No. 17-5965

IN THE
SUPREME COURT OF THE UNITED STATES

RASHEEN WESTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The lower courts disagree over a critically important question of federal law: whether laws of states, which follow the traditional definition of common law robbery, require violent physical force as required to qualify as sentencing enhancement predicates under federal law. The government's position is that the Fourth Circuit properly determined that South Carolina defines robbery in a way that requires violence and that the Fourth Circuit's decision in no way conflicts with decisions by other circuits, who have determined common law robbery is not violent. The government's position is incorrect.

This Court should also decide whether a collateral challenge to a conviction where the record fails to reflect whether counsel was present or whether the right to counsel was validly waived has been foreclosed by *Parke v. Raley*, 506 U.S. 20 (1992).

I. THE CIRCUITS HAVE INCONSISTENTLY RULED THAT COMMON LAW ROBBERY IS BOTH VIOLENT AND NONVIOLENT, AND THE DISTINCTION IS NOT GROUNDED IN DIFFERENCES BETWEEN THE MAJORITY AND MINORITY RULES

Whether a prior robbery offense qualifies as a violent felony so as to trigger an increased sentence under the Armed Career Criminal Act (ACCA) is among the most frequently litigated questions arising under that statute. The government's Brief in Opposition (BIO) collects at least a dozen published opinions addressing that question, all issued by Courts of Appeals within the past two years alone. BIO at pp. 11-12. Some circuits have held that robbery qualifies as a violent felony, and other

circuits have held that certain robbery offenses do not. *Id.* The government argues that the lower courts were correct to hold that robbery in Virginia, North Carolina, Missouri, Maine, Arkansas and Massachusetts do not qualify as violent felonies because those states follow the minority rule on robbery. BIO at pp. 11-12. The government also claims the lower courts were correct to hold that robbery in South Carolina, Colorado, Ohio, Indiana, Tennessee and Florida do qualify as violent felonies because the majority rule is followed. *See* BIO at pp. 11-12.

It appears that the distinction identified by appellate courts between the majority and minority views on robbery is that the majority defines robbery as property being taken from a person or his presence by force or putting in fear.[1] *United States v. Lockley*, 632 F.3d 1238, 1243 (11th Cir. 2011) and *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380 (5th Cir. 2006) (overruled on other grounds unrelated to its collection of cases on the minority and majority laws on robbery); *see also United States v. Yates*, 866 F.3d 723, 733 (6th Cir. 2017) (agreeing with the Fifth and Eleventh Circuits on the definitions of majority and minority robbery). The Fifth Circuit identified 38 states that follow the majority rule, which includes North Carolina, Massachusetts, and Arkansas (all of which the government

[1] These cases address the generic robbery for purposes of the sentencing guidelines, but nonetheless identify the definition of robbery followed by the majority and minority of jurisdictions.

claims follow the minority definition of robbery*). Santiesteban-Hernandez*, 469 F.3d at 380 and 380, n.5 and BIO at pp. 11-12.

The minority view of robbery "define[s] the immediate danger in terms of bodily injury". *Santiesteban-Hernandez*, 469 F.3d at 380. The minority view also references "committing violence" or "physical harm". *Lockley*, 632 F.3d at 1243. The minority jurisdictions require something more than intimidation or fear. *Id.* "[T]he defendant must directly threaten the victim's bodily integrity" under the minority view. *Id.* (citing Model Penal Code §222.1(1)). Ohio robbery is identified as following the minority view, although the government identifies it as one of the states following the majority view of robbery, which, the government contends, is correctly held to be violent. *Santiesteban-Hernandez*, 469 F.3d at 380, n.6 and BIO at p. 11.

South Carolina is identified as a state that follows the majority definition of robbery. *Santiesteban-Hernandez*, 469 F.3d at 380 and 380, n.5. The Fourth Circuit found that South Carolina robbery requires the victim to feel the threat of bodily harm. *United States v. Doctor*, 842 F.3d 306, 309 (4th Cir. 2016), cert. denied, 137 S. Ct. 1831, 197 L. Ed. 2d 773 (2017). The minority view on robbery requires a threat of bodily harm. *Santiesteban-Hernandez*, 469 F.3d at 380. One of the key findings by the Fourth Circuit, and cited by the government to argue that South Carolina robbery requires violent, physical force, is that "[t]here is no meaningful difference between a victim feeling a threat of bodily harm and feeling a threat of physical pain

or injury." *Doctor*, 842 F.3d at 309 (citing *United States v. McNeal*, 818 F.3d 141, 154 (4th Cir. 2016)).

Contradictorily, the Fourth Circuit held that North Carolina robbery, which also appears to be a majority view jurisdiction, is not violent for purposes of the ACCA. *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016). Yet, North Carolina courts indicate its robbery includes an assault on the person, which encompasses an "offer or attempt by force or violence to do injury to the person of another a reasonable apprehension of immediate bodily harm." *State v. White*, 542 S.E.2d 265, 268 (N.C. Ct. App. 2001) (citing *State v. Thompson*, 219 S.E.2d 566, 567-68 (N.C. Ct. App. 1975)).

Furthermore, the government's claim that the conflicting decisions are easily dismissed because of the division between the majority and minority views of on robbery does not explain how two different circuits reached completely different outcomes on the identical Florida robbery statute. *Compare United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017) to *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016). Although raised in Weston's petition, the government did not address this conflict, which demonstrates the circuit split on robbery is more than simply variances in state law. *See* Weston's Petition at pp. 24-25.

Therefore, the government's position that the numerous conflicting outcomes in the circuit courts about whether robbery is or is not violent is not clearly delineated

between whether the state follows the minority or majority view. These conflicting outcomes and definitions show that the conflict within the circuits rests of the interpretation of the ACCA, not merely each state's definition of robbery as argued by the government. Review by this Court is warranted to settle this repetitive issue.

II. THE GOVERNMENT'S ATTEMPT TO DISTINGUISH SOUTH CAROLINA ROBBERY FROM OTHER ROBBERY OFFENSES, WHICH HAVE BEEN DEEMED NONVIOLENT, IS FLAWED

The government also claims that no review is needed because Weston's argument is a disagreement with the Fourth Circuit's interpretation of South Carolina law, rather than how the Fourth Circuit applied the ACCA. BIO at p. 13. The government asserts that "South Carolina is under no obligation to adopt the 'historical' definition of robbery" (BIO at p. 8), while ignoring that South Carolina has, if fact, consistently applied the common law meaning to its robbery offense. *See, e.g., State v. Sutcliffe*, 35 S.C.L. 372, 4 Strob. 372 (S.C. Ct. App. 1850) (citing 4th Hawkins, p. 254, B.2 c.33, sect. 20 & 23) and *State v. Rosemond*, 560 S.E.2d 636 (S.C. Ct. App. 2003) (relying on North Carolina's definition of robbery).

The government claims that Weston's reliance on *State v. Nathan*, 5 Rich. 219 (S.C. Ct. App. 1851) is misplaced because the portion cited is counsel's argument, not the court's opinion. However, counsel was reciting the common law of robbery, which is how South Carolina has historically, and currently, defines robbery. Furthermore,

the government has no rebuttal for *Sutcliffe*, 35 S.C.L. 372, 4 Strob. 372, which also relied on historical common law authorities to define robbery.

The government essentially argues, in the face of cases that support that South Carolina follows the historical definition of common law robbery, that *State v. Rosemond*, 589 S.E.2d 757 (S.C. 2003) superseded previous South Carolina cases on strong arm robbery. BIO at pp. 9 and 9, n.2. The government incorrectly asserts that *Rosemond*, 589 S.E.2d 757 "superseded" the prior Court of Appeals decision in *Rosemond* such that the Court of Appeals reliance on the North Carolina robbery definition is not applicable. BIO at p. 9.

The South Carolina Supreme Court addressed a very narrow issue about whether a directed verdict should have been granted and altered neither the facts of the offense as recited by the Court of Appeals nor the definition of strong arm robbery. *Rosemond*, 589 S.E.2d 757. The change adopted by the South Carolina Supreme court related only to the Court of Appeals relying on the defendant's post-offense behavior toward police to support the force or intimidation element required for a strong arm robbery conviction, which reliance the Supreme Court held was improper. *Id.* at 759. The Supreme Court was in agreement with the Court of Appeals definition of strong arm robbery, as at least one case was cited in both *Rosemond* decisions to define strong arm robbery and both courts recognized that the victim must be put in fear. *Id.* at 758-59 and *Rosemond*, 560 S.E.2d at 640-41.

Although it relied on South Carolina's citation to the 30 year old case of *United States v. Wagstaff*, 865 F.2d 626 (4th Cir. 1989) in a single South Carolina case to argue strong arm robbery is defined like federal bank robbery (BIO at pp. 8 and 8, n.1), the government had no explanation for why Virginia robbery, which has also been defined in a single case by reference to *Wagstaff*, was not also held to be a violent felony. Weston's Petition at pp. 20-21.

In sum, Weston's case was wrongly decided, which is shown by South Carolina's law on robbery.

III. THE NARROW ISSUE OF WHETHER THE PRESUMPTION OF REGULARITY APPLIES WHEN STATE COURT DOCUMENTS FAIL TO SHOW COUNSEL WAS OFFERED OR VALIDLY WAIVED SHOULD BE CONSIDERED BY THIS COURT

This Court has consistently declined to apply the principles of *Burgett v. Texas*, 389 U.S. 109, 114 (1967) outside the context of right to counsel. *See, e.g., Parke v. Raley*, 506 U.S. 20, 30 (1992) and *Custis v. United States*, 511 U.S. 485, 487 (1994). Post-*Parke*, several courts of appeal held, based on *Parke*, that silence in the record, even when challenging prior convictions based on right to counsel, is insufficient to shift the burden to the government to prove the validity of the conviction. Weston's Petition at p. 32.

Yet, even *Parke* itself recognized that there are circumstances which warrant suspension of the presumption of regularity, particularly when the record is

suspiciously silent, which is a standard taken directly from *Burgett*. *Parke*, 506 U.S. at 30 and *Burgett*, 389 U.S. at 114. *Custis*, which issued after *Parke*, also explicitly recognized that convictions obtained in violation of right to counsel were the sole exception to the prohibition on collateral challenges. *Custis*, 511 U.S. at 487.

The government summarily asserts that *Parke*, although related to the validity of a guilty plea, is the correct framework to apply to right to counsel cases. BIO at pp. 13-15. In doing so, the government relies, as did the district court and court of appeals, on S.C. Code §17-3-10, which provides that indigent defendants have the right to counsel. BIO at p. 14. In the same vein, the government argues that Weston's reference to state court documents from the early 1990s fail to show that the records of Weston's convictions are suspiciously silent with regard to counsel. BIO at pp. 15-17. The government likewise contends that reference to South Carolina cases and the National Association of Criminal Defense Lawyers ("NACDL") and the American Civil Liberties Union ("ACLU") study on the failure to provide counsel in South Carolina's summary courts is irrelevant, partly because summary courts do not have jurisdiction over robbery charges.[2] The government also wrongly asserts that Weston does not challenge the burden-shifting framework. BIO at p. 15 and Weston's Petition at p. 34.

[2] This same topic was outlined in a New York Times article, published shortly after Weston's Petition was filed. *See* https://www.nytimes.com/2017/10/12/us/south-carolina-jail-no-lawyer.html (last viewed on Feb. 23, 2018).

Neither the government, nor the courts who previously considered Weston's argument, ever provided any authority explaining how the existence of a statute is sufficient to form a presumption the statute was followed. The authorities cited by Weston were not for the purpose of claiming that a robbery charge could be prosecuted in summary court. The South Carolina cases and NACDL/ACLU article demonstrate why there should be no presumption of regularity about counsel being present or offered in proceeding resulting in criminal convictions in South Carolina.

S.C. Code §17-3-10 existed at least as far back as 1976. With so much importance placed on the existence of the statute, such that the government and courts believe its very existence warrants a presumption that the statute was followed, it is likewise logical that court records would reflect that the statute was indeed followed. In particular, Weston's convictions, which failed to show he had counsel, occurred in 1991 and 1992, over 15 years after enactment of S.C. Code §17-3-10. JA 318, ¶22 and JA 321, ¶26. This is certainly a case where the record is "suspiciously silent" warranting collateral challenge to the convictions. *Parke*, 506 U.S. at 30.

Furthermore, this is a matter of law that frequently arises in the context of sentencing criminal defendants. This case provides an ideal vehicle for deciding this issue, as it involves two convictions where the record is silent about counsel and

where the state has a statute addressing an indigent defendant's right to counsel. This Court should address whether *Parke* did, in fact, intend to close the door on all collateral challenges to convictions where the record is silent about whether the defendant had counsel post-*Gideon*.

CONCLUSION

For the foregoing reasons and those outlined in the petition, this Court should grant certiorari.

Respectfully submitted.

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