminal history points based on prior sentences); and *United States v. Sampson, supra*, 385 F.3d at 194 (involving 21 U.S.C. 841(b), which provides increased mandatory minimum sentences for defendants who commit drug offenses “after” a prior conviction for a felony drug offense).

In *Driskell*, the Second Circuit found a youthful offender adjudication was a prior conviction for purposes of section 4A1.1 because a conviction was a prerequisite for a youthful offender adjudication. The Court reasoned the defendant had a conviction when he pled guilty, which was subsequently replaced by the youthful offender adjudication. 277 F.3d at 158; *see also Jones, supra*, 415 F.3d at 264.

Thus, a defendant being sentenced in a federal case who was previously adjudicated a youthful offender is being sentenced “subsequent to,” or “after,”

being convicted in that case, even if the conviction was vacated and replaced by the youthful offender adjudication (or “set aside” by the youthful offender adjudication, as the Court held in *Sellers*.) But, it cannot be said he still “has” that conviction at the time of sentencing on the federal case if the conviction has been vacated, replaced and set aside.

In *United States v. Sellers*, *supra*, the Second Circuit held that a prior “drug conviction under New York law that was replaced by a [youthful offender] adjudication is not a qualifying predicate conviction under the [Armed Career Criminal Act, 18 U.S.C. section 924(e)(1), “ACCA”] because it has been ‘set aside’ within the meaning of 18 U.S.C. § 921(a)(20) and New York law.” 784 F.3d at 879. The question of whether a youthful offender adjudication “sets aside” a prior conviction was not addressed in most of the prior cases that found youthful offender adjudications constitute prior convictions, because the guidelines and statutes at issue in those cases, unlike the ACCA, did not explicitly preclude convictions that had been “set aside.” *But, see United States v. Parnell*, 524 F.3d 166 (2d Cir. 2008) (discussed *below*.) This difference allowed the *Sellers* Court to reach a different conclusion with regard to the ACCA than it had in the other cases, which were, for this reason, “inapposite.” 784 F.3d at 884-85.

Nonetheless, there is no functional difference between finding that a youthful offender adjudication “sets aside” a conviction that it replaces, as in

*Sellers*, and finding a defendant no longer “has” the conviction that has been replaced by the youthful offender adjudication, since a defendant no longer “has” a conviction that has been set aside. The *Sellers* Court noted that, in *United States v. Parnell*, *supra*, it had

distinguished the ACCA definition of qualifying convictions under 18 U.S.C. § 921(a)(20), which excludes convictions that have been “set aside,” because that definition applied only to the ACCA and not to the Career Offender Guideline. [524 F.3d at 170]. Thus, we held that U.S.S.G. §§ 4B1.1 and 4B1.2 (the definitional section for the Career Offender Guideline), which do not exclude “set aside” convictions, allow district courts to consider YO adjudications when calculating the number of prior felony convictions for purposes of the Career Offender Guideline enhancement. [524 F.3d at 170–71.]

*Sellers*, *supra*, 784 F.3d at 885.

However, the issue decided in *Parnell* was different than that argued here. The Court “rejected Parnell’s argument that we should import the ‘set aside’ portion of 18 U.S.C. § 921(a)(20) into U.S.S.G. § 4B1.1,” because section 4B1.1 “does not exempt youthful offender adjudications that ‘set aside’ a conviction from the calculation of prior felony calculations.” *Parnell*, 524 F.3d. As in *Jones*, *Parnell* did not address the temporal requirement that, to be sentenced as a career offender, a defendant must have the predicate conviction at the time he is sentenced. Further, because *Parnell* declined to “import” the “set aside portion” of section 921(a)(20), it did not reach the question of whether a youthful offender

adjudication sets aside a prior conviction under New York law, which it decided later - in the affirmative - in *Sellers*.

It is unnecessary to “import” the “set aside” holding of *Sellers* to reach the result required by the career offender guideline’s temporal requirement. New York law specifies that a youthful offender adjudication *vacates, replaces and substitutes for* a conviction. Just as with a conviction that has been set aside, a defendant no longer *has* a conviction that has been vacated and replaced by a youthful offender adjudication.

In *Sellers*, the Second Circuit distinguished between the ACCA and the guidelines and statutes at issue in cases in which the Court found that youthful offender adjudications constitute adult convictions, on the basis that those provisions, unlike the ACCA, do not exclude convictions that have been “set aside.” The career offender guideline, like the ACCA, is also different from the guidelines and statutes at issue in those cases, in that only the career offender guideline has a temporal requirement.

While *Sellers* used the phrase “set aside” to describe the effect a youthful offender adjudication has on a prior conviction (because that phrase is used in the ACCA), New York law uses different terminology. It provides that a youthful offender finding is “substituted for the conviction of an eligible youth,” New York C.P.L. § 720.10(4); that a conviction is “deemed vacated and replaced by a

youthful offender finding,” New York C.P.L. § 720.20(3); and that, therefore, a “youthful offender adjudication is not a judgment of conviction for a crime or any other offense.” New York C.P.L. § 720.35(1).

Whether set aside, substituted for, or vacated and replaced, a defendant no longer *has* the conviction once he is adjudicated a youthful offender. While the career offender guideline does not explicitly exclude convictions that have been “set aside,” as does the ACCA, its requirement that a defendant is a career offender only if he “has” two qualifying convictions at the time of sentencing has the same effect. In this way, the career offender guideline is like the ACCA and different from the guidelines and statutes involved in cases in which the Court has found that youthful offender adjudications constitute adult convictions.

Unlike the career offender guideline, none of these provisions require that the defendant still have the conviction at the time he is to be sentenced on the new offense. Each of these applies to a defendant who received youthful offender treatment after pleading guilty or being found guilty at a trial, as there was, *at one point in time*, a conviction that was replaced by the youthful offender adjudication.

The Career Offender Guideline, in contrast, does not say it applies to a defendant sentenced after, or subsequent to, sustaining two qualifying convictions. It states that it applies to a defendant who *has* two such convictions. A defendant no longer has a conviction that has been vacated and replaced.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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JESSE M. SIEGEL

*Counsel of Record*  
233 Broadway, Suite 707  
New York, NY 10279  
212-207-9009  
jessemsiegel@aol.com

*Attorney for Petitioner*  
*Tyrone Felder*

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