No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2013

SAMUEL JAMES JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I.

WHETHER MERE POSSESSION OF A SHORT-BARRELED SHOTGUN SHOULD BE TREATED AS A VIOLENT FELONY UNDER THE ARMED CAREER CRIMINAL ACT?

INTRODUCTION

This case presents an important issue concerning proper application of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). Lower federal courts are deeply divided about whether the mere possession of a "sawed-off" shotgun is a "violent felony" triggering application of the ACCA. Despite this Court's recent jurisprudence narrowing the application of the ACCA's residual clause, the Eighth Circuit Court of Appeals has repeatedly ruled that such possession is violent. However, several other Courts of Appeals have reached the opposite conclusion in the last few years. Still other courts have declined to revisit the issue in the wake of this Court's relevant rulings.

Petitioner Samuel Johnson urges the Court to grant certiorari and address whether possession of a gun with a shortened barrel in fact "involves conduct that presents a serious potential risk of physical injury to another..." Not only is the issue one of importance in the context of short-barreled shotguns, but this case gives the Court a needed opportunity again to clarify proper application of the residual clause.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The petitioner, Samuel James Johnson, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on July 31, 2013.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is not reported in the Federal Reporter, but can be found at 2013 WL3924353, and is reprinted in the appendix hereto, p. 1a, infra.

The judgment of the United States District Court for the District of Minnesota (Kyle, J.) has not been reported. It is reprinted in the appendix hereto, p. a, infra.

JURISDICTION

Petitioner Samuel James Johnson entered a plea of guilty to violation of Title 18, United States Code, Section § 922(g). He was sentenced to 180 months imprisonment by the Honorable Richard H. Kyle, Senior United States District Judge for the District of Minnesota.

The United States Court of Appeals for the Eighth Circuit affirmed in an unpublished per curiam opinion filed on July 31, 2013. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 924(e)(1) and (e)(2)(B):

(e)(1) 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 under this title and imprisoned not less than fifteen years, and, notwithstanding 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)...

(e)(2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that —

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

Minnesota Statute § 609.67

Sub. 2. Acts prohibited. Except as otherwise provided herein, whoever owns, possesses, or operates a ... short-barreled shotgun may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

STATEMENT OF THE CASE

1. On June 6, 2012, Samuel Johnson pleaded guilty to one count of being a felon in possession of a firearm pursuant to 18 U.S.C. § 922(g)(1). In his written plea agreement, Mr. Johnson acknowledged that the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), might apply, raising the available penalties from no more than ten years in prison to a term of fifteen years to life imprisonment. However, Mr. Johnson reserved the right to challenge the application of the ACCA.

2. The presentence investigation report (PSR) concluded that Mr. Johnson's criminal history contained three prior convictions which qualified as "violent felonies" under 18 U.S.C. § 924(e)(2)(B). Mr. Johnson had two convictions for simple robbery which are not at issue in the instant petition. Mr. Johnson's criminal history also contained a 2007 conviction for possession of a short-barreled shotgun in violation of Minnesota Statute § 609.67, sub. 2.

3. Mr. Johnson objected to his treatment as an Armed Career Criminal in his sentencing filings to the district court. Relevant to the present petition, he argued that mere possession of a short-barreled shotgun should not count as a violent felony. If that conviction was not treated as an ACCA predicate, Mr. Johnson would not be subject to treatment under the statute. However, Mr. Johnson acknowledged that the Eighth Circuit had previously ruled against his claim in previous decisions.

4. At sentencing, the district court rejected Mr. Johnson's challenge and ruled that all three of the prior convictions and relied upon by the government to enhance his sentence were in fact violent felonies within the meaning of the Armed Career Criminal Act. The district court sentenced Mr. Johnson to 180 months in prison, the statutory mandatory minimum, nothing that the court would have imposed a lower sentence.

5. Mr. Johnson appealed his sentence to the Eighth Circuit Court of Appeals. Mr. Johnson argued, in relevant part, that his prior conviction for possession of a short-barreled shotgun is not a "violent felony" under the ACCA. However, he acknowledged the court's prior contrary rulings from *United States v. Vincent*, 575 F.3d 820 (8th Cir. 2009), and *United States v. Lillard*, 685 F.3d 773 (8th Cir. 2012).

6. On July 31, 2013, the Eighth Circuit issued a per curiam opinion affirming Mr. Johnson's fifteen year sentence. *United States v. Johnson*, WL3924353. The court noted that it had already ruled on the issue, and that possession of a sawed-off shotgun qualified as a violent felony under the "residual clause" to the ACCA.

> Our Circuit addressed the sentencing implications of possessing a short-barreled shotgun in *United States v. Lillard*:
>
> > Possession of a short shotgun presents a serious risk of physical injury to another because it is roughly similar to the listed offenses within the ACCA, both in kind as well as the degree of risk for harm posed. Lillard's possession of a short shotgun is a violent felony.
>
> Johnson's offense is not meaningfully distinguishable from the one

in *Lillard*.

Johnson, slip op. at 6 (quoting *United States v. Lillard*, 685 F.3d 774, 777 (8th Cir. 2012)).

REASONS FOR GRANTING THE WRIT

This Court has addressed the residual clause of the Armed Career Criminal Act four times in recent years. *See Sykes v. United States*, __ U.S. __, 131 S. Ct. 2267, (2011); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay v. United States*, 553 U.S. 137 (2008); *James v. United States*, 550 U.S. 192 (2007). Despite such close attention from this Court, lower courts' interpretations of the residual clause vary widely, resulting in disparate treatment of criminal defendants nationwide. Two men incarcerated in the same federal prison for the same offense, with identical offenses in their criminal history, face radically different sentences depending on the law in the Circuit where they were prosecuted. The treatment of possession of a shortened shotgun exemplifies this unfair disparity.

I.

THE DECISION BELOW PERPETUATES A CLEAR SPLIT AMONG THE CIRCUIT COURTS.

In the *Johnson* case, and its antecedents *Lillard* and *Vincent*, the Eighth Circuit furthered a clear and deep split among the Circuit Courts of Appeals. The Fourth, Sixth, Seventh and Eleventh Circuits have all ruled that possession of a sawed-off or short-barrel weapon is not a violent felony within the meaning of the residual clause of § 924(e). *See United States v. Haste*, 292 Fed. Appx. 249 (4th Cir. 2008)(unpub'd); *United States v. Ross*, 416 Fed. Appx. 289 (4th Cir. 2011)(unpub'd); *United States v. Amos*, 501 F.3d 525 (6th Cir. 2007); *United States v. Hawkins*, 554 F.3d 615 (6th Cir. 2009); *United States v. Miller*, 721 F.3d 435 (7th Cir. 2013); *United States v. McGill*, 618 F. 3d 1273, 1279 (11th Cir.

2010). Two other Circuits have not directly ruled on the issue, but other decisions suggest that they would join their peers that conclude that such an offense is not a violent felony. *See United States v. Crampton,* 519 F.3d 893, 898 (9th Cir. 2008), *vacated* by 555 U.S. 113 (2009) (remanded by Supreme Court to reconsider holding that possession of sawed-off shotgun is violent felony in light of *Begay*); *United States v. Serafin*, 562 F.3d 1105 (10th Cir. 2009)(finding sawed off shotgun possession not a crime of violence under related provision of § 924(c)).

Only the Eighth Circuit has addressed the issue since this Court's decisions from *Begay*, *Chambers and Sykes* and still concluded that possession of a short-barreled shotgun is a violent felony. This decision joined the First Circuit, which ruled in 1998 in *United States v. Fortes* that possession of such a weapon counts as an ACCA predicate. 141 F.3d 1, 6-8 (1st Cir. 1998). Although the First Circuit reaffirmed this holding in 2006, it has not assessed it in the wake of *Begay* and its progeny. *See United States v. Bishop*, 453 F.3d 30, 31 (1st Cir. 2006).

In *United States v. Miller*, decided one month prior to the *Johnson* decision, the Seventh Circuit concluded that violation of Wisconsin's statute prohibiting possession of a shotgun with a short barrel is not a violent felony, and conducted a searching analysis in reaching that conclusion. *Miller*, 721 F.3d 435, 439-40 (7th Cir. 2013). Following an examination of the many ways in which the Wisconsin statute could be violated by "passive possession in which the weapon is not exposed to others," the court found that "the risk of physical injury to another presented by the mere possession of a short-barreled shotgun is not in the same

league as the risks presented by the offenses of burglary, arson, extortion, or crimes involving the use of explosives." *Miller*, 721 F.3d at 440. The *Miller* court specifically analyzed and rejected the Eighth Circuit's decisions from *Vincent* and *Lillard,* and noted it would be following the contrary holdings of the Sixth and Eleventh Circuits.

> We simply don't think that the latent risks inherent in the offense of possessing a short-barreled shotgun are sufficient to qualify for the residual clause when the crimes from which we are instructed to guide our determination -- burglary, arson, extortion, and crimes involving the *use* of explosives -- all are inherently risky without that extra step required for the risk to manifest.

Miller, 721 F.3d at 443.

The Sixth Circuit reached the same conclusion as the Seventh, though years before. In *United States v. Amos*, 501 F.3d 524 (6th Cir. 2007), the court found that violation of a Tennessee statute criminalizing mere possession of a sawed-off shotgun was not a violent felony under the ACCA. The *Amos* court noted that possession does not "fit well with the more active crimes included in the statute." *Amos,* 501 F.3d at 528. The court also found a difference between crimes that carry a risk of violence and those that carry a "future" risk. *Amos,* 501 F.3d at 528-29. *See also United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010)(holding that violation of Florida statute prohibiting possession of a short-barreled shotgun was not a violent felony under the ACCA).

In total, four Circuits have expressly held that possession of a short-barreled shotgun is not a violent felony, two Circuits would likely follow suit based upon

related precedent, and only two persist in concluding that it is. Such a clear split among the Circuit Courts can only be settled by this Court.

II.

THIS CASE PRESENTS AN IDEAL VEHICLE FOR THE COURT TO DECIDE WHETHER MERE POSSESSION OF A SHORTENED FIREARM SHOULD COUNT AS A VIOLENT FELONY.

Samuel Johnson's petition provides an ideal vehicle for this Court to determine whether possession of a short-barreled shotgun should count as a crime of violence. First, the issue, is squarely presented. Aside from the sawed-off shotgun conviction, Mr. Johnson has only two prior offenses which could count as predicate offenses under the ACCA. Indeed, the district court expressed his belief that the fifteen year sentence required by the ACCA was much higher than it would otherwise impose. (Sent. p. 22) If, as the Eighth Circuit concluded, possession of a sawed-off shotgun is a violent felony under the residual clause, Mr. Johnson remains an Armed Career Criminal and his fifteen year sentence holds. If this Court agrees with the Seventh Circuit and several others that it is not a violent felony, on the other hand, Mr. Johnson was not properly sentenced under the enhanced penalties of the ACCA and remand is required.

Second, although the specific language of underlying statutes is essential to this Court's violent felony analysis, the statute at issue in Mr. Johnson's case is essentially indistinguishable from the statutes at issue in the other cases. The Minnesota statute criminalizes "whoever owns, possesses, or operates..." a short-barreled shotgun. Minn Statute § 609.67, sub. 2. The Wisconsin statute at issue in

Miller provides that "[n]o person may sell or offer to sell, transport, purchase, possess or go armed with a short-barreled shotgun or short-barreled rifle." Wisc. Stat. § 941.28(2). The North Carolina statute considered in *Haste* also prohibits simple possession of shotguns with barrels less than 18 inches. These statutes are all identical in criminalizing the simple possession of a short-barreled shotgun with no additional requirement that the gun be used in any way. By accepting review of Mr. Johnson's case, the Court can definitely answer whether mere possession of such a weapon is a violent felony.

III.

THE EIGHTH CIRCUIT'S DECISION BELOW INCORRECTLY APPLIES THIS COURT'S PRECEDENT.

Finally, Mr. Johnson urges the Court grant certiorari because the Eighth Circuit's position on this issue is simply incorrect. Although the test for whether a prior conviction counts as a violent felony under the residual clause has many facets, the central question in the present case seems to be pointed to by this Court's most recent decision on the issue, *Sykes v. United States*, ___ U.S. ___, 131 S. Ct. 2267 (2011). A court must decide that a prior conviction presents a "serious potential risk of physical injury," similar to the degree and types of risks presented by the listed offenses of "burglary, arson, extortion, and crimes involving the *use* of explosives."

Additionally, though parts of the *Begay* analysis have perhaps been somewhat sidelined by the *Sykes* holding, a court must still determine whether an

offense involves conduct that is "purposeful, violent and aggressive," before the residual clause is triggered. *Begay*, 553 U.S. at 145.

Under both lines of analysis, the simple possession of a short-barreled shotgun is not a violent felony. Most obviously, the risk presented by possession of such a weapon is much less than the offenses's closest analog among the enumerated offenses, "*use* of explosives." Indeed, both *Miller* and *McGill* noted that Congress included only "use of explosives" offenses in the statute's list, not basic possession, when they concluded that basic possession of a short-barreled weapon is not a violent felony. *Miller*, 721 F.3d at 441; *McGill*, 618 F.3d at 277 (11th Cir. 2010).

Moreover, in an ordinary possession of a short-barreled weapon case, such as the underlying offense in this case, the weapon is possessed and nothing more. Mr. Johnson's possession of a sawed-off shotgun conviction, for instance, involved the discovery of the prohibited weapon in a bag in the backseat of a car in which he was a front seat passenger. In *Miller*, the court collected cases prosecuted under the sawed-off shotgun statute and noted that they often involve "a passive possession in which the weapon is not exposed to others." *Miller,* 721 F.3d at 439-40 (referencing cases including possession of the weapon behind closed pantry doors, in a closet, and locked in a car trunk).

The Eighth Circuit's conclusion that possession of a shortened long gun is a violent felony because of the more dangerous nature of the weapon itself, *see*

United States v. Vincent, 575 F.3d 820, 825-26 (8th Cir. 2009), erroneously disregards the analysis required by *Begay* and its progeny.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Eighth Circuit.

Dated: October 28, 2013

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APPENDIX