

No. 17-8676

IN THE SUPREME COURT OF THE UNITED STATES

ERNEST KING, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's prior convictions for armed robbery, in violation of Fla. Stat. § 812.13 (1989) and Fla. Stat. § 812.13 (1995), were convictions for "violent felon[ies]" under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D1-D6) is not published in the Federal Reporter but is reprinted at 721 Fed. Appx. 913. The order of the district court (Pet. App. A1-A21) is not published in the Federal Supplement but is available at 2016 WL 592798.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2018. The petition for a writ of certiorari was filed on April 24, 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 Middle District of Florida, petitioner was convicted on one count of conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 841(b)(1)(A) and 846; one count of attempting to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 841(b)(1)(A) and 846; one count of carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). 6-cr-110 Judgment 1. He was sentenced to 300 months of imprisonment, to be followed by ten years of supervised release. Id. at 2-3. Petitioner did not appeal his conviction or sentence. Pet. App. A3. In 2015, he filed a motion to vacate his sentence under 28 U.S.C. 2255, which the district court denied in part and dismissed in part. Pet. App. A1-A20. The court of appeals granted a certificate of appealability (COA), id. at B1-B2, and affirmed, id. at D1-D6.

1. In 2006, petitioner and two others agreed to steal cocaine from a drug stash house in Florida. Presentence Investigation Report (PSR) ¶¶ 13-16. On the day of the planned robbery, the three of them met with the undercover federal agent who had told them about the stash house. PSR ¶¶ 17-18. All three were armed. PSR ¶ 17. The undercover agent led them to another location, where a SWAT team arrested them. PSR ¶ 18.

A federal grand jury in the Middle District of Florida returned a superseding indictment charging petitioner with one count of conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 841(b)(1)(A)(ii) and 846; one count of attempting to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 841(b)(1)(A)(ii) and 846; one count of carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) and 2; and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). 6-cr-110 Superseding Indictment 1-2, 4-5. Petitioner pleaded guilty to each count. 6-cr-110 Judgment 1.

2. A conviction for possession of a firearm by a felon, in violation of 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 first clause of that definition is commonly referred to as the "elements clause," and 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 without specifying which of petitioner's prior convictions qualified as ACCA predicates. PSR ¶¶ 40, 99. Petitioner did not object to that classification. Addendum to the PSR 1. The district court sentenced him to 240 months of imprisonment, to be served concurrently, on the felon-in-possession count and each of the two drug counts. 6-cr-110 Judgment 2. It also sentenced him to 60 months of imprisonment on the Section 924(c) count, to be served consecutively. Ibid. Petitioner did not appeal his conviction or sentence. Pet. App. A3.

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

In August 2015, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. 15-cv-2018 D. Ct. Doc. 1, at 1 (Aug. 28, 2015). Petitioner claimed, inter alia, that Samuel

Johnson's invalidation of the residual clause meant that he was no longer an armed career criminal under the ACCA. 15-cv-2018 D. Ct. Doc. 2, at 25-27 (Aug. 28, 2015). The government responded that petitioner still had three prior convictions that qualified as violent felonies under the ACCA's separate elements clause -- namely, a 1991 conviction for armed robbery, a 1991 conviction for resisting an officer with violence, and a 1996 conviction for armed robbery, all in violation of Florida law. 15-cv-2018 D. Ct. Doc. 13, at 10-12 (Jan. 12, 2016); see 15-cv-2018 D. Ct. Doc. 13-1, at 2-16, 20-23 (Jan. 12, 2016); PSR ¶¶ 48-49, 53.

The district court denied in part and dismissed in part petitioner's Section 2255 motion. Pet. App. A1-A20. Relying on circuit precedent, the court determined that the prior Florida convictions the government had identified satisfied the ACCA's elements clause. Id. at A7-A9 (citing United States v. Dowd, 451 F.3d 1244, 1255 (11th Cir.), cert. denied, 549 U.S. 941 (2006), and United States v. Hill, 799 F.3d 1318, 1322-1323 (11th Cir. 2015) (per curiam)). The court dismissed other claims raised in petitioner's Section 2255 motion as untimely. Id. at A14-A20. The court also denied a COA. Id. at A20-A21.

4. The court of appeals granted a COA on whether petitioner was erroneously sentenced as an armed career criminal in light of Samuel Johnson. Pet. App. B1-B2. Relying on circuit precedent, the court determined that petitioner's prior Florida robbery convictions qualify as violent felonies under the ACCA's elements

clause. Id. at D1-D6 (citing United States v. Fritts, 841 F.3d 937 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017)).

DISCUSSION

Petitioner contends (Pet. 4-7) that his prior convictions for armed robbery are not violent felonies under the ACCA's elements clause.* Although the court of appeals correctly rejected that contention, this Court is currently considering a related question in Stokeling v. United States, cert. granted, No. 17-5554 (oral argument scheduled for Oct. 9, 2018). The petition for a writ of certiorari should therefore be held pending the Court's decision in Stokeling and then disposed of as appropriate in light of that decision.

1. The court of appeals correctly determined that petitioner's prior convictions under Florida's robbery statute -- Fla. Stat. § 812.13 (1989) and Fla. Stat. § 812.13 (1995) -- are convictions for violent felonies under the ACCA's elements clause,

* Although petitioner (Pet. 2 n.2) and the courts below (Pet. App. A7-A9, D2) refer to petitioner's 1991 conviction as a conviction for "robbery," the state record shows that the conviction was for armed robbery under Fla. Stat. § 812.13(2)(b) (1989), a first-degree felony. See 15-cv-2018 D. Ct. Doc. 13-1, at 2-5. In any event, the distinction between robbery and armed robbery under Florida law does not matter for purposes of the ACCA's elements clause. Under Section 812.13(2), a defendant may be convicted of armed robbery without any showing that the weapon was used or displayed. Thus, in determining that armed robbery under Florida law qualifies as a violent felony, the court of appeals has not relied on the armed nature of the robbery. Rather, the court has reasoned that a Florida robbery conviction, "even without a firearm," satisfies the elements clause. United States v. Fritts, 841 F.3d 937, 940 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017).

which encompasses "any crime punishable by imprisonment for a term exceeding 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) (2) (B) (i).

Florida defines "robbery" as theft "by means of" either (1) "intimidation by assault or putting in fear" or (2) "force or violence." Robinson v. State, 692 So. 2d 883, 886 (Fla. 1997); see Fla. Stat. § 812.13(1) (1989, 1995) (defining robbery); Fla. Stat. § 812.13(2) (a)-(b) (1989, 1995) (providing for enhanced penalties "[i]f in the course of committing the robbery," the offender was armed). Petitioner does not dispute that the "intimidation" form of Florida robbery, which requires placing the victim in fear of bodily harm or injury, see, e.g., Brown v. State, 397 So. 2d 1153, 1155 (Fla. Dist. Ct. App. 1981), categorically satisfies the ACCA's elements clause. Contrary to petitioner's contention (Pet. 4-7), the "force or violence" form of Florida robbery does as well.

In Robinson, the Supreme Court of Florida addressed "whether the snatching of property by no more force than is necessary to remove the property from a person who does not resist" satisfies the "force or violence element required by Florida's robbery statute." 692 So. 2d at 884-885. The court surveyed Florida cases -- including McCloud v. State, 335 So. 2d 257 (Fla. 1976), Montsdoca v. State, 93 So. 157 (Fla. 1922), and various other appellate decisions dating back to 1903, see, e.g., Colby v. State,

35 So. 189 (Fla. 1903) -- and confirmed that "the perpetrator must employ more than the force necessary to remove the property from the person." Robinson, 692 So. 2d at 886. Instead, a defendant's conduct satisfies the "force or violence" element of Florida robbery only if it involved "force sufficient to overcome the victim's resistance." Id. at 887; see also ibid. ("Florida courts have consistently recognized that in snatching situations, the element of force as defined herein distinguishes the offenses of theft and robbery.").

Under Curtis Johnson v. United States, 559 U.S. 133 (2010), "physical force" for purposes of the ACCA's elements clause requires "violent force -- that is, force capable of causing physical pain or injury to another person." Id. at 140. Such force "might consist * * * of only that degree of force necessary to inflict pain -- a slap in the face, for example." Id. at 143. As the government's merits brief in Stokeling v. United States, supra, explains, the degree of force required under Florida's robbery statute -- "physical force" sufficient to "overcome" "resistance by the victim," Robinson, 692 So. 2d at 886 -- satisfies that standard. See U.S. Br. at 10-33, Stokeling v. United States, supra (No. 17-5554). Force sufficient to prevail in a physical contest for possession of the stolen item is necessarily force "capable" of "inflict[ing] pain" equivalent to "a slap in the face," Curtis Johnson, 559 U.S. at 140, 143; Florida robbery could not occur through "mere unwanted touching," id. at

142. The court of appeals therefore correctly determined that petitioner's prior convictions under Section 812.13 satisfy the ACCA's elements clause.

2. In Stokeling v. United States, supra, this Court will address whether a defendant's prior conviction for robbery, in violation of Fla. Stat. § 812.13 (1995), was a conviction for a violent felony under the ACCA's elements clause. Because the question presented in this case is related to the issue currently before this Court in Stokeling, the petition for a writ of certiorari should be held pending the Court's decision in Stokeling and then disposed of as appropriate in light of that decision. Should the petitioner in Stokeling prevail, this Court may wish to grant this petition for a writ of certiorari, vacate the judgment below in this case -- which is premised solely on the court of appeals' determination that Florida robbery is a violent felony under the ACCA, see Pet. App. D4-D6 -- and remand for a determination of whether the judgment should be reinstated on any alternative grounds or whether resentencing is warranted.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in Stokeling v. United States, cert. granted, No. 17-5554 (oral argument scheduled for Oct. 9, 2018), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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