No. 17-5965

IN THE SUPREME COURT OF THE UNITED STATES

RASHEEN WESTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's prior convictions for strong-arm robbery and armed robbery under South Carolina law were convictions for "violent felon[ies]" under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

2. Whether the court of appeals correctly rejected petitioner's claim that his conviction for strong-arm robbery was obtained in violation of his Sixth Amendment right to counsel, when the record of that conviction is silent on the issue and petitioner offered no additional evidence to support his claim.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is reprinted at 681 Fed. Appx. 235.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2017. A petition for rehearing was denied on June 20, 2017 (Pet. App. 38a). The petition for a writ of certiorari was filed on September 12, 2017. 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 South Carolina, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), 924(a)(2) and (e). Pet. App. 2a. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Ibid.; Judgment 1-3. The court of appeals affirmed. Pet. App. 1a-6a.

1. In September 2013, acting on tip from a confidential informant, an officer with the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives arranged for a confidential informant to purchase a semi-automatic firearm from petitioner, who had previously been convicted of several felonies. Presentence Investigation Report (PSR) ¶¶ 8-9. Petitioner sold the confidential informant a loaded, semi-automatic pistol for $200. PSR ¶¶ 8, 11. Three months later, officers again observed petitioner in possession of a loaded semi-automatic handgun, this time while fleeing from a known narcotics house. PSR ¶ 13. Officers arrested petitioner on the scene. Ibid.

A grand jury in the District of South Carolina returned an indictment charging petitioner with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), 924(a)(2) and (e). Indictment 1. Petitioner pleaded guilty pursuant to a plea agreement. Pet. App. 2a.

2. A conviction for violating Section 922(g)(1) typically exposes the offender to a statutory sentencing range of zero to ten years of imprisonment. See 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), requires a mandatory-minimum sentence of 15 years of imprisonment and authorizes a maximum sentence of life. See 18 U.S.C. 924(e)(1); Custis v. United States, 511 U.S. 485, 487 (1994). The ACCA defines a "violent felony" to include any offense that is punishable by a term of imprisonment exceeding one year that (1) "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)(1)(B)(i); (2) "is burglary, arson, or extortion, [or] involves use of explosives," 18 U.S.C. 924(e)(1)(B)(ii); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another," ibid. The first clause of that definition is commonly known as the "elements clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016). In Curtis Johnson v. United States, 559 U.S. 133 (2010), this Court defined "physical force" under the ACCA's elements clause to "mean[] violent force -- that is, force capable of causing physical pain or injury to another person." Id. at 140.

The Probation Office classified petitioner as an armed career criminal under the ACCA based on four prior South Carolina convictions: one for strong-arm robbery, two for armed robbery, and one for pointing and presenting a firearm at a person. PSR ¶¶ 22, 26, 30. Petitioner objected to his classification as an armed career criminal and argued that none of his convictions was for a "violent felony," citing this Court's decision in Samuel Johnson v. United States, 135 S. Ct. 2551 (2015), which held the ACCA's residual clause to be unconstitutionally vague. Pet. App. 2a. Petitioner also argued that his prior convictions for strong-arm robbery and for pointing and presenting a firearm could not serve as ACCA predicates because there was no record that, at the time of those convictions, he was afforded his Sixth Amendment right to counsel. Id. at 4a. The district court overruled petitioner's objections and sentenced him to 180 months of imprisonment. Id. at 2a.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-7a.

The court of appeals first observed that its recent decision in United States v. Doctor, 842 F.3d 306 (4th Cir. 2016), cert. denied, 137 S. Ct. 1831 (2017), foreclosed petitioner's arguments that South Carolina strong-arm robbery and armed robbery are not violent felonies. Pet. App. 2a-4a. The court explained that, in Doctor, it had held that South Carolina strong-arm robbery is a violent felony under the elements clause of the ACCA because it

categorically requires "the use, attempted use, or threatened use of physical force against the person of another." Id. at 3a (quoting Doctor, 842 F.3d at 312). And the court noted that the parties here "d[id] not dispute that if the lesser offense of strong arm robbery is a proper ACCA predicate, then armed robbery likewise qualifies." Id. at 4a n.1. In light of its determination that petitioner's prior robbery convictions were violent felonies, the court did not address whether petitioner's conviction for pointing and presenting a firearm would also qualify as a violent felony. Id. at 4a.

The court of appeals also rejected petitioner's argument that his strong-arm robbery conviction could not serve as an ACCA predicate because he had been denied his Sixth Amendment right to counsel at the time of that conviction. Pet. App. 4a-6a. The court explained that, in light of the presumption of regularity attached to final convictions in this Court's decision in Parke v. Raley, 506 U.S. 20 (1992), "[petitioner] had to overcome the presumption that the state court informed him of his right to counsel * * * and that, if he was not represented, it was because he had waived his right to counsel." Pet. App. 5a. The court held that petitioner had failed to meet that "heavy burden" because "he submitted neither documentary evidence nor testimony at the sentencing hearing to establish that he pled guilty in the absence of counsel." Ibid. The court declined to address whether petitioner had separately met that burden with respect to his prior

conviction for pointing and presenting a firearm, because that conviction was not necessary to establish his eligibility for a sentence under the ACCA. Id. at 4a.

ARGUMENT

Petitioner contends (Pet. 9-27) that his prior convictions for South Carolina strong-arm robbery and armed robbery do not qualify as violent felonies under the ACCA's elements clause because they do not include as an element the use, attempted use, or threatened use of "physical force" as the Court defined that term in Curtis Johnson v. United States, 559 U.S. 133 (2010). Petitioner also contends (Pet. 27-34) that his strong-arm robbery conviction was obtained in violation of his Sixth Amendment right to counsel and, therefore, should not have been considered as a predicate offense under the ACCA. The court of appeals correctly rejected those contentions. Its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. The court of appeals correctly held that petitioner's prior convictions for strong-arm robbery and armed robbery under South Carolina law categorically qualify as "violent felon[ies]" under the ACCA's elements clause, which encompasses "any crime punishable by imprisonment for a term exceeding one year" that "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). The South Carolina Supreme Court has defined

strong-arm robbery as the "felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." State v. Rosemond, 589 S.E.2d 757, 758-759 (S.C. 2003); see State v. Mitchell, 675 S.E.2d 435, 437 (S.C. 2009) (same); State v. Keith, 325 S.E.2d 325, 325-326 (S.C. 1985) ("Robbery is the crime of larceny accomplished with force."). The "gravamen" of the offense is a "taking from the person or immediate presence of another by violence or intimidation." Rosemond, 589 S.E.2d at 758. Where the taking is accomplished through intimidation, South Carolina law requires that "an ordinary, reasonable person in the victim's position would feel a threat of bodily harm from the perpetrator's acts." Ibid. (citing United States v. Wagstaff, 865 F.2d 626 (4th Cir.), cert. denied, 491 U.S. 907 (1989)). In either form, strong-arm robbery is punishable by up to 15 years of imprisonment. S.C. Code Ann. § 16-11-325 (2015). Armed robbery under South Carolina law is robbery while armed with a deadly weapon or while alleging to be so armed. Id. § 16-11-330(a). It is punishable by up to 30 years' imprisonment. Ibid.

Under Curtis Johnson, supra, "physical force" for purposes of the ACCA's elements clause requires "violent force -- that is, force capable of causing physical pain or injury to another person." Id. at 140. The court of appeals correctly found "no indication that South Carolina robbery by violence" can be committed without violent force. United States v. Doctor, 842

F.3d 306, 312 (4th Cir. 2016), cert. denied, 137 S. Ct. 1831 (2017). It likewise correctly found no "meaningful difference between a victim feeling a threat of bodily harm," as required by South Carolina robbery by intimidation, and "feeling a threat of physical pain or injury," as required by Curtis Johnson. Id. at 309. Indeed, the South Carolina Supreme Court has expressly equated the intimidation required under South Carolina law to that required for federal armed bank robbery, in violation of 18 U.S.C. 2113(a), see Rosemond, 589 S.E.2d at 759 (citing Wagstaff, 865 F.2d 626), which the courts of appeals uniformly have held requires the threatened use of "physical force," as that term is defined in Curtis Johnson.[1]

b. Petitioner nevertheless argues (Pet. 10-14) that South Carolina robbery is not a violent felony because common-law robbery has "historically" required no more than de minimis force, rather than the "violent" force described in Curtis Johnson. But South Carolina is under no obligation to adopt the "historical" definition of robbery. And the South Carolina Supreme Court has defined robbery under the particular common law of that State to require "violence" or conduct that would make a reasonable person "feel a threat of bodily harm," not de minimis force. Rosemond,

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[1] See, e.g., United States v. Armour, 840 F.3d 904, 909 (7th Cir. 2017); United States v. McBride, 826 F.3d 293, 296 (6th Cir. 2016), cert. denied, 137 S. Ct. 830 (2017); United States v. McNeal, 818 F.3d 141, 154 (4th Cir.), cert. denied, 137 S. Ct. 164 (2016).

589 S.E.2d at 759.[2] This Court is "bound by the [South Carolina] Supreme Court's interpretation of state law, including its determination of the elements of" South Carolina robbery, not petitioner's contentions regarding the historical common law. Curtis Johnson, 559 U.S. at 138.

Petitioner errs in contending (Pet. 15-16) that citations to North Carolina and Virginia robbery precedents in two South Carolina cases prove that South Carolina robbery follows those States' definitions of robbery, which the Fourth Circuit has held can involve only de minimis force. The South Carolina Supreme Court cited Sullivan v. Commonwealth, 433 S.E.2d 508 (Va. Ct. App. 1993), not for the amount of force required for robbery, but for the unrelated proposition that the "unit of prosecution" for robbery is based on the number of victims, not the overall scheme. State v. Jones, 543 S.E.2d 541, 544 (S.C. 2001). And the South Carolina Court of Appeals' decision in Rosemond, which cited North Carolina precedent, was superseded by the South Carolina Supreme Court's subsequent decision in the same case, which makes clear that "violence" or fear of "bodily harm" is required. State v.

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[2] Petitioner asserts (Pet. 14) that the South Carolina Court of Appeals adopted the historical common-law definition of robbery in 1851. See State v. Nathan, 5 Rich. 219, 230 (S.C. Ct. App. 1851). Even if that were so, the South Carolina Supreme Court's subsequent decision in Rosemond would control. But, in any event, the cited passage in Nathan is from the argument of counsel, not the opinion of the court. Compare Pet. 14 (citing Nathan, 5 Rich. At 230), with Nathan, 5 Rich. at 231 ("The opinion of a majority of the Court was given as follows:").

Rosemond, 560 S.E.2d 636 (S.C. Ct. App. 2002), aff'd as modified by, 589 S.E.2d 757 (S.C. 2003).

Finally, as the Fourth Circuit has observed, petitioner's examples of South Carolina robbery convictions allegedly based on de minimis force fail to show that South Carolina robbery is not a violent felony. See Doctor, 842 F.3d at 312 n.6. Contrary to petitioner's assertion (Pet. 16), it is not at all clear from the brief descriptions of the facts in State v. Gagum, 492 S.E.2d 822 (S.C. Ct. App. 1997), or Humbert v. State, 548 S.E.2d 862 (S.C. 2001), that the robberies in those cases did not include, at a minimum, a threat of violent force. See Gagum, 492 S.E.2d at 823 (explaining that, after chasing the victim down the sidewalk at 9 p.m., the defendant pulled on her arm repeatedly and glared at her in a manner indicating "he had intent of doing [her] harm"); Humbert, 548 S.E.2d at 863 (stating that the perpetrator "grabbed [the victim's] arm" and "she felt something in her back"). In any event, neither decision even addresses the definition of robbery, much less the level of force required. See Gagum, 492 S.E.2d at 823-825 (considering the admissibility of evidence of "prior bad acts"); Humbert, 548 S.E.2d at 865 (addressing whether the defendant was prejudiced by his counsel's failure to object to his wearing of shackles during trial).

c. Petitioner contends (Pet. 21-27) that the lower courts are divided about the degree of force required under a state robbery statute for such a statute to satisfy the elements clause.

The cases petitioner cites, however, do not reflect disagreement about the meaning or application of Curtis Johnson's definition of "physical force," but instead the interpretation of different States' robbery statutes. Some courts of appeals have interpreted particular States' laws to follow the minority rule, under which a robbery conviction can be sustained even when the defendant uses only slight force, or a threat of force no greater than the minimal level needed to deprive the person of property. See, e.g., United States v. Winston, 850 F.3d 677, 684-685 (4th Cir. 2017) (Virginia robbery); United States v. Bell, 840 F.3d 963, 964-967 (8th Cir. 2016) (Missouri robbery); United States v. Gardner, 823 F.3d 793, 803 (4th Cir. 2016) (North Carolina robbery); United States v. Parnell, 818 F.3d 974, 979-980 (9th Cir. 2016) (Massachusetts robbery). In other cases -- including here -- the court of appeals has determined that the relevant state court has construed its common law to follow the majority view, in which robbery requires more than the minimal amount of force needed to deprive the person of property. See, e.g., United States v. Patterson, 853 F.3d 298, 303-305 (6th Cir.) (Ohio armed robbery), cert. denied, 138 S. Ct. 273 (2017); United States v. Harris, 844 F.3d 1260, 1267-1268 (10th Cir.) (Colorado robbery), petition for cert. pending, No. 16-8616 (filed Apr. 4, 2017); Doctor, 842 F.3d at 311-312 (South Carolina robbery); United States v. Fritts, 841 F.3d 937, 942-944 (11th Cir. 2016) (Florida robbery), cert. denied, 137 S. Ct. 2264 (2017).

Decisions from the courts of appeals about the ACCA elements clause track that division: courts have held that state robbery statutes following the minority rule do not satisfy the ACCA's elements clause because they do not involve the requisite use of "violent force" under Curtis Johnson, see, e.g., United States v. Mulkern, 854 F.3d 87, 93-94 (1st Cir. 2017) (Maine robbery); United States v. Eason, 829 F.3d 633, 640-641 (8th Cir. 2016) (Arkansas robbery); Gardner, 823 F.3d at 804 (North Carolina robbery); Parnell, 818 F.3d at 978-979 (Massachusetts robbery), while state robbery laws that follow the majority rule do satisfy that standard and thus qualify as violent felonies, see, e.g., Harris, 844 F.3d at 1268 (Colorado robbery); Doctor, 842 F.3d at 311-312 (South Carolina robbery); United States v. Seabrooks, 839 F.3d 1326, 1343-1344 (11th Cir 2016) (Florida robbery), cert. denied, 137 S. Ct. 2265 (2017)[3]; United States v. Duncan, 833 F.3d 751, 755 (7th Cir. 2016) (Indiana robbery); United States v. Priddy, 808 F.3d 676, 686 (6th Cir. 2015) (Tennessee robbery).

The fact that, as petitioner highlights (Pet. 19-21), the Fourth Circuit itself has categorized robbery convictions differently depending on the State of conviction only confirms that the different outcomes reflect differences in the interpretation of state law, rather than differences in the

[3] As petitioner notes (Pet. 22), a shallow conflict exists between the Ninth and Eleventh Circuits on whether Florida robbery qualifies as a "violent felony" under the ACCA's elements clause. But that conflict is not presented by this case.

interpretation of the ACCA. At bottom, therefore, petitioner's argument in this case is based on a disagreement with the Fourth Circuit's interpretation of South Carolina law, not the ACCA. That disagreement about the contours of state law does not warrant this Court's review. See, e.g., Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1149-1150 (2017) ("We generally accord great deference to the interpretation and application of state law by the courts of appeals." (citation omitted)).

2. a. The court of appeals also correctly rejected petitioner's claim that prior strong-arm robbery conviction could be used as an ACCA predicate on the theory that it was obtained in violation of his right to counsel. A defendant generally may not attack the validity of a prior conviction supporting a sentencing enhancement under the ACCA. Custis v. United States, 511 U.S. 485, 493-494 (1994). The single exception is for prior convictions secured in violation of the right to counsel recognized in Gideon v. Wainwright, 372 U.S. 335 (1963). Custis, 511 U.S. at 493-494.

When a prior conviction is collaterally challenged in that manner, it is presumed constitutionally valid, even if the existing records of the prior conviction are silent on whether the defendant was represented by counsel. In Parke v. Raley, 506 U.S. 20 (1992), this Court recognized that a presumption of regularity supports imposing a burden of production on defendants who collaterally challenge the knowing and voluntary nature of a prior guilty plea under a state sentencing enhancement. See id. at 30-32.

Consistent with Parke, the courts of appeals have applied a burden-shifting framework for federal sentencing enhancements in which the government bears the initial burden of establishing the existence of a prior conviction and then the burden of proof shifts to the defendant who claims its invalidity.[4]

The court of appeals correctly applied that framework and the presumption of regularity in this case. Pet. App. 4a-5a. Indeed, the presumption is particularly appropriate here in light of a South Carolina statute, in force at the time of petitioner's prior conviction, that expressly requires South Carolina courts to advise defendants of their constitutional right to counsel and to provide counsel to defendants who are unable to retain their own. See S.C. Code Ann. § 17-3-10 (2015). The court of appeals also correctly determined that petitioner failed to meet his burden to overcome the presumption because "he submitted neither documentary evidence nor testimony at the sentencing hearing to establish that he pled guilty in the absence of counsel." Pet. App. 5a; see id. at 4a-6a. In fact, petitioner presented no evidence at all to

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[4] See, e.g., United States v. Charles, 389 F.3d 797, 799-800 (8th Cir. 2004); United States v. Hondo, 366 F.3d 363, 365 (4th Cir. 2004); United States v. Cruz-Alcala, 338 F.3d 1194, 1197 (10th Cir.), cert. denied, 540 U.S. 1094 (2003); United States v. Jones, 332 F.3d 688, 697-698 (3d Cir. 2003), cert. denied, 540 U.S. 1150 (2004); United States v. Gray, 177 F.3d 86, 89 (1st Cir. 1999); United States v. Warwick, 149 Fed. Appx. 464, 469 (6th Cir. 2005); see also United States v. Guerrero-Robledo, 565 F.3d 940, 944 (5th Cir.) (consulting state law for the burden of proof on a collateral attack of a state sentence and holding that South Carolina law imposes the burden on the defendant), cert. denied, 558 U.S. 892 (2009).

support his claim, arguing only that "no record of counsel" is apparent in the available documents concerning petitioner's prior conviction. C.A. App. 282.

b. Petitioner does not challenge the burden-shifting framework,[5] but he contends (Pet. 27-34) that the "presumption of regularity should [not] apply when records exist related to the prior state conviction which should, but do not, reflect anything about counsel." That argument proceeds from a mistaken premise. As petitioner himself noted before the district court, "there's no line for defense counsel" on the available records for petitioner's strong-arm robbery conviction. C.A. App. 282; see id. at 177-181. Petitioner is therefore incorrect to claim (Pet. 27) that the records available here "should, but do not, reflect anything about counsel." Rather, they do not indicate one way or the other whether petitioner was represented by counsel, which renders the presumption of regularity appropriate.

For similar reasons, this is not a case in which the extant records are "suspiciously silent" about whether petitioner was represented by counsel. Pet. 32 (quoting Parke, 506 U.S. at 30). Petitioner points to the sentence sheets from a series of 1995

[5] Petitioner mentions (Pet. 32) in passing the D.C. Circuit's holding in United States v. Martinez-Cruz, 736 F.3d 999, 1004 (2013), that, where a defendant is able to produce "objective evidence" that "seriously undermine[s] the presumption of regularity," the government bears the ultimate burden of persuasion as to a prior conviction's validity. Petitioner does not, however, advocate for that approach, which in any event would not aid him, since he produced no evidence, objective or otherwise, to undermine the presumption.

convictions to show that, "by the 1990s, counsel was generally identified somewhere in state court documents." Id. at 31; see id. at 31-32. Unlike the sentence sheet for petitioner's 1992 strong-arm robbery conviction, however, the 1995 records do include a line for indicating who served as defense counsel ("Def. Atty ___"). Compare C.A. App. 188, 192, 196, 200 with id. at 180. And petitioner's representation in connection with each of those 1995 convictions supports, rather than undermines, an inference that he was represented in connection with his 1992 strong-arm robbery conviction as well. Petitioner also cites (Pet. 31) a 1990 indictment for South Carolina burglary in the record of a different case to support his claim. But petitioner did not produce that indictment in this case, or even cite it before his petition for a writ of certiorari. In any event, the inclusion of a handwritten notation of defense counsel in the indictment in one other case from the same decade is not sufficient to overcome the presumption of regularity.

Nor is it enough for petitioner to identify (Pet. 28-29) -- also for the first time in this Court -- a small number of South Carolina decisions finding that defendants were insufficiently advised of the dangers of pro se representation or a 2017 study of South Carolina summary courts (which do not have jurisdiction over robbery charges like petitioner's[6]). Neither suggests a likelihood

[6] See S.C. Code Ann. § 14-25-45 (2015); id. § 22-3-550(A) (granting South Carolina summary courts jurisdiction over "offenses which may be subject to the penalties of a fine or

that petitioner was denied the right to counsel here. Moreover, "[o]ur system affords a defendant convicted in state court numerous opportunities" to correct any errors that might have occurred or challenge the "constitutionality of his conviction," but those opportunities "are not available indefinitely and without limitation." Daniels v. United States, 532 U.S. 374, 381 (2001). The presumption of regularity that attaches to final convictions is "deeply rooted in [this Court's] jurisprudence," Parke, 506 U.S. at 29, and protects the "principle of finality which is essential to the operation of our criminal justice system," Teague v. Lane, 489 U.S. 288, 309 (1989). Petitioner's factbound challenge to the reliance on his strong-arm robbery conviction here does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2018

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forfeiture not exceeding five hundred dollars, or imprisonment not exceeding thirty days, or both").