No. 15-6418

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY WELCH — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gregory Welch
(Your Name)

F C I Coleman-Medium
(Address)

P. O. Box 1032, Coleman Florida, 33521
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I. Whether the District Court was in error when it denied relief on Petitioner's §2255 motion to vacate, which alleged that a prior Florida conviction for "sudden snatching," did not qualify for ACCA enhancement pursuant to 18 U.S.C. §924(e).

II. Whether Johnson v. United States, 135 S. Ct. 2551 (2015), announced a new substantive rule of constitutional law that applies retroactively to cases that are on collateral review. Furthermore, Petitioner ask this Court to resolve the Circuit split which has developed on the question of Johnson retroactivity in the Seventh and the Eleventh Circuit Courts of Appeals.

LIST OF PARTIES

[X] 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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TABLE OF AUTHORITIES CITED

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

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at United States v. Welch, 683 F.3d 1304 (11th Cir. 2012)
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.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[ ] is unpublished.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

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was June 9, 2015.

[X] 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: _____, 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. § 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

AMENDMENT V OF THE CONSTITUTION (DUE PROCESS OF LAW)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor to be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation.

TITLE 18 U.S.C. §924(e) ARMED CAREER CRIMINAL ACT

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in **section** 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25.000 and imprisoned not less than fifteen years, and, not withstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

STATEMENT OF THE CASE

On August 9, 2009, Petiitoner Welch was indicted for possession of firearm by convcited felon, in violation of 18 U.S.C. §922(g) and §924(e). On advice of counsel, Petitioner entered into a written plea agreement on June 18, 2010, for a sentence of 0 - 10 years. See [APPENDIX C]. A Presentence Investigation Report (PSI), was prepared and erroneously found that Petitioner qualified for enhancement under the Armed Career Criminal Act, ("ACCA"), pursuant to §924(e). Petitioner objected to the PSI, asserting that "robbery by sudden snatching," in violation of Florida Statute 813.13(1), did not qualify for enhancement purposes under the ACCA. Petitioner also challenged a felony battery conviction, and a Florida attempted robbery conviction. On advise of counsel, Petitioner withdrew his original plea agreement for 0 - 10 years, and was sentenced to a more severe 15 year mandatory minimum. Petitioner appealed, arguing that roberry by sudden snatching did not qualify as a violent felony predicate under §924(e) (ACCA). The Eleventh Circuit affirmed. [APPENDIX C].

Petitioner next field a timely §2255 motion in which he argued that attempted robbery by sudden snatching, in violation of Flo. Stat. 813.13(1), did not qualify under Descamps v. United States, 133 S. Ct. 2276 (2013). Petitioner's §2255 motion was denied prior to the Supreme Court's ruling in Johnson v. United States, 576 U.S. _____(2015). Petioner's application to the District Court was denied. See [APPENDIX B]. A subsequent application the Eleventh Circuit Court of Appeals also denied. [APPENDIX A]. In his C.O.A application, Petitioner asked the Court to hold his case pending the outcome of Johnson v. United States, based on the fact that his case was affirmed under the residual clause. Id.

REASONS FOR GRANTING THE PETITION

I. In 1996, Petitioner plead guilty to the elements of robbery by sudden snatching as it is defined by Florida's Statute 813.131. In Florida, robbery by sudden snatching is defined as follows:

(1) "Robbery by sudden snatching" means the taking of money or other property from a victim's person, with intent to permanently or temporarily deprive the victim or the owner of the money or other perperty, when in the course of the taking, the victim was to became aware of the taking. In order to satisfy this definition, it is not necessary to show that:

(b) The offender used any amount of force beyond that effort necessary to obtain possession of the money or other property...Fla. Stat. §813.131.

As clearly imdicated above, Fla. Stat. 813.131 does not have as an element, the use or threatened use of physical force against the person of another as required by 18 U.S.C. §924(e)(2)(B)(i). In fact Florida's Statute §813.131 specifically states that it is not necessary to show any amount of use of force beyond what is necessary to obtain the money or property. Therefore, force is not necessary for a conviction under Fla. Stat, 813.131(1)(a).

Furthermore, Robbery by sudden snatching does not meet the criteria of the enumerated offenses in §924(e)(2)(B)(ii), an annunciated in United States v. Begay, 533 U.S. 137 (2008). Petitioner was thus enhanced under the residual clause which has since been held to be unconstitutionally vague by the Supreme Court in Johnson.

Five years ago, on September 20, 2010, Petitioner filed a direct appeal challenging his enhancement under §924(e). The Eleventh Circuit affirmed based on the fact that petitioner's priors were deemed violent under the residual clause. See United States v. Welch, 683 F.3d 1304 (11th Cir. 2012), [Appendix C]. Certiorari review was denied on January 7, 2013 Welch v. United States, ___ U.S. ____, 133 S. Ct. 913, 184 L. Ed. 2d 702 (2013).

In effort of not waiving or defaulting on any of his constitutional rights, i.e., his Fifth Amendment right to due process of law, Petitioner challenged the erroneous ACCA enhancement in a §2255 motion [CV-DE 72]. On December 8, 2014, the District Court denied Petitioner's §2255 moiton [Appendix B], after adopting the Magistrate Judge's Report and Recommendation ("R&R"), which primarily argued that Petitioner was not entitled to relief since the Eleventh Circuit affirmed the District Courts findings. [1] The R&R further stated that Petitioner could not litigate this claim in a collataral proceeding because it was already decided adversly on direct appeal. [CV-DE 17 pp. 9, 28-33].

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1 During the sentencing hearing on September 17, 2010, the District Court made specific factual findings that Petitioner qualified for ACCA enhancement under the residual clause. At sentencing the Court stated: "I think it meets both test, but if it doesn't meet the -- elements test, I think it meet the residual test." See [CV-DE 55 at pp. 36-37]. Attached hereto as [Appendix D].

Petitioner now ask this Honorable Court to review his claim that his prior conviction under Fla. Stat. 813.131 no longer qualify for enhancement purposes pursuant to 18 U.S.C. §924(e)(2)(B)(ii)'s residual clause. Since the residual clause has been abrogated by Johnson v. United States, Supra. In Johnson, the Court held that the imposition of an enhanced sentence under the residual clause of the ACCA violates due process because the clause is too vague to provide adequate notice. Id., at 2557.

Petitioner asserts that it would be a fundamental miscarriage of justice to leave the erroneous enhancement in place when there is no legal statutory provision for it.

JOHNSON SHOULD BE RETROACTIVELY APPLICABLE TO CASES THAT ARE ON COLLATERAL REVIEW

II. On June 26, 2015, the Supreme Court decided Case No. 13-7120, Johnson v. United States, 135 U .S. 2551 (2015). The Johnson decision effectively excise the so-called residual clause from 18 U.S.C. §924(e)(2)(B)(ii), holding that the "clause" was unconstitutionally vague and did not provide adequate notice as required by the Fifth Amendment right to due process. This holding was substantive in nature and "new substantive rules generally apply retroactively... because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." Bousley v. United States, 523 U.S. 614, 620 (1998). This is entirely consistent with Teague, which also recognized that new substantive rules

are categorically retroactive. Because of the new substantive rule announced in Johnson, coupled with the "multiple holdings that logocally dictate the retroactivity of the new rule," Tyler v. Cain, 533 U.S. 656, 688, Petitioner asserts that the Supreme Court's Johnson ruling is necessarily and categorically retroactively applicable to cases on collateral review. Id., at 668-69

C E R C U I T S P L I T

After the Supreme Court decided Johnson on June 26, 2015, it did not take long for a circuit split to develop. On July 7, 2015, the Seventh Circuit Court of Appeals decided Price v. United States, Case No. 15-2427, in which it held: "[T]here is no escaping the logical conclusion that the [Supreme] Court itself has made Johnson catagorically retroactive to cases on collateral review."

Then in August 2015, the Eleventh Circuit Court of Appeals issued a contrary decision in which it held that: "Johnson did not establish a new rule of constitutional law made retroactive to cases on collateral review by the Supreme court." See In Re: Rivero, Case No. 15-13089-C. (2015).

The above examples serves to illustrate the confusion of Johnson and the retroactive question. therefore Petitioner ask this Court to address the question of retroactivity as it applies to cases on collateral review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: Aug 26, 2015