NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

MOISES PEREZ, *Petitioner,*

-vs-

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Moises Perez respectfully requests this Honorable Court issue a Writ of Certiorari to review the decision issued by the United States Court of Appeals for the Sixth Circuit in *Perez v. United States*, 885 F.3d 984 (6th Cir. 2018) (Merritt, J., dissenting), affirming the denial of relief under 28 U.S.C. § 2255. Mr. Perez also sought en banc review, which the Sixth Circuit denied. *Perez v. United States*, 2018 U.S. App. LEXIS 16031 (6th Cir. June 14, 2018).

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

I. Whether a state robbery offense that includes as an element the common law requirement of overcoming "resistance" is categorically a "violent felony" under Armed Career Criminal Act's force clause if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?

This same question is pending before this Court in *Stokeling v. United States*, 684 F. App'x 870 (11th Cir. 2017), *cert. granted*, No. 17-5554, 2018 U.S. LEXIS 2091 (Apr. 2, 2018).

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CITATION OF OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is set forth in *Perez v. United States*, 885 F.3d 984 (6th Cir. 2018) (Merritt, J., dissenting). *See* Appendix A. Mr. Perez also petitioned the Sixth Circuit for a rehearing en banc, which was denied in an Order. *Perez v. United States*, 2018 U.S. App. LEXIS 16031 (6th Cir. June 14, 2018). *See* Appendix B.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its final judgment on March 26, 2018 and denied en banc review on June 14, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 922(g)(1) provides:

> It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(e)(2)(B) provides:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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. . .

The Fifth Amendment to the United States Constitution provides:

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

STATE STATUTES INVOLVED

N.Y. Penal Code § 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 to the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. Penal Code § 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

STATEMENT OF THE CASE

Thirty-one years ago, when Moises Perez was only seventeen, he was convicted of second-degree robbery in New York. Three decades later, Mr. Perez possessed a firearm in violation of 18 U.S.C. § 922(g). The fact of Mr. Perez's prior robbery conviction, coupled with two prior convictions for attempted felonious assault, subjected him to a mandatory minimum sentence of fifteen years of incarceration by virtue of 18 U.S.C. § 924(e) – the Armed Career Criminal Act ("ACCA"). 18 U.S.C. § 924(e)(1).[1]

The ACCA imposes a mandatory minimum fifteen-year sentence when a defendant has three or more prior convictions for either a "violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). The term "violent felony" has three different possible definitions. A crime is a "violent felony" under the ACCA if 1) it involves the use, attempted use, or threatened use of force – the force clause (also known as the elements clause); 2) it is the generic form of several enumerated felony offenses identified in the statute – the enumerated clause; or 3) it "otherwise involves conduct that presents a serious potential risk of physical injury to another" – the residual clause. *Id.* This Court held the residual clause is unconstitutionally vague, leaving only the force and enumerated clauses as viable avenues for considering a prior

[1] The government conceded in its response to Mr. Perez's Motion for Relief under 28 U.S.C. § 2255 in the district court that Mr. Perez's other prior convictions for burglary and attempted intimidation, which had originally also been used as predicate offenses to support application of the ACCA at sentencing, did not quality as violent felonies under 18 U.S.C. § 924(e).

conviction an ACCA predicate. *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015).

The ACCA required the district court to impose a sentence significantly longer than the one Mr. Perez was likely to receive under the United States Federal Sentencing Guidelines because of a robbery committed when Mr. Perez was barely enough for adult court. New York's second-degree robbery statute applies when an individual "forcibly steals property and when he is aided by another person actually present". N.Y. CLS Penal § 160.10. Forcible stealing is defined in New York as –

> . . .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 to the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. Penal Code § 160.00. However, the statute does not define "force" itself.

Following the advent of *Johnson*, Mr. Perez filed a timely petition for relief under 28 U.S.C. § 2255. In an amended petition filed with the assistance of undersigned counsel, Mr. Perez asserted that his prior second-degree robbery conviction from New York was not a violent felony, because the force required to satisfy the statute was less that the strong, violent force this Court required in *Johnson v. United States*, 559 U.S. 133 (2010).[2] Mr. Perez pointed to the Second

[2] Mr. Perez also challenged his burglary and attempted intimidation convictions in Ohio, and as noted in a prior footnote, the government conceded those offenses were not violent felonies.

Circuit's decision in *United States v. Jones*, 830 F.3d 142, 149 (2d Cir. 2016), *vacated on other grounds*, 2017 U.S. App. LEXIS 27453 (2d Cir. Sept. 11, 2017), which held that second-degree robbery in New York did not necessarily involve the use of violent force. The district court denied Mr. Perez's petition but granted a certificate of appealability on the issue.

Mr. Perez took a timely direct appeal from the denial of habeas relief raising the same issue. He also pointed to subsequent authority from the First Circuit in *United States v. Steed*, 879 F.3d 440, 450-51 (1st Cir. 2018), which held that New York second-degree robbery was not a crime of violence (using a nearly identical definition to the ACCA's force clause) under the United States Sentencing Guidelines. He also discussed decisions from the New York state intermediate courts of appeals that found sufficient evidence of second-degree robbery without the use of violent force. The United States Court of Appeals for the Sixth Circuit ultimately affirmed the denial of habeas relief. *Perez v. United States*, 885 F.3d 984 (6th Cir. 2018) (Merritt, J., dissenting). In particular, the Sixth Circuit took issue with the depth of analysis in the New York intermediate appellate state court decisions addressing the range of conduct criminalized by the statute. *Id.* at 990-91.

Judge Merritt wrote a separate dissent in which he asserted that the rule of lenity required that relief be given to Mr. Perez. *Id.* at 992. He explained, "There are many cases under New York's second degree robbery statute. Some of them find a violation but do not require any violent physical force." *Id.* Because the scope of state case law outlined a range of conduct more broad than the definition of violent felony

in the ACCA, Judge Merritt concluded that the rule of lenity should be applied. *Id.* Mr. Perez petitioned the Sixth Circuit for a rehearing en banc, which was denied in an Order. *Perez v. United States*, 2018 U.S. App. LEXIS 16031 (6th Cir. June 14, 2018). He now presents this timely petition for a writ of certiorari..

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. Mr. Perez's Petition Should Be Granted and Held in Abeyance for this Court's Decision in *Stokeling v. United States*, Case No. 17-5554.

In *Stokeling v. United States*, this Court will decide whether a state robbery offense that includes overcoming "resistance" as an element is categorically a violent felony if the offense has been specifically interpreted by state appellate courts as requiring only slight force to overcome resistance. Specifically, the petitioner in *Stokeling* argues that Florida's robbery statute has been interpreted by Florida state courts as requiring only slight or minimal force. This is true because Florida's robbery statute is satisfied by any degree of force as long as that force overcomes resistance. In fact, the petitioner in *Stokeling* notes that the Florida Supreme Court has interpreted its robbery statute as making the degree of force involved immaterial as long as that force overcomes resistance.

Here, New York incorporates the same language in its definition of "forcible stealing." Second-degree robbery is defined as "forcibly steals property and when he is aided by another person actually present". N.Y. CLS Penal § 160.10. In turn, forcible stealing requires "the immediate use of physical force" on another person for the purpose of "preventing or overcoming resistance" to the taking of property or compelling the property owner to deliver that property. N.Y. Penal Code § 160.00.

Further, like the Florida statute at issue in *Stokeling*, New York state courts have interpreted the second-degree robbery statute to be satisfied by minimal force. For example, in *People v. Spencer*, 255 A.D.2d 167, 167-68 (N.Y. App. Div. 1st Dep't 1998), the court found that a defendant standing chest to chest with a victim and

backing him against a subway pole was sufficient to establish force for second-degree robbery. Similarly, in *People v. Bennett*, 219 A.D.2d 570, 570 (N.Y. App. Div. 1st Dep't 1995), a New York state court found sufficient evidence of forcible stealing when the defendant "bumped his intended victim" in order to take his money and flee. *Accord People v. Lee*, 197 A.D.2d 378, 378 (N.Y. App. Div. 1st Dep't 1993) (sufficient evidence of robbery when store clerk attempted to grab stolen money from defendant's hand and the two tugged at each other's hands until the defendant's hand slipped out of a glove holding the money).

Mr. Perez's case involves the exact same legal issue before this Court in *Stokeling* – whether a state robbery statute that has an element of overcoming resistance is categorically a violent felony under the ACCA if the state appellate courts have interpreted the statute to be satisfied by any level of force. Because the legal issues at play in Mr. Perez's case will be resolved by this Court's ruling in *Stokeling*, this Court should grant Mr. Perez's petition and hold his case for a decision in *Stokeling*. Alternatively, this Court should grant Mr. Perez's petition for a writ of certiorari and order briefing on his second question presented.

II. There Is a Circuit Split as to Whether New York's Second-Degree Robbery Statute is a Violent Felony When New York Appellate Courts Interpret It to Be Satisfied by Minimal Force.

The Circuits are split and require this Court's direction as to whether New York's second-degree robbery statute is a violent felony. Both the First and Second Circuit Courts of Appeals agree that New York's second-degree robbery statute lacks the required level of force to satisfy the identically worded force clause of U.S.S.G. §

4B1.2. *United States v. Steed*, 879 F.3d 440 (1st Cir. 2018); *United States v. Jones*, 830 F.3d 142 (2d Cir. 2016), *vacated on other grounds*, 2017 U.S. App. LEXIS 27453 (2d Cir. Sept. 11, 2017). [3] Also, the Third Circuit noted that the government conceded second-degree New York robbery is not a crime of violence at the district-court level in response to a petition under 28 U.S.C. § 2255. *United States v. Wiltshire*, 2018 U.S. App. LEXIS 15195, * 2 (3d Cir. June 6, 2018).

However, those decisions conflict with the Sixth Circuit's decision in *Perez v. United States*, 885 F.3d 984 (6th Cir. 2018) (Merritt, J., dissenting). The Sixth Circuit held that New York's second-degree robbery statute was a violent felony because its text required the use or threatened use of force. *Id.* at 991. Further, the Sixth Circuit rejected New York state cases that found minimal force sufficient to satisfy the statute, because the decisions were "devoid of anything more than a few sentences of reasoning, and susceptible to multiple interpretations. . ." *Id.* Put another way, the Sixth Circuit declined to rely on the state court decisions interpreting the statute and instead looked solely to the plain language of the statute. The Fourth and Eighth Circuits recently reached similar conclusions in unreported cases. *United States v. Bowles*, 2018 U.S. App. LEXIS 12660, *4-7 (4th Cir. May 16, 2018) (analyzing under

[3] The Second Circuit later held that second-degree robbery was a crime of violence under the enumerated clause of the Guidelines' definition of a crime of violence. *United States v. Smith*, 884 F.3d 437, 440-41 (2d Cir. 2018). But that reasoning does not challenge the earlier *Jones* decision, which held that New York second-degree robbery does not constitute a use or threatened use of strong, violent force under the force clause.

the ACCA); *United States v. Williams*, 2018 U.S. App. LEXIS 22341, *5-7 (8th Cir. Aug. 13, 2018) (briefly discussing the Guidelines' force clause). This Court names conflicts between Circuits as one of the reasons for accepting a case for review on certiorari. Supreme Court Rule of Practice 10(a). Review is appropriate here to resolve the split.

Further, this case merits review because the Sixth Circuit's reasoning is contrary to this Court's authority. Less that strong or violent force is insufficient to satisfy the force required by the ACCA in order for an offense to be a violent felony. *Johnson v. United States*, 559 U.S. 133 (2010). While the Sixth Circuit took issue with the degree of analysis provided in New York's state appellate case law, those decisions help to define and outline the minimum conduct criminalized by the statute. *See Moncrieffe v. Holder*, 133 S Ct. 1678, 1684 (2013) (analysing similar clauses in 18 U.S.C. § 16, courts should look to the minimum conduct criminalized by the state statute). The Sixth Circuit's decision ran afoul of *Moncrieffe* and *Johnson* by disregarding those real-world decisions while simultaneously characterizing Mr. Perez's argument as "an invitation to apply 'legal imagination' to the state offense." *Perez* at 990.

Whether the New York state cases on this issue provide a detailed analysis or not, they are actual factual scenarios that have supported a conviction for robbery in real-world cases. They are not theoretical inventions of analysis. Rather, they define the minimum conduct criminalized by the state statute, which was a part of the Sixth

Circuit's required considerations under this Court's precedent. As such, review of this case is merited.

CONCLUSION

This Court should accept review of Mr. Perez's case to address and hold it in abeyance for decision in *Stokeling v. United States*. In the alternative, Mr. Perez respectfully petitions this Court to accept his case for a review of its merits.

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