IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2019

No.

JOSEPH VAN SACH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED FOR REVIEW

Van Sach was sentenced under the Armed Career Criminal Act (ACCA). He has a prior conviction for Illinois armed robbery. If this conviction does not qualify as an ACCA predicate, Van Sach is serving an illegal sentence.

Is Illinois armed robbery an ACCA violent felony after this Court's decision in *Stokeling v. United States*, 139 S. Ct. 544 (2019)?

This Court previously granted certiorari on this question, vacated the judgment, and remanded to the Seventh Circuit for further consideration in light of *Stokeling*. *Van Sach v. United States*, 139 S. Ct. 1255 (2019). On remand, the Seventh Circuit adhered to its previous rulings that Illinois robbery is a violent felony. *Klikno v. United States*, 928 F.3d 539 (7th Cir. 2019). This question is also presented in three other cases that this Court remanded to the Seventh Circuit. These three cases were decided in the same opinion that decided Van Sach's case, and petitions for certiorari are being filed in all four cases.

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Petitioner Joseph Van Sach respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit denying relief is reported at *Klikno v. United States*, 928 F.3d 539 (7th Cir. 2019) and is reprinted in the appendix to this petition.

JURISDICTION

Van Sach sought relief under 28 U.S.C. § 2255. The district court denied relief, and Van Sach took a timely appeal. The Court of Appeals affirmed on September 1, 2017. Van Sach filed a timely petition for rehearing on January 23, 2017, and the Court of Appeals denied rehearing on November 28, 2017. Van Sach filed a timely petition for a writ of certiorari on April 26, 2018.

This Court granted the petition, vacated the judgment, and remanded the case to the Seventh Circuit on February 25, 2019. *Van Sach v. United States*, 139 S. Ct. 1255 (2019). On remand, the Seventh Circuit affirmed its earlier ruling. *Klikno v. United States*, 928 F.3d 539 (7th Cir. 2019). Van Sach filed a timely motion to extend the time for filing a petition for a writ of certiorari. Justice Kavanaugh granted the motion and allowed Van Sach to file his petition on or before November 18, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 924(e)

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export

Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

720 ILCS 5/18-1(a)

(a) Robbery. A person commits robbery when he or she knowingly takes property, except a motor vehicle covered by Section 18-3 or 18-4, from the person or presence of another by the use of force or by threatening the imminent use of force.

STATEMENT OF THE CASE

Van Sach pleaded guilty to possession of a firearm by a felon, 18 U.S.C. § 922(g). The maximum sentence for this offense is 120 months, unless the defendant has three qualifying prior convictions. If so, then under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), the mandatory minimum sentence is 180 months. The district court determined that Van Sach had three such convictions and sentenced him to 210 months in prison.

After this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*), Van Sach filed a motion under 28 U.S.C. § 2255 and requested that his sentence be set aside. Van Sach argued his Illinois armed robbery no longer qualified as a violent felony. The district court rejected the request.

Van Sach filed a timely notice of appeal. The Seventh Circuit denied relief. *Van Sach v. United States*, 2017 WL 4842617 (7th Cir. Sep. 1, 2017).

Van Sach filed a petition for a writ of certiorari. After this Court decided *Stokeling v. United States*, 139 S. Ct. 544 (2019), it granted Van Sach's petition for a writ of certiorari, vacated the judgment, and remanded for reconsideration in light of *Stokeling*. *Van Sach v. United States*, 139 S. Ct. 1255 (2019).

On remand, the Seventh Circuit considered Van Sach's case along with five others that this Court remanded for reconsideration in light of *Stokeling*. The Seventh Circuit issued a single opinion for these six cases and concluded that Illinois robbery and Illinois armed robbery are violent felonies under the standard set down by this Court in *Stokeling*. *Klikno v. United States*, 928 F.3d 539 (7th Cir. 2019).

REASONS FOR GRANTING THE PETITION

This Court remanded this case for reconsideration in light of *Stokeling v. United States*, 139 S. Ct. 544 (2019), and the Seventh Circuit, in adhering to its previous ruling, erroneously applied *Stokeling*.

The decision below does not accurately apply this Court's decision in *Stokeling v. United States*, 139 S. Ct. 544 (2019). In *Stokeling*, this Court held that ACCA's force clause must be read in light of the common law definition of robbery. At common law, robbery requires force either before or contemporaneous with the taking of the victim's property. On remand, the Seventh Circuit held that Illinois robbery satisfies ACCA's force clause even though Illinois robbery can be based on force employed after the taking. The Seventh Circuit's ruling does not accurately apply *Stokeling* and must be reversed.

In *Stokeling*, this Court considered whether Florida robbery satisfied ACCA's force clause. Stokeling argued that the level of force required for Florida robbery fell far short of the definition of force required by *Johnson v. United States*, 559 U.S. 133 (2010)

(*Curtis Johnson*), which involved a battery conviction. This Court rejected the claim that the definition of force set down in *Curtis Johnson* applies to robbery statutes.

Stokeling noted that the predecessor to ACCA specifically enumerated robbery as a predicate offense. The statute defined robbery as "any felony consisting of the taking of the property of another from the person or presence of another by force or violence." 139 S. Ct. at 550. In 1986, when ACCA was amended, Congress removed robbery as an enumerated offense and substituted the force clause currently found in the statute. *Stokeling* concluded that Congress intended no substantive change from the prior version of the statute.

For that reason, *Stokeling* focused on the meaning of force or violence as required for common law robbery. To that end, the Court examined leading criminal treatises from an earlier era that set forth the elements of robbery. At common law, robbery required "violence." And violence was "committed if sufficient force [was] exerted to overcome the resistance encountered." *Id*.

at 550, quoting 2 J. Bishop, Criminal Law § 1156, at 861 (J. Zane & C. Zollman eds., 9th ed. 1923). Thus, it was robbery to "rudely" push a person for the purpose of diverting the victim's attention. *Id*., quoting W. Clark & W. Marshall, Law of Crimes 554 (H. Lazell ed., 2d ed. 1905). From these authorities, *Stokeling* concluded that *Curtis Johnson's* definition of force for battery offenses does not apply in the robbery context. Instead, any violence, regardless of its level, satisfies the violence element of robbery, so long as the violence is employed to overcome the resistance of the victim.

Stokeling's reliance on these source materials is significant. Although the Court in *Taylor v. United States*, 495 U.S. 575, 598 & n.8 1990) relied, in part, on the Model Penal Code to formulate its definition of generic burglary, *Stokeling* did not rely on the Model Penal Code when it considered the definition of robbery. Had it done so, it would have come to a radically different conclusion. Model Penal Code § 222.1 requires that the robber "inflict[] serious bodily injury upon another" or threaten another

with "immediate serious bodily injury." The MPC requires not just force, but serious bodily injury.

Stokeling then turned its attention to the Florida robbery statute and concluded that it satisfied ACCA's force clause. "The Florida Supreme Court has made clear that this statute requires 'resistance by the victim that is overcome by the physical force of the offender.'" 139 S. Ct. at 554-55, quoting *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997).

In *Stokeling*, the petitioner limited his argument to the claim that Florida robbery does not require the level of force required under *Curtis Johnson*. But *Stokeling's* analysis of the force clause also speaks to the closely related question of the timing of the force. At common law, the force or violence had to precede or be contemporaneous with the taking. If the defendant takes property without using force, the crime is larceny. Use of force after larceny does not turn the event into a robbery. "The violence must precede or be contemporaneous with the taking. When no force is used to obtain the property force used to retain

it will not make the crime robbery. Stealing a pistol and then using it to hold off the owner is therefore not robbery." 2 J. Bishop, Criminal Law § 1168, at 865 (J. Zane & C. Zollman eds., 9th ed. 1923); *accord*, W. Clark & W. Marshall, Law of Crimes 554 (H. Lazell ed., 2d ed. 1905). *Stokeling* relied on these two treatises for their account of robbery at common law.

Stokeling's canvas of the authorities recognizes this timing requirement. "[I]f any injury be done to the person, or there be any struggle by the party to keep possession of the property before it be taken from him, there will be a sufficient actual violence to establish robbery." 139 S. Ct. at 550 (internal quote marks omitted). *Stokeling* fully endorsed the common law doctrine that, for robbery, the force must precede or accompany the theft.

On remand from this Court, Van Sach argued that Illinois robbery cannot satisfy *Stokeling*. Illinois robbery includes conduct that does not satisfy ACCA's force clause. In Illinois, conduct that

would otherwise be a theft will be elevated to a robbery when the defendant uses force after the theft has been completed.

A strong body of Illinois law supports this assessment. In *People v. Merchant*, 836 N.E.2d 820 (Ill. App. 2005), the victim approached the defendant and asked the defendant if he could give him change for a $20 bill. The defendant grabbed the bill from the victim's hand and told him to move on. The victim was surprised by this turn of events, and the two men then grabbed each other and struggled. The defendant argued that since he obtained the bill through theft and the struggle occurred after he gained possession, there could be no robbery. At common law, this would be a good defense, but *Merchant* affirmed the robbery conviction. *Merchant* held that it was immaterial that the defendant already had control of the bill before the struggle commenced.

Merchant invoked numerous Illinois decisions that refuse to accept the traditional rule. *People v. Lewis*, 673 N.E.2d 1105 (Ill. App. 1996) (victim struggled with thief after unsuccessful

theft and attempted to hold him for arrest); *People v. Brooks*, 559 N.E.2d 859 (Ill. App. 1990) (after theft, victim demanded return of property, and defendant pushed her); *People v. Houston*, 502 N.E.2d 1174 (Ill. App. 1986) (blind victim became aware of theft and demanded return of money; struggle ensued).

The Illinois courts even include cases in which the thief struggles with an individual other than the person from whom the property was stolen. In *People v. Hay*, 840 N.E.2d 735 (Ill. App. 2005), the defendant entered a jewelry store, looked at some diamond rings, snatched a ring from the clerk, and ran toward the door. Another employee struggled with the thief as he tried to exit the store. The Illinois court upheld a robbery conviction based on the struggle with the second clerk.

These Illinois cases conform not to the common law, but to the Model Penal Code, which allows force during flight to turn theft into robbery. Under Model Penal Code § 222.1, a person commits robbery when, "in the course of committing a theft," he or she employs force. Section 222.1 further provides, "An act shall

be deemed 'in the course of committing a theft' if it occurs in an attempt to commit theft or in flight after the attempt or commission." The MPC commentary acknowledges that the MPC departs from the common law treatment of flight, as found in 4 W. Blackstone, Commentaries on the Laws of England 242 (1765). "Prior law was in general narrower than the Model Code on this point and did not include force during flight within the offense of robbery." Model Penal Code and Commentaries § 222.1, at 104 & nn.23 and 24 (1980). The MPC commentary pointedly observed that section 222.1 would reject the result in *State v. Holmes*, 295 S.W. 71 (Mo. 1927), which held it was not robbery when the defendant pointed a gun at the victim after he had stolen the victim's property.

In responding to Van Sach's argument,[1] the Seventh Circuit, relying on *People v. Merchant, supra*, concluded that

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[1] The Seventh Circuit's opinion focused on the nature of Illinois robbery and did not regard the armed nature of the robbery as dispositive. 928 F.3d at 543-44. Illinois armed robbery requires that

Illinois considers it robbery when a defendant uses force "as part of the action of taking or immediately upon leaving the scene." 928 F.3d at 546. That is an accurate assessment of Illinois robbery law. Illinois calls it robbery when the victim and the offender struggle with each other as the robber attempts to wrest control of the property from the owner. That is a classic case of robbery, but Illinois also includes cases that are not classic robbery. Illinois calls it robbery when the offender has obtained the property by theft, not by force, and the victim later struggles with the offender to regain the property or to capture the thief.

The Seventh Circuit strayed from *Stokeling* in concluding that Illinois robbery satisfies the common law definition of robbery. The common law definition of robbery did not include force employed "immediately upon leaving the scene." In *Jackson*

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the robber be armed, but it does not categorically require the robber to display or use the weapon. *People v. Metcaffe*, 762 N.E.2d 1099, 1104-05 (Ill. App. 2001).

v. State, 40 S.E. 1001 (Ga. 1902), the case referenced in the Clark and Marshall and the Bishop treatises, which in turn were approvingly cited in *Stokeling*, the defendant picked up the victim's pistol, a theft, and immediately pointed it at the victim in order to make his escape. The Georgia Supreme Court held the crime was theft, not robbery. The treatises endorsed by *Stokeling* present *Jackson* as a definitive reading of the common law. Under Illinois law, by contrast, a case like *Jackson* would be treated as a robbery. Illinois is, of course, free to treat it that way, but an Illinois conviction for that conduct is not an ACCA robbery.

The Seventh Circuit nonetheless asserted that *Stokeling* includes use of force "immediately upon leaving the scene." Given this Court's analysis of the common law and its use of source materials, the Seventh Circuit's assessment does not satisfy. The Clark and Marshall and the Bishop treatises, on which this Court relied, do not support turning a theft into a robbery when force occurs only after the thief has gained control of the property.

Instead, the Illinois cases exemplify the Model Penal Code approach, which explicitly rejects the common law rule.

The Seventh Circuit's *Klikno* opinion claimed that its result was consistent with *Stokeling*, but its analysis is flawed. *Klikno* read *Stokeling* to include instances in which a thief pulls a bag from the victim's grip and concluded that Stokeling would also include cases where the force immediately follows the taking. 928 F.3d at 546. But a tug of war between victim and robber presents a case in which force contemporaneously applied turns what could have been a theft into a robbery. That case easily falls within *Stokeling's* definition of robbery as measured at common law. But that case is far different from a case like *Merchant*, where the thief uses force only to escape after gaining control of the property.

The Model Penal Code approves extending robbery to cases like *Merchant*, but that extension is a rejection of the common law. *Stokeling* deliberately fashioned a rule that hews to the common law definition of robbery. *Klikno* impermissibly departs

from *Stokeling* to the extent that it includes as robbery the use of force after a theft has occurred. *Klikno* did not comply with this Court's mandate that it reconsider in light of *Stokeling*.

CONCLUSION

Wherefore, it is respectfully requested that this Court grant a writ of certiorari to review the decision below.

Dated November 15, 2019, at Chicago, Illinois.

Respectfully submitted,

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