NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICIA ANN BROWN

PETITIONER

VERSUS

COMMISSIONER OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS; SHELIA PARKS, Warden of Central Mississippi Correctional Facility; X, Y, AND Z,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A Mississippi statute requires a life sentence for one who has been convicted of three (3) felonies, one of which is a "crime of violence." This sentencing enhancement statute does not define the term "crime of violence." The question presented is:

> Is a state statute, providing for an enhanced punishment (life imprisonment) for one convicted of a "crime of violence," unconstitutionally vague, when the statute provides no definition of the operative term "crime of violence"?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Patricia Ann Brown, Petitioner;

2. Commissioner of the Mississippi Department of Corrections, Respondent; and

3. Shelia Parks, Respondent.

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MISCELLANEOUS:

OPINIONS BELOW

The unpublished order of the United States Court of Appeals for the Fifth Circuit denying Petitioner's motion for a certificate of appealability is attached as Appendix A. The unpublished order of the United States District Court for the Norther District of Mississippi denying Petitioner's motion for a certificate of appealability is attached as Appendix B. The unreported opinion of the United States District Court for the Northern District of Mississippi denying Petitioner's petition for writ of *habeas corpus* is found at 2019 WL 4007212 (5th Cir. 2019), and is attached as Appendix C. The unpublished order of the Mississippi Supreme Court denying Petitioner's application to proceed in trial court is attached as Appendix D. The Mississippi Court of Appeals' decision affirming Petitioner's life sentence is reported at 37 So. 3d 1205 (Miss. App. 2009), and is attached as Appendix E.

JURISDICTION

This Court has jurisdiction to review the decision the United States Court of Appeals for the Fifth Circuit to deny a 28 U.S.C. § 2251(c) certificate of appealability under 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236 (1998).

CONSTITUTIONAL PROVISION PROVIDED

United States Constitution Amendment Fourteen provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A Mississippi habitual offender statute provided for a mandatory life sentence to those convicted of three (3) or more felonies if one of the felonies was a "crime of violence." MISS. CODE

ANN. § 99-19-83, provides:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more, whether served concurrently or not, in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence, shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole, probation or any other form of early release from actual physical custody within the Department of Corrections.

(Emphasis added).

In 2014, as part of criminal justice reform, the Mississippi Legislature, through House Bill 585, amended MISS. CODE ANN. § 99-19-83, to incorporate MISS. CODE ANN. § 97-3-2, which defines certain crimes, including armed robbery, as crimes of violence. Even the current version of the statute, however, does not state whether or not one convicted as an accessory is to be considered guilty of a "crime of violence" for purposes of the sentencing enhancement statute, MISS. CODE ANN. § 99-19-83.

On November 21, 1989, Petitioner was convicted of armed robbery, even though she was not present when the robbery occurred. Petitioner's conviction was based upon MISS. CODE ANN. § 97-1-3, which says that one who "shall be an accessory to any felony, before the fact, shall be deemed and considered a principal, and shall be indicted and punished as such. . . ." MISS. CODE ANN. § 97-1-3.

Two (2) Mississippi trial court judges differed on whether Petitioner was eligible for life imprisonment under the sentencing enhancement statute. In November 1989, when Petitioner was convicted of the armed robbery, the trial court found that Petitioner did not commit a "crime of

violence" under the sentencing enhancement statute because "Defendant was not in possession of the firearm used in the robbery and was not physically present in the store at the time of the Robbery. . . ."

The identical issue of whether Petitioner's armed robbery conviction qualified her for a sentencing enhancement under that same statute arose again nearly two (2) decades later. This time, Petitioner was convicted of possession of less than two (2) grams of cocaine. This offense carries a statutory maximum penalty of eight (8) years in prison. MISS. CODE ANN. § 41-29-139. Disagreeing with the earlier interpretation of the meaning of the term "crime of violence," a different trial judge sentenced Petitioner to life imprisonment. According to the second trial judge, the enhancement statute was applicable, since MISS. CODE ANN. § 97-1-3 makes an accomplice guilty as a principal, and Petitioner was, thus, guilty of committing a crime of violence – armed robbery. Petitioner was sentenced to life imprisonment on April 10, 2008. Had Petitioner not received the enhanced sentence of life imprisonment, she would have been released from confinement more than four (4) years ago.

Petitioner's life sentence under the enhancement statute was affirmed by the Mississippi Supreme Court in *Brown v. State*, 37 So. 3d 1205 (Miss. App. 2009), App. E, cert. denied, *Brown v. Mississippi*, 562 U.S. 1015 (2010). The present "void for vagueness" issue was not raised in that appeal as the cases from this Court on which Petitioner relies here had not yet been decided. Petitioner made three (3) unsuccessful collateral attacks in state court on her mandatory life sentence. None raised a "void for vagueness" argument.

On November 6, 2017, Petitioner filed her fourth state court application for post-conviction

relief. In this petition, Petitioner made the claim that she is raising here: since the sentencing enhancement statute contains no definition of the term "crime of violence," it is void for vagueness under the Fourteenth Amendment.

The Mississippi Supreme Court, in a brief order, rejected Petitioner's application for post-conviction relief, stating that "[t]he panel is not persuaded by Brown's argument that *Sessions v. Dimaya*, __ U.S. __, 2018 WL 1800371 (U.S. Apr. 17, 2018) is an intervening case that 'would have actually adversely affected the outcome of [her] conviction or sentence.' Miss. Code Ann. § 99-39-27(9)." App. D.

On June 29, 2018, Petitioner filed the present federal *habeas corpus* petition. The United States District Court for the Northern District of Mississippi denied *habeas* relief, stating, *inter alia*, that *United States v. Davis*, ___ U.S. ___, 139 S. Ct. 2319 (2019) (decided while Petitioner's federal *habeas corpus* petition was pending), "is not applicable to the case before this court." According to the district court, "[p]recedent, as well as common sense, holds that armed robbery . . . is a crime of violence." *Brown v. Comm'r of Mississippi Dep't of Corr.*, 2019 WL 4007212, at *4 (N.D. Miss. 2019); App. C. By subsequent order, the district court denied a certificate of appealability. App. B.

Petitioner then requested a certificate of appealability from the United States Court of Appeals for the Fifth Circuit. On May 3, 2021, the Fifth Circuit denied a certificate of appealability, incorporating as its opinion the opinion of the district court. App. A.

REASON FOR GRANTING THE WRIT

No less than four (4) decisions from this Court (two (2) decided while Petitioner's application for post-conviction relief was pending), hold that in order to meet due process standards, a

sentencing enhancement statute must contain a non-vague definition of the term "crime of violence."

Before Petitioner filed her *habeas corpus* petition, this Court decided *Johnson v. United States*, 576 U.S. 591, 592 (2015). In *Johnson*, the government asked for an enhanced sentence based on a conviction for a "violent felony" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). Unlike the Mississippi Legislature, Congress defined the term "violent felony." That definition includes a crime which "otherwise involves conduct that presents a serious potential risk of physical injury to another. . . ." 18 U.S.C. § 924(e)(2)(B)(ii).

Johnson held that the definition of "violent felony" (contained in the statute's so-called residual clause) was unconstitutionally vague, since the "clause leaves grave uncertainty about how to estimate the risk posed by a crime" and "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Johnson*, 576 U.S. at 592 (citation omitted).

While Petitioner's application for post-conviction relief was pending in the Mississippi Supreme Court, this Court decided *Sessions v. Dimaya*, ___ U.S. ___, 138 S. Ct. 1204 (2018). The statute litigated in *Sessions* was not the ACCA, but a provision of the Immigration and Nationality Act, which provides for deportation of certain immigrants convicted of a "crime of violence." Congress defined the term "crime of violence," for purposes of the Immigration and Nationality Act, to include "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Sessions*, 138 S. Ct. at 1211, quoting 18 U.S.C. § 16(b). *Sessions* held that *Johnson* applies in statutory contexts other than the ACCA, and that "the Government must . . . persuade us that it [the statute at issue in *Sessions*] is materially clearer than its now-invalidated ACCA

counterpart." *Sessions*, 138 S. Ct. at 1213.

Sessions held that the statutory definition of "crime of violence" in the Immigration and Nationality Act, was unconstitutional for the same reasons identified in *Johnson* which was that the statutory definition "left unclear what threshold level of risk made any given crime a 'violent felony.'" *Sessions*, 138 S. Ct. at 1214.

According to *Sessions*, the "punch line" of *Johnson* is: "'By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause' violates the guarantee of due process." *Sessions*, 138 S. Ct. at 1214, quoting *Johnson*, 135 S. Ct. at 2558. *Sessions* adopts *Johnson*'s holding, that an enhancement statute's definition of the term "crime of violence" is void for vagueness if that definition combines "indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony. . . ." *Sessions*, 138 S. Ct. at 1214, quoting *Johnson*, 135 S. Ct. at 2558.

Because of *Sessions*, the *Johnson* due process holding applies to all sentencing enhancement statutes. The issue under *Johnson* and *Sessions* is whether the terms "crime of violence" or "violent felony" has been given a non-vague definition in the sentencing enhancement statute.

It is no answer to say that Petitioner was sentenced long before *Johnson*, *Sessions*, and *Davis* were decided. *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016), held that *Johnson* is to be given a retroactive effect. *Welch* reiterated the *Johnson-Sessions*' principle that the "void-for-vagueness doctrine prohibits the government from imposing sanctions 'under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless

that it invites arbitrary enforcement.'" *Welch*, 136 S. Ct. at 1262, quoting *Johnson*, 135 S. Ct. at 2556.

In *United States v. Davis*, ___ U.S. ___, 139 S. Ct. 2319 (2019), this Court once again turned to the void for vagueness doctrine in the context of sentencing enhancement statutes. *Davis* confronted a statute which provided for enhanced sentencing for those convicted of a "violent felony." The applicable statute defined the term "violent felony" to include "felonies 'that by [their] nature, involv[e] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.'" 18 U.S.C. § 924(c)(3)(B), quoted in *Davis*, 139 S. Ct. at 2323-24. *Davis* held that this statutory definition of "crime of violence" was unconstitutionally vague, noting: "Even the government admits that this language, read in the way nearly everyone (including the government) has long understood it, provides no reliable way to determine which offenses qualify as crimes of violence and thus is unconstitutionally vague." *Davis*, 139 S. Ct. at 2324.

In summary, this Court's four (4) decisions – *Johnson*, *Sessions*, *Welch*, and *Davis* – all hold that the definition of terms such as "crime of violence" or "violent felony," in a sentencing enhancement statute, must contain a non-vague definition. To overcome the void for vagueness doctrine, the statute must contain a "reliable way to determine which offenses qualify as crimes of violence. . . ." *Davis*, 139 S. Ct. at 2324. This determination must be made through eliminating the "uncertainty about how to estimate the risk posed by a crime," and eliminating the "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Johnson*, 576 U.S. at 592.

The Mississippi enhancement statute in this case is unconstitutionally vague, since it contains

no definition whatsoever of the term "crime of violence." Since the sentencing enhancement statute at issue contains no definition whatsoever of the term "crime of violence," it necessarily "provides no reliable way to determine which offenses qualify as crimes of violence. . . ." *Davis*, 139 S. Ct. at 2324. A statute which contains no definition at all of the term "crime of violence" does not eliminate the "uncertainty about how to estimate the risk posed by a crime," nor does it eliminate the "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Johnson*, 576 U.S. at 592.

The district court opinion, as incorporated by the Fifth Circuit Court of Appeals, departs from the constitutionally required approach of *Johnson*, *Sessions*, *Welch*, and *Davis*. In each of those four (4) cases, this Court required that the sentencing enhancement statute itself contain a non-vague definition of the terms "crime of violence" or "violent felony." The district court held that armed robbery is a crime of violence because Mississippi substantive law defines armed robbery to include the taking "from the person . . . against his will by violence . . . or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon. . . ." *Brown*, 2019 WL 4007212, at *4, App. C, quoting MISS. CODE ANN. § 97-3-79.

The approach of the district court and Fifth Circuit Court of Appeals is especially at odds with *Davis*. *Davis* involved a conviction of Hobbs Act robbery, which is statutorily defined by 18 U.S.C. § 1951. Yet, when *Davis* decided the issue of whether the enhancement statute contained a non-vague definition, the *Davis* Court only addressed the definition of "violent felony" contained in the sentencing enhancement statute itself. In *Davis*, this Court did not discuss the elements of the underlying crime of armed robbery as defined in 18 U.S.C. § 1951. By deciding that armed robbery

is a crime of violence based upon the statutory elements of armed robbery, the district court and the Fifth Circuit Court of Appeals failed to follow the methodology which this Court has uniformly mandated in four (4) recent decisions.

The explanation given by the district court for its decision – that the Mississippi statute does not contain a "residual clause sufficiently similar to the ACCA's. . . .," *Brown*, 2019 WL 4007212, at *3, App. C – misses the point. The point of this Court's four (4) void for vagueness decisions is not that the statutes are unconstitutional because the vague definition is contained in a residual clause. The point of the four (4) decisions is that sentencing enhancement statutes are unconstitutional because they do not give a non-vague definition of the term "crime of violence."

Based on this Court's four (4) inescapable directives, this Court should reverse so that Petitioner, who has already been in prison four (4) years over the statutory maximum, can be immediately released. Merely ordering the Fifth Circuit Court of Appeals to issue a certificate of appealability will result in further delay, while Petitioner continues to be imprisoned after she has already served the statutory maximum.

Alternatively, however, should this Court not reverse and render, then Petitioner requests that this Court direct the Fifth Circuit Court of Appeals to issue a certificate of appealability, as it was required to do under the familiar standards described in *Welch*, 136 S. Ct. at 1263-64.

CONCLUSION

This Court should reverse and order Petitioner's immediate release because the United States Circuit Court of Appeals for the Fifth Circuit has declined to follow the four (4) decisions of this Court in *Johnson*, *Sessions*, *Welch*, and *Davis*.

PATRICIA ANN BROWN, Petitioner

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RESPONDENTS

PROOF OF SERVICE

I, JIM WAIDE, do swear or declare that on this date, 23, September, 2021, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid for delivery within 3 calendar days, and via email.

The names and addresses of those served are as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on 23, September, 2021.

JIM WADE