No. ________

IN THE
Supreme Court of the United States

LATELLIS EVERETTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents an important issue concerning the proper application of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). Since this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*), striking down the ACCA's residual clause as unconstitutionally vague, several circuit courts of appeals have issued published decisions on whether various state robbery statutes qualify as "violent felon[ies]" under the ACCA's elements clause. As a result of the differing conclusions these courts have reached, a direct conflict has emerged about the degree of force necessary for a robbery offense to qualify as a "violent felony."

In Florida, a robbery occurs where an individual commits a taking using only the amount of force necessary to overcome a victim's resistance. Thus, if a victim's resistance is minimal, then the force needed to overcome that resistance need only be minimal. Two terms ago, in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), this Court left open the question of whether a Florida conviction for robbery qualifies as a "violent felony" under the ACCA's elements clause. Since then, the issue has placed the Eleventh and Ninth Circuit at odds. *Compare United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), *with United States v. Geozos*, --- F.3d ---, No. 17-35018, 2017 WL 3712155 (9th Cir. Aug. 29, 2017). This petition addresses that question. Specifically, the question presented is whether a conviction for armed robbery qualifies as a "violent felony" under the ACCA's elements clause where, as in Florida and several other states, the offense may be committed by using a *de minimis* amount of force.

This Court's resolution of this issue would not only resolve the direct conflict between the Ninth and Eleventh Circuits, but would provide much-needed guidance on how to determine whether a state offense has as an element the use of "physical force," as that term was defined in *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Johnson I*). It is respectfully submitted that this petition presents an ideal vehicle to clarify the scope of the ACCA's elements clause.

LIST OF PARTIES

Petitioner, Latellis Everette, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Latellis Everette respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION AND ORDER BELOW

The Eleventh Circuit's opinion, *United States v. Everette*, No. 16-11147, 2017 WL 3309732 (11th Cir. Aug. 3, 2017), is unpublished and is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over this criminal case, pursuant to 18 U.S.C. § 3231. An appeal from that court's final judgment proceeded for review by the court of appeals, in accordance with 28 U.S.C. § 1291. The Eleventh Circuit denied Mr. Everette's petition for hearing en banc on July 31, 2017, and affirmed the lower court judgment on August 3, 2017. *See* Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the application of the ACCA, 18 U.S.C. § 924(e). The ACCA's enhanced sentencing provision provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions . . . 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[.]

18 U.S.C. § 924(e)(1).

In relevant part, the ACCA defines a "violent felony" as:

> [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 . . . .

18 U.S.C. § 924(e)(2)(B).

The Florida robbery statute in effect at the time of Mr. Everette's conviction provides, in pertinent part:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear.
>
> If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment . . . .

Fla. Stat. § 812.13 (1992).[1]

STATEMENT OF THE CASE

Mr. Everette pled guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The presentence investigation report (PSR) recommended sentencing Mr. Everette as an armed career criminal on the basis of four prior Florida convictions: (1) armed robbery; (2) armed robbery; (3) sale of cocaine; and (4) aggravated assault (four counts).[2] As an armed career criminal, Mr. Everette's enhanced offense level and enhanced criminal history

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[1] Effective October 1, 1992, the statutory definition of robbery was amended to its present form, which reads:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

See 1992 Fla. Sess. Law Serv. Ch. 92-155 (C.S.S.B. 166) (WEST).

[2] The four aggravated assaults were committed on the same occasion and therefore qualified as only one ACCA predicate offense.

category provided an advisory guideline sentencing range of 151 to 188 months. However, due to the 180-month mandatory minimum required by the ACCA, the guideline range became 180 to 188 months. Without the ACCA enhancement, Mr. Everette's advisory guideline range would have been 84 to 105 months, and the statutory maximum would have been 120 months' imprisonment. At sentencing, Mr. Everette objected that he should not be subject to the ACCA sentencing enhancement because, among other things, his prior convictions for robbery did not qualify as a "violent felony" under the ACCA's elements clause. The district court overruled Mr. Everette's objection and sentenced him to the ACCA's mandatory minimum sentence of 120 months' imprisonment.

Shortly after Mr. Everette filed his notice of appeal, the Eleventh Circuit granted Mr. Everette's unopposed motion to stay the appellate proceedings pending the Eleventh Circuit's decision in *Fritts*, as *Fritts* was to decide whether, in light of *Johnson II*, a Florida conviction for armed robbery qualifies as a "violent felony" under the ACCA's elements clause.

On November 8, 2016, the Eleventh Circuit issued its decision in *Fritts*, holding that, based on prior panel precedent, specifically its decisions in *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006), and *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), a Florida conviction for robbery qualifies as a "violent felony" under the ACCA's elements clause. Based on *Lockley*, the Court held that the least culpable means of committing robbery under Florida law was by putting a victim in fear, and that version of the robbery offense categorically qualified under the elements clause. *Id.*

In light of *Fritts*, Mr. Everette contemporaneously filed an initial brief and a petition for hearing en banc. In both, Mr. Everette argued, among other things, a Florida conviction for robbery does not qualify as a "violent felony" under the elements clause because, under the least-culpable-act rule, it must be presumed that his robbery offense was committed by using only a minimal amount of force.

After the Eleventh Circuit denied the parties' joint motion to stay the briefing schedule pending the Court's ruling on Mr. Everette's petition, the government moved for summary affirmance based on *Fritts*. The government's motion was denied, but the Eleventh Circuit allowed the government to use its motion as its response brief. On July 31, 2017, Mr. Everette's petition for hearing en banc was denied, and three days later, on August 3, 2017, the Eleventh Circuit affirmed the district court's decision based on *Fritts*.

REASONS FOR GRANTING THE WRIT

The Ninth and Eleventh Circuits Are at Odds Regarding Whether a Florida Conviction for Armed Robbery Qualifies as a "Violent Felony" under the ACCA's Elements Clause.

Under Florida's robbery statute, a robbery occurs where a taking is accomplished using enough force to overcome a victim's resistance. *See Robinson v. State*, 692 So. 2d 883 (Fla. 1997). Thus, if a victim's resistance is minimal, the force needed to overcome that resistance is similarly minimal. Indeed, a review of Florida case law clarifies that a defendant may convicted of robbery even if he uses only a *de minimis* amount of force. A conviction may be imposed if a defendant: (1) bumps someone from behind;[3] (2) engages in a tug-of-war over a purse;[4] (3) pushes someone;[5] (4) shakes someone;[6] (5) struggles to escape someone's grasp;[7] (6) peels back

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[3] *Hayes v. State*, 780 So. 2d 918, 919 (Fla. 1st DCA 2001).

[4] *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011).

[5] *Rumph v. State*, 544 So. 2d 1150, 1151 (Fla. 5th DCA 1989).

[6] *Montsdoca v. State*, 93 So. 157, 159–160 (Fla. 1922).

[7] *Colby v. State*, 46 Fla. 112, 114 (Fla. 1903). In *Colby*, the defendant was caught during an attempted pickpocketing. *Id.* The victim grabbed the defendant's arm, and the defendant

someone's fingers;[8] or (7) pulls a scab off someone's finger.[9] Indeed, under Florida law, a robbery conviction may be upheld based on "ever so little" force. *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986).[10]

The Ninth Circuit recently recognized this in *Geozos*, where it held that a Florida conviction for robbery, regardless of whether it is armed or unarmed, fails to qualify as a "violent felony" under the elements clause. 2017 WL 3712155 at *6–*8.[11] In so holding, the Ninth Circuit relied on Florida caselaw which clarified that an individual may violate Florida's robbery

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struggled to escape. *Id.* Under the robbery statute in effect at the time, the Florida Supreme Court held it was not a robbery because the force was used to escape, rather than secure the money. *Id.* However, the Florida Supreme Court has made clear that this conduct would have qualified as a robbery under the current robbery statute, which is at issue in this case. *See Robinson v. State*, 692 So. 2d 883, 887 n.10 (Fla. 1997) ("Although the crime in *Colby* was held to be larceny, it would be robbery under the current version of the robbery statute because the perpetrator used force to escape the victim's grasp."). Indeed, Florida courts have made clear that if a pickpocket "jostles the owner, or if the owner, catching the pickpocket in the act, struggles to keep possession," a robbery has been committed. *Rigell v. State*, 782 So. 2d 440, 441 (Fla. 4th DCA 2001) (quoting W. LaFave, A. Scott, Jr., *Criminal Law* § 8.11(d), at 781 (2d ed. 1986)); *Fine v. State*, 758 So. 2d 1246, 1248 (Fla. 5th DCA 2000).

[8] *Sanders v. State*, 769 So. 2d 506, 507 (Fla. 5th DCA 2000).

[9] *Johnson v. State*, 612 So. 2d 689, 690–91 (Fla. 1st DCA 1993).

[10] In *Santiago*, the defendant reached into a car and pulled two gold necklaces from around the victim's neck, causing a few scratch marks and some redness around her neck. *Santiago*, 497 So. 2d at 976.

[11] The *Geozos* Court correctly stated that whether a robbery was armed or unarmed made no difference because an individual may be convicted of armed robbery for "<u>merely</u> carrying a firearm" during the robbery, even if the firearm is not displayed and the victim is unaware of its presence. 2017 WL 3712155 at *6–*8; *see State v. Baker*, 452 So. 2d 927, 929 (Fla. 1984); *State v. Burris*, 875 So. 2d 408, 413 (Fla. 2004); *Williams v. State*, 560 So. 2d 311, 314 (Fla. 1st DCA 1990); *see also Parnell v. United States*, 818 F.3d 974, 978–81 (9th Cir. 2016) (holding that a Massachusetts conviction for *armed* robbery, which requires only the possession of a firearm (without using or even displaying it), does not qualify as a "violent felony" under the ACCA's elements clause). Thus, it is of no moment that Mr. Everette's conviction was for *armed* robbery.

statute without using violent force, such as engaging "in a non-violent tug-of-war" over a purse. *Id.* (citing *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011)). And while both the Ninth and Eleventh Circuits have recognized the Florida robbery statute requires an individual use enough force to overcome a victim's resistance, the Ninth Circuit, in coming to a decision that it recognized was at "odds" with this Eleventh Circuit's holding in *Fritts*, stated that it believed the Eleventh Circuit "overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." *Id.*

Florida is not alone in its use of a resistance-based standard. In fact, most states permit robbery convictions where the degree of force used is sufficient to overcome a victim's resistance. Indeed, at least fifteen states use some variation of this standard in the text of their statutes,[12] and several others have adopted it through case law.[13] Since this Court struck down the ACCA residual clause in *Johnson II*, several circuits have had to reevaluate whether these robbery statutes and others still qualify as "violent felon[ies]" under the ACCA's elements clause.[14] These courts

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

[13] *See, e.g., Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989); *State v. Stecker*, 108 N.W.2d 47, 50 (S.D. 1961); *State v. Robertson*, 740 A.2d 330, 334 (R.I. 1999); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. 1997); *West v. State*, 539 A.2d 231, 234 (Md. 1988); *State v. Blunt*, 193 N.W.2d 434, 435 (Neb. 1972); *State v. Sein*, 590 A.2d 665, 668 (N.J. 1991); *Winn v. Commonwealth,* 462 S.E.2d 911, 913 (Va. 1995).

[14] *See United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016); *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016); *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016); *United States v. Eason*, 829 F.3d 633 (8th Cir. 2016); *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016); *United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017); *United States v. Doctor*, 843 F.3d 306 (4th Cir. 2016); *United States v. Duncan*, 833 F.3d 751 (7th Cir. 2016); *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015).

have reached differing conclusions, and as a result, significant tension has arisen regarding the degree of force a state robbery statute must require to categorically satisfy the "physical force" prong of the elements clause. *See Johnson I*, 559 U.S. at 140 (defining "physical force" as "*violent* force . . . force capable of causing physical pain or injury to another person.") (emphasis in original). The Fourth Circuit's decisions in *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016), and *United States v. Winston*, 850 F.3d 677, 683–86 (4th Cir. 2017), are instructive in this regard.

In *Winston*, the Fourth Circuit held that a Virginia conviction for common law robbery committed by "violence" does not categorically require the use of "physical force." *Id.* Such a robbery is committed where a defendant employs "anything which calls out resistance." *Id.* (quoting *Maxwell v. Commonwealth*, 165 Va. 860 (1936)). Indeed, a conviction may be imposed even if a defendant does not "actual[ly] harm" the victim. *Id.* (quoting *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487 (Va. Ct. App. Dec. 12, 2000)). Rejecting the government's argument that overcoming resistance requires violent "physical force," the Fourth Circuit held that the *de minimis* force required under Virginia law does not rise to the level of violent "physical force." *Id.*

In *Gardner*, the Fourth Circuit held that the offense of common law robbery in North Carolina does not qualify as a "violent felony" under the elements clause because it does not categorically require the use of "physical force." 823 F.3d at 803–04. A North Carolina common law robbery may be committed by force so long as the force is "is sufficient to compel a victim to part with his property." *Id.* (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)). "This definition," the Fourth Circuit stated, "suggests that even *de minimis* contact can constitute the 'violence' necessary for a common law robbery conviction under North Carolina law." *Id.*

(emphasis in original). The Fourth Circuit then discussed two North Carolina state cases that supported that conclusion. *Id.* (discussing *State v. Chance*, 662 S.E.2d 405 (N.C. Ct. App. 2008), and *State v. Eldridge*, 677 S.E.2d 14 (N.C. Ct. App. 2009)). Based on these decisions, the Fourth Circuit concluded that "the minimum conduct necessary to sustain a conviction for North Carolina common law robbery" does not necessarily require "physical force," and therefore the offense does not categorically qualify as a "violent felony" under the elements clause. *Id.*

Like the Virginia offense described in *Winston* and the North Carolina offense addressed in *Gardner*, a Florida robbery may be committed by force sufficient to overcome a victim's resistance. As the Fourth Circuit recognized, this definition implicitly suggests that so long as a victim's resistance is slight, a defendant need only use *de minimis* force to commit a robbery. And, as explained above, Florida case law confirms this point.

Given the circuit split between the Ninth and Eleventh Circuits, and the tension among the other circuits, this case presents an ideal vehicle for the Court to resolve these inconsistencies and reinforce what it said in *Johnson I* — that "physical force" requires "a substantial degree of force." 559 U.S. at 140. At a minimum, it requires more than the *de minimis* force required for a robbery conviction under Florida law.

The issue presented by this petition was fully preserved below and is dispositive — if Mr. Everette's prior robbery convictions do not qualify as "violent felon[ies]" under the ACCA's elements clause, then Mr. Everette is ineligible for enhanced sentencing under the ACCA and his 180-month sentence exceeds the applicable statutory maximum.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Appendix A

Decision Below

2017 WL 3309732
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Latellis EVERETTE, Defendant-Appellant.

No. 16-11147
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Non-Argument Calendar
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(August 3, 2017)

Appeals from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:15-cr-00396-SCB-AEP-1

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

Opinion

PER CURIAM:

***1** Latellis Everette appeals his 180-month sentence, imposed within the applicable advisory guideline range, after he pled guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Because binding precedent forecloses Mr. Everette's argument on appeal, we affirm.

We generally review *de novo* whether a defendant's prior conviction qualifies as a violent felony under the Armed Career Criminal Act. *See United States v. Hill*, 799 F.3d 1318, 1321 (11th Cir. 2015). The ACCA carries a mandatory minimum sentence of 15 years' imprisonment when a defendant "has three prior convictions for a violent felony or serious drug offense." *Id.* (citing § 924(e)(1).

Here, Mr. Everette had four ACCA-qualifying predicate offenses, and the district court therefore sentenced him to the statutory minimum of 15 years' (or 180 months') imprisonment. Mr. Everette does not challenge two of the underlying offenses that led to his classification as an armed career criminal, but contends that his two 1992 Florida armed robbery convictions are not "violent felonies" under the ACCA. [1]

Mr. Everette concedes that his argument is foreclosed by binding circuit precedent, *see* Br. of Appellant at 5, but raises the issue only to preserve it for further review. *See United States v. Fritts*, 841 F.3d 937, 944 (11th Cir. 2016) (holding that a defendant's 1989 armed robbery conviction under Fla. Stat. § 812.13 categorically qualifies as a "violent felony" under the ACCA's elements clause), *cert. denied*, No. 16-7883, —— U.S. ——, ——S.Ct. ——, —— L.Ed.2d ——, 2017 WL 554569 (U.S. June 19, 2017). *See also United States v. Seabrooks*, 839 F.3d 1326, 1341 (11th Cir. 2016) (holding that a defendant's 1995 armed robbery conviction under Fla. Stat. § 812.13 categorically qualifies as a "violent felony" under the ACCA), *cert. denied*, No. 16-8072, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2017 WL 715744 (U.S. June 19, 2017).

Because we are bound by the decisions of prior panels until they are overruled by this court sitting en banc or by the Supreme Court, *see United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (en banc), we affirm Mr. Everette's sentence. [2]

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2017 WL 3309732 (Mem)

Footnotes

1 Based on a total offense level of 30 and a criminal history category of V, the advisory guidelines range was 151 to 188 months' imprisonment. Mr. Everette's predicate offenses included an aggravated assault, a sale of a controlled substance, and two armed robberies committed on separate occasions.

2 Although we denied the government's motion for summary affirmance in May of 2017, we allowed the government to use that motion as its response brief for this appeal.

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