

No. 17-8764

IN THE
Supreme Court of the United States

FRANK GUBANIC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals erroneously denied Mr. Gubanic a certificate of appealability (“COA”) on whether he was unconstitutionally sentenced above the statutory maximum for his offense of possession of a firearm by a convicted felon.

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REPLY ARGUMENTS

The Court should hold this petition pending the resolution of *Stokeling v. United States*, cert. granted No. 17-5554 (Apr. 2, 2018).

* * *

As the government acknowledges, Mr. Gubanic's 28 U.S.C. § 2255 motion was denied because the district court found that even after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*), Mr. Gubanic still had three Florida convictions that qualified as ACCA predicate offenses—two drug offenses and a robbery. BIO at 5–6, 15.

In *Stokeling*, this Court will decide whether Florida robbery is a “violent felony” under the ACCA’s elements clause—i.e., whether it has as an element the use, attempted use, or threatened use of “physical force.” 18 U.S.C. § 924(e)(2)(B)(i). Central to that question is the meaning of “physical force” as defined in *Johnson v. United States*, 559 U.S. 133 (2010) (*Curtis Johnson*). At the petition stage, the petitioner in *Stokeling* argued the degree of force necessary to commit Florida robbery could be minimal, and that degree of force does not satisfy *Curtis Johnson*’s definition. In opposition, the government argued the force involved was “capable” of causing pain or injury, and for that reason it satisfied *Curtis Johnson*’s definition. Thus, the dispute over that definition is at the forefront of *Stokeling*.¹

¹ The government relies on this “capability” argument also to contend that Mr. Gubanic’s resisting with violence conviction is an ACCA predicate offense. BIO at 11–13. But neither the district court nor the Eleventh Circuit ruled on whether that conviction qualifies as such. The district court relied on only Mr. Gubanic’s two drug convictions and his robbery conviction. Therefore, this Court should hold this petition pending *Stokeling* and dispose of it as appropriate in light of that decision. If *Stokeling* is favorable to Mr. Gubanic, the status of his resisting with violence conviction may be addressed by the Eleventh Circuit in the first instance on remand. That said, Mr. Gubanic maintains that the government’s “capability” argument stems from an incorrect reading of *Curtis Johnson* and that his resisting with violence conviction does not qualify as a “violent felony” under the ACCA’s elements clause. At a minimum, reasonable jurists can debate the issue.

Because *Stokeling* will clarify *Curtis Johnson*'s "physical force" definition, and the dispute over that definition lies at the heart of this case, the proper resolution is to hold this petition pending *Stokeling*.

CONCLUSION

For the above reasons, Mr. Gubanic's petition should be held pending the resolution of *Stokeling*.

Respectfully submitted,

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