No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEREMIAH SAILOR,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.) Whether a court may grant a 28 U.S.C. § 2255 petition collaterally challenging a sentence under *Johnson* when the sentencing judge never specified – and therefore the record is silent on – whether the petitioner's original sentence was enhanced pursuant to the ACCA's now-invalidated residual clause.

2.) Whether a conviction for robbery qualifies as a "violent felony" under the ACCA's elements clause where, as in Florida and several other states, the offense may be committed by using a *de minimis* amount of force.

PARTIES INVOLVED

The parties identified in the caption of this case are the only parties before the Court.

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PETITION FOR WRIT OF CERTIORARI

In this post-conviction proceeding under 28 U.S.C. § 2255, Petitioner Jeremiah Sailor respectfully prays that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Eleventh Circuit, denying a certificate of appealability ("COA") on the claims set forth here, and subsequently entering judgment against Mr. Sailor.

OPINIONS BELOW

The Order of the Eleventh Circuit Court of Appeals denying Mr. Sailor's request for a COA was entered in *Sailor v. United States of America,* No. 18-10656 (11th Cir. Apr. 16, 2018). (App. A-1).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). The Eleventh Circuit entered judgment against Mr. Sailor on April 16, 2018. This Petition is timely filed.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1), provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions … for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]

The same statute defines a "violent felony" as:

> [A]ny 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 otherwise involves conduct that presents a serious potential risk of physical injury to another …

18 U.S.C. § 924(e)(2)(B).

28 U.S.C. § 2255 provides:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> …
>
> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by

> the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.
>
> …
>
> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

At the time of Mr. Sailor's conviction, the Florida robbery statute provided, in pertinent part:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear.
>
> If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment …

Fla. Stat. § 812.13.

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

In *Johnson v. United States,* 135 S. Ct. 2551 (2015), this Court held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), was unconstitutionally vague, and could not serve as the basis for an enhanced sentence. 135 S. Ct. at 2257. The Court based its holding on two features of the residual clause. First, when applying the residual clause, judges must adopt the "categorical" approach and look at the elements of a crime of conviction, not the particular facts of the crime as committed by the defendant. *Id.* As a result, the Court found the residual clause left "grave uncertainty" as to how a judge should "estimate the risk" of physical injury posed by any particular crime, because it in essence required courts to hypothesize what type of conduct an "ordinary" instance of a particular crime would entail. *Id.* The Court found no discernable guidepost existed for how judges were to make that determination. *Id.* at 2557-58. Second, and compounding this problem, the Court found the residual clause left unacceptable "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. The Court observed that the residual clause had left both this Court and the lower courts fragmented with "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." *Id.* at 2560. As such, the Court concluded "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Id.*

In *Welch v. United States,* 136 S. Ct. 1257 (2016), a little less than a year after *Johnson,* this Court addressed the retroactive applicability of *Johnson's* invalidation of the ACCA's residual clause. Applying the general framework from *Teague v. Lane,* 489 U.S. 288, 311-13 (1989), the Court recognized that while new rules of criminal procedure do not become applicable to cases that are already final at the time the rule is announced, new *substantive* rules generally do apply retroactively. *Welch,* 136 S. Ct. at 1264. A rule is substantive when it "alters the range of conduct or the class of persons that the law punishes." *Schriro v. Summerlin,* 542 U.S. 348, 353 (2004). Applying this test, the Court concluded *Johnson* had announced a substantive rule. *Welch,* 136 S. Ct. at 1265. Prior to *Johnson,* a felon in possession of a firearm with three qualifying prior convictions, one of which was covered by only the residual clause, faced a mandatory minimum sentence of fifteen years. *Id.* After *Johnson* "the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison." *Id.* As such, "*Johnson* changed the substantive reach" of the ACCA. *Id.* The Court thus found "*Johnson* is retroactive in cases on collateral review." *Id.* at 1268.

B. PROCEDURAL BACKGROUND

In July of 2008, the district court sentenced Mr. Sailor for, among other things, possession of a firearm and ammunition by a convicted felon (18 U.S.C. §§ 922(g)(1) and 924(e)). In doing so, the court determined Mr. Sailor qualified for sentencing pursuant to the ACCA based on three prior Florida convictions: aggravated battery with a deadly weapon, robbery, and sale of cocaine. The enhancement increased Mr.

Sailor's potential sentence from one with a ten-year maximum, to one with a 15-year mandatory minimum. Ultimately the court sentenced him to 360 months' (30 years) imprisonment. Mr. Sailor's judgment and sentence was affirmed on appeal.

After receiving permission from the Eleventh Circuit, Mr. Sailor filed a successive § 2255 motion based on the decision in *Johnson*. Relying on *Beeman v. United States,* 871 F.3d 1215 (11th Cir. 2017), the district court concluded Mr. Sailor had failed to demonstrate his ACCA enhancement was predicated on the residual clause of the ACCA. According to the court this was clear partly because Mr. Sailor's Florida robbery offense unquestionably qualified as a violent felony pursuant to the force clause. Without being able to affirmatively tie his sentence to the residual clause, Mr. Sailor could not meet his burden under § 2255. The court entered an order denying the motion and a certificate of appealabiblity on January 2, 2018. Mr. Sailor filed a notice of appeal on February 2, 2018. The Eleventh Circuit summarily denied a COA, stating merely that Mr. Sailor had failed to make a substantial showing of the denial of a constitutional right. (App. A-1).

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DIVIDED ON WHAT A MOVANT'S BURDEN IS WHEN PURSUING A § 2255 MOTION BASED ON *JOHNSON,* WHERE THE RECORD IS SILENT AS TO WHICH CLAUSE OF THE ACCA THE SENTENCING COURT USED.

There is an acknowledged, and entrenched, conflict among the circuits that is outcome-determinative on defendants' § 2255 petitions for relief under *Johnson.* As courts have recognized, post-*Johnson* and *Welch,* this question has arisen frequently because "[n]othing in the law requires a [court] to specify which clause of [the ACCA] - residual or elements clause - it relied upon in imposing a sentence." *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016), *abrogation recognized by Curry v. United States,* 714 F. App'x 968 (11th Cir. 2018). Thus, "at many pre-*Johnson* [ ] sentencings, the court did not specify under which clause it found the ACCA predicate offenses to qualify." *United States v. Geozos,* 870 F.3d 890, 894 n.4 (9th Cir. 2017). This discrepancy is especially prevalent in cases where one of a defendant's prior convictions is for robbery, an offense that is criminalized based on varying degrees of force, and therefore not clearly within the purview of the ACCA's force clause. Therefore, similarly situated § 2255 movants are being treated differently – some subject to an erroneous 15-year mandatory minimum, others a lawful 10-year maximum, depending on where their motion is filed.

i. THE TENTH AND ELEVENTH CIRCUITS HAVE HELD THAT WHEN A RECORD IS SILENT AS TO WHETHER A DEFENDANT WAS SENTENCED PURSUANT TO THE RESIDUAL CLAUSE, A § 2255 PETITION ASSERTING A *JOHNSON* CLAIM IS TIMELY BUT FAILS ON THE MERITS.

In *Beeman,* a divided panel of the Eleventh Circuit held that "[t]o prove a *Johnson* claim, the movant must show that – more likely than not – it was the use of

the residual clause that led to the sentencing court's enhancement of his sentence." *Beeman,* 871 F.3d at 1221-23. The majority also held "[i]f it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to the use of the residual clause." *Id.* at 1222. In the case of "a silent record," *i.e.* where there is no way of knowing the basis for the district court's ruling, a defendant's claim fails. *Id.* at 1224.

Beeman abrogated a prior Eleventh Circuit panel decision in *Chance*, 831 F.3d 1335, and in doing so, completely disregarded that panel's concerns regarding fairness and consistency. The panel in *Chance* gave the example of two defendants sentenced on the basis of the residual clause on the same afternoon by the same judge. 831 F.3d at 1341. In one instance "the judge thought to mention that she was sentencing the defendant under § 924(c)'s residual clause." *Id.* In the other she did not. *Id.* Given the holding in *Beeman,* the two would be treated differently with one obtaining relief, while the other does not. In an effort to eradicate this random unfairness, the *Chance* panel declared "it makes no difference whether the sentencing judge used the words 'residual clause' or 'elements clause' … If *Johnson* means that an inmate's … companion conviction should not have served as such," then his sentence is no longer lawful. *Id.*

Only further demonstrating the need for this Court's review, the Tenth Circuit has taken a position that appears to follow the Ninth Circuit but that is in fact - as recognized by the Fifth Circuit, *see United States v. Taylor,* 873 F.3d 476, 480-81 (5th

Cir. 2017) - much more aligned with the Eleventh Circuit.[1] In *United States v. Snyder,* 871 F.3d 1122, 1130 (10th Cir. 2017), the Tenth Circuit denied a § 2255 petition that argued - on a silent record - that an ACCA enhancement was no longer valid post-*Johnson.* In so doing, the Tenth Circuit reversed the district court's holding that the petition was untimely. *Id.* at 1126. "Whether or not [Mr.] Snyder can ultimately prevail on his motion," the Tenth Circuit found the petitioner "*asserts* the right established in *Johnson,* to be free from a sentence purportedly authorized by the unconstitutionally vague residual clause." *Id.* (emphasis in original). Thus, the court found the "§ 2255 motion, filed within a year of the Court's decision in *Johnson,* is timely under § 2255(f)(3)." *Id.*

On the merits, however, the Tenth Circuit looked at the "background legal environment" that existed at the time of the defendant's sentencing, and determined that under this Court's decision in *Taylor v. United States,* 495 U.S. 575 (1990), "there would have been little dispute at the time of Snyder's sentencing that his two Wyoming burglary convictions involving occupied structures fell within the scope of the ACCA's enumerated crimes clause." 871 F.3d at 1129. That analysis - although it references the "background legal environment" discussed by the Ninth Circuit in *Geozos,* discussed *infra* - is critically different in that the Ninth Circuit requires, for example, "binding circuit precedent at the time of sentencing … that [the] crime … qualified as a violent felony under the force clause." *Geozos,* 870 F.3d at 896

[1] The Fifth Circuit in *Taylor* has acknowledged the confusion of the issue among the circuits, but has not yet defined a position. 873 F.3d at 482.

(emphasis added). The Tenth Circuit's approach in *Snyder* - looking at this Court's *general* precedents quite divorced from the particular state statute at issue - is essentially the same as the Eleventh Circuit's approach that places the merits burden on the defendant to show he was originally sentenced pursuant to the residual clause.

ii. THE FOURTH AND NINTH CIRCUITS HAVE HELD THAT WHEN THE RECORD IS SILENT AS TO WHETHER A DEFENDANT WAS SENTENCED PURSUANT TO THE RESIDUAL CLAUSE, A § 2255 PETITION ASSERTING A *JOHNSON* CLAIM IS TIMELY AND MERITORIOUS.

Had Mr. Sailor's § 2255 petition asserting a *Johnson* claim on a silent record arisen in the Fourth or Ninth Circuits, it would have been granted, or at least considered on the merits. In *Geozos,* the defendant was sentenced to a 15-year mandatory minimum sentence under the ACCA based on five prior convictions but, as the Ninth Circuit observed, the record was silent as to whether those prior convictions "qualif[ied] under the 'residual clause' of the statute, the 'force clause,' or both." 870 F.3d at 892. After this Court's decisions in *Johnson* and *Welch,* the defendant brought a motion pursuant to § 2255(h)(2), arguing his sentence was no longer lawful. Reversing the district court's determination to the contrary, the Ninth Circuit ruled that the § 2255 motion was procedurally proper because the defendant's "claim does rely on *Johnson* [ ]." *Id.* at 894. Recognizing that if at sentencing the district court had stated that the past convictions "were convictions for 'violent felonies' *only* under the residual clause … [w]e would know that [the d]efendant's sentence was imposed under an invalid - indeed, unconstitutional - legal theory." *Id.* at 895 (emphasis in original). By contrast, had the sentencing court "specified that a past conviction qualified as a 'violent felony' *only* under the force clause, we would

know that the sentence rested on a constitutionally valid legal theory." *Id.* But, given the silence in the record on this issue, the Ninth Circuit ruled "it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *Id.* In this situation, the Ninth Circuit recognized the applicable principle of *Stromberg v. California,* 283 U.S. 359 (1931), that "where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that *may have* rested on that ground." *Id.* at 896 (citing *Griffin v. United States,* 502 U.S. 46, 53 (1991)) (emphasis in original). It thus held, "when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in *Johnson* [ ]" and the petitioner is eligible for relief under *Johnson. Geozos,* 870 F.3d at 896.

In so holding, the Ninth Circuit acknowledged that in certain situations, "it may be possible to determine that a sentencing court did *not* rely on the residual clause - even when the sentencing record alone is unclear - by looking to the relevant background legal environment at the time of sentencing." *Id.* at 896. Thus, if "binding circuit precedent at the time of sentencing was that crime *Z* qualified as a violent felony under the force clause, then a court's failure to invoke the force clause expressly at sentencing, when there were three predicate convictions for crime *Z,* would not render unclear the ground on which the court's ACCA determination

rested." *Id.* But, absent this type of material, the Ninth Circuit held a silent record provided the basis for a meritorious *Johnson* claim. *Id.* at 897.

In *United States v. Winston,* 850 F.3d 677 (4th Cir. 2017), the Fourth Circuit held similarly. In *Winston,* the defendant received a sentence with an ACCA enhancement based in part on his prior conviction for Virginia common law robbery. *Id.* at 679. The record was silent as to whether the sentencing judge "relied on the residual clause to conclude that the Virginia common law robbery conviction qualified as a violent felony." *Id.* at 682. Post-*Johnson,* the defendant filed a motion under 28 U.S.C. § 2255(h)(2), asking the district court to vacate his ACCA-enhanced sentence. *Id.* at 680. Finding the defendant could bring a § 2255 motion based on *Johnson,* the Fourth Circuit observed that despite the silent record "[w]e will not penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." *Id.* at 682. Imposing such a burden upon movants "would result in 'selective application' of the new rule of constitutional law announced in *Johnson* [ ]." *Id.* The court thus held "when an inmate's sentence may have been predicated on application of the now-void residual clause and, therefore, may be an unlawful sentence under the holding in *Johnson* [ ], the inmate has shown that he 'relies on' a new rule of constitutional law within the meaning of 28 U.S.C. § 2244(b)(2)(A)." *Id.* As a result, a silent record is nevertheless sufficient basis for a meritorious *Johnson* claim in the Fourth Circuit.

iii. THE FIRST CIRCUIT HAS HELD THAT WHEN THE RECORD IS SILENT AS TO WHETHER A DEFENDANT WAS SENTENCED PURSUANT TO THE RESIDUAL CLAUSE, A § 2255 PETITION ASSERTING A *JOHNSON* CLAIM IS UNTIMELY.

In *Dimott v. United States,* 881 F.3d 232 (1st Cir. 2018), a co-defendant, Casey, appealed the denial of his § 2255 motion by the district court. The First Circuit affirmed the denial. *Id.* The Court began by recognizing that according to 28 U.S.C. § 2255(f)(3), a petitioner may file a motion to set aside or correct a sentence within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." *Id.* at 236. However, the court held that for a petition to bring a timely § 2255 motion seeking relief under *Johnson,* "a habeas petitioner bears the burden of establishing that it is more likely than not that he was sentenced solely pursuant to ACCA's residual clause." *Id.* at 243. Finding "the record is silent as to which ACCA clause – enumerated or residual – the district court earlier relied upon," *id.* at 238, the court held that Casey had not met this burden and thus could not even assert a timely *Johnson* claim. *Id.* In other words, Casey could not avail himself of the one-year period of limitation applicable to § 2255 motions.

In ruling that Casey bore the burden of showing by a preponderance of the evidence that he was sentenced pursuant to the residual clause, the First Circuit asserted that it was adopting a standard in conformance with that of the Eleventh Circuit, *see Beeman*, 871 F.3d at 1232; in conflict with that of the Fourth and Ninth

Circuits, *see Geozos,* 870 F.3d at 896, *Winston,* 850 F.3d 682; and in tension with that of the Fifth Circuit in *Taylor,* 873 F.3d at 482.

The question of who bears the burden in showing that a defendant was sentenced pursuant to the residual clause when the record is silent is a crucial one. The circuits have divided firmly over the last two years - notwithstanding acknowledging each other's opinions - and there is no reason to believe further percolation will result in any greater degree of agreement among them. To the contrary, a delay in this Court's review will only lead to further unfair and disparate outcomes, as no more habeas petitions based on the ACCA's residual clause can be filed and these petitions are being finally adjudicated.

II. THE NINTH AND ELEVENTH CIRCUITS ARE AT ODDS REGARDING WHETHER A FLORIDA CONVICTION FOR ARMED ROBBERY QUALIFIES AS A "VIOLENT FELONY" UNDER THE ACCA'S ELEMENTS CLAUSE.

One of the lower courts' hurdles to overcoming the *Beeman* threshold was their insistence that a Florida robbery offense qualifies as a violent felony under the force clause. This is an argument Mr. Sailor challenged, but one the lower courts refused to consider, based partly on erroneous precedent and partly on its circular logic. In denying his motion the lower court concluded Mr. Sailor could not prove his ACCA enhancement rested on the residual clause because the only prior conviction at issue, his Florida robbery conviction, must have qualified under the force clause. Notably,

the status of Florida robbery as a violent felony under the force clause is currently pending before this Court.[2]

Under Florida's robbery statute, a robbery occurs where a taking is accomplished using enough force to overcome a victim's resistance. *See Robinson v. State*, 692 So. 2d 883 (Fla. 1997). Thus, if a victim's resistance is minimal, the force needed to overcome that resistance is similarly minimal. Indeed, a review of Florida caselaw clarifies that a defendant may be convicted of robbery even if he uses only a *de minimis* amount of force. A conviction may be imposed if a defendant: (1) bumps someone from behind;[3] (2) engages in a tug-of-war over a purse;[4] (3) pushes someone;[5] (4) shakes someone;[6] (5) struggles to escape someone's grasp;[7] (6) peels back

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[2] *Stokeling v. United States*, No. 17-5554 (U.S. 2018); *Conde v. United States*, No. 17-5772 (U.S. 2018); *Williams v. United States*, 17-6026 (U.S. 2018); *Everette v. United States*, No. 17-6054 (U.S. 2018); *Jones v. United States*, 17-6140 (U.S. 2018); *James v. United States*, 17-6271 (U.S. 2018); *Middleton v. United States*, No. 17-6276 (U.S. 2018); *Reeves v. United States*, No. 17-6357 (U.S. 2018); *Rivera v. United States*, No. 17-6374 (U.S. 2018); *Shotwell v. United States*, No. 17-6540 (U.S. 2018); *Orr v. United States*, No. 17-6577 (U.S. 2018); *Mays v. United States*, No. 17-6664 (U.S. 2018); *Hardy v. United States*, No. 17-6829 (U.S. 2018); *Wright v. United States*, No. 17-6887 (U.S. 2018); *Baxter v. United States*, 17-6991 (U.S. 2018); *Pace v. United States*, No. 17-7140 (U.S. 2018); *Repress v. United States*, No. 17-7391 (U.S. 2018); *King v. United States*, No. 17-8676 (U.S. 2018); *Jackson v. United States*, No. 17-8678 (U.S. 2018).

[3] *Hayes v. State*, 780 So. 2d 918, 919 (Fla. 1st DCA 2001).

[4] *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011).

[5] *Rumph v. State*, 544 So. 2d 1150, 1151 (Fla. 5th DCA 1989).

[6] *Montsdoca v. State*, 93 So. 157, 159–160 (Fla. 1922).

[7] *Colby v. State*, 46 Fla. 112, 114 (Fla. 1903). In *Colby*, the defendant was caught during an attempted pickpocketing. *Id.* The victim grabbed the defendant's arm, and the defendant struggled to escape. *Id.* Under the robbery statute in effect at the time, the Florida Supreme Court held it was not a robbery because the force was used to

someone's fingers;[8] or (7) pulls a scab off someone's finger.[9] Indeed, under Florida law, a robbery conviction may be upheld based on "ever so little" force. *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986).[10]

The Ninth Circuit recognized this in *Geozos*, where it held that a Florida robbery conviction, regardless of whether it is armed or unarmed, fails to qualify as a "violent felony" under the elements clause. 870 F.3d at 898-901. In so holding, the Ninth Circuit relied on Florida caselaw which clarified that an individual may violate Florida's robbery statute without using violent force, such as engaging "in a non-violent tug-of-war" over a purse. *Id.* (citing *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011)). And, while both the Ninth and Eleventh Circuits have recognized the Florida robbery statute requires an individual use enough force to overcome a victim's resistance, the Ninth Circuit, in coming to a decision that it

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escape, rather than secure the money. *Id.* However, the Florida Supreme Court has made clear that this conduct would have qualified as a robbery under the current robbery statute at issue in this case. *See Robinson v. State*, 692 So. 2d 883, 887 n.10 (Fla. 1997) ("Although the crime in *Colby* was held to be larceny, it would be robbery under the current version of the robbery statute because the perpetrator used force to escape the victim's grasp."). Indeed, Florida courts have made clear that if a pickpocket "jostles the owner, or if the owner, catching the pickpocket in the act, struggles to keep possession," a robbery has been committed. *Rigell v. State*, 782 So. 2d 440, 441 (Fla. 4th DCA 2001) (quoting W. LaFave, A. Scott, Jr., *Criminal Law* § 8.11(d), at 781 (2d ed. 1986)); *Fine v. State*, 758 So. 2d 1246, 1248 (Fla. 5th DCA 2000).

[8] *Sanders v. State*, 769 So. 2d 506, 507 (Fla. 5th DCA 2000).

[9] *Johnson v. State*, 612 So. 2d 689, 690–91 (Fla. 1st DCA 1993)

[10] In *Santiago*, the defendant reached into a car and pulled two gold necklaces from around the victim's neck, causing a few scratch marks and some redness around her neck. *Santiago*, 497 So. 2d at 976.

recognized was at "odds" with the Eleventh Circuit's holding in *Fritts*,[11] stated that it believed the Eleventh Circuit "overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily *violent* force." *Id.* (emphasis in original).

Florida is not alone in its use of a resistance-based standard. In fact, most states permit robbery convictions where the degree of force used is sufficient to overcome a victim's resistance. At least fifteen states use some variation of this standard in the text of their statutes,[12] and several others have adopted it through caselaw.[13] Since this Court struck down the ACCA residual clause in *Johnson*, several circuits have had to reevaluate whether these robbery statutes and others still qualify as "violent felon[ies]" under the ACCA's elements clause.[14] These courts

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[11] In *United States v. Fritts,* 841 F.3d 937 (11th Cir. 2016), the Eleventh Circuit held that Florida robbery conviction "categorically qualifies as a 'violent felony' under the ACCA's elements clause." *Id.* at 944.

[12] *See* Ala. Code § 13A-8-43(a)(1); Alaska Stat. § 11.41.510(a)(1); Ariz .Rev. Stat. §§ 13-1901, 1902; Conn. Gen. Stat. § 53a-133(1); Del. Code Ann. tit. 11, § 831(a)(1); Haw. Rev. Stat. § 708-841(1)(a); Me. Rev. Stat. tit. 17-A, § 651(1)(B)(1); Minn. Stat. § 609.24; Mo. Rev. Stat. §§ 570.010(13), 570.025(1); Nev. Stat. § 200.380(1)(b); N.Y. Penal Law § 160.00(1); Okla. Stat. tit. 21, §§ 791, 792, 793; Or. Rev. Stat. § 164.395(1)(a); Wash. Rev. Code § 9A.56.190; Wis. Stat. § 943.32(1)(a).

[13] *See, e.g.*, *Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989); *State v. Stecker*, 108 N.W.2d 47, 50 (S.D. 1961); *State v. Robertson*, 740 A.2d 330, 334 (R.I. 1999); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. 1997); *West v. State*, 539 A.2d 231, 234 (Md. 1988); *State v. Blunt*, 193 N.W.2d 434, 435 (Neb. 1972); *State v. Sein*, 590 A.2d 665, 668 (N.J. 1991); *Winn v. Commonwealth,* 462 S.E.2d 911, 913 (Va. 1995).

[14] *See United States v. Doctor*, 843 F.3d 306 (4th Cir. 2016); *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016); *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015); *United States v. Duncan*, 833 F.3d 751 (7th Cir. 2016); *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016); *United States v. Eason*, 829 F.3d 633 (8th Cir. 2016); *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015); *United States v. Parnell*, 818 F.3d 974

have reached differing conclusions, and as a result, significant tension has arisen regarding the degree of force a state robbery statute must require to categorically satisfy the "physical force" prong of the elements clause. *See Samuel Johnson v. United States,* 559 U.S. 133, 140 (2010) (*Samuel Johnson*) (defining "physical force" as "*violent* force … force capable of causing physical pain or injury to another person.") (emphasis in original). The Fourth Circuit's decisions in *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016), and *Winston*, 850 F.3d at 683–86, are instructive in this regard.

In *Winston*, the Fourth Circuit held a Virginia conviction for common law robbery committed by "violence" does not categorically require the use of "physical force." *Id.* Such a robbery is committed where a defendant employs "anything which calls out resistance." *Id.* (quoting *Maxwell v. Commonwealth*, 165 Va. 860 (1936)). Indeed, a conviction may be imposed even if a defendant does not "actual[ly] harm" the victim. *Id.* (quoting *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487 (Va. Ct. App. Dec. 12, 2000)). Rejecting the government's argument that overcoming resistance requires violent "physical force," the Fourth Circuit held that the *de minimis* force required under Virginia law does not rise to the level of violent "physical force." *Id.*

In *Gardner*, the Fourth Circuit held that the offense of common law robbery in North Carolina does not qualify as a "violent felony" under the elements clause

(9th Cir. 2016); *United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017); *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016).

because it does not categorically require the use of "physical force." 823 F.3d at 803–04. A North Carolina common law robbery may be committed by force so long as the force is "is sufficient to compel a victim to part with his property." *Id.* (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)). "This definition," the Fourth Circuit stated, "suggests that even *de minimis* contact can constitute the 'violence' necessary for a common law robbery conviction under North Carolina law." *Id.* (emphasis in original). The Fourth Circuit then discussed two North Carolina state cases that supported that conclusion. *Id.* (discussing *State v. Chance*, 662 S.E.2d 405 (N.C. Ct. App. 2008), and *State v. Eldridge*, 677 S.E.2d 14 (N.C. Ct. App. 2009)). Based on these decisions the court concluded that "the minimum conduct necessary to sustain a conviction for North Carolina common law robbery" does not necessarily require "physical force," and therefore the offense does not categorically qualify as a "violent felony" under the elements clause. *Id.*

Like the Virginia and North Carolina offenses described in *Winston* and *Gardner* respectively, a Florida robbery may be committed by force sufficient to overcome a victim's resistance. As the Fourth Circuit recognized, this definition implicitly suggests that so long as a victim's resistance is slight, a defendant need only use *de minimis* force to commit a robbery. And, as explained above, Florida case law confirms this point.

Given the circuit split between the Ninth and Eleventh Circuits, and the tension among the other circuits, it is important for the Court to resolve these inconsistencies and reinforce what it said in *Samuel Johnson* — that "physical force"

requires "a substantial degree of force." 559 U.S. at 140. At a minimum, it requires more than the *de minimis* force required for a robbery conviction under Florida law.

III. THE DECISION BELOW IS WRONG.

The issues presented by this petition were fully preserved below and are dispositive. Yet the district court and the appellate court denied Mr. Sailor a certificate of appealability on the merits, claiming he had failed to demonstrate that reasonable jurists could debate the issues. Under 28 U.S.C. § 2253(c)(2), a court of appeals must grant leave to appeal where the appellant makes a "substantial showing of the denial of a federal constitutional right." As this Court reiterated in *Buck v. Davis*, "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" 137 S. Ct. 759, 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). The circuit splits regarding a petitioner's burden, and the slew of cases currently pending before this Court on the issue of the degree force and robbery, are clear demonstrations that these issues are being constantly debated. At a minimum this Court should grant the petition and remand to the Eleventh Circuit for consideration of the issues in full.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner Jeremiah Sailor prays that this Court grant his Petition for a Writ of Certiorari, or, alternatively, grant summary reversal and remand the case to the Court of Appeals with instructions to grant a COA or to review Petitioner's application for a COA anew.

Respectfully submitted,

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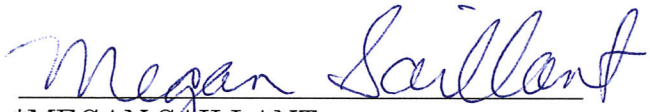
FEDERAL PUBLIC DEFENDER



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