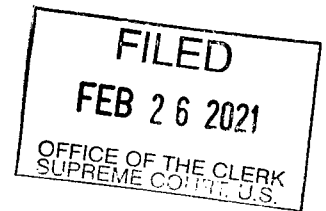


20-7451  
No.

ORIGINAL



\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

David K. Jenner — PETITIONER  
(Your Name)

vs.

Colorado Dept. of Corrections  
\_\_\_\_\_ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Colorado Court of Appeals, 2 East 14th Ave., Denver, CO. 80203

\_\_\_\_\_  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David K. Jenner, #92839

\_\_\_\_\_  
(Your Name)  
C.S.P. D-5-17  
P.O. Box #777

\_\_\_\_\_  
(Address)  
Canon City, CO. 81215-0777

\_\_\_\_\_  
(City, State, Zip Code)

Unknown

\_\_\_\_\_  
(Phone Number)

## QUESTION(S) PRESENTED

- 1) In light of this Court's decision in **Johnson v. U.S.**, 135 S.Ct. 2551 (2015), is Colorado Revised Statute § 17-22.5-403(2)-(3.5) unconstitutional in that it violates a defendant's Fourteenth Amendment due process protections?

## LIST OF PARTIES

- ☒ 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**

☐ For cases from **federal courts**:

The opinion of the United States court of appeals 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☐ is unpublished.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 United States district 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☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B 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☒ is unpublished.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 Colorado Supreme court appears at Appendix A 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 \_\_\_\_\_.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals 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. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was Nov. 9, 2020. A copy of that decision appears at Appendix A.

☐ 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

### U.S. Constitution, amend. XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### Colorado Revised Statute, § 17-22.5-403(2)/(3):

"(2)(a) Notwithstanding subsection (1) of this section, any person convicted and sentenced for second degree murder, first degree assault, first degree kidnapping is a class 1 felony, first or second degree sexual assault, first degree arson, first degree burglary, or aggravated robbery, committed on or after June 7, 1990, and before July 1, 2004, which person has previously been convicted of a crime which would have been a crime of violence as defined in section 18-1.3-406 C.R.S., shall be eligible for parole after such person has served seventy-five percent of the sentence imposed upon such person, less any time authorized for earned time pursuant to section 17-22.5-405 C.R.S....

(3) Notwithstanding subsection (1) or (2) of this section, any person convicted and sentenced for a crime enumerated in subsection (2) of this section, committed on or after June 7, 1990, and before July 1, 2004, who has twice been previously been convicted for a crime which would have been a crime of violence as defined in section 18-1.3-406, C.R.S., shall be eligible for parole after such person has served seventy-five percent of the sentence served upon such person, at which time such person shall be referred by the department to the state board of parole which may place such a person on parole for a period of time which does not exceed the time remaining on such person's original sentence." (Emphasis added).

## STATEMENT OF THE CASE

In 1997, Mr. Jenner was convicted and sentenced following a jury trial on the substantive charge of one count of first degree sex assault and a bench trial on three counts of being an habitual criminal. The sentence imposed by the trial court was 96-years in the Colorado Dept. of Corrections. Mr. Jenner's priors consisted of 3 separate prior convictions, all of which he was convicted for in the State of Washington and consisted of two convictions for second degree assault (obtained after a jury trial) and one conviction for second degree sex assault, obtained following the entry of an Alford plea following trial and a hung jury).

Mr. Jenner, as noted was sent to the Colorado Dept. of Corrections, where executive authorities made determinations concerning whether his prior convictions would have been "crimes of violence" if they'd been committed in the State of Colorado. In order to make this determination, those authorities had to look beyond the scope of the generic statutes Mr. Jenner was convicted of for his prior convictions in the State of Washington and make factual determinations about the offenses. Following this executive determination, the executive authorities for the Colorado Dept. of Corrections found that Mr. Jenner's prior criminal convictions all would be "crimes of violence" if committed in Colorado and hence applied the provisions of § 17-22.5-403(3) to his current Colorado convictions. The application of this statute to Mr. Jenner's current conviction dictates that he serve seventy-five percent of his sentence to parole eligibility and one-hundred percent of said to discharge it.

Under § 17.22.5-403 C.R.S. all prisoners serving a sentence imposed upon them normally serve fifty-percent of their sentence, less an additional twenty-five percent reduction for earned time as allowed by § 17-22.5-405 C.R.S. In other words, Mr. Jenner, based upon the executive authorities determination about Mr. Jenner's prior criminal convictions, i.e., if they'd been committed in Colorado, Mr. Jenner must serve twice the sentence he would otherwise normally serve before becoming parole eligible, or six-eighths of his sentence versus three-eighths. Moreover, under this parole enhancing statute, Mr. Jenner must serve one-hundred percent of his sentence to discharge it, whereas a normally sentenced prisoner would serve seventy-five percent of any sentence imposed, as earned time credits allowed by § 17-22.5-405 C.R.S. (which Mr. Jenner is not allowed under § 17-22.5-403(3) C.R.S.), are vested credits, allowing that once awarded cannot be rescinded.

In 2015, this Court issued it's opinion in Johnson v. U.S., 135 S.Ct. 2551 (2015), in which it determined that the provisions of the federal Armed Career Criminal Act (ACCA), codified at 18 U.S.C. § 924, were constitutionally vague, given that it allowed arbitrary and discriminatory enforcement/application by a court. Then in 2016, this Court in Welch v. United States, 136 S.Ct. 1257 (2016), found that Johnson's mandates were to be retroactively applied. Accordingly, Mr. Jenner filed an initial action under Colorado Rule of Criminal Procedure 35(a), i.e., a motion to correct an illegal sentence in the trial court where he was convicted. The trial court denied the motion on its merits and Mr.

Jenner appealed. See People v. Jenner, (Colo. App. No. 16CA0972, Mar. 29, 2018)(not published pursuant to C.A.R. 35(e)). In that decision, a division of the Colorado Court of Appeals determined that since Mr. Jenner was challenging the constitutionality of § 17-22.5-403 C.R.S., and the party applying this statute to his sentence was the Colorado Dept. of Corrections, Mr. Jenner's proper remedy was to seek relief via a civil application. As a result of this decision, Mr. Jenner filed such an action in the El Paso County, State of Colorado civil court immediately thereafter, under § 13-51-101 C.R.S. as well as 42 U.S.C. § 1983.

In that latter action, Mr. Jenner posted a challenge to, amongst other things, whether § 17-22.5-403 C.R.S., was constitutionally vague in light of this Court's rulings in Johnson and Welch, and the progeny of cases which followed this Court's mandates in those cases. The El Paso County Court summarily dismissed that action following Defendants' motion to dismiss under Colorado Rule of Civil Procedure 12(b)(5). Mr. Jenner appealed and another division of the Colorado Court of Appeals affirmed the lower court's dismissal, albeit on other grounds, i.e., that Mr. Jenner's constitutional challenge was barred under the doctrine of issue or claim preclusion, since in 2005, Mr. Jenner had filed a civil action in state court in which he sought review of application of § 17-22.5-403(3) C.R.S. to his sentence in light of this Court's finding in Apprendi v. New Jersey, 530 U.S. 466 (2000). See Jenner v. Ortiz,

155 P.3d 563 (Colo. App. 2006)(affirming Denver District Court order summarily denying relief.) See Appendix B, pp. 18-20, ¶¶ 36-39.

Mr. Jenner sought review of this affirmation, specifically whether his claim could be dismissed under the doctrine of claim/issue preclusion based upon an unrelated challenge some 13-years previous that was based upon a completely different rule of law. The Colorado Supreme Court denied Mr. Jenner's petition. See Appendix A.

The question before this Court is twofold: 1) whether in light of this Court's rulings in Johnson and Welch supras, § 17-22.5-403(3) as applied to Mr. Jenner's sentence is constitutionally vague; and 2) whether Mr. Jenner's challenge could be barred under the doctrine of claim/issue preclusion given that the rule of law announced in Johnson and Welch supras, is new. Mr. Jenner thus respectfully moves this Court to issue a writ of certiorari to review said.

## REASONS FOR GRANTING THE PETITION

- 1) In light of this Court's decision in *Johnson v. U.S.*, 135 S.Ct. 2551 (2015), is Colorado Revised Statute § 17-22.5-403(2)-(3.5) unconstitutional in that it violates a defendant's Fourteenth Amendment due process protections?

In *Johnson v. U.S.*, 135 S.Ct. 2551 (2015), this Court addressed the provisions of 18 U.S.C. § 924, i.e., the Armed Career Criminal Act, finding that this statute was unconstitutionally vague, as it allowed arbitrary and discriminatory application by failing to use a categorical approach when applying said. *Id.*, see also, *Sessions v. Dimaya*, 138 S.Ct. 1204, 1217-18 (2018); *U.S. v. Davis*, 139 S.Ct. 2319, 2327-29 (2019). In other words, when utilizing the A.C.C.A. to augment/enhance a defendant's sentence, the sentencing court must look to the statute under which the defendant was convicted to determine whether it would qualify as a "crime of violence" rather than to the facts alleged in charging documents, as to do otherwise invites arbitrary/discriminatory application.

This Court addressed the A.C.C.A., which is applied to a defendant by a sentencing court. In Colorado, however, there are analogous provisions to the A.C.C.A., which are not applied a sentencing court and instead are applied by an executive official working for the Colorado Dept. of Corrections when computing a prisoner's parole eligibility on any sentence

entered against the prisoner by the state courts. See § 17-22.5-403(2)-(3.5) C.R.S. Accordingly, when this Court issued its opinion in Johnson and then made it's application retroactive in Welch v. U.S., 136 S.Ct. 1257 (2016), Mr. Jenner posted a challenge to the enhancement of his current 96-year sentence by application of § 17-22.5-403(3) to said, as the provisions of this statute too are constitutionally vague it light of this Court's findings.

Mr. Jenner's challenge was based upon this Court's decisions rendered in 2015, et seq., yet the State courts declined to hear them (even though they were properly presented), as Mr. Jenner, had previously posted two challenges to this statute under different theories. See Jenner v. Ortiz, 155 P.3d 563 (2006)(asking whether in light of this Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2001), § 17-22.5-403(2)-(3.5) C.R.S. was a sentence enhancing element); Jenner v. Exec. Dir. Colo. Dept. of Corrections, (Colo. App. No. 14CA1341, Dec. 31, 2015, reversed on other grounds)(not published pursuant to C.A.R. 35(f)). Neither of these two previous challenges were based upon the reasonings set forth by this Court in Johnson and its progeny; nor did either case challenge § 17-22.5-403(2)-(3.5) C.R.S. as being constitutionally vague. Nonetheless, the state courts denied Mr. Jenner's claims as being barred under the doctrine if issue/claim preclusion. See Appendix B, pp. 15-20, ¶¶ 30-39 (finding that Mr. Jenner could have presented a challenge to the constitutionality of § 17-22.5-403(3) C.R.S. as being constitutionally vague hence he is barred from doing

so now.)<sup>1</sup>

Mr. Jenner respectfully submits that the state court's determination that his claim, based upon this Court's new, retroactive application of substantive law cannot be barred under the doctrine of issue/claim preclusion, given the issue presented was not available to Mr. Jenner until 2016, when this Court found that the decision rendered in Johnson supra, was to be applied retroactively. See Welch supra. Moreover, it is clear that the provisions of § 17-22.5-403(3) C.R.S. are unconstitutionally applied to Mr. Jenner, as his previous convictions, while entitled second degree assaults, would not be called this if committed in Colorado (and instead would be felony menacing and third degree assault, i.e. a misdemeanor offense.)

Accordingly, it is clear that not only does the Colorado Dept. of Corrections fail to utilize the categorical approach demanded by this Court in Johnson and its progeny; but so too the C.D.O.C. arbitrarily and discriminatorily applies said to whatever offense it chooses with leave of the state courts to do so. See e.g., Owens v. Williams, 2020 COA 177 (Colo. App. Dec. 31, 2020)(allowing the C.D.O.C. unfettered discretion

10.

1. It should be noted that on pp. 19, ¶ 37, the Colo. Ct. of Appeals cites People v. Jenner, (Colo. App. No. 16CA0972, March 29, 2018)(not published pursuant to C.A.R. 35(e)), which was an identical action to that presented herein, but posted under Crim.P.Rule 35(a). This action was denied by the Colo. Ct. of Appeals as being improperly presented as a criminal action, rather than a civil action which named the C.D.O.C.

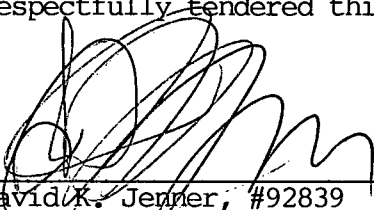
to calculate a defendant's sentence under § 17-22.5-403 C.R.S. as it sees fit.)

Mr. Jenner respectfully submits that § 17-22.5-403(2)-(3.5) C.R.S. violates his Fourteenth Amendment due process protections as it is constitutionally vague. Moreover, Mr. Jenner submits the State courts improperly dismissed his case under the doctrine of issue/claim preclusion. In turn, Mr. Jenner respectfully moves this Court to grant certiorari on his claim and allow him to brief it in full.

#### Conclusion

WHEREFORE, for the reasons set forth herein, Mr. Jenner respectfully moves this Court to issue a writ of certiorari to review the Colorado courts' decisions.

Respectfully tendered this 26<sup>th</sup> day of February, 2021.



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