

IN THE SUPREME COURT OF THE UNITED STATES

GENE WARD, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior conviction for robbery, in violation of North Carolina law, was a conviction for a "crime of violence" under the enumerated-offenses clause of Sentencing Guidelines § 4B1.2(a).

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No. 17-8345

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 707 Fed. Appx. 165.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 2017. The petition for a writ of certiorari was filed on March 27, 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 Eastern District of North Carolina, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. He was sentenced to 51 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1.

1. On October 16, 2015, a police officer saw petitioner enter a car in Greenville, North Carolina. Presentence Investigation Report (PSR) ¶ 4. The officer knew that petitioner had an outstanding probation violation for absconding from supervision. Ibid. The officer contacted another officer, who stopped the car. Plea Tr. 6. As petitioner exited the car, an officer observed a revolver on the floorboard of the backseat, where petitioner had been sitting. PSR ¶ 4. Petitioner admitted that the revolver was his. Ibid.

A federal grand jury in the Eastern District of North Carolina 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. Indictment 1. Petitioner pleaded guilty. Judgment 1.

2. The Sentencing Guideline for a conviction under 18 U.S.C. 922(g)(1) provides for a base offense level of 20 if the defendant has a prior "felony conviction of either a crime of violence or a controlled substance offense." Sentencing

Guidelines § 2K2.1(a)(4)(A); see PSR ¶ 33 (applying the 2016 version of the Guidelines). Section 4B1.2(a) defines a "crime of violence" as:

any offense under federal or state law, 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 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).

Sentencing Guidelines § 4B1.2(a); see id. § 2K2.1, comment. (n.1). Clause (i) is known as the "elements clause," and clause (ii) is known as the "enumerated offenses clause." 81 Fed. Reg. 4741, 4743 (Jan. 27, 2016).

The Probation Office determined that petitioner had a prior felony conviction that qualified as a "robbery" under Section 4B1.2(a)'s enumerated-offenses clause -- namely, a 2012 conviction for robbery in violation of North Carolina law. C.A. App. 47-48; see PSR ¶ 11. Accordingly, the Probation Office assigned petitioner a base offense level of 20 under Section 2K2.1(a)(4)(A). PSR ¶ 34. The Probation Office then applied a four-level enhancement because the firearm involved in petitioner's Section 922(g)(1) offense had an altered or obliterated serial number. PSR ¶ 35. The Probation Office also applied a three-level decrease for acceptance of responsibility. PSR ¶¶ 41-42. 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. PSR ¶ 45.

Petitioner objected to the classification of his prior robbery conviction as a crime of violence and to the four-level enhancement for an altered or obliterated serial number. Sent. Tr. 3-5. The district court sustained his objection to the four-level enhancement but overruled his objection to the classification of his prior robbery conviction. Ibid. The court found that petitioner had used "a 12-gauge shotgun" to "facilitat[e]" the robbery in question. Id. at 4. Given those "facts," id. at 3, the court determined that the robbery qualified as "a violent crime," id. at 4. The court calculated an advisory guidelines range of 51 to 63 months of imprisonment, id. at 5-6, and sentenced petitioner to 51 months, id. at 9.

3. The court of appeals affirmed. Pet. App. 1-2. The court observed that the district court had "improperly examined the facts underlying [petitioner's] prior conviction" in determining that it qualified as a crime of violence. Id. at 2. The court of appeals, however, found the error "harmless." Ibid. The court explained that under circuit precedent, "North Carolina common law robbery categorically qualifies [as] a crime of violence as defined in § 4B1.2(a)." Ibid. (citing United States v. Gattis, 877 F.3d 150 (4th Cir. 2017), cert. denied, 138 S. Ct. 1572 (2018)).

ARGUMENT

Petitioner contends (Pet. 8-14) that the court of appeals erred in determining that his prior conviction for North Carolina robbery is a crime of violence under the enumerated-offenses clause of Sentencing Guidelines § 4B1.2(a). The court's resolution of that guidelines issue is correct and does not conflict with any decision of this Court or of another court of appeals. The Court recently denied review of an identical question, see Gattis v. United States, 138 S. Ct. 1572 (2018) (No. 17-8044), and the same result is warranted here.

1. This case does not warrant review because it involves a claimed error in application of the advisory Sentencing Guidelines. Typically, this Court 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 aspect of the "crime of violence" definition at issue here was itself the product of recent amendments. Effective August 2016, the Commission amended Sentencing Guidelines § 4B1.2 to eliminate Section 4B1.2(a)(ii)'s residual clause and to expand its list of enumerated offenses to include robbery. See 81 Fed. Reg. at 4742-4743. 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.

2. In any event, the court of appeals correctly determined that petitioner's prior conviction for North Carolina robbery is a crime of violence under the enumerated-offenses clause of Sentencing Guidelines § 4B1.2(a).

To determine whether a prior conviction constitutes a crime of violence under the enumerated-offenses clause, a court generally applies the "categorical approach," which involves comparing the elements of the offense of conviction to the elements of the "generic" offense enumerated in the Guidelines (here, robbery). Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); see Taylor v. United States, 495 U.S. 575, 602 (1990). Under the categorical approach, courts "focus solely" on "the elements of the crime of conviction," not "the particular facts of the case." Mathis, 136 S. Ct. at 2248. If the offense of conviction consists

of elements that are the same as, or narrower than, the generic offense, the prior offense categorically qualifies as a crime of violence. Ibid.; see Taylor, 495 U.S. at 602 (explaining that the state offense of conviction qualifies if it “substantially corresponds” to the generic offense).

That is the case here. As the court of appeals explained in United States v. Gattis, 877 F.3d 150 (4th Cir. 2017), cert. denied, 138 S. Ct. 1572 (2018), “generic robbery is defined as the ‘misappropriation of property under circumstances involving immediate danger to the person.’” Id. at 156 (quoting 3 Wayne R. LaFare, Substantive Criminal Law § 20.3, at 173 (2d ed. 2003)) (brackets omitted). And “the ‘immediate danger’ element in that definition is categorically satisfied by the taking of property ‘from a person or a person’s presence by means of force or putting in fear.’” Id. at 157 (quoting 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)). Robbery under North Carolina law “[t]rack[s] this generic definition” because “North Carolina defines robbery as the ‘felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear.’” Id. at 158 (quoting State v. Smith, 292 S.E.2d 264, 270 (N.C.), cert. denied, 459 U.S. 1056 (1982)).

Petitioner nevertheless contends that "North Carolina common law robbery is broader than generic robbery because, unlike generic robbery, it encompasses any theft that involves 'even minimal contact' with the victim." Pet. 11-12 (quoting United States v. Gardner, 823 F.3d 793, 803 (4th Cir. 2016)). In support of that contention, petitioner cites (Pet. 13) the North Carolina Court of Appeals' unpublished decision in State v. Chance, 662 S.E.2d 405, 2008 WL 2415981 (June 17, 2008) (Tbl.). But as the court of appeals in Gattis explained, the court in Chance "affirmed the defendant's common law robbery conviction based on evidence that the defendant had not only grabbed a box of cigarettes out of the victim's hand, but had also 'pushed [the victim's] hand off the box . . . in order to get possession of it.'" Gattis, 877 F.3d at 159 (quoting Chance, 2008 WL 2415981, at *3) (brackets in original). The defendant in Chance thus did "more than stealthily pickpocket or suddenly snatch"; rather, he "direct[ed] a degree of force towards the victim beyond the minimum necessary to remove the item from the victim's grasp" -- the same degree of force necessary to commit generic robbery. Ibid.

3. Contrary to petitioner's contention (Pet. 10), the court of appeals' decision does not conflict with the decision of any other court of appeals. Petitioner does not identify any conflict on whether North Carolina robbery is a crime of violence under the enumerated-offenses clause of Section 4B1.2(a). Indeed, the Third Circuit agrees with the decision below that North Carolina robbery

is a crime of violence under that clause. United States v. Graves, 877 F.3d 494, 504 (2017).

Instead, petitioner contends (Pet. 10) that the decision below conflicts with the decisions of three other circuits, which, according to petitioner, have each held that “generic robbery requires more than minimal force.” That contention is mistaken. All three of those other circuits have adopted the same definition of generic robbery that the court of appeals adopted in Gattis -- namely, that generic robbery is the “misappropriation of property under circumstances involving immediate danger to the person.” 877 F.3d at 156 (brackets and citation omitted); see United States v. Yates, 866 F.3d 723, 734 (6th Cir. 2017); United States v. Becerril-Lopez, 541 F.3d 881, 891 (9th Cir. 2008), cert. denied, 555 U.S. 1121 (2009); Santiesteban-Hernandez, 469 F.3d at 380.

The outcomes in the cases petitioner cites (Pet. 10) from those other circuits arise not from any disagreement about the definition of generic robbery, but from differences in the definition of robbery in various States. In Yates, for example, the Sixth Circuit held that Ohio robbery does not qualify as generic robbery because (unlike North Carolina robbery, see Gattis, 877 F.3d at 159-160) Ohio robbery can be committed by “snatch[ing] property from the owner’s grasp so suddenly that the owner cannot offer any resistance to the taking.” Yates, 866 F.3d at 734 (citation omitted). In Becerril-Lopez, the Ninth Circuit held that California robbery does not qualify as generic robbery

because California robbery encompasses not just takings accomplished by threats to persons, but also takings accomplished by "mere threats to property." 541 F.3d at 891. And in Santiestaban-Hernandez, the Fifth Circuit held that Texas robbery does qualify as generic robbery, even though Texas does not "articulat[e] the requisite level of immediate danger" in terms of "an act of force" like "the majority of states" do. 469 F.3d at 381. None of those decisions conflicts with the decision below.

4. No need exists to hold the petition for a writ of certiorari pending this Court's disposition of Stokeling v. United States, cert. granted, No. 17-5554 (Apr. 2, 2018). Two weeks after this Court granted review in Stokeling, it denied a petition for a writ of certiorari in Gattis, supra (No. 17-8044), presenting the same question that petitioner raises in this case. The Court should likewise deny the petition for a writ of certiorari here.

The question presented in Stokeling is whether a defendant's prior conviction for robbery under Florida law satisfies the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i) -- a clause worded identically to the elements clause of Section 4B1.2(a)(i). 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 of the ACCA or Sentencing Guidelines § 4B1.2(a)(i) presents a different question from whether it qualifies as generic robbery. Indeed, the court of appeals in

Gattis concluded that North Carolina robbery qualifies as generic robbery, 877 F.3d 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 Gardner, 823 F.3d at 803-804). 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 after having determined 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). This Court's resolution of Stokeling thus will not affect the court of appeals' conclusion that North Carolina robbery qualifies as a crime of violence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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