No. 18–_____

In the
Supreme Court of the United States

Tajie Coleman,

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

Daniel Habib
Counsel of Record
Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
daniel_habib@fd.org
(212) 417–8742

Counsel for Petitioner

QUESTION PRESENTED

Whether the New York State offense of robbery "has, as an element the use, attempted use, or threatened use of physical force against the person of another," as required to satisfy the elements clause of the Armed Career Criminal Act, 18 U.S.C. §924(e)(2)(B)(i), a question that divides the circuits.

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OPINIONS AND ORDERS BELOW

The summary order of the United States Court of Appeals for the Second Circuit is reported at 748 F. App'x 403 and appears at Pet. App. 1a–3a. The memorandum decision and order of the United States District Court for the Southern District of New York appears at 2017 WL 2271529 and Pet. App. 4a–8a.

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §2255 and denied relief on May 3, 2017. The Court of Appeals had jurisdiction under 28 U.S.C. §§1291 and 2253 and affirmed on January 18, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The **Fifth Amendment** provides, in relevant part:

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

The Armed Career Criminal Act, **18 U.S.C. §924(e)**, provides, in relevant part:

> (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 ... committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years. ...
>
> (2) As used in this subsection— ...
>
> > (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.

N.Y. Penal Law §110.00 provides:

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

N.Y. Penal Law §160.00 provides:

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or

2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. Penal Law §160.05 provides, in relevant part:

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

N.Y. Penal Law §160.10 provides, in relevant part:

A person is guilty of robbery in the second degree when he forcibly steals property and when:

1. He is aided by another person actually present; or

2. In the course of the commission of the crime or of the immediate flight therefrom, he or another participant in the crime:

(a) Causes physical injury to any person who is not a participant in the crime.

STATEMENT OF THE CASE

This petition presents a clean opportunity to resolve a 4–1 circuit split on an important, recurring question of federal criminal law: Whether the New York State offense of robbery satisfies the elements clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e)(2)(B)(i). The Second, Fourth, Sixth, and Eighth Circuits

say yes; the First Circuit says no. *Compare United States v. Thrower*, 914 F.3d 770 (CA2 2019); *United States v. Hammond*, 912 F.3d 658 (CA4 2019); *Perez v. United States*, 885 F.3d 984 (CA6 2018); and *United States v. Williams*, 899 F.3d 659 (CA8 2018) *with United States v. Steed*, 879 F.3d 440 (CA1 2018).

The minority view is correct. ACCA's elements clause defines a "violent felony" as "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." §924(e)(2)(B)(i). In this context, "'physical force' means '*violent* force—that is, force capable of causing physical pain or injury to another person.'" *Stokeling v. United States*, ___ U.S. ___, ___ (2019) (slip op., at 9) (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*2010 Johnson*")). But New York robbery encompasses such nonviolent conduct as forming a "human wall" or other passive obstruction to block a victim from pursuing a pickpocket, *People v. Bennett*, 631 N.Y.S.2d 834, 834 (App. Div. 1995); or "'purse snatching, per se,'" *Steed*, 879 F.3d, at 450 (quoting *People v. Santiago*, 405 N.Y.S.2d 752, 757 (App. Div. 1978)). Such conduct was not robbery at common law, and it does not provoke the "physical confrontation and struggle" between victim and thief that creates the "potentiality" for injury necessary to satisfy the elements clause. *Stokeling*, ___ U.S., at ___, ___ (slip op., at 9, 11).

This circuit split would not benefit from further percolation in light of *Stokeling*. The Florida State robbery offense at issue there required "'resistance by the victim that is overcome by the physical force of the offender,'" and could not be

committed by "[m]ere 'snatching of property from another.'" *Id.*, at ___ (slip op., at 12) (quoting *Robinson v. State*, 692 So. 2d 883, 886 (1997)). This Court therefore held only that "the amount of force necessary to overcome a victim's resistance" satisfies ACCA's elements clause. *Id.*, at ___ (slip op., at 13). But the physical force required to commit New York robbery is categorically less severe, in three ways. First, force need not be used to *overcome* resistance, merely to *prevent* resistance. Second, force need not be used to overcome or prevent resistance to the *taking* of property, just to the *retention* of property after the taking. And third, force need not *suffice* to achieve any of these objectives, but need only be employed *for these purposes*. *See* N.Y. Penal Law §160.00(1) ("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 ... [p]reventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking."). Consequently, *Stokeling* does not undermine *Steed*, the split will persist, and the petition should be granted.

1. Petitioner pleaded guilty in the United States District Court for the Southern District of New York to possessing a firearm following a felony conviction, in violation of 18 U.S.C. §922(g)(1). Pet. App. 4a. This offense has a statutory sentencing range of 0–10 years, *see* 18 U.S.C. §924(a)(2), but ACCA increases the range to 15 years to life if a defendant has at least three prior "violent felony" convictions, *see* 18 U.S.C. §924(e)(1). The District Court (Daniels, J.), concluded that petitioner had three (and only three) such convictions, namely, New York State

convictions for attempted second-degree robbery, N.Y. Penal Law §§110.00 and 160.10; third-degree robbery, *id.* §160.05; and attempted third-degree robbery, *id.* §§110.00 and 160.05. Pet App. 4a. Petitioner sustained all three as a teenager, and all arose from unarmed chain snatchings that caused no injury to anyone. Brief for Appellant in No. 17–2189 (CA2 Dec. 22, 2017), Dkt. No. 23, pp. 13–14. The District Court sentenced petitioner to the mandatory minimum of 15 years. Pet. App. 4a.

2. Following *Johnson v. United States*, 576 U.S. ___ (2015), which invalidated ACCA's residual clause, 18 U.S.C. §924(e)(2)(B)(ii), as void for vagueness, petitioner timely moved for relief pursuant to 28 U.S.C. §2255. He argued that with the residual clause stricken, his robbery convictions no longer qualified as violent felonies, because none involved the use of "physical force," §924(e)(2)(B)(i), as *2010 Johnson* had interpreted that term. Pet. App. 6a. The District Court denied the motion, adhering to *United States v. Brown*, 52 F.3d 415, 425–26 (CA2 1995), which had held, pre-*2010 Johnson*, that New York attempted third-degree robbery (and, necessarily, completed and higher-degree robberies as well) satisfied the elements clause. Pet. App. 7a–8a.[1]

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[1] *Brown* reached this conclusion based on the statutory text of N.Y. Penal Law §160.00, just discussed, which "defines robbery as 'forcible stealing.'" *United States v. Brown*, 52 F.3d 415, 425 (CA2 1995). All New York robbery offenses share this element. *See United States v. Hammond*, 912 F.3d 658, 662 (CA4 2019) (citing *People v. Miller*, 87 N.Y.2d 211, 214 (1995)). Consequently, *Brown*'s holding applies to all of them. And, as explained below, although the decisions in this circuit split concern different New York robbery offenses, all turn, as *Brown* did, on §160.00's "forcible stealing" element. *See United States v. Steed*, 879 F.3d 440, 445–46, 450 (CA1 2018); *United States v. Thrower*, 914 F.3d 770, 775 (CA2 2019); *Hammond*, 912 F.3d, at 662; *Perez v. United States*, 885 F.3d 984, 988 (CA6 2018); *United States v. Williams*, 899 F.3d 659, 663 (CA8 2018).

3. The Second Circuit (Katzmann, C.J., Kearse, J., and Meyer (D Conn.) (by designation)) affirmed, relying on its then-recent decision in *United States v. Pereira-Gomez*, 903 F.3d 155 (CA2 2018), which had held that all degrees of New York robbery and attempted robbery qualify as crimes of violence under the elements clause of a provision of the United States Sentencing Guidelines, U.S.S.G. §2L1.2 cmt. n.1(B)(iii) (Nov. 2014). Pet. App. 2a–3a. The Court of Appeals reasoned that *Pereira-Gomez* controlled because "[t]hat Guideline and ACCA use identical language to describe the violence component." Pet. App. 2a (comparing §§2L1.2 cmt. n.1(B)(iii) and 924(e)(2)(B)(i)). Subsequently, a different Second Circuit panel extended *Pereira-Gomez* to ACCA in a published opinion, holding that first-degree, third-degree, and attempted third-degree robbery (and, again, all other robbery offenses, *see ante*, n.1) qualify as violent felonies under §924(e)(2)(B)(i)'s elements clause. *Thrower*, 914 F.3d, at 774–76.

REASONS FOR GRANTING THE WRIT

The circuits have split 4–1 on the question whether New York robbery satisfies the elements clause. Several decisions have acknowledged the split. *See Hammond*, 912 F.3d, at 663 n.2; *Williams*, 899 F.3d, at 664 n.3; *Perez*, 885 F.3d, at 990. This square conflict, on an important, recurring question of federal criminal law that affects numerous sentences each year, warrants review. This petition is a clean vehicle. Both courts below addressed the merits, and because petitioner has no other potential ACCA predicates, the lawfulness of his 15-year sentence turns on the answer. On the merits, New York robbery is not a violent felony. The offense

encompasses nonviolent conduct (blocking, snatching) that would not have been robbery at common law and is not "capable of causing physical pain or injury." *2010 Johnson*, 559 U.S., at 140. *Stokeling* will not prompt the First Circuit to revisit *Steed*. *Stokeling* turned on Florida robbery's overcoming-resistance element, an element missing from the New York offense.

I. This Petition Offers A Clean Vehicle To Resolve A 4–1 Circuit Split.

A. The circuits have split on the question whether New York robbery satisfies the elements clause. The Second, Fourth, Sixth, and Eighth Circuits have held that it does; the First Circuit has held that it does not. Although the relevant decisions arise under both ACCA and the Sentencing Guidelines, and concern different provisions of New York's robbery statutes, all address the same substantive question: Does New York's baseline definition of robbery—using or threatening the immediate use of physical force for the purpose of preventing or overcoming resistance to the taking or retention of property, §160.00—have as an element the use or threatened use of violent physical force?

1. In *Thrower*, the Second Circuit held that "the New York offense of robbery in the third degree, which like every degree of robbery in New York requires the common element of 'forcible stealing,' is a 'violent felony' under ACCA." 914 F.3d, at 776. *Thrower* explained that §160.00's "plain language" "matches the ACCA definition of a 'violent felony'" because both provisions require the use or threatened use of "'physical force.'" *Thrower*, 914 F.3d, at 775. Additionally, "like ACCA's force clause," §160.00 "is modeled on the common law definition of robbery,"

which encompasses "'the amount of force necessary to overcome a victim's resistance.'" *Ibid.* (quoting *Stokeling*, slip op., at 13). Rejecting the argument that "New York courts interpret the force required for New York robbery as less than that required under ACCA," *Thrower* determined, as relevant, that "the act of blocking" a victim's pursuit of a thief is "a form of overcoming the victim's resistance, as well as "'a threat that pursuit would lead to violent confrontation.'" *Ibid.* & n.4 (quoting *Pereira-Gomez*, 903 F.3d, at 166).

In *Hammond*, the Fourth Circuit held that "New York statutory robbery, irrespective of the degree of the offense, is a crime of violence" under U.S.S.G. §4B1.2(a)(1)'s elements clause. 912 F.3d, at 660.[2] Reading §160.00 in light of the common-law definition of robbery, *Hammond* concluded that "the plain language of the New York robbery statutes suggests that the use or threat of violent physical force is required for all degrees of the offense." *Id.*, at 662–63. Moreover, *Hammond* observed that "New York courts have interpreted 'forcible stealing' to require 'significantly more [force] than mere unwanted physical contact,'" and had "consistently ... reversed robbery convictions when the taking at issue was committed without the use or threat of significant physical force." *Id.*, at 663

[2] *Hammond* noted that the elements clauses of §§4B1.2(a)(1) and 924(e)(2)(B)(i) are "identically-worded." 912 F.3d, at 662. For this reason, the Fourth Circuit, like all of the circuits involved in this split, construes the two provisions interchangeably. *See Steed*, 879 F.3d, at 447; *United States v. Reyes*, 691 F.3d 453, 458 & n.1 (CA2 2012); *United States v. Montes-Flores*, 736 F.3d 357, 363 (CA4 2012);*United States v. Patterson*, 853 F.3d 298, 305 (CA6 2017); *Williams*, 899 F.3d, at 663. *See also James v. United States*, 550 U.S. 192, 206 (2007) ("[T]he Sentencing Guidelines' ... definition of a predicate 'crime of violence' closely tracks ACCA's definition of 'violent felony'.").

(quoting *People v. Curet*, 683 N.Y.S.2d 602, 603 (App. Div. 1998)). Diverging from the First Circuit's decision in *Steed*, *Hammond* determined that, as a matter of New York law, "the act of merely 'snatching' property from a victim does not amount to 'forcibly steal[ing] property' from a person." *Ibid.* & n.2 (citing *People v. Chessman*, 429 N.Y.S.2d 224 (App. Div. 1980); *People v. Davis*, 418 N.Y.S.2d 127 (App. Div. 1979)). And agreeing with the Second Circuit's decisions in *Pereira-Gomez* and *Thrower*, *Hammond* accepted that blocking a victim's pursuit of a thief "involved a threat of violent force that dissuaded the victim from attempting to break through ... or otherwise to pursue the defendant.'" 912 F.3d, at 664–65.

In *Perez*, a split panel of the Sixth Circuit held that second-degree robbery is a violent felony under §924(e)(2)(B)(i)'s elements clause. *Id.*, at 986. Like the Second and Fourth Circuits, *Perez* pointed to §160.00's text ("the elements requirement of ACCA and the elements of the New York offense line up perfectly"); State case law ("New York courts by and large have construed the statute to go beyond a mere touching and to include force that would cause pain to another"); and the common-law background ("robbery ... has long been understood to require violent force or intimidation of violent force"). 885 F.3d, at 988–89. Likewise disagreeing with *Steed*, *Perez* opined that "a human wall" constituted the "threatened use of force" because, although "unforceful by its nature," such an obstruction "may well turn violent if the victim attempts to break through it." *Id.*, at 990.

Finally, in *Williams*, the Eighth Circuit held that attempted second-degree robbery, §§110.00 and 160.10, is a crime of violence under §4B1.2(a)(1)'s elements

clause. 899 F.3d, at 663. *Williams* saw §160.00's text as analogous to the text of a Missouri robbery statute held to satisfy the elements clause in *United States v. Swopes*, 886 F.3d 668 (CA8 2018) (*en banc*), and observed that "[i]n New York, force capable of causing physical pain or injury suffices to support a conviction." 899 F.3d, at 663. In contrast, *Williams* said, "New York does not permit a conviction if a taking is without such force," for example, "'a taking by sudden or stealthy seizure or snatching.'" *Ibid.* (quoting *People v. Jurgins*, 26 N.Y.3d 607, 614 (2015)).

2. In sharp contrast, the First Circuit in *Steed* held that attempted second-degree robbery, N.Y. Penal Law §§110.00 and 160.10(2)(a), is not a crime of violence under §4B1.2(a)(1)'s elements clause. 879 F.3d, at 450–51. *Steed* explained that New York's definition of forcible stealing, although it excluded stealthy seizures, encompassed a purse snatching sufficient to produce awareness in the victim. *See* 879 F.3d, at 449 (observing that "a snatching ... could be considered physical and obtrusive enough to constitute a robbery in New York" because "it could involve the use of just enough force to 'produce awareness, although the action may be so swift as to leave the victim momentarily in a dazed condition'") (quoting *United States v. Mulkern*, 854 F.3d 87, 92–93 (CA1 2017)). "[S]uch a minimal use of force," *Steed* reasoned, "was too slight ... to constitute force 'capable of causing physical pain or injury.'" *Id.*, at 447 (quoting *Mulkern*, 854 F.3d at 93–94). Consequently, *Steed* held: "[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.'" *Id.*, at 450 (quoting *Santiago*, 405 N.Y.S.2d, at 757). 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." *Id.*, at 450–51.

In short, this question has triggered a crisp, acknowledged, circuit split.

B. This petition offers an ideal vehicle to resolve the conflict. Petitioner filed this §2255 motion, his first, within 28 U.S.C. §2255(f)(1)'s one-year statute of limitations. Respondent waived any procedural defenses by failing to assert them in the District Court. *See United States v. Canaday*, 126 F.3d 352, 359 (CA2 1997). Consequently, both courts below decided the question presented on the merits. Petitioner was convicted of third-degree robbery, which §160.05 defines as forcible stealing *simpliciter*, so this Court can address the heart of the split without the need to consider any of the aggravating circumstances that elevate forcible stealing to second- or first-degree robbery. *See* N.Y. Penal Law §§160.10(1)–(3), 160.15(1)–(4); *People v. Miller*, 87 N.Y.2d 211, 214 (1995). And because petitioner has no other potential ACCA predicates, the question is outcome-determinative.

This important issue recurs often. Between 20,000 and 30,000 robberies occur in New York State each year.[3] Accordingly, five circuits have had occasion to address the issue in published opinions since 2018. Moreover, the question affects

[3] *See* N.Y. Dep't of Crim. Justice Statistics, Index Crimes Reported to Police by Region: 2008–2017 (Sept. 24, 2018), *available at* https://on.ny.gov/2V7Yh0i.

not just the hundreds of ACCA sentences imposed each year, but also the thousands of sentences imposed under the felon-in-possession and career-offender Guidelines, U.S.S.G. §§2K2.1 and 4B1.1, both of which incorporate §4B1.2(a)(1)'s elements clause to define those crimes of violence that trigger recidivist enhancements.[4] (Because the Second Circuit has held that New York robbery is not enumerated "robbery" under the Guidelines, *Pereira-Gomez*, 903 F.3d, at 161–64, this offense only ranks as a crime of violence under the elements clause.) And, as here, years of imprisonment for individual defendants turn on the answer.

II. New York Robbery Does Not Satisfy The Elements Clause.

On the merits, New York robbery does not satisfy the elements clause, for two independent reasons. First, New York's expansive definition of robbery encompasses using force for the purpose of preventing resistance to the retention of property after a nonviolent taking, for example, by forming a "human wall" to block a victim from pursuing a pickpocket. *See Bennett*, 631 N.Y.S.2d, at 834. Second, as *Steed* explains—and as the facts of petitioner's own convictions reflect—New York treats as robbery a snatching of property sufficient to produce awareness, conduct that is not violent enough to satisfy the elements clause under *2010 Johnson*.

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[4] *See* U.S. Sent'g Comm'n, Mandatory Minimum Penalties for Federal Firearms Offenses 36 & fig.25 (2018) (tabulating ACCA sentences), *available at* https://bit.ly/2IpsGB8; U.S. Sent'g Comm'n, Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based, Fiscal Year 2017, at 54–55 (2018) (§2K2.1 sentences), *available at* https://bit.ly/2VLZQOA; U.S. Sent'g Comm'n, Quick Facts on Career Offenders 1 (2018) (§4B1.1 sentences), *available at* https://bit.ly/2XngK6x.

A. To determine whether a State offense satisfies the elements clause, this Court applies the categorical approach. *See Stokeling*, ___ U.S., at ___ (slip op., at 13). That is, this Court compares the elements (not the facts) of the State offense with §924(e)(2)(B)(i), focusing on the minimum conduct necessary to violate the State statute. *E.g.*, *Descamps v. United States*, 570 U.S. 254, 257 (2013); *Moncrieffe v. Holder*, 569 U.S. 184, 191–92 (2013). If the State statute "sweeps more broadly" than the elements clause, "a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense" in a manner that would have satisfied § 924(e)(2)(B)(i). *Descamps*, 570 U.S., at 261.

All New York robbery offenses have as an element forcible stealing. *See ante*, n.1. Section 160.00(1) defines that term: "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 ... [p]reventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking." The plain text of the statute therefore contemplates, and cases affirm, the imposition of criminal liability on the basis of a nonviolent taking (pickpocketing), followed by the use of force in the form of a passive obstruction ("a human wall") to prevent subsequent resistance to the retention of the property. *See Bennett*, 631 N.Y.S.2d, at 834 ("Defendant's guilt was proven by legally sufficient evidence that he and three others formed a human wall that blocked the victim's path as the victim attempted to pursue someone who had picked his pocket, allowing the robber to get away."). *See also, e.g.*, *People v.*

Hamlin, 682 N.Y.S.2d 134, 134 (App. Div. 1998) (affirming robbery conviction based on "defendant's actions of blocking the complainant and picking up his property"); *People v. Sharkey*, 588 N.Y.S.2d 149, 149 (App. Div. 1992) (affirming robbery conviction where "[d]efendant blocked the complainants from any possible means of escape, received an item of stolen property from his accomplice and personally took an item from another victim").

Stokeling establishes that this conduct does not satisfy the elements clause. For starters, *Stokeling* explains that §924(e)(2)(B)(i)'s reference to "force" "retained the same common-law definition that undergirded the original definition of robbery." ___ U.S., at ___ (slip op., at 7).[5] But all of the historical authorities cited in *Stokeling* make plain that New York robbery-by-obstruction, as described above, would not have constituted common-law robbery. *See* 2 J. Bishop, Criminal Law §1168(2), p. 865 (J. Zane & C. Zollman eds., 9th ed. 1923) ("The violence must precede or be contemporaneous with the taking. When no force is used to obtain the property force used to retain the property will not make the crime robbery."); W. Clark & W. Marshall, A Treatise on the Law of Crimes §12.13, p. 789

[5] As enacted in 1984, ACCA would not have encompassed New York robbery. ACCA listed "robbery" as a predicate offense, defining it as "any felony consisting of the taking of the property of another from the person or presence of another by force or violence." *See Stokeling*, ___ U.S., at ___ (slip op., at 4) (citing 18 U.S.C. App §§1202(a) and 1202(c)(8) (1982 ed., Supp. II)). But in the revision of its Penal Law in the 1960s, the New York Legislature deliberately eliminated the requirement that a taking be "from the person or in the presence of another," as prior law had provided, reasoning that this "limitation" "would exclude a variety of forcible thefts that were 'robberies in spirit." *People v. Smith*, 79 N.Y.2d 309, 313–14 & n.3 (1992). *See Pereira-Gomez*, 903 F.3d, at 163–64 (relying on *Smith* to determine that New York robbery lacks a "person or presence" element).

(M. Wingersky ed., 6th ed. 1958) ("The taking itself must be by violence, and it follows, therefore, that the violence must precede or accompany the act of taking. Violence after the taking—as where a man picks another's pocket or snatches property, and when detected or seized, uses violence to retain possession or to escape—cannot make the offense robbery."); 2 W. Russell, Crimes and Indictable Misdemeanors 66 (2d ed. 1828) ("[W]ith respect to the taking, ... it must not, ... precede the violence or putting in fear; ... a subsequent violence and putting or fear will not make a precedent taking, effected clandestinely, or without either violence or putting in fear, amount to robbery."). Consequently, §924(e)(2)(B)(i) excludes New York robbery because the force sufficient to commit that offense—force not deployed to *overcome* a victim's resistance in the course of a violent larceny, but instead to block a victim's progress and thereby *forestall* resistance after a nonviolent larceny—sweeps far beyond what the common law demanded. Hence the error of the decisions in this split that rely on the common law definition to classify the New York offense as a violent felony. *Thrower*, 914 F.3d, at 775; *Hammond*, 912 F.3d, at 662–63; *Perez*, 885 F.3d, at 988–89.

Moreover, *Stokeling* explains that overcoming-resistance robbery meets *2010 Johnson*'s standard because such robbery "necessarily involves a physical confrontation and struggle." ___ U.S., at ___ (slip op., at 9). Indeed, "it is the physical contest between the criminal and the victim that is itself 'capable of causing physical pain or injury.'" *Ibid.* (quoting *2010 Johnson*, 559 U.S., at 140). But New York law requires no "confrontation" or "physical contest" between robber and

victim. Rather, as §160.00(1) specifies, and decisions such as *Bennett* confirm, robbery by obstruction encompasses using force to *avoid* confrontation—to "prevent" resistance to the nonviolent taking of property by keeping victim and thief apart.

To be sure, several decisions in the split address *Bennett* and conclude that obstructing a victim's pursuit of a thief entails the "threatened use of physical force." *Perez*, 885 F.3d, at 990. *See also Thrower*, 914 F.3d, at 775 n.4; *Hammond*, 912 F.3d, at 664–65. These decisions err because blocking someone's path, without more, presents no intrinsic threat of violence, as anyone who has elbowed his way off a crowded subway car knows. But "[u]nder [the] categorical approach," this Court focuses on "the intrinsic nature of the offense." *United States v. Acosta*, 470 F.3d 132, 135 (CA2 2006). *Bennett* does not reflect that the blockers there did anything more, or were prepared to do anything more, than retard the victim's progress long enough for their confederate, the pickpocket, to escape. Indeed, *Bennett* clarifies that "[t]he requirement that a robbery involve the use, or the threat of immediate use, of physical force does not mean that a weapon must be used or displayed or that the victim must be physically injured or touched." 631 N.Y.S.2d, at 834. *See also Hamlin*, 682 N.Y.S.2d, at 134; *Sharkey*, 588 N.Y.S.2d, at 149 (affirming on basis of obstruction alone). The sole force that a blocker need entail or imply is that inherent in standing still to prevent a victim from chasing a pickpocket. Moreover, under the categorical approach, respondent must show not just that a *particular* obstruction might portend violence, but that *every* obstruction does. "It is in that sense that the approach is 'categorical': it looks to see whether

the offense of conviction categorically, in every case, necessarily matches the enhancement's terms." *United States v. Beardsley*, 691 F.3d 252, 270 (CA2 2012). Some blockers may use violence (or signal their intention to do so) should a victim attempt to pass, but not all do, and that is dispositive.

B. As *Steed* explains, New York robbery fails to satisfy the elements clause for a second, independent reason. New York would treat as robbery a mere "snatching" involving "just enough force to 'produce awareness.'" 879 F.3d, at 449 (quoting *Mulkern*, 854 F.3d, at 92–93). The decisions in this split debate this point of New York law. *Compare Hammond*, 912 F.3d, at 663 & n.2 *with Steed*, 879 F.3d, at 448–51. But considerable State authority establishes that as long as a taking is "more than just an 'nonphysical, unobtrusive snatching,'" it qualifies as robbery. *Matter of Kabron L.*, 591 N.Y.S.2d 371, 371 (App. Div. 1992) (quoting *People v. Rivera*, 554 N.Y.S.2d 115 (App. Div. 1990)). *See Steed*, 879 F.3d, at 449–50 (citing *People v. Lawrence*, 617 N.Y.S.2d 769 (App. Div. 1994)); *Santiago*, 405 N.Y.S.2d 752). Thus, cases affirm robbery convictions based on snatchings that do no more than trigger awareness. *E.g.*, *People v. Washington*, 728 N.Y.S.2d 48, 48 (App. Div. 2001) ("[T]he complainant was leaving her apartment when she observed an old car, with two male occupants, pull up next to her apartment. She saw one man exit the car from the passenger seat and noticed that the driver remained in the car with the engine running. The man who exited, identified by both the complainant and an eyewitness as the defendant, snatched her purse and ran back to the getaway car."); *People v. Johnson*, 586 N.Y.S.2d 136, 136 (App. Div. 1992) ("[T]he complainant was

standing face-to-face with the defendant as he snatched her earrings and pocketbook."). Indeed, petitioner's own case demonstrates that this is so. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (to demonstrate "realistic probability" that State would apply statute to non-qualifying conduct, "an offender, of course, may show that the statute was so applied in his own case"). The Presentence Investigation Report reflects that petitioner's convictions involved mere snatchings. *E.g.*, ¶ 48 ("According to an arrest report ... , the victim stated that upon walking into the supermarket, the defendant snatched his chain from behind."); ¶ 59 ("According to an arrest report, ... the victim stated that a group of 4 males snatched his yellow metal chain from his neck.").

Stokeling clarifies that a snatching of property that does not require overcoming resistance does not satisfy the elements clause. *See, e.g.*, ___ U.S., at ___ (slip op., at 4) (explaining that at common law, taking of purse or jewelry "was larceny, not robbery, if the thief did not have to overcome ... resistance); *id.*, at ___-___ (slip op., at 12–13) (noting that "[m]ere 'snatching of property from another'" does not constitute Florida robbery, and collecting cases). The common-law authorities agree. *See* 2 J. Bishop, *supra*, §1167, p. 864; Clark & Marshall, *supra*, §12.13, p. 788; 2 W. Russell, *supra*, at 67–68. For this independent reason, New York robbery is categorically broader than § 924(e)(2)(B)(i).

III. *Stokeling* Will Not Resolve The Split.

Stokeling will not prompt the First Circuit to reconsider *Steed*. New York robbery is categorically less severe than Florida robbery, so *Steed* survives

Stokeling. Recall that under Florida law, "the 'use of force' necessary to commit robbery requires 'resistance by the victim that is overcome by the physical force of the offender.'" *Stokeling*, ___ U.S., at ___ (slip op., at 2) (quoting *Robinson*, 692 So. 2d, at 886). This Court focused on the overcoming-resistance element, and stated its holding with reference to that element: "[O]ur holding today [is] that force is 'capable of causing physical injury' within the meaning of [*2010 Johnson*] when it is sufficient to overcome a victim's resistance." ___ U.S., at ___ (slip op., at 12).

New York robbery has no such overcoming-resistance element, and, as set forth above, entails less force than Florida robbery, along three key dimensions. First, a robber need not use force to overcome resistance, just to prevent it. *See* §160.00(1) ("[p]reventing or overcoming resistance"). Second, a robber need not use force to prevent or overcome resistance to the taking of property, just the property's retention. *See ibid.* ("resistance to the taking of the property or to the retention thereof immediately after the taking"). Third, a robber need not succeed in preventing or overcoming resistance, just act with that intent. *See ibid.* ("for the purpose of preventing or overcoming resistance"); *People v. Smith*, 79 N.Y.2d 309, 312 (1992) (holding that §160.00's "'for the purpose of' language sets forth a *mens rea* element," namely, that "a defendant must intend that the threatened use or actual use of physical force have one of the enumerated consequences," and that it is not "sufficient that the force employed has that unintended effect"). Each of these distinctions removes New York robbery from *Stokeling*'s holding, and ensures that the First Circuit will adhere to *Steed*, perpetuating the split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/
Daniel Habib
Counsel of Record
Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, NY 10007
(212) 417–8742
daniel_habib@fd.org

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