NO:

IN THE
SUPREME COURT OF THE UNITED STATES

KEENAN JOYNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
TRACY DREISPUL
Assistant Federal Public Defender
Counsel for Petitioner
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
Telephone (305) 536-6900

QUESTIONS PRESENTED FOR REVIEW

1. Whether Mr. Joyner's sentence must be vacated because an attempted violation of the Florida robbery statute currently under review in *Stokeling v. United States*, No. 16-12951, is not categorically a "violent felony" for purposes of the Armed Career Criminal Act;

and

2. Whether the Court of Appeals misapplied the categorical approach in determining that an "attempt" to commit a violent felony, by definition, involves the "attempted use" of physical force.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

RULES:

IN THE
SUPREME COURT OF THE UNITED STATES

No:

KEENAN JOYNER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Keenan Joyner respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 16-17285 in that court on February 22, 2018, *United States v. Joyner,* 882 F.3d 1369 (11th Cir. 2018), which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on February 22, 2018. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions and sentences of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following statutes:

18 U.S.C. § 924.

> **(e)(2)** As used in this subsection – . . .
>
> **(B)** the term 'violent felony' means 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.

Fla. Stat. § 812.13 (2007).

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.
...

(3)(a) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.

(3)(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

STATEMENT OF THE CASE AND FACTS

Keenan Joyner was charged by indictment with being a previously convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). (DE 1). He pled not guilty to the sole count of the indictment and proceeded to a jury trial.

The evidence showed that the Miami-Dade Police Department and the Miami Beach Police Department were conducting an investigation into a vehicle that Mr. Joyner was driving on the date of the offense. Between six and eight police cars converged on a parking lot where the vehicle was parked. Detective Martin Garcia testified that as the cars entered the lot, Mr. Joyner turned, spun around, and went inside the driver's seat area of the vehicle. Garcia testified he saw a firearm in Mr. Joyner's hand, "as if he was withdrawing it from his waistband." Garcia then then described Mr. Joyner "spinning in, opening the door, withdrawing the firearm," and sliding it under the seat. Detective Garcia's testimony was not corroborated by any of the numerous other police personnel who were involved in the surveillance and arrest, nor by any documentary or forensic evidence. The trial thus turned entirely on Garcia's credibility.[1] After a protracted period of deliberations, Mr. Joyner was convicted of the sole count of the indictment.

Prior to the sentencing hearing, the government alleged that Mr. Joyner

---

[1] The parties stipulated (1) that Mr. Joyner had previously been convicted of a felony and had not had his rights restored, and (2) that the firearm and ammunition had been manufactured outside the State of Florida and had therefore affected interstate or foreign commerce.

should be subject to the enhanced penalties of the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA") based on convictions for resisting an officer with violence, attempted armed robbery, and possession with intent to sell/deliver cocaine, all under Florida law. Mr. Joyner objected to the factual basis alleged in each of these paragraphs, and argued that his convictions for robbery and resisting an officer with violence should not qualify as a predicate violent felonies, while acknowledging adverse circuit precedent. Mr. Joyner additionally argued "that the three qualifying prior convictions under the Armed Career Criminal Act are elements of the offense that must be alleged in the indictment and proven beyond a reasonable doubt." (DE 42:19) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000)). He recognized, however, that this, too, was foreclosed by precedent.

Without the ACCA enhancement, Mr. Joyner argued that his offense level should be 26, and his criminal history category VI, bringing his advisory guidelines range to 120-150 months, with a statutory maximum penalty of 120 months. (DE 44-1:3). At the sentencing hearing, the district court applied the guidelines as calculated under the ACCA, finding that the total offense level was 33, and the criminal history category 6, for an advisory guideline range of 235 to 293 months. The court then varied downward from the bottom of the calculated guidelines range, and sentenced Mr. Joyner to 200 months' incarceration, to be followed by 5 years of supervised release.

Mr. Joyner's conviction and sentence were affirmed by the Eleventh Circuit in a published decision. *United States v. Joyner*, 882 F.3d 1369 (11th Cir. 2018).

REASONS FOR GRANTING THE WRIT

In *Stokeling v. United States*, No. 16-12951, this Court granted *certiorari* to review the following question:

> Is a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" categorically a "violent felony" under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i) (an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?

In the instant case, Mr. Joyner was subjected to the enhanced penalties of the Armed Career Criminal Act ("ACCA") based on an attempted violation of the same Florida robbery statute that is currently under review. He therefore asks this Court to hold his case in abeyance pending the resolution of this question in *Stokeling*

I. Attempted robbery is not a violent felony under the elements clause of the ACCA.

The offense of attempted robbery is not an enumerated offense under 18 U.S.C. § 924(e)(2)(B)(ii), and the residual clause of that provision has been declared void for vagueness, *Samuel Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015). Thus, this offense can qualify only under the elements clause in § 924(e)(2)(B)(i), which defines violent felony as certain crimes that "ha[ve] as an element the use, attempted use, or threatened use of force against the person of another." Mr. Joyner's prior Florida conviction for attempted robbery does not meet the ACCA's elements clause because it does not necessarily require violent force.

In *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), the Court defined "physical force" to mean "violent force." It explained that violent force referred to a "substantial degree of force" involving "strength," "vigor," "energy," "pressure," and "power." *Id.* at 139; *see id.* at 142 (violent force "connotes force strong enough to constitute 'power'"). Accordingly, it held that Florida simple battery, which could be committed only by a slight touching, *id.* at 138, did not necessarily require violent force. The same is true of the offense here.

In *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017), the Ninth Circuit considered a robbery conviction under the statute at issue here and held that it did not qualify as a violent felony under the elements clause, because it did not necessarily require the use of "violent force" under *Curtis Johnson*. The Ninth Circuit found significant that the terms "force" and "violence" were used separately, within the test of Fla. Stat. § 812.13, which suggested "that not all 'force' that is covered by the statute is 'violent force.'" *Geozos*, 970 F.3d at 900. That, in and of itself, led the Ninth Circuit to "doubt whether a conviction for violating Section 812.13 qualifies as a conviction for a 'violent felony." *Id.* In addition, Florida case law made "clear" that "one can violate section 812.13 without using violent force." *Id.* The Ninth Circuit recognized that, according to *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997), a conviction under § 812.13(1) requires that there "be resistance by the victim that is overcome by the physical force of the offender." *Id.* at 886. And, critically, Florida case law both before and after *Robinson* confirmed that "the amount of resistance can be minimal." *Geozos*, 870 F.3d at 900.

For instance, the Ninth Circuit noted that, in *Mims v. State*, 342 So.2d 883, 886 (Fla. 3rd DCA 1997), a Florida court had held that, "[a]lthough purse snatching is not robbery if no more force or violence is used than necessary to physically remove the property from a person who does not resist, if the victim does resist in any degree and this resistance is overcome by the force of the perpetrator, the crime of robbery is complete." *Geozos*, 870 F.3d at 900 & n. 9 (adding emphasis to "in any degree" and noting that *Mims* was "cited with approval in *Robinson*").

The Ninth Circuit also found significant that, in *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011), another Florida court had held that a robbery conviction "may be based on a defendant's act of engaging in a tug-of-war over the victim's purse." In the Ninth Circuit's view, such an act "does not involve the use of violent force within the meaning of the ACCA;" rather, it involves "something less than violent force within the meaning of *Johnson I*." *Geozos*, 870 F.3d at 900.

Notably, the Ninth Circuit acknowledged that its conclusion put it "at odds" with the Eleventh Circuit, which held just the opposite in *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016), and *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011). However, the Ninth Circuit correctly found that *Lockley* and *Fritts* were unpersuasive because they overlooked the crucial point—confirmed by Florida case law—that violent force was unnecessary to overcome the victim's resistance where the resistance itself is slight:

> [W]e think that the Eleventh Circuit, in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, has overlooked the fact that, if the resistance

> itself is minimal, then the force used to overcome that resistance is not necessarily violent force. *See Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922) ("The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance.").

Geozos, 870 F.3d at 901 (parallel citation omitted).

This split of authority will be resolved by this Court in *Stokeling*. Mr. Joyner therefore asks this Court to stay decision in his case pending resolution of Stokeling.

II. Florida Attempted robbery does not satisfy the elements clause.

A. Attempted Robbery does not require as an element the use, attempted use, or threatened use of physical force.

Even if this Court concludes that Florida robbery convictions do qualify as violent felonies, a conviction for **attempted** robbery does not. Under Florida law, a person is guilty of attempt where 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 interception or prevented in the execution thereof." Fla. Stat. § 777.04(1) (emphasis added). The State need only show that the defendant had an intent to commit the crime of robbery, and that he engaged in some physical act in furtherance of the offense. Significantly, there is no requirement that the overt act itself involve any use, attempted use, or threatened use of violent force. Rather, it requires only that the defendant "go[ ] beyond merely thinking or talking about" committing the offense. *Thomas v. State*, 531 So.2d 708, 710 (Fla. 1988). It must be "adapted to effect the intent to commit the crime," but

"must fall short of executing the ultimate design." *Davis v. State*, 207 So.3d 177, 197 (Fla. 2016) (citation omitted); *see* Fla. Std. Jury Instr. (Crim.) No. 5.1.

Therefore, it is possible for an individual to commit an attempted violent crime without ever using, attempting to use, or threatening to use violent force. An individual can do so merely by approaching the target or victim with intent to commit that crime, but being apprehended before he could carry it out. *See*, *e.g.*, *Thomas*, 531 So.2d at 709 (affirming attempted burglary conviction where defendant entered neighborhood with intent to commit burglary but was arrested before committing it); *State v. Walker*, 705 So.2d 589 (Fla. 4th DCA 1997) (affirming attempted murder conviction where student expressed intent to kill principal, came to school armed, and brought change of clothes, but was apprehended during his first class before any assault). In that common scenario, there is no use, attempted use, or threatened use of force, even if there would have been had the offense been consummated.

For example, a Florida court upheld an attempted armed robbery conviction where the defendant aggressively attempted to open a locked door to a jewelry store, while cradling a heavy object in his baggy front pocket. He immediately fled when the occupants refused to let him in the store based on his aggressive entry attempt, his wearing gloves and a hooded sweatshirt on a hot day, and his wearing of a "do-rag" covering his face. *Grant v. State*, 138 So.3d 1079, 1081–82 (Fla. 4th DCA 2014). Merely attempting to open the door, with the requisite intent to

commit a robbery, was a sufficient overt act. It did not matter that there was no use, attempted use, or threatened use of force.

The same was true in *Mercer v. State*, 347 So.2d 733 (Fla 4th DCA 1977). In that case, the court affirmed an attempted robbery conviction where the defendant discussed how a gas station handled its money with an employee, sought the employee's help in robbing the gas station, announced his plan to rob the gas station the following morning, and arrived at the gas station as scheduled the next morning, but then left upon learning that the manager, the only one with a key to the safe, was not present. The employee then alerted the manager, who called the police. A search of his car revealed a shotgun and tools. *Id*. at 734. The court found that the defendant had committed the requisite overt act to commit attempt, for his conduct extended beyond mere preparation. *Id.* at 734–35.

For support, the court in *Mercer* relied on *People v. Moran*, 122 P. 969 (Cal. Ct. App. 1912). There, the defendants pushed open the door to a saloon with intent to rob the patrons, but they turned and left upon seeing a dozen men inside. *Id.* at 969–70. The court held that "[t]he pushing open the door and the partial entry through the same were overt acts that went beyond mere acts of preparation. They were such overt acts as amounted to an attempt to commit the intended crime," and it was "[t]he large number of persons in the saloon [that] prevented the consummation of the robbery." *Id.* at 970.

In all of these cases, the defendant committed the requisite overt act without using, attempting to use, or threatening to use violent force against another person.

They thus confirm what the plain language of the Florida attempt statute makes clear: one commits an attempt by engaging in "any act" to commit a violent crime with the intent to do so. In sum, even if the completed, substantive offense of robbery necessarily requires the use, attempted use, or threatened use of violent force, the same is not true of attempted robbery. It therefore does not satisfy the elements clause.

B. Attempt crimes must be analyzed separately from their substantive offenses under the categorical approach.

The Eleventh Circuit erred in failing to analyze the elements of attempted robbery separately from those of the substantive offense. The Eighth Circuit appears to have engaged in the same conclusory reasoning in *Maxey v. United States*, 719 F. App'x 539, 540 (8th Cir. 2018) ("Applying the force clause of the ACCA, we held that Missouri second-degree robbery qualifies as a violent felony. . . . Thus, we conclude that *Maxey* is not entitled to relief, as his convictions for attempted robbery are sufficient to qualify him as an armed career criminal because this offense 'has as an element the . . . attempted use . . use of physical force against the person of another.") (citation omitted). This Court has previously recognized, however, that substantive and attempt offenses are not equivalent for ACCA purposes. *See, e.g.*, *James v. United States*, 550 U.S. 192, 197 (2007) (distinguishing attempt from substantive offense for ACCA purposes). These courts thus misapprehended and misapplied the categorical approach by treating an attempt to commit a violent felony as necessarily constituting a violent felony by

itself. The courts of appeals' failure to properly employ the categorical approach in attempt cases presents an important question of federal law warranting review.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit, to review whether attempt crimes should be analyzed distinctly from their substantive offenses under the categorical approach. Alternatively, Mr. Joyner asks this Court to stay his petition pending the resolution of *Stokeling*, and thereafter grant his petition for a writ of certiorari, vacate the decision of the Court of appeal, and remand his case to the Eleventh Circuit for further proceedings.

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender

By: s/ *Tracy Dreispul*
Tracy Dreispul
Assistant Federal Public Defender
Counsel for Petitioner

Miami, Florida
May 23, 2018

A P P E N D I X

APPENDIX

A-1

882 F.3d 1369
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Keenan JOYNER, Defendant–Appellant.

No. 16-17285

(February 22, 2018)

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of Florida, No. 1:16–cr–20316–MGC–1, Marcia G. Cooke, J., of being a convicted felon in possession of a firearm and ammunition and was sentenced to 200 months' imprisonment. Defendant appealed.

Holdings: The Court of Appeals, Hull, Circuit Judge, held that:

[1] district court adequately responded to jury's question concerning possession of car;

[2] defendant's Florida conviction for resisting an officer with violence qualified as a violent felony under Armed Career Criminal Act (ACCA); and

[3] defendant's Florida conviction for attempted strong arm robbery qualified as violent felony under the ACCA.

Affirmed.

West Headnotes (13)

[1] **Criminal Law**
Issues related to jury trial
110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1155 Issues related to jury trial
Court of Appeals reviews a district court's response to a jury question for an abuse of discretion.

Cases that cite this headnote

[2] **Criminal Law**
Failure to instruct
110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1152 Conduct of Trial in General
110k1152.21 Instructions
110k1152.21(2) Failure to instruct
Court of Appeals examines a district court's refusal to give a requested jury instruction for an abuse of discretion.

Cases that cite this headnote

[3] **Criminal Law**
Authority or discretion of court
Criminal Law
Requisites and sufficiency
110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k863 Instructions After Submission of Cause
110k863(1) Authority or discretion of court
110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k863 Instructions After Submission of Cause
110k863(2) Requisites and sufficiency
District courts have considerable discretion regarding the extent and character of supplemental jury instructions, but the supplemental instructions cannot misstate the law or confuse the jury.

Cases that cite this headnote

[4] **Criminal Law**
Duty of judge in general
110 Criminal Law
110XX Trial

110XX(G) Instructions:Necessity, Requisites, and Sufficiency
110k769 Duty of judge in general
A district court has a duty to guide the jury.

Cases that cite this headnote

[5] **Criminal Law**
Requisites and sufficiency
Criminal Law
Issues related to jury trial
110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k863 Instructions After Submission of Cause
110k863(2) Requisites and sufficiency
110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.52 Issues related to jury trial
To determine whether a jury was misled or confused, Court of Appeals reviews supplemental jury instructions as part of the entire jury charge and in light of the indictment, evidence presented, and arguments of counsel.

Cases that cite this headnote

[6] **Criminal Law**
Instructions in general
110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1172 Instructions
110k1172.1 In General
110k1172.1(1) Instructions in general
Court of Appeals must have a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations before reversing a conviction on a challenge to the jury charge.

Cases that cite this headnote

[7] **Criminal Law**
Requisites and sufficiency
110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k863 Instructions After Submission of Cause
110k863(2) Requisites and sufficiency
In prosecution of defendant for possessing a firearm and ammunition as a convicted felon, district court adequately responded to jury's question concerning possession of car where gun was found; court directed jury to earlier written instructions defining "actual possession" and "knowingly," and even if jury was confused about possession of gun through possession of car, court made clear that possession of car was not an issue in the case but that possession of gun was the issue, and court was not required to say more to prevent jury's possible confusion.

Cases that cite this headnote

[8] **Criminal Law**
Review De Novo
110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 In general
Court of Appeals reviews de novo constitutional sentencing issues, including the issue of whether a prior conviction qualifies as a "violent felony" under the Armed Career Criminal Act (ACCA). 18 U.S.C.A. § 924(e)(1).

2 Cases that cite this headnote

[9] **Sentencing and Punishment**
Particular offenses
350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1283 Violent or Nonviolent Character of Offense
350Hk1285 Particular offenses
Defendant's prior conviction for resisting an officer with violence under Florida law categorically qualified as a "violent felony"

under the elements clause of the Armed Career Criminal Act (ACCA); violence was a necessary element of the offense of resisting an officer with violence. 18 U.S.C.A. § 924(e)(2)(B); Fla. Stat. Ann. § 843.01.

2 Cases that cite this headnote

[10] Criminal Law
Attempts
110 Criminal Law
110III Attempts
110k44 In general
Under Florida law, the government must prove the existence of an overt act as necessary to support a conviction for attempt. Fla. Stat. Ann. § 777.04.

Cases that cite this headnote

[11] Sentencing and Punishment
Particular offenses
350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1283 Violent or Nonviolent Character of Offense
350Hk1285 Particular offenses
Defendant's prior conviction for attempted strong arm robbery under Florida law categorically qualified as a "violent felony" under the elements clause of the Armed Career Criminal Act (ACCA); underlying substantive offense of strong arm robbery involved the requisite use of force. Fla. Stat. §§ 812.13(1), 812.13(2)(c), 774.04.

2 Cases that cite this headnote

[12] Sentencing and Punishment
Notice of intent to seek enhancement
350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(K) Proceedings
350Hk1361 Notice of intent to seek enhancement
A statutory penalty provision, like the Armed Career Criminal Act (ACCA), simply authorizes a court to increase the sentence for a recidivist, and does not define a separate crime; consequently, neither the statute nor the Constitution requires the government to charge the factor that it mentions in the indictment. 18 U.S.C.A. § 924(e)(2)(B).

Cases that cite this headnote

[13] Sentencing and Punishment
Factors enhancing sentence
350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(F) Evidence
350Hk322 Degree of Proof
350Hk322.5 Factors enhancing sentence
A defendant's recidivism is not an element of his crime, and therefore need not be proven beyond a reasonable doubt.

Cases that cite this headnote

***1371** Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:16–cr–20316–MGC–1

Attorneys and Law Firms

Phillip Drew DiRosa, Robert Benjamin Cornell, U.S. Attorney's Office, Fort Lauderdale, FL, Jonathan Kent Osborne, Marianne Curtis, Eloisa Delgado Fernandez, Wifredo A. Ferrer, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, for Appellee.

Tracy Michele Dreispul, Joaquin E. Padilla, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Miami, FL, for Appellant.

Before MARCUS, FAY and HULL, Circuit Judges.

Opinion

HULL, Circuit Judge:

Defendant Keenan Jermaine Joyner appeals his conviction and sentence after a jury found him guilty of being a convicted felon in possession of a firearm and ammunition. On appeal, defendant Joyner argues that the district court's supplemental jury instruction did not

adequately address the jury's question about possession of a firearm. Joyner also contends that the district court erred in concluding that his prior Florida convictions for attempted strong arm robbery and resisting an officer with violence are "violent felonies" under the Armed Career Criminal Act ("ACCA"). After careful review, and with the benefit of oral argument, we affirm.

I. BACKGROUND

On May 6, 2016, a federal grand jury indicted defendant Joyner on one count of possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) & 924(e)(1). Joyner pled not guilty, and the case proceeded to a jury trial beginning on August 29, 2016.

A. Evidence at Trial

At trial, the government presented four witnesses: Detective Martin Garcia, Detective Dustin James, crime scene technician Andrea Amy, and crime lab analyst Hali Meyer.

Detective Garcia testified as follows. Garcia and other officers were conducting surveillance on a particular car, in connection with an ongoing investigation. [1] Defendant Joyner was not the registered owner of the car, and was not a subject of the ongoing investigation.

1 The investigation concerned an armed carjacking. Detective Garcia did not testify about the subject of the investigation.

On the day in question, Detective Garcia and other officers were covertly observing the subject car, which was parked in a lot adjacent to a convenience store and laundromat. One of the observing officers, Detective Dustin James, was the "eyeball" of the surveillance team, meaning that he maintained visual contact with the car at all times. Garcia testified that when Detective James, the "eyeball," told the other officers over the radio that the car appeared to be occupied, all of the officers, including Garcia, began moving toward the car from their various positions.

As Detective Garcia approached, he saw two people standing in front of the car, one of whom was defendant Joyner. When Joyner realized that police officers were approaching him, he ran from the front of the car to the driver's side door. Joyner ***1372** was "about 20, 25 feet" away from Garcia. At that point, Garcia saw a firearm in Joyner's left hand, "as if he was withdrawing it from his waistband." Garcia testified he was "[a]bsolutely 100 percent" certain he saw a firearm in Joyner's left hand.

Detective Garcia testified that when Joyner reached the driver's side door, he spun around, opened the door, dropped to one knee, and "slides the gun underneath the seat." Garcia did not see which hand Joyner used to open the car door. However, as far as Garcia could tell, the gun was in Joyner's left hand at all times.

Detective Garcia immediately radioed the code "55" to the other officers, which told the officers that a gun was present. The detectives moved in, and Joyner was "taken down." Approximately one minute later, after Joyner was in custody, Garcia looked inside the car and saw a firearm underneath the driver's seat. Later, when the firearm was collected from the scene, it was found to contain an ammunition magazine with eight live projectile cartridges.

The government's second eyewitness, Detective Dustin James, was the "eyeball." James testified that the car was parked in front of the laundromat and backed into a parking space, such that James's vantage point was from the front of the car. At a certain point, James saw two men, one of whom was Joyner, walking towards the car. One of the men—the one who was not Joyner—opened a car door on the passenger side and started loading bins of laundry into the car. The other man—Joyner—remained in front of the car, "basically looking around."

When Detective James saw Joyner and the other individual occupy the car, James radioed the other officers to take both men into custody. The officers converged on the car. James testified that as the officers approached the car, he saw defendant Joyner move from the front of the car to the driver's side and open the driver's side door. James heard Detective Garcia scream "55" as Joyner opened the door, which James understood to mean a gun was present. However, because Joyner's back was to James as Joyner opened the car door, James never saw a gun in Joyner's hand. James did not know which hand Joyner used to open the car door, but James "assum[ed]" that Joyner used his left hand. James testified that he never saw Joyner bend down or put anything under the driver's seat.

The government's third witness, crime scene technician Andrea Amy, testified that she did not find any fingerprints on the gun or ammunition magazine recovered from the car. However, Amy explained that "many factors" can affect whether a fingerprint is left on an item. Amy further testified that after testing for fingerprints, she collected DNA swabs from the gun, the magazine, and the eight live projectile cartridges. The swabs were then sent to the county DNA lab for analysis. [2]

2 During Amy's testimony, the government introduced the firearm and magazine with ammunition into evidence. The firearm was a Sig Sauer .45 caliber handgun.

The government's last witness, crime lab analyst Hali Meyer, testified that she tested the DNA swabs taken from the gun and magazine, but was unable to confirm that Joyner's DNA was present. Meyer testified that there are "a lot of reasons" DNA might not be left behind after a person handles an object.

Joyner did not present any witnesses. The parties stipulated that Joyner had a previous felony conviction and that the firearm he allegedly possessed affected interstate or foreign commerce. Thus, the ***1373** only contested issue was whether Joyner possessed the firearm.

B. The Jury Charge

After the close of evidence, the district court excused the jury while the parties discussed the proposed jury instructions. Among other things, the parties agreed to remove instructions concerning "several kinds of possession" and "constructive possession," but to leave in instructions regarding "actual possession" and "sole possession."

When the jury returned, the district court issued the instructions to the jury. The district court gave the charge verbally and in writing to the jury. In relevant part, on page 10, the charge instructed that the government had to prove defendant Joyner "knowingly possessed" the firearm, stating:

> It's a Federal crime for anyone who has been convicted of a felony offense to possess a firearm and/or ammunition in or affecting interstate or foreign commerce.
>
> The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:
>
> (1) the Defendant knowingly possessed a firearm and/or ammunition in or affecting interstate or foreign commerce; and
>
> (2) before possessing the firearm and/or ammunition, the Defendant had been convicted of a felony—a crime punishable by imprisonment for more than one year.

(emphasis added).

On page 11 of the charge, the district court instructed the jury about actual and sole possession, stating:

> "Actual possession" of a thing occurs if a person knowingly has direct physical control of it.
>
> "Sole possession" of a thing occurs if a person is the only one to possess it.

(emphasis added). On page 12 of the charge, the district court told the jury the meaning of the word "knowingly," stating:

> The word "knowingly" means that an act was done voluntarily and intentionally and not because of a mistake or by accident.

C. Closing Arguments

Once the jury was charged, the parties presented their closing arguments. The government's argument focused on the concept of actual possession in a person's hand. To illustrate how defendant Joyner knowingly possessed the firearm, counsel for the government held a pen in his hand. Counsel explained that he was "possessing" the pen at that point. Counsel then "[got] rid of" the pen by placing it underneath a lectern. The government argued that the evidence established that defendant Joyner knowingly possessed the firearm in a similar manner. That evidence was Detective Garcia's testimony that he "saw the Defendant possessing that firearm first near his waistband, and then he testified he saw him put that firearm underneath the driver's seat of that car."

The government's theory was that Joyner possessed the firearm before he put it under the driver's seat.

The closing argument of defendant Joyner's counsel emphasized that Detective Garcia's testimony was the only evidence that Joyner possessed the gun. Defense counsel reminded the jury that the car, in which the gun was later found, was not registered to Joyner, and that Joyner was not involved in the crime for which the car was being investigated. Defense counsel argued that Joyner "wasn't even the only person in the car," so that "any number of people" could have put the gun under the driver's seat. Defense counsel characterized ***1374** the government's physical evidence of possession as "[t]hree different people's DNA on a gun found in a car that wasn't [Joyner's]."

Defense counsel also argued that the testimonies of witnesses Garcia and James were inconsistent on certain points. According to defense counsel, Garcia testified that Joyner held the gun in his left hand at all times, whereas James testified that Joyner opened the car door with his left hand. In addition, Garcia said both Joyner and the other man were standing in front of the car when the officers approached, whereas James said the second man was loading laundry into the back of the car.

In rebuttal, the government argued that if defendant Joyner was not guilty, then Garcia was either mistaken or a liar. The government also argued that because Joyner opened the driver's side door of the car and the firearm undisputedly was found underneath the driver's seat, "[e]ither this Defendant is the most unlucky human being I have ever met or he is guilty."

After both sides presented their closing arguments, the district court asked the parties, in a sidebar, if they had any objections to the jury instructions as read. Neither party objected. The district court then directed the jury to begin deliberations.

D. The Jury's Question

The jury deliberated for approximately three hours before submitting a question about actual possession as follows:

> Clarification regarding Possession:
>
> We hereby request further clarification of "Actual Possession" as defined in the Court's instructions to the jury. Please explain or provide additional clarification or explanation on "...knowingly has direct physical control of it.["] Clarify "direct" as it pertains to physical control. Furthermore, does possession imply or not imply possession of the vehicle [whether] "on" the vehicle or "in" the vehicle?

The district court discussed with the parties how to respond to the jury's question. The parties agreed the district court should tell the jury that possession of the car was not at issue, and that the only issue for the jury was whether defendant Joyner possessed the gun and ammunition.

But Joyner also asked that the district court further clarify to the jury that "[t]he mere fact that the gun was in the vehicle is not at issue in this case." Joyner argued that the government's theory of the case was that Joyner possessed the gun in his hand outside the car, and that without his requested clarification, the jury could find that Joyner possessed the gun merely based on its presence in the car.

Ultimately, the district court concluded that if the court referred the jury back to the existing written definitions of "actual possession" and "knowingly," the jury would understand that it must determine whether or not Joyner had actual possession of the firearm, and, if so, whether he possessed the firearm knowingly. The district court gave this written response to the jury, referring them back to those definitions and advising that possession of the vehicle was not an issue in the case and that the issue was whether Joyner possessed the firearm, as follows:

> The possession of the vehicle is not an issue in this case.
>
> The issue before you is whether Mr. Joyner possessed the firearm and ammunition.
>
> Please refer to page 11 of the instructions for the definition of possession.
>
> Please refer to page 12 of the instructions for the definition of "knowingly."

As recounted earlier, the district court's charge on page 11 instructed that actual possession of a thing occurs "if a person ***1375** knowingly has direct physical control of it." The district court did not give Joyner's other requested clarification.

The jury deliberated for two more hours before retiring for the day without reaching a verdict. Deliberations resumed the following day, and the next afternoon, the jury returned a guilty verdict against defendant Joyner.

E. Sentencing

In its presentence briefing, the government argued that defendant Joyner qualified as an armed career criminal under the ACCA based upon these prior Florida felony convictions: (1) a 2005 conviction for resisting an officer with violence, in violation of Fla. Stat. § 843.01, (2) a 2009 conviction for attempted strong arm robbery, in violation of Fla. Stat. §§ 812.13(1), (2)(c), & 777.04, and (3) a 2009 conviction for possession of cocaine with intent to sell, manufacture, or deliver, in violation of Fla. Stat. § 893.13(1)(A)(1). Although Joyner acknowledged that under this Court's precedent his predicate convictions qualified, he preserved his objections to this enhancement.

With the ACCA enhancement, Joyner's advisory sentencing guidelines range was 235–293 months' imprisonment. The district court sentenced Joyner to 200 months' imprisonment, below the low end of the advisory guidelines range, followed by five years of supervised release.

Joyner appeals his conviction and sentence. We start with the jury charge.

II. COURT'S JURY CHARGE

[1] [2] We review a district court's response to a jury question for an abuse of discretion. United States v. Lopez, 590 F.3d 1238, 1247 (11th Cir. 2009). We also examine a district court's refusal to give a requested jury instruction for an abuse of discretion. Id. at 1248.

[3] [4] When a jury requests supplemental instruction, a district court should answer "within the specific limits of the question presented" and resolve the jury's difficulties "with concrete accuracy." United States v. Baston, 818 F.3d 651, 661, 663 (11th Cir. 2016) (quotations omitted). District courts have considerable discretion regarding the extent and character of supplemental jury instructions, but the supplemental instructions cannot misstate the law or confuse the jury. Lopez, 590 F.3d at 1247–48. A district court has a "duty to guide the jury." United States v. Anderton, 629 F.2d 1044, 1048 (5th Cir. 1980).

[5] [6] To determine whether the jury was misled or confused, we review supplemental jury instructions as part of the entire jury charge and in light of the indictment, evidence presented, and arguments of counsel. Lopez, 590 F.3d at 1248. We must have "a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations" before reversing a conviction on a challenge to the jury charge. United States v. House, 684 F.3d 1173, 1196 (11th Cir. 2012) (quotation omitted).

[7] Here, the district court's original jury charge, which was given verbally and in writing, made clear that the issue was Joyner's actual and sole possession of the firearm. The original charge was a correct statement of the law. Indeed, the district court's instructions regarding actual possession and sole possession were verbatim the pattern jury instructions for those terms. See Pattern Crim. Jury Instr. 11th Cir. S6 (Apr. 2016). Neither party objected to the original jury charge, then or now.

Similarly, the evidence and closing arguments also made clear that the issue for the jury was whether defendant Joyner actually held the gun in his hand outside the car. Detective Garcia's testimony centered on seeing Joyner holding the gun ***1376** before placing it under the driver's seat of the car. Witnesses Amy and Meyer testified about the physical gun and ammunition and whether forensic evidence could prove Joyner had held the gun in his hand outside the car. The government's closing argument emphasized that Joyner possessed the gun in his hand outside the car. Defense counsel's closing argument asserted that witness Garcia's testimony was the only evidence that Joyner possessed the gun. And the government never tried to establish that the car belonged to Joyner such that anything found inside the car could be imputed to him. To the contrary, the government made clear through Garcia's testimony that the car was not registered to Joyner, and the government said during its closing argument that Joyner "[got] rid of" the gun when he placed it in the car.

Nevertheless, the jury's question does reflect a concern about possession of the car. The jury's question asked: "Furthermore, does possession imply or not imply possession of the vehicle [whether] 'on' the vehicle or 'in' the vehicle?" The question itself is confusing. It could be

read to mean the jury wanted to know if actual possession of the gun also required that Joyner possessed the vehicle where the gun was found. On the other hand, Joyner argues the question could also be read to mean that the jury was deliberating whether Joyner could have possessed the gun merely by possessing the car. But the question does not mention the gun at all, and thus that is not necessarily what the question meant. At bottom, the question borders on being unintelligible.

In any event, the district court responded appropriately and adequately to the jury's question. The district court first reminded the jury that "[t]he possession of the vehicle is not an issue in this case," and that "[t]he issue before you is whether Mr. Joyner possessed the firearm and ammunition." The remainder of the district court's response referred the jury to its earlier written instructions, which defined actual possession on page 11 and knowingly on page 12. Nothing in the district court's response was a misstatement of the law. And the district court responded to the jury's question "within the specific limits of the question presented." Baston, 818 F.3d at 663 (quotations omitted). Accordingly, the district court did not fail in its "duty to guide the jury." See Anderton, 629 F.2d at 1048.

Importantly too, the government never argued that Joyner possessed the gun by possessing the car. Rather, the government's theory was that Joyner actually possessed the gun in his hand outside the car and got rid of it by putting it in the car. No party mentioned "constructive possession," and the district court was wise to stick to actual possession and not inject the term "constructive possession" into the case. Even assuming arguendo, as Joyner argues, that the jury was confused about possession of the gun through possession of the car, the district court's response to the jury's question adequately addressed that confusion by making clear that possession of the car was not an issue but that possession of the gun was the issue—in other words, the jury should not consider possession of the car, but should decide whether Joyner possessed the gun. [3]

3 Joyner's requested instruction as phrased—"[t]he mere fact that the gun was in the vehicle is not at issue in this case"—was not correct in any event. This is because the fact that a gun was found in the car was relevant evidence that corroborated Garcia's testimony that Joyner held the gun outside the car and then opened the door and put the gun inside. If anything the district court's response—telling the jury not to consider possession of the car—was more beneficial to Joyner than harmful.

*1377 We also must reject Joyner's argument that the district court was required to say more to prevent the jury's possible confusion. This ignores that the district court had substantial discretion regarding the extent and character of its supplemental jury instruction, so long as its instructions adequately guided the jury and did not misstate the law or mislead the jury. Lopez, 590 F.3d at 1247–48. As noted above, the district court's response to the jury's question was a correct statement of the law and served to clarify the issue before the jury. Taking into consideration the jury instructions as a whole, the evidence presented, and the arguments of counsel, we have nothing near a "substantial and ineradicable doubt" that the district court misguided the jury. House, 684 F.3d at 1196 (quotations omitted). Accordingly, defendant Joyner has shown no error in the district court's supplemental jury instruction.

III. SENTENCING UNDER THE ACCA

[8] We review de novo constitutional sentencing issues, including the issue of whether a prior conviction qualifies as a "violent felony" under the ACCA. United States v. Harris, 741 F.3d 1245, 1248 (11th Cir. 2014); United States v. Canty, 570 F.3d 1251, 1254 (11th Cir. 2009).

A. The ACCA

Joyner does not dispute that he was a convicted felon and prohibited from possessing a firearm and ammunition. See 18 U.S.C. § 922(g). Under the ACCA, a defendant felon convicted of having a prohibited firearm and ammunition is subject to a mandatory minimum sentence of 15 years (180 months) if he has three prior felony convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. § 924(e)(1). In this appeal, Joyner argues that his prior convictions for resisting an officer with violence and attempted strong arm robbery are not violent felonies under the ACCA. [4]

4 Joyner does not dispute that his conviction for possession with intent to sell cocaine, in violation of Fla. Stat. § 893.13(1), is a serious drug offense under the ACCA. In any event, this Court has held that a conviction under Fla. Stat. § 893.13(1), like Joyner's,

qualifies as a "serious drug offense" under the ACCA. United States v. Smith, 775 F.3d 1262, 1268 (11th Cir. 2014).

A "violent felony" is any offense punishable by a term of imprisonment 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 prong of this definition is referred to as the "elements clause," while the second prong contains the "enumerated crimes" clause and, finally, what is commonly called the "residual clause." United States v. Fritts, 841 F.3d 937, 939 (11th Cir. 2016). Joyner's appeal concerns only the elements clause. This is because neither Florida robbery nor resisting an officer with violence is an enumerated crime, and the Supreme Court struck down the ACCA's residual clause as unconstitutionally vague in Johnson v. United States, 576 U.S. ——, ——, 135 S.Ct. 2551, 2556–58, 2563, 192 L.Ed.2d 569 (2015). Thus, we address whether Joyner's prior convictions for resisting an officer with violence and for attempted strong arm robbery have "as an element the use, attempted use, or threatened use of physical force against the person of another" ***1378*** within the meaning of the ACCA. 18 U.S.C. § 924(e)(2)(B)(i).

B. Resisting an Officer with Violence

[9] Florida Statute § 843.01 provides that any person who "knowingly and willfully resists, obstructs, or opposes any officer ... in the lawful execution of any legal duty, by offering or doing violence to the person of such officer," is guilty of resisting an officer with violence. Fla. Stat. § 843.01 (emphasis added). Florida courts have held that "violence is a necessary element of the offense" of resisting an officer with violence. United States v. Hill, 799 F.3d 1318, 1322 (11th Cir. 2015) (citing cases); see also United States v. Romo–Villalobos, 674 F.3d 1246, 1248–51 (11th Cir. 2012) (concluding under the 2010 Sentencing Guidelines that a conviction under Fla. Stat. § 843.01 constitutes a crime of violence for purposes of the elements clause of U.S.S.G. § 2L1.2(b)(1)(A)(ii), which has the same language as the ACCA elements clause). Accordingly, as this Court previously held in Hill, a Fla. Stat. § 843.01 conviction for resisting an officer with violence "categorically qualifies as a violent felony under the elements clause of the ACCA." Id.

C. Attempted Strong Arm Robbery

Joyner also has a prior conviction for attempted strong arm robbery, in violation of Fla. Stat. §§ 812.13(1), (2)(c), & 774.04. Section 812.13(1) defines "robbery" as "the taking of money or other property ... 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." Fla. Stat. § 812.13(1). Subsection (2)(c) of the statute provides that "[i]f in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon," then the robbery is a second degree felony. Id. § 812.13(2)(c).

[10] As to attempt, Florida Statute § 777.04 provides that "[a] person who 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, commits the offense of criminal attempt." Fla. Stat. § 777.04(1). Under Florida law, the government must prove the existence of an overt act as necessary to support a conviction for attempt. See Thomas v. State, 531 So.2d 708, 709–10 (Fla. 1988).

In United States v. Lockley, this Court examined the elements of a robbery offense under Fla. Stat. § 812.13, and held that a Florida conviction for attempted robbery, without the use of a weapon, categorically qualified as a "crime of violence" under the career offender sentencing guideline at U.S.S.G. § 4B1.2(a), which has the same elements clause as the ACCA. 632 F.3d 1238, 1240, 1242–43, 1245 (11th Cir. 2011). In reaching this conclusion, the Lockley Court pointed out that robbery under Fla. Stat. § 812.13(1) "necessarily requires" that the defendant (1) take money or property of some value from another person, (2) with the intent to permanently or temporarily deprive the person of that money or property, (3) by "using force, violence, or an intentional threat of imminent force or violence against another coupled with an apparent ability to use that force or violence, or by causing the person to fear death or great bodily harm." Id. at 1242–43 (evaluating Fla. Stat. § 812.13(1)). The Lockley Court also determined that "[t]hese elements hew almost exactly to the generic definition of robbery." Id. at 1243.

Given these elements, the Lockley Court further concluded that Florida robbery (1) thus involves either the use or threatened use of physical force, or "some act that puts the victim in fear of death or great ***1379** bodily harm," and (2) therefore "has, as an element, the 'use, attempted use, or threatened use of physical force against the person of another.' " Id. at 1245 (citing U.S.S.G. § 4B1.2(a)(1)). As such, the Lockley Court held that a Florida conviction for attempted robbery categorically qualified as a crime of violence under the elements of even the least culpable of these acts criminalized by Fla. Stat. § 812.13(1). Id.

The Lockley Court further noted that Florida's attempt statute in Fla. Stat. § 777.04 "falls within the generic, contemporary meaning of attempt" because it requires that the defendant commit an overt act, beyond mere preparation, in furtherance of the commission of the offense. Id. at 1245 n.6. As to attempt, this Court also reasoned as follows:

> Florida's attempt statute is therefore a close analogue to the Model Penal Code definition of attempt, as both require an "overt act"—meaning an act or omission —which clearly signals the commission of the offense instead of mere preparation. Compare [Morehead v. State, 556 So.2d 523, 524 (Fla. Dist. Ct. App. 1990)] ... with United States v. Ballinger, 395 F.3d 1218, 1238 n.8 (11th Cir. 2005) (en banc) ("A substantial step must be more than remote preparation, and must be conduct strongly corroborative of the firmness of the defendant's criminal intent." (internal quotation marks omitted)). Section 777.04(1) thus falls within the generic, contemporary meaning of attempt.

Id.

[11] In challenging the use of his attempted strong arm robbery conviction as an ACCA predicate, defendant Joyner does not focus so much on the attempt aspect of his robbery conviction. Rather, Joyner argues that the underlying substantive offense of strong arm robbery does not qualify as a violent felony because it does not involve the requisite degree of force. But, as he acknowledges, Joyner's arguments concerning attempted strong arm robbery are foreclosed by Lockley, as well as our other precedent following Lockley. See Fritts, 841 F.3d at 940, 942 (involving an ACCA case but following Lockley, a guidelines case, because the ACCA's elements clause is identical, and concluding that nothing in Curtis Johnson [5] undermines our precedent in Lockley about Florida robbery); see also United States v. Seabrooks, 839 F.3d 1326, 1341 (11th Cir. 2016) (following Lockley and concluding that a Florida armed robbery conviction qualified as a violent felony under the ACCA); United States v. Dowd, 451 F.3d 1244, 1255 (11th Cir. 2006) (holding, "without difficulty," that a Florida conviction for armed robbery was "undeniably a conviction for a violent felony" under the ACCA's elements clause). Based on our precedent, we conclude that Florida attempted robbery is categorically a violent felony under the ACCA.

5 Curtis Johnson v. United States, 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010).

D. Prior Convictions Not Charged in Indictment

[12] **[13]** Defendant Joyner argues that his ACCA sentence is unconstitutional because he was subjected to increased statutory penalties based on prior Florida convictions that were neither alleged in the indictment nor proven to the jury. But the Supreme Court has explained that a statutory penalty provision, like the ACCA, "simply authorizes a court to increase the sentence for a recidivist," and "does not define a separate crime." Almendarez-Torres v. United States, 523 U.S. 224, 226, 118 S.Ct. 1219, 1222, 140 L.Ed.2d 350 (1998). "Consequently, neither the statute nor the Constitution requires the Government to charge the factor that it mentions"—Joyner's ***1380** prior convictions—"in the indictment." [6] Id. at 226–27, 118 S.Ct. 1219; see also United States v. Sparks, 806 F.3d 1323, 1350 (11th Cir. 2015). In addition, a defendant's recidivism is not an element of his crime, and therefore need not be proven beyond a reasonable doubt. See Almendarez-Torres, 523 U.S. at 247, 118 S.Ct. at 1232–33.

6 Joyner has never disputed that he in fact has these three prior Florida convictions. The government submitted, and the record contains, certified copies of his convictions. Joyner's claim is as to the indictment.

III. CONCLUSION

For all of the above reasons, we conclude that the district court did not err in its supplemental jury instruction or in declining to give the additional instruction requested by defendant Joyner. We also hold that Joyner's prior felony convictions for resisting an officer with violence

and attempted strong arm robbery qualified as crimes of violence under the ACCA. We therefore affirm Joyner's conviction and sentence.

AFFIRMED.

All Citations

882 F.3d 1369, 27 Fla. L. Weekly Fed. C 631

End of Document

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
KEENAN JOYNER

JUDGMENT IN A CRIMINAL CASE

Case Number: **16-20316-CR-COOKE**
USM Number: **13331-104**

Counsel For Defendant: **Joaquin Padilla, AFPD**
Counsel For The United States: **Marianne Curtis, AUSA**
Court Reporter: **Tamra Piderit**

The defendant was found guilty on count 1 of the Indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18, U.S.C. 922(g)(1)	Possession of a firearm and ammunition by a convicted felon.	12/14/2015	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence:
11/16/2016

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge

November 16, 2016

DEFENDANT: **KEENAN JOYNER**
CASE NUMBER: **16-20316-CR-COOKE**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **200 months**.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **KEENAN JOYNER**
CASE NUMBER: **16-20316-CR-COOKE**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **KEENAN JOYNER**
CASE NUMBER: **16-20316-CR-COOKE**

SPECIAL CONDITIONS OF SUPERVISION

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **KEENAN JOYNER**
CASE NUMBER: **16-20316-CR-COOKE**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **KEENAN JOYNER**
CASE NUMBER: **16-20316-CR-COOKE**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

No:

IN THE
SUPREME COURT OF THE UNITED STATES

KEENAN JOYNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Keenan Joyner, pursuant to SUP CT. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed *in forma pauperis*.

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Southern District of Florida was appointed to represent Petitioner pursuant to 18 U.S.C. § 3006A. Therefore, in reliance upon RULE 39.1 and § 3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. § 1746.

Miami, Florida
May 23, 2018

By:

MICHAEL CARUSO
Federal Public Defender

Tracy Dreispul
Assistant Federal Public Defender
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
(305) 536-6900

No:

IN THE
SUPREME COURT OF THE UNITED STATES

KEENAN JOYNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I certify that on this 2rd day of May, 2018, in accordance with SUP. CT. R. 29, copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed *In Forma Pauperis*, (3) Certificate of Service, and (4) Declaration Verifying Timely Filing, were served by third party commercial carrier for delivery within three days upon the United States Attorney for the Southern District of Florida, 99 N.E. 4th Street, Miami, Florida 33132-2111, and upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

MICHAEL CARUSO
Federal Public Defender

Miami, Florida
May 23, 2018

By: Tracy Dreispul

Tracy Dreispul
Assistant Federal Public Defender
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
(305) 536-6900

No:

IN THE
SUPREME COURT OF THE UNITED STATES

KEENAN JOYNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

DECLARATION VERIFYING TIMELY FILING

Petitioner, Keenan Joyner, through undersigned counsel and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the **Petition for Writ of Certiorari** filed in the above-styled matter was sent in an envelope via third party commercial carrier for delivery within three days, addressed to the Clerk of the Supreme Court of the United States, on the 23rd day of May, 2018, which is within the time the petition for writ of certiorari is due on May 23, 2018.

MICHAEL CARUSO
Federal Public Defender

Miami, Florida
May 23, 2018

By: Tracy Dreispul

Tracy Dreispul
Assistant Federal Public Defender
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
(305) 536-6900