

IN THE SUPREME COURT OF THE UNITED STATES

ROGELIO SANCHEZ MOLINAR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

KIRBY A. HELLER
Attorney

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

QUESTION PRESENTED

Whether petitioner's prior conviction for attempted armed robbery, in violation of Arizona law, was a conviction for a "crime of violence" under the commentary to former Sentencing Guidelines § 4B1.2 (2014).

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No. 17-8443

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-29a) is reported at 881 F.3d 1064. A separate memorandum opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 704 Fed. Appx. 629.

JURISDICTION

The amended judgment of the court of appeals was entered on February 5, 2018. A petition for rehearing was denied on that date (Pet. App. 4a). The petition for a writ of certiorari was filed on April 4, 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 District of Arizona, petitioner was convicted on two counts of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g) (1) and 924(a) (2). Judgment 1. He was sentenced to 44 months of imprisonment, to be followed by three years of supervised release. Judgment 1-2. The court of appeals affirmed. Pet. App. 1a-29a.

1. On June 10, 2013, petitioner sold dozens of rounds of ammunition to a pawn shop. Presentence Investigation Report (PSR) ¶ 3. Two months later, petitioner was arrested on charges of trafficking in stolen property. PSR ¶ 4. Police officers executed a search warrant at petitioner's home, where they found additional rounds of ammunition. Ibid.

A federal grand jury in the District of Arizona indicted petitioner on two counts of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g) (1) and 924(a) (2). Indictment 1-2. Petitioner pleaded guilty to both counts. 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) (2014). At the time of petitioner's sentencing, 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); Pet. App. 5a n.2 (applying the 2014 version of the Guidelines). The official commentary to Section 4B1.2(a) expressly provided that crimes of violence included "robbery" and "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." Sentencing Guidelines § 4B1.2, comment. (n.1) (2014).

The Probation Office determined that petitioner had a prior felony conviction that qualified as a crime of violence -- namely, a 2009 conviction for attempted armed robbery in violation of Arizona law. PSR ¶¶ 9, 24. Accordingly, the Probation Office assigned petitioner a base offense level of 20 under Section 2K2.1. PSR ¶ 9. It then applied a three-level decrease for acceptance of responsibility. PSR ¶¶ 16-17. Based on a total offense level of 17 and a criminal history category of V, the Probation Office calculated an advisory guidelines range of 46 to 57 months of imprisonment. PSR ¶ 61.

Petitioner objected to the classification of his prior attempted armed robbery conviction as a crime of violence. D. Ct. Doc. 39, at 1-21 (Aug. 12, 2015). The district court overruled

petitioner's objection and adopted the Probation Office's calculation of his advisory guidelines range. Sent. Tr. 22-23. The court then granted a downward variance and sentenced petitioner to 44 months of imprisonment. Id. at 34.

3. The court of appeals affirmed. Pet. App. 1a-29a.

a. The court of appeals observed that in United States v. Taylor, 529 F.3d 1232 (9th Cir. 2008), it had determined that armed robbery under Arizona law has as an element "the threat or use of [physical] force" and therefore qualifies as a crime of violence under the elements clause of Section 4B1.2(a)(1). Pet. App. 7a (quoting Taylor, 529 F.3d at 1237). The court took the view, however, that its decision in Taylor was implicitly abrogated by this Court's subsequent decision in Johnson v. United States, 559 U.S. 133 (2010), which construed the term "physical force" in the identically worded elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), to mean "violent force -- that is, force capable of causing physical pain or injury to another person," Johnson, 559 U.S. at 140. See Pet. App. 8a, 12a. The court of appeals reasoned that although Arizona courts have held that Arizona robbery entails the threat or use of force "'intended to overpower the party robbed,'" they "have not required this 'overpowering' force to be violent in the sense discussed * * * in Johnson." Id. at 10a (citation omitted). The court of appeals also reasoned that in Arizona, armed robbery "is no more violent within the meaning of Johnson than robbery itself," ibid.,

because “merely possessing a fake gun during the commission of a robbery, even without mentioning or brandishing it, would constitute armed robbery,” id. at 9a. The court thus concluded that “a conviction for robbery -- or armed robbery -- in Arizona” can “no longer be considered” a crime of violence under the elements clause of Section 4B1.2(a)(1). Id. at 12a.

The court of appeals determined, however, that “a conviction for robbery under Arizona law” nevertheless qualified as a crime of violence under Sentencing Guidelines § 4B1.2 (2014) because it “is equivalent to generic robbery,” an offense “enumerated in the commentary.” Pet. App. 13a. The court observed that it had previously defined “generic robbery as ‘aggravated larceny, containing at least the elements of misappropriation of property under circumstances involving immediate danger to the person.’” Ibid. (quoting United States v. Becerril-Lopez, 541 F.3d 881, 891 (9th Cir. 2008), cert. denied, 555 U.S. 1121 (2009)). And the court explained that the element of “immediate danger to the person” is satisfied by the taking of property “from a person or a person’s presence by means of force or putting in fear.” Id. at 14a. Surveying Arizona case law, the court determined that Arizona robbery must involve “[f]orce sufficient to overcome resistance” or conduct “reasonably calculated to put the victim in fear,” either of which “satisfies the generic definition of robbery.” Id. at 18a, 20a. The court thus concluded that both robbery and armed robbery under Arizona law are “coextensive with generic

robbery.” Id. at 20a. The court further concluded that because “Arizona attempt is coextensive with generic attempt,” ibid., Arizona attempted armed robbery is a crime of violence under Section 4B1.2, id. at 21a.

b. Judge Fletcher dissented, arguing that the court of appeals had “defined force and fear so broadly that neither word necessarily entails” “circumstances involving immediate danger to the person,” as the definition of generic robbery under circuit precedent required. Pet. App. 29a; see id. at 23a-29a.

ARGUMENT

Petitioner contends (Pet. 5-15) that the court of appeals erred in determining that his prior conviction for attempted armed robbery under Arizona law is a crime of violence under former Sentencing Guidelines § 4B1.2 (2014). 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. In addition, this case would be a poor vehicle for review because this Court’s resolution of the question presented would not affect the outcome of this case. The petition for a writ of certiorari should be denied.

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 Sentencing 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 Sentencing Guidelines § 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, 4742-4743 (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.

2. In any event, the court of appeals correctly determined that petitioner’s prior conviction for Arizona attempted armed

robbery is a crime of violence under the commentary to former Sentencing Guidelines § 4B1.2 (2014).

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). 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).

Applying those principles here, the court of appeals correctly determined that "Arizona Robbery (and thus armed robbery) is a categorical match to generic robbery." Pet. App. 13a. As the court explained, "generic robbery" is defined as the "'misappropriation of property under circumstances involving immediate danger to the person.'" Ibid. (citation omitted). And "[t]he majority of states implement the notion of immediate danger to the person by 'requiring property to be taken from a person or

a person's presence by means of force or putting in fear.'" Id. at 14a (brackets and citation omitted). "Arizona robbery is coextensive with generic robbery," id. at 18a, because under Arizona law, robbery must involve either "[f]orce sufficient to overcome resistance," ibid., or conduct "reasonably calculated to put the victim in fear," id. at 20a; see Ariz. Rev. Stat. § 13-1902(A) ("A person commits robbery if * * * such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.").

Petitioner contends that the definition of generic robbery adopted by the decision below will require courts to engage in the type of "circumstance-specific review" that "the categorical approach precludes." Pet. 6 (quoting Descamps v. United States, 570 U.S. 254, 277 (2013)). That contention is mistaken. The court of appeals determined that "Arizona Robbery (and thus armed robbery) is a categorical match to generic robbery." Pet. App. 13a. Under the decision below, Arizona robbery (and armed robbery) will therefore qualify as crimes of violence, regardless of the circumstances of any particular conviction.

Petitioner also contends that the definition of generic robbery adopted by the decision below is "too inscrutable to apply evenhandedly at sentencing," thereby making it "impossible" to "'correctly calculat[e] the applicable Guidelines range.'" Pet. 8 (citation omitted). As petitioner acknowledges (ibid.),

however, "the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause." Beckles v. United States, 137 S. Ct. 886, 890 (2017). And in any event, petitioner's claim (Pet. 8) that the court of appeals' definition of generic robbery is "too inscrutable to apply" cannot be squared with the experience of a "majority of states," Pet. App. 14a, which have long applied the same definition of robbery in their respective jurisdictions.

Petitioner likewise errs in asserting that the court of appeals' view of the "force" necessary to commit generic robbery "effectively read[s] the element of 'immediate danger to the person' out of the definition of generic robbery." Pet. 10 (quoting Pet. App. 29a) (Fletcher, J., dissenting). The degree of force that the court found necessary -- "force sufficient 'to compel acquiescence to the taking of or escaping with the property,'" Pet. App. 15a (citation omitted) -- is consistent with the "immediate danger" requirement. The court's definition of generic robbery thus reflects the elements of "the offense as commonly understood." Descamps, 570 U.S. at 257.

3. Contrary to petitioner's contention (Pet. 10), the court of appeals' decision does not conflict with the decision of the Sixth Circuit in United States v. Yates, 866 F.3d 723 (2017). In Yates, the Sixth Circuit adopted the same definition of generic robbery that the court of appeals adopted here -- namely, that generic robbery is the "misappropriation of property under

circumstances involving immediate danger to the person.” Id. at 734 (citation omitted); see Pet. App. 13a. Although the Sixth Circuit determined that Ohio robbery does not satisfy that definition, it did so only because Ohio robbery (unlike Arizona robbery, see Pet. App. 10a-11a) 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). The outcomes in Yates and this case thus reflect differences in how Ohio and Arizona define robbery, not any disagreement about the definition of generic robbery.

4. This case would be a poor vehicle for review because this Court’s resolution of the question presented would not affect the outcome of this case. Even if petitioner’s prior conviction for Arizona attempted armed robbery did not satisfy the definition of generic robbery, it would still qualify as a crime of violence under the residual clause of former 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. Arizona attempted armed 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 Pet. App. 19a-20a (finding that Arizona robbery involves “the sort of face-to-face confrontation that inherently presents a risk of violence” and citing United States v. Prince, 772 F.3d 1173, 1178 (9th Cir. 2014), vacated, 135 S. Ct. 2936

(2015), which had determined that California attempted robbery satisfied the ACCA's residual clause). Thus, regardless of this Court's resolution of the question presented, the court of appeals correctly affirmed the district court's calculation of the applicable advisory guidelines range.

5. 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). As petitioner himself acknowledges (Pet. 15), "this Court will not resolve the questions presented here in Stokeling." The question presented in Stokeling is whether a defendant's prior conviction for robbery under Florida law satisfies the elements clause of the ACCA, 18 U.S.C. 924(e)(2)(B)(i) -- a clause worded identically to the elements clause of Section 4B1.2(a)(1). The court of appeals below has already held that the specific Florida robbery statute at issue in Stokeling does not satisfy the ACCA's elements clause, see United States v. Geozos, 870 F.3d 890, 898-901 (9th Cir. 2017), but that holding did not control the outcome here.

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 court of appeals in this case concluded that "Arizona robbery is coextensive with generic robbery," Pet. App. 20a, even

after having determined that Arizona robbery does not satisfy Section 4B1.2(a)'s elements clause, id. at 12a; see id. at 16a-17a (finding "no indication" that the "definition of 'violent force' in Johnson [v. United States, 559 U.S. 133 (2010),] * * * should apply to the understanding of 'force' in the definition of generic robbery"). This Court's resolution of Stokeling thus will not affect the court of appeals' determination that Arizona robbery qualifies as a crime of violence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

KIRBY A. HELLER
Attorney

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