

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMIE TODD BJERKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Whether a state robbery offense that permits a conviction for use of force sufficient to overcome light resistance qualifies as a predicate conviction under the “force clause” of the United States Sentencing Guidelines.

LIST OF PARTIES

All parties appear in the caption on the cover page of this Petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jamie Todd Bjerke requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as an unpublished opinion at *United States v. Bjerke*, __ Fed. Appx. __, 2018 WL 3752143 (8th Cir. Aug. 7, 2018), and the original slip opinion is reprinted in the Appendix to this Petition. (App. A). The Appendix also contains this Court's order extending the time for submission of this Petition. (App. B).

JURISDICTION

Petitioner was charged by indictment filed in the United States District Court for the District of Minnesota, alleging federal crimes relating to unlawful possession of firearms. After having reached a plea agreement, Petitioner entered a guilty plea and the matter proceeded to the sentencing phase. The district court imposed a 120-month prison term. The Eighth Circuit Court of Appeals affirmed by unpublished opinion filed on August 7, 2018. (App. A). Petitioner filed an application to extend the time to file a Petition for Writ of Certiorari, and this Court extended the time to file this Petition to and including December 5, 2018. (App. B). Under 28 U.S.C. § 1254(1), this Court has jurisdiction to review the decision of the Court of Appeals.

STATUTE INVOLVED

This Petition involves provisions of the United States Sentencing Guidelines, particularly—

* * *

USSG § 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).

* * *

INTRODUCTION

Petitioner asks this Court to review a decision by the lower courts, holding the offense of Minnesota Simple Robbery qualifies as a sentence-enhancing predicate conviction under the “force clause” of the United States Sentencing Guidelines. This, despite state legal authorities demonstrating that a person may be convicted of the offense by using light force to overcome equally light resistance, in the manner of a purse-snatching or pickpocket. This Court is presently considering a nearly identical issue in a case entitled *Stokeling v. United States*, having recently heard oral argument in the matter. Though the Court has yet to issue its opinion in *Stokeling*, the tenor of oral argument suggests the forthcoming opinion will contain legal principles and holdings that will alter the foundational premises upon which the lower court relied in Petitioner’s case. In anticipation of such a premises-altering decision in the *Stokeling* matter, Petitioner requests that this Court grant certiorari, vacate the lower court decision, and remand (*i.e.*, issue a GVR order).

STATEMENT OF THE CASE

A. Sentencing determinations of the district court

In the district court below, Petitioner was charged with a federal firearms offense. He ultimately entered a guilty plea under the terms of a plea agreement. At the sentencing phase, the district court made a number of determinations regarding the United States Sentencing Guidelines (USSG or Guidelines), resulting in an adjudicated Guidelines range of 110-120 months.

Of particular importance to this Petition, in adjudicating the above Guidelines range the district court construed USSG § 2K2.1, which calls for a stepped-up base

offense level when a defendant's criminal history includes a "crime of violence." This last term includes those offenses that fall within the "force clause" of USSG § 4B1.2(a) (also known as the Guidelines Force Clause) (reproduced in the Statutes Involved section, *supra*).

Specifically, Petitioner's criminal history included a 2009 conviction for the Minnesota offense known as Simple Robbery, Minn. Stat. § 609.24 (2009). The district court determined that this statute of conviction "has as an element the use, attempted use, or threatened use of physical force against the person of another," USSG § 4B1.2(a), and thus constitutes a "crime of violence" resulting in a stepped-up base offense level, USSG § 2K2.1.

Had the district court made a contrary determination—*i.e.*, had it held that the Minnesota Simple Robbery conviction did not contain an element of force within the meaning of the Guidelines Force Clause—then Petitioner's Guidelines range would have been significantly lessened, as illustrated by these alternative scenarios:

	Scenario 1: Conviction at issue <u>not counted</u> as predicate	Scenario 2: Conviction at issue <u>counted</u> as predicate
Base offense level USSG § 2K2.1(a)(4) or (a)(6)	14	20
Adjustments not at issue (net total)	+5	+5
Total:	19	25

As just shown, then, had the district court determined the prior offense at issue did not qualify under the Guidelines Force Clause (see middle column, Scenario 1), Petitioner's criminal history category (VI) would have resulted in a Guidelines range of 63-79 months.

Instead, the district court determined that the prior offense did qualify under the Force Clause (Scenario 2 above), resulting in a Guidelines range of 110-120 months. And ultimately, the district court imposed a prison sentence of 120 months, in line with the latter scenario.

B. Affirmance by court of appeals

On direct appeal, Petitioner challenged the district court's key sentencing determination above, *i.e.*, that the Minnesota Robbery offense at issue qualifies as a predicate under the Guidelines Force Clause.

1. Substantive thesis—Overcoming light resistance

Petitioner challenged the district court's determination that the Minnesota Simple Robbery conviction at issue constitutes a predicate "crime of violence" for purposes of USSG §§ 2K2.1 & 4B1.2(a). Using the applicable categorical approach to statutory analysis, Appellant supplied state court authorities indicating this conviction needn't necessarily implicate "violent force" so as to qualify under the Guidelines Force Clause. Petitioner pointed out that Minnesota courts have determined that the requisite "force" that may result in a conviction may be nothing more than that which is necessary to overcome light resistance.

For example, the requisite "force" may exist when "a woman hangs on to her purse and the defendant uses force to overcome her resistance." *State v. Nash*, 339

N.W.2d 554, 557 (Minn. 1983). Or when a defendant grabs at a person’s jacket, which the victim promptly sheds and abandons. *State v. Nelson*, 297 N.W.2d 285, 286 (Minn. 1980). Or when a defendant applies “gentle but firm” pressure against the victim in an elevator in order to pick his pocket. *Duluth St. Ry. v. Deposit Co. of Md.*, 161 N.W. 595, 595-96 (Minn. 1917) (cited in state’s published jury instruction guide construing statute at issue, 10 *Minn. Prac. Jury Instr. Guide—Crim.*, No. 14.02 (Westlaw 6th ed. 2018)).

The Eighth Circuit rejected this thesis, relying instead upon its earlier decisions in *United States v. Johnson*, 526 Fed. Appx. 708, 711 (8th Cir. 2013), *rev’d on other grounds*, 135 S. Ct. 2551 (2015) and *United States v. Libby*, 880 F.3d 1011, 1015-16 (8th Cir. 2018). Both of these decisions construed the parallel-worded force clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), and held that Minnesota Robbery qualifies as a predicate under this provision. In particular, the Eighth Circuit’s *Libby* decision relied heavily upon the statutory requirement of force “to overcome a person’s resistance,” including the jacket-grabbing case mentioned earlier. *Id.* The Eighth Circuit also relied upon the idea that the victim’s fear would suffice to trigger the ACCA Force Clause. By extension, the Court of Appeals held that Minnesota Robbery must then also qualify as a predicate under the Guidelines Force Clause.¹

¹ The Guidelines Force Clause is nearly identical to the Force Clause contained in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). The parallel language is not coincidental. The drafters consciously modeled the Guidelines “crime of violence” definition upon the ACCA “violent felony” definition. *See, e.g.*, USSG, App. C at C.139 (1987) (Am. 268) (“The definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e).”). Consequently, federal courts have long construed the two provisions *in pari materia*, even going so far as to say the two are “interchangeable.” *E.g.*, *United States v. Hall*, 877 F.3d 800, 806 (8th Cir. 2017) (select punctuation and citations omitted).

2. Procedural thesis—Stay pending this Court’s ruling

In addition to his substantive thesis above, Petitioner also advanced a procedural one, *i.e.*, that the case ought to be stayed until this Court could rule upon a pending and potentially dispositive matter. In particular, Petitioner cited this Court’s grant of certiorari review in *Stokeling v. United States*, 138 S. Ct. 1438 (2018), where the Question Presented is:

Is a state robbery offense that includes “as an element” the common law requirement of overcoming “victim resistance” categorically a “violent felony” under [ACCA] if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?

Stokeling v. United States, No. 17-5554, Cert. Pet. at ii (Aug. 4, 2017).²

Petitioner further observed that the state robbery statute at issue in *Stokeling* may be violated due to the minor quantum of force needed to overcome light resistance, *e.g.*, a “tug-of-war over the victim’s purse.” Similarly, the Minnesota Robbery statute at issue can be violated “if a woman hangs on to her purse and the defendant uses force to overcome her resistance.” *State v. Nash*, 339 N.W.2d 554 (Minn. 1983).

Petitioner argued that this pending matter justified a stay of the appellate proceedings below, as this Court’s upcoming decision in *Stokeling* was likely to inform or even control the above substantive issue. The Eighth Circuit did not engage with the point. Instead, the Court of Appeals opted to: “[E]xpress no opinion on whether the Supreme Court’s future *Stokeling* decision may impact *Libby*’s holding or to what

And lower courts employ decisions construing the ACCA Force Clause when adjudicating controversies involving the Guidelines Force Clause. *See, e.g., id.*

² See <http://www.scotusblog.com/case-files/cases/stokeling-v-united-states/>

extent.” (App. A at 5.) Without further comment, then, the court ruled against Petitioner and declined to stay either its decision or mandate.

C. Petition to this Court for writ of certiorari

In the meantime, in October 2018 this Court held arguments in the *Stokeling* matter. Petitioner sought an extension of time to file this Petition, recognizing the possibility that this Court could soon issue a decision that would bolster his substantive thesis described earlier.

This Court granted the extension until December 5, 2018. (App. B.) As of this writing, the Court is still considering its final decision in *Stokeling*. Hence, in anticipation of a forthcoming decision favorable to his position, Petitioner now requests an order which grants certiorari review, vacates the lower court ruling, and remands to the lower court for further proceedings in light of the forthcoming *Stokeling* opinion (*i.e.*, a GVR order). The remainder of this Petition will supply the explanation for the requested relief.

REASONS FOR GRANTING THE PETITION

I. This Court should issue a GVR order in light of its forthcoming decision in *Stokeling*.

This Court stands poised to render a decision in the above-described *Stokeling* case. Petitioner anticipates that the forthcoming decision will include legal principles that bolster his substantive legal argument explained earlier, *i.e.*, that the Minnesota Robbery offense at issue does not qualify as a predicate under the Guidelines Force Clause. Hence, Petitioner requests that, after issuing its decision in *Stokeling*, the Court issue an order granting certiorari review, vacating the lower court's decision below, and remanding for re-evaluation in light of the anticipated and forthcoming *Stokeling* decision. In the Court's parlance, then, Petitioner requests a GVR order, a particularly apt judicial device in situations like that faced by Petitioner here.

A. It is common and functional for this Court to issue a GVR order in light of this Court's own intervening-apposite authority.

GVR orders, it has been observed, have a number of advantages: (i) assisting the lower court by flagging an issue that might not have received due consideration; (ii) assisting this Court by permitting the lower court to weigh in prior to granting plenary review; and (iii) conserving this Court's scarce resources. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Hence, a "GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal." *Id.* at 168.

Accordingly, this Court has issued GVR orders in numerous situations where some unforeseen development has occurred after the lower court issues its final decision, but before this Court is able to accept review. *Id.* at 166-67. Perhaps chief

amongst these, this Court has frequently issued GVR orders when its own intervening decisions cast doubt upon the legal premise(s) used by lower courts in rendering a given decision. *See, e.g., id.; Stutson v. United States*, 516 U.S. 193, 195-96 (1996).

Indeed, this Court has said a GVR order is particularly appropriate when “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 determination may determine the ultimate outcome of the matter.” *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (citation and internal punctuation omitted).

Accordingly, this Court has issued rafts of GVR orders in light of its own decisions construing certain federal criminal statutes, particularly the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), at issue here. For example:

- *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding that ACCA Residual Clause is unconstitutionally vague)
- *Mathis v. United States*, 136 S. Ct. 2243 (2016) (explicating the proper use of the categorical approach and modified categorical approach in ACCA context)

And many of these GVR orders cover petitions involving not ACCA, but rather an analogue provision of the United States Sentencing Guidelines. This is precisely the situation that Petitioner anticipates with respect to this Court’s forthcoming *Stokeling* decision, and so this Court should issue a GVR order here as explained next.

B. This Court’s forthcoming *Stokeling* decision is likely to announce legal principles and holdings that cast doubt upon the premises used by the lower court in rendering its decision.

As discussed earlier, here the Eighth Circuit Court of Appeals held that the offense of Minnesota Robbery categorically falls under the Guidelines Force Clause, thus significantly increasing Petitioner’s Guidelines sentencing range and resultant prison term. The court of appeals reasoned the offense qualifies as such even though it requires only enough force to overcome light resistance, such as that needed to overcome resistance during a purse snatching.

It is, of course, not possible to divine precisely how this Court will decide the *Stokeling* case. But an examination of the oral argument transcript³ (*Stokeling* Tr.) offers some likely components of a future decision, and that would appear highly pertinent to the premises relied upon by the lower court here.

First, multiple members of the Court explored the meaning of “violent force” for purposes of the ACCA Force Clause as set out in *Curtis Johnson v. United States*, 559 U.S. 133 (2010). There, this Court explained that the “force” aspect of the statute refers not to slight touching, but rather “violent force.” *Id.* at 140. That is to say, “force capable of causing physical pain or injury to another person.” *Id.* The discussion during oral argument suggested the Court would clarify or otherwise revisit the *Curtis Johnson* standard, particularly in reference to a state robbery statute similar to the Minnesota one at issue here. (*Stokeling* Tr. at 5, 11, 22-25, 40-45, 49-61.)

³ See https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-5554_i426.pdf

Second, multiple members of this Court expressed discomfort with the notion that the Force Clause—which is purportedly designed to target those likely to commit firearms violence—should apply to run-of-the-mill purse snatchers, who will almost always have to overcome at least some slight resistance. (*Stokeling* Tr. at 33-34, 37, 43, 49, 59-60.)

Third, at least one member of this Court questioned whether the ACCA Force Clause could be triggered by a robbery offense which may result due to fear experienced by the victim, whether objectively justified or not. (*Stokeling* Tr. at 37-38.) A similar concept of fear-instillation was a key rationale for the Eighth Circuit in its *Libby* decision, in which it held that Minnesota Robbery falls under the ACCA Force Clause.

Of course, Petitioner does not say with any certainty that these topics will be explored in this Court’s ultimate *Stokeling* decision. Nor is it possible to say with any certainty whether they will be resolved in a manner that is favorable to Petitioner’s substantive thesis, *i.e.*, that Minnesota Robbery does not qualify under the Guidelines Force Clause.

What *can* be said, however, is that all of these topics were explored at oral argument with some vigor. And if resolved in a manner that tends to bolster Petitioner’s argument below, a GVR order is definitely appropriate here.

For example, this Court might hold that the ACCA Force Clause does not reach a robbery statute that permits a conviction for purse snatching that overcomes light resistance. If such a holding were to emerge, the decision below of the Eighth Circuit

is based upon a defective premise, and thus would almost certainly be in need of correction.

The same can be said if this Court were to rule that the *Curtis Johnson* formulation does not extend to common purse-snatching or pickpocket behavior. Or if this Court holds that mere instillation of fear—whether objectively justified or not—does not meet the *Curtis Johnson* test. Any or all of these putative holdings and/or legal principles would cast serious doubt upon the premises used by the lower court here. Any or all would fully justify a GVR order.

In the end, it is safe to say that such rulings would undercut the core of the lower court’s reasoning, such that a GVR order would be necessary to appropriate. A GVR order would: (i) give the lower court an opportunity to re-examine its prior decision in light of new and apposite authority issued by this Court; (ii) avoid the strong medicine of summary reversal; and (iii) conserve this Court’s scarce resources. Anticipating a decision in *Stokeling* that undercuts a premise used by the lower court here, Petitioner requests that the Court issue a GVR order.

CONCLUSION

For all these reasons, Petitioner asks the Court to issue a GVR order in light of its forthcoming decision in the *Stokeling* case.

Dated: December 4, 2018

Respectfully submitted,

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