

No. 19-8741

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IN THE SUPREME COURT OF THE UNITED STATES

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KELLY DAVID ANKENY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior conviction for second-degree robbery, in violation of Or. Rev. Stat. § 164.405(1)(a) (1971), was a conviction for a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Or.):

United States v. Ankeny, No. 04-cr-5 (June 17, 2005, as amended Aug. 8, 2008; opinion and order denying 28 U.S.C. 2255 motion Feb. 13, 2017, as amended Feb. 23, 2017)

United States Court of Appeals (9th Cir.):

United States v. Ankeny, No. 05-30457 (Sept. 13, 2007)

United States v. Ankeny, No. 08-30296 (Feb. 19, 2009)

United States v. Ankeny, No. 17-35138 (Mar. 9, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is not published in the Federal Reporter but is reprinted at 798 Fed. Appx. 990. The opinion and order of the district court (Pet. App. 12-26) is not published in the Federal Supplement but is available at 2017 WL 722580. A prior opinion of the court of appeals is reported at 502 F.3d 829.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2020. The petition for a writ of certiorari was filed on June

12, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Oregon, petitioner was convicted on four counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), and of possessing an unregistered firearm, in violation of 26 U.S.C. 5861(d). Judgment 1. The district court sentenced him to 262 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed in part, reversed in part, and vacated petitioner's sentence. 502 F.3d 829, cert. denied, 553 U.S. 1034. On remand, the district court sentenced petitioner to 188 months of imprisonment, to be followed by five years of supervised release. Am. Judgment 2-3. In 2016, petitioner moved to vacate his sentence pursuant to 28 U.S.C. 2255. D. Ct. Doc. 103 (June 6, 2016) (2255 Mot.). The district court denied the motion, Pet. App. 12-26, and the court of appeals affirmed, id. at 1-11.

1. In October 2003, the mother of petitioner's son notified Portland police that petitioner had violently attacked her and brandished a firearm. Presentence Investigation Report (PSR) ¶¶ 8-9. Based on that incident as well as petitioner's criminal history, including several outstanding felony and misdemeanor warrants, police officers executed a search warrant on his temporary residence. PSR ¶¶ 8, 10. When they entered the

residence, police saw petitioner rising from a chair and ordered him to get down on the ground. PSR ¶ 10. During a search of the residence, the officers found two loaded firearms near the chair where petitioner had been sitting. PSR ¶ 12. The officers also found a sawed-off shotgun in petitioner's bedroom, a rifle in the basement, and methamphetamine and drug paraphernalia throughout the house. PSR ¶¶ 13-14.

A federal grand jury in the District of Oregon charged petitioner with four counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), and one count of possessing an unregistered firearm (the sawed-off shotgun), in violation of 26 U.S.C. 5861(d). Indictment 1-5. Petitioner and the government entered into a conditional plea agreement, which the district court accepted. Judgment 1.

2. A conviction under 18 U.S.C. 922(g)(1) has a default statutory sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life, 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as:

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; 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 clause of that definition is commonly referred to as the "elements clause," and the portion beginning with "otherwise" is known as the "residual clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

The Probation Office's presentence report classified petitioner as an armed career criminal under the ACCA based on a prior Oregon conviction for second-degree robbery and two prior Oregon convictions for delivery of a controlled substance. PSR ¶¶ 23, 35, 47, 49. It calculated his advisory Guidelines range at 262 to 327 months of imprisonment. PSR ¶ 78. The district court likewise found that the ACCA applied to petitioner's felon-in-possession offenses and sentenced him to concurrent terms of 262 months of imprisonment for each, to run concurrently with a 120-month term of imprisonment for the unregistered-firearm count. Judgment 2. The district court also imposed a five-year term of supervised release. Judgment 3.

The court of appeals affirmed in part, reversed in part, and vacated petitioner's sentence. 502 F.3d at 832. It rejected petitioner's argument that his second-degree robbery conviction did not qualify as a violent felony under the ACCA, explaining that "[t]he Oregon statutory definition of second-degree robbery contains the required element of use, attempted use, or threatened

use of physical violence." Id. at 840. The court of appeals concluded, however, that petitioner's felon-in-possession counts were multiplicitous and therefore remanded for the district court to dismiss all but one of those counts and resentence him. Id. at 838-839. This Court denied certiorari. 553 U.S. 1034.

On remand, the district court sentenced petitioner to 188 months of imprisonment for the remaining felon-in-possession count, to run concurrently with a 120-month term of imprisonment for the unregistered-firearm count, to be followed by a five-year term of supervised release. Am. Judgment 1-3. The court of appeals summarily affirmed, 2009 WL 226199, and this court denied certiorari, 556 U.S. 1225 (2009).

3. In 2015, this Court held in Johnson v. United States, 576 U.S. 591, that the ACCA's residual clause is unconstitutionally vague. Id. at 606. The Court subsequently held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. Welch, 136 S. Ct. at 1268.

In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, relying on Johnson to argue that he was wrongly sentenced as an armed career criminal. 2255 Mot. 4-14. Petitioner contended his conviction for second-degree robbery could not qualify as a violent felony under the residual clause in light of Johnson, and did not qualify under the elements clause on the theory that this offense did not require proof of the "use,

attempted use, or threatened use of physical force against the person of another." 2255 Mot. 5, 8-14 (citation omitted).

The district court denied the motion, although it granted a certificate of appealability. Pet. App. 12-26. It explained that Oregon's second-degree robbery statute is divisible into two separate offenses with different elements: (a) offenses in which the defendant "[r]epresents by word or conduct that [he] is armed with what purports to be a dangerous or deadly weapon"; and (b) offenses in which the perpetrator "[i]s aided by another person actually present." Id. at 18 (quoting Or. Rev. Stat. Ann. § 164.405 (West 1971)); see id. at 18-21. After reviewing the record of petitioner's robbery conviction, the court found that he had been convicted for the armed-representation version of the crime. Id. at 21. And it determined, based on state case law, that armed-representation robbery necessarily requires at least the "threat[ened] \* \* \* use of physical force" within the meaning of the ACCA's elements clause because the "'threat of violence is what causes the victim to part with the property.'" Id. at 23 (quoting State v. White, 211 P.3d 248, 256 (Or. 2009) (en banc)).

4. The court of appeals affirmed. Pet. App. 1-11. It observed that petitioner had "concede[d]" that Oregon's second-degree robbery statute is "divisible" into separate offenses and that the record of his conviction revealed that petitioner had been "charged exclusively" for the armed-representation version.

Id. at 5-6. And it determined that a violation of that provision "necessarily entails a threat of violent force." Id. at 6.

The court of appeals observed that armed-representation robbery requires the defendant to "intend to cause the victim to be aware of the fact that he or she is armed with a dangerous weapon," Pet. App. 7 (quoting State v. Lee, 23 P.3d 999, 1003 (Or. Ct. App. 2001)), and found that the crime necessarily involves "an implicit threat to use a purported weapon capable of serious or deadly force if the victim resists the robbery," ibid. Relying on the Oregon Supreme Court's decision in White, supra, the court further explained that "to commit robbery and represent that one is armed" under the Oregon law, "one must commit robbery by representing that one is armed." Pet. App. 7. The court further observed that Oregon cases involving armed-representation robbery "always involve the defendant's using the representation that he or she was armed as the means of threatening force against the victim" and that petitioner had not cited "any Oregon cases suggesting otherwise." Id. at 8.

#### ARGUMENT

Petitioner contends (Pet. 6-12) that the court of appeals erred in rejecting his motion for postconviction relief under 28 U.S.C. 2255. That contention lacks merit. The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly determined that petitioner's conviction for Oregon second-degree robbery, in violation of Or. Rev. Stat. § 164.405(1)(a) (1971), was a conviction for a "violent felony" under the ACCA's elements clause.

a. To determine whether a prior conviction constitutes a "violent felony" under the elements clause, courts apply a "categorical approach," Mathis v. United States, 136 S. Ct. 2243, 2248 (2016), which requires analysis of "the elements of the crime of conviction" rather than the offense conduct, ibid.; see Taylor v. United States, 495 U.S. 575, 602 (1990). If the statute of conviction lists multiple alternative elements establishing multiple distinct crimes, it is "'divisible,'" and a court may apply a "'modified categorical approach'" that "looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of." Mathis, 136 S. Ct. at 2249 (citation omitted); see Shepard v. United States, 544 U.S. 13, 26 (2005).

Oregon law defines basic (third-degree) robbery as a theft in which the defendant "uses or threatens the immediate use of physical force upon another" with the intent of "[p]reventing or overcoming resistance" to the theft, or compels someone to deliver property or otherwise aid the theft. Or. Rev. Stat. § 164.395 (1971). The court of appeals has concluded that Oregon third-degree robbery is not a violent felony for purposes of the ACCA

because it encompasses offenses such as purse-snatching, which need not include the use or threatened use of physical force. United States v. Strickland, 860 F.3d 1224, 1227 (9th Cir. 2017); cf. Stokeling v. United States, 139 S. Ct. 544, 555 (2019) (explaining that, although the term "'physical force'" typically includes force sufficient to overcome resistance, it does not include "[m]ere 'snatching of property from another'") (citations omitted).

Oregon law defines second-degree robbery as a third-degree robbery in which the perpetrator either "(a) [r]epresents by word or conduct that he is armed with what purports to be a dangerous or deadly weapon," or "(b) [i]s aided by another person actually present." Or. Rev. Stat. § 164.405 (1971). Petitioner acknowledges (Pet. 6 n.1) that those two subsections define separate offenses with different elements, and that the statute is therefore divisible. And he further acknowledges (Pet. 6) that he was convicted under the armed-representation variant specified in subsection (a).

b. The court of appeals correctly determined that a conviction for Oregon second-degree armed-representation robbery qualifies as a violent felony under the ACCA's elements clause because it "necessarily entails a threat of violent force," Pet. App. 6, and thus "has as an element the \* \* \* threatened use of physical force against the person of another," 18 U.S.C. 924(e) (2) (B) (i). As petitioner acknowledges, the armed-

representation provision requires that the defendant "intends to cause the victim to be aware of the fact that he or she is armed with a dangerous weapon." Pet. 8 (quoting State v. Lee, 23 P.3d 999, 1003 (Or. Ct. App. 2001)); accord Pet. App. 7. And as the court of appeals explained, that conduct entails at least a threat of physical force because it necessarily conveys an "implicit threat to use a purported weapon capable of serious or deadly force if the victim resists the robbery" in a manner that may result in serious injury or death. Pet. App. 7.

Petitioner's contrary arguments lack merit. Citing Elonis v. United States, 575 U.S. 723 (2015), he asserts that the armed-representation provision does not require a defendant to "communicate an intent to cause harm" or to "know that the communication is threatening" and that the court of appeals "read[] an additional threat element into the crime." Pet. 7-8. According to petitioner, a defendant can violate the armed-representation provision merely "by possessing a visible weapon during the course of a nonviolent purse snatching." Pet. 9. But petitioner "rightly abandon[ed] that hypothetical" below because such conduct does not in fact qualify as Oregon second-degree robbery, which -- as petitioner acknowledges -- "requires an intentional representation" that the defendant is armed. Pet. App. 9 (emphasis added); see Pet. 8. Petitioner has identified no Oregon case that supports his understanding of the statute.

Petitioner challenges (Pet. 9-12) the court of appeals' determination that a defendant commits second-degree robbery only "by representing that [he] is armed," such that second-degree robbery's armed-representation element is necessarily tethered to the commission of the underlying robbery. Pet. App. 7. But petitioner does not question the court of appeals' conclusion that Oregon cases applying the armed-representation provision "always involve the defendant's using the representation that he or she was armed as the means of threatening force against the victim." Id. at 8 (collecting cases). And petitioner's review (Pet. 11-12) of state cases involving the separate aided-by-another robbery offense does not establish that the armed-representation provision would be applied to conduct that does not at least involve the threatened use of physical force. Petitioner also misreads (Pet. 10) the Oregon Supreme Court's decision in State v. White, 211 P.3d 248 (2009). In discussing the nature of Oregon's robbery statutes, the court in White explained that "the threat of violence (or actual violence) is part of the crime of robbery only when it is used 'in the course of committing or attempting to commit theft.'" Id. at 256 (emphasis added; citation omitted). Accordingly, within the context of second-degree robbery, representing that one is armed cannot be performed independently from "us[ing] or threaten[ing] the immediate use of physical force upon another." Or. Rev. Stat. § 164.395 (1971) (third-degree robbery).

2. In any event, the question presented does not warrant this Court's review. Petitioner does not allege that the decision below conflicts with any decision of any other court of appeals. Instead, he asserts that his challenge "could impact a range of state statutes that provide for an elevated form of robbery when an offender represents he or she is armed." Pet. 13. But every court of appeals to address one of the statutes he identifies has determined, consistent with the decision below, that committing a robbery while representing one is armed is a violent felony. See, e.g., United States v. Harris, 844 F.3d 1260, 1270 (10th Cir. 2017), cert. denied, 138 S. Ct. 1438 (2018) (finding Colorado robbery under Colo. Rev. Stat. Ann. § 18-4-301 (West 2004) is a violent felony for purposes of the ACCA); United States v. Bordeaux, 886 F.3d 189, 194 (2d Cir. 2018) (same for Connecticut robbery under Conn. Gen. Stat. Ann. § 53a-134(a)(4) (West 1992)); United States v. Doctor, 842 F.3d 306, 312 (4th Cir. 2016) (same for South Carolina robbery under S.C. Code Ann. § 16-11-330 (West 1996)), cert. denied, 137 S. Ct. 1831 (2017); cf. United States v. Smith, 928 F.3d 714, 717 (8th Cir. 2019) (finding that aggravated robbery under Ark. Code Ann. § 5-12-103 (Supp. 1995) is a crime of violence for purposes of Sentencing Guidelines § 4B1.2).

Furthermore, as petitioner's arguments illustrate (Pet. 6-12), whether Oregon second-degree robbery satisfies the ACCA's elements clause depends almost entirely on how the Ninth Circuit and Oregon courts have construed that statute. The interpretation

of that particular state law does not warrant this Court's review, especially given that this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004); see Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."). Petitioner identifies no reason for this Court to depart from that settled practice in this case.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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