

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

REPLY BRIEF OF PETITIONER

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ARGUMENTS IN REPLY

The government's opposition consists of recycling its Brief in Opposition from another recent case and then adding on two short arguments that respond to some—but not all—of the issues in the petition. Neither the old, recycled arguments nor the new ones are persuasive.

I. The circuit courts' deep divide directly affects Scott's sentence.

The government's first argument comes from its Brief in Opposition (BIO) in *Weston v. United States*, cert. denied, No. 17-5965 (Apr. 2, 2018), which the government summarily incorporates by reference into its BIO here. *See Scott* BIO at 5–6. In its *Weston* BIO, the government explained away the circuit split by characterizing it as a product of differing state laws, rather than of diverging applications of *Curtis Johnson v. United States*, 559 U.S. 133 (2010). *Weston* BIO at 10–13. The petitioner's briefs in *Stokeling v. United States*, cert. granted, No. 17-5554 (Apr. 2, 2018), more than rebut that characterization. *Stokeling* accurately depicts a pervasive state of confusion throughout the federal courts, where the amount of punishment someone receives for a federal crime depends on where he is prosecuted. *See, e.g.*, Reply Brief for Petitioner, *Stokeling v. United States*, 2017 WL 8686120, at *3 (Dec. 27, 2017) (No. 17-5554) (stating that under the split, “geography alone” determines whether a person is subject to an ACCA-enhanced sentence.)

The government insists this state of confusion has no impact on whether South Carolina robbery fits within the ACCA's elements clause. *See Weston* BIO at

13 n.3. Federal courts’ treatment of North Carolina’s nearly identical offense proves otherwise. The Fourth Circuit has held that crime *does not* fit within the elements clause. *United States v. Gardner*, 823 F.3d 793, 804 (4th Cir. 2016). However, two district judges in the Sixth Circuit have explicitly rejected *Gardner*, and the Sixth Circuit has not disturbed their judgments. *Smith v. United States*, No. 2:03-CR-73-JRG-2, 2016 WL 7365634, at *4 (E.D. Tenn. Dec. 16, 2016), *certificate of appealability denied*, No. 17-5016, 2017 WL 6886062 (6th Cir. Aug. 10, 2017); *United States v. Smith*, No. 3:13-CR-5-TAV-CCS-3, 2016 WL 6875877, at *5 (E.D. Tenn. Nov. 21, 2016), *aff’d*, 881 F.3d 954 (6th Cir. 2018). Creating still more disagreement, the Third Circuit has criticized those two decisions. *United States v. Graves*, 877 F.3d 494, 502 n.35 (3d Cir. 2017). Meanwhile, the petition in *Stokeling* analyzed *Gardner* at length to show that the Fourth Circuit is in direct conflict with the Tenth and Eleventh circuits. *See* Petition for a Writ of Certiorari, *Stokeling v. United States*, 2017 WL 8686116, at *20–26 (Aug. 4, 2017) (No. 17-5554).

While not obvious at first, this conflict directly impacts the element clause’s applicability to South Carolina robbery. The lynchpin of *Gardner* was that in North Carolina, “the degree of force used is immaterial, so long as it is sufficient to compel the victim to part with his property.” 823 F.3d at 803 (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)). Six months after *Gardner*, the Fourth Circuit issued *United States v. Doctor*, 842 F.3d 306 (4th Cir. 2016). Although the South Carolina Supreme Court’s *Rosemond* opinion¹ was the star in *Doctor*, *Sawyer* played a key

¹ *State v. Rosemond*, 589 S.E.2d 757 (S.C. 2003).

supporting role. The Fourth Circuit used *Sawyer* to distinguish South Carolina robbery from its North Carolina counterpart: “Unlike the definition of North Carolina robbery, the definition of South Carolina robbery does not suggest that the degree of actual force used is ‘immaterial.’ There is no general statement from the South Carolina Supreme Court or intermediate appellate court to that effect.” *Doctor*, 842 F.3d at 312.

That statement is simply wrong. In *Rosemond* itself, the South Carolina Court of Appeals quoted *Sawyer* and another North Carolina case to define force and intimidation for South Carolina robbery. *State v. Rosemond*, 560 S.E.2d 636, 640–41 (S.C. Ct. App. 2002) (quoting *State v. Norris*, 141 S.E.2d 869, 872 (N.C. 1965), which quoted *Sawyer*, 29 S.E.2d at 37.) To be sure, the state Court of Appeals’ opinion does not use the word “immaterial.” However, that opinion was authored by then-judge Ralph King Anderson, Jr., whose many contributions to South Carolina jurisprudence include pattern jury charges he wrote. His charges for common-law robbery and armed robbery both state that “[t]he degree of force used is immaterial so long as such force or threat of force is actually sufficient to overcome the victim’s resistance.” Ralph King Anderson, Jr., South Carolina Requests to Charge—Criminal §§ 2-11 & 2-12 (2d ed. 2012). And in his notes for each charge, he cites his opinion in *Rosemond* for that proposition. *Id.* Reading Judge Anderson’s opinion in *Rosemond* alongside his pattern jury instructions makes explicit that the Court of Appeals in *Rosemond* was citing *Norris* and *Sawyer* for the immateriality rule. Moreover, courts across South Carolina routinely rely on

Judge Anderson’s charges; his decree-of-force statement has likely been charged to juries in countless robbery trials.

The *Rosemond* analysis does not just invalidate the Fourth Circuit’s holding in *Doctor*. It shows the Fourth Circuit drew a false distinction between two similar crimes—the case it used to distinguish the offenses is actually the case that unites them. Due to that flagrant misreading of South Carolina law, federal defendants are continuing to receive disparate sentences for previously committing what is materially the same crime. This is no isolated incident prejudicing only Robert Scott and Kareem Doctor; in just over a year, the Fourth Circuit has used *Doctor* at least eight times to affirm sentence enhancements for prior South Carolina robbery offenses.² Nor is it confined to the Fourth Circuit’s territory; district courts in the Second and Eleventh circuits have also used *Doctor* to rule against defendants.³

The Fourth Circuit’s frequent, reflexive reliance on *Doctor* demonstrates it will not correct its error on its own. Until *Doctor* is overruled, each new citation to it in a court opinion or presentence investigation report will cause another person to

² *United States v. Simmons*, 708 F. App’x 114, 114 (4th Cir. 2018); *United States v. Wise*, 701 F. App’x 279, 280–81 (4th Cir. 2017); *United States v. Harrison*, 691 F. App’x 769, 771 (4th Cir. 2017); *United States v. Shrader*, 690 F. App’x 811, 811–12 (4th Cir. 2017); *United States v. Dickerson*, 690 F. App’x 813, 814 (4th Cir. 2017); *United States v. Weston*, 681 F. App’x 235, 237 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 1439 (2018); *United States v. Robinson*, 672 F. App’x 330, 331 (4th Cir. 2017); *United States v. Albright*, 672 F. App’x 297, 298 (4th Cir.), *cert. denied*, 137 S. Ct. 2143 (2017).

³ *Witherspoon v. United States*, No. 2:00-CR-19, 2017 WL 3473188, at *2 (S.D. Ga. Aug. 11, 2017), *report and recommendation adopted*, No. 2:00-CR-19, 2017 WL 5171847 (S.D. Ga. Nov. 8, 2017); *Grant v. United States*, No. 06-CR-732 (DLI), 2017 WL 2881132, at *7 (E.D.N.Y. July 5, 2017); *Stevens v. United States*, No. CR 107-030, 2017 WL 1485509, at *5 (S.D. Ga. Mar. 30, 2017), *report and recommendation adopted*, No. CR 107-030, 2017 WL 1503994 (S.D. Ga. Apr. 24, 2017).

spend longer in prison than the law allows. That alone compels this Court's intervention.

The above deconstruction of *Doctor* also ties this case back to the circuit split. Because South Carolina's definition of robbery comes from North Carolina case law whose ACCA significance figures prominently in *Stokeling*, that debate applies to South Carolina robbery as well. In other words, not only is *Doctor*—the case used to justify Scott's sentence enhancement—wrong, but when South Carolina robbery is defined accurately, *Doctor's* continued application ensures that someone convicted of South Carolina robbery faces an uncertainty about future punishment that only one's location at the time of federal prosecution answers. As the *Stokeling* briefs drive home, circuit-by-circuit geography is an indefensible way to mete out punishment for violating federal law.

In its *Weston* BIO, the government suggests the Court should ignore the South Carolina Court of Appeals' reliance on *Sawyer* in *Rosemond* because the Court of Appeals' decision "was superseded by the South Carolina Supreme Court's subsequent decision in the same case." *Weston* BIO at 9. That reads both too much and too little into the state Supreme Court's opinion. In that short opinion, the court recited the evidence from the trial and then affirmed the Court of Appeals' decision that there was sufficient evidence for the case to go to the jury. 589 S.E.2d at 759. Tellingly, the Supreme Court said nothing about the Court of Appeals' citation of North Carolina law. The only thing the state Supreme Court "superseded" was the Court of Appeals' reliance on the fact that Rosemond resisted

arrest; the Supreme Court clarified that such post-crime conduct was irrelevant to whether Rosemond used force or intimidation during the crime itself. *Id.* If the Supreme Court thought that *Sawyer* and *Norris* did not reflect South Carolina law, it could have said so.

The circuits are divided against each other—and the Fourth Circuit is divided against itself—on a question of federal law whose answer controls how long Scott and untold others must spend in prison. This Court must answer that question.

II. The government has taken contradictory positions on how South Carolina defined robbery when Scott was convicted.

Because the decisions below relied on *Doctor*, and because *Doctor* relies so heavily on *Rosemond*, a deep analysis of *Rosemond*'s connection to the circuit split is necessary. However, as Scott noted in his petition, *Rosemond*'s definition of South Carolina robbery are beside the point; his convictions predate those cases, and the ACCA requires that violent-felony determinations be based on “the version of state law that the defendant was actually convicted of violating.” *McNeill v. United States*, 563 U.S. 816, 821 (2011) (pointing out the Court has determined whether convictions are for ACCA violent felonies by looking to the version of the state law in effect when the defendant was convicted); *see also United States v. Faust*, 853 F.3d 39, 57 (1st Cir.) (applying *McNeill* to Massachusetts statute that, like South Carolina's armed robbery statute, incorporates portions of the common law), *reh'g denied*, 869 F.3d 11 (1st Cir. 2017). Scott pressed that point below, but the courts summarily referred him back to *Doctor*.

The government tries to dismiss that error by saying “the South Carolina Supreme Court in *Rosemond* did not purport to change South Carolina law.” *Scott* BIO at 6. That is an about-face from what the government told this Court in *Weston*. In that case, the petitioner argued that South Carolina adopted the historical common-law definition of robbery in *State v. Nathan*, 39 S.C.L. 219, 230 (5 Rich.) (S.C. Ct. App. 1851) and had since followed that definition. The government responded by saying, “Even if that were so, the South Carolina Supreme Court’s subsequent decision in *Rosemond* would control.” *Weston* BIO at 9 n.2.

That the government cannot articulate a consistent position on a pivotal case is troubling, but it may not be consequential. If *Rosemond* merely reflects the law in effect when Scott was convicted of armed robbery, this Court should grant review because the decisions below rest ultimately on the incorrect belief that *Rosemond* requires more than *de minimis* force. And if, instead, *Rosemond* changed the law, review is warranted because the Fourth Circuit violated *McNeill* and the cases cited therein.⁴

⁴ Interestingly, the district court in *Doctor* took that latter view. The defendant argued *State v. Scipio*, 322 S.E.2d 15, 16 (S.C. 1984) (stating robbery can be committed by acting merely “against the will or without consent”), defined South Carolina robbery, but the district court found that *Rosemond*, which “greatly post-dates *Scipio*,” superseded *Scipio*. *United States v. Doctor*, No. 2:13-CR-811-PMD, 2015 WL 8160764, at *4 (D.S.C. Dec. 7, 2015), *aff’d*, 842 F.3d 306 (4th Cir. 2016).

III. The government did not address Scott’s vagueness argument.

There are only two plausible explanations for what is happening in our federal courts: either a group of courts are repeatedly misapplying the elements clause, or the clause is incapable of being consistently applied. The government has tried to refute that first explanation, but it says nothing in its BIOs about the second. Instead, the government dismissively says this case is no different than *Weston*. *Scott* BIO at 7. *Weston*, however, did not address the second explanation—that the elements clause is void for vagueness.

That possibility is too grave to be ignored. *See, e.g., Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (Kagan, J.) (plurality opinion) (stating the void-for-vagueness doctrine “guards against arbitrary or discriminatory law enforcement” and “is a corollary of the separation of powers”); *id.* at 1230–31 (Gorsuch, J., concurring in part and concurring in the judgment) (discussing the vagueness doctrine’s role as a means to enforce “fair notice of the law—the most venerable of due process’s requirements”). And it should not be put off for another day. This Court’s decision in *Samuel Johnson* to strike the ACCA’s residual clause followed nearly a decade of confusion, despite attempts to save the clause. And here, eight years after this Court tried to clarify the elements clause in *Curtis Johnson*, the circuit and district courts still frequently disagree on whether specific robbery offenses fit within it. A provision that confounds the federal judiciary does not afford “ordinary people . . . fair notice of the conduct it punishes.” *Johnson v. United*

States, 135 S. Ct. 2551, 2557 (2015). The Court should give this issue the consideration it demands by granting certiorari.

IV. The Court should review this case now and consider consolidating it with *Stokeling*.

Finally, the government asserts the Court should not hold this case pending the outcome of *Stokeling*. *Scott* BIO at 7. It bases that assertion on its misplaced belief that the issues and arguments here are no different than those raised in *Weston*. To the contrary, Scott's case *is* part of the circuit split the Court has agreed to address in *Stokeling*. In addition, this case presents an intra-circuit contradiction as well as a vagueness challenge not presented in *Weston* or in *Stokeling*. Those additional dimensions justify certiorari and independent merits briefing, but at the very least, this case should be consolidated with *Stokeling* so that the Court can resolve the circuit split both cases present.

CONCLUSION

For the reasons above and in his petition, Robert Vernon Scott respectfully requests that a writ of certiorari issue and that this case be considered either on its own or through consolidation with *Stokeling*. Alternatively, Scott asks that the Court hold his petition in abeyance pending its decision in *Stokeling*.

Respectfully submitted,



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