

No. 17-8202

IN THE SUPREME COURT OF THE UNITED STATES

TRACY NEIL TRUELOVE, 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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QUESTION PRESENTED

Whether petitioner's prior convictions for robbery and aggravated robbery, in violation of Texas law, were convictions for "crime[s] of violence" under the commentary to former Sentencing Guidelines § 4B1.2 (2014).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. D1-D2) is not published in the Federal Reporter but is reprinted at 707 Fed. Appx. 281.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2017. The petition for a writ of certiorari was filed on March 21, 2018. 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 Northern District of Texas, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A1. He was sentenced to 180 months of imprisonment, to be followed by four years of supervised release. Id. at A2-A3. He did not appeal his conviction or sentence. Petitioner later filed a motion to vacate his sentence under 28 U.S.C. 2255, which the district court granted. Pet. App. B1. He was resentenced to 77 months of imprisonment, to be followed by three years of supervised release. Id. at C2-C3. The court of appeals affirmed. Id. at D1-D2.

1. On October 24, 2013, petitioner was a passenger in a car stopped by a police officer in Garland, Texas. D. Ct. Doc. 24, at 1 (Oct. 22, 2014). As the officer approached the car, he smelled a strong odor of marijuana and asked petitioner to step out. Id. at 2. The officer observed a 12-gauge shotgun on the floorboard of the car. Ibid. Petitioner admitted that he had possessed the firearm. Ibid.

A federal grand jury in the Northern District of Texas indicted petitioner on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Indictment 1. Petitioner pleaded guilty pursuant to a plea agreement. Plea Agreement 1-8; Pet. App. A1. In the plea agreement, petitioner waived his right to appeal his sentence, except to challenge "a

sentence exceeding the statutory maximum punishment" or "an arithmetic error at sentencing." Plea Agreement 5-6.

2. A conviction for violating Section 922(g)(1) has a default statutory sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment, 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as:

any crime punishable by imprisonment for a term exceeding one year * * * 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.

18 U.S.C. 924(e)(2)(B). The portion beginning with "otherwise" is known as the "residual clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

The Probation Office classified petitioner as an armed career criminal under the ACCA based on three prior Texas convictions -- namely, a 1996 conviction for robbery, a 1997 conviction for aggravated robbery, and a 2008 conviction for evading arrest. Presentence Investigation Report (PSR) ¶¶ 28, 33, 35, 40.

Petitioner did not object to his classification as an armed career criminal. C.A. ROA 274. The district court imposed the statutory-minimum ACCA sentence of 180 months of imprisonment. Pet. App. A2. Petitioner did not appeal his conviction or sentence.

3. In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the ACCA's residual clause is unconstitutionally vague. Id. at 2557. The Court subsequently made clear that Johnson's holding is a substantive rule that applies retroactively. See Welch, 136 S. Ct. at 1265.

Petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, arguing that Johnson's invalidation of the residual clause meant that his prior Texas conviction for evading arrest was not a violent felony. D. Ct. Doc. 46-1, at 7 (Apr. 21, 2016). The district court granted the motion and vacated petitioner's sentence. Pet. App. B1.

4. Applying the 2014 version of the Sentencing Guidelines, the Probation Office recalculated petitioner's advisory guidelines range. C.A. ROA 280-282; PSR ¶ 21. The Sentencing Guideline for a conviction under 18 U.S.C. 922(g)(1) provided for a base offense level of 24 if the defendant had at least two prior "felony convictions of either a crime of violence or a controlled substance offense." Sentencing Guidelines § 2K2.1(a)(2) (2014). Former Section 4B1.2(a) defined a "crime of violence" as:

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 burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Id. § 4B1.2(a); see id. § 2K2.1, comment. (n.1). The official commentary to Section 4B1.2(a) expressly provided that a crime of violence included "robbery." Id. § 4B1.2, comment. (n.1).

The Probation Office determined that petitioner's prior Texas convictions for robbery and aggravated robbery qualified as crimes of violence. C.A. ROA 280-281. Accordingly, the Probation Office assigned petitioner a base offense level of 24 under Section 2K2.1. Ibid. It then applied a three-level decrease for acceptance of responsibility. Id. at 281. Based on a total offense level of 21 and a criminal history category of VI, the Probation Office calculated an advisory guidelines range of 77 to 96 months of imprisonment. Ibid.

Petitioner objected to the classification of his prior Texas convictions for robbery and aggravated robbery as crimes of violence. C.A. ROA 283. Petitioner acknowledged that the commentary to former Section 4B1.2(a) listed "robbery" as a crime of violence. Id. at 287. But petitioner argued that "[t]he enumeration of robbery in the commentary was designed to interpret the residual clause" of former Section 4B1.2(a)(ii). Ibid. And petitioner contended that under Johnson, that clause -- like the

identically worded residual clause of the ACCA -- was unconstitutionally vague. Id. at 284-285. The district court overruled petitioner's objection, 9/30/16 Sent. Tr. 5, and sentenced petitioner to 77 months of imprisonment, id. at 12.

5. The court of appeals affirmed in an unpublished, nonprecedential opinion. Pet. App. D1-D2. The court rejected petitioner's contention that "the residual clause of former § 4B1.2 and accompanying commentary" are "invalid and void for vagueness following Johnson." Id. at D2. The court observed that in Beckles v. United States, 137 S. Ct. 886 (2017), this Court "declined to extend Johnson and held that 'the Guidelines are not subject to a vagueness challenge under the Due Process Clause.'" Pet. App. D2 (quoting Beckles, 137 S. Ct. at 892). Relying on pre-Johnson circuit precedent, the court of appeals determined that "Texas robbery and aggravated robbery qualify as enumerated crimes of violence under the former commentary to § 4B1.2." Ibid. (citing United States v. Santiesteban-Hernandez, 469 F.3d 376, 380 (5th Cir. 2006), abrogated on other grounds by United States v. Rodriguez, 711 F.3d 541 (5th Cir.) (en banc), cert. denied, 571 U.S. 989 (2013)). Having rejected petitioner's contention on the merits, the court found it unnecessary to address whether petitioner's appeal was barred by the appeal waiver in his plea agreement. Id. at 2 n.1.

ARGUMENT

Petitioner contends (Pet. 5-6) that Texas robbery and aggravated robbery are broader than the generic offense of robbery enumerated in the commentary to former Sentencing Guidelines § 4B1.2 (2014). He does not, however, seek plenary review of that issue. Rather, he asks (Pet. 6-8, 11) this Court to hold his petition for a writ of certiorari pending its disposition of various other cases. The Court has recently declined to hold similar petitions for writs of certiorari, see Lester v. United States, 138 S. Ct. 1604 (2018) (No. 17-8197); Blaylock v. United States, 138 S. Ct. 1584 (2018) (No. 17-8196); Morin v. United States, 138 S. Ct. 1583 (2018) (No. 17-8191), and it should follow the same course here. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that petitioner's prior Texas convictions for robbery and aggravated robbery were convictions for crimes of violence under former Section 4B1.2.

To determine whether a prior state conviction constitutes a crime of violence, a court generally applies the "categorical approach," which involves comparing the definition of the state offense to the relevant federal definition (here, the definition of "generic" robbery, an offense enumerated in the commentary to former Section 4B1.2). Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); see Taylor v. United States, 495 U.S. 575, 602 (1990).

As the court of appeals explained in United States v. Santiesteban-Hernandez, 469 F.3d 376 (5th Cir. 2006), abrogated on other grounds by United States v. Rodriguez, 711 F.3d 541 (5th Cir.) (en banc), cert. denied, 571 U.S. 989 (2013), “the generic form of robbery ‘may be thought of as aggravated larceny,’ containing at least the elements of ‘misappropriation of property under circumstances involving immediate danger to the person.’” Id. at 380 (brackets and citation omitted). The “elements” of Tex. Penal Code Ann. § 29.02 (West 1994) -- which define robbery for purposes of both simple robbery and aggravated robbery, see id. § 29.03 -- “substantially correspond to the basic elements of the generic offense, in that they both involve theft and immediate danger to a person.” 469 F.3d at 381. Thus, “Texas robbery and aggravated robbery qualify as enumerated crimes of violence under the former commentary to § 4B1.2.” Pet. App. D2.

Petitioner argued below that former Section 4B1.2(a)’s residual clause is unconstitutionally vague and that the commentary to that section “should be disregarded” because it was “designed to effectuate the residual clause.” Pet. C.A. Br. 20; see id. at 16-21. This Court in Beckles v. United States, 137 S. Ct. 886 (2017), however, held that “the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)’s residual clause is not void for vagueness.” Id. at 895. Beckles thus forecloses petitioner’s

contention that "the Commentary's enumeration of 'robbery' must * * * be set aside." Pet. C.A. Br. 19.

2. Petitioner contends for the first time in his petition for a writ of certiorari (Pet. 5-6) that Texas robbery and aggravated robbery are broader than the generic offense of robbery enumerated in the commentary to former Section 4B1.2. Petitioner does not suggest, however, that the issue independently warrants this Court's review. Rather, petitioner asks (Pet. 6-8, 11) this Court to hold his petition pending the disposition of other petitions for writs of certiorari and then consider whether to grant his petition, vacate the judgment below, and remand for further proceedings in light of those dispositions.

No need exists to hold the petition for a writ of certiorari in this case pending the Court's disposition of another case. The Court has already denied review in two of the cases petitioner identifies (Pet. 7) -- Martinez-Cerda v. United States, No. 17-7173 (Apr. 30, 2018), and Allen v. United States, No. 17-5684, (May 21, 2018). The two remaining cases petitioner identifies (Pet. 6-7) -- United States v. Stitt, cert. granted, No. 17-765 (Apr. 23, 2018), and Quarles v. United States, petition for cert. pending, No. 17-778 (filed Nov. 24, 2017) -- involve questions concerning the definition of generic burglary, not generic robbery. This Court's disposition of those cases thus will not affect the court of appeals' determination that Texas robbery and aggravated robbery qualify as crimes of violence. Indeed, this Court denied

a petition for a writ of certiorari presenting the identical question here on the same day that it granted review in Stitt. See Lester, supra (No. 17-8197).

Nor does any reason exist to hold the petition for a writ of certiorari in this case pending the Court's disposition of Stokeling v. United States, cert. granted, No. 17-5554 (Apr. 2, 2018). The question presented in Stokeling is whether a defendant's prior conviction for robbery under Florida law satisfies the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i) -- a clause worded identically to the elements clause of Section 4B1.2(a)(1). Whether robbery under the law of a particular State "has as an element the use, attempted use, or threatened use of physical force against the person of another" under the elements clause of the ACCA or Sentencing Guidelines § 4B1.2(a)(1) (2014) presents a different question from whether it qualifies as generic robbery. Indeed, the Fourth Circuit in United States v. Gattis, 877 F.3d 150 (2017), cert. denied, 138 S. Ct. 1572 (2018), concluded that North Carolina robbery qualifies as generic robbery, id. at 160, even though it had previously determined that North Carolina robbery does not satisfy the ACCA's elements clause, see id. at 158 (discussing United States v. Gardner, 823 F.3d 793, 803-804 (4th Cir. 2016)). The Ninth Circuit in United States v. Molinar, 881 F.3d 1064 (2018), petition for cert. pending, No. 17-8443 (filed Apr. 4, 2018), likewise concluded that Arizona robbery qualifies as generic robbery, id. at 1070-1074, even though

it was of the view that neither Arizona robbery nor the specific Florida robbery statute at issue in Stokeling satisfies the ACCA's elements clause, id. at 1068-1070; United States v. Geozos, 870 F.3d 890, 898-901 (2017). And after granting review in Stokeling, this Court denied several petitions for writs of certiorari seeking review of issues relating to the definition of generic "robbery" under the Guidelines. See Lester, supra (No. 17-8197); Blaylock, supra (No. 17-8196); Morin, supra (No. 17-8191).

3. As noted above, petitioner does not seek plenary review of whether his prior Texas convictions for robbery and aggravated robbery satisfy the definition of generic robbery under former Section 4B1.2. For several reasons, plenary review would not be warranted in any event.

a. First, this Court typically leaves issues of guidelines application in the hands of the Sentencing Commission, which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991). Given that the Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines. See ibid.; see also United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue

to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.”).

Indeed, the “crime of violence” definition at issue here exemplifies the Commission’s process. Effective August 2016, the Commission amended Section 4B1.2 to eliminate the residual clause in Section 4B1.2(a)(2) and to include robbery as an enumerated offense in Section 4B1.2(a)(1) rather than the commentary. See 81 Fed. Reg. 4741, 4741-4743 (Jan. 27, 2016). The recent amendments to Section 4B1.2 illustrate the Commission’s continuing attention to the Guidelines in general and the definition of a crime of violence in particular. This case presents no reason for this Court to deviate from its usual practice of declining to review questions of guidelines interpretation.

b. Second, the court of appeals’ decision does not conflict with the decision of another court of appeals. The Ninth Circuit’s decision in United States v. Esparza-Herrera, 557 F.3d 1019 (2009) -- which petitioner cites (Pet. 7) -- concerned whether Arizona aggravated assault satisfies the definition of generic aggravated assault, 557 F.3d at 1022-1025. Petitioner does not identify any conflict on whether Texas robbery or aggravated robbery satisfies the definition of generic robbery.

c. Third, this case would be a poor vehicle for further review. Petitioner did not contend below that Texas robbery and aggravated robbery are broader than the generic offense of robbery. Petitioner’s contention would thus be reviewable, if at all, only

for plain error. See Puckett v. United States, 556 U.S. 129, 135 (2009); Fed. R. Crim. P. 52(b).

In addition, petitioner waived the right to appeal his sentence except as provided in his plea agreement. Plea Agreement 5-6. Although the court of appeals did not need to reach the issue, Pet. App. D2 n.1, neither exception in the plea agreement -- for sentences exceeding the statutory maximum and for arithmetic errors, Plea Agreement 5 -- applies here. Petitioner argues (Pet. 9-10) that the appeal waiver may be unenforceable because he agreed to it before this Court's decisions in Johnson v. United States, 135 S. Ct. 2551 (2015), and Mathis v. United States, 136 S. Ct. 2243 (2016). But subsequent developments in the law do not undermine the fact that petitioner's appeal waiver was knowing and voluntary. See, e.g., Sanford v. United States, 841 F.3d 578, 580 (2d Cir. 2016) (per curiam). Petitioner's reliance (Pet. 9) on Smith v. Blackburn, 632 F.2d 1194 (5th Cir. 1980) (per curiam), United States v. Troxler, 390 Fed. Appx. 363 (5th Cir. 2010) (per curiam), and United States v. McBride, 826 F.3d 293 (6th Cir. 2016), cert. denied, 137 S. Ct. 830 (2017), is misplaced because none of those cases involved an appeal waiver.

Moreover, this Court's resolution of the question presented would not affect the outcome of this case. Even if petitioner's prior Texas convictions for robbery and aggravated robbery did not satisfy the definition of generic robbery, they would still qualify as crimes of violence under the residual clause of Sentencing

Guidelines § 4B1.2(a) (2014). This Court upheld the constitutionality of Section 4B1.2(a)'s residual clause in Beckles, 137 S. Ct. at 897. And under circuit precedent -- which petitioner does not challenge -- Texas robbery satisfies that clause because it "involves conduct that presents a serious potential risk of physical injury to another." Sentencing Guidelines § 4B1.2(a)(2) (2014); see United States v. Davis, 487 F.3d 282, 287 (5th Cir. 2007) (concluding that Texas robbery satisfies the ACCA's residual clause); United States v. Mohr, 554 F.3d 604, 609 n.4 (5th Cir.) (explaining that the court of appeals applies "holdings under the residual clause of the ACCA to analyze the definition of crimes of violence under § 4B1.2"), cert. denied, 130 S. Ct. 56 (2009). Thus, regardless of this Court's resolution of the question presented, the courts below correctly determined that petitioner's prior Texas convictions for robbery and aggravated robbery qualify as crimes of violence under former Section 4B1.2(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2018