

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD DEAN MCCRANIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

KIRBY A. HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's prior conviction for aggravated robbery, in violation of Colo. Rev. Stat. § 18-4-302(1)(d) (1986 & Supp. 1996), was a conviction for a "crime of violence" under Sentencing Guidelines § 4B1.2(a) (2016).

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-6257

EDWARD DEAN MCCRANIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 889 F.3d 677.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2018. On July 23, 2018, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including October 1, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Colorado, petitioner was convicted of bank robbery, in violation of 18 U.S.C. 2113(a). Judgment 1. He was sentenced to 175 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A5.

1. In 2016, petitioner walked into a bank in Thornton, Colorado. Plea Agreement 6. Petitioner pointed what appeared to be a handgun at two bank tellers and demanded that they place money on the counter. Ibid. Petitioner took the money and fled. Id. at 7.

A federal grand jury in the District of Colorado indicted petitioner on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). Indictment 1-2. The government subsequently filed an information charging petitioner with one count of bank robbery, in violation of 18 U.S.C. 2113(a). Information 1-2. Petitioner pleaded guilty to that charge. Judgment 1.

2. Applying the 2016 version of the Sentencing Guidelines, Revised Presentence Investigation Report (PSR) ¶ 29, the Probation Office classified petitioner as a career offender under Sentencing Guidelines § 4B1.1 (2016), PSR ¶ 37. Under Section 4B1.1, a defendant is subject to an enhanced advisory sentencing range as a "career offender" if (1) he was at least 18 years old at the

time of the offense of conviction, (2) the offense of conviction is a felony "crime of violence" or "controlled substance offense," and (3) he has at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." Sentencing Guidelines § 4B1.1(a) (2016). Section 4B1.2(a) defines a "crime of violence" as:

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).

Id. § 4B1.2(a). Clause (1) is known as the "elements clause," and clause (2) is known as the "enumerated offenses clause." 81 Fed. Reg. 4741, 4743 (Jan. 27, 2016).

The Probation Office determined that petitioner had two prior convictions for crimes of violence -- namely, a 2001 conviction for bank robbery, in violation of 18 U.S.C. 2113(a); and a 1997 conviction for aggravated robbery, in violation of Colo. Rev. Stat. § 18-4-302(1)(d) (1986 & Supp. 1996). PSR ¶ 38; see PSR ¶¶ 54-55. The Probation Office accordingly classified petitioner as a career offender and calculated an advisory guidelines range of 151 to 188 months of imprisonment. PSR ¶¶ 37, 109.

Petitioner objected to classification as a career offender, arguing that federal bank robbery and Colorado aggravated robbery are not crimes of violence. D. Ct. Doc. 43, at 1-5 (Jan. 13, 2017). The district court overruled petitioner's objection and adopted the Probation Office's calculation of his advisory guidelines range. Pet. App. A10. The court sentenced petitioner to 175 months of imprisonment. Judgment 2.

3. The court of appeals affirmed. Pet. App. A1-A5. The court noted petitioner's acknowledgement that, under circuit precedent, "Colorado robbery is categorically a crime of violence." Id. at A2 (quoting Pet. C.A. Br. 45 and citing United States v. Harris, 844 F.3d 1260 (10th Cir. 2017), cert. denied, 138 S. Ct. 1438 (2018)). The court also determined that federal bank robbery qualifies as a crime of violence. Id. at A5. The court therefore upheld petitioner's classification as a career offender under Section 4B1.1. Id. at A2-A5.

ARGUMENT

Petitioner contends (Pet. 10-13) that his prior conviction for aggravated robbery, in violation of Colo. Rev. Stat. § 18-4-302(1)(d) (1986 & Supp. 1996), does not qualify as a conviction for a crime of violence under Sentencing Guidelines § 4B1.2(a) (2016). He does not, however, seek plenary review of that issue. He instead asks (Pet. 13-16, 23) this Court to hold his petition for a writ of certiorari pending its disposition of Stokeling v. United States, No. 17-5554 (Jan. 15, 2019).

After the petition for a writ of certiorari was filed, the Court issued its decision in Stokeling. The Court in Stokeling determined that a defendant's prior conviction for robbery under Florida law satisfied the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), which is a clause worded identically to the elements clause of Sentencing Guidelines § 4B1.2(a)(1) (2016). See slip op. 2, 13. The Court explained that "the term 'physical force' in ACCA encompasses the degree of force necessary to commit common-law robbery" -- namely, "force necessary to overcome a victim's resistance." Id. at 13.

This Court's decision in Stokeling forecloses petitioner's contention that aggravated robbery, in violation of Colo. Rev. Stat. § 18-4-302(1)(d) (1986 & Supp. 1996), does not satisfy the elements clause of Section 4B1.2(a)(1). Colorado's aggravated-robbery offense incorporates the elements of robbery, see ibid., and petitioner acknowledges (Pet. 10) that the force necessary to commit "robbery" under Colorado law is "identical" to the force necessary to commit common-law robbery, see United States v. Harris, 844 F.3d 1260, 1267 (10th Cir. 2017) ("Colorado remains committed to the common law definition of robbery."), cert. denied, 138 S. Ct. 1438 (2018); People v. Borghesi, 66 P.3d 93, 99 (Colo. 2003) (en banc) (explaining that Colorado robbery "track[s] the basic elements of common law robbery"). Because "the term 'physical force' in ACCA encompasses the degree of force necessary to commit common-law robbery," Stokeling, slip op. 13, and because

petitioner does not suggest that "physical force" in Sentencing Guidelines § 4B1.2(a)(1) (2016) has a more restrictive meaning, see Pet. 8-9, Colorado aggravated robbery, in violation of Section 18-4-302(1)(d), would satisfy the elements clause of Section 4B1.2(a)(1). The court of appeals therefore correctly determined that petitioner's prior conviction for Colorado aggravated robbery was a conviction for a crime of violence under Section 4B1.2(a)(1). Pet. App. A2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

KIRBY A. HELLER
Attorney

JANUARY 2019