NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

KENNETH ROY CONDE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW
QUESTION PRESENTED

Is a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" categorically a "violent felony" under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i)(an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Kenneth Roy Conde respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion affirming Mr. Conde's enhanced ACCA sentence, *United States v. Conde*, __ Fed. Appx. ___, 2017 WL 1485021 (11th Cir. April 26, 2017) is included in the Appendix at A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming Mr. Conde's sentence was entered on April 26, 2017. Mr. Conde sought, and the Court granted, a 30-day extension of the time until August 24th for filing a petition for writ of certiorari. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

> **(e)(2)** As used in this subsection – . . .
>
> > **(B)** the term 'violent felony' means 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.

Fla. Stat. § 812.13. Robbery (1997)

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear. ...
>
> (3)(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

STATEMENT OF THE CASE

The Charges and Plea

On January 13, 2015, Kenneth Conde was charged by information with being a previously convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §922(g)(1) and §924(e)(1). On February 27, 2015, Mr. Conde pled guilty to that charge. The court set the case for sentencing after *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015), which struck down the ACCA's residual clause as unconstitutionally vague.

The PSI and Sentencing

Prior to sentencing, Mr. Conde's probation officer opined that he was subject to enhanced sentencing as an Armed Career Criminal under 18 U.S.C. § 924(e) because his three 1992 Florida robbery convictions remained qualifying "violent felonies" within the ACCA's elements clause. Accordingly, the probation officer recommended that pursuant to U.S.S.G. § 4B1.4(b)(3)(A), Mr. Conde's otherwise-applicable Chapter 2 adjusted offense level of 26 under § 2K2.1, be increased to a level 34. With a 3-level reduction for acceptance of responsibility, his total recommended offense level was 31. At a Criminal History of VI, his recommended advisory guideline range as an Armed Career Criminal was 188-235 months imprisonment.

Mr. Conde objected to being sentenced as an Armed Career Criminal since his robbery convictions occurred prior to the Florida Supreme Court's decision in *Robinson v. State*, 692 So.2d 883 (Fla. 1987), which had clarified that victim

resistance was necessary to robbery and distinguished it from larceny. Prior to *Robinson*, he noted, several intermediate Florida appellate courts had held that a conviction for "robbery by force" was permissible upon proof of a mere "sudden snatching." Therefore, he argued, at the time of his conviction the offense did not categorically require the type of *violent* force necessary for an offense within the ACCA's elements clause according to *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010).

The government disagreed. In its view, *Robinson*'s interpretation of Fla. Stat. § 812.13(1) was "properly understood to say what the law had always been, that force to overcome the victim was always required, despite whether that decision was consistent with preexisting precedent."

Two days before Mr. Conde's sentencing, this Court handed down its decision in *Welch v. United States*, 136 S.Ct. 1257 (2016) recognizing that "reasonable jurists could debate" whether a pre-*Robinso*n Florida robbery categorically qualified as a "violent felony" without the ACCA's residual clause. The district court, however, found that *Welch* had not "changed" *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011), and that pursuant to *Lockley*, Mr. Conde qualified as an Armed Career Criminal. As such, the court sentenced Mr. Conde within the ACCA-enhanced guideline range, to a term of 204 months imprisonment, followed by a 3-year term of supervised release.

The Eleventh Circuit Appeal

On appeal, Mr. Conde argued that *Lockley* did not control his case since it involved a post-*Robinson* conviction. And, according to *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012), as well as the Florida appellate decisions discussed in *Welch*, *McNeill v. United States*, 563 U.S. 816 (2011), and this Court's precedents clarifying proper application of the categorical approach, he argued, his pre-*Robinson* conviction could have been for a mere snatching and did not qualify as a "violent felony" for that reason.

After he filed his brief so arguing, however, the Eleventh Circuit handed down its decision in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), holding that even a pre-*Robinson* robbery qualified as a "violent felony." Specifically, the Eleventh Circuit agreed with the government's position that *Robinson* had clarified what the Florida robbery statute "always meant" – which was that a Florida robbery conviction required victim resistance, and mere snatching "without resistance by the victim and the use of physical force to overcome the victim's resistance" did not constitute a robbery under § 812.13. Therefore, *Fritts* held, even a pre-*Robinson* Florida robbery was categorically a "violent felony." *Fritts*, 841 F.3d at 942-943. As such, the government urged the court to find that Mr. Conde's appeal had been "resolved" "definitively" by *Fritts*, which "specifically refuted" his arguments.

And that is precisely what the Eleventh Circuit found. On April 26, 2017, it issued an unpublished decision holding that a pre-*Robinson* robbery qualified as an

ACCA "violent felony" within the elements clause. *United States v. Conde*, ___ Fed. Appx. ___, 2017 WL 1485021 at **1-2 (11th Cir. April 26, 2017). It noted that it had previously concluded in *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016) that a post-*Robinson* robbery qualified as an ACCA violent felony based upon *Lockley*, but that in *Fritts* it concluded based upon another precedent, *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006) "alone," that even a pre-*Robinson* robbery so qualified as well. It explained:

> We further determined that *Lockley*, *Robinson*, and other Florida Supreme Court law supported the qualification of Florida armed robbery as a violent felony. *Id.* at 940-44. In response to the defendant's argument that, before the Florida Supreme Court's decision in *Robinson*, only the slightest force was sufficient to convict a defendant of Florida robbery, we pointed out that the *Robinson* Court had made clear that the § 812.13 robbery statute had never included a theft or taking by mere snatching because snatching was theft only and did not involve the force needed to sustain a robbery conviction under § 812.13(1). *Id.* at 942-43. In other words, Florida robbery has always required the "substantial degree of force" required by the ACCA's elements clause. *See Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 1271, 176 L.Ed.2d 1 (2010).
>
> The district court did not err by sentencing Conde as an armed career criminal based on his three 1992 Florida robbery convictions because Florida's robbery statute has always required violence beyond mere snatching, and, therefore, has as an element the use, attempted use, or threatened use of physical force against the person of another and qualifies as a violent felony under the elements clause of the ACCA.

Conde, 2017 WL 1485021 at *2.[1]

[1] This Court denied certiorari in both *Seabrooks* and *Fritts* on June 19, 2017.

REASON FOR GRANTING THE WRIT

The Circuits are in conflict over whether a conviction for a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" is categorically a "violent felony" under the ACCA, if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance.

The question of whether state robbery convictions necessarily have *violent* force "as an element" was not a pressing question for this Court when the ACCA's residual clause remained in existence. Many circuits, including the Eleventh, had easily concluded that the residual clause extended to categorically non-violent crimes due to the mere "risk" of physical injury during a robbery, or in its aftermath. In that vein, the Eleventh Circuit had held in *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012), that even a robbery by "sudden snatching," a crime which – by definition – requires no more force than that necessary to snatch money or an item from the victim's hand, and neither victim resistance nor injury, was nonetheless a "violent felony" and proper ACCA predicate within the residual clause because "[s]udden snatching ordinarily involves substantial risk of physical injury to the victim." *Id.* at 1313.

Once this Court eliminated the residual clause as the easiest route to an ACCA enhancement in *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015), however, lower courts have had to reconsider whether state robbery crimes – long counted as "violent felonies" within the residual clause, or within the elements clause before this Court clarified the meaning of "physical force" as "*violent* force" in *Curtis Johnson v. United States*, 559 U.S. 133, 141 (2010), or the categorical

approach in *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013); *Descamps v. United States*, 133 S.Ct. 2276 (2013): and *Mathis v. United States*, 136 S.Ct. 2243 (2016) – would qualify as "violent felonies" under these intervening precedents.

Some circuit courts have risen to that task. Unlike the Eleventh Circuit, they have carefully re-examined their prior elements clause robbery precedents; strictly applied the dictates of the now-clarified categorical approach; carefully conducted the now-mandated threshold "divisibility" inquiry, *Mathis*, 136 S.Ct. at 2256; sought out the state courts' interpretation of the elements of their robbery offenses as mandated by *Curtis Johnson*, 559 U.S. at 138, and *Mathis*, 136 S.Ct. at 2256; and determined the minimum conduct necessary for conviction as required by *Moncrieffe*, 133 S.Ct. at 1680. *See, e.g., United States v. Yates*, ___ F.3d ___, 2017 WL 3402084 at **4-7 (6th Cir. Aug. 9, 2017); *United States v. Gardner*, 823 F.3d 793, 801-804 (4th Cir. 2016); *United States v. Winston*, 850 F.3d 677, 682-686 (4th Cir. 2017); *United States v. Parnell*, 818 F.3d 974, 978-981 (9th Cir. 2016); *United States v. Redrick*, 841 F.3d 478, 484 (D.C. Cir. 2016).

Notably, after conducting a proper analysis under the now-clarified categorical approach, one circuit – the Fourth in both *Gardner* and *Winston* – has concluded that two different common law robbery offenses, both of which require overcoming "victim resistance," do ***not*** categorically require the *Curtis Johnson* level of "*violent* force." 130 S.Ct. at 141 (defining "*violent* force" as "force capable of causing physical pain or injury to another person," which is "a substantial degree of force;" the word "violent" connotes "strong physical force"). *See Gardner*, 823 F.3d

at 803 (North Carolina common law robbery "by violence" does not qualify as an ACCA "violent felony" because it is clear from North Carolina caselaw that *de minimis* contact with the victim was sufficient for conviction, and the degree of force used was "immaterial"); *Winston*, 850 F.3d at 684-685 (Virginia common law robbery by "violence" does not qualify as an ACCA "violent felony" because, as confirmed by Virginia appellate decisions, the minimum conduct sufficient to overcome resistance can be "slight;" thus, the offense does not require "violent force").

By contrast, the Eleventh Circuit – interpreting a statutory robbery offense based upon common law robbery, and which includes the same "resistance" element as the common law robbery offenses construed in the Fourth Circuit cases – has held (without reviewing ***any*** Florida appellate decisions) that simply ***because*** Florida robbery requires overcoming "victim resistance," the offense is categorically an ACCA violent felony. *See United States v. Seabrooks,* 839 F.3d 1326, 1340-1341, 1346, 1352 (11th Cir. 2016)(separate decisions by Hull, Baldock, and Martin, JJ.) (narrowly agreeing that Seabrooks' 1997 Florida robbery conviction was a "violent felony" according to *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) since Seabrooks' conviction post-dated the Florida Supreme Court's decision in *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997) which clarified that a Florida robbery offense requires overcoming victim resistance); *United States v. Fritts*, 841 F.3d 937, 940-944 (11th Cir. 2016) (following not only *Lockley* but its even earlier "precedent," *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), to hold that all Florida

robbery convictions, including those before *Robinson*, categorically qualify as ACCA "violent felonies" since *Robinson* clarified what the Florida robbery statute "always meant").

In both *Seabrooks* and *Fritts*, the appellants informed the Court in their briefing that Florida caselaw made clear that overcoming "resistance" did not require violent force in every case. They urged the Eleventh Circuit to specifically consider Florida decisions like *Sanders v. State*, 769 So.2d 506, 507-508 (Fla. 5th DCA 2000) which confirmed *violent* force was not necessary to overcome resistance where the resistance itself was slight. *See, e.g*, Reply Brief of the Appellant in *United States v. Seabrooks*, 2016 WL 137 *See, e.g.*5906 at **14-15 (11th Cir. March 4, 2016); Reply Brief of the Appellant in *United States v. Fritts*, 2016 WL 3136766 at *18 (11th Cir. June 2, 2016).

Both Seabrooks and Fritts argued that the analysis in *Lockley* and *Dowd* had been abrogated by this Court's intervening precedents in *Descamps*, *Moncrieffe*, and *Mathis*. But in *Seabrooks*, the Eleventh Circuit reflexively adhered to its prior precedent in *Lockley*, and ignored the appellant's argument that *Lockley's* analysis had not survived the Court's clarification of the categorical approach in *Moncrieffe*, *Descamps*, and *Mathis*. And thereafter in *Fritts*, the Eleventh Circuit not only followed *Lockley*, but *Dowd*, which had demonstrably misapplied the "modified categorical approach" and contained no other analysis. In *Seabrooks* and *Fritts*, the Eleventh Circuit steadfastly refused to review ***any*** Florida caselaw – deferring completely to its prior precedents in *Lockley* and *Dowd* which preceded *Moncrieffe*,

and did not consult Florida law to determine the least culpable conduct for conviction.

In this regard, the Tenth Circuit has aligned itself with the Eleventh Circuit. Indeed, in construing the offense of Colorado statutory robbery – which like Florida statutory robbery – is based upon common law robbery, the Tenth Circuit chose to defer to a dictionary definition of "violence" instead of surveying the relevant Colorado appellate caselaw to determine the least culpable conduct under the statute. *See United States v. Harris*, 844 F.3d 1260, 1266-1268 (10th Cir. 2017)(acknowledging that "Colorado remains committed to the common law definition of robbery," but finding Colorado statutory robbery remains an ACCA "violent felony" due to the Colorado Supreme Court's statement that "there can be no robbery without violence, and there can be no larceny with it;" finding the dictionary's definition of "violent" dispositive, rather than surveying the true meaning of "violence" according to Colorado appellate court decisions), *pet. for cert. filed* April 4, 2017 (No. 16-8616).

At the Sixth Circuit has just aligned itself with the Fourth, in holding that the Ohio statutory robbery offense does not qualify as an ACCA violent felony, given Ohio appellate decisions confirming that a robbery by "use of force" under the statute can be accomplished by the minimal amount of force necessary to snatch a purse involuntarily from an individual, or simply "bumping into an individual." *Yates*, 2017 WL 3402084 at *6 (noting accord with the Fourth Circuit in *Gardner*,

823 F.3d at 803-804, where "even minimal contact may be sufficient to sustain a robbery conviction if the victim forfeits his or her property in response.")

As such, the decisions of these four circuits are in direct conflict at this time.[2] For the following reasons, that conflict is intractable, untenable, and potentially far-reaching. It should be resolved by the Court forthwith.

A. The common law roots of the "overcoming resistance" requirement

Florida, like the majority of states, permits a conviction for robbery based on the use of force so long as the degree of force used is sufficient to overcome a victim's resistance. *See Robinson v. State*, 692 So. 2d 883 (Fla. 1997). Although at least fifteen states have now expressly included some variation of this standard in the text of their statutes,[3] many others (including Florida, North Carolina, Virginia, Colorado, and Ohio) have judicially recognized an "overcoming resistance" element through their caselaw.[4]

[2] Until June 17th of this year, the decisions of the Tenth and Eleventh Circuits also conflicted with the Eighth Circuit's decisions in *United States v. Bell*, 840 F.3d 963, 965-967 (8th Cir. 2016) (holding that Missouri second degree robbery was not a "crime of violence" under the Guidelines), and *United States v. Swopes*, 850 F.3d 979, 981 (8th Cir. 2017)(following *Bell* to conclude that such a crime was likewise not a "violent felony" under the ACCA). However, on June 17th, the Eighth Circuit vacated *Swopes* and set that case for rehearing en banc.

[3] *See* Ala. Code § 13A-8-43(a)(1); Alaska Stat. § 11.41.510(a)(1); Ariz. Rev. Stat. §§ 13-1901, 1902; Conn. Gen. Stat. § 53a-133(1); Del. Code Ann. tit. 11, § 831(a)(1); Haw. Rev. Stat. § 708-841(1)(a); Me. Rev. Stat. tit. 17-A, § 651(1)(B)(1); Minn. Stat. § 609.24; Mo. Rev. Stat. §§ 570.010(13), 570.025(1); Nev. Stat. § 200.380(1)(b); N.Y.Penal Law § 160.00(1); Okla. Stat. tit. 21, §§ 791, 792, 793; Or. Rev. Stat. § 164.395(1)(a); Wash. Rev. Code § 9A.56.190; Wis. Stat. § 943.32(1)(a).

[4] *See, e.g., Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989); *State v. Stecker*, 108 N.W2d 47, 50 (S.D. 1961); *State v. Robertson*, 740 A.2d 330, 334 (R.I.

Notably, this widely-applied requirement of "victim resistance" in state robbery offenses, has deep roots in the common law. Common law robbery had an element labeled "violence." *See* 2 Joel Prentis Bishop, *Commentaries on the Criminal Law* § 966 (2nd ed. 1858) (defining robbery as "larceny committed by violence"); 4 William Blackstone, *Commentaries on the Laws of England* 241 (1st ed. 1765) ("Larciny from the person is either by privately stealing; or by open and violent assault, which is usually called robbery."); 3 Edward Coke, *Institutes of the Laws of England* 68 (1629) (explaining that robbery is a common law felony in which property is taken "by a violent assault"). It was sometimes said that robbery was a larceny committed "by violence *or* putting in fear." *E.g.*, 2 Edward Hyde East, *Pleas of the Crown* 707 (2d ed. 1806) (emphasis added). Although the "sudden taking of a thing unawares from the person," without more, did not involve "violence" and so was mere larceny, not robbery, *id.* at 708, as LaFave has noted, the difference between the two offenses was, in reality, a "fine distinction[]"; "[t]he line between robbery and larceny from the person (between violence and lack of violence)" was "not always easy to draw." 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.3 (2d ed. 2016).

Nonetheless, the term "violence" did ***not*** imply a "substantial degree of force" at common law. *See Mahoney v. People*, 48 How. Pr. 185, 189 (N.Y. 1874) ("it is not

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1999); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. 1997); *West v. State*, 539 A.2d 231, 234 (Md. 1998); *State v. Blunt*, 193 N.W.2d 434, 435 (Neb. 1972); *State v. Sein*, 590 A.2d 665, 668 (N.J. 1991); *Winn v. Commonwealth*, 462 S.E.2d 911, 913 (Va. 1995); *People v. Davis*, 935 P.2d 79, 84 (Colo. App. 1996); *State v. Robertson*, 531 S.E.2d 490 (N.C. Ct. App. 2000); *State v. Juhasz*, 2015 WL 5515826 at *2 (Ohio Ct. App. 2015).

the extent and degree of force which make the crime, but the success thereof.") *see also State v. Parsons*, 87 P. 349, 351 (Wash. 1906) ("[T]he degree of force used was *immaterial* as long as it was sufficient to compel the prosecuting witness to part with his property.")(Emphasis added).

The law d[id] not require that one be beaten before he submitted to the robbery to constitute the offense." *Gordon v. State*, 187 S.W. 913, 915 (Ark. 1916). No bodily injury or threat of bodily injury was necessary. Rather, it was "sufficient that so much force ... be used as might ... oblige a man to part with his property without or against his consent." 4 Blackstone, *Commentaries* 242.

As such, two recurring fact patterns defined the boundaries of "violence" for purposes of common law robbery.

First, any "struggle for possession of the property" between the criminal and the victim constituted "violence" sufficient to render the taking a robbery. 2 East, *Pleas of the Crown* 708; 2 William Russell, *Crimes and Indictable Offenses* 68 (2d ed. 1828); *State v. Trexler*, 4 N.C. 188, 192-93 (N.C. 1815). For example, in *Davies' Case* (Old Bailey, 1712), the court held that an offense was robbery (not merely larceny) where the defendant tried to surreptitiously snatch a sword from a gentleman's side, but "the gentleman perceived" the effort and "himself laid hold of [the sword] at the same time and struggled for it" before the defendant obtained possession. John Rood, *A Digest of Important Cases on the Law of Crimes* § 149 (1906). Similarly, in *Williams v. Commonwealth*, 50 S.W. 240, 240 (Ky. 1899), the court explicitly applying the common law of robbery, upheld a robbery conviction against

the defendant's contention that he only committed a larceny where the defendant "wrenched [a] pocketbook out of [the victim's] left hand" and obtained possession because he was "stronger" than she was. The court explained: "It is not necessary that a blow should be struck or the party be injured, to be a violent taking; but if the robber overcomes resistance by force, he is guilty." *Id.* at 241; *see also* William Clark & William Marshall, *A Treatise on the Law of Crimes* 553 (2d ed. 1905) ("[I]f the victim] resists the attempt to rob him, and his resistance is overcome, there is sufficient violence to make the taking robbery, however slight the resistance." (citing *Davies' Case*)).

Second, even in the absence of a struggle between the parties, the "snatching" of an article "constitute[d] robbery" at common law if "the article [wa]s so attached to the person or clothes as to create resistance, however slight." 2 Bishop, *Commentaries* § 968; *accord* 1 William Odgers, *The Common Law of England* 333 (2d ed. 1920). For this proposition, Bishop and Odgers cite *Rex v. Mason*, 168 Eng. Rep. 876, 876 (1820), in which the theft of a watch was deemed a robbery because the defendant used "actual force" to break a chain that had been holding the watch around the victim's neck and thereby "overc[a]me the resistance" created by the chain. Early American common law cases explicitly followed (and arguably extended) *Mason*. For example, in *State v. McCune*, 5 R.I. 60 (1857), the court held that a defendant "used violence" sufficient to sustain a robbery conviction when he pulled and broke "a silk ribbon" holding a watch around the victim's neck. *Id.* At 61-62 (citing *Mason*). And in *State v. Broderick*, 59 Mo. 318 (1875), the court held

that "[t[he violence used was sufficient" to sustain a robbery conviction where the defendant stole a watch chain by "seizing [it]" and "br[ea]k[ing] it loose from the watch and the button hole" to which it was attached. *Id.* At 319-21 (citing *Mason*).

Thus, all common law robberies were "violent," but in a very specialized sense of that word. The prosecutor did not need to show that the defendant caused or threatened to cause pain or injury or otherwise used force that was "substantial," "strong," or "extreme," as *Curtis Johnson* requires. 559 U.S. at 140-41. Indeed, courts and commentators often describe robbery as "a battery plus larceny." 4 *Wharton's Criminal Law* § 454; *see* 3 LaFave, *Substantive Criminal Law* § 20.3 ("Since it is a battery to administer a drug to an unsuspecting victim, it seems clear that such conduct is 'force' which will do for robbery." (citation omitted)); *Morris v. State*, 993 A.2d 716, 735 (Md. Ct. Spec. App. 2010) ("Robbery is a larceny from the person accomplished by either an assault (putting in fear) or a battery (violence)."). And this Court was clear in *Curtis Johnson* that a simple battery does not require the use of physical force within the meaning of § 924(e)(2)(B)(i). 559 U.S. at 139-40. Common law battery is not a violent felony.

The Florida appellate courts, notably, have long recognized that the unarmed robbery offense originally described in Fla. Stat. § 812.13(1) ***was*** common law robbery. *See Montsdoca v. State*, 84 Fla. 82, 86 (1922) (reiterating the common law rules that "[t]here can be no robbery without violence, and there can be no larceny with it," and that "the degree of force used is immaterial"); *State v. Royal*, 490 So.2d 44, 45-46 (Fla. 1986) (acknowledging that "the common law definition of robbery"

was "set forth in subsection (1)). As the Florida Supreme Court expressly recognized in *Royal*, the requirement in § 812.13(1) that the taking be by "force, violence, assault, or putting in fear" not only derived from the common law, but the Court had thereafter interpreted that provision "consistent with the common law." *Id.* at 46 (citing *Williams v. Mayo*, 126 Fla. 871, 875, 172 So. 86, 87 (1937)).

The only change to the common law robbery offense incorporated into that statutory provision occurred immediately after – and in response to – *Royal*, when the Florida Legislature broadened the statutory offense to include the use of "force" not only during a taking, but after it as well. *See, e.g., Foster v. State*, 596 So.2d 1099, 1107-1108 (Fla. 5th DCA 1992). Other than that, however, there has been no change to the underlying "common law definition of robbery set forth in subsection (1)," *Royal*, 490 So.2d at 46, to this day.

While the Eleventh Circuit has never acknowledged in its precedential robbery decisions (*Dowd, Lockley, Seabrooks,* or *Fritts*) that the unarmed robbery offense in Florida *is* essentially common law robbery, the Tenth Circuit in *Harris* did at least acknowledge that "Colorado remains committed to the common law definition of robbery," and defines the required the amount of force "consistent with the common law." *Harris,* 844 F.3d at 1267, 1270. It should have followed from that, and careful review of Colorado caselaw, that Colorado robbery is not a violent felony. *See, e.g., People v. Davis*, 935 P.2d 79, 84 (Colo. App. 1996) (holding as a matter of first impression that a purse snatching satisfied the "overcoming

resistance" requirement of robbery, if the force was "of an extent that the victim is unable to retain control;" citing other state decisions holding similarly).

But like the Eleventh Circuit in *Fritts*, the Tenth Circuit in *Harris* refused to even consider the significance of *Davis'* facts or holding, given the Colorado Supreme Court's subsequent decision in *People v. Borghesi*, 66 P.3d 93, 99 (Colo. 2003) stating that "the gavamen of the offense of robbery is the *violent* nature of the taking." *Harris*, 844 F.3d at 1267 (emphasis added). Rather than delve beneath the surface of that statement in *Borghesi*, and recognize that "violence" was simply a common law term of art with a unique meaning, the Tenth Circuit summarily rejected the defendant's argument that the Colorado Supreme Court might not have meant "violent" when it used the term "violence." Rather than deferring to *Davis*, as *Moncrieffe* and *Mathis* dictate, the Tenth Circuit deferred to the dictionary definition of "violent." *Id.*

Had the Tenth and Eleventh Circuits strictly applied the categorical approach as it has been clarified by this Court's recent precedents, and had the Tenth and Eleventh Circuits carefully analyzed the relevant state appellate caselaw as the Fourth Circuit did in *Gardner* and *Winston*, they would have concluded that neither Colorado robbery nor Florida robbery are categorically violent felonies under the ACCA.

B. The Tenth and Eleventh Circuits are in direct conflict with the Fourth and Sixth Circuits as to whether "overcoming resistance" categorically requires "*violent* force."

In *Gardner*, the Fourth Circuit held that the offense of common law robbery by "violence" in North Carolina did not qualify as a "violent felony" under the ACCA's elements clause because it did not categorically require the use of "physical force." 823 F.3d at 803-804. In reaching that conclusion, the Fourth Circuit did not simply rely upon the common law principles set forth *supra*. Rather, consistent with the categorical approach as clarified by this Court in *Moncrieffe*, *Descamps*, and *Mathis*, the court thoroughly reviewed North Carolina appellate law to determine the least culpable conduct for a North Carolina common law robbery conviction. And notably, it was only after its thorough survey of North Carolina law, that the Fourth Circuit concluded that a North Carolina common law robbery by means of "violence" may be committed by any force "sufficient to compel a victim to part with his property," and that "'[t]he degree of force used is immaterial.'" *Id.* (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)). In fact, the Fourth Circuit noted, *Sawyer*'s definition "suggests that even *de minimis* contact can constitute the 'violence' necessary for a common law robbery conviction under North Carolina law." *Id.* (emphasis in original).

The Fourth Circuit discussed two supportive North Carolina appellate decisions in detail. *Id.* (discussing *State v. Chance*, 662 S.E.2d 405 (N.C. Ct. App. 2008), and *State v. Eldridge*, 677 S.E.2d 14 (N.C. Ct. App. 2009)). In *Chance*, the Fourth Circuit noted, a North Carolina court had upheld a robbery conviction where

the defendant simply pushed the victim's hand off a carton of cigarettes; that was sufficient "actual force." And in *Eldridge*, a different court upheld a robbery conviction where a defendant merely pushed the shoulder of a store clerk, causing her to fall onto shelves while the defendant took possession of a TV. Based on those decisions, the Fourth Circuit concluded that "the minimum conduct necessary to sustain a conviction for North Carolina common law robbery" does not necessarily require "physical force," and that the offense does not categorically qualify as a "violent felony" under the elements clause. *Id.*[5]

Thereafter in *Winston*, the Fourth Circuit held that a conviction for Virginia common law robbery, which may be committed by either "violence or intimidation," does not qualify as a "violent felony" within the ACCA's elements clause since – as confirmed by Virginia caselaw – such an offense can be committed by only slight, non-violent force. *Id.* at 685.

The Fourth Circuit acknowledged in *Winston* that prior to *Curtis Johnson*, it had held that a Virginia common law robbery conviction qualified as a "violent felony" within the elements clause. However, citing *Gardner*, the Fourth Circuit

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[5] Although the Fourth Circuit did not discuss *State v. Robertson*, 531 S.E.2d 490 (N.C. Ct. App. 2000) in *Gardner*, the government had discussed *Robertson* in in its *Gardner* brief, and had correctly described *Robertson* as holding that mere "purse snatching" does not involve sufficient force for a common law robbery conviction in North Carolina. Brief of the United States in *United States v. Gardner*, No. 14-4533 at 46-49, 53 (4th Cir. Aug. 21, 2015). *Robertson* had expressly recognized that North Carolina followed "'[t] rule prevailing in most jurisdictions" that "'the force used . . . must be of such a nature as to show that it was intended to *overpower the party robbed or prevent his resisting, and not merely to get possession of the property stolen*.'" *Id.* at 509 (quoting *State v. John*, 50 N.C. 163, 169 (1857)(emphasis added by *Robertson*)). The Fourth Circuit in *Gardner* was undoubtedly aware from *Robertson* that North Carolina robbery required overcoming victim resistance.

rightly found that such precedent was no longer controlling after (1) this Court in *Curtis Johnson* not only redefined "physical force" as "violent force" but made clear that federal courts applying the categorical approach were bound by the state courts' interpretation of their own offenses, and (2) in *Moncrieffe* "instructed that we must focus on the 'minimum conduct criminalized' by state law." *Id.* at 684.

Consistent with these intervening precedents, the Fourth Circuit carefully examined for the first time in *Winston* how the Virginia state courts interpreted a robbery "by violence or intimidation." While noting that its prior decision in *Gardner* was "persuasive," the Fourth Circuit rightly acknowledged that its "conclusion that North Carolina robbery does not qualify as a violent felony" did not itself "compel a similar holding in the present case;" because it was required to "defer to the [Virginia] courts' interpretations of their own [] common law offenses." *Winston*, 850 F.3d at 685 n. 6.

Accordingly, as it had done in *Gardner*, the Fourth Circuit undertook a thorough survey of Virginia appellate decisions on common law robbery. *See id.* at 684-685 (discussing in particular, and finding significant: *Maxwell v. Commonwealth*, 165 Va. 860, 183 S.E. 452, 454 (1936); *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487, at * 3 (Va. Ct. App. Dec. 12, 2000) (unpublished); and *Jones v. Commonwealth*, 26 Va. App. 736, 496 S.E.2nd 668, 670 (1998)). Citing these three decisions, the Fourth Circuit concluded that a Virginia common law robbery "by violence" requires only a "'slight' degree of violence;" that "anything which calls out resistance is sufficient;" and "such

resistance by the victim does not necessarily reflect use of 'violent force.'" *Winston*, 850 F.3d at 684-685. And therefore, the Fourth Circuit expressly rejected the precise assumption made by the Eleventh Circuit in both *Seabrooks* and *Fritts*, without considering a single Florida decision: namely, that force sufficient to overcome resistance in Florida necessarily involves *violent* force. *Winston, id.* at 683. To the contrary, the Fourth Circuit held, the "minimum conduct necessary to sustain a conviction for Virginia common law robbery does not necessarily include [] 'violent force.'" *Id.* at 685.

In the recent *Yates* case, the Sixth Circuit similarly concluded that an Ohio statutory robbery "by force" covered "more than force 'capable of causing pain or injury to another person,'" since several Ohio robbery convictions had been affirmed by the Ohio appellate courts where the force applied by the defendant was demonstrably "lower than the type of violent force required by [*Curtis*] *Johnson*." 2017 WL 3402084 at *4. For instance, the Sixth Circuit noted, in *State v. Carter*, 29 Ohio App.3d 148, 504 N.E.2d 469 (1985), a purse snatching case, the court affirmed a robbery conviction where the victim simply had a firm grasp of her purse, the defendant pulled it from her, and then pulled her right hand off her left hand where she was holding the bottom of the purse. *Id.* at 470-471(explaining that this simple incident involved the requisite degree of actual force, "*however miniscule*" to constitute a robbery; citing as support *State v. Grant*, 1981 WL 4576 at *2 (Ohio Ct. App. Oct. 22, 1981), which had held that a mere "bump is an act of violence" within

the meaning of the robbery statute, "even though only mildly violent, as the statute does not require a high degree of violence").

In another Ohio purse snatching case, *In re Boggess*, 205 WL 3344502 (Ohio Ct. App. 2005), the Sixth Circuit noted, the appellate court had clarified that the "force" requirement in the Ohio robbery statute would be satisfied so long as the offender "physically exerted force upon the victim's arm so as to remove the purse from her *involuntarily*." *Id.* at *3 (emphasis added). In *Boggess*, the defendant simply grabbed the victim's purse, then jerked her arm back, and kept running." *Id.* at *1. In *State v. Juhasz*, 2015 WL 5515826 (Ohio Ct. App. 2015), an Ohio court confirmed that so long as there was "a *struggle* over control of an individual's purse" in any degree, that would be sufficient to establish the "element of force" in the statute. The "struggle need not be prolonged or active; the act of forcibly removing a purse from an individual's shoulder is sufficient." *Id.* at *2. While the *Juhasz* court did not specifically discuss the common law roots of the "struggle" concept in the Ohio robbery caselaw, as discussed *supra*, that is a concept that derives directly from the common law.

Based upon the Ohio caselaw highlighted in *Yates*, the Sixth Circuit found a "realistic probability" that Ohio applied its robbery statute "in such a way that criminalizes a level of force lower than the type of force required by [*Curtis*] *Johnson*." 2017 WL 3402084 at * 5 (citing *Moncrieffe*, 133 S.Ct. at 1684). And notably, Florida caselaw – like North Carolina, Virginia, and Ohio caselaw – likewise confirms that *violent* force is ***not*** necessary to overcome victim resistance,

and commit a robbery under Fla. Stat. § 812.13(1) either. Like the North Carolina common law robbery offense addressed in *Gardner*, the Virginia common law robbery offense addressed in *Winston*, and the Ohio statutory robbery offense addressed in *Yates*, a Florida statutory robbery may also be committed by the minimal force sufficient to overcome a victim's minimal resistance. Indeed, a simple survey of Florida's own appellate law (consistently ignored by the Eleventh Circuit) easily confirms this point.

In *Johnson v. State*, 612 So.2d 689 (Fla. 1st DCA 1993), a Florida appellate court found force sufficient to tear a scab off a victim's finger was enough to sustain conviction for robbery. *Id.* at 690. In *Sanders v. State*, 769 So. 2d 506 (Fla. 5th DCA 2000), another Florida appellate court affirmed a strongarm robbery conviction where the defendant merely peeled back the victim's fingers before snatching money from his hand. The court explained that the victim's "clutching of his bills in his fist as Sanders pried his fingers open could have been viewed by the jury as an act of resistance against being robbed by Sanders," thus confirming that no more resistance, or "force" than that was necessary for a strongarm robbery conviction under § 812.13(1)). *Id.* at 507-508. In *Hayes v. State*, 780 So.2d 918, 919 (Fla. 1st DCA 2001), a Florida court upheld a conviction for robbery by force based upon testimony of the victim "that her assailant 'bumped' her from behind with his shoulder and probably would have caused her to fall to the ground but for the fact that she was in between rows of cars when the robbery occurred," and did not fall. And most recently, in *Benitez -Saldana v. State*, 67 So.3d 320 (Fla. 2nd DCA 2011),

a final Florida appellate court decisively rejected a defendant's argument that actual "violence" was necessary for a strongarm robbery conviction in Florida, and that his act of "engaging in a tug-of-war over the victim's purse" could not constitute robbery because it "was not done with violence or the threat of violence." That simple act of "tugging," the court held, was sufficient to prove "the use of force to overcome the victim's resistance." *Id.* at 323.

Had the Fourth Circuit heard Mr. Conde's case, and specifically considered this Florida caselaw, it would have found that like the robbery offense in *Gardner*, Florida robbery may be committed by using only a *de minimis* degree force, and therefore does not categorically require the use of "physical force." It has always been the law in Florida (as in North Carolina) that the degree of force is "immaterial." *Montsdoca v. State*, 93 So.157, 159 (Fla. 1922). And, as the Fourth Circuit recognized in *Gardner*, a standard requiring that force overcome resistance, but reaffirming that the degree of force used is "immaterial," suggests that so long as a victim's resistance is slight, a defendant need only use *de minimis* force to commit a robbery. The standards in *Sawyer* and *Montsdoca* are similarly worded and functionally indistinguishable.

Plainly, the act of peeling back the victim's fingers in *Sanders* is functionally equivalent to the act of pushing away the victim's hand in *Chance.* Both acts allowed the defendants to overcome the victim's resistance and remove the cigarettes (in *Chance*) and the cash (in *Sanders*) from the victim's grasp. But neither act rises to the level of "*violent* force' required by *Curtis Johnson.* And

plainly, the "bump" in *Hayes* is indistinguishable from the "bump" in *Grant*, and the "push" in *Eldridge*. If anything, the "push" in *Eldridge* was more forceful in that it caused the victim to fall onto shelves, while the victims in *Hayes* and *Grant* did not even fall.

Moreover, the "bump" in *Hayes* appears to involve even less than the "extent of resistance" in *Jones* – which was the defendant's "jerking" of the victim's purse, which caused her to "turn and face" the defendant, but was not strong enough to cause the victim to fall down. *Winston*, 850 F.3d at 685 (citing *Jones*, 496 S.E. 2nd at 669-670). And while the purse snatching accompanied by the jerking of the victim's arm in the Ohio *Boggess* case is analogous to the purse snatching that the Fourth Circuit found insufficiently violent in *Jones*, Florida law notably suggests that something even less than either a "bump" or the "jerking" of the victim's arm during a purse snatching – namely, such *de minimis* conduct as simply "jostling" a victim during a pickpocketing, *see Rigell v. State*, 782 So.2d 440, 442 (Fla. 4th DCA 2001)(approving LaFave's example) – will constitute sufficient "force" to "overcome resistance," take a person's property, and seal a Florida robbery conviction.

Reading *Montsdoca* as the Fourth Circuit read *Sawyer*, and consulting the pertinent Florida caselaw here, the Court should come to the same conclusion as the Fourth Circuit did in both *Gardner* and *Winston*, and the Sixth Circuit did in *Yates*. It should hold, specifically, that a Florida statutory robbery – despite the fact that it necessitates overcoming some "victim resistance" – does not categorically require

the use of "*violent* force" to do so in every case. Such an offense therefore falls outside the ACCA's elements clause.

C. The circuit conflict is intractable and untenable. It is prejudicing Tenth and Eleventh Circuit defendants, and should be resolved

In a series of recent decisions since *Fritts*, the Eleventh Circuit – which applies its "prior panel precedent rule" more rigidly than any other circuit in this country[6] – has adhered rigidly to *Fritts*. Not only in Mr. Conde's case, but in multiple other cases as well, the Eleventh Circuit continues to affirm ACCA sentences predicated upon Florida robberies based upon *Fritts*. *See, e.g.*, *United States v. Hughes*, ___ Fed. Appx. ___, 2017 WL 2471207 (11th Cir. June 8, 2017); *United States v. Smith*, ___ Fed. Appx. ___, 2017 WL 2477356 at *2 (11th Cir. June 8, 2017); *United States v. Williams*, ___ Fed. Appx. ___, 2017 WL 2712964 at *2 (11th Cir. June 23, 2017); *United States v. Burke*, ___ F.3d ___, 2017 WL 3044623 (11th Cir. July 19, 2017); *United States v. Everette*, ___ F.3d ___, 2017 WL 3309732 (11th Cir. Aug. 3, 2017).[7]

In *Everette*, notably, the appellant filed a request for an initial en banc hearing with the hope that the Eleventh Circuit would reconsider *Fritts*' holding that all Florida robbery offenses categorically qualify as ACCA "violent felonies." But not one judge in active service on the court voted for en banc consideration, and

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[6] *See* the pending petition for writ of certiorari in *Warren Golden v. United States*, No. 17-5050, where certiorari has been sought on that basis.

[7] Certiorari will be sought in all of these cases. Certiorari has just been sought in another Eleventh Circuit case, *Denard Stokeling v. United States* (No. 17-5554), which raises the identical issue as the instant case.

Everette's request was summarily denied. *United States v. Everette*, Slip op. (11th Cir. July 31, 2017).

And indeed, after the Eleventh Circuit's recent order in *Bobby Jo Hardy v. United States*, Slip op. (11th Cir. Aug. 11, 2017), granting the government's motion for "summary affirmance" based upon *Fritts*, it now appears the government will not even have to file responsive briefs in Eleventh Circuit cases challenging ACCA enhancements predicated upon Florida robbery convictions. *See Hardy*, Slip op. at 3 (finding summary affirmance based upon *Fritts* "appropriate because the government is clearly right as a matter of law, and no substantial question exists as to the outcome of the case;" defendant's "convictions categorically qualify as 'violent felonies' under the ACCA based on *Fritts*, and any doubt about that conclusion was put to rest when the Supreme Court denied certiorari in that case").

With these recent decisions, the Eleventh Circuit has made undeniably clear that its conflict with the Fourth and Sixth Circuits is intractable. The Eleventh Circuit will not reconsider whether a Florida robbery offense categorically requires the *Curtis Johnson* level of *violent* force. And it is unlikely that the Tenth Circuit will reconsider whether a Colorado robbery, or any other common law robbery offense, is categorically an ACCA predicate either. The only hope for defendants in these circuits, plainly, is for this Court to grant certiorari to resolve this conflict once and for all. The instant case presents the Court with a perfect vehicle in which to do that. Nevertheless, if the Court believes that either another pending Eleventh Circuit case like *Stokeling*, or another circuit's case like *Harris* presents a better

vehicle for resolving the circuit conflict presented herein, Mr. Conde asks that the Court hold his case pending its resolution of the common issues these cases share.

CONCLUSION

Resolution of the elements clause questions raised by Mr. Conde will have far reaching impact not only for other Eleventh Circuit defendants, but for Tenth Circuit defendants as well. And potentially, it could impact defendants in other circuits with common law robbery convictions or statutory robbery convictions that are based on common law robbery. Until this Court definitively resolves the current circuit conflict on whether overcoming "victim resistance" categorically meets the ACCA elements clause, other circuits might follow *Fritts* or *Harris* and more defendants will be prejudiced.

The ACCA's elements clause, notably, is identical to the elements clause used in the Career Offender provision of the Guidelines, as well as in the commentary to the reentry guideline, U.S.S.G. § 2L2.1, comment. n. 2. And it is virtually identical to the elements clause in both 18 U.S.C. § 16(a), and in 18 U.S.C. 924(c)(3)(A). Therefore, the Court's resolution of the questions in this case will not only affect which robbery offenses are properly counted as "violent felonies" under the ACCA, and "crimes of violence" under the Guidelines, but potentially (depending upon the Court's resolution of the residual clause question in *Sessions v. Dimaya*, No. 15-1498 (argued Jan. 17, 2017)), which state robbery offenses will qualify as "aggravated felonies" pursuant to 8 U.S.C. 1101(a)(43)(F)(which incorporates the "crime of violence" definition in § 16). Indeed, the questions raised herein might

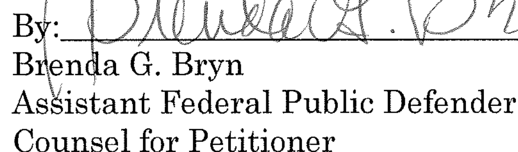
even impact whether federal robbery offenses such as Hobbs Act robbery in violation of 18 U.S.C. § 1951 qualify as § 924(c) predicates going forward. This case is an excellent vehicle for certiorari for these reasons as well.

Finally, in the three decades that have passed since Congress amended the ACCA to delete "robbery" and "burglary" as automatic ACCA predicates, replacing those two specific crimes with broader "violent felony" definitions designed to better target the most dangerous gun offenders, the Court has granted certiorari multiple times to determine whether state burglary offenses were proper ACCA predicates. It has never, however, considered an ACCA sentence predicated upon a state robbery offense. And the time has come to test the government's repeated assertions, accepted now by two circuits with little or no analysis, that *any* robbery offense that requires overcoming "victim resistance" is sufficiently dangerous that it deserves enhanced punishment under the elements clause of the ACCA.

The direct circuit conflict that currently exists on that issue is prejudicing defendants in two federal circuits, and the disparate treatment of defendants in these circuits must come to an end. The Court should grant the writ.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER



By:______________________
Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
August 24, 2017

APPENDIX

A-1

2017 WL 1485021
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Kenneth Roy **CONDE**, Defendant-Appellant.

No. 16-11876
|
Non-Argument Calendar
|
(April 26, 2017)

Synopsis
Background: Defendant pleaded guilty, in the United States District Court for the Southern District of Florida, No. 9:15-cr-80002-KLR-1, to possession of a firearm and ammunition by a convicted felon. He appealed his sentence.

[Holding:] The Court of Appeals held that defendant's three prior Florida convictions for robbery qualified as violent felonies under elements clause of the Armed Career Criminal Act (ACCA).

Affirmed.

West Headnotes (1)

[1] **Sentencing and Punishment**
Particular offenses

Defendant's three prior Florida convictions for robbery qualified as violent felonies under elements clause of the Armed Career Criminal Act (ACCA), and thus district court did not err, in prosecution for possession of a firearm and ammunition by a convicted felon, by sentencing defendant as an armed career criminal on basis of those prior convictions; since Florida's robbery statute always required violence beyond mere snatching, it had as an element the use, attempted use, or threatened use of physical force against the person of another. 18 U.S.C.A. §§ 922(g)(1), 924(e); Fla. Stat. Ann. § 812.13.

Cases that cite this headnote

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 9:15-cr-80002-KLR-1

Attorneys and Law Firms

Aileen Cannon, Wifredo A. Ferrer, Nicole D. Mariani, Adam C. McMichael, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, for Plaintiff-Appellee

Brenda Greenberg Bryn, Federal Public Defender's Office, Fort Lauderdale, FL, Robin Cindy Rosen-Evans, Federal Public Defender's Office, West Palm Beach, FL, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Miami, FL, for Defendant-Appellant

Before TJOFLAT, WILSON, and WILLIAM PRYOR, Circuit Judges.

Opinion

PER CURIAM:

***1** Kenneth Roy Conde appeals his 204-month sentence, imposed after he pleaded guilty to one count of possession of a firearm and ammunition by a convicted felon, pursuant to 18 U.S.C. §§ 922(g)(1) and 924(e). Conde argues that the district court erred by sentencing him as an armed career criminal based on his three 1992 Florida robbery convictions under Fla. Stat. § 812.13.

We review de novo the district court's conclusion that a particular offense constitutes a "violent felony" under 18 U.S.C. § 924(e). *United States v. Wilkerson*, 286 F.3d 1324, 1325 (11th Cir. 2002) (per curiam).

Under the Armed Career Criminal Act (ACCA), any person who violates 18 U.S.C. § 922(g) and has three prior convictions for a violent felony or a serious drug offense, is subject to a mandatory minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e)(1). The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment 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 prong of this definition is sometimes referred to as the "elements clause," while the second prong contains the "enumerated crimes" and, finally, what is commonly called the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

In 1997, the Florida Supreme Court held that, in order for the snatching of property from another to amount to robbery, "the perpetrator must employ more than the force necessary to remove the property from the person." *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997). The Court explained that the Florida robbery statute requires "resistance by the victim that is overcome by the physical force of the offender." *Id.*

In *United States v. Lockley*, we addressed whether a 2001 Florida attempted-robbery conviction qualified as a crime of violence under the elements clause of the career-offender provision of the Sentencing Guidelines. 632 F.3d 1238, 1240 (11th Cir. 2011); *see also United States v. Alexander*, 609 F.3d 1250, 1253 (11th Cir. 2010) (providing that "[c]onsidering whether a crime is a "violent felony" under the ACCA is similar to considering whether a conviction qualifies as a crime of violence under U.S.S.G. § 4B1.2(a) because the definitions for both terms are virtually identical." (internal quotation marks omitted)). We determined that the conviction categorically constituted a crime of violence under the clause. *Id.* at 1246.

In *Dowd*, we held that a 1974 conviction for Florida armed robbery was "undeniably a conviction for a violent felony" under the ACCA's elements clause. *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006). We reached this conclusion "without difficulty" and cited only the ACCA's elements clause. *Id.*

In *Seabrooks*, we relied on *Lockley* to determine that a 1997 Florida robbery conviction constituted a violent felony under the ACCA. *See United States v. Seabrooks*, 839 F.3d 1326, 1338–41 (11th Cir. 2016); *id.* at 1346 (Baldock, J. concurring); *id.* at 1346, 1350–51 (Martin, J. concurring). The narrowest ground on which we agreed in *Seabrooks* was that, under *Lockley*, post-*Robinson* Florida armed robbery convictions categorically qualify as violent felonies under the ACCA's elements clause. *See id.* at 1340; *id.* at 1346 (Baldock, J., concurring); *id.* at 1352 (Martin, J., concurring).

***2** However, in *United States v. Fritts*, we concluded that, under *Dowd* alone, a pre-*Robinson* Florida armed robbery conviction qualifies as an ACCA violent felony under the elements clause. 841 F.3d 937, 940 (11th Cir. 2016). We further determined that *Lockley*, *Robinson*, and other Florida Supreme Court law supported the qualification of Florida armed robbery as a violent felony. *Id.* at 940–44. In response to the defendant's argument that, before the Florida Supreme Court's 1997 decision in *Robinson*, only the slightest force was sufficient to convict a defendant of Florida robbery, we pointed out that the *Robinson* Court had made clear that the § 812.13 robbery statute had never included a theft or taking by mere snatching because snatching was theft only and did not involve the force needed to sustain a robbery conviction under § 812.13(1). *Id.* at 942–43. In other words, Florida robbery has always required the "substantial degree of force" required by the ACCA's elements clause. *See Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 1271, 176 L.Ed.2d 1 (2010).

The district court did not err by sentencing Conde as an armed career criminal based on his three 1992 Florida robbery convictions because Florida's robbery statute has always required violence beyond mere snatching, and, therefore, has as an element the use, attempted use, or threatened use of physical force against the person of another and qualifies as a violent felony under the elements clause of the ACCA. Accordingly, we affirm.

AFFIRMED.

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All Citations

--- Fed.Appx. ----, 2017 WL 1485021

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A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

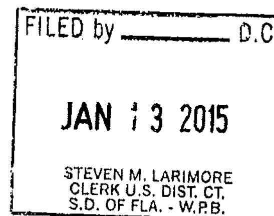
CASE NO. 15-80002-CR-Ryskamp | Hopkins
18 U.S.C. § 922(g)(1)

UNITED STATES OF AMERICA

v.

KENNETH ROY CONDE,

Defendant.
_______________________________/



INFORMATION

The United States Attorney charges that:

On or about December 19. 2014. in Palm Beach County, in the Southern District of Florida, the defendant,

KENNETH ROY CONDE,

having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess firearms and ammunition. in and affecting interstate and foreign commerce, to wit:

a. one (1) .38 caliber Charter Arms handgun;

b. one (1) .223 caliber BWK Sporter rifle;

c. one (1) .45 caliber Taurus handgun; and

d. assorted ammunition;

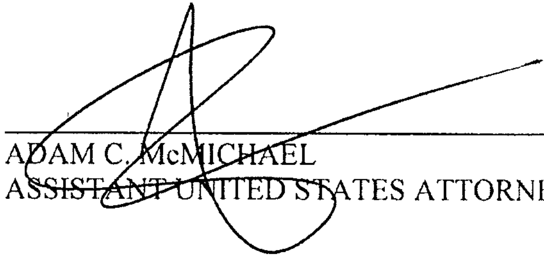
all in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

FORFEITURE

Upon conviction of the violation alleged in this Information, the defendant KENNETH ROY CONDE shall forfeit to the United States any firearms or ammunition involved in or used in said violation.

Pursuant to Title 28, United States Code, Section 2461, Title 18, United States Code, Section 924(d), and the procedures outlined at Title 21, United States Code, Section 853.

WIFREDO A. FERRER
UNITED STATES ATTORNEY



ADAM C. McMICHAEL
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA **CASE NO.** ______________________

vs.

CERTIFICATE OF TRIAL ATTORNEY*

KENNETH ROY CONDE

Defendant.
______________________/

Superseding Case Information:

Court Division: (Select One)

___ Miami ___ Key West
___ FTL _X_ WPB ___ FTP

New Defendant(s) Yes ___ No ___
Number of New Defendants ___
Total number of counts ___

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) No
List language and/or dialect N/A

4. This case will take 2 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

	(Check only one)		(Check only one)	
I	0 to 5 days	X	Petty	
II	6 to 10 days		Minor	
III	11 to 20 days		Misdem.	
IV	21 to 60 days		Felony	X
V	61 days and over			

6. Has this case been previously filed in this District Court? (Yes or No) No
If yes:
Judge: ______________________ Case No. ______________________
(Attach copy of dispositive order)
Has a complaint been filed in this matter? (Yes or No) Yes
If yes:
Magistrate Case No. 14-08533-DLB
Related Miscellaneous numbers: None
Defendant(s) in federal custody as of 12/19/2014
Defendant(s) in state custody as of N/A
Rule 20 from the ______________ District of ______________
Is this a potential death penalty case? (Yes or No) NO

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? ___ Yes _X_ No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? ___ Yes _X_ No

ADAM McMICHAEL
ASSISTANT UNITED STATES ATTORNEY
Florida Bar No. 0772321

*Penalty Sheet(s) attached

REV 4/8/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

CASE NO. ________________________

Defendant's Name: KENNETH ROY CONDE,

COUNT	VIOLATION	U.S. CODE	MAX. PENALTY
1	Unlawful Firearm and ammunition possession by a convicted felon	18:922(g)(1) and 924(e)	15 years to life $250,000 fine SR: 3 years $100 Special Assessment
	Forfeiture		

A-3

UNITED STATES DISTRICT COURT

Southern District of Florida
West Palm Beach Division

UNITED STATES OF AMERICA
v.
KENNETH ROY CONDE

JUDGMENT IN A CRIMINAL CASE

Case Number: **15-80002-CR-KLR**
USM Number: **40320-004**

Counsel For Defendant: **Robin Rosen-Evans**
Counsel For The United States: **Adam McMichael**

The defendant pleaded guilty to count(s) One.

The defendant is adjudicated guilty of these offenses:

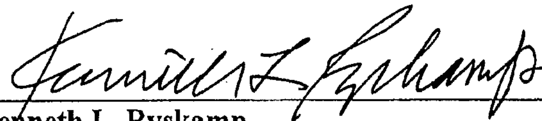
TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
U.S.C.922 (g)(1)	Possession of a Firearm by a Prohibited Person	12/19/2014	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

All remaining counts are dismissed on the motion of the government.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **4/20/2016**



Kenneth L. Ryskamp
United States Senior District Judge

Date: 4/20/16

DEFENDANT: **KENNETH ROY CONDE**
CASE NUMBER: **15-80002-CR-KLR**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term **of 204 months**.

The court recommends to the U.S. Bureau of Prisons:

Designation to a facility in Tennessee.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

____

____

____

____

____

____

Defendant delivered on ____________________ to ____________________

at ____________________, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **KENNETH ROY CONDE**
CASE NUMBER: **15-80002-CR-KLR**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 **years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **KENNETH ROY CONDE**
CASE NUMBER: **15-80002-CR-KLR**

SPECIAL CONDITIONS OF SUPERVISION

Employment Requirement - The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: **KENNETH ROY CONDE**
CASE NUMBER: **15-80002-CR-KLR**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

The Government shall file a preliminary order of forfeiture within 3 days.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

KENNETH ROY CONDE,

Petitioner,

v.

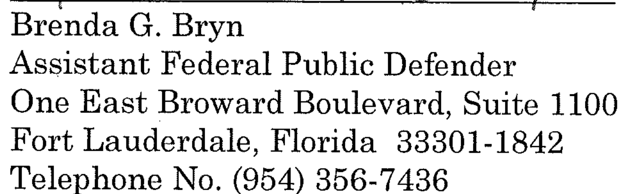
UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I certify that on this 24th day of August, 2017 in accordance with SUP. CT. R. 29, eleven copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed *In Forma Pauperis*, (3) Certificate of Service, and (4) Declaration Verifying Timely Filing, were served by U.S. mail upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

MICHAEL CARUSO
Federal Public Defender



Fort Lauderdale, Florida
August 24, 2017

By:

Brenda G. Bryn
Assistant Federal Public Defender
One East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1842
Telephone No. (954) 356-7436

No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

KENNETH ROY CONDE,

Petitioner,

v.

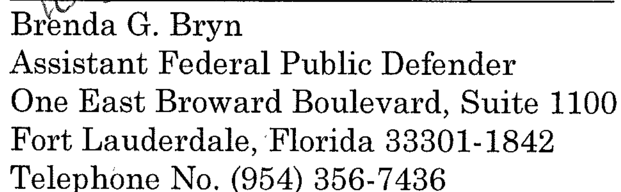
UNITED STATES OF AMERICA,

Respondent.

DECLARATION VERIFYING TIMELY FILING

Petitioner, Kenneth Roy Conde, through undersigned counsel, and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the Petition for Writ of Certiorari filed in the above-styled matter was placed in the U.S. mail in a prepaid first class envelope, addressed to the Clerk of the Supreme Court of the United States, on the 24th day of August, 2017.

MICHAEL CARUSO
Federal Public Defender



Fort Lauderdale, Florida
August 24, 2017

By: ______________________

Brenda G. Bryn
Assistant Federal Public Defender
One East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1842
Telephone No. (954) 356-7436

No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

KENNETH ROY CONDE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Kenneth Roy Conde, pursuant to SUP CT. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed *in forma pauperis*.

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Southern District of Florida was appointed to represent Petitioner pursuant to 18 U.S.C. § 3006A. Therefore, in reliance upon RULE 39.1 and § 3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. § 1746.

MICHAEL CARUSO
Federal Public Defender

Fort Lauderdale, Florida
August 24, 2017

By:
Brenda G. Bryn
Assistant Federal Public Defender
One East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1842
Telephone No. (954) 356-7436