No. 20-5184

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD BRIAN WILLIAMS, 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 the district court erred in sentencing petitioner under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), where the indictment did not cite that sentencing provision.

2. Whether the Mississippi offense of robbery, in violation of Miss. Code Ann. § 97-3-73 (2006), qualifies as a "violent felony" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i).

RELATED PROCEEDINGS

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

United States v. Williams, No. 17-cr-64 (June 26, 2019)

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

United States v. Williams, No. 19-60463 (Feb. 27, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2) is reported at 950 F.3d 328.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2020. The petition for a writ of certiorari was filed on July 22, 2020. 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). Pet. App. 1, at 1. The court sentenced him to 190 months of imprisonment, to be followed by five years of supervised release. Id. at 1, at 2-3. The court of appeals affirmed. Pet. App. 2.

1. On January 20, 2017, police detectives in Mississippi traveled to petitioner's mother's home in an effort to locate petitioner, who had an outstanding warrant for motor vehicle theft. Presentence Investigation Report (PSR) ¶ 11. As petitioner attempted to leave via the back door, he dropped two pistols, one of which had been stolen. PSR ¶¶ 11-13.

A grand jury in the Southern District of Mississippi returned an indictment charging Williams with possessing a firearm as a felon, "in violation of Sections 922(g)(1) and 924(a)(2), Title 18, United States Code." Indictment 1. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of possessing a firearm as a felon is 0 to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), however, prescribes a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense" committed on different occasions. The ACCA defines a "violent felony" to include any crime punishable by more than one year of imprisonment that "has as an element the use, attempted use, or threatened use of physical force against the person of another"

(the "elements clause"); "is burglary, arson, * * * extortion [or] involves use of explosives" (the "enumerated felonies clause"); or "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). 18 U.S.C. 924(e)(2)(B); Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

In July 2017, petitioner entered a guilty plea in open court. C.A. ROA 133-171. During the hearing, the prosecutor observed that petitioner had five prior convictions, and the district court therefore asked whether petitioner could "have been charged here as a career criminal." Id. at 162. The prosecutor explained that the government had not charged petitioner as a career offender and that she did not "know that there w[ere] sufficient convictions of the requisite nature to support" an ACCA enhancement. Ibid. Petitioner's counsel then provided a lengthy explanation of why he believed that petitioner's prior offenses did not qualify. Id. at 162-164.

After petitioner entered his first guilty plea, the Probation Office prepared an amended presentence report in which it determined that petitioner could be sentenced under the ACCA because three of his prior convictions qualified as ACCA predicates. C.A. ROA 310. Petitioner objected to that determination and filed a motion to withdraw his guilty plea because he had not been informed that he could face an ACCA

sentence. Id. at 37-42. The district court granted the motion. Id. at 105-109.

2. In August 2018, petitioner again sought to enter a guilty plea in open court. C.A. ROA 172-184. Petitioner's counsel explained that, while petitioner continued to object to the determination that his prior convictions qualified as violent offenses under the ACCA, he nevertheless wished to enter a plea of guilty. Id. at 174-175. The court then questioned the prosecutor regarding her prior statement that the government was not charging petitioner as a career offender. Id. at 176. The prosecutor explained that, during the first plea hearing, the government had been under the mistaken impression that one of the prior convictions that had been identified as violent felonies had been committed as a juvenile, and that she had also had some uncertainty regarding the law concerning what would qualify as a violent felony. Id. at 178-179. But the prosecutor assured the court that her concerns had now been resolved, and she believed that petitioner qualified for the ACCA enhancement. Ibid.

After hearing counsel's explanation, the district court ordered both the prosecutor and the probation officer to prepare independent reports explaining why petitioner qualified for an ACCA enhancement and distinguishing the precedent petitioner had offered in support of his contrary position. C.A. ROA at 179-180. And although defense counsel stated that petitioner would "still

be interested in pleading guilty" even if the court agreed that he qualified as a career offender, id. at 180, the court decided to postpone the plea colloquy until it was able to make a final determination on the applicability of the ACCA enhancement, id. at 181.

In May 2019, the district court held a final hearing in which the court found that petitioner was eligible for the ACCA sentencing enhancement and accepted petitioner's guilty plea. C.A. ROA 185-300. The court heard argument from defense counsel regarding whether the absence of a citation to Section 924(e) in the indictment precluded an ACCA sentence, and whether petitioner's prior conviction for Mississippi robbery qualified as a violent felony under the ACCA. Id. at 232-236. The court rejected petitioner's arguments on both issues, noting that "[a]s you recognized, the Fifth Circuit preceden[t] is against you." Id. at 236. The court sentenced petitioner to 190 months of imprisonment, to be followed by five years of supervised release. Id. at 291-293; Pet. App. 1, at 2-3.

3. The court of appeals affirmed in a summary, per curiam opinion. Pet. App. 2.

The court first rejected petitioner's contention that the district court erred in sentencing him under the ACCA because Section 924(e) was not cited in his indictment. Pet. App. 2, at 2. The court observed that the plain language of the ACCA states

that it "'shall' apply when the noted prerequisites are met." Ibid. (citation omitted). The court further explained that, although petitioner was entitled to some notice of the possibility of an enhanced sentence as a matter of due process, he received that notice through the presentence report. Ibid.

The court of appeals also rejected petitioner's contention that Mississippi robbery is not a violent felony under the ACCA "because it can be committed by putting someone in fear of immediate injury and because it can be committed by poisoning." Pet. App. 2, at 2. Relying on its prior decisions and petitioner's failure to cite Mississippi law suggesting otherwise, the court determined that Mississippi robbery, in violation of Miss. Code Ann. § 97-3-73 (2006), involves "the use, attempted use, or threatened use of physical force against the person of another." Pet. App. 2, at 2 (quoting 18 U.S.C. 924(e)(2)(B)(i) and citing United States v. Reyes-Contreras, 910 F.3d 169, 173, 181-187 (5th Cir. 2018) (en banc), and United States v. Brewer, 848 F.3d 711, 714-716 (5th Cir. 2017)).

ARGUMENT

Petitioner renews his contentions (Pet. 7-13) that he should not have been sentenced under the ACCA because the indictment did not cite 18 U.S.C. 924(e), and that his Mississippi robbery conviction is not a "violent felony" under the ACCA. The court of appeals correctly rejected both contentions, and its decision does

not conflict with any decision of another court of appeals or this Court. Further review is not warranted.

1. Petitioner first contends (Pet. 7-8) that he should not have been sentenced under the ACCA because the indictment did not cite Section 924(e). Pet. App. 1, at 1; Indictment 1. The court of appeals correctly rejected that contention.

As a threshold matter, in the circumstances here -- where petitioner pleaded guilty with full awareness that he was subject to an ACCA sentence -- his guilty plea relinquished any challenge to the indictment on that basis. See, e.g., Class v. United States, 138 S. Ct. 798, 803 (2018) ("[A] guilty plea bars appeal of many claims, including some antecedent constitutional violations related to events (say, grand jury proceedings) that had occurred prior to the entry of the guilty plea") (citation and internal quotation marks omitted); id. at 805 (recognizing that a claim that could "have been 'cured' through a new indictment by a properly selected grand jury" would be relinquished by a guilty plea) (citation omitted). In any event, under Almendarez-Torres v. United States, 523 U.S. 224 (1998), a defendant may be subject to an ACCA enhancement even if the indictment does not allege his prior qualifying convictions. See, e.g., United States v. Smith, 775 F.3d 1262, 1266 (11th Cir. 2014), cert. denied, 576 U.S. 1013 (2015). And the courts of appeals have consistently recognized that -- while due process requires that a defendant have some

notice and opportunity to contest a statutory sentencing enhancement -- the requisite notice may be provided through a presentencing report or other post-conviction mechanism. United States v. Moore, 208 F.3d 411, 414 (2d Cir.) (citing cases), cert. denied, 531 U.S. 905 (2000); Pet. App. 1, at 1. Petitioner clearly received adequate notice in this case, given that he was permitted to withdraw his initial plea after he first learned that the ACCA enhancement might apply, and the district court permitted him to reenter his plea only after ascertaining that he was willing to accept the possibility of an ACCA sentence. See pp. 4-5, supra.

Petitioner asserts (Pet. 7-8) that, under this Court's decision in United States v. Batchelder, 442 U.S. 114 (1979), the government must be bound by the prosecutor's initial decision to charge him under Section 924(a)(2) rather than Section 924(e). But Batchelder held only that a legislature may constitutionally enact two statutes establishing different maximum sentences for the same criminal conduct, even if that effectively grants a prosecutor discretion to choose which of the two maximum sentences a particular defendant will face. Id. at 124. That holding has no application here, where the ACCA is not a standalone crime, but instead a sentence enhancement for the felon-in-possession crime for which he was charged and to which he pleaded guilty, with notice of the enhanced sentence.

2. Petitioner also contends (Pet. 8-13) that he should not have been sentenced under the ACCA because his prior Mississippi conviction for 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 observes that the Mississippi robbery statute requires either violence to the victim or placing the victim "in fear of some immediate injury," Pet. 11 (emphasis omitted), and argues that the latter 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. § 97-3-73 (2006) (defining robbery as "feloniously tak[ing] the personal property of another * * * by violence to his person or by putting such person in fear of some immediate injury to his person"). But the "fear of immediate injury" 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) -- exactly what the victim is threatened with under the Mississippi statute's "fear" prong. Indeed, this Court has 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). And as the Mississippi Supreme Court has observed, robbery "necessarily involve[s] violence -- or at least the threat of imminent violence to another -- to accomplish the crime." Brown v. State, 102 So. 3d 1087, 1091 (Miss. 2012) (en banc).

Next, petitioner contends (Pet. 13) that 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, in which this Court construed the phrase "use of physical force" in a similar statutory provision to include such indirect uses of force. 572 U.S. 157, 171 (2014) (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. Instead, he attempts (Pet. 12-13) to rely on the Fifth Circuit's decision in United States v. Villegas-Hernandez, 468 F.3d 874 (2006), cert. denied, 549 U.S. 1245 (2007). But, relying on Castleman, the en banc Fifth Circuit expressly overruled Villegas-Hernandez in United States v. Reyes-Contreras, 910 F.3d 169, 187 (5th Cir. 2018). This Court has recently and repeatedly denied certiorari on related questions,[2] and it should follow the same course here.

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[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. 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. DeShazior, 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., Liddell v. United States, No. 19-6858 (June 15, 2020); DeShazior v. United States, 139 S. Ct. 1255 (2019) (No. 17-8766); Harmon v. United States, 139 S. Ct. 939 (2019) (No. 18-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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5965); 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 (2018) (No. 17-8260); Hughes v. United States, 138 S. Ct. 2649 (2018) (No. 17-7420).