No. 17-6140

IN THE SUPREME COURT OF THE UNITED STATES

XAVIER JONES, 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 the court of appeals correctly denied a certificate of appealability (COA) on petitioner's claim that his prior convictions for armed robbery, in violation of Fla. Stat. Ann. § 812.13 (West 2001) and Fla. Stat. Ann. § 812.13 (West 2006), were convictions for "violent felon[ies]" under the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i).

2. Whether the court of appeals correctly denied a COA on petitioner's claim that his prior conviction for attempted armed robbery, in violation of Fla. Stat. Ann. §§ 777.04(1) and 812.13 (West 2001), was a conviction for a "violent felony" under the elements clause of the ACCA.

3. Whether the court of appeals correctly denied a COA on petitioner's claim that his prior conviction for attempted first-degree murder, in violation of Fla. Stat. §§ 777.04(1) (West 2001) and 782.04(1)(a) (West 2002), was a conviction for a "violent felony" under the elements clause of the ACCA.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The order of the district court (Pet. App. 2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2017. The petition for a writ of certiorari was filed on September 25, 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 Southern District of Florida, petitioner was convicted of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). 14-cr-20734 D. Ct. Doc. 31, at 1 (Mar. 17, 2015) (Judgment); 14-cr-20734 D. Ct. Doc. 4, at 1 (Oct. 1, 2014) (Indictment). He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. Petitioner did not appeal his conviction or sentence. Petitioner later filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. 16-cv-22566 D. Ct. Doc. 1 (June 24, 2016) (Motion). The district court denied the motion and denied petitioner's request for a certificate of appealability (COA). Pet. App. 2a; 16-cv-22566 D. Ct. Doc. 11, at 4 (Feb. 3, 2017). The court of appeals also denied a COA. Pet. App. 1a.

1. On September 8, 2014, the Miami-Dade Police Department received an anonymous 911 call reporting that a man was walking the streets with a gun. 14-cr-20734 D. Ct. Doc. 25, at 1 (Jan. 5, 2015). As a police officer approached petitioner, who matched the description given by the 911 caller, petitioner placed a dark object underneath a nearby vehicle. Ibid. The police searched the area under the car and recovered a loaded handgun. Ibid.

A federal grand jury in the Southern District of Florida indicted petitioner on one count of possession of a firearm and

ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Indictment 1. 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," and the portion beginning with "otherwise" is known as the "residual clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016). In Curtis 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 his 2009 conviction for Florida armed robbery, his 2003 convictions for Florida armed robbery and Florida armed burglary, and his 2003 convictions in a different case for Florida attempted armed robbery and Florida attempted first-degree murder. Presentence Investigation Report (PSR) ¶¶ 18, 24-25, 27. Petitioner did not file any objections to the PSR or to his classification as an armed career criminal. 3/16/15 Sent. Tr. 3. Adopting the findings of the PSR, the district court imposed the mandatory-minimum ACCA sentence of 180 months of imprisonment. Id. at 3, 9-10. Petitioner did not appeal his conviction or sentence.

3. In 2015, this Court held in Samuel Johnson v. United States, 135 S. Ct. 2551, that the ACCA's residual clause is unconstitutionally vague. Id. at 2557. The Court subsequently made clear that Samuel Johnson's holding is a substantive rule that applies retroactively. See Welch, 136 S. Ct. at 1265.

In June 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. Motion 1. Petitioner asserted that he no longer had three predicate convictions under the ACCA because Samuel Johnson's invalidation of the residual clause meant that his prior Florida convictions were not violent felonies. Motion 10-25; 16-cv-22566 D. Ct. Doc. 10, at 3 n.1 (Nov. 10, 2016).

Adopting the recommendation of a magistrate judge, the district court denied petitioner's motion. Pet. App. 2a; 16-cv-22566 D. Ct. Doc. 11, at 4. The court observed that since Samuel Johnson, the court of appeals had reaffirmed that Florida armed robbery and Florida attempted robbery qualify as violent felonies under the ACCA's elements clause. 16-cv-22566 D. Ct. Doc. 11, at 3-4 (citing United States v. Fritts, 841 F.3d 937 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017)). The district court explained that it was bound by that circuit precedent to conclude that petitioner "has at least three predicate convictions -- two for armed robbery and one for attempted armed robbery." Id. at 4. Because those convictions were sufficient to classify petitioner as an armed career criminal, the court declined to address whether his prior convictions for attempted first-degree murder or armed burglary also qualified as ACCA predicates. See ibid. The court denied a COA. Ibid.

4. The court of appeals likewise denied a COA, finding that petitioner had "failed to make a substantial showing of the denial of a constitutional right." Pet. App. 1a.

ARGUMENT

Petitioner contends (Pet. 6-40) that the court of appeals erred in denying a COA on his claims that his prior Florida convictions for armed robbery, attempted armed robbery, and attempted first-degree murder are not "violent felon[ies]" under the ACCA's elements clause. The court correctly declined to issue

a COA. First, its decisions have long held that Florida armed robbery is a violent felony under the ACCA's elements clause. 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. Second, given that petitioner's prior conviction for armed robbery is a violent felony, it follows that his prior conviction for attempted armed robbery is a violent felony as well, because it "has as an element the * * * attempted use * * * of physical force." 18 U.S.C. 924(e)(2)(B)(i) (emphasis added). Third, petitioner's prior conviction for attempted first-degree murder is likewise a violent felony, because this Court's decision in United States v. Castleman, 134 S. Ct. 1405 (2014), undermines petitioner's contention that the "use of force" requires the direct application of force. Id. at 1414-1415. In any event, petitioner would have at least three ACCA predicate convictions regardless of whether his conviction for attempted first-degree murder also qualified as one. Further review is not warranted.*

* Other pending petitions for writs of certiorari also present the question whether Florida robbery is categorically 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); Williams v. United States, No. 17-6026 (filed Sept. 14, 2017); Everette v. United States, No. 17-6054 (filed Sept. 18, 2017); Orr v. United States, No. 17-6577 (filed Oct. 26, 2017).

1. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under Section 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation and internal quotation marks omitted).

Contrary to petitioner's contention (Pet. 8), the court of appeals did not err in denying a COA on his claim that his prior Florida convictions do not qualify as violent felonies. Although "[t]he COA inquiry * * * is not coextensive with a merits analysis," Buck v. Davis, 137 S. Ct. 759, 773 (2017), the Court has made clear that a prisoner seeking a COA must still show that jurists of reason "could conclude [that] the issues presented are adequate to deserve encouragement to proceed further," ibid. (citation omitted). Petitioner's claim that his prior convictions could qualify as ACCA predicates only by resort to the now-invalidated residual clause does not "deserve encouragement to proceed further," ibid. (citation omitted), particularly given that his primary argument has long been foreclosed by circuit precedent, United States v. Fritts, 841 F.3d 937, 939-944 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017).

2. In Fritts, 841 F.3d at 943-944, the court of appeals correctly determined that Florida armed robbery, in violation of Fla. Stat. Ann. § 812.13, categorically 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). That determination was correct and does not warrant further review.

a. 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. Ann. § 812.13(1) (West 2001); see id. § 812.13(2)(a)-(b) (providing for enhanced penalties "[i]f in the course of committing the robbery," the offender was armed). 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 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 Curtis 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, which 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," Curtis Johnson, 559 U.S. at 140, 143; Florida robbery could not occur through "mere unwanted touching," id. at 142. The court of appeals in Fritts thus correctly determined that Florida armed robbery is categorically a "violent felony" under the ACCA's elements clause. 841 F.3d at 943-944.

b. Contrary to petitioner's contention (Pet. 10-11), the court of appeals in Fritts faithfully applied the categorical approach as prescribed by this Court's decisions in Mathis v. United States, 136 S. Ct. 2243 (2016), Descamps v. United States, 133 S. Ct. 2276 (2013), and Moncrieffe v. Holder, 569 U.S. 184 (2013). Petitioner suggests (Pet. 10-11) that the court of appeals departed from those decisions by failing to evaluate whether the least culpable conduct penalized by Florida's robbery statute involved "physical force." But the court concluded that all violations of Section 812.13 involve such force. See Fritts, 841 F.3d at 942 (explaining that the Florida Supreme Court has "made clear that the § 812.13 robbery statute has never included a theft or taking by mere snatching because snatching is theft only and does not involve the degree of physical force needed to sustain a robbery conviction").

c. Petitioner cites several Florida appellate decisions (Pet. 12, 26-29) that he argues demonstrate that Florida robbery may involve no more than de minimis force. But those cases do not

establish that Florida robbery may involve a degree of force less than the "physical force" required by the ACCA's elements clause.

In Montsdoca v. State, supra, the Florida Supreme Court stated that "[t]he degree of force used is immaterial," but only if "such force * * * is actually sufficient to overcome the victim's resistance." 93 So. at 159. Montsdoca involved the "violent or forceful taking" of an automobile, whereby the defendants, under a false pretense of official authority, "grabbed" the victim "by both shoulders," "shook him," "ordered him to get out of the car," and demanded his money "under the fear of bodily injury if he refused." Ibid. Montsdoca thus involved a degree of force greater than de minimis.

In Mims v. State, 342 So. 2d 116 (Fla. Dist. Ct. App. 1977) (per curiam), the defendant "forced" the victim "into a car" and drove her "to a deserted area" where the defendant "grabbed" the victim's pocketbook. Id. at 117. When the victim "resist[ed]," the defendant "beat[]" her and "pushed [her] out of the car." Ibid. The force employed by the defendant in Mims was plainly "capable of causing physical pain or injury to another person" and would thus qualify as "physical force" under the ACCA's elements clause. Curtis Johnson, 559 U.S. at 140.

In Sanders v. State, 769 So. 2d 506 (Fla. Dist. Ct. App. 2000), the Florida intermediate appellate court affirmed the robbery conviction of a defendant who peeled back the victim's fingers from a clenched fist before snatching money out of his

hand. Id. at 507. Bending back someone's fingers with force sufficient to overcome his efforts to keep hold of an object involves more than the "merest touching," Curtis Johnson, 559 U.S. at 139, and is "capable of causing physical pain or injury," id. at 140. Indeed, the court contrasted the force used in Sanders with the circumstances of a prior case, in which merely "touch[ing] or brush[ing]" the victim's hand in the course of taking money was "insufficient to constitute the crime of robbery" under Florida law. 769 So. 2d at 507 (discussing Goldsmith v. State, 573 So. 2d 445 (Fla. Dist. Ct. App. 1991)).

In Benitez-Saldana v. State, 67 So. 3d 320 (Fla. Dist. Ct. App. 2011), the court determined that trial counsel rendered ineffective assistance by conceding that the defendant engaged in conduct on which "a conviction for robbery may be based" -- namely, "a tug-of-war over the victim's purse." Id. at 323. The victim testified that in the course of the tug of war, the defendant grabbed her arm, causing an abrasion. Id. at 322. The conduct in Benitez-Saldana thus involved a "degree of force necessary to inflict pain," not unlike "a slap in the face." Curtis Johnson, 559 U.S. at 143.

The remaining cases petitioner cites (Pet. 27, 29) involved a similar degree of force. In Hayes v. State, 780 So. 2d 918 (Fla. Dist. Ct. App. 2001) (per curiam), the record reflected that the defendant "bumped" the victim with sufficient force that she would have fallen if not for the fact that "she was in between rows of

cars when the robbery occurred." Id. at 919. In Rigell v. State, 782 So. 2d 440 (Fla. Dist. Ct. App. 2001), the defendant "yanked" a purse "from the victim's shoulder, causing her to feel sharp pain." Id. at 441. And in Winston Johnson v. State, 612 So. 2d 689 (Fla. Dist. Ct. App. 1993), the defendant "used sufficient force" not only "to remove the money," but also "to cause slight injury" to the victim's hand. Id. at 691. In each of those cases, the defendant used "force capable of causing physical pain or injury to another person," Curtis Johnson, 559 U.S. at 140 -- in Hayes, force otherwise strong enough to cause the victim to fall; in Rigell, force causing actual physical pain; and in Winston Johnson, force causing actual physical injury.

d. Petitioner contends (Pet. 20-21) that robbery as traditionally defined under the common law did not require any showing that the defendant used more than de minimis force. But this Court is "bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of" Florida robbery. Curtis Johnson, 559 U.S. at 138. And the Florida Supreme Court has rejected the view that "the degree of force used to snatch a victim's property from his person, even when the victim does not resist and is not injured, is sufficient to satisfy the force element of Florida's robbery offense." Robinson, 692 So. 2d at 886. That authoritative interpretation of Florida's robbery statute -- not petitioner's contentions regarding "common law

robbery," Pet. 21 -- governs whether his prior convictions qualify as "violent felon[ies]" under the ACCA.

e. 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.

i. The outcomes in the cases petitioner identifies involving robbery under the laws of other States (Pet. 9, 15-16, 22-26) arise not from any disagreement about the meaning of "physical force" under Curtis 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. 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 also 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 Fritts, a court of appeals has determined that a State's definition of robbery does satisfy the ACCA's elements clause because the State requires force greater than the de minimis amount necessary to remove the property from the person. Tellingly, 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 -- which petitioner alleges (Pet. 15-16, 23-29) to be in conflict with the Eleventh Circuit on the application of the ACCA's elements clause to robbery offenses like Florida's -- 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." 685 Fed. Appx. 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." 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. 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.").

ii. In United States v. Geozos, 870 F.3d 890 (2017), the Ninth Circuit determined that Florida robbery is not categorically 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 suggested 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 as petitioner's extensive discussion of state-court decisions demonstrates (Pet. 15-16, 21-29), 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.

3. Petitioner also contends (Pet. 29-32) that his Florida conviction for attempted armed robbery does not qualify as a

"violent felony" under the ACCA's elements clause. He observes (Pet. 30-32) that Florida courts have upheld convictions for attempted robbery in cases that did not involve actual use of physical force against another, and he argues that those "cases make clear that Florida attempted armed robbery does not require the use or threatened use of violence."

The ACCA's elements clause, however, encompasses not just felonies that have "as an element the use * * * or threatened use of physical force," but also felonies that have "as an element the * * * attempted use * * * of physical force." 18 U.S.C. 924(e)(2)(B)(i) (emphasis added). Florida law provides that a person "commits the offense of criminal attempt" if he "attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof." Fla. Stat. Ann. § 777.04(1) (West 2001). Florida courts have construed that statute to require "a specific intent to commit a particular crime" and "an overt act toward its commission." Thomas v. State, 531 So. 2d 708, 710 & n.3 (Fla. 1988); see Morehead v. State, 556 So. 2d 523, 524 (Fla. Dist. Ct. App. 1990).

As explained above, see pp. 8-10, supra, armed robbery under Florida law necessarily involves the use of physical force, either actual or threatened. Attempted armed robbery under Florida law thus requires proof of a specific intent to use such force and an overt act toward the completion of that crime. Accordingly,

Florida attempted armed robbery has "as an element the * * * attempted use * * * of physical force." 18 U.S.C. 924(e)(2)(B)(i); see, e.g., Hill v. United States, No. 16-3239, 2017 WL 6350071, at *2 (7th Cir. Dec. 13, 2017) ("When a substantive offense would be a violent felony under § 924(e) and similar statutes, an attempt to commit that offense also is a violent felony."); United States v. Johnson, 688 Fed. Appx. 404, 405-406 (8th Cir. 2017) (per curiam) (holding that Minnesota attempted robbery is a violent felony under the ACCA because it has "as an element the 'attempted use' of force against a person") (citation omitted). Petitioner identifies no court of appeals that has held otherwise.

4. Finally, petitioner contends (Pet. 32-40) that his Florida conviction for attempted first-degree murder does not qualify as a violent felony under the ACCA's elements clause. That contention likewise lacks merit.

a. Under Florida law, "the elements of attempted first-degree murder are: (1) an act intending to cause death that went beyond just thinking or talking about it; (2) premediated design to kill; and (3) commission of an act which would have resulted in the death of the victim except that someone prevented the defendant from killing the victim or the defendant failed to do so." Gordon v. State, 780 So. 2d 17, 21 (Fla. 2001) (per curiam), abrogated on other grounds by Valdes v. State, 3 So.3d 1067, 1077 (Fla. 2009); see Fla. Stat. §§ 782.04(1)(a) (West 2002), 777.04(1) (West 2001). Because it involves an attempt to kill someone that is frustrated

by outside forces, attempted first-degree murder necessarily requires at least the "attempted use * * * of physical force" under the ACCA. 18 U.S.C. 924(e)(2)(B)(i).

Petitioner contends (Pet. 33-34, 36-40) that first-degree murder does not require the use of physical force because it may be committed by causing death through indirect means such as by poisoning. The Court in Castleman rejected that contention, concluding that "use of force" in a provision analogous to the ACCA's elements clause includes both the direct and indirect causation of physical harm. 134 S. Ct. at 1415 (construing 18 U.S.C. 921(a)(33)(A)). Castleman explained that "physical force" is a broad term encompassing all "force exerted by and through concrete bodies" and that Congress used the modifier "physical" to distinguish physical force from, for example, "intellectual force or emotional force." Id. at 1414 (quoting Curtis Johnson, 559 U.S. at 138). The Court in Castleman determined that force may be applied directly -- through immediate physical contact with the victim -- or indirectly, for instance, by shooting a gun in the victim's direction, administering poison, infecting the victim with a disease, or "resort[ing] to some intangible substance, such as a laser beam." Id. at 1415 (citation and internal quotation marks omitted). The Court reasoned that when, for example, a person "sprinkles poison in a victim's drink," ibid. (citation omitted), he or she has used force because the "'use of force' in [that] example is not the act of 'sprinkl[ing]' the poison; it is

the act of employing poison knowingly as a device to cause physical harm," ibid. (second set of brackets in original).

Petitioner's examples (Pet. 33-34, 38-40) similarly involve the use of force under Castleman's rationale. If, for example, a person "sprinkl[ed] ground-up nuts" into the food of someone he or she knew to be "deathly allergic to nuts," Pet. 33-34, that person has "employ[ed] [the nuts] knowingly as a device to cause physical harm." Castleman, 134 S. Ct. at 1415. And "[i]f the defendant uses guile, deception, or omission to intentionally cause someone to be injured by physical force, then that would be the use of force as well." United States v. Pena, 161 F. Supp. 3d 268, 282 (S.D.N.Y. 2016) (emphasis omitted). Castleman concluded that in such cases, it "does not matter" whether "the harm occurs indirectly, rather than directly (as with a kick or punch)." 134 S. Ct. at 1415. Petitioner does not address Castleman at all.

b. Petitioner (Pet. 34, 36) relies on a Fifth Circuit decision concluding that Florida manslaughter is not a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) on the theory that it "does not require proof of force" because it could be committed by poisoning. United States v. Garcia-Perez, 779 F.3d 278, 283-284, 289 (2015). But the Fifth Circuit did not address Castleman, and the only authority it cited for its conclusion was circuit precedent predating Castleman. Id. at 284 nn.18-20 (citing United States v. Andino-Ortega, 608 F.3d 305, 310-311 (5th Cir. 2010)). The Fifth Circuit's recent decision in

United States v. Rico-Mejia, 859 F.3d 318 (2017), concluded that Castleman did not apply to the definition of "crime of violence" in Sentencing Guidelines § 2L1.2(b)(1)(A)(ii), and relied on a pre-Castleman ACCA unpublished decision to construe that guidelines provision. Rico-Mejia, 859 F.3d at 321-323. But it did not directly address the ACCA, and other courts of appeals have concluded that Castleman applies to the definition of "violent felony" in the ACCA or to the definitions of "crime of violence" in other federal statutes or the Sentencing Guidelines, abrogating any pre-Castleman precedent to the contrary. The Seventh Circuit, for example, recently applied Castleman's reasoning to the ACCA and held that "[b]oth murder and attempted murder in Illinois are categorically violent felonies under § 924(e)," even though "[i]t is possible to commit murder in Illinois by administering poison, or exposing a baby to freezing conditions, or placing a hapless person in danger * * * and then standing aside while the risk comes to pass." Hill, 2017 WL 6350071, at *2.

That view of Castleman is consistent with other circuits'. See United States v. Ellison, 866 F.3d 32, 34, 37-38 (1st Cir. 2017) (applying Castleman to the ACCA and Sentencing Guidelines § 4B1.2); United States v. Hill, 832 F.3d 135, 143-144 (2d Cir. 2016) (applying Castleman to 18 U.S.C. 924(c)(3)(A)); United States v. Chapman, 866 F.3d 129, 133 (3d Cir. 2017) (applying Castleman to Sentencing Guidelines § 4B1.2); United States v. Reid, 861 F.3d 523, 527-529 (4th Cir. 2017) (applying Castleman to the

ACCA), cert. denied, No. 17-6359, 2017 WL 4574355 (Nov. 13, 2017); United States v. Verwiebe, 874 F.3d 258, 261 (6th Cir. 2017) (applying Castleman to Sentencing Guidelines § 4B1.2); United States v. Winston, 845 F.3d 876, 878 (8th Cir.) (applying Castleman to the ACCA), cert. denied, 137 S. Ct. 2201 (2017); Arellano Hernandez v. Lynch, 831 F.3d 1127, 1131 (9th Cir. 2016) (applying Castleman to 18 U.S.C. 16(a)), cert. denied, Hernandez v. Sessions, 137 S. Ct. 2180 (2017); United States v. Ontiveros, 875 F.3d 533, 536 (10th Cir. 2017) (applying Castleman to Sentencing Guidelines § 4B1.2); see also United States v. Haldemann, 664 Fed. Appx. 820, 822 (11th Cir. 2016) (per curiam) (applying Castleman to Sentencing Guidelines § 4B1.2), cert. denied, 137 S. Ct. 1356 (2017); United States v. Redrick, 841 F.3d 478, 484 (D.C. Cir. 2016) (suggesting that Castleman applies to the ACCA), cert. denied, 137 S. Ct. 2204 (2017).

Petitioner also cites (Pet. 32-33) two Eleventh Circuit orders -- one granting a COA on the denial of a Section 2255 motion, and the other authorizing the district court to consider a second or successive Section 2255 motion -- that opined that Florida attempted first-degree murder "does not appear to qualify" under the ACCA's elements clause "because it could be committed without the use of 'physical force' if, for example, the defendant poisoned the victim." Order at 5, Phillips v. United States, No. 16-17106 (Mar. 8, 2017); see Order at 11, In re Anderson, No. 16-13453 (July 7, 2016). But as explained above, that reasoning is

contrary to Castleman, and neither order addressed the Court's decision in that case.

c. In any event, this case would be a poor vehicle for reviewing petitioner's claim that his prior Florida conviction for attempted first-degree murder does not qualify as a "violent felony." Under the ACCA, a defendant is an armed career criminal so long as he has three qualifying prior convictions. See 18 U.S.C. 924(e). As the district court found, petitioner would have "at least three predicate convictions -- two for armed robbery and one for attempted armed robbery" -- regardless of whether his conviction for attempted first-degree murder also qualifies as an ACCA predicate. 16-cv-22566 D. Ct. Doc. 11, at 4 (Feb. 3, 2017). Given petitioner's other prior convictions, it is not relevant whether Florida attempted first-degree murder is a violent felony under the ACCA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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