No. 19-1264

In the Supreme Court of the United States

DONCEY FRANK BOYKIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
BRIAN C. RABBITT
Acting Assistant Attorney General
JOHN M. PELLETTIERI
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's prior convictions for second-degree robbery, in violation of Ala. Code § 13A-8-42(a) (LexisNexis 1982), were convictions for "violent felon[ies]" under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i).

ADDITIONAL RELATED PROCEEDING

United States Court of Appeals (11th Cir.):

In re Boykin, No. 16-12188 (May 27, 2016)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 783 Fed. Appx. 1001. The opinion of the district court (Pet. App. 4a-15a) is not published in the Federal Supplement but is available at 2018 WL 705523.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 2019. A petition for rehearing was denied on January 9, 2020 (Pet. App. 17a-18a). The petition for a writ of certiorari was filed on April 30, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1; see Pet. App. 5a. The district court sentenced petitioner to 235 months of imprisonment, to be followed by 60 months of supervised release. Judgment 2-3. The court of appeals affirmed. 273 F.3d 1120 (Tbl.). The district court later denied petitioner's motion under 28 U.S.C. 2255 to vacate his sentence. 00-cr-188 D. Ct. Doc. 46 (Dec. 17, 2002). It also dismissed several successive Section 2255 motions that petitioner filed without obtaining the necessary authorization from the court of appeals. See 00-cr-188 D. Ct. Doc. 55 (Jan. 27, 2005); 13-cv-8012 D. Ct. Doc. 7 (May 2, 2013); 00-cr-188 D. Ct. Doc. 78-1 (June 20, 2013).

In 2017, petitioner obtained authorization from the court of appeals to file a successive Section 2255 motion to challenge his sentence in light of *Samuel Johnson* v. *United States*, 135 S. Ct. 2551 (2015). 16-12188 C.A. Order 3 (May 27, 2016). The district court dismissed the motion and declined to issue a certificate of appealability (COA). Pet. App. 4a-15a. The court of appeals granted a COA, 18-10585 C.A. Order (June 6, 2018), and affirmed the dismissal of petitioner's Section 2255 motion, Pet. App. 1a-3a.

1. In 1999, officers from the Birmingham Police Department approached a parked car in which petitioner was a passenger and saw a semiautomatic rifle in the backseat. Presentence Investigation Report (PSR) ¶ 4. The officers recognized petitioner, who told them that he was taking the weapon to his cousin. *Ibid.* The officers took petitioner into custody. PSR ¶ 5.

A federal grand jury in the Northern District of Alabama indicted petitioner on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. Following a trial, a jury found petitioner guilty. *Ibid.*; see Pet. App. 5a.

2. A conviction for violating Section 922(g)(1) carries a default statutory sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment, 18 U.S.C. 924(e)(1).

The ACCA defines a "violent felony" as an offense punishable by more than a year in prison that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The first clause of that definition is commonly referred to as the "elements clause," and the portion beginning with "otherwise" is known as the "residual clause." *Welch* v. *United States*, 136 S. Ct. 1257, 1261 (2016).

The Probation Office's presentence report classified petitioner as an armed career criminal under the ACCA based on a 1983 conviction for Alabama first-degree assault and two 1987 convictions for Alabama second-degree robbery. PSR ¶¶ 20, 24, 35-36. The presentence

report explained that each offense qualified as a "violent felony" under the ACCA's elements clause and its residual clause. PSR ¶¶ 24, 35-36 (emphasis omitted). The district court agreed that petitioner qualified as an armed career criminal and sentenced him to 235 months of imprisonment. Sent. Tr. 7-8. The court of appeals affirmed. 273 F.3d 1120 (Tbl.).

In 2002, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, alleging, among other things, ineffective assistance of counsel. 00-cr-188 D. Ct. Doc. 39, at 2-3 (Apr. 18, 2002); see 00-cr-188 D. Ct. Doc. 33, at 2-6 (Feb. 7, 2002). The district court denied the motion. 00-cr-188 D. Ct. Doc. 46. Petitioner subsequently filed several successive Section 2255 motions, which the court dismissed for failure to obtain the necessary authorization from the court of appeals. See 00-cr-188 D. Ct. Docs. 55, 78-1; 13-cv-8012 D. Ct. Doc. 7; Pet. App. 5a; 18-10585 Gov't C.A. Br. 2-6.

3. In 2015, this Court concluded in *Samuel Johnson* v. *United States*, *supra*, that the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. at 2557. This Court subsequently held that *Samuel Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. See *Welch*, 136 S. Ct. at 1268. In 2016, the court of appeals granted petitioner's application for authorization to file a successive Section 2255 motion to challenge his sentence in light of *Samuel Johnson*. 16-12188 C.A. Order 3. In his successive Section 2255 motion, petitioner argued that *Samuel Johnson* establishes that he was wrongly classified and sentenced as an armed career criminal. 16-cv-8081 D. Ct. Doc. 1, at 2 (June 23, 2016). Petitioner contended that none of his prior convictions qualified as convictions for

violent felonies under the ACCA without the residual clause that *Samuel Johnson* had invalidated. *Ibid.*

The district court dismissed petitioner's motion. Pet. App. 4a-15a. The court determined that petitioner's prior convictions for Alabama first-degree assault and Alabama second-degree robbery qualified as "violent felonies" under the ACCA's elements clause, which *Samuel Johnson* "left untouched." *Id.* at 9a. As relevant here, the court found Alabama robbery to be "substantially similar" to Florida robbery, which the court of appeals had already found to satisfy the ACCA's elements clause. *Id.* at 12a; see *id.* at 13a (citing *United States* v. *Fritts*, 841 F.3d 937, 942-943 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017)). The district court explained that, like Florida's robbery statute, Alabama's robbery statute "require[s] 'such force as is actually sufficient to overcome the victim's resistance.'" *Id.* at 13a (quoting *Casher* v. *State*, 469 So. 2d 679, 680 (Ala. Crim. App. 1985)). The court further explained that under Alabama law—as under Florida law—"mere snatching is not * * * robbery unless there is some concurrent intimidation or violence." *Ibid.* (quoting *Proctor* v. *State*, 391 So. 2d 1092, 1093 (Ala. Crim. App. 1980)). The court therefore determined that petitioner's "Alabama second degree robbery offenses are violent felonies under the elements clause of the ACCA, regardless of whether they also would fall under the ACCA's now-void residual clause." *Id.* at 14a. The court denied a COA. *Ibid.*

4. The court of appeals granted a COA limited to whether petitioner's prior convictions for Alabama second-degree robbery were convictions for violent felonies under the ACCA's elements clause, 18-10585 C.A. Order 2, and then affirmed the dismissal of petitioner's

Section 2255 motion, Pet. App. 1a-3a. Relying on circuit precedent, the court determined that "second-degree robbery under Alabama law qualifies as a predicate offense under the elements clause of the [ACCA]." *Id.* at 2a (citing *United States* v. *Hunt*, 941 F.3d 1259, 1261 (11th Cir. 2019) (per curiam), cert. denied, No. 19-7506 (June 8, 2020), and *In re Welch*, 884 F.3d 1319, 1324 (11th Cir. 2018)). Accordingly, the court rejected petitioner's challenge to his sentence. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 12-14, 16-20) that his prior convictions for Alabama second-degree robbery were not convictions for violent felonies under the ACCA's elements clause. The court of appeals correctly rejected that contention. Petitioner asserts (Pet. 9-11) that the court of appeals' decision conflicts with *United States* v. *Walton*, 881 F.3d 768 (9th Cir. 2018). But the Ninth Circuit decided *Walton* before this Court's decision in *Stokeling* v. *United States*, 139 S. Ct. 544 (2019), which abrogates *Walton*'s reasoning. In any event, the question presented does not warrant this Court's review because it turns on the interpretation of a particular state law and lacks broad legal importance. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that petitioner's prior convictions for second-degree robbery, in violation of Ala. Code § 13A-8-42(a) (LexisNexis 1982), were convictions for "violent felon[ies]" under the ACCA's elements clause, which encompasses "any crime punishable by imprisonment for a term exceeding one year" that "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).

a. Under Alabama law, a person commits third-degree robbery when, "in the course of committing a theft," he:

> (1) Uses force against the person of the owner or any person present with intent to overcome his physical resistance or physical power of resistance; or
>
> (2) Threatens the imminent use of force against the person of the owner or any person present with intent to compel acquiescence to the taking of or escaping with the property.

Ala. Code § 13A-8-43(a) (LexisNexis 1982). Under Alabama law, a person commits second-degree robbery when he commits third-degree robbery and "is aided by another person actually present." *Id.* § 13A-8-42(a).

Because second-degree robbery incorporates the elements of third-degree robbery, it likewise requires proof of "theft *plus* the element of force or threat of force." *Ex parte Byner*, 270 So. 3d 1162, 1167 (Ala. 2018) (citation omitted). And under Alabama law, "[t]he amount or degree of force requisite to robbery is such force as is actually sufficient to overcome the victim's resistance." *Casher* v. *State*, 469 So. 2d 679, 680 (Ala. Crim. App. 1985) (citation omitted).

In *Stokeling* v. *United States*, *supra*, this Court explained that "the term 'physical force' in ACCA encompasses the degree of force necessary to commit common-law robbery"—namely, "force necessary to overcome a victim's resistance." 139 S. Ct. at 555. The degree of force that must be used or threatened under Alabama's robbery statute—namely, force "actually sufficient to overcome the victim's resistance," *Casher*, 469 So. 2d at 680 (citation omitted)—satisfies that standard. Ala-

bama second-degree robbery therefore "has as an element the use * * * or threatened use of physical force against the person of another," and the court of appeals correctly determined that petitioner's prior convictions for that offense qualify as "violent felon[ies]" under the ACCA's elements clause. 18 U.S.C. 924(e)(2)(B)(i).

b. Petitioner's state-law-based objections to that determination lack merit. Petitioner contends (Pet. 19) that, under Alabama law, a defendant who merely snatches property from a victim is guilty of second-degree robbery. He therefore argues (*ibid.*) that the use of force under Alabama's robbery statute does not necessarily involve "force to overcome the victim's resistance." That argument, however, cannot be squared with Alabama precedents. The Alabama Court of Criminal Appeals has explained that "mere snatching is not robbery unless there is some concurrent intimidation or violence," *Proctor* v. *State*, 391 So. 2d 1092, 1093 (1980), and that "[t]he amount or degree of force requisite to robbery is such force as is actually sufficient to overcome the victim's resistance," *Casher*, 469 So. 2d at 680 (citation omitted).

Petitioner contends (Pet. 14) that the court of appeals "disregard[ed] Alabama state court decisions that upheld convictions for mere snatchings, coupled with at most minimal force." Petitioner contends (Pet. 12-13) that the court thus failed to follow this Court's "directive[]" in *Curtis Johnson* v. *United States*, 559 U.S. 133 (2010), that "federal courts are bound by state courts' construction of the substantive elements of [a state] offense." But none of the Alabama decisions petitioner cites (Pet. 10, 20) involved a degree of force less than the "physical force" required by the ACCA's ele-

ments clause, 18 U.S.C. 924(e)(2)(B)(i). Rather, each involved force "actually sufficient to overcome the victim's resistance," *Casher*, 469 So. 2d at 680 (citation omitted), in accord with the ACCA's elements clause. In *Jackson* v. *State*, 969 So. 2d 930 (Ala. Crim. App. 2007), for example, the defendant "rushed toward [the victim], tugged her purse a couple of times," and "yanked her purse off of her arm." *Id.* at 931. *Jackson* thus involved "a physical confrontation and struggle" in which the defendant prevailed by using force to overcome the victim's resistance, *Stokeling*, 139 S. Ct. at 553, "however slight," *id.* at 550 (citation omitted). Likewise, in both *Wright* v. *State*, 487 So. 2d 962, 964 (Ala. Crim. App. 1985), and *Wright* v. *State*, 432 So. 2d 510, 512 (Ala. Crim. App. 1983), the defendant "pushed" a store employee out of the way in the course of taking the store's money. As *Stokeling* makes clear, "rudely push[ing] [someone] about," in the course of taking property, is force sufficient "to overcome the resistance encountered" and therefore "physical force" under the ACCA. 139 S. Ct. at 550 (citations omitted).

Petitioner's assertion (Pet. 18) that Alabama's robbery statute does "not require use of force actually sufficient to overcome physical resistance, but only use of force with intent to overcome physical resistance," is accordingly mistaken. As described above, the Alabama Court of Criminal Appeals has construed Alabama's robbery statute to require "such force as is actually sufficient to overcome the victim's resistance." *Casher*, 469 So. 2d at 680 (citation omitted). And petitioner has not identified any Alabama decision upholding a robbery conviction based on a "[u]se[]" of "force" less than that. Ala. Code § 13A-8-43(a)(1) (LexisNexis 1982).

Petitioner also contends (Pet. 18-19) that, because Alabama robbery can be committed by "[t]hreaten[ing] the imminent use of force," Ala. Code § 13A-8-43(a)(2) (LexisNexis 1982), it does not necessarily satisfy the ACCA's elements clause. An offense satisfies the elements clause, however, so long as 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) (emphasis added). And robbery by "threat[]" of "force" under Alabama law, Ala. Code § 13A-8-43(a)(2) (LexisNexis 1982), necessarily involves the threatened use of physical force—*i.e.*, the threatened use of force "sufficient to overcome the victim's resistance," *Casher*, 469 So. 2d at 680 (citation omitted). Contrary to petitioner's contention (Pet. 19), *Saffold* v. *State*, 951 So. 2d 777 (Ala. Crim. App. 2006), does not suggest otherwise. In *Saffold*, the Alabama Court of Criminal Appeals found that a jury could infer from a particular defendant's actions that he was threatening to use force. See *id.* at 779-781. Petitioner thus errs in asserting (Pet. 19) that the court in that case upheld a robbery conviction where "no threat [wa]s made" at all.

2. Petitioner contends (Pet. 9-11) that the decision below conflicts with the Ninth Circuit's decision in *United States* v. *Walton*, *supra*. In *Walton*—a case decided before this Court's decision in *Stokeling*—the Ninth Circuit concluded that Alabama robbery does not qualify as a violent felony under the ACCA's elements clause. 881 F.3d at 772-775. In reaching that conclusion, the Ninth Circuit stated that "'physical force'" under the ACCA means "'substantial'" or "'strong'" force, as distinguished from "minor" or "minimal" force. *Id.* at 773-774 (citation omitted). It then examined the three Alabama appellate decisions discussed above—

Jackson and the two *Wright* decisions, see *ibid.*—and determined that "[t]he force required to support a conviction for third-degree robbery in Alabama is * * * not sufficiently violent to render that crime a violent felony under ACCA," *id.* at 774. On the Ninth Circuit's view at that time, "[s]hoves that merely cause others to briefly lose their balance or step backward, as in the two *Wright* cases," do not qualify as physical force under the elements clause. *Ibid.*

The Ninth Circuit's previous view is no longer tenable in light of this Court's decision in *Stokeling*. Indeed, the Ninth Circuit has since recognized that its "prior distinction between 'substantial' and 'minimal' force in the ACCA robbery context * * * cannot be reconciled with [this] Court's clear holding in *Stokeling*." *Ward* v. *United States*, 936 F.3d 914, 919 (2019). It has acknowledged that, while its "pre-*Stokeling* case law * * * differentiated between minimal and substantial force, even when the minimal force involved was sufficient to overcome a victim's resistance," *Stokeling* held that force "sufficient to overcome a victim's resistance, 'however slight,'" qualifies as physical force under the ACCA's elements clause. *Id.* at 918 (citation omitted). And the Ninth Circuit has recognized that, under *Stokeling*, "pushing or grabbing a person"—the same type of conduct at issue in the Alabama appellate decisions discussed in *Walton*—qualifies as such force. *Id.* at 919 (citation omitted).

Petitioner contends (Pet. 11 n.4) that the Ninth Circuit has not specifically identified *Walton* "as a decision that ha[s] been overruled." But the Ninth Circuit has declared that, "to the extent [its] precedent regarding robberies is irreconcilable with *Stokeling*, those cases are effectively overruled." *Ward*, 936 F.3d at 919. The

Ninth Circuit's decision in *Walton* is irreconcilable with *Stokeling*, for reasons the Ninth Circuit itself has identified. See *id.* at 917-919. Accordingly, *Walton* has been effectively overruled. At a minimum, *Stokeling* casts *Walton*'s continuing validity into serious doubt. Thus, at least until the Ninth Circuit itself takes the view that "*Walton* remains good law," Pet. 12 n.4, no sound reason exists for this Court's intervention.

3. In any event, the question presented does not warrant this Court's review. As petitioner's arguments illustrate (Pet. 13-14, 18-22), whether Alabama robbery satisfies the ACCA's elements clause turns on "the scope of the Alabama robbery statute" (Pet. 20). The interpretation of that particular state law does not warrant this Court's review, especially given that this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 16 (2004); see *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law.").

The question whether Alabama robbery is a "violent felony" also does not present an issue of broad legal importance. The issue arises only with respect to defendants with prior convictions for Alabama robbery. Accordingly, the issue is unlikely to recur with great frequency in the Ninth Circuit, which sits on the other side of the country. Indeed, the infrequency with which the issue would arise there may well explain why the Ninth Circuit has not yet needed to specifically confirm that *Walton* is no longer good law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
BRIAN C. RABBITT
Acting Assistant Attorney General
JOHN M. PELLETTIERI
Attorney

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