

No. _____

21-6501

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

NOV 24 2021

OFFICE OF THE CLERK

Luke D. Patterson — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Sixth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Luke Dwight Patterson #60459-060
(Your Name)

FCI-Gilmore / Po Box 6000
(Address)

Glenville, WV 26351
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- I) whether conflicting decisions within a single court can present an unfair sentence disparity
- II) whether Rule 15(a) (Newly Discovered Evidence) and 28 U.S.C. §158(d)(2)(A)(ii) (Conflicting Decisions) qualify as grounds for a resentencing

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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Ohio Rev. Code Ann. §2911.01(A)(1), (C).....	Various

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 A 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 is unpublished.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 is unpublished.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 _____ 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 is unpublished.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 _____ 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 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 12-20-2017.

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: 01-23-2017, and a copy of the order denying rehearing appears at Appendix B.

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 _____. A copy of that decision appears at Appendix _____.

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

18 U.S.C. § 924(e)(1)

A defendant is subjected to an enhanced sentence if the instant offense of conviction is a violation 18 U.S.C. § 922(g) and the defendant has at least three prior convictions for a "violent felony" or "serious drug offense" or both, committed on occasions different from another.

U.S.S.G. § 4A1.2 (Application Note 3)

Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e. the defendant is arrested for the first offense prior to committing the second). Otherwise, prior sentences are considered related if they resulted from offense (1) occurred on the same occasion; (2) were part of a single common scheme or plan; (3) were consolidated for trial or sentencing.

18 U.S.C. § 158(d)(2)(A)(ii)

The appropriate court of appeals shall have jurisdiction of appeals... the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions.

18 U.S.C. § 3659(3)(A)(i), (ii)

Non-qualifying Robbery

STATEMENT OF THE CASE

This case shows, and proves that there is a conflicting decision within courts, primarily within the Sixth Circuit Court of Appeals.

There has been numerous issues that were presented, that were never addressed within the Honorable Appeals Court that showed prominent reasons as to why the Honorable Appeals Court should have reversed the decision to sentence Mr. Patterson as an Armed Career Criminal.

The Honorable Appeals Court addressed only a portion of the argument, relying upon the original indictment instead of the issue of it only being ONE (1) indictment. It was said, by the Honorable Appeals Court that "the Supreme Court has restricted federal district courts tasked with answering the ACCA-predicate question to first the statutory definition of the prior offense, and, if that definition is phrased in the alternative, to limited evidence, because of the ACCA's text and legislative history and because of the likely conflict with the Constitution were the evidentiary restrictions absent." It was also said that, "accordingly, we (the Sixth Circuit Court of Appeals) hold that Taylor and Shepard's limitations on the evidentiary sources and information that a federal district court may consider in determining whether a prior conviction is a predicate under the ACCA also apply when the court determines whether prior offenses were 'committed on occasions differnet from one another' under ACCA."

Here, there were no transcripts of Mr. Patterson's plea colloquy or copies of written plea agreement from the 2000 conviction showing and admission by Mr. Patterson. Therefore, Mr. Patterson did not "necessarily admit the times and locations asserted in the Bill of Particulars when he plead guilty in 2000. But, the government relies upon a discarded, invalid indictment

(which Mr. Patterson never plead to) instead of the amended indictment (what Mr. Patterson plead to). Mr. Patterson DID NOT plea to the indictment that the government so willfully is using but an AMENDED indictment that clarified the situation, not speculated on what was charged. But this fact still shows that it was a SINGLE indictment, a CONSOLIDATED case, a SINGLE charge. Mr. Patterson's single indictment is being separated into three portions to enhance his sentence. Mr. Patterson, (by law) has ONE (1) predicate offense.

REASONS FOR GRANTING THE PETITION

I. Whether Conflicting Decisions Within The Honorable Sixth Circuit Court Of Appeals Would/Should Be Grounds For Rehearing Under Precedent Case Law.

The Supreme Court has always held, in Taylor v. United States, it is IMPERMISSIBLE for "a particular crime to sometimes count towards enhancements and sometimes not, depending on the facts of the case." *id.*, @ 601, 110 S. Ct. 2143, 109 L. Ed. 2d 607; see Dean v. United States, 581 U.S. ___, (2017) ruling.

The Sixth Circuit Appeals Court has held (in King v. United States, 2017 BL 6th Cir., No. 15-4192, 3-30-2017), that "a sentencing court may rely on the evidentiary source and information approved by the Supreme Court in Taylor and Shepard." opinion by Judge Laurie J. Michelson. Taylor v. United States, 495 U.S. 575 (1990) and Shepard v. United States, 544 U.S. 13 (2005). The Sixth Circuit Court also pointed out that recent Supreme Court decision (Descamp v. United States, (2013) and Mathis v. United States, (2016)), puts further limitations on the application of the Act. Various sister circuits share this view of the Sixth Circuit.

The Honorable Appeals Court has erred in stating that Mr. Patterson's reliance on King would not help. For Mr. Patterson does not solely rely upon

King (their ruling within the Sixth Circuit), but various rulings listed. Including, but not limited to, the application of the United States Sentencing Guidelines for counting separate sentences for enhancement purposes.

For the purpose of determining whether a defendant has three (3) prior convictions, Application Note 3 of §4B1.2(c) of the United States Sentencing Guidelines indicates that the question of whether a defendant's prior felony convictions are to be counted separately MUST be determined in accordance with §4A1.2 of the United States Sentencing Guideline. §4A1.2(a)(2) provides that prior sentences imposed in "related cases" ARE to be treated as 1 sentence (not shall or could but ARE). Whether prior sentences are to be considered "related" are to be determined in accordance with Application Note 3 to §4A1.2 which provides:

Application Note 3 to §4A1.2:

"prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e. the defendant is arrested for the first offense prior to committing the second.) OTHERWISE, prior sentences are considered RELATED if they resulted from offenses (1) occurred on the same occasion; (2) were part of a single common scheme or plan; (3) were CONSOLIDATED for trial or sentencing."

Furthermore, Mr. Patterson relies upon United States v. Balacsak, 873 F.2d 673, 683-84 (3d Cir. 1989) (en banc) (two burglaries counted as single predicate offenses since convictions were adjudicated together) (emphasis omitted). In Balacsak, 6 members of the Third Circuit took the minority view that the defendant's prior criminal episodes MUST BE SEPARATED BY CONVICTIONS, considering substantial legislation history to support the view that Congress intended the enhancement to apply ONLY to "three-time-losers" *id.* 873 F.2d @674-84

Mr. Patterson's prior conviction was consolidated into one (1) indictment sentenced all on the same day and time, ran concurrent with each other, and terminated on the same day. Thus, Mr. Patterson only has (by law) one (1)

predicate offense which does not qualify him for an ACCA enhancement. If it be allowed, the separation of one conviction into three prior convictions, would violate, not only the Honorable Sixth Circuit Appeal Court's previous ruling (King v. United States (causing a conflicting decision)), but also a United States Sentencing Guideline Application and numerous precedent case law that prevents the separation of a consolidated case for enhancement purposes.

In conclusion, the Honorable Appeals Court has stated that the District Court is limited to the documents that the Supreme Court has authorized for the purposes of enhancements. To use an unauthorized document (or allow an unauthorized document to be used), would constitute a MISCARRIAGE OF JUSTICE. To separate a single charging instrument (with no proof of an intervening arrest or that the case was not consolidated), would be a violation of the U.S.S.G., also taking into account a conflicting decision within the Sixth Circuit Court of Appeals. And therefore, GROUNDS FOR A REHEARING.

II. Whether Rule 15(a) (Newly Discovered Evidence) as well as 28 U.S.C. §158 (d)(2)(A)(ii) (Conflicting Decisions) would/should be grounds for rehearing and resentencing

Mr. Patterson's Ohio Rev. Code A..§2911.01(A)(1), (C)-Aggravated Robbery, statute no longer qualify under 18 U.S.C. §924(e)(2)(A)(i)-Physical Force Clause in coalition with Ohio Rev. Code Ann. §2911.02(A)'s-Robbery, statute (being a derivative of §2911.01(A)(1) statute.)

OHIO AGGRAVATED ROBBERY STATUTE

I.) An aggravated Robbery O.R.C. 2911.01(A)(1), states that "no person, in attempting or committing a theft offense...or in fleeing immediately after such attempt of offense, shall...have a deadly weapon or dangerous ordinance..

on or about his person or under his control." O.R.C. 2911.01(A)(1).

For a conviction to fall within the Force Clause of the Armed Career Criminal Clause, the statute must contain, as an element, "the use, attempted use, or threatened use of physically FORCE against the person of another." 18 U.S.C. §924(e)(1). The phrase "physical force" means "violent force—that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140 (2010). This is not an element of O.R.C. 2911.01(A)(1), which requires only possession of a deadly weapon while attempting, committing, or fleeing from a theft offense.

When compared, the elements of Aggravated Robbery under O.R.C. 2911.01(A)(1) do not match those of the Armed Career Criminal Force Clause because the state's statute does not require the use of physical force against the person of another. A purely textual comparison reveals that Aggravated Robbery could have been committed without the use of ANY physical force—such as when a defendant possess a weapon but never displays, brandishes, or even indicates he possesses it. While the government may assert the presence of a firearm during the commission of a robbery creates an emotional duress equivalent to force, the United States Supreme Court has already rejected that argument. In the 2010 Johnson decision, (not to be confused with the more recent decision of the same name that invalidated the ACCA's case), the Supreme Court held that the elements of the physical force "plainly refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force." *id.* @ 139. Moreover, O.R.C. 2911.01(A)(1) does not require the victims even be aware of a weapon. Because a straight comparison of elements is required, this court cannot consider some more attenuated, implied, or theoretical force.

Additionally, Mr. Patterson's prior conviction of Aggravated Robbery encompasses a range of conduct much wider than that contemplated by the ACCA.

Ohio's Aggravated Robbery statute ONLY requires that the defendant possessed or had under his control a deadly weapon.

There is NO other requirement that the defendant displayed or brandish the weapon. Likewise, there is no requirement that the defendant indicate his possession of the weapon to the victim in any way. Ohio case law appropriately reflects the broad conduct encompassed by this statute.

Irrespective of how broadly "force" is defined under the robbery statute, it remains that an accused can be convicted of aggravated robbery under O.R.C. 2911.01(A)(1) without having used or threatened to use any force, as long as the accused merely possesses a deadly weapon or dangerous ordinance during the commission of a theft.

Thus, Ohio case law reflects that convictions under O.R.C. 2911.01(A)(1) punish a broader range of conduct than the "violent felonies" encompasses by the element of the force clause of the ACCA. Further, the government has conceded robbery statutes that only require possession of a weapon during a theft offense are no longer qualifying predicates under the ACCA. See, e.g. United States v. Terry, No. 1:05-cr-382, Dkt. 53 (N.D. Oh. Jan. 6, 2016) (agreeing this very same aggravated robbery statute is no longer a crime of violence under the elements and force clause); United States v. Lanam, 1:12-cr-222, Dkt. 30 (N.D. Oh. Feb. 1. 2016) (agreeing O.R.C. 2911.01(A)(1), a similar statute no longer a match).

Likewise, the statute encompasses conduct that is much broader than that required by the ACCA. As the Supreme Court clarified, ONLY convictions with the same of narrower elements qualify as a predicate offense. Descamp v. United States, 133 S. Ct. 2276, 2281 (2013). Aggravated Robbery under O.R.C. 2911.01(A)(1) requires NO PHYSICAL FORCE. Therefore, it's elements are not sufficient to meet the force clause of the ACCA statute.

On _____, the Honorable Appeals Court concluded that Mr.

Patterson's robbery conviction in 2000 was deemed a violent felony. THE SIXTH CIRCUIT APPEALS COURT, on 9-12-2017, in Johnson v. United States, 2017 U.S. App. LEXIS 17812; 2017 FED App. 0524N (6th Cir.) 17a0524n.06, Case No. 16-4003, "Overview: Holdings" clearly stated: "[1]-The District Court erred in sentencing defendant under Armed Career Criminal Act (ACCA) because defendant's Pre-Senate Bill Robbery and attempted robbery conviction under Ohio Rev. Code Ann. §§2923.02(A) and 2911.02(A)(1982) no longer qualified as violent felonies under the ACCA 18 U.S.C. §924(e)(2)(B)."

THE VERY SAME COURT on 8-9-2017, in United States v. Yates, 501 Fed. Appx. 505, 2012 U.S. App. LEXIS 20857 (6th Cir. Ohio, Oct. 5, 2012), "Overview Holdings" stated: "[1]-Defendant's 1999 robbery conviction under Ohio Rev. Code Ann. §2911.02(A)(3) did not qualify as a crime of violence under U.S.S.G. §4B1.2(a)(1); [3]-Only minimal level of force was needed to sustain a conviction under §2911.02(A)(3); [4]-Defendant was entitled to be resentenced; [5]-Section 2911.02(A)(3) did not require proof of sufficient physical force to constitute a crime of violence under 4B1.2(a)(1)."

In BOTH Sixth Circuit Appeals Court rulings, the Sixth Circuit Court deemed that "Defendant's sentence for being a felon in possession of a firearm...was vacated and the case was remanded since he (Yates) was improperly classified as a Career Offender because his Ohio Robbery conviction did not qualify as a crime of violence under U.S.S.G. §4B1.(a)(3)." as well as "District Court erred in sentencing defendant under the ACCA because defendant's Pre-Senate Bill Robbery and attempted robbery convictions under Ohio Rev. Code Ann. §§2923.02(A)(and 2911.02(A)(1982) NO LONGER QUALIFIED AS VIOLENT FELONIES under the ACCA, 18 U.S.C. §924(e)(2)(B)."

But, months prior, this very same court deemed these very same robbery convictions violent felonies for ACCA enhancement purposes (as stated previously), and remanded Mr. Patterson back to District Court to be

resentenced as an Armed Career Criminal.

It was stated by the Honorable Appeals Court that: "in determining whether an alien's conviction under Ohio Rev. Code Ann. §2911.02(A)(3) is a crime of violence as defined by the U.S. Sentencing Guidelines (USSG), a court must apply a categorical approach, meaning a court looks at the statutory definition of the crime of conviction, not the facts underlying that conviction, to determine the nature of the crime. Under the categorical approach, a court must first assume that defendant's conviction rested upon nothing more than the least of the act criminalized, and then determined whether even those acts would qualify as a crime of violence under U.S.S.G. The minimum culpable conduct criminalized by the state statute includes only conduct to which there is realistic probability, NOT THEORETICAL POSSIBILITY, that the state would apply the statute. In other words, a court must determine the minimum level of force criminalized by §2911.01(A)(1) and then resolve whether that conduct constitutes the type of violent force required by the U.S.S.G.'s Force Clause." It was also stated that: "The force criminalized by Ohio Rev. Code Ann. §2911.01(A)(1) is defined as any means upon or against a person. Ohio Rev. Code Ann. §2911.01(A)(1). By its plain language, Ohio's expansive definition of force appears to cover more than force capable of causing physical pain or injury to another person. Only a MINIMUM level of force is needed to sustain a conviction under Ohio Rev. Code Ann. §2911.01(A)(1). The force required for a conviction under Ohio Rev. Code Ann. §2911.01(A)(1) IS NOT VIOLENT FORCE capable of causing physical pain or injury to another person. There is no way to distinguish that level of force from the force held to be minimal by other federal circuits. A realistic probability exists, in other words, that Ohio is applying §2911.01(A)(1) in such a way that criminalizes a level of force LOWER than the type of violent force required by the Johnson decision. As a consequence, a conviction under that statute

does not constitute a crime of violence under the force clause in U.S. Sentencing Guidelines Manual §4B1.2(a). (omitted).

A conviction under Ohio Rev. Code Ann. 2911.01(A)(1) is a crime of violence as defined by the guidelines, it must be applied by the "categorical approach" meaning that it must be looked at by the "statutory definition of the crime of conviction not facts underlying that conviction" (see United States v. Ford, 560 F.3d 420, 421-22 (6th Cir. 2009); also see Moncrieffe v. Holder, 133 S. Ct. 1678, 1684, 185 L. Ed. 2d 727 (2013) (The conviction 'rested upon [nothing] more than the least of th[e] acts' (quoting Johnson, 559 U.S. @ 137)). The minimum culpable conduct criminalized by the state statute includes only conduct to which there is a "realistic probability, not a theoretical possibility" that a state would apply the statute. *id.*, @1685 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007)). It was stated by the Honorable Appeals Court that: "A review of Ohio-court decisions confirm our view that a defendant need not engage in violent force in order to be convicted of robbery under Ohio Rev. Code §2911.02(A)(3)." It was further stated that: "Other circuits have similarly held that, when a state robbery statute criminalizes minimal force, such as the force incidental to purse-snatching, a conviction under that statute is not a "crime of violence" under the guidelines' FORCE CLAUSE or a "violent felony" under the ACCA FORCE CLAUSE. (see United States v. Mulkern, 854 F.3d 87, 93 (1st Cir. 2017); United States v. Gardner, 823 F.3d 793, 803-04 (4th Cir. 2016); United States v. Nicholas, No. 16-3043, 2017 U.S. App. LEXIS 7101, 2017 WL 1429788, @ *3-5 (10th Cir. Apr. 24, 2017); United States v. Winston, 859 F.3d 677, 684-85 (4th Cir. 2017); United States v. Eason, 829 F.3d 633, 640-42 (8th Cir. 2016)." The force required for a conviction under Ohio Rev. Code Ann. §2911.01(A)(1) is similarly NOT "violent force...capable of causing physical pain or injury to another person." See

Johnson, 559 U.S. @ 140.

Various circuits have upheld the use of state robbery convictions for sentence-enhancement purposes because "[i]n each of these cases, there was either an explicit element of violence in the statute..."(emphasis omitted). Ohio Rev. Code Ann. §2911.01(A)(1), in contrast has no explicit requirements of violent force.

CONCLUSION

Mr. Patterson has shown Prima Facie that BOTH of Mr. Patterson's decisions were conflicting decisions within the Honorable Sixth Circuit Court of Appeals. That these decisions should be applied to his case and judgment rendered according to these decisions. Being that, these cases have Nunc Pro Tunc, it is hereby requested that this Honorable Court GRANT Mr. Patterson's Writ of Certiorari on the aforementioned case and, according to the laws set forth by Congress, the Honorable Sixth Circuit's decision, and numerous precedent case laws, Vacate Mr. Patterson's sentence, Remand it to the District Court and Order him Resentenced WITHOUT the ACCA enhancement.

Respectfully Submitted;



Date: 10-14-2021