No. 18-6993

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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UPDATED QUESTION PRESENTED[1]

I.

Whether a grant-vacate-remand (GVR) order is needed, where this Court's intervening decision has announced a new and previously unconsidered legal principle, which is highly pertinent to the lower court's well-informed determination as to whether a state robbery offense qualifies under the Force Clause of the United States Sentencing Guidelines.

[1] This section has been dubbed an "Updated" Question Presented, recognizing that it is different from the Question Presented as stated in the original Petition for Writ of Certiorari. (Cert. Pet. at i). As explained in the body of this Reply Brief, *infra,* the original Petition recognized that this Court was then considering a case which might well result in a decision announcing new and unexpected legal principles germane to the case at hand. (Cert. Pet. at 12-14). As explained later on, what began as a supposition has now come to fruition by way of this Court's intervening decision in *Stokeling v. United States*, 139 S. Ct. 544 (2019).

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INTRODUCTION

Petitioner submits this short Reply Brief in support of his Petition for a Writ of Certiorari, (Cert. Pet.), which seeks a grant-vacate-remand (GVR) order in the case at hand. A GVR order is most appropriate here, in light of this Court's recent decision in *Stokeling v. United States*, 139 S. Ct. 544 (2019). The original Petition was filed while the *Stokeling* matter was pending, and hence Petitioner was unable to divine whether or in what way the final decision would bear upon the present appeal. But in its now-released *Stokeling* decision, it is plain to see this Court has announced new and as-yet unconsidered legal principles, highly pertinent to a well-informed adjudication of this case. In particular, this Court's *Stokeling* decision excludes from the ACCA force clause any state "robbery" offense that permits a conviction under a "sudden snatch" or snatch-and-flee scenario. The robbery statute at issue here

permits a conviction under just such circumstances, and hence a GVR order is necessary and appropriate, so the lower court may consider that novel issue. The government's responsive brief fails to address this aspect of the legal problem. Accordingly, Petitioner renews his request that this Court issue a GVR order here.

UPDATED STATEMENT OF THE CASE

Much of the pertinent background information needed to determine whether to grant the requested GVR order may be found in the original Petition. (Cert. Pet. at 4-9). That being said, a number of post-Petition developments bear consideration in deciding whether to grant a GVR order here:

1. As discussed in the original petition addressed to this Court, Petitioner pleaded guilty to federal firearms offenses thereby subjecting him to federal sentencing proceedings. And a core component of the latter is an accurate determination of an advisory penalty under the United States Sentencing Guidelines (USSG or Guidelines).

2. In relevant part, Petitioner was subject to USSG § 2K2.1, which calls for a stepped-up offense level (and hence higher Guidelines-advised sentencing range) if the defendant's criminal history includes a "crime of violence" as defined under USSG § 4B1.2(a). This last Guidelines provision largely echoes the language contained in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), and hence 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). In particular, both USSG § 4B1.2(a)(1) and ACCA, 18 U.S.C. § 924(e)(2)(B)(i), contain an identically

worded "force clause." In both cases, the force clause defines what will qualify as a sentence-enhancing predicate offense, including any conviction which "has as an element the use, attempted use, or threatened use of physical force against the person of another."

3. Petitioner's criminal history includes a 2009 conviction for the Minnesota state offense known as Simple Robbery, Minn. Stat. § 609.24. Under then-prevailing circuit precedent construing the ACCA force clause, the district court determined that the conviction qualified under the Guidelines Force Clause. Accordingly, Petitioner was assigned a substantially higher advisory Guidelines penalty range, and received a prison term falling within that range. Had the district court reached the opposite conclusion, Petitioner's advisory penalty (and hence likely actual penalty) would have been much reduced. (Cert. Pet. at 5-6).

4. Petitioner appealed to the Eighth Circuit Court of Appeals, which upheld the district court's determination that a conviction of Minnesota Simple Robbery qualifies under the Guidelines Force Clause. (Cert. Pet., App. A). In doing so, the Eighth Circuit relied upon its then-prevailing circuit rule as stated in *United States v. Libby*, 880 F.3d 1011, 1015-16 (8th Cir. 2018). Petitioner also urged the Eighth Circuit to stay its decision in anticipation of this Court's then-forthcoming decision in the *Stokeling* matter mentioned earlier. But the Eighth Circuit declined, instead opting to: "[E]xpress no opinion on whether the Supreme Court's future *Stokeling* decision may impact *Libby*'s holding or to what extent." (Cert. Pet., App. A at 5).

5. In his original filing to this Court, Petitioner framed the Question Presented in parallel with that of the then-pending *Stokeling* matter, *i.e.,* whether a state robbery offense that permits a conviction owing to light force needed to overcome light resistance qualifies under the force clause of the Guidelines. (Cert. Pet. at i). That being said, Petitioner acknowledged that it was "not possible to divine precisely how this Court will decide the *Stokeling* case." (Cert. Pet. at 12). Petitioner observed, however, that the papers and transcript of oral argument suggested the Court's final decision might well revisit or clarify legal principles with a direct bearing upon the case at hand, *e.g.,* whether the Force Clause "should apply to run-of-the-mill purse snatchers." (Cert. Pet. at 13).

6. In its *Stokeling* decision, this Court said:

(a). The ACCA Force Clause imports the definition of "robbery" as the term was understood at common law, which encompasses force needed to overcome resistance, however light the resistance. 139 S. Ct. at 550-52.

(b). Hence, any state robbery offense that incorporates such a requirement may fall within the scope of the ACCA Force Clause, since overcoming a victim's resistance "necessarily involves a physical confrontation and struggle." 139 S. Ct. at 553.

(c). But this Court indicated that a "sudden snatch" or snatch-and-flee fact pattern—which falls outside the common law understanding of "robbery"—would not qualify under the ACCA Force Clause. By way of example, a defendant who "merely snatches money from the victim's hand and runs away." 139 S. Ct. at 554-55.

7. The "sudden snatch" or snatch-and-flee exclusion articulated by this Court was not considered by the lower courts or parties in the case at hand. This is because the lower courts did not have the benefit of the *Stokeling* opinion at the time of their decisions, and the concept does not appear in any pre-*Stokeling* case law that Petitioner is aware of. Certainly the government does not cite any such authority in its Opposition Brief. (Gov't Opp., *passim*).

8. In light of the new and pertinent legal principles articulated in *Stokeling*, a GVR order is particularly apt here, as explained in the remainder of this Reply Brief.

REASONS FOR GRANTING THE PETITION

Petitioner requests that the Court issue a GVR order based upon the following:

1. Issuance of GVR order to permit consideration of intervening and apposite decisions issued by this Court

In appropriate cases, this Court has long recognized the utility of granting certiorari review, vacating the lower court's judgment, and remanding to the lower court for reconsideration. *E.g., Lawrence v. Chater*, 516 U.S. 163, 167 (1996). 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); *Wellons v. Hall*, 558 U.S. 220, 225 (2010). This is precisely the situation here, as the lower courts issued a decision without the benefit of new and apposite legal principles articulated in this Court's *Stokeling* decision.

2. This Court's *Stokeling* decision announced new and apposite legal principles, highly pertinent to a well-informed disposition of the case at hand.

Given its above-described function, a GVR order is needed for the lower courts to issue a well-informed decision in this case—

(a). The Stokeling *snatch-and-flee exclusion*

As already mentioned, in the recent *Stokeling* decision this Court strongly indicated (if not outright held) that any state robbery statute that will permit a conviction in a "sudden snatch" or snatch-and-flee scenario must fall outside the ACCA Force Clause. 139 S. Ct. at 554-55. To borrow this Court's illustrative example, the type of situation where a defendant "merely snatches money from the victim's hand and runs away." *Id.* And given the parallel phrasing, such a conviction would fall outside the Guidelines Force Clause as well. *See, e.g., Hall*, 877 F.3d at 806.

(b). Premise underlying decision of lower court

In this case the lower court determined that a conviction for Minnesota Simple Robbery constitutes a sentence-enhancing predicate offense under the Guidelines Force Clause. To reach that conclusion, the lower court relied upon its prior precedent construing the identically worded ACCA Force Clause. *United States v. Libby*, 880 F.3d 1011, 1015-16 (8th Cir. 2018). Neither the lower court nor the *Libby* court examined whether the offense of Minnesota robbery might permit a conviction under a "sudden snatch" or snatch-and-flee fact pattern. (Cert. Pet., App. A at 3-6). The reason for the omission is the lower court did not have the benefit of the "sudden

snatch" exclusion as articulated in this Court's *Stokeling* decision. 139 S. Ct. at 554-55.

(c). Minnesota snatch-and-flee robbery

As just demonstrated: (i) the lower court issued its decision without considering whether the Minnesota robbery offense at issue permits a conviction under the above snatch-and-flee scenario; and (ii) the lower court did not have the benefit of intervening legal authority suggesting a snatch-and-flee exclusion, as stated in this Court's *Stokeling* decision. This alone justifies a GVR order, so that the lower court can reconsider the issue in light of new and pertinent legal principles contained in this Court's *Stokeling* decision.

Moreover, an examination of Minnesota law suggests the robbery offense at issue *does* permit a conviction in just such a snatch-and-flee scenario. To illustrate, in *State v. Burrell*, 506 N.W.2d 34 (Minn. App. 1993), a state appellate court upheld a robbery conviction where the defendant took property from a shop by stealth (*i.e.,* no cause to overcome any resistance at all at the time of "taking") and hurried away from the premises to make a getaway. The shop owner became suspicious, pursued the defendant, and a fracas ensued. The state appellate court upheld robbery conviction even though there was no force or violence or resistance at the time of the taking. It was sufficient, said this court, if the defendant used some force during the immediate flight or "carrying away" phase.

The *Burrell* decision places Minnesota Simple Robbery under the *Stokeling* snatch-and-flee exclusion. Post-taking "force" was not deemed a "robbery" under the common law, the latter having been relied upon in this Court's *Stokeling* opinion. *See,*

e.g., 2 J.P. Bishop, *Criminal Law*, §§ 1156, 1167-68 (1923), *cited in Stokeling*, 139 S. Ct. at 550; 4 *Wharton's Criminal Law* § 463 (Westlaw 15th ed. 2018) ("At common law, and in some states, force or threated force . . . amounts to robbery only if it used to 'take' property from the possession of another. Force or threatened force used thereafter, in order to retain possession of the property taken or to facilitate escape, does not qualify.") (internal footnotes and punctuation omitted).

The "force" used to facilitate immediate flight (or "carrying away") does not inherently involve "a physical confrontation and struggle," *Stokeling*, 139 S. Ct. at 553, which is doubtless why such scenarios were not deemed "robbery" under the common law. And Minnesota law provides that in a robbery prosecution, the "degree of force is immaterial." *Duluth St. Ry. Co. v. Fidelity & Deposit Co. of Md.*, 161 N.W. 595, 596 (Minn. 1917); *accord, e.g.,* 10 *Minn. Practice, Jury Instruction Guides—Criminal* § 14.02 (Westlaw 6th ed. 2018) *(*citing *Duluth St. Ry.* to aid in construing the Minnesota Simply Robbery statute and in formulating jury instructions*) &* 41 *Dunnell Minn. Digest ROBBERY* § 1.00 (Lexis 2018) (same). Hence, it is reasonable to conclude that the "force" used to support a snatch-and-flee robbery conviction could be nothing more than brushing the arm of a pursuing shopkeeper—a threshold that does not conform to this Court's precedents construing the ACCA Force Clause. *See, e.g., Curtis Johnson v. United States,* 559 U.S. 133 (2010).

It is worth observing that the lower court at issue here—the Eighth Circuit Court of Appeals—is presently considering this very legal question in a number of pending cases. *See, e.g., Taylor v. United States,* No. 17-1760 (8th Cir.); *United States v. Mork*, No. 18-1425 (8th Cir.); *United States v. Jackson-Bey*, No. 18-3545 (8th Cir.);

United States v. Redditt, No. 18-3660 (8th Cir.). This raises the discomfiting possibility (if not likelihood) that the Eighth Circuit will ultimately agree with Petitioner that Minnesota Simple Robbery falls outside the ACCA/Guidelines Force Clause, and yet Petitioner will be denied relief due to accident of timing.[2] All the more reason to issue a GVR order here.

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: April 12, 2019

Respectfully submitted,

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[2] The government suggests that the outcome of this case did not necessarily turn on whether the Minnesota robbery offense at issue fits under the Guidelines Force Clause, but rather could have been upheld under a different provision known as the Guidelines Enumerated Offenses Clause. (Gov't Opp. at 7-8). The trouble with this assertion is the lower court considered that very same argument and explicitly declined to address it, opting instead to follow circuit precedent with respect to the ACCA/Guidelines Force Clause. (Cert. Pet., App. A at 5). Hence, the government is incorrect (or at least premature) in its claim that the case is resolved without deciding the legal issue described in this Reply Brief.