No.

In The Supreme Court Of The United States

Darryl Williams,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

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Dated: March 18, 2022

Question Presented for Review

This Court holds various residual clauses are unconstitutionally vague under the Due Process Clause, but has not yet addressed the residual clause in the then-mandatory Sentencing Guidelines in effect before *United States v. Booker*, 543 U.S. 220 (2005). Circuits are split on this issue, resulting in unequal relief under 28 U.S.C. § 2255 for those serving pre-*Booker* career offender sentences resting on U.S.S.G. § 4B1.2(a)(2)'s residual clause. Had Mr. Williams been sentenced in the First, Seventh, or D.C. Circuits, his pre-*Booker* mandatory career offender sentence would have received review under § 2255. Because his prior state conviction does not qualify as a crime of violence under either the enumerated or force clauses of the then-mandatory guideline, his sentence is unconstitutional. Resolution by this Court is necessary to ensure equal application of review under 28 U.S.C. § 2255 for unconstitutional sentences.

Related Proceedings

Petitioner Darryl Williams pled guilty in 2001 to a single charge of unarmed bank robbery under 18 U.S.C. § 2113(a). App. F, G. The District of Nevada imposed a then-mandatory career offender sentence of 165 months in prison. App. D, E. Mr. Williams started the federal sentence on August 8, 2016, after completing an unrelated Nevada state sentence.

On May 28, 2020, Mr. Williams moved under 28 U.S.C. § 2255 to vacate the mandatory career offender sentence imposed, given *United States v. Davis*, 139 S. Ct. 2319 (2019) and *Johnson v. United States*, 576 U.S. 591, 595–97 (2015). On May 5, 2021, the district court denied the motion as untimely and denied a certificate of appealability (COA), relying on *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2761 (2019). App. B, C. The Ninth Circuit summarily denied a COA on December 20, 2021. App. A.

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Petition for Certiorari

Darryl Williams petitions for a writ of certiorari to review judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit's order denying a certificate of appealability is not published: *United States v. Williams,* No. 21-16121, Dkt. 5 (9th Cir. Dec. 20, 2021) (unpublished). App. A.

The District of Nevada's order denying relief under 28 U.S.C. § 2255 is not published but is reprinted at: *United States v. Williams*, No. 3:20-cv-00316-HDM, 2021 WL 1792071 (D. Nev. May 5, 2021) (unpublished). App. B. The District of Nevada judgments, sentencing transcript, plea agreement, and indictment are unpublished. App. B, D, E, F, G.

Jurisdiction

The Ninth Circuit entered its final order on December 20, 2021, denying a certificate of appealability. App. A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely per Supreme Court Rule 13.1, because it is filed within 90 days after the lower court's order denying discretionary review.

Constitutional, Statutory, and Sentencing Guideline Provisions Involved

1. U.S. Const. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law.

2. U.S.S.G. § 4B1.1, Career Offender (2000), and its commentary, state in relevant part:

> 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.
>
> * * *
>
> Commentary, Application Notes:
> 1. "Crime of violence," "controlled substance offense," and "two prior felony convictions" are defined in § 4B1.2.

3. U.S.S.G. § 4B1.2, Definitions of Terms Used in Section 4B1.1 (2000), and its commentary, state in relevant part:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.
>
> * * *
>
> Commentary, Application Notes:
> 1. For purposes of this guideline--
> "Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.
>
> "Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as "crimes of

violence" if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

* * *

4. The 1991 California robbery statute, Cal. Penal Code § 211 (1991), provides:

> Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

Statement of the Case

A. The District of Nevada imposed a then-mandatory career offender sentence, without identifying two qualifying predicate offenses.

Mr. Williams pled guilty in 2001 to a single charge of unarmed bank robbery under 18 U.S.C. § 2113(a). App. F: 31a. Applying the 2000 edition of the U.S. Sentencing Guidelines, the district court adopted a then-mandatory career offender 151- to 188-month sentencing range. App. E: 15a; *see United States v. Booker*, 543 U.S. 220 (2005). The district court imposed a within-range prison sentence of 165 months. App. D: 6a; App. E: 25a. Pursuant to the plea agreement, Mr. Williams did not file a direct appeal. App. F: 32a–33a.

Although the district court applied the then-mandatory career offender sentencing range, the district court did not discuss which priors qualified, nor did it discuss which section of the "crime of violence" definition at U.S.S.G. § 4B1.2(a) applied. App. E: 14a–15a, 21a, 24a–25a. The Presentence Report (PSR) prepared

by the Probation Officer recommended that "the instant offense of federal bank robbery is a qualifying felony offense," PSR ¶ 27, and that two prior robbery convictions qualified as crimes of violence: (1) a 1991 federal armed bank robbery conviction under 18 U.S.C. § 2113(a) and (d) in *United States v. Williams*, No. 91-cr-0326-VRW (N.D. Cal. 1991); and (2) a 1991 California robbery with a firearm conviction under Cal. Penal Code § 211 in *People v. Williams*, No. 109385 (Cal. Alameda Cty. Super. Ct. 1991). PSR ¶¶ 32, 33. Because the career offender guideline requires a triggering offense and two prior crimes of violence, the career offender range cannot apply if either the instant offense or one of the prior convictions does not qualify. Without the then-mandatory career offender guideline, Mr. Williams's sentencing range would have been 74- to 92-months, rather than 151- to 188-months. App. E: 17a, 24a-25a.

Although the present federal sentence was imposed in 2001, Mr. Williams did not begin this federal sentence until August 8, 2016, following completion of an unrelated Nevada state sentence. Thus, Mr. Williams has been imprisoned for over twenty-one years since his arrest for this case in 1999. He is now 56 years old and in poor health.[1] Accounting for good time credit, approximately 5 years and 9 months remains of the unconstitutional 164-month (13.6 year) sentence.

[1] During pendency of his § 2255 motion, Mr. Williams moved for compassionate release based on his documented poor health, under 18 U.S.C. § 3582(c)(1)(A). Dkt. 44, 45, 53, 55. The district court denied compassionate release. Dkt. 58.

B. The lower courts denied relief from the then-mandatory guideline sentence despite this Court's *Johnson* and *Davis* decisions.

Mr. Williams's plea agreement did not waive collateral appellate rights. App. F: 32a–33a. In 2015 this Court held that imposing an increased sentence under the residual clause of the Armed Career Criminal Act's ("ACCA") violent felony definition violates the Constitution's guarantee of due process. *Johnson v. United States*, 576 U.S. 591 (2015). This Court held *Johnson* applied retroactively to cases on collateral review in *Welch v. United States*, 578 U.S. 120, 130 (2016). Also in 2015, the Ninth Circuit held that California robbery, Cal. Penal Code § 211, was not a crime of violence under the ACCA's force clause. *United States v. Dixon*, 805 F.3d 1193, 1194 (9th Cir. 2015).

In 2018, this Court then held the residual clause at 18 U.S.C. § 16(b), which applies in the criminal and immigration context, is unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). A few months later, the Ninth Circuit issued *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2761 (2019), which held that habeas petitions seeking relief from sentences imposed under the residual clauses at 18 U.S.C. § 924(c) and U.S.S.G. § 4B1.2(a)(2) were premature because this Court had not yet recognized these residual clauses as unconstitutional. In 2019, however, this Court held the residual clause at 18 U.S.C. § 924(c)(3)(B), for use of a firearm during a crime of violence is unconstitutionally vague. *Davis*, 139 S. Ct. 2319.

Within a year of *Davis,* Mr. Williams timely moved to vacate his sentence under 28 U.S.C. § 2255, asking the district court to vacate his illegal sentence because is rested on the unconstitutionally vague mandatory guideline residual clause. Dkt. 40. Mr. Williams argued the Ninth Circuit's *Blackstone* opinion was effectively abrogated by this Court's decision in *Davis*.

Without addressing the merits, the government moved to dismiss under *Blackstone*. Dkt. 54. Mr. Williams opposed dismissal, noting the deepening circuit split on this issue. Dkt. 56, pp. 3-5; Dkt. 59. The district court denied the motion as untimely under *Blackstone*, and denied a COA, without addressing the merits. App. B: 2a; App. C: 3a–4a. Mr. Williams timely appealed to the Ninth Circuit, and the Ninth Circuit summarily denied a COA, citing *Blackstone*. App. A: 1a.

Reasons for Granting the Petition

Until this Court settles the entrenched Circuit split by addressing whether the residual clause of the then-mandatory career offender guideline is unconstitutionally vague, defendants will continue to serve unconstitutional mandatory guidelines sentences in violation of the Due Process Clause. U.S. Const. amend. V. Without the residual clause at U.S.S.G. § 4B1.2(a)(2) (2000), Mr. Williams would not have qualified as a career offender because the Ninth Circuit holds California robbery does not otherwise qualify as a crime of violence. It is imperative this Court settles the Circuit split to ensure § 2255 relief is consistently provided to defendants serving unconstitutional sentences nationwide.

I. The Circuits are split over whether the mandatory career offender guideline residual clause is unconstitutionally vague results in inconsistent relief under 28 U.S.C. § 2255, requiring resolution by this Court.

The right asserted by Mr. Williams is that the Due Process Clause prohibits vagueness in a law "fixing sentences." *Davis*, 139 S. Ct. at 2327; U.S. Const. amend. V. At the time of Mr. William's sentencing in November 2001, the guidelines fixed mandatory sentencing ranges. *Booker*, 543 U.S. at 234.

Under the mandatory guidelines, a career offender sentence applied when the offense was a felony crime of violence and the defendant had at least two prior felony convictions for crimes of violence. U.S.S.G. § 4B1.1 (2000). The guideline defined a "crime of violence" as an offense punishable by more than a year in prison that:

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another [**the force clause, also called the elements clause**], or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives [**the enumerated clause**], or otherwise involves conduct that presents a serious potential risk of physical injury to another [**the residual clause**].

U.S.S.G. § 4B1.2(a) (2000).

Because the Due Process Clause prohibits vagueness in a law "fixing sentences," this Court holds three similar residual clauses to be unconstitutionally vague: the residual clauses at 18 U.S.C. § 924(e)(2)(B)(ii), 18 U.S.C. § 16(b), and 18 U.S.C. § 924(c)(3)(B); *Johnson*, 576 U.S. 591; *Dimaya*, 138 S. Ct. 1204; *Davis*, 139 S. Ct. 2319.

Before *Booker* issued in 2005, the Sentencing Guidelines were mandatory, having the "force and effect of laws." *Booker*, 543 U.S. at 234. At that time, 18 U.S.C. § 3553(b) mandated "that the district court '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited circumstances." *Id.* at 234.

This Court explained the significant due process differences between a mandatory guideline and a post-*Booker* advisory guideline in *Beckles v. United States*, 137 S. Ct. 886 (2017). The question in *Beckles* was whether the advisory Guidelines "fix the permissible range of sentences" so they could be challenged as unconstitutionally vague. *Id.* at 892. This Court concluded the post-*Booker* advisory guidelines' residual clause was not unconstitutionally vague because it did not fix sentences. *Id.* at 894. The mandatory Guidelines, in contrast, were "binding on district courts" and "constrain[ed]" them. *Id.* at 894. Thus, the mandatory, binding nature of the pre-*Booker* residual clause violates the Due Process Clause, rendering Mr. Williams's sentence unconstitutional.

A year after *Beckles*, the Ninth Circuit issued *Blackstone*, 903 F.3d 1020. *Blackstone* held that a defendant's challenge to a then-mandatory career offender guideline sentence was untimely under 28 U.S.C. § 2255 because this Court had not yet recognized the mandatory guidelines' residual clause as unconstitutional. The Ninth Circuit's opinion in *Blackstone* was not only incorrect, but also conflicted with this Court's decisions in *Johnson* and *Dimaya,* and effectively abrogated by *Davis.*

A circuit decision does not control when a decision of this Court undermines the reasoning of the circuit decision. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). "[T]he issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id.* . When there is "clear irreconcilability," courts are "bound by the intervening higher authority and [must] reject the prior opinion of this court as having been effectively overruled." *Id.* .

The *Johnson*, *Dimaya*, and *Davis* decisions refute *Blackstone.* In *Johnson*, this Court found the ACCA's residual clause vague because "[b]y 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 Due Process Clause. *Johnson*, 576 U.S. at 598. In *Dimaya*, this Court found § 16(b)'s residual clause was also unconstitutional because it "too requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk." *Dimaya*, 138 S. Ct. at 1216 (cleaned up). As a result, the § 16(b) residual clause "produces, just as the ACCA's residual clause did, 'more unpredictability and arbitrariness than the Due Process Clause tolerates.'" *Id.* at 1216 (quoting *Johnson*, 576 U.S. at 592). In *Davis*, this Court held that § 924(c)'s residual clause is unconstitutionally vague, stating a residual clause is "no law at all." *Davis*, 139 S. Ct. at 2323. The same "vagueness

problems that doomed the statutes in *Johnson* and *Dimaya*" applied to the residual clause that fixed sentences in *Davis*. *Id.* at 2327.

These same due process principles apply to the pre-*Booker* mandatory guideline that also fixed sentences. *United States v. Rearden*, 349 F.3d 608, 614 (9th Cir. 2003) ("We allow challenges to the [then-mandatory] sentencing guidelines on vagueness grounds. . . ."); *United States v. Johnson*, 130 F.3d 1352 (9th Cir. 1997) (same).

Two Justices of this Court have implored review of this issue to resolve the circuit split. *See, e.g.,* B*ridge v. United States,* 140 S. Ct. 983 (2020) (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of certiorari); *Simmons v. United States*, 140 S. Ct. 983 (2020) (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of certiorari). These dissents explain the residual clause of the mandatory career offender guideline is identical in language and effect to residual clauses found unconstitutionally vague—and the pre-*Booker* guidelines imposed fixed sentences by "binding" judges to mandatory sentencing ranges. *Brown v. United States*, 139 S. Ct. 14, at 14-15 (2018) (Sotomayor, J., joined by Ginsberg, J. dissenting from denial of certiorari). Noting the circuit split on this issue, the dissenting Justices asked this Court to clarify "that if a sequence of words that increases a person's time in prison is unconstitutionally vague in one legally binding provision, that same sequence is unconstitutionally vague if it serves the same purpose in another legally binding provision." *Brown*, 139 S. Ct. at 14–16.

All Circuits have issued published decisions on this issue, solidifying the split. The First, Seventh, and D.C. Circuits properly hold the pre-*Booker* guideline residual clause is unconstitutional, granting relief under 28 U.S.C. § 2255 in such cases. The most recent circuit decision—and the final circuit to issue a published opinion—is from the D.C. Circuit. In *United States v. Arrington*, 4 F.4th 162, 171 (D.C. Cir. 2021), the D.C. Circuit held the defendant's § 2255 motion challenging the pre-*Booker* residual clause was timely filed because it asserted a recognized right—residual clauses fixing sentences are unconstitutionally vague. *Id.* at 171; *see also Shea v. United States*, 976 F.3d 63 (1st Cir. 2020); *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). "[T]he Supreme Court guides—and indeed binds —the lower courts not just with technical holdings confined to the precise facts of each case but with general rules that are logically inherent in those holdings." *Shea*, 976 F.3d at 73. Thus, "the residual clause in the mandatory Career Offender Guideline was, beyond reasonable debate, 'a law regulating private conduct by fixing permissible sentences' that did not 'provide notice[] and avoid[] arbitrary enforcement by clearly specifying the range of penalties available,'" requiring relief. *Id.* at 81–82 (quoting *Beckles*, 137 S. Ct. at 895).

Holding the opposite, the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits do not permit habeas challenges to the residual clause in the mandatory guidelines.[2] Instead, these circuits require defendants to wait

[2] *See Nunez v. United States*, 954 F.3d 465, 467 (2d Cir.), *cert. denied*, 141 S. Ct. 941 (2020); *United States v. Green*, 898 F.3d 315, 321 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1590 (2019); *United States v. Brown*, 868 F.3d 297, 303 (4th Cir.

until this Court specifically clarifies its vagueness residual clause holdings apply to the pre-*Booker* mandatory sentencing guidelines. Yet several circuit judges express concern that these Circuits—including the Ninth Circuit—err on this issue:

- In the Ninth Circuit, Judge Berzon noted disagreement with *Blackstone*, voting to rehear the issue en banc. *Hodges v. United States*, 778 F. App'x 413 (9th Cir. 2019) (unpublished) (Berzon, J., concurring), *cert. denied*, 140 S. Ct. 2675 (2020).

- In the Second Circuit, Judge Pooler noted the "injustice our decision today creates" because it "denies petitioners, and perhaps more than 1,000 like them, a chance to challenge the constitutionality of their sentences." *Nunez*, 954 F.3d at 472 (Poole, J., concurring) (quoting *Brown v. United States*, 139 S. Ct. 14, 14 (2018) (Sotomayor, J., dissenting)).

- The Fourth Circuit held such challenges untimely over the detailed dissent of Chief Judge Gregory. "[T]hat the residual clause at issue here is contained in the mandatory Sentencing Guidelines . . . is a distinction without a difference for purposes of this Court's timeliness inquiry. The clauses' text is identical, and courts apply them using the same categorical approach for the same ends—to fix a defendant's sentence. *** I would thus find his petition timely." *Brown*, 868 F.3d at 297, 304 (Gregory, J., dissenting).

- In the Fifth Circuit, Judge Costa explained, "we are on the wrong side of a split over the habeas limitations statute." *London*, 937 F.3d at 510-11 (Costa, J., concurring).

- In the Sixth Circuit, Judge Moore disagreed with finding such challenges untimely, urging the Circuit to revisit the issue. *Holmes v. United States*, No. 19-5845, 2020 WL 4516001, at *2 (6th Cir. May 11, 2020) (unpublished) (Moore, J., concurring) (stating the Sixth Circuit "was wrong[]" on this issue and "that error is worth correcting"); *Chambers v. United States*, 763 F. App'x 514, 519 (6th Cir. 2019) (unpublished) (Moore, J., concurring) (same).

2017), *cert. denied*, 139 S. Ct. 14 (2018); *United States v. London*, 937 F.3d 502, 503 (5th Cir. 2019), *as revised* (Sept. 6, 2019), *cert. denied*, 140 S. Ct. 1140 (2020); *Raybon v. United States*, 867 F.3d 625, 629-30 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2661 (2018); *Russo v. United States*, 902 F.3d 880, 883 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 1297 (2019); *Blackstone*, 903 F.3d at 1023; *United States v. Greer*, 881 F.3d 1241, 1248 (10th Cir.), *cert. denied*, 139 S. Ct. 374 (2018); *see also In re Griffin*, 823 F.3d 1350, 1356 n.4 (11th Cir. 2016).

- In the Tenth Circuit, Judge Bacharach routinely dissents on this issue, noting the circuit split. *See, e.g.*, *United States v. Ellis*, 779 F. App'x 570, 472 (10th Cir. 2019) (unpublished) (Bacharach, J., dissenting).

- An entire Eleventh Circuit panel questioned that Circuit's decision to hold such challenges untimely. *In re Sapp*, 827 F.3d 1334, 1336-41 (11th Cir. 2016) (Jordan, J., Rosenbaum, J., Pryor, J., concurring). And the Eleventh Circuit's Judge Martin also dissents on this issue. *In re Anderson*, 829 F.3d 1290, 1294 (11th Cir. 2016) (Martin, J., dissenting); *Lester v. United States*, 921 F.3d 1306, 1319 (11th Cir. 2019) (en banc) (Martin, J., dissenting, joined by Rosenbaum and Pryor, JJ.).

The inter-Circuit and Supreme Court dissension on this issue supports Mr. Williams's request for certiorari. He asks this Court to resolve the circuit split and address whether defendants can raise § 2255 challenges to a pre-*Booker* sentence imposed under the then-mandatory career offender guideline's unconstitutionally vague residual clause.

II. Mr. Williams's sentence violates the Due Process Clause because he lacks the requisite "crimes of violence" for the then-mandatory career offender guideline, warranting review under 28 U.S.C. § 2255.

The residual clause in the mandatory career offender Guideline, U.S.S.G. § 4B1.2(a)(2) (2000), is void for vagueness. *See supra,* pp. 11-17. The only remaining clauses are the force clause of § 4B1.2(a)(1) (2000) and the enumerated offense clause of § 4B1.2(a)(2) (2000).

Categorical analysis determines whether an offense qualifies as a crime of violence. *Davis*, 139 S. Ct. at 2326–36. Categorical analysis examines only the statutory definition of the prior offense, not the underlying facts of the offense. *Mathis v. United States*, 579 U.S. 500, 136 S. Ct. 2243, 2248 (2016); *Descamps v. United States*, 570 U.S. 254, 260-61 (2013). If the statute of conviction criminalizes

some conduct broader than either the generic offense definition or does not require intentional violent force as an element, then the statute of conviction is overbroad and does not categorically qualify. *Mathis*, 136 S. Ct. at 2248–49. The final step of categorical analysis is to determine whether an overbroad statute is divisible. *Id.* . An overbroad indivisible offense does not qualify. *Id.* .

At issue are a prior conviction for California robbery with a firearm under Cal. Penal Code § 211 (1991), a prior conviction for federal armed bank robbery, and the current offense of federal bank robbery. PSR ¶¶ 32, 33. Because the career offender guideline requires two prior crimes of violence and the California robbery prior does not qualify, this Court need not address whether the instant and prior federal bank robbery convictions qualify.

California robbery does not meet the enumerated or force clauses of U.S.S.G. § 4B1.2(a) (200) because: (1) robbery is not an enumerated offense; and (2) the force clause requires intentional use of violent force, which the elements of California robbery do not include.

First, "robbery" is not listed as an enumerated offense in the guideline text. U.S.S.G. § 4B1.2(a)(1) (2000) (listing only lists "burglary of a dwelling, arson, or extortion, involves use of explosives"). Thus, neither the current none of the robbery convictions qualify under the enumerated clause.

While the 2000 guideline commentary listed "robbery" as an offense that qualifies under the residual clause, *see* U.S.S.G. § 4B1.2 cmt. n.1 (2000), this commentary has no freestanding definitional power. Only commentary "that

interprets or explains a guideline" is authoritative. *Stinson v. United States*, 508 U.S. 36, 38 (1993); *see also* U.S.S.G. § 1B1.7 (explaining commentary purpose is to "interpret [a] guideline or explain how it is to be applied"). When commentaries such as application notes contradict a guideline, the guideline text controls. *Stinson*, 508 U.S. at 43. Under these principles, the guideline commentary here, which interpreted the now-void residual clause, must also be excised.

Two circuits agree the mandatory guidelines commentary at U.S.S.G. § 4B1.2 cmt n.1 is invalid because it interpreted the now-void mandatory guidelines residual clause. *See D'Antoni v. United States*, 916 F.3d 658, 663-64 (7th Cir. 2019); *United States v. Soto-Rivera*, 811 F.3d 53, 59 (1st Cir. 2016). A pre-*Beckles* decision of the Eighth Circuit was in accord. *United States v. Bell*, 840 F.3d 963, 968 (8th Cir. 2016). *Beckles* did not address this issue, and does not undermine *Bell*'s reasoning that the commentary only interpreted the residual clause. Without the residual clause, "§ 4B1.2's commentary, standing alone, cannot serve as an independent basis for a conviction to qualify as a crime of violence because 'doing so would be inconsistent'" with removal of the residual clause. *Bell*, 840 F.3d at 968 (quoting *Soto-Rivera*, 811 F.3d at 60). "The issue," *Bell* observed, "is whether the government can rely solely upon the commentary when it *expands* upon the four offenses specifically enumerated in the [text of the] Guideline itself. The answer is no." *Id.* at 967. Thus neither California robbery nor federal bank robbery qualify as crimes of violence under the enumerated clause of U.S.S.G. § 4B1.2(a)(2) (2000).

Second, to qualify under the force clause, the offense must require—as an element—the intentional use of violent force. *Borden v. United States*, 141 S. Ct. 1817 (2021). The Ninth Circuit has long-held that California robbery, Cal. Penal Code § 211, can be accidentally committed and thus does not qualify under the force clause. *United States v. Garcia-Lopez*, 903 F.3d 887, 893 (9th Cir. 2018) (citing *United States v. Dixon*, 805 F.3d 1193, 1194 (9th Cir. 2015)). Analyzing California state law, the Ninth Circuit correctly determined in *Dixon* that a person could commit California robbery "by *accidentally* using force." *Dixon*, 805 F.3d at 1197 (citing *People v. Anderson*, 252 P.3d 968, 972 (2011)). This Court's recent decision in *Borden*, 141 S. Ct. 1817, clarifying the ACCA force clause requires intentional use of violent physical force, reaffirms that California robbery does not qualify under the force clause.

Thus, because the prior California robbery conviction does not qualify under either the enumerated and force clauses of U.S.S.G. § 4B1.2(a) (2000), Mr. Williams lacked the necessary prior offenses and is not a career offender. His sentence is unconstitutional, requiring review under 28 U.S.C. § 2255.

III. Petitioner Williams raises an issue of exceptional importance that this Court has not yet addressed.

The question presented is of exceptional importance to both federal courts and defendants. As illustrated by Mr. Williams's case, the pre-*Booker* career offender guideline often *doubled* the mandatory sentencing range. App. E: 17a, 24a-25a. Mr. Williams is just one of the approximately 4,700 persons in federal prison

serving pre-*Booker* sentences.[3] Unsurprisingly, sentence length for career offenders has steadily decreased post-*Booker*, leaving those sentenced before *Booker*—like Mr. Williams—serving higher sentences.[4] Racial disparity also persists in career offender sentencing, with over 60% of defendants sentenced as career offenders being black male defendants like Mr. Williams.[5] Correcting sentencing inequities across the split circuits is thus an important step in remedying the career offender guideline's disparate impact.

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[3] U.S. Sent. Comm'n, *Federal Offenders in Prison* (March 2021) (3.1% of the BOP inmate population was sentenced before *Booker*), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_March2021.pdf.

[4] U.S. Sent. Comm'n, *2012 Report to the Congress: Continuing Impact of United States v. Booker on Federal Sentencing*, Part C, Career Offenders, p. 12 (Dec. 2012) (analyzing demographic data for career offenders from 1996 to 2011), available at https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_C12_Career_Offenders.pdf; U.S. Sent. Comm'n, *2016 Report to Congress: Career Offender Enhancements*, p. 22 (July 2016) (analyzing career offender sentencing data from 2005 to 2014), available at https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

[5] *See*, *e.g.,* U.S. Sent. Comm'n, *Quick Facts: Career Offenders* (May 2021) (finding 60.8% of defendants sentenced as career offenders in Fiscal Year 2020 were Black) https://www.ussc.gov/research/quick-facts/career-offenders; U.S. Sent. Comm'n, *2016 Report to Congress: Career Offender Enhancements*, p. 19 (July 2016) (finding 59.7% of defendants sentenced as career offenders in Fiscal Year 2014 were Black) https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf; U.S. Sent. Comm'n, *2012 Report to the Congress: Continuing Impact of United States v. Booker on Federal Sentencing*, Part C, Career Offenders, p.10 (Dec. 2012) (from 1996 to 2011, 58.8% to 64.9% of defendants sentenced as career offenders were Black), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_C12_Career_Offenders.pdf.

While this Court has held various residual clauses unconstitutional since 2015, this Court has not yet addressed the residual clause in the then-mandatory Sentencing Guidelines in effect before *Booker*. The intra-Circuit, inter-Circuit, and Supreme Court dissension on this issue needs resolution by this Court to ensure consistent review of unconstitutional sentences under 28 U.S.C. § 2255.

Conclusion

Petitioner Williams requests that the Court grant this petition for a writ of certiorari.

Dated: March 18, 2022.

Respectfully submitted,
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