IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2018

No.

LASHON BROWNING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED FOR REVIEW

1. Does Illinois robbery categorically require the use of force and thereby qualify as a violent felony under the Armed Career Criminal Act?

(This Court has granted certiorari to consider essentially the same question, although the question arose in the context of Florida's robbery statute. *Stokeling v. United States*, No. 17-5554, *cert. granted* April 2, 2018. The Court also has pending petitions raising this issue under the Illinois robbery statute. *Klikno v. United States*, No. 17-5018, *cert. filed* June 22, 2017; *Van Sach v. United States*, No. 17-8740, *cert. filed* May 31, 2018; and *Shields v. United States*, No. 17-9399, *cert. file*d June 12, 2018.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lashon Browning respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit denying relief is reported at *Browning v. United States*, 723 Fed. Appx. 343 (7th Cir. 2018), and is reprinted in the appendix to this petition. A. 1.[1]

JURISDICTION

Browning sought post-conviction relief under 28 U.S.C. § 2255. The district court denied relief. R. 27. Browning filed a timely appeal. The Court of Appeals affirmed on May 21, 2018. *Browning v. United States*, 723 Fed. Appx. 343 (7th Cir. 2018).

[1] "A. ___" indicates a reference to the Appendix to this petition. "R. __" indicates a reference to the district court record. "Cr. R. __" indicates a reference to the record in the underlying criminal case.

Browning timely moved for an extension to file a certiorari petition. He was given leave to file on or before October 18, 2018. *Browning v. United States*, No. 18A170. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 924(e)

(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).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(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

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Ill. Rev. Stat. ch 38, §18–1(a) (1997)

(a) Robbery. A person commits robbery when he or she knowingly takes property, except a motor vehicle covered by Section 18-3 or 18-4, from the person or presence of another by the use of force or by threatening the imminent use of force

Ill. Rev. Stat. ch 38, §18–2(a) (1997)

(a) A person commits armed robbery when he or she violates Section 18-1 while he or she carries on or about his or her person, or is otherwise armed with a dangerous weapon.

STATEMENT OF THE CASE

LEGAL BACKGROUND

Under 18 U.S.C. § 924(a)(2), the range of imprisonment for the offense of unlawful possession of a firearm after a previous felony conviction is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(1), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions . . . for a violent felony or a serious drug offense." ACCA defines a "violent felony" to include any crime punishable by more than one year that "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. § 924(e)(2)(B)(ii). ACCA includes alternative definitions of violent felony under its "force" clause and under its "residual" clause. This petition raises a question about the interpretation of ACCA's force clause.

If it is to count under the force clause, a prior conviction must categorically require "force" as an element of the offense. In making this inquiry, a court looks to the elements of the proposed

predicate offense, not the underlying facts of the specific conviction. *Taylor v. United States*, 495 U.S. 575, 600-01 (1990). A conviction counts under the force clause only if the offense always, that is, categorically, requires the use of force as defined in federal law. *Descamps v. United States,* 570 U.S. 254, 257 (2013).

In *Johnson v. United States*, 559 U.S. 133 (2010) (*Curtis Johnson*), a case involving a battery conviction, the Court interpreted the force clause as requiring not any physical force, but "***violent*** force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140 (emphasis in original). Thus, "physical force," as used in ACCA, means "a degree of power that would not be satisfied by the merest touching." *Id.* at 139. However, a "slap in the face" could cause enough pain to satisfy the definition of force. *Id.* at 143.

FACTUAL AND PROCEDURAL BACKGROUND

This is an appeal from the denial of post-conviction relief under 28 U.S.C. § 2255. Browning was sentenced to 240 months

in prison under the Armed Career Criminal Act (ACCA). 18 U.S.C. § 924(e). Browning claims that his ACCA sentence is illegal after *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015).

Browning was charged with one count of possession of a firearm by a felon and one count of possession of a firearm with an obliterated serial number. He was convicted of the former after a jury trial and sentenced as an armed career criminal to 240 months in prison. The district court relied on two Illinois armed robbery convictions and an Illinois aggravated battery conviction to impose the enhanced sentence. R. 15, at 1

The Seventh Circuit affirmed his conviction and the sentence. *United States v. Browning*, 436 F.3d 780 (7th Cir. 2006), *cert. denied sub nom., Browning v. United States*, 547 U.S. 1215 (2006).

After this Court's decision in *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), Browning petitioned the district court to review his ACCA-enhanced sentence through a section

2255 motion.[2] R. 1. The district court denied relief. It ruled that since the Seventh Circuit had ruled that Illinois robbery is a violent felony, it was bound by Circuit precedent. The district court also considered itself bound by Circuit precedent on the aggravated battery conviction. After examining the charging documents in the aggravated battery case, it concluded that the battery conviction involved the infliction of bodily harm and, therefore, amounted to the use of force. R. 15, at 7–8; A. 7–8. The district court granted a certificate of appealability as to the armed robbery convictions. R. 15, at 10.

REASONS FOR GRANTING THE PETITION

The decision below misapplies this Court's definition of force as that term is used in the Armed Career Criminal Act. *Curtis Johnson* has defined "force" as "***violent*** force—that is, force capable of causing physical pain or injury to another

[2] Browning erroneously filed an application with the Seventh Circuit seeking leave to file a second or successive motion pursuant to 28 U.S.C. § 2255. As Browning had not filed a prior § 2255 petition, that Court transferred the motion to the district court.

person." 559 U.S. at 140 (emphasis in original). Although the Illinois robbery statute makes force an element of the offense, the Illinois definition of force is by no means equivalent to the federal definition of force. Illinois sets the bar much lower and, by doing so, disqualifies Illinois robbery as an ACCA predicate. Many other states have taken the same approach to robbery, and a major Circuit split has resulted, leading to this Court's grant of certiorari in *Stokeling*. Browning's case presents another example of this persistent problem.

I. The decision below exacerbates a Circuit split on robbery as a violent felony, an issue now awaiting decision by this Court.

The decision below relies on a line of Seventh Circuit cases that has assumed an equivalence between the level of force required for Illinois robbery and the level of force required by ACCA. That assumed equivalence is unsupportable.

The Illinois robbery statute makes force an element of the offense. Although the statute itself provides no definition of force, the Illinois Supreme Court has declared that force "however

slight" counts. *People v. Campbell*, 84 N.E. 1035, 1036 (Ill. 1908). *Campbell* elaborated on this principle, "Where a diamond pin, with a corkscrew stalk twisted in a lady's hair, was snatched out and a part of the hair was drawn away at the same time, it was held that this constituted robbery; and where a watch was fastened by a steel chain, which was broken in snatching the watch, it was held robbery." *Id*. The Illinois Supreme Court has continued to adhere to the "however slight" doctrine." *People v. Taylor*, 541 N.E.2d 677, 679 (Ill. 1989). Illinois is by no means alone in declaring that even slight force will suffice for a robbery conviction. 3 Wayne R. LaFave, Substantive Criminal Law § 20.3(d)(1) (3d ed. 2018).

The task for a federal court, then, is to measure the standard established by the Illinois cases against *Curtis Johnson's* definition of force. The Seventh Circuit has not faithfully performed that task. The leading Seventh Circuit case, *United States v. Dickerson*, 901 F.2d 579 (7th Cir. 1990), has held that "force" in the Illinois robbery statute had the same meaning as "force" in ACCA. In reaching this conclusion, *Dickerson* merely

quoted the Illinois statute and quoted the ACCA statutory language. *Dickerson* then assumed that the word had the same meaning in both statutes.

> Ill.Rev.Stat. ch. 38, § 18–1(a), in effect at the time of Dickerson's arrest and conviction, provided that: "A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force." The Illinois robbery statute very clearly, then, contains "an element [of] use, attempted use, or threatened use of physical force against the person of another," necessary to qualify as a "violent felony" under 18 U.S.C. § 924(e)(2)(B). . . .
>
> We agree with the district court that the Illinois robbery statute in its own terms includes the elements of either "use of force or ... threatening the imminent use of force," that clearly come within the scope of 18 U.S.C. § 924(e)(2)(B).

901 F.2d at 584. For *Dickerson*, it was sufficient that both statutes contained the word "force"; it did not seem to cross the Court's mind that a word appearing in two different statutes might have two different meanings.

Moreover, *Dickerson* considered the alleged facts underlying the defendant's robbery conviction; it did not confine itself to an appraisal of statutory elements of Illinois robbery.

> Not only are the elements of the Illinois robbery statute within the scope of 18 U.S.C. § 924(e)(2)(B), the circumstances of Dickerson's own crime reflect elements of use or threatened use of physical force. During his guilty plea hearing Dickerson admitted that he struck the victim, knocked him to the ground, and took $13.00 from the victim's pocket. These activities clearly involved the use of physical force against the victim.

901 F.2d at 584. But under *Taylor v. United States*, 495 U.S. 575, 600-01 (1990), the sentencing court must look at the statutory elements of the offense, not the actual conduct underlying the conviction. *Dickerson* approached the problem from a vantage point explicitly forbidden by this Court's precedents.

Dickerson has been specifically rejected in *Amos v. United States*, 2017 WL 2335671 (D. Ariz. May 30, 2017), where the defendant had a prior conviction under the Illinois armed robbery statute. The government appealed the *Amos* ruling, but later dismissed its appeal, *Amos v. United States*, 2017 WL 8236051 (9th Cir. Dec. 21, 2017), avoiding a Circuit split regarding the Illinois statute. *Dickerson's* approach has been rejected in a number of Circuits regarding statutes similar to the Illinois

statute. *E.g., United States v. Walton*, 881 F.3d 768 (9th Cir. 2018) (Alabama armed robbery); *United States v. Jones*, 877 F.3d 884 (9th Cir. 2017) (Arizona armed robbery); *United States v. Mulkern*, 854 F.3d 87 (1st Cir. 2017) (Maine robbery); *United States v. Winston*, 850 F.3d 677, 685 (4th Cir. 2017) (Virginia robbery); *United States v. Eason*, 829 F.3d 633, 640-42 (8th Cir.2016) (Arkansas robbery); *United States v. Gardner*, 823 F.3d 793, 803-04 (4th Cir. 2016) (North Carolina robbery); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) (Massachusetts armed robbery).

In rejecting Browning's request for relief, the Seventh Circuit provided scant discussion, but cited to *Dickerson* and to *Shields v. United States*, 885 F.3d 1020 (7th Cir. 2018), its most recent reaffirmation of *Dickerson*. *Shields* also invoked a more recent precedent. *United States v. Chagoya-Morales*, 859 F.3d 411 (7th Cir. 2017). *Chagoya* represents a separate line of analysis, and it is equally defective.

Illinois, like many other states, recognizes that if the defendant takes property without using force, then the offense is

theft. *People v. Taylor*, 541 N.E.2d 677, 679 (Ill. 1989). The factual line between robbery and theft can sometimes seem thin. Thus, as stated in *Taylor*, if the defendant snatches a hat from the victim's head, the crime is theft, whereas yanking a watch attached by a chain is robbery. *Id.* In *Chagoya*, the Seventh Circuit concluded that if *Johnson*-level force is not used, then the Illinois offense is theft, not robbery. The Seventh Circuit has gone astray in assuming that Illinois robbery always requires *Johnson* force. That conclusion flies in the face of *Campbell*, which requires force, however slight.

Illinois robbery is not a violent felony, nor is Illinois armed robbery a violent felony. The Illinois armed robbery statute merely requires that the defendant carry a weapon while committing a robbery. Ill. Rev. Stat. ch 38, §18–2(a) (1997). There is no requirement that the defendant threaten the use of a weapon, nor a requirement that the defendant indicate in any way to the victim that a weapon is present. *People v. Gray*, 806 N.E.2d 753, 757-58 (Ill. App. 2004). *Cf. People v. Alejos,* 455 N.E.2d 48, 50 (Ill. 1983) (armed violence requires no more than

possession of a weapon). If the robber makes threats to use a weapon, even when he does not actually have one, then a different offense comes into play, aggravated robbery under Ill. Rev. Stat. ch 38, §18–1(b)(1) (1997). *People v. Thomas*, 545 N.E.2d 289, 293 (Ill. App. 1989). Browning was convicted of armed robbery, not aggravated robbery.

Other Circuits considering statutes similar to the Illinois armed robbery statute have confirmed that the offense is not a violent felony. *United States v. Walton*, 881 F.3d 768 (9th Cir. 2018) (Alabama armed robbery); *United States v. Jones*, 877 F.3d 884 (9th Cir. 2017) (Arizona armed robbery); *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017) (Florida armed robbery); *United States v. Starks*, 861 F.3d 306 (1st Cir. 2017) (Massachusetts armed robbery); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) (Massachusetts armed robbery).

This Court has recently granted certiorari in *Stokeling v. United States,* No. 17-5554, *cert. granted* April 2, 2018, to decide whether Florida's robbery statute categorically requires force as defined by this Court in *Curtis Johnson*. Browning's sentence,

which rests on a conviction under an Illinois robbery statute, raises essentially the same issue raised in *Stokeling*. The robbery statute of each state requires "force," and the question in each case is whether "force" as required in each statute equates with "force" as required in ACCA. Browning requests that the Court hold his petition until it decides *Stokeling*.

CONCLUSION

Wherefore, it is respectfully requested that this Court grant a writ of certiorari to review the decision below.

Dated October 10, 2018, at Chicago, Illinois.

Respectfully submitted,

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