19-6229

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

JOHN DOUGLAS - PETITIONER

VS.

UNITED STATES - RESPONDANT

On Petition For A Writ Of Certiorari to the U.S. Court of Appeals for the Eighth Circuit.

John Douglas #16109-041
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PRO-- SE

QUESTIONS PRESENTED

I. IF A STATES AIDING AND ABETTING STATUTE IS BROADER THAN THE FEDERAL GENERIC DEFINITION; DOES AIDING AND ABETTING AGGRAVATED ROBBERY QUALIFY AS A PREDICATE OFFENSE UNDER THE A.C.C.A. IN THAT STATE ?

II. DOES MINNESOTA'S AGGRAVATED ROBBERY STATUTE -WHICH ALLOWS COVICTIONS FOR SUDDEN SNATCHING- STILL QUALIFY AS AN A.C.C.A. PREDICATE AFTER THE SUPREME COURTS DECISION IN STOKELING ?

III. IF A STATUTE ON ITS FACE IS OVERBROAD, CAN THE COURT LOOK BEYOND THE STATUTE OF CONVICTION TO A LESSER INCLUDED OFFENSE OF A LESSER INCLUDED OFFENSE TO DETERMINE THAT THE OVERBROAD STATUTE NOW QUALIFIES ?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Petitioner knows of no related cases pending.

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STATUTES AND RULES

IN THE

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgement below.

OPINION BELOW

The opinion of the United States court of appeals, appeal #17-3422, appears at Appendix 1 to the petition and is unpublished.

JURISDICTION

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 15, 2019, and a copy of the order denying rehearing appears at Appendix 2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner is a Pro-Se defendant and knows of no Constitutional and statutory provisions involved. This however, does not mean that there are none involved in this case. Petitioner asks this court to, therefore, liberally construe his petition and look to the substance.

STATEMENT OF THE CASE

On February 10,2012, petitioner was convicted of being a felon in possession of a firearm contrary to 18 U.S.C. 922(g)(1). The district court found him to qualify for the armed career criminal enhancement (ACCA), and sentenced him on January 15, 2013 to 240 months in prison. The court used the following convictions to enhance petitioners sentence: third-degree burglary, first-degree burglary, two counts of aggravated robbery, and two counts of second-degree assault.

> (The government conceded at petitioners 2255 evidentiary hearing that his two burglary convictions no longer qualify as predicate offenses. Although petitioner's two counts of aggravated robbery, and one count of second-degree assault were commited on the same occasion -which would leave him with only two qualifying predicate offenses and invalidate his ACCA enhancement- the district court ruled that petitioner was procedurely barred from raising his same occasion argument because it was not preserved at sentencing.)

On March 9, 2015, petitioner filed a pro-se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255 with regards to his claims of ineffective assistance of counsel. Petitioner also requested that based upon Johnson v. United States 135 S.Ct. 2551 (2015), wherein the third prong of the ACCA definition of "violent felony" the residual clause, was void for vagueness andunconstitutional, that his sentence be found illegal

and in excess of the law entitling him to be resentenced, since the procedural history in this case had been ambiguous as to what portion of the ACCA definition had been used to qualify some of his prior convictions as violent felonies. (ECF No. 177). After the Supreme Court made "Johnson" retroactive persuant to "United States v. Welch, 136 S.Ct. 1257,1265 (2016)" but not retroactive in regards to the career offender sentencing guidelines definition of crime of violence as set out in U.S.S.G. 4B1.2(a) and "Beckles v. United States, 137 S.Ct. 886 (2017)," the district court allowed petitioner to brief whether his designation of being an armed career criminal under the ACCA was appropriate. (ECF No.167).

Notably, in its May 5, 2017, supplemental response to petitioners 2255 motion, the government provided of its own accord -for the first time- both to the defense and attached as exhibits, various documents from the record of petitioners prior convictions, including the complaint stemming from the September 25, 1998, incident which produced the aggravated robbery charges and its probable cause statement. (App. at 44; ECF No. 173). Also attached was the transcript of the plea colleguy from that case and other transcripts which set forth in detail the particular facts of petitioners aggravated robbery convictions. The government utilized the details of the facts contained therein to argue under the modified catogorical approach to ACCA predicate evaluation that petitioners aiding and abetting aggravated robbery convictions ought to be considered qualifying ACCA offenses.

The district court denied petitioners argument that the aggravated robberies were not violent felonies, and decided for the first time that his September 25, 1998, convictions should count seperately, even though this was not determined at sentencing and the government never argued at sentencing or any other time that the offenses should be counted seperately, denying petitioner the chance to refute this claim. - but did grant petitioner a certificate of appealability as to whether the convictions for aiding and abetting aggravated robbery constitute violent felonies under Minnesota law and for the purposes of the ACCA. (ECF No. 179). On July 6,2018, petitioner filed his appeal to this question and the case was decided on March 11, 2019, denying petitioners appeal without analysis as to his argument. Petition for rehearing was denied on May 15, 2019. For the reasons set forth herein petitioner asserts that his Minnesota convictions for aggravated robbery do not qualify as ACCA predicate convictions.

REASONS FOR GRANTING THE PETITION

A. Minnesota accomplice liability is overbroad.

Minnesota's aiding and abetting statute, under which petitioner was convicted for aggravated robbery, provides in relevant part:

> 609.05. Liability for crimes of another
>
> **Subdivision 1. Aiding, abetting; liability.** A person is criminally liable for a crime commited by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.
>
> **Subdivision 2. Expansive liability.** A person liable under subdivision 1 is also liable for any other crime commited in pursuance of the intended crime if reasonably forseeable by the person as a probable consequence of committing or attempting to commit the crime intended.
>
> ...

In an accomplice liability case such as petitioners, a conviction can be secured simply by showing that the defendant "knew that the alleged accomplices were going to commit a crime; and...intended his presence or actions to further the commision of that crime." State v. Taylor, 869 N.W.2d 1, 15 (Minn.2015) (quoting State v. Mahkuk, 736 N.W.2d 675 (Minn.2007)(internal quotation marks ommitted).

Under the law of the state of Minnesota, as codified in statute and enshrined by its highest court, prosecutors need not "prove beyond a reasonable doubt that the defendant's presence actually 'did aid' the commission" of aggravated robbery. Id. (citing Mahkuk, 736 N.W.2d 675). And so petitioner could have been convicted, and in fact was convicted, simply of having **knowledge of another's aggravated robbery and some vague intention to further that crime stemming from his presence with the principal.** See Swopes, 886 F.3d at 671 (courts "applying the categorical approach under the ACCA" "examine both the text of the statute and how the state courts have applied the statute.").

The Eighth circuit cited in its denial of petitions argument the aging case of United States v. Salean, 583 F.3d 1059 (8th Cir.2009), for its footnote proposition that "modern criminal statutes abrogate the common law distinction between principals and aiders and abetters." Id. at 1060 n. 2; see also United States v. Valdivia-Flores, 876 F.3d 1201, 1207 (9th Cir. 2017).

However, that position did not consider the vast breadth of Minnesota's aiding and abetting law relative to the Federal aiding and abetting precedent that Salean cited. While federal law requires some affirmative act in furtherance of the principal crime, see Rosemond v. United States, 134 S.Ct. 1240, 1245 (2014) (quoting 18 U.S.C. s 2) ("The federal aiding and abetting statute...states that a person who furthers--more specifically, who 'aids, abets, counsels, commands, induces or procures'--the commission of a federal offense 'is punishable as a principal.'"), Minnesota's aiding and abetting law,

as noted here, requires mere knowledge and a much more vague intent to further the crime.

The Supreme Court has implicitly recognized the elements of an underlying offense that is aided are not sufficient to satisfy the requirements of the force clause. see Gonzales v. Duenas-Alvorez, 549 U.S. 183 (2007). In Gonzales v. Duenas-Alvorez the Supreme court acknowledged that a state conviction for aiding and abetting theft would not qualify as generic theft if the state aiding and abetting statute were broader than generic aiding and abetting. See also United States v. Valdivia-Flores, 876 F.3d 1201 (9th Cir.2017). The 9th Circuit held that under the categorical approach that an overbroad state aiding and abetting statute goes beyond the scope of aiding and abetting a principal crime as contemplated under federal law. Mr. Valdivia-Flores successfully contended that "under both the federal and state criminal laws, a person charged with a drug trafficing offense may be convicted either as a principal or for aiding and abetting," and the court noted that it was critical to his case that "Washington defines aiding and abetting more broadly than does federal law so that Washington forbids more conduct." Id. at 1207.

Looking beyond the language of Minnesota accomplice liability, to answer the determinative question whether "in at least one other case, the state courts in fact did apply the statute...to conduct that falls outside the generic definition of a crime" Nunez, 594 F.3d at 1129 & n.2 (emphasis added). Minnesota courts have done so. In State v. Ostrem, the Minnesota Supreme Court upheld an accomplice-

liability conviction based on evidence 1) placing the defendant at the scene of the crime; 2) establishing that he was a "long term" acquaintance of the co-defendants; and 3) showing that he "did nothing to 'thwart [the crime's] completion'" and instead, "passively condoned" it. 535 N.W.2d 916, 925-26 (Minn.1995). Accomplice liability, the court explained, only requires proof that the defendant be "present during the criminal activity," that he do "nothing to prevent the offenses committed" and that he "kn[ew] of the crime and made noand made no effort to stop it." Id. at 925 (quoting state v. Parker, 164 N.W.2d 633, 641 (Minn 1969)). This is proof of knowledge, not intent, concerning the principals crime. See Franklin, 904 F.3d at 798. And, State v. Dominguez-Ramirez, 563 N.W.2d 245, 258 (Minn 1997) (holding that jury could convict defendant on accomplice liability theory based only on evidence that he knowingly helped principal commit offense).

Petitioner respectfully asks this court to answer this important question. It will help alleviate this split between the 8th and 9th circuits and ensure uniformitty between the courts. Further it will correct a grave injustice in which a person can be convicted, through his conduct, in a state court, while that exact same conduct would render the defendant innocent under federal law and yet still have the predicate offense qualify under the ACCA. If a person, by their actions, would be found innocent under federal law, then the offense should simply be considered overbroad. It is a clear fact that a person can be convicted in the state of Minnesota for aiding and abetting aggravated robbery while at the same time be found innocent under the federal definition of aiding and abetting.

B. Minnesota's Robbery statute no longer qualifies as an ACCA predicate after the Supreme Courts decision in Stokeling v. United States.

State v. Slaughter, 691 N.W.2d 70 (Minn.2005), and State v. Morton, 362 N.W.2d 336 (Minn. Ct. App. 1985), prove that Minnesota simple robbery is not a violent felony. In Slaughter, the Minnesota court held that a defendant who comes up behind a person, snatches a necklace from their neck (causing incidental scratches in the process), and runs away is guilty of robbery, because the scratches "represent demonstrable physical injury, sufficient to sustain a conviction." 691 N.W.2d at 76. Similarly, in Morton, the defendant was convicted of robbery based on his having "asked a woman for the time, then grabb[ing] her purse and [running] away." 362 N.W.2d at 336. In niether Slaughter nor Morton did the defendant use "violent force... to overcome a victim's physical resistance" in the course of a "physical confrontation and struggle." Stokeling v. United States, 139 S.Ct. 544, 543 (2019) (second emphasis added). Consequently, the robberies in those cases were'nt violent felonies.

One could argue that the jewelry-snatching in Slaughter was a violent felony because it left scratches, which proves that it involved "force or the threat of force sufficient to overcome resistance". This analysis would distort Stokeling. Under Stokeling, an offense will qualify as a violent felony only if it involves use of force "to overcome" the victim's resistance. Stokeling, 139 S.Ct. at 553. Use of force that might have overcome resistance--even though there is no evidence that it was intended to overcome resistance or

actually did so--is conduct that falls outside the scope of the ACCA's force clause.

That the ACCA only encompasses offenses which categorically require proof of the use or intended use of force to overcome resistabce is not only apparent from Stokeling itself, but it also follows from decisions issued in Stokelings wake. In United States v. Lawrence, 758 F.App'x 624 (9th Cir.2019), for example, a panel of the 9th Cir. reaffirmed that robbery will only qualify as a violent felony if it requires proof of the use of force "to overcome a victim's resistance." 758 F.App'x 624, 624-25 (9th Cir.2019). In lawrence, the government argued that Stokeling required the court to overrule its prior decision that Oregon Robbery III is not a violent felony. The panel refused because robbery III only requires proof that the defendant used or "intended to use force sufficient to overcome any resistance that the victim **may have offered had she had more time to react.**" Id. at 625 (quoting State v. Johnson, 168 P.3d 312, 313 (Or.Ct.App.2007) (emphasis added by Lawrence). Robbery that only requires proof that the defendeant used force that might have overcome the victim's hypothetical resistance "remains outside the scope of the elements clause as defined in Stokeling." Id. The panels logic applies to Minnesota robbery as well.

The Minnesota Court of Appeals decision in Morton also shows that Minnesota robbery is not a violent felony. Morton describes a simple robbery conviction where the defendant "asked a woman for the time, then grabbed her purse and ran away." Morton, 362 N.W.2d at 336. This act of snatching is clearly outside the scope of the ACCA's

force clause. Although Morton predates [and is inconsistant with] the Minnesota Supreme Courts decision in Slaughter, Slaughter was not issued until 6 years after petitioners conviction, so Morton was good law at the time of petitioners convictins for aggravated robberies in 1999.

Further, by demonstrating under Morton that Minnesota has secured at least one conviction for robbery based on mere purse-snatching, Morton answers the categorical approach's determinative question: whether there is "a realistic probability, not a theoretical possibility, that the state would apply [the statute] to conduct that falls outside the generic definition." Nunez v. Holder, 771 F.3d 1124, 1129 n.2 (9th Cir.2010); see also Leal v. Holder, 771 F.3d 1140, 1145 (9th Cir. 2014) (realistic probability "can be established based on factual evidence of actual convictions...". Morton, like Slaughter, proves that the definition of Minnesota robbery has expanded beyond its common law origins to encompass cases of snatching--which do not qualify as violent felonies under the force clause. See Stokeling, 139 S.Ct. at 555 ("mere snatching" not a violent felony).

C. The Court cannot look beyond the statute of conviction to determine that an overbroad statute qualifies as an ACCA predicate because a lesser included offense of a lesser included offense that is similiarly wordered to to a qualifying offense re-qualifies the overbroad statute.

"A conviction under the 'dangerous weapon' prong of the first-degree aggravated robbery statute [is] not an ACCA predicate offense because, according to Minnesota case law, all it require[s] [is] that the defendant merely possesses a dangerous weapon during the course of the robbery." Townsend, 2016 WL 7339202, at *3; see also United States v. Pettis, 2016 WL 5107035, at *5 (D.Minn. Sept. 19, 2016). "When a statute criminalizes both conduct that does and does not qualify as a violent felony and the statute is divisible, [the court] ...may review certain judicial records to identify which section of the statute supplied the basis for a defendant's conviction.'" Fogg, 836 F.3d at 954 (citing United States v. Headbird, 832 F.3d 844, 846 (8th Cir.2016)); see also United States v. McFee, 842 F.3d 572, 574 (8th Cir.2016). Because Minnesota's aggravated robbery force element criminalizes significantly more conduct than "violent force" required under the ACCA's force clause, aggravated robbery convictions do not constitute "violent felonies." See eg., id; see also Johnson, 559 U.S. at 140.

The courts have recently concluded that Minnesota's first-degree aggravated robbery counts as a qualifying ACCA predicate offense by analyzing its lesser included offenses. see United States v. Libby, 2018 WL 559791. However, the ACCA mandates courts exclusively focus on the elements of the offense at issue. see Descamps, 133 S.Ct. at 2297.

Nothing in the ACCA suggests that the court explore a crime's lesser included offenses in its analysis of whether a crime requires sufficient force. Compare United States v. Fogg, 836 F.3d 951 (8th Cir. 2016) (starting with the formal catagorical approach and looking only to the fact of conviction and the statutory definition of the prior offense) and United States v. Phillips, 2017 WL 1228563 at *1 (8th Cir. 2017) (looking only to the fact of conviction and the statutory definition of the prior offense in determining whether a past conviction is a violent felony), with United States v. Ocie Pankey, 2017 WL 1043581, at *2 (D.Minn. Mar. 16, 2017) (analyzing the the lesser included offenses of first-degree aggravated robbery without precedent to conclude aggravated robbery is an ACCA predicate offense).

The decision in Libby went beyond the statute of conviction, and decided that fifth-degree assault is a lesser included offense in simple robbery; and simple robbery is a lesser included offense in agravated robbery; and because fifth-degree assault is similiarly worded to Minnesota's domestic assault, which has previously been determined to qualify as an ACCA predicate, that now aggravated robbery can qualify as an ACCA predicate offense. However, no such precident exists for the court to parse out the lesser included offenses of aggravated, or simple, robbery to try to analyze whether aggravated robbery convictions constitute ACCA predicate offenses. This lengthy chain to an unconvicted offense directly conflicts with prior rulings in Jones v. United States, 870 F.3d 750, 752-753 (8th Cir. 2017) (When assessing whether a state statute qualifies as a 'violent felony' for the purposes of the ACCA, we employ the

catagorical approach, looking only to the elements of the statute in question. see also Descamps, 133 S.Ct. at 2297, the ACCA mandates courts exclusively focus on the elements of the offense at issue.

The 8th Cir. in deciding Libby went beyond the statute of conviction, and after finding that the statute itself was overbroad, continued in its quest to go beyond the catagorical approach and continue analyzing the offense.

No precedent exists for this act of parsing out lesser included offenses and this court should review and decide that the lower courts cannot go beyond the statute of conviction to determine if an over-broad statute should qualify as an ACCA predicate.

CONCLUSION

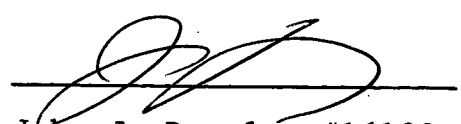
Because Minnesota's aiding and abetting statute is overbroad compared to its federal counterpart, and a person could be convicted of aiding and abetting aggravated robbery in Minnesota while, in contrast, being found innocent under federal law. Minnesota's aiding and abetting aggravated robbery should be found overbroad, and should no longer qualify as an ACCA predicate offense. This courts determination would bring harmony between the split in the 8th and 9th circuit courts of appeals, and correct the injustice many offenders are being subjected to under the extremely harsh sentences imposed under the ACCA.

Petitioner respectfully requests this court to find that its previous analysis in Stokeling regarding the "sudden snatching" convictions be applied to Minnesota's aggravated robbery statute. Minnesota has ruled that a person can be convicted of aggravated robbery by sudden snatching and yet has not applied this courts logic in its decisions. This court should look at Minnesota's aggravated robbery statute in order to make sure the 8th circuit complies with its recent decision in Stokeling.

Finally, petitioner respectfully asks this court to determine that the lower courts should not be able to look beyond the statute of conviction, something this court has made clear numerous times, to determine if an offense qualifies as an ACCA predicate. The decision by the 8th circuit to allow the courts to link uncharged offenses to re-qualify overbroad statutes sets a horrendous precident that could potentially re-qualify every other offense this court has previously determined to be overbroad and could result in a major impact to thousands of defenders.

Dated: 9-25-19

Respectfully Submitted,



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