No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Jason Mitchell Abbo — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For The Tenth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jason Mitchell Abbo
(Your Name)

Reg. No. 27299-064
Federal Correctional Institution
(Address) P.O. Box 9
Mendota, California 93640

(City, State, Zip Code)

N/A (Unknown by Me)
(Phone Number)

QUESTION(S) PRESENTED

#1. Does a Juvenile Conviction for "Possession" of a controlled substance qualify as a prior predicate conviction for an ACCA enhancement when 18 U.S.C. §924(e)(2)(C) only allows for application of a "violent felony" by a Juvenile?

#2. Was the Appeals Court in error, and in violation of Congresses intent as stated in 18 U.S.C. §924(e)(1) by failing to apply said felonies had to be committed on occasions different from one another and distinct in time, and not arising from one criminal episode?

#3. Is it a denial of a convicted Defendants Fifth Amendment Rights of Due Process and Equal Protection for a court to intentionally misapply and misconstrue the "actual number" of "qualifying" applicable convictions to wrongfully apply an enhanced ACCA sentence to said defendant?

#4. When neither Appellant's Pre-Sentence Report (PSR), nor the Sentencing Court identified which clause, (elements, force, or residual clause) was applicable to defendant and enhanced defendants sentence solely on the recommendation and adoption of the PSR by the sentencing Court for an ACCA enhanced sentence. Is the Tenth Circuit's application of it's holding in United States v. Driscoll, 892 F.3d 1127 and United States v. Washington, 890 F.3d 891 an illegal burden shifting rule relieving the government of it's burden to prove which "clause" the government advanced at sentencing of the prior predicate offense for the ACCA sentence?

*** NOTICE ***

This is a Pro Se filing and Appellant moves for this Honorable Court to construe the pleading liberally. Erickson v. Pardue 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007)

LIST OF PARTIES

[XX] 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:

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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

[X] For cases from **federal courts**:

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

[X] reported at 2020 U.S. App. LEXIS 146; No. 18-6081; 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 "B" to the petition and is

[X] reported at 2018 U.S.Dist. LEXIS 34397; 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 _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; 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 April 8, 2019.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 03, 2020, and a copy of the order denying rehearing appears at Appendix "C".

[ ] 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 _____. A copy of that decision appears at Appendix _____.

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

[ ] 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

#1. Violation of Appellant's Due Process and Equal Protection Rights under the Fifth Amendment to the Constitution of the United States of America.

#2. Violation and improper application of 18 U.S.C. §924(e)(1) and 18 U.S.C. §924(e)(2) in failing to properly apply Congresses intent as so stated by Congresses lanuage. To:Wit - "committed on occasions different from one another".

#3. Oklahoma State Statute 21 O.S. §1431 is to broad to qualify under an ACCA enhancement. Even though the Tenth Circuit ruled in 1997 that Oklahoma's First Degree Burglary, (i.e. 21 O.S. §1431) was a crime of violence under U.S.S.G. §4B1.2. Is not applicable to an enhanced sentence under the ACCA, and is more fully setforth in QUESTION #3, due to more recent rulings and holdings since 1997.

STATEMENT OF THE CASE

In 2012, a jury convicted Abbo on a charge of being a felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1). At sentencing Abbo did not object to the Presentence Investigation Report (PSR), which recommended sentencing under the ACCA, after identifying at least three predicate felony offenses. The PSR referenced the following convictions from Oklahoma state courts;

1. A 2002 conviction, as a Juvenile, for "Possession of a controlled dangerous substance with intent to distribute," Case No. JDL-02-1119; - Age 16
2. A 2004 conviciton, as an adult, for "Possession of a controlled dangerous substance with intent to distribute" and "Conspiracy for unlawful distribution of controlled dangerous substance." Case No: CF-2004-5069; - Age 18
3. A 2007 conviciton for "Domestic abuse by strangulation" and "Burglary, first degree." Case No. CF-2007-189; Age 20, and;
4. A 2008 conviction for "Buglary, first degree" and "Domestic assault and battery." Case No. CR-2007-3486. Age 21

The District Court adopted the PSR and sentenced Abbo to 180 months imprisonment under the Armed Career Criminal Act (ACCA). Abbo, appealed, on non-ACCA grounds and in 2013 the Tenth Circuit Court of Appeals affirmed. **United States v. Abbo, 515 F. App'x 764 (10th Cir. 2013).**

On June 25, 2016 Abbo filed a Motion pursuant to 28 U.S.C. §2255 seeking to vacate his ACCA sentence based on the Supreme Courts decision in **Johnson v. United States, 135 S.Ct. 2551** (2015). On March 02, 2018 the District Court denied Mr. Abbo's §2255 Motion and also denied to issue a COA.

Whereupon appointed counsel filed a COA directly to the Tenth Circuit Court of Appeals. On April 8, 2019 the Tenth Circuit Court of Appeals in Case No. 18-6081 denied Abbo's Certificate of Appealability.

On September 5th, 2019 Abbo filed a Pro Se MOTION FOR RECONSIDERATION. The Tenth Circuit Court of Appeals construed Abbo's Motion For Reconsideration as a, "Request for Panel Rehearing" and GRANTED in part and only to the extent that the ORDER Denying Certificate of Appealability issued on April 8, 2019 is VACATED, and entered a revised ORDER Denying Certificate of Appealability in its place, on January 3, 2020.

In addition to make the Justices of this Court aware of the manipulation of the facts by the Tenth Circuit Court of Appeals in order to justify their erroneous assertions in the number of "actual" qualifying convictions Appellant has under State law for an enhanced ACCA sentence.

Under applicable law, Appellant has only two (2) prior qualifying convictions and not three as required to be enhanced with an ACCA sentence.

Out of the Four listed "convictions" by Appellant, (#1. 2002 Juvenile conviction for Drug Possession; #2. 2004 Adult conviction for Drug Possession; #3. 2007 conviction for Domestic Abuse by Strangulation and First Degree Burglary; #4. 2008 conviction for Domestic Assault and Battery and First Degree Burglary).

Only the 2004 conviction for Drug Possession on Case No: JDL-02-1119, and the 2007 Conviction for Domestic Abuse by Strangulation are the ONLY two (2) applicable felonies toward an ACCA enhanced sentence.

Appellant proved in the filing accepted by the Tenth Circuit Court of Appeals for Rehearing that the 2008 charge for First Degree Burglary had been dismissed by the State. There was no 2008 conviction for First Degree Burglary. Nor was the 2008 Domestic Assault and Battery in Case No: CR-2007-3486 applicable because the maximum sentence was up to one (1) year or less. In addition to the Fact the Domestic Assault and Battery Charge for Case No: CR-2007-3486, was a charge under 21 O.S. 644.C, which statute DOES NOT charge an element of "intent" and therefore fails to be a prior predicate conviction that can be used for an ACCA enhancement. For a conviction to be applicable as an ACCA prior predicate the "offense" requires the element of "intent" to validate that the action was not accidential or recklessness in nature, but committed with intent. Intent is not required to be in violation of 21 O.S. 644.C.

This Court should GRANT Certiorari and decide the Circuits Split in the issues presented herein on the side of Lenity. For this your Appellant shall ever pray.

REASONS FOR GRANTING THE PETITION

It shall be clearly pointed out in questions #1, #3, and #4 that the holdings and Rulings by the Tenth Circuit Court of Appeals is a Circuit Split from the holding's and Rulings of the Fourth Circuit Court of Appeals.

THEREFORE, this Honorable Court should address these issues and RESOLVE the Circuit Split to the Applicable Constitutional resolve most favorable under the Rule of Lenity to the Defendant/Petitioner.

QUESTION #1

Does a Juvenile Conviction for "Possession" of a Controlled Substance qualify as a prior predicate conviction for an ACCA enhancement when 18 USC §924(e)(2)(C) only allows for application of a "violent felony" by a Juvenile?

It is the position of the Tenth Circuit that a prior State Juvenile conviction for Possession of a controlled substance does qualify under 18 USC §924(e)(2)(ii) as a prior predicate toward's the three (3) previous convictions required to enhance a defendant's sentence as an ACCA offender.

This position by the Tenth Circuit, that a Juvenile conviction for drug possession can be used for an ACCA enhancement is contrary and in opposition to the holdings in the Fourth Circuit which held in the case of; "**Reese v. United States, 2017 U.S. Dist. LEXIS 109426** (4th Cir.)(By NEGATIVE IMPLICATION an act of Juvenile deliquency involving a Serious Drug Offense arguabley does not constitute a "Violent Felony Conviction" for purposes of the ACCA).

Appellant states the Tenth Circuits position that Juvenile drug possession is an ACCA predicate must fail under the principle of this courts holding in; "**Carachuri-Rosendo v. Holder**, 560 U.S. 563, 130 S.Ct. 2577, 177 L.Ed.2d 68 (2010)(What matters is the potential Maximum sentence to which a defendant is exposed, not the highest possible sentence.)

Being convicted of drug possession as a Juvenile would negate any maximum term of imprisonment of ten (10) years (as required pursuant to 18 USC §924(e)(2)(A)(ii)) to a sentence no greater than the defendant's eighteenth birthdate. Which in Appeallants case would only be two (2) years since Appellant was sixteen (16) when he was convicted as a Juvenile for drug possession.

Since Congress only saw fit to make any "violent felony" by a juvenile a prior "conviction" with positive legislation at 18 USC §924(e)(2)(C) for an ACCA enhanced

sentence and did not proscribe for Juvenile Drug Possession as a prior predicate for ACCA purposes.

QUESTION #2

Was the Appeals Court in error, and in violation of Congresses intent as stated in 18 U.S.C. §924(e)(1) by failing to apply said felonies had to be committed on occasions different from one another and distinct in time, and not arising from one criminal episode?

It is Appellants contention that the Tenth Circuit Court of Appeals failed to abide by and apply Congresses direct intent that offenses be distinct in time and committed on occassions different from one another.

A review of Page Two (2) of APPENDIX "A", (April 8, 2019 ORDER DENYING CERTIFICATE OF APPEALABILITY) of Appellants PSR of prior convictions at #2 states;

> 2. a 2004 conviction, as an adult, for "Possession of a controlled dangerous ssubstance with intent to distribute" and "Conspiracy for unlawful distribution of controlled dangerous substance." Case No: CF-2004-5069.

Then a review of Page Four (4) of APPENDIX "C", (January 03, 2020 ORDER DENYING CERTIFICATE OF APPEALABILITY) of Appellants PSR of prior convictions at #2, the Tenth Circuit Court of Appeals "increased" the amount of "convictions" for the 2004 from ONE to TWO. As the January 3rd, 2020 ORDER states at #2;

> 2. Two 2004 convictions, as an adult, first, for "Possession of a controlled dangerous substance with intent to distribute," and, second, for "Conspiracy for unlawful distribution of controlled dangerous substance." Case No: CF-2004-5069;

The Tenth Circuit Court of Appeals is in Double Error for applying the 2004 conviction as Two (2) prior predicate convictions for ACCA enhancement instead of One.

FIRST - 18 U.S.C. §924(e)(2)(A)(ii) states verbatim:

> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 801), for which a maximum term of imprisonment of ten years of more is proscribed by law.

this statute of the United States Code does not consider "Conspiracy" as an applicable "conviction" for purposes of 18 U.S.C. §924(e)(2)(A)(ii) because "Drug Conspiracy" is not listed in 21 U.S.C. 801, as a "Controlled Substance" and therefore could not be attributed as a "conviction" under the Controlled Substance Act.

SECOND - Pursuant to Congresses intent as stated in 18 U.S.C. §924(e)(1), a violent felony or a serious drug offense, or both, committed on occasions different from one another, has to be offenses distinct in time.

The actual, "possession of a controlled dangerous substance with intent to distribute" and "conspiracy for unlawful distribution of controlled dangerous substance." Are not drug offenses committed on occasions different from one another. Both are ensic at the same time and both are on going at the same time. So they are not "offenses committed on different occasions, and therefore constitute just one Drug conviction and not two as so stated by the Tenth Circuit Court of Appeals.

The same principle applies to Appellant's 2007 conviction on Case No: CF-2007-189.

A review of Oklahoma City Police Department police report, (which was the bases for the charges in Case No: CF-2007-189). Clearly show and prove the First Degree Burglary and Domestic Abuse by Strangulation occurred during one criminal episode. (See Appendix "D") As the Burglary charge asertained from the Appellant kicking open the front door to gain entrance to confront his girlfriend, whom he then strangled during his rage of passion.

A plain reading of the statutory language of 18 U.S.C. §924(e)(1); "occasions different from one another," supports the conclusion that Congress intended the three (3) prior predicate offenses to be distinct in time. **United States v. Tisdate, 921 F.2d 1095 (1990)(10th Cir.).**

In Appellants situation, The First Degree Burglary and Domestic Abuse Stangulation arose out of the "same" criminal episode and was not committed on occasions different from one another. In, **United States v. Leeson, 453 F.3d 631** (4th Cir.) held; "The fact that one crime happened inside the store and the second crime happened outside the store as the perpetrator left the store was on the premises of the food store and in Fourth Amendment parlance was within its curtilege and one criminal episode not committed on seperate occasions.

The very same principle is applicable to Appellant Abbo, The Domestic Abuse and First Degree Burglary happened during the same criminal episode and on the same curtilege, and therefore should be assessed as One (1) applicable conviction under 18 U.S.C. §924(e)(1) for not being committed on occasions different from one another.

This "issue" clearly shows a Split between the Tenth Circuit and the Fourth Circuit. Pursuant to the argument that neither incident was distinct in time nor

committed on occasions different from one another. The Fourth Circuits holding that two crimes committe during a criminal episode on the same curtilege was one (1) applicable conviction and not two (2) under 18 U.S.C. §924(e)(1) is the more applicable application of Congresses intent of, "committed on occasions different from one another".

Appellant is of the belief the reading and holding in, **United States v. Leeson, 453 F.3d 631** out of the Fourth Circuit is the proper and correct application of 18 U.S.C. §924(e)(1).

QUESTION #3

Is it a denial of a convicted Defendants Fifth Amendment Rights of Due Process and Equal Protection for a court to intentionally misapply and misconstrue the "actual number" of "qualifying" convictions to wrongfully apply an enhanced ACCA sentence to said defendant?

In **United States v. Bennett, 108 F.3d 1315, 1317** the Tenth Circuit Court of Appeals in 1997 held that Oklahoma's first degree burglary is a crime of violence under U.S.S.G. §4B1.2 (requiring that the burglary be of a dwelling). This court in **United States v. Stitt, 139 S.Ct. 399, 403-04** (2018) held: (Generic Burglary "includes burglary of a structure or vehicle that has adapted or is customarily used for overnight accommodations.)

Both the District Court and the Tenth Circuit Court of Appeals were in "Error" in counting and applying Appellants 2007 First Degree Burglary in violation of 21 O.S. §1431 as a predicate conviction for an ACCA enhanced sentence.

Clearly set forth on Page Seven (7) of the Appeals Court ORDER of January 03, 2020, (APPENDIX "C") states Appellant Abbo was convicted of First Degree Burglary in violation of 21 O.S. §1431, which in 2007 read as follows;

> "Every person who breaks into and enters the dwelling house of another, in WHICH THERE IS AT THE TIME SOME HUMAN BEING, with intent to commit some crime therein, either:..."

Oklahoma's First Degree Burglary Statute, 21 O.S. §1431 is ONLY applicable for First Degree Burglary if at the time the perpetrator enters the dwelling house of another there is AT THAT TIME another Human present in the dwelling. This element of "requiring" that a Human Person be present at the time the perpetrator enters the dwelling makes 21 O.S. §1431 "Broader" than "Generic Burglary" and therefore

is a"Mismatch" of the elements.

This court has clearly held that if the elements of the charging statute are "broader" than the generic elements then said conviction cannot qualify as a prior predicate offense for ACCA enhancement purposes. Pursuant to this courts holding in; **Mathis v. United States**, 195 L.Ed.2d 604 (2016), stating; (if the charging statute elements are broader than those of the Generic Crime then the ACCA enhancement is not applicable.) See, e.g. **Taylor**, 495 U.S. at 602, 110 S.Ct. 1707, 143 L.Ed.2d 985 - makes no difference; even if his conduct fits within the Generic Offense, the Mismatch of elements saves the defendant from an ACCA sentence. **Richardson v. United States**, 526 U.S. 813, 817. The requirement within 21 O.S. §1431 that a Human Being must be in the dwelling at the time of the breaking and entering makes §1431 broader than Generic Burglary and causes a mismatch of the element.

QUESTION #4

When neither Appellant's Pre-Sentence Report (PSR), nor the Sentencing Court identiied which clause, (elements, force, or residual clause) was applicable to defendant and enhanced defendants sentence solely on the recommendation and sdoption of the PSR by the sentencing Court for an ACCA enhanced sentence. Is the Tenth Circuit's application of it's holdings in **United States v. Driscoll**, 892 F.3d 1127 and **United States v. Washington**, 890 F.3d 891 an illegal burden shifting rule relieving the government of it's burden to prove which "clause" the government advanced at sentencing of the prior predicate offense for the ACCA sentence?

The Tenth Circuit Court of Appeals in two (2) of it's cases; **United States v. Driscoll**, 892 F.3d 1127 and **United States v. Washington**, 890 F.3d 891, held;

> "Defendant/[Petitioner] did not establish by a preponderance of the evidence that the sentencing court used the stricken residual clause in 18 U.S.C. §924(e)(2)(B) to qualify his conviction..."

Appellant believes this is clearly an illegal burden-shifting ruling which places the burden on the defendant to show the court sentenced the defendant under the "residual clause". Instead of requiring the government to prove that defendant was NOT sentenced under the "residual clause". When the sentencing court based defendant's ACCA enhanced sentence solely upon the recommendation contained in defendants PSR, without any factual determination by the court of those convictions and/or application under anyother clause besides the residual clause.

Prior to the 2015 decision by this court on the residual clause being unconstitut-

ional per Johnson. The Residual Clause was a "catch-all" by default for the sentencing courts in applying an ACCA enhancement for prior convictions. The courts were well aware that any prior convictions were within the parameter of the Residual Clause prior to the Johnson decision that said Residual Clause was unconstitutional.

The Fourth Circuit Court of Appeals in the Case of; "United States v. Winston, 850 F.3d 677 (2017)", DOES NOT AGREE with the Tenth Circuit Court of Appeals on shifting the Burden to the defendant/petitioner, and to do so, is "selective application" as stated therein - which states;

> "Although the record does not establish that the Residual Clause served as the bases for concluding that Winston's prior convictions for rape and robbery qualified as violent felonies, '[n]othing in the law requires a [court] to specify which clause...it relied upon in imposing a sentence.' In re Chance, 831 F.3d 1335, 1340 (11th Cir. 2016). We will NOT penalize a movant for a court's discrtionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony. Thus, imposing the burden on movants urged by the government in the present case would result in 'selective application' of the new rule of constitutional law announced in Johnson II, violating 'the principle of treating similarly situated defendants the same' Id at 1341 (quoting Teague, 489 U.S. at 304). We therefore hold that when an inmate's sentence may have been predicated on application of the now-void residual clause and, therefore, may be an unlawful sentence under the holding in Johnson II, the inmate has shown that he 'relies on' a new rule of Constitutional law within the meaning of 28 U.S.C. §2244(b)(2)(A). This is true regardless of any non-essential conclusions a court may or may not have articulated on the record in determining the defendant's sentence. Chance, 831 F.3d at 1340.

Unlike the Tenth Circuits holdings in, Driscoll and Washington where the movant/petitioner did not establish by a preponderance of the evidence that the sentencing court used the stricken residual clause of 18 U.S.C. §924(e)(2)(B) to qualify his conviction. The Fourth Circuit Court of Appeals is of the opinion that putting the burden on the movant/petitioner is "penalizing" the movant/defendant which amounts to "selective application" of a NEW RULE of Constitutional law violating the principle of treating similarly situated defendantw the same.

This is CLEARLY a CIRCUIT SPLIT, in which under the Rule of Lenity the holding of the Fourth Circuit Court of Appeals should be AFFIRMED by this Court to ALL Federal Circuit Court of Appeals in the United States!!! (Emphasis Added). It would be a "Fair" and equal playing field then and not discrimination due to an Appeals Court whim to an illegal burden-shifting rule.

CONCLUSION

Due to one or more of the questions raised herein this Honorable Court should preserve legal harmony between the Circuit Courts due to the Circuit Split to afford the same relief on said issues to ALL Petitioners in ALL the Circuits.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Juan M. Abbo

Date: March 27, 2020