No. _____

In The
Supreme Court of the United States

KENNETH L. HARRIS,
a.k.a. Kenneth Leander Harris,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeal for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a pre-1997 Florida robbery with a firearm conviction qualify as a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B) ("ACCA")?

2. Does a Hobbs Act robbery conviction count as a "crime of violence" as defined under 18 U.S.C. § 924(c)(3)(A)?

3. Is the "residual clause" set forth in 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague?

PARTIES TO THE PROCEEDING

Petitioner Kenneth L. Harris was the appellant in the United States Court of Appeals for the Eleventh Circuit. Respondent, the United States, was the appellee in the Eleventh Circuit.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Kenneth L. Harris, respectfully petitions the Court for a writ of certiorari to review the Opinion of the Eleventh Circuit Court of Appeal.

DECISIONS BELOW

The United States District Court for the Middle District of Florida issued an unpublished and unreported order rejecting Petitioner's argument that his pre-1997 Florida robbery convictions did not count as violent felonies for purposes of ACCA, that his Hobbs Act robbery convictions were not "crimes of violence" within the meaning of 18 U.S.C. § 924(c)(3)(A), and that the residual clause of 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. The order is reproduced in the appendix at App. 6.

The Eleventh Circuit's opinion affirming Petitioner's judgment and sentence is unpublished but reported at 704 Fed. Appx. 919. The opinion is reproduced in the appendix at App. 1.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The Eleventh Circuit issued its Opinion on November 28, 2017. App. 1. Mr. Harris petitioned the Eleventh Circuit for rehearing en banc. The Eleventh Circuit summarily denied that petition without a written opinion on March 28, 2018. App. 5. This timely petition for writ of certiorari follows. This Court has jurisdiction. 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Under the Armed Career Criminal Act, a "violent felony" is a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(c)(2)(B)(i).

A "crime of violence" under the Armed Career Criminal Act means "an offense that is a felony" and—

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3).

Under the Hobbs Act, 18 U.S.C. § 1951(b), the term "robbery" means:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b).

At the time of Petitioner's state robbery convictions in 1991, section 812.13(1), Florida Statutes, defined "robbery" as 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." Fla. Stat. § 812.13(1) (1987). To convict a person under section 812.13(2)(a) at that time, the state was required to prove that, "in the course of committing the robbery," the defendant "carried a firearm or other deadly weapon." Fla. Stat. § 812.13(2)(a) (1987).

STATEMENT OF THE CASE

A jury convicted Kenneth Harris of three counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) and (b), three counts of using and carrying a firearm during those Hobbs Act robberies, in violation of 18 U.S.C. § 924(c)(1)(A), and one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§

922(g)(1), 924(a)(2), and 924(c)(1). App. 2. The district court sentenced him to 188 months each on the Hobbs Act robbery convictions, to run concurrently; 84, 300, and 300 months on the § 924(c)(1)(A) convictions, to run consecutively; and 180 months on the firearm possession conviction under the Armed Career Criminal Act, to run concurrently with the Hobbs Act robbery sentences. App. 2.

Mr. Harris appealed his 872-month sentence. App. 2. He first argued that his § 924(c)(1)(A) convictions must be vacated because his companion Hobbs Act robbery convictions did not categorically qualify as "crime[s] of violence" under § 924(c)(1)(A). App. 2. Specifically, he maintained that, because the full range of conduct covered by the Hobbs Act robbery statute does not require "violent force," it cannot qualify as a "crime of violence" under the "force clause," § 924(c)(3)(A). Br. of the Appellant at 9-12. He also argued that § 924(c)(3)(B)'s residual clause is unconstitutionally vague. *Id.* at 17. Mr. Harris additionally claimed that the district court erred in sentencing him as an armed career criminal based on three 1991 Florida felony convictions for robbery with a firearm. App. 3.

The Eleventh Circuit held that Petitioner's arguments were foreclosed by binding precedent. App. 2-4 (citing *In re Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016) and *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016)). Mr. Harris petitioned the Eleventh Circuit for rehearing en banc. App. 5.

He argued that *Fritts* was wrongly decided because, prior to 1997, a defendant could violate the Florida robbery statute even when the force used to take property is minimal, such as a sudden snatching. Pet. Reh'g at 9. Thus, under *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), the degree of force was not the sort of "strong physical force" that would suffice under the categorical approach for the offense to qualify as a "crime of violence" under ACCA. *Id.* Mr. Harris also observed that the Ninth Circuit Court of Appeals rejected the logic of *Fritts* in *United States v. Geozos*, 870 F.3d 890, 901 (9th Cir. 2017), and held that all Florida robbery convictions are not ACCA predicates, even if the convictions occurred after 1997. *Id.* at 5-6.

The Eleventh Circuit denied the petition for rehearing on March 28, 2018. App. 5. Mr. Harris now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. This Court should Grant this Petition, Vacate the Final Judgment and Sentence, and Remand this Case for Further Consideration in light of the Outcome in *Stokeling v. United States.*

This Court has already granted certiorari review on a question that mirrors the first question presented. *See Stokeling v. United States*, No. 17-5554. In *Stokeling*, as here, the petitioner challenged the Government's reliance on a pre-1997 Florida robbery conviction as a "violent felony" predicate for purposes of imposing an ACCA enhancement. Br. of Petitioner at 7. The only difference between this case and *Stokeling* is that Mr. Harris "carried" a firearm "in the course of committing the robbery." Fla. Stat. § 812.13(2)(a) (1987).

That distinction is of no moment. Under Florida law, a defendant can be convicted of "carrying" a firearm during a robbery even if the weapon is never used. Indeed, the victim need not even be aware of the weapon. *See State v. Baker*, 452 So. 2d 927, 929 (Fla. 1984) (the "statutory element which enhances punishment for armed robbery is not the use of the deadly weapon, but the mere fact that a deadly weapon was carried by the perpetrator. *The victim may never even be aware that a robber is armed*, so long as the perpetrator has the weapon in his possession during the offense.") (emphasis added); *State v. Burris*, 875 So. 2d 408, 413 (Fla. 2004) ("In *Baker*, we recognized the distinction between carrying a deadly weapon and using a deadly weapon"). As the Ninth Circuit held in *Geozos*, the "mere presence of a firearm or other deadly weapon that is never revealed to a robbery victim does not constitute the 'use, attempted use, or threatened use of physical force' against the victim." *Geozos*, 870 F.3d at 900 (citing *United States v. Parnell*, 818 F.3d 974, 980-81 (9th Cir. 2016)).

The Florida Supreme Court has also held that, to commit robbery in Florida, "[t]he degree of force used is immaterial." *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922). "Any degree of force suffices." *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976). Although the Florida Supreme Court opined in 1997 that the force used must overcome some resistance by the victim, *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997), Petitioner's convictions predate that ruling, and so he could have been convicted even if the force used was infinitesimal. Even after *Robinson*, Florida appellate courts have recognized that the victim's resistance itself may be slight,

which would require only a slight degree of force to overcome it. *E.g. Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. Dist. Ct. App. 2011) ("[A] conviction for robbery may be based on a defendant's act of engaging in a tug-of-war over the victim's purse") (citing *McCloud*, 335 So. 2d at 258-59). Hence, since "neither robbery, armed robbery, nor use of a firearm in the commission of a felony under Florida law is categorically a 'violent felony,'" *Geozos*, 870 F.3d at 901, the Eleventh Circuit erred when it sustained Petitioner's ACCA enhancement based on his pre-1997 armed robbery convictions.

The Court's decision in *Stokeling* will be dispositive of the first issue presented. Accordingly, this Court should hold this case in abeyance, and, if it resolves *Stokeling* in favor of the petitioner, it should grant this petition, vacate the judgment, and remand this case to the Eleventh Circuit for further consideration. *See, e.g., Adams v. Alabama*, 136 S. Ct. 1796, 1797 (2016) (granting petition for writ of certiorari, vacating the conviction, and remanding the case to the Alabama Court of Criminal Appeals in light of *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016)).

2. This Court should Clarify whether a Hobbs Act Robbery Constitutes a "Crime of Violence" under 18 U.S.C. § 924(c)(3)(A).

A "crime of violence" under § 924(c)(3)(A) is any felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," (the "force clause"). To decide whether a person's conviction falls within this definition, courts generally apply the categorical approach. *See Taylor v. United States*, 495 U.S. 575, 598 (1990); *Mathis v. United States*, 136 S. Ct. 2243, 2248-49 (2016); *see also, e.g., United States v. Munro*, 394 F.3d 865, 870 (10th Cir. 2015) (employing categorical approach to determine whether an offense is a "crime of violence" under §924(c)). Under that approach, all that counts are the "the elements of the statute of conviction." *Taylor*, 495 U.S. at 601. The particular facts of the prior conviction are immaterial. *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013) ("The key . . . is elements, not facts.")

The Hobbs Act, 18 U.S.C. § 1951(b), defines "robbery" to mean:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to

> his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

Under the categorical approach, "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions," *Taylor*, 495 U.S. at 600, Hobbs Act robbery should not be considered a crime of violence because it does not have as an element the use, attempted use, or threatened use of *physical force* against the person of another.

In *Curtis Johnson*, 599 U.S. at 139, this Court concluded that the words "physical force" in the context of the definition of "violent felony" contemplates "violent force—that is, force capable of causing physical pain or injury to another person." Because § 924(c)(3)(A) speaks to "physical force" in the context of defining "crimes of *violence*," and because it employs parallel language to the language construed in *Curtis Johnson*, the force clause requires an element of force "capable of causing physical pain or injury to another person." *Id.*

A person can commit Hobbs Act robbery without using such force. Hobbs Act robbery is in essence a common-law robbery that affects interstate commerce. *See United States v. Peterson*, 236 F.3d 848, 851 (7th Cir. 2001), *abrogated on other grounds by Taylor v. United States*, 136 S. Ct. 2074 (2016); *United States v. Harrington*, 108 F.3d 1460, 1471 (D.C. Cir. 1997); *United States v. Nedley*, 255 F.2d 350, 357 (3d Cir. 1958). At common law, the "degree of force is not material" when determining whether a defendant committed robbery. 4 Wharton's Criminal Law § 460 (15th ed. & September 2017 update). As illustrated by the Florida law cited in the preceding section, all that is needed is enough force to "overcome [any] resistance" to the taking. *Id.* That force can be slight. *E.g., Benitez-Saldana*, 67 So. 3d at 323.

Federal appellate decisions on Hobbs Act robbery convictions confirm that the crime can be committed without resorting to violent force. It can be committed by pushing someone out of the way, *United States v. Smith*, 141 Fed. Appx. 83, 84-85 (4th Cir. 2005), threatening to arrest someone while armed and wearing a police uniform, *United States v. Pledge*, 51 Fed. Appx. 911, 914-15 (4th Cir. 2002), handcuffing someone, placing him in the back of a squad car, and blocking him from getting out, *United States v. Snell*, 432 Fed. Appx. 80, 85 (3d Cir. 2011), or snatching keys attached to a victim's clothing, *United States v. Rodriguez*, 925 F.2d 1049, 1052

(2nd Cir. 1991). None of these cases involved the use of "violent force . . . capable of causing physical pain or injury." *Curtis Johnson*, 599 U.S. at 139. It follows that a conviction for Hobbs Act robbery should not be considered a "crime of *violence*" within the meaning of § 924(c)(3)(A).

Nevertheless, the Eleventh Circuit concluded that a Hobbs Act robbery conviction categorically constitutes a crime of violence and rejected Petitioner's argument to the contrary. App. 2-3. This Court should grant certiorari review and resolve this question of paramount importance.

In the alternative, to the extent that *Stokeling*, which asks whether a state robbery offense is a "violent felony" under ACCA if the offense has been specifically interpreted to require only slight force to overcome resistance, is decided in a manner that resolves the second question presented in this Petition, the Court should grant this petition, vacate the conviction, remand the matter to the Eleventh Circuit for further consideration.

3. The Court should Decide whether § 924(c)(3)(B) is Unconstitutionally Vague.

If the Court agrees with Mr. Harris that a Hobbs Act robbery is not a "crime of violence" within the meaning of § 924(c)(3)(A), then it should resolve the third question presented, that is, whether the residual clause, § 924(c)(3)(B), is unconstitutional. Earlier this term, this Court found 18 U.S.C. § 16(b) unconstitutionally vague. *Sessions v. Dimaya*, 138 S.Ct. 1204, 1223 (2018).

In *Dimaya*, the Court considered whether the Immigration and Naturalization Act's ("INA") residual clause violated due process. *See generally id.* The INA "renders deportable any alien convicted of an 'aggravated felony' after entering the United States." *Id.* at 1210. Numerous types of offenses can qualify as an aggravated felony under the INA, which often cross-references federal criminal statutes for definitions. *Id.* at 1211. One such cross-reference is to 18 U.SC. § 16 and "crime[s] of violence." *Id.* Section 16 defines a crime of violence as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Court in *Dimaya* reiterated *Johnson*'s two concerns regarding ACCA's residual clause, noting that they applied equally to § 16(b), which "produces . . . 'more unpredictability and arbitrariness than the Due Process Clause tolerates.'" *Id.* at 1216.

The statutory language of § 924(c)3)(B) mirrors the language this Court found unconstitutional in *Dimaya*, with the lone exception of an additional comma in § 16(b). Therefore, the Supreme Court's holding in *Dimaya* that § 16's residual clause is void for vagueness should also render § 924(c)'s residual clause void for vagueness.

The Eleventh Circuit did not reach the question in deciding Petitioner's appeal, as it found that the Hobbs Act robbery conviction satisfied the force clause. App. 2-3. Nevertheless, Mr. Harris raised the question in his briefing, and the Eleventh Circuit recently reaffirmed prior precedent affirming the constitutionality of § 924(c)'s residual clause. *United States v. St. Hubert*, 883 F.3d 1319, 1327-28 (11th Cir. 2018). If Mr. Harris prevails on the second question presented, the Court should reach the third question, instead of remanding the case to the Eleventh Circuit, which will be bound by its prior precedent. *United States v. Wiles*, 723 Fed. Appx. 968, 969 (11th Cir. 2018) (rejecting argument that residual clause of § 924(c) was unconstitutionally vague as barred by prior precedent). Based on the foregoing, this Court should grant this petition and consider the case on the merits, or alternatively, grant this petition, vacate the final judgment and remand for consideration in light of the outcome in *Stokeling*.

CONCLUSION

Petitioner Kenneth L. Harris respectfully requests that this Court grant this petition for a writ of certiorari and review the proceedings below, or alternatively, grant this petition, vacate his final judgment of conviction, and remand for further proceedings in light of the outcome in *Stokeling*.

Respectfully submitted on this 26th day of June, 2018.

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