

NO. _____
October Term, 2019

IN THE SUPREME COURT OF THE UNITED STATES

FLORENTINO VILLANUEVA, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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(a) **The Question Presented for Review Expressed in the Terms and Circumstances of the Case.**

Does a robbery statute qualify as a predicate conviction under the Armed Career Criminal Act when the force can be employed after the taking of the property, contrary to common law principles?

(b) **List of all Parties to the Proceeding**

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) **Table of Contents and Table of Authorities**

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(d) **Reference to the Official and Unofficial Reports of any Opinions**

The order and judgment of the United States Court of Appeals for the Tenth Circuit is unpublished. *United States v. Villanueva*, No.18-6203, ___ Fed.Appx.___, 2019 WL 4203522 (10th Cir. Sept. 5, 2019) (unpublished).

(e) **Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.**

- (i) Date of judgment sought to be reviewed.

The unpublished Order and Judgment of the Tenth Circuit of which review is sought was filed September 5, 2019;

- (ii) Date of any order respecting rehearing.

Not applicable;

- (iii) Cross Petition.

Not applicable;

- (iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, Section 1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

- (v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

The Constitutional Provisions, Statutes and Rules which the Case Involves.

(1) Constitutional Provisions:

None.

(2) 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 possession with intent to manufacture or distribute, a controlled substance (as defined in Section 201 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.

OKLA. STAT. tit. 21, § 791

Robbery is a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

OKLA. STAT. tit. 21, § 792

To constitute robbery, the force or fear must be employed either to obtain or retain possession of the property, or to prevent or overcome resistance to the taking. If employed merely as a means of escape, it does not constitute robbery.

OKLA. STAT. tit. 21, § 793

When force is employed in either of the ways specified in the last section, the degree of force employed is immaterial.

OKLA. STAT. tit. 21, § 800

Whenever two or more persons conjointly commit a robbery or where the whole number of persons conjointly commits a robbery and persons present and aiding such robbery amount to two or more, each and either of such persons shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than five (5) years nor more than fifty (50) years.

(3) Rules Involved:

None.

(4) Other:

None.

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of an order entered by a United States Court of Appeals, affirming the denial of relief in a Section 2255 Petition to Vacate a Sentence in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015). The jurisdiction of the District Court was invoked pursuant Title 18, United States Code, Section 3231. Review in the Court of Appeals was sought under Title 28, United States Code, Section 1291. The Court of Appeals denied Mr. Villanueva's appeal on September 5, 2019. Review in this Court is sought under Title 28, United States Code, Section 1254. This petition is timely filed pursuant to Supreme Court Rule 13.1.

Concise Statement of the Case

On September 3, 2013, Mr. Villanueva was charged in a one count indictment with possession of a firearm after former conviction of a felony in violation of 18 U.S.C. § 922(g). (ROA, Vol. 1, at 11). The Government filed a *Notice to Defendant of Enhanced Penalty as an Armed Career Criminal* on October 28, 2013. (ROA, Vol. 1, at 14). The notice did not specifically identify which prior convictions qualified Mr. Villanueva for an enhanced penalty under 18 U.S.C. § 924(e). Mr. Villanueva

entered a plea of guilty with a plea agreement and a Presentence Investigation Report (“PSR”) was prepared. (ROA, Vol. 2, at 12).

The PSR identified three prior Oklahoma convictions that subjected Mr. Villanueva to the enhanced penalty of the Armed Career Criminal Act (“ACCA.”) (ROA, Vol. 2, at 20, 23-24). At issue in the Section 2255 proceedings in the district court and court of appeals was conjoint robbery under Oklahoma law. Originally, Mr. Villanueva objected to the application of the ACCA. The district court overruled the objection and sentenced Mr. Villanueva to 210 months imprisonment. (ROA, Vol. 1, at 25). Mr. Villanueva appealed and the United States Court of Appeals for the Tenth Circuit affirmed on grounds not relevant to this petition. *United States v. Villanueva*, 821 F.3d 1226 (10th Cir. 2016).

Following the United States Supreme Court’s decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), Mr. Villanueva timely filed a pro se Motion to Vacate his sentence under 28 U.S.C. § 2255, alleging that at least one of his prior convictions did not qualify as a violent felony without the now-void residual clause. (ROA, Vol. 1, at 32). Counsel was appointed and Mr. Villanueva filed a supplement to his petition. (ROA, Vol. 1, at 48). Mr. Villanueva argued his conjoint robbery convictions failed to qualify under the ACCA. (Id. at 58-62).

This district court denied relief, concluding conjoint robbery contained the amount of force necessary to satisfy the force clause of the ACCA. (ROA, Vol. 1, at 131-32). The district court also granted a certificate of appealability on the issue of whether Oklahoma conjoint robbery is a predicate offense under the ACCA.

The Tenth Circuit Court of Appeals affirmed the district court in an unpublished order and judgment. *United States v. Villanueva*, No.18-6203, ___ Fed.Appx.___, 2019 WL 4203522 (10th Cir. Sept. 5, 2019) (unpublished). In its decision, the Tenth Circuit noted that “[u]nder Oklahoma law conjoint robbery occurs ‘[w]henver two or more persons conjointly commit a robbery or where the whole number of persons conjointly commits a robbery and persons present and aiding such robbery amount to two or more.’ OKLA. STAT. tit. 21, § 800.” *Villanueva*, slip. op. at 4 (second alteration in original). It then concluded that the amount of force or fear under Oklahoma robbery requires a level of force sufficient to overcome a victim’s resistance, which under *Stokeling v. United States*, 139 S.Ct. 544, 554 (2019), is sufficient to qualify under the ACCA. *Id.* at 4-5. The Tenth Circuit Court of Appeals dismissed Mr. Villanueva’s argument on the distinction between the amount of force necessary to “prevent or overcome resistance to the taking” of the property with the amount of force necessary to “obtain or retain possession of the property.” *Id.* at 5-6. The Tenth Circuit concluded that nothing in the language of the ACCA, nor in *Stokeling*,

suggests a distinction between the force or threat used to take the property rather than retain it. *Id.* at 5-6.

(h) **Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.**

This case presents an example of a state robbery statute that encompasses conduct outside the scope of the force contemplated by the Armed Career Criminal Act. This Court should grant review to further refine which prior convictions qualify as predicate offenses under the Armed Career Criminal Act.

- I. Oklahoma robbery statutes fail to qualify as predicate offenses under the ACCA because the necessary force can be employed after the taking, contrary to the common law principles explained in *Stokeling v. United States*, 139 S.Ct. 544 (2019)

In *Stokeling v. United States*, this Court reviewed under what circumstances a robbery conviction qualified as a violent felony under the Armed Career Criminal Act's force clause. 139 S.Ct. 544 (2019). Under 18 U.S.C. § 924(e)(2)(B)(i), a prior conviction qualifies as a predicate offense if, among other things, it "has as an element, the use, attempted use, or threatened use of physical force against the person of another." Previously, this Court had outlined the level of force necessary under this clause in the context of common law assault and battery statutes. *See Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) ("We think it clear that in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means *violent*

force – that is, force capable of causing physical pain or injury to another person.”) (emphasis in original).

Stokeling’s analysis focused on the common law origins of many robbery statutes and how the ACCA originally included robbery as a specific predicate offense. 139 S.Ct. at 550-51. In particular, *Stokeling* concluded the meaning of force in 18 U.S.C. § 924(e)(2)(B)(i) referred to the common law definition of robbery because the statute originally included robbery as an enumerated offense. 18 U.S.C. App. § 1202(a) (1982 ed., Supp. II). Common law robbery, in turn, required force or violence necessary to “overcome resistance . . . however slight the resistance.” *Stokeling*, 139 S.Ct. at 551 (quoting W. Clark & W. Marshall, *Law of Crimes* 554 (H. Lazell ed., 2d ed. 1905) (hereafter “Clark and Marshall”)). Importantly, *Stokeling* did not discuss the use of force in common law to occur throughout the interaction between the actor and the victim. Instead, the opinion focused on the degree of force necessary.

Stokeling relied heavily on Clark and Marshall’s *Law of Crimes* for the common law definition of robbery. *See, e.g., Stokeling*, 139 S.Ct. at 550 (quoting Clark and Marshall three times); *id.* at 551 (quoting Clark and Marshall one time).

At common law, as discussed by Clark and Marshall, the force employed must be used during the taking, and not to retain possession of the property:

The taking itself must be by violence, and it follows, therefore, that the violence must precede or accompany the act of taking. Violence after the taking – as where a man picks another’s pocket or snatches property, and when detected or seized, uses violence to retain possession or to escape – cannot make the offense robbery.

Clark and Marshall, 554 (emphasis in original).

In contrast, Oklahoma law allows for a robbery when the force employed is used after the taking.

To constitute robbery, the force or fear must be employed either to obtain or *retain possession of the property*, or to prevent or overcome resistance to the taking. If employed merely as a means of escape, it does not constitute robbery.

OKLA. STAT. tit. 21, § 792 (emphasis added).

Oklahoma case law confirms convictions for robbery when the force employed is used to retain the property, not in the taking. *See, e.g., Kernell v. State*, 10 P.2d 287, 288-89 (Okla. Crim. App. 1932) (The obtaining of the gasoline having been without force, but with the consent of the owner, *the . . . facts shown could only constitute robbery in case the resistance offered by defendant and his companion was to retain possession of the property and not as a means of escape.*”) (emphasis added). *See also Guarino v. State*, 491 P.2d 326 (Okla. Crim. App. 1971) (describing force employed to be used to retain possession of the property).

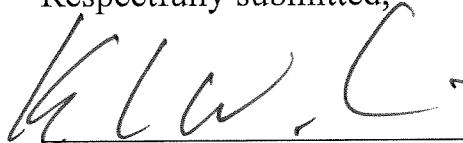
Thus, Oklahoma law permits a conviction for robbery when the force is employed after the taking, contrary to the common law. Without the foundation in the common law, the character of the force in Oklahoma can yield a robbery conviction with a degree of force much less than that required by the ACCA. Indeed, “the degree of force is immaterial” under Oklahoma law. OKLA. STAT. tit. 21, § 793. Without the foundation in the common law necessary to this Court’s decision in *Stokeling*, Oklahoma’s force requirement fails to qualify under the ACCA.

The Tenth Circuit’s decision otherwise is error, and this Court should review this case to further refine the nature of the required force in robbery statutes under the ACCA.

Conclusion

The petition should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'K.E. Wackenheim', is written over a horizontal line.

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(i) **Appendix.**

- (i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Villanueva, No.18-6203, ____ Fed.Appx.____, 2019 WL 4203522 (10th Cir. Sept. 5, 2019) (unpublished).

- (ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

Order, dated December 21, 2018, United States District Court for the Western District of Oklahoma, CR-12-201-HE; CIV-16-726-HE (Docket Number 92);

- (iii) Any order on rehearing:

None;

- (iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

None;

- (v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

- (vi) Other appended materials:

None.