No. 18-_____

In the Supreme Court of the United States

Burgess Massey,

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

PETITION FOR A WRIT OF CERTIORARI

Darrell Fields
Counsel of Record

Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
Tel.: (212) 417-8742
darrell_fields@fd.org

QUESTIONS PRESENTED

1. Whether the New York State offense of robbery in the third degree is a "violent felony" under the elements clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(b)(i), when the least of the acts that may have constituted the offense includes purse snatching.

2. A federal prisoner making a "second or successive" habeas petition, under 28 U.S.C. § 2255, must show that "the claim relies on" a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. Id. § 2244(b)(2)(A). Here, Petitioner argued that his claim, in his successive § 2255 motion, "relie[d] on" the rule of Johnson v. United States, 135 S.Ct. 2551 (2015) -- which invalidated ACCA's "residual clause" as void for vagueness and is retroactive to cases on collateral review -- since his prior robbery conviction indisputably qualified under the residual clause, regardless of whether it also fit under the elements clause. Petitioner thus could not successfully attack his ACCA sentence until Johnson eliminated the residual clause. The Court of Appeals held, however, that petitioner's challenge to his prior New York robbery conviction could not possibly rely on Johnson because the district court's finding that New York robbery was an ACCA predicate had rested on the "elements" clause, not the residual clause.

The question presented is:

Whether, on a second or successive § 2255 motion, the movant's claim relies on Johnson's invalidation of the residual clause when the original sentencing court rested its ACCA-finding on the elements clause rather than the residual clause.

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JURISDICTION

The Second Circuit filed its opinion, affirming the district court's denial of petitioner's § 2255 motion, on July 11, 2018. Petitioner filed a timely petition for rehearing and for rehearing en banc, which the court denied on October 4, 2018. On December 19, 2018, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including February 1, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V provides, in relevant part:

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

18 U.S.C. § 924(e)(1), known as the Armed Career Criminal Act ("ACCA"), states:

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

18 U.S.C. § 924(e)(2)(B) defines an ACCA "violent felony" in two subsections, stating:

> (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; 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 [.]

28 U.S.C. § 2255 states, in relevant part:

> **(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.
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> * * *
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> **(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 --
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> (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
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> (2) a new rule of constitutional law,

made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2244 states:

> (a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.
>
> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;....
>
> * * *
>
> (4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

N.Y. Penal Law § 160.00, defining robbery in New York, 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
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> 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. Penal Law § 160.05, third-degree New York robbery, provides:

> A person is guilty of robbery in the third degree when he forcibly steals property.

STATEMENT OF THE CASE

I. The Armed Career Criminal Act

A person convicted of possessing a firearm after a prior felony conviction, in violation of 18 U.S.C. § 922(g)(1), faces a statutory sentencing range of 0 to 10 years. See 18 U.S.C. § 924(a)(2). But the Armed Career Criminal Act ("ACCA") increases that sentence to a minimum of 15 years in prison, and to a maximum of life in prison, if the person "has three previous convictions" for a "violent felony" offense. 18 U.S.C. § 924(e)(1).

As relevant here, ACCA defines a "violent felony" as "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; 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)(i)-(ii).

Clause (i) is known as the "elements" clause (or force clause) because it requires the predicate offense to have "as an element the use, attempted use, or threatened use of physical force against the person of another." In clause (ii), the first part is known as the "enumerated crimes" clause, because it enumerates certain generic crimes -- i.e., any crime that "is burglary, arson, or extortion, [or] involves the use of explosives" -- that Congress sought to cover. The final part of clause (ii), known as the "residual clause," offered a catchall definition sweeping in any other crimes that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(i)-(ii); see Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

In June 2015, however, this Court struck down ACCA's residual clause as unconstitutionally vague. Johnson v. United States, 135 S.Ct. 2551, 2563 (2015). The result is that, as of that date, the elements clause and the enumerated crimes clause became the only channels by which a prior conviction could qualify as an ACCA "violent felony." And this Court held that Johnson applies retroactively to cases on collateral review. Welch, 136 S. Ct. at

1265.

To determine whether a conviction qualifies as a violent felony, courts apply a method called the "categorical approach" that requires courts to evaluate a prior state conviction "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." United States v. Stitt, 139 S.Ct. 399, 405 (2018) (quoting Begay v. United States, 553 U.S. 137, 141 (2008)).[1] This inquiry requires a two-step analysis. First, a court must identify the "elements of the statute forming the basis of the defendant's conviction." Descamps v. United States, 133 S.Ct. 2276, 2281 (2013). Second, a court compares the least culpable conduct necessary for a state conviction with the conduct that constitutes a "violent felony" under ACCA. 18 U.S.C. § 924(e)(2)(B). If the state statute "sweeps more broadly" -- i.e., it punishes activity that the federal statute does not encompass -- then the state crime cannot count as a predicate "violent felony" for ACCA's fifteen-year mandatory minimum. Descamps, 133 S.Ct. at 2283.

II. The relevant facts

After a jury trial in the Southern District of New York (in

[1] The modified categorical approach, see, e.g., Mathis v. United States, 136 S.Ct. 2243, 2249 (2016), does not apply here. Petitioner's 1987 New York State conviction for third-degree robbery arises under an indivisible statute, rendering the modified categorical approach inapplicable. See N.Y. Penal Law § 16-0.05; Descamps, 133 S.Ct. At 2282.

March 2004), petitioner was convicted of possessing a firearm after a conviction for a felony, in violation of 18 U.S.C. § 922(g)(1). At the sentencing (in August 2005), the district court found he was subject to ACCA because of three prior New York felony convictions; one each for robbery in the third degree, N.Y. Penal Law § 160.05; second-degree assault, id. § 120.05; and second-degree attempted assault, id. §§ 110.00 and 120.05. The district court found that all three offenses "involve the use or attempted use of force" and were therefore predicate offenses under ACCA. Until 2015, however, petitioner's robbery conviction would also come within the residual clause. See, e.g., United States v. Thrower, 585 F.3d 70, 73-75 (2d Cir. 2009) (per curiam) (even the New York offense of grand larceny in the fourth degree, defined as stealing property from the person of another, without any requirement that violence or force be used or threatened, qualified under ACCA's residual clause).

Petitioner was sentenced to 235 months' imprisonment, which was the bottom of the Guidelines sentencing range of 235 to 293 months.

On the direct appeal, the Second Circuit affirmed, concluding that "the district court properly relied on the statutory elements of Massey's prior convictions in finding he had committed three prior violent felonies." United States v. Massey, 461 F.3d 177, 179 (2d Cir. 2006).

After the Supreme Court denied his petition for a writ of certiorari (in 2007),[2] petitioner filed his first motion for relief pursuant to 28 U.S.C. § 2255.[3] The District Court denied his motion and did not issue a certificate of appealability, finding that his three prior offenses "all qualify as violent felonies for purposes of an ACCA sentence enhancement."[4]

Following the Court's 2015 decision in Johnson v. United States, 135 S. Ct. 2551 (2015) ("2015 Johnson"), striking down the residual clause, petitioner sought to vacate his ACCA sentence under 28 U.S.C. § 2255. He argued that, because 2015 Johnson invalidated ACCA's residual clause, and because robbery is not an offense enumerated in ACCA's text, only ACCA's elements clause remains as a lawful basis for a finding that the prior robbery to be an ACCA predicate. And third-degree New York robbery, petitioner argued, does not categorically require the "**violent** force" that the force clause of ACCA demands. See Johnson v. United States, 559 U.S. 133, 140 (2010) (emphasis in original).

Because of petitioner's prior § 2255 motion (filed in 2008), he was required by statute to seek permission from the Second Circuit before filing another one. 28 U.S.C. § 2255(h)(2). In April

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[2] Massey v. United States, 549 U.S. 1136 (2007).

[3] Massey v. United States, 2009 WL 1285991 (S.D.N.Y. Apr. 23, 2009)

[4] Id. at *3.

2016, he filed a motion in the Second Circuit for permission to file a second or successive motion on the grounds that, after 2015 Johnson, at least one, if not all three, of the predicate convictions no longer a qualifying predicate for an enhanced sentence under ACCA. The Circuit granted petitioner permission to file the second or successive § 2255 motion based on Johnson.

The district court denied petitioner's § 2255 motion on the merits, concluding that third-degree New York robbery was an ACCA predicate under the elements clause.

But it rejected the Government's argument that the petition was procedurally defective under the gatekeeping provisions for second or successive habeas motions under 28 U.S.C. § 2255(h)(2). The Government asserted that the petition relied not on 2015 Johnson, but on another case of the same name, Johnson v. United States, 559 U.S. 133 (2010) ("2010 Johnson"), which involved the statutory interpretation of ACCA's definition of physical force under the elements clause, rather than a constitutional error.

The district court -- the same judge who sentenced petitioner in 2005 -- stated it had based its ACCA determination on the elements clause, not the residual clause. But the court concluded that the petition nevertheless "'relies on' Johnson [2015], at least in part, because Johnson [2015] precludes any argument that Massey's sentence was proper under the ACCA's residual clause." 2015 Johnson, the district court noted, "at least narrowed the

possible grounds for enhancing Massey's sentence to the ACCA's 'force' clause."[5]

But, as noted, the district court ruled against petitioner on the merits. It then granted a certificate of appealability on whether "New York third-degree robbery" is a violent felony under ACCA. Petitioner appealed.[6]

On the appeal from the district court's denial of his § 2255 motion, petitioner argued that his New York robbery conviction did not meet ACCA's elements clause because the force sufficient to commit New York robbery falls short of the "physical force" necessary to satisfy ACCA under 2010 Johnson. On the procedural issue, of whether he presented a claim that relied on 2015 Johnson, petitioner contended that the district court had correctly concluded that the § 2255 motion necessarily relied on both Johnson decisions, from 2015 and 2010. The claim in the § 2255 motion, petitioner noted, is that he was erroneously subjected to ACCA's enhanced sentencing penalty because he does not have the requisite three prior convictions that meet ACCA's definition of "violent felony." But to succeed on the § 2255 motion, he had to show that his prior robbery conviction does not meet any one of ACCA's three violent-felony definitions: i.e., that it does not fit either the

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[5] Id.

[6] See 28 U.S.C. § 2253(c)(1)-(3)(requiring a certificate of appealability for an appeal to "be taken to the court of appeals" and that the certificate indicate the specific issues for appeal).

elements clause, or the enumerated crimes, or the residual clauses. And before the 2015 decision in Johnson, his prior robbery conviction would have qualified under ACCA's residual clause, regardless of whether the offense came within the elements clause.

The panel (Wesley, Chin, CJJ., Furman, DJ.) affirmed, concluding that the § 2255 motion did not rely on 2015 Johnson, because petitioner could not show that the court that sentenced him "relied on" or may have relied on the residual clause in deciding that the robbery conviction was an ACCA predicate. Massey, 895 F.3d at 251-53 & n.10. Thus, the panel concluded, petitioner did not meet the threshold gatekeeping requirements for second or successive § 2255 motions.

The panel joined other circuits that read into the governing statute a requirement that the movant show that the original sentencing court "relied on" or may have relied on the residual clause in its ACCA finding. Massey, 895 F.3d at 252-53 & n.10 (citing United States v. Geozos, 870 F.3d 890, 895 (9th Cir. 2017) (where record is unclear about whether the sentencing court had relied on the residual clause, "but it may have" done so, so the petition could proceed to a merits ruling); Dimott v. United States, 881 F.3d 232, 236 (1st Cir. 2018) (successive petitions barred because the movants were "sentenced under the ACCA's enumerated [offense] clause, not the residual clause")).

The panel also indicated that "robbery under New York law is

a crime of violence under the ACCA's force clause." Massey, 895 F.3d at 251 n.6 (stating that the vacatur of a 2016 Second Circuit decision -- that had found that New York robbery was not a "crime of violence" under the elements clause of U.S.S.G. § 4B1.2(a)(2) -- "reinstate[d]" the Circuit's prior law that New York robbery was an ACCA predicate).[7] And the Second Circuit subsequently held that New York's baseline definition of robbery (i.e., forcible stealing) satisfies ACCA's elements clause. United States v. Thrower, No. 17-445-pr, __F.3d__, 2019 WL 385652 (2d Cir. Jan. 31, 2019).[8]

The Second Circuit denied rehearing and rehearing en banc. Pet. App. 13.

REASONS FOR GRANTING THE WRIT

Introduction

1. In Stokeling v. United States, 139 S. Ct. 544 (2019), this Court recently explained that "the term 'physical force'" in ACCA is the degree of force necessary to commit "common-law robbery,"

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[7] Although the panel stated it was deciding the case solely on procedural grounds, id. at 253 n.11, it nevertheless ruled that its prior law holding that New York robbery was an ACCA predicate had been reinstated. Id. at 251 n.6. And it subsequently, in another case, restated that the prior case law holding that New York robbery was a crime of violence under the elements clause had been "reinstated." United States v. Pereira-Gomez, 903 F.3d 155, 165 n.45, 166 (2d Cir. 2018) (New York attempted second-degree robbery is a "crime of violence" under the elements clause of the illegal reentry Guideline in the 2014 Guidelines Manual).

[8] Thrower was submitted to the Circuit the day before the oral argument in petitioner's case and the panel included the two circuit judges who decided petitioner's appeal.

which encompasses robbery offenses that "require the criminal to overcome the victim's resistance." Id. at 550, 555. But the Court indicated that robbery offenses "encompassing something less [than force that overcomes a victim's resistance], such as purse snatching," do not rise to the ACCA-level of physical force. Id. at 552, 554-55 (noting that under the Florida statute "[m]ere snatching of property from another will not suffice" and Florida has "enacted a separate sudden snatching" statute not requiring proof of force or victim resistance) (citations and internal quotation marks omitted).

The First Circuit has held that, under New York's robbery statute, there is a realistic probability that "the least of the acts that may have constituted that offense included purse snatching, per se." United States v. Steed, 879 F.3d 440 (1st Cir. 2018). Thus, the First Circuit held, the New York offense of attempted robbery in the second degree, N.Y. Penal Law §§ 110.00/160.10, is not a crime of violence under the elements clause of the career offender guideline, U.S.S.G. § 4B1.2(a)(2), which is materially identical to ACCA's elements clause.

The First Circuit's decision conflicts with the Sixth Circuit. See Perez v. United States, 885 F.3d 984, 986 (6th Cir. 2018) (holding that New York second-degree robbery, N.Y. Penal Law § 160.10(1), is a violent felony under the elements clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(i)). And the Sixth Circuit

acknowledged the split with First Circuit. Id. at 990.

The First Circuit is also in conflict with the Second Circuit. Massey, 895 F.3d at 251 n.6 ("robbery under New York law is a crime of violence under the ACCA's force clause"); United States v. Thrower, No. 17-445-pr, __F.3d__, 2019 WL 385652 (2d Cir. Jan. 31, 2019) (New York robbery is an ACCA predicate); United States v. Pereira-Gomez, 903 F.3d 155, 166 (2d Cir. 2018) (New York attempted robbery in the second degree is a "crime of violence" under the identically worded elements clause of the illegal reentry Guideline of the 2014 Sentencing Guidelines).

This conflict among the circuits, on an important, recurring question of federal statutory interpretation, warrants the Court's review. New York robbery is a common predicate for enhanced punishment, and uncertainty regarding the correct answer to the question presented has resulted in disparate treatment of identically-situated federal prisoners. On the merits, New York robbery is not a crime of violence or a violent felony. As the First Circuit reasoned, New York's definition of forcible stealing, see N.Y. Penal Law § 160.00, encompasses a "purse snatching" that is just sufficient to produce awareness in the victim. Stead, 879 F.3d at 449.

2. In addition, the plain language of § 2244(b)(2)(A), the statute governing second or successive § 2255 motions, is addressed to what petitioner's "claim relies on," thus requiring only a

showing that the movant's "claim relies on" the new constitutional rule. And here, petitioner's § 2255 motion "'relie[d] on'" 2015 Johnson, at least in part, since, until then, any New York robbery conviction was indisputably a valid ACCA predicate under the residual clause. The Second Circuit, however, reads into the statute a requirement of a showing that the original sentencing court "relied on" the residual clause. It followed other circuits that similarly imposed on movants the burden to show that the sentencing court relied on the residual clause in its ACCA finding. The Court should grant certiorari and require the courts of appeals to adhere to the plain language of the statute governing second or successive § 2255 motions.

I. The First, Second, and Sixth Circuits have split on the question whether New York robbery satisfies the elements clause.

As noted, in Stokeling v. United States, 139 S. Ct. 544 (2019), the Court recently explained that "the term 'physical force'" in ACCA is the degree of force necessary to commit "common-law robbery," which is force that overcomes the victim resistance. Id. at 550. However, robbery offenses "encompassing something less, such as purse snatching," do not rise to the ACCA level of physical force. Id. at 552.

In Stokeling, the Solicitor General acknowledged that there are jurisdictions that define non-aggravated robbery to permit a conviction based on force that is less than that required to

overcome resistance, "such as purse snatching." Id. at 552 (the government stated that "2 states and the District of Columbia" had such robbery statutes). Furthermore, in analyzing Florida's robbery statute, Stokeling noted that "[m]ere snatching of property from another will not suffice" for a robbery under Florida law. Id. at 555 (citation and internal quotation marks omitted); see id. ("a defendant who merely snatches money from the victim's hand and runs away has not committed robbery" in Florida.). So in Florida, "a defendant who steals a gold chain does not use force, within the meaning of the robbery statute, simply because the victim 'fe[els] his fingers on the back of her neck.'" Id. at 555 (citation omitted). And the Court found it noteworthy that, "in 1999, Florida enacted a separate 'sudden snatching' statute" under which it is unnecessary to show either that the defendant used any force "beyond that effort necessary to obtain possession of the money or other property" or that "[t]here was any resistance by the victim[.]" Id. (citing Fla. Stat. § 812.131 (1999)).

In Steed, the First Circuit concluded that New York's definition of forcible stealing, see N.Y. Penal Law § 160.00, encompasses a "purse snatching" just sufficient to produce awareness in the victim. See 879 F.3d at 449. Thus, it held that a New York State conviction for attempted second-degree robbery, N.Y. Penal Law §§ 110.00/160.10(2)(a), is not a crime of violence under the elements clause of the career offender guideline, §

4B1.2(a)(1). 879 F.3d at 450–51.[9]

The level of force required for New York robbery, Steed explained, had been held insufficient to meet the elements clause in United States v. Mulkern, 854 F.3d 87 (1st Cir. 2017). Consequently, Steed concluded, "[A]s we read the relevant New York precedents, there is a realistic probability that Steed's conviction was for attempting to commit an offense for which the least of the acts that may have constituted that offense included 'purse snatching, per se.'" Stead, 879 F.3d at 450 (quoting People v. Santiago, 62 A.D.2d 572, 579 (2d Dep't 1978), aff'd, 48 N.Y.2d 1023 (1980)). Because "such conduct falls outside the scope" of the elements clause, "we cannot say that, under the categorical approach, Steed's conviction was for an offense that the force clause of the career offender guideline's definition of a 'crime of violence' encompasses." Steed, 879 F.3d at 450–51.

The First Circuit's decision conflicts with the Sixth Circuit, which expressly disagreed with Steed. Perez, 885 F.3d at 986, 989-

[9] Steed relied on First Circuit precedent interpreting the elements clauses of the Guidelines and the ACCA interchangeably, due to their identical language. See 879 F.3d at 446 (citing United States v. Hart, 674 F.3d 33, 41 n.5 (1st Cir. 2012)). This approach is standard. See, e.g., James v. United States, 550 U.S. 192, 206 (2007) (explaining that "the Sentencing Guidelines' ... definition of a predicate 'crime of violence' closely tracks ACCA's definition of 'violent felony'"); see also, e.g., United States v. Reyes, 691 F.3d 453, 458 & n.1 (2d Cir. 2012); United States v. Montes-Flores, 736 F.3d 357, 363 (4th Cir. 2012); United States v. Mata, 869 F.3d 640, 644 (8th Cir. 2017) (all interpreting elements clauses interchangeably).

90. The Sixth Circuit held that a prior New York State conviction for second-degree robbery, § 160.10(1), is a violent felony under ACCA's elements clause. Id., 885 F.3d at 986.

Steed also conflicts with the Second Circuit, which has held that robbery under New York law meets ACCA's elements clause. Massey, 895 F.3d at 251 n.6 ("robbery under New York law is a crime of violence under the ACCA's force clause"); United States v. Thrower, No. 17-445-pr, __F.3d__, 2019 WL 385652 (2d Cir. Jan. 31, 2019) (New York robbery is an ACCA predicate). Accordingly, the writ of certiorari should be granted to resolve this important and continuing split.

II. The court of appeals misconstrued the statute governing second or successive § 2255 motions.

Section 2255 requires that a second or successive motion "contain . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). And the "claim presented in a second or successive application" must also satisfy the requirements of 28 U.S.C. § 2244. Id. § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application . . . unless the applicant shows that the claim satisfies the requirements of this section"). The plain language of the governing provision of § 2244 -- § 2244(b)(2)(A) -- is addressed to what the petitioner's § 2255 "claim relies on," not on what the district court relied on at sentencing. See 28 U.S.C.

§ 2244(b)(2)(A). The statute provides:

> (2) A **claim presented** in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --
>
> (A) the applicant shows that the **claim relies on** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2244(b)(2) (emphasis added).

Section 2244(b)(2)(A), therefore, does not require the petitioner to show what the sentencing court's ruling relied on. It requires only that the petitioner's "the claim rel[y] on" a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. 28 U.S.C. § 2244(b)(2)(A).

Under the plain language of § 2244(b)(2)(A), petitioner's § 2255 motion necessarily relies on both Johnson decisions, the decisions in 2015 and 2010. His claim is that he was erroneously subjected to ACCA's enhanced sentencing penalty because he does not have three prior convictions that meet ACCA's definition of "violent felony." To succeed on his § 2255 motion, he has to show that his prior New York robbery conviction does not come within any of ACCA's three definitions of a "violent felony"; he has to show it does not fit either the elements, or the enumerated crimes, or the now-invalidated residual clauses of ACCA. See 18 U.S.C. § 924(e)(2)(B)(i)-(ii). Robbery is not one of ACCA's enumerated

crime. Id.,(e)(2)(B)(ii). But before 2015, the robbery conviction would have qualified under the residual clause, regardless of whether it fit the elements clause. Until 2015 Johnson, even the New York offense of grand larceny in the fourth degree -- defined as stealing property from the person of another, without any requirement that violence or force be used or threatened -- qualified under ACCA's residual clause. United States v. Thrower, 585 F.3d 70, 73-75 (2d Cir. 2009) (per curiam). Larceny from the person was a violent felony, under the residual clause, "notwithstanding the fact that some conduct that is neither violent nor aggressive -- such as pickpocketing -- would surely be covered by the statute." United States v. Johnson, 616 F.3d 85, 91 (2d Cir. 2010) (citing N.Y. Penal Law § 155.30(5), grand larceny in the fourth degree).

So until the Court invalidated the residual clause in 2015, petitioner could not claim his ACCA sentence was invalid. The prior robbery conviction -- even if it did not qualify under the elements clause -- did qualify under the residual clause. See Thrower, 585 F.3d at 72 ("A crime may qualify as a violent felony even if it does not have an element of physical force against another person as described in clause (i), or is not one of the enumerated offenses detailed in clause (ii)" of § 924(e)(2)(B)).

Therefore, the panel's requirement that petitioner demonstrate that the district court "relied on" on the residual clause in its

ACCA finding is contrary to the plain language of the statute governing second or successive § 2255 motions. Other circuits have similarly required second-or-successive § 2255 petitioners to show that the district court either relied or may have relied on the residual clause in the ACCA finding.[10] Thus, the courts of appeal have "decided an important question of federal law that has not been but should be settled by this Court." Sup. Ct. R. 10(c). The Court should grant the writ.

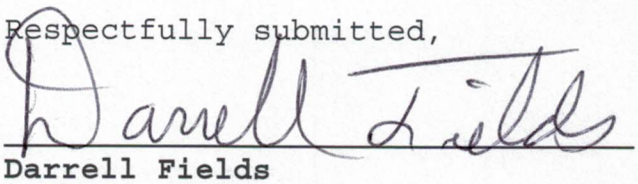
[10] The panel cited several circuits that required a habeas petitioner to show either that the sentencing court actually "relied on" or may have relied on the residual clause. Massey, 895 F.3d at 252-53 & n.10. The cited cases were as follows: Dimott v. United States, 881 F.3d 232, 236 (1st Cir. 2018) (movants have burden to show they were sentenced solely pursuant to the residual clause when the sentencing court does not specify); Beeman v. United States, 871 F.3d 1215, 1221–22 (11th Cir. 2017) (same); United States v. Taylor, 873 F.3d 476, 480–82 (5th Cir. 2017) (a movant's § 2255 claim relies on the 2015 Johnson decision if the sentencing court did not specify which ACCA clause it invoked); United States v. Winston, 850 F.3d 677, 682 (4th Cir 2017) (same); United States v. Geozos, 870 F.3d 890, 895, 896 (9th Cir. 2017) (same); United States v. Snyder, 871 F.3d 1122, 1128–30 (10th Cir. 2017) (where the district court did not specify which clause was invoked, the court could look to the "relevant background legal environment" to determine which clause the ACCA determination relied upon).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: New York, New York
February 1, 2019

Respectfully submitted,



Darrell Fields
Counsel of Record

Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, NY 10007
Tel.: (212) 417-8742
Darrell_Fields@fd.org