NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

NATHANIEL BEVERLY,

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

MICHAEL CARUSO
Federal Public Defender

Brenda G. Bryn
Assistant Federal Public Defender
Counsel of Record
One East Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Does a Florida robbery conviction categorically require the use of "*violent* force" as defined in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) due to its "overcoming resistance" element, if that element can be satisfied by such minor conduct as bumping the victim, unpeeling the victim's fingers to take money from his hand, or engaging in a tug-of-war over a purse?

2. Whether the Eleventh Circuit, in denying Petitioner a certificate of appealability to resolve the above issue, erred under *Miller-El v. Cockrell*, 537 U.S. 322, 336-338 (2003) and *Buck v. Davis*, 137 S.Ct. 759, 773-774 (2017) in holding reasonable jurists could not debate whether a Florida robbery conviction categorically required the use of "*violent* force" due to adverse Eleventh Circuit precedent, when the Ninth Circuit has resolved the issue in a directly contrary manner, favorably to Petitioner?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND OTHER AUTHORITY:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

No:

NATHANIEL BEVERLY,
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

NATHANIEL BEVERLY respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's order denying a certificate of appealability to Petitioner to appeal the district court's denial of his motion to vacate his enhanced ACCA sentence pursuant to 28 U.S.C. § 2255, *Beverly v. United States*, Slip op. (11th Cir. Nov. 22, 2017) (No. 17-11527-A), is included as Appendix A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals denying Petitioner a certificate of appealability to appeal the district court's denial of his motion to vacate pursuant to 28 U.S.C. § 2255, was entered on November 22, 2017. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

(e)(2) As used in this subsection – . . .

(B) the term 'violent felony' means any 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.

28 U.S.C. § 2253. Appeal

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceedings in which the detention complained of arises out of process issued by State court; or

(B) the final order in a proceeding under section 2255

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Fla. Stat. § 812.13. Robbery (1978)

(1) "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.

(2)(a) 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 . . .

(b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree . . .

(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree . . .

(3) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.

STATEMENT OF THE CASE

On March 3, 2005, Petitioner was charged with being a previously convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). He went to trial, and on August 8, 2005, was found guilty of those charges. On November 21, 2005, he was sentenced to 210 months imprisonment as an Armed Career Criminal, followed by 5 years supervised release. His ACCA enhancement was predicated upon four Florida convictions: a 1997 conviction for burglary of a dwelling, a 1978 conviction for robbery, a 1997 conviction for heroin with intent to sell, and a 1992 conviction for possession of cocaine with intent to sell.

On October 2, 2015, after this Court's decision in *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015) declaring the ACCA's residual clause unconstitutionally vague, Petitioner filed a *pro se* motion to vacate his sentence under 28 U.S.C. § 2255. He argued that his burglary conviction was no longer a qualifying ACCA predicate without the residual clause, and that his heroin conviction no longer qualified either. On August 1, 2016, counsel filed a supportive supplemental memorandum of law, arguing that in addition, Petitioner's 1978 robbery conviction was no longer a "violent felony" without the residual clause.

On February 9, 2017, the district court denied the motion to vacate. While agreeing with Petitioner that his burglary conviction no longer qualified as an ACCA predicate, the court found that his robbery conviction, committed while armed with a deadly weapon, categorically qualified as a "violent felony" for purposes of the ACCA elements clause, under *United States v. Dowd*, 41 F.3d 1244 (11th Cir. 2006); *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2001); and *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016). In addition, the court found, his possession with intent to sell heroin and possession with intent to sell cocaine convictions still

qualified as ACCA predicates. At the conclusion of its order, the court denied Petition a certificate of appealability.

On April 10, 2017, Petitioner filed a motion for certificate of appealability ("COA") with the Eleventh Circuit, setting forth the "debatable among reasonable jurists" standard governing the decision to grant a COA, and multiple reasons why reasonable jurists could indeed debate whether Petitioner was entitled to relief on his ACCA claim. As to the legal standard, Petitioner argued:

> A certificate of appealability ("COA") must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. §2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).
>
> As the Supreme Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Supreme Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. *See also Buck v. Davis*, ___ U.S. ___, 2017 WL 685534, *11-12 (U.S. Feb. 22, 2017).
>
> Under this "debatable among reasonable jurists" standard, the fact that there is a split among various courts on the question satisfies the standard for obtaining a COA. *See Lambright v. Stewart*, 220 F.3d 1022, 1028-29 (9th Cir. 2000). Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001); *see also Welch v. United States*, 136 S. Ct. 1257, 1263-1264, 1268 (2016) (Court of Appeals erred by denying a COA, because "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence").

Here, Petitioner argued, reasonable jurists could debate whether his Florida robbery conviction categorically qualified as an ACCA predicate notwithstanding *Fritts*, because even if *Fritts* were correct that all Florida robbery convictions regardless of the date of conviction required overcoming "victim resistance," reasonable jurists outside the Eleventh Circuit had recognized that robbery offenses with a similar overcoming resistance element could be satisfied by non-violent force and did not categorically qualify as ACCA violent felonies. On that point, he noted a conflict between the view expressed in *Fritts* and that of the Fourth Circuit in *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016), which had recognized that only minimal force was required to commit a North Carolina common law robbery against a victim's resistance. *Fritts*, he pointed out, had reached the opposite conclusion by ignoring the Florida court's construction of Fla. Stat. § 812.13(1) in *Sanders v. State*, 769 So.2d 506, 507-508 (Fla. 5th DCA 2000); *Johnson v. State*, 612 So.2d 689, 690 (Fla. 1st DCA 1993); *Hayes v. State*, 780 So.2d 918, 919 (Fla. 1st DCA 2001); and *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011), which confirmed that only minimal, non-violent conduct was sufficient for a "forceful" taking under that provision. And indeed, he noted, the Fourth Circuit had construed the Virginia common law robbery offense similarly in *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017). In light of that split with the Fourth Circuit in two successive cases, Petitioner argued, whether a robbery conviction under a statute like Florida's is a qualifying ACCA predicate was not simply a question that reasonable jurists "could" debate; they were hotly debating it at that very moment.

And then, while his motion for COA remained pending before the Eleventh Circuit, the Ninth Circuit reached a directly opposite conclusion from *Fritts*, on the Florida robbery statute, in *United States v. Geozos*, 870 F.3d 890 (9th Cir. Aug. 29, 2017). Specifically, the Ninth

Circuit held, a Florida armed robbery conviction did *not* categorically qualify as an ACCA violent felony since Fla. Stat. § 812.13(1) – both by its text, and as interpreted by the Florida courts – did *not* require the use of "violent force." On the latter point, the Ninth Circuit specifically cited *Benitez-Saldana* (a case cited by Petitioner in his motion for COA) and found that the Eleventh Circuit in *Fritts* had "overlooked the fact that if resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." 870 F.3d at 901 (citing *Montsdoca v. State*, 93 So. 157, 159 (1922) ("[t]he degree of force used is immaterial")).

In a notice of supplemental authority, Petitioner notified the Eleventh Circuit of *Geozos*, pointing out that the "armed nature" of the Florida robbery in *Geozos* did not make a difference to the Ninth Circuit, since that court had found Florida law to be clear that an "armed robbery" under Fla. Stat. § 812.13(2) could result from merely carrying a concealed firearm or other deadly weapon during the course of a robbery, even if it is never displayed and the victim remains unaware of it. 870 F.3d at 900-901 (citing *State v. Baker*, 452 So.2d at 929). And, he argued, given the Ninth Circuit's criticism of the Eleventh Circuit in *Geozos*, "it is indisputable that reasonable jurists not only can debate – but have expressly debated – the correctness of the conclusion in *Fritts*." For that reason, he argued, they could debate the correctness of the district court's decision that Petitioner remained an Armed Career Criminal even without the ACCA's residual clause. And therefore, he argued, with the recent decision in *Geozos*, he had clearly met the *Slack* standard. He urged the Eleventh Circuit to grant him a COA so that he could seek further review of his ACCA sentence.

The Eleventh Circuit, however, refused to grant him a COA. On November 22, 2017, Judge Beverly Martin issued an order denying him a COA, noting that the rule in the Eleventh Circuit was that "no COA should issue where the claim is foreclosed by binding circuit

precedent because reasonable jurists will follow controlling law." A-1 at 7, 11-12 (citing *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (per curiam) (quotation omitted)). And here she pointed out, *Fritts* was binding precedent holding that "Florida robbery convictions under § 812.13 were categorically violent felonies under the ACCA's elements clause. 841 F.3d at 944. Given our Court's binding precedent in *Fritts*," she concluded, "reasonable jurists would not debate whether, post-*Johnson*, Mr. Beverly's 1978 Florida robbery conviction remains an ACCA violent felony." Appendix A-1 at 10.

Judge Martin did not acknowledge the Ninth Circuit's contrary holding in *Geozos.*

REASONS FOR GRANTING THE WRIT

A. The Eleventh and Ninth Circuits are intractably divided on whether a Florida robbery conviction categorically requires the *Curtis Johnson* level of "*violent* force," and that conflict confirms that reasonable jurists can debate the issue.

In *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), the Eleventh Circuit held that Florida robbery is categorically an ACCA violent felony. *Id.* at 943. The court, notably, did not analyze Fritts' armed robbery conviction any differently than an unarmed robbery conviction. According to the Eleventh Circuit, both convictions failed to qualify as an ACCA violent felony for the same reason: namely, according to *Robinson v. State,* 692 So.2d 883, 886 (Fla. 1997), overcoming victim resistance is a necessary element of any Florida robbery offense. 841 F.3d at 942-944. The court assumed from the mere fact of "victim resistance," and the perpetrator's need to use some physical force to overcome it, that the offense was categorically a violent felony.

According to *Fritts*, it was irrelevant that Fritts' own conviction pre-dated *Robinson* since *Robinson* simply clarified what the Florida robbery statute "always meant." 841 F.3d at 943. But while *Robinson* did clarify that a mere sudden snatching without any victim resistance

is simply theft, not robbery, *id.* at 942-944, what *Robinson* did *not* clarify was how much force was actually necessary to overcome resistance for a Florida robbery conviction. Notably, decades before *Robinson*, in *Montsdoca v. State*, 93 So. 157 (1922), the Florida Supreme Court had held that the "degree of force" was actually "immaterial" so long as it was sufficient to overcome resistance. *Id.* at 159. And the Eleventh Circuit in *Fritts* cited *Montsdoca* as controlling as well. 841 F.3d at 943.

Although neither *Montsdoca* nor *Robinson* specifically addressed what degree of force is necessary to overcome resistance under the Florida robbery statute, the Florida intermediate appellate court have provided clarity as to the "least culpable conduct" under the statute in that regard. Notably, several Florida appellate court decisions have confirmed post-*Robinson* that victim resistance in a robbery may well be quite minimal, and where it is, the degree of force necessary to overcome it is also minimal. Specifically, Florida courts have sustained robbery convictions under Fla. Stat. § 812.13 where a defendant simply: (1) bumps someone from behind, *Hayes v. State*, 780 So. 2d 918, 919 (Fla. 1st DCA 2001); (2) engages in a tug-of-war over a purse, *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011); (3) peels back someone's fingers in order to take money from his clenched fist, *Sanders v. State*, 769 So.2d 506, 507 (Fla. 5th DCA 2000); or (4) otherwise removes money from someone's fist, knocking off a scab in the process, *Winston Johnson v. State*, 612 So.2d 689, 690-91 (Fla. 1st DCA 1993).

As one Florida court paraphrased the Florida standard, a robbery conviction may be upheld in Florida based on "ever so little" force. *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986). And as another court stated, the victim must simply resist "in any degree;" where "any degree" of resistance is overcome by the perpetrator, "the crime of robbery is complete." *Mims v. State*, 342 So.2d 116, 117 (Fla. 3rd DCA 1977).

The Ninth Circuit recently recognized this in *United States v. Geozos*, 879 F.3d 890 (9th Cir. 2017), where it held that a Florida conviction for robbery, whether armed or unarmed, fails to qualify as a "violent felony" under the elements clause because it "does not involve the use of violent force within the meaning of ACCA." *Id.* at 900-901.[1] In so holding, the Ninth Circuit found significant that under Florida caselaw, "any degree" of resistance was sufficient for conviction, and an individual could violate the statute simply by engaging "in a non-violent tug-of-war" over a purse. *Id.* at 900 (citing *Mims* and *Benitez-Saldana*).

Notably, the Ninth Circuit – in coming to a decision that it recognized was at "odds" with the Eleventh Circuit's holding in *Fritts* – has rightly pointed out that the Eleventh Circuit, "in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, has overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily *violent* force." *Id.* at 901 (citing *Montsdoca*, 93 So. at 159 ("The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance"))(emphasis in the original).

As is clear from *Geozos*, the Ninth and Eleventh Circuits are now directly in conflict on an important and recurring question of Federal law: namely, whether the minimal force required to overcome minimal resistance under the Florida robbery statute categorically meets the level of "physical force" required by the ACCA's elements. In *Curtis Johnson v. United States*, 559 U.S.

[1] The *Geozos* Court correctly stated that whether a robbery was armed or unarmed makes no difference because an individual may be convicted of armed robbery for "merely *carrying* a firearm" during the robbery, even if the firearm is not displayed and the victim is unaware of its presence. 870 F.3d at 900-9901 ("As an initial matter, the armed nature of each of Defendant's convictions does not make the conviction one for a violent felony;" citing *State v. Baker*, 452 So. 2d 927, 929 (Fla. 1984); following *Parnell v. United States*, 818 F.3d 974, 978–81 (9th Cir. 2016), which held that a Massachusetts conviction for *armed* robbery, which required 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))(emphasis in original).

133 (2010), the Court explained that the meaning of "physical force" in 18 U.S.C. § 924(e)(2)(B)(i) "is a question of federal law, not state law." *Id.* at 138. And indeed, in the context of a "violent felony" definition, "physical force" means "*violent* force," which requires a "substantial degree of force." *Id.* at 140.

Given the Eleventh Circuit's refusal to reconsider *Fritts* en banc in *United States v. Latellis Everette*, Slip op. (11th Cir. July 31, 2017), followed by its summary affirmance without requiring government briefing in *Bobby Jo Hardy v. United States*, Slip op. at 3 (11th Cir. Aug. 11, 2017) (No. 17-11275),[2] the circuit conflict on that issue is demonstrably intractable at this point. It will not be resolved without this Court's intervention.

Notably, in decision after decision since *Fritts*, the Eleventh Circuit – which applies its "prior panel precedent rule" rigidly – has reflexively adhered to *Fritts*. As of this writing, certiorari has been sought in multiple Eleventh Circuit cases challenging *Fritts*' holding that a Florida robbery conviction categorically requires "violent force." In addition to the instant petition, there are at present no less than twenty-one others—twenty from the Eleventh Circuit, and one from the Fourth Circuit—raising this issue.[3] That conservative figure does not include

---

[2] In *Hardy*, the Eleventh Circuit found "summary affirmance based upon *Fritts* "appropriate because the government is clearly right as a matter of law, and no substantial question exists as to the outcome of the case." It stated that "defendant's "convictions categorically qualify as 'violent felonies' under the ACCA based on *Fritts*, and any doubt about that conclusion was put to rest when the Supreme Court denied certiorari in that case." Slip op. at 3.

[3]For the Eleventh Circuit petitions, see *Stokeling v. United States*, No. 17-5554 (petition filed Aug. 4, 2017); *Davis v. United States*, No. 17-5543 (petition filed Aug. 8, 2017); *Conde v. United* States, No. 17-5772 (petition filed Aug. 24, 2017); Phelps *v. United States,* No. 17-5745 (petition filed Aug. 24, 2017); *Williams v. United States,* No. 17-6026 (petition filed Sept. 14, 2017); *Everette v. United States,* No. 17-6054 (petition filed Sept. 18, 2017); *Jones v. United States,* No. 17-6140 (petition filed Sept. 25, 2017); *James v. United States*, No. 17-6271 (petition filed Oct. 3, 2017); *Middleton v. United States,* No. 17-6276 (petition filed Oct. 3, 2017); *Reeves v. United States*, No. 17-6357 (petition filed Oct. 3, 2017); *Rivera v. United States,* No. 17-6374 (petition filed Oct. 12, 2017); *Shotwell v. United States*, No. 17-6540 (petition filed Oct. 17, 2017); *Mays v. United States,* No. 17-6664 (petition filed Nov. 2, 2017); *Hardy v. United States,*

the numerous petitions that were filed and denied before *Geozos*. Nor does it include the incalculable number of petitions that will be filed absent immediate intervention by this Court. And notably, there is not simply now a direct circuit conflict between the Ninth and Eleventh Circuits on whether Florida robbery Florida robbery offense categorically requires the *Curtis Johnson* level of violent force. The conflict actually extends much farther. Other circuits have considered analogous robbery offenses with the same "overcoming resistance" element that derives from the common law, and their conclusions likewise conflict with the Eleventh Circuit.

Florida, notably, is not alone in its use of an "overcoming resistance" 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,[4] while many others (including Florida, North Carolina, Virginia, Colorado, and Ohio) have judicially adopted it through case law.[5]

No. 17-6829 (petition filed Nov. 9, 2017); *Baxter v. United States*, No. 17-6991 (petition filed Dec. 4, 2017); *Pace v. United States*, No. 17-7140 (petition filed Dec. 18, 2017); *Repress v. United States*, No. 17-7391 (petition filed Jan. 9, 2017); *Wright v. United States*, No. 17-6887 (petition filed Nov. 16, 2017); *Ballard v. United States*, No. 17-7402 (petition filed Jan. 9, 2018); *Jones v. United States*, No. 17-7667 (petition filed Jan. 24, 2018). For the Fourth Circuit petition, see *Orr v. United States,* No. 17-6577 (petition filed Oct. 26, 2017).

[4] *See* Ala. Code § 13A-8-43(a)(1); Alaska Stat. § 11.41.510(a)(1); Ariz. Rev. Stat. §§ 13-1901, 1902, 1904; 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).

[5] *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); *People v. Davis*, 935 P.2d 79, 84 (Colo. App. 1996); *State v. Robertson*, 531 S.E.2d 490 (N.C. Ct. A pp. 2000); *State v. Juhasz*, 2015 WL 5515826 at *2 (Ohio Ct. App. 2015).

As has been detailed in several petitions for certiorari now pending before this Court, *see, e.g., Harris v. United States*, No. 16-8616; *Stokeling v. United States*, No. 17-5554; and *Conde v. United States*, No. 17-5772, this widely-applied requirement of "victim resistance" in state robbery offenses has deep roots in the common law. Common law robbery had an element labeled "violence," but the term "violence" did ***not*** imply a "substantial degree of force." The general rule at common law was that the degree of force used was "immaterial," so long as it compelled the victim to give up money or property.

In this vein, the Florida appellate courts have long recognized that the underlying robbery offense originally described in Fla. Stat. § 812.13(1) ***was*** common law robbery. *See Montsdoca*, 93 So. at 159 (reiterating the common law rules that "[t]here can be no robbery without violence, and there can be no larceny with it," and that "the degree of force used is immaterial"); *State v. Royal*, 490 So.2d 44, 45-46 (Fla. 1986) (acknowledging that "the common law definition of robbery" was "set forth in subsection (1)). As the Florida Supreme Court expressly recognized in *Royal*, the requirement in § 812.13(1) that the taking be by "force, violence, assault, or putting in fear" not only derived from the common law; the Court thereafter interpreted that provision "consistent with the common law." *Id.* at 46 (citing *Williams v. Mayo*, 126 Fla. 871, 875, 172 So. 86, 87 (1937)).

The only change to the common law robbery offense incorporated into that statutory provision occurred immediately after – and in response to – *Royal*, when the Florida Legislature broadened the statutory offense to include the use of "force" not only during a taking, but after it as well. *See, e.g., Foster v. State*, 596 So.2d 1099, 1107-1108 (Fla. 5th DCA 1992). Other than that, however, there has been no change to the underlying "common law definition of robbery set forth in subsection (1)," *Royal*, 490 So.2d at 46, to this day.

Given that the "overcoming resistance" element in Florida robbery derives from the common law and has been interpreted consistently with the common law, the conflict between the Ninth and Eleventh Circuit extends to other circuits that have considered analogous common law robbery offenses. Notably, the Fourth Circuit has now recognized that both North Carolina common law robbery and Virginia common law robbery can be committed without violent force and are not proper ACCA predicates for that reason. And the Sixth Circuit has held similarly, with regard to Ohio statutory robbery, which – like Florida statutory robbery – is modeled on common law robbery.

In *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2015), the Fourth Circuit held that the offense of common law robbery by "violence" in North Carolina did not qualify as a "violent felony" under the ACCA's elements clause because it did not categorically require the use of "physical force." 823 F.3d at 803-804. In reaching that conclusion, however, the Fourth Circuit did not simply rely upon common law principles. Rather, consistent with the categorical approach as clarified by this Court in *Moncrieffe*, *Descamps*, and *Mathis*, the court thoroughly reviewed North Carolina appellate law to determine the least culpable conduct for a North Carolina common law robbery conviction. And notably, it was only after its thorough survey of North Carolina law, that the Fourth Circuit concluded that a North Carolina common law robbery by means of "violence" may be committed by any force "sufficient to compel a victim to part with his property," and that "'[t]he degree of force used is immaterial.'" *Id.* (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)). In fact, the Fourth Circuit noted, *Sawyer*'s definition "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 discussed two supportive North Carolina appellate decisions in detail. *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)). In *Chance*, the Fourth Circuit noted, a North Carolina court had upheld a robbery conviction where the defendant simply pushed the victim's hand off a carton of cigarettes; that was sufficient "actual force." And in *Eldridge*, a different court upheld a robbery conviction where a defendant merely pushed the shoulder of a store clerk, causing her to fall onto shelves while the defendant took possession of a TV. Based on those 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 that the offense does not categorically qualify as a "violent felony" under the elements clause. *Id.*[6]

Thereafter in *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), the Fourth Circuit held that a conviction for Virginia common law robbery, which may be committed by either "violence or intimidation," does not qualify as a "violent felony" within the ACCA's elements clause since – as confirmed by Virginia caselaw – such an offense can be committed by only slight, non-violent force. *Id.* at 685.

The Fourth Circuit acknowledged in *Winston* that prior to *Curtis Johnson*, it had held that a Virginia common law robbery conviction qualified as a "violent felony" within the elements clause. However, citing *Gardner*, the Fourth Circuit rightly found that such precedent was no

[6] Although the Fourth Circuit did not discuss *State v. Robertson*, 531 S.E.2d 490 (N.C. Ct. App. 2000) in *Gardner*, the government had discussed *Robertson* in in its *Gardner* brief, and had correctly described *Robertson* as holding that mere "purse snatching" does not involve sufficient force for a common law robbery conviction in North Carolina. Brief of the United States in *United States v. Gardner*, No. 14-4533 at 46-49, 53 (4th Cir. Aug. 21, 2015). *Robertson* had expressly recognized that North Carolina followed "'[t] rule prevailing in most jurisdictions" that "'the force used . . . must be of such a nature as to show that it was intended to *overpower the party robbed or prevent his resisting, and not merely to get possession of the property stolen.*'" *Id.* at 509 (quoting *State v. John*, 50 N.C. 163, 169 (1857)(emphasis added by *Robertson*)). The Fourth Circuit in *Gardner* was undoubtedly aware from *Robertson* that North Carolina robbery required overcoming victim resistance.

longer controlling after (1) this Court in *Curtis Johnson* not only redefined "physical force" as "violent force" but made clear that federal courts applying the categorical approach were bound by the state courts' interpretation of their own offenses, and (2) in *Moncrieffe* "instructed that we must focus on the 'minimum conduct criminalized' by state law." *Id.* at 684.

Consistent with these intervening precedents, the Fourth Circuit carefully examined for the first time in *Winston* how the Virginia state courts interpreted a robbery "by violence or intimidation." While noting that its prior decision in *Gardner* was "persuasive," the Fourth Circuit rightly acknowledged that its "conclusion that North Carolina robbery does not qualify as a violent felony" did not itself "compel a similar holding in the present case" because the court was required to "defer to the [Virginia] courts' interpretations of their own [] common law offenses." *Winston*, 850 F.3d at 685 n. 6.

Accordingly, as it had done in *Gardner*, the Fourth Circuit undertook a thorough survey of Virginia appellate decisions on common law robbery. *See id.* at 684-685 (discussing in particular, and finding significant: *Maxwell v. Commonwealth*, 165 Va. 860, 183 S.E. 452, 454 (1936); *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487, at * 3 (Va. Ct. App. Dec. 12, 2000) (unpublished); and *Jones v. Commonwealth*, 26 Va. App. 736, 496 S.E.2nd 668, 670 (1998)). Citing these three decisions, the Fourth Circuit concluded that a Virginia common law robbery "by violence" requires only a "'slight' degree of violence;" that "anything which calls out resistance is sufficient;" and "such resistance by the victim does not necessarily reflect use of 'violent force.'" *Winston*, 850 F.3d at 684-685. And therefore, the Fourth Circuit expressly rejected the precise assumption made by the Eleventh Circuit in *Fritts* without considering a single Florida decision: namely, that force sufficient to overcome resistance in Florida necessarily involves *violent* force. *Winston, id.* at 683. To the contrary, the Fourth

Circuit held, the "minimum conduct necessary to sustain a conviction for Virginia common law robbery does not necessarily include [] 'violent force.'" *Id.* at 685.

In *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017), the Sixth Circuit expressly aligned itself with the Fourth Circuit, in holding that the Ohio statutory robbery offense does not qualify as an ACCA violent felony, given Ohio appellate decisions confirming that a robbery by "use of force" under the statute could be accomplished by the minimal amount of force necessary to snatch a purse involuntarily from an individual, or simply "bumping into an individual." *Yates*, 866 F.3d at 730-731 (noting accord with the Fourth Circuit in *Gardner*, 823 F.3d at 803-804, where "even minimal contact may be sufficient to sustain a robbery conviction if the victim forfeits his or her property in response.") The force applied by the defendant in such circumstances, the Sixth Circuit noted, was demonstrably "lower than the type of violent force required by [*Curtis*] *Johnson.*" 866 F.3d at 729.

The Sixth Circuit noted with significance that in *State v. Carter*, 29 Ohio App.3d 148, 504 N.E.2d 469 (1985), a purse snatching case, the court had affirmed a robbery conviction where the victim simply had a firm grasp of her purse, the defendant pulled it from her, and then pulled her right hand off her left hand where she was holding the bottom of the purse. *Id.* at 470-471(explaining that this simple incident involved the requisite degree of actual force, "*however miniscule*" to constitute a robbery; citing as support *State v. Grant*, 1981 WL 4576 at *2 (Ohio Ct. App. Oct. 22, 1981), which had held that a mere "bump is an act of violence" within the meaning of the robbery statute, "even though only mildly violent, as the statute does not require a high degree of violence").

And in another Ohio purse snatching case, *In re Boggess*, 2005 WL 3344502 (Ohio Ct. App. 2005), the Sixth Circuit noted, the appellate court had clarified that the "force" requirement

in the Ohio robbery statute would be satisfied so long as the offender "physically exerted force upon the victim's arm so as to remove the purse from her *involuntarily*." 866 F.3d at 731 (emphasis added). In *Boggess*, the defendant simply grabbed the victim's purse, then jerked her arm back, and kept running." *Id.* at 729. Finally, in *State v. Juhasz*, 2015 WL 5515826 (Ohio Ct. App. 2015), an Ohio court confirmed that so long as there was "a *struggle* over control of an individual's purse" in any degree, that would be sufficient to establish the "element of force" in the statute. The "struggle need not be prolonged or active; the act of forcibly removing a purse from an individual's shoulder is sufficient." *Id.* at 729-730. While the *Juhasz* court did not specifically discuss the common law roots of the "struggle" concept in the Ohio robbery caselaw, that is a concept that derives directly from the common law.

Based upon the Ohio caselaw highlighted in *Yate*s, the Sixth Circuit found a "realistic probability" that Ohio applied its robbery statute "in such a way that criminalizes a level of force lower than the type of force required by [*Curtis*] *Johnson*." 2017 WL 3402084 at *5 (citing *Moncrieffe*, 133 S.Ct. at 1684). And notably, Florida caselaw – like North Carolina, Virginia, and Ohio caselaw – likewise confirms that *violent* force is ***not*** necessary to overcome victim resistance, and commit a robbery under Fla. Stat. § 812.13(1) either. Like the North Carolina common law robbery offense addressed in *Gardner*, the Virginia common law robbery offense addressed in *Winston*, and the Ohio statutory robbery offense addressed in *Yates*, a Florida statutory robbery may also be committed by the slight force sufficient to overcome a victim's slight resistance. Indeed, as the Ninth Circuit correctly noted in *Geozos*, Florida's own appellate law easily confirms this point.[7]

[7] Notably, the Ninth Circuit has just ruled similarly for the Arizona statutory robbery offense. *See United States v. Molinar*, ___ F.3d ___, 2017 WL 7362022 at **4-5 (9th Cir. Feb. 5, 2018) (amending prior panel decision, but reaffirming that Ariz. Rev. Stat. § 1904 did not meet the career offender elements clause because Arizona courts had not required the "overpowering

Had the Fourth and Sixth Circuits considered the Florida courts of appeals decisions in *Hayes*, *Benitez-Saldana*, *Sanders*, and *Winston Johnson* – and compared them to the state appellate decisions they considered in *Gardner*, *Winston*, and *Yates* – these circuits would likely have recognized that a Florida statutory robbery (just like a North Carolina common law robbery, a Virginia common law robbery, and an Ohio statutory robbery) requires only minimal force to overcome victim resistance. And for that reason, these circuits – like the Ninth Circuit – would likely have found Petitioner's robbery convictions were no longer ACCA "violent felonies."

As noted *supra*, it has always been the law in Florida (as in North Carolina, and other common law robbery states) that the degree of force used in a robbery is "immaterial." *Montsdoca v. State*, 93 So. at 159. And, as the Fourth Circuit recognized in *Gardner*, a standard requiring that force overcome resistance, but reaffirming that the degree of force used is "immaterial," suggests that so long as a victim's resistance is slight, a defendant need only use minimal force to commit a robbery. The standards in *Sawyer* and *Montsdoca* are similarly worded and functionally indistinguishable.

Plainly, the act of peeling back the victim's fingers in *Sanders* is functionally equivalent to the act of pushing away the victim's hand in *Chance*. Both acts allowed the defendants to overcome the victim's resistance and remove the cigarettes (in *Chance*) and the cash (in *Sanders*) from the victim's grasp. But neither act rises to the level of "*violent* force' required by *Curtis Johnson*. And plainly, the "bump" in *Hayes* is indistinguishable from the "bump" in *Grant*, and

---

force" element "to be violent in the sense discussed by the Supreme Court in *Johnson*;" they had recognized that if an article is attached in some way, "so 'as to create resistance however slight," the offense becomes robbery;" thus, "minor scuffles," including those involving bumping or grabbing where the victim was not harmed, are "insufficiently violent to qualify as force under *Johnson*"); *United States v. Jones*, 877 F.3d 884, 888-889 (9th Cir. 2017) (*Molinar*'s holding applied equally to whether Arizona armed robbery was a "violent felony" under the ACCA's elements clause).

the "push" in *Eldridge*. If anything, the "push" in *Eldridge* was more forceful in that it caused the victim to fall onto shelves, while the victims in *Hayes* and *Grant* did not even fall.

Moreover, the "bump" in *Hayes* appears to involve even less than the "extent of resistance" in the Virginia *Jones* case – which was the defendant's "jerking" of the victim's purse, which caused her to "turn and face" the defendant, but was not strong enough to cause the victim to fall down. *Winston*, 850 F.3d at 685 (citing *Jones*, 496 S.E. 2nd at 669-670). And while the purse snatching accompanied by the jerking of the victim's arm in the Ohio *Boggess* case is analogous to the purse snatching that the Fourth Circuit found insufficiently violent in *Jones*, Florida law notably suggests that something even less than either a "bump" or the "jerking" of the victim's arm during a purse snatching – namely, such *de minimis* conduct as simply "jostling" a victim during a pickpocketing, *see Rigell v. State*, 782 So.2d 440, 442 (Fla. 4th DCA 2001)(approving LaFave's example) – will constitute sufficient "force" to "overcome resistance," take a person's property, and seal a Florida robbery conviction.

Had Petitioner's case been decided by the *Geozos*, *Gardner*, *Winston*, or *Yates* courts – rather than an Eleventh Circuit panel bound by *Fritts* – Petitioner would not be facing an enhanced ACCA sentence today.

B. The decision below is wrong in holding Florida robbery is categorically an ACCA "violent felony," and the COA standard.

The decision below is wrong because *Fritts* is wrong. The Eleventh Circuit made unwarranted assumptions in that case as to the level of force required to overcome resistance. Not only did the court disregard the common law roots of this requirement; it disregarded that the Florida courts' interpretation of "overcoming resistance" to this day has been consistent with the approach at common law: the degree of force used is "immaterial." As the Ninth Circuit correctly noted in *Geozos*, the "Eleventh Circuit, in focusing on the fact that Florida robbery

requires a use of force sufficient to overcome the resistance of the victim, has overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." 870 F.3d at 901. In overlooking that key point, and failing to consult the intermediate appellate decisions illuminating the scope of Florida's "overcoming resistance" element, the court below committed a clear error of law under this Court's precedents that infected its ultimate conclusion.

The Eleventh Circuit has consistently ignored this Court's precedents, which confirm that not all "force" qualifies as "physical force" for purposes of the ACCA elements clause. Notably, when *Curtis Johnson* defined the term "physical force" as "violent force—that is, force capable of causing pain or injury to another person," 559 U.S. at 140, both before and after that 15-word definition, the Court made clear that "violent force" was measured by the "degree" or "quantum" of force. *Id.* at 139, 140, 142 (referring to "substantial degree of force" involving "strength," "vigor," "energy," "pressure," and "power"). While a mere nominal touching did not meet that standard, the only specific conduct *Curtis Johnson* mentioned as necessarily involving the requisite degree of "violent force" was a "slap in the face," since the force used in slapping someone's face would necessarily "inflict pain." *Id.* at 143. Beyond that single example of a classic battery by striking, the Court did not mention any other category of conduct that would inflict an "equivalent" degree of pain or injury to categorically meet its new "violent force" definition.

Thereafter, in *United States v. Castleman*, 572 U.S. __, 134 S. Ct. 1405 (2014), in the course of adopting the broader common-law definition of "physical force" for a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9), rather than *Curtis Johnson*'s "*violent* force" definition, the Court emphasized that that "domestic violence" encompasses a range of

force broader than 'violence' *simpliciter*." *Id.* at 1411 n.4 (emphasis in original). Relevant here, the Court observed that "most physical assaults committed against women and intimates are relatively minor," and include "pushing, grabbing, [and] shoving." *Id.* at 1412 (citations omitted). The Court opined that such "[m]inor uses of force may not constitute 'violence' in the generic sense." *Id.* As one such "example," the Court pointed out that, in *Curtis Johnson*, it had cited "with approval" *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003), where the Seventh Circuit had noted that it was 'hard to describe . . . as 'violence'" "a squeeze of the arm [that] causes a bruise." *Id.*

That deliberate approval suggests that the dividing line between violent and non-violent "force" lies somewhere between a slap to the face and a bruising squeeze of the arm. On that view, certainly the "bump" (without injury) in *Hayes* would constitute similarly "minor" and thus non-violent force. The same is also true of unpeeling the victim's fingers without injury in *Sanders*. And even though the grabbing of an arm during a tug-of-war in *Benitez-Saldana* caused "an abrasion," and there was a "slight injury" to the victim's hand by the offender's grabbing money and tearing off a scab in *Winston Johnson,* just like the bruising squeeze to the arm discussed in *Castleman*, which likewise resulted in a minor injury, such conduct does not constitute "violence" in the generic sense.

Finally, it is notable that Justice Scalia—writing only for himself—opined in *Castleman* that shoving, grabbing, pinching, and hair pulling would all meet the *Curtis Johnson* definition of "*violent* force," since (in his view) each of these actions was "capable of causing physical pain or injury." *Id.* at 1421-1422 (Scalia, J., concurring in the judgment). Significantly, however, no other member of the Court joined that view. That is so because such conduct—constituting more than an unwanted touch, but less than a painful slap to the face—entails only a minor use

of force, not strength, vigor, or power. It thus lacks the degree of force necessary to qualify as violent. And because Florida robbery may unquestionably be committed by such conduct, it is not categorically a violent felony under the ACCA's elements clause.

The decision below is wrong for another reason as well: The Eleventh Circuit's rule in *Hamilton v. Sec'y, Fla. Dept. of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) – that a COA may not be granted where binding circuit precedent forecloses a claim – erroneously applies the COA standard articulated by this Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S.Ct. 759 (2017). To obtain a COA, Congress has required a movant to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). However, the Court confirmed in *Buck*, "[u]ntil a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El*, 537 U.S. at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a rule requiring that COAs be adjudicated on the merits. Under the Eleventh Circuit's unique approach, COAs may not be granted where binding circuit precedent forecloses a claim "because reasonable jurists will follow controlling law."

Hamilton, 793 F.3d at 1266 ("we are bound by our Circuit precedent, not by Third Circuit precedent, and circuit precedent "is controlling on us and ends any debate among reasonable jurists about the correctness of the district court's decision under binding precedent") (citation omitted); *see also Tompkins v. Sec'y, Dep't of Corr.,* 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005). To be sure, the Court phrased its decision in Petitioner's case using the proper terms—that reasonable jurists would not debate whether he is entitled to relief—but reached its conclusion by essentially deciding the case on the merits, that he would be unsuccessful on appeal because *Fritts* is binding circuit precedent. *Buck*, 137 S. Ct. at 773. The Eleventh Circuit's unique COA rule places too heavy a burden on movants at the COA stage. As this Court explained in *Buck*:

> [W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El,* 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774.

Indeed, as this Court stated in *Miller-El*, "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch*, 136 S. Ct. at 1264. Here, we

know that is not the case, since the Ninth Circuit Court of Appeals has issued a decision that directly conflicts with *Fritts* on the precise predicate offense here at issue.

C. This is an ideal vehicle for the Court to clarify proper interpretation of the ACCA elements clause, and the applicable COA standard

Given the direct circuit split between the Ninth and Eleventh Circuits, the tension between *Fritts* and decisions of other circuits reviewing analogous common law robbery offenses, and the clear error in the decision below, this case presents an ideal vehicle for the Court to not only resolve the inconsistencies among the lower courts on the substantive issue, but also clarify the COA standard.

On the ACCA elements clause issue, the Court can and should use this case to reinforce what it said in *Curtis Johnson* — that "physical force" requires "*violent* force," and that is "a substantial degree of force." 559 U.S. at 140. At a minimum, the Court should clarify, "*violent* force" requires more than the type of minor conduct that has sufficed for robbery convictions in Florida and other common law robbery states: namely, bumping the victim, unpeeling the victim's fist clenching money, or engaging in a tug-of-war over a purse.

Notably, the issue as to whether such minor conduct involved in overcoming resistance under the Florida statute necessitates the *Curtis Johnson* level of "violent force" was fully preserved before the court of appeals in this case. Petitioner specifically urged the Eleventh Circuit to consider *Benitez-Saldana* – the precise Florida appellate decision that convinced the Ninth Circuit that a Florida robbery does not necessitate "violent force," and resulted in the direct conflict between the Eleventh and Ninth Circuits. And, he raised the broader conflict with other circuits in his motion for COA as well, to no avail.

Most importantly, resolution of the circuit conflict in his favor will be case-dispositive. If Petitioner's Florida armed robbery conviction does not qualify as an ACCA predicate, his 210-

month sentence must be vacated. Not only will he then be ineligible for his current sentence, which far exceeds the otherwise applicable 120-month statutory maximum; he will be eligible for immediate release from prison given that he has long overserved the 120-month maximum. And notably, a grant of certiorari in this case will not only be important for Petitioner. It will be important for the many similarly-situated defendants facing enhanced ACCA sentences based upon Florida robbery, and those potentially facing enhanced sentences based upon analogous common law robbery offenses throughout the country.

But a grant of certiorari to resolve that issue in this case would be independently important for additional reasons as well. In the three decades that have passed since Congress amended the original version of the ACCA to delete "robbery" and "burglary" as automatic ACCA predicates, replacing those two specific crimes with broader "violent felony" definitions designed to better target the most dangerous gun offenders – three decades in which the Court has granted certiorari multiple times to determine whether state burglary offenses were proper ACCA predicates. *See, e.g., Taylor v. United States*, 495 U.S. 575 (1990); *James v. United States*, 550 U.S. 192 (2007); *Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276 (2013); and *Mathis v. United States*, ___ U.S. ___, 136 S.Ct. 2243 (2016) – the Court has never considered whether *any* state robbery conviction fell within either the elements (or residual) clauses. That question looms large after elimination of the residual clause, since the elements clause has taken center stage in ACCA litigation, and robbery remains to this day one of the most common ACCA predicates. The Court expressly left open the Florida robbery elements-clause question in *Welch v. United States*, 578 U.S. ___, 136 S.Ct. 1257, 1268 (2016). The time has come for a definitive resolution.

Finally, the instant petition will have the added benefit of permitting the Court to also review the Eleventh Circuit's erroneous application of the COA standard which has prejudiced, and will continue to prejudice, countless Eleventh Circuit defendants unless and until the Court clarifies its proper application.

CONCLUSION

The disparate treatment of identically-situated defendants is inequitable, and must come to an end. The Court should grant the writ.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: _____
Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
February 8, 2018