IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2017

No.

JOSEPH VAN SACH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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April 26, 2018

QUESTION PRESENTED FOR REVIEW

Does Illinois robbery categorically require the use of force and thereby qualify as a violent felony under the Armed Career Criminal Act?

(This Court has granted certiorari to consider essentially the same question, although the question arose in the context of Florida's robbery statute. *Stokeling v. United States*, No. 17-5554, *cert. granted* April 2, 2018. The Court also has a pending petition raising this issue under the Illinois robbery statute. *Klikno v. United States*, No. 17-5018, *cert. filed* June 22, 2017.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Joseph Van Sach respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit denying relief is reported at *Van Sach v. United States*, 2017 WL 4842617 (7th Cir. Sep. 1, 2017), and is reprinted in the appendix to this petition. A. 1.[1] The district court's opinion is found at *Van Sach v. United States*, 2017 WL 987365 (N.D. Ill. Mar. 14, 2017), and is reprinted in the appendix. A. 4.

JURISDICTION

Van Sach sought post-conviction relief under 28 U.S.C. § 2255. The district court denied relief. *Van Sach v. United States*, 2017 WL 987365 (N.D. Ill. Mar. 14, 2017). Van Sach entered a

[1] "A. ___" indicates a reference to the Appendix to this petition. "R. __" indicates a reference to the district court record.

timely appeal. The Court of Appeals affirmed on September 1, 2017**.** *Van Sach v. United States*, 2017 WL 4842617 (7th Cir. Sep. 1, 2017). Van Sach filed a timely petition for rehearing and rehearing en banc, which was denied on November 28, 2017. A. 3. He timely moved for an extension to file a certiorari petition. He was given leave to file on or before April 27, 2018. *Van Sach v. United States*, No. 17A891. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 924(e)

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Ill. Rev. Stat. ch 38, §18–1(a) (1997)

(a) Robbery. A person commits robbery when he or she knowingly takes property, except a motor vehicle covered by Section 18-3 or 18-4, from the person or presence of another by the use of force or by threatening the imminent use of force

Ill. Rev. Stat. ch 38, §18–2(a) (1997)

(a) A person commits armed robbery when he or she violates Section 18-1 while he or she carries on or about his or her person, or is otherwise armed with a dangerous weapon.

INTRODUCTION

Mr. Van Sach was sentenced as an armed career criminal based on his prior conviction for Illinois armed robbery. This Court has recently granted certiorari in *Stokeling v. United States*, No. 17-5554, *cert. granted* April 2, 2018, to consider whether Florida robbery is a violent felony and counts as a predicate for armed career criminal sentencing. The Illinois robbery statute is essentially the same as the Florida robbery statute. Although Van Sach's conviction was for armed robbery, Van Sach's petition presents the same issue, and no others, as Stokeling's petition. As will be discussed below, the Illinois armed robbery statute does not require force above the level of force required for simple robbery, a proposition accepted by the Seventh Circuit's decision below. A.1. Van Sach requests that this Court hold his petition for resolution in light of the Court's anticipated decision in *Stokeling*.

STATEMENT OF THE CASE

LEGAL BACKGROUND

Under 18 U.S.C. § 924(a)(2), the range of imprisonment for the offense of unlawful possession of a firearm after a previous felony conviction is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(1), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions . . . for a violent felony or a serious drug offense." ACCA defines a "violent felony" to include any crime punishable by more than one year that "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. § 924(e)(2)(B)(ii). ACCA includes alternative definitions of violent felony under its "force" clause and under its "residual" clause. This petition raises a question about the interpretation of ACCA's force clause.

If it is to count under the force clause, a prior conviction must categorically require "force" as an element of the offense. In making this inquiry, the court looks to the elements of the

proposed predicate offense, not the underlying facts of the specific conviction. *Taylor v. United States*, 495 U.S. 575, 600-01 (1990). A conviction counts under the force clause only if the offense always, that is, categorically, requires the use of force as defined in federal law. *Descamps v. United States,* 570 U.S. 254, 257 (2013).

In *Johnson v. United States*, 559 U.S. 133 (2010) (*Curtis Johnson*), a case involving a battery conviction, the Court interpreted the force clause as requiring not any physical force, but "***violent*** force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140 (emphasis in original). Thus, "physical force," as used in ACCA, means "a degree of power that would not be satisfied by the merest touching." *Id.* at 139. However, a "slap in the face" could cause enough pain to satisfy the definition of force. *Id.* at 143.

In 1997, when Van Sach committed his robbery offense, Illinois defined robbery as "knowingly tak[ing] property . . . from the person or presence of another by the use of force or by threatening the imminent use of force." Ill. Rev. Stat. ch 38, §18–

1(a) (1997). This language parallels the language of the Florida robbery statute in *Stokeling*, which prohibits the taking of property when "there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13. Van Sach's conviction was for Illinois armed robbery, but he raises the same issue raised in *Stokeling*, since Illinois armed robbery adds only the element that the robber "carries on or about his or her person, or is otherwise armed with a dangerous weapon." Ill. Rev. Stat. ch 38, §18–2(a) (1997). Under that provision, a defendant is not required to threaten the victim with a weapon or to make a reference to a weapon; the victim can be completely unaware that the robber is armed. *People v. Thomas*, 545 N.E.2d 289, 293 (Ill. App. 1989).

FACTUAL AND PROCEDURAL BACKGROUND

Van Sach was charged with a single count of possession of a firearm by a felon. He was convicted after a jury trial and sentenced as an armed career criminal to 210 months in prison.

The district court relied on an Illinois armed robbery conviction and two Illinois aggravated battery convictions. A. 5.

The Seventh Circuit affirmed his conviction and the sentence. *United States v. Van Sach*, 458 F.3d 694 (7th Cir. 2006), *cert. denied sub nom., Van Sach v. United States*, 549 U.S. 1174 (2007).

Van Sach later filed a motion under 28 U.S.C. § 2255, which the district court summarily dismissed. The district court also denied a certificate of appealability and denied in forma pauperis status. Van Sach appealed, *Van Sach v. United States*, No. 08-1808, but his appeal was dismissed for failure to pay the docketing fee.

After this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*), Van Sach petitioned the Seventh Circuit for permission to file a second section 2255 motion. *Van Sach v. United States*, No. 16-1977. The Seventh Circuit granted permission, and Van Sach's petition was transferred to the district court.

The district court denied relief. It ruled that since the Seventh Circuit had held that Illinois robbery is a violent felony, *United States v. Dickerson*, 901 F.2d 579 (7th Cir. 1990), it was bound by Circuit precedent. A. 4. The district court also considered itself bound by Circuit precedent on the aggravated battery convictions.

Initially, the district court granted a certificate of appealability only as to the aggravated battery convictions, but declined to grant a certificate as to the armed robbery conviction. A. 8. On a motion for reconsideration, the district court expanded the certificate of appealability to include the armed robbery conviction. A. 10.

After Van Sach's appeal was fully briefed, but without oral argument, the Seventh Circuit issued a short order, summarily affirming the decision below. A. 1. The Court agreed that Illinois robbery is an indivisible offense, and, noting the government's acquiescence, it accepted that the armed nature of the offense was not significant for its analysis. A. 1. The Court concluded that Illinois robbery applies only to takings of property

accomplished through violent force as measured by *Curtis Johnson*.

Van Sach filed a petition for rehearing with a suggestion of rehearing en banc. The Seventh Circuit called for a response by the government, but ultimately denied rehearing. A. 3.

Since Van Sach will receive relief if the Illinois robbery conviction does not count, he limits this petition for certiorari to the robbery conviction.

REASONS FOR GRANTING THE PETITION

The decision below misapplies this Court's definition of force as that term is used in the Armed Career Criminal Act. *Curtis Johnson* has defined "force" as "***violent*** force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140 (emphasis in original). Although the Illinois robbery statute makes force an element of the offense, the Illinois definition of force is by no means equivalent to the federal definition of force. Illinois sets the bar much lower and disqualifies Illinois robbery as an ACCA predicate. Many other

states have taken the same approach to robbery, and a major Circuit split has resulted, leading to this Court's grant of certiorari in *Stokeling*. Van Sach's case presents another example of this persistent problem.

I. Van Sach's petition raises the issue now pending before this Court in *Stokeling v. United States*.

This Court has recently granted certiorari in *Stokeling v. United States,* No. 17-5554, *cert. granted* April 2, 2018, to decide whether Florida's robbery statute categorically requires force as defined by this Court in *Curtis Johnson*. Van Sach's sentence, which rests on a conviction under an Illinois robbery statute, raises essentially the same issue raised in *Stokeling*. The robbery statute of each state requires "force," and the question in each case is whether "force" as required in each statute equates with "force" as required in ACCA. Van Sach requests that the Court hold his petition until it decides *Stokeling*.

The Florida robbery statute at issue in *Stokeling*, Fla. Stat. § 812.13, requires that the robber use "force." The Florida Supreme Court in *McCloud v. State*, 335 So.2d 257, 258 (Fla.

1976) has declared that "any degree of force suffices to convert larceny into a robbery." Since "any degree of force" would include non-violent force, Florida robbery does not categorically require force as defined in *Curtis Johnson*. The Eleventh Circuit has, however, read the Florida statute to include only violent force as measured under *Curtis Johnson*. *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011). The decision in *United States v. Stokeling*, 684 Fed.Appx. 870 (11th Cir. 2017) is but one example of the dozens of Eleventh Circuit cases coming to the same conclusion. The Ninth Circuit in *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017) has come to exactly the opposite conclusion regarding the Florida statute, setting up the Circuit conflict to be resolved in *Stokeling*.

Van Sach was convicted under an Illinois robbery statute, which, like the Florida statute, designates "force" as an element of the offense. Ill. Rev. Stat. ch 38, §18–1(a) (1997). The Illinois Supreme Court has ruled that the force required for robbery can include yanking an object that is attached to the victim's clothes, such as a watch on a watch chain. *People v. Campbell*, 84 N.E.

1035, 1036 (Ill. 1908). Illinois and Florida are by no means alone in so defining the minimum level of force for robbery. 3 Wayne R. LaFave, Substantive Criminal Law § 20.3(d)(1) (3d ed. 2018).

Since tugging on an object attached to the victim's clothing would not inflict *Curtis John*son force on the victim, Illinois robbery cannot be a violent felony under ACCA. Yet the Seventh Circuit has steadfastly adhered to the view that Illinois robbery is categorically a violent felony. *United States v. Dickerson*, 901 F.2d 579 (7th Cir. 1990).

Dickerson has been specifically rejected in *Amos v. United States*, 2017 WL 2335671 (D. Ariz. May 30, 2017), where the defendant had a prior conviction under the Illinois armed robbery statute. The government appealed the *Amos* ruling, but later dismissed its appeal, *Amos v. United States*, 2017 WL 8236051 (9th Cir. Dec. 21, 2017), avoiding a Circuit split regarding the Illinois statute. *Dickerson's* approach has been rejected in a number of Circuits regarding statutes similar to the Illinois statute. *E.g., United States v. Walton*, 881 F.3d 768 (9th Cir. 2018) (Alabama armed robbery); *United States v. Jones*, 877 F.3d

884 (9th Cir. 2017) (Arizona armed robbery); *United States v. Mulkern*, 854 F.3d 87 (1st Cir. 2017) (Maine robbery); *United States v. Winston*, 850 F.3d 677, 685 (4th Cir. 2017) (Virginia robbery); *United States v. Eason*, 829 F.3d 633, 640-42 (8th Cir.2016) (Arkansas robbery); *United States v. Gardner*, 823 F.3d 793, 803-04 (4th Cir. 2016) (North Carolina robbery); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) (Massachusetts armed robbery).

This Court should hold Van Sach's petition until it has decided *Stokeling*. The decision in *Stokeling* will rest on the interplay of ACCA and the Florida statute. Van Sach's case presents essentially the same statutory language, albeit with its own body of state decisional law. Regardless of the result in *Stokeling*, the decision should provide a template for deciding Van Sach's case, as well as cases involving robbery statutes in other states. Once the Court has decided *Stokeling*, it should consider Van Sach's petition.

II. The decision below is incorrect.

The decision below relies on a line of Seventh Circuit cases that has assumed an equivalence between the level of force required for Illinois robbery and the level of force required by ACCA. That perceived equivalence is unsupportable.

In considering this question, one must remember that this case transcends a dispute about the elements of Illinois robbery. The application of ACCA necessarily depends on a comparison of the relevant state law with the federal definition of violent force. If, as in Van Sach's case, a court does not get Illinois law right, it cannot come to an accurate application of ACCA.

The Illinois robbery statute makes force an element of the offense. Although the statute itself provides no definition of force, the Illinois Supreme Court has frequently considered the issue and has given content to the term. Illinois does not categorically require the robber to inflict or threaten violent force on the victim. The Illinois Supreme Court has declared that snatching an item attached to the victim, such as a watch on a chain, counts as enough force to amount to robbery. "[I]f the article is so

attached to the person or clothes as to create resistance, ***however slight***, . . . the taking is robbery." *People v. Campbell*, 84 N.E. 1035, 1036 (Ill. 1908) (emphasis added). Illinois is by no means alone in declaring that even slight force will suffice for a robbery conviction. 3 Wayne R. LaFave, Substantive Criminal Law § 20.3(d)(1) (3d ed. 2018).

Campbell remains good Illinois law even a century later. In *People v. Jones*, 797 N.E.2d 640 (Ill. 2003), the defendant was charged with aggravated battery and robbery arising from a single incident. Illinois law treats any battery, even an offensive touching, as an aggravated battery when the offense occurs on the public way. The victim testified that she did not hand over her purse when the robbers demanded it, but she tussled with them for possession of the purse, which one of them pulled from her hand. The jury acquitted on the battery charge, but deadlocked on the robbery count. Jones argued that he could not be retried on the robbery charge after his acquittal on the battery charge. The Illinois Supreme Court disagreed. "A jury could find defendant guilty of robbery if it found that he forcibly pulled her

purse away from her. A jury would not have to relitigate whether defendant pushed or struck [her]." *Id*. at 650-51. *Jones* confirms that even the slight force of tussling over a purse will suffice for a robbery conviction.

The task for a federal court, then, is to measure the standard established by the Illinois cases against *Curtis Johnson's* definition of force. The Seventh Circuit has not accurately performed that task. The leading Seventh Circuit case is *United States v. Dickerson*, 901 F.2d 579 (7th Cir. 1990), which held that "force" in the Illinois robbery statute had the same meaning as "force" in ACCA. In reaching this conclusion, *Dickerson* merely quoted the Illinois statute and quoted the ACCA statutory language, commenting that both statutes denounced the use of force.

> Ill.Rev.Stat. ch. 38, § 18–1(a), in effect at the time of Dickerson's arrest and conviction, provided that: "A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force." The Illinois robbery statute very clearly, then, contains "an element [of] use, attempted use, or threatened use of physical force against the person of

> another," necessary to qualify as a "violent felony" under 18 U.S.C. § 924(e)(2)(B). . . .
>
> We agree with the district court that the Illinois robbery statute in its own terms includes the elements of either "use of force or ... threatening the imminent use of force," that clearly come within the scope of 18 U.S.C. § 924(e)(2)(B).

901 F.2d at 584. *Dickerson* made no effort to examine the Illinois Supreme Court's construction of the Illinois robbery statute.

Moreover, *Dickerson* considered the alleged facts underlying the defendant's robbery conviction; it did not confine itself to an appraisal of statutory elements of Illinois robbery.

> Not only are the elements of the Illinois robbery statute within the scope of 18 U.S.C. § 924(e)(2)(B), the circumstances of Dickerson's own crime reflect elements of use or threatened use of physical force. During his guilty plea hearing Dickerson admitted that he struck the victim, knocked him to the ground, and took $13.00 from the victim's pocket. These activities clearly involved the use of physical force against the victim.

901 F.2d at 584. But under *Taylor v. United States*, 495 U.S. 575, 600-01 (1990), the sentencing court must look at the statutory elements of the offense, not the actual conduct underlying the conviction.

In rejecting Van Sach's request for relief, the Seventh Circuit relied on *Dickerson*, but also invoked its more recent decision in *United States v. Chagoya-Morales,* 859 F.3d 411 (7th Cir. 2017), which had considered the issue in the context of the career offender sentencing guideline. *Chagoya* fastened on Illinois' distinction between theft and robbery, and concluded that Illinois robbery categorically requires violent force as measured by *Curtis Johnson*. In *Chagoya's* view, if the defendant employs less than *Curtis Johnson* force, he commits theft, not robbery. 859 F.3d at 421-22.

That conclusion misreads Illinois law and leads to an erroneous application of ACCA. Illinois, like many other jurisdictions, draws a line between robbery and theft. No force, then theft, not robbery—that is the line. But force of even the slightest degree moves the defendant to the robbery side of the line. In *People v. Patton,* 389 N.E.2d 1174, 1177 (Ill. 1979), the defendant snatched a purse from the victim's hand, and she did not immediately sense that her purse had been taken. The Illinois Supreme Court likened this situation to grabbing a hat off

the victim's head, which would be considered theft, not robbery. The court reversed the robbery conviction, citing the distinction it had noted in *Campbell*.

Shortly after *Patton*, however, the Illinois Supreme Court in *People v. Bowel*, 488 N.E.2d 995, 998 (Ill. 1986), confirmed the distinction established in *Campbell*. *Bowel* affirmed a robbery conviction in which the defendant grabbed the victim by her hand and then took her purse. Grabbing the victim by the hand, although it caused no pain, was enough to turn a theft into a robbery. *Bowel* invoked the long-standing rule enunciated in Campbell.

These Illinois cases might seem to establish a fine line, but they confirm that Illinois robbery can result from less than the violent force required by *Curtis Johnson*. Moreover, the line established in Illinois is by no means unique. Many other jurisdictions (but not all) mark out the same line. 3 Wayne R. LaFave, Substantive Criminal Law § 20.3(d)(1) (3d ed. 2018).

Illinois robbery is not a violent felony, nor is Illinois armed robbery a violent felony. The Seventh Circuit correctly accepted

that the level of force for robbery was the relevant question and that the label "armed" did not change the inquiry. A. 1 As noted above, Illinois armed robbery merely requires that the defendant carry a weapon while committing a robbery. Ill. Rev. Stat. ch 38, §18–2(a) (1997). There is no requirement that the defendant threaten use of a weapon, no requirement that the defendant indicate in any way to the victim that a weapon is present. *People v. Gray*, 806 N.E.2d 753, 757-58 (Ill. App. 2004). *Cf. People v. Alejos,* 455 N.E.2d 48, 50 (Ill. 1983) (armed violence requires no more than possession of a weapon). If the robber makes threats to use a weapon, even when he does not actually have one, then a different offense comes into play, aggravated robbery under Ill. Rev. Stat. ch 38, §18–1(b)(1) (1997). *People v. Thomas*, 545 N.E.2d 289, 293 (Ill. App. 1989).Van Sach was convicted of armed robbery, not aggravated robbery.

Other Circuits considering statutes similar to the Illinois armed robbery statute have confirmed that the offense is not a violent felony. *United States v. Walton*, 881 F.3d 768 (9th Cir. 2018) (Alabama armed robbery); *United States v. Jones*, 877 F.3d

884 (9th Cir. 2017) (Arizona armed robbery); *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017) (Florida armed robbery); *United States v. Starks*, 861 F.3d 306 (1st Cir. 2017) (Massachusetts armed robbery); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) (Massachusetts armed robbery). For that reason, the Seventh Circuit's decision in Van Sach's case rested on the elements of robbery and did not give any additional weight to the armed nature of the offense.

No one should doubt the Seventh Circuit's commitment to *Dickerson*. In *United States v. Shields*, 885 F.3d 1020, 1024 (7th Cir. 2018), it reaffirmed the *Dickerson* rule, which will continue to adversely affect hundreds of defendants until this Court sets the matter right.

CONCLUSION

Wherefore, it is respectfully requested that this Court grant a writ of certiorari to review the decision below.

Dated April 26, 2018, at Chicago, Illinois.

Respectfully submitted,

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