No. 17-6577

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD ARTHUR ORR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior convictions for robbery, in violation of Fla. Stat. Ann. § 812.13 (West 1979, 1981, 1985), were convictions for "violent felon[ies]" 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. 1a-7a) is not published in the Federal Reporter but is reprinted at 685 Fed. Appx. 263.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 2017. A petition for rehearing was denied on June 12, 2017 (Pet. App. 8a). On September 6, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 26, 2017, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of North Carolina, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. 9a. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Id. at 10a-11a. The court of appeals affirmed. Id. at 1a-7a.

1. On May 2, 2015, petitioner forced his way into a house in Conover, North Carolina. D. Ct. Doc. 14, at 1-2 (Feb. 12, 2016). Petitioner was carrying a loaded .38 caliber revolver and pointed the gun in the direction of the five residents. Id. at 2. One of the residents persuaded petitioner to go outside. Ibid. Responding to reports of an armed intruder, two sheriff's deputies arrived at the home and arrested petitioner. Id. at 1-2.

A federal grand jury in the Western District of North Carolina 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. Petitioner pleaded guilty. Pet. App. 9a.

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 eight convictions in the 1980s, including six convictions for Florida robbery and one for Florida armed robbery, in violation of Fla. Stat. Ann. § 812.13 (West 1979, 1981, 1985). Presentence Investigation Report ¶¶ 23, 38-44. 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. Ann. § 812.13(1) (West 1979, 1981, 1985).

Petitioner objected to his classification as an armed career criminal. Pet. App. 20a. He argued that his Florida robbery convictions did not qualify as violent felonies under the ACCA's elements clause because at the time of his convictions in the 1980s Florida's robbery statute required proof of only de minimis force. Id. at 20a-22a, 26a-27a. The district court overruled petitioner's objections and imposed the mandatory-minimum ACCA sentence of 180 months of imprisonment. Id. at 29a, 35a.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-7a. The court observed that the Eleventh Circuit had determined that Florida robbery is a violent felony under the ACCA's elements clause. See id. at 3a-4a (citing United States v. Fritts, 841 F.3d 937, 942 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017)). The court also observed that "Florida state court decisions" -- including the Florida Supreme Court's decision in Robinson v. State, 692 So. 2d 883 (1997) -- supported the Eleventh Circuit's conclusion. Pet. App. 4a. "Given the weight of the case law," the court of appeals found that "more than de minimis force is required under the Florida robbery statute, thus distinguishing this case from" United States v. Gardner, 823 F.3d 793 (4th Cir. 2016), in which the court had held that "North Carolina common-law robbery is categorically not an ACCA

predicate." Pet. App. 3a-4a. The court also rejected petitioner's contention that "even if Florida's robbery statute currently requires more than de minimis force, this was not the case prior to the Robinson decision in 1997." Id. at 4a. The court found no "'realistic probability' that, prior to 1997, the Florida robbery statute would be extended to non-violent crimes outside of the ACCA's definition." Id. at 5a. Accordingly, the court determined that petitioner "was properly sentenced as an armed career criminal." Id. at 7a.

ARGUMENT

Petitioner contends (Pet. 17-19) that his prior convictions for Florida robbery are not "violent felon[ies]" under the ACCA's elements clause. The court of appeals correctly determined that Florida robbery is a violent felony. Pet. App. 7a. 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. In any event, this case would be a poor vehicle for this Court's review because petitioner's Florida robbery convictions predate Robinson v. State, 692 So. 2d 883 (Fla. 1997), and petitioner asserts (Pet. 5-6, 13-14) that the relatively small and decreasing class of defendants with such older robbery

convictions could be viewed differently from defendants with more recent ones. Further review is not warranted.*

1. The court of appeals correctly determined that Florida robbery, in violation of Fla. Stat. Ann. § 812.13 (West 1979, 1981, 1985), 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).

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 1979, 1981, 1985). 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

* 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); Williams v. United States, No. 17-6026 (filed Sept. 14, 2017); Everette v. United States, No. 17-6054 (filed Sept. 18, 2017); Jones v. United States, No. 17-6140 (filed Sept. 25, 2017).

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, supra, 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." 692 So. 2d 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 because "more than de minimis force is required under the Florida robbery statute," Florida robbery is a violent felony under the ACCA's elements clause. Pet. App. 4a, 7a.

b. Contrary to petitioner's contention (Pet. 12, 17-18), the court of appeals faithfully applied the categorical approach as prescribed by this Court's decision in Moncrieffe v. Holder, 569 U.S. 184 (2013). Petitioner suggests (Pet. 17-18) that the court of appeals departed from that decision 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 Pet. App. 4a (concluding that "more than de minimis force is required under the Florida robbery statute").

c. Petitioner contends (Pet. 12) that the decision below reflects confusion among the courts of appeals on the showing required to establish "a realistic probability" that a State "would apply its statute to conduct that falls outside" the ACCA. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007). In his view

(Pet. 12), courts have adopted three different approaches, with (1) the Fourth, Seventh, and D.C. Circuits requiring the defendant to "identif[y] a particular case that sustains a conviction based on less-than-violent force," (2) the Eighth Circuit considering whether "the reasoning of a state court decision would logically permit a prosecution for less-than-violent conduct," and (3) the Sixth Circuit "refus[ing] to consider state intermediate-appellate court decisions."

The decisions petitioner identifies (Pet. 12), however, do not reflect any disagreement about Duenas-Alvarez's "realistic probability" standard. Rather, they reflect case-specific assessments of different States' laws. In the Fourth, Seventh, and D.C. Circuit cases petitioner cites, the court of appeals was unable to identify any conviction supporting the defendant's "fanciful," United States v. Maxwell, 823 F.3d 1057, 1062 (7th Cir.), cert. denied, 137 S. Ct. 401 (2016), or "farfetched," United States v. Redrick, 841 F.3d 478, 484 (D.C. Cir. 2016), cert. denied, 137 S. Ct. 2204 (2017), theory of what was punishable under state robbery law. See also United States v. Doctor, 842 F.3d 306, 311 n.5 (4th Cir. 2016) (describing as "stranger-than-fiction" a robbery committed in the way the defendant had hypothesized), cert. denied, 137 S. Ct. 1831 (2017). In United States v. Bell, 840 F.3d 963 (2016), by contrast, the Eighth Circuit (in reaching a holding it is now reconsidering) relied not only on the reasoning of a state-court decision, but also on the

fact that the same decision "upheld a conviction" for Missouri second-degree robbery where, at least in the panel's view, the "defendant's conduct appear[ed] to have fallen short of using 'force capable of causing physical pain or injury to another person.'" Id. at 966 (citation omitted); see also Order at 1, United States v. Swopes, No. 16-1797 (8th Cir. June 17, 2017) (granting rehearing en banc to consider whether Missouri second-degree robbery is a violent felony under the ACCA). And in United States v. Southers, 866 F.3d 364 (2017), the Sixth Circuit acknowledged, as a general matter, that "federal courts should look to intermediate state appellate court decisions in determining what is the least conduct criminalized under a state's statute," id. at 369, but declined to rely on the Tennessee intermediate-appellate court decisions the defendant cited in that case because they were "inconsistent with Tennessee Supreme Court precedent," id. at 368.

d. Petitioner also contends (Pet. 4-6, 10-12, 18-19) that the court of appeals ignored several Florida appellate decisions 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 McCloud v. State, supra, the defendant "exert[ed] physical force to extract [the victim's purse] from her grasp," causing the victim to fall to the ground. 335 So. 2d at 259. The evidence also "showed that [the defendant] attempted to kick his victim while she lay on the ground and after the purse had been secured." Ibid. The force employed by the defendant 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. Johnson, 559 U.S. at 140. The court's statement that "[a]ny degree of force suffices to convert larceny into a robbery," McCloud, 335 So. 2d at 258, was therefore dictum, which was effectively repudiated in Robinson, 692 So. 2d at 886.

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 defendant plainly employed "force capable of causing

physical pain or injury to another person." 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," 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 had been deemed "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 -- namely, "a tug-of-war over the victim's purse" -- on which "a conviction for robbery may be based." 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." Johnson, 559 U.S. at 143.

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. And 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. In each of those cases, the defendant used "force capable of causing physical pain or injury to another person," Johnson, 559 U.S. at 140 -- in Hayes, force otherwise strong enough to cause the victim to fall, and in Rigell, force causing actual physical pain.

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. 7 n.2) 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. Harris, 844 F.3d 1260 (2017), petition for cert. pending, No. 16-8616 (filed Apr. 4, 2017), for example, 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 courts have reached similar state-statute-specific conclusions as to other 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); Doctor, 842 F.3d at 311-312 (South Carolina robbery); 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 Pet. App. 4a ("distinguishing this case from 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."). This case illustrates the point. The different classifications of

the state robbery convictions at issue in Gardner and this case -- which were both decided by the same court of appeals -- reflect differences in the relevant state statutes, not differences in the approach to classifying ACCA predicates. See Pet. App. 3a-4a.

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 as petitioner's discussion of state-court decisions demonstrates (Pet. 3-6), 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. In any event, this case would be a poor vehicle for further review because following petitioner's convictions for Florida robbery in the 1980s, the Florida Supreme Court made clear in its 1997 decision in Robinson that in order for a taking of money or other property to qualify as a robbery, "there must be resistance by the victim that is overcome by the physical force of the offender." 692 So. 2d at 886. Petitioner contends (Pet. 5-6, 13-14) -- as he did below, Pet. App. 26a-27a; Pet. C.A. Br. 16-18 -- that a post-Robinson conviction presents a different issue under the ACCA's elements clause than a pre-Robinson conviction. The court of appeals rejected that contention. Pet. App. 5a. But to the extent that the dates of his Florida robbery convictions are relevant, further review in this case would affect only the relatively small category of defendants whose sentences depend on convictions for Florida robbery before Robinson was decided in 1997, over two decades ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2018