No. 17-5876

IN THE SUPREME COURT OF THE UNITED STATES

EARNEST EARL MATTHEWS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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SUBMITTED: September 5, 2017

QUESTION PRESENTED

1. Whether the Michigan unarmed robbery statute "has as an element, the use, attempted use, or threatened use of physical force against the person of another," so as to constitute a "violent felony" under the federal Armed Career Criminal Act.

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Earnest Earl Matthews, the Petitioner, respectfully asks this Court to grant a Writ of Certiorari to review the decision of the Sixth Circuit Court of Appeals (entered May 8, 2017), affirming his conviction and sentence.

OPINIONS BELOW

The divided 2-to-1 Opinion of the United States Court of Appeals for the Sixth Circuit was issued on May 8, 2017, and is unpublished. A copy of the decision appears in Appendix "A" to this petition. The Judgment of the United States District Court of the Eastern District of Michigan, appears in Appendix "B," hereto. Petitioner timely filed a Motion for Rehearing and Rehearing *En Banc*, which was summarily denied on June 8, 2017. A copy of that Order is attached hereto as Appendix "C."

JURISDICTION

Judgment was entered on October 20, 2016. Defendant, Earnest Earl Matthews, filed a timely appeal to the Sixth Circuit Court of Appeals, which affirmed via a 2-to-1 decision on May 8, 2017. Mr. Matthews filed a timely petition for rehearing and rehearing *en banc*. On June 8, 2017, the court denied the petition. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

18 U.S.C. §924(e), part of the Armed Career Criminal Act, provides in relevant part that:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
(2) As used in this subsection—
(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and
(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Mich. Comp. Laws § 750.530 (P.A. 1931, No. 328 § 530) (amended by P.A. 2004, No. 128 (effective July 1, 2004)), provides that:

Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

STATEMENT OF THE CASE

Earnest Earl Matthews is charged and convicted of being a Felon in Possession of a Firearm (18 U.S.C. § 922(g)(1)). Normally, this allows for a maximum sentence of ten years' imprisonment. 18 U.S.C. §924(a)(2). This is increased to a mandatory minimum sentence of fifteen years' imprisonment under the Armed Career Criminal Act, if a defendant has three previous "violent felony" convictions and violates 18 U.S.C. §922(g). Under the Armed Career Criminal Act, "violent felony" means:

> ...any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> (ii) is burglary, arson, or extortion, involves use of explosives...

In this case, the District Court agrees with Mr. Matthews's presentence report and determines that he has prior felony convictions for armed robbery, carjacking, and unarmed robbery (under Michigan law). Thus, the Court decides that he therefore has the requisite prior convictions for violent felonies in order to be sentenced to the mandatory minimum fifteen (15) years pursuant to the Armed Career Criminal Act.

At specific issue in this appeal is the 1983 state conviction that Mr. Matthews has for unarmed robbery (under Michigan law), which statute provides that:

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years. Mich. Comp. Laws § 750.530 (P.A. 1931, No. 328 § 530) (amended by P.A. 2004, No. 128 (effective July 1, 2004)).

This Petition follows to determine whether the District Court and Court of Appeals correctly determine that Mr. Matthews's violation of the statute qualifies as a "violent felony" for purposes of applying the Armed Career Criminal Act to his sentence.

REASONS FOR GRANTING THE PETITION

The majority opinion in this case incorrectly holds that unarmed robbery under Michigan law constitutes a violent felony for purposes of the Armed Career Criminal Act. By doing so, the Sixth Circuit decides an important federal question in a way that conflicts with decisions by the Michigan Supreme Court, as set forth in *Michigan v. Kruper*, 64 N.W. 2d 629 (Mich. 1954), *Michigan v. Randolph*, 648 N.W. 2d 164 (Mich. 2002), and other common law decisions. As such, review should be granted by this Court. (Supreme Court Rule 10(a)).

Also, the Sixth Circuit's decision creates a further, deepening conflict among the Circuit Courts as to the appropriate scope of the Armed Career Criminal Act's reach.

In addition, review of this Petition is warranted because the Sixth Circuit Court of Appeals decides an important question of federal law that has not yet been addressed by this Court, namely, the question concerning the proper scope of crimes deemed to be "violent felonies" for purposes of the Armed Career Criminal Act. Through the Acts' application against Mr. Matthews's sentence in this case, his period of incarceration is increased by five years. Anytime an individual is deprived of his liberty in a disputed manner, the importance of the issue is obvious. (Supreme Court Rule 10(b)).

J. THE DISTRCT COURT AND SIXTH CIRCUIT DECISIONS MISCONSTRUE MICHIGAN LAW

The lower courts misconstrue Michigan law. Both the District Court and Sixth Circuit opine that Michigan law defines unarmed robbery as a "violent felony" for purposes of applying the Armed Career Criminal enhancement to a sentence. However, in *United States v. Mitchell*,

743 F. 3d 1054 (6th Cir. 2014), the Sixth Circuit Court of Appeals holds that "putting in fear" satisfies the language of the Armed Career Criminal Act when the state supreme court interprets "fear" to include *only* "fear of bodily injury from physical force offered or impending." *United States v. Mitchell*, 743 F. 3d 1054, 1060 (6th Cir. 2014). Despite the majority's conclusion otherwise, the Michigan Supreme Court has never determined this.

In fact, as pointed out by the dissenting opinion below, the Michigan Supreme Court has never clearly limited "putting in fear" to cases involving conduct intended to put the victim in fear of immediate *physical* injury, as required by the Act. *See Michigan v. Gardner*, 265 N.W.2d 1, 5 (Mich. 1978) ("Attempted robbery unarmed may therefore be committed simply by putting someone in fear.."). Instead, in *Michigan v. Kruper*, 64 N.W.2d 629, 632 (Mich. 1954), the state high court holds that "The threat to do 'injury to the person *or property*,' . . . when accompanied by force, actual or constructive, and property or money is given up in consequence of that force . . . can constitute robbery." Thus, the Michigan Supreme Court has guided that robbery can occur without any threat of injury to a person at all.

Furthermore, the majority opinion also incorrectly interprets the Michigan Supreme Court's reliance on the common law definition of robbery in interpreting the unarmed robbery statute to mean that "putting in fear" must be interpreted as "putting in fear of bodily injury." As acknowledged by both Mr. Matthews and the dissenting opinion, the Michigan Supreme Court observed that the unarmed robbery statute was essentially a codification of the common law offense of robbery. *Michigan v. Randolph*, 648 N.W.2d 164, 167 (Mich. 2002). However, the majority opinion inaccurately determines that based on that revelation, "putting in fear" must be limited to cases involving fear of *physical*, bodily injury.

However, as again pointed out by the dissenting opinion, the majority's rationale fails to accurately interpret Michigan common law, which allows for multifarious ways for a victim to be 'put in fear' when threats are made against a person, their property, or their character. Thus, as the dissent posits, the *Randolph* decision holds that the unarmed robbery statute can be violated without the use, attempted use, or threatened use of physical force against the person of another and, as a result, it is not a violent felony under the Armed Career Criminal Act.

Next, the majority incorrectly relies on *Michigan v. Kruper*, 64 N.W. 2d 629 (Mich. 1954), as "important context for how it [the Michigan Supreme Court] views robbery." Using that case, the majority attempts to support the proposition that "fear" only occurs when the party robbed has a reasonable belief that he may suffer physical injury unless he complies with the demand. Thus, the majority infers that such an injury can only be a physical, bodily injury as required by the Act. The majority fails to recognize that the *Kruper* decision also allows that "the threat to do injury to the person *or property*...when accompanied by force, actual or constructive...can [also] constitute robbery." (*Kruper*, 64 N.W. 2d at 632). despite the majority's holding to the contrary, the Michigan Supreme Court has not limited "putting in fear" to cases involving only fear of immediate physical, bodily injury to a person, but has also clearly allows for the crime to occur when there is also only an injury to one's property.

Accordingly, the Michigan Supreme Court has determined that the unarmed robbery statute can be violated without "the use, attempted use, or threatened use of physical force against the person of another" and, as a result, the crime is not a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B).

IV. THE SIXTH CIRCUIT'S DECISION CREATES AN EVEN FURTHER DIVIDED COURT OF APPEALS ON WHETHER "UNARMED ROBBERY" IS A "VIOLENT FELONY" FOR ACCA PURPOSES.

The Sixth Circuit's decision in this case further divides the Court of Appeals. There are now two main views as to whether a state's unarmed robbery statute, such as existed in this case, can satisfy the requirements of a "violent felony" for ACCA sentencing purposes. In other words, Circuit Courts around the country are not uniformly applying the ACCA enhancement to criminal defendants.

A crime only qualifies as a violent felony under the force clause if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). This Court interprets this language to mean that the "categorical approach" must be used to determine whether a defendant's prior conviction for a certain crime satisfies the force clause. See *Shepard v. United States*, 544 U.S. 13, 19 (2005). In fact, a Court should consider only whether the least serious conduct for which there is a "realistic probability" of a charge and conviction necessarily involves the use of violent force. See *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013).

When applying this test, Courts reach varying decisions, and defendants across America receive different sentences.

On the one hand, the Fifth Circuit concludes that such statutes contemplate a physical bodily injury to a person and therefore, are violent felonies under the ACCA. See *United States v. Davis*, 487 F. 3d 282, 287 (5th Cir. 2007). However, this finding was made under the now unconstitutional residual clause, and should no longer have any precedential merit. *Id.* Likewise, the Seventh Circuit finds that such a statute qualifies as a violent felony. See *United States v. Tirrell,* 120 F.3d 670, 680–81 (7th Cir.1997) ("attempted unarmed robbery" under Michigan law

qualified as a violent felony under the ACCA; "under Michigan law, the element of putting in fear means threatening the use of physical force against the person of another"); *see also United States v. Dickerson,* 901 F.2d 579, 584 (7th Cir.1990) ("robbery" under Illinois law qualified as a violent felony); and *United States v. Nigg*, 667 F.3d 929, 937–38 (7th Cir. 2012). The Eighth Circuit, in *United States v. Lamb*, 847 F.3d 928, 930 (8th Cir. 2017), determines that Michigan unarmed robbery convictions were violent felonies under Armed Career Criminal Act.

On the other hand, the First Circuit decides that an "unarmed statute" like the one under which Mr. Matthews is convicted and sentenced, is not a violent felony. See *United States v. Starks*, 861 F. 3d 306 (1st Cir. 2017). In that case, the statute provided that:

> Whoever, not being armed with a dangerous weapon, by force and violence, or by assault and putting in fear, robs, steals, or takes from the person of another, or from his immediate control, money or other property which may be the subject of larceny, shall be punished by imprisonment in the state prison for life or for any term of years. Mass. Gen. Laws ch. 265, § 19(b).

The Court notes that Massachusetts' unarmed robbery statute does not satisfy the force clause of the ACCA. *United States v. Starks*, 861 F.3d 306, 315–20 (1st Cir. 2017). The Ninth Circuit follows suit. See *United States v. Parnell*, 818 F. 3d 974, 979-982 (9th Cir. 2016). Similarly, the Eleventh Circuit looks to how Florida courts defined the least culpable conduct sufficient to support an unarmed robbery conviction in *United States v. Stokeling*, 684 F. App'x 870, 873–74 (11th Cir. 2017). There, the Court determines that Florida law is clear that conduct involving "any degree of force," like sudden snatching, is enough to justify a robbery conviction. *Id.* Then the Circuit addresses whether such conduct necessarily involves the use, attempted use, or threatened use of violent force or a substantial degree of force, and concludes that it does not. Thus, the 11th Circuit also determines that under Florida law, a similar statute should not count as a violent felony within the meaning of the elements clause of the ACCA. *Id.* Therefore, in these

Circuits, a defendant like Mr. Matthews could have received a five-year lesser sentence since the Courts determined that the ACCA did not apply, for the exact or similar offense.

This Court should grant certiorari to resolve the Circuit split regarding the proper scope of the ACCA enhancement to state unarmed robbery statutes in order to ensure that defendants in all Circuits are similarly treated.

V. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE

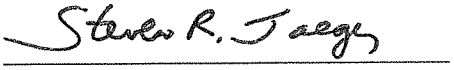
This Court should grant this Writ of Certiorari to resolve the Question Presented that concerns important issues of federal sentencing under the Armed Career Criminal Act. These issues affect countless criminal defendants across the country.

The facts of this case illustrate that the application of the Armed Career Criminal Act to Mr. Matthews's sentence led to a 50% longer increase in his sentence, equating to five additional years' incarceration above the otherwise statutory maximum that could have been imposed without application of the ACCA. When an individual is deprived of his liberty in a manner that is disputed not only by the parties involved, but also by the panel deciding the case, having the issue addressed and decided by this Court is warranted.

CONCLUSION

This petition for Writ of Certiorari should be granted.

Respectfully Submitted,



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Submitted: September 5, 2017

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APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI

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SUBMITTED: September 5, 2017

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Filed: May 08, 2017

Mr. Steven Richard Jaeger
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Re: Case No. 15-2298, *USA v. Earnest Matthews*
Originating Case No. : 2:14-cr-20721-1

Dear Counsel,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Roy G. Ford
Case Manager
Direct Dial No. 513-564-7016

cc: Earnest Earl Matthews
Ms. April Nicole Russo
Mr. David J. Weaver

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 17a0260n.06

No. 15-2298

FILED
May 08, 2017
DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EARNEST EARL MATTHEWS Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: MERRITT, BATCHELDER, and ROGERS, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. A jury convicted Earnest Matthews of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He raises three issues on appeal: (1) whether the Fourth Amendment required suppression of a firearm; (2) whether an evidentiary determination by the district court was erroneous; and (3) whether the unarmed robbery for which he had been convicted under Michigan law was a violent-felony conviction for purposes of the Armed Career Criminal Act. For the following reasons, we AFFIRM the district court's orders on all three issues.

I.

Around 9:45 p.m. on October 24, 2014, two Detroit police officers were driving their patrol car when they saw Matthews on the street. Believing that Matthews matched the description of the suspect in a robbery that had occurred in the area nine days before, the officers initially tried to speak to him through their car window. When one of the officers started to get

out of the car, Matthews ran, and the officer chased after him. While running, Matthews removed a pistol from the front pocket of his hooded sweatshirt. The officer, who was a few feet behind Matthews at this point, yelled, "Drop it or I'll shoot." Matthews ran into an alley, where he threw the pistol toward a fence. He then tripped over a hose and tumbled to the ground, where the officer put him under arrest. The other police officer, who had followed Matthews in the patrol car, immediately retrieved the abandoned pistol.

Matthews was charged with being a felon in possession of a firearm, and he moved to suppress the pistol as evidence against him, claiming that the officers had had no basis on which to arrest him. At an evidentiary hearing on this motion, he disputed the officer's version of the events leading to his arrest. According to Matthews, the officers tripped him and demanded to know whether he was 6'2" and weighed 200 pounds. He told them that a person matching this description was in the alley. He also testified that the officers had planted the gun on him. The district court denied the motion to suppress on the ground that "[t]he firearm was not recovered from [Matthews's] person . . . [and therefore Matthews] has not demonstrated he had a reasonable expectation of privacy with regard to the firearm."

At a pretrial conference, Matthews argued that the government's claim that he matched the physical description of the robbery suspect was untrue and that this evidence could lead the jury to infer that he had committed the earlier robbery, which would prejudice the jury against him. The district court ruled that the evidence was not relevant, because whether Matthews matched the description of the robber had no bearing on whether he possessed the pistol nine days later. The district court also stated that the government could seek to introduce the evidence in rebuttal or redirect examination should Matthews contest the stop.

At trial, Matthews reversed course and sought to introduce the description of the robber over the government's motion *in limine* to exclude that evidence. Matthews argued that there was a disparity in the description of the robber and his own physical attributes, and that this disparity called the officers' perception into question. But the district court adhered to its earlier ruling that the evidence was not relevant.

Matthews did not testify at his trial, and the jury returned a verdict of guilty. Matthews's presentence report indicated that he had prior felony convictions for armed robbery, carjacking, and unarmed robbery. Matthews argued that unarmed robbery in Michigan did not constitute a violent felony for purposes of the Armed Career Criminal Act ("ACCA"), but the district court disagreed and sentenced him to the ACCA's mandatory minimum sentence of fifteen years' imprisonment. This appeal followed.

II.

A.

We affirm the district court's decision denying Matthews's motion to suppress the pistol. When reviewing a district court's decision on a motion to suppress, we review findings of facts for clear error and conclusions of law de novo. *See United States v. Kinison*, 710 F.3d 678, 681 (6th Cir. 2013). The district court did not clearly err in finding that the officers' version of the events on October 24 was more credible than Matthews's. According to the officers, Matthews abandoned his pistol—and therefore any expectation of privacy that he had in it—when he threw it. *See United States v. Robinson*, 390 F.3d 853, 873–74 (6th Cir. 2004) ("If property has been 'abandoned' . . . the Fourth Amendment is not violated through the search or seizure of this property.").

Furthermore, Matthews began his encounter with the officers by voluntarily answering their questions. Such a voluntary conversation with police is not a "seizure" under the Fourth Amendment. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991). Therefore, Matthews's argument that the officers lacked reasonable suspicion to stop him fails; reasonable suspicion was not required.

B.

We review evidentiary rulings for abuse of discretion. *See United States v. Chambers*, 441 F.3d 438, 455 (6th Cir. 2006). We find no such abuse in the district court's rejection of Matthews's eve-of-trial change of heart concerning the admissibility of the robber's description. Matthews initially requested that the jury not hear any testimony concerning the description of the earlier robbery suspect. It was not until after counsel had presented their case statements to the prospective jurors during voir dire that Matthews reversed course, arguing that the difference between his size and the suspected robber's size called into question the police officers' perceptive abilities. The district court had already heard the officers' and Matthews's testimony on this point and had resolved a pretrial motion to exclude this evidence. Although the evidence of the robbery suspect's physical description may have been tangentially related to the officers' credibility and perceptive abilities, the district court did not abuse its discretion by determining that it would abide by its earlier evidentiary determination.

III.

The jury convicted Matthews of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Ordinarily, this offense warrants a maximum sentence of ten years' imprisonment. 18 U.S.C. § 924(a)(2). The Armed Career Criminal Act, however, imposes a mandatory minimum sentence of fifteen years' imprisonment when a person with three previous

"violent felony" convictions violates § 922(g). *Id.* § 924(e)(1). The ACCA defines that key term:

> the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

Id. § 924(e)(2)(B) (emphasis added). The italicized portion of this statute is known as the "residual clause," which the Supreme Court has declared unconstitutionally vague. *See Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"). *Johnson II* did "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.

The district court found that Matthews had three prior convictions for offenses that were violent felonies and sentenced him to the mandatory minimum sentence of fifteen years in prison. "We review de novo a district court's determination that an offense constitutes a 'violent felony' under the ACCA." *United States v. Mitchell*, 743 F.3d 1054, 1058 (6th Cir. 2014). For the following reasons, the district court properly held that unarmed robbery under Michigan law constitutes a violent felony.

Matthews's unarmed robbery conviction is from 1983, but Michigan has since amended its statute. We analyze the version in effect at the time of his conviction:

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not

> being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

Mich. Comp. Laws § 750.530 (P.A. 1931, No. 328 § 530) (amended by P.A. 2004, No. 128 (effective July 1, 2004)).[1] The issue is whether this constitutes a violent felony. That is, we must determine whether the statute "has as an element, the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). The Supreme Court defines "physical force" as "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson I*").

Matthews contends that because one may commit unarmed robbery in Michigan by "putting [another person] in fear," the statute does not require "the use, attempted use, or threatened use of force against another" and is therefore overly broad. After carefully considering the relevant authority from Michigan, we disagree. *See Mitchell*, 743 F.3d at 1058–59 (explaining that this court is "bound by" a state supreme court's interpretation of an offense). Michigan unarmed robbery requires physical force or the threat of physical force in order to sustain a robbery conviction.

Under the Michigan statute, one can accomplish an unarmed robbery by *putting a person in fear*, which the Michigan Supreme Court has held to mean *fear of personal injury*. The Michigan Supreme Court has explained that its state legislature codified common law robbery in the unarmed robbery statute. *See Michigan v. Randolph*, 648 N.W.2d 164, 167–68, 171 (Mich. 2002) ("[R]obbery is a larceny aggravated by the fact that the taking is from the person, or in his presence, accomplished with force or the threat of force."), *superseded by statute*, P.A. 2004, No.

[1] This version of the statute and the current version have at least one key difference. In the version at issue here, the first of the several alternative means of committing an unarmed robbery is "by force *and* violence." Note that the phrase is conjunctive. The current statute, however, is disjunctive, penalizing a person who "uses force *or* violence against a person who is present." Mich. Comp. Laws § 750.530. We need not address this distinction here, but future cases addressing Michigan unarmed robbery may need to do so.

128, *as recognized in Michigan v. March*, 886 N.W.2d 396 (Mich. 2016). *Randolph* analyzed whether violence that occurred during a defendant's flight following a larceny escalated the larceny to a robbery. The Michigan Supreme Court explained at length that violence or putting in fear are foundational elements of robbery at common law, citing Blackstone and other commentators. A repeated point in this discussion is that "putting in fear" requires putting a person in fear *of injury*. *See Randolph*, 648 N.W.2d at 167–168 & 167 n.6 ("Feloniously taking the property of another in his presence and against his will, *by putting him in fear of immediate personal injury*, is robbery at common law." (emphasis added) (quoting RAPAJLE, LARCENY & KINDRED OFFENSES § 445 (1892))). The *Randolph* court did not contradict this language and quoted it with approval.

Other Michigan case law strengthens the conclusion that a threat of injury is necessary to put someone in fear. In *Michigan v. Kruper*, 64 N.W.2d 629, 632 (Mich. 1954), the Michigan Supreme Court provides important context for how it views robbery:

> Whenever the elements of force or putting in fear enter into the taking, and that is the cause which induces the party to part with his property, such taking is robbery. This is true regardless of how slight the act of force or the cause creating fear may be, provided, in the light of the circumstances, the party robbed has a *reasonable belief that he may suffer injury unless he complies with the demand.*

Id. (emphasis added). This definition complies with *Johnson I*, because it means that the act causing the victim to be put in fear—however slight—must be "capable of causing physical pain or injury to another person." *Johnson I*, 559 U.S. at 140.

When Michigan courts apply this test to determine whether a victim was put in fear, they ask whether the victim believed that injury was likely to result if he or she failed to comply. *See, e.g.*, *Michigan v. Hearn*, 406 N.W.2d 211, 214 (Mich. Ct. App. 1987) ("When a person is induced to part with property out of fear, the test to determine whether a robbery has been

committed is whether 'the party robbed has a reasonable belief that he may suffer injury unless he complies with the demand.'" (quoting *Kruper*, 64 N.W.2d at 632)). For example, when a robber orders a waitress to lie on the floor and surrender her money when she is alone in the wee hours of the morning, the waitress' fear of personal injury is sufficient for a robbery conviction in Michigan. *See People v. Laker*, 151 N.W.2d 881, 883–84 (Mich. Ct. App. 1967) (citing *Kruper*, 64 N.W.2d at 632). Because Michigan law requires one to fear injury in order to be "put in fear," Michigan's statute criminalizing unarmed robbery is a violent felony for purposes of the ACCA.

Two of our sister circuits have reached the same conclusion in persuasive opinions. *See United States v. Tirrell*, 120 F.3d 670, 679–81 (7th Cir. 1997) ("[U]nder Michigan law, the element of putting in fear means threatening the use of physical force against the person of another."); *see also United States v. Lamb*, 638 F. App'x 575, 576 (8th Cir. 2016), *vacated on other grounds by* 580 U.S. __ (Nov. 28, 2016).

Matthews argues that *Tirrell* is no longer good law because the Seventh Circuit decided it before the Supreme Court defined "physical force" as "violent force" in *Johnson I*. But *Tirrell* specifically stated that its conclusion relied on the difference in Michigan law between a robbery conducted through threat of physical force and one conducted through other threats of injury. *Tirrell*, 120 F.3d at 680 (citing *People v. Krist*, 296 N.W.2d 139, 143 (Mich. Ct. App. 1980) ("Larceny by fear of immediate bodily harm or violence to the person will be prosecuted as robbery; the unlawful obtaining of property by threats of a different nature, i.e., threats of future harm, will ordinarily constitute a different offense such as extortion.")). Therefore, because it read Michigan law to require a threat of physical injury, *Tirrell* held that "the element of putting in fear means threatening the use of physical force against the person of another." *Id.*

Accordingly, the district court properly determined that unarmed robbery in Michigan is a violent felony for purposes of the ACCA.

IV.

For these reasons, we AFFIRM Matthews's conviction and sentence.

MERRITT, Circuit Judge, dissenting. I do not agree with the majority's holding that Michigan's unarmed robbery statute amounts to a "violent felony" under the Armed Career Criminal Act. In my view, the Michigan Supreme Court has neither expressly nor impliedly held that the statute's "putting in fear" element is limited to "fear of bodily injury from physical force offered or impending." Accordingly, I would vacate the defendant's sentence and remand the case for resentencing without application of the fifteen year mandatory minimum provided for under 18 U.S.C. § 924(e).

The Armed Career Criminal Act begins with the statute criminalizing the possession of a firearm by a felon, 18 U.S.C. § 922(g)(1), which provides: "It shall be unlawful for any person—(1) who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm or ammunition . . . ." If the felon has three or more earlier convictions of a "violent felony," the "Armed" Act increases his prison term to a minimum of fifteen years. § 924(e)(1). The Act defines "violent felony" as follows:

> [A]ny crime punishable by imprisonment for a term exceeding one year . . . that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*[.]

§ 924(e)(2)(B) (emphasis added).

The closing words of this definition, italicized above, are known as the "residual clause" of the Armed Career Criminal Act. In June of 2015, the Supreme Court declared the residual clause unconstitutional as void for vagueness. *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). Accordingly, the fifteen-year mandatory minimum is only applicable where a crime "has as an element the use, attempted use, or threatened use of physical force against the person of

another," 18 U.S.C. § 924(e)(2)(B), or is one of the four specific offenses enumerated in § 924(e)(2)(A).

In the instant case, both sides agree that Matthews has two felony convictions (armed robbery and carjacking) that meet the definition of "violent felony," but they disagree that the third felony—"unarmed robbery" under Michigan Penal Code § 750.530(1)—meets the definition of "violent felony." At the time of Matthews's conviction, that Michigan statute read as follows:

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

Mich. Comp. Laws § 750.530 (P.A. 1931, No. 328 § 530) (subsequently amended by P.A. 2004, No. 128) (effective July 1, 2004)). Thus, the Michigan statute says that it may be violated by an unarmed person who uses violence or threats of violence, but the statute also allows a conviction for putting a person "in fear."

The parties agree that the record before the district court and this Court does not disclose how the "unarmed" robbery in question was committed. Specifically, the record does not indicate whether Matthews threatened violence or simply put the victim in "fear" of some type of nonphysical injury, such as loss of peace of mind or reputation or some benefit not associated with bodily integrity—for example, a job, an inheritance, the affection of a spouse or friend, or a position of honor. People have many types of "fear" besides fear of violence or physical injury. Thus, the phrase "or puts the person in fear" in the Michigan statute is ambiguous.

This Court has previously held that "putting in fear" is only equivalent to the "use" or "threatened use" of physical force under § 924(e)(2)(B) when the state supreme court interprets

"fear" to include only "fear of bodily injury from physical force offered or impending." *See United States v. Mitchell*, 743 F.3d 1054, 1059 (6th Cir. 2014); *see also United States v. Fraker*, 458 Fed. App'x 461, 463 (6th Cir. 2012) (holding the plain text of Tennessee's robbery statute fell outside of the Armed Career Criminal Act's definition of "violent felony" because "a defendant can violate the [plain text of the] statute by employing only fear, rather than physical violence or force"). Contrary to the majority's holding, the Michigan Supreme Court has never clearly limited "putting in fear" to cases involving conduct intended to put the victim in fear of immediate *physical* injury, as required by the Act. *See Michigan v. Gardner*, 265 N.W.2d 1, 5 (Mich. 1978) ("Attempted robbery unarmed may therefore be committed simply by putting someone in fear while assault with intent to rob unarmed requires an assault with force and violence."); *Michigan v. Kruper*, 64 N.W.2d 629, 632 (Mich. 1954) ("The threat to do 'injury to the person *or property*,' . . . when accompanied by force, actual or constructive, and property or money is given up in consequence of that force . . . can constitute robbery." (emphasis added)).

The majority incorrectly reasons that the Michigan Supreme Court's reliance on the common law definition of robbery in interpreting the unarmed robbery statute means that "putting in fear" must be interpreted as "putting in fear of bodily injury." It is certainly true that the Michigan Supreme Court has observed that the unarmed robbery statute was essentially a codification of the common law offense of robbery. *Michigan v. Randolph*, 648 N.W.2d 164, 167 (Mich. 2002). However, the majority is wrong to conclude that, based on that fact, "putting in fear" must be limited to cases involving fear of *physical* injury. At common law, a victim was held to have been "put in fear" when the defendant made certain threats against his property or his character. 2 William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanors* 71 (1828). Indeed, English common law courts held that threats to injure a victim's property

alone—as distinct from his person—were sufficient to put the victim "in fear," transforming simple larceny into a robbery. *Id.* at 72-75 (collecting cases). Those courts also held that a threat against a victim's character by means of an accusation of sodomy was sufficient to put the victim "in fear." *Id.* at 76-88 (citing *Jones's Case* (1776) 2 East. P.C. 714; *Hickman's Case* (1783) 2 East. P.C. 728; *Donally's Case* (1779) 2 East. P.C. 715-28). In *Hickman's Case*, specifically, Lord Ashhurst held that "whether the terror arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference; for to most men the idea of losing their fame and reputation is equally if not more terrific than the dread of personal injury." *Id.* at 81 (quoting *Hickman's Case*, 2 East. P.C. 728). Even discounting the character-based holdings as inconsistent with our more modern notions of morality, the authorities make clear that there was no *per se* requirement at common law that a robbery be accomplished by means of employing or threatening physical force against the victim's person.

Where, as here, an undefined phrase in a criminal statute had a settled meaning at common law, the Michigan Supreme Court "assume[s] that the Legislature adopted that meaning unless a contrary intent is plainly shown." *Michigan v. March*, 886 N.W.2d 396, 402 (Mich. 2016) (internal quotations omitted). "Putting in fear" had a settled meaning at common law that did not require a threat of injury to the person, and Michigan's legislature has not expressed any intent to deviate from that meaning. Accordingly, the Michigan Supreme Court's decision in *Randolph* stands for exactly the opposite of the majority's conclusion: the unarmed robbery statute can be violated without "the use, attempted use, or threatened use of physical force against the person of another" and, as a result, it is not a "violent felony" under the Armed Career Criminal Act. 18 U.S.C. § 924(e)(2)(B).

The title of the statute is the "*Armed* Career Criminal Act." "Unarmed" robbery that includes simply "putting in fear" when people have many different kinds of "fear" is insufficient to constitute one of the types of wrongs that the Armed Career Criminal Act defines as the "use" or "threatened use of physical force." 18 U.S.C. § 924(e)(2)(B). Even if the statute were ambiguous after applying the relevant principles of statutory interpretation—which it is not—I would apply the rule of lenity and interpret the ambiguity in favor of the criminal defendant. *See United States v. Ford*, 560 F.3d 420, 425 (6th Cir. 2009). The defendant's actual crime here is walking down the street with a pistol in his pocket. It would be better for the sentencing judge to have the leeway to impose a lighter sentence if the judge is so disposed rather than to have to impose a long, "mandatory" sentence. The old system prior to the advent of mandatory, long sentences worked better and allowed the judge to take the possibility of rehabilitation into account and allowed for a less harsh, more humane system of punishment.

Because I would hold that the Michigan unarmed robbery statute is not a "violent felony" under the Armed Career Criminal Act and that the defendant is entitled to resentencing, I respectfully dissent.

United States District Court
Eastern District of Michigan

United States of America
V.
EARNEST EARL MATTHEWS

JUDGMENT IN A CRIMINAL CASE

Case Number: 14CR20721-1
USM Number: 50580-039

Seymour Berger
Defendant's Attorney

THE DEFENDANT:

■ Was found guilty on count(s) **Count One of the Indictment** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. Sections 922(g)(1) and 924(e)(1)	Felon in Possession of a Firearm - Armed Career Criminal	10/24/2014	One

The defendant is sentenced as provided in pages **2 through 5** of this judgment. This sentence is imposed pursuant to the Sentencing Reform Act of 1984

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.

October 20, 2015
Date of Imposition of Judgment

s/Avern Cohn
United States Senior Judge

October 21, 2015
Date Signed

DEFENDANT: EARNEST EARL MATTHEWS
CASE NUMBER: 14CR20721-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:
180 Months

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
United States Marshal

_____
Deputy United States Marshal

DEFENDANT: EARNEST EARL MATTHEWS
CASE NUMBER: 14CR20721-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **60 Months**

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.

If the defendant is convicted of a felony offense, DNA collection is required by Public Law 108-405.

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. Revocation of supervised release is mandatory for possession of a controlled substance.

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 ot the probation officer and shall submit a truthful and complete written report within the first five 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;

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; and

14) the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. Revocation of supervised release is mandatory for possession of a firearm.

DEFENDANT: EARNEST EARL MATTHEWS
CASE NUMBER: 14CR20721-1

CRIMINAL MONETARY PENALTIES

	Assessment	Fine	Restitution
TOTALS:	$ 100.00	$ 0.00	$ 0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS:	$ 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.

DEFENDANT: EARNEST EARL MATTHEWS
CASE NUMBER: 14CR20721-1

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

The following property is forfeited to the United States pursuant to 18 U.S.C. 924(d):

1. One BSR Taurus Ultra Lite, Model 85, .38 Caliber Revolver, bearing serial number CP38916.

2. Five rounds of CBC Ammunition, Caliber .38.

No. 15-2298

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 08, 2017
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EARNEST EARL MATTHEWS,

Defendant-Appellant.

ORDER

BEFORE: MERRITT, BATCHELDER, and ROGERS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Merritt would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: June 08, 2017

Mr. Steven Richard Jaeger
The Jaeger Firm
23 Erlanger Road
Erlanger, KY 41018

Re: Case No. 15-2298, *USA v. Earnest Matthews*
Originating Case No. : 2:14-cr-20721-1

Dear Mr. Jaeger,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. April Nicole Russo

Enclosure

17-5876

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EARNEST EARL MATTHEWS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, Steven R. Jaeger, Esq., do swear or declare that on this date, the 5th day of September, 2017, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

April Nicole Russo, Esq.
United States Attorney's Office
211 W. Fort Street
Suite 2001
Detroit, MI 48226

I declare under penalty of perjury that the foregoing is true and correct.
Executed this 05 day of September, 2017.

Respectfully Submitted,

Steven R Jaeger

STEVEN R. JAEGER
(KBA 35451)
THE JAEGER FIRM, PLLC
23 Erlanger Road
Erlanger, Kentucky 41018
TELE: (859) 342-4500
EMAIL: srjaeger@thejaegerfirm.com

Counsel for Petitioner

No. 17-5876

IN THE SUPREME COURT OF THE UNITED STATES

EARNEST EARL MATTHEWS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to proceed *in forma pauperis* pursuant to Supreme Court Rule 12.2.

The United States Code provides that when a Criminal Justice Attorney has been appointed pursuant to 18 U.S.C. §3006A, and Petitioner "petitions for a writ of certiorari, he may do so without prepayment of fees or costs or security therefor and without filing the affidavit required by section 1915(a) of title 28." 18 U.S.C. §3006A(d)(7). As such, no affidavit is required to be filed in support of this Motion.

Petitioner has previously been granted leave to proceed *in forma pauperis* before the United States Court of Appeals, Sixth Circuit. Because of his poverty, the Sixth Circuit appointed the undersigned as Counsel pursuant to the Criminal Justice Act. The undersigned Criminal Justice Act attorney desires to continue representation of Petitioner in this matter, due to his appointment, and Petitioner's

dire financial situation. However, because of his financial position, Petitioner is unable to pay the costs of this case or to give security therefor.

WHEREFORE, Petitioner, Ernest Earl Matthews, asks this Court to grant this Motion to Proceed *in forma pauperis.*

Respectfully Submitted,

STEVEN R. JAEGER
(KBA 35451)
THE JAEGER FIRM, PLLC
23 Erlanger Road
Erlanger, Kentucky 41018
TELE: (859) 342-4500
EMAIL: srjaeger@thejaegerfirm.com

Counsel for Petitioner

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

September 7, 2017

Mr. Steven Richard Jaeger
23 Erlanger Road
Erlanger, KY 41018

Re: Earnest Earl Matthews
v. United States
No. 17-5876

Dear Mr. Jaeger:

The petition for a writ of certiorari in the above entitled case was filed on September 5, 2017 and placed on the docket September 7, 2017 as No. 17-5876.

A form is enclosed for notifying opposing counsel that the case was docketed.

Sincerely,

Scott S. Harris, Clerk

by

Lisa Nesbitt
Case Analyst

Enclosures