

NO. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

RANDY PLATT, 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.

In *Stokeling v. United States*, 139 S.Ct. 544 (2029), this Court reviewed whether Florida's robbery statute required a level of force necessary to qualify as a crime of violence under the Armed Career Criminal Act's (hereinafter ACCA) elements clause, 18 U.S.C. §924(e)(2)(B)(i). The Court held “‘physical force,’ or ‘force capable of causing physical pain or injury,’ includes the amount of force necessary to overcome a victim’s resistance.” *Id.* at 555 (citation omitted). The majority in *Stokeling* relied on the fact that Congress used the common law definition of robbery in the original enactment of the ACCA and in its subsequent expansion in the elements clause.

Utah's robbery statute, U.C.A §76-6-301, penalizes conduct beyond that of common law robbery. Should robbery convictions for purposes of the career offender provision of the United States Sentencing Guidelines be limited to only those that meet the common law definition of robbery as originally defined by Congress in 18 U.S.C. App. §1202(c)(8) (1982)?

(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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None.

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

United States v. Platt, No. 19-6061, 2020 WL 1481592 (10th Cir. filed March 23, 2020).

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

(i) Date of judgment sought to be reviewed.

The Order and Judgment of which review is sought was filed March 23, 2020.

(ii) Date of any order respecting rehearing.

Rehearing was not sought;

(iii) Cross Petition.

Not applicable;

(iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, §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).

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

(1) Constitutional Provisions:

None.

(2) Statutes Involved:

Utah Code Ann. §76-6-301

(1) A person commits robbery if:

- (a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the person property; or
- (b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft or wrongful appropriation.

(2) An act is considered to be “in the course of committing a theft or wrongful appropriation” if it occurs:

- (a) in the course of an attempt to commit theft or wrongful appropriation;
- (b) in the commission of theft or wrongful appropriation; or
- (c) in the immediate flight after the attempt or commission.

(3) Rules Involved:

United States Sentencing Guideline §4B1.2(a)

**§4B1.2. Definitions of Terms Used in Section 4B1.1
(Career Offender)**

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of a judgment entered by a United States Court of Appeals. The jurisdiction of the district court below was based originally on an alleged violation of the laws of the United States. The United States District Court for the Western District of Oklahoma has original jurisdiction over offenses against the laws of the United States which occur in that district. 18 U.S.C. §3231.

Facts Material to Consideration of Question Presented

On July 3, 2018, a one count Indictment was returned by a federal grand jury naming Randy Platt as the only defendant. The Indictment alleged a single violation of 18 U.S.C. §113(a)(6), assault with serious bodily injury. Mr. Platt pled guilty and a Presentence Report was ordered. The Presentence Report advised Mr. Platt was a career offender for purposes of United States Sentencing Commission, Guidelines Manual (“USSG”) §4B1.1, thereby increasing his advisory guideline range from 57 to 71 months’ imprisonment to 77 to 96 months’ imprisonment. The Presentence Report concluded Mr. Platt qualified as a career offender due to the instant offense as well as a Utah conviction for robbery and a federal conviction for bank robbery.

Mr. Platt objected to application of the career offender enhancement, specifically arguing the Utah robbery conviction was not a crime of violence under USSG §4B1.2. Mr. Platt argued the degree of force necessary to commit a violation of the Utah statute under subsection (1)(a) did not meet this Court’s requirement of fear of “violent physical force” as required by *Johnson v. United States (Curtis Johnson)*, 559 U.S. 133, 140 (2010). In addition, Mr. Platt argued that since subsection (1)(b) of the Utah robbery statute allowed a conviction when the use of force or fear of immediate force occurred *after* the taking of property and not before

or simultaneous to the taking, it prohibited conduct beyond the scope of generic robbery, i.e. common law robbery.

The United States Probation Office responded to Mr. Platt's objection noting an apparent "means-versus-elements issue with Utah's statute under *Mathis v. United States*, 136 S. Ct. 2243 (2016), as the supporting documents available to the probation officer [did] not specify whether the defendant was convicted under 76-6-301(1)(a) or 76-6-301(1)(b)." The response concluded the Utah conviction would "qualify as a crime of violence for [USSG] § 4B1.2 only if both subsections (a) and (b) of 76-6-301(1) qualify" as a crime of violence *citing United States v. Jefferson*, 911 F.3d 1290 (10th Cir. 2018).

Concluding the Utah statute qualified as a crime of violence, the Probation Office stated that Utah robbery satisfies the "elements clause" of USSG §4B1.2(a)(1) and meets the definition of "generic robbery" for purposes of USSG §4B1.2(a)(1). The district court overruled Mr. Platt's objection to the career offender enhancement holding:

[T]he Court agrees with and adopts the response of the report writer, particularly in connection with the analysis of the Utah statute under the enumerated offenses portion of the Guideline . . . definitions.

Further, consideration of the recent United States Supreme Court case *Stokeling v. United States*, 139 Supreme Court 544, a 2019 decision, supports this conclusion.

The district court sentenced Mr. Platt to imprisonment for 77 months to run consecutively to his undischarged term of imprisonment from the District of Utah. Mr. Platt timely filed his notice of appeal.

The Tenth Circuit affirmed the district court's application of the career offender provision. *United States v. Platt*, 807 Fed.Appx. 804 (10th Cir. 2020). The Tenth Circuit stated Mr. Platt conceded that subsection (1)(a) of the Utah robbery statute fell within the definition of generic robbery. *Id.* at 807. It should be noted Mr. Platt *did not* concede the level of fear required by subsection (1)(a) of the Utah statute rose to the level of "fear of violent physical force."

As it concerns subsection (1)(b), the Tenth Circuit held that although Utah's definition of robbery included conduct beyond that prohibited by the common law definition of robbery, nonetheless, the definition in subsection (1)(b) fell within the uniform definition of generic robbery and was thus a crime of violence under USSG §4B1.2(a)(2). *Platt*, 807 Fed.Appx at 807-808.

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

Career offender provision and Utah Code Annotated §76-6-301(1)

The career offender provision in the United States Sentencing Guidelines defines a career offender as a defendant who at the time of conviction for the instant offense (1) was at least 18 eighteen years old; (2) whose instant conviction was a

crime of violence or controlled substance offense; (3) and who had previously been convicted of two prior crimes of violence or controlled substances offenses. USSG § 4B1.1(a). Relevant here, a crime of violence is defined as an offense punishable by imprisonment in excess of one year that:

- (1) has as an element, the use, attempted use, or threatened use of physical force against the person of another, or
- (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. §5845(a) or explosive material as defined in 18 U.S.C. §841(c).

USSG § 4B1.2(a)(1) and (2). Subsection 1 is known as the force clause; subsection 2 is known as the enumerated offenses clause. In this case, the dispositive issue is whether Mr. Platt's prior Utah robbery conviction qualifies as a crime of violence under the career offender guideline.

Utah Code defines the crime of robbery as follows:

- (1) A person commits robbery if:
 - (a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the person property; or
 - (b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft or wrongful appropriation.

(2) An act is considered to be “in the course of committing a theft or wrongful appropriation” if it occurs:

- (a) in the course of an attempt to commit theft or wrongful appropriation;
- (b) in the commission of theft or wrongful appropriation; or
- (c) in the immediate flight after the attempt or commission.

§76-6-301(1)(a) and (b). The addition of subsections §76-6-301(1)(b) and (2) incorporated “the ‘transactional’ approach to robbery.” *State in Interest of D.B.*, 925 P.2d 178, 181 (Utah 1996).

The documents associated with Mr. Platt’s Utah robbery conviction did not specify whether he was convicted under 76-6-301(1)(a) or 76-6-301(1)(b). Thus, to qualify as a crime of violence for career offender purposes both §76-6-301(1)(a) and (b) had to fall within the elements clause or within the definition of “generic” robbery.

Argument

Subsection (1)(b) of the Utah robbery statute covers *thefts* that involve the use of force or fear *after* the taking of property. As a result, the statute prohibits conduct beyond that prohibited by common-law robbery. Mr. Platt submits this Court’s decision in *Stokeling v. United States*, 139 S.Ct. 544 (2029) dictates that only robbery

convictions resulting from violations of a statute prohibiting common-law robbery may be used as predicate offense for purposes of the career offender provision.¹

In *Stokeling*, this Court held the ACCA’s elements clause encompassed robbery offenses in which a defendant used an amount of force necessary to “overcome the victim’s resistance.” *Id.* at 555. Such an amount of force was deemed to be consistent with “physical force” or “force capable of causing physical pain or injury” as required by *Johnson v. United States*, 559 U.S. 133 (2010).

The Court relied heavily on the common law definition of robbery in determining the issue in *Stokeling*. The Court observed that Congress incorporated the common law definition of robbery in the original enactment of the ACCA, citing 18 U.S.C. App. §1202(c)(8) (1982)). The Court also observed that although the ACCA was subsequently amended in 1986 and robbery removed from the definition of a crime of violence in the enumerated offenses clause, the expanded definition of predicate offenses to include any offense that “has as an element the use, attempted use, or threatened use of physical force” included common-law robbery. *Id.* at 551.

¹ *Stokeling* addressed the issue whether a robbery statute was a predicate offense pursuant to the ACCA. As recognized by the Tenth Circuit Court of Appeals, concepts and terms under the ACCA and career offender provisions in the Sentencing Guidelines are interchangeable. See *United States v. Charles*, 576 F.3d 1060, 1068 n. 2 (10th Cir. 2009) (noting that “the Supreme Court’s analysis under the ACCA ‘applies equally to the sentencing guidelines,’” quoting *United States v. Tiger*, 538 F.3d 1297, 1298 (10th Cir. 2008)).

The symmetry between the 1984 definition of robbery (requiring the use of “force or violence”) and the 1986 elements clause (requiring the use of “physical force”) is striking. By replacing robbery as an enumerated offense with a clause that has “force” as its touchstone, Congress made clear that “force” retained the same common-law definition that undergirded the original definition of robbery adopted a mere two years earlier. That conclusion is reinforced by the fact that the original 1984 statute defined “robbery” using terms with well-established common-law meanings.

Id. at 551-552.

The majority in *Stokeling* refused to depart from the common law understanding of the force necessary to commit robbery. The majority concluded “the term ‘physical force’ in 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.

Section 76-6-301(1)(b) prohibits conduct beyond the scope of common-law robbery as acknowledged by the Tenth Circuit. *Platt*, 807 Fed.Appx. 807. Section 76-6-301(1)(b) by its very terms penalizes theft that has been aggravated after the taking by use of force or fear of immediate force. Thus, the scope of conduct proscribed by §76-6-301(1)(b) exceeds that of common-law robbery. Pursuant this Court’s reasoning in *Stokeling*, only robberies that meet the common law definition of robbery should be considered as predicate offenses for purposes of the career

offender provision. As a result, §76-6-301(1)(b) should not qualify as a crime of violence for purposes of the career offender sentencing guidelines enhancement.

(i) Appendix.

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

United States v. Platt, No. 19-6061, 2020 WL 1481592 (10th Cir. filed March 23, 2020).

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

None;

(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.

CONCLUSION

For the foregoing reasons, Mr. Randy Platt respectfully requests a Writ of Certiorari issue to review the Order and Judgment filed March 23, 2020, of the United States Court of Appeals for the Tenth Circuit in Case Number 19-6061.

Respectfully submitted,

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