No. _____

IN THE
Supreme Court of the United States

SHANNON D. ROBINETT,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a state robbery offense that includes "as an element" the requirement of "overcoming resistance" categorically a "violent felony" under the force clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), if the offense has been specifically interpreted by state appellate courts (in this instance Missouri) to require only slight force to overcome resistance?

Stokeling v. United States, *cert. granted*, No. 17-5554, ___ S.Ct. ___ (Apr. 2, 2018).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shannon Robinett respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 30, 2018, affirming the district court's judgment.

OPINION BELOW

The Eighth Circuit's judgment and opinion affirming the judgment of the district court is reported at __ F.3d ___, 2018 WL 1542395 (8th Cir. 2018), and is included in Appendix A.

JURISDICTION

The decision of the Court of Appeals affirming the district court's judgment and sentence was entered on March 30, 2018. Prior to denying the appeal, the Court of Appeals granted a certificate of appealability on November 29, 2016. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1291, 28 U.S.C. § 2253, and Sup. Ct. R. 13.3.

STATUTORY PROVISION 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.

STATEMENT OF THE CASE

The Guilty Plea and Sentencing

Shannon Robinett pled guilty in 2009 to one count of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(l). Upon his plea of guilty, a presentence report was ordered. The report recommended that Mr. Robinett was subject to an enhanced penalty range under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e). The report found a guideline range of 180 to 210 months. (PSR at ¶90). On June 2, 2009, Mr. Robinett was sentenced to 180 months' imprisonment.

The Post-Conviction Relief Motion

Mr. Robinett filed a motion pursuant to 28 U.S.C. § 2255 on February 26, 2016. Mr. Robinett sought sentencing relief in light of the Supreme Court's decision *Johnson v. United States*, 135 S.Ct. 2551 (2015). Mr. Robinett alleged that in light of *Johnson* and its retroactive application to his case on collateral review, he would no longer be subject to the enhanced penalty provision of the ACCA and, therefore, the sentence he is serving is an illegal sentence predicated upon an unconstitutionally vague, and now invalidated, clause of that statute.

The district court denied Mr. Robinett's motion, finding that Mr. Robinett had "four predicate felonies under the ACCA." (Appendix B, pg. 7). Specifically, the district court concluded that Mr. Robinett's prior robbery convictions in Missouri and Kansas continued to qualify as ACCA predicate offenses. The court also concluded that Mr. Robinett's two Missouri assault in the second degree convictions were qualifying predicate convictions. The district court also denied a certificate of

appealability, finding that Mr. Robinett had not made a substantial showing of the denial of a constitutional right.

Appeal to the Eighth Circuit

On appeal before the Eighth Circuit, Mr. Robinett argued that his prior robbery convictions in question did not constitute a "violent felony." In denying the appeal, a panel of the Eighth Circuit held that Mr. Robinett's Missouri second-degree robbery conviction "is categorically a violent felony under the force clause." *United States v. Robinett*, __ F.3d ___, 2018 WL 1542395 (8th Cir. 2018), *2 (Appendix A) (citing *United States v. Swopes*, No. 16-1797, —— F.3d ——, 2018 WL 1525825 (8th Cir. Mar. 29, 2018) (en banc). This conclusion was dispositive to its holding that Mr. Robinett had at least three prior "violent felony" predicate convictions, and therefore the district court did not error in concluding he was properly sentenced as an armed career criminal pursuant to § 924(e).[1]

[1] The other two "violent felony" convictions that the Eighth Circuit relied on were Mr. Robinett's two Missouri assault convictions, and therefore the court concluded that it was "not necessary to address whether the Kansas conviction for robbery also qualifies." *Id*. at *2. Thus, the propriety of the Eighth Circuit's legal conclusion that Mr. Robinett remains an ACCA offender rests solely on whether his Missouri second degree robbery conviction satisfies the force clause.

REASON FOR GRANTING THE WRIT

The Circuits are in conflict over whether a conviction for a state robbery offense that includes as an element the common law requirement of overcoming "victim resistance" is categorically a "violent felony" under the ACCA, if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance.

I. This Court should review the Eighth Circuit's *en banc* opinion in *Swopes* with *Stokeling* on this "related issue" because it would help definitively resolve the circuit split, in analyzing a Missouri state law robbery offense remarkably similar to the Florida robbery offense at issue in *Stokeling*.

As this Court has already determined by granting certiorari in *Stokeling v. United States*, whether a state robbery conviction sustained by overcoming slight victim resistance satisfies the force clause, is a question of exceptional importance and is one that has divided the Courts of Appeals. *Stokeling v. United States,* No. 17-5554, ___ S.Ct. ____, 2018 WL 1568030, (Apr. 2, 2018). The petition for certiorari in *Stokeling* compellingly outlined why Supreme Court intervention is warranted to settle this split.

However, the Eighth Circuit, sitting *en banc*, recently added a new depth and dimension to the split, in analyzing a Missouri state law robbery offense remarkably similar to the Florida robbery offense in *Stokeling*. The Eighth Circuit had previously concluded that Missouri robbery in the second degree did not satisfy the force clause, until it recently reversed course in an *en banc* opinion, concluding that it did satisfy the force clause. *United States v. Swopes*, No. 16-1797, —— F.3d ––, 2018 WL 1525825 (8th Cir. Mar. 29, 2018) (en banc), overruling *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016).

A day after deciding the *Swopes en banc* opinion, the Eighth Circuit denied

Mr. Robinett's appeal based on *Swopes*, making it unambiguous that Mr. Robinett's only remaining appeal was to this Court. The defendant in *Swopes* will not be able to immediately appeal to this Court, based on the *en banc* Court's disposition to "return the case to the original three-judge panel to resolve the balance of the appeal." *Swopes*, 2018 WL 1525825, at *3.

Thus, Mr. Robinett's case is a clean vehicle that will allow this Court to directly review the *en banc Swopes* decision immediately, in tandem with *Stokeling* on this "related question." *See* Rule 27.3.[2] This is important because two circuits have relied on the Eighth Circuit's prior holding in *Bell*—now overruled by *Swopes*—to conclude that other similar state law robbery statutes are *not a* "violent felony", and those circuit opinions are now accordingly called into question. *See United States v. Walton*, 881 F.3d 768, 774 (9th Cir. 2018) (analyzing *Bell* to conclude Alabama robbery is not a "violent felony"); *United States v. Yates*, 866 F.3d 723, 730 (6th Cir. 2017) (analyzing *Bell* to conclude Ohio robbery is not a "violent felony"). The *Stokeling* petition for certiorari, itself, noted the evolution of the Eighth Circuit's analysis of the Missouri robbery statute, in highlighting the circuit split. *Stokeling* petition for certiorari, pg. 13.

Resolving the Missouri robbery force clause issue analyzed by the Eighth Circuit will therefore provide more specific guidance to the circuits, than just

[2] While the government raised a procedural default issue before the district court in response to Mr. Robinett's §2255 motion, neither the district court nor the Eighth Circuit relied on any procedural issue to deny relief. Instead, both lower courts reached the merits of Mr. Robinett's ACCA claim, and therefore no procedural issue would prevent this Court from reaching the merits, too.

deciding the issue in *Stokeling*. Additionally, reviewing the issue presented by the Eighth Circuit will allow this Court insight on how an *en banc* circuit court analyzed this "related question", and whether the Eighth Circuit properly chose to reverse course on an issue that is not meaningfully distinguishable from the one presented in *Stokeling*.

Simply put, Mr. Robinett's case is a compelling case to further assist the analysis of this related question with *Stokeling*, whether the "overcoming resistance" element in a state robbery conviction satisfies the force clause "-e.g., bumping, grabbing, pulling the strap on a purse, etc." *Stokeling* reply brief, pg. 10. The Eighth Circuit's *en banc* opinion cursorily concluded that it was sufficient force: "A blind-side bump, brief struggle, and yank—like the 'slap in the face' posited by *Johnson*, 559 U.S. at 143,—involves a use of force that is capable of inflicting pain." *Swopes*, 2018 WL 1525825, at *2. But in so concluding just a few weeks ago, *Swopes* failed to even mention the existing circuit split, let alone address the serious concerns outlined by the Fourth, Sixth and Ninth circuits, which have caused those courts to reach the opposite legal conclusion.

A final reason exists for this Court to cast a broader net, to review the Missouri state law robbery issue too, because it would provide more *binding* guidance on this ACCA issue. This is important because the government often argues that ACCA predicate offenses must be analyzed on a state-by-state basis, because they turn on "not from any disagreement about the meaning of 'physical force' under *Johnson*, but from differences in how States define robbery." *Stokeling*,

Solicitor General's brief in opposition, pg. 14. Specifically, in litigating these ACCA predicate offense issues on a state-by-state basis, the government, at times, fails to take this Court's clear direction from one Supreme Court case and apply it to an indistinguishable ACCA predicate offense from another state. This taxes judicial resources, and results in arbitrary and unjust results.

To give just one example, this Court concluded in *Mathis v. United States*, 136 S.Ct. 2243 (2016), that an Iowa burglary statute was indivisible, rendering it not a "violent felony." *Id*. at 2243. After *Mathis,* the government continued to maintain that the Missouri burglary statute was divisible, and therefore remained a "violent felony" in part. Based on this litigation, the Eighth Circuit, at first, erroneously concluded that it remained a "violent felony" in part, only to eventually reverse course and properly conclude that it was not a "violent felony." *United States v. Naylor*, No. 16-2047, 2018 WL 1630249, at *1 (8th Cir. Apr. 5, 2018), overruling *United States v. Sykes*, 844 F.3d 712 (8th Cir. 2016). In addition to expending judicial resources within the Eighth Circuit, this litigation also caused this Court to expend resources considering whether to accept transfer in *Sykes*. Specifically, this Court relisted the case approximately sixteen times, prior to issuing a GVR order after the Eighth Circuit corrected the error itself in *Naylor*. *See Sykes v. United States*, 16-9604 (issuing GVR order to the Eighth Circuit based on *Naylor* on April 16, 2018).

Ultimately, that a circuit split in fact exists on this specific issue has become undeniable, after this Court granted certiorari in *Stokeling*. The only issue

remaining for this Court is how best to resolve the split. Because the Eighth Circuit played a central role in causing the circuit split, this petition for certiorari should be granted by this Court, to help definitively resolve the split and provide clear guidance to the other circuits.[3]

II. The "overcoming resistance" robbery issue that this Court will analyze in *Stokeling* based on Florida state law, is not meaningfully distinguishable from the Missouri state law issue.

The Missouri second-degree robbery statute at issue provides that the crime occurs "when he forcibly steals property." Mo. Rev. Stat. § 569.030.1 (1979). A person "forcibly steals" when, in the course of the stealing as follows:

> he uses or threatens the immediate use of physical force upon another for the purpose of . . . preventing or ***overcoming resistance*** to the taking of the property or to the retention thereof immediately after the taking . . .

Mo. Rev. Stat. § 569.010 (1) (1979) (emphasis added).

The issue of overcoming the victim's resistance "includes the same 'resistance' element as the common law robbery offenses . . . because Florida robbery requires overcoming 'victim resistance." *Stokeling* petition for certiorari, pg. 11 (citing *Robinson v. State,* 692 So.2d 883, 886 (Fla. 1997)). Thus, both the *Stokeling* petition and this petition raise the "related question" of whether a state law robbery offense that requires overcoming "victim resistance" is "categorically an ACCA violent

[3] To the extent this Court disagrees and believes that analyzing the Florida robbery statute alone is sufficient, Mr. Robinett requests that this Court stay his petition for certiorari, pending the resolution of *Stokeling*.

felony." *See Stokeling* petition for certiorari, pg. 14 and 17 (citing to contemporary Missouri robbery statute and an 1875 Missouri Supreme Court decision analyzing common law robbery).

While this ACCA "violent felony" analysis is a state law issue that depends on the individualized case law of the given state, *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013), the Florida state case law at issue in *Stokeling* and the Missouri case law at issue in this case are remarkably similar:

Florida "victim resistance"	Missouri "victim resistance"
"Tug of war" over purse *Benitez-Saldana v. State*, 67 So.3d 320 (Fla. 2nd DCA 2011) **"Bumped", and property stolen** *Hayes v. State*, 780 So.2d 918 (Fla. 1st DCA 2001) **"Jostles" the victim** *Rigell v. State*, 782 So.2d 440 (Fla. 4th DCA 2001)	**"Tug of war" over bag** *State v. Jolly*, 820 S.W.2d 734 (Mo. Ct. App. 1991) **"Bump", and purse stolen** *State v. Lewis*, 466 S.W.3d 629 (Mo. Ct. App. 2015) **"Tussle" with the victim** *State v. Childs*, 257 S.W.3d 655, 660 (Mo. Ct. App. 2008)

Because the state case law in Missouri and Florida is not meaningfully distinguishable, either both state crimes categorically satisfy the force clause, or neither does. Specifically, Missouri and Florida share the "related question" of whether a state robbery conviction that includes as an element the common law requirement of overcoming "victim resistance" is categorically a "violent felony" under the ACCA, if the offense has been interpreted by state appellate courts to require only slight force to overcome resistance. *See* Rule 27.3.

This question should be decided by this Court, because it is the final

arbitrator to interpret the ACCA. "The meaning of 'physical force' in § 924(e)(2)(B)(i) is a question of federal law, not state law." *Curtis Johnson v. United States*, 559 U.S. 133, 138 (2010). A "bump", or a "tug of war" over property, fall well short of the federal definition of physical force under the force clause, which is "extreme," "severe," "characterized by the exertion of great physical force or strength," and akin to "murder, forcible rape, and assault and battery with a dangerous weapon." *Id.* When Missouri and Florida say force overcoming resistance, it means something *less*. Because this is a "related question" in Missouri and Florida, this Court should resolve it collectively to definitively resolve the split in the circuits.

III. Missouri state case law, like Florida case law, traces the common law roots of robbery to the modern day robbery state case law, which assists this Court in determining whether both statutes require violent force.

Missouri case law adds further depth to this issue because, like Florida case law that interprets Fla. Stat. § 812.13 (1997), it helps to trace a straight line from the common law roots of robbery, to the modern day state case law. These common law robbery principles are embedded in the DNA of Missouri state case law, which interprets Mo. Rev. Stat. § 569.030 (1979). And, as highlighted by the *Stokeling* petition for certiorari, tracing the steps of the common law roots of the modern day state crime is critical to understanding why it does not satisfy the force clause under the ACCA. *Stokeling*, petition for certiorari, pg, 14-19.

In *State v. Broderick*, 59 Mo. 318, 321 (Mo. 1875), the Missouri Supreme Court analyzed the antiquated Missouri robbery statute, in a case where the victim was walking down the street when the defendant suddenly turned and, "without

saying anything, seized [the victim]'s watch chain, and in doing so, broke it loose from the watch and the button hole." 59 Mo. at 319. In affirming the conviction, the Missouri Supreme Court noted "that the *violence* which constituted robbery, as charged in the indictment, was sustained by the *proof of force used by the defendant sufficiently great to break the chain*." 59 Mo. at 319. Thus, the dispositive issue in *Broderick* was "violence" breaking a chain, which cannot satisfy the force clause.[4]

In *State v. Adams*, 406 S.W.2d 608, 611 (Mo. 1966), the Missouri Supreme Court continued to adhere to this common law "violence" element of the robbery crime, directly citing to *Broderick*. Specifically, the Missouri Supreme Court held that while "snatching" is not a robbery 'where the article is merely snatched from the hand of another", but that *"snatching" is robbery when it involves "detaching the article taken where it is fastened to the clothing or person of the victim."* 406 S.W.2d at 611 (emphasis added). But snatching from clothing indisputably does not satisfy the force clause pursuant to *Curtis Johnson*, 559 U.S. 133, 140 (2010).

Missouri continues to rely on the common law conception of force in its analysis of Mo. Rev. Stat. § 569.030 (1979), the statute in question in this case. For example, in *State v. Butler*, the Court concluded that "[t]he evidence reveals that the strap of the purse was wrapped around either the victim's arm, her finger, or

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[4] Subsequent to the robbery "the property was retained by force [by the defendant], for the [victim] was struck by the defendant at the very time when he made an attempt to snatch the chain out of defendant's hands." *Broderick*, 59 Mo. at 321. However, this was irrelevant to the court's analysis because "violence, to constitute robbery, should occur *before the taking, and induce surrender*." *Id.* at 318 (emphasis added).

both. We believe that this attachment of the purse to her body makes this case similar to those involving a watch chain snatched from the victim's person." *State v. Butler*, 719 S.W.2d 35, 37 (Mo. Ct. App. 1986); *see also State v. Lewis*, 466 S.W. 3d 629, 632 (Mo. Ct. App. 2015) (quoting *Adams*, "[S]natching a valuable article from another is robbery where force is exercised in overcoming the resistance of the person robbed or in detaching the article taken where it is fastened to the clothing or person of the victim."). This common law analysis infects modern day Missouri case law (and Florida case law), because state courts allow defendants to be convicted of robbery, through conduct that does not require violent force to a *person*.

Stated another way, all common law robberies were "violent," but in a very specialized sense of that word. A prosecutor did not need to show that the defendant caused or threatened to cause pain or injury or otherwise used force that was "substantial," "strong," or "extreme," as *Curtis Johnson* requires. 559 U.S. at 140-41. Indeed, courts and commentators often describe robbery as "a battery plus larceny." 4 Wharton's Criminal Law § 454; see 3 LaFave, Substantive Criminal Law § 20.3. And this Court was clear in *Curtis Johnson* that a simple battery does not require the use of physical force within the meaning of § 924(e)(2)(B)(i). 559 U.S. at 139-40.

Because this element of "common law" robbery is inexorably intertwined with both Missouri case law analyzing Mo. Rev. Stat. § 569.030 (1979), and Florida case law interpreting Fla. Stat. § 812.13 (1997), both state statutes do not satisfy the force clause.

IV. The Eighth Circuit's en banc decision in *Swopes*- just like the Eleventh Circuit's decision in *Stokeling*- is incorrect.

A. The Supreme Court has given specific meaning to the force clause of the ACCA in *Curtis Johnson* and *Castleman*, which illustrates the error below.

The ACCA defines a "violent felony" as 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; or (ii) is burglary, arson, or extortion, involves use of explosives[;] or [(iii)] otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). These three clauses are known as the "force clause," the "enumerated clause," and the "residual clause," respectively.

In *Curtis Johnson*, this Court clarified that the "physical force" required under ACCA's force clause must be "*violent* force" or "force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. The mere potential for some trivial pain or slight injury will not suffice because "violent" force must be "substantial" and "strong." *Id.* In support of this holding, the Court in *Curtis Johnson* favorably quoted the definition of "violent felony" from Black's Law Dictionary: "a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon." *Id.* at 140–41.

Thereafter, this Court, in *United States v. Castleman*, 134 S.Ct. 1405, 1411-12 (2014), further explained the need for substantial force for a conviction to qualify as a violent felony under ACCA's force clause. *Castleman* distinguished "[m]inor

uses of force" that suffice for a "misdemeanor crime of domestic violence," such as squeezing an arm hard enough to leave a bruise, from the "substantial degree of force" required for violent felonies under ACCA. *Id.* *Castleman* thus drew a distinction between "violent force" and the "common law meaning of force", because to equate one as the same would result in a "comical misfit." *Id.* at 1412 (quoting *Curtis Johnson*, 559 U.S. at 145).

Specifically, *Castleman* refused to extend the term "violent force" in the context of the Misdemeanor Domestic Violence Act in § 921(a)(33)(A).[5] And what *Castleman* included in adopting the common law definition of the term, were acts logically excluded from the force clause: "'Domestic violence' is not merely a type of "violence"; it is a term of art encompassing acts that one might not characterize as "violent" in a nondomestic context." *Id.* at 1411. "Indeed, most physical assaults committed against women and men by intimates are *relatively minor* and consist of pushing, grabbing, shoving, slapping, and hitting." *Id.* at 1411-12 (emphasis added).

Six members of this Court in *Castleman* thus gave a more robust meaning to the force clause, and in doing so refused to adopt Justice Scalia's contrary view

[5] This Court in *Castleman* gave three powerful reasons for interpreting identical language in the two acts differently. One, Congress likely intended a lesser meaning of force for a statute, like the Misdemeanor Domestic Violence Act, aimed mostly at assault and battery laws, which themselves often require only the common law definition of force for conviction. *Id.* at 1411. Two, the term "violent felony" (or "crime of violence") connotes a higher degree of force than the term "domestic violence" because the latter "encompass[es] acts that one might not characterize as 'violent' in a nondomestic context." *Id.* at 1411–12. Three, the type of force that designates one an armed career criminal (or career offender) would logically be higher than the type of force that defines a domestic abuser. *Id.* at 1412.

which the Court found was "rebutt[ed"] by the reasoning of *Johnson*. 134 S.Ct. 1405, fn 3. 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.

Applying these principles from *Curtis Johnson* and *Castleman* to the state law robbery context demonstrates why the Eighth and Eleventh Circuits erred below. Specifically, because Missouri and Florida state robbery offenses may be committed by conduct that does not satisfy the force clause, they are both categorically not a "violent felony."

B. The Eighth Circuit's reasoning in *Swopes* is flawed in two specific regards. *First*, it improperly lowers the "violent force" standard required by the ACCA's "force clause." *Second*, it elevates the amount of force required by Missouri courts by neglecting the "least culpable conduct" that may result in a conviction.

The Eighth Circuit's *en banc* opinion in *Swopes* has two major analytical flaws, in concluding that Mo. Rev. Stat. § 569.030 (1979), categorically satisfies the force clause of the ACCA.

First, *Swopes* improperly lowers the "violent force" standard required by the ACCA's "force clause." In *Swopes*, the Eighth Circuit's *en banc* opinion dedicated only *two sentences* to what the force clause required, concluding that "physical force" means "force capable of causing physical pain or injury to another person", and includes a "slap in the face." 2018 WL 1525828, * 1-2 (quoting *Curtis Johnson*, 559 U.S. at 140, 143). This summary interpretation of the force clause is incomplete, and fails to acknowledge an important distinction in this Court's case law.

Specifically, *Swopes* ignored that *Castleman* drew a distinction between "violent force" and the "common law meaning of force", because to equate one as the same would result in a "comical misfit." *Id.* at 1412. This distinction is important because, as highlighted above, Mo. Rev. Stat. § 569.030 (1979), retains the common law meaning of overcoming force in Missouri case law, and *Castleman* concluded that much of that conduct would not necessarily satisfy the ACCA's force clause. The Supreme Court of Missouri held long ago "that the *violence* which constituted robbery . . . was sustained by the *proof of force used by the defendant sufficiently great to break the chain*" *Broderick,* 59 Mo. at 319, and importantly these common

law concepts of "violence" remain today in Missouri case law. *See, for example, Lewis*, 466 S.W.3d at 633. And this common law "violence" does not satisfy the ACCA's force clause.

Furthermore, *Swopes* incorrectly assumes that all conduct "capable" of causing any pain or injury, alone, satisfies the force clause. That test lacks a meaningful limit. While *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"). A singular focus on the word "capable" ignores the explanation pervading the remainder of the opinion.

And it entirely ignores *Castleman*, because if "capable" of causing any pain were dispositive to this analysis, it would render this Court's distinction between "violent force" and the "common law meaning of force", meaningless. *Id.* at 1412 (emphasis added). By failing to acknowledge the distinction between these two categories, *Swopes* perpetuates the "comical misfit" that this Court previously avoided.

Ultimately, in *Swopes*, the Eighth Circuit assumed, without explanation, that "[a] blind-side bump, brief struggle, and yank" is "like the 'slap in the face' posited by *Johnson*, 559 U.S. at 143, [because it] involves a use of force that is capable of inflicting pain." *Swopes*, 2018 WL 1525825, at *2 (citing to *Lewis*, 466 S.W.3d at

633). But *Lewis* is a great example of why "capable of inflicting pain" cannot be the sole, determinative factor because "[s]ignificantly, the victim [in *Lewis*] did not testify the slight struggle caused her any pain, or that she was injured by the incident." *United States v. Bell*, 840 F.3d 963, 966 (8th Cir. 2016), *overruled by Swopes*. The bulk of contact prohibited at common law *might* be capable of inflicting pain (even the "merest touch"), but we know that does not satisfy the force clause based on *Curtis Johnson*. Ultimately, bumping, grabbing, and yanking do not require the same violence or degree of force as a slap in the face.

Second, *Swopes* inflated the amount of force that has been required by Missouri courts in sustaining convictions under Mo. Rev. Stat. § 569.030 (1979), by neglecting the least culpable conduct that may result in a conviction under the statute. "Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts [suffice]." *Moncrieffe*, 133 S.Ct. at 1684.

Yet, conspicuously absent from *Swopes*, are any opinions from the Missouri Supreme Court analyzing Mo. Rev. Stat. § 569.030, which is problematic because in conducting this analysis, federal courts are bound by the state supreme court's "interpretation of state law." *Curtis Johnson*, 559 U.S. at 138. Had the Eighth Circuit analyzed *Broderick* and *Adams*, it would have had the benefit of understanding that the Missouri Supreme Court has repeatedly made common law robbery a centerpiece of its analysis, and that Missouri courts still rely on these

principles to interpret Mo. Rev. Stat. § 569.030.

The *Swopes en banc* court concluded, "[b]ased on the data available, we see no realistic probability that Missouri courts would apply the Missouri statute to conduct that does not involve the force that is capable of causing physical pain or injury." *Swopes*, 2018 WL 1525825, at *3. However, such "data" *does* exist, and includes yet another Missouri Supreme Court case.

In *Coleman*, the Supreme Court of Missouri recently affirmed a robbery conviction under Mo. Rev. Stat. § 569.030 where no force, or threat of force, was proven when the defendant "walked into a bank, rested his forearm on the counter, handed the bank teller a plastic grocery sack, and said "I need you to do me a favor. Put the money in this bag." *State v. Coleman*, 463 S.W.3d 353, 354 (Mo. banc 2015). After the teller placed money in the bag, the defendant told her, "Ma'am, stop where you are and don't move any farther" and the employee complied. *Id.* The defendant took the bag of money and ran out of the bank, with the entire encounter lasting approximately 45 seconds. *Id.*

As pointed out by the dissenting opinion in *Coleman*:

> The dictionary defines "physical" as "of or relating to the body," Webster's Third New International Dictionary 1706 (1993), and "force" as "power, violence, compulsion, or constraint exerted upon or against a person or thing," *id.* at 887. The dictionary definition of "immediate" is "occurring, acting, or accomplished without loss of time: made or done at once: INSTANT." *Id.* at 1129. Mr. Coleman's conduct of having his hand below the counter, demanding money to which he has no lawful right, and directing the branch manager not to move any farther is insufficient to prove that he threatened immediate use of power, violence, compulsion or constraint [against the bank teller or branch manager]. Therefore, there was insufficient evidence that he threatened the "immediate" use of "physical force," which was required

to convict him.

Id. at 356–57. This is a real world application of force clause principles strikingly similar to those found in *Curtis Johnson*, one that was telling rejected by a majority of the Missouri Supreme Court in 2015.

Instead of analyzing these authoritative cases from the Missouri Supreme Court, the Eighth Circuit instead chose to put dispositive weight on decisions from the Missouri Court of Appeals. But even those cases should give this Court pause because, if one extracts the stealing element from them, they amount to the "common law" acts "one might not characterize as 'violent' ", which "are *relatively minor* and consist of pushing, grabbing, shoving, slapping, and hitting." *Castleman*, at 1411-12 (emphasis added). Not all slaps, are a slap to the face.[6]

To conclude that Missouri robbery satisfied the force clause, *Swopes* relied on *Applewhite*, where a "defendant intentionally pushed a store manager out of his way and knocked him against a door." 2018 WL 1525825, *2 (citing *State v. Applewhite*, 771 S.W.2d 865, 868 (Mo. Ct. App. 1989)). But *Swopes* failed to explain why *Applewhite* was indicative of violent, physical force where there was no indication that the defendant was injured or sustained pain from the conduct. The same is true of the Eighth Circuit's reliance on *Lewis*, where the defendant stole the victim's purse from behind and ran away, which involved what various witnesses

[6] A slap to the face is also a term of art, because "it shocks or upsets you because it shows that they do not support you or respect you." https://www.collinsdictionary.com/us/dictionary/english/a-slap-in-the-face

variously described as a "bump", "yank", "nudge" or "slight struggle." *Id*.

And then there are other notable Missouri Court of Appeals cases, which the Eighth Circuit failed to analyze. In *State v. Harris*, 622 S.W.2d 742 (Mo. App. 2001), the defendant both "shoved" the victim, and then later "pulled away" some clothes from her hands. *Id*. at 745. *Harris* found *either* act sufficient to constitute robbery under Missouri law: "Defendant points out that her pulling back the clothes from [the victim] was not force 'upon the person'. But it is not necessary that the person be touched. The force shown - that is, of seizing and trying to free the clothing from [the victim] – was sufficient for the forcible stealing of § 569.030 . . ., even though the person of the victim was not touched by the defendant." *Id.* at 745. Similarly, the victim's stumbling after a push during a theft as in *State v. Scoby*, 719 S.W.2d 916, 917 (Mo. Ct. App. 1986), demonstrates that "victim resistance" need not entail violent force, especially because the victim could "catch [her]self." *Id*.

Swopes also missed the mark by citing to Missouri intermediate appellate case law where courts have, at times, reversed a conviction for second-degree robbery where the defendant merely "'grabbed the [victim's] purse by its strap, took it from her shoulder and ran off,' because there was no use or threatened use of physical force." *Swopes*, 2018 WL 1525825, *2, quoting *State v. Tivis*, 884 S.W.2d 28 (Mo. Ct. App. 1994). However, this analysis is not representative of the least of the acts' criminalized under Mo. Rev. Stat. § 569.030, *Moncrieffe*, 133 S.Ct. at 1684, because it only illustrates an example of exoneration, which by its very definition does not inform this Court what is criminalized under the statute.

As the dissenting opinion said in *Swopes*, "in Missouri a defendant can be convicted of second-degree robbery when he has physical contact with a victim but does not necessarily cause physical pain or injury." *Swopes*, 2018 WL 1525825, *3 (Kelly, J., dissenting) (quoting *Bell*, 840 F.3d at 966). It is this analysis that should carry the day under the ACCA's force clause.

The dividing line between violent and non-violent "force" under the ACCA lies somewhere between a slap to the face and a bruising squeeze of the arm. On that view, certainly the "bump" without injury in *Lewis* (or in Florida, *Hayes*) would constitute similarly "minor", and therefore non-violent force. The same is also true of minor injuries during a tug-of-war as in *Jolly* (or in Florida, *Benitez-Saldana*).

Each of these minor uses of force was sufficient to overcome a victim's minor resistance in a Missouri or Florida robbery case. But just like the bruising squeeze to the arm discussed in *Castleman*, which actually resulted in a minor injury, they do not constitute "violence" under the force clause. The Eighth Circuit's implicit assumption that minor injuries are themselves proof of "violent force" is not supported by *Curtis Johnson*, *Castleman*, or real-world experience.

C. The Eighth Circuit's force clause test for state robbery crimes is unworkable, and should not be adopted by this Court because it has caused unpredictable results within the Eighth Circuit. Other circuits' tests provide a more consistent and predictable means for lower courts to properly interpret the force clause.

The Eighth Circuit's force clause test for state robbery crimes in *Swopes* is unworkable, and not just in theory. It has also caused unpredictable and inconsistent results within the Eighth Circuit, when analyzing different states' robbery statutes. Approximately three months before deciding Missouri robbery was not a violent felony in *Bell*, the Eighth Circuit also concluded that Arkansas robbery, §5-12-102, was not a violent felony, employing a similar force clause test to analyze the robbery statute in *United States v. Eason*, 829 F.3d 633, 640–41 (8th Cir. 2016) (analyzing Arkansas robbery statute, § 5-12-102).

Bell and *Eason* had established a trend as to how state robbery convictions were to be analyzed under the force clause in the Eighth Circuit. *Eason,* 829 F.3d at 641 (when "the degree of force used was sufficient to support a robbery conviction even where there was no threat of force and no actual injury befell the victim" Arkansas robbery did not satisfy force clause); *Bell*, 840 F.3d at 966 ("when he has physical contact with a victim but does not necessarily cause physical pain or injury", Missouri robbery did not satisfy force clause). Other circuits took note of this trend in the Eighth Circuit, and followed its guidance. *See, for example, United States v. Yates,* 866 F.3d 723, 728-30 (6th Cir. 2017) (analyzing *Bell* and *Eason*).

But then the Eighth Circuit reversed course in *Swopes*, concluding that "Missouri decisions applying the statute show that physical force under the

Missouri statute is the equivalent of physical force within the meaning of the ACCA." *Swopes*, 2018 WL 1525825, *3. In so concluding, the *Swopes en banc* court did not even mention *Eason*, or how the Arkansas case law was meaningfully distinct from Missouri case law. Troublingly, it is not distinct.

In concluding that Arkansas robbery was not a "violent felony", the Eighth Circuit relied on a case it found problematic because "jerking the door from [a victim], cornering [her] in the back hallway and grabbing her dress [lightly] is sufficient restraint and bodily impact to constitute physical force." *Eason*, 829 F.3d at 641, quoting *Fairchild v. State*, 600 S.W.2d 16, 17 (1980). The problem with *Swopes* is the Eighth Circuit's *en banc* approach is diametrically opposed to the analysis in *Eason*. "[J]erking the door from [a victim]" in *Fairchild* is "force capable of causing physical pain or injury to another person." *Curtis Johnson*, 559 U.S. at 140. Nonetheless, *Eason* was correctly decided because while the force was "capable" of causing physical pain or injury, that possibility was too remote in *Farchild*, especially when there was no evidence that it caused pain or injury.

The end result of *Swopes* is that, even in the Eighth Circuit, there are defendants with a diametrically different outcome on how their state robbery convictions are treated, based solely on geography. Those convicted of Missouri robbery are prejudiced in sustaining an ACCA predicate, in a way that those convicted of Arkansas robbery are not.

It should not be this way. Other circuits have developed a more coherent approach, like the Eighth Circuit used to have prior to *Swopes*. The Sixth Circuit

has set forth a straightforward test that is easy to apply: "Ohio courts have held that a struggle over control of an individual's purse has been sufficient to establish the element of force", and that "[t]hese cases show that, at the very least, a 'realistic probability' exists that Ohio is applying Ohio Rev. Code Ann. § 2911.02(A)(3) in such a way that criminalizes a level of force lower than the type of violent force required by *Johnson*." *United States v. Yates*, 866 F.3d 723, 729–30 (6th Cir. 2017).

So, too, the Fourth Circuit has set forth a workable test: "North Carolina common law robbery *does not necessarily* include the use, attempted use, or threatened use of 'force capable of causing physical pain or injury to another person', *Curtis Johnson*, as required by the force clause of the ACCA." *United States v. Gardner*, 823 F.3d 793, 803–04 (4th Cir. 2016) (emphasis added) (giving the example that "a defendant pushed the shoulder of an electronics store clerk, causing her to fall onto shelves while the defendant took possession of a television.").

And the Ninth Circuit's approach joins these other circuits, in a setting forth a workable rule to how the force clause should be applied: "Shoves that merely cause others to briefly lose their balance or step backward . . . are no more violent than minor scuffles. The force required to support a conviction for third-degree robbery in Alabama is therefore not sufficiently violent to render that crime a violent felony under ACCA." *United States v. Walton*, 881 F.3d 768, 774 (9th Cir. 2018).

This Court should use the Eighth Circuit's experience as a laboratory, learning from its mistake so as to prevent the entire country from undergoing the same chaotic results as it pertains to the force clause. In short, it should adopt an approach like the Eighth Circuit used to have before *Swopes*, and which the Fourth, Sixth, and Ninth Circuit have adopted, to ensure the ACCA's force clause is given a proper and consistent meaning under this Court's case law.

CONCLUSION AND PRAYER FOR RELIEF

The Eighth Circuit's conclusion that Mr. Robinett sustained three previous qualifying convictions for a violent felony, was predicated on its assumption that his Missouri robbery conviction is a violent felony based on *Swopes*. Because *Swopes* was erroneously decided, Mr. Robinett does not have three or more "violent felony" convictions, and therefore his ACCA sentence of 180 months is an illegal sentence in excess of the statutory maximum of 18 U.S.C. § 924(a)(2).

For the foregoing reasons, Mr. Robinett respectfully requests that the Court grant his petition for certiorari.

Respectfully submitted,

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APPENDIX

Appendix A – Judgement and Opinion of the Eighth Circuit Court of Appeals

Appendix B – Judgement of the District Court