No. _____

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**In the**
**Supreme Court of the United States**
October Term, 2018

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KIRK LASSEND,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

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*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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# PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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## QUESTIONS PRESENTED

1. Whether This Court Should Grant This Petition To Resolve The Circuit Split As To Whether A Crime Which Does Not Require The Actual Use Of Violent Force Can Qualify As A "Violent Felony" Under The ACCA.
2. Whether This Court Should Grant The Petition To Determine Whether Mr. Lassend Can Be Held To Have Committed A "Violent Felony" When The Armed Robbery Statue Allows Convictions Based On Use Of Non-Dangerous Weapons And Also Imposes Strict Accomplice Liability That Does Not Comport With The Purpose Of Imposing An Enhanced ACCA Sentence.

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*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

Kirk Lassend ("petitioner" or "Mr. Lassend") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit that affirmed the judgment of the United States District Court for the District of Massachusetts.

## OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the First Circuit is Appendix A to this petition. The order denying Mr. Lassend's petition for rehearing is attached hereto at Exhibit B. The memorandum and order of the United States District Court of Massachusetts denying Mr. Lassend's 28 U.S.C. § 2255 petition is attached hereto at Exhibit C.

## JURISDICTION

The Judgment of the United States Court of Appeals for the First Circuit was entered on August 2, 2018, and Mr. Lassend's petition for rehearing was denied on October 26, 2018. This

Court has jurisdiction under 28 U.S.C. § 1254(1). The District Court had jurisdiction pursuant to 28 U.S.C. § 2255, and the Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the United States Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 U.S.C. § 924 (e):
(1)
In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title 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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
(2) As used in this subsection—
(A) the term "serious drug offense" means—
(i)
an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
(ii)
an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;
(B) the 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; and
(C)

the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

## STATEMENT OF THE CASE

A. Procedural History[1]

Mr. Lassend filed a petition for habeas relief pursuant to 28 U.S.C. §2255. Included in his claims for relief was a claim that - - pursuant to *Johnson v. United States,* 135 S.Ct. 2551 (2015) ("*Johnson II*") - - his sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), was imposed in violation of the Constitution.

On July 11, 2017, the district court denied Mr. Lassend's habeas claims, including his *Johnson* claims. (Appendix C). On September 7, 2017, Mr. Lassend filed a timely notice of appeal (RA 285), and also filed for a motion for a certificate of appealability. (RA 286-294). On September 11, 2017, the District Court issued a certificate of appealability "as to petitioner's claim that the sentence under the ACCA was imposed in violation of the Constitution." (RA295-296).

On August 2, 2018, the United States Court of Appeals for the First Circuit denied Mr. Lassend's appeal. (Exhibit A). On October 26, 2018, it denied Mr. Lassend's petition for rehearing/rehearing *en banc*. (Exhibit B).

B. Facts Relevant To Resolution Of The Petition

On October 11, 2011, after a jury trial, Mr. Lassend was convicted of being a felon in possession of a firearm and a felon in possession of ammunition. The Probation Department prepared a presentence report ("PSR"). (SRA 1-27). Pursuant to the PSR, paragraph 31, Mr.

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1 Matters contained in the Appendix at the First Circuit will be designated by RA-page number. Matters contained in the Sealed Record Appendix will be designated by SRA-page number.

Lassend was found to be "subject to the Armed Career Criminal provisions as described at 18 U.S.C. § 924(e) and the guidelines at U.S.S.G. § 4B1.4 as: (1) the offense of conviction is a violation of 18 U.S.C. § 922(g); and (2) the defendant has at least three prior convictions for a violent felony or serious drug offense or both, committed on occasions different from one another." (SRA 7). The PSR, paragraph 48, stated that the defendant was subject to the ACC provisions because of offenses specified in paragraphs 38, 39, 40 and 43 of the PSR. These convictions were respectively: New York robbery in the first degree; New York robbery in the first degree; New York assault in the second degree; and Massachusetts assault and battery by dangerous weapon/ assault by dangerous weapon. (SRA 8-11)

Mr. Lassend objected to the conclusion that he was an armed career criminal on the basis that "the residual clause that determines the nature of the predicate offenses that trigger violations of the Act (and the subsequent sentence) is unconstitutionally void for vagueness." (SRA 24). At the sentencing hearing, the district court overruled this objection (RA 52) and found that Mr. Lassend qualified as an armed career criminal. (RA 56). The judgment issued wherein Mr. Lassend was sentenced to 235 months imprisonment to be followed by five years of supervised release. (RA 43-48).

As the district court described in its memorandum and order: ("Memorandum"), Mr. Lassend contends that none of his five prior convictions counted as "predicate offenses under either the force clause or the enumerated offenses clause." (Appendix C). Ultimately, the district court found that the following three convictions qualified as "violent felonies" under the ACCA: (1) a 1997 New York conviction for robbery in the first degree ("robbery conviction"); (2) a 1998 New York conviction for attempted assault in the second degree ("attempted assault conviction") and (3) a 2010 Massachusetts conviction for assault with a dangerous weapon

("ADW conviction"). (ADD. 29-43). In this petition to this Court, Mr. Lassend challenges that the two predicate New York convictions are "violent felonies."

1. Relevant facts concerning the first degree robbery conviction

The Government introduced a "Certificate of Disposition Indictment" from the Clerk of the Supreme Court of the State of New York. (RA 115). According to this Certificate, Mr. Lassend was convicted on September 10, 1997, of robbery in the first degree in violation of N.Y. P.L. § 160.15(4). A conviction under that provision requires: "A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime…(4) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged…."

2. Facts Relevant To Attempted Assault Conviction

The Government also introduced a "Certificate of Disposition Indictment" for the attempted assault conviction from the Clerk of the Supreme Court of the State of New York. (RA 115). Unlike the case with the robbery Certificate, this Certificate did not specify under which subsection of the assault statute, N.Y. P.L § 120.05, Mr. Lassend was convicted. That statute has quite a number of subsections.

The Government then sought leave to introduce other documents related to the attempted assault conviction. It introduced a four count indictment against Mr. Lassend with the second count reciting: "The Grand Jury of the County of the Bronx by this Indictment, accuses the defendant Kirk Lassend of the crime of assault in the second degree committed as follows: The

defendant, Kirk Lassend, on or about March 27, 1997, with intent to cause physical injury to another person, Willie Wells, did cause such injury to Willie Wells, where at the time of the commission of the act, the defendant was confined in a correctional facility pursuant to having been charged with or convicted of a crime." (DE 182, Exhibit 1). The indictment did not list which subdivision of N.Y. P.L. § 120.05 governed the charge.

The Government also introduced the transcript of the plea hearing wherein Mr. Lassend's attorney stated that Mr. Lassend wished to plead guilty to attempted assault pursuant to count two of the indictment. (RA 139-149). During the course of the plea colloquy, the elements of second degree assault were not addressed, nor did Mr. Lassend admit that he was acting intentionally. The New York court even told Mr. Lassend that he was "pleading guilty to a nonviolent felony offense here…" (RA144).

## REASONS FOR GRANTING THE PETITION

This Court should grant Mr. Spencer's petition because two of the predicate offenses which the district court found qualified as "violent felonies" under the ACCA were not in fact "violent felonies" under the force clause of the ACCA and thus his sentence is unconstitutional under the due process clause of the Fifth Amendment as per *Johnson II*. This Court should grant the petition to resolve a circuit split as to whether or not a New York assault conviction - - which requires no showing of an act of violent force - - is a "violent felony." Moreover, the Court should grant the petition to resolve the question whether a New York predicate offense of armed robbery requires proof that the weapon used was a dangerous one and that the individual himself acted intentionally in the use of the dangerous weapon.

### A. This Court Should Grant This Petition To Resolve The Circuit Split As To Whether A Crime Which Does Not Require The Actual Use Of Violent Force Can Qualify As A "Violent Felony" Under The ACCA.

The First Circuit erred in finding that the New York attempted assault conviction under N.Y. P.L § 120.05(7) categorically qualified as a "violent felony." The ACCA requires three previous convictions for a "violent felony or serious drug offense." 18 U.S.C. § 924(e)(1). "Violent felony" is defined, for purposes of Mr. Lassend's case, as one 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). Under section 120.05(7), a person is guilty of second degree assault if (while incarcerated): "with intent to cause physical injury to another person, he causes such injury to such person or to a third person…"

As is clear from the language of the statute, no use of "violent force" is required for a conviction under section 120.05(7). Faced with a statute that does not require a New York prosecutor to prove "violent force," the First Circuit instead found that the statute necessarily meets the "violent force" requirement because "[i]t is hard to imagine how a prisoner could intentionally cause physical harm to someone in prison by, for instance, failing to fulfill a legal duty. And Lassend does not point us to a single New York case in which a conviction under §120.05(7) has been obtained based on nonviolent conduct." *Lassend v. United States*, 898 F.3d 115, 127 (1st Cir. 2018).

The First Circuit's opinion blatantly removes the requirement that the Government bears the burden to show that the elements of the offense categorically amount to "violent force." As this Court recently stated in *Stokeling v. United States*, ---S.Ct. ----2019 WL 189343, *6 (2019) (emphasis in original):

> Our understanding of 'physical force comports with *Johnson v. United States*, 559 U.S. 133 (2010)…There, the Court held that 'actua[l] and intentiona[l] touching'" – the level of force necessary to commit common-law misdemeanor battery – did not require the 'degree of force' necessary to qualify as a 'violent felony' under the ACCA's elements clause….[The Court] 'held that 'physical force means '*violent* force – that is, force capable of causing physical pain or injury to another person.' *Id.* at 140.

In this case, there simply is no requirement under the statute that the defendant used violent force at all; instead, all that is required is intention and injury. In reaching this opinion, the First Circuit downplayed its own decision in *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015). In *Whyte*, the First Circuit examined Connecticut's third-degree assault statute and found that the petitioner had been convicted of Conn. Gen. Stat. 53a-61(a)(1): "With intent to cause physical injury to another person, he causes such injury to such person or to a third person…." *Id.* at 467. That language is indistinguishable from N.Y. Penal Law 120.05(7).

The Court found that the plain language of the Connecticut statute (as here) required only two elements: intent and causing injury. As in *Whyte*, the Government here has not shown that New York requires violent force as an element. *Id.* at 469. The *Whyte* court, *id.*, cited with approval *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) for the proposition that a conviction under a statute requiring only intent and injury could, for example, happen "by 'telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim.'" Contrary to the First Circuit's opinion, a prisoner certainly could cause injury by telling a prisoner to do/not do something knowing that it will result in harm, but not using "force." Conflating causation of injury with use of violent force further fails because it does not recognize that, under New York law, a party can be convicted of second degree assault based on omissions, as opposed to actions - - thus completely negating any argument over whether there was the "use" of force at all and whether

that force is "violent." Under New York law, "criminal liability may be based on an omission to act where there is a legal duty to do so." *People v. Miranda*, 612 N.Y.S.2d 65, 66 (App. Div. 1994). In *People v. Gladden*, 118 Misc.2d 831, 831-32 (Sup. Ct. 1983), for example, the defendant mother was charged under section 120.05(1) - - intending to cause, and causing, serious physical injury - - based on her failure to feed her child. Although the court dismissed the indictment on evidentiary grounds, it confirmed that a parent, upon whom the law imposes "the duty of providing support for the child," can be guilty of assault by "fail[ing] to perform [that] legal duty." *Id.* at 833. *See also United States v. Oliver*, ---Fed.Appx.---, 2018 WL 1547595, *3 (3rd Cir. 2018) (where, under Pennsylvania law, an aggravated assault can be committed by either an act or omission, Government could not establish categorically the use of "physical force.")

Below the Government argued that *United States v. Castleman*, 134 S.Ct. 1408 (2014) somehow undermined the holding in *Whyte*. But the *Whyte* court specifically considered *Castleman* and found that the decision supported its holding that the Connecticut statute could not be found to be an "aggravated felony." *Whyte*, 807 F.3d at 470-471. Moreover, other courts have rejected the same argument. For example, in *United States v. McNeal*, 818 F.3d 141, 156 (4th Cir. 2016), the Fourth Circuit examined its precedent on the issue of "reading in" the use of violent force where none is set forth in the elements.

> In our *Torres-Miguel* decision [*United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012)] in 2012, we further examined what it means for a crime to have as an element the 'use' of physical force. We concluded that a California statute, which prohibited willfully threatening to commit a crime that would result in death or great bodily injury, failed to qualify as a crime of violence under Guidelines section 2L1.2. *See Torres-Miguel*, 701 F.3d at 166. Our ruling rested on the distinction between using physical force and causing bodily injury. We reasoned that 'a crime may *result* in death or serious bodily injury without use of physical force.' *Id.* at 168.

In a footnote, the Fourth Circuit stated: "The government suggests that the Supreme Court decision in *United States v. Castleman*, ---U.S. ---, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014), has abrogated the distinction that we recognized in *Torres-Miguel* between the use of force and the causation of injury. That strikes us as a dubious proposition. Writing for the *Castleman* majority, Justice Sotomayor expressly reserved the question of whether causation of bodily injury 'necessarily entails violent force.' *See* 134 S.Ct. at 1413; *see also id.* at 1414 (emphasizing that Court was not deciding question of whether or not causation of bodily injury 'necessitate[s] violent force, under *Johnson*'s definition of that phrase."). *McNeal*, 818 F.3d at 156, n. 10. *See also United States v. Reid*, 861 F.3d 523, 528 (4th Cir. 2017) ("To be sure, *Castleman* did not construe [the] ACCA's force clause[.]").

It is clear that the circuit courts have come to differing views as to whether intent and injury can "substitute" for the element of "violent force." Interestingly, *Whyte* has been cited as supportive of the (correct) proposition that violent force as required under *Johnson I* and *Stokeling* cannot be established merely by intent and resulting injury. In a dissent in *United States v. Rice*, 813 F.3d 704, 707-08 (8th Cir. 2016) (emphasis added), Judge Kelly stated:

> A number of courts and judges, including a **clear plurality** of the courts of appeals, have concluded that a person may cause physical or bodily injury without using violent force. *Whyte v. Lynch*, 807 F.3d 463, 469–72 (1st Cir.2015) ; *United States v. Torres–Miguel*, 701 F.3d 165, 168–69 (4th Cir.2012) ; *United States v. Villegas–Hernandez*, 468 F.3d 874, 880–82 (5th Cir.2006) ; *United States v. Perez–Vargas*, 414 F.3d 1282, 1286–87 (10th Cir.2005) ; *Chrzanoski v. Ashcroft*, 327 F.3d 188, 196 (2d Cir.2003) ; *United States v. Fischer*, 641 F.3d 1006, 1010–11 (8th Cir.2011) (Colloton, J., concurring); *United States v. Anderson*, 695 F.3d 390, 404–05 (6th Cir.2012) (White, J., concurring). In my view, they are correct."

Given the circuit split on the issue and given that the First Circuit's opinion abrogates Mr. Lassend's Fifth Amendment rights to have his sentence enhanced under the ACCA only if the

New York statute categorically meets the "elements clause" requiring "violent force," this Court should grant Mr. Lassend's petition.

B. This Court Should Grant The Petition To Determine Whether Mr. Lassend Can Be Held To Have Committed A "Violent Felony" When The Armed Robbery Statute Allows Convictions Based On Use Of Non-Dangerous Weapons And Also Imposes Strict Accomplice Liability That Does Not Comport With The Purpose Of Imposing An Enhanced ACCA Sentence.

This Court also should grant Mr. Lassend's petition where the First Circuit' opinion affirming a New York armed robbery conviction as a predicate ACCA offense further can be based on the use of non-violent force and also can be imposed on the basis of strict accomplice liability. N.Y. P.L. § 160.15(4) (emphasis added) states: "A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, *he or another participant* in the crime…(4) *Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm*; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged…."

As an initial matter, as found by the District Court (Exhibit C, p. 15) (internal citation omitted) "[u]nder New York law, the 'forcibly stealing' element can be satisfied by minimal force and therefore does not satisfy the requirements of the force clause. New York courts have held that the 'force' requirement of § 160.15 can be satisfied by bumping the victim, blocking the victim's passage or engaging in a brief tug-of-war." Thus, something more is required to meet the force clause. In its Opinion, the First Circuit acknowledges that "under New York law, an individual can violate §160.15(4) by displaying an item that is not actually a firearm but appears to the victim to be such. There is a New York case suggesting that 'a towel wrapped

around a black object…, a toothbrush held in a pocket….[,] or even a hand consciously concealed in clothing' can satisfy the display element of §160.15(4) 'if under all the circumstances the defendant's conduct could reasonably lead the victim to believe that a gun is being used during the robbery.' *Lassend*, 898 F.3d at 128-29. The Court finds that "what matters…is not whether the defendant's displayed item is actually capable of inflicting physical injury, but rather whether the defendant's actions cause the victim to be in reasonable fear of bodily harm." *Id.* at 129. But the victim's perception cannot change *Johnson I*'s requirement of the use or threatened use of "violent force – that is, force *capable* of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). A hand in a pocket is simply not a "dangerous weapon" capable of inflicting physical pain or injury.

The opinion here also stands in stark contrast to another First Circuit opinion, *United States v. Starks,* 861 F.3d 306 (1st Cir. 2017), where the First Circuit held that Massachusetts armed robbery does not qualify categorically as a violent felony. There, the Court found that a Massachusetts armed robbery conviction could be premised on the defendant carrying a dangerous weapon but never showing it to the victim and thus did not meet the "violent force" definition under the ACCA. *Id.* at 320. *Starks* found that Massachusetts armed robbery did not require proof of a "touching …committed *with a weapon that is designed to produced or used in a way that is capable of producing seriously bodily harm or death*." *Id.* at 323-24, quoting from *United States v. Whindleton*, 797 F.3d 105, 115 (1st Cir. 2015) (emphasis added). A review of New York's jury instructions for NY PL 160.15(4) shows that there is no requirement that the defendant actually display a firearm but only that it "appears" to be one. Thus, in New York, a defendant can be convicted under this subsection from concealing a hand or a toothbrush during the course of a robbery. But because that hand or toothbrush is not capable of producing

"seriously bodily harm or death," Mr. Lassend's conviction under this subsection cannot serve as an ACCA predicate. As the Court stated in *Starks*: "even if most armed robberies are in fact violent, if a conviction can be obtained without proof of violent force, then the offense does not qualify as a violent felony under the ACCA's force clause." *Starks*, 861 F.3d at 815. *See also United States v. Whindleton*, 797 F.3d 105, 114 (2015) (emphasis added) ("As a result, the element of a **dangerous weapon** imports the "violent force" required by *Johnson* into the otherwise overbroad simple assault statute.").

Even if the display of a toothbrush can somehow qualify as "violent force," upholding Mr. Lassend's conviction here does not comport with the Fifth Amendment because a conviction under section 160.15(4) can be premised on strict accomplice liability. Under New York law, "strict liability for an aggravating circumstance attaches to an accomplice, regardless of the latter's intent, knowledge or conduct with respect to the aggravating circumstance." *People v. Gage*, 259 A.D.2d 837, 839, 687 N.Y.S2d 202, 204 (3rd Dept. 1999) (citation omitted). A statute that does not require Mr. Lassend's intent to use physical force cannot serve as a valid ACCA predicate.

As an initial matter, the Opinion states that the ACCA focuses on the "elements" of the predicate offense, *Lassend*, 898 F.3d at 130, and if Congress wanted to exclude accomplice liability, it could have done so. *Id.* at 133. But this assertion flies in the face of *Leocal v. Ashcroft*, 543 U.S. 1 (2004). There, this Court found that a Florida OUI could not count as a violent predicate because "statutes such as Florida's *do not require any mental state with respect to the use of force against another person*, thus reaching individuals who were negligent or less." *Id.* at 13 (emphasis added). Here, the First Circuit's opinion creates a worse situation - -

allowing a violent felony to be predicated on strict liability, not even knowledge or negligence, as it relates to the "mental state with respect to the use of force."

Second, allowing the New York robbery statute to serve as a violent felony predicate subverts a key goal of the ACCA which is "incapacitating repeat violent offenders…*consistently* notwithstanding the peculiarities of state law." *Shepard v. United States*, 544 U.S. 13, 35 (2005) (O'Connor, J., dissenting, joined by Kennedy and Breyer, JJ.) (emphasis in original). The opinion itself acknowledges that - - contrary to New York Law - - under federal law "to prove aiding and abetting the crime of using or carrying a firearm during a crime of violence, the government must prove 'that the defendant actively participated in the underlying [crime] … with advance knowledge that a confederate would use or carry a gun during the crime's commission…" *Lassend*, 898 F.3d at 133 (citing *Rosemund v. United States*, 572 U.S. 65 (2014)). This kind of inconsistency is exactly why the mens rea under *Leocal* is required and strict liability does not suffice.

Requiring an individual intent to employ violent force in the ACCA serves an important purpose. Given "the Act's basic purposes," *Begay v. United States*, 553 U.S. 137, 146 (2008), ACCA's residual clause itself (when it was in effect) was limited to crimes requiring "purposeful, violent, and aggressive conduct" rather than "crimes that impose strict liability, criminalizing conduct in respect to which the offender need not have had any criminal intent at all." *Id.* at 145. Mr. Lassend's "prior record of [first-degree New York robbery], a strict-liability crime, differs from a prior record of violent and aggressive crimes committed intentionally." *Id*. at 148. As the conviction does not require "intentional or purposeful conduct" as to actual or threatened violence, there's "no reason to believe that Congress intended a 15-year mandatory prison term." *Id*. at 146. *See also Stokeling*, 2019 WL 189343, * 13 (Sotomayor, J.,

dissenting) (discussing that the purpose of the ACCA was not to sweep lower-grade offenders into its reach).

In short, Mr. Lassend's robbery conviction cannot serve as an ACCA predicate offense because section 160.15(4) allows defendants to be convicted without the use or display of a firearm or other dangerous weapon capable of producing serious bodily injury or death. Moreover, it cannot stand because a defendant can be convicted without ever having any knowledge or intent of the use of a weapon during the commission of a robbery.

## CONCLUSION

For the reasons set forth above, the petitioner, Kirk Lassend, respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

KIRK LASSEND

By his counsel,

/s/Karen A. Pickett

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