No. _____

In the

Supreme Court of the United States

_____

Tyrone Jemane Johnson,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

I. Whether a generic aggravated assault as defined in United States Sentencing Guidelines § 4B1.2 requires a *mens rea* greater than mere recklessness, and if so, whether such a diminished offense constitutes "the use, attempted use, or threatened use of physical force against the person of another?"

II. Whether construing 18 U.S.C. § 922(g) to reach every instance that a firearm has ever crossed state lines asserts a federal police power.

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

No other proceedings that are directly related to this one. The case came before the Fifth Circuit on direct review of Petitioner's federal conviction and sentence.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

PETITION FOR A WRIT OF CERTIORARI

Petitioner Tyrone Jemane Johnson seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Johnson*, 781 Fed. Appx. 370 (5th Cir. Oct. 22, 2019) (unpublished. It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on October 22, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Tenth Amendment, 18 U.S.C. § 922(g) and United States Sentencing Guidelines § 4B1.2(a). The Tenth Amendment states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

U.S. Const. amend X. 18 U.S.C. § 922(g) states:

> (g) It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> ***
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any

> firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g). USSG § 4B1.2(a) states:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

USSG § 4B1.2(a).

STATEMENT OF THE CASE

On February 7, 2017, the federal government indicted Mr. Johnson in a two-count indictment. Count I alleged that Mr. Johnson, having been convicted of a crime punishable for a term exceeding one year, possessed a firearm on or about October 20, 2015. Count II alleged that he possessed a firearm on or about August 6, 2016. Following extensive pretrial litigation, Mr. Johnson entered a plea of guilty to Count II subject to a pending motion to dismiss and reserved his right to challenge the constitutionality of the felon-in-possession law. The government dismissed the remaining count.

In his motion to dismiss, Mr. Johnson asserted that 18 U.S.C. § 922(g)'s reach to every firearm that has at any time traveled in interstate commerce implicates a constitutionally prohibited federal police power. The district court denied his motion.

Prior to sentencing, US Probation prepared a presentence report ("PSR") using the 2016 edition of the United States Sentencing Guidelines. ("USSG"). The PSR applied a six-level base offense adjustment under USSG § 2K2.1(a)(1), on the ground that Mr. Johnson's two previous convictions for Texas Aggravated Assault qualified as "crimes of violence" that have "as an element the use, attempted use, or threatened use of physical force against the person of another." Mr. Johnson disputed in his objections to the PSR that Texas Aggravated Assault constitutes a "crime of violence", either under the force or enumerated offense clauses of USSG §

4B1.2(a).[1] He showed the district court that the Fifth Circuit stands nearly alone in considering aggravated assaulted as defined at Texas Penal Code 22.02 as a crime of violence. Bound by its circuit's case law, the district court overruled Mr. Johnson's objection.

Mr. Johnson asserted these two issues on appeal. But both are foreclosed by Fifth Circuit case law. He now petitions this Honorable Court for a grant of *certiorari* so that it may consider these issues of pressing dimensions.

[1] USSG § 2K2.1 has a cross reference to USSG § 4B1.2(a).

REASONS FOR GRANTING THIS PETITION

I. Circuit courts have split on whether a generic aggravated assault requires a *mens rea* greater than mere recklessness, causing lack of uniformity in federal law and fundamental unfairness to defendants, and also, they have split on whether such minimal offenses constitute the requisite force under USSG § 4B1.2(a)'s force clause

Whether aggravated assault as defined in the Texas Penal Code 22.02(a) qualifies an individual for a "crime of violence" enhancement depends on a bit of bad luck. If the individual is sentenced in the Fifth Circuit, he or she will suffer the penalty of an enhancement. If the same individual appears in the Forth, Sixth, Eighth or Ninth circuits, then he or she will not. Increasingly, the Fifth Circuit stands alone in applying a crime of violence enhancement based on an offense that can be categorically defined with a *mens rea* requirement of mere recklessness.

This different treatment arises because circuits are split as to the requisite *mens rea* that USSG § 4B1.2(a) requires for a generic aggravated assault. The Fifth Circuit reasons that offenses with a *mens rea* requirement of mere ordinary recklessness fall within the generic definition, so long as the prohibited conduct is within the range of a generic aggravated assault. *See United States v. Guillen-Alvarez*, 489 F.3d 197, 199 (5th Cir. 2007). At least four circuits, however, have rejected this reasoning.

In *United States v. Schneider*, the Eighth Circuit declined the government's invitation to classify a North Dakota statute as a generic aggravated assault on account that the statute required that an individual acted willfully, but defined

willfully as "acting intentionally, knowingly, or *recklessly*." *See United States v. Schneider,* 905 F.3d 1088, 1092 (8th Cir. 2018)(emphasis added). In reaching that conclusion, the Eighth Circuit noted that it was siding with three other circuits that have found the Fifth Circuit's logic unpersuasive. *Id.* at 1095. The Fourth and Ninth Circuits have held that the generic definition of aggravated assault requires knowledge. *See United States v. Garcia-Jimenez*, 807 F.3d 1079, 1086 (9th Cir. 2015)(explaining that assault is a crime of general intent, and that general intent equates with knowledge); *see also, United States v. Barcenas-Yanez*, 826 F.3d 752, 756 (4th Cir. 2016). The Sixth Circuit has held that it at least requires a *mens rea* greater than recklessness. *See United States v. McFalls*, 592 F.3d 707, 716 (6th Cir. 2010).

When reviewing the precise statute at issue in this matter—Texas Penal Code 22.02(a)—the Fifth and Fourth Circuit have reached opposite conclusions. The Fifth Circuit has maintained that yes, it qualifies as a generic aggravated assault. *See United States v. Guillen-Alvarez*, 489 F.3d 197, 201 (5th Cir. 2007). The Fourth Circuit, considering that same statute, held that the "…inclusion of a mere reckless state of mind renders the statute broader than the generic offense," of aggravated assault. *See United States v. Barcenas-Yanez*, 826 F.3d at 756.

In a recent reaffirmation of its position, albeit in consideration of a different state's assault statute, the Fourth Circuit also made clear that a crime that falls to qualify under the enumerated clause also fails the force clause. *See United States v. Simmons*, 917 F.3d 312, 320-321 (4th Cir. 2019)("For largely the same reason that

North Carolina AWDWOGO fails to satisfy the definition of 'crime of violence' under the enumerated offenses clause, it also fails to satisfy the definition under the force clause."). Thus, in that circuit the government prevails neither under the enumerated offenses nor force clause of USSG § 4B1.2(a) when trying to seek an enhancement for an aggravated assault that lacks a *mens rea* requirement greater than recklessness.

The Fifth Circuit continues undeterred in its assessment that such reduced crimes constitute the appropriate amount force required by USSG § 4B1.2(a). In *United States v. Combs*, the Fifth Circuit recently held that a Texas conviction for aggravated assault, based on an underlying assault involving causing bodily injury to the victim, satisfied the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i). *See United States v. Combs*, 772 Fed.Appx. 108 (5th Cir. 2019).[2] It minimized that Texas courts and prosecuting agencies have allowed cases to go forward that consist of transmission of HIV and the computer transmission of convulsion-inducing strobe lights. *Id.* at 110. This behavior—reprehensible, no doubt—is a far cry from the "physical confrontation and struggle" typically associated with a term like "violent felony." *Stokeling v. United States*, 139 S. Ct. 544, 553 (2019)(This court's most recent pronouncement on different degrees of force).

This Court's commitment to Congress to ensure the uniformity of federal law and fundamental fairness compels review in this case as to whether the aggravated

[2] A petition for certiorari was filed and this case is pending review. *See Combs v. United States*, No. 19-5908.

assault as defined in the Texas Penal Code 22.02(a) qualifies as a generic crime of violence.

II. This Court should clarify whether 18 U.S.C. § 922(g) impermissibly asserts a federal police power.

The Supreme Court's decision in *Bond v. United States*, 572 U.S. 844 (2014) cautions against construing criminal statutes in a manner that effectively asserts a federal police power. Section 922(g) of Title 18 should therefore not be construed to reach every instance that a firearm has crossed state lines. Rather, the term "in and affecting commerce," 18 U.S.C. § 922(g), should be constructed to reach only those firearms that move in response to the defendant's conduct, or in the relatively recent past. Because the government's indictment makes no allegation satisfying these standards, it should have been dismissed.

Section 922(g) of Title 18 authorizes conviction when certain people possess a firearm "in or affecting commerce." 18 U.S.C. § 922(g). The Fifth Circuit has held that possession of a firearm that has at any time moved across state lines violates the statute. *See United States v. Fitzhugh*, 984 F.2d 143, 146 (5th Cir. 1993). Under this view of the statute, the government's alleged conduct represents a federal offense. But the Supreme Court's more recent opinion in *Bond v. United States*, 572 U.S. 844 (2014) suggests that this is not the proper reading.

Bond was convicted of violating 18 U.S.C. § 229, a statute that criminalized the knowing possession or use of "any chemical weapon." Bond, 134 S.Ct. at 2085-2086; 18 U.S.C. § 229(a). She placed toxic chemicals—an arsenic compound and potassium dichromate—on the doorknob of a romantic rival. *See id.* The Supreme

Court reversed her conviction, holding that any construction of the statute capable of reaching such conduct would compromise the chief role of states and localities in the suppression of crime. *See id*. at 2093. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id*. at 2090-2091.

Notably, §229 defined the critical term "chemical weapon" broadly as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." 18 U.S.C. §229F(8)(A). Further, it criminalized the use or possession of "any" such weapon, not of a named subset. 18 U.S.C. §229(a). The Court nonetheless applied a more limited construction of the statute, reasoning that statutes should not be read in a way that sweeps in purely local activity:

> The Government's reading of section 229 would "alter sensitive federal state relationships," convert an astonishing amount of "traditionally local criminal conduct" into "a matter for federal enforcement," and "involve a substantial extension of federal police resources." [*United States v.]Bass*, 202 U.S. [336] 349-350, 92 S.Ct. 515, 30 L. Ed. 2d 488 [(1971)]. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal antipoisoning regime that reaches the simplest of assaults. As the

> Government reads section 229, "hardly" a poisoning "in the land would fall outside the federal statute's domain." *Jones [v. United States]*, 529 U.S. [848,] 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 [(2000)]. Of course, Bond's conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack.

Bond, 134 S. Ct. 2091-2092.

As in *Bond*, it is possible to read §922(g) to reach the conduct alleged here: possession of a firearm that has moved across state lines at some point in the distant past. But to do so would intrude deeply on the traditional state responsibility for crime control. Such a reading would assert the federal government's power to criminalize virtually any conduct anywhere in the country, with little or no relationship to commerce, or to the interstate movement of commodities. Accordingly, nearly all instances of this criminal conduct would fall within the scope of federal criminal law enforcement, whether not they were readily prosecuted by the state. This would intrude deeply on the traditional state responsibility for crime control.

Mr. Johnson submits that criminal prohibitions on such possession amounts to a federal police power, forbidden by the constitution. See *United States v. Morrison*, 529 U.S. 598, 619-619 (2000).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 21st day of January, 2019.

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