No. 11-6606

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS GORE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior felony conviction under Texas law for conspiracy to commit aggravated robbery is a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A30) is reported at 636 F.3d 728.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2011. A petition for rehearing was denied on June 20, 2011 (Pet. App. B1-B3). The petition for a writ of certiorari was filed on September 16, 2011. 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 Texas, petitioner was convicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. A1-A30.

1. In December 2007, officers with the Texas Game Warden Office and the United States Forest Service observed petitioner illegally hunting deer in a national forest. Petitioner had in his possession a loaded rifle. A subsequent investigation revealed that petitioner had previously been convicted of a felony, and petitioner was charged with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Petitioner pleaded guilty to that offense. See Presentence Investigation Report (PSR) paras. 1-7.

2. For that offense, petitioner was subject to a mandatory minimum prison sentence of 15 years under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), if he had "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The Act 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).

Petitioner has two qualifying Texas convictions from December 1997 for "serious drug offense[s]." See 10/13/09 Sent. Tr. 5-6 (Tr.); see also PSR paras. 32-34. At the sentencing hearing, however, petitioner disputed whether an additional prior Texas conviction was for a "violent felony": his conviction in September 1982 for conspiracy to commit aggravated robbery. PSR para. 24.[1] As evidence that he had not "affirmatively participated in the robbery" and "did not use a gun," Tr. 6-7, petitioner introduced the state indictment for the conspiracy offense. That indictment charged that petitioner and two co-conspirators, Sara Gore and Ronald Robinette, "intentionally and knowingly with intent that the felony offense of aggravated robbery be committed, agree[d] among themselves and with one another that [Robinette] would engage in conduct that would constitute the offense of aggravated robbery."

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[1] According to the PSR, on September 1, 1982, petitioner was part of a group that robbed a convenience store in Richwood, Texas. Petitioner, Sara Gore, and Carlin Staples acted as accessories to Ronald Robinette, who robbed the store's clerk using a .22 caliber handgun. See PSR para. 24.

Pet. App. A6 (second brackets in original). The indictment also charged that Robinette "performed an overt act in pursuance of that agreement" when he placed a female store clerk "in fear of imminent bodily injury and death by using and displaying a deadly weapon, namely a firearm," in the course of robbing a convenience store. Id. at A6-A7. After reviewing the indictment and the applicable Texas law, the district court concluded that petitioner's conspiracy conviction qualified as a violent felony for ACCA purposes. Id. at A2. The court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release.

3. a. The court of appeals affirmed. Pet. App. A1-A30. It held that the Texas offense of conspiracy to commit aggravated robbery falls within the ACCA's so-called residual clause, 18 U.S.C. 924(e)(2)(B)(ii), because the offense "involves conduct that presents a serious potential risk of physical injury to another." Pet. App. A17. The court accepted petitioner's contentions that there are various ways to commit the Texas offense and that "the least culpable means * * * is to agree to 1) commit robbery and 2) threaten or place a person, who is 65 years of age or older or is disabled, in fear of imminent bodily injury or death." Id. at A8. In the court's view, however, even that manner of committing the offense presents a serious potential risk of physical injury to others, because Texas law requires not only that the conspirators agree to commit aggravated robbery but

that one of the conspirators commit an overt act in furtherance of the conspiracy. Id. at A13. The court concluded that although the overt act might not invariably present an actual risk of physical injury to third parties, it would present a serious potential risk of such injury. Id. at A14 (discussing James v. United States, 550 U.S. 192 (2007), and the offense of attempted burglary).

b. Judge Higginbotham joined the panel opinion but specially concurred to express his view that Begay v. United States, 553 U.S. 137 (2008), requires "a two-step inquiry to determine whether a particular offense falls within the ambit" of the ACCA's residual clause. Pet. App. A26. In his view, the first inquiry is "whether the offense in question is a similar kind of offense" as the ACCA's enumerated crimes, and the second inquiry is "whether it poses a similar degree of risk" to those crimes. Ibid. Judge Higginbotham concluded that "[t]he answer to both questions is yes as to conspiracy to commit aggravated robbery as defined under Texas law." Ibid.

ARGUMENT

Petitioner contends that his prior Texas conviction for conspiracy to commit aggravated robbery is not a "violent felony" under the ACCA's residual clause, 18 U.S.C. 924(e)(2)(B)(ii). The court of appeals correctly rejected that contention, and its decision is consistent with recent decisions of this Court and other courts of appeals interpreting the ACCA. The court of appeals correctly recognized that although the Tenth Circuit

reached a different conclusion in United States v. King, 979 F.2d 801 (1992), that case predates this Court's recent ACCA jurisprudence and is no longer good law. Further review is not warranted.

1. a. The court of appeals correctly held that the Texas offense of conspiracy to commit aggravated robbery is an ACCA violent felony. Under Texas law, the offense of robbery is aggravated if, in the course of the theft, the perpetrator "causes serious bodily injury to another," Tex. Penal Code § 29.03(a)(1) (Vernon 2011); "uses or exhibits a deadly weapon," id. § 29.03(a)(2); or "causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is * * * 65 years of age or older [or] a disabled person," id. § 29.03(a)(3)(A)-(B). If a defendant agrees with others to engage in one of those three types of conduct, and if any of the conspirators "performs an overt act in pursuance of the agreement," then under Texas law the defendant has conspired to commit aggravated robbery. Id. § 15.02(a)(1)-(2).

Petitioner does not appear to dispute that insofar as a conspiracy to commit aggravated robbery involves "caus[ing] serious bodily injury to another" or "us[ing] or exhibit[ing] a deadly weapon," Tex. Penal Code § 29.03(a)(1)-(2), then the offense presents a serious potential risk of physical injury to others. Rather, petitioner appears to argue (Pet. 2, 4) that his conspiracy offense might have involved "threaten[ing] or plac[ing]" someone

who is "65 years of age or older" or "disabled" "in fear of imminent bodily injury or death," Tex. Penal Code § 29.03(a)(3)(A)-(B) -- conduct that, in petitioner's view, does not present a serious potential risk of physical injury to others.

The court of appeals correctly rejected that argument. Where conspirators agree to threaten or place a senior or disabled person in fear of imminent harm, and one of the conspirators acts in furtherance of that agreement, there is a substantial risk that someone -- whether the intended victim, a law enforcement officer, or an innocent bystander -- will be harmed. See Pet. App. A13-A14; see also United States v. White, 571 F.3d 365, 371 (4th Cir. 2009) ("Put succinctly, the Conspiracy Offense presents an immediate, serious, and foreseeable physical risk that arises concurrently with the formation of the conspiracy."), cert. denied, 130 S. Ct. 1140 (2010). Just as this Court recognized in James v. United States, 550 U.S. 192, 203 (2007), that the main risk of attempted burglary arises from the possibility of a confrontation between the would-be burglar and a third party, the main risk of conspiracy to commit aggravated robbery arises from the possibility of a confrontation between one of the would-be robbers and a third party. See Pet. App. A14-A15.

In addition, this Court has long recognized that formation of a conspiracy inherently threatens the accomplishment of the conspiracy's object. See, e.g., United States v. Jimenez Recio, 537 U.S. 270, 275 (2003) ("The conspiracy poses a 'threat to the

public' over and above the threat of the commission of the relevant substantive crime -- both because the '[c]ombination in crime makes more likely the commission of [other] crimes' and because it 'decreases the probability that the individuals involved will depart from their path of criminality.'") (quoting Callanan v. United States, 364 U.S. 587, 593-594 (1961)). As the Fourth Circuit has explained, "[w]hen conspirators have formed a partnership in crime to achieve a violent objective, and when they intend to achieve that object, they have substantially increased the risk that their actions will result in serious physical harm to others." White, 571 F.3d at 371; see United States v. Chimurenga, 760 F.2d 400, 404 (2d Cir. 1985) ("Because the conspiracy itself provides a focal point for collective criminal action, attainment of the conspirators' objectives becomes * * * a significant probability.") (emphasis omitted).

b. This Court's most recent ACCA decision supports the court of appeals' holding. In Sykes v. United States, 131 S. Ct. 2267 (2011), the Court held that a prior felony conviction under Indiana law for intentional vehicular flight from a law enforcement officer is a "violent felony" under the ACCA's residual clause, because vehicular flight categorically "presents a serious potential risk of physical injury to another." Id. at 2273. The Court rejected the defendant's argument that Begay v. United States, 553 U.S. 137 (2008), and Chambers v. United States, 555 U.S. 122 (2009), "require ACCA predicates to be purposeful, violent, and aggressive

in ways that vehicle flight is not." 131 S. Ct. at 2275. The Court held that, "[i]n general, levels of risk divide crimes that qualify from those that do not." Ibid. The Court distinguished Begay as "involv[ing] a crime akin to strict liability, negligence, and recklessness crimes." Id. at 2276. Outside of that context, "[i]n many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk." Id. at 2275; id. at 2275-2276 (inquiry into "risk levels provide[s] a categorical and manageable standard that suffices to resolve the case before [the Court]").

As in Sykes, the present crime involves knowing or intentional conduct, see Tex. Penal Code § 15.02(a)(1), and thus an inquiry into "risk levels provide[s] a categorical and manageable standard that suffices to resolve the case." Sykes, 131 S. Ct. at 2275-2276. For the reasons set forth above, the offense of conspiracy to commit aggravated robbery satisfies the risk-of-injury requirement of Sykes. See supra, pp. 7-8. The offense of conspiracy to commit aggravated robbery is therefore a "violent felony" under the ACCA's residual clause, without any need to conduct a redundant inquiry into whether the offense is also purposeful, violent, and aggressive. In any event, conspiracy to commit aggravated robbery necessarily involves action aimed toward a violent end -- conduct that is by definition purposeful, violent, and aggressive. See White, 571 F.3d at 372-373 (noting that the offense of conspiracy to commit robbery with a dangerous weapon is

"marked by combative readiness or bold determination against the person of another") (internal quotation marks omitted).

2. Petitioner advances various arguments for why the Texas offense of conspiracy to commit aggravated robbery is not an ACCA predicate. All of those arguments lack merit.

a. Petitioner contends that the Texas offense of conspiracy to commit aggravated robbery is not an ACCA violent felony because "no element of the Texas conspiracy statute under which [he] pleaded guilty included use, attempted use, or threatened use of physical force against another." Pet. 15. The court of appeals, however, agreed that the Texas conspiracy offense does not have a force-related element. See Pet. App. A3. The court therefore did not hold that the Texas conspiracy offense qualifies as an ACCA predicate under 18 U.S.C. 924(e)(2)(B)(i), which concerns offenses with a force-related element. Rather, the court held that the Texas conspiracy offense qualifies as an ACCA predicate under 18 U.S.C. 924(e)(2)(B)(ii), which concerns offenses that present a serious potential risk of physical injury to another. Petitioner does not explain why the Texas conspiracy offense fails to qualify under that residual clause, i.e., why conspiracy to commit aggravated robbery under Texas law does not involve a serious potential risk of harm to others.

b. Petitioner also contends (Pet. 13-14) that Congress did not intend ACCA to reach conspiracy offenses, but the text of the ACCA's residual clause draws no such exception. As the court of

appeals correctly recognized, conspiracies to commit violent crimes can themselves present a substantial risk of physical harm to others. See supra, pp. 7-8. Petitioner sees "nothing violent about the agreement" that underlies a conspiracy offense, Pet. 14, but that necessarily depends on what the conspirators agree to do and whether they are required to act in furtherance of their agreement. Here, petitioner conspired at the very least to threaten or place a senior or disabled person in fear of imminent harm, and Texas law required that either petitioner or one of his co-conspirators act in furtherance of that agreement. Accordingly, the conspiracy offense at issue in this case -- conspiracy to commit aggravated robbery -- involves a substantial risk of physical harm to others.[2]

c. Petitioner argues (Pet. 15-17) that his conspiracy conviction does not "show an increased likelihood that [he] is the kind of person who might deliberately point the gun and pull the trigger." Sykes, 131 S. Ct. at 2275 (quoting Begay, 553 U.S. at 146). The categorical approach, however, looks not to the conduct

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[2] The Sentencing Commission includes "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses" in its definition of "crime of violence" for purposes of the career offender sentencing enhancement. See Sentencing Guidelines § 4B1.2, comment. (n.1). In James, this Court looked to the Commission's career offender enhancement as "evidence that a crime like attempted burglary," which is an inchoate crime, "poses a risk of violence similar to that presented by the completed offense." 550 U.S. at 207. The Commission's considered judgment on this question further confirms the correctness of the court of appeals' decision.

involved in petitioner's particular conviction but to whether "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." James, 550 U.S. at 208. The court of appeals correctly concluded that, in the ordinary case, the elements of conspiracy to commit aggravated robbery will present a serious risk of physical injury to others. See Pet. App. A21 ("Even if an offender, such as [petitioner], agreed that another co-conspirator would commit the crime, his participation in a conspiracy to commit aggravated robbery -- in which he must intend that the crime be carried out -- serves as a self-identification as the type of person who, if later armed, is more likely to pull the trigger.").

3. Contrary to petitioner's contention (Pet. 5-10), further review is not warranted to address any division in authority among the courts of appeals. The decision below is consistent with recent decisions of this Court and other courts of appeals interpreting the ACCA. Although the Tenth Circuit reached a different conclusion in United States v. King, 979 F.2d 801 (1992), that case is no longer good law in light of this Court's recent ACCA jurisprudence and is in any event distinguishable on its facts.

a. In King, the Tenth Circuit held that a defendant's prior New Mexico conviction for conspiracy to commit armed robbery was not a violent felony for ACCA purposes. See 979 F.2d at 804. The court recognized that "[a] strong argument can be made that a

conspiracy to commit a violent felony presents a serious potential risk of physical injury to another, and is therefore itself a 'violent felony' for purposes of [the ACCA]." Id. at 803. The court also recognized that other circuits had adopted that argument, holding that conspiracies to commit violent felonies are themselves qualifying ACCA predicates. Id. at 803-804 (citing cases). The court observed, however, that it was "not writ[ing] on a clean slate," because it had held in United States v. Strahl, 958 F.2d 980 (10th Cir. 1992), "that attempted burglary was not a violent felony for purposes of [the ACCA]." 979 F.2d at 804. The court concluded that in light of circuit precedent and "the elements of the conspiracy crime under New Mexico law," the New Mexico conspiracy offense was not an ACCA violent felony. Ibid.

King is no longer good law. It relied on circuit precedent holding that attempted burglary is not an ACCA violent felony -- a position that this Court subsequently rejected in James. Accordingly, in recent cases, the Tenth Circuit has "moved toward the majority position" among the circuits. United States v. Turner, 501 F.3d 59, 68 n.8 (1st Cir. 2007), cert. denied, 552 U.S. 1243 (2008). For instance, in United States v. Brown, 200 F.3d 700 (1999), cert. denied, 528 U.S. 1178, and 529 U.S. 1081 (2000), the Tenth Circuit held that the federal crime of conspiracy to commit carjacking is a "crime of violence" under 18 U.S.C. 924(c)(3). Brown, 200 F.3d at 706; see ibid. (noting that the definition of "crime of violence" in Section 924(c)(3) is "essentially identical"

to the definition of "violent felony" in Section 924(e)(2)(B)). Although the Tenth Circuit observed in Brown that the federal conspiracy statute contains an overt act requirement, see 18 U.S.C. 371, the court emphasized that, "at a minimum, an agreement to accomplish the statutory elements of carjacking necessarily involves a substantial risk of physical force against the person or property of a victim." 200 F.3d at 706.

In its post-James decision in United States v. Fell, 511 F.3d 1035 (2007), the Tenth Circuit found it "unnecessary" to determine whether the district court had properly applied King and Brown, because this Court's decision in James "provided the federal courts with a new framework applicable to the question of whether a prior conviction for an inchoate crime qualifies as a violent felony under the ACCA." Id. at 1039.[3] The Tenth Circuit has thus recognized that King is no longer good law in light of this Court's intervening decision in James. And even assuming King were still good law, it is distinguishable from the present case, because the

[3] The Tenth Circuit held in Fell that the defendant's prior Colorado conviction for conspiracy to commit second-degree burglary was not an ACCA violent felony, because the overt act committed in furtherance of the conspiracy might not be directed toward the entry of a building or structure. See 511 F.3d at 1044. But the fact that the conspirators' overt acts might not cause a confrontation with third parties in a particular case does not diminish the serious potential risk of such a confrontation in the typical case. In any event, the court of appeals in this case believed that the overt act requirement in a conspiracy to commit aggravated robbery did create the requisite risk. See Pet. App. A13-A15. Any tension between the analysis in Fell and the result here does not give rise to a square conflict, given the divergent nature of the object crimes at issue.

Tenth Circuit in King relied on the fact that the New Mexico conspiracy offense at issue there did not require commission of an overt act in furtherance of the conspiracy. See 979 F.2d at 802-803. Here, the court of appeals relied on the fact that the Texas conspiracy offense at issue does require commission of an overt act, see Pet. App. A13-A15; Tex. Penal Code § 15.02(a)(2), which creates a risk that others will be harmed.

b. The remaining cases that petitioner cites (Pet. 6, 10) do not create a square conflict. In United States v. Boaz, 558 F.3d 800 (2008), the Eighth Circuit held that a defendant's prior Arizona conviction for conspiracy to commit auto theft was not an ACCA violent felony. Id. at 808. The court relied on the fact that under Arizona law auto theft could be committed simply through taking another's vehicle, without any use of violence. Ibid. Here, even the least menacing version of the Texas aggravated robbery offense requires "threaten[ing] or plac[ing]" someone who is "65 years of age or older" or "disabled" "in fear of imminent bodily injury or death." Tex. Penal Code § 29.03(a)(3)(A)-(B).

In United States v. Whitson, 597 F.3d 1218 (2010), the Eleventh Circuit held that a defendant's prior South Carolina conviction for conspiracy to commit "strong arm robbery" was not a "crime of violence" under Sentencing Guideline § 4B1.2. In addition to the distinguishing fact that Whitson involved the Guidelines and not the ACCA, in that case South Carolina law did not require an overt act in furtherance of the conspiracy. See

597 F.3d at 1221-1223. Whitson therefore does not conflict with the decision below, which addresses only the circumstance under ACCA in which there is an agreement to commit a violent felony as well as an overt act in furtherance of that agreement. Whitson also relied on an analysis under Begay of whether the conspiracy at issue was "violent" and "aggressive." Id. at 1222. But in light of Sykes, given that the court held that conspiracy to commit a strong arm robbery was both "purposeful" and carried a sufficient degree of risk, see id. at 1221-1222, the inquiry into the "violent" and "aggressive" character of the crime was "redundant," Sykes, 131 S. Ct. at 2275. Accordingly, the Eleventh Circuit may revisit Whitson in an appropriate case.

4. Finally, petitioner renews his argument (Pet. 10-12) that the ACCA's residual clause is void for vagueness. This Court has recently rejected that argument. See Sykes, 131 S. Ct. at 2277 ("Although [the residual clause] may at times be more difficult for courts to implement, it is within congressional power to enact."); id. at 2276 (applying the ACCA to the Indiana offense of vehicular flight from a law enforcement officer); id. at 2277 (Thomas, J., concurring in the judgment (same)). Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2012