NO:

IN THE
SUPREME COURT OF THE UNITED STATES

TYRONE ANDERSON,

***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

In *Stokeling v. United States*, No. 16-12951, the 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?

Mr. Anderson was subjected to the enhanced penalties of the Armed Career Criminal Act ("ACCA") based in part on an alleged prior conviction under the same Florida robbery statute that is currently under review in *Stokeling*. He therefore brings this petition challenging his sentence on the same grounds as those presented in *Stokeling*.

Additionally, Mr. Anderson's sentence was enhanced based on alleged prior convictions that were neither charged by indictment nor admitted by him during his change of plea hearing. Moreover, Mr. Anderson specifically contested that one such alleged predicate qualified as a "conviction" for purposes of the ACCA.

The questions presented are:

> I. Whether Mr. Anderson's sentence must be vacated because Florida robbery is not a "violent felony" for purposes of the Armed Career Criminal Act.
>
> II. Whether *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998), should be overruled.

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

Tyrone Anderson 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 16-11424 in that court on January 26, 2018, *United States v. Anderson,* 723 F. App'x 833 (11th Cir. Jan. 26, 2018), *reh'g denied* (11th Cir. Mar. 29, 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 January 26, 2018. Mr. Anderson filed a timely petition for rehearing and rehearing *en banc*, which was denied on March 29, 2018. This petition is timely filed pursuant to SUP. CT. R. 13.1 and 13.3. The district court had jurisdiction pursuant to 18 U.S.C. § 3231 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.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following statutes and constitutional provisions:

U.S. CONST. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 922(g)(1)

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime publishable imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

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 (2009)

(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 or as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(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

On August 21, 2015, Miami-Dade police officers executed a traffic stop on vehicle in which the petitioner, Tyrone Anderson, was a passenger. (DE 14). Mr. Anderson was ordered to show his hands and, when he complied, the officers saw marijuana. (DE 14). A search incident to Mr. Anderson's ensuing arrest revealed a 9mm Astra A100 firearm in his waistband. (DE 14).

Mr. Anderson was charged in the Southern District of Florida 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 6). He pled guilty to the sole count of the Indictment. (DE 15).

A Pre-Sentence Investigation Report ("PSI") prepared by the United States Probation Office determined that Mr. Anderson should be sentenced pursuant to the enhanced provisions of the Armed Career Criminal Act, 18 U.S.C. § 924(e), based on two prior convictions for selling marijuana and one prior conviction for armed robbery under Florida law. (*See* PSI ¶¶ 13, 25 27, 29). Mr. Anderson objected to being sentenced under the ACCA on multiple grounds, including that his prior robbery conviction does not qualify as a "violent felony" under the ACCA and that the facts of his prior offenses were neither found by a jury nor admitted by him.

At the sentencing hearing, the district court overruled Mr. Anderson's objections and imposed the ACCA enhancement. Mr. Anderson was sentenced to 180 months' imprisonment, the mandatory minimum allowable under the ACCA, followed by five years of supervised release. (DE 37)

Mr. Anderson appealed his sentence to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit affirmed the sentence based on binding precedent. First, in *United States v. Fritts*, 841 F.3d 937, 944 (11th Cir. 2016), the Eleventh Circuit held that a conviction for armed robbery under Fla. Stat. § 812.13 categorically qualifies as a violent felony under the ACCA. *United States v. Anderson,* 723 F. App'x 833, 836 (11th Cir. Jan. 26, 2018), *reh'g denied* (11th Cir. Mar. 29, 2018).

Second, the Eleventh Circuit held that "the fact of a prior conviction is an exception" to the general rule that facts that increase a defendant's mandatory minimum must be submitted to a jury and found beyond a reasonable doubt. *See id.* (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998)). The court also rejected Mr. Anderson's argument "that the use of his prior convictions to enhance his sentence under ACCA required the sentencing court to find facts ***about*** his convictions, rather than simply rely on the facts ***of*** his convictions." *Id.* (emphasis in original). This, too, was precluded by circuit precedent. *Id.* (citing *United States v. Greer*, 440 F.3d 1267, 1275 (11th Cir. 2006)).

REASONS FOR GRANTING THE WRIT

I. Florida robbery is not a "violent felony" for purposes of the Armed Career Criminal Act.

Title 18, U.S.C. § 924(a)(2) establishes a ten-year maximum penalty for convicted felon who knowingly possesses either a firearm or ammunition in violation of 18 U.S.C. § 922(g)(1). If, however, a convicted felon knowingly possesses a firearm or ammunition, subsequent to three prior convictions for either a "violent felony" or a "serious drug offense" or both, Congress has mandated that such an offender be sentenced to a minimum of 15 years imprisonment, up to a maximum of "life." 18 U.S.C. § 924(e)(1) (the "Armed Career Criminal Act").

The term "violent felony" is defined in § 924(e)(2)(B) to mean "any crime punishable by imprisonment for a term exceeding one year" that, *inter alia*, has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Mr. Anderson's prior Florida conviction for robbery does not meet the ACCA's elements clause because it does not require "physical force" as that term has been defined by this Court.

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 convictions for robbery and armed robbery under the statute at issue here and held that they did not count as violent felonies under the elements clause because the statute does 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*, 870 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 116, 118 (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 between the Ninth and Eleventh Circuits will be resolved by this Court in *Stokeling,* and the result therein will be determinative for Mr. Anderson. The fact that Mr. Anderson's conviction was for armed robbery does not differentiate his case. As the Ninth Circuit noted, "the 'armed' nature of [the conviction] does not make the conviction one for a violent felony." *Geozos*, 800 F.3d at 900. "A person could be convicted of violating section 812.13(2)(a) for merely ***carrying*** a firearm or other deadly weapon during the course of a robbery. Accordingly, it would have been possible for someone to be convicted of violating the statute for carrying a firearm during a robbery even if that firearm was not displayed and the victim of the robbery was unaware of its presence." *Id*. (emphasis in original) (citation omitted).

Mr. Anderson therefore asks this Court to stay decision in his case pending resolution of *Stokeling*. He asks that the Court grant his petition, vacate the decision of the Eleventh Circuit, and remand his case for further proceedings.

II. *Almendarez-Torres v. United States*, 118 S. Ct. 1219 (1998), should be overruled.

Alternatively, this Court should grant review to revisit whether *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998), should be overruled.

The offense with which Mr. Anderson was charged, and to which he pled guilty, carries a ten-year statutory maximum. 18 U.S.C. § 922(g). However, his minimum sentence was raised to 15 years based on prior convictions that were neither charged in the indictment nor admitted to him at his change of plea hearing. Nor did Mr. Anderson have a right to contest these allegations in front of a jury. Mr. Anderson is thus one of the "[i]nnumerable criminal defendants [who] have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torre*s, despite the fundamental 'imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.'" *Shepard v. United States*, 544 U.S. 13, 28, 125 S. Ct. 1254, 1264 (2005) (Thomas, J. concurring).

A. *Almenadarez-Torres* has been undermined by two decades of intervening precedent.

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), a 5-4 majority of the Court interpreted 8 U.S.C. § 1326, the illegal reentry statute, as creating a single offense with different "sentencing factors," including whether the defendant had a prior aggravated felony conviction, that served to raise the defendant's applicable

statutory maximum sentence. The Court reasoned that the subject matter on which the sentencing enhancement was based, recidivism, was "as typical a sentencing factor as one might imagine." *Id.* at 230. Furthermore, the Court rejected the petitioner's argument that the Court "should simply adopt a rule that any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement." *See id*. at 247. The Court concluded that "the Constitution . . . does not impose such a requirement." *Id*.

Two year later, however, the Court adopted ***exactly*** the proposition dismissed by the *Almendarez-Torres* Court – that a court's power at sentencing is limited by the Sixth Amendment to the parameters of a properly obtained conviction based on the facts decided by a jury beyond a reasonable doubt or stipulated to by the defendant. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The *Apprendi* Court noted the decision's tension with *Almendarez-Torres*, but noted that, "Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset." *Apprendi*, 530 U.S. at 490.

Almendarez-Torres was thus permitted to survive for procedural reasons, while a series of cases applied and affirmed *Apprendi*'s general principle that any (other) fact that raises a defendant's maximum sentence must be charged by indictment and found by a jury beyond a reasonable doubt. *See*, *e.g.*, *United States v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781 (2002) (holding that any fact that would increase the "statutory maximum" sentence, as that term was used in *Apprendi*,

must be charged in the indictment to comport with the Fifth Amendment right to due process and grand jury indictment); *United States v. Booker*, 543 U.S. 220, 222, 125 S. Ct. 738 (2005) (finding judge's post-verdict enhancement invalid because "the jury's verdict alone [did] not authorize the sentence"). Significantly, the *Almendarez-Torres* Court noted that the rule Almendarez-Torres sought "would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty, a punishment far more severe than that faced by petitioner here." *Almendarez-Torres*, 523 U.S. at 247, *citing*, *e.g.*, *Walton v. Arizona*, 497 U.S. 639, 647 (1990). *Walton*, however, was later overruled. *See Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002). More recently, in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the Court overruled *Harris v. United States*, 536 U.S. 545 (2002), which had differentiated facts raising a defendant's minimum sentence from his maximum sentence for *Apprendi* purposes.

Almendarez-Torres is out of step with two decades of intervening jurisprudence and should be overruled. *See Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring) ("*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. . . . The parties do not request it here, but in an appropriate case, this Court should consider Almendarez-Torres' continuing viability."). *See also Dretke v. Haley*, 124 S. Ct.

1847, 1853-54 (2004) (recognizing that whether *Almendarez-Torres* remains valid following *Apprendi* presents a "difficult constitutional question").

B. Mr. Anderson disputed the existence of three prior convictions.

This is a case in which that jury trial right might have made significant difference. Mr. Anderson's sentence was enhanced based on an alleged prior conviction for which adjudication has been withheld under Florida law. (PSI ¶ 25). It has long been understood, as a matter of Florida law, that such withheld adjudications do not qualify as "convictions" and that citizens do not lose their civil rights – including the right to possess as firearm – as a result of obtaining them. *See generally Clarke v. United States*, 184 So.3d 1107, 1112 (Fla. 2016) (recognizing a "longstanding, consistent definition of 'conviction' that requires an adjudication").

In light of the Florida Supreme Court's *Clarke* decision, which was a result of a question certified to it by the Eleventh Circuit, the Eleventh Circuit recently admitted its error in treating withheld adjudications as "convictions" for purposes of 18 U.S.C. § 922(g). *See United States v. Clarke*, 822 F.3d 1213 (11th Cir. 2016). Mr. Anderson was unable to convince the Eleventh Circuit, however, to overturn its precedent treating withheld adjudications as "convictions" for purposes of the ACCA enhancement. *See Anderson*, 712 F. App'x at 836-837. In light of the patent dissonance and unfairness of this result, it is certainly possible that Mr. Anderson would have had better luck with a jury.

Thus, Mr. Anderson was deprived of the fundamental constitutional right to be able to demand a jury trial on facts which had the effect of increasing his sentence by at least five years. This practice of raising a defendant's maximum sentence based on prior convictions that are neither charged by indictment nor proven to a jury is inconsistent with two decades of Sixth Amendment jurisprudence and should be stopped.

CONCLUSION

Based upon the foregoing petition, Mr. Anderson 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. Alternatively, he asks this Court to grant review to decide whether *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998), should be overruled.

Respectfully submitted,

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