

No. 20-5993

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IN THE SUPREME COURT OF THE UNITED STATES

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KEITH A. JAMES, 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 FIFTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the Louisiana offense of armed robbery, in violation of La. Rev. Stat. Ann. § 14:64(A) (2007), is 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 (E.D. La.):

United States v. James, No. 17-cr-207 (Sept. 26, 2018)

United States Court of Appeals (5th Cir.):

United States v. James, No. 18-31069 (Feb. 18, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8)\* is reported at 950 F.3d 289.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2020. A petition for rehearing was denied on July 9, 2020 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on October 7, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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\* Petitioner filed two appendices to the petition for a writ of certiorari. The first contains the court of appeals' opinion and designates that opinion as Appendix A. The second contains an order denying a petition for rehearing, which this brief refers to as Appendix B.

## STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 188 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A8.

1. In 2017, a Louisiana probation officer conducted a residence check at petitioner's home. Presentence Investigation Report (PSR) ¶ 6. Petitioner's mother directed the officer to petitioner's bedroom, where he was sleeping. Ibid. After noticing a loaded nine-millimeter pistol in plain view on top of a dresser, the officer told petitioner that he was in violation of his probation and to put his hands behind his back. Ibid. When the officer tried to restrain petitioner, he resisted and fled toward the front door. Ibid. After the officer ordered him to stop and displayed a Taser, petitioner complied and was arrested. Ibid. A federal grand jury indicted petitioner on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1. He pleaded guilty to the charge. Pet. App. A2.

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)(1), specifies a statutory sentencing range of 15 years to life imprisonment, ibid. 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, listing three prior felony convictions for Louisiana armed robbery. PSR ¶¶ 18, 21; see Pet. App. A2-A3. Petitioner objected, contending that Louisiana armed robbery does not qualify as a violent felony. Sent. Tr. 2-3. The district court overruled the objection and sentenced him to 188 months of imprisonment, to be followed by five years of supervised release. Id. at 4-5.

2. The court of appeals affirmed. Pet. App. A1-A8. The court observed that in United States v. Brown, 437 F.3d 450 (5th Cir.), cert. denied, 547 U.S. 1157 (2006), it had determined that

Louisiana simple robbery qualifies as a violent felony under the ACCA's elements clause. Pet. App. A3. And the court explained that because Louisiana armed robbery is simple robbery "'while armed with a dangerous weapon,'" petitioner's objection concerning his armed-robbery convictions was foreclosed "by that precedent." Id. at A3-A5 (quoting La. Rev. Stat. Ann. § 14:64(A) (2007)).

The court of appeals rejected petitioner's contention that Brown conflicted with subsequent decisions of this Court, observing that later "precedent buttresses rather than overrules Brown." Pet. App. A7; see id. at A4-A7. Noting that Brown had "discussed only" the ACCA's elements clause, the court disagreed with petitioner's assertion that Brown had relied on the ACCA's residual clause, which this Court held to be unconstitutionally vague in Johnson v. United States, 576 U.S. 591 (2015). Pet. App. A5. Turning to the elements clause, the court of appeals observed that this Court had held that a robbery offense qualifies as a violent felony when it requires "force sufficient to 'overcome a victim's resistance,'" id. at A6 (quoting Stokeling v. United States, 139 S. Ct. 544, 555 (2019)), and that "'use of force' in overcoming the will or resistance of the victim is necessary" to commit Louisiana simple robbery, ibid. (quoting State v. Leblanc, 506 So. 2d 1197, 1200 (La. 1987)) (emphasis omitted).

## ARGUMENT

Petitioner contends (Pet. 9-18) that Louisiana armed robbery does not qualify as a violent felony under the ACCA's elements clause. The court of appeals correctly rejected that contention, determining that Louisiana armed robbery "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); see Pet. App. A3-A7. That determination is based on an interpretation of state law 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 convictions for armed robbery, in violation of La. Rev. Stat. Ann. § 14:64(A) (2007), were convictions for "violent felon[ies]" under the ACCA's elements clause.

a. Under Louisiana law, "[a]rmed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon." La. Rev. Stat. Ann. § 14:64(A) (2007). Louisiana simple robbery consists of the same elements as Louisiana armed robbery, except that for simple robbery, the defendant is "not armed with a dangerous weapon." Id. § 14:65(A). Louisiana classifies both simple robbery and armed robbery as "crimes of violence," which state law defines as crimes that have, "as an element, the use, attempted use, or threatened



use of physical force against the person or property of another.” Id. § 14:2(B)(21) and (23).

In Stokeling v. United States, 139 S. Ct. 544 (2019), this Court explained that “the term ‘physical force’ in ACCA encompasses the degree of force necessary to commit common-law robbery” -- namely, “force necessary to overcome a victim’s resistance.” Id. at 555. The degree of force that must be used or threatened under Louisiana’s armed-robbery statute satisfies that standard. Louisiana simple robbery both “contemplates that some energy or physical effort will be exerted in the ‘taking’ element of the crime” and requires “some additional ‘use of force’ in overcoming the will or resistance of the victim.” State v. Leblanc, 506 So. 2d 1197, 1200 (La. 1987). Louisiana armed robbery therefore “has as an element the use, attempted use, or threatened use of physical force against the person of another,” and the court of appeals correctly determined that petitioner’s prior convictions for that offense qualify as “violent felon[ies]” under the ACCA’s elements clause. 18 U.S.C. 924(e)(2)(B)(i).

b. Petitioner’s state-law-based objections to that determination lack merit. Petitioner contends that a defendant can commit Louisiana armed robbery by impersonating a police officer and thereby exerting only “intellectual or emotional force.” Pet. 11; see Pet. 11-12. The two Louisiana cases he

cites, both of which addressed a simple robbery involving the actual use of physical force, do not support that contention.

In State v. Russell, 607 So. 2d 689 (La. Ct. App. 1992), the defendants approached two victims sitting in a parked car, identified themselves as police officers, and "pulled" the victims "out of the car." Id. at 690. One of the defendants "proceeded to walk" the male victim "away from the car toward the opposite end of the parking lot," while the other "frisked" the female victim, "sat her down," and "took off" her "watch and bracelet" after questioning her about stolen property. Ibid. The Louisiana intermediate appellate court determined that the jury had reasonably found that the defendants had committed simple robbery, observing that they had not only "misrepresented themselves as police officers," but had also "forcibly removed the victims from their vehicle" and had taken the female victim's jewelry. Id. at 692.

Similarly, in State v. Thomas, 447 So. 2d 1053 (La. 1984), the defendant pulled over two victims, showed them a badge, "told the couple they would be in serious trouble if they had any drugs in the truck," rummaged through the truck's cab and the female victim's purse, and instructed them "to drive away without looking back." Id. at 1054. After reviewing the evidence, the Louisiana Supreme Court determined that the jury had reasonably found that the defendant, who had taken money from the truck and the purse,

had committed simple robbery. Id. at 1055. Noting that a defendant's "violence or intimidation" must be sufficient to stop a victim from "prevent[ing] the taking," the court observed that the victims were generally "intimidated" by the defendant's "badge," "threat of trouble," and "general demeanor," and that he had specifically "'grabbed'" the female victim's arm, who "was scared." Ibid. (citation omitted). The court also found that the "face-to-face confrontation involved the increased risk of bodily harm which distinguishes robbery from theft," ibid., thereby indicating that the circumstances supported a reasonable person's perception of a threat of violence if the victims did not comply with the defendant's commands. Accordingly, neither Russell nor Thomas involved convictions for robbery "accomplished without the offender using or threatening violent force." Pet. 11.

c. Petitioner further contends that Louisiana armed robbery does not qualify as a violent felony under the ACCA's elements clause on the theory that the offense can be committed "based solely on a victim's subjective, nonspecific feeling of 'being intimidated' without any actual threat by the offender." Pet. 13; see Pet. 13-15. That characterization of Louisiana law is at odds with the Louisiana Supreme Court's decision in State v. Smith, 23 So. 3d 291 (2009) (per curiam), which explained that a defendant commits armed robbery when his conduct is "sufficiently

intimidating” that “an ordinary person” in the victim’s position “reasonably could have inferred a threat of bodily harm” from the defendant “if she resisted.” Id. at 299.

Petitioner identifies no decision from the Louisiana Supreme Court that supports his contrary understanding of Louisiana law. Instead, he relies on (Pet. 13-15) two decisions from a Louisiana intermediate appellate court upholding convictions for simple robbery based on evidence that the defendant snatched money from the victim’s hand and caused the victim to feel intimidated. See State v. Johnson, 60 So. 3d 43, 43-46 (La. Ct. App. 2011); State v. Robinson, 713 So. 2d 828, 829-831 (La. Ct. App. 1998). In each case, the court determined that the defendant committed the robbery by use of intimidation, but did not specifically discuss whether “an ordinary person” in the victim’s position “reasonably could have inferred a threat of bodily harm” from the defendant “if she resisted.” Smith, 23 So. 3d at 299.

A different Louisiana intermediate appellate court, however, determined that a defendant had not committed Louisiana simple robbery by causing the victim to feel “scared” before grabbing money from his hand. State v. Florant, 602 So. 2d 338, 339 (La. Ct. App. 1992). The court explained that the defendant had not “used any force to overcome the will or resistance of the victim” and dismissed the fact that the victim “felt \* \* \* ‘intimidated’” as “insufficient.” Id. at 341. Thus, like Smith, supra, that

decision indicates that the prosecution cannot establish Louisiana armed robbery "based solely on a victim's subjective, nonspecific feeling of 'being intimidated,'" Pet. 13, without evidence of the actual or threatened use of physical force. To the extent that any tension exists between Florant and Smith on the one hand and Robinson and Johnson on the other, the Louisiana Supreme Court's decision in Smith controls. And in any event, any division of authority between Louisiana intermediate appellate courts on a question of state law would not warrant this Court's review.

2. Although petitioner contends (Pet. 15-18) that the decision below conflicts with the decisions of other courts of appeals, he identifies no court that has determined that Louisiana armed robbery is not a violent felony under the ACCA's elements clause. Indeed, both the Seventh and Ninth Circuits have determined that the offense categorically meets the definition of a "crime of violence" under the Sentencing Guidelines -- which contains an elements clause similar to the ACCA's -- because it requires the use or threatened use of physical force. See Sentencing Guidelines § 4B1.2(a)(1); United States v. Knight, 710 Fed. Appx. 733, 735 (9th Cir. 2017); United States v. Leslie, 983 F.2d 1073, 1993 WL 5867 at \*2 (7th Cir. 1993) (Tbl.).

Petitioner's alleged circuit conflict is instead premised on his state-law argument that Louisiana armed robbery does "not require an actual threat or use of violent physical force." Pet.

16; see Pet. 15-17. But the decision below did not adopt that expansive characterization of Louisiana armed robbery. To the contrary, it recognized that the ACCA's elements clause requires the use, attempted use, or threatened use of "force sufficient to 'overcome a victim's resistance,'" Pet. App. A6 (quoting Stokeling, 139 S. Ct. at 555), and determined that Louisiana armed robbery requires that level of force, see id. at A6-A7. That determination does not conflict with any of the court of appeals decisions petitioner identifies, which concern whether other state crimes, as defined by other States, are violent felonies under the ACCA's elements clause.

Because petitioner's disagreement with the court of appeals is thus limited solely to its construction of state law, it does not provide a sound basis for certiorari. 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 to depart from that settled policy in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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