No. 16-8616

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL KEVIN HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

SECOND SUPPLEMENTAL BRIEF

Respectfully submitted,

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SECOND SUPPLEMENTAL BRIEF

Mr. Harris writes pursuant to Rule 15.8 to call the Court's attention to two cases recently decided by the Ninth and Tenth Circuits, which underline the deep and recurring nature of the circuit split presented in this case.

In *United States v. Jones*, the Ninth Circuit held that Arizona robbery is not a violent felony for purposes of the Armed Career Criminal Act. *See Jones*, ___ F.3d ___, No. 17-15869, 2017 WL 6395827, at *2 (9th Cir. Dec. 15, 2017). Arizona robbery is equivalent to Colorado robbery (the offense at issue in this case). Both states follow the majority rule that a taking of property is robbery if, but only if, the thief uses force sufficient to overcome any degree of resistance to the theft offered by the victim or to break an attachment holding the property to the victim's person or clothing. *Compare United States v. Molinar*, ___ F.3d ___, No. 15-10430, 2017 WL 5760565, at *4 (9th Cir. Nov. 29, 2017), *with* BIO at 10. In *Jones*, the Ninth Circuit held that this degree of force fails to qualify an offense as a violent felony. *See Jones* ___ F.3d at ___, No. 17-15869, 2017 WL 6395827, at *2 (adopting the reasoning of *Molinar*, a guidelines case, for purposes of the Armed Career Criminal Act). This holding is impossible to reconcile with the decision below, which held that the same degree of force suffices to qualify an offense as a violent felony. *See United States v. Harris*, 844 F.3d 1260, 1271 (10th Cir. 2017).

In *United States v. Garcia*, the Tenth Circuit held that New Mexico robbery is a violent felony for purposes of the Armed Career Criminal Act. *See Garcia*, ___ F.3d

___, No. 17-2019, slip op. at 22 (10th Cir. Dec. 18, 2017). New Mexico robbery is equivalent to Arizona robbery, *id.* at 11–22, and both are equivalent to other robbery offenses that the Fourth, Eighth, and Ninth Circuits have held to lack the requisite degree of force, Reply Br. at 3–8, Harris Suppl. Br. at 1–3. Like these other offenses, New Mexico classifies a taking of property as robbery if, but only if, the theft is accomplished by enough force to overcome resistance to the taking offered by the victim or by an attachment holding the property to the victim's person or clothing. *See Garcia*, slip op. at 11–22. *Garcia*'s holding that this level of force suffices to make an offense a violent felony cannot be reconciled with the decisions of the Fourth, Eighth, and Ninth Circuit. Indeed, in holding that New Mexico robbery qualifies as a violent felony, *Garcia* specifically rejected the reasoning of the Fourth and Eighth Circuits. *Id.* at n.11, n.12 (refusing to follow *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016), and *United States v. Bell*, 840 F.3d 963, 966 (8th Cir. 2016)).[1] This belies the assertions in the Government's BIO that the Tenth Circuit's approach can be reconciled with that of the Fourth, Eighth, and Ninth Circuits.

In addition to highlighting the recurring nature of the circuit split over robbery, *Jones* and *Garcia* reinforce Mr. Harris's contention at pp. 28–30 of his certiorari petition that this split reflects broader confusion over the meaning of the elements clause, 18 U.S.C. § 924(e)(2)(B)(i), which in turn derives from ambiguity in this

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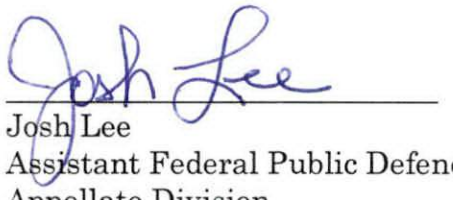
[1] Mr. Harris's prior briefing pointed not only to *Bell*, but also to *United States v. Swopes*, 850 F.3d 979 (8th Cir. 2017), as in conflict with the Tenth Circuit's approach. However, the Eighth Circuit decided to review *Swopes* en banc on June 17, 2017. The en banc court has not issued a decision in *Swopes*.

Court's decision in *Curtis Johnson v. United States*, 559 U.S. 133 (2010). According to *Jones*, conduct like bumping into, jolting, kicking, or struggling with someone does not amount to sufficient force to satisfy the elements clause. *Molinar*, ___ F.3d at ___, No. 15-10430, 2017 WL 5760565, at *4, *followed by Jones*, ___ F.3d at ___, No. 17-15869, 2017 WL 6395827, at *2. According to *Garcia*, however, conduct like slapping, shoving, and pinching qualify as sufficient force under the elements clause. *Garcia*, ___ F.3d at ___, slip op. at 9–10, n.4, n.11. Indeed, the Tenth Circuit has gone as far as to hold that an offense that can be committed by *omission* can qualify as a violent felony, *United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017), whereas in the Fifth Circuit not even threatening death or serious physical injury is enough, *United States v. Rico-Mejia*, 859 F.3d 318, 320–23 (5th Cir. 2017).

Unless this Court clarifies *Curtis Johnson*, both the specific division over robbery and the broader division over the interpretation of § 924(e)(2)(B)(i) will continue to produce disparate sentences for defendants based solely on the circuit from which their cases arise.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender



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AFFIDAVIT OF SERVICE

Josh Lee, Assistant Federal Public Defender for the District of Colorado, hereby attests that, pursuant to Supreme Court Rule 29, the preceding Second Supplemental Brief was served on counsel for the Respondent, in the manner requested by the Respondent, by:

- Emailing a copy of the document to SupremeCtBriefs@usdoj.gov, with attention to Jeffrey B. Wall, Acting Solicitor General and Counsel of Record; and

- Enclosing a copy of the document in an envelope and sending the envelope via first-class mail to Jeffrey B. Wall, Acting Solicitor General and Counsel of Record, U.S. Department of Justice, Office of the Solicitor General, Washington D.C. 20530-0001

It is further attested that the document was emailed and sent via first-class mail on December 18, 2017, and that all parties required to be served have been served.

Josh Lee

JOSH LEE
Assistant Federal Public Defender
Appellate Division
Counsel of Record for the Petitioner

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 18th day of December, 2017.

Clarita B Costigan

CLARITA B COSTIGAN
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 19934000830
MY COMMISSION EXPIRES MAY 16, 2021

Clarita B. Costigan
Notary Public

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AFFIDAVIT OF MAILING

Josh Lee, Assistant Federal Public Defender for the District of Colorado, hereby attests that, pursuant to Supreme Court Rule 29, the preceding Reply in Support of Petition for Writ of Certiorari was enclosed in an envelope and sent via Federal Express for overnight delivery to:

Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

It is further attested that the envelope was sent via Federal Express on December 18, 2017, and that all parties required to be served have been served.

JOSH LEE
Assistant Federal Public Defender
Appellate Division
Counsel of Record for the Petitioner

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 18th day of December, 2017.

CLARITA B COSTIGAN
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 19934000830
MY COMMISSION EXPIRES MAY 18, 2021

Clarita B. Costigan
Notary Public