No. 19-6229

IN THE SUPREME COURT OF THE UNITED STATES

JOHN JOSEPH DOUGLAS, 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 convictions for first-degree aggravated robbery, in violation of Minn. Stat. § 609.245, subdiv. 1 (1998), were convictions for violent felonies under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Minn.):

United States v. Douglas, No. 11-cr-324 (Jan. 15, 2013)

Douglas v. United States, No. 15-cv-1218 (Oct. 23, 2017)

United States Court of Appeals (8th Cir.):

United States v. Douglas, No. 13-1231 (Mar. 11, 2014)

Douglas v. United States, No. 17-3422 (Mar. 11, 2019), petition for reh'g denied, May 15, 2019

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1, at 1-2) is not published in the Federal Reporter but is reprinted at 759 Fed. Appx. 554. The order of the district court (Pet. App. 4, at 1-9) is not published in the Federal Supplement but is available at 2017 WL 4737243.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2019. A petition for rehearing was denied on May 15, 2019 (Pet. App. 2, at 1). The petition for a writ of certiorari was filed on

August 2, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial 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; Pet. App. 3, at 4. The district court sentenced petitioner to 240 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. 744 F.3d 1065. The district court later denied petitioner's motion under 28 U.S.C. 2255 to vacate his sentence, but granted a certificate of appealability (COA). Pet. App. 4, at 1-9. The court of appeals affirmed. Pet. App. 1, at 1-2.

1. Just after midnight on May 30, 2011, police officers in Aurora, Minnesota, responded to calls reporting gunshots at an unoccupied property. Presentence Investigation Report (PSR) ¶ 5. The officers encountered petitioner and several other people gathered near a campfire, and they learned from witnesses that petitioner had been drinking and showing off his sawed-off shotgun by firing it until he ran out of ammunition. PSR ¶¶ 5, 7. The officers arrested petitioner, who was on probation and prohibited from possessing alcohol, firearms, or ammunition. PSR ¶ 7. A search of the area revealed a sawed-off shotgun wrapped in plastic and ten spent shotgun shell casings. PSR ¶ 8.

A federal grand jury in the District of Minnesota indicted petitioner on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Following a trial, a jury found petitioner guilty. Judgment 1; Pet. App. 3, at 4.

2. A conviction for violating 18 U.S.C. 922(g)(1) has a default statutory sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment, 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year * * * that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). Clause (i) is known as the "elements clause"; the first part of clause (ii) is known as the "enumerated offenses clause"; and the latter part of clause (ii), beginning with "otherwise," is known as the "residual clause." See Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

The Probation Office classified petitioner as an armed career criminal based on two prior Minnesota convictions for burglary, two prior Minnesota convictions for second-degree assault, and two prior Minnesota convictions for first-degree aggravated robbery. PSR ¶¶ 26, 44-46. The district court determined that petitioner's prior convictions qualified him for sentencing under the ACCA, Sent. Tr. 12, and sentenced him to 240 months of imprisonment, id. at 27. The court of appeals affirmed. 744 F.3d 1065.

3. In 2015, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, alleging that he had received ineffective assistance of counsel. D. Ct. Doc. 137, at 4-5 (Mar. 9, 2015). While his Section 2255 motion was pending, this Court concluded in Johnson v. United States, 135 S. Ct. 2551 (2015), that the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. at 2557. It subsequently held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. See Welch, 136 S. Ct. at 1268. And it held in Mathis v. United States, 136 S. Ct. 2243 (2016), that "when a defendant is convicted under a statute that lists multiple, alternative means of satisfying one (or more) of its elements," the offense qualifies as a violent felony under the ACCA's enumerated-offenses clause only if the elements themselves "are the same as, or narrower than, those of the generic offense." Id. at 2247-2248.

Following the Court's decisions in those cases, petitioner filed a supplemental brief, asserting that Johnson and Mathis established that he was wrongly classified as an armed career criminal. D. Ct. Doc. 170, at 1 (Apr. 14, 2017). Petitioner argued that Johnson precluded reliance on the ACCA's residual clause, id. at 5, and that his two prior Minnesota convictions for burglary and his two prior Minnesota convictions for first-degree aggravated robbery were not violent felonies under the enumerated-offenses or elements clauses, id. at 10-24.

The district court denied petitioner's Section 2255 motion. Pet. App. 3, at 1-22; Pet. App. 4, at 1-9. The court rejected petitioner's claim of ineffective assistance of counsel. Pet. App. 3, at 5-21. The court likewise rejected his claim that he was wrongly classified as an armed career criminal. Pet. App. 4, at 3-9. The court noted the government's acknowledgement that petitioner's two prior Minnesota convictions for burglary no longer qualified as violent felonies under the ACCA. Id. at 2. The court also noted petitioner's acknowledgement that one of his prior Minnesota convictions for second-degree assault still qualified as a violent felony. Id. at 3. The court then determined that petitioner's two prior Minnesota convictions for first-degree aggravated robbery qualified as violent felonies under the ACCA's elements clause. Id. at 7-8. The court explained that "simple robbery" under Minnesota law "qualifies as a violent felony under

the [elements] clause," and "[b]ecause simple robbery is a lesser-included offense of first-degree aggravated robbery, the latter is necessarily also a violent felony." Id. at 7. The court, however, granted a COA on the question whether Minnesota first-degree aggravated robbery qualifies as a violent felony. Id. at 8.

4. The court of appeals affirmed. Pet. App. 1, at 1-2. On appeal, petitioner acknowledged that, under circuit precedent, "the elements composing the principal crimes of either simple or aggravated robbery in Minnesota necessarily require for conviction that a defendant be found, at a minimum, to have used or threatened the use of violent force as that phrase is defined in the context of analysis of an ACCA sentence enhancement." Pet. C.A. Br. 6. Petitioner contended, however, that his prior convictions were for "aiding and abetting aggravated robbery," id. at 24, and that they therefore did not satisfy the ACCA's elements clause, id. at 19-33.

The court of appeals rejected that contention. Pet. App. 1, at 2. Relying on circuit precedent, the court explained that Minnesota first-degree aggravated robbery satisfies the ACCA's elements clause, and that classification under the elements clause remains valid when a "prior conviction was premised on [an] aiding-and-abetting theory of liability." Ibid. (citing United States v. Libby, 880 F.3d 1011, 1013, 1016 (8th Cir. 2018), and United States

v. Salean, 583 F.3d 1059, 1060 n.2 (8th Cir. 2009), cert. denied, 559 U.S. 961 (2010)).

ARGUMENT

Petitioner contends (Pet. 7-17) that his prior Minnesota convictions for first-degree aggravated robbery are not convictions for violent felonies under the ACCA's elements clause. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. This Court has previously denied petitions for writs of certiorari raising similar issues, see Bjerke v. United States, 139 S. Ct. 2010 (2019) (No. 18-6993); Pettis v. United States, 139 S. Ct. 1258 (2019) (No. 18-5232), and the same result is warranted here.

1. The court of appeals correctly determined that petitioner's prior convictions for first-degree aggravated robbery, in violation of Minn. Stat. § 609.245, subdiv. 1 (1998), were convictions for violent felonies under the ACCA's elements clause, which encompasses "any crime punishable by imprisonment for a term exceeding one year" that "has 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).

a. Section 609.245, subdiv. 1, provides that "[w]hoever, while committing a robbery, is armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to

reasonably believe it to be a dangerous weapon, or inflicts bodily harm upon another, is guilty of aggravated robbery in the first degree." Minn. Stat. § 609.245, subdiv. 1 (1998). A conviction under Section 609.245, subdiv. 1, thus requires proof of (1) a simple robbery and (2) an aggravating factor -- namely, committing the robbery while "armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon" or while "inflict[ing] bodily harm." Ibid.

Minnesota first-degree aggravated robbery is a violent felony under the ACCA's elements clause, because simple robbery under Minnesota law in itself necessarily involves "the use * * * or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). Under Minnesota law, a person "is guilty of robbery" if, "having knowledge of not being entitled thereto," he "takes personal property * * * and uses or threatens the imminent use of force against any person to overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property." Minn. Stat. § 609.24 (1998). In Stokeling v. United States, 139 S. Ct. 544 (2019), this Court explained that "the term 'physical force' in ACCA encompasses the degree of force necessary to commit common-law robbery" -- namely, "force necessary to overcome a victim's resistance." Id. at 555. The type of force that must be

used or threatened under Section 609.24 satisfies that standard. See United States v. Libby, 880 F.3d 1011, 1015 (8th Cir. 2018).

b. Petitioner errs in contending (Pet. 11-13) that simple robbery under Minnesota law does not satisfy the ACCA's elements clause. Petitioner asserts (ibid.) that State v. Slaughter, 691 N.W.2d 70 (Minn. 2005), and State v. Morton, 362 N.W.2d 336 (Minn. Ct. App. 1985), demonstrate that Minnesota robbery need not involve the use or threatened use of physical force. Petitioner's reliance on those decisions is misplaced. In Slaughter, the Minnesota Supreme Court found the evidence sufficient to sustain a conviction for simple robbery, where the defendant had "inflicted bodily harm" on the victim "by causing scratches on her neck during the robbery." 691 N.W. 2d at 76. The defendant there thus had used a degree of force "capable of causing physical pain or injury," satisfying the elements clause's definition of "physical force," Stokeling, 139 S. Ct. at 553 (citation omitted), and affirmance of the denial of the motion for acquittal does not suggest that Minnesota simple robbery need not involve such force, Slaughter, 691 N.W.2d at 76. And in Morton, the decision of the Minnesota intermediate appellate court did not address the use of force required for simple robbery or discuss the sufficiency of the evidence to establish that element. See 362 N.W.2d at 336-337. Morton therefore does not establish that simple robbery under

Minnesota law may involve a degree of force less than the "physical force" required by the ACCA's elements clause.

Petitioner likewise errs in contending (Pet. 13-16) that a court may not consider whether simple robbery under Minnesota law satisfies the ACCA's elements clause in determining whether Minnesota first-degree aggravated robbery is a violent felony. Minnesota law defines first-degree aggravated robbery as "committing a robbery" while "armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon" or while "inflict[ing] bodily harm." Minn. Stat. § 609.245, subdiv. 1 (1998). Because Minnesota law incorporates simple "robbery" as part of the definition of Minnesota first-degree aggravated robbery, ibid., a court may appropriately consider the elements of simple robbery in determining whether first-degree aggravated robbery "has 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).

c. Petitioner also contends (Pet. 7-10) that because he was charged with, and pleaded guilty to, first-degree aggravated robbery under an aiding-and-abetting theory of liability, his convictions for that offense do not satisfy the ACCA's elements clause. See D. Ct. Doc. 170-2, at 5-6 (Apr. 14, 2017) (complaint charging petitioner with two counts of first-degree aggravated

robbery, with reference to Minnesota's aiding-and-abetting statute, Minn. Stat. § 609.05 (1998)); D. Ct. Doc. 173-2, at 5-6 (May 5, 2017) (petitioner pleading guilty to the two counts of first-degree aggravated robbery charged in the complaint). Petitioner argues (Pet. 7-8) that because he was convicted under a theory of accomplice liability, his convictions did not require proof that he personally engaged in the use or threatened use of physical force.

The ACCA's elements clause, however, requires only that an offense 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) (emphasis added). It does not require that "the use, attempted use, or threatened use of physical force" be committed by the defendant himself. Here, a conviction under Minnesota's aiding-and-abetting statute requires "commi[ssion]" of the underlying "crime" "by another," Minn. Stat. 609.05, subdiv. 1 (1998), and as explained above, see pp. 7-10, supra, the underlying crime -- first-degree aggravated robbery -- "has as an element the use * * * or threatened use of physical force," 18 U.S.C. 924(e)(2)(B)(i). Petitioner's prior convictions for aiding and abetting that crime therefore satisfy the ACCA's elements clause.

2. Petitioner does not point to any conflict among the courts of appeals on whether Minnesota first-degree aggravated

robbery, or aiding and abetting that offense, qualifies as a violent felony under the ACCA's elements clause. Instead, petitioner contends (Pet. 9-10) that the decision below conflicts with the Ninth Circuit's decision in United States v. Valdivia-Flores, 876 F.3d 1201 (2017). The issue in Valdivia-Flores was "whether a conviction for possession of a controlled substance with intent to distribute under Washington state law is an aggravated felony for purposes of federal immigration law." Id. at 1203. The Ninth Circuit determined that such a conviction is not an aggravated felony because Washington's drug trafficking statute has "a more inclusive mens rea requirement for accomplice liability than its federal analogue." Id. at 1207; see id. at 1209. In United States v. Franklin, 904 F.3d 793 (2018), cert. dismissed, 139 S. Ct. 2690 (2019), the Ninth Circuit applied Valdivia-Flores to the classification of a prior Washington conviction as a "serious drug offense" under the ACCA, see id. at 797-803; 18 U.S.C. 924(e)(2)(A)(ii). The correctness of comparing a state drug offense to a federal analogue under 18 U.S.C. 924(e)(2)(A)(ii) is currently before this Court in Shular v. United States, cert. granted, No. 18-6662 (June 28, 2019). But this case does not involve 18 U.S.C. 924(e)(2)(A)(ii), comparison to a generic federal analogue crime, or Washington law. Petitioner's assertion of a circuit conflict therefore is mistaken, and no need exists to hold this case for Shular.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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