No. _____

In The
SUPREME COURT OF THE UNITED STATES

_____

WILLIAM THROWER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

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QUESTIONS PRESENTED

Subdivision 1 of New York's Penal Law § 70.02 lists by class (from Class B to Class E) all Penal Law offenses defined as "violent felony" offenses; subdivision 2 specifies the authorized sentence for offenses listed in each class. New York Penal Law § 70.04 provides for mandatory enhanced sentences for repeat violent felony offenders.

Only New York's aggravated robbery offenses -- robbery in the first degree under Penal Law § 160.15, and robbery in the second degree under Penal Law § 160.10 -- are listed as "violent felony" offenses in Penal Law § 70.02. Robbery in the third degree under Penal Law § 160.05 and attempted robbery in the third degree are *not* included in § 70.02, and, therefore, both are categorically not deemed "violent felony" offenses by New York.

The questions presented are:

1. Does robbery in the third degree under New York Penal Law § 160.05 categorically qualify as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)?

2. Does attempted robbery in the third degree under New York Penal Law §§ 110.00 and 160.05 categorically qualify as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)?

3. In determining whether a state statute qualifies as an ACCA-predicate offense under "the elements clause" of 18 U.S.C. §

924(e)(2)(B)(i), is the analysis of the categorical approach as explained in *Decamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016), confined to an "elements-based inquiry" based on the text of the statute, or does the "realistic probability test" suggested in *Gonzales v. Duenas-Alvarez,* 549 U.S. 183, 193 (2007), put the burden on the defendant to demonstrate the facts and theory behind his own prior conviction or the conviction of another person in order to show that, in fact, one has been prosecuted for and convicted of the offense at issue without proof of one of the three elements listed in 18 U.S.C. §924(e)(2)(B)(i) – *i.e.,* "the use", "the attempted use", or the "threatened use" of physical force against the person of another?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Plaintiff-Appellant United States of America, and Defendant-Appellee William Thrower.

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ORDERS BELOW

The relevant orders (reprinted in the attached Appendix, at A-1-36) are: (1) the District Court's Order granting Petitioner's motion pursuant to 28 U.S.C. § 2255 and ordering his release (dated February 13, 2017, and reported at 234 F. Supp. 3d 372 (EDNY 2017)) (A-1); (2) the *per curiam* Opinion of the Second Circuit reversing the district court's grant of the § 2255 petition (dated January 31, 2019, and reported at 914 F.3d 770 (2d Cir. 2019)) (A-23); and (3) the Second Circuit's Order, dated March 29, 2019, denying rehearing (A-36).

JURISDICTION

The Court of Appeals' Order denying rehearing was entered on March 29, 2019. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

18 U.S.C. § 924(e)(1) enhances the penalty for a violation of 18 U.S.C. §922(g)(1) to a mandatory 15 years to life if the offender has three previous convictions for a "violent felony or a serious drug offense, or both, committed on occasions different from one another."

18 U.S.C. § 924(e)(2)(B) defines "violent felony" as:

> [A]ny 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, the attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another…

New York Penal Law § 160.00 Robbery; defined.

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 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.

New York Penal Law § 160.05 Robbery in the third degree.

A person is guilty of robbery in the third degree when he forcibly steals property. Robbery in the third degree is a class D felony.

New York Penal Law § 110.00. Attempt to commit a crime.

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.

New York Penal Law § 110.05. Attempt to commit a crime; **punishment.**

An attempt to commit a crime is a:
* * *
6. Class E felony when the crime attempted is a class D felony;
* * *

New York Penal Law §§ 70.02, 70.04, 160.10 and 160.15 are included in the Appendix (A-37-45)**.**

STATEMENT OF THE CASE

Petitioner William Thrower was convicted in 2005 of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). While this offense, on its own, carries a 10-year maximum sentence, Thrower's sentence was enhanced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1) because of prior convictions.

18 U.S.C. § 924(e)(1) enhances the penalty for a § 922(g)(1) offense to a mandatory 15 years to life if the offender has three previous convictions for "a violent felony or serious drug offense." Mr. Thrower had five prior felony convictions.[1] At his sentencing in 2005, Judge Ross determined that at least three priors were for "violent felonies."

After Mr. Thrower's sentence was imposed, this Court refined the understanding of the crimes that may be considered "violent" for purposes of the ACCA enhancement. First, in *Johnson v. United States,* 559 U.S. 133, 141 (2010) ("*Curtis Johnson"*), the Court clarified the first clause of 18 U.S.C. § 924(e)(2)(B) – the so-called "force" or "elements" clause. It held that "the phrase 'physical force' means *violent* force – that is, force capable of causing physical pain or injury to another person." Then, in *Johnson v United States,* 135 S. Ct. 2251 (2015) ("*Samuel*

[1] The five prior convictions were: (1) in 1981, first-degree robbery, New York Penal Law § 160.15; (2) in 1981, third-degree burglary, New York Penal Law § 140.20; (3) in 1993, fourth-degree larceny, New York Penal Law § 155.30; (4) in 1994, attempted third-degree robbery, New York Penal Law §§ 110.00 and 160.05.; and (5) in 2000, third-degree robbery, New York Penal Law § 160.05. The offenses underlying the 1981 robbery and burglary convictions were committed when Mr. Thrower was sixteen.

Johnson"), the Court struck the so-called "residual clause" of 18 U.S.C. § 924(e)(2)(B)(ii) ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") as unconstitutionally vague, leaving the "elements clause" of subsection (i) and the "enumerated offense clause" of subsection (ii) as the only bases for finding a prior conviction a "violent felony" under ACCA.

Mr. Thrower filed several petitions to set aside his sentence under 28 U.S.C. § 2255(a) in light of these decisions. After *Welch v. United States,* 136 S. Ct. 1257, 1266 (2016), held that *Samuel Johnson* had retroactive effect, the Second Circuit (in an order dated August 26, 2016) gave Thrower permission to file the petition at issue here as a successive petition.

In that petition, Thrower argued, and Judge Ross agreed, that the district court had relied on the unconstitutional residual clause in classifying one or more of his prior convictions as violent felonies when sentencing him in 2005. Because she also determined that Thrower did not have three prior convictions that qualified as violent felonies under either the elements clause (as interpreted in *Curtis Johnson*) or the enumerated offense clause, Judge Ross found this constitutional error prejudicial, and determined that the 15-year sentence imposed under ACCA was unauthorized. By that time, Mr. Thrower had served more than 12 years in prison, and Judge Ross ordered his immediate release. (Appendix, A-1-22)

In so ruling, Judge Ross focused on the two most recent prior convictions: attempted third-degree robbery in 1994, and third-degree robbery in 2000. She noted that the Government no longer claimed that the 1993 larceny conviction

qualified as a prior violent felony, and reasoned that if these two priors also did not qualify, the ACCA enhancement would not be supported by three predicates.[2]

Judge Ross drew on the analysis the Second Circuit had used in *United States v. Jones,* 830 F.3d 142 (2d Cir. 2016), vacated, 838 F.3d 296 (2d Cir. 2016) (concluding that even a conviction for *first*-degree robbery in New York did not qualify as a "crime of violence" under the elements clause of the Career Offender Guidelines, U.S.S.G § 4B1.2(a)(1)), and held that neither Thrower's third-degree robbery conviction nor his attempted third-degree robbery conviction was a violent felony under ACCA's elements clause.[3] Finding the ACCA enhancement unsupported by the requisite number of predicates, Judge Ross granted the §2255 petition and ordered Mr. Thrower's release.

Without seeking to stay Mr. Thrower's release, the Government appealed. The Second Circuit ultimately agreed with the Government that the district court

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[2] In earlier litigation (*Thrower v. United States,* Second Circuit Docket No. 15-2221), the Government had explicitly conceded that *both* the prior larceny conviction *and* the burglary conviction did not qualify as ACCA predicates. (See, Government's Response, 15-2221, Document # 36, at 2-3 & n.1.) Given these concessions, Thrower argued that only *one* of the robbery convictions needed to be disqualified: if *either* third-degree robbery *or* the attempted third-degree robbery does not qualify as a "violent felony" under 18 U.S.C. § 924(e)(2)(B)), the ACCA enhancement must be set aside.

[3] Consistent with New York Penal Law § 70.02 which does not list third-degree robbery as a "violent felony offense", unrefuted evidence in the district court confirmed that New York authorities did not treat Mr. Thrower's third-degree robbery as a violent offense: (1) Directives from the Department of Correction Services provide that only inmates serving "*non-violent* crimes may receive merit time allowances;" and (2) Mr. Thrower received Merit Board review while serving his sentence for the 2000 third-degree robbery conviction. (See District Court Dkt. Nos. 102, 103 and attached Directives.)

erred in concluding that Thrower's third-degree robbery and attempted third-degree robbery convictions did not qualify as predicate "violent felonies" under ACCA.[4] It reversed the district court's grant of the § 2255 petition, and remanded for reinstatement of the original sentence. (Appendix, A-23-35)

The Circuit relied principally on this Court's recent decision in *Stokeling v. United States,* 139 S. Ct. 544 (2019) (decided after the briefing in Thrower's case), which held that Florida's robbery statute qualifies as a "violent felony" under ACCA. The Second Circuit likened New York's robbery statute to Florida's in that it too used the same language found in ACCA – *i.e.*, "physical force" – and, according to the Circuit, was (purportedly) modeled on the common law definition of robbery.[5] Moreover, according to the Circuit, the New York statute "explicitly incorporates the common law definition" by (supposedly) "explaining that `physical force' means enough force to `[p]revent[ ] or overcom[e] resistance to the taking … or … [to c]ompel[ ] the owner … to deliver up the property." (Appendix, A-30-31, citing New York Penal Law § 160.00)

In addition to arguing that New York's third-degree robbery statute does not require that the force used or threatened be capable of causing physical pain or

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[4] While the appeal was pending, and prior to issuing its opinion, the Circuit denied Mr. Thrower's motion to certify questions to the New York Court of Appeals, pursuant to Local Rule 27.2, regarding whether a conviction for third-degree robbery and attempted third-degree robbery must always involve violent force. (See Docs. 100, 110)

[5] According to the majority opinion in *Stokeling*, the level of "force" or "violence" needed for robbery at common law was "well established: `Sufficient force must be used to overcome resistance … however slight the resistance.' Clark & Marshall 553." 139 S. Ct. at 551.

injury, Mr. Thrower also argued that even if it does, *attempted* third-degree robbery does not qualify as an ACCA predicate. Using the categorical approach required by *Descamps v. United States,* 570 U.S. 254 (2013), and *Mathis v. United States,* 136 S. Ct. 2243 (2016), Mr. Thrower argued that *attempted* third-degree robbery under New York law does not categorically require either the "use," the "attempted use" or the "threatened use" of physical force against another -- the three elements specifically listed in § 924(c)(2)(B)(i); attempted third-degree robbery can be committed by virtue of an "*attempt to threaten*" the use of physical force (for example, where a would-be robber is arrested just outside a bank with a threatening note in his hand), but "attempt to threaten" the use of physical force is *not* listed as a qualifying element in § 924(c)(2)(B)(i).

The Government maintained that New York's third-degree robbery statute was not divisible and hence a modified categorical analysis was inappropriate because "using force and threatening the use of force do not seem to be alternative elements … but merely `various factual means of committing a single element' – the element of forcible stealing. See *Mathis,* 136 S. Ct. at 2249, 2256." (Document 67; Reply Brief, at 12-13, n. 4) However, the Government did not apply the categorical analysis to the attempted third-degree robbery offense to show that an essential element of the crime was necessarily either the "use," the "attempted use," or the "threatened use" of physical force against another, or to argue that attempted third-degree robbery categorically qualifies as a predicate for the ACCA enhancement. Rather, it dismissed Thrower's argument that "attempt to threaten" was not a listed

element in § 924(e)(2)(B)(i) as "absurd[ ]", and, putting the cart before the horse, insisted that, regardless of the specific language Congress used in § 924(e)(2)(B)(i), "Congress sought to sweep broadly and preclude a technical reading of the statute that would exclude valid ACCA predicates." (Document 67, Reply Brief, at 20)

The Circuit did not adopt the Government's arguments, but it rejected Thrower's contention that "an attempt to threaten the use" of physical force is distinct from either the "use", the "attempted use," or the "threatened use" of physical force. It did so without addressing either *Descamps* or *Mathis*, or how either the categorical or modified categorical analysis applied in this case.

Instead, quoting *Gonzales v. Duenas-Alvarez,* 549 U.S. 183, 193 (2007), the Circuit ruled that Mr. Thrower failed:

> to "at least point to his own case or other cases in which the state courts in fact did apply the statute in the … manner for which he argues." … As such, we are left with the text of the New York attempted robbery statute, which plainly matches ACCA's definition of a `violent felony.'
>
> We therefore conclude that the New York offense of attempted robbery in the third degree is a `violent felony' under ACCA. (Appendix, A-34-5)

In a footnote (n. 6), the Circuit added, "Even if Thrower could cite to such an example, we would not come out differently on this issue. An attempt to threaten to use force by, for example, attempting to use a threatening note, itself constitutes a `threatened use of physical force.'" (Appendix, A-34)

Mr. Thrower petitioned for rehearing and (1) asked for the opportunity to address the critical differences between New York's robbery statute and the Florida

statute at issue in *Stokeling* – differences that had not been addressed by the panel*;* and (2) argued that (a) the "realistic probability" analysis taken from dicta in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), and employed by the panel to hold that attempted third-degree robbery is a violent felony, was inappropriate as recognized by the Circuit in *Hylton v. Sessions,* 897 F.3d 57, 63-64 (2d Cir. 2018), and (b) the court had erroneously collapsed the distinction between the substantive crime (threatening the use of physical force against another in the course of committing a larceny) and the attempt crime. Rehearing was denied. (Appendix, A-36) The Court of Appeals stayed its mandate, however, pending the outcome of this certiorari petition, and Mr. Thrower remains at liberty.

REASONS FOR GRANTING THE WRIT

1. The Second Circuit Misapplied This Court's Precedents And Engendered A Circuit Split When It Erroneously Concluded That The New York Offenses Of Third-Degree Robbery And Attempted Third-Degree Robbery Are "Violent Felonies" Under ACCA.

In *Stokeling v. United States,* 139 S. Ct. 544 (2019), the Court examined the ACCA's elements clause to determine whether a Florida robbery conviction constituted a predicate offense under the ACCA. The Second Circuit relied heavily on *Stokeling*, but failed to address fundamental differences between New York's robbery statute and the Florida statute at issue in *Stokeling,* and it either misapprehended or misrepresented the elements of New York's third-degree

robbery offense. The Circuit shoehorned New York's law to fit the *Stokeling* mold without engaging in the categorical analysis required by this Court's precedents.

Stokeling involved the Florida robbery statute and Florida law. The question it decided was a narrow one: "whether a robbery offense *that has as an element the use of force sufficient to overcome a victim's resistance* necessitates the `use of physical force' within the meaning of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i)." 139 S. Ct. at 516 (emphasis added). The Court answered the question affirmatively. According to the Court, "the force necessary to overcome a victim's physical resistance is inherently `violent,'" and concluded that "the elements clause encompasses *robbery offenses that require the criminal to overcome the victim's resistance*." Id. at 521, 518. (Emphasis added.)

Critical to the *Stokeling* decision were not only the words of Florida's robbery statute (under Florida law, robbery is defined as "the taking of money or other property … from the person or custody of another, … when in the course of the taking there is use of force, violence, assault or putting in fear"), but also, importantly, the Florida Supreme Court's explanation "that the `use of force' necessary to commit robbery requires `resistance by the victim that is overcome by the physical force of the offender.'" *Id*. at 517.

Unlike the Florida statute, New York's third-degree robbery statute does not require the offender to overcome the victim's resistance. Neither the New York statutory definition of robbery nor New York's third-degree robbery offense includes the word "violence", and, while there may be robbery cases like *People v. Safron,*

166 AD2d 892 (4th Dept. 1990), in which the victim's resistance was apparently overcome, New York decisional law does *not* impose the requirement that a person must overcome the victim's resistance in order to commit robbery. As the district court in this case and numerous other courts have found[6], robbery convictions have been upheld in cases like *People v. Bennett,* 219 AD2d 570 (1st Dept. 1995), and *People v. Lee,* 197 AD2d 378 (1st Dept. 1993), where the victim did not resist at all.

While the word "resistance" does appear in New York's statutory definition of robbery, it is not identified (as in Florida) as a facet or characteristic of either perpetrator's conduct, the degree of force used by the perpetrator, or the victim's reaction to the perpetrator's conduct. Rather, *resistance* is a component (*of only one of two alternatives*) regarding the perpetrator's *purpose*, and *overcoming* resistance is not even a requirement of that alternative. Subdivision 1 of § 160.00 (the "purpose" alternative that includes "resistance") also includes its own alternatives; it refers to "preventing or overcoming resistance". See *People v. Gordon*, 23 NY 3d

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[6] See *United States v. Johnson*, 220 F. Supp. 3d 264 (EDNY 2016) (robbery in the third degree and attempted robbery in the second degree not violent felonies); *United States v. Moncrieffe,* 167 F. Supp.3d 383, 402-6 (EDNY 2016) (robbery in the first degree not a "crime of violence" under the Immigration and Nationality Act); *Diaz v. United States,* 2016 U.S. Dist. LEXIS 11619 (WDNY Aug. 30, 2016) (third-degree robbery not a violent felony); *United States v. Brown*, 2017 U.S. Dist. LEXIS 84112 (EDNY May 26, 2017) (attempted second-degree robbery not a violent felony); *Buie v, United States,* 2017 U.S. Dist. LEXIS 145618 (SDNY Sept. 8, 2017) (first-degree robbery not a violent felony); *Austin v. United States*, 16-cv-4446 (JSR); 06-cr-991 (JSR) (SDNY Dec. 4, 2017), 2017 U.S. Dist. LEXIS 199344 *; 2017 WL 6001162 (attempted third-degree robbery, second-degree robbery, and attempted second-degree robbery not violent felonies). Accord, *United States v. Childers*, 2017 U. S. Dist. LEXIS 90334 (D. Me. June 13, 2017) (NY second degree robbery); *United States v. Jones*, 2017 U.S. Dist. LEXIS 71701 (WDPa. May 11, 2017) (NY robbery in the first degree); *United States v. Steed*, 879 F.3d 440 (1st Cir. 2018) (NY third-degree robbery).

643, 650 (2014) ("`The applicable culpability standard—intent—require[s] evidence that, in using or threatening physical force, [the] defendant's 'conscious objective' was either to compel [the] victim to deliver up property or to prevent or overcome resistance to the taking' or retention thereof…") (Citations omitted.)

Thus, Penal Law § 160.00 defines Robbery as (emphasis added):

> 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 *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.

Neither the Government nor the panel pointed to any New York decisional law either holding that a victim's resistance actually must be overcome or measuring the degree of force that must be employed by a person who commits robbery by the victim's resistance. That the actual use or threatened use of force sufficient to "overcome resistance" is not the *sine qua non* of every robbery (or attempted robbery) offense is reflected in New York cases such as *Bennett, Lee, People v. Patton,* 184 A.D. 2d 483 (1st Dept. 1992), and *People v. Lawrence*, 209 A.D.2d 165 (1st Dept. 1994) (a purse snatching case relied upon by the First Circuit in *United States v. Steed*, 879 F. 3d 440 (1st Cr. 2018), when it found, using the categorical approach, that attempting to commit second degree robbery under New

York law is not an offense that falls within the force clause of § 4B1.2(a) of the United States Sentencing Guidelines.

That force sufficient to overcome resistance is *not* an element of third-degree robbery (or attempted third-degree robbery) is also reflected in New York's Pattern Jury Instructions. (Appendix, A-46-52) Contrary to the Circuit's declaration that the New York statute "explicitly incorporates the common law definition" "that `physical force' means enough force to `[p]revent[ ] or overcom[e] resistance to the taking", the Pattern Jury Instructions make clear that the statute's "preventing or overcoming resistance" language concerns the "purpose" or "intent" of the person using or threatening force, not a measure of the degree of force actually used or threatened.

The pattern instructions clarify that (unlike in Florida where the use of force necessary to commit a robbery *requires* resistance by the victim that is overcome by the physical force of the offender), in New York, robbery can be committed without any resistance by the victim, and, indeed, even without an intent in the mind of the robber to use force in order to prevent or overcome resistance by the victim. The Pattern Jury Instructions – mirroring the statute, New York Penal Law § 160.00 – provide discrete alternatives for the "purpose" of the offender, one of which, drawn from subdivision 2 of § 160.00, makes no reference at all to "resist" or "resistance." (Appendix, A-47)

The Second Circuit was plainly wrong when, without citation to any authority, it extracted language out of context from the *mens rea* "purpose" element

to conclude that New York's robbery statute "explicitly incorporates" the common law definition of robbery, and that the statute "explain[s]" "that `physical force' means enough force to `[p]revent[ ] or overcom[e] resistance to the taking … or … [to c]ompel[ ] the owner … to deliver up the property."

The Second Circuit did not identify the elements of third-degree robbery, and did not address the alternative intents/purposes specifically set forth in New York Penal Law § 160.00. More importantly, while it acknowledged that courts use a "categorical approach" to determine whether a prior conviction qualifies as an ACCA predicate, the Circuit eschewed actually conducting the elements-based categorical approach this Court has established. See *Descamps,* 570 U.S. at 260-265, where the Court used the approach where the issue was whether the prior conviction counted as one of ACCA's enumerated offenses under 18 U.S.C. § 924(e)(2)(B)(ii); *Mathis*, 136 S. Ct. at 2257, where the Court applied the categorical, elements-based approach in an enumerated offense case where the statute "happens to list possible alternative means of commission"; and *Stokeling*, 139 S. Ct. at 555, where it applied the categorical approach to determine that Florida's robbery statute qualifies as an ACCA-predicate offense under the elements clause.

In the context of the elements clause of 18 U.S.C. § 924(e)(2)(B)(i), the categorical approach "requires asking whether the least culpable conduct covered by the statute at issue nevertheless `has as an element the use, attempted use, or threatened use of physical force against another,'" as the term "physical force" was explained in *Curtis Johnson. Stokeling,* 139 S. Ct. at 557 (Sotomayor, J.,

dissenting). New York's third-degree robbery statute -- as interpreted and applied by the New York courts, and as charged to New York juries – sweeps more broadly than Florida's robbery statute.[7] Since the statute covers a range of conduct that does not entail violent "physical force" as used in ACCA, and as construed in *Curtis Johnson,* the Second Circuit erred in concluding that, simply because Penal Law § 160.00 contains the words "physical force," New York's third-degree robbery offense qualifies as a "violent felony" ACCA predicate.

It is hard to square the Circuit's conclusion that New York's third-degree robbery offense (and *a fortiori* the lesser included offense of attempted third-degree robbery) categorically qualify as violent felonies under ACCA with New York's explicit statutory determination that *neither* third-degree robbery *nor* attempted third-degree robbery is a "violent felony offense," and New York's treatment of Mr. Thrower's third-degree robbery conviction in accord with that determination. Unlike New York's aggravated first-degree and second-degree robbery offenses, third-degree robbery (a class D felony) and attempted third-degree robbery (a class E felony) are *not* included in the list of felonies deemed "violent felony offenses" set forth in New York Penal Law § 70.02 1.(c) and (d).[8] New York authorities also did

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[7] See *Austin v. United States*, 2017 U.S. Dist. LEXIS 199344 (SDNY 2017), for Judge Rakoff's exhaustive review of New York cases where he concludes that in "many cases, victims and offenders likely both view the defendant's use of force as nothing more than an attempt to obtain or keep their property, not as the expression of an intent to use substantial or serious violence if the victim resists." *Id.* at **17-18.

[8] Numerous New York cases recognize that the crime of robbery in the third degree under Penal Law § 160.05 is not classified as a violent felony offense, and may not

not treat Mr. Thrower's 2000 third-degree robbery conviction as a violent offense: Mr. Thrower received Merit Board review while serving his sentence for the 2000 third-degree robbery conviction, and directives from the Department of Correction Services provide that only inmates serving "*non-violent* crimes may receive merit time allowances."

This mismatch between the Second Circuit's treatment of a third-degree robbery conviction for purposes of enhancing Mr. Thrower's sentence under federal law and New York's treatment of the same offense under state law would not exist had the Circuit conducted a straightforward examination of the statutory elements as required by the categorical approach. Indeed, the Circuit's failure to engage in such an analysis – choosing instead to cherry-pick statutory terms to fit the *Stokeling* mold – has led to a decision that creates the very unfairness with which this Court was concerned when it emphasized the reasons for employing an elements-based categorical approach: The decision will "deprive some defendants of the benefits of their negotiated plea deals." *Descamps,* 570 U.S. at 271.

In this case, Mr. Thrower – like the imagined defendants in *Descamps* -- surrendered his right to trial in exchange for the State's agreement that he plead guilty to crimes (attempted third-degree robbery in 1994 and third-degree robbery in 2000) that the State of New York had definitively declared were non-violent

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be used as a predicate for second violent felony offender status. See, e.g., *People v. Hicks,* 79 A.D. 2d 887 (4th Dept. 1980); *People v. Coleman,* 23 A.D.3d 1033 (4th Dept. 2005); *People v. LeGrand*, 123 A.D. 2d 290 (1st Dept. 1986); *People v. Webb,* 135 A.D. 2d 855 (2d Dept. 1987); *People v. Tomasullo*, 112 A.D.2d 960 (2d Dept. 1985); *People v. McCay*, 10 A.D. 3d 734 (2d Dept. 2004).

felony offenses, offenses that did not carry the baggage of mandatorily enhancing his sentence should he commit a crime in the future. The Second Circuit's "way of proceeding, on top of everything else, would allow a later sentencing court to rewrite the parties' bargain." *Id.* There are undoubtedly thousands of cases like this one. The confusion and unfairness resulting from the Second Circuit's decision throws a serious fly in the ointment of plea negotiations on which so much of New York's criminal justice system depends. This provides a strong reason to grant *certiorari.*

There is an additional unfairness here that the grant of *certiorari* can remedy: the unfairness stemming from the Circuit split between the First and Second Circuits in terms of how each views the "forcible stealing" element of New York's robbery offenses. As noted above, the First Circuit, in *United States v. Steed,* 879 F. 3d 440 (1st Cr. 2018), using the categorical approach, determined that attempting to commit second degree robbery under New York law is not an offense that falls within the force clause of § 4B1.2(a) of the United States Sentencing Guidelines. In *Lassend v. United States,* 898 F.3d 115, 129, n. 4 (1st Cir. 2018), the court and the parties recognized that the holding in *Steed* applied in an ACCA case involving first-degree robbery ("Neither party disputes that the `forcibly steals property' element of § 160.15(4) does not satisfy *Johnson I*'s violent-force requirement in light of our decision in *United States v. Steed*, 879 F.3d 440 (1st Cir. 2018).") Given this split, individuals who commit the same federal offense (being a felon in possession of a firearm) and who have the same prior conviction (for New York third-degree robbery or attempted third-degree robbery) may be subject to

dramatically different sentences depending on whether they are sentenced in Brooklyn or Boston.

Certiorari should be granted to correct the Second Circuit's holding and to resolve the Circuit split.

2. *In Erroneously Concluding That New York's Attempted Third-Degree Robbery Offense Is A "Violent Felony" Under ACCA, The Second Circuit Used A "Realistic Probability" Test Drawn From Dicta In Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), A Case Involving Immigration Proceedings, Instead Of Applying The Elements-Based Categorical Test Required By This Court's Precedents In The Context Of Federal Sentencing*

Descamps and Mathis make clear that to determine whether a prior conviction qualifies as an ACCA predicate, courts must use the categorical approach. This approach is straightforward. When a statute sets out a single (or "indivisible") set of elements to define a single crime, the analysis is strictly elements based. "Sentencing courts may `look only to the statutory definitions' – *i.e.,* the elements – of defendant's prior offenses, and *not* `to the particular facts underlying those convictions.'" *Descamps,* 570 U.S. at 261 (quoting *Taylor v. United States,* 495 U.S. 575*,* 600 (1990)). ACCA is indifferent to how a defendant actually committed the prior offense, and courts must focus solely the *elements* of the crime of conviction. *Mathis,* 136 S. Ct. at 2251-2254

In *Decamps* and *Mathis,* the categorical approach was used in cases involving the enumerated offense clause of § 924(e)(2)(B)(ii). In *Stokeling,* it was applied to the elements clause of § 924(e)(2)(B)(i). As applied to an elements clause case, if

conviction of the crime under consideration does not necessarily require proof one of the elements listed in subdivision (i) ("the use, the attempted use, or threatened use of physical force against the person on another"), the categorical approach precludes counting that conviction as an ACCA predicate.

Mathis recognized that the categorical approach is somewhat more complex when the statute under examination has a "more complicated" structure -- that is, when the statute sets forth "alternatives" or includes terms in the disjunctive. A statute may contain a listing of elements in the alternative and thereby define multiple crimes, or it may enumerate various factual means of committing a single element. If the former, that is, if alternative terms outline elements of distinct offenses, the statute is deemed "divisible" and the court employs a "modified categorical approach." Under the modified approach, the court must first ascertain the alternative under which the defendant was convicted (and does so by considering underlying records of the conviction); it then determines, using the categorical approach, whether that alternative is or is not a qualifying ACCA. If, on the other hand, a statute describes alternative means of committing one offense, the court must keep to the classic categorical approach; resort to underlying records to find the means by which a defendant committed the crime is not permitted. *Mathis,* 136 S. Ct. at 2248, 2249, 2255.

Mathis also provided guidance as to how to determine whether the alternatives set forth in a statute describe elements or means. If the text of the statute, state decisions or other law state law sources do not resolve the issue,

federal courts can "peek at the [record] documents" for the "sole and limited purpose" of determining whether the alternatives are elements or means. *Mathis* at 2256-7. If this "peek" does not give a clear answer, then a sentencing judge will not be able to satisfy "*Taylor's* demand for certainty" when determining whether a defendant's prior conviction qualifies as an ACCA predicate. *Id.* at 2257.[9]

When the Second Circuit considered the attempted third-degree robbery conviction in this case, it gave lip service to the categorical approach, but did not apply it or the modified categorical approach; moreover, though the core definition of robbery has alternatives in two places (it specifies conduct in the disjunctive and lists two discrete purposes), it did not try to ascertain whether the alternatives were elements or means. Instead, citing *Gonzales v. Duenas-Alvarez,* 549 U.S. 183, 193 (2007), an Immigration case, it insisted that the determination whether the prior conviction qualified as an ACCA predicate depended on Mr. Thrower's demonstrating the facts and theories behind his own conviction or the convictions of others who pled to or were tried for attempted robbery in the third degree. In doing this, the Circuit garbled both the elements of attempted third-degree robbery and the particular elements set forth in § 924(e)(2)(B)(i).

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[9] If the record does not give a clear answer as to whether the statute is divisible, and the least of the acts described in statute under consideration cannot serve as an ACCA predicate offense because it does not necessarily require proof of one of the elements listed in § 924(e)(B)(2)(i), then the prior conviction cannot serve as a predicate offense. The government has the burden of proving that a prior conviction is a conviction for a predicate offense. *See, e.g., United States v. Moreno*, 821 F.3d 223, 227 (2d Cir. 2016). Any ambiguity in the applicability of a sentencing enhancement must be resolved in favor of the defendant. *United States v. Simpson*, 319 F.3d 81, 86-87 (2d Cir. 2002).

New York Penal Law § 160.05 states that a "person is guilty of robbery in the third degree when he forcibly steals property." § 160.00 explains "forcible stealing" in the disjunctive: "A person forcibly steals property, and commits robbery, when in the course of committing a robbery, he uses or threatens the immediate use of physical force upon another…"

Mr. Thrower argued below that, based on this disjunctive statute, a New York conviction for *attempted* third-degree robbery can be based on either an *attempt to use* physical force or *an attempt to threaten the use* of physical force. "Attempt to threaten the use of physical force," however, is not one of the three elements listed in 18 U.S.C. § 924(e)(2)(B)(i), at least one of which is required in order for a crime to satisfy the meaning of the term "violent felony" under ACCA. Since one can commit the crime of attempted third-degree robbery without the State's having to prove one of the listed elements in 18 U.S.C. § 924(e)(2)(B)(i), the categorical approach precludes counting an attempted third-degree robbery conviction as an ACCA predicate.

The Circuit rejected the argument but did not follow the required elements-based categorical analysis. Instead, it put the onus on Mr. Thrower to demonstrate the facts underlying his or other attempted third-degree robbery convictions. The Circuit held that Mr. Thrower's attempted third-degree robbery conviction qualifies as an ACCA "violent felony" because Thrower failed to "`at least point to his own case or other cases'" in which a person was convicted of attempted third-degree robbery "for an attempt to threaten to use physical force – as distinct from an

attempt to use physical force or a threat to use physical force." (Appendix, A-34) The Circuit's reasoning cannot be reconciled with *Descamps* and *Mathis*. [10]

The Government proffered in its Reply Brief that New York Penal Law § 160.00 is indivisible. It presented no basis (and there was no basis) for the Circuit to find that the statutory alternatives "uses or threatens the immediate use" were

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[10] As a fallback, the Circuit wrongly collapsed the distinction between the substantive crime (threatening the use of physical force against another in the course of committing larceny) and the attempt crime, ruling in a footnote, "An attempt to threaten to use force by, for example, attempting to use a threatening note, itself constitutes a `threatened use of physical force.'" This is a variant of the Government's position below that each and every robbery related offense in New York – whether first-degree or third-degree robbery, whether a completed offense or an attempt - qualifies as a violent felony under ACCA because, according to the Government, whatever physical force is actually used or threatened or attempted, there is always the "threat" that the situation can escalate to the degree of violence required by the Supreme Court in *Curtis Johnson*. This was but an effort to revive the residual clause, and should have been rejected because it promotes the very uncertainty and speculation about how much risk it takes for a crime to qualify as a violent felony that led this Court to declare the residual clause of § 924(e)(2)(B)(ii) ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") void for vagueness in *Samuel Johnson*. 135 S. Ct. at 2558.

Attempt is a lesser-included offense of the substantive crime; as a matter of law in New York, one is not even entitled to a lesser-included offense charge unless there is a reasonable view of the evidence that would support a finding that the defendant committed the lesser offense but *not* the greater. See, *People v. Glover,* 57 NY2d 61, 63 (1982). See also *Ljutica v. Holder,* 588 F.3d 119, 125 (2d Cir. 2009) ("an attempt to commit a substantive crime is a lesser included offense of that substantive crime"). However close to commission of the completed crime one must come in order to be guilty of an attempt, the plain text of the statute does not require that the *actus reus* of the completed crime has been committed. Thus, while the facts supporting a conviction for a completed crime may also support a conviction for attempt, it does not follow that the facts that support a conviction for attempt necessarily support a conviction for the completed crime. In other words, while it may not be possible to commit third-degree robbery based on threatening the immediate use of physical force without also committing every element of the lesser-included attempt offense, it is possible to commit attempted third-degree robbery without committing the threatening act.

separate elements of separate crimes, or, if they were separate crimes, that Mr. Thrower's prior conviction for attempted third-degree robbery was for the "use" as opposed to the "threaten to use" alternative. The burden was not on Mr. Thrower to make the opposite case. [11]

The Circuit was wrong here for the same reasons the Government was wrong in *Descamps* when it asserted "that sentencing courts may use the modified approach `to determine whether a particular defendant's conviction under' such an overbroad statute actually `was for [the] generic' crime." 570 U.S. at 275. Faced with an overbroad statute the text of which allows for conviction without proof of either "the use," "the attempted use," or the "threatened use" of physical force against the person of another (the three listed elements of 18 U.S.C. § 924(e)(2)(B)(i)), the Circuit erroneously found a back-door way to say the defendant's conviction was actually narrower. "But that circumstance-specific review is just what the categorical approach precludes." *Descamps*, 570 U.S. at 277.

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[11] Petitioner agrees with the Government that, by all indications, "uses or threatens the immediate use" of physical force are alternative means of committing forcible stealing, not separate elements of separate crimes. The statutory alternatives do not carry separate punishments; the pattern jury instructions do not require the jury to agree on whether defendant used or threatened the use of force (Appendix, A-47, A-48); and no New York state court decision that we could find even addresses the question. Cf. *People v. Charles*, 61 NY2d 321, 327-8 (1984) (Where an offense may be committed by doing any one of several things, the indictment may, in a single count, group them together and charge the defendant with having committed them all, and a conviction may be had on proof of the commission of any one of the things, without proof of the commission of the others) (Citations omitted.)

As in *Descamps,* because the statute at issue is indivisible, under the categorical approach, "Whether [Thrower] *did* [use, attempted to use, or threatened to use physical force against another] makes no difference." *Id.* at 265. Nor does it make a difference whether Thrower could locate a case (including among thousands where defendants pled guilty to attempted third-degree robbery) where the charging papers, the jury instructions, the plea agreement, or the plea colloquy demonstrated that the conviction was based on the "attempt to threaten to use" physical force alternative.

This Court was emphatic in *Descamps* and *Mathis*: Elements means elements; the ACCA is indifferent to how a defendant committed the crime. "[A] court may not look behind the elements of a generally drafted statute to identify the means by which a defendant committed a crime." *Mathis,* 136 S. Ct. at 2255 (citing, *Descamps,* 570 U. S., at ___, 133 S. Ct. 2276). See also, *Agtuca v. United States,* 2018 U.S. Dist. LEXIS 80902 *; 2018 WL 2193134 (W.D. Wash. 2018) (court rejects government's use of records underlying defendant's convictions to show that defendant's conduct actually involved physical violence; citing *Mathis* and *Descamps*, court concludes that, because state statute is both overbroad and indivisible, it does not qualify as a violent felony for purposes of ACCA).

Even the Second Circuit previously recognized that imposing a requirement on the defendant to "produce old state cases to illustrate what the statute makes punishable by its text," "misses the point of the categorical approach" that must be used to determine whether a prior conviction qualifies as a "violent felony," and

"`wrenches the Supreme Court's language in *Duenas-Alvarez* from its context.'" *Hylton v. Sessions,* 897 F.3d 57, 63-64 (2d Cir. 2018) (quoting *United States v. Aparicio-Soria,* 740 F.3d 152, 157 (4th Cir. 2014) (en banc) (internal quotations and citations omitted). *Hylton* recognized that crimes should be given their plain meaning, and a court must conduct "an elements-based categorical inquiry" based on the text of the statutes, not put the defendant to a so-called "realistic probability test." 897 F. 3d at 63.

Hylton is not the only case criticizing use of the "realistic probability" test suggested in *Duenas-Alvarez*. Other courts have as well. See *Salmoran v. AG United States*, 909 F.3d 73, 81-2 (3d Cir. 2018) (discussing the confusion caused by the *Duenas-Alvarez* language quoted by the panel here, and holding that it is error to place an undue burden on petitioners of identifying cases of actual prosecution where the statute at issue expressly authorizes the state government to enforce the law against conduct broader than that included in the federal statute).[12]

Judge Weinstein of the Eastern District of New York specifically questioned the applicability of the "realistic probability" test in the criminal sentencing context. In *United States v. Barrow*, 230 F. Supp. 3d 116, 121-122 (EDNY 2017), he wrote:

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[12] Application of the categorical approach is actually more straightforward in this case than in *Duenas-Alvarez, Hylton,* and *Salmoran*. In those cases, the analytical exercise involved deciding whether a state had created a crime that encompassed conduct outside that prohibited by the generic definition of a crime listed in the federal Immigration and Nationality Act. Here the question is whether, to prove the state crime, the state must necessarily prove one the three listed elements in the force or "elements clause" of 18 U.S.C. § 924(e)(2)(B)(1). There is no need to use imagination. One simply must look to the relevant state statutes and identify the elements of the crime.

> The Supreme Court has held, in the context of using the categorical approach in a civil immigration proceeding, that the "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be a 'realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85, 185 L. Ed. 2d 727 (2013) (quoting *Gonzales v. Duenas-Alvarez,* 549 U.S. 183, 193, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007*)).* To show that a State would apply the statute in non-generic way, the defendant "must at least point to his own case or other cases in which the state courts in fact did apply the statute" in that way. *Duenas-Alvarez,* 549 U.S. at 193. It is not clear that the *Duenas-Alvarez* "realistic probability" gloss on the categorical approach applies in the context of the criminal sentencing. The only Supreme Court opinion to refer to that language in the criminal sentencing context is *James v. United States*. In that case, the Supreme Court considered whether a conviction for attempted burglary under Florida law qualified as a violent felony under the Armed Career Criminal Act ("ACCA"). 550 U.S. 192, 195-96, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007). The Court quoted the "realistic probability" language from *Duenas-Alvarez* and held that "the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another" *Id.* at 208. This decision was explicitly overruled eight years later—the Supreme Court held that the relevant clause of the ACCA was unconstitutionally vague because it tied "the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements" *Johnson v. United States*, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015). The *Johnson* Court refused to "jettison...the categorical approach" in part because of the "utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction" *Id.* at 2562.

Granting *certiorari* would serve the important purpose of dispelling this confusion, clarifying whether the *Duenas-Alvarez* language has any vitality in the context of criminal sentencing, and explaining more clearly how to apply the categorical approach when the issue before a sentencing court is whether or not a prior conviction qualifies as an ACCA predicate under the elements clause.

Confusion in this area of the law is highly problematic for the very reasons that this Court applies the categorical approach: the categorical approach helps courts avoid the Sixth Amendment concerns that would arise from courts' making findings of fact that properly belong to juries, and avert the practical difficulties and potential unfairness of a factual approach.

The elements of New York's attempted third-degree robbery offense are evident from the text of Penal Law §§ 110.00 and 160.05, and it is the text – not legal imagination -- that allows for the statutes to apply to conduct that does not involve either "the use," the "attempted use" or the "threatened use" of physical force against another. If the Second Circuit's errors go uncorrected, numerous other future defendants may be incorrectly sentenced as armed career criminals who do not actually qualify under this Court's precedents.

CONCLUSION

For all of the foregoing reasons, Petitioner William Thrower respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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