No. 22-6130

IN THE SUPREME COURT OF THE UNITED STATES

DARVILL JIMMY JOSEPH BRAGG, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

J. BENTON HURST
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's Iowa conviction for willful injury, in violation of Iowa Code § 708.4(1) (2014), constitutes a conviction for a "violent felony" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i).

2. Whether petitioner's Illinois convictions for armed robbery, in violation of 720 Ill. Comp. Stat. Ann. 5/18-2(a)(2) (2010), constitute convictions for violent felonies under the ACCA.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Bragg, No. 19-cr-00112 (May 4, 2021)

United States Court of Appeals (8th Cir.):

United States v. Bragg, No. 21-2096 (Aug. 15, 2022)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 10-26) is reported at 44 F.4th 1067.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27) was entered on August 15, 2022. A petition for rehearing was denied on October 4, 2022 (Pet. App. 29). The petition for a writ of certiorari was filed on November 18, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. 1. The district court sentenced him to 240 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals affirmed. Id. at 10-26.

1. On October 25, 2019, the former boyfriend of petitioner's girlfriend went to visit the girlfriend at her apartment. Pet. App. 11. When the former boyfriend arrived at the apartment complex, petitioner and another man shot at him with a revolver from a black Chevrolet Impala. Ibid. After the former boyfriend told the police what had occurred, the police stopped a black Impala that was returning to the apartment complex. Ibid. Petitioner was in the passenger seat, and the police recovered an unloaded revolver from the map pocket within petitioner's reach. Ibid. Petitioner was arrested and charged with possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e), and a jury found him guilty of that offense. Pet. App. 1, 10.

The Probation Office determined that petitioner qualified for sentencing under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), based on an Iowa conviction for willful injury, in violation of Iowa Code § 708.4(1) (2014), and two Illinois

convictions for armed robbery, in violation of 720 Ill. Comp. Stat. Ann. 5/18-2(a)(2) (2010). Presentence Investigation Report (PSR) ¶¶ 31, 41-43; Pet. App. 18. The ACCA increases the penalty for unlawful firearm possession to 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 separate occasions, and defines "violent felony" to include, inter alia, any crime punishable by more than one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(1) and (2)(B)(i).

Petitioner objected to his ACCA classification on the theory that both the Iowa willful-injury statute and the Illinois armed-robbery statute do not qualify as violent felonies. D. Ct. Doc. 87, at 5-8, 11-13 (Apr. 30, 2021); Sent. Tr. 4-5. The district court overruled his objections. Pet. App. 9. However, although the Probation Office had calculated an advisory guidelines range of 262-327 months, the court varied downward and imposed a 240-month sentence. Id. at 18; see id. at 2.

2. The court of appeals affirmed. Pet. App. 18-26.

a. In addressing petitioner's challenge to his sentence, the court of appeals first found that petitioner's Iowa willful-injury conviction qualifies as an ACCA violent felony. Pet. App. 18-22. The court explained that the Iowa statute at issue prohibits a category of unjustified and intentional acts that "cause[] serious injury to another." Id. at 18 (quoting Iowa Code

§ 708.4(1) (2014)). And the court noted that the Iowa statute defines "serious injury" to include, inter alia, "[d]isabling mental illness." Id. at 19 (quoting Iowa Code § 702.18 (2014)). But the court rejected petitioner's contention that "the inclusion of 'disabling mental illness'" in the definition of "serious injury" renders the Iowa statute "facially overbroad because a defendant can cause disabling mental illness without 'the use, attempted use, or threatened use of physical force against the person of another.'" Id. at 20 (citation omitted).

The court of appeals "f[ou]nd the answer to th[e] question in controlling Eighth Circuit precedents, interpreted in light of [this] Court's caution that a showing of overbreadth[] 'requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" Pet. App. 20 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)). It relied in particular on United States v. Quigley, 943 F.3d 390 (8th Cir. 2019), in which neither the defendant nor the court had "identified any Iowa cases where an individual was convicted of assault with intent to inflict serious injury without having at least threatened to use physical force." Pet. App. 21 (quoting Quigley, 943 F.3d at 394) (brackets omitted).

While the court noted petitioner's reliance on an Eighth Circuit immigration decision holding that "'[o]verbroad statutory

language alone is sufficient to establish that [a] statute does not qualify' under the force clause," Pet. App. 21 (citing Gonzalez v. Wilkinson, 990 F.3d 654, 660 (8th Cir. 2021)), the court observed that the decision had not been applied "in an ACCA or career offender force clause case," ibid. And the court determined that petitioner's reliance on this Court's decision in United States v. Taylor, 142 S. Ct. 2015 (2022), was misplaced because Taylor "involved 'only whether the elements of one federal law align with those prescribed in another,'" whereas this case involves a question of "'how a state court would interpret its own State's law.'" Pet. App. 21 (quoting Taylor, 142 S. Ct. at 2025).

b. The court of appeals also found that petitioner's Illinois armed-robbery convictions qualify as ACCA violent felonies. Pet. App. 22-24. The court recognized that this Court in Borden v. United States, 141 S. Ct. 1817 (2021), held that "offenses with a mens rea of recklessness do not qualify as 'violent felonies'" under the ACCA, Pet. App. 22 (citation omitted). But the court observed that the Illinois armed-robbery statute has "no explicit mens rea requirement" and is thus "not facially overbroad." Id. at 23. The court also identified "guidance from the [Illinois] Supreme Court as to the mens rea element inherent in armed robbery" as demonstrating that there is "no realistic probability that a person would be charged with and convicted of Illinois armed robbery based on merely reckless

conduct." Id. at 24 (citing People v. Jones, 595 N.E.2d 1071 (Ill. 1992)).

ARGUMENT

Petitioner contends (Pet. 18) that the court of appeals incorrectly classified state crimes with "plainly overbroad statutory language" as violent felonies under the ACCA. The court of appeals correctly affirmed petitioner's sentence, and its decision does not implicate any conflict warranting this Court's review. This Court has repeatedly and recently denied petitions for writs of certiorari raising similar arguments.[1] It should follow the same course here.

1. As a general matter, to determine whether a prior conviction supports a sentencing enhancement like the one in the ACCA, courts employ a "categorical approach" under which they

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[1] See, e.g., Womack v. United States, 143 S. Ct. 468 (2022) (No. 22-5892); Croft v. United States, 142 S. Ct. 347 (2021) (No. 21-297); Capelton v. United States, 141 S. Ct. 927 (2020) (No. 20-6122); Alexis v. Barr, 141 S. Ct. 845 (2020) (No. 20-11); Herrold v. United States, 141 S. Ct. 273 (2020) (No. 19-7731); Eady v. United States, 140 S. Ct. 500 (2019) (No. 18-9424); Hilario-Bello v. United States, 140 S. Ct. 473 (2019) (No. 19-5172); Bell v. United States, 140 S. Ct. 123 (2019) (No. 19-39); Luque-Rodriguez v. United States, 140 S. Ct. 68 (2019) (No. 19-5732); Frederick v. United States, 139 S. Ct. 1618 (2019) (No. 18-6870); Lewis v. United States, 139 S. Ct. 1256 (2019) (No. 17-9097); Vega-Ortiz v. United States, 139 S. Ct. 66 (2018) (No. 17-8527); Rodriguez Vazquez v. Sessions, 138 S. Ct. 2697 (2018) (No. 17-1304); Gathers v. United States, 138 S. Ct. 2622 (2018) (No. 17-7694); Espinoza-Bazaldua v. United States, 138 S. Ct. 2621 (2018) (No. 17-7490); Green v. United States, 138 S. Ct. 2620 (2018) (No. 17-7299); Robinson v. United States, 138 S. Ct. 2620 (2018) (No. 17-7188); Vail-Bailon v. United States, 138 S. Ct. 2620 (2018) (No. 17-7151).

compare the definition of the state offense with the definition of the relevant generic (or federal) offense. E.g., Mathis v. United States, 579 U.S. 500, 504 (2016). In evaluating the definition of a state offense, courts must look to the "interpretation of state law" by the State's highest court. Curtis Johnson v. United States, 559 U.S. 133, 138 (2010). If the definition of the state offense is broader than the relevant generic definition, the prior state conviction does not qualify. Mathis, 579 U.S. at 504.

This Court has cautioned, however, that the categorical approach "is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside'" the generic definition. Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)); see Taylor v. United States, 495 U.S. 575, 602 (1990) (holding that the categorical approach is satisfied if the "statutory definition [of the prior conviction] substantially corresponds to [the] 'generic' [definition]"); see also Quarles v. United States, 139 S. Ct. 1872, 1880 (2019) ("[T]he Taylor Court cautioned courts against seizing on modest state-law deviations from the generic definition of burglary.").

Petitioner contends (Pet. 4) that the Fifth and Eighth Circuits, in contrast to others, "require defendants to point to separate evidence where a statute was applied in an overbroad manner, even if the statute is plainly overbroad on its face."

See Pet. 14-17. But to the extent any disagreement exists, this case does not implicate it because the court of appeals did not explicitly adopt petitioner's view that the predicate state crimes are plainly overbroad. In assessing petitioner's Iowa willful-injury conviction, the court followed the Eighth Circuit's prior decision in United States v. Quigley, 943 F.3d 390 (2019). See Pet. App. 19, 21. Quigley does not stand for the proposition that an unambiguously overbroad statute should be narrowed to fit a generic federal definition unless the defendant can show a realistic probability of prosecutions for nongeneric conduct.

Although the court in Quigley explained that "[m]ere speculation" that Iowa's assault crime "could be applied to conduct not involving physical force does not take the offense outside the scope of the force clause," and found no "'realistic probability'" of such applications, it did not find the statute facially overbroad. 943 F.3d at 394 (citation omitted). In particular, it did not express the view that the terms "assault" and "serious injury," used in combination in the context of the particular Iowa statute at issue, would otherwise be understood to encompass conduct that involves no physical force, or threat of such force, at all. Ibid. Nor did the court of appeals express such a view about the Iowa willful-injury statute at issue in this case. See Pet. App. 21. And it is far from clear that standard principles of statutory interpretation would logically lead to the conclusion that Iowa's Class C felony prohibition -- with a ten-year maximum

sentence, Iowa Code § 902.9(1)(d) (2014) -- on "commit[ting] willful injury," through "an act which is not justified and which is intended to cause serious injury" and that in fact does "cause serious injury," would apply to a crime with no force-related component, akin to the pure verbal infliction of emotional distress, Iowa Code § 708.4(1) (2014).

Similarly, in assessing petitioner's Illinois armed-robbery convictions, the court of appeals did not conclude that the Illinois statute unambiguously prohibits reckless robbery yet nonetheless qualifies as a violent felony because petitioner failed to identify any actual prosecutions of reckless robbery. See Pet. App. 23-24. To the contrary, the court noted that "the Illinois armed robbery statute at issue ha[s] no explicit mens rea requirement" at all, and followed "guidance from the [Illinois] Supreme Court" interpreting the armed-robbery statute to exclude recklessness crimes. Ibid. (citing Jones, 595 N.E.2d at 1075). That state judicial construction, which federal courts are bound to follow, refuted petitioner's attempt to inject a recklessness mens rea into the statute. Ibid.; see Curtis Johnson, 559 U.S. at 138 (federal courts are "bound by [a state supreme court's] interpretation of state law, including its determination of the elements of" the offense). The court's observation that it could "see no realistic probability that a person would be charged with and convicted of Illinois armed robbery based on merely reckless

conduct," simply confirmed the court's understanding of the state statute. Pet. App. 24.[2]

The petition thus errs in simply taking as a given that the court of appeals employed a realistic-probability analysis to flout plain statutory text. Petitioner includes no meaningful analysis of whether his sweeping construction of the Iowa willful-injury statute is unambiguously required. Nor does petitioner engage with the Illinois decisional law interpreting the Illinois armed-robbery statute. Accordingly, because the question presented is not squarely implicated in this case, further review in this Court is unwarranted.

2. Petitioner similarly errs in asserting (Pet. 10-14) that the decision below conflicts with this Court's decisions in Taylor and Pereida v. Wilkinson, 141 S. Ct. 754 (2021). In Taylor, this Court declined to apply a realistic-probability analysis in the determination of whether a federal statute that the Court had construed "not [to] require proof of any of the elements" required by the elements clause in 18 U.S.C. 924(c)(3)(A) could nevertheless fit within that clause. 142 S. Ct. at 2025. As the court of

[2] Petitioner incorrectly asserts (Pet. 18) that "the Solicitor General has previously conceded that [petitioner's] Illinois robbery conviction includes a reckless mens rea, making it overbroad." The footnote to which he refers, U.S. Br. at 16 n.2, Borden v. United States, No. 19-5410 (June 8, 2020), identifies Illinois as a state whose criminal code provides for a default mens rea of recklessness. But that footnote does not concede that the default mens rea applies to the armed-robbery statute in particular, and Illinois decisional law suggests that it does not, see Jones, 595 N.E.2d at 1075.

appeals recognized (Pet. App. 21-22), this Court's discussion expressly distinguished the analysis of state statutes, which presents a "federalism concern" that justifies "consult[ing] how a state would interpret its own State's laws." Taylor, 142 S. Ct. at 2025. Petitioner's reliance on Taylor also presupposes that the state statutes in his case are facially overbroad. As discussed above, that premise is unsound.

Petitioner's reliance on Pereida is similarly misplaced. Petitioner contends (Pet. 13) that the Eighth Circuit has applied the categorical approach more favorably to the government in criminal cases than in immigration cases, which petitioner believes is inconsistent with Pereida's footnote stating that "while the ACCA's categorical approach demands certainty from the government, the INA's demands it from the alien," 141 S. Ct. at 766 n.7. But the burden-of-proof issue in Pereida is segregable from the analytical framework in which that proof operates, at issue here. And in any event, the Eighth Circuit immigration decision on which petitioner relies (Pet. 17) concluded only that the realistic-probability inquiry did not apply where "[t]he parties agree[d] that, on its face, the [relevant] Florida statute covers conduct that the federal [comparator] does not." Gonzalez, 990 F.3d at 658.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

J. BENTON HURST
Attorney

FEBRUARY 2023