

No. 18-6993

IN THE SUPREME COURT OF THE UNITED STATES

JAMIE TODD BJERKE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior conviction for robbery, in violation of Minn. Stat. § 609.24 (2009), was a conviction for a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(1) (2016).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is not published in the Federal Reporter but is reprinted at 744 Fed. Appx. 319.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2018. On October 31, 2018, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including December 5, 2018, and the petition was filed on December 4, 2018. 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 Minnesota, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A9.

1. In 2015, a police officer stopped petitioner's vehicle and arrested him pursuant to a state warrant. Pet. App. A2. Inside the vehicle, the officer found a rifle and ammunition, along with stolen property and other items related to recent local burglaries. Ibid. Petitioner was taken into custody but later released. Ibid. Soon after, police officers spotted a stolen vehicle near the residence of petitioner's girlfriend. Ibid. The homeowner consented to a search of the residence, and the officers found a handgun and two pry bars in the bedroom where petitioner had been staying. Ibid.

A federal grand jury in the District of Minnesota returned a three-count indictment charging petitioner with two counts of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), and one count of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-6. Petitioner pleaded guilty to one count of possession of a firearm by a felon. Judgment 1.

2. The Sentencing Guideline for a conviction for violating 18 U.S.C. 922(g)(1) provides for a base offense level of 20 if the defendant has a prior "felony conviction of either a crime of violence or a controlled substance offense." Sentencing Guidelines § 2K2.1(a)(4)(A) (2016). At the time of petitioner's sentencing, Sentencing Guidelines § 4B1.2(a) (2016) defined 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).

Ibid.; see id. § 2K2.1, comment. (n.1); Second Revised Presentence Investigation Report (PSR) ¶ 14 (applying the 2016 version of the Guidelines).

The Probation Office determined that petitioner had a prior conviction for a crime of violence -- namely, a 2010 conviction for robbery, in violation of Minn. Stat. § 609.24 (2009). PSR ¶¶ 15, 46; see Pet. App. A4. The Probation Office accordingly calculated a base offense level of 20. PSR ¶ 16. It then applied a four-level increase because the offense involved a firearm with an altered or obliterated serial number, a four-level increase for

using or possessing a firearm in connection with another felony offense, and a three-level decrease for acceptance of responsibility. PSR ¶¶ 19-20, 27-28. Based on a total offense level of 25 and a criminal history category of VI, the Probation Office calculated an advisory Guidelines range of 110 to 120 months of imprisonment. PSR ¶ 102.

Petitioner objected to classification of his prior Minnesota robbery conviction as a crime of violence. Sent. Tr. 5. The district court overruled petitioner's objection and adopted the Probation Office's calculation of his advisory Guidelines range. Id. at 10. The court sentenced petitioner to 120 months of imprisonment. Id. at 27.

3. The court of appeals affirmed. Pet. App. A1-A9. Relying on circuit precedent, the court determined that petitioner's prior Minnesota robbery conviction qualified as a crime of violence under Section 4B1.2(a)(1) because Minnesota robbery necessarily involves the use of physical force. Id. at A4-A5 (citing United States v. Libby, 880 F.3d 1011, 1015-1016 (8th Cir. 2018)). Given that determination, the court found it unnecessary to address whether Minnesota robbery is a crime of violence on the independent ground that it qualifies as "robbery" under Section 4B1.2(a)(2). Id. at A5.

ARGUMENT

Petitioner contends (Pet. 12-14) that his prior conviction for robbery, in violation of Minn. Stat. § 609.24 (2009), was not

a conviction for a crime of violence under Sentencing Guidelines § 4B1.2(a)(1) (2016). He does not, however, seek plenary review of that issue. Rather, he asks (Pet. 4, 10) this Court to hold his petition for a writ of certiorari pending its disposition of Stokeling v. United States, 139 S. Ct. 544 (2019). After the petition for a writ of certiorari in this case was filed, the Court issued its decision in Stokeling. That decision undermines petitioner's argument that Minnesota robbery does not qualify as a crime of violence under Section 4B1.2(a)(1). The Court recently declined to review a similar question about whether Minnesota robbery is a violent felony under the identically worded elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i). See Pettis v. United States, No. 18-5232 (Feb. 25, 2019). The same result is warranted here.

1. In Stokeling, this Court determined that a defendant's prior conviction for robbery under Florida law satisfied the ACCA's elements clause. 139 S. Ct. at 555. The Court explained that "the term 'physical force' in ACCA encompasses the degree of force necessary to commit common-law robbery," ibid. -- namely, "force necessary to overcome a victim's resistance," ibid., "'however slight' that resistance might be," id. at 550.

This Court's decision in Stokeling undermines petitioner's argument that robbery, in violation of Minn. Stat. § 609.24 (2009), does not qualify as a crime of violence under Sentencing Guidelines § 4B1.2(a)(1) (2016). Petitioner himself acknowledges (Pet. 12)

that Minnesota robbery -- like Florida robbery -- requires the use of "force" necessary to "overcome resistance," however "light" that resistance might be. See also Pet. 4, 6, 8, 13. Because "physical force" under the ACCA's elements clause encompasses "force necessary to overcome a victim's resistance," Stokeling, 139 S. Ct. at 555, and because Minnesota robbery requires such force, see Pet. 4, 6, 8, 12-13; United States v. Pettis, 888 F.3d 962, 964-966 (8th Cir. 2018), cert. denied, No. 18-5232 (Feb. 25, 2019), Stokeling reinforces the court of appeals' determination that petitioner's prior conviction for Minnesota robbery was a conviction for a crime of violence under Section 4B1.2(a)(1), which is worded identically to the ACCA's elements clause, Pet. App. A4-A5.

2. As noted above, petitioner does not seek plenary review of whether his prior conviction for Minnesota robbery was a conviction for a crime of violence under Section 4B1.2(a)(1). Plenary review would not be warranted in any event.

a. First, this Court typically leaves issues of Guidelines application in the hands of the Sentencing Commission, which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991). Because the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions

interpreting the Guidelines. Ibid.; see United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").

Indeed, the Commission has illustrated its attention to such matters through its actions with respect to other portions of the "crime of violence" definition at issue here. In 2016, the Commission amended Section 4B1.2(a)(2) to eliminate the provision's residual clause and to expand the list of enumerated offenses to include "robbery." See 81 Fed. Reg. 4741, 4742-4743 (Jan. 27, 2016). Those amendments demonstrate the Commission's continuing attention to the Guidelines in general and to the definition of a crime of violence in particular. No sound reason exists for this Court to deviate from its usual practice of declining to review questions of Guidelines interpretation.

b. Second, this Court's resolution of the question presented would not affect the outcome of the case. Even if Minnesota robbery does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," Sentencing Guidelines § 4B1.2(a)(1) (2016), it would still qualify as a crime of violence because it satisfies the definition of generic "robbery," an offense enumerated in Section 4B1.2(a)(2). Although the court of appeals did not need to reach

the issue, generic robbery is defined as "the taking of property 'from a person or a person's presence by means of force or putting in fear,'" United States v. Gattis, 877 F.3d 150, 157 (4th Cir. 2017) (citation omitted), cert. denied, 138 S. Ct. 1572 (2018), and Minnesota robbery is a categorical match with that generic definition, see United States v. Bickham, No. 17-cr-60, 2017 WL 6210807, at *2-*3 (D. Minn. Dec. 8, 2017). Thus, regardless of this Court's resolution of the question presented, the court of appeals correctly affirmed the district court's calculation of the applicable advisory Guidelines range.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2019