NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

JOHN HUDSON
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 18-60479

PETITION FOR WRIT OF CERTIORARI

Omodare B. Jupiter (MB #102054)
Federal Public Defender
N. and S. Districts of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Michael L. Scott (MB #101320)
Assistant Federal Public Defender

Attorney for Defendant-Petitioner

QUESTION PRESENTED FOR REVIEW

The specific question presented for review is whether the United States Court of Appeals for the Fifth Circuit erred by denying Mr. Hudson a Certificate of Appealability in this § 2255 case. The underlying question is whether, under this Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), Mr. Hudson should be resentenced without application of the armed career criminal provisions of the Armed Career Criminal Act.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. OPINIONS BELOW

The United States District Court for the Southern District of Mississippi entered a Judgment of Conviction against Petitioner John Hudson on October 26, 2005.[1] The conviction was for felon in possession of a firearm in violation of 18 U.S.C. § 922(g). His sentence was enhanced under the provisions of 18 U.S.C. § 924(e), the Armed Career Criminal Act (hereinafter "ACCA"). The district court case number is 3:03cr138-WHB-AGN. The subject § 2255 Petition arose out of the sentence ordered for the felon in possession conviction.

In 2015, after Mr. Hudson's conviction and sentence, this Court ruled that the "residual clause" portion of the "violent felony" definition in the Armed Career Criminal Act is unconstitutional. *See Johnson v. United States*, 135 S.Ct. 2551 (2015).[2] Mr. Hudson filed the subject § 2255 Petition on June 24, 2016. Invoking the holdings in *Johnson* (2015) he argued that he should be resentenced without application of the sentence enhancement provisions of the ACCA. The district court entered an Order denying the relief sought in the § 2255 Petition on June 27,

[1] The district court's Judgment is attached hereto as Appendix 1.

[2] This Petition cites two important Supreme Court cases captioned "*Johnson v. United States*." One was filed in 2015 and published at 135 S.Ct. 2551. That case renders the residual clause of § 924(e)(2)(B)(ii) unconstitutional. The other was filed in 2010 and published at 559 U.S. 133. That case defines the parameters of the phrase "physical force" in § 924(e)(2)(B)(i). In this Petition, *Johnson v. United States*, 135 S.Ct. 2551 (2015) is referred to as "*Johnson* (2015)," and *Johnson v. United States*, 559 U.S. 133 (2010) is referred to as "*Johnson* (2010)."

2018. It also denied a Certificate of Appealability (hereinafter "COA") on the same day.[3]

Mr. Hudson appealed the case to the United States Court of Appeals for the Fifth Circuit on July 2, 2018. The Fifth Circuit case number is 18-60479. Because the district court denied a COA, he was required to petition the appellate court for a COA before it would hear the merits of the case. Rule 11(a), Rules Governing § 2255 Proceedings; Rule 22(b)(1), Federal Rules of Appellate Procedure; 28 U.S.C. § 2253(c). Accordingly, Mr. Hudson filed an Application for COA in the Fifth Circuit on August 21, 2018. The Fifth Circuit entered an Order denying the Application for COA on June 12, 2019, without hearing the merits of the case.[4] This Petition for Writ of Certiorari followed.

[3] The district court's Order is attached hereto as Appendix 2. The denial of a COA is stated on page 7 of the Order.
[4] The Fifth Circuit's Order is attached hereto as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit entered its Order denying the Application for COA on June 12, 2019. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Order, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS INVOLVED

In *Johnson* (2015), the case that Mr. Hudson's argument is based on, this Court found that the "residual clause" portion of ACCA's definition of "violent felony" is unconstitutional under the Due Process Clause of the Fifth Amendment to the United States Constitution. 135 S.Ct. at 2563. The Due Process Clause of the Fifth Amendment states: "No person shall … be deprived of life, liberty, or property, without due process of law[.]"

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a Petition filed under 28 U.S.C. § 2255, in which Mr. Hudson sought to be resentenced without application of the ACCA's sentencing provisions. The § 2255 Petition concerns an underlying conviction and sentence filed in the United States District Court for the Southern District of Mississippi for a felon in possession of a firearm. The Southern District of Mississippi had jurisdiction over the case under 18 U.S.C. § 3231 because the felon in possession conviction arose from the laws of the United States of America.

B. Statement of material facts.

Facts relevant to the issue in this Petition pertain solely to sentencing. Specifically, the facts focus on the district court's application of the "violent felony" provisions of the ACCA and the "residual clause" portion of the "violent felony" definition.

To be eligible for sentencing under the ACCA, a defendant must have violated 18 U.S.C. § 922(g) and have a combined total of three prior convictions for either "serious drug offenses" or "violent felonies." 18 U.S.C. § 924(e)(1). In the instant case, the court deemed Mr. Hudson an armed career criminal under 18 U.S.C. § 924(e) based on his prior Michigan state conviction for "assault with

intent to rob and steal unarmed," and his prior Mississippi state convictions for "house burglary," and "robbery," which the court categorized as "violent felonies."

Application of the armed career criminal enhancements increased Mr. Hudson's offense level from 24 to 33. With credit for acceptance of responsibility, his total offense level was reduced to 30. Mr. Hudson had a criminal history category of VI. This, in turn, yielded a Guidelines imprisonment range of 168 to 210 months. Because of the 15-year mandatory minimum sentence required under the ACCA, the bottom end of his Guidelines range increased to 180 months. The court sentenced Mr. Hudson to 180 months in prison.

Mr. Hudson is not contesting his guilt in regard to the instant felon in possession conviction. His sentence is the contested issue. As discussed above, he was subjected to an enhanced sentence because he had prior convictions for assault with intent to rob and steal unarmed, house burglary, and robbery, which the court deemed "violent felonies." Mr. Hudson concedes that house burglary is a violent felony under 18 U.S.C. § 924(e)(2)(B). However, as analyzed in the "Argument" section below, under *Johnson* (2015), his remaining convictions no longer qualify as "violent felonies."

Without the ACCA enhancements, Mr. Hudson's offense level will be 21 (adjusted offense level of 24 less three points for acceptance of responsibility). An offense level of 21 and a criminal history category of VI results in a Guidelines

range of 77 to 96 months in prison.[5] *See* Guidelines Sentencing Table. Also, he will not be subject to a 15-year mandatory minimum sentence.

[5] Mr. Hudson had a base offense level of 24 under Guidelines § 2K2.1(a)(1) for having "at least two felony convictions of . . . a crime of violence. . ." See USSG §§ 2K2.1 and 4B1.2. Many of the arguments contained herein that apply to the definition of "violent felony" under ACCA also apply to the definition of "crime of violence" under § 4B1.2, which would reduce Mr. Hudson's offense level even more. Mr. Hudson, therefore, reserves the right to argue the enhancement under § 2K2.1 at resentencing, if necessary.

V. ARGUMENT

A. Review on certiorari should be granted in this case.

As stated in Rule 10 of the Supreme Court Rules, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons."

Federal district and appeal courts are flush with cases arising from this Court's rulings in *Johnson* (2015). As with Mr. Hudson's case, many of the issues focus in part on defining action that constitutes "*physical force* against the person of another." The "physical force" requirement must be met for a prior conviction to count as a "violent felony" under the force clause of the ACCA, which is contained in 18 U.S.C. § 924(e)(2)(B)(i). This Court provided a level of guidance on the "physical force" requirement in *Johnson* (2010),[6]

Notwithstanding the holdings in *Johnson* (2010), lower courts still struggle with determining what types of actions constitute "physical force" under § 924(e)(2)(B)(i). Granting certiorari in this case will give the Court an opportunity to clarify the definition of "physical force" in the context of the ACCA. Therefore, the Court should grant Mr. Hudson's Petition for Writ of Certiorari.

[6] *See supra*, footnote 2.

B. Procedure for reviewing a § 2255 ruling on appeal.

Appeal of a denied § 2255 petition is procedurally unique because the right to appeal hinges on obtaining a COA. In *Buck v. Davis*, 137 S.Ct. 759 (2017), this Court described the required procedure. The Court held:

> A … prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal. Federal law requires that he first obtain a COA from a circuit justice or judge. 28 U.S.C. § 2253(c)(1). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case.
>
> The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims."

Id. at 773 (case law citations omitted).

Under *Buck*, an appellate court lacks jurisdiction to consider the merits of an argument presented in a § 2255 petition until it answers the threshold question of whether "the applicant has made a substantial showing of the denial of a constitutional right." 137 S.Ct. at 773 (holding that when an appeal court sidesteps the COA process by deciding the issue on the merits, "it is in essence deciding an appeal without jurisdiction."). *Id.* (citation omitted).

In Mr. Hudson's case, the Fifth Circuit followed proper procedure. That is, the court decided whether it believed that Mr. Hudson is entitled to a COA. It denied a COA, so it did not address the merits of the issue. This begs the question of what this Court can review at this point in the case.

The first option is to limit review to deciding whether the Fifth Circuit erred by denying a COA. If the Court agrees with Mr. Hudson's argument, then the remedy under this option will be to remand the case to the Fifth Circuit and order the Court to rule on the merits of the subject arguments.

The second option is limitless review, allowing this Court to review the merits of the subject arguments. That is the option that the Court followed in *Buck*. 137 S.Ct. at 774-75 (holding "[w]ith respect to this Court's review, § 2253 does not limit the scope of our consideration of the underlying merits, and at this juncture we think it proper to meet the decision below and the arguments of the parties on their own terms.").

Given the detailed level of briefing that has been submitted to the courts below, Mr. Hudson suggests that this case is ripe for review on the merits. However, he recognizes that the decision is left to this Court's discretion.

C. Section 2255 standard.

Mr. Hudson's Petition is filed under the provisions of 28 U.S.C. § 2255. Section 2255(a) states:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the **sentence was imposed in violation of the Constitution** or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(Emphasis added).

Mr. Hudson contends that his sentence "was imposed in violation of the Constitution." His argument is based on the rulings in *Johnson* (2015), a case decided by this Court on June 26, 2015. The Court later held that *Johnson* (2015) is retroactively applicable to cases on collateral review. *United States v. Welch*, 136 S.Ct. 1257 (2016).

D. The holdings in *Johnson* (2015).

The initial paragraph of the *Johnson* (2015) opinion provides a good synopsis of the issue addressed by the Court. This paragraph states:

> Under the Armed Career Criminal Act of 1984, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a "violent felony," a term defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). We must decide **whether this part of the definition of a violent felony survives the Constitution's prohibition of vague criminal laws**.

Johnson (2015), 135 S.Ct. at 2555 (emphasis added).

The opinion focuses on a provision of the ACCA codified in 18 U.S.C. § 924. The relevant provision of § 924 states:

> (e)(1) In the case of a person who violates section 922(g)[7] of this title and has three previous convictions by any court referred to in section 922(g)(1)[8] of this title for a **violent felony** or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and **imprisoned not less than fifteen years**, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1) (emphasis added; bracketed footnotes added).

Johnson (2015) pertains to the "violent felony" language in § 924(e). This phrase is defined in 18 U.S.C. § 924(e)(2)(B) as follows:

> (e)(2) As used in this subsection –
>
> * * * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> (ii) is burglary, arson, or extortion, involves use of explosives, **or otherwise involves conduct that presents a serious potential risk of physical injury to another**[.]

(Emphasis added).

The *Johnson* (2015) holdings particularly focus on the language of § 924(e)(2)(B)(ii), which states that the definition of "violent felony" includes any act that "otherwise involves conduct that presents a serious potential risk of

[7] 18 U.S.C. § 922(g) makes it a crime for a convicted felon to possess a firearm.
[8] 18 U.S.C. § 922(g)(1) limits the definition of a convicted felon to a felon "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[.]"

physical injury to another." This language is commonly referenced as the ACCA's "residual clause." *See Johnson* (2015), 135 S.Ct. at 2555-56.

Following is a summary of the relevant facts in *Johnson* (2015) and the Court's framing of the issue in light of the case-specific facts:

> After his eventual arrest, Johnson pleaded guilty to being a felon in possession of a firearm in violation of § 922(g). The Government requested an enhanced sentence under the Armed Career Criminal Act. It argued that three of Johnson's previous offenses – including unlawful possession of a short-barreled shotgun, *see* Minn. Stat. § 609.67 (2006) – qualified as violent felonies. The District Court agreed and sentenced Johnson to a 15-year prison term under the Act. The Court of Appeals affirmed. We granted certiorari to decide whether Minnesota's offense of unlawful possession of a short-barreled shotgun ranks as a violent felony under the residual clause. We later asked the parties to present reargument addressing the compatibility of the residual clause with the Constitution's prohibition of vague criminal laws.

Johnson (2015), 135 S.Ct. 2556 (citations to procedural history omitted).

In relation to the residual clause of the ACCA, the *Johnson* (2015) Court held:

> [I]mposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James*[9] and *Sykes*[10] are overruled. Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.

Johnson (2015), 135 S.Ct. at 2563 (bracketed footnotes added).

[9] The full cite for *James* is *James v. United States*, 550 U.S. 192, 180 L.Ed.2d 60 (2007).
[10] The full cite for *Sykes* is *Sykes v. United States*, —— U.S. ——, 131 S.Ct. 2267 (2011).

Johnson (2015) holds that it is unconstitutional to increase a defendant's sentence under § 924(e)(1) because he has any prior "violent felonies," as defined under the residual clause of § 924(e)(2)(B)(ii). The Court also stated that its ruling is not applicable to the enumerated "violent felonies" stated in § 924(e)(2)(B)(ii), which are burglary, arson, extortion or crimes involving the use of explosives.

To summarize, post-*Johnson* (2015) a prior conviction qualifies as a "violent felony" under the ACCA if the conviction falls into one of two categories enumerated under 18 U.S.C. § 924(e)(2)(B). The crime of conviction must:

(1) have "as an element the use, attempted use, or threatened use of physical force against the person of another" (§ 924(e)(2)(B)(i)); or

(2) be "burglary, arson, or extortion" or "involve[] use of explosives" (§ 924(e)(2)(B)(ii)).

Prior to *Johnson* (2015), if a crime of conviction fell under a third category, the residual clause of § 924(e)(2)(B)(ii), then the prior conviction was a violent felony. Under the residual clause, a prior conviction is deemed a violent felony if it "otherwise involve[ed] conduct that present[ed] a serious potential risk of injury to another[.]" *Id.* Since *Johnson* (2015) declared the residual clause unconstitutional, it is no longer applicable to the violent felony analysis.

E. Mr. Hudson's prior convictions for "Robbery" and "Assault with Intent to Rob & Steal Unarmed" are not "violent felonies" under the ACCA.

The district court found that Mr. Hudson was subject to the ACCA's sentencing provisions because he had two prior convictions under Mississippi law for "house burglary" and "robbery," and one prior conviction under Michigan law for "assault with intent to rob & steal unarmed." Mr. Hudson concedes that his house burglary conviction is a violent felony under 18 U.S.C. § 924(e)(2)(B). Therefore, the following analysis pertains only to his convictions for "robbery" and "assault with intent to rob and steal unarmed."

1. Mr. Hudson's Mississippi state conviction for "Robbery."

Robbery is clearly not an enumerated crime under § 924(e)(2)(B)(ii). Since *Johnson* (2015) rendered the residual clause unconstitutional, the only possible option under which the prior attempted robbery conviction can be deemed a "violent felony" is § 924(e)(2)(B)(i).

A prior conviction is considered a "violent felony" under § 924(e)(2)(B)(i) if it has "as an element the use, attempted use, or threatened use of **physical force** against the person of another[.]" (Emphasis added). In *Johnson* (2010), the Supreme Court defined the level of force required to meet the "physical force" required of § 924(e)(2)(B)(i). "[T]he phrase 'physical force' means violent force – that is, force capable of causing physical pain or injury to another person." *Id.* at 141 (citation omitted). "It plainly refers to force exerted by and through concrete

bodies – distinguishing physical force from, for example, intellectual force or emotional force." *Id.* at 138.

In the context of the *Johnson* (2010) Court's definition of "physical force," we must consider whether Mr. Hudson's robbery conviction is a "violent felony" under § 924(e)(2)(B)(i). The first step is to look at the language of the charging statute, which is presumptively § 97-3-73 of the Mississippi Code, titled "Robbery."[11] This statute states: "Every person who shall feloniously take the personal property of another, in his presence or from his person and against his will, by violence to his person or by **putting such person in fear** of some immediate injury to his person, shall be guilty of robbery." (Emphasis added).

To determine whether Mississippi's robbery statute is a "violent felony" on the basis that the prohibited conduct involves "physical force," we look to "the least of the [] acts" enumerated in the statute. *Johnson* (2010), 559 U.S. at 137 (citation omitted). Committing robbery by "putting in fear" is the "least act" that will satisfy the statutory elements of § 97-3-73. Putting a person in fear is comparable to inflicting "intellectual force or emotional force" to commit the crime, and *Johnson* (2010) clearly holds that this does not meet the definition of "physical force" under § 924(e)(2)(B)(i). *Johnson* (2010), 559 U.S. at 138.

[11] The presentence investigation report adopted by the district court does not state the statute of conviction. It appears, however, that the only possible statute of conviction is § 97-3-73.

In summary, the Mississippi crime of robbery fails to meet the definition of "violent felony" under the ACCA. This is true because committing the crime requires no physical force, it is not an enumerated violent felony and the residual clause is no longer a constitutional option to decide the violent felony issue. Since the robbery conviction fits into neither of the categories defining "violent felony," Mr. Hudson's conviction for this crime cannot support imposing sentence enhancements under the ACCA.

2. Mr. Hudson's prior Michigan state conviction for "Assault with Intent to Rob & Steal Unarmed."

Mr. Hudson's prior Michigan conviction for assault with intent to rob and steal appears to be under § 750.88 of the Michigan Code, titled "Assault with intent to rob and steal; unarmed." This code section states: "Any person, not being armed with a dangerous weapon, who shall assault another with force and violence, and with intent to rob and steal, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years." *Id.*

Michigan state court interpretations of this statute indicated that it can be violated by "threatening conduct designed to put another in apprehension of an immediate battery." *People v. Reeves*, 580 N.W.2d 433, 436 (Mich. 1998). Putting another in "apprehension" is the same as putting another in "fear." As analyzed in the immediately preceding section of this Petition, putting in fear or apprehension is insufficient to meet the force clause definition of a violent felony.

Further, because this crime is not an enumerated violent felony, it cannot be considered in the ACCA analysis.

Accordingly, Mr. Hudson is not an armed career criminal under the ACCA. His sentence should be vacated and the case remanded to the district court for resentencing.

VI. CONCLUSION

Based on the arguments presented above, Mr. Hudson asks the Court to grant his Petition for Writ of Certiorari in this case.

/s/Michael L. Scott
MICHAEL L. SCOTT
Assistant Federal Public Defender
Office of the Federal Public Defender
Southern District of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Attorney for Defendant-Petitioner