

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

JOHN WILLIE JOHNSON,
also known as DEWAYNE HENDERSON
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. 19-60731

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The overall issue is whether the Fifth Circuit erred by denying Mr. Johnson a Certificate of Appealability. The underlying issue is whether Mr. Johnson is entitled to resentencing without applying the Armed Career Criminal Act because post-*Johnson* and post-*Borden*, he no longer has three prior qualifying “violent felony” convictions that are required to trigger the Armed Career Criminal Act’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. Johnson on March 27, 2003. 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 3:01cr167-HTW. The subject § 2255 Petition arose out of conviction and sentence for the felon in possession conviction.

In 2015, after Mr. Johnson'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). Invoking the holdings in *Johnson*, Mr. Johnson filed the subject § 2255 Petition to Vacate Sentence (hereinafter "§ 2255 Petition" or "Petition") on June 21, 2016. The district court assigned the Petition civil case number 3:16cv481-HTW.

In the Petition, Mr. Johnson argued that he is entitled to a sentence reduction because post-*Johnson*, he no longer has three prior felony convictions that qualify as "violent felonies" under the ACCA. Thus the ACCA sentence enhancing provisions applied at his sentencing in 2003 no longer apply.

The district court entered an Order denying the relief sought in the § 2255 Petition on September 30, 2019. On the same day, the district court entered

Judgment that also denied a Certificate of Appealability. The district court's Order and Judgment are attached hereto as composite Appendix 1.

Mr. Johnson appealed the case to the United States Court of Appeals for the Fifth Circuit on October 1, 2019. The Fifth Circuit case number is 19-60731.

Because the district court denied Mr. Johnson 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 January 25, 2021. 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 January 25, 2021. 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 ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C § 922(g)(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. Johnson 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. Johnson 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. Johnson 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 20, 2003. The court ordered Mr. Johnson to serve 190 months in prison, followed by five years of supervised release.

Because the district court deemed Mr. Johnson an armed career criminal under the ACCA provision codified at 18 U.S.C. § 924(e)(1), his offense level under the Guidelines increased from 27 to 30. Also, his status as an armed career criminal required a 15-year mandatory minimum sentence under § 924(e)(1). Without classification as an armed career criminal, the statutory maximum sentence

is ten years. 18 U.S.C. § 924(a)(2). As stated above, the court ordered a 190-month prison term.

With the ACCA enhancements, Mr. Johnson's total offense level was 30. His criminal history category, which was unaffected by the ACCA, was VI. This combination yielded a Guidelines sentence range of 168 to 210 months in prison. However, because the district court applied the ACCA at sentencing, the lower end of the Guidelines range increased to 180 months. So the final sentencing range under the Guidelines was 180 to 210 months in prison.

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

- A Mississippi state court conviction for "Armed Robbery."
- A Mississippi state court conviction for "Possession of Cocaine with Intent to Distribute."
- A Mississippi state court conviction for "Simple Assault on Law Enforcement Officer."
- A federal court conviction for "Possession of an Unregistered Firearm."

Post-*Borden*, which was decided by this Court only days ago, the Mississippi state court conviction for "Simple Assault on a Law Enforcement

Officer” is no longer a “violent felony” under § 924(e)(2)(B).¹ Post-*Johnson*, the federal court conviction for “Possession of an Unregistered Firearm” is no longer a “violent felony” under § 924(e)(2)(B). Because three prior qualifying convictions are required to trigger the ACCA enhancements, removal of these two prior convictions from the purview of “violent felonies” significantly reduces Mr. Johnson’s Guidelines sentencing range.²

Without the ACCA enhancements, Mr. Johnson’s offense level would have been 27. At an offense level of 27 and a criminal history category of VI, his Guidelines range would have been 130 to 162 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 120 months, or ten years.

¹ The full cite for *Borden* is *Borden v. United States*, __ S.Ct. __, 2021 WL 2367312 (June 10, 2021). *Borden* is further discussed below.

² In the courts below, Mr. Johnson also argued that the Mississippi state court conviction for “Armed Robbery” no longer qualifies as a “violent felony” post-*Johnson*. That issue does not need to be addressed at this point because even if that conviction does count as an ACCA predicate conviction, Mr. Johnson still only has two prior qualifying convictions.

V. ARGUMENT:

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. Johnson’s case.

The overall issue in this case is whether the Fifth Circuit erred by refusing to grant Mr. Johnson a Certificate of Appealability. But the underlying issue is whether he is entitled to resentencing without applying the ACCA because post-*Johnson* and post-*Borden*, he no longer has three prior qualifying “violent felony” convictions.

Under 18 U.S.C. § 924(e)(1), the sentence enhancing provisions of the ACCA apply *only if* a defendant has *three* prior qualifying convictions. One category of prior qualifying offenses is “serious drug offenses.” *Id.* The other category is “violent felonies.” *Id.* At issue in our case is the “violent felonies” category, which is defined as:

[A]ny 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*[.]

18 U.S.C. § 924(e)(2)(B) (emphasis added).

The emphasized language of § 924(e)(2)(B)(ii) is commonly referred to as the “residual clause.” While the residual clause still appears in § 924, all federal courts agree that this clause was deemed unconstitutional under this Court’s rulings in *Johnson*. At issue in the subject case is § 924(e)(2)(B)(i), which is referred to as the “force clause” or “the elements clause.”

The four prior felony convictions relied on by the prosecution to support Mr. Johnson’s armed career criminal status were:

- A Mississippi state court conviction for “Armed Robbery.”³
- A Mississippi state court conviction for “Possession of Cocaine with Intent to Distribute.”⁴
- A Mississippi state court conviction for “Simple Assault on Law Enforcement Officer.”
- A federal court conviction for “Possession of an Unregistered Firearm.”

Clearly, under this Court’s rulings in *Johnson* and *Borden*, two of these four prior convictions are no longer qualifying prior convictions under the ACCA.

Just a few days ago, this Court decided *Borden v. United States*, __ S.Ct. __, 2021 WL 2367312 (June 10, 2021). In *Borden*, the Court held, “[o]ffenses with a

³ See *supra*, footnote 2.

⁴ Mr. Johnson concedes that this conviction counts as an ACCA predicate conviction.

mens rea of recklessness do not qualify as violent felonies under ACCA. They do not require, as ACCA does, the active employment of force against another person. And they are not the stuff of armed career criminals.”

This recent holding in *Borden* is relevant to Mr. Johnson’s case because his Mississippi state court conviction for “Simple Assault on a Law Enforcement Officer” can be committed with a *mens rea* of recklessness. The statute of conviction is Mississippi Code § 97-3-7(1)(a). This code section states:

(1)(a) A person is guilty of simple assault if he (i) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; (ii) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (iii) attempts by physical menace to put another in fear of imminent serious bodily harm[.]

Id. (emphasis added). Because the subject crime can be committed with a *mens rea* of recklessness, it no longer qualifies as a “violent felony” under the ACCA.

Another relevant conviction to this analysis is for “Possession of an Unregistered Firearm” under federal law. A review of Mr. Johnson’s Presentence Investigation Report indicates that this is a conviction for possession of a sawed off shotgun.

Under the holdings in *Johnson*, this conviction does not qualify as a “violent felony” under the ACCA. *Johnson* addressed that specific issue, and the Court found that this crime is not a “violent felony.” 135 S.Ct. at 2259-63.

In conclusion, this Court should grant certiorari and summarily vacate Mr. Johnson's sentence. The Court should then remand the case to lower court because under the binding holdings in *Borden* and *Johnson*, he no longer has three prior qualifying convictions for "violent felonies" under the ACCA.

VI. CONCLUSION

Based on the arguments presented above, Mr. Johnson asks the Court to vacate his sentence and summarily remand the case to lower court for further proceedings.

Submitted June 14, 2021, by:



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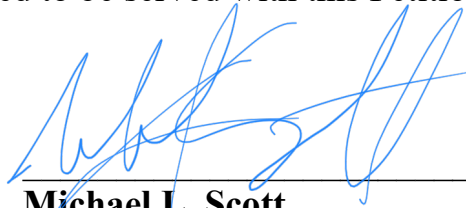
CERTIFICATE OF SERVICE

I, Michael L. Scott, appointed under the Criminal Justice Act, certify that today, June 14, 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. 773988466940, addressed to:

The Honorable Elizabeth Prelogar
Acting 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.

A handwritten signature in blue ink, appearing to read 'Michael L. Scott', is written over a horizontal line.

Michael L. Scott
Assistant Federal Public Defender