No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

KELLY DAVID ANKENY, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Elizabeth G. Daily
Assistant Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Petitioner

QUESTION PRESENTED

Whether Oregon Robbery in the Second Degree (Or. Rev. Stat. § 164.405(1)(a)) is a violent felony under the Armed Career Criminal Act when the statute's basic force requirement has been deemed nonviolent and the aggravated form of the offense is satisfied by the defendant "represent[ing] by words or conduct that [he or she] is armed with what purports to be a dangerous or deadly weapon," but does not require the intentional use, attempted use, or threatened use of physical force against the person of another.

PARTIES TO THE PROCEEDINGS

All parties to this proceeding appear in the caption of the case on the cover page.

RELATED COURT PROCEEDINGS

The following proceedings are directly related to the present case:

United States v. Kelly David Ankeny, Sr., Case No. 3:04-cr-00005-MO-1 (D. Or.) (judgment entered June 17, 2005, amended judgment entered August 8, 2008, after resentencing; opinion and order denying 28 U.S.C. § 2255 motion entered February 13, 2017, as amended on February 23, 2017).

United States v. Kelly David Ankeny, Sr., Case No. 17-35138 (9th Cir.) (affirming denial of § 2255 motion, mandate issued March 9, 2).

United States v. Kelly David Ankeny, Sr., Case No. 08-30296, (9th Cir.) (on direct appeal after resentencing, mandate issued February 19, 2009).

United States v. Kelly David Ankeny, Sr., Case No. 05-30457 (9th Cir.) (on direct appeal, mandate issued September 13, 2007).

TABLE OF CONTENTS

Page

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page

SUPREME COURT OPINIONS

FEDERAL COURT OPINIONS

UNITED STATES CODE

STATE CASES

STATE STATUTES

OTHER

Petitioner Kelly David Ankeny, Sr., respectfully petitions for a writ of certiorari to review the final order of the United States Court of Appeals for the Ninth Circuit in Case No. 17-35138, affirming the denial of relief under 28 U.S.C. § 2255.

1. Opinions Below

The District Court denied petitioner's motion to vacate sentence in an unpublished amended opinion on February 23, 2017 (Appendix 12). The Ninth Circuit affirmed the denial of habeas corpus relief in an unpublished opinion on January 16, 2020. *United States v. Ankeny*, 798 F. App'x 990 (9th Cir. 2020) (Appendix 1).

2. Jurisdictional Statement

This petition is timely under Supreme Court Rule 13.3 and this Court's Order dated March 19, 2020, extending the deadline for filing any petition for a writ of certiorari to 150 days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

3. Constitutional and Statutory Provisions

The following statutory provisions are relevant to this petition and are set out verbatim in the Appendix:

- 28 U.S.C. § 2255 (Remedies on Motion Attacking Sentence)
- 18 U.S.C. § 924(e) (Armed Career Criminal Act)
- Or. Rev. Stat. § 164.395 (Oregon Robbery in the Third Degree)
- Or. Rev. Stat. § 164.405 (Oregon Robbery in the Second Degree)

For ease of reference, the relevant state robbery statutes are also included here:

Oregon Robbery in the Third Degree

(1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft or unauthorized use of a vehicle as defined in ORS 164.135 the person uses or threatens the immediate use of physical force upon another person with the intent of:

(a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or

(b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft or unauthorized use of a vehicle.

(2) Robbery in the third degree is a Class C felony.

Or. Rev. Stat. § 164.395.

Oregon Robbery in the Second Degree

(1) A person commits the crime of robbery in the second degree if the person violates ORS 164.395 and the person:

(a) Represents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon; or

(b) Is aided by another person actually present.

(2) Robbery in the second degree is a Class B felony.

Or. Rev. Stat. § 164.405.

4. Statement of the Case

On January 13, 2004, a federal grand jury in the District of Oregon indicted petitioner Kelly David Ankeny, Sr., on five criminal counts: four counts of being a felon in possession of a firearm, and one count of possession of an unregistered firearm, based on conduct alleged to have occurred on November 20, 2003. After his conviction on a plea of guilty, the district court determined that Mr. Ankeny qualified as an armed career

criminal under 18 U.S.C. § 924(e). The Armed Career Criminal Act (ACCA) eliminates the normal 10-year statutory maximum sentence for being a felon in possession of a firearm and instead mandates a 15-year minimum sentence and a maximum sentence of life in prison for an offender who has "three previous convictions . . . for a violent felony or for a serious drug offense." 18 U.S.C. § 924(e)(1). The district court found that Mr. Ankeny had two serious drug offense convictions and that his prior conviction for Oregon robbery in the second degree (Robbery II) qualified as a violent felony. After an initial remand from the Ninth Circuit to dismiss the multiplicitous felon in possession counts, the district court imposed an ACCA sentence of 188-months.

In 2015, this Court in *Johnson v. United States* held that a part of the ACCA's violent felony definition known as the "residual clause" is unconstitutionally vague and that "[i]ncreasing a defendant's sentence under the [residual] clause denies due process of law." 135 S. Ct. 2551, 2557 (2015). *Johnson* announced a new rule of constitutional law that applied retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016).

On June 6, 2016, Mr. Ankeny filed a timely motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. He argued that *Johnson* invalidated his ACCA sentence because, without the residual clause, his conviction for Oregon Robbery II could not otherwise satisfy the violent felony definition under the ACCA's force clause.

The district court denied relief, and the Ninth Circuit affirmed. In their reasoning, both courts agreed with the defense that Oregon's simple robbery statute, Or. Rev. Stat.

§ 164.395 (Robbery III), is nonviolent. However, the courts concluded that the element that elevates third-degree robbery to second-degree robbery—a defendant's representation that he or she is armed with a dangerous weapon—is equivalent to a threatened use of physical force within the meaning of the ACCA, satisfying the force clause.

In 2018, Mr. Ankeny completed the 188-month term of imprisonment imposed in this case and was released from the Bureau of Prisons to commence the five-year term of supervised release. He is presently detained in the custody of the United States Marshals on a violation of supervised release.

5. Reasons for Granting the Writ

This case provides the Court with the opportunity to address an important question of federal law: the meaning of a "threatened use of physical force against the person of another" in the ACCA. The district court and the Ninth Circuit in the opinions below reasoned that, when a person in the course of a robbery represents that he or she is armed, that statement qualifies as a threat of violent force. That reasoning departs from the plain meaning of the ACCA, it disregards controlling state precedent construing the statute, and it is inconsistent with this Court's elements-only mandate for applying the categorical approach. This Court should grant certiorari and reverse.

A. To Qualify As A Violent Felony Under The ACCA's Force Clause, The Elements Of A State Crime Must Necessarily Entail The Use, Attempted Use, Or Threatened Use Of Violent Physical Force.

A crime is a "violent felony" under the ACCA's force clause if it "has as an element the use, attempted use, or threatened use of physical force against the person of another."

18 U.S.C. § 924(e)(2)(B)(i). "Physical force" in that definition must be "'*violent* force—that is, force capable of causing physical pain or injury to another person.'" *Stokeling v. United States*, 139 S. Ct. 544, 553 (2019) (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson 2010*")) (emphasis in original). Physical force does not include mere offensive touching. *Id.*

In assessing whether a prior conviction satisfies the force clause, courts must apply the elements-based "categorical approach." *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Taylor v. United States*, 495 U.S. 575 (1990). The categorical approach requires courts to "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the force clause], while ignoring the particular facts of the case." *Mathis*, 136 S. Ct. at 2248; *accord Descamps v. United States*, 570 U.S. 254, 263-64 (2013). Because the categorical approach is concerned only with what conduct the offense necessarily involves, the court "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (internal quotation marks and alterations omitted). State law is determinative regarding the elements of a state crime. 559 U.S. 133, 138 (2010) ("We are, however, bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of Fla. Stat. § 784.03(2).").

B. Oregon Robbery In The Second Degree Does Not Satisfy The Force Clause Because A Representation That An Offender Is Armed With A Purported Weapon Does Not Necessarily Entail A Threatened Use Of Physical Force.

Oregon proscribes robbery in three statutes, defining the base offense (robbery in the third degree), the intermediate level of the crime (robbery in the second degree), and the most serious version (robbery in the first degree). *See* Or. Rev. Stat. §§ 164.395-164.415. The base offense—Robbery III—occurs when a defendant "in the course of committing or attempting to commit theft . . . uses or threatens the immediate use of physical force upon another person" to prevent or overcome resistance to the theft or to compel delivery of the property. Or. Rev. Stat. § 164.395(1). The higher degrees of robbery require proof that the defendant committed Robbery III plus proof of one of several defined elevating conditions. For Robbery II, the defendant must have either (1) "[r]epresent[ed] by word or conduct that [he or she] is armed with what purports to be a dangerous or deadly weapon," or (2) "[been] aided by another person actually present." Or. Rev. Stat. § 164.405(1). Mr. Ankeny was convicted under the representing to be armed prong of the statute, subsection (1)(a).[1]

Based on authoritative state case law, both the Ninth Circuit and the district court in their opinions below held that the "physical force" element of Robbery III does not require *violent* force because it can be committed by a nonviolent snatching. Appendix 5 (Ninth

[1] In the Ninth Circuit, Mr. Ankeny conceded that the two prongs of second-degree robbery constitute alternative elements of separate crimes, making the statute divisible. Appendix 5.

Circuit opinion citing *United States v. Strickland*, 860 F.3d 1224, 1227 (9th Cir. 2017) (holding that Robbery III is not a violent felony), and *United States v. Shelby*, 939 F.3d 975, 979 (9th Cir. 2019) (holding that Robbery I while armed with a deadly weapon is not a violent felony); Appendix 22 (district court opinion). Thus, the key question here, as it was in the lower courts, is "whether the elevating circumstance of representing that one is armed with what purports to be a dangerous weapon converts the force required under Robbery II to violent force as required under the ACCA." Appendix 22.

The Ninth Circuit reasoned that "Robbery II(a)'s representation element entails an implicit threat to use a purported weapon capable of serious or deadly force if the victim resists the robbery." However, that reasoning reads an additional threat element into the crime, contrary to this Court's categorical approach precedent and the well-understood definition of a threat.

As this Court recognized in *Elonis v. United States*, the common definition of a threat typically requires a "communicated intent to inflict harm or loss on another[.]" 135 S. Ct. 2001, 2008 (2015) (quoting BLACK'S LAW DICTIONARY 1519 (8th ed. 2004)). Relying on the "basic principle" that "wrongdoing must be conscious to be criminal," the Court in *Elonis* held that a threat requires not only a communication that is objectively threatening, but also a culpable mental state as to the threatening nature of the communication. *Id.* at 2008, 2011 (interpreting 18 U.S.C. § 875(c)). The Court rejected the government's argument that the law should punish statements as threats so long as they would reasonably be regarded as threats and the defendant "comprehended [their] contents

and context." *Elonis*, 135 S. Ct. at 2009, 2011. The Court explained that such a standard would reduce the mens rea for the offense to mere negligence:

> Criminal negligence standards often incorporate "the circumstances known" to a defendant. . . . Courts then ask, however, whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct. . . . That is a negligence standard.

Id.

Within the context of Oregon Robbery II, a representation that a person is armed does not qualify per se as a threatened use of physical force because there is no requirement that the defendant communicate an intent to cause harm, nor is there any requirement that the defendant either intend to threaten or know that the communication is threatening. The Oregon Court of Appeals has instructed that a defendant "represents" to the victim that he or she is armed if the defendant "intends to cause the victim to be aware of the fact that he or she is armed with a dangerous weapon." *State v. Lee*, 174 Or. App. 119, 126, 23 P.3d 999 (2001); *State v. Zimmerman*, 170 Or. App. 329, 333, 12 P.3d 996 (2000). Thus, all that § 164.405(1)(a) requires is that the defendant in some manner communicate that he or she has a purported weapon. Merely possessing a weapon will suffice, so long as the weapon is visible.

It does not follow from the elements of Robbery II that a defendant who is visibly armed necessarily intends to use a weapon to inflict injury. The district court recognized as much when it said, "[A] person could represent that he or she is armed with what purports to be a dangerous weapon in a way that is completely divorced from the use

or threatened use of force." Appendix 23. As the Ninth Circuit held in a related context, "The mere fact an individual is armed . . . does not mean he or she has used the weapon, or threatened to use it, in any way." *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016). For example, a defendant can satisfy the elements of robbery in the second degree by possessing a visible weapon during the course of a nonviolent purse snatching. While that conduct could incite greater fear in the victim, the offense itself entails no greater degree of violent force nor any communicated threat of violence.

Where neither the statutory text nor state case law necessarily require the threatened use of violent force, the ACCA's force clause is not satisfied.

C. Under Oregon Law, The Representation Of Being Armed Element Is Not "Conjoined" With The Physical Force Element Of Robbery In The Third Degree.

In finding that Oregon Robbery II under subsection (1)(a) categorically requires a threatened use of violent physical force, both the Ninth Circuit and the district court interpreted the "representing to be armed" element of § 164.405 as somehow "conjoined" with the "use or threatened use of physical force" element of third-degree robbery. Appendix 8 (Ninth Circuit); Appendix 23 (district court). In other words, the courts concluded that the use or threatened use of force must be carried out *by the means of* the representation that one is armed with a purported weapon.

The statutory text refutes that position. Section 164.405(1) sets forth the essential elements of the crime by stating that a person commits second-degree robbery by committing the elements of third-degree robbery "and" also satisfying a separate and

additional elevating condition. Or. Rev. Stat. § 164.405(1). The text sets forth the elevating conditions independently and provides no basis to "conjoin" those conditions with any element of third-degree robbery.

The Ninth Circuit purported to draw support from an Oregon Supreme Court case, *State v. White*, 346 Or. 275, 287, 211 P.3d 248 (2009). Appendix 7-8. But nothing in *White* holds, or even suggests, that interpretation. In fact, the court in *White* was not called on to interpret the statutory elements because the sole issue was whether separate verdicts under § 164.405(1)(a) and (1)(b) should merge into a single conviction, a question the court decided in the affirmative. *White*, 346 Or. at 291. In its analysis, the court considered the state legislature's overarching intent in establishing the three degrees of Oregon robbery: "[T]he statutes and the legislative history indicate [] an incremental classification, not of levels of actual violence during the commission of a robbery, but of levels of the *potential* for violence, including its potential extent." *Id.* at 287 (emphasis added). The court found that the greater degrees of the offense correspond to "the degree of perceived or actual threat to the victim[.]" *Id.* at 288. However, the Court distinguished "[a]ctual or threatened violence . . . [which] is punishable under other statutes" from the "coercive effect of potential violence in the course of theft." *Id.* at 290.

If anything, *White*'s reasoning suggests that Robbery II is satisfied when there is a risk of violence, but no actual threat. In any event, the court never had occasion to interpret the statutory elements, and nothing in *White* requires Robbery III's physical force element to be carried out "by the means" of a representation that a person is armed.

State cases actually interpreting the elements of Robbery II under § 164.405(1)(b) (robbery while "aided by another person actually present") confirm that the elevating conditions are independent requirements. In *State v. Morgan*, the Oregon Court of Appeals held that the "aided by another" element is satisfied by the mere presence of another individual *capable* of assisting in the crime, even if no actual assistance is rendered. 274 Or. App. 792, 799-800, 364 P.3d 690 (2015). In *Morgan*, the other person present was the defendant's boyfriend, who unknowingly drove her away from the scene of a shoplift, thereby enabling her to flee pursuing security officers. *Id.* at 794-95. Looking to legislative intent, the court found that the rationale behind subsection (1)(b) "is the increased danger of an assault on the victim when the robber is reinforced by another criminal who is actually present." *Id.* at 800.

Similarly, in *State v. Jackson*, the Oregon Court of Appeals held that the presence of a getaway driver in "physical proximity to the robbery" with "capability to intervene" was sufficient to establish the elevating condition, even though the driver had not participated in the use or threatened use of force. 212 Or. App. 51, 55, 157 P.3d 239 (2007). In *State v. Miller*, the Oregon Court of Appeals concluded that the presence of a second man 25 feet away from the commission of a purse snatching was sufficient to support the jury's finding that the defendant was aided by a second person actually present. 14 Or. App. 608, 611, 513 P.2d 1199 (1973). In none of those cases did the Court find the elevating element—the presence of a second person—must be "conjoined" with the use of physical force to satisfy the elements of Robbery II.

The Ninth Circuit acknowledged that, in light of this precedent, "other facts that may elevate simple robbery to Robbery I or II under Oregon law need not be tied to Robbery III's force element," but summarily concluded that "Robbery II(a)'s representation element must." Appendix 8. The court offered no viable basis to distinguish subsection (1)(a) from any other elevating condition, other than simply observing, "Oregon Robbery II(a) cases always involve the defendant's using the representation that he or she was armed as the means of threatening force against the victim." Appendix 8. The Ninth Circuit's reliance on how the crime is ordinarily committed is incompatible with this Court's categorical approach precedent, which focuses on the outer boundaries of the offense. *Moncrieffe*, 569 U.S. at 191 (requiring consideration of the "least of the acts criminalized"); *Mathis*, 136 S. Ct. at 2248 (holding that courts must "focus solely on whether the elements of the crime of conviction sufficiently match the elements [of the generic offense], while ignoring the particular facts of the case"). Here, whatever specific facts arise in reported case precedent, the elements of Robbery II simply do not align with the force clause. If there were any uncertainty on that score, doubts must be resolved in the defendant's favor. *Mathis*, 136 S. Ct. at 2256-57 (Where "state law fails to provide clear answers," a sentencing judge "will not be able to satisfy '*Taylor*'s demand for certainty.'") (quoting *Shepard v. United States*, 544 U.S. 13, 21 (2005)).

D. The Court Should Grant Certiorari To Clarify The Meaning Of A "Threatened Use Of Physical Force," For State Robbery Statutes That Require A Defendant To Be Visibly Or Purportedly Armed.

Although the present case concerns the particular text of Oregon's robbery in the second degree statute, the question presented implicates broader federal questions of exceptional importance. For one thing, the Court's ruling could impact a range of state statutes that provide for an elevated form of robbery when an offender represents he or she is armed. *See, e.g.*, Alaska Stat. Ann. § 11.41.500 (Alaska robbery in the first degree); Ark. Code Ann. § 5-12-103 (Arkansas aggravated robbery); Colo. Rev. Stat. Ann. § 18-4-302 (Colorado aggravated robbery); Conn. Gen. Stat. Ann. § 53a-134; Del. Code Ann. tit. 11, § 832 (Delaware robbery in the first degree); S.C. Code Ann. § 16-11-330 (South Carolina robbery and attempted robbery while armed with a deadly weapon). For each of those statutes, the question whether the offense qualifies as a violent felony has grave individual and systemic consequences because of the harsh increase to both the statutory minimum and maximum penalties mandated by the ACCA for being a felon in possession with qualifying prior convictions.

More broadly, this case provides the Court with an opportunity to clarify the meaning of a "threatened use of physical force," a phrase that appears in the force clause of the ACCA, in the "crime of violence" definition in 18 U.S.C. § 924(c), and in Sentencing Guidelines enhancements in U.S.S.G. § 4B1.2(a), but that this Court has never expressly defined. As noted, *Elonis* drew from "basic principles" of wrongdoing to conclude that a criminalized threat must encompass both a content requirement—a communicated intent

to inflict harm or loss on another—and a culpable mens rea requirement—that the defendant know the threatening character of the communication. Yet here, the Ninth Circuit deemed Oregon second-degree robbery to satisfy the force clause even though the offense requires no threat of force nor any intent to threaten injury. By granting certiorari, the Court can consider whether the basic principles enunciated in *Elonis* and other threat precedent also determine the federal definition of a "threatened use of physical force."

6. Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

Dated this 12th day of June, 2020.

/s/ Elizabeth G. Daily
Elizabeth G. Daily
Attorney for Petitioner

NOT FOR PUBLICATION

FILED

JAN 16 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KELLY DAVID ANKENY, Sr., Defendant-Appellant.	No. 17-35138 D.C. Nos. 3:16-cv-01013-MO 3:04-cr-00005-MO-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, Chief Judge, Presiding

Argued and Submitted July 12, 2018
Submission Withdrawn September 18, 2018
Resubmitted January 15, 2020
Portland, Oregon

Before: WARDLAW and OWENS, Circuit Judges, and LEFKOW,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Joan H. Lefkow, United States District Judge for the Northern District of Illinois, sitting by designation.

Kelly David Ankeny appeals the denial of his motion to vacate his conviction under 28 U.S.C. § 2255.[1] We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(c)(2) and affirm.

Ankeny was sentenced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), because he had one conviction of a violent felony and two of serious drug offenses. Ankeny filed a motion to vacate his sentence under 28 U.S.C. § 2255, arguing that after *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551 (2015), declared vague the "residual clause" of the ACCA's definition of "violent felony," Ankeny's predicate conviction of Oregon second-degree robbery (Robbery II), Or. Rev. Stat. § 164.405, cannot be classified as a violent felony under § 924(c); thus, he should not have been sentenced as an armed career criminal. The district court denied the motion, holding that Ankeny's Robbery II conviction was of a crime of violence under the ACCA's "force clause." We review that decision *de novo*. *United States v. Parnell*, 818 F.3d 974, 978 (9th Cir. 2016).

A crime is a violent felony under the force clause if it "has as an element the use, attempted use, or threatened use of physical force against the person of

[1] Although Ankeny's prison term ended while this appeal was pending, he is still subject to a term of supervised release and thus remains in custody for purposes of § 2255. *Matus-Leva v. United States*, 287 F.3d 758, 761 (9th Cir. 2002).

another." 18 U.S.C. § 924(e)(2)(B)(i). "'[P]hysical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (citing *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003)). Recently, the Supreme Court clarified that this definition "encompasses robbery offenses that require the criminal to overcome the victim's resistance." *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019).

"[T]o determine whether a defendant's conviction under a state criminal statute qualifies as a violent felony under the force clause, we do not look to the underlying facts of the defendant's actual conviction." *United States v. Walton*, 881 F.3d 768, 771 (9th Cir. 2018) (citing *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016)). Instead, we ask "whether the conduct proscribed by the statute *necessarily* involves the use, attempted use, or threatened use of physical force against the person of another." *Ward v. United States*, 936 F.3d 914, 917 (9th Cir. 2019) (quoting *United States v. Geozos*, 870 F.3d 890, 898 (9th Cir. 2017)) (quotation marks omitted). "State cases that examine the outer contours of the conduct criminalized by the state statute are particularly important because we must presume that the conviction rested upon nothing more than the least of the acts criminalized by that statute." *Walton*, 881 F.3d at 771–72 (quoting *United States v. Strickland*, 860 F.3d 1224, 1226–27 (9th Cir. 2017)) (internal quotation marks omitted).

But if a statute is "divisible," meaning that what the state labels as a single crime is effectively several different crimes, we apply a modified categorical approach, "consult[ing] a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction, and then apply the categorical approach under the subdivision under which the defendant was convicted." *Id.* at 772 (quoting *United States v. Werle*, 815 F.3d 614, 619 (9th Cir. 2016)). "To be divisible, a state statute must contain 'multiple, alternative elements of functionally separate crimes.'" *United States v. Dixon*, 805 F.3d 1193, 1196 (9th Cir. 2015) (emphasis omitted) (quoting *Rendon v. Holder*, 764 F.3d 1077, 1085 (9th Cir. 2014)). The touchstone of a divisible crime is "alternative elements, which are essential to a jury's finding of guilt," rather than "alternative means, which are not." *Id.* at 1198 (quotation omitted). Elements are alternative if the prosecutor "must generally select the relevant element from its list of alternatives. And the jury, as instructions in the case will make clear, must then find that element, unanimously and beyond a reasonable doubt." *Id.* (quoting *Rendon*, 764 F.3d at 1085).

Robbery II is not categorically a violent felony. A person commits Robbery II by committing third-degree Oregon robbery (Robbery III), Or. Rev. Stat. § 164.395, and

> (a) Represent[ing] by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon; or

(b) [Being] aided by another person actually present.

Or. Rev. Stat. § 164.405(1)(a)–(b). Robbery III, in turn, occurs when "in the course of committing or attempting to commit theft . . . [a] person uses or threatens the immediate use of physical force upon another person with the intent of: (a) [p]reventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or (b) [c]ompelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft." Or. Rev. Stat. § 164.395(1). We have held that Oregon Robbery III is not a violent felony under the force clause because "[s]tate cases show that Oregon doesn't require physically violent force." *Strickland*, 860 F.3d at 1227 (collecting cases); *see also United States v. Shelby*, 939 F.3d 975, 979 (9th Cir. 2019) (reaffirming *Strickland* after *Stokeling*). By extension, because a defendant can commit Robbery II by having another person present during a nonviolent Robbery III, Robbery II does not necessarily entail the use of force.

But as Ankeny concedes, Robbery II is divisible.[2] Under Oregon law, each subsection of § 164.405(1) is an alternative element that must be proven to a jury

[2] We originally certified the question of Robbery II's divisibility to the Oregon Supreme Court, *United States v. Lawrence*, 905 F.3d 653, 659 (9th Cir. 2018), which declined certification in part because it understood existing Oregon

beyond a reasonable doubt. *State v. Gaines*, 365 P.3d 1103, 1108–09 (Or. Ct. App. 2015) (holding jury must concur on theory of second-degree robbery); *see also State v. White*, 211 P.3d 248, 254–55 (Or. 2009) (though holding Robbery II's two elevating conditions constitute a single crime under state law, acknowledging that they "involve proof of different facts"). That understanding holds true in Ankeny's case, where he was charged exclusively under subsection (a), corroborating our conclusion that the statute is divisible. *See Mathis*, 136 S. Ct. at 2256–57 (permitting courts to "peek at the record documents" to determine whether state treats items listed in a statute as elements). We therefore hold that Oregon Robbery II is divisible and accept Ankeny's concession.

Under the modified categorical approach, the information and guilty plea reveal that Ankeny was convicted of Robbery II under § 164.405(1)(a) because he represented that he was armed with what purported to be a dangerous weapon while committing Robbery III. We must therefore determine whether representing that one is armed in the course of committing Oregon Robbery III necessarily entails a threat of violent force.

It does. A threat of violent force under the ACCA "requires some outward expression or indication of an intention to inflict pain, harm or punishment."

---

law to answer our certified question. *United States v. Lawrence*, 441 P.3d 587, 589–90 (Or. 2019) (citing *State v. Gaines*, 365 P.3d 1103 (Or. Ct. App. 2015)).

Parnell, 818 F.3d at 980. Robbery II(a)'s representation element requires such an outward expression: the defendant must actively communicate to the victim during the course of a robbery that he or she is armed with what purports to be a dangerous or deadly weapon. *State v. Lee*, 23 P.3d 999, 1003 (Or. Ct. App. 2001) ("[T]o commit second-degree robbery, the defendant must intend to cause the victim to be aware of the fact that he or she is armed with a dangerous weapon."). Although Robbery III is not categorically violent, Robbery II(a)'s representation element entails an implicit threat to use a purported weapon capable of serious or deadly force if the victim resists the robbery. *See, e.g.*, *United States v. Perez-Silvan*, 861 F.3d 935, 942–43 (9th Cir. 2017) (holding that unlawful touching while "us[ing] or display[ing] a deadly weapon" constitutes a violent felony under the ACCA).

We further agree with the district court that Robbery II(a)'s representation element is "conjoined" with Robbery III's force element—that is, to commit robbery *and* represent that one is armed, one must commit robbery *by* representing that one is armed. The Oregon Supreme Court has described the elements in such terms, explaining that higher degrees of robbery correspond with increased "levels of threat that may persuade the victim to part with his or her property with more or less reluctance." *White*, 211 P.3d at 256. The Oregon Court of Appeals has implicitly conjoined Robbery III's force element and Robbery II(a)'s

representation element by describing Robbery II(a) as "commit[ing] *theft* while representing that he was armed with what purported to be a deadly or dangerous weapon . . . ." *State v. Colmenares-Chavez*, 260 P.3d 667, 669 (Or. Ct. App. 2011) (emphasis added). Moreover, Oregon Robbery II(a) cases always involve the defendant's using the representation that he or she was armed as the means of threatening force against the victim. *See, e.g.*, *White*, 211 P.3d at 249–50 (defendant threatened to stab loss-prevention employee during robbery); *State v. Shields*, 407 P.3d 940, 941 (Or. Ct. App. 2017) (defendant confronted victims with a gun and demanded cash); *State v. Christner*, 624 P.2d 1085, 1086 (Or. Ct. App. 1981) (defendant threatened to shoot victim with a handgun).

Although other facts that may elevate simple robbery to Robbery I or II under Oregon law need not be tied to Robbery III's force element, Robbery II(a)'s representation element must. Unlike Robbery I, which criminalizes possessing but not using a dangerous weapon during a robbery, *Shelby*, 939 F.3d at 979, or Robbery II(b), which criminalizes committing a robbery with the aid of another person present who does not use or threaten force, *State v. Morgan*, 364 P.3d 690, 694–95 (Or. Ct. App. 2015), Robbery II(a) requires active use of the representation to commit the simple robbery. Ankeny has not cited and we are not aware of any Oregon cases suggesting otherwise.

Nor do we see a reasonable possibility that Robbery II(a) could ever be applied to nonviolent conduct. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In the district court, Ankeny proposed that a defendant who inadvertently displays a weapon during a nonviolent robbery but does not use the weapon to effect the robbery could be guilty of Robbery II(a) without threatening violent force. Ankeny rightly abandons that hypothetical here, because that defendant has not committed Robbery II(a), which requires an intentional representation. *Lee*, 23 P.3d at 1003. It would require vivid legal imagination to uncover a way to represent affirmatively that one is armed during a robbery without at least implicitly threatening to use the purported weapon if the victim resists. *See Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) ("[O]ur 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.'" (citation omitted)).

Finally, Ankeny argues that under *State v. Lee*, Robbery II(a) does not require proof that the defendant intends to threaten violent force against the victim. In *Lee*, the defendant argued that the jury should have been instructed on menacing—"by word or conduct . . . intentionally attempt[ing] to place another in fear of imminent serious physical injury"—as a lesser included offense of Robbery

II. 23 P.3d at 1002–03. The Oregon Court of Appeals held that menacing is not a lesser included offense because Robbery II(a) does not require specific intent to cause fear. *Id.* at 1003. The court reasoned that making the victim believe that the defendant is armed with a dangerous weapon "does not *necessarily*" require proof that "the defendant also intends to create in the mind of the victim the particular mental state of 'fear of imminent serious physical injury.'" *Id.* The court posited that a defendant who says "I have a gun, but I don't want you to be afraid. Just give me your money, and no one will harm you in any way" would be guilty of Robbery II(a) but not menacing. *Id.* Ankeny argues that if Oregon does not require proof of intent to frighten the victim, Robbery II(a) does not necessarily entail the "threatened use of physical force" under the ACCA.

Lee does not transform Robbery II(a) into a nonviolent crime. First, *Lee* holds at most that Robbery II(a)'s representation element does not require specific intent to frighten the victim. But the ACCA does not require specific intent: "knowledge, or general intent, remains a sufficient *mens rea* to serve as the basis for a crime of violence." *Werle*, 877 F.3d at 882. *Lee* itself suggests that defendants who intentionally communicate to their robbery victims that they are armed will know that most victims will feel fear. *Lee*, 23 P.3d at 1003 ("[M]any or most victims in such circumstances in fact will be afraid."). Second, *Lee* holds that Robbery II(a) does not *necessarily* require proof of intent to frighten, *id.*, but the

ACCA requires "outward expression or indication of an intention to inflict pain, harm or punishment." *Parnell*, 818 F.3d at 980. A defendant's intention to frighten the victim and a defendant's intention to communicate an intent to inflict pain, harm and punishment if the victim resists are not necessarily two sides of the same coin. *See Lee*, 23 P.3d at 1003.

Finally, Ankeny argues that we should apply the rule of lenity to construe Robbery II in his favor. The rule applies only "where there is a grievous ambiguity or uncertainty in the language or structure of the statute," *United States v. Wanland*, 830 F.3d 947, 954 (9th Cir. 2016) (quoting *United States v. Kahre*, 737 F.3d 554, 572 (9th Cir. 2013)), which we do not find here.

We therefore **AFFIRM.**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA,

No. 3:04-cr-00005-MO-1

v.

AMENDED
OPINION AND ORDER

KELLY DAVID ANKENY, SR.,

Defendant.

MOSMAN, J.,

This matter comes before the Court on Defendant's Motion to Vacate or Correct Sentence pursuant to 28 U.S.C. § 2255 [103]. For the reasons set forth below, I DENY Defendant's Motion.

BACKGROUND

In 2005, Defendant entered a conditional guilty plea to four counts of being a felon in possession of a firearm and one count of possession of an unregistered sawed-off shotgun. Defendant appealed his convictions, arguing that three out of the four counts of being a felon in possession of a firearm were "multiplicitous." The Ninth Circuit agreed but also rejected Defendant's argument that his Oregon Robbery in the Second Degree ("Robbery II") conviction was not a predicate "violent felony" under the Armed Career Criminal Act ("ACCA"). On remand, this Court modified Defendant's sentence to 188 months in prison on the remaining

felon in possession of a firearm count ("Count 3") and 120 months on the possession of an unregistered firearm count ("Count 4").

In light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"), Defendant filed the present motion on June 6, 2016. Defendant's core argument is that his Robbery II conviction does not qualify as a violent felony under the ACCA without the application of the statute's residual clause, which was found to be unconstitutional in *Johnson II*. *Id.* at 2561. In response, the Government argues that, even without the residual clause, the Robbery II conviction constitutes a predicate violent felony because it satisfies the force clause of the ACCA (18 U.S.C. § 924(e)(2)(B)(i)). I held oral argument on the present motion on October 31, 2016.

DISCUSSION

For the reasons below, I conclude that Defendant's Robbery II conviction remains a qualifying predicate violent felony under the ACCA.

I. Sentence Enhancements Under the ACCA

18 U.S.C. § 922(g) makes it unlawful for anyone who has previously been convicted of "a crime punishable for a term exceeding one year" to possess or receive any firearm or ammunition, "which has been shipped or transported in interstate or foreign commerce." A person who violates § 922(g) and has three qualifying prior convictions for a violent felony or serious drug offense is subject to imprisonment of not less than 15 years, regardless of the statutory maximum for the offense. § 924(e)(1). Under the statute, a violent felony is one 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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

§ 924(e)(2)(B). In *Johnson II*, the Supreme Court held that the last portion of § 924(e)(2), commonly referred to as the residual clause, is unconstitutionally vague. 135 S. Ct. at 2557 (referring to "otherwise involves conduct that presents a serious potential risk of physical injury to another"). Thus, in order for a person to be subject to a sentence enhancement under § 924(e) based on a prior violent felony conviction, the felony must be one of those enumerated in § 924(e)(2) ("enumerated list") or an element of the felony must include the use or threatened use of force ("force clause").

In this case, Defendant was convicted of being a felon in possession of a firearm (Count Three) and possession of an unregistered sawed-off shotgun (Count Four).[1] Because he had three predicate offenses, his sentence on Count Three was enhanced to a total of 188 months imprisonment. Two of the previous offenses were convictions for controlled substance charges, and they remain valid predicate offenses under § 924(e). The third offense was a conviction for Robbery II, and it is the subject of the current motion.

Defendant argues that Robbery II does not constitute a violent felony under the statute and thus cannot serve as a valid predicate offense. The parties agree that Robbery II is not an offense included in the enumerated list. Therefore, in light of the Supreme Court's ruling in *Johnson II*, the only way Robbery II can qualify as a violent felony is if it contains as an element the use or threatened use of force.

II. Requirement of "Violent Force" Under the Force Clause

At first glance, it may appear that the Ninth Circuit has already determined that Defendant's Robbery II conviction qualifies as a violent felony under the force clause. Indeed, on the previous appeal, the Ninth Circuit found that Robbery II by statute "contains the required

[1] Count Four is irrelevant for purposes of the present § 2255 motion because Defendant has already served his 120-month sentence on the conviction.

element of use, attempted use or threatened use of physical violence," and thus "constitutes a violent felony for purposes of [the] ACCA." *United States v. Ankeny*, 502 F.3d 829, 840 (9th Cir. 2007). The Ninth Circuit's decision, however, came before the Supreme Court determined that the phrase "physical force" actually means "violent force," or "force capable of causing physical pain or injury to another person. *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010) ("*Johnson I"*). The force must also "be inflicted intentionally, as opposed to recklessly or negligently." *United States v. Lawrence*, 627 F.3d 1281, 1284 (9th Cir. 2010). As such, the fact that a criminal statute contains an element of force is insufficient, by itself, to satisfy the force clause under the ACCA. Therefore, the Ninth Circuit's earlier decision in *Ankeny* is no longer conclusive. I must determine the level of force required to be convicted under Robbery II, and whether that level of force satisfies the requirements of the ACCA's force clause.

The fact that an element of force, by itself, does not satisfy the force clause is further demonstrated in the recent case of *United States v. Dunlap*, 162 F. Supp. 3d 1106 (D. Or. 2016). In *Dunlap*, this Court held that Robbery in the Third Degree ("Robbery III") was overbroad and could not serve as a predicate violent felony conviction for purposes of the ACCA. *Id.* at 1116. In reaching this conclusion, this Court reasoned that even though Robbery III "includes the use or threatened use of physical force as an element," court decisions interpreting the relevant state statute prove that only "minimal force" is required. *Id.* at 1114-15. The decision in *Dunlap* is important because although a distinct crime, Robbery II incorporates and adopts the force

element from Robbery III. *See* Or. Rev. Stat. Ann. § 164.405 (West 2016).[2] Thus, the only remaining question is whether the addition of the elevating conditions under Robbery II converts the force required under the offense to violent force, thereby qualifying Robbery II as a violent felony for purposes of the ACCA.

III. Determining Whether a Previous Conviction Constitutes a Violent Felony Under the ACCA

In deciding whether a previous conviction qualifies as a violent felony under the ACCA, a court engages in a process that involves up to three steps. *United States v. Cisneros*, 826 F.3d 1190, 1193 (9th Cir. 2016) (citing *Descamps v. United States*, 133 S. Ct. 2276 (2013)).

First, the court examines the elements of the state predicate offense to determine whether the conviction qualifies as a violent felony under the ACCA. *United States v. Dixon*, 805 F.3d 1193, 1195 (9th Cir. 2015); *Dunlap*, 162 F. Supp. 3d at 1112. In doing so, the court must "presume that the conviction rested upon nothing more than the least of the acts criminalized" without applying "legal imagination" to the state offense. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013) (internal quotation marks omitted). If the state statute's elements are "the same

[2] Under ORS § 164.395:

> (1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft or unauthorized use of a vehicle as defined in ORS 164.135 the person uses or threatens the immediate use of physical force upon another person with the intent of:
>
> > (a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or
> >
> > (b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft or unauthorized use of a vehicle.

Under ORS § 164.405:

> (1) A person commits the crime of robbery in the second degree if the person violates ORS 164.395 and the person:
>
> > (a) Represents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon; or
> >
> > (b) Is aided by another person actually present.

as, or narrower than, those included in the ACCA's definition of violent felony," a violation of the statute is "categorically a violent felony under the ACCA." *Dixon*, 805 F.3d at 1195 (internal quotation marks omitted) (citing *Descamps*, 133 S. Ct. at 2281). If the state statute criminalizes conduct beyond the reach of a violent felony, however, the statute is overbroad, requiring the court to move on to step two. *See id.* at 1196; *Dunlap*, 162 F. Supp. 3d at 1112 (citing *Almanza-Arenas v. Lynch*, 809 F.3d 515, 521 (9th Cir. 2015) (en banc)).

At step two, the court considers whether the statute is "divisible" or "indivisible." *Cisneros*, 826 F.3d at 1193. A divisible statute is one that "sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building *or* an automobile." *Descamps*, 133 S. Ct. at 2281. A statute worded in the disjunctive is not necessarily divisible. *Dixon*, 805 F.3d at 1198. Rather, in order to be divisible, the statute must supply "multiple, alternative elements of functionally separate crimes," as opposed to "multiple, alternative means" of the same crime. *Id.*; *Rendon v. Holder*, 764 F.3d 1077, 1085-86 (9th Cir. 2014). When the statute is overbroad and divisible, the court moves on to step three of the analysis. *Cisneros*, 826 F.3d at 1193. If the statute is overbroad and indivisible, however, the court's inquiry ends because "a conviction under an indivisible, overbroad statute can *never* serve as a predicate offense." *Id.*

At step three, the court applies a "modified categorical approach," which allows the court to "examine certain documents from the defendant's record of conviction to determine what elements of the divisible statute he was convicted of violating." *Id.* If the court determines that a defendant was convicted under a portion of the state statute that also "meets the ACCA's definition of 'violent felony,'" then the statute can serve as a valid predicate for the ACCA's sentence enhancement. *Dixon*, 805 F.3d at 1196.

a. *Step One: Whether Oregon's Robbery II Statute is Overbroad*

First, I must look at the elements of Robbery II to determine whether it qualifies as a violent felony under the ACCA. Because robbery is not included on the enumerated list, the only way Robbery II can be a violent felony under the ACCA is if it contains as an element the use or threatened use of violent force.

A person commits Robbery II if the person commits Robbery III and the person: "(a) Represents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon; or (b) Is aided by another person actually present." Or. Rev. Stat. Ann. § 164.405. Looking at the text of the statute, there is a "realistic probability" that state officials would apply this statute to conduct that falls outside the ACCA's requirement of violent force. *See Mocrieffe*, 133 S. Ct. at 1685.

There are several realistic scenarios in which a person could commit Robbery II with minimal force[3] while being "aided by another person actually present." *See* Or. Rev. Stat. Ann. § 164.405; *Dunlap*, 162 F. Supp. at 1114 (citing *State v. Johnson*, 168 P.3d 312 (Or. App. 2007)). For example, a person might snatch a victim's purse on the street while another person attempts to distract the victim. Even though the purse snatcher's actions would constitute Robbery II, it is difficult to argue that such actions are "capable of causing physical pain or injury to another person." *Johnson I*, 130 S. Ct. at 1271. In other words, Robbery II criminalizes conduct that is broader than that covered by the force clause, making the statute overbroad.

b. *Step Two: Whether Oregon's Robbery II Statute is Divisible*

Because Robbery II is overbroad, I must determine whether the elevating conditions under the statute are divisible. To determine whether the elevating conditions are separate

[3] This Court has already concluded that the force requirement under Robbery III does not amount to violent force under the ACCA. *Dunlap*, 162 F. Supp. at 1114-15.

elements as opposed to separate means, I must look to Oregon state law. *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016).

Of course, looking to state law will necessarily involve an "apples to oranges" comparison. No state case will directly answer the divisibility question, which is a question of application of the ACCA. But, what state law can do is provide guidance as to whether the various subparts of a statute amount to "multiple, alternative elements of functionally separate crimes" or "multiple, alternative means" of the same crime.

The Government relies heavily on *Oregon v. White*, a case in which the Oregon Supreme Court considered whether a defendant's conduct that satisfied both enhancing conditions under Robbery II could support two separate guilty verdicts. 211 P.3d 248, 250 (Or. 2009). Specifically, the government focuses on several statements in *White* that make clear the court viewed the two enhancing conditions of Robbery II as separate elements. *See id.* at 254-55. This is useful, as far as it goes. But the formulation has two parts: (1) multiple alternative elements, of (2) functionally separate crimes. And here is where what *White* gives the Government with one hand, it takes away with the other. Because in the context of deciding whether to merge two guilty verdicts – one for each enhancing condition – the court holds that the Robbery II statute, with its two alternative elements, constitutes a single crime.

By describing multiple elements of a single crime, the controlling state authority leaves open or ambiguous the divisibility question. But, by looking carefully at the rationale in *White*, and the structure of the Robbery II statute, I conclude the statute is divisible.

My conclusion draws support from several sources. First, as noted above, the court in *White* made clear that the elevating conditions from Robbery II constitute different elements that "involve proof of different facts." *Id.* at 254. Moreover, the criminal episode, which satisfied

both paragraphs of § 164.405, supported two different guilty verdicts on two separate jury instructions. Even though these verdicts eventually merged for purposes of sentencing, the fact that they were instructed separately indicates the statute is divisible.

Second, when state law "fails to provide clear answers" on the divisibility of a statute, courts may "peek at the [record] documents" for the "sole and limited purpose of determining whether the [listed items are] element[s] of the offense." *Mathis*, 136 S. Ct. at 2256-57 (quoting *Rendon v. Holder*, 782 F.3d 466, 473-74 (9th Cir. 2015) (internal quotation marks omitted)). Here, the Information states that Defendant represented "by word and conduct that he . . . was armed with a dangerous and deadly weapon." It does not refer to the second elevating condition, providing further support that the statute is divisible. *See id.* at 2257 ("[A]n indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime.").

Finally, even though both enhancing conditions "address the same coercive effect on the victim of the threat of violence," they do so in different ways. *White*, 211 P.3d at 257. Unlike a list of related terms, such as "force, violence, or intimidation," the representation of a dangerous weapon involves significantly different proof than the presence of an accomplice. This aspect of the statute also weighs in favor of the statute being divisible.

In opposition to this conclusion, Defendant relies on *Dunlap*; a case in which this Court concluded that the disjunctively worded portions of Robbery III did not make the statute divisible. 162 F. Supp. 3d at 1115-16. The outcome in *Dunlap*, however, is unhelpful in determining the divisibility of Robbery II. First, it goes without saying that Robbery III is not the same offense; it does not even contain the elevating conditions at issue here. Additionally, unlike the disjunctive phrases in Robbery III, a jury would need to unanimously agree that a person (a)

represented he was armed with what purports to be a dangerous weapon, or (b) was aided by another person actually present to convict that person of Robbery II. *See Ramirez v. Lynch*, 810 F.3d 1127, 1134 (9th Cir. 2016). Thus, the divisibility analysis in *Dunlap* does not answer the divisibility question here.

Based on the rationale, if not the result, in *Oregon v.* White, and the text and organizational structure of the statute, I find the enhancing conditions in Robbery II to be divisible. Therefore, I must move to step three to determine what elements of Robbery II Defendant was convicted of violating.

c. *Step Three: Whether A Conviction Under Paragraph (a) of Oregon's Robbery II Constitutes a Violent Felony Under the ACCA*

Because Robbery II is overbroad and divisible, I apply the modified categorical approach at step three to "determine what elements of the divisible statute he was convicted of violating." *Cisneros*, 826 F.3d at 1193. As noted above, the Information in this case provides that Defendant "did unlawfully and knowingly threaten the immediate use of physical force" and "did represent by word and conduct that he . . . was armed with a dangerous and deadly weapon." Thus, it is clear that Defendant was convicted under paragraph (a) of § 164.405, rather than paragraph (b).

Although this conclusion is helpful to the government, it is not the end of my analysis. I must still decide whether § 164.405(a), rather than the statute as a whole, is overbroad as compared to the requirements for a violent felony under the ACCA.[4] Again, the Court must look to state law to determine the conduct to which § 164.405(a) applies.

[4] In a recent opinion by Judge Hernandez, this Court already concluded that Robbery II is not a crime of violence, as defined under § 4B1.2(a) of the Sentencing Guidelines. *See United States v. Wickland*, No. 3:15-cr-00015-HZ, 2016 WL 6806341, at *3 (D. Or. Nov. 17, 2016). While the definition for a crime of violence under § 4B1.2(a) is very similar to the definition of a violent felony under the ACCA, *see* 18 U.S.C. § 924(e)(2), the two cases pose different questions. The effect of *Johnson II* on sentences enhanced under §4B1.2 of the Sentencing Guidelines is an issue currently before the U.S. Supreme Court. *See Beckles v. United States*, 136 S. Ct. 2510 (2016).

i. Robbery II's Force Element Alone Does Not Constitute Violent Force

As an initial matter, this Court has already held that the force element under Robbery III – an element that Robbery II incorporates – does not amount to violent force under the ACCA. *Sloan v. Feather*, No. 3:15-cv-00342-MO, 2016 WL 4472997, at *2 (D. Or. Apr. 8, 2016); *Dunlap*, 162 F. Supp. 3d at 1114-15. In reaching this conclusion, the Court relied, in part, on an Oregon case in which a defendant was convicted of Robbery III after snatching the victim's purse and flowers. *See Oregon v. Johnson*, 168 P.3d 312 (Or. App. 2007). Even though the victim did not become aware of the robbery until after she saw the defendant fleeing, the Oregon Court of Appeals concluded that the defendant used sufficient force to be convicted of Robbery III. *Id.* at 313-14. As a result, this Court concluded that the force element under Robbery III requires only minimal force and does not amount to violent force as required under the ACCA. *Dunlap*, 162 F. Supp. 3d at 1114-15. Because Robbery II requires a violation of Robbery III, this conclusion applies in equal force to the force element under Robbery II.

ii. Robbery II's Force Element Is Conjoined with the Elevating Weapon Condition

The question remains as to whether the elevating circumstance of representing that one is armed with what purports to be a dangerous weapon converts the force required under Robbery II to violent force as required by the ACCA. The central debate surrounding this question, as framed by the parties, is whether the elevating weapon condition can be performed independently from the force element, or whether the two are necessarily conjoined. If conjoined, Robbery II would require the use or threatened use of force to be carried out by the means of the representation that one is armed with what purports to be a dangerous weapon. Such construction would likely satisfy the ACCA's requirement of violent force because a defendant would necessarily be required to use or threaten to use "force capable of causing

physical pain or injury to another person." *Johnson I*, 130 S. Ct. at 1271 (2010). Alternatively, if not conjoined, a person could represent that he or she is armed with what purports to be a dangerous weapon in a way that is completely divorced from the use or threatened use of force. This latter construction would not likely meet the requirement of violent force under the ACCA.

The Government argues that under Robbery II, the threat or use of physical force and the enhancing weapon condition are conjoined. Again, *Oregon v. White* supports the Government's position. The court in *White* noted that it is the "concept of fear or threat of violence that separates robbery from mere theft." 211 P.3d at 256. Indeed, the "use or threat of violence is what causes the victim to part with the property, and that coercive effect is what each of the robbery statutes addresses." *Id.* Although *White* uses the word "violence," its findings are instructive on the level and quality of force required for Robbery II. Essentially, *White* shows that the coercive effect on the victim from the use of force or violence increases by virtue of the robber purporting to have a dangerous weapon or being accompanied by another person. *Id.* at 256-57. The effect of either elevating circumstance "results in different levels of threat that may persuade the victim to part with his or her property with more or less reluctance." *Id.* at 256. Thus, because *White* makes clear that the representation of a weapon increases the coerciveness of the threat or use of force, the force and weapon elements under Robbery II are necessarily conjoined.

Defendant argues that several state decisions indicate a person can satisfy the statute without communicating an intent to use the weapon. The principal case on which Defendant relies is *Oregon v. Lee*, a case in which the Oregon Court of Appeals considered whether the crime of menacing is a lesser included offense of Robbery II. 23 P.3d 999, 1002 (Or. App. 2001). In considering this question, the court noted that under Robbery II, a defendant must "intend to

cause the victim to be aware of the fact that he or she is armed with a dangerous weapon," but not necessarily to cause fear in the mind of the victim. *Id.* at 1003. As such, a robber who represents that he is armed but does not intend that the victim be afraid has committed Robbery II but not necessarily menacing. *Id.* Defendant argues that this conclusion supports the idea that the force element and weapon enhancement under Robbery II are not conjoined.

Defendant's reliance on *Lee* is misplaced. Even though the robber from the hypothetical in *Lee* does not intend that the victim feel fear, the presence of the weapon still elevates the coerciveness of the robber's threat or use of force. *See White*, 211 P.3d at 256 (noting that "the use or threat of violence is what causes the victim to part with the property" and that the coercive effect increases with each gradation of robbery). In other words, the mere representation that the robber is armed with what purports to be a dangerous weapon makes it more likely that the victim will relinquish property in response to the robber's demand. The robber's subjective beliefs are irrelevant. Rather, the linchpin of Robbery II, and what separates it from Robbery III according to *White*, is the objective effect of using or threatening to use force in conjunction with an elevating condition. Absent state authority to the contrary, therefore, the force element and the elevating weapon condition are necessarily conjoined under Robbery II.

iii. Because the Force Element and Weapon Condition Under Paragraph (a) Are Conjoined, Defendant's Hypothetical Falls Apart

Up to this point, I have determined that the level of force required to commit Robbery III is minimal but that the elevating weapon condition under Robbery II is necessarily conjoined to the force element of the crime. Thus, the only remaining question is whether there exists a realistic scenario in which a person could satisfy the requirements of Robbery II without using or threatening the use of "force capable of causing physical pain or injury to another person." *Johnson I*, 130 S. Ct. at 1271.

Defendant argues that such scenario exists. Specifically, Defendant presents a hypothetical similar to the situation in *Oregon v. Johnson*, where the defendant was convicted of Robbery III after using minimal force to snatch the victim's purse and flowers. 168 P.3d at 313-14. Defendant argues that had the victim seen a gun in the defendant's waistband while he was running away, the elevating condition in Robbery II would be satisfied. In this scenario, however, the representation that one is purportedly armed with a dangerous weapon is completely divorced from the use or threatened use of force. Thus, the hypothetical does not contain what *White* asserts is a necessary part of Robbery II: that the representation of a dangerous weapon objectively elevates the threat to the victim.

Defendant's scenario does not present a "realistic probability . . . that the State would apply its statute to conduct that falls outside" the requirements of a violent felony. *Moncrieffe*, 133 S. Ct. at 1684-85. As such, under the modified categorical approach, paragraph (a) of Robbery II is not overbroad and can validly serve as a predicate offense under the ACCA.

//

//

//

//

//

//

//

//

//

//

CONCLUSION

Under the categorical approach, Robbery II is overbroad as compared to the requirements for a violent felony under the ACCA. The statute is also divisible because the elevating circumstances in paragraphs (a) and (b) constitute alternative elements, as opposed to alternative means. Under the modified categorical approach, a conviction under paragraph (a) of Robbery II meets the ACCA's definition of a violent felony, meaning that Defendant's Robbery II conviction remains a valid predicate crime under the ACCA. Accordingly, I DENY Defendant's Motion to Vacate or Correct Sentence pursuant to 28 U.S.C. § 2255 [103].

DATED this __23rd__ day of February, 2017.

/s/ Michael W. Mosman_____
MICHAEL W. MOSMAN
Chief United States District Judge

18 U.S.C. § 924(e)

Armed Career Criminal Act

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

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

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

28 U.S.C. § 2255

Federal custody; remedies on motion attacking sentence

(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.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

> **(1)** the date on which the judgment of conviction becomes final;
>
> **(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> **(3)** the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(4)** the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(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--

> **(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
>
> **(2)** a new rule of constitutional law, made retroactive to cases on collateral review by the

Oregon Revised Statutes § 164.395

Robbery in the Third Degree

(1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft or unauthorized use of a vehicle as defined in ORS 164.135 the person uses or threatens the immediate use of physical force upon another person with the intent of:

(a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or

(b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft or unauthorized use of a vehicle.

(2) Robbery in the third degree is a Class C felony.

Oregon Revised Statutes § 164.405

Robbery in the Second Degree

(1) A person commits the crime of robbery in the second degree if the person violates ORS 164.395 and the person:

(a) Represents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon; or

(b) Is aided by another person actually present.

(2) Robbery in the second degree is a Class B felony.