No. 17-6664

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL A. MAYS, PETITIONER

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly denied a certificate of appealability on petitioner's claim that his prior conviction for robbery, in violation of Fla. Stat. Ann. § 812.13 (West 1993), was a conviction for a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i).

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## OPINION BELOW

The order of the court of appeals (Pet. App. A1) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on August 9, 2017. The petition for a writ of certiorari was filed on November 2, 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

two counts of possession with the intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). 11-cr-457 D. Ct. Doc. 31, at 1 (Feb. 17, 2012) (Judgment). He was sentenced to 188 months of imprisonment, to be followed by 72 months of supervised release. Judgment 2-3. Petitioner did not appeal his convictions or sentences. Petitioner later filed a motion to vacate his sentence under 28 U.S.C. 2255. 16-cv-99 D. Ct. Doc. 1, at 1 (Jan. 14, 2016) (Motion). The district court denied the motion and denied petitioner's request for a certificate of appealability (COA). 16-cv-99 D. Ct. Doc. 28, at 1-2 (Jan. 26, 2017) (Order). The court of appeals similarly denied a COA. Pet. App. A1.

1. In April 2011, a confidential informant purchased cocaine base from petitioner. 11-cr-457 D. Ct. Doc. 34, at 25. Police officers subsequently executed a search warrant at petitioner's residence and found cocaine base and a loaded .22 caliber pistol. Id. at 26.

A federal grand jury in the Middle District of Florida indicted petitioner on two counts of possession with the intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). 11-cr-457 D. Ct. Doc. 1, at 1-2 (Aug. 31, 2011). Petitioner pleaded guilty to each count. 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 three prior Florida convictions, including a 1994 conviction for robbery, in violation of Fla. Stat. Ann. § 812.13 (West 1993). Presentence Investigation Report (PSR) ¶¶ 29, 37. 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 1993).

Petitioner did not object to his classification as an armed career criminal. 11-cr-457 D. Ct. Doc. 36, at 4-5 (Feb. 23, 2016). Adopting the findings of the PSR, id. at 5, the district court sentenced petitioner to 188 months of imprisonment, to be followed by 60 months of supervised release, on his conviction for possession of a firearm by a felon, Judgment 2-3. The court sentenced petitioner to 188 months of imprisonment, to be followed by 72 months of supervised release, on each of the other two counts. Ibid. The court ordered all three sentences to be served concurrently. Ibid. Petitioner did not appeal his convictions or sentences.

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 January 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. Motion 1. Petitioner asserted that he was no longer an armed career criminal under the ACCA because Samuel Johnson's invalidation of the residual clause meant that his prior Florida robbery conviction was not a violent felony. 16-cv-99 D. Ct. Doc. 1-1, at 1-3 (Jan. 14, 2016). Petitioner argued that his prior Florida robbery conviction did not satisfy the ACCA's separate elements clause because at the time of his conviction in 1994, robbery under Section 812.13 could be committed with the use of only de minimis force. Id. at 1-2.

The district court denied petitioner's Section 2255 motion. Order 1-2. Relying on circuit precedent, the court determined that petitioner's Florida robbery conviction qualified as a violent felony under the ACCA's elements clause. Order 2 (citing United States v. Fritts, 841 F.3d 937 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017)). The district court also 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. A1.

ARGUMENT

Petitioner contends (Pet. 5-9) that the court of appeals erred in denying a COA on his claim that his prior Florida conviction for robbery is not a violent felony under the ACCA's elements clause. The court correctly declined to issue a COA. Its

decisions have long held that Florida 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. In any event, this case would be a poor vehicle for this Court's review because petitioner's Florida robbery conviction predates Robinson v. State, 692 So. 2d 883 (Fla. 1997), and petitioner asserted below that the relatively small and decreasing class of defendants with such older robbery convictions could be viewed differently from defendants with more recent ones. In addition, this Court's resolution of the question presented would not affect petitioner's overall sentence. Further review is not warranted.*

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

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

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. i), the court of appeals did not err in denying a COA on his claim that his prior Florida conviction for robbery does not qualify as a violent felony. 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 Florida conviction for robbery could qualify as an ACCA predicate only by resort to the now-invalidated residual clause did not "deserve encouragement to proceed further," ibid. (citation omitted), particularly given that his argument had 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 robbery, in violation of Fla. Stat. Ann. § 812.13, 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 1993). 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, 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 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. 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," 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 robbery is a "violent felony" under the ACCA's elements clause. 841 F.3d at 943-944.

b. Petitioner cites several Florida appellate decisions (Pet. 5-6 & nn.3-10) 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 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 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." Curtis Johnson, 559 U.S. at 143.

The remaining cases petitioner cites (Pet. 5-6 & nn.3, 5, 7, 9-10) 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 Rumph v. State, 544 So. 2d 1150 (Fla. Dist. Ct. App. 1989), the defendant "shove[d] [a store employee] out of his way and into [a] door," causing the employee to "hit her shoulder on the door." Id. at 1151. 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 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. And in Santiago v. State, 497 So. 2d 975 (Fla. Dist. Ct. App. 1986), the defendant "tore two gold necklaces from around [the victim's] neck and departed the scene, leaving the victim with a few scratch marks and some redness around her neck." Id. at 976. 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 Rumph, force causing the victim to hit her shoulder on a door; in Rigell, force causing actual physical pain; and in Winston Johnson and Santiago, force causing actual physical injury.

c. 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. 7-9 & n.14) 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 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 Fritts, 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. 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. 7-9) 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" 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.").

ii. 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. 5-6 & nn.3-10), 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. After petitioner was convicted of Florida robbery in 1994, the Florida Supreme Court made clear 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 contended below that a "pre-1997" robbery conviction involved a different "version of the robbery statute" than a "post-1997" robbery conviction. Pet. C.A. COA Appl. 10-13; see 16-cv-99 D. Ct. Doc. 1-1, at 1-2. The court of appeals in Fritts rejected that contention, 841 F.3d at 942-943, and petitioner does not renew it in his petition. 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.

This case would also be a poor vehicle for review because this Court's resolution of the question presented would not affect petitioner's overall sentence. The district court sentenced petitioner to 188 months of imprisonment on each of his three counts of conviction, to be served concurrently. See p. 4, supra. Petitioner's classification as an armed career criminal under the ACCA affected only his sentence on his conviction for possession of a firearm by a felon; it did not affect his sentence on the other two counts. See 18 U.S.C. 924(e); PSR ¶¶ 28-30. Thus, regardless of this Court's resolution of the question presented, petitioner's sentences on those other counts would still stand, and his overall sentence would still include 188 months of imprisonment (and 72 months of supervised release).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2018