No. 19-

IN THE

SUPREME COURT OF THE UNITED STATES

JACOBY BURNS,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

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QUESTIONS PRESENTED FOR REVIEW

I. Does a conviction under Georgia's felony obstruction-of-an-officer statute, OCGA § 16-10-24(b), qualify as either a "crime of violence" under the elements clause of the career offender Sentencing Guideline, USSG § 4B1.2(a)(1), or a "violent felony" under the elements clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(b)(i), when under a proper categorical analysis the least of the acts criminalized by § 16-10-24(b) does not require proof of the "use, attempted use, or threatened use of physical force against the person of another"?

II. Does a proper categorical analysis under this Court's precedent in *Johnson v. United States*, 559 U.S. 133 (2010), and *Moncrieffe v. Holder*, 569 U.S. 184 (2013), require an examination of whether the least of the acts criminalized under the statute in question requires proof of the "use, attempted use, or threatened use of physical force against the person of another"?

PARTIES

Jacoby Burns is the petitioner, who was the defendant-appellant below. The United States of America is the respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jacoby Burns respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit issued on August 30, 2018, affirming Petitioner's conviction is captioned as *United States v. Burns*, No. 16-17082, and is provided in the Appendix to the Petition as App. A-1. The unpublished order of the Eleventh Circuit issued on November 19, 2018, denying Petitioner's Petition for Panel Rehearing is provided as App. A-2.

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of the judgment below. The petition is timely filed pursuant to Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL SENTENCING GUIDELINE AND FEDERAL & STATE STATUTES INVOLVED

USSG § 4B1.2 provides in relevant part:

> **Definitions of Terms Used in Section 4B1.1**
>
> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another . . .

18 U.S.C. § 924(e)(2) provides in relevant part:

> (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;

OCGA § 16-10-24(b) provides in relevant part:

> Whoever knowingly and willfully resists, obstructs, or opposes any law enforcement officer . . . in the lawful discharge of his or her official duties by offering or doing violence to the person of such officer . . . shall be guilty of a felony and shall, upon a first conviction thereof, be punished by imprisonment for not less than one year nor more than five years.

STATEMENT OF THE CASE

A. Facts and Proceedings Below

1. Offense Conduct

On May 19, 2016, agents of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) were participating in a multi-agency investigation into narcotics sales in the English Avenue area of Atlanta, Georgia, known as "The Bluff." Several individuals were observed standing in front of 754 Jett Street; one of them, later identified as Mr. Burns, yelled "Hey" to an undercover officer (UC), and instructed the UC to "circle the block."

The UC drove around the immediate area, and pulled up to the intersection of Jett Street and James P. Brawley Drive. Mr. Burns approached the UC and asked, "How much you want?" The UC replied "Forty," meaning $40 of heroin. Mr. Burns told the UC to "drive back around." After driving around the block, the UC returned and gave Mr. Burns $40 in previously-issued government funds in exchange for a small clear plastic baggie of what later was identified as less than ¼ of a gram (.23 grams) of heroin.

2. Indictment and Guilty Plea

A federal grand jury sitting in the Northern District of Georgia returned a one-count indictment charging defendant Jacoby Burns with possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(C). Mr. Burns entered a straight-up, non-negotiated plea of guilty to the indictment.

3. Sentencing

Prior to sentencing, the probation officer prepared a presentence report. Using the 2015 version of the Sentencing Guidelines Manual, the probation officer recommended a

base offense level of 12 under USSG § 2D1.1(a)(5) and (c)(14) because the offense involved less than 10 grams of heroin; and a 3-level reduction for acceptance of responsibility under § 3E1.1. With a criminal history category of V, his Guideline range would have been 27-33 months in prison. *See* USSG Ch. 5, Pt. A (sentencing table). Yet Mr. Burns was determined to be a career offender under § 4B1.1 based on (1) his 2003 Georgia conviction for aggravated assault, burglary and aggravated battery; and (2) his 2014 Georgia conviction for felony obstruction of a law enforcement officer. Because of his career offender status, Mr. Burns's base offense level was enhanced 20 levels to offense level 32, resulting in a total offense level of 29, and a criminal history category of VI. The resulting recommended Sentencing Guideline range was 151-188 months in prison.

Mr. Burns objected to the probation officer's finding that he was a career offender, arguing that his obstruction-of-an-officer conviction was not for a "crime of violence" for purposes of the career offender Sentencing Guidelines, USSG §§ 4B1.1(a)(3) and 4B1.2(a)(1). (App. A-3 at 2-12). Mr. Burns argued the objection again at his sentencing hearing. (App. A-4 at 2-9).

The district court overruled Mr. Burns's objection, concluding that it was bound by Eleventh Circuit precedent in *United States v. Brown*, 805 F.3d 1325 (11th Cir. 2015), which held that a conviction under Georgia's felony obstruction-of-an-officer statute qualified as a "violent felony" under the elements clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i) – and thus, by extension, also qualified as a "crime of violence" under the elements clause of the career offender Sentencing Guideline,

§ 4B1.2(a)(1).[1] (App. A-4 at 9-11). The district court adopted the findings of the presentence report, including its application of the career offender enhancement. *Id.* at 11. Relying on a total offense level of 29, a criminal history category of IV, and a custody Guideline range of 151-188, the court varied downward to sentence Mr. Burns to 84 months in prison, *id.* at 19 – which was 51 months above his unenhanced 27-33 month sentencing range. (App. A-5 at 2).

4. Appeal

Mr. Burns appealed his sentence, arguing that the district court erred in finding that his prior Georgia conviction for felony obstruction of an officer in violation of OCGA § 16-10-24(b) was a qualifying predicate conviction for purposes of enhancing his sentence for being a career offender under USSG § 4B1.1. (App. A-1 at 2). He argued that the Eleventh Circuit's decision in *Brown* had been undermined to the point of abrogation by this Court's precedent. *Id.* In an unpublished opinion, a panel of the Eleventh Circuit affirmed, holding that the district court properly concluded that Mr. Burns's conviction for felony obstruction of an officer under OCGA § 16-10-24(b) categorically qualified as a crime of violence under the elements clause of the career offender Guideline. *Id.* at 3. In so holding, the panel determined that it was bound by circuit precedent in *Brown*. *Id.* at 3-5.

Mr. Burns filed a petition for rehearing en banc in which he argued that the Eleventh Circuit sitting en banc should overrule *Brown* because *Brown* failed to apply a proper

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[1]The elements clause of the career offender Sentencing Guideline is identical to the elements clause of the ACCA. *Compare* USSG § 4B1.2(a)(1) *with* 18 U.S.C. § 924(e)(2)(B)(i).

categorical analysis under binding Supreme Court precedent, which would have revealed that the least of the acts criminalized by OCGA § 16-10-24(b) does not require proof of the "use, attempted use, or threatened use of physical force against the person of another." On November 19, 2018, the Eleventh Circuit denied the petition for rehearing en banc. (App. A-2).

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit failed to apply a proper categorical analysis, as required by this Court's precedent, when it held that a conviction under Georgia's felony obstruction-of-an-officer statute, OCGA § 16-10-24(b), qualifies both as a "crime of violence" under the elements clause of the career offender Sentencing Guideline, USSG § 4B1.2(a)(1), and as a "violent felony" under the elements clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i).

Courts must apply a categorical approach to determine whether a conviction qualifies as a "crime of violence" under the elements clause of the career offender Sentencing Guidelines, USSG § 4B1.2(a)(1), or a "violent felony" under the elements clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(i). *See Taylor v. United States*, 495 U.S. 575, 600–602 (1990). In the elements-clause context, this categorical method requires asking whether the least culpable conduct covered by the statute at issue "has as an element the use, attempted use, or threatened use of physical force against the person of another." *See Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013); *Johnson v. United States*, 559 U.S. 133, 137 (2010). If it does not, then the statute is too broad to qualify as either a "crime of violence" or a "violent felony." In determining the breadth of a particular state crime, federal courts look

to, and are constrained by, state courts' interpretations of state law. *See Johnson*, 559 U.S. at 138; *Mathis v. United States*, 579 U.S. ___. ___, 136 S. Ct. 2243, 2256 (2016).

In determining that Georgia's felony obstruction-of-an-officer statute, OCGA § 16-10-24(b), qualifies both as a "crime of violence" under the "use-of-force" element of the career offender Sentencing Guideline, USSG § 4B1.1, and a "violent felony" under the "use-of-force" element of the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), the Eleventh Circuit failed to apply the categorical analysis established by this Court's decisions in cases such as *Johnson* and *Moncrieffe*.[2] A proper categorical analysis requires an examination of whether the least of the acts criminalized under the statute requires proof of the "use, attempted use, or threatened use of physical force against the person of another." Under this type of analysis, Georgia's felony obstruction-of-an-officer statute is neither a crime of violence nor a violent felony because, under Georgia case law, the least of the acts criminalized by § 16-10-24(b) does not require proof of the "use, attempted use, or threatened use of physical force against the person of another."

Because the Eleventh Circuit fails to apply a proper categorical in determining how to sentence recidivist under both federal statutes and the Sentencing Guidelines, this case presents an issue of exceptional importance.

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[2]The Eleventh Circuit also failed to apply an appropriate categorical analysis in *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013), when it held that convictions under Fla. Stat. § 784.045(1)(a)(1) and (1)(a)(2) categorically qualify as violent felonies under the ACCA's elements clause. *See United States v. Golden*, 854 F.3d 1256 (11th Cir.) (Pryor, J., concurring) ("*Turner* reached the wrong conclusion, however, because it failed to consider the least of the acts Florida criminalizes in its aggravated assault statute."), *cert. denied*, ___ U.S. ___, 138 S. Ct. 197 (2017).

II. Eleventh Circuit precedent failed to apply the categorical analysis established by this Court in *Johnson* and *Moncrieffe* in determining that Georgia's felony obstruction-of-an-officer statute, OCGA § 16-10-24(b), qualifies as a "crime of violence" under the career offender Sentencing Guideline, USSG § 4B1.2(a)(1), and as a "violent felony" under the ACCA, 18 U.S.C. § 924(e)(2)(B)(i).

Mr. Burns argued on direct appeal that the district court erred in finding that his prior Georgia conviction for felony obstruction of an officer in violation of OCGA § 16-10-24(b) was a qualifying predicate conviction for purposes of enhancing his sentence for being a career offender under USSG §§ 4B1.1 and 4B1.2(a)(1). In affirming Mr. Burns's sentence, a panel of the Eleventh Circuit ruled that it was bound by its prior opinion in *United States v. Brown*, 805 F.3d 1325 (11th Cir. 2015), which held that a conviction under OCGA § 16-10-24(b) qualified as a "violent felony" under the elements clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i) – and thus, by extension, also qualified as a "crime of violence" under the elements clause of the career offender Sentencing Guidelines.

The Eleventh Circuit in *Brown,* however, failed to conduct the categorical analysis developed by this Court in *Descamps v. United States*, 570 U.S. 254 (2013), *Moncrieffe v. Holder*, 569 U.S. 184 (2013), and *Johnson v. United States*, 559 U.S. 133 (2010), because it neglected to look to the least of the acts criminalized by § 16-10-24(b), as defined by state law, to determine whether the offense satisfied the use-of-force element of § 924(e)(2)(B)(i). Had *Brown* conducted a proper categorical analysis, it would have found that the least of the acts criminalized by Georgia's felony obstruction-of-an-officer statute does not require proof, as a necessary element, of the "use, attempted use, or threatened use of physical force

against the person of another." *Id.* Because a proper categorical analysis would have revealed that Georgia's felony obstruction-of-an-officer statute does not qualify as a "violent felony" under the elements clause of § 924(e)(2)(B)(i), it also would not qualify as a "crime of violence" under the elements clause of USSG § 4B1.2(a)(1). Based on this Court's precedent, the Eleventh Circuit should not have felt constrained by *Brown* to affirm Mr. Burns's career offender sentence. Instead, it should have granted Mr. Burns's en banc petition, overruled *Brown*, vacated Mr. Burns's sentence, and remanded for resentencing without the career offender enhancement.

A. A proper categorical analysis requires an examination of the least culpable conduct criminalized by the statute.

Section 4B1.1 of the Sentencing Guidelines provides that a defendant is classified as a career offender if, under certain circumstances, his offense of conviction was a "crime of violence" and he had at least two prior felony convictions for crimes of violence. *See* USSG § 4B1.1(a). The Guidelines include in its definition of "crime of violence": "any offense under federal or state law, 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*." USSG 4B1.2(a)(1) (emphasis added). Similarly, under the Armed Career Criminal Act (ACCA), a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a "violent felony." *See* 18 U.S.C. § 924(e)(1). The ACCA defines a "violent felony" to mean, among other things, "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." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). The term "physical force" for purposes of both the career offender Guideline and the ACCA is defined by federal law as "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140 (emphasis in original).

If a defendant's prior conviction was under a state statute that lists alternative "elements," the statute is considered "divisible"; with a divisible statute, the court may employ a modified categorical approach to determine the elements of the prior conviction. *See Descamps*, 570 U.S. at 261. But if the statute merely lists "various factual means" of committing a single offense, then the statute is considered "indivisible." *Id.* With an indivisible statute, the district court must use a categorical approach to evaluate whether a defendant's prior state offense qualifies under the use-of-force element of an elements clause; "[s]entencing courts may 'look only to the statutory definitions'—i.e., the elements—of a defendant's prior offenses, and not 'to the particular facts underlying those convictions." *Id.* (emphasis omitted) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)).

Whether a state statute defines only crimes of violence for career offender purposes or violent felonies for ACCA purposes is determined by evaluating the least culpable conduct criminalized by the statute. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015) (holding that an alien's actual conduct is irrelevant to the inquiry of whether a state conviction triggers removal under the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i); instead, the adjudicator must "presume that the conviction rested upon nothing more than the least of the acts criminalized" under the state statute) (quoting *Moncrieffe*, 569 U.S. at 190-91)

("Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense.") (addressing whether a Georgia marijuana possession conviction qualified as "illicit trafficking in a controlled substance" under the Immigration and Nationality Act) (quoting *Johnson*, 559 U.S. at 137) (examining the use-of-force element of the "elements clause"). To identify the least culpable conduct, the court looks to how state courts interpret the statute. *See Johnson*, 559 U.S. at 138 ("We are, however, bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of Fla. Stat. § 784.03(2).").

In sum, this Court's precedent requires that a district court employ a categorical approach to determine whether a prior state conviction is a "crime of violence" under the career offender Sentencing Guideline or a "violent felony" under the ACCA. This approach requires first determining whether the least of the acts criminalized under the state statute includes the use, attempted use, or threatened use of physical force against another person under the elements clauses of either USSG § 4B1.2(a)(1) or 18 U.S.C. § 924(e)(2)(B)(i), looking to state law for the answer. If not, the prior conviction does not count as either a "crime of violence" or a "violent felony."

B. The Eleventh Circuit misapplied this Court's categorical analysis in finding that Georgia's felony obstruction-of-an-officer statute categorically is a "violent felony" and, therefore, also a "crime of violence."

In 2015, the Eleventh Circuit in *Brown* first examined whether Georgia's felony obstruction-of-an-officer statute, OCGA § 16-10-24(b), was a violent felony under the ACCA. 805 F.3d at 1327. This statute provides in relevant part:

> Whoever knowingly and willfully resists, obstructs, or opposes any law enforcement officer . . . in the lawful discharge of his official duties *by offering or doing violence* to the person of such officer or legally authorized person is guilty of a felony and shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.

OCGA § 16-10-24(b) (emphasis added). Georgia's felony obstruction-of-an-officer statute is an indivisible statute because it sets out a single, indivisible set of elements as described by *Descamps*, *supra*. Because Georgia's felony obstruction-of-an-officer statute is indivisible, a categorical approach must be employed to determine whether a prior conviction under this statute is a "violent felony" under the "use-of-force" element of the ACCA. The first step in the categorical approach is to determine whether the least of the acts criminalized by § 16-10-24(b) includes the use, attempted use, or threatened use of physical force against another person under § 924(e)(2)(B)(i). If not, § 16-10-24(b) does not qualify as a "violent felony" under the use-of-force element of § 924(e)(2)(B)(i).

The *Brown* court held that § 16-10-24(b) was, categorically, a "violent felony" for purposes of the ACCA's elements clause. 805 F.3d at 1328. In so holding, the court correctly observed that, under § 924(e)(2)(B)(i), "a felony is a violent felony under the elements clause if it 'has as an element the use, attempted use, or threatened use of physical force against the person of another.'" 805 F.3d at 1327. The panel also correctly noted that "the phrase

'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." *Id.*

Where the *Brown* panel went wrong was in failing to apply the proper categorical analysis of *Johnson*. Rather than looking to the least of the acts criminalized by § 16-10-24(b), as defined by state law, when conducting its categorical analysis, the court instead looked to just two decisions – one from the Eleventh Circuit and one from the Georgia Court of Appeals – and ruled that these two decisions, read together, "establish that the Georgia crime of felony obstruction of justice categorically meets the 'use, attempted use, or threatened use of physical force' requirement of the elements clause of the ACCA." *Brown*, 805 F.3d at 1327. *Brown*'s method of analysis and legal conclusion were equally flawed.

In the first of the two decisions examined by *Brown* – *United States v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012) – the Eleventh Circuit determined that a state statute involving an attempt to employ physical force by "pushing, struggling, kicking and flailing arms and legs ... undeniably would" satisfy the elements clause. *Id.* at 1250. In the second decision – *Jones v. State*, 276 Ga. App. 66, 622 S.E.2d 425 (2005) – the Georgia Court of Appeals opined, in response to an inconsistent verdict challenge, that the jury could have found Jones guilty of violating § 16-10-24(a) (misdemeanor obstruction of an officer) instead of § 16-10-24(b) (felony obstruction of an officer) because "although Jones shoved and fought with [the officer], her conduct did not rise to the level of 'offering and/or doing violence' to the officer's person." 276 Ga. App. at 68, 622 S.E.2d at 427. According to the panel in *Brown*, when read together, "[t]he *Jones* and *Romo-Villalobos* decisions establish

that the amount of violence the Georgia statute requires is enough to satisfy the elements clause of the ACCA." *Id.* at 1328.

The analysis in *Brown* was flawed in two significant respects. First, rather than conduct a proper categorical analysis – which would have required a survey of Georgia state cases to determine whether the least of the acts criminalized under § 16-10-24(b) included the use, attempted use, or threatened use of physical force against another person under § 924(e)(2)(B)(i) – the *Brown* panel simply examined two decisions: *Romo-Villalobos*, which described conduct that would satisfy the use-of-force element, and *Jones*, which described conduct that would not. Neither *Romo-Villalobos* nor *Jones* – whether read separately or together – identifies the least of the acts criminalized by § 16-10-24(b). Because those two case did not establish the parameters of the statute, *Brown's* categorical analysis was deficient.

Second, had *Brown* applied the correct analytical framework to Georgia's felony obstruction-of-an-officer statute, it would have found that § 16-10-24(b) does not require the use of violent force capable of causing physical pain or injury, and therefore does not categorically satisfy the use-of-force element of § 924(e)(2)(B)(i). Instead, Georgia courts have routinely defined felony obstruction of an officer as including conduct that does not amount to the use, attempted use, or threatened use of violent force capable of causing physical pain or injury to the officer, and therefore criminalizes conduct that does not qualify under the use-of-force element of § 924(e)(2)(B)(i) – or, by extension, the use-of-force element of § 4B1.2(a)(1).

For example, in *Barstad v. State*, 329 Ga. App. 214, 764 S.E.2d 453 (2014), a police officer came to Barstad's house, identified himself, and informed Barstad that he had a

warrant for his arrest. *Id.* at 5, 764 S.E.2d 455. The officer asked Barstad to turn around and put his hands behind his back, but Barstad instead stepped farther into his house and refused to stop. *Id.* The police officer warned Barstad that he would use his taser if Barstad did not stop moving, but Barstad continued to move toward the back of the house; when he reached for the back door, the police officer used his taser to subdue Barstad, and he was placed under arrest. *Id.* On appeal, the Georgia Court of Appeals concluded that Barstad's conduct – which did not involve either the use, attempted use or threatened use of violent physical force against the officer as required by *Johnson* – was sufficient to support Barstad's conviction for obstructing a law enforcement officer under OCGA § 16-10-24(b). *Barstad*, 329 Ga. App. at 216 n. 2, 764 S.E.2d at 456 n. 2. This statute sweeps too broadly to categorically qualify as either a "violent felony" for purposes of the ACCA or a "crime of violence" for purposes of the career offender Sentencing Guidelines.

The Georgia Court of Appeals also has held that taking a "fighting stance" and yelling obscenities at a police officer can be sufficient to support a conviction for felony obstruction of an officer under § 16-10-24(b). *See In re D.D.*, 287 Ga. App. 512, 651 S.E.2d 817 (2007). In D.D., officers were attempting to arrest a juvenile defendant when he "assumed a 'fighting stance,' placed his fists in front of his face, and yelled obscenities at the officer while refusing to obey commands." *Id.* at 513. The Georgia Court of Appeals concluded that this evidence "was sufficient to show that D.D. 'offered to do violence' to the officer." *Id.* But taking a fighting stance and yelling obscenities is insufficient to establish the use, attempted use or threatened use of violent force. Indeed, beginning boxers are taught to take a fighting stance – known in boxing as a "peek-a-boo" stance – as a defensive, rather than offensive, technique. *See* https://commandoboxing.com/content/types-boxing-guards. A boxer takes

a "peek-a-boo" stance when his "hands are placed in front of the boxer's face, like in the baby's game of the same name." https://en.m.wikipedia org/wiki/Peek-a-Boo_ (boxing_style). This type of stance, developed by legendary trainer Cus D'Amato, is believed to "offer[] the most protection while still providing access to the full range of offensive and defensive techniques." *Id.* In other words, taking a fighting stance is passive conduct, which is legally insufficient to establish even the threatened use of "violent force" as that term is defined in *Johnson*, 559 U.S. at 146-47 (referencing, among other definitions, Black's Law Dictionary 717 (9th ed. 2009), defining "force" as "[p]ower, violence, or pressure directed against a person or thing."). Taking a fighting stance and yelling obscenities simply does not satisfy the use-of-force elements of either § 924(e)(2)(B)(i) or § 4B.2(a)(1).

Similarly, in *Andrews v. State*, 307 Ga. App. 557, 559, 705 S.E.2d 319, 321 (2011), evidence that the defendant approached a sheriff's deputy "so that their noses were almost touching," took up a "fighting stance," spat in the deputy's face, and needed to be forced to the ground in order to be handcuffed was held to be sufficient to support a conviction for felony obstruction of an officer under OCGA § 16-10-24(b). Here again, § 16-10-24(b) was found to include conduct that does not involve the use, attempted use or threatened use of violent force capable of causing physical pain or injury. Therefore it, too, does not categorically satisfy the use-of-force elements of either § 924(e)(2)(B)(i) or § 4B.2(a)(1).

This Court in *Johnson* found that "physical force" refers to a certain threshold degree of force — it refers to the substantial degree of force that is associated with punching, kicking, and other violent acts. When applying the appropriate test to determine whether Georgia's felony obstruction-of-an-officer statute is either a "crime of violence" under USSG § 4B.2(a)(1) or a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(i), it flunks.

Simply put, because Georgia's felony obstruction-of-an-officer statute does not require the use of force capable of causing physical pain or injury, it does not categorically satisfy the use-of-force element of either § 4B1.2(a)(1) or § 924(e)(2)(B)(i). Had the Eleventh Circuit in either *Brown* or the case at bar applied the proper categorical analysis, it would have examined the decisions in *Barstad, In re D.D.* and *Andrews*, and come to the same conclusion.

In sum, the Eleventh Circuit fails to apply a proper categorical analysis in determining whether criminal defendants should be sentenced either as career offenders under USSG § 4B1.2(a)(1) or as armed career criminals under 18 U.S.C. § 924(e)(2)(B)(i). It is respectfully requested that this Court grant certiorari to provide guidance on this issue of exceptional importance in the sentencing of recidivists.

CONCLUSION

For all of these reasons, Mr. Burns respectfully requests that his certiorari petition be granted, and that the decision of th Eleventh Circuit affirming his sentence be reversed.

Respectfully submitted this 26th day of January, 2019.

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