No. 18–_____

In the
Supreme Court of the United States

Trevor Williams,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the New York State offense of robbery is a violent felony under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), a question that divides the First and Sixth Circuits.

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OPINIONS AND ORDERS BELOW

The order of the United States Court of Appeals for the Second Circuit is reported at 712 F. App'x 50 and appears at Pet. App. 1a–6a. The order of the United States District Court for the Southern District of New York is not reported, but appears at 2015 WL 4563470 and Pet. App. 7a–14a. The Second Circuit's order denying panel rehearing and rehearing *en banc* appears at Pet. App. 15a.

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 2255 and entered a decision and order denying relief on July 20, 2015. The Second Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253, affirmed on October 26, 2017, and denied a timely petition for panel rehearing and rehearing *en banc* on January 30, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The **Fifth Amendment** provides, in relevant part:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

The Armed Career Criminal Act, **18 U.S.C. § 924(e)**, provides, in relevant part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony ... committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years. ...
>
> (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.

N.Y. Penal Law § 160.00 provides:

> Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:
>
> > 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
> >
> > 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. Penal Law § 160.05 provides:

> A person is guilty of robbery in the third degree when he forcibly steals property.

N.Y. Penal Law § 160.10 provides, in relevant part:

> A person is guilty of robbery in the second degree when he forcibly steals property and when:
>
> > 1. He is aided by another person actually present; or
> >
> > 2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:
> >
> > > (a) Causes physical injury to any person who is not a participant in the crime.

STATEMENT OF THE CASE

1. A federal defendant convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. § 922(g)(1), faces a statutory sentencing range of 0–10 years. *See* 18 U.S.C. § 924(a)(2). The Armed Career Criminal Act ("ACCA") increases the sentencing range to 15 years to life if the defendant "has three previous convictions" for a "violent felony" offense. 18 U.S.C. § 924(e)(1). As

relevant, ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year," that "has as an element the use, attempted use, or threatened use of physical force against the person of another," § 924(e)(2)(B)(i), a provision known as the elements clause.

In determining whether a prior conviction satisfies this definition, a court applies "a 'categorical' approach that asks whether the least of conduct made criminal by the state statute falls within the scope of activity that the federal statute penalizes." *Stuckey v. United States*, 878 F.3d 62, 67 (2d Cir. 2017). This inquiry requires a two-step analysis. *First*, a court must identify the "elements of the statute forming the basis of the defendant's conviction." *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). The categorical approach dictates that a court looks "only to the statutory definitions of the prior offenses, and not to particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600 (1990). "A defendant's actual conduct is irrelevant to the inquiry," because "the adjudicator must 'presume that the conviction rested upon nothing more than the least of the acts criminalized'" under the state statute. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015) (quoting *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013)). *Second*, a court "compare[s] the minimum conduct necessary for a state conviction with the conduct that constitutes a 'violent felony' under the ACCA." *Stuckey*, 878 F.3d at 67. "If the state statute 'sweeps more broadly'—i.e., it punishes activity that

the federal statute does not encompass—then the state crime cannot count as a predicate 'violent felony.'" *Ibid.* (quoting *Descamps*, 133 S. Ct. at 2283).[1]

In addition, this Court has adopted a narrow construction of § 924(e)(2)(B)(i)'s term "physical force." "[I]n the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force, that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*2010 Johnson*"). Not all force is "violent force," and "[m]inor uses of force may not constitute 'violence' in the generic sense." *United States v. Castleman*, 134 S. Ct. 1405, 1412 (2014). For example, "a squeeze on the arm that causes a bruise" is "hard to describe ... as violence," *ibid.* (quoting *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003)); so too "relatively minor" "physical assaults" such as "pushing, grabbing, shoving, slapping, and hitting," *id.* at 1411–12. Rather, the statutory term "violent felony," in conjunction with ACCA's emphasis on physical force, "suggests a category of violent, active crimes." *2010 Johnson*, 559 U.S. at 140 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004)). *See also ibid.* ("Even by itself, the word 'violent' in § 924(e)(2)(B) connotes a substantial degree of force. ... When the adjective 'violent'

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[1] The modified categorical approach, *see, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016), has no role to play here. Petitioner's 1993 New York State conviction for third-degree robbery arises under an indivisible statute, rendering the modified approach inapplicable. *See* N.Y. Penal Law § 160.05; *Descamps*, 133 S. Ct. at 2282. Below, the government conceded that the record does not reflect which subdivision of N.Y. Penal Law § 160.10 formed the basis of petitioner's 1994 conviction for attempted second-degree robbery. Gov't Br. 37 n.7, *Williams v. United States*, No. 15–2674 (2d Cir. March 28, 2017), ECF No. 92. This Court therefore presumes that the conviction arose under § 160.10(1), "the least of the acts criminalized." *See Mellouli*, 136 S. Ct. at 1986.

is attached to the noun 'felony,' its connotation of strong physical force is even clearer."). "Violent felonies" are those "characterized by extreme physical force, such as murder," "forcible rape," and "assault and battery with a dangerous weapon." *Ibid.* at 140–41 (quoting *Black's Law Dictionary* 1188 (9th ed. 2009)). To qualify under ACCA's elements clause, therefore, a crime must be "violent" and "active," must involve "violent force" "capable of causing pain or injury" and "strong enough to constitute 'power,'" and must entail "extreme physical force" akin to that involved in "murder" and "forcible rape." *2010 Johnson*, 559 U.S. at 140–42.

2. Following a jury trial in the Southern District of New York, petitioner (who proceeded *pro se*) was convicted of possessing a firearm following a felony conviction, in violation of § 922(g)(1). Pet. App. 2a. The district court (Berman, J.) sentenced petitioner to 192 months pursuant to ACCA. *Ibid.* The Second Circuit affirmed on direct appeal, concluding that petitioner had three prior "violent felony" convictions, all in New York State Supreme Court, Bronx County, namely:

- A 1993 conviction for third-degree robbery, N.Y. Penal Law § 160.05;
- A 1994 conviction for attempted second-degree robbery, *id.* §§ 110.00 and 160.10;
- A 1997 conviction for second-degree assault, *id.* § 120.05(2).

United States v. Williams, 526 F. App'x 29, 37 (2d Cir. 2013) ("*Williams I*"). The Court of Appeals concluded that the robberies counted under *United States v. Brown*, 52 F.3d 415, 426 (2d Cir. 1995) (holding that New York attempted third-degree robbery, §§ 110.00 and 160.05, is violent felony under ACCA's elements clause); and that the assault counted under *United States v. Walker*, 442 F.3d 787,

788 (2d Cir. 2006) (holding that New York attempted second-degree assault, §§ 110.00 and 120.05(2), is violent felony under elements and residual clauses). *Williams I*, 526 F. App'x at 37. *Williams I* did not address the continuing viability of *Brown* or *Walker* in light of *2010 Johnson*, 559 U.S. at 140. For good reason: petitioner (who was still *pro se*) had not raised a *2010 Johnson* claim with respect to any of the priors on which *Williams I* relied to affirm his ACCA sentence. Appendix 93–105, *Williams v. United States*, No. 15–2674 (2d Cir. Dec. 27, 2016) ("C.A. App."), ECF No. 75–1; Pet. App. 4a. This Court denied certiorari. 134 S. Ct. 1911 (2014).

Petitioner (still *pro se*) timely moved for 28 U.S.C. § 2255 relief, arguing that his robberies did not count as ACCA predicates in light of *2010 Johnson* and *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*2015 Johnson*") (invalidating residual clause of ACCA's "violent felony" definition, 18 U.S.C. § 924(e)(2)(B)(ii), as void for vagueness). C.A. App. 123, 197–202. The district court denied relief, ruling that petitioner's claim "was previously resolved upon direct appeal by the Second Circuit" and therefore "cannot be relitigated in a § 2255 petition." Pet. App. 13a. The court deemed *2015 Johnson* irrelevant because petitioner had been sentenced pursuant to ACCA's elements clause, not its residual clause. Pet. App. 14a.

Represented by counsel for the first time, petitioner appealed. On the merits, he argued that his prior robberies did not rank as ACCA predicates. In particular, he emphasized that neither of his robberies met the elements clause because, as numerous courts (including the Second Circuit) had concluded, the force sufficient to commit New York robbery falls well short of the "violent physical force" necessary

to satisfy ACCA under *2010 Johnson*. *See, e.g.*, Slip Op. 14–15, *United States v. Jones*, No. 15–1518 (2d Cir. July 21, 2016) ("*Jones I*"), ECF. No. 97, *vacated on other grounds*, 838 F.3d 296, *reissued as amended*, 878 F.3d 10 (2d Cir. 2017) ("*Jones II*").[2] As *Jones I* concluded, New York robbery can be satisfied with *de minimis* or nil force, for example, forming a "human wall" to block the victim of a pickpocketing from pursuing a thief; bumping or shoving a victim; or engaging in a "tug-of-war" with a victim over stolen property. Slip. Op. 14–15. On procedure, petitioner contended that the law of the case doctrine did not bar relief because his *2010 Johnson* challenge to his prior robberies had not been raised or decided on direct appeal.[3] Even if it had been, petitioner argued, the need to prevent clear error or manifest injustice—that is, to correct a sentence six years greater than the lawful statutory maximum, *see* § 924(a)(2)—warranted an exception to this discretionary doctrine. In particular, petitioner noted that at least seven other federal prisoners, most of whom never challenged their ACCA sentences at all, had won § 2255 relief

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[2] In *Jones I*, the Second Circuit held that New York first-degree robbery, N.Y. Penal Law § 160.15(2), is not a "crime of violence" under the elements clause of U.S.S.G. § 4B1.2(a)(1), which is materially identical to ACCA's elements clause. Slip Op. 14–15. Likewise, *Jones I* concluded that the residual clause of U.S.S.G. § 4B1.2(a)(2) was "likely" void for vagueness in light of *2015 Johnson*. Slip Op. 17. The Second Circuit vacated *Jones I* pending this Court's disposition of *Beckles v. United States*, No. 15–8544. *See* 830 F.3d 296. After *Beckles* held that the advisory Guidelines are not subject to vagueness challenges, 137 S. Ct. 886, 890 (2017), the Second Circuit issued an amended opinion holding that New York first-degree robbery is a "crime of violence" under the residual clause of § 4B1.2(a)(2), while reserving the elements-clause question. *Jones II*, 878 F.3d at 13.

[3] The government waived any procedural default defense by failing to assert it in the district court or in its brief on appeal. *See, e.g.*, *United States v. Canady*, 126 F.3d 352, 359–60 (2d Cir. 1997).

on the ground that New York robbery was not an elements-clause predicate. *See* C.A. OB.36–38 & n.3.

The panel (Sack, Hall, and Droney, JJ.) affirmed, concluding that the law of the case doctrine required adherence to *Williams I*. Pet. App. 3a. The panel explained that *Williams I* "considered and rejected the precise claim that [petitioner] raises in his habeas petition: that his ACCA-based sentence was unconstitutional because he did not have at least three prior violent felony convictions." Pet. App. 4a. Without finding that petitioner had *raised* a *2010 Johnson* claim with respect to his prior robberies on direct appeal, the panel nonetheless decided that *Williams I* had *rejected* such a claim: *Williams I* had "implicitly determined that New York third-degree robbery 'qualifies, categorically, as a violent felony under the Armed Career Criminal Act' notwithstanding *2010 Johnson*." Pet. App. 5a (quoting *Williams I*, 526 F. App'x at 37).

The panel acknowledged that "the law-of-the-case doctrine 'remains a matter of discretion, not jurisdiction.'" Pet. App. 4a (quoting *United States v. Becker*, 502 F.3d 122, 127 (2d Cir. 2007)). Thus, the panel agreed that it was "appropriate to revisit an earlier decision if presented with 'cogent or compelling reasons' to do so," including "'the need to correct a clear error.'" *Ibid.* (quoting *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000)). However, the panel found no "clear error" in *Williams I*'s implicit conclusion that New York robbery satisfies the elements clause, explaining: "[W]e must treat *Williams I* as having been correctly decided." Pet. App. 6a.

The Second Circuit denied rehearing and rehearing *en banc*. Pet. App. 15a.

REASONS FOR GRANTING THE WRIT

Since the decision below, a sharp Circuit split has arisen on the question whether New York's baseline definition of robbery (*i.e.*, forcible stealing) satisfies the elements clause. *Compare United States v. Steed*, 879 F.3d 440, 450–51 (1st Cir. 2018) (holding that New York attempted second-degree robbery, N.Y. Penal Law §§ 110.00 and 160.10(2)(a), is not § 4B1.2(a)(1) crime of violence) *with Perez v. United States*, 885 F.3d 984, 986 (6th Cir. 2018) (holding that New York second-degree robbery, N.Y. Penal Law § 160.10(1), is § 924(e)(2)(B)(i) violent felony). The Sixth Circuit has acknowledged the split. *Perez*, 885 F.3d at 990.

This square conflict, on an important, recurring question of federal statutory interpretation, warrants this Court's review. New York robbery is a common ACCA predicate, and uncertainty regarding the correct answer to the question presented has resulted in disparate treatment of identically-situated federal prisoners. On the merits, New York robbery is not a violent felony. New York robbery can be committed with low-level uses of force such as blocking, bumping, and tugging, well short of the "violent" physical force *2010 Johnson* held necessary under the elements clause. The Second Circuit's law-of-the-case ruling below poses no obstacle to review. That ruling contained an implicit determination of the question presented, and the Court of Appeals would be compelled to revisit its procedural holding if this Court were to conclude that New York robbery is not an elements-clause predicate. At a minimum, and in the alternative, this petition should be held

for *Stokeling v. United States*, No. 17–5554, which presents the similar question whether Florida robbery satisfies the elements clause.

I. The First And Sixth Circuits Have Split On The Question Whether New York Robbery Satisfies The Elements Clause.

A. As noted, the First and Sixth Circuits have split on the question whether New York robbery satisfies the elements clause. In *Steed*, the First Circuit held that a prior New York State conviction for attempted second-degree robbery, §§ 110.00 and 160.10(2)(a), is not a crime of violence under the elements clause of the career-offender Guideline, § 4B1.2(a)(1).[4] 879 F.3d at 450–51. Specifically, *Steed* reasoned that New York's definition of forcible stealing, *see* N.Y. Penal Law § 160.00, although it excludes stealthy seizures, encompasses a purse snatching just sufficient to produce awareness in the victim. *See* 879 F.3d at 449. That level of force, *Steed* explained, had been held insufficient to meet the elements clause in *United States v. Mulkern*, 854 F.3d 87 (1st Cir. 2017). Consequently, *Steed* concluded: "[A]s we read the relevant New York precedents, there is a realistic probability that Steed's conviction was for attempting to commit an offense for which the least of the acts that may have constituted that offense included 'purse

[4] *Steed* relied on First Circuit precedent interpreting the Guideline's elements clause and ACCA's interchangeably, in light of their identical language. *See* 879 F.3d at 446 (citing *United States v. Hart*, 674 F.3d 33, 41 n.5 (1st Cir. 2012)). This approach is standard. *See, e.g.*, *James v. United States*, 550 U.S. 192, 206 (2007) (explaining that "the Sentencing Guidelines' ... definition of a predicate 'crime of violence' closely tracks ACCA's definition of 'violent felony'"); *see also, e.g.*, *United States v. Reyes*, 691 F.3d 453, 458 & n.1 (2d Cir. 2012); *United States v. Montes-Flores*, 736 F.3d 357, 363 (4th Cir. 2012); *United States v. Mata*, 869 F.3d 640, 644 (8th Cir. 2017) (all interpreting elements clauses interchangeably).

snatching, per se.'" 879 F.3d at 450 (quoting *People v. Santiago*, 62 A.D.2d 572, 579 (2d Dep't 1978), *aff'd*, 48 N.Y.2d 1023 (1980)). Because "such conduct falls outside the scope" of ACCA's elements clause, "we cannot say that, under the categorical approach, Steed's conviction was for an offense that the force clause of the career offender guideline's definition of a 'crime of violence' encompasses." *Steed*, 879 F.3d at 450–51.

In acknowledged conflict with *Steed*, the Sixth Circuit later held that a prior New York State conviction for second-degree robbery, § 160.10(1), is a violent felony under ACCA's elements clause. *Perez*, 885 F.3d at 986. *Perez* expressly disagreed with both *Steed* and the Second Circuit's vacated panel decision in *Jones I, see ante* n.2, explaining that neither decision "seems to account for" the possibility that conduct not involving the *use* of violent force might involve the *threatened use* of such force. *See* 885 F.3d at 989–90. For example, both *Steed* and *Jones I* had discussed *People v. Bennett*, 219 A.D.2d 570, 570 (1st Dep't 1995), which found force sufficient to commit New York robbery where the defendant and his accomplices formed a "human wall that blocked the victim's path as the victim attempted to pursue someone who had picked his pocket, allowing the robber to get away." In the view of the *Perez* court, that situation involved threatened force: "a human wall may be unforceful by its nature. But it may well turn violent if the victim attempts to break through it." 885 F.3d at 990.

The conflict between *Steed* and *Perez* crystallizes, with respect to New York robbery, the broader division among the Circuits that has arisen in the wake of

2015 Johnson on which state robbery offenses satisfy the elements clause. Numerous Circuits have held that state robbery offenses, like New York's, that can be committed with minimal physical force do not qualify as elements-clause predicates. *E.g.*, *United States v. Geozos*, 870 F.3d 890, 901 (9th Cir. 2017) (Florida); *United States v. Strickland*, 860 F.3d 1224, 1227 (9th Cir. 2017) (Oregon); *United States v. Yates*, 866 F.3d 723, 729 (6th Cir. 2017) (Ohio); *United States v. Winston*, 850 F.3d 677, 682–86 (4th Cir. 2017) (Virginia); *United States v. Eason*, 829 F.3d 633, 641–42 (8th Cir. 2016) (Arkansas); *United States v. Gardner*, 823 F.3d 793, 803–04 (4th Cir. 2016) (North Carolina); and *United States v. Parnell*, 818 F.3d 974, 979 (9th Cir. 2016) (Massachusetts). Other Circuits have held other offenses to qualify. *E.g.*, *United States v. Pettis*, ___ F.3d ___, 2018 WL 1972751, at *3 (8th Cir. Apr. 27, 2018) (Minnesota); *United States v. Swopes*, 886 F.3d 668, 671 (8th Cir. 2018) (Missouri); *United States v. Harris*, 844 F.3d 1260, 1262 (10th Cir. 2017) (Colorado); *United States v. Armour*, 840 F.3d 904, 907 (7th Cir. 2016) (Indiana); *United States v. Fritts*, 841 F.3d 937, 943 (11th Cir. 2016) (Florida). To be sure, variation in state statutory and case law accounts for some of this division. But as the splits on New York (*Steed* versus *Perez*) and Florida (*Geozos* versus *Fritts*) robbery confirm, the division stems, most fundamentally, from the Circuits' divergent and incompatible applications of *2010 Johnson*. This petition offers an opportunity to resolve the *Steed*/*Perez* split and to further clarify *2010 Johnson*.

B. On the merits, neither of petitioner's prior New York State convictions (for third-degree and attempted second-degree robbery) is an ACCA predicate. N.Y.

Penal Law § 160.05 provides: "A person is guilty of robbery in the third degree when he forcibly steals property." Section 160.00, in turn, defines forcible stealing:

> A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:
>
> 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

And Section 110.00, in its turn, defines attempts: "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime."

Neither of these convictions is an elements-clause predicate because the "physical force" sufficient to meet § 160.00's definition of "forcible stealing" is categorically lesser than the "*violent* force ... capable of causing physical pain or injury" necessary to satisfy the elements clause under *2010 Johnson*, 559 U.S. at 140. The argument is straightforward. Under New York's baseline definition of robbery, § 160.00, the "physical force" necessary to accomplish a "forcible stealing" may be quite modest, and falls well short of "violent force." For example, as noted above, a defendant commits robbery if he and his accomplices form a "human wall that block[s] the victim's path as the victim attempt[s] to pursue someone who had picked his pocket." *Bennett*, 219 A.D.2d at 570. "The requirement that a robbery involve the use, or the threat of immediate use, of physical force does not mean that a weapon must be used or displayed or that the victim must be physically injured or

touched." *Id. See also People v. Patton*, 184 A.D.2d 483, 483 (1st Dep't 1992) ("By blocking the victim's passage, defendant aided in codefendant's retention of the property, and thereby participated in the robbery."). Likewise, robbery has occurred if the defendant "bumped his unidentified victim, took money, and fled while another forcibly blocked the victim's pursuit." *People v. Lee*, 197 A.D.2d 378, 378 (1st Dep't 1993). *See also, e.g.*, *People v. Woodridge*, 30 A.D.3d 898, 900 (3d Dep't 2006) ("defendant physically pushed [the victim] aside"); *People v. Green*, 277 A.D.2d 82, 83 (1st Dep't 2000) ("defendant pushed a security guard"). And one commits robbery by engaging in a brief tug-of-war over property: "Proof that the store clerk grabbed the hand in which defendant was holding the money and the two tugged at each other until defendant's hand slipped out of the glove holding the money was sufficient to prove that defendant used physical force." *People v. Safon*, 166 A.D.2d 892, 892 (4th Dep't 1990).

Thus, whether by forming a human wall, bumping or pushing, or engaging in a brief tug-of-war over property, robbery can be committed in New York with less than "*violent* force," as a host of district courts within the Second Circuit have held. "Merely standing in someone's way does not involve the use of physical force capable of causing substantial physical pain or injury. And neither pulling away when someone grabs your hand, ... nor a shove that only causes someone to step backward, amounts to 'substantial' or 'strong' physical force." *Austin v. United States*, 280 F. Supp. 3d 567, 574 (S.D.N.Y. 2017). *See also United States v. Moncrieffe*, 167 F. Supp. 3d 383, 404 (E.D.N.Y. 2016) ("The 'forcibly stealing'

element ... common to all New York robbery offenses, includes *de minimis* levels of force which do not fall within the federal definition of a 'crime of violence'" in the elements clause.). So, "[w]hile 'forcibly stealing' property will likely often entail the use of violent force, it is not a necessary element of the crime. ... New York courts have found conduct such as bumping a victim and taking his money, shoving a victim aside to prevent pursuit of a co-defendant, and engaging in a tug-of-war with a victim ... is sufficient to satisfy the 'force' element .... None of these minimal exertions of force rise to the level of 'violent force.'" Sent'g Tr. 7, *United States v. Avitto*, No. 15 Cr. 265 (ARR) (E.D.N.Y. March 14, 2016). *See Buie v. United States*, 2017 WL 3995597, at *7 (S.D.N.Y. Sept. 8, 2017) (citing *Bennett*, *Lee*, and *Safon*; concluding that "under New York law, the 'force' in 'forcibly steals' need not be—and, as an empirical matter, is not always—'capable of causing physical pain or injury to another person'").

The Second Circuit's analysis in *Jones I* is persuasive:

> "[F]orcible stealing" alone does not necessarily involve the use of "violent force." Appellate Division decisions have held that the requisite force can be established by "evidence that [the defendant] and three others formed a human wall that blocked the victim's path as the victim attempted to pursue someone who had picked his pocket, allowing the robber to get away," *People v. Bennett*, 219 A.D.2d 570, 570, 631 N.Y.S.2d 834, 834 (N.Y. App. Div. 1st Dep't 1995); evidence that the "defendant bumped his unidentified victim, took money, and fled while another forcibly blocked the victim's pursuit," *People v. Lee*, 197 A.D.2d 378, 378, 602 N.Y.S.2d 138, 139 (N.Y. App. Div. 1st Dep't 1993); or evidence that "the store clerk grabbed the hand in which defendant was holding the money and the two tugged at each other until defendant's hand slipped out of the glove holding the money," *People v. Safon*, 166 A.D.2d 892, 893, 560 N.Y.S.2d 552, 552 (N.Y. App. Div. 4th Dep't 1990).

Slip Op. 14–15. Thus, "[b]ecause Appellate Division decisions have interpreted 'forcible stealing' so that it does not always involve 'force capable of causing physical pain or injury to another,'" *Jones I* held, "a New York robbery conviction involving forcible stealing, absent other aggravating factors, is no longer necessarily" an elements-clause predicate. Slip Op. 15–16 (quoting *2010 Johnson*, 559 U.S. at 138).

C. The Second Circuit's reliance on the law of the case doctrine below poses no obstacle to review. As noted above, the Court of Appeals recognized a "clear error" exception to law of the case, but determined that petitioner had not met the exception. Pet. App. 4a, 6a. That determination contained an implicit resolution of petitioner's substantive ACCA claim. In a similar context, this Court has held that a state procedural rule is not "independent" of federal law, and thus not adequate to bar federal review under the adequate-and-independent-state-ground doctrine, where the state procedural rule "depend[s] on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). In *Ake*, this Court concluded that Oklahoma's waiver rule—which, like the law of the case doctrine as applied below, contained an exception for fundamental trial errors such as federal constitutional violations—was not independent. *Id.* at 75–76. Specifically, *Ake* explained: "[T]he State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed. Before applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on

the merits of the constitutional question." *Id.* at 76. *See also, e.g.*, *Foster v. Chatman*, 136 S. Ct. 1737, 1746–47 & n.4 (2016) ("[W]hether a state law determination is characterized as 'entirely dependent on,' 'resting primarily on,' or 'influenced by' a question of federal law, the result is the same: the state law determination is not independent of federal law and thus poses no bar to our jurisdiction." (citations omitted)).

The same rationale governs here. To apply the "clear error" exception to the law of the case, the Court of Appeals first had to make the antecedent determination whether there was error, that is, whether New York robbery categorically requires violent physical force. Thus, the question presented was raised and decided below. Moreover, if this Court were to hold that New York robbery is not an elements-clause predicate, the Second Circuit would be compelled to revisit its procedural ruling and determine, in its discretion, whether to continue to apply the law-of-the-case bar to preclude petitioner's claim for § 2255 relief. Consequently, this petition is a suitable vehicle.

II. In The Alternative, This Petition Should Be Held For *Stokeling v. United States*, No. 17–5554.

In the alternative, this petition should be held for *Stokeling*. *Stokeling* presents the question whether Florida robbery—which, like New York robbery, can be committed with minimal physical force, as long as the force suffices to overcome resistance, *compare Robinson v. State*, 692 So. 2d. 883, 886 (Fla. 1997) *with* § 160.00(1)—is an elements-clause predicate. Indeed, in its brief below, respondent argued that New York's robbery statute is "similar" to the Florida statute at issue

in *Stokeling*. Brief for United States 35, *Williams v. United States*, No. 15–2674 (2d Cir. March 28, 2017) (citing *Fritts*, 841 F.3d 937), ECF No. 92.

Again, law of the case does not counsel against a hold. In addition to the "clear error" exception discussed above, the Court of Appeals also explained that "'an intervening change of controlling law'" warrants reconsideration of an earlier decision. Pet. App. 4a (quoting *Tenzer*, 213 F.3d at 39). *See also, e.g.*, *Davis v. United States*, 417 U.S. 333, 342 (1974) (holding, in § 2255 proceeding, that law of the case does not preclude reconsideration of an issue decided on direct appeal "'if new law has been made ... since the trial and appeal'" (quoting *Kaufman v. United States*, 394 U.S. 217, 230 (1969)). If this Court were to hold that Florida robbery is not an elements-clause predicate, that holding would constitute an intervening change in law sufficient to prompt the Second Circuit to reconsider its procedural holding. No more would be required to support a GVR following a decision in the petitioner's favor in *Stokeling*. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) ("Where intervening developments ... reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.").

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held for *Stokeling*.

Respectfully submitted,

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