NO: 17-7140

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

KELVIN PACE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, Petitioner Kelvin Pace wishes to alert the Court to the Ninth Circuit Court of Appeals' recent decision in *United States v. Walton*, 881 F.3d 768 (9th Cir. Feb. 1, 2018), holding that a conviction for Alabama first-degree robbery is not categorically a violent felony within the ACCA's elements clause. *Walton* is significant to this case for several reasons.

Alabama first-degree robbery is the enhanced (armed) version of Alabama third-degree robbery. Like the Florida unarmed robbery offense at issue in Petitioner's case, the Alabama third-degree robbery offense requires a taking of property by "force" sufficient to overcome the victim's resistance. And notably, *Walton* has made clear that the Alabama courts have interpreted the "overcoming resistance" element of their robbery statute just as the Florida courts interpret the "overcoming resistance" element in the Florida robbery statute: namely, to require only minimal, non-violent force, consistent with the rule at common law. *See Walton*, 881 F.3d at 773-774 (noting with significance that Alabama courts have affirmed robbery convictions where the "force" used to overcome resistance was "non-violent under *Johnson I*" such as where the defendant merely tugged a purse and yanked it off the victim's arm, *Jackson v. State*, 969 So.2d 930 (Ala. Crim. App. 2007); pushed a cashier out of the way to take money from a cash register, *Wright v. State*, 487 So.2d 962, 964 (Ala. Crim. App. 1985); or shoved the victim into a corner to effect an escape, *Wright v. State*, 432 So.2d 510, 512 (Ala. Crim. App. 1983)).

The Eleventh Circuit has recognized that the elements of Florida and Alabama robbery are the same; under both statutes "the degree of force required –

force sufficient to overcome the victim's resistance – is defined in a similar way;" and it is therefore "arguable" that the "same reasoning" applied in *United States v. Fritts*, 841 F.3d 937, 940-42 (11th Cir. 2016) and *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) would apply to Alabama robbery. *United States v. Gilbert*, ___ Fed. Appx. ___, 2017 WL 6728518 at **5-6 (11th Cir. Dec. 29, 2017). Moreover, district courts within the Eleventh Circuit have consistently held that because the Alabama robbery offense "is substantially similar to the Florida robbery statute," *Fritts* and *Lockley* require a finding that Alabama robbery likewise meets the elements clause. *See Senter v. United States*, 2018 WL 705526 at *2-3 (N.D. Ala. 2018); *Boykin v. United States*, 2018 WL 705523 (N.D. Ala. 2018); *Childs v. United States*, 2017 WL 4538923 (N.D. Ala. 2017); *Dunn v. United States*, 2017 WL 4472714 (N.D. Ala. 2017); *United States v. Rice*, 2017 WL 1247402 (N.D. Ala. 2017); *United States v. Freeman*, 2016 WL 4394172 (S.D. Ala. 2016).

Given that Eleventh Circuit courts treat these analogous robbery offenses as categorically violent, and Ninth Circuit courts do not, *Walton* not only confirms that resolution of the circuit conflict as to whether Florida robbery is a violent felony will have broad legal importance; it specifically disproves the government's claim that the issue raised by Petitioner "is unlikely to recur with great frequency *in the Ninth Circuit*, which sits on the other side of the country." BIO at 17 (emphasis added).

With the decision in *Walton*, the Ninth Circuit has considered three times in less than a year whether the degree of force necessary to overcome victim resistance in a state robbery offense is categorically "violent force" as defined in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). As Petitioner noted in his Reply

to the BIO, after holding in *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017) that Florida robbery was not a violent felony because Florida caselaw confirms overcoming resistance does not require violent force, the Ninth Circuit analyzed the Arizona robbery statute similarly, and held that a conviction under that statute was not a violent felony since the Arizona courts interpret their "overcoming resistance" element to require only minimal, non-violent force. *See* Reply to BIO at 10, n. 7 (citing *United States v. Molinar*, ___ F.3d ___, 2017 WL 7362022 at **4-5 (9th Cir. Feb. 5, 2018) and *United States v. Jones*, 877 F.3d 884, 888-889 (9th Cir. 2017)).

The Ninth Circuit in *Walton* expressly followed *Molinar*[1] in holding that Alabama robbery did not categorically qualify as an ACCA violent felony. Although *Walton* did not specifically mention *Geozos*, the reasoning in *Walton* and *Molinar* is consistent with *Geozos*. Moreover, the Ninth Circuit also found *United States v. Lee*, 701 Fed. Appx. 697, 701 (10th Cir. 2017) (holding that Florida's resisting with violence offense is not a violent felony since it can be committed by simply "wiggling and struggling" and "scuffling") particularly relevant to its analysis of whether an Alabama robbery conviction qualified as an ACCA violent felony. For indeed, it noted, the "shoving" conduct in the two Alabama *Wright* cases was "no more violent than these minor scuffles" in the Florida resisting context. Therefore, the Ninth Circuit concluded, the "force" required to support an Alabama robbery conviction was "not sufficiently violent to render that crime a violent felony under the ACCA." *Walton*, 881 F.3d at 774.

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[1] The *Molinar* decision cited in *Walton*, originally published at 876 F.3d 953 (9th Cir. Nov. 29, 2017), was amended and superseded on denial of rehearing en banc on February 5, 2018. The amendment did not affect the portion cited in *Walton*.

The Ninth Circuit ultimately went beyond its decisions in *Geozos* and *Molinar* by clarifying in *Walton* that "[t]he mere potential for some trivial pain or slight injury will not suffice" for the ACCA elements clause, since "'violent' force must be 'substantial' and 'strong.'" *Walton*, 881 F.3d at 773 (citing *Curtis Johnson* and *United States v. Castleman*, ___ U.S. ___, 134 S.Ct. 1405 (2014)). And notably, in so holding, the Ninth Circuit adopted arguments articulated by Petitioner in the Reply to the BIO at 13-15 as to why the decision below, the assumptions in *Fritts*, and the government's arguments herein are wrong. On the rationale articulated in *Walton*, the "mere potential for some trivial pain or slight injury," such as that which existed (without actual injury) in both *Hayes v. State*, 780 So.2d 918 (Fla. 1st DCA 2011) and *Sanders v. State*, 769 So.2d 506 (Fla. 5th DCA 2000), does not suffice for the ACCA's elements clause.

For that reason, neither a Florida robbery conviction nor an Alabama robbery conviction is an ACCA violent felony.

Respectfully submitted,

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March 7, 2018