NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

EDWARD DEAN McCRANIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is Colorado robbery, which follows the common-law definition of the amount of force required, a crime of violence for purposes of the career-offender guideline?

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PRAYER

Petitioner, Edward Dean McCranie, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on May 3, 2018.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, United States v. McCranie, 889 F.3d 677 (10th Cir. 2018), is found in the Appendix at A1. The oral decision of the United States District Court for the District of Colorado is found in the Appendix at A6.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). Justice Sotomayor has extended the time in which to petition for certiorari to, and including, October 1, 2018, see A11, so this petition is timely.

FEDERAL PROVISIONS INVOLVED

This case concerns the definition of a crime of violence for purposes of the career-offender provision of the United States Sentencing Guidelines. That provision provides as follows:

> **§ 4B1.2. Definitions of Terms Used in Section 4B1.1**
>
> (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 murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2(a).

The federal sentencing guidelines define a career offender as follows:

> **§ 4B1.1. Career Offender**
>
> (a) 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.

U.S.S.G. § 4B1.1(a).

STATEMENT OF THE CASE

Edward McCranie pleaded guilty to a one-count information charging him with bank robbery, in violation of 18 U.S.C. § 2113(a). Vol. 1 at 12-13 (information), 18-19 (plea agreement). At the same time, Mr. McCranie pleaded guilty to violating his supervised release in an earlier case. Vol. 1 at 20; see generally Vol. 3 at 53-83 (plea hearing for both bank robbery and supervised-release revocation).[1]

The parties recommended a disposition that depended on whether Mr. McCranie was a career offender. Vol. 1 at 20-21. If he was, they agreed, a term of 151 months on the bank robbery, the low end of the guideline range of 151-188 months, and a concurrent term of twelve months on the supervised-release revocation, was appropriate. Id.

The agreement contemplated a much lower sentence if Mr. McCranie was not a career offender. The anticipated range for the bank robbery, at an offense level of 22 and a Criminal History Category of V, id. at 21, would then be 77-96 months. In that case, the parties would seek a high-

[1] For this Court's convenience in the event it deems it necessary to review the record to resolve the petition, see Sup. Ct. R. 12.7, this petition will cite to the record on appeal to the Tenth Circuit.

end sentence of 96 months, with a consecutive term of twelve months for the supervised-release violation, for a total of 108 months. Id. As well, the prosecution reserved the right to seek a one-level variance on the bank robbery, which would produce a total term of 117 months. Id.

The main dispute in the district court was thus whether Mr. McCranie was a career offender. The presentence report asserted he was. Vol. 2 at 17. For the two prior convictions required to support a career-offender, the report relied on a conviction for unarmed federal bank robbery and his conviction for Colorado aggravated robbery. Id.

Mr. McCranie objected to the characterization of his Colorado conviction as a crime of violence. Vol. 1 at 46. He recognized that the Tenth Circuit had held, in United States v. Harris, 844 F.3d 1260 (10th Cir. 2017), cert. denied, 138 S.Ct. 1438 (2018), that the lesser-included offense of Colorado robbery was a crime of violence, foreclosing his position. Vol. 1 at 46. He raised it to preserve his objection for further review.

The district court overruled Mr. McCranie's objections, Vol. 3 at 14-18, and concluded he was a career offender. Using the resulting guideline

range of 151-188 months, id. at 18, 42, it imposed a sentence of 175 months, id. at 43.

In the Tenth Circuit, Mr. McCranie renewed his contention that his Colorado aggravated-robbery conviction was not a crime of violence, to preserve the issue for review by the Tenth Circuit *en banc*, or by this Court. He explained that the element that made the robbery an aggravated one did not itself require the "use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). And so, it was the decision in Harris, that Colorado robbery in its basic form is a crime of violence, that was determinative of the issue.

The Tenth Circuit, bound by Harris, rejected Mr. McCranie's claim that his aggravated-robbery conviction was not a crime of violence. United States v. McCranie, 889 F.3d 677, 678 & n.3 (10th Cir. 2018); A2.

REASONS FOR GRANTING THE WRIT

This Court should hold this case pending its decision in Stokeling v. United States, and, if appropriate, GVR in light of the decision in Stokeling, as this cases raises the same issue of the amount of force required for common-law robbery.

Colorado is "committed to the common law definition of robbery." United States v. Harris, 844 F.3d 1260, 1267 (10th Cir. 2017), cert. denied, 138 S.Ct. 1438 (2018). So too is Florida. Brief for Petitioner in Stokeling v. United States, No. 17-5554, 2018 WL 2960923, *26-29 (U.S. June 11, 2018). Florida follows the common-law rule as to the amount of force that can support a robbery conviction. Id., 2018 WL 2960923, *28. As the petitioner in Stokeling has explained, the Florida courts have "repeatedly embraced the common law rule that robbery can be committed by *any* degree of force." Id. at *28-29 (emphasis in original).

In Stokeling, in which argument is being heard on October 9, this Court will be deciding whether the minimum force required for a Florida robbery qualifies as the "physical force" needed for a conviction to count as a predicate under the force clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). With both Florida and Colorado following the common-law definition of robbery, the decision in Stokeling

will very likely dictate (and will certainly at least bear on) whether Colorado robbery necessarily has such physical force, the issue that was before the Tenth Circuit in Mr. McCranie's appeal.

Although Mr. McCranie's case involves the career-offender provision of the federal sentencing guidelines, and not sentencing under the ACCA, Stokeling will still guide the outcome in this case. The force clause of the career-offender definition of "crime of violence" is *identical* to the force clause of the definition of "violent felony" in the ACCA. Compare U.S.S.G. § 4B1.2(a)(1) (career offender) *with* 18 U.S.C. § 924(e)(2)(B)(ii). And what is being defined in each instance is something partaking of violence, so the same interpretive guidance this Court drew from that fact with respect to the ACCA's force clause, Johnson v. United States, 559 U.S. 133, 140 (2010), applies to interpreting physical force in the career offender's force clause. Indeed, the Tenth Circuit applies decisions issued in the context of the ACCA's force clause to the career offender's force clause. United States v. Armijo, 651 F.3d 1226, 1231 (10th 2011); see also United States v. Benton,

876 F.3d 1260, 1263 (10th 2017) (using Johnson's definition of physical force in career-offender context), cert. denied, 138 S.Ct. 1576 (2018).

This Court will grant certiorari, vacate the judgment below, and remand a case where "'intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome.'" Wellons v. Hall, 558 U.S. 220, 225 (2010) (quotation omitted) (ellipses by the Court in Wellons). If this Court holds in Stokeling that the force required for Florida robbery -- the same as required for common-law robbery -- is not physical force under the ACCA, there is a reasonable probability the Tenth Circuit would follow that lead and reach here a different determination as to Colorado robbery than it did in Harris. That redetermination may also determine the ultimate outcome of Mr. McCranie's appeal.

Accordingly, this Court should hold this case pending the decision in Stokeling and, if it rules in favor of the petitioner, grant certiorari, vacate

the decision of the Tenth Circuit, and remand this case for reconsideration in light of Stokeling.

A. The Tenth Circuit's controlling case law, used to reject Mr. McCranie's claim, interpreted the minimum force required for Colorado robbery -- which is identical to robbery at common law -- by looking to the fact that Colorado robbery requires the "violence" needed at common law, but without considering the common-law meaning of that term.

The Tenth Circuit rejected Mr. McCranie's claim regarding his Colorado aggravated-robbery conviction on the authority of its earlier decision in Harris. McCranie, 889 F.3d at 678 & n.3; A2. Harris interpreted Colorado robbery to require the physical force needed to be an ACCA predicate under that statute's force clause. And as the Tenth Circuit recognized, Colorado uses the common-law definition of robbery.

The Tenth Circuit in Harris looked to the decision of the Colorado Supreme Court in People v. Borghesi, 66 P.3d 93 (Colo. 2003) (en banc). See Harris, 844 F.3d at 1266. The question in Borghesi was not the amount of force needed for robbery. Rather, it was whether robbery should be

considered a crime against the person, or instead a crime against property. Id. (citing Borghesi, 66 P.3d a 99).

The Tenth Circuit explained at the outset that the Colorado Supreme Court considered the terms used in the state's robbery statute to have their meaning at common law. Id. For that reason, the Tenth Circuit noted, the state court in Borghesi looked to the common law as controlling its reading of the statute:

> Because "there is no indication that the legislature has departed from the usual and customary meaning of any of the common law terms," the [Colorado Supreme Court] sought guidance from the common law.

Id. (quoting Borghesi, 66 P.3d at 99).

The Tenth Circuit continued that the Court in Borghesi had considered authorities such as Blackstone's Commentaries and Professor LaFave's criminal-law treatise to answer whether robbery is a crime against the person, or against property. Id. That led the state court to conclude that, at common law, it was the use of "'violence or intimidation'" in the taking of the property that distinguished robbery from larceny, as there "'can be no robbery without violence, and there can

be no robbery with it.'" Id. (quoting Borghesi, 844 F.3d at 99). And, the Tenth Circuit added, the court in Borghesi had stated that its cases had the same emphasis. Id. at 1267.

In the end, the Tenth Circuit reiterated that "Colorado remains committed to the common law definition of robbery." Id. But in assessing the minimum force that would sustain a robbery conviction in Colorado, the Tenth Circuit in Harris did not identify any state cases that answered this question. Nor did it look for guidance -- as it recognized the Colorado Supreme Court would, id. at 1266 -- to the common law. Instead, the Tenth Circuit took the word "violent" to have its usual meaning, without regard to what it meant as a legal matter in the robbery context at common law. Id. at 1267. The Tenth Circuit even looked to the definition of the word in a contemporary (non-legal) dictionary as support for its conclusion that a Colorado robbery is a violent felony. Id.

In short, the Tenth Circuit held that Colorado follows the common law meaning of robbery. It recognized that Colorado robbery, consistent with the common law, requires a taking of property by violence (or by

intimidation). But it made no effort to determine, as the Colorado Supreme Court would do, what was meant in this context by the word "violence" at common law. Instead, the Tenth Circuit merely gave that word is ordinary, present-day meaning.

B. Because Stokeling squarely presents the issue of the minimum force that will allow a conviction for robbery at common law, a decision for the petitioner in Stokeling will very likely cause the Tenth Circuit to reach a different result as to Colorado robbery.

The question that the Tenth Circuit elided in Harris is now pending before this Court in Stokeling. That case involves whether the minimum amount of force for robbery in Florida amounts to that required by the force clause of the ACCA. And Florida robbery, just like Colorado robbery, is the same as robbery at common law.

The parties in Stokeling agree that Florida robbery is common-law robbery. The petitioner there has explained that "Florida codified the crime of robbery in 1868, and the Florida Supreme Court has interpreted that core component of the offense in accordance with the common law ever since." Brief for Petitioner in Stokeling, 2018 WL 2960923, *26-27.

And, the petitioner has stated, "the Florida Supreme Court has consistently embraced the common law rule that robbery can be committed by *any* degree of force." Id., 2018 WL 2960923, *28.-29 (emphasis in original).

The government, the respondent in Stokeling, likewise considers Florida robbery to be common-law robbery. In its brief, it repeatedly acknowledges that Florida (with an exception regarding when force be used that is not relevant here, Brief for Respondent in Stokeling v. United States, No. 17-5554, 2018 WL 3727777, *31 (U.S. Aug. 3, 2018)) defines robbery as at common law, and that the force it requires is that required at common law. The government describes both the ACCA and Florida robbery as being "drawn from the common law," id. at *7, and says Florida's robbery statute is "derived from the common law," id. at *15-16. The government also speaks of the violence required "for common-law robbery crimes like Florida's. Id. at *33; see also id. at *18 (Florida robbery tracks common law on the force required).

Indeed, the government's argument in Stokeling is that the ACCA uses the same definition of force as the common law used for robbery. Id.

at 7-8, 14-18, 27. In Appendix B of its brief, the government includes Florida, id. at *3aa, as a state "adhering to the common-law definition of force, id. at *1aa.

So, the decision in Stokeling will very likely turn on the force needed for robbery at common law. If it does, it will at the same time answer the amount of force needed for Colorado robbery. After all, as shown in the preceding subsection, Colorado robbery is common-law robbery. And on this point too, the government agrees. In its brief in Stokeling, it includes Colorado in the same appendix as a state that adheres to the common-law definition of force, citing Borghesi as proof. Id. at *2aa.

If Stokeling is decided in the petitioner's favor, there is more than a reasonable probability that the Tenth Circuit will hold Colorado robbery not to require the physical force necessary to meet the elements clause of the ACCA. Because the Tenth Circuit reads the elements clause in the definition of crime of violence in the career-offender guideline the same way, there is also more than a reasonable probability that it will hold

Colorado robbery not to be a crime of violence in the context presented by Mr. McCranie's case.

C. There are no other reasons not to GVR this case in the event of a ruling for the petitioner in Stokeling.

Mr. McCranie's predicate was not just Colorado robbery, but Colorado aggravated robbery. If the aggravating element of that offense were to satisfy the force clause, it could still be classified as a crime of violence, even if simple Colorado robbery could not be. Mr. McCranie was also sentenced under the 2016 version of the guidelines, which allows a crime-of-violence determination if a conviction is for an enumerated offense, including robbery.

Neither of these possibilities is a reason not to hold this petition pending the decision in Stokeling. The Tenth Circuit has not addressed either possibility. And as explained below, there is good reason to think it would reject each as a basis for treating Mr. McCranie as a career offender, so that a favorable decision in Stokeling "'may determine the ultimate outcome'" of this case. Wellons, 558 U.S. at 225 (quotation omitted).

1. The aggravating element for Mr. McCranie's prior robbery conviction does not categorically satisfy the career offender's force clause.

If the Tenth Circuit were to hold in light of the decision in Stokeling that Colorado robbery is not categorically a crime of violence, there would still be the question of whether the aggravated version of the offense for which Mr. McCranie was convicted is categorically a crime of violence. See McCranie, 889 F.3d at 677; A1 (applying categorical approach here); see also United States v. O'Connor, 874 F.3d 1147, 1151 (10th Cir. 2017) (categorical approach applies to determining whether conviction is for crime of violence under career-offender guideline). The documents the prosecution submitted to the district court showed that Mr. McCranie was prosecuted for violating subsection (1)(d) of the aggravated-robbery statute. A conviction under that subsection can be had if the robber "possesses" an article that is "fashioned in a manner to lead any person who is present to believe it to be a deadly weapon." Colo. Rev. Stat. § 18-4-302(1)(d) (1997). The question becomes whether the least of the acts

criminalized by this subsection satisfies the force clause. Johnson, 559 U.S. at 137. It does not.

Section 18-4-302(1)(d) does not require that the robber actually use, attempt to use or threaten to use physical force against the person of another. See U.S.S.G. § 4B1.2(a)(1). One who has a weapon like a gun or a knife during a robbery would fall within the literal reach of the statute. Even if the article would have to be visible to those present, a robber who had such an item sticking out of his or her pocket, and was not even aware of this fact, would be guilty of aggravated robbery. This is not the use, attempted use or threatened use of physical force. For this reason, if the Tenth Circuit were to hold that Colorado robbery is not a crime of violence, Mr. McCranie's prior conviction for Colorado aggravated robbery would not be a crime of violence under the career offender's force clause.

2. Because Colorado robbery is not generic robbery, it does not satisfy the enumerated-offense clause either.

Mr. McCranie was sentenced under the 2016 version of the guidelines. The enumerated-offense clause in U.S.S.G. § 4B1.2(a)(2) is an

alternative way that a conviction can be a crime of violence, and robbery is one of the enumerated offenses.

But if Colorado robbery is broader than the generic, contemporary definition of robbery, then it is not robbery within the meaning of the enumerated-offense clause. United States v. Rivera-Oros, 590 F.3d 1123, 1126-27 (10th Cir. 2009); see Taylor v. United States, 495 U.S. 575, 598 (1990) (ACCA case). In that case, Mr. McCranie's conviction would not qualify under that clause either, and would not be a crime of violence. Colorado robbery does not align with generic robbery for at least one reason, and perhaps two reasons.

The first reason is that Colorado robbery requires proof of only general intent. People v. Mosley, 566 P.2d 331, 335 (Colo. 1998) (en banc). As this Court explained in Carter v. United States, 530 U.S. 255, 268 (2000), in addressing the federal, bank-robbery statute, one can take money (satisfying general intent) without having an intent to permanently deprive the owner of the funds (failing to satisfy specific intent). And the

contemporary, generic definition of robbery, unlike Colorado robbery, requires specific intent.

This is confirmed by the sources relevant to determining the generic definition of a crime. Black's Law Dictionary equates robbery to an aggravated larceny, Black's Law Dictionary 1354 (8th ed. 1999), and defines larceny as requiring the "intent to deprive the possessor of [the property] permanently," id. at 896. Likewise, Professor LaFave's treatise on substantive criminal law explains that robbery is a specific-intent crime. 3 Wayne R. LaFave, *Substantive Criminal Law*, § 20.3 (3d ed. 2017); see also id. at § 20.3 n.21 (collecting cases that make the point that there must be the specific intent to steal).

The Model Penal Code, although it does not use the terms "specific intent" and "general intent," considers robbery to be an aggravated form of theft, Model Penal Code § 221, and requires for theft the "purpose to deprive" another of property, id. § 223.2(1). One acts "purposely" in that regard by having the "conscious object," id., § 2.02(2)(a) (defining that

mental state), to deprive another of property. That is consistent with specific intent. United States v. Bailey, 444 U.S. 394, 405 (1980).

The Model Penal Code also defines "deprive" in a manner largely consistent with Professor LaFave's treatise. To deprive, under the Code, means to withhold property permanently, or for so long as to appropriate a major portion of its economic value, or with the intent to return it only after payment; or to dispose of property, so that the owner is unlikely to recover it. Model Penal Code, § 223.0.

As for the contemporary meaning of robbery in the majority of jurisdictions, Taylor, 475 U.S. at 589, the great majority of jurisdictions, unlike Colorado, also require specific intent. See State v. Mejia, 662 A.2d 308, 317-18 (N.J. 1995) (noting that large majority makes robbery a specific-intent crime and providing examples of such jurisdictions, as well as those in the minority that require only general intent, including Colorado). At least thirty-six jurisdictions, as the chart included in the Appendix at A12-14 shows, require the specific intent to deprive permanently or for an extended period of time, or something similar.

Given these authorities, there can be no doubt that the generic, contemporary meaning of robbery requires this specific intent. As Colorado does not, and allows for a robbery conviction on only a showing of general intent, Mosley, 566 P.2d at 335, Mr. McCranie's aggravated-robbery conviction does not satisfy the enumerated offense clause.

The second reason why Mr. McCranie's conviction may not satisfy the enumerated offense clause involves the amount of force required by the contemporary, generic definition of robbery. As the Third Circuit has noted, there is a circuit split as to whether only minimal force is needed (as under the common law) or something more. United States v. Graves, 877 F.3d 494, 503 (3d Cir. 2017), cert. denied, 2018 WL 3009140 (U.S. Oct. 1, 2018).[2] The split indicates that the Tenth Circuit could reasonably hold that

[2] The Third Circuit identified the split as being between, on the one hand, the Fifth and Ninth Circuits (which define generic robbery as requiring more than *de minimis* force) and, on the one hand, the Seventh and Eleventh Circuit (which define generic robbery as requiring no more than *de minimis* force). The Ninth Circuit has actually held, in a divided opinion, that only *de minimis* force is needed for generic robbery. United States v. Molinar, 881 F.3d 1064, 1072-73 (9th Cir. 2017). The Third Circuit reached that same result in Graves. United States v. Graves, 877 F.3d 494, 503 (3d Cir. 2017), cert. denied, 2018 WL 3009140 (U.S. Oct. 1, 2018).

such common-law robbery is not generic robbery, and it should decide that issue in the first instance.

* * *

A decision for the petitioner in Stokeling will almost certainly resolve in Mr. McCranie's favor the same issue on which the Tenth Circuit held his Colorado, aggravated-robbery conviction to satisfy the force clause of the definition of a crime of violence for the career-offender guideline. There is therefore far more than a reasonable probability that the Tenth Circuit, on reconsideration in light of such a decision, would rule in his favor on that issue. There is also good reason to believe that the Tenth Circuit will not consider that conviction to be a crime of violence for any other reason, and will grant Mr. McCranie relief.

This Court should therefore hold this petition pending the decision in Stokeling. If it rules in favor of the petitioner in Stokeling, it should then grant certiorari, vacate the judgment of the Tenth Circuit, and remand this case for reconsideration.

CONCLUSION

This Court should grant Mr. McCranie a writ of certiorari.

Respectfully submitted,

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