NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

AUTREY CANADATE,

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

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QUESTION PRESENTED FOR REVIEW

Whether reasonable jurists could debate whether the Florida offense of attempted armed robbery, Fla. Stat. § 812.13, categorically requires the use of "violent force," as defined in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), so as to qualify as a "violent felony" under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)?

INTERESTED PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

Autrey Canadate 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 18-10278 in that court on March 28, 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 March 28, 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 of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

U.S. Const. amend. V

The Fifth Amendment to the Constitution provides in pertinent part:

No person shall be...deprived of life, liberty or property without due process of law.

28 U.S.C. § 2255(a):

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2253(c):

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) A certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

18 U.S.C. §924(e) - ACCA

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e) provides in pertinent part:

> (e)(1) 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.
>
> (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 Robbery

> (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.
>
> (2)(a) 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 . . .

STATEMENT OF THE CASE

On October 4, 2012, Mr. Canadate was charged by indictment with: possessing a firearm, having been previously convicted of a felony, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1); possessing with the intent to distribute a detectable amount of cocaine base, in violation of 18 U.S.C. §§ 841(a)(1) and (b)(1)(C); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 21 U.S.C. § 924(c)(1)(A)(i).

On June 6, 2013, Mr. Canadate pled guilty to Count 1 of the Indictment, which charged him with possessing a firearm, having been previously convicted of a felony, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). In a written plea agreement, the government agreed to dismiss Counts 2 and 3 after sentencing. Also in the plea agreement, the parties agreed that Mr. Canadate has been convicted of the following felonies:

(a) Possession with the Intent to Distribute or Sell Cocaine, in violation of Florida Statute § 812.13(1)(a)(1), Miami-Dade County, Florida Case Number F02-037370;
(b) Attempted Armed Robbery, in violation of Florida Statutes §§ 812.13(2)(B), 777.04, and 775.087, Miami-Dade County, Florida Case Number F08-044814A;
(c) Aggravated Assault with a Firearm, in violation of Florida Statutes §§ 784.021(1)(A) and 775.087, Miami-Dade County, Florida Case Number F10-009460; and
(d) Possession with the Intent to Distribute or Sell Cocaine, in violation of Florida Statute § 893.13(1)(A)(1), Miami-Dade County, Florida Case Number F11-026230B.

The Presentence Investigation Report (hereinafter "PSI") classified Mr. Canadate as an Armed Career Criminal, subject to an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e). Although the PSI did not specify which prior convictions constituted the predicates for Mr. Canadate's ACCA status, the following convictions arguably could have been considered:

1. PSI ¤27: Possession with intent to sell or deliver cocaine, Dkt. F02-37370.
2. PSI ¤34: Shooting or throwing a deadline missile, Dkt. F06-9476.
3. PSI ¤37: Attempted armed robbery, Dkt. F07-44914A.
4. PSI ¤39: Aggravated assault with a firearm, Dkt. F10-9460.
5. PSI ¤42: Possession with intent to sell or deliver cocaine, Dkt. F11-262230B.

Of those five, three (¤¤ 34, 37, and 39) were potentially "crimes of violence."

On October 8, 2013, Mr. Canadate was sentenced, on Count 1 of the Indictment, to 180 months of imprisonment, to be followed by two years of supervised release. Counts 2 and 3 of the Indictment were dismissed. Mr. Canadate did not appeal his sentence. He never requested relief under 28 U.S.C. § 2255 until June 24, 2016, in which he requested relief in light of the Supreme Court's decision in *Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551 (2015), which held that the ACCA's "residual clause" in § 924(e)(2)(B)(ii) is unconstitutionally vague.

The district court referred the motion to the United States magistrate judge resulting in a report and recommendation recommending that the motion be denied.

On November 21, 2017, the district court adopted the report and recommendation, denied Mr. Canadate's motion and declined to issue a certificate of appealability. Mr. Canadate appealed the denial of a certificate of appealability and

the Eleventh Circuit Court of Appeals denied his motion and dismissed his appeal on March 28, 2018. In the order denying the motion for certificate of appealability, the Court ruled that to merit a COA, Mr. Canadate must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further," citing *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). The Court then ruled that, "Because Circuit precedent forecloses Canadate's claim, he has not met this standard, and his motion for a COA is DENIED."

REASON FOR GRANTING THE WRIT

"[R]easonable jurists could at least debate whether Mr. Canadate is entitled to relief' on his ACCA claim following *Johnson v. United States,* 576 U.S. ___, 135 S. Ct. 2551 (2015). *See Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1268 (2016). This is because it is at least debatable whether his conviction for attempted armed robbery qualifies as a "violent" felony under the elements clause of §924(e).

Legal Standard

A certificate of appealability (COA) is required to appeal the denial of a 28 U.S.C. § 2255 motion to vacate sentence. A COA must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

As this Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been

granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

This Court recently applied this standard in *Buck v. Davis*, ___ U.S. ___, 137 S. Ct. 759, 773 (2017), where it reversed the denial of a COA, holding that the COA inquiry "is not coextensive with a merits analysis." At the COA stage, the *only* question is whether the applicant has shown that the claim is fairly debatable. If it is fairly debatable – in other circuits or in the Supreme Court – binding precedent is not a proper consideration for the denial of a COA.

Welch v. United States, 578 U.S. ___, 136 S. Ct. 1257 (2016), also arose from the denial of a COA. *Id.* at 1263-1264. In that case, the Court broadly held that *Johnson* announced a substantive rule that applied retroactively to cases on collateral review. *Id.* at 1268. But in order to resolve the particular case before it, the Court also held that the Court of Appeals erred by denying a COA because "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence." *Id.* at 1264, 1268. In that case, the parties disputed whether Welch's robbery conviction would continue to qualify as a violent felony absent the residual clause, and there was no binding precedent resolving that question. *See id.* at 1263-1264, 1268. Accordingly, this Court held that a COA should issue.

For the reasons stated below, reasonable jurists could debate whether Mr. Canadate's sentence was properly enhanced by the ACCA. This is so because, as the Court recognized in *Welch,* it is at least debatable whether a Florida conviction for robbery qualifies as a violent felony under ACCA's elements clause. Therefore, reasonable jurists could debate whether the sentence violated the Due Process Clause. Accordingly, the United States Court of Appeals for the Eleventh Circuit erred when it denied Mr. Canadate a certificate of appealability, and his petition for writ of certiorari should be granted.

Mr. Canadate's sentence was enhanced under the Armed Career Criminal Act (ACCA), based, in part, on the Florida offense of attempted armed robbery. Had he been sentenced in the Ninth Circuit, he would not have been subject to the ACCA-enhanced penalties based on this offense. This Court recently granted certiorari in *Stokeling v. United States*, ___ S. Ct. ___, 2018 WL 1568030 (April 2, 2018), which will resolve the circuit split on Florida robbery that is discussed below.

The Eleventh and Ninth Circuits are intractably divided on whether a Florida robbery conviction categorically requires the Curtis *Johnson* level of "violent force," and certiorari has been granted to resolve the circuit conflict on that issue.

In *United States v. Fritts*, the Eleventh Circuit held that Florida robbery—whether armed or unarmed—is categorically an ACCA violent felony. 841 F.3d 937, 943 (11th Cir. 2016). According to the Eleventh Circuit, armed and unarmed robbery qualify as violent felonies for ACCA purposes for the same reason,

i.e., according to *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997), overcoming victim resistance is a necessary element of any Florida robbery offense. 841 F.3d at 942-944. The Eleventh Circuit assumed from the mere fact of "victim resistance," and the perpetrator's need to use some physical force to overcome it, that robbery was categorically a violent felony.

According to *Fritts*, it was irrelevant that Fritts' own conviction pre-dated *Robinson* since *Robinson* simply clarified what the Florida robbery statute "always meant." 841 F.3d at 943. But while *Robinson* did clarify that a mere sudden snatching without any victim resistance is simply theft, not robbery, *id.* at 942-944, what it did not clarify was how much force was actually necessary to overcome resistance for a Florida robbery conviction. Decades before *Robinson*, however, the Florida Supreme Court had held that the "degree of force" was actually "immaterial" so long as it was sufficient to overcome resistance. *Montsdoca v. State*, 93 So. 157, 159 (1922). And the Eleventh Circuit in *Fritts* cited *Montsdoca* as controlling as well. 841 F.3d at 943.

Although neither *Montsdoca* nor *Robinson* specifically addressed what degree of force is necessary to overcome resistance under the Florida robbery statute, the Florida intermediate appellate courts have provided clarity as to the "least culpable conduct" under the statute in that regard. Several Florida appellate court decisions have confirmed post-*Robinson* that victim resistance in a robbery may well be quite minimal, and where it is, the degree of force necessary to overcome it is also minimal. Specifically, Florida courts have sustained robbery convictions under Fla.

Stat. § 812.13 where a defendant has simply: (1) bumped someone from behind, *Hayes v. State*, 780 So. 2d 918, 919 (Fla. 1st DCA 2001); (2) engaged in a tug-of-war over a purse, *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011); (3) peeled back someone's fingers in order to take money from his clenched fist, *Sanders v. State*, 769 So. 2d 506, 507 (Fla. 5th DCA 2000); or (4) otherwise removed money from someone's fist, knocking off a scab in the process, *Winston Johnson v. State*, 612 So. 2d 689, 690-91 (Fla. 1st DCA 1993).

As one Florida court explained, a robbery conviction may be upheld in Florida based on "ever so little" force. *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986). And as another court stated, the victim must simply resist "in any degree"; where "any degree" of resistance is overcome by the perpetrator, "the crime of robbery is complete." *Mims v. State*, 342 So. 2d 116, 117 (Fla. 3d DCA 1977).

The Ninth Circuit recognized this in *United States v. Geozos*, where it held that a Florida conviction for robbery, whether armed or unarmed, fails to qualify as a "violent felony" under the elements clause because it "does not involve the use of violent force within the meaning of ACCA." 879 F.3d 890, 900-01 (9th Cir. 2017). In so holding, the Ninth Circuit found significant that under Florida case law, "any degree" of resistance was sufficient for conviction, and an individual could violate the statute simply by engaging "in a non-violent tug-of-war" over a purse. *Id.* at 900 (citing *Mims* and *Benitez-Saldana*).

In coming to a decision that it recognized was at "odds" with the Eleventh Circuit's holding in *Fritts*, the Ninth Circuit rightly pointed out that "in focusing on

the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, [the Eleventh Circuit] has overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." *Id.* at 901 (citing *Montsdoca*, 93 So. at 159 ("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.")).

As is clear from *Geozos*, the Ninth and Eleventh Circuits' decisions directly conflict regarding an important and recurring question of federal law: namely, whether the minimal force required to overcome minimal resistance under the Florida robbery statute categorically meets the level of "physical force" required by *Curtis Johnson* for "violent felonies" within the ACCA elements clause. *See* 559 U.S. at 140 (holding that in the context of a "violent felony" definition, "physical force" means "violent force," which requires a "substantial degree of force.") And indeed, in *Stokeling v. United States*, ___ S. Ct. ___, 2018 WL 1568030 (April 2, 2018), certiorari was granted to resolve that very issue.

Given the Ninth Circuit's criticism of the Eleventh Circuit in *Geozos,* it is undisputable that reasonable jurists not only can debate – but have expressly debated – the correctness of the conclusion that a Florida robbery conviction qualifies as an ACCA violent felony. Because reasonable jurists could at least debate, and members of the Eleventh Circuit, as well as other circuits, have in fact debated, whether a Florida armed robbery conviction satisfies ACCA's elements clause, the

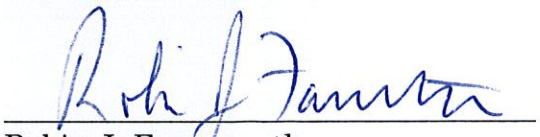
Eleventh Circuit erred when it failed to grant a certificate of appealability for Mr. Canadate.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: 

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