

IN THE SUPREME COURT OF THE UNITED STATES

DEANTE DIXON, 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 IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 922(g)(1), which makes it unlawful for a convicted felon to possess a firearm that has traveled in interstate commerce, exceeds Congress's authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3.

2. Whether petitioner's conviction for robbery in violation of Fla. Stat. § 812.13, was properly classified as a "crime of violence" under Sentencing Guidelines § 4B1.2(a) (2015).

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No. 17-8853

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is reprinted at 718 Fed. Appx. 924.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2018. On March 20, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including May 9, 2018, and the petition was filed on that date. 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 of possessing a firearm and ammunition after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. 8a. He was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. Id. at 9a-10a. The court of appeals affirmed. Id. at 1a-7a.

1. On June 16, 2015, the St. Petersburg Police Department received calls reporting that a man was pointing a gun at people while riding a bicycle. Presentence Investigation Report (PSR) ¶ 5. Shortly thereafter, officers stopped a man, later identified as petitioner, who matched the description provided by the callers. PSR ¶ 6. The officers searched petitioner's backpack and recovered a loaded .22 caliber pistol. Ibid. A subsequent records search indicated that petitioner had previously been convicted of numerous felonies under Florida law. PSR ¶ 8. An expert with the Bureau of Alcohol, Tobacco, Firearm, and Explosives examined the pistol and ammunition and determined that they had been manufactured outside the State of Florida. PSR ¶ 7.

2. A federal grand jury in the Middle District of Florida returned an indictment charging petitioner with possession of a firearm and 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 the charge without a written plea agreement, PSR ¶ 4,

and admitted that the gun and ammunition were manufactured outside the State of Florida, Pet. App. 22a; see id. at 17a.

Before sentencing, the Probation Office prepared a presentence report for the district court. The Office assigned petitioner a base offense level of 20 under Sentencing Guidelines § 2K2.1(a)(4) (2015), which prescribes an enhanced offense level if the defendant has a prior felony conviction for a "crime of violence." PSR ¶ 13; see PSR ¶ 12 (stating that the 2015 edition of the Guidelines Manual was used to calculate petitioner's sentence).

Under Section 2K2.1, the phrase "[c]rime of violence" has the same meaning as under Section 4B1.2(a). Sentencing Guidelines § 2K2.1, comment. (n.1). The phrase "crime of violence" was defined in former Section 4B1.2(a) to include a felony offense that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another," (2) "is burglary of a dwelling, arson, or extortion, [or] involves use of explosives," or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another." Sentencing Guidelines § 4B1.2(a) (2015). The first clause of that definition is commonly known as the "elements clause," and the third is commonly known as the "residual clause." 81 Fed. Reg. 4741, 4743 (Jan. 27, 2016). The official commentary to former Section 4B1.2 also expressly provided that a crime of violence included "robbery." Sentencing Guidelines § 4B1.2, comment. (n.1) (2015).

The Probation Office found that petitioner had a prior felony conviction that qualified as a crime of violence -- namely, a 2008 conviction for robbery, in violation of Fla. Stat. § 812.13. PSR ¶ 13. After recommending an adjustment for petitioner's acceptance of responsibility, the Probation Office calculated a total offense level of 17. PSR ¶¶ 20-22. Based on that total offense level and a criminal history category of VI, the Probation Office calculated an advisory Guidelines range of 51 to 63 months of imprisonment. PSR ¶¶ 32, 76.

Petitioner objected to the categorization of his prior conviction for Florida robbery as a "crime of violence," arguing that it was not an enumerated offense in Section 4B1.2(a), did not qualify under the elements clause, and could not qualify under the residual clause because that clause was unconstitutionally vague. Addendum to the PSR 1-2. The district court overruled the objection and sentenced petitioner to 60 months of imprisonment. Sent. Tr. 4, 15. After the sentence was imposed, petitioner renewed his objection to the advisory Guidelines calculation but, in response to the court's question, raised no "additional objections." Id. at 17.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-7a.

Relying on circuit precedent, the court determined that robbery under Florida law is a crime of violence under former Section 4B1.2(a). Pet. App. 4a-5a (citing United States v.

Lockley, 632 F.3d 1238, 1246 (11th Cir.), cert. denied, 565 U.S. 885 (2011)). The court also observed that petitioner's argument that the residual clause of former Section 4B1.2(a)(2) is unconstitutionally vague was foreclosed by this Court's recent decision in Beckles v. United States, 137 S. Ct. 886 (2017), which held that the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause. Pet. App. 5a.

The court of appeals additionally rejected petitioner's argument, raised for the first time on appeal, that the statutory provision under which he was convicted, 18 U.S.C. 922(g)(1), is unconstitutional on the theory that it exceeds Congress's power under the Commerce Clause "both facially and as-applied." Pet. App. 6a. The court observed that "[t]his is not the first time [it] ha[d] considered this argument," and explained that "it is well-settled that Section 922(g) 'is not constitutionally invalid under the Commerce Clause.'" Ibid. (quoting United States v. Wright, 607 F.3d 708, 715 (11th Cir. 2010)).

ARGUMENT

Petitioner contends (Pet. 5-20) that 18 U.S.C. 922(g)(1), which prohibits convicted felons from possessing firearms and ammunition that have previously traveled in interstate commerce, exceeds Congress's authority under the Commerce Clause. Petitioner forfeited that contention by failing to raise it in the district court, and the court of appeals' decision rejecting it does not conflict with any decision of this Court or another court

of appeals. Alternatively, petitioner requests (Pet. 20-21) that the Court hold this petition pending the Court's disposition of Stokeling v. United States, cert. granted, No. 17-5554 (Apr. 2, 2018), in which the Court will consider whether robbery under Florida law "has as an element the use, attempted use, or threatened use of physical force against the person of another," within the meaning of the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i). The court of appeals, however, has determined that Florida robbery independently qualifies as a "crime of violence" under each clause -- the elements clause, the residual clause, and the enumerated offenses clause -- of former Section 4B1.2(a). The petition for a writ of certiorari should accordingly be denied.

1. Petitioner contends (Pet. 3, 13-18) that Section 922(g)(1) exceeds Congress's power under the Commerce Clause. The court of appeals' decision rejecting that argument does not conflict with any decision of this Court or another court of appeals. Following this Court's decision in United States v. Lopez, 514 U.S. 549 (1995), on which petitioner relies (Pet. 13), the courts of appeals uniformly have held that Section 922(g)'s prohibition against possessing a firearm that has previously moved in interstate commerce falls within Congress's Commerce Clause authority.¹ The Court has recently and repeatedly denied petitions

¹ See, e.g., United States v. Weems, 322 F.3d 18, 25-26 (1st Cir.), cert. denied, 540 U.S. 892 (2003); United States v. Santiago, 238 F.3d 213, 215-217 (2d Cir.) (per curiam), cert.

for writs of certiorari challenging the constitutionality of Section 922(g)(1) under the Commerce Clause.² The same result is warranted here, particularly given that petitioner's claim was not raised in the district court and therefore is subject to review only for plain error. See Fed. R. Crim. P. 52(b).

2. Petitioner suggests in the alternative (Pet. 20-21) that this petition should be held pending this Court's decision in Stokeling v. United States, supra. That suggestion is misplaced. The question presented in Stokeling is whether a defendant's prior conviction for robbery under Florida law qualifies as a "violent

denied, 532 U.S. 1046 (2001); United States v. Singletary, 268 F.3d 196, 198-205 (3d Cir. 2001), cert. denied, 535 U.S. 976 (2002); United States v. Gallimore, 247 F.3d 134, 137-138 (4th Cir. 2001); United States v. Daugherty, 264 F.3d 513, 518 (5th Cir. 2001), cert. denied, 534 U.S. 1150 (2002); United States v. Henry, 429 F.3d 603, 619-620 (6th Cir. 2005); United States v. Williams, 410 F.3d 397, 400 (7th Cir. 2005); United States v. Stuckey, 255 F.3d 528, 529-530 (8th Cir.), cert. denied, 534 U.S. 1011 (2001); United States v. Davis, 242 F.3d 1162, 1162-1163 (9th Cir.) (per curiam), cert. denied, 534 U.S. 878 (2001); United States v. Dorris, 236 F.3d 582, 584-586 (10th Cir. 2000), cert. denied, 532 U.S. 986 (2001); United States v. Scott, 263 F.3d 1270, 1271-1274 (11th Cir. 2001) (per curiam), cert. denied, 534 U.S. 1166 (2002).

² See, e.g., Boatwright v. United States, 138 S. Ct. 2650 (2018) (No. 17-7645); Kitchen v. United States, 138 S. Ct. 1989 (2018) (No. 17-7521); Massey v. United States, 138 S. Ct. 500 (2017) (No. 16-9376); Moorefield v. United States, 138 S. Ct. 154 (2017) (No. 16-9549); Brice v. United States, 137 S. Ct. 812 (2017) (No. 16-5984); Isom v. United States, 137 S. Ct. 45 (2016) (No. 15-9109); Crouch v. United States, 137 S. Ct. 43 (2016) (No. 15-8974); James v. United States, 136 S. Ct. 2509 (2016) (No. 15-8227); Moore v. United States, 136 S. Ct. 2488 (2016) (No. 15-8601); Fisk v. United States, 136 S. Ct. 2485 (2016) (No. 15-7855); Delgado v. United States, 136 S. Ct. 2485 (2016) (No. 15-7850); Gibson v. United States, 136 S. Ct. 2484 (2016) (No. 15-7475).

felony” under the elements clause of the ACCA. Although that clause is worded identically to the elements clause of former Section 4B1.2(a)(1), the Court’s decision in Stokeling will have no bearing on whether robbery in a particular State independently satisfies the residual clause of former Section 4B1.2(a)(2) or the enumerated robbery offense in the commentary to that section. And here, binding circuit precedent on which the court of appeals relied holds that Florida robbery satisfies not only the elements clause but both of those other clauses as well. See Pet. App. 4a (citing United States v. Lockley, 632 F.3d 1238, 1246 (11th Cir. 2001), cert. denied, 565 U.S. 885 (2011)); Lockley, 632 F.3d at 1244 (“Florida’s robbery statute is indeed generic [robbery].”); id. at 1245 (“The bare elements of [Florida robbery] also satisfy the elements and residual clauses of [Section] 4B1.2(a).”). Petitioner has not challenged those independent holdings or suggested any plausible reason why Stokeling might disturb them. A hold for the Court’s disposition of Stokeling is therefore unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2018