

No. _____

In The
Supreme Court of the United States

DUIANETE MOORE,

Petitioner;

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner pleaded guilty to Interference with Commerce by Threats or Violence, 18 U.S.C. Section 1951(a); Brandishing of a Firearm in Furtherance of a Crime of Violence, 18 U.S.C. Section 924(c)(1)(A)(ii); and Felon in Possession of a Firearm, 18 U.S.C. Section 922(g)(1). The PSR determined that Petitioner was a Career Offender pursuant to Section 4B1.1(c)(2)(A) of the Federal Sentencing Guidelines based on an assault, armed criminal action and attempted robbery conviction that occurred when Petitioner was 16 years old. The determination that Petitioner was a Career Offender significantly raised his advisory sentencing guidelines and Petitioner was ultimately sentenced to a term of 264 months' imprisonment.

The question presented is:

Is a conviction committed 24 years ago, when Petitioner was 16 years old, a proper predicate offense for classification of Career Offender status pursuant to 4B1.1(c)(2)(A) of the Federal Sentencing Guidelines?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED CASES

United States of America v. Duianete Moore, 4:19CR00311
RLW, United States District Court for Eastern District of Missouri. Judgment Entered on September 20, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Duianete Moore respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

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OPINIONS BELOW

The Eighth Circuit's unpublished opinion affirming the District Court's judgment and sentence imposed on Mr. Moore on direct appeal is included in the Appendix at App. 4. The Eighth Circuit's unreported

order denying Mr. Moore’s petition for rehearing en banc is included in the Appendix at App. 1. The Eighth Circuit’s judgment in Mr. Moore’s case is included in the Appendix at App. 2.

The District Court’s judgment in Mr. Moore’s criminal case is included in the Appendix at App. 7.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming the District Court’s judgment and imposed sentence of Mr. Moore in his criminal case was entered on October 14, 2021. On December 6, 2021, the court of appeals entered its mandate denying Petitioner’s timely petition for rehearing en banc. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

United States Sentencing Guideline 4B1.1(a) states, in pertinent part:

§ 4B1.1. *Career Offender*

- (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the

instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

- (b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

<i>Offense Statutory Maximum</i>	<i>Offense Level*</i>
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than one year, but less than 5 years	12

*If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

USSG § 4B1.1(a).

United States Sentencing Guideline 4B1.2 states, in pertinent part:

§ 4B1.2. Definitions of Terms Used in Section 4B1.1

* * *

(c) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

* * *

Commentary

Application Notes:

For purposes of this guideline—

* * *

“Prior felony conviction” means a prior adult federal or state conviction for an offense

punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

USSG § 4B1.2.

INTRODUCTION

Section 4B1.1 of the United States Sentencing Guidelines (USSG) sets increased Based Offense Levels for “Career Offenders” – defendants who: 1) are at least 18 years old at the time of their present offense; 2) their instant offense is either a crime of violence or a controlled substance offense; and 3) the defendant has at least 2 prior convictions for either a crime of violence or a controlled substance offense. A defendant who satisfies these requirements and qualifies as a Career Offender has their Guideline Base Offense Level raised from what it would otherwise be, thereby raising his or her advisory Sentencing Guideline range.

USSG 4B1.2 provides relevant definitions for “crime of violence,” “controlled substance offense” and “two prior felony offenses.” Nowhere within these two sections is there a definition or language citing the inclusion of a juvenile offense for purposes of determining a defendant’s status as a Career Offender. That definition is found only within the Application Note to Section 4B1.2.

STATEMENT OF THE CASE

1. On June 26, 2018, Moore and an accomplice robbed a fireworks stand in St. Charles, Missouri. Moore was armed with a gun during this robbery. Moore and his accomplice took cash registers, fireworks and robbed the two employees who were present of their money and cell phones.

2. During the summer of 2018, Moore committed multiple car break ins in St. Charles, Chesterfield, and St. Louis County, Missouri. These offenses were charged at the state level. Police officers arrested Moore on April 10, 2019. At the time of his arrest, officers located a handgun in Moore’s backpack.

3. A federal grand jury in the Eastern District of Missouri initially indicted Moore on April 24, 2019 solely for possessing a firearm as a convicted felon in violation of 18 U.S.C. Section 922(g)(1) related to the April 2019 incident. A Superseding Information was filed on January 7, 2020 charging Moore with: 1) Interference with Commerce by Threats or Violence, 18 U.S.C.

Section 1951(a); and 2) Brandishing of a Firearm in Furtherance of a Crime of Violence, 18 U.S.C. Section 924(c)(1)(A)(ii); and Felon in Possession of a Firearm, 18 U.S.C. Section 922(g)(1). Counts 1 and 2 of the Superseding Information relate to the 2018 fireworks robbery and Count 3 originates from Moore's April 2019 arrest. Moore pleaded guilty to all three counts pursuant to a written plea agreement.

4. The PSR determined that Moore was a Career Offender pursuant to Section 4B1.1(c)(2)(A) of the Federal Sentencing Guidelines due to a 1998 conviction for Assault First Degree and Attempted Robbery First Degree and a 2008 conviction for Conspiracy to Distribute and Possession with Intent to Deliver Heroin. As a result of this determination, the PSR stated that Moore's advisory Sentencing Guideline range was 262-327 months' imprisonment. Moore objected to this designation in the PSR citing that the Assault and Attempted Robbery convictions were too remote in time, committed when he was 16, and violated his constitutional rights.

5. On October 20, 2020, Moore's sentencing hearing occurred. Moore again raised his objection to the PSR finding that he was a Career Offender based on the conviction committed 23 years ago when he was a juvenile. The District Court overruled Moore's objection and adopted the guideline range offered in the PSR: 262-327 months' imprisonment. Moore asked for a downward variance from the adopted Guideline range but the District Court sentenced him to 264 months' imprisonment.

6. Moore timely filed an appeal on October 20, 2020. His appeal raised only one issue – that classifying Moore’s conviction from when he was 16 years old as a predicate offense based on the commentary to a Guideline section for Career Offender status was unconstitutional. Moore alleged that the classification of that offense from 1998 was unconstitutional and violated his due process rights.

REASONS FOR GRANTING THE WRIT

I. Making Petitioner a Career Offender for a juvenile conviction based on the commentary to a Guideline section violates the Constitution.

A. Standard of Review

For purposes of sentencing a court reviews factual findings for clear error applying the preponderance of evidence standard. *United States v. Davis*, 875 F.3d 869, 872 (8th Cir. 2017); *United States v. Atterberry*, 775 F.3d 1085 (8th Cir. 2015). A district court cannot base a sentence upon disputed unproven allegations in the PSR. *Id.*

B. Argument

The key analysis pertains to an interpretation of the Application Note to USSG § 4B1.2, cmt. n.1 that states a “prior felony conviction” is defined as a “conviction for an offense committed prior to age eighteen

... if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted." This entire appeal and Petitioner's offender classification turns on an interpretation of the Application Notes to the Sentencing Guidelines.

Permitting juvenile offenses, especially those that are extremely old such as Petitioner's 23-year-old juvenile conviction, to categorize a defendant as a Career Offender violates a defendant's due process rights. Especially when the authority to count such offenses comes not from the language of the Guideline § 4B1.2 but rather the commentary. Commentaries to the Guidelines should not broaden their scope but rather only interpret them. To do otherwise gives the sentencing commission too much power that they were not intended to have, as the Third Circuit recently noted in an opinion:

If we accept that the commentary can do more than interpret the guidelines, that it can add to their scope, we allow circumvention of the checks Congress put on the Sentencing Commission, a body that exercises considerable authority in setting rules that can deprive citizens of their liberty. *United States v. Nasir*, 982 F.3d 144, 159 (3d Cir. 2020).

In *Nasir*, the Third Circuit further addressed the interpretations of the commentary to the Sentencing Guidelines in determining whether or not a defendant is a career offender.

Unlike the guidelines, the commentary "never passes through the gauntlets of congressional

review or notice and comment.” *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (en banc) (per curiam); *see also United States v. Swinton*, 797 F. App’x 589, 602 (2d Cir. 2019) (quoting same and remanding for resentencing with an instruction for the district court to “consider again whether, in light of the concerns addressed in *Havis* and *Winstead*, the career offender [g]uideline applies” to a defendant whose predicate offenses for the career offender enhancement include a conviction for attempted criminal sale of a controlled substance). On that basis, along with the plain text of the guidelines, another of our sister courts of appeals has rejected the notion that commentary to 4B1.2(b) can expand the guidelines’ scope. *See Havis*, 927 F.3d at 386. (Because it has not been approved by Congress, “commentary has no independent legal force—it serves only to interpret the [g]uidelines’ text, not to replace or modify it.”). We too agree that separation-of-powers concerns advise against any interpretation of the commentary that expands the substantive law set forth in the guidelines themselves. Cf. 28 U.S.C. § 995(a)(20) granting the Sentencing Commission power to make recommendations to Congress concerning modification or enactment of statutes relating to sentencing[.]

Id. at 159-60.

The language in *Nasir* is of course on point for the present case. The commentary to USSG § 4B1.2 greatly expands the scope of the career offender statute to

provide an extremely harsh result. As outlined above, a crime that Petitioner committed at age 16 should not so harshly raise his sentence – especially when it occurred more than 20 years ago. And arriving at that unjust enhancement as a result of a commentary to the Sentencing Guidelines should not be afforded such weight that it can drastically affect a Defendant's designation as a career offender.

C. District courts, such as in Petitioner's case, should reject an application of the Guidelines when the result is overly harsh.

Petitioner's 23-year-old juvenile conviction created a significant increase in the potential term of imprisonment he received. The Fourth Circuit addressed such an issue in *U.S. v. Mason*, 284 F.3d 555 (4th Cir. 2002) and stated:

The commentary to § 4A1.2 gives further instructions on how to count offenses committed prior to age eighteen:

Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence

within five years of the defendant's commencement of the instant offense are counted.

USSG § 4A1.2, cmt. n.7 (1998).

Mason was sixteen when he committed the robbery leading to the 1981 conviction that he claims the district court erroneously counted. When Mason commenced the offense in this case in 1999, more than five years had passed since his sentence and release from confinement under his 1981 conviction. For that reason, the 1981 conviction cannot be counted under § 4A1.2(d)(2). Therefore, if Mason's 1981 conviction is to be counted, it must qualify under § 4A1.2(d)(1). The guideline itself, § 4A1.2(d)(1), requires an adult conviction and "a sentence of imprisonment exceeding one year and one month." The related commentary explains that "only those [offenses] that resulted in adult sentences . . . are counted." U.S.S.G. § 4A1.2, cmt. n. 7 (1998) (emphasis added). If the commentary is followed, Mason's 1981 robbery conviction counts only if he was both convicted and sentenced as an adult. The government completely ignores the commentary and argues that a conviction for an offense committed prior to age eighteen counts "for career offender purposes if [it is] classified as an adult conviction." Br. of United States at 6.

U.S. v. Mason, 284 F.3d 555 (4th Cir. 2002). In the present case, like in *Mason*, Petitioner committed the offenses of Assault, Armed Criminal Action and Attempted Robbery when he was a mere 16 years old.

Mason is factually similar to the facts of this case. It is illogical for Petitioner to be classified as a career offender and the petitioner in *Mason* not be classified a career offender and to do so violates the due process clause of the United States Constitution.¹

Additionally, numerous courts have rejected an overly harsh application of the Career Offender Guidelines. *See Cross v. United States*, 892 F.2d 288, 304-06 (7th Cir. 2018) (ruling that defendants who were sentenced under the mandatory Guidelines may bring *Johnson*-based vagueness challenges to the career offender guideline); *see also United States v. Lomax*, 816 F.3d 468, 478 (7th Cir. 2016) (“had the district court relied on [the] career offender status when choosing the appropriate sentence, the error would not have been harmless even though the guideline range would not have been different”). Furthermore, the First Circuit even vacated a sentence to allow a district court to consider the United States Sentencing Commission’s current policy position on who qualifies as a career offender. *See United States v. Frates*, 896 F.3d 93 (1st Cir. 2018) (“For these reasons, we ‘think it prudent to allow the [district] court the opportunity to consider the Sentencing Commission’s updated views.’ *U.S. v. Ahrendt*, 560 F.3d 69, 80 (1st Cir. 2009). We therefore vacate

¹ To treat Petitioner differently than the petitioner in *Mason* merely because how state law defines a conviction as a “juvenile” conviction violates the due process and equal protection clause of the United States Constitution in addition to his right not to be subject to cruel and unusual punishment.

Frates's sentence and remand for resentencing consistent with this opinion."

It is just such a harsh application of the Guidelines that the commentary note imposed on Petitioner in this case. He became a Career Offender based upon a 23-year-old crime that he committed when he was 16.

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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 Eighth Circuit.

Respectfully submitted,

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February 8, 2022