

IN THE SUPREME COURT OF THE UNITED STATES

STEVIE ELBERT JONES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior convictions for robbery, in violation of Tex. Penal Code Ann. § 29.02 (West 2003), were convictions for "crime[s] of violence" under the enumerated offenses clause of Sentencing Guidelines § 4B1.2(a)(2) (2016).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Jones, No. 17-cr-237 (Aug. 9, 2018)

United States Court of Appeals (5th Cir.):

United States v. Jones, No. 18-11106 (Apr. 25, 2019)

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No. 19-5350

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 768 Fed. Appx. 290.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2019. The petition for a writ of certiorari was filed on July 24, 2019. 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 Northern District of Texas, petitioner was convicted of bank robbery, in violation of 18 U.S.C. 2113(a). Pet. App. B1. The district court sentenced him to 151 months of imprisonment, to be followed by three years of supervised release. Id. at B2. The court of appeals affirmed. Id. at A1-A2.

1. In 2017, petitioner walked into a federally insured bank in Arlington, Texas. D. Ct. Doc. 20, at 2 (Jan. 24, 2018). Petitioner instructed a bank employee to hand over money and warned the employee not to do "anything stupid." Ibid. Petitioner took the money and fled, but he was later apprehended. Ibid.

A federal grand jury in the Northern District of Texas indicted petitioner on one count of bank robbery, in violation of 18 U.S.C. 2113(a). Indictment 1. Petitioner pleaded guilty. Pet. App. B1.

2. The Probation Office classified petitioner as a career offender under Sentencing Guidelines § 4B1.1 (2016). Presentence Investigation Report (PSR) ¶ 33; see PSR ¶ 25 (applying the 2016 version of the Guidelines). Under Section 4B1.1, a defendant is subject to an enhanced advisory sentencing range as a "career offender" if (1) he was at least 18 years old at the time of the offense of conviction, (2) the offense of conviction is a felony "crime of violence" or "controlled substance offense," and (3) he

has at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." Sentencing Guidelines § 4B1.1(a) (2016). Section 4B1.2(a) defines 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).

Id. § 4B1.2(a). Clause (1) is known as the "elements clause," and clause (2) is known as the "enumerated offenses clause." 81 Fed. Reg. 4741, 4743 (Jan. 27, 2016).

The Probation Office determined that petitioner had two prior convictions for crimes of violence -- namely, two 2011 convictions for robbery, in violation of Tex. Penal Code Ann. § 29.02 (West 2003). PSR ¶ 33; see PSR ¶¶ 56-57; C.A. ROA 179, 183. The Probation Office accordingly classified petitioner as a career offender and calculated an advisory guidelines range of 151 to 188 months of imprisonment. PSR ¶¶ 33, 108.

Petitioner objected to classification as a career offender, claiming that Texas robbery is not a crime of violence. C.A. ROA 189-197. The district court overruled petitioner's objection and

adopted the Probation Office's calculation of his advisory guidelines range. Sent. Tr. 4-5. The court sentenced petitioner to 151 months of imprisonment. Id. at 12.

3. The court of appeals affirmed, rejecting petitioner's claim that Texas robbery is not a crime of violence under Section 4B1.2. Pet. App. A1-A2. The court noted petitioner's acknowledgement that his claim was foreclosed by United States v. Santiesteban-Hernandez, 469 F.3d 376 (5th Cir. 2006), abrogated on other grounds by United States v. Rodriguez, 711 F.3d 541 (5th Cir.) (en banc), cert. denied, 571 U.S. 989 (2013), which determined that Texas robbery "falls within the generic, contemporary meaning of 'robbery,'" id. at 379. See Pet. App. A2.

ARGUMENT

Petitioner contends (Pet. 4) that his prior convictions for robbery, in violation of Tex. Penal Code Ann. § 29.02 (West 2003), do not qualify as convictions for crimes of violence under the enumerated offenses clause of Sentencing Guidelines § 4B1.2(a)(2) (2016). He does not, however, seek plenary review of that issue. He instead asks (Pet. 5) this Court to grant the petition for a writ of certiorari, vacate the judgment below, and remand the case for further consideration (GVR) in light of this Court's decision in Stokeling v. United States, 139 S. Ct. 544 (2019). But petitioner had the opportunity to bring Stokeling, which was decided before the decision below in this case, to the court of

appeals' attention, and in any event, no reasonable probability exists that Stokeling would alter the result here. A GVR is therefore unwarranted, and the petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that petitioner's prior convictions for Texas robbery were convictions for crimes of violence under the enumerated offenses clause of Sentencing Guidelines § 4B1.2(a)(2) (2016). Pet. App. A2.

To determine whether a prior state conviction constitutes a crime of violence under the enumerated offenses clause, a court generally applies the "categorical approach," which involves comparing the elements of the offense of conviction to the elements of the "generic" offense listed in the Guideline (here, robbery). Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); see Taylor v. United States, 495 U.S. 575, 602 (1990). Under the categorical approach, courts "focus solely" on "the elements of the crime of conviction," not "the particular facts of the case." Mathis, 136 S. Ct. at 2248. If the offense of conviction consists of elements that "substantially correspond[]" to, or are narrower than, the generic offense, the prior offense categorically qualifies as a crime of violence. Taylor, 495 U.S. at 602; see Mathis, 136 S. Ct. at 2248.

That is the case here. As the court of appeals explained in United States v. Santiesteban-Hernandez, 469 F.3d 376 (5th Cir.

2006), abrogated on other grounds by United States v. Rodriguez, 711 F.3d 541 (5th Cir.) (en banc), cert. denied, 571 U.S. 989 (2013), "the generic form of robbery 'may be thought of as aggravated larceny,' containing at least the elements of 'misappropriation of property under circumstances involving immediate danger to the person.'" Id. at 380 (brackets and citation omitted). The "elements" of robbery under Tex. Penal Code Ann. § 29.02 (West 2003) "substantially correspond to the basic elements of the generic offense, in that they both involve theft and immediate danger to a person." 469 F.3d at 381. Thus, Texas robbery qualifies as a crime of violence under the enumerated offenses clause of Section 4B1.2(a)(2).

2. Contrary to petitioner's contention (Pet. 5), no basis exists to GVR in light of Stokeling. Although this Court's decision sometimes issues a GVR order in light of an "intervening development[]" or a "recent development[]" that the court of appeals lacked the opportunity to "fully consider," Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam), the decision in Stokeling was neither. This Court decided Stokeling on January 15, 2019, shortly after petitioner filed his brief in the court of appeals but about a month before the government filed a motion for summary affirmance, which petitioner did not oppose, and more than three months before the court rendered its decision on April 25, 2019. See Pet. App. A1-A2. Petitioner thus had the opportunity

to raise any Stokeling-based contentions below, but declined to do so. See Lawrence, 516 U.S. at 180-181 (Scalia, J., dissenting) (explaining that the Court's "intervening event" GVR practice involves "a postjudgment decision of this Court" or, occasionally, a decision of this Court that "preceded the judgment in question, but by so little time that the lower court might have been unaware of it") (emphasis omitted).

In any event, petitioner has not shown that further consideration in light of Stokeling would have a reasonable probability of altering the outcome in this case. In Stokeling, 139 S. Ct. at 555, this Court determined that a defendant's prior conviction for robbery under Florida law satisfied the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i) -- a clause worded identically to the elements clause of Sentencing Guidelines § 4B1.2(a)(1) (2016). Whether robbery under the law of a particular State "has as an element the use, attempted use, or threatened use of physical force against the person of another" under the elements clause of the ACCA or Section 4B1.2(a)(1) presents a different question from whether it qualifies as generic "robbery" under the enumerated offenses clause of Section 4B1.2(a)(2). Indeed, the court of appeals in Santiesteban-Hernandez explained that Texas robbery need not "have as an element the use or threat of force against another person"

to fall within "the generic, contemporary meaning of 'robbery.'" 469 F.3d at 379.

Other courts of appeals have likewise distinguished the two inquiries. The Fourth Circuit in United States v. Gattis, 877 F.3d 150 (2017), cert. denied, 138 S. Ct. 1572 (2018), for example, concluded that North Carolina robbery qualifies as generic robbery, id. at 160, even though it had previously determined that North Carolina robbery does not satisfy the ACCA's elements clause, see id. at 158 (discussing United States v. Gardner, 823 F.3d 793, 803-804 (4th Cir. 2016)). And the Ninth Circuit in United States v. Molinar, 881 F.3d 1064, cert. denied, 139 S. Ct. 64 (2018), concluded that Arizona robbery qualifies as generic robbery, id. at 1070-1074, even though it was of the view that neither Arizona robbery nor the specific Florida robbery statute at issue in Stokeling satisfied the ACCA's elements clause, id. at 1068-1070; United States v. Geozos, 870 F.3d 890, 898-901 (2017), abrogated by Stokeling, supra.

This Court's application of the ACCA's elements clause in Stokeling therefore has no bearing on whether Texas robbery qualifies as generic robbery under the enumerated offenses clause of Section 4B1.2(a)(2). After granting review in Stokeling, this Court denied several petitions for writs of certiorari seeking review of issues relating to the definition of generic robbery under the Guidelines, see Molinar v. United States, 139 S. Ct. 64

(2018) (No. 17-8443); Ward v. United States, 139 S. Ct. 61 (2018) (No. 17-8345); Lester v. United States, 138 S. Ct. 1604 (2018) (No. 17-8197); Blaylock v. United States, 138 S. Ct. 1584 (2018) (No. 17-8196); Morin v. United States, 138 S. Ct. 1583 (2018) (No. 17-8191); United States v. Gattis, 138 S. Ct. 1572 (2018) (No. 17-8044) -- including one petition seeking review, as the petition here does, of whether Texas robbery qualifies as generic robbery, see Truelove v. United States, 139 S. Ct. 58 (2018) (No. 17-8202). The Court should follow the same course here.*

3. As noted above, petitioner does not seek plenary review of whether his prior convictions for Texas robbery were convictions for crimes of violence under Section 4B1.2(a)(2). Plenary review would not be warranted in any event, because petitioner identifies no conflict in the circuits and this case involves a claimed error in application of the advisory Sentencing Guidelines. Typically, this Court 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 Texas robbery qualifies as generic robbery under the enumerated offenses clause of Section 4B1.2(a)(2), no need exists to hold this case pending the disposition of Walker v. United States, cert. granted, No. 19-373 (Nov. 15, 2019), in which the Court will consider whether crimes that can be committed with a mens rea of recklessness can qualify as violent felonies under the ACCA’s elements clause.

Given that the Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines. See ibid.; see also 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.”).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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