

IN THE SUPREME COURT OF THE UNITED STATES

DAVID LAMONT LIDDELL, 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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QUESTIONS PRESENTED

1. Whether petitioner's prior conviction for armed robbery, in violation of Miss. Code Ann. § 97-3-79 (West 1994), was a conviction for a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2) (B) (i) .

2. Whether petitioner's prior conviction for aggravated assault, in violation of Miss. Code Ann. § 97-3-7(2) (West 2002), was a conviction for a "violent felony" under the ACCA's elements clause, 18 U.S.C. 924(e) (2) (B) (i) .

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Miss.):

United States v. Liddell, No. 09-cr-112 (Aug. 18, 2010)

United States v. Liddell, No. 16-cv-480 (May 1, 2017)

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

United States v. Liddell, No. 17-60361 (Sept. 4, 2019)

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No. 19-6858

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3, at 1-4) is not published in the Federal Reporter but is reprinted at 776 Fed. Appx. 258. The opinion and order of the district court (Pet. App. 2, at 1-7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2019. The petition for a writ of certiorari was filed on December 2, 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 Southern District of Mississippi, petitioner was convicted on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 120 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. Petitioner did not appeal his conviction or sentence. Petitioner later filed a motion under 28 U.S.C. 2255 to vacate his sentence. D. Ct. Doc. 28 (June 21, 2016) (2255 Mot.). The court denied petitioner's motion and declined to issue a certificate of appealability (COA). Pet. App. 2, at 1-7. The court of appeals granted a COA on the question whether petitioner's previous offenses qualified as violent felonies under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), see COA Order 2 (Jan. 23, 2018), but affirmed the district court's decision on the merits, Pet. App. 3, at 1-4.

1. In 2009, a police officer stopped petitioner for speeding. Presentence Investigation Report (PSR) ¶ 5. After determining that the license plate on petitioner's car was not registered to the car, the officer approached the driver's door to speak with petitioner. Ibid. Another officer who had arrived on the scene noticed a gun on the floor behind the driver's seat, and the officers removed it for safety and sought to determine its owner. PSR ¶ 6. When one of the officers asked petitioner to

exit the car, he refused, and instead drove away, leading the officers on a high-speed chase. Ibid. After being cornered on a dead-end street, petitioner jumped out of the car while it was still moving and ran toward one of the officers, who subdued him with a Taser. PSR ¶¶ 6-7.

Petitioner subsequently told an officer that he fled because he had been drinking and knew the gun was in the car. PSR ¶ 8. He also informed the officer that he was a convicted felon and that he had purchased the gun for \$50 from a person he could not identify. Ibid.

2. A federal grand jury in the Southern District of Mississippi charged petitioner with one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Petitioner and the government entered into a plea agreement. Plea Agreement 1-6; Plea Supp. 1-7. The district court accepted the plea. Judgment 1.

A conviction for possessing a firearm as a felon carries a default sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 922(g)(1) and 924(a)(2). It qualifies as a Class C felony, 18 U.S.C. 3559(a)(3), and allows for a supervised release term of up to three years, 18 U.S.C. 3583(b)(2). If the offender has at least three prior convictions for a "violent felony" or a "serious drug offense," however, then the ACCA requires a sentence of 15 years to life imprisonment. 18 U.S.C. 924(e); see Logan v.

United States, 552 U.S. 23, 26 (2007); Custis v. United States, 511 U.S. 485, 487 (1994). An ACCA-qualifying offense is a Class A felony, 18 U.S.C. 3581(b)(1), and thus carries a five-year statutory maximum for supervised release, 18 U.S.C. 3583(b)(1).

The ACCA defines a "violent felony" as an offense punishable by more than a year in prison 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 remainder of clause (ii) (beginning with "otherwise") is known as the "residual clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

The Probation Office determined that petitioner was subject to an enhanced sentence under the ACCA because he had a minimum of three prior violent felony convictions. PSR ¶ 22. Specifically, it detailed that petitioner had prior convictions for burglary of an occupied dwelling, armed robbery, and kidnapping, which were committed on the same "occasion[]" and thus could account for only one ACCA predicate, see 18 U.S.C. 924(e); a separate conviction for armed robbery; and a separate conviction for aggravated assault with a weapon. PSR ¶¶ 26-31.

Pursuant to the plea agreement, the government moved for a reduction below the 15-year ACCA minimum on the basis of petitioner's substantial assistance. See 18 U.S.C. 3553(e); Mot. for Downward Departure. The district court granted the motion and sentenced petitioner to 120 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

3. In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the ACCA's residual clause was unconstitutionally vague. Id. at 2557. The Court subsequently held that Johnson announced a new substantive rule that applied retroactively to cases on collateral review. Welch, 136 S. Ct. at 1268.

In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, arguing that under Johnson he was wrongly sentenced as an armed career criminal. 2255 Mot. 1-2. Petitioner did not dispute that his prior conviction for burglary qualified as an ACCA predicate. Pet. App. 2, at 4 n.1. But he contended that his prior convictions for armed robbery and aggravated assault with a weapon did not qualify because those offenses did not require proof of the "use, attempted use, or threatened use of physical force" under the elements clause, 18 U.S.C. 924(e)(2)(B)(i), and could not qualify under the residual clause in light of Johnson. Pet. App. 2, at 4-5.

The district court denied petitioner's motion. Pet. App. 2, at 1. The court stated that because petitioner was sentenced to ten years of imprisonment rather than 15, he did not receive an enhanced sentence under the ACCA in the first place. Id. at 5. The court alternatively determined that, even if petitioner had received an ACCA enhancement, "that sentence would have been proper because his state court convictions for aggravated assault and armed robbery both constitute 'violent felonies' under the 'elements clause' of the ACCA." Ibid. The court declined to issue a COA. Id. at 7.

4. The court of appeals granted a COA on the question whether, in light of Johnson, petitioner was subject to a five-year term of supervised release under the ACCA. COA Order 2. It then rejected petitioner's ACCA claim on the merits. Pet. App. 3, at 4. Petitioner argued that the Mississippi armed robbery statute did not satisfy the elements clause because it could be satisfied by "putting a victim in fear," but the court rejected that argument "in light of recent holdings that similarly-worded robbery statutes involve sufficient force" to qualify as ACCA predicates. Id. at 2-3. The court also rejected petitioner's contention that Mississippi aggravated assault was not an ACCA predicate because it could be committed using nonviolent means, such as poison. The court explained that under circuit precedent "indirect force can constitute the use of physical force, and there is no distinction

between causation of injury and use of force.” Id. at 3 (citing United States v. Reyes-Contreras, 910 F.3d 169, 180-184 (5th Cir. 2018) (en banc)).

ARGUMENT

Petitioner contends (Pet. 8-19) that the court of appeals erred in rejecting his motion for postconviction relief under 28 U.S.C. 2255. The decision below was correct and does not conflict with any decision of this Court or another court of appeals. Neither further review nor holding the petition in light of Borden v. United States, No. 19-5410 (filed July 24, 2019), is appropriate.

1. To determine whether a prior conviction constitutes a “violent felony” under the ACCA’s elements clause, courts apply the “categorical approach,” see Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); Taylor v. United States, 495 U.S. 575, 602 (1990), which requires analysis of “the elements of the crime of conviction” rather than the offense conduct. Mathis, 136 S. Ct. at 2248. If the statute of conviction lists multiple alternative elements establishing multiple distinct crimes, it is “‘divisible,’” and a court may apply the “‘modified categorical approach’” by “look[ing] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the]

defendant was convicted of.” Id. at 2249 (citation omitted); see Shepard v. United States, 544 U.S. 13, 26 (2005).

2. Petitioner contends (Pet. 13-17) that his prior conviction for armed robbery does not satisfy the ACCA’s elements clause. Petitioner does not allege a circuit conflict on this question, and both of his arguments on this point lack merit.

First, petitioner points out (Pet. 14-15) that the armed-robbery statute may be satisfied by placing a victim “in fear of immediate injury,” which he argues need not necessarily involve the “use, attempted use, or threatened use of physical force.” 18 U.S.C. 924(e) (2) (B) (i); see Miss. Code Ann. § 97-3-79 (West 1994) (prohibiting “feloniously tak[ing] or attempt[ing] to take from the person or from the presence the personal property of another and against his will * * * by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon”). But the “fear” component of the Mississippi offense requires at least the attempted or threatened use of physical force. This Court has held that “physical force” for purposes of the ACCA’s elements clause means “force capable of causing physical pain or injury to another person.” Johnson v. United States, 559 U.S. 133, 140 (2010) (Curtis Johnson). It has further noted that robbery “has always been within the ‘category of violent, active crimes’ that Congress included in ACCA.” Stokeling v. United States, 139 S. Ct. 544, 553 (2019) (quoting Curtis Johnson, 559

U.S. at 140). Robbery involving the display of a deadly weapon that puts someone in fear of immediate injury clearly qualifies under that standard as an attempted or threatened use of force. See Brown v. State, 102 So. 3d 1087, 1091 (Miss. 2012) (robbery “necessarily involve[s] violence -- or at least the threat of imminent violence to another -- to accomplish the crime”).

Next, petitioner contends (Pet. 15-17) that armed robbery does not qualify as a violent felony under the ACCA’s elements clause on the theory that it permits conviction based on an indirect use of force, such as poisoning. That contention is inconsistent with this Court’s decision in United States v. Castleman, 572 U.S. 157 (2014), in which the Court construed the phrase “use * * * of physical force” in a similar statutory provision to include such indirect uses of force. Id. at 171 (interpreting 18 U.S.C. 921(a)(33)(A)). Castleman explained that “physical force” encompasses all “force exerted by and through concrete bodies.” Id. at 170 (quoting Curtis Johnson, 559 U.S. at 138). And it accordingly made clear that force may be applied directly -- through immediate physical contact with the victim -- or indirectly, such as by shooting a gun in the victim’s direction, administering poison, infecting the victim with a disease, or “resort[ing] to some intangible substance, such as a laser beam.” Ibid. (citation and internal quotation marks omitted). The Court explained that when, for example, a person “sprinkles poison in a

victim's drink," the relevant "'use of force' * * * is not the act of 'sprinkl[ing]' the poison; it is the act of employing poison knowingly as a device to cause physical harm." Id. at 171 (citation omitted; brackets in original). The courts of appeals that have decided the question have consistently applied Castleman's logic to the elements clause of the ACCA and other similarly worded provisions.¹ Petitioner does not address Castleman, much less suggest any reason why it would not apply here. This Court has recently and repeatedly denied certiorari on this and related questions of Castleman's scope,² and it should follow the same course here.

¹ See, e.g., United States v. Ellison, 866 F.3d 32, 37-38 (1st Cir. 2017); Villanueva v. United States, 893 F.3d 123, 128-130 (2d Cir. 2018); United States v. Reid, 861 F.3d 523, 528-529 (4th Cir.), cert. denied, 138 S. Ct. 462 (2017); United States v. Reyes-Contreras, 910 F.3d 169, 180-182 (5th Cir. 2018) (en banc); United States v. Verwiebe, 874 F.3d 258, 261 (6th Cir. 2017), cert. denied, 139 S. Ct. 63 (2018); United States v. Jennings, 860 F.3d 450, 458-460 (7th Cir. 2017), cert. denied, 138 S. Ct. 701 (2018); United States v. Winston, 845 F.3d 876, 878 (8th Cir.), cert. denied, 137 S. Ct. 2201 (2017); Arellano Hernandez v. Lynch, 831 F.3d 1127, 1131 (9th Cir. 2016), cert. denied, 137 S. Ct. 2180 (2017); United States v. Ontiveros, 875 F.3d 533, 537 (10th Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018); United States v. DeShazor, 882 F.3d 1352, 1357-1358 (11th Cir. 2018), cert. denied, 139 S. Ct. 1255 (2019); United States v. Haight, 892 F.3d 1271, 1280 (D.C. Cir. 2018), cert. denied, 139 S. Ct. 796 (2019).

² See, e.g., DeShazor v. United States, 139 S. Ct. 1255 (2019) (No. 17-8766); Harmon v. United States, 139 S. Ct. 939 (2019) (No. 18-6965); Sanchez v. United States, 139 S. Ct. 793 (2019) (No. 18-5923); Ybarra v. United States, 139 S. Ct. 456 (2018) (No. 18-5435); Makonnen v. United States, 139 S. Ct. 455 (2018) (No. 18-5105); Rodriguez v. United States, 139 S. Ct. 87 (2018) (No. 17-8881); Griffin v. United States, 139 S. Ct. 59

3. Petitioner separately contends (Pet. 17-19) that his conviction for aggravated assault fails to qualify as a “violent felony” under the ACCA’s elements clause. That contention likewise lacks merit, does not implicate any conflict in the circuits, and does not warrant this Court’s review.

First, petitioner claims (Pet. 18) that Mississippi aggravated assault can be satisfied by the indirect application of force, and renews his contention that an indirect application of force does not qualify as “physical force” under the elements clause. That argument is unsound for the reasons discussed above. See pp. 9-10, supra; see also United States v. Griffin, 946 F.3d 759, 761-762 (5th Cir. 2020) (per curiam) (rejecting argument that Mississippi aggravated assault conviction was not an ACCA violent felony because it was potentially predicated on the indirect use of force).

Second, petitioner contends (Pet. 18-19) that Mississippi aggravated assault does not qualify as a violent felony because it permits conviction based on a mens rea of recklessness. The government has previously acknowledged a circuit conflict as to whether a mens rea of recklessness is sufficient to satisfy the ACCA’s elements clause, and this Court has granted certiorari to resolve that issue in Borden. See Walker v. United States, No.

(2018) (No. 17-8260); Hughes v. United States, 138 S. Ct. 2649 (2018) (No. 17-7420).

19-373, cert. granted (Nov. 15, 2019), cert. dismissed (Jan. 27, 2020); Borden, supra (No. 19-5410). The issue is not, however, presented here, and it is accordingly unnecessary to hold this case pending Borden's disposition.

At the time of petitioner's offense, Mississippi's aggravated assault statute prohibited:

- (a) attempt[ing] to cause serious bodily injury to another, or caus[ing] such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or
- (b) attempt[ing] to cause or purposely or knowingly caus[ing] bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm.

Miss. Code Ann. § 97-3-7(2) (2002). As the court of appeals has recognized, under state law, the two subsections define distinct offenses with different elements. Griffin, 946 F.3d at 761; Mason v. State, 867 So. 2d 1058, 1059 (Miss. Ct. App. 2004) ("Section 97-3-7(2) delineates two separate crimes of aggravated assault."). As a result, the statute is divisible, and courts may accordingly consider a "limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of." Mathis, 136 S. Ct. at 2249.

The available documents from petitioner's state conviction demonstrate that he was convicted of causing "bodily injury to another with a deadly weapon," in violation of subsection (b).

The judgment in petitioner's case states that he pleaded guilty to "the charge of GUN AGGRAVATED ASSAULT W/WEAP." D. Ct. Doc. 36, at 1 (Aug. 16, 2016). Because petitioner was convicted under subsection (b) -- which cannot be satisfied by reckless conduct, as opposed to purposeful or knowing conduct -- the court of appeals properly determined that petitioner's conviction qualifies under the ACCA's elements clause regardless of whether recklessness is sufficient. This case therefore does not implicate the circuit conflict under consideration in Borden.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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