No. 18-5313

In the
Supreme Court of the United States

JOSEPH STEELE,

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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The government does not appear to dispute the importance of the question presented in Joseph Steele's petition for a writ of *certiorari*. Instead, the government has attempted to reframe that question as one that is limited to the "modified categorical approach" review of a single New York State robbery statute. *See* Opp'n Br., at (I), 4. Unfortunately, the government has not provided any arguments regarding the exiting (and growing) conflict among the federal courts of appeals as to whether the definition of a "violent felony" provided under the "elements clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(i), encompasses crimes that do not require proof of a defendant's culpable participation in violent conduct. The government has also failed to respond to Steele's argument that he was subjected to a mandatory minimum sentence of 15 years' imprisonment because the Court of Appeals for the Second Circuit has interpreted § 924(e)(2)(B)(i) in a way that conflicts with the ACCA's "basic purposes," which were previously recognized by this Court in *Begay v. United States*, 553 U.S. 137, 145-46 (2008), *abrogated on other grounds by Johnson v. United States*, --- U.S. ----, 135 S.Ct. 2551 (2015).

Until the conflict described in Steele's petition is resolved by this Court, defendants who are convicted of felon-in-possession crimes under 18 U.S.C. § 922(g) and who have prior convictions for offenses that do not require proof of intentional, knowing, or reckless violent conduct will be subjected to the ACCA's substantial sentencing enhancements, or not, depending on the federal circuit in which they are convicted and sentenced. Therefore, the instant petition should be granted.

ARGUMENT

I. The First Circuit Has Joined the Second and Fourth Circuits in Holding that the ACCA Elements Clause Applies to Offenses that Do Not Require Proof of a Defendant's Intentional, Knowing, or Reckless Violent Conduct.

In the time since Steele's petition for a writ of *certiorari* was filed, the conflict among the federal courts of appeals regarding the question presented in this case has grown. On August 2, 2018, the Court of Appeals for the First Circuit held, in *Lassend v. United States*, that the ACCA elements clause "focuses on the elements of the crime of conviction—i.e., what acts occurred—without respect to any actor's intent or culpability." 898 F.3d 115, 131 (1st Cir. 2018) (internal quotation omitted). The First Circuit's analysis of the New York first degree robbery statute and the ACCA elements clause relied on this Court's reasoning in *Dean v. United States*, 556 U.S. 568 (2009), a case which involved a highly distinguishable sentencing statute that does not require proof of a culpable *mens rea*.[1] 898 F.3d 130-31. The

[1] In the *Dean* opinion, this Court specifically noted that the mandatory minimum sentencing enhancement for the discharge of a firearm during and in relation to a crime of violence or drug trafficking crime, 18 U.S.C. § 924(c)(1)(A)(iii), was written in the passive voice ("if the firearm is discharged . . ."), indicating that the statute applies "without respect to any actor's intent or culpability." 556 U.S. at 572.

First Circuit's *Lassend* opinion also cited to *Stuckey v. United States*, 878 F.3d 62, 70 (2d Cir. 2017), *cert. denied*, --- S.Ct. ----, 2018 WL 3023907 (Mem.) (Oct. 1, 2018), in which the Second Circuit held that the ACCA "requires only a threshold intent to engage in criminal conduct," and that proof of a defendant's intent with respect to the use, attempted use, or threatened use of violent force is not required under *Johnson v. United States*, 559 U.S. 133, 140 (2010) (hereinafter "*Johnson 2010*"), and *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).[2]

Thus, the First Circuit's current interpretation of the ACCA elements clause as it applies to prior convictions that do not require culpable violent conduct is in line with the Second Circuit's *Stuckey* rule and the Fourth Circuit's recent decision in *United States v. Smith*, 882 F.3d 460, 463-64 (4th Cir. 2018). As discussed in Steele's petition, *Stuckey* and *Smith* are in direct conflict with the decisions of other circuit courts. *See, e.g.*, *United States v. Dixon*, 805 F.3d 1193, 1197-98 (9th Cir. 2015) (holding that a California robbery statute encompassing accidental uses of violent force does not qualify as an ACCA violent felony); *Higdon v. United States*, 882 F.3d 605, 607 (6th Cir. 2018) (noting that "conduct giving rise to force (*e.g.*, pulling a trigger on a gun)" must be "'volitional' rather than accidental") (citing *Voisine v. United States*, --- U.S. ----, 136 S.Ct. 2272, 2278-79 (2016)); *United States v. Lewis*, 720 Fed. App'x 111, 114 (3d Cir. 2018) (holding that "the use of physical force" required under U.S.S.G. § 4B1.2(a)(1) "must be knowing or intentional; recklessness or gross negligence are insufficient.").

[2] The *Stuckey* decision was binding on the Second Circuit panel that decided Steele's appeal. *See* Pet. App. A.3.

Until this conflict is resolved, § 922(g) defendants with similar criminal histories will be subject to vastly different sentencing requirements depending on the circuit in which they are prosecuted. Therefore, this Court's intervention is warranted to promote uniformity in federal court decisions relating to the ACCA elements clause and analogous provisions.[3]

II. The New York "Forcible Stealing" Element Does Not Require Proof of a Defendant's Use, Attempted Use, or Threatened Use of Violent Force.

Instead of addressing the conflict among the federal courts of appeals described above, the government has argued that Steele's prior robbery conviction qualifies as an ACCA violent felony because the "forcible stealing" element applicable to all New York robbery crimes under P.L. § 160.00 requires proof of the use or threatened use of "physical force." Opp'n Br., at 5-7, 10-11. In *People v. Jurgins*, 26 N.Y.3d 607, 614 (2015), which the government cites in its opposition brief, the New York Court of Appeals indicated that a taking of property accomplished "by sudden or stealthy seizure or snatching" may not qualify as a "forcible stealing." But this does not mean that *all* non-violent property thefts are excluded from robbery prosecutions in New York. To the contrary, the New York State appellate courts have repeatedly confirmed that violent force is not necessary to establish a "forcible stealing" under P.L. § 160.00.[4]

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[3] *See, e.g.*, 18 U.S.C. §§ 16(a); 924(c)(3)(A); U.S.S.G. § 4B1.2(a)(1).

[4] Moreover, it is worth noting that *Jurgins* was decided approximately seven years after Steele's 1998 robbery conviction. *See generally United States v. Steed*, 879 F.3d 440, 447-51 (1st Cir. 2018) (applying an "historical categorical approach" by analyzing "the state

For example, the defendants in *People v. Smith*, 22 N.Y.3d 1092 (2014) committed a robbery by impersonating undercover police officers and conducting an unlawful stop-and-frisk of their victim:

> Defendant Mikal Smith and his brother impersonated plainclothes police officers as they approached the victim in the stairwell of his apartment building. Defendant ordered the victim to stop; announced that he was a police officer; displayed a fake badge hanging from his neck (similar to one worn by his brother); and asked the victim to produce identification. After the victim did so, defendant told him to place his hands on the wall. The victim complied with these demands and was frisked, during which time defendant removed items from the victim's pockets. One of the assailants then declared 'this is not the person we are looking for[,]' so the victim was permitted to leave.

Id., at 1093.

The government argues that the *Smith* robbery was accomplished by an implied threat of violent physical force, but there is nothing in the New York Court of Appeals opinion to support that argument. Opp'n Br., at 6-7. Because the *Smith* defendants were pretending to be police officers, the victim was impliedly threatened with the possibility of *some* unpleasant consequence—perhaps a ticket, or even an arrest—if he did not comply with their demands. But there is no basis to speculate that the *Smith* defendants specifically threatened the victim with "*violent* force." *Johnson 2010*, 559 U.S. at 140. Indeed, the government's analysis of *Smith* would make sense only if *all* stop-and-frisks and similar encounters with law enforcement were presumed to involve threats of physical violence, which would be a strange premise for the government to rely on.

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of New York law as it stood at the time Steed was convicted" of second-degree robbery, in violation of P.L. § 160.10(2)(a)).

After the petition for *certiorari* was filed in this case, the Second Circuit determined that a "forcible stealing" under P.L. § 160.00 qualifies as a "crime of violence" under the Application Notes to Section 2L1.2 of the U.S. Sentencing Guidelines.[5] *United States v. Pereira-Gomez*, 903 F.3d 155, 165-66 (2d Cir. 2018). However, this Court recently heard oral arguments in *Stokeling v. United States*, No. 17-5554, in which the petitioner argues that Florida's armed robbery statute, Fla. Stat. § 812.13, which requires proof that a defendant overcame a victim's resistance to the taking of property, does not satisfy the "*violent* force" standard under *Johnson 2010*. A comparison of the Florida armed robbery statute and New York's "forcible stealing" element indicates that a decision from this Court in favor of the *Stokeling* petitioner could effectively abrogate the Second Circuit's *Pereira-Gomez* decision and foreclose the government's arguments regarding the first element of Steele's prior robbery conviction.

Florida's armed robbery statute specifically requires proof of "the use of force, violence, assault, or putting in fear." Fla. Stat. Ann. § 812.13(1). In New York, a "forcible stealing" requires proof that a defendant "use[d] or threaten[ed] the immediate use of physical force upon another person[.]" P.L. § 160.00. As the *Stokeling* petitioner's brief explains, the Florida Supreme Court has held that "[t]he degree of force" required to sustain a conviction under Fla. Stat. Ann. § 812.13(1) is "immaterial." Brief for Petitioner at 29, No. 17-5554 (June 11, 2018) (quoting *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922)). The New York appellate courts

[5] Like the ACCA elements clause, the Guidelines "crime of violence" definition encompasses crimes that have "as an element the use, attempted use, or threatened use against the person of another."

have likewise confirmed that the P.L. § 160.00 definition of "physical force" may include *de minimus* and non-violent uses of force, such as the pat-down conducted by the defendants in *Smith*, 22 N.Y.3d at 1094. *See also People v. Lee*, 197 A.D.2d 378 (App. Div. 1st Dept. 1993) ("Defendant bumped his unidentified victim, took money, and fled while another forcibly blocked the victim's pursuit."); *People v. Safon*, 166 A.D.2d 892 (App. Div. 4th Dept. 1990) ("[T]he 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. Bennett*, 219 A.D.2d 570 (App. Div. 1st Dept. 1995) ("[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"); *People v. Patton*, 184 A.D.2d 483 (App. Div. 1st Dept. 1992) ("By blocking the victim's passage, defendant aided in codefendant's retention of the property, and thereby participated in the robbery.").

If this Court rules in favor of the petitioner in *Stokeling*, the government's arguments regarding the "forcible stealing" element of Steele's prior robbery conviction will be effectively nullified. But whether or not this petition is held pending the outcome of *Stokeling*, it remains true that federal courts are bound by the New York appellate courts' interpretations of New York State statutes, *Johnson v. Fankell*, 520 U.S. 911, 916 (1997), and the decisions cited above clearly demonstrate that violence is not required to establish a "forcible stealing" under P.L. §§ 160.00 or 160.15.

CONCLUSION

Neither of the two elements underlying Steele's prior conviction for first degree robbery under P.L. § 160.15(4) required proof of his participation in an intentional, knowing, or reckless use, attempted use, or threatened use of violent force. Therefore, the instant petition for a writ of *certiorari* should be granted and the Court should resolve the question of whether the definition of a violent felony under the ACCA elements clause is limited to offenses that necessarily involve culpable violent conduct.

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Respectfully submitted,

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