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NO.

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA,
Plaintiff - Appellee.
v.
BRAUN THOMPSON

Defendant - Appellant

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
No. 17-3140

PETITION FOR WRIT OF CERTIORARI

JOHN J. BISHOP
222 Third Ave. SE, Suite 299

Cedar Rapids, Iowa 52401

(319) 398-0343

ATTORNEY FOR APPELLANT

QUESTION PRESENTED FOR REVIEW

Whether aggravated robbery under Minnesota law is a violent felony within the scope of the elements clause of 18 U.S.C. §924(e)(2)(b)(i).

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JURISDICTIONAL STATEMENT

Mr. Thompson was was convicted in Northern District of Iowa case No. CR03-3069 for the following charges: Felon in Possession of a Firearm, after having been convicted of three or more violent felonies, in violation of 18 U.S.C. §§922(g) and 924(e); Possession of a Unregistered Firearm, in violation of 26 U.S.C. §§5841, 5861(d) and 5871; Felon in Possession of Ammunition, after having been convicted of three or more violent felonies, in violation of 18 U.S.C. §§922(g) and 924(e)

Jurisdiction in the district court was based on 18 U.S.C. §3231, as Mr. Thompson was charged with offenses against the laws of the United States.

Mr. Thompson eventually filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. §2255 in Northern District of Iowa case No. C16-3028. This motion was denied by the district court on September 15, 2017. Mr. Thompson filed his Notice of Appeal on September 26, 2017.

On May 17, 2019, a three judge panel of the United States Court of Appeals for the Eighth Circuit affirmed Mr. Thompson's sentence. Mr. Thompson filed a Petition for Rehearing En Banc on June 27, 2019.

The United States Court of Appeals for the Eighth Circuit denied the Petition for Rehearing En Banc on July 19, 2019.

Jurisdiction in the United States Court of Appeals for the Eighth Circuit was based on 28 U.S.C. §1291, which provides for jurisdiction over a final judgment from a United States District Court.

Jurisdiction for review in the Supreme Court of the United States is conferred by 28 U.S.C. §1254, and also by the United States Constitution, Article 3, Section 2, Clause 2.

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STATEMENT OF THE CASE

On December 9, 2003, a jury returned guilty verdicts against Mr. Thompson for Felon in Possession of a Firearm after having been convicted of three or more violent felonies; Possession of a Unregistered Firearm; and Felon in Possession of Ammunition after having been convicted of three or more violent felonies. At sentencing Mr. Thompson was determined to have qualified to be sentenced as an "Armed Career Criminal". This was based upon three convictions for Aggravated Robbery in violation of Minnesota code §609.245. As a result, Mr. Thompson became subject to a statutory mandatory minimum sentence of 180 months up to a maximum sentence of life imprisonment and received a 420 month term of imprisonment (he would have otherwise been subject to a statutory maximum sentence of 120 months for each count).

Under the categorical approach, neither first degree aggravated robbery nor the included offense of simple robbery under Minnesota law come within the scope of the elements clause of 18 U.S.C. §924(e)(2)(B)(i). Mr. Thompson's three convictions for aggravated robbery are therefore not violent felonies under the ACCA. Lacking three prior convictions for a violent felony, Mr. Thompson was not subject to sentencing as an armed career criminal.

ARGUMENT

In 2018, the Eighth Circuit considered the issue of whether Robbery as defined in Minnesota Code §609.245 is a crime of violence within the scope of §924(e)(2)(B)(i) in two cases - United States v. Libby, 880 F.3d 1011 (8th Cir. 2018) and United States v. Pettis, 888 F.3d 962 (8th Cir. 2018). In both Libby and Pettis, the Court determined that Minn. Stat. §609.24[1] and §609.245[2] were indivisible offenses and therefore the Court utilized a "categorical approach" focusing on the elements of the state statute in considering whether a violation

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[1] Section 609.24 defines Simple Robbery as:

> Whoever, having knowledge of not being entitled thereto, takes personal property from the person or in the presence of another and uses or threatens the imminent use of force against any person to overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property is guilty of robbery and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both.

Minn. Stat. §609.24

[2] Section 609.245 defines Aggravated Robbery as:

> Subdivision 1. First degree. Whoever, while committing a robbery, is armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon, or inflicts bodily harm upon another, is guilty of aggravated robbery in the first degree and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $35,000, or both.

Minn. Stat. §609.245

necessarily satisfied the federal definition of violent felony.[3] Libby 880 F.3d at 1015; Pettis 888 F.3d at 964. In doing so, the Court concluded that a conviction for robbery under Minn. Stat. §609.24 requires proof of the use, attempted use, or threatened use of violent force and as such, it was a predicate offense under the ACCA. Libby 880 F.3d at 1016; Pettis 888 F.3d at 965. The struggle in Libby and Pettis centered on whether the language in §609.24, requiring that a defendant "threaten[ ] the imminent use of force" in order to either "compel acquiescence" or "to overcome the person's resistance or powers of resistance ...." constituted a threat of *violent* force.

The appellants in Libby and Pettis relied heavily on two cases, United States v. Eason, 829 F., 3d 633 (8th Cir. 2016) (interpreting an Arkansas robbery statute) and United States v. Bell, 840 F.3d 963 (8th Cir. 2016) (examining second-degree robbery in Missouri). In Eason and Bell, the Eighth Circuit found that the convictions under each respective robbery statute did not require violent force and therefore did not qualify as predicate offense. Eason 829 F.3d at 641-642; Bell, 840 F.3d at 966-67. In Libby and Pettis, the Eighth Circuit found the Arkansas

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[3] A violent felony under §924(e)(2)(B) requires physical force "capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140 (2010).

statute distinguishable from the Minnesota statute and as a result it was not bound by Eason. Libby 880 F.3d at 1016; Pettis 888 F.3d at 964. In Pettis, however, the Eighth Circuit acknowledged that the Missouri statute in Bell was indistinguishable from the Minnesota statute.[4] Pettis 888 F.3d at 965. After briefs were filed in Pettis, this Eighth Circuit held in United States v. Swopes, 866 F.3d 668 (8th Cir. 2018) that the Missouri second degree robbery statute did indeed satisfy the definition of violent felony, and Bell was overturned. Swopes, 866 F.3d 671. As a result, this Court in Pettis determined that Bell was no longer a consideration. Pettis, 888 F.3d at 964.

Mr. Thompson urges the Court to reconsider and overrule Libby and Pettis. The Arkansas robbery statute at issue in Eason provided that "[a] person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately after committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person." Ark. Code Ann. §5-12-102. "Physical force" was defined under Arkansas law as "any...[b]odily impact, restraint, or confinement; or [t]hreat of any

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[4] In Libby the Court chose not to consider Bell because it was a non-ACCA case. Libby 880 F.3d at Ftn. 5.

bodily impact, restraint, or confinement." Ark. Code. Ann. §5-12- 101. The Eighth Circuit has previously observed that a robbery conviction could be sustained under Arkansas law "even where there was no threat of force and no actual injury befell the victim." Id at 641; citing Fairchild v. State, 269 Ark. 273, 600 S.W.2d 16, 17 (1980) ("[J]erking the door from [a victim], cornering [her] in the back hallway and grabbing her dress [lightly] is sufficient restraint and bodily impact to constitute physical force."). Furthermore, this Court has previously found that "(t)he Minnesota robbery statute's phrase 'uses or threatens the imminent use of force against any person,' Minn. Stat. §609.24, is almost identical in meaning to the Arkansas statute's phrase 'employs or threatens to immediately employ physical force upon another person,' Ark. Code. Ann. §5-12-102(a)." United States v. Samuel Johnson, 526 Fed. Appx. 708, 711 (8th Cir. 2013), rev'd on other grounds, 135 S.Ct. 2551 (2015). Given this Court's finding of the near identity in language between Minnesota's simple robbery statute and Arkansas's robbery statute, it follows that the analysis in Eason leading to the conclusion that robbery under Arkansas law is not a violent felony under the ACCA applies here and leads to the conclusion that Minnesota's simple robbery crime is also not a violent felony under the ACCA.

Finally, the appellants in Libby and Pettis urged that there was a Minnesota case which demonstrated that Minn. Stat. §609.24 allowed a minimal, non-violent amount of force to sustain a robbery conviction - State v. Nelson, 297 N.W.2d 285 (1980). Libby viewed Nelson as a case where the defendants threatened violent force. Libby, 880 F.3d 1016. Pettis viewed Nelson as not a threat of force, but a situation where actual violent force was used. Pettis, 888 F.3d 966. In Nelson, the Minnesota Supreme Court found in upholding a robbery conviction that the defendant's use of force caused "the victim to acquiesce in taking of the property." Nelson, 297 N.W.2d at 286. As summarized by the Minnesota Supreme Court, the evidence upon which this finding was based was as follows:

> The state's evidence established that defendant and an accomplice, both young adults, followed and grabbed a 13-year-old boy after he got off a bus and after they discussed "getting" him because he looked like he had "lots of money." While defendant forcefully pulled on the boy's coat, the boy responded by slipping out of the jacket and running into his parents' nearby restaurant and seeking help. The boy's father followed defendant and his accomplice and confronted them as they were searching the pockets of the jacket. Defendant, in his testimony, claimed that he did not know why he grabbed the boy but that he had deliberately planned to take the jacket before he "jostled" the boy.

Id.

The forgoing summary certainly contains no evidence of a threat as asserted in Libby. The defendant and his accomplice discussed "getting" the victim, however that discussion clearly appears to have been between themselves and not a threat communicated to the victim. With respect to the analysis in Pettis, a violent felony under §924(e)(2)(B) requires physical force "capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140 (2010). The defendant merely grabbed the victim's coat which the victim then slipped out of and ran away. Pulling on a coat is not violent force capable of causing physical pain or injury. Because this decision from the Minnesota Supreme Court sustained a conviction for simple robbery on a level of force that is less than violent force, there certainly is a "realistic probability" that Minnesota would apply its simple robbery statute to conduct that falls outside the definition of a "violent felony" under the ACCA.

Based upon the foregoing reconsideration of the implications of Eason and Nelson, this court should overturn Libby and Pettis.

CONCLUSION

For the reasons stated above, the appellant, Braun Thompson, respectfully requests a full review by the Supreme Court of the United States and respectfully prays that his Writ of Certiorari be granted.

Respectfully Submitted,

/s/ *John Bishop*

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JOHN J. BISHOP AT0000937
222 Third Ave. SE; Suite 299
Cedar Rapids, IA 52401
Telephone: (319) 398-0343
Facsimile: (319) 364-8914
E-Mail: johnbishoplaw@gmail.com

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that on the 16th day of October 2019, I, the undersigned party, or person acting in his behalf, did serve the foregoing Petition on Writ of Certiorari on Appellee's counsel by sending one copy each to all counsel of record in this matter, pursuant to Supreme Court Rule 29(3), at the following address(es):

Mr. Matt Cole
United States Attorney's Office
401 1st St. SE, Suite 400
Cedar Rapids, IA 52401-1821

Solicitor General of the United States Department of Justice
Room 5614
950 Pennsylvania Ave., N.W.
Washington D.C. 20530-0001

/s/ *John Bishop*

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JOHN J. BISHOP AT0000937
222 Third Ave. SE; Suite 299
Cedar Rapids, IA 52401
Telephone: (319) 398-0343
Facsimile: (319) 364-8914
E-Mail: johnbishoplaw@gmail.com

ATTORNEY FOR APPELLANT

CERTIFICATE OF FILING

On the 16th day of October, 2019, I, the undersigned party or person acting on his behalf, filed the foregoing Writ of Certiorari by mailing ten (10) copies, and one original, first class prepaid, from a federal mail depository addressed to the Clerk of Court, Supreme Court of the United States, One First Street N.E., Washington, D.C. 20543, pursuant to Supreme Court Rule 29(2), with the intent that this document would be deemed filed as of the date of mailing.

/s/ *John Bishop*

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JOHN J. BISHOP AT0000937
222 Third Ave. SE; Suite 299
Cedar Rapids, IA 52401
Telephone: (319) 398-0343
Facsimile: (319) 364-8914
E-Mail: johnbishoplaw@gmail.com

ATTORNEY FOR APPELLANT

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