

No. 17-8857

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR CHARLES SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's prior conviction for robbery, in violation of North Carolina law, was a conviction for a "crime of violence" under the residual clause of former Sentencing Guidelines § 4B1.2(a) (2012).

2. Whether this Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), should be overruled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. E2-E9) is reported at 881 F.3d 954. A prior opinion of the court of appeals (Pet. App. B1-B19) is not published in the Federal Reporter but is reprinted at 582 Fed. Appx. 590. Another prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 667 Fed. Appx. 536. The order of the district court (Pet. App. C1-C19) is not published in the Federal Supplement but is available at 2016 WL 6875877.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2018. The petition for a writ of certiorari was filed on May 8, 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 Eastern District of Tennessee, petitioner was convicted of pharmacy robbery, in violation of 18 U.S.C. 2118(a) and 2; using, carrying, and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. 924(c) (1) and 2; and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g) (1). D. Ct. Doc. 75, at 1 (Oct. 4, 2013) (Judgment). He was sentenced to 262 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. B1-B19. Petitioner filed a petition for a writ of certiorari, and this Court granted the petition, vacated the judgment of the court of appeals, and remanded for further consideration in light of Johnson v. United States, 135 S. Ct. 2551 (2015). 135 S. Ct. 2930 (2015). The court of appeals subsequently vacated petitioner's sentence and remanded for resentencing. 667 Fed. Appx. 536, 536-537 (per curiam). Petitioner was resentenced to 262 months of imprisonment, to be followed by five years of supervised release. Pet. App. D2-D3. The court of appeals affirmed. Id. at E2-E9.

1. On December 17, 2012, petitioner and a co-defendant entered a CVS store in Sevierville, Tennessee. D. Ct. Doc. 39, at 1 (Apr. 12, 2013). Petitioner pointed a loaded pistol at the on-duty pharmacist and ordered the pharmacist to place controlled substances worth about \$15,000 into a bag. Id. at 1-2. Petitioner and his co-defendant, along with another accomplice who had been waiting outside, fled in a stolen vehicle. Id. at 2. Police pursued the vehicle and ultimately arrested them. Ibid.

A federal grand jury in the Eastern District of Tennessee indicted petitioner on one count of robbing a pharmacy, in violation of 18 U.S.C. 2118(a) and 2; one count of using, carrying, and brandishing a firearm during a crime of violence, 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). Indictment 1-2. Petitioner pleaded guilty to the charges. Judgment 1.

2. Applying the 2012 version of the Sentencing Guidelines, Presentence Investigation Report (PSR) ¶ 19, the Probation Office classified petitioner as a career offender under Sentencing Guidelines § 4B1.1 (2012), PSR ¶ 38. Under former (and current) Section 4B1.1, a defendant was subject to enhanced punishment as a "career offender" if (1) he was at least 18 years old at the time of the offense of conviction, (2) the offense of conviction was a felony "crime of violence" or "controlled substance offense," and (3) he had at least two prior felony convictions for a "crime

of violence" or a "controlled substance offense." Sentencing Guidelines § 4B1.1(a) (2012). Former 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). Clause (1) is known as the "elements clause," and the portion of clause (2) beginning with "otherwise" is known as the "residual clause." 81 Fed. Reg. 4741, 4743 (Jan. 27, 2016). The official commentary to former Section 4B1.2 expressly provided that a crime of violence included "robbery." Sentencing Guidelines § 4B1.2, comment. (n.1) (2012).

The Probation Office determined that petitioner had a prior conviction that qualified as a controlled substance offense. PSR ¶ 61. The Probation Office also found that petitioner had a prior conviction that qualified as a crime of violence -- namely, a 2010 conviction for robbery, in violation of North Carolina law. PSR ¶ 62. It accordingly classified petitioner as a career offender and calculated an advisory guidelines range of 262 to 327 months of imprisonment under former Section 4B1.1(c)(2)(B) and (3). PSR ¶ 39.

Petitioner objected to classification as a career offender, arguing that his prior conviction for robbery was not a conviction for a crime of violence. D. Ct. Doc. 74, at 1 (Sept. 30, 2013). The district court overruled the objection, determining that North Carolina robbery qualified as a crime of violence under the residual clause of former Section 4B1.2(a)(2). Id. at 3-5. The court also rejected petitioner's contention that "the Sixth Amendment requires the fact of a prior conviction be proven to a jury before that fact may be used to increase his sentence." Id. at 5. The court found petitioner's contention foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998). D. Ct. Doc. 74, at 5-6. The court sentenced petitioner to 262 months of imprisonment. Judgment 2.

3. The court of appeals affirmed. Pet. App. B1-B19. The court determined that robbery under North Carolina law "presents a serious risk of physical injury to another" and therefore qualified as a crime of violence under the residual clause of former Section 4B1.2(a)(2). Id. at B19. Relying on Almendarez-Torres, the court also rejected petitioner's contention that "the Sixth Amendment prohibits judicial fact-finding of a defendant's prior convictions for the purpose of increasing a sentence." Ibid.

Petitioner filed a petition for a writ of certiorari, and this Court granted the petition, vacated the judgment, and remanded for further consideration in light of Johnson v. United States, supra, which held that the residual clause of the Armed Career

Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. 135 S. Ct. 2930. On remand, the court of appeals determined that "Johnson's reasoning applies with equal force to § 4B1.2(a)(2)'s residual clause." 667 Fed. Appx. at 537. Accordingly, the court vacated petitioner's sentence and remanded the case to the district court for resentencing. Ibid.

4. At resentencing, the district court found that petitioner's prior conviction for North Carolina robbery still qualified as a conviction for a crime of violence, for two independent reasons. Pet. App. C1-C19. First, the court determined that North Carolina robbery satisfies the elements clause of former Section 4B1.2(a)(1). Id. at C9-C15. Second, the court determined that North Carolina robbery qualifies as generic "robbery," an offense enumerated in the commentary to former Section 4B1.2. Id. at C16. The court thus overruled petitioner's objection to classification as a career offender, id. at C19, and resentenced him to 262 months of imprisonment, id. at D2.

The court of appeals affirmed. Pet. App. E2-E9. The court observed that, following petitioner's resentencing, this Court in Beckles v. United States, 137 S. Ct. 886 (2017), had held that "the advisory Guidelines are not subject to void-for-vagueness challenges" and that "the Guidelines' residual clause 'is not void for vagueness.'" Pet. App. E5 (quoting Beckles, 137 S. Ct. at 892). The court of appeals thus reasoned that Beckles "reinstated the Guidelines' residual clause as a basis on which to conclude

that offenses qualify as crimes of violence.” Ibid. Adhering to its prior decision in petitioner’s case, the court reaffirmed that North Carolina robbery “qualifies as a crime of violence under the residual clause.” Ibid. The court also adhered to its prior determination that Almendarez-Torres foreclosed petitioner’s Sixth Amendment claim. Id. at E9.

ARGUMENT

Petitioner contends (Pet. 5-17) that the court of appeals erred in determining that his prior conviction for North Carolina robbery is a crime of violence under the residual clause of former Sentencing Guidelines § 4B1.2(a) (2012). He also contends (Pet. 17-20) that this Court should grant certiorari to overrule Almendarez-Torres v. United States, 523 U.S. 224 (1998). Those contentions lack merit, and the court of appeals’ decision does not conflict with any decision of this Court or of another court of appeals. In addition, this Court typically declines to review questions of guidelines application, and the Sentencing Commission has since amended Section 4B1.2(a) to eliminate the residual clause altogether. In any event, this case would be a poor vehicle for addressing whether North Carolina robbery satisfies Section 4B1.2(a)’s now-superseded residual clause because this Court’s resolution of that question would not affect the outcome of this case. The petition for a writ of certiorari should be denied.

1. Petitioner's contention that his prior conviction for North Carolina robbery does not satisfy the residual clause of former Section 4B1.2(a)(2) does not warrant this Court's review.

a. This Court typically 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 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.").

Adherence to that practice is particularly appropriate in this case. The "crime of violence" definition at issue here exemplifies the Commission's process. Effective August 2016, the Commission amended Section 4B1.2(a) to eliminate the residual clause altogether. See 81 Fed. Reg. at 4742-4743. The Court's review of the application of a superseded version of Section 4B1.2(a) is unwarranted.

b. In any event, the court of appeals correctly determined that petitioner's prior conviction for North Carolina robbery

satisfies the residual clause of former Section 4B1.2(a)(2). North Carolina defines robbery as the "felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." State v. Smith, 292 S.E.2d 264, 270 (N.C.), cert. denied, 459 U.S. 1056 (1982). In the court of appeals, petitioner did not dispute that robbery committed by means of violence "presents a serious potential risk of physical injury to another." Sentencing Guidelines § 4B1.2(a)(2) (2012); see Pet. App. E6; Pet. C.A. Br. 35-38. Petitioner argued only that robbery committed by means of fear does not present such a risk. Pet. App. E6; Pet. C.A. Br. 35-38. In particular, petitioner contended -- as he does in this Court, Pet. 16 -- that under North Carolina law, robbery could be committed "through threats of something other than physical injury (like a threat to terminate the victim's employment)," Pet. App. E6. But as the court of appeals explained, North Carolina law requires that the victim be placed in "fear 'for the sake of his person.'" Id. at B13 (quoting State v. Sawyer, 29 S.E.2d 34, 37 (N.C. 1944)). Because "'fear' in [the] robbery statute * * * refer[s] to fear of bodily injury," id. at B19, North Carolina robbery "does generally present a serious risk of physical injury to another," id. at B13.

Petitioner devotes much of his petition to arguing that North Carolina robbery "can be committed without the use or threatened use of physical force," Pet. 16, and that the "concept of 'fear'

under North Carolina robbery law * * * is in no way tethered to the career offender's [elements] clause jurisprudence," Pet. 13. But as the court of appeals explained, "[w]hether North Carolina common-law robbery 'has as an element the use, attempted use, or threatened use of physical force against the person of another[]' * * * has no bearing on * * * whether North Carolina common-law robbery necessarily 'involves conduct that presents a serious potential risk of physical injury to another.'" Pet. App. E8 (citation omitted). The court's resolution of that question is correct and does not conflict with any decision of this Court or of another court of appeals. See United States v. Scales, 717 Fed. Appx. 265, 267 (4th Cir. 2018) (per curiam) (concluding that North Carolina robbery "necessarily qualifies as a residual clause crime of violence").

Petitioner contends that "it is impossible to correctly interpret the 'inscrutably vague' residual clause." Pet. 8 (citation omitted). As petitioner acknowledges (Pet. 6-7), however, this Court in Beckles v. United States, 137 S. Ct. 886 (2017), held that "the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)'s residual clause is not void for vagueness." Id. at 895. As the court of appeals recognized, petitioner's contention is, at bottom, "an attempt to revisit Beckles' holding." Pet. App. E7. And he identifies no circuit that has found the

language of the residual clause to be inapplicable under the Guidelines after Beckles.

c. This case would be a poor vehicle for review because the outcome of this case does not depend on application of the language of the residual clause. Even if North Carolina robbery did not satisfy the residual clause, it would still qualify as a crime of violence because it satisfies the definition of generic "robbery," an offense enumerated in the commentary to former Section 4B1.2. Sentencing Guidelines § 4B1.2, comment. (n.1) (2012). Although the court of appeals did not need to reach the issue, generic robbery is defined as "the taking of property 'from a person or a person's presence by means of force or putting in fear,'" United States v. Gattis, 877 F.3d 150, 157 (4th Cir. 2017) (citation omitted), cert. denied, 138 S. Ct. 1572 (2018), and North Carolina robbery is "a categorical match with" that generic definition, id. at 158; see also United States v. Graves, 877 F.3d 494, 504 (3d Cir. 2017) (concluding that North Carolina robbery satisfies the definition of generic robbery), petition for cert. pending, No. 17-9358 (filed June 8, 2018); United States v. Moore, 223 Fed. Appx. 422, 424 (5th Cir.) (per curiam) (same), cert. denied, 552 U.S. 883 (2007).

Petitioner contends (Pet. 12) that North Carolina robbery is broader than generic robbery because, unlike generic robbery, it "encompasses a theft where an offender uses only de minim[i]s force," as in the case of a sudden "'snatching.'" But petitioner's

only support for that contention is two unpublished decisions, see ibid., and the North Carolina Court of Appeals -- in a published decision -- has held to the contrary. See State v. Robertson, 531 S.E.2d 490, 493 (2000) (holding that a "typical purse-snatching incident" is "larceny, not robbery"). Thus, regardless of the resolution of the question presented, petitioner's prior conviction for North Carolina robbery qualified as a crime of violence under former Section 4B1.2.

d. 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). 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 Sentencing Guidelines § 4B1.2(a)(1) (2012). As the court of appeals recognized, whether robbery in 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 Section 4B1.2(a)(1) presents a different question from whether it satisfies the residual clause of former Section 4B1.2(a)(2). Pet. App. E8. Indeed, the Fourth Circuit in Scales concluded that North Carolina robbery "necessarily qualifies" as a crime of violence under the residual clause, 717 Fed. Appx. at 267, even though it had previously determined that North Carolina robbery does not satisfy the ACCA's elements

clause, see id. at 266 n.1 (discussing United States v. Gardner, 823 F.3d 793, 804 (4th Cir. 2016)). This Court's resolution of Stokeling thus will not affect the court of appeals' determination that North Carolina robbery satisfies the residual clause of former Section 4B1.2(a)(2).

2. Petitioner asserts (Pet. 17-20) that this Court's decision in Almendarez-Torres v. United States, supra, has been "severely undercut," Pet. 18, and should be reconsidered. That claim, which this Court has often and recently denied,* does not warrant further review. See Rangel-Reyes v. United States, 547 U.S. 1200, 1201-1202 (2006) (No. 05-10706) (Stevens, J., respecting the denial of the petitions for writ of certiorari) ("The doctrine of stare decisis provides a sufficient basis for the denial of certiorari in these cases.").

In Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court held that the Sixth Amendment requires any fact "[o]ther than the fact of a prior conviction" to be submitted to a jury and proved beyond a reasonable doubt, or admitted by the defendant, when it "increases the penalty for a crime beyond the prescribed statutory maximum." Id. at 490. This Court has since repeatedly affirmed that the Sixth Amendment rule announced in Apprendi applies only to penalty-enhancing facts "[o]ther than the fact of a prior

* See, e.g., Bain v. United States, 138 S. Ct. 1593 (2018) (No. 17-7494); Mejia-Guerra v. United States, 138 S. Ct. 643 (2018) (No. 17-5746); Robinson v. United States, 137 S. Ct. 1114 (2017) (No. 16-7445); Hernandez-Ayala v. United States, 137 S. Ct. 684 (2017) (No. 16-6874).

conviction.” Ibid.; see Descamps v. United States, 570 U.S. 254, 269 (2013); Alleyne v. United States, 570 U.S. 99, 111 n.1 (2013); Southern Union Co. v. United States, 567 U.S. 343, 346 (2012); Carachuri-Rosendo v. Holder, 560 U.S. 563, 567 n.3 (2010); Cunningham v. California, 549 U.S. 270, 274-275 (2007); Booker, 543 U.S. at 244; Blakely v. Washington, 542 U.S. 296, 301-302 (2004); Dretke v. Haley, 541 U.S. 386, 395-396 (2004).

In any event, neither Almendarez-Torres nor Apprendi has any bearing on this case because the district court did not rely on petitioner’s prior convictions to increase the statutory sentencing range for petitioner’s crimes. Rather, the court considered petitioner’s prior convictions only in calculating his advisory guidelines range. This Court has held that a court may, consistent with the Constitution, select a sentence within the applicable statutory range based on facts found by the court by a preponderance of the evidence. See, e.g., Alleyne, 570 U.S. at 116 (explaining that the Court’s decision “does not mean that any fact that influences judicial discretion must be found by a jury” and that the Court has “long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment”); Cunningham, 549 U.S. at 285 (noting “no disagreement among the Justices” that judicial factfinding under the Sentencing Guidelines “would not implicate the Sixth Amendment” as long as the Guidelines are advisory); Booker, 543 U.S. at 233 (explaining that “when a trial judge exercises his

discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant"); cf. Beckles, 137 S. Ct. at 892 ("Unlike the ACCA, * * * the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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