No. _____

In the
Supreme Court of the United States

RASHEEN J. WESTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does robbery, as defined at common law, have violent force as an element, as the Tenth, Eleventh, and now Fourth Circuits have held, or is the force necessary to commit common law robbery too slight to qualify as violent force, as the Eighth, Ninth, District of Columbia, and contradictorily, Fourth Circuits have held? Will the conflicting holdings about whether common law robbery is a violent felony under the Armed Career Criminal Act, ("ACCA"), 18 U.S.C. §924(e), result in and continue to result in discrepant enhanced sentences for some defendants, like Petitioner, while not for other similarly situated defendants? Relatedly, if South Carolina robbery, as defined under common law is not violent, is armed robbery which is robbery while being armed with a deadly weapon, including mere possession, a violent felony, a question minimally addressed by the Fourth Circuit in *Weston*?

II. After *Parke v. Raley*, 506 U.S. 20 (1992), what burden do defendants bear to show that the presumption of regularity that attaches to final judgments should be suspended? Did the Fourth Circuit improperly shift the burden to Weston to prove he did not have or did not voluntarily waive the right to counsel when the available state court documents should have, but did not, reflect whether he was offered or had counsel during the state proceedings?

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Rasheen J. Weston, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 15-4744, entered on March 9, 2017 .

OPINION BELOW

The Fourth Circuit panel issued its unpublished opinion on March 9, 2017, affirming the judgment of the United States District Court for the District of South Carolina. This opinion is reported as *United States v. Weston*, 681 Fed. Appx. 235 (4th Cir. 2017). App. A. In the opinion, the Fourth Circuit relied exclusively on its recently decided decision in *United States v. Doctor*, 842 F.3d 306 (4th Cir. 2016), which is located in the attached appendix. App. B. On March 21, 2017, Weston filed a petition for rehearing and rehearing en banc with the circuit court. This petition was denied on June 20, 2017. App. C.

JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion and entered its judgment on March 9, 2017. App. A. On March 21, 2017, Weston filed a petition for rehearing and rehearing en banc with the circuit court, which was denied on June 20, 2017. App. C. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924 (e)(1):

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

STATEMENT OF THE CASE

Petitioner Rasheen J. Weston pled guilty to the unlawful possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The maximum penalty for a conviction under this statute is 10 years. 18 U.S.C. § 924(a)(2). However, if a person has three prior convictions for a "violent felony or a serious drug offense, or both," the penalty increases to a mandatory minimum of 15 years under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. 924(e)(1). A defendant sentenced under the ACCA also may be required to serve a five-year term of supervised release (*i.e.*, two additional years). 18 U.S.C. §3559 and 18 U.S.C. §3583(b)(1). The basis for jurisdiction in the district court is 18 U.S.C. §3231, which provides in pertinent part that the district courts shall have original jurisdiction, exclusive of the state courts, of all offenses against the laws of the United States.

The district court held that Weston had four qualifying convictions, including two armed robberies, strong arm robbery, and pointing and presenting. Joint Appendix ("JA") 73-76.[1] District courts in South Carolina, as the district court did in this case, have historically relied on *United States v. Presley*, 52 F.3d 64 (4th Cir. 1995), a case that held Virginia common law robbery was a violent felony, to hold that South Carolina robbery is violent because of its similarity to Virginia robbery. JA 74-75. The addendum to Weston's presentence report ("PSR") likewise relied on *Presley*

[1] Citations to JA refer to the appellate record compiled in the joint appendix on file with the Fourth Circuit. *See United States v. Weston*, No. 15-4744 (4th Cir. Dec, 2, 2015) at Docket Entry Nos. 24 and 26.

for its assertion that Weston was an armed career criminal. JA 308. After the *Weston* decision, the Fourth Circuit overruled *Presley*, and now holds that Virginia common law robbery is not a violent felony. *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017).

The court sentenced Weston to 180 months and five years of supervised release. JA 301-02. Weston appealed pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742. The Fourth Circuit affirmed, deciding that strong arm robbery and armed robbery were violent felonies solely on the basis of the circuit court's recently decided case of *Doctor*, 842 F.3d 306. *Weston*, 681 Fed. Appx. at 237 and 237, n.1. The court did not independently address Weston's argument that South Carolina robbery could be committed by *de minimis* actual force.

The Fourth Circuit disposed of Weston's challenge to armed robbery as a violent felony in a footnote, stating "the parties do not dispute that if the lesser included offense of strong arm robbery is a proper ACCA predicate, then armed robbery likewise qualifies." *Id*. at 237, n.1. Because of its decision about robbery, the Fourth Circuit failed to give any further analysis about armed robbery, where the elements are robbery while armed with, including mere possession of, a deadly weapon. S.C. Code Annotated §16-11-330(A) (Lexis 1995) and *State v. Heck*, 404 S.E.2d 514, 515 (S.C. Ct. App. 1991).

In *Doctor*, addressing the actual force issue, first raised at oral argument, the Fourth Circuit held "there is no indication that South Carolina robbery by violence can

be committed with minimal actual force." *Doctor*, 842 F.3d at 311-12. In affirming Weston's case, the Fourth Circuit held that "'South Carolina has defined its common law robbery offense, whether committed by means of violence or intimidation, to necessarily include as an element the use attempted use or threatened use of physical force against the person of another.'" *Weston*, 681 Fed. Appx. at 237 (quoting *Doctor*, 842 F.3d at 312-13). Contrary to Weston's case, where the main issue raised was whether South Carolina robbery could be accomplished by *de minimis* force, the *Doctor* case mostly focused on the issues of intimidation or constructive force and the *mens rea* required, recognizing that Doctor did not brief the *de minimis* force issue. *Doctor*, 842 F.3d at 309-12.

The *Doctor* panel also relied heavily on a citation to *United States v. Wagstaff*, 865 F.2d 626 (4th Cir. 1989) in a single South Carolina case to determine that South Carolina has adopted the federal definition of intimidation, including the recent definition of intimidation outlined in *United States v. McNeal*, 818 F.3d 141 (4th Cir. 2016), which *Doctor* held encompassed violent physical force. *Doctor*, 842 F.3d at 309-10 (citing *State v. Rosemond,* 589 S.E.2d 757, 759 (S.C. 2003)). *Doctor* explained, in reliance on *McNeal*, that "[t]here is no meaningful difference between a victim feeling a threat of bodily harm and feeling a threat of physical pain or injury." *Id*. at 309.

Weston also challenged the use of two prior convictions, pointing and presenting and robbery, as ACCA predicates because the available state court records failed to indicate that Weston had or was offered counsel, although similar, available state court

records related to Weston's other prior convictions reflected that he was represented by counsel. Compare JA 175, 177, and 180 to JA 188, 192, 196 and 200. The Fourth Circuit held that Weston failed "to overcome the presumption that the state court informed him of his right to counsel as it was required by statute to do". *Weston*, 681 Fed. Appx. at 237. Based on *Parke v. Raley*, 506 U.S. 20 (1992) and Fourth Circuit cases, the Fourth Circuit held Weston failed to "bear[] the heavy burden of showing that the prior conviction is invalid." *Weston*, 681 Fed. Appx. at 237. The court further observed that Weston did not meet his burden because he did not submit additional documents or testimony about his prior convictions. *Id*. at 237-38.

This petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the circuits are divided over whether robbery, as defined at common law, is a "violent felony" for purposes of the Armed Career Criminal Act ("ACCA"), which defines "violent felony" to include offenses that "ha[ve] 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 vast majority of American jurisdictions, including South Carolina, still define their robbery offenses pursuant to common law. This includes defining the amount of force necessary to commit robbery according to traditional, common law principles. As demonstrated herein, under the common law, and in the bulk of American jurisdictions today, "violence" means conduct by the perpetrator sufficient to overcome any degree of

resistance offered by the victim or used to break an attachment holding the property to the victim's person or clothing. This Court should grant certiorari to resolve the division among the circuits over whether common law force as defined in robbery is sufficient to satisfy the federal definition of violent felony.

This Court should also look at the Fourth Circuit's diversion from this Court's holding that courts must look at how a state defines its own crimes. *Descamps v. United States*, 133 S.Ct. 2276, 2285-86 (2013) and *United States v. Johnson*, 559 U.S. 133, 138 (2010) (hereinafter *Johnson 2010*). The Fourth Circuit held that South Carolina's citation to a single federal case means all subsequent federal definitions about the same subject applied to South Carolina robbery. *Doctor*, 842 F.3d at 309-10. This holding failed to address that South Carolina defines robbery commensurate with the common law, which includes that robbery can be accomplished by *de minimis* force.

This position ignores that South Carolina has historically followed and presently defines its robbery offense pursuant to common law definitions. The Fourth Circuit's opinion likewise fails to follow this Court's directive to compare the state crime's elements, as defined by the state, to the ACCA's elements.

Because South Carolina robbery is rooted in common law, and common law robbery is not violent, armed robbery in South Carolina is likewise not violent since the only additional element is having a weapon, which does not need to be displayed during the robbery for a conviction. *Heck*, 404 S.E.2d at 515 (citing *State v. Nix*, 343 S.E.2d 627 (S.C. Ct. App. 1986)).

Petitioner respectfully submits that South Carolina follows the traditional common law robbery definition and its robbery is identical to common law robbery in other states. Petitioner points out that many federal courts of appeal have held that common law robbery for those other states is not a violent felony under the ACCA. The Fourth Circuit's decision in *Doctor*, as applied in *Weston*, and some opinions from other circuits are in conflict with these other courts of appeal, and failed to follow the analysis as outlined by this Court. Additionally, the Fourth Circuit has created a conflict within the circuit itself, based on the Fourth Circuit's sudden departure from the analysis required by this Court's precedent. These conflicts have caused the Petitioner to be subject to a penalty under the ACCA that similarly situated defendants in other circuits do not face.

Relatedly, South Carolina armed robbery requires only robbery and possession of a weapon, so would also not qualify as an ACCA predicate.

Second, this Court should address whether the availability of state court records, which should have, but did not, reflect whether Weston had counsel during his two prior state proceedings was sufficient to shift the burden to the government to show that Weston, in fact, had, or knowingly and intelligently waived the right to, counsel. Numerous circuits have interpreted *Parke*, 506 U.S. 20 to mean that silence in the record as to counsel is insufficient to invoke a collateral challenge to a prior conviction where the status of counsel is an issue. The question of when or if the burden ever shifts to the government is in question, as is what is sufficient to over the presumption of regularity of prior convictions. This is an important question that should be settled

by this Court.

I. THE WESTON OPINION IS WRONG AND CONFLICTS WITH OTHER CIRCUITS' VIEW THAT COMMON LAW ROBBERY IS NOT A VIOLENT FELONY

The Fourth Circuit's decision that South Carolina common law robbery is a violent offense has widened the circuit split on this matter, and diverges from this Court's established analysis, which the Fourth Circuit used to determine Virginia and North Carolina common law robbery offenses are not violent, but which the Fourth Circuit abandoned in this case. South Carolina's common law robbery retains its common law definitions and does not qualify as a violent felony under the ACCA.

A. South Carolina Common Law Robbery Lacks Violence, As Defined by This Court, Required to Be an ACCA Predicate

1. This Court Requires Violent Physical Force to Qualify as an ACCA Predicate

In determining whether a prior crime qualifies as a violent felony, this Court has instructed that courts are to look at the state law under which a defendant was convicted and determine whether the elements of the offense meet the ACCA's definition of a violent felony. *Taylor v. United States*, 495 U.S. 575 (1990) and *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007).

Under the force clause, 18 U.S.C. §924(e)(2)(B)(i), the court should identify the minimum "force" required by the state law for the commission of the offense, and then determine if that force fits the definition of physical force. *Mondcrieffe v. Holder,* 133

S.Ct. 1678, 1684 (2013). Furthermore, "physical force" means "***violent*** force - that is, force capable of causing physical pain or injury to another person." *Johnson 2010,* 559 U.S. at 140 (emphasis in original). The Court in *Johnson* explained that "violent" connotes a substantial degree of force. *Id.*

This Court held that battery, defined as intentionally touching or striking another against his or her will or intentionally causing bodily harm, is not a violent felony for ACCA purposes under the force clause because the statute can be violated by slight physical contact. *Johnson 2010*, 559 U.S. at 136-38. The Court contrasted violent force with the degree of force needed to commit common law battery, which had an element labeled "force" but could be committed "by even the slightest touching." *Id.* at 139. This sort of "force" is not enough to constitute "physical force" within the meaning of §924(e)(2)(B)(i). *Id.* at 139–41.

2. Common Law Robbery Lacks Violent Physical Force

The minimum conduct required to commit common law robbery, both historically and in South Carolina, does not meet *Johnson 2010*'s "violent force" standard. "The degree of violence [for robbery] is immaterial at common law." *A Rationale of the Law of Aggravated Theft*, 54 Colum. L. Rev. 84, 85 (1954) (citing 2 Bishop, Criminal Law, §1158 and §1166-§1168 (9th ed. 1923)).

American statutes often define the crime of robbery "in the somewhat undetailed language used by Blackstone, Hawkins, Hale, and East in defining common-law robbery," or, as South Carolina does, the laws "punish robbery without defining it,

leaving the definition to the common law." Wayne R. LaFave, 3 *Subst. Crim. L.* §20.3, n.6 (2nd ed. Oct. 2016) and S.C. Code §16-11-325. "For the most part, notwithstanding statutory development over the years, the common-law conception of robbery has survived intact." 4 Charles Torcia, *Wharton's Criminal Law* §468 (15th ed. 2016).

"'Robbery is a felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear.'" John R. Rood, *A Digest of Important Cases on the Law of Crimes* §146 (1906) (hereinafter Rood, *Important Cases*) (citing 2 East P.C. 707). Violence or putting in fear elements, which are relevant to the definition of violent felony under federal law today, have long been found in the common law definition of robbery. *See* 2 Edward Hyde East, *Pleas of the Crown* 544 (P.R. Glazebrook, ed., 1972) (1803) (hereinafter East, *Pleas of the Crown*). As another common law authority explains:

> The words of the common law definition [of robbery], as given at the beginning of the Chapter, are in the alternative, "violence *or* putting in fear;" and taking the property by *either* of these means against the will of the party … such taking will be sufficient to constitute robbery. The principle, indeed, of robbery is violence; but it has been often holden, that actual violence is not the only means by which a robbery may be effected, but that it may also be effected by fear, which the law considers as constructive violence.

2 William Russell, *A Treatise on Felonies and Misdemeanors* 779-80 (9th ed. 1936) (hereinafter Russell, *Felonies and Misdemeanors*).

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; Russell, *Felonies and Misdemeanors* 780; and *State v. Trexler*, 4 N.C. 188, 192–93 (N.C. 1815).

In *Williams v. Commonwealth*, 50 S.W. 240, 240 (Ky. 1899), the court, explicitly applying the common law definitions of robbery, upheld a robbery conviction where the defendant "wrenched the pocketbook out of [the victim's] left hand" and obtained possession because he was "stronger" than the victim 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. "[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." William L. Clark & William L. Marshall, *A Treatise on the Law of Crimes* 553 (4th ed. 1940).

Second, even in the absence of a struggle or "active opposition" between the parties, the "snatching" of an article constituted robbery at common law if "the article [wa]s so attached to the person or clothes as to create resistance, however slight." 2 Joel Prentiss Bishop, *Criminal Law* §1167 (John M. Zane and Carl Zollmann, eds., 1923). For example, snatching "a basket of linen suddenly from the head of another" would suffice for robbery under common law. *Id*. (internal quotation marks and citation omitted).

In defining violence and putting in fear as required for robbery, the English 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 "perceiving " the effort,

the gentleman "laid hold of [the sword] at the same time and struggled for it". Rood, *Important Cases* §149 (citing to *Davies' Case*, 2 East P.C. 709 (Eng. Old Bailey, 1712)). Similarly, as decided by a full panel of judges, common law robbery includes the force required to break a chain attached to a watch, where the defendant jerked on it two or three times until the chain broke. *Id*. (citing *R. v. Mason*, Russ. & R. 419 (Eng. C.C.R. 1820)). The defendant "had to overcome the resistance made by the steel chain, and used actual force for that purpose." Russell, *Felonies and Misdemeanors* 781 (citation omitted). The conviction was properly for robbery "because of the actual force used to break the chain." Rood, *Important Cases* §149. Therefore, in common law, the force can be against property attached to the person, and the resistance can be created by the object.

The common law has clearly defined violence to encompass minimal force, specifically defining violence to include any degree of violence. *Aggravated Theft*, 54 Colum. L. Rev. at 85 (citing 2 Bishop, Criminal Law, §1158 and §1166-§1168). Common law robbery does not satisfy *Johnson 2010*'s violent physical force requirement, as it can include the force required to snatch a purse or pull a chain from someone's neck.

These old English cases form the basis of the states' definitions of robbery today, including South Carolina robbery. S.C. Code §16-11-325. Even the states that have robbery statutes define the crime based on common law. *Aggravated Theft*, 54 Colum. L. Rev. at 85.

3. South Carolina Has Long Defined Its Robbery by Common Law Definitions, So Is Not Violent

South Carolina's definition of robbery has long been tied to the common law definitions. In defining robbery in the 1850s, a South Carolina case shows that its definition of robbery is grounded in the common law. *See State v. Nathan*, 5 Rich. 219, 230-31 (S.C. Ct. App. 1851) (In reference to the robbery charge against the defendant, the court cited to numerous English cases with the "P.C." citation, similar to those cited in Rood, *Important Cases* §149, and referencing common law sources, including Coke and Hale). While referencing punishment associated with various capital common law offenses, the South Carolina Court of Appeals included robbery as one of its common law offenses. *State v. Sutcliffe*, 35 S.C.L. 372, 4 Strob. 372 (S.C. Ct. App. 1850) (citing 4th Hawkins, p. 254, B.2 c.33, sect. 20 & 23).

The Supreme Court of South Carolina articulated the elements of common law robbery in *Rosemond*, 589 S.E.2d 757. The South Carolina Court held that the offense is "defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another in his presence by violence or by putting such person in fear." *Id*. at 758 (citation omitted). The Court further explained that "[t]he gravamen of a robbery charge is a taking from the person or immediate presence of another by violence or intimidation," and that intimidation occurs when "an ordinary, reasonable person in the victim's position would feel a threat of bodily harm from the perpetrator's acts." *Id.* at 758-59; compare to Rood, *Important Cases* §146

(defining common law robbery).

Furthermore, to this day, South Carolina has not codified its robbery offense and it remains defined by the common law. South Carolina only has a statute outlining the punishment for committing common law robbery. S.C. Code §16-11-325; 4 Torcia, *Wharton's Criminal Law* § 468; and H. Mitchell Caldwell and Jennifer Allison, *Counting Victims and Multiplying Counts: Business Robbery, Faux Victims and Draconian Punishment*, 46 Idaho L. Rev. 647, 654-55 n.62 (2010) (hereinafter Caldwell, *Business Robbery,* 46 Idaho L. Rev. 647). This punishment is found in the South Carolina Criminal code in the chapter entitled "Offenses Against Property". S.C. Code, Chap. 11, generally.

Furthermore, the Fourth Circuit has held that Virginia and North Carolina common law robbery, where both robbery offenses are defined by common law, are not violent felonies under the ACCA. *Winston*, 850 F.3d 677 (4th Cir. 2017) and *United States v. Gardner*, 823 F. 3d 793 (4th Cir. 2016). South Carolina has also relied on how both Virginia and North Carolina define robbery, both of which define robbery based on common law. *State v. Jones*, 543 S.E.2d 541, 544 (S.C. 2001) (citing *Sullivan v. Commonwealth*, 433 S.E.2d 508 (Va. Ct. App. 1993)) (South Carolina Supreme Court relied on Virginia's definition of common law robbery, which the Fourth Circuit held is not violent in *Winston*, 850 F.3d 677); *State v. Rosemond*, 560 S.E.2d 636, 641 (S.C. Ct. App. 2003) (quoting *North Carolina v. Norris*, 141 S.E.2d 869, 872 (N.C. 1965) (South Carolina relies on North Carolina's definition of robbery, which is virtually

identical to South Carolina's robbery)); and Caldwell, *Business Robbery,* 46 Idaho L. Rev. at 654-55 n.62. South Carolina, Virginia, and North Carolina still define their robbery offenses by case and common law, with all three having only statutory provisions for the punishment. *See* S.C. Code §16-11-325, N.C.G.S.A. §14-87.1, Va. Code §18.2-58 and Caldwell, *Business Robbery,* 46 Idaho L. Rev. at 654-55 n.62.

South Carolina's more recent case law also demonstrates that the minimum force required by state law, like under common law, does not satisfy the ACCA's requirements. *See Moncrieffe,* 133 S.Ct. at 1684. A robbery in South Carolina can be accomplished with *de minimis* actual force. The defendant was convicted of South Carolina robbery when he told the victim to give him the purse, grabbed her arm, pulled groceries out of her hand, pulled on her arm and purse until she let go, and stared at her "in an unkind manner". *State v. Gagum*, 492 S.E.2d 822, 823 (S.C. Ct. App. 1997). Similarly, all that was required for a strong arm robbery conviction was that the defendant grabbed the victim's arm and "she felt something in her back." *Humbert v. State*, 548 S.E.2d 862, 863 (S.C. 2001). This is not the kind of violent physical force defined in *Johnson 2010*, 559 U.S. at 136-38.

South Carolina robbery by intimidation is likewise not violent. In a case where the defendant robbed a convenience store, after the victim ran and hid behind a freezer door, the defendant picked up the cash register and threw it to the ground to open it. *Rosemond*, 560 S.E.2d at 638-39. As held in *Rosemond*, robbery by intimidation was accomplished by a glare, flipping property into the air and throwing it on the ground.

Id. at 641. For a robbery conviction, fear can be created by the slightest of causes and without the threat of violent physical force against a person. *Id*.

Based on the common law definition of robbery and South Carolina's case law, South Carolina robbery encompasses conduct of far less magnitude than is required for a statute to fall within the force clause. Therefore, South Carolina robbery is not a violent felony.

B. The Fourth Circuit Failed to Consider the Underlying Common Law Definition of Robbery, Particularly What Constitutes Violence, and Rendered a Decision in Conflict with Itself and Other Circuits

In holding that South Carolina robbery is a violent felony in Weston's case, the Fourth Circuit summarily relied on its recent decision in *Doctor*, 842 F.3d 306 to determine that both the intimidation and violence prongs of robbery satisfied the ACCA's force clause. *Weston*, 681 Fed. Appx. at 237. The Fourth Circuit did not examine South Carolina's long history of cases defining robbery under common law, including the cases that show a conviction in South Carolina can rest on *de minimis* force.

The *Doctor* opinion seizes on South Carolina's prior mention in a single case of *Wagstaff*, 865 F.2d 626 to determine that South Carolina has adopted the federal definition of intimidation, which the Fourth Circuit held was violent.[1] *Doctor*, 842 F.3d at 309-10. The *Doctor* panel then extrapolates that South Carolina's one-time

[1] A search of cases citing *Wagstaff* shows that South Carolina has mentioned it only in *Rosemond*, 589 S.E.2d at 759.

reference to the almost 30-year old case of *Wagstaff* means that South Carolina likewise approves the definition of intimidation in the Fourth Circuit's more recent case of *McNeal*, 818 F.3d 141.

This position ignores South Carolina's long and consistent reliance on common law to define robbery. *See*, *e.g.*, *Sutcliffe*, 35 S.C.L. 372, 4 Strob. 372 (citing 4th Hawkins, p. 254, B.2 c.33, sect. 20 & 23). In fact, although numerous states have codified their robbery crimes, South Carolina still defines robbery under common law, and only provides for the punishment, not the definition of the crime, by statute. S.C. Code §16-11-325 and *Aggravated Theft*, 54 Colum. L. Rev. at 85-86.

In holding that Weston's prior robbery conviction, and by extension his armed robbery convictions, were violent, the Fourth Circuit failed to review the historical sources of common law that define robbery, such as Hale, Coke and Hawkins, and upon which South Carolina has traditionally relied to define robbery. *See Nathan*, 5 Rich. at 230 and *Sutcliffe*, 35 S.C.L. 372, 4 Strob. 372. Instead, contrary to this Court's directives in *Taylor*, 495 U.S. 575 and *Duenas-Alvarez*, 549 U.S. 183, the Fourth Circuit defined South Carolina's robbery by its own federal law interpretations. The Fourth Circuit's analysis resulted in an error regarding how federal courts should determine the minimum conduct that could realistically result in a conviction under *Duenas-Alvarez* and *Moncrieffe*.

1. The Fourth Circuit Has Rendered a Decision that Will Result in Disparate Sentences for Identical Conduct

The flawed analysis is demonstrated by the Fourth Circuit's analysis in two of its other cases and by comparison to other circuit's decisions, where common law robbery has been deemed not violent. The Fourth Circuit has previously held that North Carolina and Virginia common law robbery, both of which retain the common law definition of robbery, are not violent felonies. A circuit split also exists regarding numerous states' common law robbery offenses.

Prior to issuing the *Weston* opinion, the Fourth Circuit held that North Carolina common law robbery, which is still defined by the common law and has not been codified, is not a violent felony. *Gardner*, 823 F.3d 793. South Carolina has relied on North Carolina's definition of robbery in several robbery cases. *See*, *e.g.*, *State v. Dodd*, 579 S.E.2d 331, 334 (S.C. Ct. App. 2003) (citing *Trexler,* 342 S.E.2d at 880) and *Rosemond*, 560 S.E.2d at 641 (quoting *Norris*, 141 S.E.2d at 872, in turn quoting *State v. Sawyer*, 29 S.E.2d 37, 37 (N.C. 1944)).

Furthermore, the Fourth Circuit recognized that "the degree of force used is immaterial" to be "actual violence" for common law robbery purposes; violence simply means whatever degree of force "'is sufficient to compel the victim to part with his property.'" *Gardner*, 823 F.3d at 803 (quoting *Sawyer*, 29 S.E.2d at 37). *Sawyer*, upon which the Fourth Circuit relied to hold North Carolina common law robbery was not

violent, is the exact case on which South Carolina has relied to define its own robbery. *See Rosemond*, 560 S.E.2d at 641.

Both South Carolina and North Carolina define their robbery crimes under common law definitions. South Carolina has explicitly relied on North Carolina's definition of robbery, but the Fourth Circuit reached a contradictory conclusion that South Carolina robbery is violent. Likewise, the Fourth Circuit held that Virginia robbery was not violent after the *Weston* decision issued. *Winston*, 850 F.3d 677. The district court in Weston's case relied on *Presley*, 52 F.3d 64 (4th Cir. 1995), a case that held Virginia common law robbery was a violent felony and which was abrogated by *Winston*, to hold that South Carolina robbery was a violent felony because of the similarities between Virginia and South Carolina common law robbery. JA 74-75. The South Carolina Supreme Court previously relied on Virginia's definition of common law robbery regarding its own armed robbery, which contains the robbery elements plus one additional element (being armed, including possession). *Jones*, 543 S.E.2d at 544 (citing *Sullivan*, 433 S.E.2d 508).

To further confuse matters, Virginia has previously held in a single case that the definition of intimidation in its common law robbery offense mirrored *Wagstaff*. *See Loving v. Commonwealth*, No. 0606-98-2, 1999 WL 1129835 at *2 (Va. Ct. App. 1999) (citing *Wagstaff*, 865 F.2d 626). The Virginia court defined intimidation as "whether the defendant's conduct placed the victim in fear of bodily harm." *Id.* (citing *Wagstaff*, 865 F.2d at 628); *compare Doctor*, 842 F.3d at 309 (holding that South Carolina, by

relying on the intimidation definition in *Wagstaff* that "an ordinary victim feels a threat of bodily harm from the robber's acts", adopted the federal definition of intimidation recently confirmed in *McNeal*, which is that intimidation means threat of physical force).

However, in *Winston*, the Fourth Circuit did not extrapolate that Virginia's one-time reference to the almost 30-year old case of *Wagstaff* meant that Virginia defines intimidation in robbery under federal law. This is especially troubling since *Doctor*'s key holding is that the intimidation element of South Carolina robbery, which the Fourth Circuit defined pursuant to federal law, satisfies the force clause. *Doctor*, 842 F.3d at 309-10.

The flawed analysis applied by the court in *Weston* and *Doctor* results in a realistic probability that defendants in the same circuit who have committed robbery in different states will be subject to inequitable punishment for engaging in the same conduct. The Fourth Circuit's flawed analysis also creates a circuit split with several other circuits who have addressed common law robbery and held that it is not violent.

2. The Circuits Are Split Over Whether Common Law Robbery's Violence and Intimidation Elements Are Violent Under 924(e)(2)(B)(i)

This court should grant certiorari because the lower courts are divided over whether the "violence" required for common law robbery equates to the use of physical force under §924(e)(2)(B)(i). *Compare Weston,* 681 Fed. Appx. 235 and *Doctor,* 842 F.3d 306 (both South Carolina robbery); *United States v. Harris*, 844 F.3d 1260, 1270 (10th

Cir. 2017) (Colorado robbery) and *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016) (Florida robbery) to *United States v. Geozos*, No. 17-35018, 2017 WL 12155 (9th Cir. Aug. 29, 2017) (Florida robbery); *Winston*, 850 F.3d 677 (Virginia robbery); *Gardner*, 823 F.3d 793 *(North Carolina robbery); United States v. Bell*, 840 F.3d 963 (8th Cir. 2016) (Missouri robbery); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) (Massachusetts armed robbery) and *United States v. Redrick,* 841 F.3d 478, 480 (D.C. Cir. 2016) (Maryland robbery).

In addition to *Weston* and *Doctor*, several other circuits have held that common law robbery is a violent felony. The Tenth Circuit held that Colorado robbery was violent, based on the Colorado Supreme Court relying on the common law definition of robbery, which the court held required violence. *Harris*, 844 F.3d at 1262 and 1266-67. The Tenth Circuit distinguished *Parnell*, 818 F.3d 974, noting that the Ninth Circuit had indicated Massachusetts robbery had departed from the common law. *Harris*, 844 F.3d at 1267.

Yet, Colorado, and South Carolina, whose robbery offenses have been deemed violent, and Massachusetts, Virginia, and North Carolina, whose robbery offenses have been held not violent, and Florida, whose robbery statute has been held violent and non-violent by different circuits, all continue to define their robbery crimes under common law. Caldwell*, Business Robbery,* 46 Idaho L. Rev. at 654-55 n.62. As recently as 2016, Massachusetts defined robbery by common law standards, notwithstanding the *Harris* court's assertion to the contrary to distinguish Colorado's common law

robbery. *Com. v. Pearson*, 60 N.E.3d 1196, at *2 n.4 (Mass. App. Ct. 2016) and *Harris*, 844 F.3d at 1267-68.

The Court of Appeals for the District of Columbia Circuit in *Redrick,* 841 F.3d at 482-83 discussed Maryland's robbery offense, which is still defined by common law. Maryland's common law robbery is nearly identical to that of South Carolina's. In Maryland, robbery is "the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence or putting in fear", retaining the common law definition. *Id.* at 482 (citation omitted). Relying on the government's concession in a similar case, the Court held that Maryland common law robbery was not a violent offense. *Id.* (The Court did go on to find that Maryland *armed* robbery was a violent offense. *Id.* at 484.) *But see United States v. Wilson*, 951 F.2d 586, 588 (4th Cir. 1991) (Maryland robbery, adopting the common law definition requiring the carrying away of property "by the use of violence or by putting in fear", is a crime of violence under the force clause).

The Eighth Circuit, in *Bell*, 840 F.3d 963, analyzed Missouri's robbery statute, holding it was not a guideline crime of violence predicate under the force clause. A person commits the crime of robbery in the second degree when he forcibly steals property. *Id.* at 965 (citing Mo. Rev. Stat. 569.030.1). The term "forcibly steals" means "a person 'forcibly steals,' and thereby commits robbery, when, in the course of stealing . . . he uses or threatens the immediate use of physical force upon another person." *Id.* (internal quotation marks omitted). The amount of force necessary to support a

conviction in state court does not rise to the level of physical force, "violent force capable of causing physical pain or injury to another person" under *Johnson 2010, supra.* *Id.* at 965. In so holding, the Eighth Circuit favorably cited to *Gardner*, 823 F.3d 793, noting it also involved a common law robbery offense. *Bell*, 840 F.3d at 967.

The Ninth Circuit in *Parnell,* 818 F.3d 974 held that Massachusetts armed robbery was not a violent offense. Massachusetts robbery can be committed when a person "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". Mass. Gen. Laws Ann. ch. 265, §19(b). The Ninth Circuit held that armed robbery, encompassing robbery, does not have as an element the use, attempted use, or threatened use of physical force against the person of another because the degree of force required is immaterial - any amount of force will support a conviction as long as the victim is aware of it. *Parnell,* 818 F.3d at 979.

Most demonstrative of the unfair application of the circuits' conflicting views of common law robbery are the cases of *Fritts*, 841 F.3d 937 and *Geozos*, No. 17-35018, 2017 WL 3712155. The Eleventh Circuit has held that Fla. Stat. §812.13(1), defined in relevant part as "the taking of money or other property . . . .[with] the use of force, violence, assault, or putting in fear", is a violent felony. *Fritts*, 841 F.3d at 942 and *United States v. Bostick*, 675 Fed. Appx. 948 (11th Cir. 2017) (unpublished).

Yet, the Ninth Circuit recently held that Fla. Stat. §812.13(2)(a), which is the commission of Fla. Stat. §812.13(1) plus the additional factor of carrying a gun or other

deadly weapon, is not a violent felony. *Geozos*, No. 17-35018, 2017 WL 3712155 at *6-*8. *Geozos* compared Florida robbery and armed robbery to the Massachusetts statute at issue in *Parnell*. *Id*. at *6-*8.

These various robbery crimes are similar, if not identical, and rooted in the common law. Yet, based on the jurisdiction, the circuits have concluded common law robbery is both violent and non-violent.

C. Resolving the Circuit Split Would Allow the Court to Clarify the Force Clause Parameters, Which Have Been Inconsistently Applied

This is an important question of federal law that has not been settled by this Court and is in conflict with relevant decisions of this Court. As indicated, the Fourth Circuit's decision is in conflict with the decisions in several other circuits, which have held that common law robbery is not violent.

The circuit split demonstrates how crucial it is for this issue to be resolved. Circuits have reached different outcomes, even when the common law robbery offense retains its common law definition. *Compare Harris*, 844 F.3d at 1262 and 1266-67 (Colorado robbery is violent because it is rooted in the common law definition) to *Redrick,* 841 F.3d at 482 (Maryland robbery is not violent, although it is defined by common law). The circuits have inconsistently relied on similar cases to reach contrary conclusions. *Compare Harris*, 844 F.3d at 1267 (to show that Colorado's common law robbery was violent, the Tenth Circuit distinguished *Parnell*, by saying Massachusetts robbery, a common law offense, had departed from common law principles which is

why the Ninth Circuit held it was not violent) to *Geozos*, No. 17-35018, 2017 WL 3712155 at *7 (relying on *Parnell* to show that Florida robbery is similar to the robbery at issue in *Parnell* and to hold it is not violent).

These cases represent incongruous understandings of the elements clause. Granting certiorari to address common law robbery would not only allow the Court to resolve the circuit split over that particular offense; it would also provide the Court with an opportunity to provide further clarity about what § 924(e)(2)(B)(i) means more generally.

A consistent application of §924(e)(2)(B)(i) is especially important following this Court's 2015 decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) striking down § 924(e)'s so-called residual clause. Absent the residual clause, §924(e)(2)(B)(i) will solely determine whether an offense qualifies as a violent felony, unless the offense qualifies as generic burglary, generic arson, generic extortion, or involves explosives under § 924(e)(2)(B)(ii). As a result, the elements clause will now affect many more sentences than it did when this Court decided *Johnson 2010*.

This Court should grant certiorari to resolve the division in the circuits over whether §924(e)(2)(B)(i) applies to common law robbery and to clarify the meaning of that statute.

D. This Case Is an Ideal Vehicle for Resolving the Question Presented

Weston's case presents the issue in a straightforward manner, where both the circuit court and district court sentenced Weston above the statutory maximum based

on their conclusions that common law robbery, and the related armed robbery, convictions were violent such that the 15-year mandatory minimum of the ACCA could be applied. By necessity, this Court would be required to decide the issue presented if it decides to grant certiorari.

This case involves an issue that is likely to be repeatedly raised to this Court, particularly because defendants will be subject to vastly different sentences based on the same conduct, depending on the circuit in which the §922(g) charges are brought and the state in which their prior convictions occurred. *Compare Fritts*, 841 F.3d 937 to *Geozos*, No. 17-35018, 2017 WL 12155 (both cases involving Florida robbery).

Therefore, Petitioner respectfully requests that this Court settle the circuit split about robbery.

II. THE FOURTH CIRCUIT WRONGLY HELD THAT THE PRESUMPTION OF REGULARITY SHOULD APPLY IN WESTON'S CASE WHERE NOTHING IN THE EXISTING RECORDS SHOWS THAT HE WAS OFFERED COUNSEL OR KNOWINGLY AND INTELLIGENTLY WAIVED THAT RIGHT

This Court should grant certiorari because *Parke v. Raley*, 506 U.S. 20, 30 (1992) left open the question of whether the presumption of regularity applied to prior convictions used for sentencing enhancement purposes when the record is "suspiciously 'silent'" about whether the defendant had or waived the right to counsel. The very narrow issue here, of significant importance constitutionally, is whether a presumption of regularity should apply when records exist related to the prior state conviction which should, but do not, reflect anything about counsel. The failure of the records to reflect

anything about counsel is of considerable importance since South Carolina has a law requiring defendants to be informed of their right to counsel, records in existence around the same time frame of Weston's convictions at issue usually indicate counsel's name, and South Carolina has extensive case law, and studies have been conducted, showing the right to counsel often is not offered to South Carolina defendants under S.C. Code §17-3-10. This important question of federal law should be settled by this Court.

In Weston's case, the Fourth Circuit held that *Parke's* presumption of regularity applied, where the records for his 1992 strong arm robbery conviction and his 1990 pointing and presenting conviction did not provide any information about attorney representation. JA 172-73, JA 175, JA 177, JA 180, and JA 298-99. As the district courts have historically done, the district court and Fourth Circuit relied on S.C. Code §17-3-10, requiring a defendant to be informed of his right to counsel, to presume Weston was provided or waived the right to counsel during the state court proceedings. *Weston*, 681 Fed. Appx. at 237 and 237, n.2. The Fourth Circuit further held that Weston "had to overcome the presumption that the state court informed him of his right to counsel as it was required by statute to do". *Id.* at 237.

However, in South Carolina, the court records might not readily reflect the status of counsel. South Carolina appellate courts have frequently determined that defendants are not offered the right to counsel or warned of the dangers of self-representation in the lower courts. *See, e.g.*, *State v. Bateman*, 373 S.E.2d 470 (S.C. 1988); *Wroten v. State*, 391 S.E.2d 575 (S.C. 1990), *Prince v. State*, 392 S.E.2d 462 (S.C.

1990), *Salley v. State*, 410 S.E.2d 921 (S.C. 1991), *Stevenson v. State*, 522 S.E.2d 343 (S.C. 1999), *Watts v. State*, 556 S.E.2d 368 (S.C. 2001), *Gardner v. State*, 570 S.E.2d 184 (S.C. 2002), *State v. Rutledge*, No. 2008-UP-010, 2008 WL 9832817 (S.C. Ct. App. 2008) (court held that the record "falls far short" of establishing a valid waiver of the right to counsel), and *Ex Parte Jackson*, 672 S.E.2d 585, 588-89 (S.C. 2009) (holding it was reversible error when the record failed to show defendant was told about her right to counsel or that she knowingly and intelligently waived her right to counsel). It is clear that during the time period of Weston's challenged convictions that the state courts did not necessarily follow S.C. Code §17-3-10. Furthermore, the South Carolina Supreme Court and Court of Appeals remanded these cases largely because the state court records were inadequate to show that the right to counsel was protected. This history of inadequate records should overcome any presumption that S.C. Code §17-3-10 is always followed, as the district court held in Weston's case.

As further support that the presumption of regularity should be suspended, recently, two studies conducted by the National Association of Criminal Defense Lawyers ("NACDL") and the American Civil Liberties Union ("ACLU") found that South Carolina summary courts, which hear hundreds of thousands of cases a year, "operate in a largely Sixth Amendment-free zone" according to the NACDL's president. https://www.nacdl.org/RushToJudgement_Release/ (last viewed on Sept. 7, 2017). The studies revealed that less than 10% of the defendants observed during the study were represented by counsel. *Id*. More than half the defendants observed were not advised of their right to counsel while talking to judges. *Id*. Therefore, there is no support

whatsoever to apply the presumption of regularity in this case.

Parke is a case where the defendant attempted to extrapolate the holding in *Burgett v. Texas*, 389 U.S. 109, 114 (1967), a case where the state court records "raise[d] a presumption that petitioner was denied his right to counsel", to his collateral challenge to the validity of a guilty plea in a prior conviction that was used to enhance his sentence. *Parke*, 506 U.S. at 23 and 30-31. Even though this Court declined to extend its *Burgett* holding to *Parke*, this Court recognized that there can be "good reason[s] to suspend the presumption of regularity". *Id*. at 30. As an example, this Court noted that *Parke* was "not a case in which an extant transcript is suspiciously silent on the question of whether the defendant waived constitutional rights. Evidently, no transcripts or other records of the earlier plea colloquies exist at all." *Id*.

Even after *Parke* was decided, this Court recognized the unique right to make a collateral attack on prior convictions where the right to counsel was in question. When prior convictions are used to enhance the defendant's sentence under the ACCA, the defendant has no right to collaterally attack these convictions "with the sole exception of convictions obtained in violation of the right to counsel". *Custis v. United States*, 511 U.S. 485, 487 (1994). "Failure to appoint counsel for an indigent defendant [i]s a unique constitutional defect". *Id*. at 496. This Court reviewed the "historical basis in our jurisprudence" that the right to counsel is unique, at least in part because "'[t]he right to be heard would be, in many cases, of little avail if it did not comprehend

the right to be heard by counsel.'" *Id*. at 494-95 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

The seminal case regarding indigent defendants' right to counsel in state proceedings was decided in 1963. *Gideon v. Wainwright*, 372 U.S. 335 (1963). South Carolina has had some form of statute for defense of indigents since 1962. *See* S.C. Code §17-3-10 (1976) (crediting the former S.C. Code §17-281 from 1962 as the historical version of the statute). Almost 30 years after *Gideon* and South Carolina's indigent's defense statute was enacted, the safeguards for protecting indigent defendants' right to counsel should have been well entrenched in state courts' procedures. In fact, this Court distinguished a defendant's unique right to collaterally challenge prior convictions based on right to counsel issues by noting that it is very simple to determine from "the judgment roll" or "accompanying minute order" whether counsel was improperly denied. *Custis*, 511 U.S. at 496. Even though records were available related to Weston's prior convictions, it was not readily apparent if he had counsel.

In South Carolina, by the 1990s, counsel was generally identified somewhere in state court documents. For example, in another case which raised the same issue, state court documents reflected that the defendant had counsel on the face of the indictment for a 1990 burglary charge. Joint Appendix (Docket Entry No. 16) at 134, *United States v. Albright*, No. 16-4179 (4th Cir. docketed Apr. 4, 2016). Similarly, Weston's state court documents in a series of 1995 offenses also reflected he was

represented by counsel. JA 188, 192, 196, 200 and JA 322-24. Therefore, this case involves records that are "suspiciously silent", as recognized in *Parke*, and warrants the suspension of the presumption of regularity. *Parke*, 506 U.S. at 30.

Although the holding in *Parke* was related to the defendant's challenge to a prior guilty plea, not whether he was afforded his constitutional right to counsel, almost all of the circuits interpreting *Parke* have held it to mean that the burden is on the defendant to show that his right to counsel was violated when collaterally attacking a prior conviction, and the burden does not shift to the government simply because the record is silent. *See*, *e.g.*, *United States v. Gray*, 177 F.3d 86, 90-91 (1st Cir. 1999); *United States v. Jones*, 332 F.3d 688, 697-98 (3rd Cir. 2003); *United States v. Collins*, 415 F.3d 304, 316 (4th Cir. 2005); *United States v. Guerrero-Robledo*, 565 F.3d 940, 943-44 (5th Cir. 2009); and *United States v. Cline*, 362 F.3d 343, 350-51 (6th Cir. 2004). The District of Columbia Circuit took a different view, holding that, post-*Parke*, the Due Process Clause does not allow the courts to shift the burden of persuasion regarding whether he had counsel for a prior conviction to the defendant once the defendant met his burden of production. *United States v. Martinez-Cruz*, 736 F.3d 999 (D.C. Cir. 2013).

Relying on the *Burgett* principle, the defendant urged the court to shift the burden onto the government to prove he had counsel where the docket sheet did not show he validly waived the right to counsel. *Gray*, 177 F.3d at 90. The First Circuit held that *Parke* foreclosed the argument by limiting the *Burgett* principle to prior

convictions that occurred before *Gideon* because silence in the record is indicative of a constitutional violation since a defendant cannot waive a right of which he is unaware. *Id*. at 91 (citing *Parke*, 506 U.S. at 31).

The Fourth Circuit also cited *Parke* for the proposition that the presumption of regularity attaches to final judgments, making it "'appropriate to assign the burden of proof to the defendant.'" *Collins*, 415 F.3d at 316 (quoting *Parke*, 506 U.S. at 31). However, the Fourth Circuit recognized the ongoing validity of *Burgett*, noting that a defendant can submit "sufficient evidence to defeat the presumption that a prior conviction was constitutionally sound". *Id*. at 316, n.6. The Fourth Circuit held *Collins* was more akin to *Parke*, where no transcripts or other records existed at all, and the defendant, therefore, failed to meet his burden to overcome the presumption of regularity. *Id*. at 316. The Fourth Circuit distinguished *Collins* and *Parke* from "'a case in which an extant transcript is suspiciously "silent" on the question whether the defendant waived constitutional rights.'" *Id*. (quoting *Parke*, 506 U.S. at 30).

Weston presented a straightforward issue to the Fourth Circuit, arguing that his prior criminal convictions should not be used to enhance his sentence because the available state documents were silent on the issue of whether he had or knowingly and intelligently waived counsel during the proceedings leading to that conviction, relying on *Carnley v. Cochran*, 369 U.S. 506, 515-16 (1962), *Burgett*, 389 U.S. 109, and *Custis*, 511 U.S. 485. The question is simple: does the failure of the South Carolina state court records to reflect whether Weston was offered or validly waived counsel shift the

burden to the government to show that the defendant's constitutional rights were protected? In other words, is this a case where the presumption of regularity should be suspended, since records exist, but are suspiciously silent, especially since South Carolina had a decades old statute requiring courts to offer counsel to defendants?

The *Weston* court erroneously attached a presumption of regularity in a case where the collateral challenge involved the right to counsel in prior convictions used to enhance Weston's sentence, and where the state court documents were suspiciously silent as to counsel, all of which is in violation of Supreme Court precedent. *See Carnley*, 369 U.S. 506, *Burgett*, 389 U.S. 109 and *Parke*, 506 U.S. at 30.

The Fourth Circuit, therefore, improperly shifted the burden onto Weston to show that he was offered counsel or knowingly waived the right to counsel. The available state court documents failed to show Weston had or was offered counsel, although the right to counsel was well-established and similar state court documents during the same time frame reflected counsel's name. Therefore, Weston asks this Court to grant his petition to answer this important legal question about whether prior convictions can be used to enhance a defendant's sentence when the available records are silent about whether the defendant had or was offered counsel during the prior proceedings.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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