No. 17-6026

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY BERNARD WILLIAMS, 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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QUESTION PRESENTED

Whether petitioner's prior conviction for robbery, in violation of Fla. Stat. § 812.13 (1999), was a conviction for a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-7) is not published in the Federal Reporter but is reprinted at 700 Fed. Appx. 895.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2017. The petition for a writ of certiorari was filed on September 14, 2017. 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 possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-7.

1. On December 23, 2015, petitioner sold a .380 caliber semiautomatic pistol and ammunition to an undercover officer for $400. D. Ct. Doc. 13, at 17 (May 11, 2016). A federal grand jury in the Middle District of Florida indicted petitioner on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Indictment 1-2. Petitioner pleaded guilty. Judgment 1.

2. A conviction for violating Section 922(g)(1) typically exposes the offender to a statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. See 18 U.S.C. 924(e)(1); Custis v. United States, 511 U.S. 485, 487 (1994). The ACCA 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). The first clause of that definition is commonly referred to as the "elements clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016). In Johnson v. United States, 559 U.S. 133 (2010), this Court defined "physical force" under the ACCA's elements clause to "mean[] violent force -- that is, force capable of causing physical pain or injury to another person." Id. at 140.

The Probation Office classified petitioner as an armed career criminal under the ACCA based on three prior Florida convictions, including a 2000 conviction for robbery, in violation of Fla. Stat. § 812.13 (1999). Presentence Investigation Report ¶¶ 20, 30; D. Ct. Doc. 40-1, at 7 (Sept. 21, 2016). Under Section 812.13, "'[r]obbery' means the taking of money or other property * * * when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1) (1999).

Petitioner objected to his classification as an armed career criminal. D. Ct. Doc. 40, at 1 (Sept. 21, 2016). He argued, inter alia, that his Florida robbery conviction did not qualify as a violent felony because "[t]he force required by the Florida robbery

statute does not rise to the level of" "physical force" under the ACCA's elements clause. Id. at 12. The district court overruled petitioner's objections and imposed the mandatory-minimum ACCA sentence of 180 months of imprisonment. Sent. Tr. 7-8, 38.

3. The court of appeals affirmed. Pet. App. 1-7. Relying on circuit precedent, the court determined that petitioner's Florida robbery conviction qualified as a violent felony under the ACCA's elements clause. Id. at 5 (citing United States v. Fritts, 841 F.3d 937, 942 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017)). Accordingly, the court concluded that petitioner was correctly classified as an armed career criminal under the ACCA. Id. at 7.

ARGUMENT

Petitioner contends (Pet. 3-5) that his prior conviction for Florida robbery is not a "violent felony" under the ACCA's elements clause. The court of appeals correctly determined that Florida robbery is a violent felony. Pet. App. 5. Although a shallow circuit conflict exists on the issue, that conflict does not warrant this Court's review because the issue is fundamentally premised on the interpretation of a specific state law and lacks broad legal importance. Further review is not warranted.*

* Other pending petitions for writs of certiorari also present the question whether Florida robbery is a "violent felony" under the ACCA's elements clause. See, e.g., Stokeling v. United States, No. 17-5554 (filed Aug. 4, 2017); Conde v. United States, No. 17-5772 (filed Aug. 24, 2017); Everette v. United States, No. 17-6054 (filed Sept. 18, 2017); Jones v. United States, No. 17-

1. The court of appeals correctly determined that Florida robbery, in violation of Fla. Stat. § 812.13 (1999), qualifies as a "violent felony" under the ACCA's elements clause, which encompasses "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i).

Florida's robbery statute provides in relevant part that robbery is "the taking of money or other property * * * from the person or custody of another" through "the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1) (1999). Under the putting-in-fear prong, "the fear contemplated by the statute is the fear of death or great bodily harm." United States v. Lockley, 632 F.3d 1238, 1242 (11th Cir.) (brackets omitted) (quoting Magnotti v. State, 842 So. 2d 963, 965 (Fla. Dist. Ct. App. 2003)), cert. denied, 565 U.S. 885 (2011). Thus, "robbery under th[e] statute requires either the use of force, violence, a threat of imminent force or violence coupled with apparent ability, or some act that puts the victim in fear of death or great bodily harm." Id. at 1245.

In Robinson v. State, 692 So. 2d 883 (1997), the Florida Supreme Court addressed "whether the snatching of property by no more force than is necessary to remove the property from a person

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6140 (filed Sept. 25, 2017); Orr v. United States, No. 17-6577 (filed Oct. 26, 2017).

who does not resist" satisfies the "force or violence element required by Florida's robbery statute." Id. at 884-885. The court surveyed Florida cases -- including McCloud v. State, 335 So. 2d 257 (Fla. 1976), Montsdoca v. State, 93 So. 157 (Fla. 1922), and various other appellate decisions dating back to 1903, see, e.g., Colby v. State, 35 So. 189 (Fla. 1903) -- and confirmed that "the perpetrator must employ more than the force necessary to remove the property from the person." Robinson, 692 So. 2d at 886. Rather, there must be both "resistance by the victim" and "physical force [by] the offender" that overcomes that resistance. Ibid.; see also id. at 887 ("Florida courts have consistently recognized that in snatching situations, the element of force as defined herein distinguishes the offenses of theft and robbery.").

Under Johnson v. United States, 559 U.S. 133 (2010), "physical force" for purposes of the ACCA's elements clause requires "violent force -- that is, force capable of causing physical pain or injury to another person." Id. at 140. Such force might "consist * * * of only that degree of force necessary to inflict pain," such as "a slap in the face." Id. at 143. The degree of force required under Florida's robbery statute -- "physical force" necessary to "overcome" "resistance by the victim," Robinson, 692 So. 2d at 886 -- satisfies that standard. Force sufficient to prevail in a physical contest for possession of the stolen item is necessarily force "capable" of "inflict[ing] pain" equivalent to "a slap in the face," Johnson, 559 U.S. at 140, 143; Florida robbery could

not occur through "mere unwanted touching," id. at 142. The court of appeals thus correctly determined that Florida robbery is a violent felony under the ACCA's elements clause. Pet. App. 5.

2. Although a shallow conflict exists between the Ninth and Eleventh Circuits on whether Florida robbery in violation of Section 812.13 qualifies as a "violent felony" under the ACCA's elements clause, that conflict does not warrant this Court's review.

a. The outcomes in the cases petitioner identifies involving robbery under the laws of other States (Pet. 3-4 & n.1) arise not from any disagreement about the meaning of "physical force" under Johnson, but from differences in how States define robbery.

Some courts of appeals have determined that a State's definition of robbery does not satisfy the ACCA's elements clause because "even de minimis contact" can constitute the force necessary to support a robbery conviction under the particular state statute at issue. United States v. Gardner, 823 F.3d 793, 803 (4th Cir. 2016). In Gardner, for example, the Fourth Circuit understood North Carolina law to require only that the "degree of force" be "sufficient to compel the victim to part with his property." Ibid. (citation omitted). In United States v. Winston, 850 F.3d 677 (2017), the Fourth Circuit understood Virginia law to require "only a 'slight' degree" of force, id. at 684 (citation omitted), a standard satisfied by a "defendant's act of 'physical

jerking,' which was not strong enough to cause the victim to fall," id. at 685 (citation omitted). And in United States v. Yates, 866 F.3d 723 (2017), the Sixth Circuit understood Ohio law to require only "nonviolent force, such as the force inherent in a purse-snatching incident or from bumping against an individual." Id. at 732; see United States v. Mulkern, 854 F.3d 87, 93-94 (1st Cir. 2017) (Maine robbery); United States v. Eason, 829 F.3d 633, 641-642 (8th Cir. 2016) (Arkansas robbery); United States v. Parnell, 818 F.3d 974, 978-980 (9th Cir. 2016) (Massachusetts armed robbery). In those cases, the degree of force required under state law was not sufficient to satisfy the ACCA's elements clause.

In other cases, such as this one, a court of appeals has determined that a State's definition of robbery does satisfy the ACCA's elements clause because the state statute at issue requires force greater than the de minimis amount necessary to remove the property from the person. In United States v. Orr, 685 Fed. Appx. 263 (2017) (per curiam), petition for cert. pending, No. 17-6577 (filed Oct. 26, 2017), for example, the Fourth Circuit agreed with the Eleventh Circuit that Florida robbery is a violent felony under the ACCA after observing that "more than de minimis force is required under the Florida robbery statute." Id. at 265. In United States v. Harris, 844 F.3d 1260 (2017), petition for cert. pending, No. 16-8616 (filed Apr. 4, 2017), the Tenth Circuit relied on Colorado precedent stating that "the gravamen of the offense of robbery is the violent nature of the taking" to conclude that the

offense was a violent felony. Id. at 1267 (citation omitted). And other courts have reached similar state-statute-specific conclusions as to particular robbery offenses. See, e.g., United States v. Patterson, 853 F.3d 298, 302-305 (6th Cir.) (Ohio aggravated robbery), cert. denied, 138 S. Ct. 273 (2017); United States v. Doctor, 842 F.3d 306, 311-312 (4th Cir. 2016) (South Carolina robbery), cert. denied, 137 S. Ct. 1831 (2017); United States v. Duncan, 833 F.3d 751, 754-756 (7th Cir. 2016) (Indiana robbery); United States v. Priddy, 808 F.3d 676, 686 (6th Cir. 2015) (Tennessee robbery), abrogated on other grounds, United States v. Stitt, 860 F.3d 854, 855 (6th Cir. 2017) (en banc), petition for cert. pending, No. 17-765 (filed Nov. 21, 2017).

Because differences in state definitions of robbery explain why robbery in some States, but not others, is a "violent felony," the courts' decisions do not suggest any conflict meriting this Court's review. See Orr, 685 Fed. Appx. at 265 (distinguishing Florida robbery from North Carolina robbery, which was at issue in Gardner); cf. Winston, 850 F.3d at 686 ("The state courts of Virginia and North Carolina are free to define common law robbery in their respective jurisdictions in a manner different from that employed by federal courts in construing a federal statute.").

b. In United States v. Geozos, 870 F.3d 890 (2017), the Ninth Circuit determined that Florida robbery is not a "violent felony." Id. at 901. The Ninth Circuit acknowledged that under Robinson, "there must be resistance by the victim that is overcome

by the physical force of the offender." Id. at 900 (quoting Robinson, 692 So. 2d at 886). But the Ninth Circuit read the Florida cases to mean that "the Florida robbery statute proscribes the taking of property even when the force used to take that property is minimal." Id. at 901. The Ninth Circuit recognized that its decision "put[] [it] at odds with the Eleventh Circuit," but it believed that the Eleventh Circuit had "overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." Ibid.

The shallow conflict does not warrant this Court's review. This Court has repeatedly denied petitions for writs of certiorari that raised the same issue of whether Florida robbery is a "violent felony." See United States v. Bostick, 675 Fed. Appx. 948 (11th Cir.) (per curiam), cert. denied, 137 S. Ct. 2272 (2017); United States v. McCloud, No. 16-15855 (11th Cir. Dec. 22, 2016), cert. denied, 137 S. Ct. 2296 (2017); Fritts, 841 F.3d 937, cert. denied, 137 S. Ct. 2264 (2017); United States v. Seabrooks, 839 F.3d 1326 (11th Cir. 2016), cert. denied, 137 S. Ct. 2265 (2017); United States v. Durham, 659 Fed. Appx. 990 (11th Cir. 2016) (per curiam), cert. denied, 137 S. Ct. 2264 (2017). Notwithstanding the narrow conflict created by the Ninth Circuit's recent decision in Geozos, supra, the same result is warranted here.

Although the issue of whether Florida robbery is a "violent felony" arises under the ACCA, it is fundamentally premised on the interpretation of a specific state law. The Ninth and the Eleventh

Circuits may disagree about the degree of force required to support a robbery conviction under Florida law, but that state-law issue turns on Florida case law. As such, the issue does not warrant this Court's review. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004) ("Our custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located."), abrogated on other grounds, Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

The question whether Florida robbery is a "violent felony" also does not present an issue of broad legal importance. The issue arises only with respect to defendants with prior convictions for Florida robbery. Accordingly, the issue is unlikely to recur with great frequency in the Ninth Circuit, which sits on the other side of the country. Should that prove to be incorrect, there will be ample opportunity for the government to seek further review in that circuit or in this Court. At this time, however, the issue is not of sufficient recurring importance in the Ninth Circuit to warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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