NO. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

DAVID OJEDA, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Devin McLaughlin, Esq.
CJA Counsel for Petitioner
Langrock Sperry & Wool, LLP
PO Drawer 351
Middlebury, VT 05753-0351
E-mail: dmclaughlin@langrock.com
Ph: (802) 388-6356 | Fax: (802) 388-6149

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit misapplied Stokeling v. United States, ___ U.S. ___, 139 S. Ct. 544 (2019), in holding that all degrees of robbery under New York State law are "violent felonies" for purposes of the Armed Career Criminal Act, which holding added to the existing Circuit split on this issue.

2. Whether the United States Court of Appeals for the Second Circuit erred in holding that its expansive interpretation of "serious drug offense" as encompassing attempted drug offenses for purposes of the Armed Career Criminal Act was not unconstitutionally vague under United States v. Johnson, ___ U.S. ___, 135 S. Ct. 2551 (2015).

LIST OF PARTIES

1. Petitioner – Defendant David Ojeda

2. Respondent – Plaintiff United States of America

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PETITION FOR WRIT OF CERTIORARI

Petitioner David Ojeda prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit issued its decision in United States v. Ojeda, 951 F.3d 66 (2d Cir. 2020), attached at Appendix A, holding that Defendant/Petitioner Ojeda's prior New York first-degree robbery conviction was a predicate violent felony under the physical force clause of the Armed Career Criminal Act ("ACCA"), and that Ojeda's prior New York attempted drug crimes were predicate serious drug offenses under ACCA.

BASIS FOR JURISDICTION

The Second Circuit issued its decision on February 24, 2020. The instant Petition for Writ of Certiorari is timely under Rules 13.1 and 13.3 of the Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1) of ACCA enhances the penalty for a violation of 18 U.S.C. 922(g)(1) to a mandatory 15 years to life if the offender has three previous convictions for a "violent felony or serious drug offense, or both, committed on occasions different from one another."

18 U.S.C. § 924(e)(2)(A) defines "serious drug defense" as follows:

> **(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;

18 U.S.C. § 924(e)(2)(B) defines "violent felony" as follows:

(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

New York Penal Law § 160.00, Robbery: defined

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or

2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

New York Penal Law § 160.15, Robbery in the first degree

A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

1. Causes serious physical injury to any person who is not a participant in the crime; or

2. Is armed with a deadly weapon; or

3. Uses or threatens the immediate use of a dangerous instrument; or

4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an

> affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

New York Penal Law § 220.39(1), Criminal Sale of a controlled substance in the third degree.

> A person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells:
>
> 1. a narcotic drug;

New York Penal Law § 220.16(1), Criminal possession of a controlled substance in the third degree

> A person is guilty of criminal possession of a controlled substance in the third degree when he knowingly and unlawfully possesses:
>
> 1. a narcotic drug with intent to sell it;

New York Penal Law § 110.00; Attempt to commit a crime.

> A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

STATEMENT OF THE CASE

The Second Circuit misapplied Stokeling v. United States, ____ U.S. ____, 139 S. Ct. 544 (2019), in holding that all New York State robbery convictions are "violent felonies" for purposes of ACCA, and added to an existing Circuit split with the First Circuit. The Second Circuit also erred in holding that Ojeda's attempted New York State drug convictions were "serious drug offenses" for purposes of ACCA. These are important questions of federal law which should be addressed by this Court.

Ojeda was indicted on April 27, 2015, in the United States District Court for the Southern District of New York for being a felon in possession of a firearm in violation of 18 U.S.C. § 922 (g). The indictment arose out of an altercation Ojeda had on November 24, 2014. The indictment put him on notice that the government considered him an armed career criminal under ACCA, 18 U.S.C. § 924(e), subject to its enhanced sentencing structure. The indictment identified three predicate offenses under ACCA: (1) a November 7, 2007 conviction in New York County Supreme Court of robbery in the first degree, in violation of New York Penal Law § 160.15; (2) a November 12, 1998 conviction in New York County Supreme Court of attempted criminal possession of a controlled substance in the third degree, in violation of New York Penal Law § 220.16(1); and (3) a March 5, 1998 conviction in New York County Supreme Court of attempted criminal sale of a controlled substance in the third degree, in violation of New York Penal Law § 220.39.

Ojeda plead open to the indictment. Probation found that the above predicate offenses mandated sentencing under ACCA, with a 15-year mandatory minimum. § 924(e). Without this mandatory minimum, Ojeda's Guidelines range would have been 168 to 210 months.

In anticipation of sentencing, United States District Court Judge Andrew Carter, Jr., ordered briefing on the continued viability of United States v. King, 325 F.3d 110 (2d Cir. 2003), in light of the Supreme Court's decision in Johnson v. United States, ___ U.S. ___, 135 S. Ct. 2551 (2015)("Johnson 2015"). King held that attempted controlled substance convictions under New York State law were qualifying predicates for ACCA. 325 F.3d at 112-15. Judge Carter held that Johnson 2015's striking of the residual clause definition of "violent felony" as unconstitutionally vague did not undermine the remaining definitions of predicate offenses under ACCA, including the definition of "serious drug offense." Finding that Ojeda's three predicates

were qualifying offenses under ACCA, Judge Carter sentenced Ojeda to the mandatory minimum of 180 months' imprisonment.

On direct appeal to the United States Court of Appeals for the Second Circuit, Ojeda argued that none of his prior convictions qualified as ACCA predicates. The Second Circuit disagreed.

With regard to Ojeda's 2007 conviction for robbery in the first degree, in violation of New York Penal Law § 160.15, the court did not disagree with Ojeda's contention that the first degree aggravator did not categorically qualify the robbery conviction as a violent felony. This was because the first degree robbery aggravator could be satisfied by the defendant or another participant in the crime being "armed with a deadly weapon." § 160.15(3). As Ojeda argued, a defendant could be convicted under § 160.15(3) when armed with a deadly weapon "that is never discharged, displayed, or even retrieved during the robbery," 951 F.3d at 71, which would not in and of itself entail the use or threatened use of physical force. See People v. Pena, 50 N.Y.2d 400, 407 n.2 (1980)(discussing that for purposes of New York first degree robbery a deadly weapon – as opposed to a less dangerous instrumentality – only needs to be possessed as opposed to employed). The court assumed, without deciding, that Ojeda's argument on this point was correct. 951 F.3d at 71.

Regardless, the court found that Ojeda's conviction categorically qualified because all degrees of robbery under New York Penal Law required, as a foundational element, that the defendant "forcibly steals" property. Robbery and forcible stealing are defined in § 160.00 as follows:

> Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

> 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

New York Penal Law § 160.00.

The court noted the alignment between the language in § 160.00 and ACCA's definition of "violent felony." It then relied upon the Supreme Court's holding in Stokeling that the term "physical force" under ACCA "encompasses the degree of force necessary to commit common-law robbery." 139 S. Ct. at 555. In the Florida robbery statute at issue in Stokeling, this was described as "the force necessary to overcome a victim's physical resistance" Id. at 553. Relying on its prior decision in United States v. Thrower, 914 F.3d 770 (2d Cir. 2019), the court held that New York's "forcible stealing" element of robbery likewise was modeled on the common-law definition of robbery, requiring "'the amount of force necessary to overcome a victim's resistance.'" 951 F.3d at 72 (quoting Thrower, 914 F.3d at 775). As discussed infra, this holding was wrong. But based on this holding, the court concluded that "it is not possible to satisfy the forcible taking element of New York robbery without physical force." 951 F.3d at 72.

With regard to Ojeda's two attempted drug offenses under New York Penal Law §§ 220.39(1) and 220.16(1), the court upheld its prior decision in King that attempted drug offenses qualified as ACCA predicates under § 924(e)(2)(A). The court held that by defining "serious drug offense" to include those state law crimes "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a [federally recognized] controlled substance," id., Congress intended an "expansive" meaning encompassing attempted offenses. 951 F.3d at 73-76. It rejected Ojeda's argument that ACCA's definition of "serious drug offense" suffered from the same unconstitutional vagary as the residual risk of force clause found

unconstitutionally vague in Johnson 2015. Specifically, Ojeda argued that use of the term "involving" to encompass attempt crimes would lead to an overly expansive and potentially limitless interpretation of possible drug crime predicates. The court disagreed, and held that Ojeda's attempted drug crimes were valid ACCA predicates. 951 F.3d at 75-76.

Jurisdiction in the United States District Court over the federal criminal charges existed pursuant to 18 U.S.C. § 3231. Appellate jurisdiction in the Second Circuit existed pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. Because this petition for writ of certiorari has been filed within 90 days of the Second Circuit's February 24, 2020 decision, it is timely.

REASONS FOR GRANTING THE WRIT

1. This Court should address the important federal question raised by the Second Circuit's misapplication of *Stokeling* to New York state robbery convictions, and the existing Circuit split with the First Circuit.

In Stokeling v. United States, ___ U.S. ____, 139 S. Ct. 544 (2019), this Court held that robbery under Florida State law was a "violent felony" for purposes of ACCA. It held that the "use of physical force" under ACCA "encompasses the degree of force necessary to commit common-law robbery, and because Florida robbery requires that same degree of 'force', Florida robbery qualifies as an ACCA-predicate offense under the elements clause." Id. at 555. There are two distinct components of this holding. First, that ACCA's elements clause was satisfied by the level of physical force required to constitute common-law robbery. Id. at 550-54. Second, that Florida's robbery statute categorically required the use of physical force necessary to commit common-law robbery. Id. at 554-55. The Second Circuit's error in its application of Stokeling to Ojeda and numerous other defendants is at this second step.

In Stokeling, the Florida robbery statute categorically required use of the physical force needed for common-law robbery because it had been interpreted by the Florida Supreme Court to require overcoming the victim's resistance. As discussed in Stokeling, 139 S. Ct. at 549, robbery

in Florida was statutorily defined as "the taking of money or other property ... from the person or custody of another ... when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1)(1995). The Florida Supreme Court held that the "use of force" necessary to commit robbery requires "resistance by the victim that is overcome by the physical force of the offender." Robinson v. State, 692 So.2d 883, 886 (1997).

These necessary elements of Florida robbery – resistance by the victim which is overcome by the physical force of the offender – is what allowed the Court to conclude that a Florida robbery conviction always met the common-law definition of robbery, and consequently always qualified as an ACCA predicate. This holding is repeated throughout the decision in Stokeling. See 139 S. Ct. at 550 ("we conclude that the elements clause encompasses robbery offenses that require the criminal to overcome the victim's resistance"); id. (under common law, "the crime was larceny, not robbery, if the thief did not have to overcome such resistance"); id. at 551 ("'sufficient force must be used to overcome resistance'")(quoting W. Clark & W. Marshall, Law of Crimes 553 (H. Lazell ed., 2d ed. 1905)); id. at 552 ("In 1986, a significant majority of the States defined nonaggravated robbery as requiring force that overcomes a victim's resistance."). id. at 553 (reconciling holding with opinion in Johnson v. United States, 559 U.S. 133 (2010)("Johnson 2010"), by observing that "the force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by" Johnson 2010); id. (under common law, "[o]vercoming a victim's resistance was per se violence against the victim").

In contrast, robbery in New York does not require overcoming resistance by the victim, and the Second Circuit's contrary holding is clearly wrong. In Ojeda, the court held that "New York's definition of 'forcibly stealing' 'is modeled on the common law definition of robbery,'

which requires 'the amount of force necessary to overcome a victim's resistance.'" 951 F.3d at 72 (quoting United States v. Thrower, 914 F.3d 770, 775 (2d Cir. 2019)). This is simply not true.

All degrees of robbery in New York require a showing of "forcible stealing." Robbery and forcible stealing are defined as follows:

> Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:
>
> 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

New York Penal Law § 160.00 (emphasis added).

Under the plain language of this definition, overcoming the resistance of the victim is not a necessary element of robbery in New York. First, this is only listed as one of multiple alternative "purposes" of an offender's actions. This purpose element is a mens rea requirement, not an actus reas requirement. People v. Smith, 79 N.Y.2d 309, 311-14, 582 N.Y.S.2d 946 (1992)(the "purpose" clauses of robbery statute are mens rea elements). Committing actions with the "intent" or "purpose" of "overcoming resistance" does not require that the actor in fact have overcome victim resistance or even have been faced by it. This is in stark contrast to the Florida statute, which as interpreted by the Florida Supreme Court unequivocally required resistance by the victim. Stokeling, 139 S. Ct. at 549 (quoting Robinson, 692 So.2d at 886).

Second, under New York law, an offender does not even have to have the purpose of overcoming resistance. An offender also commits robbery if his purpose was to "prevent[]" resistance. N.Y. Penal Law § 160.00(1). Likewise, a victim's resistance is not necessary if the

offender acted "for the purpose of ... [c]ompelling the owner of such property or another person to deliver up the property ... ." Id. at § 160.00(2).

In light of this critical difference between the New York and Florida robbery statutes, the Second Circuit plainly erred in holding that Stokeling provided the answer to whether New York robbery was a "violent felony" under the elements clause. New York robbery does not require "resistance" by the victim, which was the linchpin to the Stokeling conclusion that Florida robbery necessarily constituted common-law robbery. Further, because Stokeling held that ACCA intended to incorporate the common-law definition of robbery in the elements clause, 139 S. Ct. at 550-54, if a State robbery statute is broader than this definition, it cannot categorically qualify as an ACCA predicate.

Notwithstanding that New York Penal Law § 160.00 does not by its own statutory terms require resistance by the victim, if this requirement has been definitively grafted on to the elements by judicial decision, then New York robbery would necessarily rise to the level of common-law robbery. See Stokeling, 139 S. Ct. at 549 (relying on Florida Supreme Court's holding that Florida robbery statute requires "resistance by the victim"); Johnson 2010, 559 U.S. at 138 (bound by State Supreme Court's interpretation of the law). The easy answer is that there is no such bright line test under New York caselaw, and there certainly was not as of the date of Ojeda's 2007 conviction.

Whether a particular robbery statute requires sufficient physical force to overcome the resistance of the victim is often decided in the context of purse snatching. If a defendant could be convicted of robbery by snatching a purse from a victim's hand without any touching of the person or physical threatening, then that robbery statute criminalizes more than common-law robbery. See Stokeling, 139 S. Ct. at 555 (observing that Florida robbery statute does not apply

to "a defendant who merely snatches money from the victim's hand" or "who steals a gold chain" where the victim only "feels his fingers on the back of her neck")(internal quotations omitted).

Under New York law, the answer is not clear. There are cases which hold that this type of purse snatching is not robbery in New York. See People v Middleton, 212 A.D.2d 809, 810, 623 N.Y.S.2d 298 (1995)(purse snatching where victim was not "intimidated, knocked down, struck, or injured" did not constitute robbery); People v. Chessman, 75 A.D.2d 187, 190, 429 N.Y.S.2d 224 (1980)(purse snatching where victim "did not feel anything on her body" was not robbery). On the other hand, People v. Lawrence, 209 A.D.2d 165, 166, 617 N.Y.S.2d 769 (1994), suggested the opposite conclusion. In Lawrence, the court held that defendant was properly convicted of robbery because it was not persuaded that defendant engaged in a "nonphysical, nonobtrusive snatching" of the victim's purse. This implies that a nonphysical "obtrusive" snatching would have sufficed. Likewise, in People v. Santiago, 62 A.D.2d 572, 575-79, 405 N.Y.S.2d 752 (1978), the intermediate court canvassed New York law and observed that it appeared to be an open question whether "purse snatching, per se," constitutes robbery. The Court of Appeals affirmed, without ruling on the open question. People v. Santiago, 48 N.Y.2d 1023, 425 N.Y.S.2d 782 (1980). The Court of Appeals decision in People v. Jurgins, 26 N.Y.3d 607, 26 N.Y.S.3d 495 (2015), besides being decided long after Ojeda's conviction, does not answer the question because it simply notes the parties' representations that purse snatching would not qualify as robbery under New York law.

Under the categorical approach, for Ojeda's New York robbery conviction to qualify as an ACCA violent felony, the minimum conduct required for conviction must qualify. Descamps v. United States, 570 U.S. 254, 257 (2013). This "requires more than the application of legal

imagination to [the] ... statute's language." Gonzalez v. Duenes-Alvarez, 549 U.S. 183, 193 (2007). There must be "a realistic probability, not a theoretical possibility" that the statute at issue would be applied to conduct that is not a violent felony. Id. In light of the above-described divide in New York caselaw, there is a realistic probability that at the time of Ojeda's conviction, "forcible stealing" could have been applied to nonphysical purse snatching, with no requirement of resistance by the victim. It is for this precise reason that the First Circuit held that New York robbery in the second degree was not a "crime of violence" for career offender purposes under the Sentencing Guidelines. United States v. Steed, 879 F.3d 440 (1st Cir. 2018).

Moreover, as discussed above, robbery can be committed in New York even absent the purpose of "overcoming resistance." It can be based alternatively on a "purpose" of "preventing ... resistance" or also on a "purpose" of "compelling the owner of such property ... to deliver up the property." See People v. Telesford, 149 A.D.3d 170, 178, 49 N.Y.S.3d 414 (2017)(the mens rea elements of New York robbery are independent alternatives). Consequently, New York robbery does not categorically require the common law element of overcoming resistance identified as necessary in Stokeling for robbery to be an ACCA predicate.

The Second Circuit's decision below has contributed to the existing Circuit split over whether New York robbery is categorically a "violent felony" under ACCA or a "crime of violence" under the career offender provisions of the Guidelines. The Second Circuit joins the Fourth, Sixth, Eighth and Eleventh Circuits in holding that New York robbery qualifies as a predicate. See United States v. Hammond, 912 F.3d 658, 661-65 (4th Cir. 2019); Perez v. United States, 885 F.3d 984, 990 (6th Cir. 2018); United States v. Williams, 899 F.3d 659, 662-64 (8th Cir. 2018); United States v. Sanchez, 940 F.3d 526, 531-33 (11th Cir. 2019).

On the other side of the divide, the First Circuit in Steed held that the defendant's 2000 conviction for New York attempted robbery in the second degree was not a "crime of violence" for purposes of the career offender guideline. Because it was at least an open question under New York law in 2000 whether mere purse snatching would constitute "forcible stealing" under the New York robbery statute, there was a "realistic probability" that the defendant's robbery conviction could have been based on conduct which was not a crime of violence. 879 F.3d at 448-51. See also United States v. Rabb, 942 F.3d 1, 4-7 (1st Cir. 2019)(because New York robbery criminalized a perpetrator using only enough force in committing a purse snatching to produce awareness in the victim, it was broader than generic crime of robbery); Lassend v. United States, 898 F.3d 115, 129 n.4 (1st Cir. 2018)(parties conceded that defendant's first degree New York robbery was not a "violent felony" under ACCA). Purse snatching, per se, does not necessarily have the level of "violent force" required by Johnson 2010, 559 U.S. at 140, or the overcoming of the victim's resistance required in Stokeling, 139 S.Ct. at 550-54. Accordingly, the First Circuit's holdings are correct, and the Second Circuit joined the wrong side of the divide.

Certiorari should be granted to correct the Second Circuit's misapplication of Stokeling, and to resolve the Circuit split which unfairly leaves similarly situated defendants with vastly different sentences.

2. Following from this Court's decision in *Johnson v. United States*, U.S. , 135 S. Ct. 2551 (2015)("*Johnson 2015*"), the Court should find that ACCA's definition of a serious drug offense is also unconstitutionally vague as applied to attempted drug offenses under State law.

In United States v. King, 325 F.3d 110 (2d Cir. 2003), the Second Circuit held that ACCA's definition of a "serious drug offense" included attempted drug offenses under New York law. ACCA defined "serious drug offense" as:

> (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.

§ 924(e)(2)(A).

The court in King focused on the word "involving." It held that this word "has expansive connotations," and called for a broad reading of the definition of "serious drug offenses." 325 F.3d at 113. The court held that it encompassed attempted criminal possession of a controlled substance in the third degree under New York Penal Law § 220.16(1), because New York law required that the defendant have an intent to sell it, and because attempt requires proof that the defendant came "very near" or "dangerously near" to completing the intended crime. 325 F.3d at 114.

In Ojeda's case, two attempted drug convictions were used as ACCA predicates: his November 1998 conviction of attempted criminal possession of a controlled substance in the third degree in violation of New York Penal Law § 220.16(1), and his March 1998 conviction of attempted criminal sale of a controlled substance in the third degree in violation of New York Penal Law § 220.39(1). The District Court Judge ordered briefing on whether this Court's decision in Johnson 2015 undermined the decision in Hill.

In Johnson 2015, the Supreme Court struck down a portion of ACCA. It held that the residual clause definition of "violent felony" as a crime which "otherwise involves conduct that presents a serious potential risk of physical injury to another," § 924(e)(2)(B)(ii), was unconstitutionally vague in violation of the Due Process Clause. 135 S. Ct. at 2557-2560. When

deciding whether an offense qualifies as an ACCA predicate, the court must use the "categorical approach." This looks at the offense of conviction, and not the actual facts underlying a defendant's conviction. Taylor v. United States, 495 U.S. 575, 600 (1990). This in turn, when applying the residual clause, requires the court to picture the kind of conduct that the crime involves in the "ordinary case", and to ask whether that presents a "serious potential risk of physical injury to another." James v. United States, 550 U.S. 192, 208 (2007).

The Court held that this hypothetical exercise was too vague to withstand constitutional scrutiny. There was no reliable standard to estimate the risk posed by the "ordinary case" of a crime of conviction, 135 S. Ct. at 2557, and no reliable standard to estimate whether that risk fell within the definition of "serious potential risk." Id. at 2558. There simply was too much uncertainty in trying to apply this test to the vast multitude of state crimes potentially qualifying.

In Ojeda's case, the District Court Judge held that Johnson 2015 did not invalidate the holding in Hill, and his ruling was upheld by the Second Circuit. The court held that ACCA's use of the word "involving" in defining covered State law drug offenses was intended to have an expansive meaning beyond the listed offenses of "distributing, manufacturing or possessing." Consequently, attempt crimes qualified as serious drug offenses. 951 F.3d at 73. The court rejected Ojeda's challenge that such an expansive interpretation rendered the definition unconstitutionally vague under Johnson 2015. It held that the degree of vagary in the risk of force clause found unconstitutional in Johnson 2015 was not replicated by use of the word "involving" in defining a serious drug offense. It held that the word "involving" properly focused the inquiry on the elements of the charged crimes, which did not have the same question of uncertainty implicated in the risk of force inquiry. Id. at 74. It also observed that the federal drug offenses qualifying as ACCA predicates included attempt crimes. Id. at 75.

Ojeda submits that the same concern expressed in Johnson 2015 about the definition of violent felonies applies to trying to divine which crimes "involve" the specifically identified crimes of "manufacturing, distributing, or possessing with intent to manufacture or distribute" a controlled substance. The Second Circuit held that "involving" must be interpreted expansively. But that begs the question, central to Johnson 2015, as to whether an expansive and potentially limitless interpretation is not so void of comprehensible limits as to be unconstitutionally vague. "Involving" is undisputably not a precise term. It is even less precise when interpreted as an expansive inquiry. Where does it begin, and where does it end?

The court held that "involving" extended to attempted criminal possession of a controlled substance under New York Penal Law because attempt under New York law required that the defendant came "very near", or "dangerously near", or "within dangerous proximity" to completing the intended crime. Ojeda, 951 F.3d at 76. But what do these mean? What is the difference between these three measures, and where is the line? This definitional void suffers from some of the same vagaries relied upon by the Court in Johnson 2015 in finding the residual clause unconstitutional.

Justice Thomas, concurring in Johnson 2015, directly addressed the vagueness implicated when attempt crimes are considered predicates. In James, the Court had held that the attempted burglary offense at issue could be considered a violent felony because the attempt required an overt act directed toward entry of a structure. Yet this needed to be distinguished from attempts which could be satisfied by mere preparatory conduct, such as possessing burglary tools, which would not categorically qualify. See Johnson 2015, 135 S. Ct. at 2564-65 (Thomas, J., concurring).

Recognition of the difficulties in distinguishing between qualifying and non-qualifying attempt offenses, as discussed in Johnson 2015, provides further support that Johnson 2015 is inconsistent with the Second Circuit's inclusion of attempted controlled substance offenses as ACCA predicates. It is fair to read Johnson 2015 as a deliberate contraction on the continued expansion of ACCA's reach. There are constitutional limits. Stretching the definition of "serious drug offense" to attempted offenses goes beyond that constitutional limit.

Certiorari should be granted to correct the Second Circuit's unconstitutionally expansive interpretation of what constitutes a serious drug offense under ACCA.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED at Middlebury, Vermont, this 21st day of May, 2020.

Devin McLaughlin, Esq.
Langrock Sperry & Wool, LLP
PO Drawer 351
Middlebury, VT 05753-0351
E-mail: dmclaughlin@langrock.com
Ph: (802) 388-6356 | Fx: (802) 388-6149
CJA Counselor for Defendant-Appellant
David Ojeda

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