No. 17-6540

IN THE SUPREME COURT OF THE UNITED STATES

DESMOND SHOTWELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior convictions for armed robbery, in violation of Fla. Stat. § 812.13 (2002), 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)(B)(i).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is not published in the Federal Reporter but is available at 2017 WL 4022794.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2017. The petition for a writ of certiorari was filed on October 17, 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 Southern District of Florida, petitioner was convicted of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. C1. He was sentenced to 180 months of imprisonment, to be followed by two years of supervised release. Id. at C2-C3. The court of appeals affirmed. Id. at A1-A8.

1. On January 30, 2016, petitioner was a passenger in a vehicle that police officers stopped for traffic violations. D. Ct. Doc. 24, at 1 (May 27, 2016). As the officers approached the vehicle, they detected the smell of marijuana, and they asked petitioner and the driver to step out of the car. Ibid. When the officers attempted to secure petitioner for their own safety, petitioner resisted. Ibid. The officers grasped the leather jacket that petitioner was wearing, but petitioner was able to wiggle out of the jacket and flee. Id. at 1-2. One of the officers ran after petitioner and apprehended him after a short chase. Id. at 2. The other officer remained at the scene and found a loaded firearm in the jacket that petitioner had abandoned. Ibid.

A federal grand jury in the Southern District of Florida indicted petitioner on one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Indictment 1. Petitioner pleaded guilty. Pet. App. C1.

2. A conviction for violating Section 922(g)(1) has a default 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), specifies a statutory sentencing range of 15 years to life imprisonment. See 18 U.S.C. 924(e)(1); Custis v. United States, 511 U.S. 485, 487 (1994). 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." Welch v. United States, 136 S. Ct. 1257, 1261 (2016). In 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 convictions for armed

robbery, in violation of Fla. Stat. § 812.13 (2002). See Presentence Investigation Report ¶¶ 15, 22-25. Under Section 812.13, "'[r]obbery' means the taking of money or other property * * * when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1) (2002); see id. § 812.13(2)(a)-(b) (providing for enhanced penalties "[i]f in the course of committing the robbery," the offender was armed).

Petitioner objected to his classification as an armed career criminal. D. Ct. Doc. 41, at 1-15 (July 29, 2016). He argued, inter alia, that his Florida armed robbery convictions did not qualify as violent felonies because "the quantum of 'force' required for conviction is not the Johnson level of 'violent force.'" Id. at 9. The district court overruled petitioner's objection and imposed the mandatory-minimum ACCA sentence of 180 months of imprisonment. 8/18/16 Sent. Tr. 12-14, 17.

3. The court of appeals affirmed. Pet. App. A1-A8. Relying on circuit precedent, the court determined that a Florida armed robbery conviction qualifies as a violent felony under the ACCA's elements clause. Id. at A6-A8 (citing United States v. Fritts, 841 F.3d 937, 942 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017)). Accordingly, the court upheld petitioner's classification as an armed career criminal under the ACCA. Id. at A7-A8.

ARGUMENT

Petitioner contends (Pet. 5-9) that his prior convictions for Florida armed robbery are not violent felonies under the ACCA's elements clause. The court of appeals correctly determined that Florida robbery is a violent felony. Although a shallow circuit conflict exists on the issue, that conflict does not warrant this Court's review because the issue is fundamentally premised on the interpretation of a specific state law and lacks broad legal importance. Further review is not warranted.*

1. The court of appeals correctly determined that Florida armed robbery, in violation of Fla. Stat. § 812.13 (2002), qualifies as a "violent felony" 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).

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* Other pending petitions for writs of certiorari also present the question whether Florida robbery is a violent felony under the ACCA's elements clause. See, e.g., Stokeling v. United States, No. 17-5554 (filed Aug. 4, 2017); Conde v. United States, No. 17-5772 (filed Aug. 24, 2017); Williams v. United States, No. 17-6026 (filed Sept. 14, 2017); Everette v. United States, No. 17-6054 (filed Sept. 18, 2017); Jones v. United States, No. 17-6140 (filed Sept. 25, 2017); James v. United States, No. 17-6271 (filed Oct. 3, 2017); Middleton v. United States, No. 17-6276 (filed Oct. 3, 2017); Reeves v. United States, No. 17-6357 (filed Oct. 3, 2017); Rivera v. United States, No. 17-6374 (filed Oct. 12, 2017); Orr v. United States, No. 17-6577 (filed Oct. 26, 2017); Mays v. United States, No. 17-6664 (filed Nov. 2, 2017); Hardy v. United States, No. 17-6829 (filed Nov. 9, 2017); Wright v. United States, No. 17-6887 (filed Nov. 16, 2017).

a. Florida's robbery statute provides in relevant part that robbery is "the taking of money or other property * * * from the person or custody of another" through "the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1) (2002). Under the putting-in-fear prong, "the fear contemplated by the statute is the fear of death or great bodily harm." United States v. Lockley, 632 F.3d 1238, 1242 (11th Cir.) (brackets omitted) (quoting Magnotti v. State, 842 So. 2d 963, 965 (Fla. Dist. Ct. App. 2003)), cert. denied, 565 U.S. 885 (2011). Thus, "robbery under th[e] statute requires either the use of force, violence, a threat of imminent force or violence coupled with apparent ability, or some act that puts the victim in fear of death or great bodily harm." Id. at 1245.

In Robinson v. State, 692 So. 2d 883 (1997), the Florida Supreme Court addressed "whether the snatching of property by no more force than is necessary to remove the property from a person who does not resist" satisfies the "force or violence element required by Florida's robbery statute." Id. at 884-885. The court surveyed Florida cases -- including McCloud v. State, 335 So. 2d 257 (Fla. 1976), Montsdoca v. State, 93 So. 157 (Fla. 1922), and various other appellate decisions dating back to 1903, see, e.g., Colby v. State, 35 So. 189 (Fla. 1903) -- and confirmed that "the perpetrator must employ more than the force necessary to remove the property from the person." Robinson, 692 So. 2d at 886. Rather, there must be both "resistance by the victim" and "physical

force [by] the offender" that overcomes that resistance. Ibid.; see also id. at 887 ("Florida courts have consistently recognized that in snatching situations, the element of force as defined herein distinguishes the offenses of theft and robbery.").

Under Johnson v. United States, 559 U.S. 133 (2010), "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. Such force might "consist * * * of only that degree of force necessary to inflict pain," such as "a slap in the face." Id. at 143. The degree of force required under Florida's robbery statute -- "physical force" necessary to "overcome" "resistance by the victim," Robinson, 692 So. 2d at 886 -- satisfies that standard. Force sufficient to prevail in a physical contest for possession of the stolen item is necessarily force "capable" of "inflict[ing] pain" equivalent to "a slap in the face," Johnson, 559 U.S. at 140, 143; Florida robbery could not occur through "mere unwanted touching," id. at 142. The court of appeals thus correctly determined that Florida armed robbery is a violent felony under the ACCA's elements clause. Pet. App. A7-A8.

b. Petitioner cites (Pet. 6-7) several Florida appellate decisions that he argued below (Pet. C.A. Br. 11-13) demonstrate that Florida robbery may involve no more than de minimis force. But those cases do not establish that Florida robbery may involve

a degree of force less than the "physical force" required by the ACCA's elements clause.

In Montsdoca v. State, supra, the Florida Supreme Court stated that "[t]he degree of force used is immaterial," but only if "such force * * * is actually sufficient to overcome the victim's resistance." 93 So. at 159. Montsdoca involved the "violent or forceful taking" of an automobile, whereby the defendants, under a false pretense of official authority, "grabbed" the victim "by both shoulders," "shook him," "ordered him to get out of the car," and demanded his money "under the fear of bodily injury if he refused." Ibid. Montsdoca thus involved a degree of force greater than de minimis.

In McCloud v. State, supra, the defendant "exert[ed] physical force to extract [the victim's purse] from her grasp," causing the victim to fall to the ground. 335 So. 2d at 259. The evidence also "showed that [the defendant] attempted to kick his victim while she lay on the ground and after the purse had been secured." Ibid. The force employed by the defendant was plainly "capable of causing physical pain or injury to another person" and would thus qualify as "physical force" under the ACCA's elements clause. Johnson, 559 U.S. at 140. The court's statement that "[a]ny degree of force suffices to convert larceny into a robbery," McCloud, 335 So. 2d at 258, was therefore dictum, which was effectively repudiated in Robinson, 692 So. 2d at 886.

In Mims v. State, 342 So. 2d 116 (Fla. Dist. Ct. App. 1977) (per curiam), the defendant "forced" the victim "into a car" and drove her "to a deserted area" where the defendant "grabbed" the victim's pocketbook. Id. at 117. When the victim "resist[ed]," the defendant "beat[]" her and "pushed [her] out of the car." Ibid. The defendant plainly employed "force capable of causing physical pain or injury to another person." Johnson, 559 U.S. at 140.

And in Sanders v. State, 769 So. 2d 506 (Fla. Dist. Ct. App. 2000), the Florida intermediate appellate court affirmed the robbery conviction of a defendant who peeled back the victim's fingers from a clenched fist before snatching money out of his hand. Id. at 507. Bending back someone's fingers with force sufficient to overcome his efforts to keep hold of an object involves more than the "merest touching," Johnson, 559 U.S. at 139, and is "capable of causing physical pain or injury," id. at 140. Indeed, the court contrasted the force used in Sanders with the circumstances of a prior case, in which merely "touch[ing] or brush[ing]" the victim's hand in the course of taking money had been deemed "insufficient to constitute the crime of robbery" under Florida law. 769 So. 2d at 507 (discussing Goldsmith v. State, 573 So. 2d 445 (Fla. Dist. Ct. App. 1991)).

c. Petitioner also cites (Pet. 7) several Florida appellate decisions that he argued below (Pet. C.A. Br. 13-17) demonstrate that Florida robbery may involve no more than negligent conduct.

But Florida courts have never suggested that robbery in violation of Section 812.13(1) can be committed negligently. See Lockley, 632 F.3d at 1245 (finding it "inconceivable that any act which causes the victim to fear death or great bodily harm" in the course of taking the victim's property "would not involve the use or threatened use of physical force"); cf. United States v. Doctor, 842 F.3d 306, 311 (4th Cir. 2016) (evaluating a similar South Carolina robbery statute and reasoning that "the intentional taking of property, by means of violence or intimidation sufficient to overcome a person's resistance, must entail more than accidental, negligent, or reckless conduct"), cert. denied, 137 S. Ct. 1831 (2017).

In the cases cited by petitioner (Pet. 7) -- namely, Flagler v. State, 198 So. 2d 313, 314 (Fla. 1967); Diaz v. State, 14 So. 3d 1156, 1158 (Fla. Dist. Ct. App. 2009); State v. Baldwin, 709 So. 2d 636, 637-638 (Fla. Dist. Ct. App. 1998); and Smithson v. State, 689 So. 2d 1226, 1228 (Fla. Dist. Ct. App. 1997) -- the state court addressed only the mental state of the victim, not the mens rea of the defendant. In Baldwin, for example, the court observed that under Section 812.13(1)'s putting-in-fear prong, "actual fear need not be proved"; rather, the test is whether "the circumstances attendant to the robbery were such as to ordinarily induce fear in the mind of a reasonable person." 709 So. 2d at 637. Baldwin and the other cases petitioner cites said nothing about the requisite mens rea of the defendant under the putting-in-fear prong, much

less suggest that a defendant could be convicted of Florida robbery through a negligent threat of death or great bodily harm.

2. Petitioner does not suggest that the decision below implicates any broad or methodological conflict in the court of appeals. Although a shallow conflict exists between the Ninth and Eleventh Circuits on the specific question whether Florida robbery in violation of Section 812.13 qualifies as a "violent felony" under the ACCA's elements clause, that conflict does not warrant this Court's review.

In United States v. Geozos, 870 F.3d 890 (2017), the Ninth Circuit determined that Florida robbery is not a "violent felony." Id. at 901. The Ninth Circuit acknowledged that under Robinson, "there must be resistance by the victim that is overcome by the physical force of the offender." Id. at 900 (quoting Robinson, 692 So. 2d at 886). But the Ninth Circuit read the Florida cases to mean that "the Florida robbery statute proscribes the taking of property even when the force used to take that property is minimal." Id. at 901. The Ninth Circuit recognized that its decision "put[] [it] at odds with the Eleventh Circuit," but it believed that the Eleventh Circuit had "overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." Ibid.

The shallow conflict does not warrant this Court's review. This Court has repeatedly denied petitions for writs of certiorari that raised the same issue of whether Florida robbery is a "violent

felony." See United States v. Bostick, 675 Fed. Appx. 948 (11th Cir.) (per curiam), cert. denied, 137 S. Ct. 2272 (2017); United States v. McCloud, No. 16-15855 (11th Cir. Dec. 22, 2016), cert. denied, 137 S. Ct. 2296 (2017); United States v. Fritts, 841 F.3d 937 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017); United States v. Seabrooks, 839 F.3d 1326 (11th Cir. 2016), cert. denied, 137 S. Ct. 2265 (2017); United States v. Durham, 659 Fed. Appx. 990 (11th Cir. 2016) (per curiam), cert. denied, 137 S. Ct. 2264 (2017). Notwithstanding the narrow conflict created by the Ninth Circuit's recent decision in Geozos, supra, the same result is warranted here.

Although the issue of whether Florida robbery is a "violent felony" arises under the ACCA, it is fundamentally premised on the interpretation of a specific state law. The Ninth and the Eleventh Circuits may disagree about the degree of force required to support a robbery conviction under Florida law, but as petitioner's discussion of state-court decisions demonstrates (Pet. 7), that state-law issue turns on "Florida cases." As such, the issue does not warrant this Court's review. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004) ("Our 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."), abrogated on other grounds, Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

The question whether Florida robbery is a "violent felony" also does not present an issue of broad legal importance. The issue arises only with respect to defendants with prior convictions for Florida robbery. Accordingly, the issue is unlikely to recur with great frequency in the Ninth Circuit, which sits on the other side of the country. Should that prove to be incorrect, there will be ample opportunity for the government to seek further review in that circuit or in this Court. At this time, however, the issue is not of sufficient recurring importance in the Ninth Circuit to warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2018