

Supreme Court, U.S.
FILED

MAY 15 2018

OFFICE OF THE CLERK

19-8884

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
JUNE TERM 2019

SAMUEL GRAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Samuel Gray
Reg. No. 50346-019
U.S.P. Atlanta
P.O. Box 150160
Atlanta, GA 30315.

ORIGINAL

QUESTION(S) PRESENTED

- I.** THERE IS A LACK OF CLARITY AND UNANIMITY AMONG LOWER COURTS OF WHETHER A PRIOR GEORGIA ROBBERY CONVICTION CONSTITUTES A "CRIME OF VIOLENCE" FOR ENHANCEMENT PURPOSES
- II.** THE ISSUES RAISED ARE IMPORTANT AND WORTHY OF THIS COURT'S ATTENTION BECAUSE OTHER SIMILARLY SITUATED DEFENDANT'S AROUND THE COUNTRY HAVE BEEN ENHANCED UNDER 18 U.S.C. §3559(c) AFTER THE GOVERNMENT EXPLOITED STATEMENTS OF "NON-ELEMENTAL FACTS" IN THE RECORD OF A PRIOR CONVICTION TO INCREASE MAXIMUM STATUTORY PENALTY UNDER 18 U.S.C. §3559(c)(2)(F), WHEN THE ELEMENT OF THE PRIOR OFFENSE ARE NOT A MATCH WITH THE GENERIC OFFENSE

LIST OF ALL PARTIES

All parties appear in the caption of the case on page.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
JUNE TERM 2019

SAMUEL GRAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

The Defendant Samuel Gray, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is attached hereto as Appendix A.

The judgment of the United States District Court for the Northern District of Georgia is attached hereto as Appendix B.

The reconsideration of the Court of Appeals for the Eleventh Circuit is attached hereto as Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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JURISDICTION

In November, 1999, Defendant Samuel Gray was found guilty after a jury trial for a Hobbs Act violation after having previously sustained two crimes of violence in violation of 18 U.S.C. §§1951 and 3559(c). On February 25, 2000, Mr. Gray was sentenced to life imprisonment after the district court utilized a 1989 State of Georgia prior robbery conviction under O.C.G.A. §16-8-40 as a predicate violent offense for 18 U.S.C. §3559(c), when said statute states that a weapon must be present to trigger the enhancement. However, Mr. Gray pled guilty to a lesser included offense of simple robbery without the use of a weapon.

In 2015, relying upon Johnson 2015, Defendant filed a motion for permission to file a second or successive §2255 in the United States Court of appeals for the Eleventh Circuit, and the Court granted Defendant's petition, remanding the case back to the United States District Court for the Northern District of Georgia. The district court denied the Defendant's motion, and the Eleventh Circuit affirmed the district's denial of the Defendant's motion in an unpublished opinion.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1951 Provides in pertinent part:

- (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
- (b) As used in this section -
 - (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining,
 - (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
 - (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof, all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. §3559 Provides in pertinent part:

- (1) Mandatory life imprisonment. Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if --
 - (A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of --
 - (i) 2 or more serious violent felonies; or
 - (ii) one or more serious violent felonies and one

or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

(2) Definitions. For purposes of this subsection --

(A) the term "assault with intent to commit rape" means an offense that has as its elements engaging in physical contact with another person or using or brandishing a weapon against another person with intent to commit aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 [18 U.S.C.S. §§2241 and 2242]);

(B) The term "arson" means an offense that has as its elements maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive;

(C) the term "extortion" means an offense that has as its elements the extraction of anything of value from another person by threatening or placing that person in fear of injury to any person or kidnapping of any person;

(D) The term "firearms use" means an offense that has as its elements those described in section 924(c) or 929(a) [18 U.S.C.S. §§924(c) or 929(a)], if the firearm was brandished, discharged, or otherwise used as a weapon and the crime of violence or drug trafficking crime during and relation to which the firearm was used was subject to prosecution in a court of the United States or a court of a State, or both;

(E) the term "kidnapping" means an offense that has as its elements the abduction, restraining, confining, or carrying away of another person by force or threat of force;

(F) the term "serious violent felony" means --

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111 [18 U.S.C.S. §1111]); manslaughter other than involuntary manslaughter (as described in section 1112 [18 U.S.C.S. §1112]); assault with intent to commit murder (as described in section 113(a) [18 U.S.C.S. §113(a)]); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242 [18 U.S.C.S. §§2241 and 2242]); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)); [18 U.S.C.S. §2244(a)(1) and (a)(2)]; kidnapping; aircraft piracy (as described in section

46502 of Title 49); robbery (as described in section 2111, 2113, or 2118 [18 U.S.C.S. §§2111, 2113, or 2118]); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c) [18 U.S.C.S. §924(c)]); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense;

(G) the term "State" means a State of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States; and

(H) the term "serious drug offense" means --

(i) an offense that is punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C.S. §§841(b)(1)(A), 848 or section 1010(b)(1)(A) of the Controlled Substance Import and Export Act (21 U.S.C.S. §960(b)(1)(A)); or

(ii) an offense under State law that, had the offense been prosecuted in a court of the United States, would have been punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C.S. §§841(b)(1)(A), 848 or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C.S. §960(b)(1)(A)).

(3) Nonqualifying felonies.

(A) Robbery in certain cases. Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that --

(i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and

(ii) the offense did not result in death or serious bodily injury (as defined in section 1365 [18 U.S.C.S. §1365]) to any person.

STATEMENT OF THE CASE

Following a jury trial, Defendant Samuel Gray was convicted for violating 18 U.S.C. §1951, and his sentence was enhanced pursuant to 18 U.S.C. §3559(c). Gray's Judgment

The Defendant was sentenced to life imprisonment, to be followed by 5 years of supervised release, after the district court utilized a prior Georgia State Robbery conviction (O.C.G.A. 16-8-40). Doc. 136. The Court of Appeals for the Eleventh Circuit affirmed Mr. Gray's conviction and sentence. See United States v. Gray, 260 F.3d 1267 (11th Cir 2001). The Court denied Defendant's petition for writ of certiorari. See Gray v. United States, 536 U.S. 963, 153 L.Ed. 2d 845 (2002). In June 2016, Defendant filed a 28 U.S.C. §2255 petition, which the lower court denied. See Gray v. United States, 1:99-CR-386-RWS-ECS The Defendant petitioned to file a second or successive 28 U.S.C. §2255. The Eleventh Circuit granted Defendant's petition to file a second or successive 28 U.S.C. §2255. The district court denied Defendant's motion. See Gray v. United States, 1:16-CV-3446-RWS (6/27/2017).

1. Defendant was involved in a robbery of a Church's Fried Chicken restaurant in Atlanta, Georgia. See Gov't C.A. Br. (summarizing trial evidence). The defendant entered the restaurant with a .38 caliber handgun and demanded that the employee open the cash register. Id. The store manager told her employees to retreat to the kitchen and leave the restaurant, at which point Defendant jumped over the counter and pulled the cash drawer open. Id. The Defendant grabbed the money and ran out the restaurant. Id. The defendant was arrested shortly thereafter. Id.

On July 27, 1999, a federal grand jury indicted Gray on two charges related to the robbery. Count I of the indictment charged Gray with a violation of the Hobbs Act, 18 U.S.C. §1951, and alleged that he unlawfully obstructed, delayed, and affected interstate commerce by taking from the restaurant approximately \$300 and the money drawer. Count II charged Gray with knowingly "using and carrying a firearm" during and in relation to the robbery, in violation of 18 U.S.C. §924(c).

Before trial, the Government served a sentencing information setting forth Gray's prior convictions -- a 1990 conviction on two counts of robbery and a 1979 conviction for rape -- and indicated its intent to seek a mandatory life sentence under 18 U.S.C. §3559(c)(1), the so-called "three strikes" statute. The case was tried to a jury on November 8-10, 1999. At the close of the Government's case, and again at the close of the evidence, Gray moved unsuccessfully for entry of a judgment of acquittal. The jury convicted Gray on all counts.

The PSI concluded that Gray was subject to a mandatory life sentence under §3559(c)(1) by virtue of his conviction on Count I. The PSI noted Gray's two prior convictions, and also noted that Gray had used a dangerous weapon (a screwdriver) as an offensive weapon in the robberies giving rise to his 1990 conviction. The PSI concluded as well that Gray was subject to a consecutive seven-year sentence on Count II because he had brandished a firearm during the robbery, see 18 U.S.C. §924(c)(1)(A)(ii), and additionally that Gray was liable for restitution.

Gray raised multiple objections to the PSI. Among other

things, Gray asserted that §3559(c)(1) is unconstitutional to the extent it puts the burden on the defendant to prove by clear and convincing evidence that a prior robbery conviction should not count as a "strike" because no dangerous weapon was used. See 18 U.S.C. §3559(c)(3)(A). Gray also asserted that he was subject to only a five-year sentence on Count II because the indictment did not allege expressly, and Government did not prove to the jury, that he brandished a firearm during the robbery giving rise to this case. The district court rejected these arguments.

The district court adopted the PSR's finding that Defendant was subject to a mandatory life sentence under §3559(c)(1) by virtue of his conviction on Count I. Over Defendant's objections to the fact that he pled guilty to a lesser included offense ("simple robbery") and the fact that no dangerous weapon was used, the Court relying on the PSR found that Defendant's prior 1990 Georgia State Robbery conviction under O.C.G.A. 16-8-40 ("a lesser included offense of -- simple robbery, two Counts") triggered the "Three Strike enhancement." The court sentenced Defendant to life imprisonment on Count I and seven years consecutive for Count II, to be followed by five years of supervised release.

In Petitioner's §2255 petition, he asserted that he was improperly sentenced under the Federal Three Strikes provision, based on a prior Georgia robbery conviction, which under the elements of robbery under State law, includes robbery by force or robbery by intimidation or robbery by sudden snatching, the alternate means of committing robbery depending on how the robbery was perpetrated where broader than the elements of generic robbery, which only

included the taking or attempting to take from the person or presence of another , anything of value... by force and violence, or by intimidation, and thus the defendant's robbery convictions were not predicate crimes under the Federal Three Strikes Statute under 18 U.S.C. §3559(c).

The district court failed to recognize the mismatch of elements connecting petitioner's prior convictions with those of the generic offenses in 18 U.S.C. §3559(c)(2)(F)(i) leading to the court wrongly determining petitioner's priors still constitute qualifying predicate convictions sustaining his mandatory life sentence enhancement, violating Due Process of Law.

Three Strike is triggered when a defendant is convicted of a serious violent felony, after having twice been convicted of serious violent felonies. Section 3559(c) includes:

- (i) a federal or state offense, by whatever designation and wherever committed, consisting of aggravated sexual abuse and sexual abuse (as described in 2241 and 2242);... robbery (as described in section 2111, 2113, or 2118) or attempt, conspiracy, or solicitation to commit any of the above offenses; and
- (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense...

The United States District Court's contention that subsection (i) of 18 U.S.C. §3559(c) is the linchpin tying petitioner's prior conviction as predicated offenses serving as Three Strike triggers is wrong. Congress, in listing crimes affecting §3559(c) referred to only the usual or generic version and not all variants of the

offense. That means as to robbery that Congress means a crime containing the following elements: (i) robbery as described in (2111, 2113, or 2118)... or attempt, conspiracy, or solicitation to commit any of the above offenses; and (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another, or that by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense... To determine whether a prior conviction is generic for the purpose of 18 U.S.C. §3559(c)(Three Strikes), courts apply what has come to be known as the categorical approach focusing solely on whether the elements of the crime of conviction sufficiently match the elements of the generic offense while ignoring the particular facts of the case. The distinction between element and facts is crucial to the application of prior convictions to §3559. Elements, are the constituent parts of a crime's legal definition (the things a prosecutor must prove to sustain a conviction, what a jury must find beyond a reasonable doubt to convict on; or what a defendant necessarily admits when he pleads guilty. Facts, by contrast, are mere real-world things extraneous to the crime's legal requirements. They have no legal effect or consequence: in particular, they need neither be found by a jury nor admitted by a defendant. And §3559 cares not a whit about them. A crime counts for enhancement purposes under 18 U.S.C. §3559(c)(Three Strikes) if its elements are the same as, or narrower than, those of the generic offense. If the crime of conviction cover any more conduct than the generic

offense, then it is not a Three Strikes Robbery even if the defendant's actual conduct (i.e. the facts of the crime) fits within the generic offense's boundaries.

The Court, in its order, finds Petitioner's argument, that his conviction under State of Georgia statute O.C.G.A. §16-8-40, unconvincing that the elements of his statute of conviction does not rise to the level of triggering §3559(c) Three Strikes Enhancement. A closer examination of Petitioner's state conviction taken from the Superior Court of Fulton County, the Final Disposition of Judge Luther Alverson, and the Elements of Petitioner's statute of conviction, taken from the Official Code of Georgia Annotated, that state what the state must prove beyond a reasonable doubt to convict an accused under O.C.G.A. §16-8-40. On the 9th day of March 1990, Petitioner appeared before Judge Luther Alverson after having presented evidence and negotiating a plea to the lowest possible offense and pleading to the offense of Simple Robbery, two counts, (as acknowledged by the Eleventh Circuit in Petitioner's direct appeal). An examination of Official Code of Georgia, Title 16 Chapter 8 Article 2, reveals the most serious form of robbery falls under O.C.G.A. §16-8-41 Armed Robbery and does not apply to Petitioner, though Petitioner was charged initially with Armed Robbery. The less serious forms of robbery are under O.C.G.A. §16-8-40 and is the statute affecting Petitioner's conviction and sentence.

The Official Code of Georgia §16-8-40's statutory language is as follows:

Robbery by Force:

(a) A person commits the offense of robbery when

with the intent to commit theft, he takes property of another from the person or the immediate presence of another: (1) By use of force;

Robbery by Intimidation

(a) A person commits the offense of robbery when, with the intent to commit theft, he takes property of another from the person or the immediate presence of another: (2) by intimidation, by use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another;

Robbery by Sudden Snatching

(a) A person commits the offense of robbery when, with the intent to commit theft, he takes property of another from the person or the immediate presence of another; (3) by Sudden Snatching.

The essential elements of the offense the state must prove beyond a reasonable doubt are that the taking must have been done:

- a. with the purpose to commit theft,
- b. against the will of the person robbed, and
- c. by force, by intimidation, by the use of threat or coercion, by placing such person or another in fear of immediate serious bodily injury to himself/herself or another,

2.31.20 Force: Defined

Force means personal violence or that degree of force necessary to remove articles from the person or from the clothing of the person so as to create resistance, however slight.

Walker v. State, 225 Ga. 734(2)(1979)

Where property taken was in another room more than 15 feet from victim at time of taking
Welch v. State, 235 Ga. 243,245, 219 S.E. 2d 151 (1975)

Theft of purse 30 feet away from victim "was not too far afield to be outside [the victim's] immediate presence"

Meyers v. State, 249 Ga. 248, 547 S.E. 2d 781 (Ga. App. 2001)

The U.S. Supreme Court has approved the modified categorical approach for use with statutes having multiple alternative elements. Under that approach, a sentencing court looks at a limited class

of documents (for example, the indictment, jury instructions, plea agreement, plea colloquy, or the document most important to this case, the final disposition), to determine what crime, with what elements, a defendant was convicted of. The court can then compare that crime, as the categorical approach commands, with the relevant generic offense. The district court, relying on the law of the case doctrine, wrongly denied Petitioner's motion because the Eleventh Circuit, in Petitioner's previous 28 U.S.C. §2241 appeal, stated Petitioner's prior convictions still constituted "serious violent felonies" under §3559. Specifically, the Court held that Petitioner robbery conviction qualified as a "serious violent felony" under §3559(c)'s enumerated offense clause of subsection (i)... the Court explained that §3559(c)'s enumerated offense clause of subsection (i) provides that a "serious violent felony" includes "robbery as described in sections §2111, 2113, or 2118." The Court went on to quote 18 U.S.C. §2111, which provides that robbery is the "taking or attempting to take from the person of another anything of value... by force and violence, or by intimidation. In the end, in upholding Petitioner's §3559(c) life sentence, the Eleventh Circuit held that, even if Descamps applied, Petitioner's prior convictions qualified as "serious violent felonies" under subsection (i) and did not rely on subsection (ii) at all.

The district court, relying on the law of the case doctrine, wrongly denied Petitioner's motion because the Eleventh Circuit, in Petitioner's previous §2241 appeal, stated Petitioner's prior convictions still constituted "serious violent felonies" under

§3559. Specifically, the Court held that Petitioner's robbery conviction qualified as a "serious violent felony" under §3559(c)'s enumerated offense clause of subsection (i), that robbery, the court explained, §3559(c)'s enumerated offense clause of subsection (i) provides that a "serious violent felony" includes "robbery" as described in sections 2111, 2113, or 2118." The Court went on to quote 18 U.S.C. §2111, which provides that robbery is the "taking or attempting to take from the person of another anything of value... by force and violence, or by intimidation. In the end, in upholding Petitioner's §3559(c) life sentence, the Eleventh Circuit held that, even if Descamps applied, Petitioner's prior conviction qualified as "serious violent felonies" under subsection (i), and did not rely on subsection (ii) at all.

What the district court nor the Eleventh Circuit realized is that had Descamps been available through retroactivity, as is the case with Petitioner's Johnson claim now presented, Petitioner could have easily proved his prior robbery could in no way qualified as a 18 U.S.C. §3559(c) predicate. The Final Disposition to Petitioner's March 1990 conviction clearly shows Petitioner was convicted of the least of Georgia's robbery statutes (Simple Robbery) and a look at the Official Code of Georgia reveals that O.C.G.A. §16-8-40 has no offensive weapon requirement and can be perpetrated multiple ways and the requisite force for O.C.G.A. §16-8-40 under (2.31.20 Force: Defined) Force means personal violence or that degree of force necessary to remove articles from the person or from the clothing of the person so as to create resistance, however slight. Georgia's simple robbery requires no offense weapon, can be committed

in more than one way and with the slightest amount of force or resistance. Not a §3559(c) predicate. Title 18 U.S.C. §3559(c) requires predicates of serious violence and §3559(c) robberies require use of an offensive weapon. (gun or other dangerous weapon) 18 U.S.C. §3559(c)(3)(A) Nonqualifying felonies — Robberies in certain cases — Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that — (i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense... Not only did Petitioner dispute and convince the state court that no firearm or other dangerous weapon was involved but his conviction reflects no use of a firearm or other dangerous weapon.

This Court has repeatedly made clear that sentencing enhancements can only exceed the statutory maximum sentence by way of qualifying prior convictions and that only the prior's statutes and the elements of those statutes may be used to trigger enhancements. If the elements of Petitioner's prior convictions are not a match with §3559(c)'s generic offense, also if Petitioner's prior convictions cover any more conduct than §3559(c)'s generic offense, they can never qualify as predicate triggering offenses. This can easily be resolved by Supreme Court precedents, which have repeatedly held, and in no uncertain terms, that a state crime cannot qualify as a predicate if its elements are broader than those of a listed generic offense. See Taylor, 495 U.S. 575 @ 602. "The underlying brute

facts or means by which the defendant commits his crime, Richardson v. U.S., 526 U.S. 813, make no difference; even if the defendant's conduct, in fact, fits within the definition of the generic offense, the mismatch of elements saves him from a §3559(c) life sentence." Supreme Court precedent requires a sentencing judge to look only to "the elements of the offense, not to the facts of the defendants conduct, Taylor, 495 U.S. at 601 allowing a sentencing court to go any further would raise serious Sixth Amendment concerns because only a jury, not a judge, may find facts that increase the maximum penalty. Apprendi v. New Jersey, 530 U.S. 466. Further, an element focus avoids unfairness to defendants, who otherwise might be sentenced based on statements of non-elemental facts that are prone to error because their proof is unnecessary to a conviction. Descamps, 570 U.S. __, __ Finally, a statute's listing of disjunctive means does nothing to mitigate the possible unfairness of basing an increased penalty on something not legally necessary to a prior conviction. Accordingly, whether means are listed in a statute or not, a sentencing court's focus should always remain on a crime's elements.

The state of Georgia, when legislating its robbery statute recognized multiple forms of robbery as well as multiple ways it could be perpetrated, determined the necessity of creating two distinct robbery statutes: O.C.G.A. §16-8-41 dealing with Georgia's most serious incidents of robbery with a sentence of up to life and also includes the death penalty; and O.C.G.A §16-8-40 covering the least serious forms of the crime that has no requirement of the use of a firearm nor other dangerous weapons or any violence

that rises to the level of Federal Three Strikes.

Petitioner, having been convicted of the latter, no longer qualified for §3559(c)'s mandatory life sentence, because his prior robbery conviction triggers neither 18 U.S.C. §3559(c)(2)(F)(i) nor 18 U.S.C. §3559(c)(2)(F)(ii). Petitioner's prior Georgia robbery convictions did not require the use of a firearm or other dangerous weapon and allows the slightest use of force and/or no resistance. Under due process principals, the district court did not have the authority to second guess the State Court's ability to levy it convictions, as it deems necessary to fit crimes presented to it, and increasing the seriousness of Petitioner's prior convictions is tantamount to retrying Petitioner without the benefit of his Sixth Amendment jury protections. The sentencing court is given no special warrant to explore the facts of Petitioner's prior offense, rather than to determine the crime's elements and compare them with the generic definition. This Court has held that only a jury, and not a judge, may find facts that increased a maximum penalty except for the fact of a prior conviction. Apprendi v. New Jersey, 530 U.S. 466 That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about "what the defendant and state judge must have understood as the factual basis of the prior plea." He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of. Elements focus avoids unfairness to defendants and statements of

non-elemental facts in the record of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearing, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he may have good reason not to or even be precluded from doing so by the court. When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.

This Court should vacate the affirming judgment of the Eleventh Circuit and remand for further proceedings.

REASONS FOR GRANTING THE WRIT

Mr. Gray respectfully urges this Court to grant this writ of certiorari in his case for three reasons. First, the question of whether a statement of "non-elemental fact" in the record of a prior conviction regarding the manner in which a defendant committed his offense, be exploited to increase a defendant's statutory maximum penalty under 18 U.S.C. §3559(c)(2)(F)(i), be used when the elements of the prior conviction are not a match with the generic offense, presents a novel issue. Moreover, Mr. Gray submits that the lower court was simply incorrect. Second, the question of whether 18 U.S.C. §3559(c)(2)(F)(ii)'s force provision can be used to increase the maximum statutory penalty when the prior conviction (O.C.G.A. §16-8-40) list multiple forms of commission, to include by sudden snatching, and has a minimum force requirement,

(defined by 2.31.20), however slight, presents an issue of first impression in relation to Georgia prior State convictions pursuant to Walker v. State, 225 Ga. 734 (1979). The Eleventh Circuit's view of this matter is incorrect. Third, the question of whether 18 U.S.C. §3559(c) can be used to enhance a sentence beyond the statutory maximum when the State statute's elements are not a match with the elements of the generic offense judicial fairness will be served by this Court answering this pressing question.

I. THERE IS A LACK OF CLARITY AND UNANIMITY AMONG LOWER COURTS OF WHETHER A PRIOR GEORGIA ROBBERY CONVICTION CONSTITUTES A "CRIME OF VIOLENCE" FOR ENHANCEMENT PURPOSES

First, Mr. Gray urges that there is a division among the lower courts as to whether a prior State of Georgia robbery conviction qualifies as a "crime of violence" for enhancement purposes, necessitates this Court's intervention, in light of the fact that the elements of robbery under Georgia law include robbery by intimidation or robbery by sudden snatching. See Smith v. State, 336 Ga. App. 256(Ga. 2015)(a person commits robbery by intimidation when, "with intent to commit theft, he takes property of another from the person or the immediate presence of another...[b]y intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or another." O.C.G.A. 16-8-40(a)(2). A taking by intimidation is the distinguishing character of robbery, the gist of the offense. The force necessary for robbery is the actual violence of intimidation exerted upon the person being robbed, by operating upon his fears, the fear of injury to his person, or property, or character). To date

the Eleventh Circuit refuses to specifically decide this important issue, especially in the context of an 18 U.S.C. §3559(c) Three Strikes enhancement, which requires that an offensive weapon be used.

In the context of other similarly worded enhancement statutes, two district courts in the Eleventh Circuit and other courts have ruled that Georgia Robbery convictions do not qualify as a "crime of violence" under either the elements clause or the enumerated clause of 4Bl.2. See United States v. Cochran, 3:17-070/MCR (N.D. Fla. 2018) (the Court defining Georgia Code Ann. §16-8-40 as a single crime of robbery, one which provides alternative "means" by which a person can effectuate the taking element. Accord United States v. Jackson, 713 F. App'x 172, 2017 WL 5514433 (4th Cir. 2017). Because the statute presents a single set of elements that are satisfied through various means, rather than multiple alternative elements of functionally separate crimes, the Court finds the statute is indivisible, such that the Court's inquiry is confined to the pure categorical approach. Applying the categorical approach, the Court finds that the least of the acts criminalized by Georgia's robbery statute (i.e., sudden snatching) does not require proof, as a necessary element, that the defendant "used, attempted to use, or threatened to use" violent, physical force. Accordingly, the Court finds that Georgia's robbery statute does not qualify as a "crime of violence" under the elements clause of 4Bl.2); See also Green v. United States, No. CV16-154, CR405-139 (S.D. Ga. 2017) (same).

The Fourth Circuit has also ruled that Georgia robbery statute

§16-8-40 does not qualify as a "crime of violence" under either the elements clause or enumerated offense clause. United States v. Fluker, 891 F.3d 541 (4th Cir. 2108)(the district court erred by finding that the inmates Georgia robbery conviction qualified him as a career offender, because it is broader than the generic robbery); See United States v. Jackson, 713 App'x 172 WL 5514433 (4th Cir. 2017)(same).

Mr. Gray respectfully urges that the lower court's denial of his claim is simply incorrect, and that the decisions rendered by the district courts in Florida and Georgia, along with the Fourth Circuit in Jackson and Fluker correctly analyzed the issue. He urges the Court to grant review in his case and, rule that Georgia robbery convictions do not qualify as a "crime of violence" for §3559(c) or enhancement purposes.

II. THE ISSUES RAISED ARE IMPORTANT AND WORTHY OF THIS COURT'S ATTENTION BECAUSE OTHER SIMILARLY SITUATED DEFENDANT'S AROUND THE COUNTRY HAVE BEEN ENHANCED UNDER 18 U.S.C. §3559(c) AFTER THE GOVERNMENT EXPLOITED STATEMENTS OF "NON-ELEMENTAL FACTS" IN THE RECORD OF A PRIOR CONVICTION TO INCREASE THE MAXIMUM STATUTORY PENALTY UNDER 18 U.S.C. §3559(c)(2)(F), WHEN THE ELEMENTS OF THE PRIOR OFFENSE ARE NOT A MATCH WITH THE GENERIC OFFENSE

Second, Mr. Gray submits that the issues presented herein are of profound importance for himself and countless others similarly situated defendants around the country. Hundreds if not thousands of prisoners have been enhanced under 18 U.S.C. §3559(c) after the government exploited statements of "non-elemental facts" in the record of a prior conviction regarding the manner in which a defendant committed his offense, to increase the maximum statutory penalty

under 18 U.S.C. §3559(c)(2)(F)(i), when the elements of a Petitioner's prior offenses are not a match with the generic offense.

Under Georgia law, a robbery occurs "when, with intent to commit theft," an individual "takes property of another from the person or the immediate presence of another: (1) [b]y use of force; (2) [b]y intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or another; or (3) [b]y sudden snatching." See Ga. Code Ann. §16-8-40(a). Sudden snatching is the least of the three acts by which a defendant can commit robbery under Ga. Code Ann §16-8-40. The Georgia Supreme Court has explained that robbery by sudden snatching "occurs where no more force is used than is necessary to obtain possession of the property from the owner, who is off guard, and where there is no resistance by the owner or injury to his person." Edwards v. State, 224 Ga. 684, 686, 164 S.E. 2d 120 (1968); See also King v. State, 214 Ga. App. 311, 447 S.E. 2d 645 (1999)(same). While the victim must be conscious of the theft before it is complete, the property need only be taken from the victim's immediate presence, which, "extends well beyond his person or his reach, Smith v. State, 281 Ga. App. 91, 635 S.E. 2d 385, 386 (Ga. App. 2006), to virtually any object....under control or responsibility," so long as "the victim was not too far distant, "Perkins v. State, 235 Ga. App. 449, 568 S.E. 2d 601, 602 (Ga. App. 2002)(citing Welch v. State, 235 Ga. 243, 245, 219 S.E. 2d 151 (1975)(immediate presentence shown where property taken was in another room more than 15 feet from victim at time of taking); See also Meyers v. State, 249 Ga. 547 S.E. 2d 781

(Ga. App. 2001)(theft of purse 30 feet away from victim "was not too far afield to be outside the [victim's] immediate presence"). Applying their principles, Georgia Appellate Courts routinely affirm robbery by sudden snatching convictions in cases involving substantially less force than that capable of causing physical pain or injury. See Brown v. State, 309 Ga. App. 511, 710 S.E. 2d 674 (Ga App. 2011)(affirming conviction for robbery by sudden snatching where defendant took the victim's wallet out of a shopping cart while the victim was several feet away and the victim yelled for defendant to stop); King, 447 S.E. 2d at 646-47 (affirming robbery by sudden snatching conviction where defendant grabbed six cartons of cigarettes off a checkout counter and ran out of the store while the clerk's back was turned: Holmes v. State, 155 Ga. App. 115, 270 S.E. 2d 327 (Ga. App. 1980)(affirming robbery conviction where defendant "came up to [victim] to ask directions and while she was giving them, [he] snatched purse and ran with it"). Thus, Georgia robbery by sudden snatching does not require proof, as a necessary element, that the defendant "used, attempted to use, or threatened physical force" violent, physical force. Accordingly, Ga Code Ann. §16-8-40 cannot categorically qualify as a "crime of violence" under the elements clause of U.S.S.G. §4B1.2.

In the lower court, Mr. Gray argued that his conviction under State of Georgia statute O.C.G.A. §16-8-40 did not rise to the level triggering §3559(c)'s Three Strikes enhancement. The court found that Petitioner's argument was unconvincing. Mr. Gray avers that a quick examination of the final disposition in his Fulton

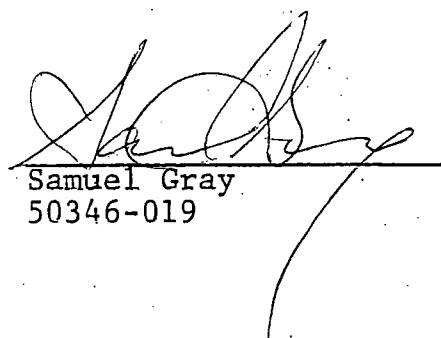
County, State of Georgia conviction taken from the Official Code of Georgia Annotated show exactly what the State must prove beyond a reasonable doubt to convict an accused under O.C.G.A. §16-8-40. In his State case, on the 9th day of March 1990, Petitioner appeared before the court after having presented evidence and entered into a negotiated plea to a lesser offense and pled guilty to two counts of "simple robbery" (as acknowledged by the Eleventh Circuit Court of Appeals on Petitioner's direct appeal). A quick examination of the Official Code of Georgia, Title 16 Chapter 8, Article 2, reveal that the most serious form of robbery falls under O.C.G.A. §16-8-41 armed Robbery, and this does not apply to Petitioner, because Petitioner was initially charged with Armed Robbery, but Petitioner pled guilty to a lesser offense, Simple Robbery, and this is governed under O.C.G.A. §16-8-40, the statute affecting Petitioner's conviction and sentence.

Mr Gray submits that unless addressed by this Court, this issue will arise again and again each and every time a defendant appeals a sentence enhanced under 18 U.S.C. §3559(c), after the Government exploits statements of "non-elemental facts" in the record of a defendant's prior conviction to increase the maximum statutory penalty under 18 U.S.C. §3559(c)(2)(F), when the elements of the prior offense are not a match with the generic offense. Because this Court's decisions in Descamps, Johnson, and Dimaya, and their related decisions have forever changed the landscape of federal sentencing, Mr. Gray urges the Court to clarify the law concerning the claims raised herein in such an important context.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Done this 15 day of June 2019.



Samuel Gray
50346-019