No. 16-8616

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL KEVIN HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction for robbery, in violation of Colo. Rev. Stat. § 18-4-301(1), constituted a conviction for a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 844 F.3d 1260. A prior opinion of the court of appeals is reported at 447 F.3d 1300.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2017. The petition for a writ of certiorari was filed on April 4, 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 Colorado, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(e). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals affirmed. 447 F.3d 1300. In 2015, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255(a). The district court denied the motion, Pet. App. B1-B6, and the court of appeals affirmed, id. at A1-A28.

1. On December 22, 2003, officers with the Longmont, Colorado, police department observed a vehicle matching the description of a vehicle listed as having been associated with recent armed robberies. Presentence Investigation Report (PSR) ¶ 5. Officers pursued the vehicle, and the driver, later identified as petitioner, fled. PSR ¶¶ 6. Petitioner eventually stopped the car in front of a residence and exited the car, but was immediately apprehended. PSR ¶¶ 7-8. Following his arrest, officers found two .45-caliber magazines and a small quantity of methamphetamine. PSR ¶ 8. When asked if he had a gun, petitioner responded that he did and that it was near the car. Ibid. Officers then located a fully loaded Colt .45-caliber pistol approximately 20 feet from the car. Ibid. Further investigation revealed that

petitioner had an extensive criminal history that included several prior felony convictions. PSR ¶ 14.

2. A grand jury in the District of Colorado returned an indictment charging petitioner with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. Petitioner pleaded guilty to the charge. Judgment 1.

a. 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. These clauses are known as the elements clause,

the enumerated-crimes clause, and the residual clause, respectively. In Curtis Johnson v. United States, 559 U.S. 133 (2010), this Court defined "physical force," in the context of 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 (emphasis omitted).

b. Petitioner's PSR characterized him as an armed career criminal under the ACCA based on four qualifying prior convictions: one for Colorado second-degree burglary, two for Colorado distribution of a controlled substance, and one for Colorado robbery. PSR ¶¶ 46, 57, 84, 90. The PSR noted that these crimes occurred years apart and in different jurisdictions. Ibid.

Petitioner did not object to the factual assertions in the PSR recounting his criminal history and his prior convictions, but instead argued that the question of whether his prior convictions were "committed on occasions different from one another" was a question of fact that a jury, not a judge, was required to decide. 447 F.3d at 1301-1302 (citation omitted). The district court overruled petitioner's objection. The court found that petitioner's robbery and burglary convictions were "violent felonies" and that his drug offenses were "serious drug offenses," and, on that basis, classified petitioner as an armed career criminal and sentenced him to 180 months of imprisonment. Id. at 1303. The court of appeals affirmed, rejecting petitioner's

renewed argument that his Sixth Amendment rights were violated when the district court (rather than a jury) made the different-occasions finding, as well as other unrelated sentencing challenges. Id. at 1304-1307.

3. On June 26, 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551 (2015), that the residual clause of the ACCA's definition of violent felony is void for vagueness. Id. at 2557. The Court made clear that its decision invalidating the residual clause "d[id] not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." Id. at 2563. On April 18, 2016, this Court held in Welch v. United States, 136 S. Ct. 1257 (2016), that Johnson's holding was a substantive rule that applies retroactively to prisoners seeking collateral relief from ACCA sentences. Id. at 1265.

a. On May 17, 2016, petitioner filed a motion to vacate his sentence, arguing that, in light of Johnson and Welch, he did not have three qualifying predicate convictions to support his armed career criminal status and sentence because neither his burglary nor his robbery convictions qualified as violent felonies. D. Ct. Doc. 61. The government opposed the motion. D. Ct. Doc. 67 (May 24, 2016). Even though petitioner's burglary conviction no longer qualified as a violent felony, the government argued that his robbery conviction still qualified as such under the ACCA's

elements clause -- which Johnson left undisturbed -- because the offense has as an element the use or threatened use of physical force. See Colo. Rev. Stat. § 18-4-301(1) (2016) ("A person who knowingly takes anything of value from the person or presence of another by use of force, threats, or intimidation commits robbery."). The district court denied petitioner's motion, agreeing with the government that "robbery in Colorado -- as that crime has been interpreted by Colorado courts -- is a 'violent felony' under the ACCA because it has as an element the use, attempted use, or threatened [use] of physical force against the person of another." Pet. App. B5. The district court granted petitioner a certificate of appealability. D. Ct. Doc. 79 (June 10, 2016).

b. The court of appeals affirmed. Pet. App. A1-A26. The court recognized (Pet. App. A8) that this Court has held that the term "physical force" as used in the ACCA's elements clause does not encompass every unwanted touching but rather is limited to "violent force -- that is, force capable of causing physical pain or injury to another person." Curtis Johnson, 559 U.S. at 140 (emphasis in original). Colorado's robbery statute satisfies that standard, the court of appeals explained, because the Colorado Supreme Court has consistently held that "robbery in Colorado requires a 'violent taking,'" which is "consistent with the physical force required by the ACCA's elements clause." Pet. App.

A11. The court of appeals explained that, in People v. Borghesi, 66 P.3d 93 (Colo. 2003), the Colorado Supreme Court held that its prior decisions made clear that "the gravamen of the offense of robbery is the violent nature of the taking." Id. at 100-101 (citations omitted); see also United States v. Forrest, 611 F.3d 908, 910-911 (8th Cir.) ("The Colorado Supreme Court has consistently held that 'the gravamen of the offense of robbery is the violent nature of the taking.'"), cert. denied, 562 U.S. 1053 (2010). For that reason, the court of appeals concluded that robbery by "force" in Colorado categorically satisfies the elements clause. But because the Colorado statute also covers robbery committed by threats or intimidation, and because a court confronting a statute worded in this way must ask whether the "minimum conduct criminalized by the state statute" satisfies the elements clause, Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013); see Pet. App. A7, the court also addressed whether robbery by threats or intimidation satisfies the elements clause, and concluded it did. Pet. App. A18-19 (discussing People v. Jenkins, 599 P.2d 912, 913-914 (Colo. 1979) (holding that robbery by threat or intimidation "is a crime involving the use of 'force or violence'")).

Judge Ebel concurred separately, agreeing that robbery by the use of force under Colorado law satisfies the elements clause but suggesting that the majority need not have reached the question

whether robbery by threats or intimidation qualifies because petitioner "never ma[d]e[] any argument on appeal implicating either of those two means of committing robbery in Colorado." Pet. App. A24.

ARGUMENT

Petitioner contends (Pet. 7-27) that his prior Colorado robbery conviction does not qualify as a violent felony under the ACCA's elements clause because it does not have as an element the use, attempted use, or threatened use of "physical force" as this Court defined that term in Curtis Johnson v. United States, 559 U.S. 133 (2010). Contrary to petitioner's arguments, the court of appeals correctly concluded that petitioner qualified as an armed career criminal and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review of this case is not warranted.

1. The court of appeals correctly held that petitioner's conviction under Colorado's robbery statute, Colo. Rev. Stat. § 18-4-301(1), categorically qualified as a "violent felony" under the ACCA's elements clause. As the court explained, the elements clause's reference to "physical force" means "violent force -- that is, force capable of causing physical pain or injury to another person." Pet. App. A8 (citation omitted). The Colorado robbery statute satisfies that standard because the Colorado Supreme Court has held that "robbery in Colorado requires a

'violent taking.'" Id. at A14 (citing People v. Borghesi, 66 P.3d 93, 101 n.12 (Colo. 2003)). "[I]t is the 'violence' that distinguishes common law larceny from robbery." Id. at A12-A13; see United States v. Forrest, 611 F.3d 908, 910-911 (8th Cir.) ("The Colorado Supreme Court has consistently held that 'the gravamen of the offense of robbery is the violent nature of the taking.'"), cert denied, 562 U.S. 1053 (2010).

Petitioner argues (Pet. 8-12) that "[t]he minimum conduct required to commit common law robbery, both traditionally and in Colorado, does not meet Curtis Johnson's 'violent force' standard." Pet. App. 8. But the Colorado Supreme Court rejected petitioner's proposed understanding of "traditional" common law robbery in Borghesi, where it concluded that the "gravamen of the offense of robbery is the violent nature of the taking." 66 P.3d at 100. The court of appeals correctly declined petitioner's invitation to ignore that explicit determination as to the requirements of Colorado state law. See Pet. App. A14 ("[Petitioner] argues that we should not take the Colorado Supreme Court at its word -- for it might not have meant 'violent' when it said 'violent.'").

Petitioner acknowledges (Pet. 12) that "all common law robberies are 'violent,'" but argues that that term is used "in a very specialized sense" that includes simple-touching-type force that would not be considered violent under Curtis Johnson. Once

again, however, the Colorado Supreme Court has held otherwise, explaining that, in its view, common law robbery in Colorado focuses on "the assaultive nature of the crime." Pet. App. A14. The court of appeals correctly accepted the Colorado Supreme Court's interpretation of Colorado law and, for that reason, declined to follow decisions from other circuits concluding that other state robbery statutes do not define a violent felony. See id. A15 (noting that, in United States v. Parnell, 818 F.3d 974 (2016), the Ninth Circuit held that Massachusetts robbery does not satisfy the elements clause because that state's robbery statute did not require "violence or intimidation of any sort").

As petitioner notes, at common law, "any struggle for possession of the property between the criminal and the victim constituted 'violence' sufficient to render the taking a robbery," and even in the absence of a struggle, the snatching of an article likewise qualified as robbery if the article was attached to the person "as to create resistance." Pet. 10-11 (citations and internal quotation marks omitted). Because the Colorado robbery statute at issue reaches those acts, the statute requires force "capable of causing physical pain or injury." Curtis Johnson, 559 U.S. at 140. Other courts of appeals agree that a state robbery statute that follows the common law requirement that the robber overcome the victim's resistance requires sufficient force to

satisfy Curtis Johnson. E.g., United States v. Armour, 840 F.3d 904, 909 (7th Cir. 2016).

2. Petitioner contends (Pet. 20-28) that the lower courts are divided concerning the degree of force required under a state robbery statute to satisfy the elements clause. The division petitioner identifies springs not from any misunderstanding about the meaning of "physical force" under Curtis Johnson, but from differences in the understanding of how different States define robbery. Some courts of appeals have interpreted state law to follow the minority common law 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 common law robbery); United States v. Gardner, 823 F.3d 793, 803 (4th Cir. 2016) (North Carolina common law robbery); United States v. Bell, 840 F.3d 963, 964-967 (8th Cir. 2016) (Missouri robbery); United States v. Parnell, 818 F.3d 974, 979-980 (9th Cir. 2016) (Massachusetts robbery). In other cases -- including petitioner's own case -- the court of appeals has concluded 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. 2017) (Ohio armed robbery); United States v. Doctor, 842 F.3d 306, 311-312 (4th Cir. 2016) (South Carolina robbery), cert. denied, No. 16-8435 (Apr. 24, 2017); United States v. Fritts, 841 F.3d 937, 942-944 (11th Cir. 2016) (Florida robbery).

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 "physical force" under Curtis Johnson, see, e.g., United States v. Mulkern, 854 F.3d 87, 93-93 (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., Doctor, 842 F.3d at 311-312 (South Carolina robbery); United States v. Duncan, 833 F.3d 751, 755 (7th Cir. 2016) (Indiana robbery); United States v. Seabrooks, 839 F.3d 1326, 1343-1344 (11th Cir 2016) (Florida robbery), petition for cert. pending, No. 16-8072 (filed Feb. 16, 2017); United States v. Priddy, 808 F.3d 676, 686 (6th Cir. 2015) (Tennessee robbery). The fact that courts have parsed various States' laws to incorporate different requirements for their

robbery statutes presents no conflict meriting this Court's review. Cf. Winston, 850 F.3d at 686 ("The state courts of Virginia and North Carolina are free to define common law robbery in their respective jurisdictions in a manner different from that employed by federal courts in construing a federal statute.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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