

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

EVERETT EARL PARKER
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. 19-60077

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, under the Supreme Court precedent established in *Johnson v. United States*, 135 S.Ct. 2551 (2015), Mr. Parker's life sentence for count 1 should be vacated because he no longer has two prior qualifying "serious violent felony" convictions under § 3559.

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 Mr. Parker on December 12, 2003. The conviction was for: count 1, bank robbery in violation of 18 U.S.C. § 2113(a) and (d); and count 2, brandishing a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1). The district court case number is 5:03cr5-DCB. The subject § 2255 Petition arose out of conviction and sentence for these two charges.

In 2015, after Mr. Parker's conviction and sentence, this Court ruled that the "residual clause" portion of the "violent felony" definition in the Armed Career Criminal Act is unconstitutional. *See Johnson v. United States*, 135 S.Ct. 2551 (2015). The Fifth Circuit did not dispute that the holdings in *Johnson* invalidate the comparably worded residual clause in 18 U.S.C. § 3559, which is the statute at issue in this Petition. Therefore, that issue is not addressed in this Petition.

Invoking the holdings in *Johnson*, Mr. Parker filed the subject § 2255 Petition to Vacate Sentence (hereinafter "§ 2255 Petition" or "Petition") on June 23, 2016. The district court assigned the Petition civil case number 5:16cv58-DCB. In the Petition, Mr. Parker argued that post-*Johnson*, his mandatory life sentence for the count 1 robbery conviction should be vacated because he no

longer has two prior qualifying “serious violent felony” convictions under 18 U.S.C. § 3559. Thus, the mandatory life sentence under § 3559 no longer applies.

The district court entered an Order denying the relief sought in the § 2255 Petition on January 24, 2019. On the same day, the district court entered Judgment. The district court’s Order and Judgment are attached hereto as composite Appendix 1.

Mr. Parker appealed the case to the United States Court of Appeals for the Fifth Circuit on January 29, 2019. The Fifth Circuit case number is 19-60077. The Fifth Circuit entered an Order affirming the district court’s rulings on June 30, 2021. It entered a Judgment on the same day. The Fifth Circuit’s Order and Judgment are 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 June 30, 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

(c) Imprisonment of certain violent felons.--

(1) Mandatory life imprisonment.--Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if--

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of--

(i) 2 or more serious violent felonies; or

(ii) one or more serious violent felonies and one or more serious drug offenses[.]

18 U.S.C. § 3559(c)(1).

(2) Definitions.--For purposes of this subsection—

* * * * *

(F) the term “serious violent felony” means--

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense[.]

18 U.S.C. § 3559(c)(2)(F).

(3) Nonqualifying felonies.--

(A) Robbery in certain cases.--Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph

(2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that--

(i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and

(ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person.

18 U.S.C. § 3559(c)(3)(A).

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. Parker for: count 1, bank robbery in violation of 18 U.S.C. § 2113(a) and (d); and count 2, brandishing a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1). 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. Parker arose from the laws of the United States of America.

B. Statement of material facts.

We begin with the recommended sentence calculation under the United States Sentencing Guidelines (hereinafter “Guidelines”). Mr. Parker’s criminal history category was VI. His offense level for count 1 was 35. This combination yielded a recommended sentence of 292 to 365 months in prison.

Calculating the Guidelines sentence range does not end the story for count 1. This is true because the prosecution filed a “Notice of Prior Serious Violent Felony / Serious Drug Offense Conviction Information” on August 25, 2003. In that context the Presentence Investigation Report states, “because Parker was convicted of a serious violent felony in the instant offense and has been convicted on separate prior occasions in a Court of the United States or of a State of 2 or more serious

violent felonies, the defendant shall be sentenced to life imprisonment.” The statute supporting this enhancement is 18 U.S.C. § 3559(c)(1), which is quoted above in the section of this Petition titled “Statutes involved.”

The two prior felonies that purportedly supported the mandatory life sentence under § 3559 were:

- a federal court conviction for “Bank Robbery;” and
- a Louisiana state court conviction for “Armed Robbery.”

As analyzed below, the Court should find that the Louisiana state court conviction for “Armed Robbery” no longer qualifies Mr. Parker for a mandatory life sentence under § 3559 because it is not a “serious violent felony” post-*Johnson*. If the Court agrees, then the sentencing range at resentencing will be limited to the Guidelines calculation for count 1.

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. Parker’s case.

One of the two prior convictions that purportedly qualified Mr. Parker for a life sentence was a federal court conviction for “Bank Robbery.” That prior conviction is not at issue in this Petition. The other prior conviction that purportedly qualified Mr. Parker for a life sentence under § 3559 was a Louisiana state court conviction for “Armed Robbery.” That prior conviction is at issue.

Section 3559 requires a mandatory life sentence if a defendant has two prior convictions for “serious violent felonies.” 18 U.S.C. § 3559(c)(1). For purposes of the issue on appeal, “serious violent felony” is defined as any “offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another[.]” 18 U.S.C. § 3559(c)(2)(F)(ii).

To determine whether Louisiana “Armed Robbery” qualifies Mr. Parker for a life sentence, we must look further into the provisions of § 3559. Specifically, we look to the provisions of § 3559(c)(3), titled “Nonqualifying felonies.” This code section states:

(A) Robbery in certain cases.--Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that--
(i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and
(ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person.

18 U.S.C. § 3559(c)(3)(A) (emphasis added).

In summary, a crime does not qualify as a “serious violent felony” under § 3559 if no firearm or dangerous weapon was used during the crime. Also, a crime does not qualify as a “serious violent felony” if no victim was killed or seriously injured.

A review of the Presentence Investigation Report gives no details as to how the robbery was committed. It simply states that the Louisiana indictment alleged that Mr. Parker was “armed with a dangerous weapon.” It states nothing about any injuries to any victims.

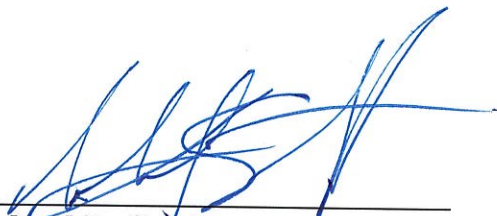
The content of the Presentence Investigation Report is the only information in evidence regarding this conviction. Courts are “not permitted to rely on the PSR’s characterization of the offense” when deciding whether a sentence should be enhanced based on a prior conviction. *United States v. Garza-Lopez*, 410 F.3d 268, 273-74 (5th Cir. 2005) (citing *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 1257 (2005)).

In summary, there is an absence of reliable information that Mr. Parker was armed with a firearm or a dangerous weapon during the robbery, and there is an absence of any evidence that any victim was harmed. Therefore, under § 3559(c)(3)(A), this Court should grant certiorari and find that Mr. Parker's prior Louisiana conviction for "Armed Robbery" does not qualify him for a life sentence under § 3559(c)(1). If the Court so rules, then Mr. Parker's life sentence must be vacated because he no longer has two prior qualifying convictions under § 3559.

VI. CONCLUSION

Based on the arguments presented above, Mr. Parker asks the Court to
Petition for Writ of Certiorari.

Submitted November 16, 2021, by:



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CERTIFICATE OF SERVICE

I, Michael L. Scott, appointed under the Criminal Justice Act, certify that today, November 16, 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. 775221236350, addressed to:

The Honorable Elizabeth Prelogar
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