

No. \_\_\_\_\_

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

RENE BORRERO — PETITIONER  
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO  
U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

\_\_\_\_\_  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RENE BORRERO #67381-018

(Your Name)

FCI COLEMAN, PO. BOX. 1032

(Address)

COLEMAN, FLORIDA 33521 - 1032

(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

## QUESTION(S) PRESENTED

1. Whether Florida's State attempted robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" is categorically a .. "violent felony" under the Armed Career Criminal Act, - 18 U.S.C. § 924(e)(2)(B)(i), when the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance ?

2. Whether Petitioner's writ of certiorari should be granted in light of the Supreme Court's grant of certiorari in Stokeling v. United States, (U.S. No. 17-554), and the relisting in Pace v. United States, (U.S. No. 17-7140), raising the identical question above in question #1 ?

3. Whether Petitioner's conviction for attempted robbery under Florida's - State statute qualifies as a ACCA predicate ?

4. Whether Petitioner's sentence of five years over his statutory maximum pursuant to 18 U.S.C. § 922(g) is unlawful, in violation of the Fifth Amendment Due Process Clause ?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix   A   to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was APRIL 13, 2018.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **AMENDMENT 5**

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

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.

## STATEMENT OF THE CASE

Petitioner was charged in a one count indictment with knowingly being in possession of a firearm and ammunition which had traveled in interstate commerce (a violation of 18 U.S.C. § 922(g)(1) and § 924(e)). On May 17, 2017, Petitioner plead guilty to the ..... indictment without a plea agreement. The United States Probation Department prepared a (PSI) report to which there was no objections filed by either party before sentencing. Petitioner stated his objections, through Counsel to ¶20 of the (PSR) to his being classified as an Armed Career Criminal based on a Florida attempt .. Robbery conviction listed as a predicate offense. The grounds asserted were that the statute was "overly .. broad", did "not fit the generic definition of a crime of violence and, therefore it did not qualify as a - predicate offense for the ACCA". During - the sentencing, Petitioner preserved his objections pro-se to all three offenses listed in ¶20, as being insufficient to .... qualify him as an Armed Career Criminal. "I'm not asking to change anything. I just want it in the record that I objected to it." Doc. 65 at 8. Petitioner's Appointed



Counsel **declined** the court's invitation for him to question the U.S. Probation Office findings on the .. validity of the convictions and stated his opinion - that the (PSI) was correct. Doc. 65 at 5, 7. The U.S. District Court overruled the objection and adopted the statements in the presentence report along with the advisory guidelins it calculated, a toltal level of 30 with a criminal history category of V. The Guidelines range of 151 to 188 months imprisonment by the statutory minimum mandatory requirement of a term of at least 180 months impriosonment under 18 U.S.C. § 924(e). The court imposed a sentence of 180 months, the statutory mandatory minimum sentence, five years over the statutory maximum pursuant to 18 U.S.C. § 922(g)(1).

Petitioner took an appeal to the Eleventh Circuit in the case No. 17-14010-HH, and appointed counsel then filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), which was affirmed in a .. (per curiam) opinion on April 13, 2018. Petitioner now files this petition for writ of certiorari timely, under the prison mailbox rule within 90 days of the OP/ORDER.

## REASONS FOR GRANTING THE PETITION

Petitioner has arguably three predicate convictions pursuant to the ACCA. The conviction in question here, if obviated, would render his sentence unlawful. As .. stated above, petitioner lodged pro-se objections that were overruled by the district court; reminding this Honorable court that neither party filed presentence - objections to the enhancement under § 924(e). Petitioner argues below that Florida's attempted robbery (which has the same elements as Florida robbery), does not .. satisfy the elements clause because it does not require violent force. See Curtis Johnson v. United States, 599 U.S. 133 (2010)(defining "physical force" to mean ... "violent force — that is, force capable causing physical pain or injury to another person"). Petitioner, however acknowledges that his argument pro-se is now foreclosed by the Eleventh Circuit's precedent in United States v. Fritts, 841 F.3d 937 (11th Cir. 2016), but maintains that Fritts was wrongly decided and moves for the Court to grant certiorari on the questions presented herein.

Indeed, the Ninth Circuit has since considered this verry issue and rejected Fritts, thereby creating a .. circuit split and increasing the prospect for Supreme

Court review. In United States v. Geozos, the Ninth Circuit considered a Florida robbery conviction under the exact same statute at issue in Fritts Fla. Stat. § 812.13— and held that the conviction did not qualify as a violent felony under the elements clause because, it did not necessarily require the use of "violent force" as defined in Curtis Johnson. 870 F.3d 890 (9th Cir. 2017).

In 1998, Florida defined robbery as "the taking of money or other property which may be the subject of ... larceny from the person or custody of another when in the course of the taking there is the use of force, ... violence, assault, or putting in fear." Analyzing the identical language in a Florida robbery statute from 1979, the Ninth Circuit found significant that the terms "force" and "violence" were used separately, which then suggested "that not all 'force' that is covered by the statute is 'violent force.'" Id 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 makes "clear" that "one can violate § 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. And critically, Florida case law both before and .. after Robinson v. State, confirmed that "the amount of force can be minimal." Id. For instance in Mimms v. State, the Florida court 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 not resist **in any degree** and this resistance is overcome by force of the perpetrator, the crime of the robbery is complete." Id. (quoting Mimms v. State, 342 S.2d 116, 117 (Fla Dist. Ct. App. 1977) and adding emphasis to the words "**in any ... degree**"); Id. at n.9 (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. Dist. Ct. App. 2011), another Florida court held that a robbery conviction "may be based on a ... defendant's act of engaging in a tug-of-war over a victim's purse." In the Ninth Circuit's view, such an act "does not involve the use of violent force within the meaning of Johnson I." Id. at 900. Notably, the Ninth Circuit then acknowledged that its conclusion that a Florida robbery offense was not categorically an ACCA "violent felony" put

it "at odds" with the Eleventh Circuit, which held .. just the opposite in Fritts 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 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.").

Id at 901. That is, since "violent force" has plainly not been required for **every** Florida robbery conviction, a robbery by "force" in Florida does not meet the ACCA's element clause. See United States v. Estrella, 758 F.3d 1239, 1244 (11th Cir. 2014)(noting that is the state .. cannot establish "beyond a reasonable doubt and without exception, and element involving the use, or threatened

use of [violent force] against a person for every charge brought under the statute," the conviction does not categorically meet the elements clause).

Petitioner herein adopts the Ninth Circuit's .... sound reasoning in Geozos and moves this Honorable - Court to issue the writ of certiorari.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert B. ...

Date: 6.22.2018