No. 18-7663

IN THE SUPREME COURT
OF THE UNITED STATES

RANDY JASON FORD,
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

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September 20th, 2018

QUESTIONS PRESENTED FOR REVIEW

I. When an Iowa "assault" is accompanied only by the "display" of a dangerous weapon, does the "displaying" provide the "threatened use of force" such that the statute necessarily meets the "force clause" to become a predicate offense under the Armed Career Criminal Act?

LIST OF PARTIES

All parties to the proceeding are identified in the style of the case.

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IN THE SUPREME COURT FOR THE UNITED STATES PETITION FOR WRIT OF CERTIORARI PRAYERI

Petitioner, Randy Jason Ford, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eight Circuit appears in Appendix A to this Petition and can be found at *United States v. Randy Jason Ford*, 888 F.3d 922 (8th Cir. 2018).

JURISDICTION

On April 25, 2018, a three judge panel of the Eight Circuit Court of Appeals entered its opinion in the United States v. Randy Jason Ford, 888 F.3d 922 (8th Cir. 2018). Mr. Ford did not file a Petition for Rehearing En Banc. Additional time to comply with this Court's rules has been granted until September __, 2018 to file this Petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF CASE

On February 23, 2016, a grand jury of the Southern District of Iowa charged Randy Jason Ford with possession of a firearm as a felon in violation of 18 U.S.C. § 922(g)(1). (Dkt No. 2) [1]. On July 5, 2016, Ford filed a motion to suppress evidence seized in connection with his arrest. (Dkt. 43). The district court held a hearing on August 1, 2016 (Dkt. 48) and denied the motion on August 9, 2016 (Dkt 52). On July 5, 2016, Ford entered a conditional guilty plea on August 22, 2016 (Dkt. 53) The Court then determined that Ford had at least three prior "violent felonies" and/or "serious drug offenses" to qualify as predicates under the Armed Career Criminal Act ("ACCA"). The Judge then sentenced Ford as an Armed Career Criminal to 180 months' imprisonment on January 24, 2017 (Dkt. 71). Ford filed a timely notice of appeal on January 31, 2017. (Dkt.73).

On April 25, 2018, the Eight Circuit Court of Appeals denied Fords appeal and confirmed his conviction and sentence.

STATEMENT OF FACTS

On January 19, 2016, U.S. Marshalls received a tip of a confidential informant that Ford was staying at that address and was in violation of his parole warranted through the Iowa Department of Corrections. Without a search warrant, the Marshalls raided a residence located on 12th Street in Des Moines, Iowa. (Dkt. 52,

[1] In this petition, the following abbreviations will be used: "Dkt" is the District Court Clerk's docket record followed by docket entry number and page number; "Sup.Tr" designates references to the Suppression hearing transcript.

Sup. Tr. pages 5 and 6, 19-20, 30, 48). Ford was arrested at the scene and charged with the possession of firearm by a felon in contravention of 18 U.S.C. § 922(g)(1).

After pleading guilty, the Probation Department prepared a Pre-Sentence Report ("PSR"). The PSR indicated that Ford was subject to the ACCA because he had a prior assault with a deadly weapon under Iowa Code § 708.3A(2) and two prior drug convictions under Iowa Code § 124.401(1) that were qualifying convictions. Ford's lawyer failed to object to the use of these crimes as predicate offenses. However, on his own, Ford raised the contention that none of these priors were properly qualifying convictions.

The Eight Circuit determined under plain error review that Iowa assault with a deadly weapon was a crime of violence and that the Iowa drug convictions were "serious drug offenses." The district court judge sentenced Ford to the statutory minimum of 180 months.

ARGUMENT FOR GRANTING CERTIORARI

Iowa's assault with a dangerous weapon on a peace officer is not a "violent felony" for purposes of the ACCA.

Under the Armed Career Criminal Act ("ACCA"), "violent felonies" include crimes that have "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Furthermore, "the phrase

'physical force' means violent force-that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010).

The Iowa crime of assault with a dangerous weapon on a peace officer contains the following three elements:

A person who [1] commits an assault, as defined in §708.1, against a peace officer ... [2] who knows that the person against whom the assault is committed is a peace officer ... and [3] who uses *or displays* a dangerous weapon in connection with the assault, is guilty of a class "D" felony. Iowa Code § 708.3A(2).

"Assault" under § 708.1 occurs when a person does any one of the following:

> a) Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
>
> b) Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
>
> c) Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another. Iowa Code § 708.1

On appeal Ford contended that because the statute of conviction referenced and included the definition of "assault," that made the Iowa aggravated assault statute too broad and categorically not a "violent felony" for purposes of the ACCA. As is clear from the Iowa statute, "assault" can be committed by any act ... which is intended to result in physical contact which will be insulting or offensive to another..." Furthermore, it is also clear that "assault" in Iowa is not divisible.

However, the Eight Circuit focused on the additional definition of a "dangerous weapon" under Iowa law, which defines a "dangerous weapon" as:

"[A]ny instrument or device designed primarily for use in inflicting death or injury upon a human being or animal and which is capable of inflicting death upon a human being when used in the manner for which it was designed ...

Additionally, any instrument or device of any sort whatsoever which is used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being, is a dangerous weapon." Iowa Code, § 702.7.

The Eight Circuit determined that the Iowa definition of "dangerous weapon" made the Iowa aggravated assault statute a violent felony. The Court determined that "[d]isplaying an instrument or device designed primarily for use in inflicting death or injury in connection with an assault is a violent felony." *United States v. Ford,* 888 F.3d 922 (8th Cir. 2018), citing *United States v. Pulliam*, 566 F.3d 784, 788 (8th Cir. 2009). The statute at issue in *Pulliam* was Missouri's unlawful use of a weapon when a defendant knowingly "[e]xhibits, in the presence of one or more persons, any weapon readily capable or lethal use *in an angry or threatening manner.*" *Pulliam*, 566 F.3d at 787 citing Mo. Rev. Stat § 571.030.1(4). "It goes without saying that displaying an operational weapon before another in any angry or threatening manner qualifies as threatened use of physical force against another." *Id.* at 788. In other words, in Ford's case, the Eight Circuit determined that an otherwise non-violent crime became a violent offense when a dangerous

weapon was simply "displayed" in the commission of the offense even though the Eight Circuit had previously required that the "displaying" a weapon also have as an element an intentional threatening occur simultaneously.

The question presented here is whether the simple act of "displaying" a dangerous weapon (without any requirement that there be either an intentional or knowing threat accompanying the displaying) can make an otherwise non-violent offense become a violent offense under the ACCA.

Several other Circuits have examined this issue in the same or related contexts and have reached differing conclusions, creating a Circuit split not only Circuit to Circuit, but also between the judges within certain Circuits. The focus of the difference centers upon just what "intent" is required in the state statutes at issue.

In Iowa it is clear that one may be found guilty of assault against a peace officer by displaying a dangerous weapon even if the defendant lacked any specific intent to cause any threat of violent force. Merely having a general intent to commit an assault is apparently enough to make a statute a qualifying predicate in the Eight Circuit.

Other Circuits have reached different conclusions though. For example, the Ninth Circuit examined whether "exhibiting" a weapon in connection with an assault was a violent crime. *See United States v. Long*, 1995 U.S. App. Lexis 21602 (9th Cir. July 31, 1996). After noting the defendant's argument that "exhibiting does not require intent and is distinguished from assault on that basis," the Ninth Circuit

determined that the assault was violent under the now unconstitutional "residual clause." *Id.*

The Seventh Circuit stated, "we conclude that defendant's display of the gun, and its discharge ... do not qualify as crimes of violence under § 4B1.2(1)(i)." *United States v. Talbott*, 78 F.3d 1183, 1189 (7th Cir. 1996).

The Tenth Circuit examined the issue in the context of New Mexico's aggravated assault statute. *See United States v. Silva*, 608 F.3d 663 (10th Cir. 2010). New Mexico defines aggravated assault as "unlawfully assaulting or striking another with a deadly weapon." N.M.Stat § 30-3-2(A). The Tenth Circuit noted that one method of committing New Mexico aggravated assault required only proof of general criminal intent. *Id.* at 672. The defendant countered that after *Leocal v. Ashcroft*, 543 U.S. 1 (2004), violent felonies only "encompass[es] those offenders convicted of crimes involving 'intentional or purposeful conduct.'" *Id.* And because New Mexico's statute could be violated without proof of "any intent with respect to the perceived threat [the defendant] has raised in the mind of the victim" thus, the statute "does not have as an element the intentional use, attempted use or threatened use of physical force." *Id.* However, a majority of the panel concluded that "[t]he presence or absence of an element of specific intent does not dispositively determine whether a prior conviction qualifies as a violent felony under the ACCA." *Id.* at 673.

The dissent in *Silva* contended that a crime has as an element the "threatened use of physical force against the person of another" only if it proscribes "conduct

performed with an intent to induce fear." *Id.* And in this case, one of the prongs of New Mexico's statute was missing--the specific intent to induce fear. *Id.* "Inducing fear of a battery by intentional acts (such as driving a car or firing a weapon) that are not intended to induce fear or to hurt someone does not suffice under the ACCA any more than does applying physical force against another person by intentional acts (such as driving a car or firing a weapon) that are not intended to apply physical force against another person." *Id.* at 676 (J. Hartz, dissenting). "[T]he intent required for an offense to be a violent felony under the ACCA is not satisfied simply because the offender intended to engage in certain bodily movements; the necessary intent is an intent to apply physical force against another person or to induce fear of such force." *Id.* at 679.

More recently, the Sixth Circuit, in conflict with the decision in *Silva*, examined the same aggravated assault statute in New Mexico. *See United States v. Rede-Mendez*, 680 F.3d 552 (6th Cir. 2012). In *Rede-Mendez* the defendant was convicted of aggravated assault under New Mexico law. The Sixth Circuit noted that it was in direct conflict with two other Circuits that had found the same New Mexico statute was a qualifying "violent felony." *Id.* at 558. "Other Circuits have held that even a general-intent crime may include the threatened use of physical force as an element if it includes the use of a deadly weapon as an element." *Id.* citing *United States v. Grajeda*, 581 F.3d 1186, 1191-92 (9th Cir. 2009) and *United States v. Dominguez*, 479 F.3d 345, 348-49 (5th Cir. 2007).

However, the Sixth Circuit noted that "'[n]ot every crime becomes a crime of violence when committed with a deadly weapon." *Rede-Mendez*, 680 F.3d at 559. "[N]ot all crimes involving a deadly weapon have the threatened use of physical force as an element." *Id.* The Court then noted that "the use of a deadly weapon may transform a lesser degree of force into the necessary 'violent force.' Nonetheless, the underlying crime must already have as an element some degree of, or the threat of, physical force in the more general sense. The use of a deadly weapon may exacerbate the threat of physical force, but it does not necessarily supply the threat if it is not already present in the underlying crime." *Id.*

Ultimately the Sixth Circuit concluded that "[a]lthough using a deadly weapon while attempting to commit a battery, N.M. Stat. § 30-3-1(A), or while engaging in an 'unlawful act, threat or menacing conduct' that places someone in fear of an imminent battery, *Id.* at § 30-3-1(B), may constitute the kind of crime that employs the threatened use of physical force, doing so while 'us[ing] ... insulting language toward another impugning his honor, delicacy or reputation,' *Id.* at 30-3-1(C), does not." *Rede-Mendez*, 680 F.3d at 558.

In 2012, the Tenth Circuit also examined the issue where a defendant had violated the Texas aggravated assault statute under Tex. Penal Code § 22.01(a)(1). *See United States v. Duran*, 696 F.3d 1089 (10th Cir. 2012). In Texas one could be found guilty of assault either intentionally, knowingly or recklessly. *Id.* at 1092. If the defendant used or exhibited a deadly weapon, he was guilty of aggravated assault. *Id.* The Tenth Circuit concluded that because the assault could be

committed recklessly, it lacked the mens rea required to be classified as a crime of violence. *Id.*

The government contended that if a defendant "uses" a deadly weapon, then he "employs it to carry out a purpose," and "then the use of a deadly weapon necessarily implies true intent rather than mere recklessness." The Court rejected this proposition because there was no mens rea required for the extra element of the use or exhibition of a weapon. *Id.* "It is thus clearly possible to commit a crime that involves the use of a deadly weapon under Texas law without committing a crime of violence under federal law." *Id.* at 1094.

To add more confusion to the mix, the Sixth Circuit revisited the issue again in 2016. *See United States v. Rafidi*, 829 F.3d 437 (6th Cir. 2016). In *Rafidi*, the Court examined the forcible assault on a federal officer while using a dangerous or deadly weapon under 18 U.S.C. § 111(b). The Court noted that § 111(b) encompassed the assault definition under § 111(a). Section 111(a) required that the assault be "forcible." *Id.* at 444. But, even so, the Court stated that § 111(a) may not be a crime of violence on its own. Then the Court noted: "Not every crime becomes a crime of violence when committed with a deadly weapon. But if a statute has as an element some degree of, or the threat of, physical force in the more general sense, then the use of a deadly weapon may transform this more general force into the necessary 'violent force' to constitute a 'crime of violence'". *Id.* at 446 (quotations omitted).

The Court then cited a previous case where an earlier panel had noted that "the element of force necessary for a conviction under § 111 may be shown by such a threat or display of physical aggression toward the officer as to inspire fear of pain, bodily harm, or death." *Id.* citing *United States v. Chambers,*195 F.3d 274, 277 (6th Cir. 1999). Using this gloss of the statute by an earlier panel, the Court concluded "[u]nder this reasoning, if a defendant commits a violation of § 111 through intentionally causing physical contact with the federal officer-even if this physical contact is not itself capable of causing physical pain or injury, § 111(b)'s additional required element of using a deadly weapon during this encounter would elevate this lower degree of physical force into 'violent force' sufficient to establish § 111(b) as a 'crime of violence.'" *Id.* at 446 (quotations omitted).

The dissent in *Rafidi* noted the obvious and apparent inconsistency in the majority opinion. Judge Davis stated: "As for part II.A, which examines the question of whether the (alternative) requirement of 18 U.S.C. § 111(b), that a dangerous weapon be used in committing an offense under § 111(a), categorically renders a violation of the former a crime of violence under the force clause of § 924(c)(3)(A), I remain dubitante. I cannot say with assurance that the judicial gloss placed on the statutory terms of § 111 by the reasoning in cases such as *United States v. Chambers*, 195 F.3d 274 (6th Cir. 19999), and, by analogy, *United States v. Reve-Mendez,* 680 F.3d 552 (6th Cir. 2012), is enough to hold that the statute means what its text does not say." *Id.* (J. Davis, dissenting).

"Put differently, it is unclear to me that the use of a dangerous weapon in 'forcibly,' but not 'violently,' resisting arrest by an FBI agent, for example, categorically elevates the kind of non-violent force sufficient to satisfy § 111(a) into 'violent force' within the meaning of the term as recognized in Supreme Court precedent." *Id.*

Nonetheless, the dissent agreed with the majority that § 111(b) was a crime of violence but only under the residual clause. *Id.*

Most recently, to further exacerbate the Circuit split, the Ninth Circuit addressed whether using or carrying a weapon in connection with a Florida robbery was a "violent felony" under the elements or "force" clause of the ACCA. *See United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017). The Ninth Circuit initially determined that simple robbery under Florida Stat. § 812.13(1) was not a violent felony because the statute could be violated by either force or violence and not "violent force." The Court then concluded that the additional use or carrying of a weapon in connection with the simple robbery did not elevate the crime to a "violent felony." "We hold that neither robbery, armed robbery, nor the use of a firearm in the commission of a felony under Florida law is categorically a "violent felony." *Geozos*, 870 F.3d at 900. "We recognize that this holding puts us at odds with the Eleventh Circuit, which has held post-*Johnson* I, that both Florida robbery and (necessarily) armed robbery are violent felonies" under the force clause." *Id.* citing *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011)(robbery) and *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016)(armed robbery).

In a similar situation, the Eleventh Circuit (en banc) reviewed the "use of force" clause applicability to Florida's felony battery statute under Fla. Stat. §784.041(1). *See United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017). Two elements comprise Florida felony battery: a person must (1) "[a]ctually and intentionally touch[] or strike[] another person against the will of the other;" and (2) "cause[] great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1).

In that case, the first element certainly is not, standing alone, a "violent felony." However, a majority of the Eleventh Circuit found that "the defendant must touch or strike the victim in a manner that causes not just offense or slight discomfort but great bodily harm." *Vail-Bailon,* 868 F.3d at 1305. "[W]e have cited *Johnson* [559 U.S. 133 (2010)] for the proposition that physical force in this context means force capable of causing physical pain or injury." *Id.* at 1299. Thus, "[f]orce that actually causes injury necessarily was capable of causing that injury thus satisfies the federal definition." *Id.* at 1302, citing *Douglas v. United States*, 858 F.3d 1069,1071-72 (7th Cir. 2017).

The dissent looked at the statute from a different approach. Judge Rosenbaum focused on the required intent (or lack thereof) to cause the pain or injury. *Id.* at 1314 (J. Rosenbaum, dissenting, joined by J. Martin, J. Jordan). While the majority concluded that the intent to commit the battery in the first element (i.e. the intent to touch or strike) satisfied the necessary intent to meet the use of force clause, Rosenbaum noted that the actual causing of injury or pain may have been

negligently or reckless done. And because the second element could be completed without any intent, the statute did not satisfy the force clause requirements.

Rosenbaum noted that three recent Supreme Court decisions interpreting the word "use" -- *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *United States v. Castleman*, 134 S. Ct. 1405 (2014), and *Voisine v. United States*, 136 S. CT. 2272 (2016)-- led to this conclusion. *Id.* at 1316. These "Supreme Court cases dictate that that element cannot satisfy the 'use' requirement of the elements clause where, as here, the statute does not require any kind of intent at all to cause harm." *Id.* "[W]here the crime has no element requiring intent to injure or to engage in an act that has a substantial likelihood of harming another, any harm that results from the prohibited conduct cannot, in and of itself, satisfy the elements clause.

Iowa's aggravated assault statute under which Ford was convicted provides the same dilemma. Like Florida's battery statute, the first prong (simple assault) can be met without the use of force. Furthermore, the second prong in Iowa only requires the additional display of a weapon. The Eight Circuit concluded that the open displaying could cause fear in the victim officer. However, there is no requirement that the "displaying" be done with any intent to inspire fear or harm.

CONCLUSION

Iowa's aggravated assault is not a categorical "violent felony" under the ACCA. When a defendant "displays" a weapon, he may simply do so with no intent

whatsoever to inspire fear or communicate any threat all. Even so, many Circuits have found that just displaying or exhibiting a weapon satisfies the "force clause" of the ACCA.

This case provides the Supreme Court with the perfect vehicle to resolve this Circuit split and clarify whether a general intent to complete a criminal act is sufficient intent for ACCA purposes or whether there must also be specific intent to inspire fear or communicate some threat of harm or injury.

Respectfully Submitted,

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