RECORD NO. _____

In The Supreme Court of The United States

ROBERT VERNON SCOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

South Carolina common law robbery is stealing from the person of another "by violence or by putting such person in fear" or "against the will and without consent;" and armed robbery is robbery committed while possessing a weapon. Do the elements of these and similarly defined crimes in other states require "violent force," as three circuits have held, and therefore qualify as predicate offenses under the Armed Career Criminal Act; or are the levels of force required too minimal, as at least five circuits have held?

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT VERNON SCOTT

v.

UNITED STATES OF AMERICA

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

Petitioner, ROBERT VERNON SCOTT, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 17-4198, entered October 12, 2017.

OPINION BELOW

The Fourth Circuit panel issued its unpublished opinion on October 12, 2017, affirming the judgment of the United States District Court for the District of South Carolina. App. A. In the opinion, the Fourth Circuit relied heavily on its recent opinion in *United States v. Doctor*, 842 F.3d 306 (4th Cir. 2016).

JURISDICTION

The questions presented by this Petition were presented to the Fourth Circuit, the merits of them considered by the Fourth Circuit, and that Court ruled in favor of the government on all issues presented in this Petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1):

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection - -
>
> ***
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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; . . . .

STATEMENT OF THE CASE

On July 18, 2013, Petitioner Robert Vernon Scott pled guilty to unlawful possession of a firearm by a convicted felon pursuant to a written plea agreement, in violation of 18 U.S.C. 922(g)(1). The maximum penalty for a conviction under this statute is 10 years, except in cases where the person convicted has three prior convictions for "a violent felony or a serious drug offense, or both," in which case the penalty becomes a minimum of 15 years imprisonment to LIFE, under the provisions of the Armed Career Criminal Act ("ACCA"). A sentencing hearing was held on March 28, 2017, at which time the District Court adopted the conclusions of the Presentence Investigation Report, finding that Scott had four qualifying convictions, including three convictions for armed robbery, and sentenced Scott to a term of imprisonment of 180 months. At sentencing, the District Court relied on the Fourth Circuit's recent holding in *United States v. Doctor*, 842 F.3d 306 (2016), cert. denied (U.S. Apr. 24, 2017), which determined that South Carolina's offense of "strong arm" robbery is a violent felony.[1] The *Doctor* court held "there is no indication that South Carolina robbery by violence can be committed with minimal actual force."

In summarily rejecting Scott's arguments on appeal, the Fourth Circuit also relied exclusively on its decision in *Doctor*.

[1] South Carolina's armed robbery incorporates the definition of strong armed robbery and appends to it the element of being armed with a deadly weapon.

The judgment was filed on March 30, 2017, and the Notice of Appeal was filed on April 4, 2017. JA 50. The jurisdiction of this Court is based upon Title 28, United States Code, Section 1291, and Title 18, United States Code, Section 3742; it is an appeal from a final judgment.

This case presents a similar issue involving South Carolina robbery as that now pending before this Court in *Rasheen Weston v. United States*, Docket Number 17-5965, in which the Court directed but has not yet received a response from the United States. Other cases, including *Kenneth Conde v. United States*, Docket Number 17-5772 and *Michael Kevin Harris v. United States*, Docket Number 16-8616, which are also pending before this Court address substantially similar issues involving the interpretation of Florida's and Colorado's common law robbery provisions in the context of the Armed Career Criminal Act.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question presented in this Petition was raised before the United States District Court for the District of South Carolina while the case was pending sentencing. The same question presented herein was presented to the Fourth Circuit United States Court of Appeals. The federal claims were therefore properly presented and reviewed below on direct appeal, and are therefore appropriate for consideration by this Court.

REASONS WHY THE WRIT SHOULD ISSUE

Petitioner was convicted of South Carolina armed robbery in 1988. Then, as now, all elements of the crime of armed robbery under South Carolina law other than that of being armed are incorporated by reference from the common law.[2]

South Carolina Code section 16-11-330 establishes the crime of armed robbery and its attendant punishment. It was, at the time of Petitioner's conviction, as it is now, codified in Chapter Eleven of Title Sixteen; Chapter Eleven is entitled "Offenses Against Property:"

> Any person convicted for the crime of robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor or other deadly weapon shall suffer punishment by imprisonment at hard labor for a term of not less than ten years nor more than twenty-five years….

S.C. Code Ann. § 16-11-330 (1975).

Because the statute did not itself provide a definition for robbery, the elements of the crime of robbery are found in the state's common law. Four years before Petitioner's convictions, in the same year that Congress passed the Armed Career Criminal Act ("ACCA"), setting into motion more than three decades of litigation to establish the meaning of its overbroad and vague terms, the South Carolina Supreme Court decided *State v. Scipio*, 283 S.C. 124 (1984), in which it defined

[2] The present case rests on the construction of South Carolina's common law robbery provision. Whether that crime is violent or not for the purposes of the Armed Career Criminal Act is the threshold question. Whether the presence of a deadly weapon, in Petitioner's cases, scissors and a knife, has any bearing on the violence or lack thereof of his crimes, is a matter to be addressed only after the pressing question involving common law robbery is settled.

robbery as "the felonious taking and carrying away of goods of another against the will or without consent."[3]

Robbery is not an enumerated offense in the ACCA under 18 U.S.C. § 924(e)(2)(B)(ii), and the "residual clause" of § 924(e)(2)(B)(ii) was found unconstitutionally vague in *Johnson (Samuel) v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015). After *Johnson*, any predicate offense must be one of the enumerated violent felonies described by Congress, or must meet the requirements of the "force clause" of §924(e)(2)(B). That clause requires that a qualifying conviction must have *as an element*, the use, attempted use, or threatened use of force against the person of another.

I. The Court should intercede to resolve a growing split of authority among the Circuit Courts of Appeal as to whether the common law crimes of robbery and, by extension, armed robbery, qualify as predicate offenses for the purposes of the Armed Career Criminal Act.

In *Johnson v. United States*, 559 U.S. 133, 140 (U.S. 2010), this Court held that "in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." Following Johnson, a sentencing court should identify the minimum conduct—here the minimum force—required by the state law for the

[3] *United States v. Doctor*, *supra*, upon which the District Court and Court of Appeals summarily dismissed Petitioner's claims below makes repeated reference to statements of the common law of robbery from South Carolina cases decided long after Petitioner's conviction for the same became final. Nonetheless, whether this Court reviews those cases decided before Petitioner's conviction or after, there is no express requirement of violent physical force required under South Carolina's common law.

commission of the offense, and then determine if that force fits the definition of physical force. *See Moncrieffe v. Holder*, 569 U.S. ---, 133 S.Ct. 1678, 1684 (2013).

The question of whether South Carolina's crime of robbery is a violent felony, has arisen numerously and in jurisdictions beyond the Fourth Circuit Court of Appeals. While recent cases from the Fourth Circuit and sister circuits have focused on *State v. Rosemond*, 356 S.C. 426, 589 S.E.2d 757 (2003) (defining robbery as "the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another in his presence by violence or by putting such person in fear"), for a statement of the common law, and Petitioner's case predates *Rosemond* by more than a decade, the approach laid out by *Johnson* is the same whether the *Rosemond* is the source or an earlier case, like that of *State v. Scipio*, in which South Carolina's Supreme Court defined robbery as "the felonious taking and carrying away of goods of another against the will or without consent." In either case, South Carolina's definition of robbery corresponds in all material respects to the generic definition of robbery. *See United States v. Walker*, 595 F.3d 441, 446 (2d Cir. 2010). "Indeed, all fifty states define robbery, essentially, as the taking of property from another person or from the immediate presence of another person by force or by intimidation." *Id.*[4]

[4] The Model Penal Code definition differs from South Carolina's common law, and that of the majority of states, in that it requires and adds the element of "serious bodily injury":

> A person is guilty of robbery if, in the course of committing a theft, he: (a) inflicts serious bodily injury upon another; or (b) threatens another with or purposely puts him in fear of immediate serious bodily injury.

The Fourth Circuit's decision is in conflict with the decisions in the following cases where common law robbery has been held by federal courts of appeals NOT to be crimes of violence: *United States v. Castro–Vazquez*, 802 F.3d 28 (1st Cir.2015)(Puerto Rico robbery); *United States v. Redrick*, 841 F.3d 478, 480 (D.C. Cir. 2016)(Maryland robbery); *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016)(North Carolina robbery); *United States v. Winston,* 2017 WL 977031 (4th Cir. March 13, 2017)(Virginia robbery);[5] *United States v.* Yates, --- F.3d --- (6th Cir. Aug. 9, 2017) (Ohio robbery); United *States v. Eason*, 829 F.3d 633 (8th Cir. 2016)(Arkansas robbery); *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016) (Missouri robbery); *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015)(California robbery); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) (Massachusetts robbery).

The First Circuit in *United States v. Castro–Vazquez*, 802 F.3d 28 (1st Cir.2015) analyzed Puerto Rico's robbery statute, nearly identical to that of South

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§ 222.1. Robbery, Model Penal Code.

Ten states, Maine, Montana, New Jersey, North Dakota, Ohio, Pennsylvania, Texas, Virginia, West Virginia and Wyoming, currently require an element of serious bodily injury for the crime of robbery. *See* Me. Rev. Stat. Ann. tit. 17-A, § 651(I)(A) (West 2003); Mont. Code Ann. § 45-5-401(1) (2003); N.J. Stat. Ann. § 2C:15-1(a) (West 1995); N.D. Cent. Code § 12.1-22-01(1) (2005); Ohio Rev. Code Ann. § 2911.02(A)(2) (West 2002); Pa. Cons. Stat. Ann. tit. 18, § 3701; Tex. Pen. Code Ann. § 29.02; Va. Code Ann. § 18.2-58 (West 2016); W. Va. Code Ann. § 61-2-12(b) (West 2003); Wyo. Stat. Ann. § 6-2-401(a)l (2003).

[5] In addition to the circuit split identified by these cases, there is an intra-circuit split within the Fourth Circuit. *Compare United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016) (holding that North Carolina's common law robbery is not a crime of violence); *United States v. Winston,* 2017 WL 977031 (4th Cir. March 13, 2017) (holding that Virginia's common law robbery is not a crime of violence); and *U.S. v. Doctor* (4th Cir. 2016) (holding that South Carolina's common law robbery is a crime of violence).

Carolina's. Robbery is "unlawfully taking personal property belonging to another in the immediate presence of said person and against his/her will by means of violence or intimidation." *Id.* at 37 (quoting P.R. Laws Ann. tit. 33, § 4826). The Court found that this was a divisible robbery statute but fell short of the requirement that the offense included an element of "physical force," defined as "violent force" under *Johnson, supra*.

The Court of Appeals for the D.C. Circuit in *United States v. Redrick*, 841 F.3d 478, 480 (D.C. Cir. 2016) discussed Maryland's common law robbery offense. Maryland's common law robbery is also nearly identical to that of South Carolina's. In Maryland, robbery is "the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence or putting in fear." *Id.* at 482. Relying on the government's concession in a similar case, the Court held that it was not a violent offense. *Id.* (The Court did go on to find that Maryland *armed* robbery was a violent offense because it requires the *use* (more than mere possession) of a deadly weapon. *Id.* at 484.)

The Sixth Circuit, in *United States v. Yates*, --- F3d. --- (6th Cir. Aug. 9, 2017), was asked to consider Ohio's robbery statute, as it was codified in 1999, and which provided that "no person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall . . .use or threaten the immediate use of force against another." Revisiting an earlier unpublished case in which it had held Ohio's armed robbery statute to be a violent felony, the *Yates*

court held, after a comprehensive review of other cases prosecuted in Ohio as robbery, that "only a minimum level of force is needed to sustain a conviction." *Id.*

The Eighth Circuit, in *United States v. Eason*, 829 F.3d 633 (8th Cir. 2016) analyzed Arkansas's robbery statute, Ark. Code Ann. § 5-12-102, and found that it did not qualify as a violent felony. A person commits robbery in Arkansas "if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately after committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person." *Id.* at 640-641. The Court noted that jerking the door from a victim, cornering her in the back hallway and grabbing her dress lightly is sufficient restraint and bodily impact to constitute physical force for the purposes of robbery. *Id.* at 641. The "mere snatching of money or goods from the hand of another is not robbery 'unless some injury is done to the person or there be some struggle for possession of the property prior to the actual taking or some force used in order to take it.'" *Id.* at 641-642 (internal citations omitted). "In sum, we cannot conclude that the degree of physical force required to commit robbery in Arkansas rises to the level of physical force required to establish a crime of violence for ACCA purposes." *Id.*

The Eighth Circuit, in *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016) also analyzed Missouri's robbery statute. A person commits the crime of robbery in the second degree when he forcibly steals property. The term "forcibly steals" is further defined in that "a person 'forcibly steals,' and thereby commits robbery, when, in the course of stealing . . . he uses or threatens the immediate use of physical force upon

another person." Mo. Rev. Stat. §§ 569.030.1, 569.010(1). The amount of force necessary to support a conviction in state court does not rise to the level of physical force, "violent force capable of causing physical pain or injury to another person under *Johnson, supra*." *Bell* at 965. A defendant can be convicted when he has physical contact with a victim but does not necessarily cause physical pain or injury. *Id.* at 966. Because robbery under Missouri law does not necessarily require the type of violent force described by the Supreme Court in Johnson, Missouri's robbery offense did not meet the violent force requirement of Johnson. *Id.* at 967.

The Ninth Circuit in *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015) found that California robbery was not a violent offense under the ACCA. Robbery in California is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Cal. Penal Code § 211. Again, almost identical to South Carolina's robbery, the Court found that one may commit this offense by accidentally using force. *Dixon* at 1197.

The Ninth Circuit in *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) held that Massachusetts robbery was not a violent offense. Massachusetts robbery can be committed by force and violence, or by assault and putting in fear, when one robs, steals or takes from the person of another, or from his immediate control, money or other property. Mass. Gen. Laws Ann. ch. 265, § 19(b). The Ninth Circuit held that armed robbery, encompassing robbery, does not have as an element the use, attempted use, or threatened use of physical force against the

person of another because the degree of force required is immaterial - any amount of force will satisfy as long as the victim is aware of it. *Id.* at 979.

This Court should intervene to address the patchwork of cases that are being decided with increasing regularity and diminishing conformity regarding common law robbery convictions under the Armed Career Criminal Act.

II. The split of authority reflects not only an issue ripe for consideration by the Supreme Court, but also that the same flaw that was fatal to the "residual clause" of the Armed Career Criminal Act is present in the "force clause" of that Act. The Supreme Court should grant the petition to remedy this perennially problematic provision.

As the Tenth Circuit noted in the preamble to its decision in January of 2017 in United States v. Michael Kevin Harris, "[I]n the last twelve months, eleven circuit-level decisions have reached varying results on this very narrow question—in examining various state statutes, five courts have found no violent felony and six have found a violent felony. So, the obvious may not be so plain." *United States v. Harris*, 844 F.3d 1260, 1262 (10th Cir. 2017); *Michael Kevin Harris v. United States*, United States Supreme Court Docket No. 16-8616, *pending*.

That the obvious may not be so plain was the essential concern of this Court in J *Johnson v. United States*, 135 S.Ct. 2551 (U.S. 2015), in which the residual clause of the ACCA was finally struck down after nearly a decade of attempts at this highest level to remedy the vagueness of that portion of the statute. And just as soon as the residual clause was stricken, courts began relying on the language of

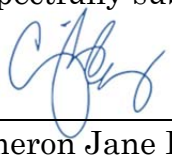
the force clause in order to find predicate violent felonies from convictions for non-enumerated offense. "Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Id.* at 2556.

Where—as here, and as in so many circuits interpreting similar common law robbery convictions from states around the country—a robbery conducted under North Carolina law is not a violent felony, but a nearly identical robbery under South Carolina law may be, depending on the circuit or even the panel considering the issue, citizens cannot be said to be sufficiently on notice of what conduct the ACCA punishes. As in *Johnson*, a provision of law this arbitrary and standardless cannot withstand constitutional scrutiny. This Court should intervene as it did in *Johnson* to determine whether the force clause can be clarified and saved or must be jettisoned.

CONCLUSION

For the reasons set forth herein, the Petitioner, Robert Vernon Scott respectfully requests a writ of certiorari issue to review this decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,



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