No. _____

IN THE

Supreme Court of the United States

DANIEL K. GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a conviction for robbery qualifies as a "violent felony" under the ACCA's elements clause where, as in Florida and several other states, the offense may be committed by using a *de minimis* amount of force.

PARTIES INVOLVED

The parties identified in the caption of this case are the only parties before the Court.

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PETITION FOR WRIT OF CERTIORARI

In this post-conviction proceeding under 28 U.S.C. § 2255, Petitioner Daniel K. Garcia respectfully prays that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Eleventh Circuit denying a certificate of appealability ("COA") on the claims set forth here and subsequently entering judgment against Petitioner.

OPINIONS BELOW

The Order of the Eleventh Circuit Court of Appeals denying Petitioner's request for a COA was entered in *Garcia v. United States of America,* No. 17-11952-B (11th Cir. Jul. 18, 2017). (App. A-2). Rehearing was denied on August 31, 2017. (App. A-1).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Eleventh Circuit entered judgment against Petitioner on July 18, 2017, and denied rehearing on August 31, 2017. This Petition is timely filed.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the ACCA, 18 U.S.C. § 924(e). The ACCA's enhanced sentencing provision provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions … for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]

18 U.S.C. § 924(e)(1).

In relevant part, the ACCA defines a "violent felony" as:

> [A]ny 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 Florida robbery statute in effect at the time of Mr. Garcia's conviction provides, in pertinent part:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear.
>
> If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment …

Fla. Stat. § 812.13.

STATEMENT OF THE CASE

Mr. Garcia was convicted of possession of a firearm by a convicted felon, and on January 22, 1999, was sentenced under the Armed Career Criminal Act (ACCA) to 180 months' imprisonment. At the time of sentencing, Mr. Garcia had seven Florida convictions that qualified as ACCA predicate offenses – three burglary and four robbery convictions. Mr. Garcia filed a timely appeal and it was denied on January 4, 2000.

On September 15, 2000, Mr. Garcia moved to vacate his sentence under 28 U.S.C. § 2255. The motion was denied on June 13, 2002. Mr. Garcia appealed this decision, and it was also denied.

On June 13, 2016, after receiving permission from the Eleventh Circuit, Mr. Garcia filed a second or successive § 2255 motion arguing his ACCA sentence was unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*). (Doc 237). The court agreed Mr. Garcia's Florida burglary convictions were no longer proper predicates in light of *Johnson II*. The court concluded, however, that a Florida robbery still qualified pursuant to the force/elements clause of the ACCA. The motion was denied by the district court on April 14, 2017. The court also denied a certificate of appealability. On April 26, 2017, Mr. Garcia filed a timely notice of appeal.

The Eleventh Circuit summarily denied a COA, stating merely that Mr. Garcia had failed to make a substantial showing of "a denial of a constitutional right." (App. A-2).

REASONS FOR GRANTING THE WRIT

The Ninth and Eleventh Circuits Are at Odds Regarding Whether a Florida Conviction for Armed Robbery Qualifies as a "Violent Felony" under the ACCA's Elements Clause.

Under Florida's robbery statute, a robbery occurs where a taking is accomplished using enough force to overcome a victim's resistance. *See Robinson v. State*, 692 So. 2d 883 (Fla. 1997). Thus, if a victim's resistance is minimal, the force needed to overcome that resistance is similarly minimal. Indeed, a review of Florida caselaw clarifies that a defendant may be convicted of robbery even if he uses only a *de minimis* amount of force. A conviction may be imposed if a defendant: (1) bumps someone from behind;[1] (2) engages in a tug-of-war over a purse;[2] (3) pushes someone;[3] (4) shakes someone;[4] (5) struggles to escape someone's grasp;[5] (6) peels back

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[1] *Hayes v. State*, 780 So. 2d 918, 919 (Fla. 1st DCA 2001).

[2] *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011).

[3] *Rumph v. State*, 544 So. 2d 1150, 1151 (Fla. 5th DCA 1989).

[4] *Montsdoca v. State*, 93 So. 157, 159–160 (Fla. 1922).

[5] *Colby v. State*, 46 Fla. 112, 114 (Fla. 1903). In *Colby*, the defendant was caught during an attempted pickpocketing. *Id.* The victim grabbed the defendant's arm, and the defendant struggled to escape. *Id.* Under the robbery statute in effect at the time, the Florida Supreme Court held it was not a robbery because the force was used to escape, rather than secure the money. *Id.* However, the Florida Supreme Court has made clear that this conduct would have qualified as a robbery under the current robbery statute at issue in this case. *See Robinson v. State*, 692 So. 2d 883, 887 n.10 (Fla. 1997) ("Although the crime in *Colby* was held to be larceny, it would be robbery under the current version of the robbery statute because the perpetrator used force to escape the victim's grasp."). Indeed, Florida courts have made clear that if a pickpocket "jostles the owner, or if the owner, catching the pickpocket in the act, struggles to keep possession," a robbery has been committed. *Rigell v. State*, 782 So. 2d 440, 441 (Fla. 4th DCA 2001) (quoting W. LaFave, A. Scott, Jr., *Criminal Law* § 8.11(d), at 781 (2d ed. 1986)); *Fine v. State*, 758 So. 2d 1246, 1248 (Fla. 5th DCA 2000).

someone's fingers;[6] or (7) pulls a scab off someone's finger.[7] Indeed, under Florida law, a robbery conviction may be upheld based on "ever so little" force. *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986).[8]

The Ninth Circuit recently recognized this in *United States v. Geozos*, where it held that a Florida robbery conviction, regardless of whether it is armed or unarmed, fails to qualify as a "violent felony" under the elements clause. 870 F.3d 890, 898-901 (9th Cir. 2017). In so holding, the Ninth Circuit relied on Florida caselaw which clarified that an individual may violate Florida's robbery statute without using violent force, such as engaging "in a non-violent tug-of-war" over a purse. *Id.* (citing *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011)). And, while both the Ninth and Eleventh Circuits have recognized the Florida robbery statute requires an individual use enough force to overcome a victim's resistance, the Ninth Circuit, in coming to a decision that it recognized was at "odds" with the Eleventh Circuit's holding in *Fritts*, stated that it believed the Eleventh Circuit "overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." *Id.* (emphasis in original).

Florida is not alone in its use of a resistance-based standard. In fact, most states permit robbery convictions where the degree of force used is sufficient to

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[6] *Sanders v. State*, 769 So. 2d 506, 507 (Fla. 5th DCA 2000).

[7] *Johnson v. State*, 612 So. 2d 689, 690–91 (Fla. 1st DCA 1993)

[8] In *Santiago*, the defendant reached into a car and pulled two gold necklaces from around the victim's neck, causing a few scratch marks and some redness around her neck. *Santiago*, 497 So. 2d at 976.

overcome a victim's resistance. Indeed, at least fifteen states use some variation of this standard in the text of their statutes,[9] and several others have adopted it through case law.[10] Since this Court struck down the ACCA residual clause in *Johnson II*, several circuits have had to reevaluate whether these robbery statutes and others still qualify as "violent felon[ies]" under the ACCA's elements clause.[11] These courts have reached differing conclusions, and as a result, significant tension has arisen regarding the degree of force a state robbery statute must require to categorically satisfy the "physical force" prong of the elements clause. *See Johnson v. United States,* 559 U.S. 133, 140 (2010) (*Johnson I*) (defining "physical force" as "*violent* force . . . force capable of causing physical pain or injury to another person.") (emphasis in original). The Fourth Circuit's decisions in *United States v. Gardner*, 823 F.3d 793

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[9] *See* Ala. Code § 13A-8-43(a)(1); Alaska Stat. § 11.41.510(a)(1); Ariz .Rev. Stat. §§ 13-1901, 1902; Conn. Gen. Stat. § 53a-133(1); Del. Code Ann. tit. 11, § 831(a)(1); Haw. Rev. Stat. § 708-841(1)(a); Me. Rev. Stat. tit. 17-A, § 651(1)(B)(1); Minn. Stat. § 609.24; Mo. Rev. Stat. §§ 570.010(13), 570.025(1); Nev. Stat. § 200.380(1)(b); N.Y. Penal Law § 160.00(1); Okla. Stat. tit. 21, §§ 791, 792, 793; Or. Rev. Stat. § 164.395(1)(a); Wash. Rev. Code § 9A.56.190; Wis. Stat. § 943.32(1)(a).

[10] *See, e.g.*, *Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989); *State v. Stecker*, 108 N.W.2d 47, 50 (S.D. 1961); *State v. Robertson*, 740 A.2d 330, 334 (R.I. 1999); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. 1997); *West v. State*, 539 A.2d 231, 234 (Md. 1988); *State v. Blunt*, 193 N.W.2d 434, 435 (Neb. 1972); *State v. Sein*, 590 A.2d 665, 668 (N.J. 1991); *Winn v. Commonwealth,* 462 S.E.2d 911, 913 (Va. 1995).

[11] *See United States v. Doctor*, 843 F.3d 306 (4th Cir. 2016); *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016); *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015); *United States v. Duncan*, 833 F.3d 751 (7th Cir. 2016); *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016); *United States v. Eason*, 829 F.3d 633 (8th Cir. 2016); *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016); *United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017); *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016).

(4th Cir. 2016), and *United States v. Winston*, 850 F.3d 677, 683–86 (4th Cir. 2017), are instructive in this regard.

In *Winston*, the Fourth Circuit held a Virginia conviction for common law robbery committed by "violence" does not categorically require the use of "physical force." *Id.* Such a robbery is committed where a defendant employs "anything which calls out resistance." *Id.* (quoting *Maxwell v. Commonwealth*, 165 Va. 860 (1936)). Indeed, a conviction may be imposed even if a defendant does not "actual[ly] harm" the victim. *Id.* (quoting *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487 (Va. Ct. App. Dec. 12, 2000)). Rejecting the government's argument that overcoming resistance requires violent "physical force," the Fourth Circuit held that the *de minimis* force required under Virginia law does not rise to the level of violent "physical force." *Id.*

In *Gardner*, the Fourth Circuit held that the offense of common law robbery in North Carolina does not qualify as a "violent felony" under the elements clause because it does not categorically require the use of "physical force." 823 F.3d at 803–04. A North Carolina common law robbery may be committed by force so long as the force is "is sufficient to compel a victim to part with his property." *Id.* (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)). "This definition," the Fourth Circuit stated, "suggests that even *de minimis* contact can constitute the 'violence' necessary for a common law robbery conviction under North Carolina law." *Id.* (emphasis in original). The Fourth Circuit then discussed two North Carolina state cases that supported that conclusion. *Id.* (discussing *State v. Chance*, 662 S.E.2d 405 (N.C. Ct. App. 2008), and

State v. Eldridge, 677 S.E.2d 14 (N.C. Ct. App. 2009)). Based on these decisions the court concluded that "the minimum conduct necessary to sustain a conviction for North Carolina common law robbery" does not necessarily require "physical force," and therefore the offense does not categorically qualify as a "violent felony" under the elements clause. *Id.*

Like the Virginia and North Carolina offenses described in *Winston* and *Gardner* respectively, a Florida robbery may be committed by force sufficient to overcome a victim's resistance. As the Fourth Circuit recognized, this definition implicitly suggests that so long as a victim's resistance is slight, a defendant need only use *de minimis* force to commit a robbery. And, as explained above, Florida case law confirms this point.

Given the circuit split between the Ninth and Eleventh Circuits, and the tension among the other circuits, this case presents an ideal vehicle for the Court to resolve these inconsistencies and reinforce what it said in *Johnson I* — that "physical force" requires "a substantial degree of force." 559 U.S. at 140. At a minimum, it requires more than the *de minimis* force required for a robbery conviction under Florida law.

The issue presented by this petition was fully preserved below and is dispositive — if Mr. Garcia's prior robbery convictions do not qualify as "violent felon[ies]" under the ACCA's elements clause, then Mr. Garcia is ineligible for enhanced sentencing under the ACCA and his 327-month sentence exceeds the applicable statutory maximum.

At a minimum this Court should grant the petition and remand to the Eleventh Circuit for consideration of the issue in full. The Eleventh Circuit denied Mr. Garcia's request for a COA, and therefore never arrived at a decision based on the merits of his arguments.

Under 28 U.S.C. § 2253(c)(2), a court of appeals must grant leave to appeal where the appellant makes a "substantial showing of the denial of a federal constitutional right." As this Court reiterated in *Buck v. Davis*, "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" 137 S. Ct. 759, 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

The Ninth Circuit's decision in *Geozos,* which is in direct conflict with the Eleventh Circuit, along with the conclusions of the Fourth Circuit regarding similar state statutes, clearly demonstrates there is an ongoing debate regarding the issue that deserves encouragement to proceed. Mr. Garcia, at the very least, requests that this Court vacate the order below and remand for reconsideration of his claims in light of the circuit conflicts.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner Daniel Garcia prays that this Court grant this Petition for a Writ of Certiorari, or, alternatively, grant

summary reversal and remand the case to the Court of Appeals with instructions to grant a COA or to review Petitioner's application for COA anew.

Respectfully submitted,

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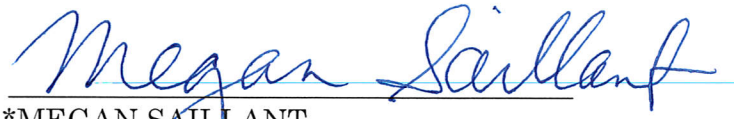
FEDERAL PUBLIC DEFENDER



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