

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

BARTO EDWARD USRY, JR.
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. 19-60241

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Mr. Usry is entitled to resentencing without applying the ACCA because post-*Johnson* (2015), he no longer has three prior qualifying “violent felony” convictions that are required to trigger the ACCA’s sentencing provisions.

PARTIES TO THE PROCEEDING

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

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I. OPINIONS BELOW

The United States District Court for the Southern District of Mississippi entered a Judgment of Conviction against Petitioner Mr. Usry on April 5, 1995. The conviction was for felon in possession of a firearm in violation of 18 U.S.C. § 922(g). The district court case number is 3:94cr123-HTW. The subject § 2255 Petition arose out of conviction and sentence for the felon in possession conviction.

In 2015, after Mr. Usry's conviction and sentence, this Court ruled that the "residual clause" portion of the "violent felony" definition in the Armed Career Criminal Act (hereinafter "ACCA") is unconstitutional. *See Johnson v. United States*, 135 S.Ct. 2551 (2015).¹ Invoking the holdings in *Johnson* (2015), Mr. Usry filed the subject § 2255 Petition to Vacate Sentence (hereinafter "§ 2255 Petition" or "Petition") on June 24, 2016. The district court assigned the Petition civil case number 3:16cv499-HTW.

In the Petition, Mr. Usry argued that he is entitled to a sentence reduction because post-*Johnson* (2015), his prior felony convictions no longer qualify as

¹ This Brief 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 phrase "physical force" in § 924(e)(2)(B)(i). In this Brief, *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)."

“violent felonies” under the ACCA. Thus the ACCA sentence enhancing provisions applied at his sentencing in 1995 no longer apply.

The district court entered an Order denying the relief sought in the § 2255 Petition on April 15, 2019. Over two months later on July 1, 2019, the district court denied a Certificate of Appealability. The district court’s April 15 and July 1, 2019 Orders are attached hereto as composite Appendix 1.

Mr. Usry appealed the case to the United States Court of Appeals for the Fifth Circuit on April 15, 2019. The Fifth Circuit case number is 19-60241. Because the district court denied Mr. Usry a Certificate of Appealability, he had to move the Fifth Circuit for the same. The Fifth Circuit entered an Order denying a Certificate of Appealability on August 28, 2020. The Fifth Circuit’s Order is attached hereto as Appendix 2.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed its final Order in this case on August 28, 2020. This Petition for Writ of Certiorari is filed within 150 days after entry of the Fifth Circuit's Judgment as required by Rule 13.1 of the Supreme Court Rules, which was amended by this Court's COVID-19 related Order dated March 19, 2020. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. STATUTES INVOLVED

“It shall be unlawful for any person... who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[.]” 18 U.S.C § 922(g)(1).

“Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.” 18 U.S.C. § 924(a)(2).

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) 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[.]

18 U.S.C. § 924(e)(1).

[T]he 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[.]

18 U.S.C. § 924(e)(2)(B)(i).

IV. STATEMENT OF THE CASE

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

This case arises out of a criminal conviction entered against Mr. Usry for felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Mr. Usry arose from the laws of the United States of America.

B. Statement of material facts.

As described above, this § 2255 case arises out of a charge and conviction against Mr. Usry for felon in possession of a firearm in violation of 18 U.S.C. § 922(g). The district court conducted a sentencing hearing on March 31, 1995. The court ordered Mr. Usry to serve 295 months in prison, followed by five years of supervised release. It also ordered a \$5,000 fine.

The sentence included enhancements under the ACCA. The enhancements increased Mr. Usry's offense level under § 4B1.4 of the United States Sentencing Guidelines (hereinafter "Sentencing Guidelines" or "Guidelines"). As it becomes apparent below, it is important to note that § 4B1.4 is triggered only if a defendant is subject to the ACCA. Mr. Usry was also subject to the 15-year mandatory

minimum sentence under 18 U.S.C. § 924(e)(1), which is a provision of the ACCA.

On June 24, 2016, Mr. Usry filed the subject § 2255 Petition. The relief sought in the Petition is based on the law established by this Court in *Johnson* (2015). Through the Petition, Mr. Usry argued that post-*Johnson* (2015), his ACCA-based sentence should be vacated, and he should be resentenced without applying the sentence enhancing provisions of the ACCA. The district court denied the § 2255 based on the erroneous conclusion that Mr. Usry's argument relies primarily on the Sentencing Guidelines, and not on the provisions of the ACCA. This erroneous decision by the district court is described below in the "Argument" section of this Petition.

Because the district court deemed Mr. Usry an armed career criminal under the ACCA provision codified at 18 U.S.C. § 924(e)(1), his adjusted offense level under the Guidelines increased under U.S.S.G. 4B1.4(a). With the ACCA enhancements, Mr. Usry's total offense level was 34. His criminal history category, which was unaffected by the ACCA, was VI. This combination yielded a Guidelines sentence range of 262 to 327 months in prison. Also, his status as an armed career criminal required a 15-year mandatory minimum sentence under § 924(e)(1). The court ordered a 295-month prison term.

The prior felonies convictions relied on by the prosecution to support Mr. Usry's armed career criminal status were:

- Four Mississippi state court convictions for "Armed Robbery."
- A Mississippi state court conviction for "Robbery."
- A Mississippi state court conviction for "Business Burglary."

These convictions no longer qualify as "violent felonies" under § 924(e)(2)(B).

Removal of these convictions from the purview of "violent felonies" significantly reduces Mr. Usry's Guidelines sentence range.

Without the ACCA enhancements, Mr. Usry's offense level would have been 28. At an offense level of 28 and a criminal history category of VI, his Guidelines range would have been 140 to 175 months in prison. *See* Guidelines Sentencing Table. However, the statutory maximum penalty under § 924(a)(2) is ten years in prison. Therefore, his recommended sentence under the Guidelines, without any ACCA enhancements, would have been ten years.

V. ARGUMENT

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

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion.” For the following reasons, this Court should exercise its discretion to grant certiorari in Mr. Usry’s case.

The overall issue in this case is whether Mr. Usry is entitled to resentencing without applying the ACCA because post-*Johnson* (2015), he no longer has three prior qualifying “violent felony” convictions. This overall issue consists of two sub-issues.

The first sub-issue is whether this Court’s rulings in *Beckles v. United States*, 580 S.Ct. 886 (2017) foreclose any *Johnson* (2015) related arguments pertaining to U.S.S.G. § 4B1.4. As a general rule, *Beckles* holds that *Johnson* (2015) does not apply to the Sentencing Guidelines. However, under the provisions of § 4B1.4(a), the sentence enhancement provisions of § 4B1.4 apply only if a defendant is deemed “an armed career criminal” under “the provisions of § 18 U.S.C. § 924(e)[.]” For this reason, *Beckles* does not foreclose *Johnson* (2015) arguments based on Guidelines § 4B1.1.

Supreme Court Rule 10(a) allows this Court to grant certiorari when “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]” The

Fifth Circuit's Order in Mr. Usry's case conflicts with the Eleventh Circuit's holdings in *United States v. Kirk*, 636 Fed. App'x 548, 550 (11th Cir. 2016). As further described below, the *Kirk* court ruled that the holdings in *Johnson* (2015) apply to U.S.S.G. § 4B1.4. *Id.* at 550. Therefore, under Rule 10(a), this Court should grant certiorari to resolve the conflict between the Fifth and Eleventh Circuits on this important issue.

The second sub-issue pertains to defining the phrase “physical force” in the ACCA context. Fifth Circuit case law is at odds with this Court's requirement in *Johnson* (2010)² that the force must be physical in nature, as opposed to mental or emotional force. Granting certiorari will give the Court an opportunity to correct the Fifth Circuit's misinterpretation of both this Court's holdings and the language of the ACCA. Correcting this error will save numerous years of unjust imprisonment for both Mr. Usry and other similarly situated defendants in the Fifth Circuit.

B. Section 2255 standard.

Mr. Usry'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

² See *supra*, footnote 1.

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. Usry 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 case on collateral review. *United States v. Welch*, 136 S.Ct. 1257 (2016).

C. 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)[³] of this title and has three previous convictions by any court referred to in section

³ 18 U.S.C. § 922(g) makes it a crime for a convicted felon to possess a firearm.

922(g)(1)[⁴] 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 physical injury to another.” This language is commonly referred to as the ACCA’s “residual clause.” *See Johnson* (2015), 135 S.Ct. at 2555-56.

⁴ 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[.]”

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*⁵ and *Sykes*⁶ 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).

Under the above holdings in *Johnson* (2015), it is unconstitutional to increase a defendant's sentence under § 924(e)(1) because he has any prior

⁵ The full cite for *James* is *James v. United States*, 550 U.S. 192, 180 L.Ed.2d 60 (2007).

⁶ The full cite for *Sykes* is *Sykes v. United States*, — U.S. —, 131 S.Ct. 2267 (2011).

“violent felonies,” as defined under the residual clause of § 924(e)(2)(B)(ii). This ruling does not apply 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.

D. The district court erred by ruling that this Court’s holdings in *Beckles* bars the subject arguments.

The district court denied the § 2255 Petition because it ruled that under *Beckles v. United States*, 580 S.Ct. 886 (2017), the holdings in *Johnson* (2015) do

not apply to the Sentencing Guidelines. The defense agrees that as a general rule, *Beckles* stands for the proposition that the holdings in *Johnson* (2015) do not apply to the Guidelines. However, in Mr. Usry's case, his sentence was affected by the ACCA, so the holdings in *Beckles* do not apply.

First and foremost, the district court's ruling ignores that fact that but for Mr. Usry's classification as an armed career criminal under the ACCA, his statutory maximum sentence would have been 10 years, or 120 months. *See* 18 U.S.C. § 924(a)(2). The fact that the court ordered a 295-month prison sentence means that the sentence was affected by the ACCA. Therefore, *Beckles* does not foreclose the subject arguments.

Next, we address the district court's ruling that *Beckles* forecloses any *Johnson* (2015) related arguments pertaining to U.S.S.G. § 4B1.4. It is true that Mr. Usry's sentence was enhanced in part under the provisions U.S.S.G. § 4B1.4. However, under the provisions of § 4B1.4(a), the sentence enhancement provisions of § 4B1.4 apply only if a defendant is deemed "an armed career criminal" under "the provisions of § 18 U.S.C. § 924(e)[.]" That is, a defendant must be deemed an armed career criminal under the ACCA before any of the sentence enhancement provisions of § 4B1.4 apply. That is, any sentence enhancement applied under § 4B1.4 is inexorably intertwined with the question of whether a defendant is an

armed career criminal under the ACCA. Therefore, the holdings in *Johnson* (2015) apply to the analysis and are not barred by *Beckles*.

The proposition that the holdings in *Beckles* do not apply to § 4B1.4 is consistent with case law. For example, in *United States v. Kirk*, 636 Fed. App'x 548, 550 (11th Cir. 2016), the court held:

Although *Johnson* does not apply to the guidelines, *Johnson* does mean that Kirk is no longer subject to the statutory sentence enhancement in § 924(e)(1). And as explained below, the primary guideline used to calculate Kirk's guidelines range was the § 4B1.4 guideline that applies only if the defendant "is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e)." U.S.S.G. § 4B1.4(a). Kirk is no longer subject to that guideline. We explain how Kirk's guidelines range was calculated and why this case warrants a recalculation of Kirk's guidelines range and thus a full resentencing.

See also, United States v. Seabrook, 839 F.3d 1326, 1332 (11th Cir. 2016) (holding "[d]ue to his status as an armed career criminal under § 924(e), Seabrook's offense level increased from 30 to 33 under U.S.S.G. § 4B1.4(b)(3)(B)."); *United States v. Brooks*, Crim. Action No. 03-324, 2017 WL 467671 at *2 (E.D. La. Feb. 3, 2017) (holding "Section 4B1.4 of the United States Sentencing Guidelines contains special offense level and criminal history category provisions applicable to defendants subject to the ACCA.").

The bottom line is this – the district court erred when it found that *Beckles* forecloses Mr. Usry's arguments. This is true for two reasons. First, Mr. Usry was

subject to a 15-year mandatory minimum sentence under the ACCA. Second, § 4B1.4 applies only if a defendant is an armed career criminal under the ACCA.

E. Statutory provisions that trigger the ACCA.

Under the ACCA provision stated in 18 U.S.C. § 924(e)(1), a defendant is subject to a 15-year mandatory minimum sentence if he or she “has three previous convictions ... for a violent felony or serious drug offense.” It is undisputed that Mr. Usry does not have any prior convictions for serious drug offenses. At issue is whether he has three prior convictions for violent felonies.

“Violent felony” is defined in § 924(e)(2)(B)(i) and (ii), which states,

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 language in bold print is the residual clause that *Johnson* (2015) found unconstitutional. Congress has not removed the residual clause from the statute, but all courts agree that it is unconstitutional and cannot be considered in the armed career criminal analysis.

The prior felonies relied on by the prosecution to support the armed career criminal enhancement were:

- Four Mississippi state court convictions for “Armed Robbery.” PSR, ROA.281, ¶ 22; ROA.282, ¶¶ 25 & 26; ROA.283, ¶ 27.
- A Mississippi state court conviction for “Robbery.” *Id.* at ROA.281, ¶ 23.
- A Mississippi state court conviction for “Business Burglary.” *Id.* at ROA.282, ¶ 24.

For the following reasons, none of these convictions qualifies as a “violent felony” post-*Johnson* (2015).

F. Mr. Usry’s prior Mississippi state convictions for “Armed Robbery” and “Robbery” are not “violent felonies” under the ACCA.

One issue before the Court is whether the robbery convictions qualify as ACCA predicate offenses. Robbery is not an enumerated crime under § 924(e)(2)(B)(ii). So the only possible option under which the prior robbery convictions can be deemed “violent felonies” is § 924(e)(2)(B)(i), which is referred in case law as the “elements clause,” the “physical force clause,” or simply the “force clause.”

As set forth above, 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 v. United States*, 559 U.S. 133 (2010), this 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 2019, this Court again analyzed the force requirement. In *Stokeling v. United States*, 139 S.Ct. 544 (2019), the Court held that a crime satisfies the “physical force” aspect of the elements clause if the force required for a conviction “is sufficient to overcome a victim’s resistance.” *Id.* at 554. But *Stokeling* does not overturn the *Johnson* (2010) Court’s ruling that the force at issue must be physical force.

In the context of the *Johnson* (2010) and *Stokeling* Courts’ definitions of “physical force,” we must consider whether Mr. Usry’s robbery convictions are “violent felonies” under § 924(e)(2)(B)(i). The first step is to look at the language of the charging statutes, which state:

§ 97-3-73. “Robbery” defined

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.

§ 97-3-79. Robbery using deadly weapon; punishment

Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if

the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.

(Emphasis added).

To determine whether Mississippi's robbery statutes are "violent felonies" because the prohibited conduct involves "physical force," we look to "the least of the [] acts" enumerated in the statute. *Johnson*, 559 U.S. at 137 (citation omitted). Committing robbery by "putting in fear of some immediate injury" is the "least act" that will satisfy the statutory elements of §§ 97-3-73 and 97-3-79.

Putting a person in fear is comparable to inflicting "intellectual force or emotional force" to commit the crime, and *Johnson* clearly holds that this does not meet the definition of "physical force" under § 924(e)(2)(B)(i). *Johnson*, 559 U.S. at 138.⁷ For this reason, the district court erred by finding that Mr. Usry is an armed career criminal.

We also look to the "some immediate injury" language of Mississippi robbery statute's language that a person can be robbed by "putting in fear of some immediate injury." We are guided by the Fifth Circuit's rulings in *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006), *overruled by United States v.*

⁷ The defense acknowledges that this argument is against Fifth Circuit precedent to the extent that in *United States v. Brewer*, 848 F.3d 711, 715-16 (5th Cir. 2017), this Court held that bank robbery by "intimidation" satisfies the physical force clause.

Reyes-Contreras, 910 F.3d 169, 187 (5th Cir. 2018) (*en banc*).⁸ The defendant in that case was convicted of illegally reentering the United States after deportation following a state court assault conviction. *Villegas-Hernandez*, 468 F.3d at 876-77. At issue was whether defendant’s assault conviction was an “aggravated felony” under § 2L1.2(b)(1)(C).⁹ *Id.* at 877. The district court found that it was, and defendant appealed. *Id.* at 877-78.

Both parties agreed that the applicable subsection of the Texas Misdemeanor assault statute – Texas Penal Code § 22.01 – makes a person guilty of the offense if it is proven that he “intentionally, knowingly, or recklessly causes bodily injury to another[.]” *Villegas-Hernandez*, 468 F.3d at 878. “The government contend[ed] that 22.01(a)(1)’s requirement that a defendant cause bodily injury incorporates a requirement to show the intentional use of force, such that *Villegas-Hernandez*’s

⁸ In candor to the Court, the defense acknowledges that *Villegas-Hernandez* was overruled by *Reyes-Contreras*, which was decided on November 30, 2018. Thus the argument asserted by the defense is against Fifth Circuit precedent. However, the holdings in *Reyes-Contreras* are arguably at odds with this Court’s holdings in *Johnson* and *Stokeling*. This is true because *Reyes-Contreras* allows a crime to fall under the force clause without the defendant employing any physical force against the victim at all.

⁹ For purposes relevant to the appeal, § 2L1.2’s definition of “aggravated felony” is found in 18 U.S.C. § 16(a)’s definition of “crime of violence.” See *Villegas-Hernandez*, 468 F.3d at 877. Section 16(a) states:

The term “crime of violence” means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]

This language is functionally identical to the language of 18 U.S.C. § 924(e)(2)(B)(i) that is at issue in the subject case.

prior assault conviction satisfies 16(a)'s definition of crime of violence." *Id.* at 878-79. This Court disagreed. *Id.* at 879.

The Court held "an assault offense under section 22.01(a)(1) satisfies subsection 16(a)'s definition of a crime of violence only if a conviction for that offense could not be sustained without proof of the use of 'destructive or violent' force." *Villegas-Hernandez*, 468 F.3d at 879. Then, the Court went on to provide examples of how a violation of the assault statute could be committed without using any physical force:

The bodily injury required by section 22.01(a)(1) is "physical pain, illness, or any impairment of physical condition." Tex. Pen. Code Ann. § 1.07(a)(8). Such injury could result from any of a number of acts, without use of "destructive or violent force", making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim. To convict a defendant under any of these scenarios, the government would not need to show the defendant used physical force against the person or property of another. Thus, use of force is not an element of assault under section 22.01(a)(1), and the assault offense does not fit subsection 16(a)'s definition for crime of violence.

Villegas-Hernandez, 468 F.3d at 879.

Just like the example stated in *Villegas-Hernandez*, the "immediate injury" to a victim under Mississippi's robbery statute could be poison, which is a "deadly weapon." Robbing a person by using or threatening to use a poisonous substance requires no physical force at all. Therefore, Mr. Usry's robbery convictions do not count as violent felonies under the ACCA.

G. Mr. Usry’s prior Mississippi state conviction for “Business Burglary” is not a “violent felony” under the ACCA.

Mr. Usry has a prior conviction for “business burglary” under Mississippi law. The PSR does not state the statute of conviction, but we reasonably assume that it is under § 97-17-33(1) of the Mississippi Code, titled “Burglary; other buildings, motor vehicles and vessels.” In relevant part, this code section states:

Every person who shall be convicted of breaking and entering, in the day or night, any shop, store, booth, tent, warehouse, or other building or private room or office therein, water vessel, commercial or pleasure craft, ship, steamboat, flatboat, railroad car, automobile, truck or trailer in which any goods, merchandise, equipment or valuable thing shall be kept for use, sale, deposit, or transportation, with intent to steal therein, or to commit any felony, or who shall be convicted of breaking and entering in the day or night time, any building within the curtilage of a dwelling house, not joined to, immediately connected with or forming a part thereof, shall be guilty of burglary[.]

Miss. Code Ann. § 97-17-33(1).

Clearly, Mississippi’s burglary statute requires no “physical force” to commit the crime. So the physical force clause of the ACCA is inapplicable to our analysis. Our focus is on the enumerated offense clause.

“Burglary” is an enumerated offense under § 924(e)(2)(B)(ii). However, that does not end our analysis. We must compare the generic definition of burglary with Mississippi’s statutory definition of burglary. *See United States v. Vigil*, 774 F.3d 331, 333-34 (5th Cir. 2014) (citing *Taylor v. United States*, 495 U.S. 575 (1990)). If Mississippi’s definition is broader than the generic definition, then Mr.

Usry's burglary conviction cannot be a "violent felony" under the enumerated offense clause of the ACCA. *See id.*

In *Taylor*, this Court provided the generic definition of burglary. Burglary is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." 495 U.S. at 598. This definition is consistent with the definition stated in the Model Penal Code. *Id.* at 598 n.8.

In *United States v. Wheeler*, 434 Fed. App'x 831 (11th Cir. 2011), the Eleventh Circuit analyzed whether Florida's burglary statute constitutes a crime of violence under the ACCA. Specifically, the court considered whether Florida's statute defined burglary more broadly than the generic definition of burglary. The *Wheeler* court held:

Florida defines burglary as 'entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein.' Fla. Stat. § 810.02(1)(b).

* * * * *

On its face, Florida's third degree burglary statute is non-generic in at least two regards. First, in addition to covering buildings and structures, it also includes "conveyance" which is defined as a "motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car." See Fla. Stat. § 810.011(3). Second, Florida defines "structure," as it is used in the burglary statute, to include the curtilage of the structure, which the Florida Supreme Court has construed narrowly to include some form of an enclosure around the structure. *See State v. Hamilton*, 660 So.2d 1038, 1044 (Fla.1995); *see also James v. United States*, 550 U.S. 192, 212–13, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007) (citing to *Hamilton's* definition of curtilage and noting that Florida's definition of curtilage takes the offense of burglary outside of *Taylor's* definition of generic burglary).

Id. at 833.

While Florida's burglary definition did not fit the generic definition of burglary, the *Wheeler* court went on to find that the subject burglary conviction qualified as a "violent felony" under the residual clause of the ACCA. *Wheeler*, 434 Fed. App'x at 833-34. However, *Johnson* (2015) which was decided after *Wheeler*, rendered the residual clause unconstitutional.

Based on the well-reasoned holdings in *Wheeler*, Florida's burglary statute does not meet the generic definition of burglary. Like Florida's burglary statute, Mississippi's burglary statute allows for a conviction if a defendant burglarizes something other than a "structure," such as a "water vessel, commercial or pleasure craft, ship, steamboat, flatboat, railroad car, automobile, truck or trailer[.]" See Miss. Code Ann. § 97-17-33(1).

Also, like the Florida statute, Mississippi's burglary statute covers "the curtilage of a dwelling house." See Miss. Code Ann. § 97-17-33(1). Under Mississippi law, curtilage is defined as "the yard, garden or field which is near to and used in connection with the dwelling." *Arnett v. Mississippi*, 532 So.2d 1003, 1008 (Miss. 1988) (citations omitted). Clearly, a person's yard is not a "building or other structure," as defined by the *Taylor* Court.

For all of the above reasons, Mississippi's definition of burglary is broader than the generic definition of the crime. Therefore, Mr. Usry's business burglary conviction does not qualify as a "violent felony" under the ACCA.

VI. CONCLUSION

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

Submitted January 19, 2021, by:



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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

BARTO EDWARD USRY, JR.
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. 19-60241

CERTIFICATE OF SERVICE

I, Michael L. Scott, appointed under the Criminal Justice Act, certify that today, January 19, 2021, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis was served on Counsel for the United States by Federal Express, No. 772666530510, addressed to:

The Honorable Noel Francisco
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.



Michael L. Scott
Assistant Federal Public Defender