NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DARRYL REPRESS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a Florida robbery conviction categorically require the use of "*violent* force" as defined in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) due to its "overcoming resistance" element, if that element can be satisfied by such minor conduct as bumping the victim, unpeeling the victim's fingers to take money from his hand, or engaging in a tug-of-war over a purse?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Darryl Repress respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion affirming the district court's denial of Petitioner's motion to vacate his enhanced ACCA sentence pursuant to 28 U.S.C. § 2255, *Repress v. United States*, ___ Fed. Appx. ___, 2017 WL 4570661 (11th Cir. Oct. 13, 2017), is included in Appendix A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming the district court's denial of Petitioner's motion to vacate pursuant to 28 U.S.C. § 2255, was entered on October 13, 2017. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

(e)(2) As used in this subsection – . . .

> **(B)** the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, ... , that –
>
> > **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another.

Fla. Stat. § 812.13. Robbery (1982)

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear.
>
> (2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree . . .
>
> (b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree . . .
>
> (c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree . . .
>
> (3) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.

STATEMENT OF THE CASE

On February 23, 2005, Petitioner was charged with being a previously convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1) and § 924(e)(1). He pled guilty to that charge, and on May 6, 2005, was sentenced to 188 months imprisonment as an Armed Career Criminal. His ACCA enhancement was predicated upon three Florida convictions: a 1982 conviction for robbery with a firearm, a 1983 conviction for robbery with a firearm and attempted first degree murder, and a 1998 conviction for delivery of cocaine.

On June 24, 2016, after this Court's decision in *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015) declaring the ACCA's residual clause unconstitutionally vague, Petitioner moved to vacate his sentence under 28 U.S.C. § 2255. On July 6, 2016, he amended that motion. In it he argued that his Florida robbery convictions no longer qualified as ACCA predicates without residual clause, and without those convictions as qualifiers his enhanced ACCA sentence could not stand.

On September 12, 2016, the district court issued an order denying the § 2255 motion, but granting Petitioner a certificate of appealability. Although the court found that Petitioner, due to his date of conviction, "could potentially have been convicted of robbery-by-sudden snatching, which does not require force," it opined that Petitioner was convicted of a different offense, "robbery with a firearm." And, according to the court, a conviction for "armed robbery by sudden snatching" qualified as an ACCA violent felony, even though § 812.13(2) only required an

offender to "carry" a firearm or deadly weapon during the robbery. In the court's view, "carrying" a weapon "creates the threatened use of physical force against the person of another." Accordingly, the court found, Petitioner's ACCA sentence remained valid.

On October 6, 2016, Petitioner filed a motion to alter or amend judgment pursuant to Fed. R. Crim. P. 59(e) urging the district court to reconsider its ruling. In particular, he argued that the Florida robbery statute was indivisible after *Descamps v. United States*, 133 S.Ct. 2276 (2013) and *Mathis v. United States*, 136 S.Ct. 2243 (2016), which meant that all convictions under § 812.13(1) were categorically overbroad, since the level of "violent force" required by *Curtis Johnson v. United States*, 559 U.S. 133 (2010), was not required in every case. Moreover, he argued, as confirmed by the standard Florida robbery instruction at the time of his convictions, it was clear that the aggravating factors in § 812.13(2) with regard to the "carrying" of a weapon were simply sentencing factors – not elements of a separate "armed robbery" offense.

After he filed that motion, the Eleventh Circuit issued its decision in *United States v. Fritts*, 841 F.3d 937 (11th Cir. Nov. 8, 2016), following its prior precedents in *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006), and *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), and holding that a Florida armed robbery conviction categorically qualified as an ACCA "violent felony" regardless of the date of conviction. *Fritts* noted with significance that in *Robinson v. State*, 692 So.2d 883 (Fla. 1997), the Florida Supreme Court had confirmed that a mere snatching was

not sufficient for robbery in Florida, because robbery required overcoming victim resistance. 841 F.3d at 942-943.

On December 28, 2016, the district court denied Petitioner's motion to alter or amend the judgment, finding that *Fritts* was controlling and supported the reasoning in the court's earlier order. The court stated that it was "unconvinced" by Petitioner's argument that "robbery with a firearm is not a separate offense, but rather a 'penalty enhancement.'"

In his brief to the Eleventh Circuit, Petitioner argued that his 1982 and 1983 robbery convictions were categorically not "violent felonies" under the ACCA's elements clause for several reasons including, as pertinent here, that the post-*Robinson* caselaw in Florida – namely, *Sanders v. State*, 769 So.2d 506, 507-508 (Fla. 5th DCA 2000); *Johnson v. State*, 612 So.2d 689, 690 (Fla. 1st DCA 1993); *Hayes v. State*, 780 So.2d 918, 919 (Fla. 1st DCA 2001); and *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011) – made clear that "overcoming resistance" for purposes of the Florida robbery statute did not necessitate the *Curtis Johnson* level of violent force. In fact, he noted, it had always been the law in Florida, since *Montsdoca v. State*, 93 So.157, 159 (Fla. 1922), that the "degree of force used" in a robbery "is immaterial." The degree of force necessary to overcome victim resistance, he explained, would always be a direct function of the degree of resistance.

To the extent that *Fritts* ignored the Florida courts' flexible interpretation of the "quantum of force" element of a robbery conviction, Petitioner argued, *Fritts* was

inconsistent with prior circuit law, and under the prior panel precedent rule should not control. Moreover, he argued, contrary to the district court, a sentence for "armed robbery" under Fla. Stat. § 812.13(2) did not transform his categorically non-violent robbery conviction into one for a "violent felony" since the Florida Supreme Court had confirmed in *State v. Baker*, 452 So.2d 927 (Fla. 1984) that an "armed robbery" under § 812.13(2) simply required "carrying" a weapon, not using it. Indeed, he noted, other circuits had so held in reviewing convictions under analogous statutes requiring only carrying – not use – for "armed robbery."

While the appeal remained pending before the Eleventh Circuit, the Ninth Circuit reached a directly opposite conclusion from *Fritts* in *United States v. Geozos*, 870 F.3d 890 (9th Cir. Aug. 29, 2017). Specifically, the Ninth Circuit held, a Florida armed robbery conviction did *not* categorically qualify as an ACCA violent felony since Fla. Stat. § 812.13(1) – both by its text, and as interpreted by the Florida courts – did *not* require the use of "violent force." On the latter point, the Ninth Circuit specifically cited *Benitez-Saldana* (a case cited by Petitioner in his Eleventh Circuit briefing) and found that the Eleventh Circuit in *Fritts* had "overlooked the fact that if resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." 870 F.3d at 901 (citing *Montsdoca*, 93 So. at 159 ("[t]he degree of force used is immaterial")).

In a letter of supplemental authority pursuant to Fed. R. App. P. 28(j), Petitioner notified the Eleventh Circuit of *Geozos*. He pointed out that the "armed nature" of the Florida robbery in *Geozos* did not make a difference to the Ninth

Circuit, since that court had found Florida law to be clear that an "armed robbery" under Fla. Stat. § 812.13(2) could result from merely carrying a concealed firearm or other deadly weapon during the course of a robbery, even if it is never displayed and the victim remains unaware of it. 870 F.3d at 900-901 (citing *State v. Baker*, 452 So.2d at 929). Ultimately, he argued:

> Under settled circuit precedent, this Court must defer to the state courts' interpretation of the substantive elements of a state offense. *United States v. Rosales-Bruno*, 676 F.3d 1017, 1021 (11th Cir. 2012). Since the Florida courts, as *Geozos* recognizes, do *not* interpret the "overcoming resistance" element of robbery to require the use of violent force, Mr. Repress' ACCA sentence should be vacated.

On October 13, 2017, the Eleventh Circuit issued an unpublished decision affirming the district court, based on *Fritts*. *Repress v. United States*, ___ F.3d Appx. ___, 2017 WL 4570661 (11th Cir. Oct. 13, 2017). In *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), the court noted, a prior panel had held without explanation that a 1974 Florida conviction for robbery with a firearm qualified as a "violent felony" within the ACCA's element clause, and *Fritts* held that *Dowd* remained "binding circuit precedent." *Repress*, 2017 WL at 4570661 *2 ("We are bound to follow *Dowd* and *Fritts* 'unless and until [they are] overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting en banc.'" *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008)").

The court acknowledged that it "may have been arguable when Repress filed his § 2255 motion whether *Dowd* remained good law," but it found "*Fritts* settled that question." 2017 WL 4570661 at *2. And, while the court also acknowledged Repress' assertion that "*Dowd*, *Fritts*, and other decisions construing Florida's

robbery statute failed to account for vagaries of state law or consider additional reasons why a conviction for robbery with a firearm should not qualify as a predicate under the ACCA's elements clause," it responded:

> Even assuming Repress is correct, we are bound to follow *Dowd* and *Fritts*. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1301-04 (11th Cir. 2001) (explaining that our prior panel precedent binds subsequent panels even if the prior panel overlooked reasons brought to the subsequent panel's attention and regardless of whether the subsequent panel agrees with the prior panel's result).

2017 WL 4570661 at *2.

REASONS FOR GRANTING THE WRIT

A. The Eleventh and Ninth Circuits are intractably divided on whether a Florida robbery conviction categorically requires the *Curtis Johnson* level of "*violent* force"

In *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), the Eleventh Circuit held that Florida robbery is categorically an ACCA violent felony. *Id.* at 943. The court, notably, did not analyze Fritts' armed robbery conviction any differently than an unarmed robbery conviction, as the district court did below. According to the Eleventh Circuit, both convictions failed to qualify as an ACCA violent felony for the same reason: namely, according to *Robinson v. State,* 692 So.2d 883, 886 (Fla. 1997), overcoming victim resistance is a necessary element of any Florida robbery offense. 841 F.3d at 942-944. The court assumed from the mere fact of "victim resistance," and the perpetrator's need to use some physical force to overcome it, that the offense was categorically a violent felony.

According to *Fritts*, it was irrelevant that Fritts' own conviction pre-dated *Robinson* since *Robinson* simply clarified what the Florida robbery statute "always

meant." 841 F.3d at 943. But while *Robinson* did clarify that a mere sudden snatching without any victim resistance is simply theft, not robbery, *id.* at 942-944, what *Robinson* did *not* clarify was how much force was actually necessary to overcome resistance for a Florida robbery conviction. Notably, decades before *Robinson*, in *Montsdoca v. State*, 93 So. 157 (1922), the Florida Supreme Court had held that the "degree of force" was actually "immaterial" so long as it was sufficient to overcome resistance. *Id.* at 159. And the Eleventh Circuit in *Fritts* cited *Montsdoca* as controlling as well. 841 F.3d at 943.

Although neither *Montsdoca* nor *Robinson* specifically addressed what degree of force is necessary to overcome resistance under the Florida robbery statute, the Florida intermediate appellate court have provided clarity as to the "least culpable conduct" under the statute in that regard. Notably, several Florida appellate court decisions have confirmed post-*Robinson* that victim resistance in a robbery may well be quite minimal, and where it is, the degree of force necessary to overcome it is also minimal. Specifically, Florida courts have sustained robbery convictions under Fla. Stat. § 812.13 where a defendant simply: (1) bumps someone from behind, *Hayes v. State*, 780 So. 2d 918, 919 (Fla. 1st DCA 2001); (2) engages in a tug-of-war over a purse, *Benitez-Saladana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011); (3) peels back someone's fingers in order to take money from his clenched fist, *Sanders v. State*, 769 So.2d 506, 507 (Fla. 5th DCA 2000); or (4) otherwise removes money from someone's fist, knocking off a scab in the process, *Winston Johnson v. State*, 612 So.2d 689, 690-91 (Fla. 1st DCA 1993).

As one Florida court paraphrased the Florida standard, a robbery conviction may be upheld in Florida based on "ever so little" force. *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986). And as another court stated, the victim must simply resist "in any degree;" where "any degree" of resistance is overcome by the perpetrator, "the crime of robbery is complete." *Mims v. State*, 342 So.2d 116, 117 (Fla. 3rd DCA 1977).

The Ninth Circuit recently recognized this in *United States v. Geozos*, 879 F.3d 890 (9th Cir. 2017), where it held that a Florida conviction for robbery, whether armed or unarmed, fails to qualify as a "violent felony" under the elements clause because it "does not involve the use of violent force within the meaning of ACCA." *Id.* at 900-901.[1] In so holding, the Ninth Circuit found significant that under Florida caselaw, "any degree" of resistance was sufficient for conviction, and an individual could violate the statute simply by engaging "in a non-violent tug-of-war" over a purse. *Id.* at 900 (citing *Mims* and *Benitez-Saldana*).

Notably, the Ninth Circuit – in coming to a decision that it recognized was at "odds" with the Eleventh Circuit's holding in *Fritts* – has rightly pointed out that the Eleventh Circuit, "in focusing on the fact that Florida robbery requires a use of

[1] The *Geozos* Court correctly stated that whether a robbery was armed or unarmed makes no difference because an individual may be convicted of armed robbery for "merely *carrying* a firearm" during the robbery, even if the firearm is not displayed and the victim is unaware of its presence. 870 F.3d at 900-9901 ("As an initial matter, the armed nature of each of Defendant's convictions does not make the conviction one for a violent felony;" citing *State v. Baker*, 452 So. 2d 927, 929 (Fla. 1984); following *Parnell v. United States*, 818 F.3d 974, 978–81 (9th Cir. 2016), which held that a Massachusetts conviction for *armed* robbery, which required only the possession of a firearm without using or even displaying it, does not qualify as a "violent felony" under the ACCA's elements clause))(emphasis in original).

force sufficient to overcome the resistance of the victim, has overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily *violent* force." *Id.* at 901 (citing *Montsdoca*, 93 So. at 159 ("The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance"))(emphasis in the original).

As is clear from *Geozos*, the Ninth and Eleventh Circuits are now directly in conflict on an important and recurring question of Federal law: namely, whether the minimal force required to overcome minimal resistance under the Florida robbery statute categorically meets the level of "physical force" required by the ACCA's elements. In *Curtis Johnson v. United States*, 559 U.S. 133 (2010), the Court explained that the meaning of "physical force" in 18 U.S.C. § 924(e)(2)(B)(i) "is a question of federal law, not state law." *Id.* at 138. And indeed, in the context of a "violent felony" definition, "physical force" means "*violent* force," which requires a "substantial degree of force." *Id.* at 140.

Given the Eleventh Circuit's refusal to reconsider *Fritts* en banc in *United States v. Latellis Everette*, Slip op. (11th Cir. July 31, 2017), followed by its summary affirmance without requiring government briefing in *Bobby Jo Hardy v. United States*, Slip op. at 3 (11th Cir. Aug. 11, 2017) (No. 17-11275),[2] the circuit

[2] In the *Hardy* order, the Eleventh Circuit found "summary affirmance based upon *Fritts* "appropriate because the government is clearly right as a matter of law, and no substantial question exists as to the outcome of the case." It stated that "defendant's "convictions categorically qualify as 'violent felonies' under the ACCA based on *Fritts*, and any doubt about that conclusion was put to rest when the Supreme Court denied certiorari in that case." Slip op. at 3.

conflict on that issue is demonstrably intractable at this point. It will not be resolved without this Court's intervention.

Notably, in decision after decision since *Fritts*, the Eleventh Circuit – which applies its "prior panel precedent rule" rigidly – has reflexively adhered to *Fritts*. As of this writing, certiorari has been sought in multiple Eleventh Circuit cases challenging *Fritts*' holding that a Florida robbery conviction categorically requires "violent force." In addition to the instant petition, there are at present no less than sixteen others—fifteen from the Eleventh Circuit, and one from the Fourth Circuit—raising this issue.[3] That conservative figure does not include the numerous petitions that were filed and denied before *Geozos*. Nor does it include the incalculable number of petitions that will be filed absent immediate intervention by this Court. And notably, there is not simply now a direct circuit conflict between the Ninth and Eleventh Circuits on whether Florida robbery

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[3] For the Eleventh Circuit petitions, see *Stokeling v. United States*, No. 17-5554 (petition filed Aug. 4, 2017); *Davis v. United States*, No. 17-5543 (petition filed Aug. 8, 2017); *Conde v. United State*s, No. 17-5772 (petition filed Aug. 24, 2017); *Phelps v. United States,* No. 17-5745 (petition filed Aug. 24, 2017); *Williams v. United States,* No. 17-6026 (petition filed Sept. 14, 2017); *Everette v. United States,* No. 17-6054 (petition filed Sept. 18, 2017); *Jones v. United States,* No. 17-6140 (petition filed Sept. 25, 2017); *James v. United States*, No. 17-6271 (petition filed Oct. 3, 2017); *Middleton v. United States,* No. 17-6276 (petition filed Oct. 3, 2017); *Rivera v. United States,* No. 17-6374 (petition filed Oct. 12, 2017); *Shotwell v. United States*, No. 17-6540 (petition filed Oct. 17, 2017); *Mays v. United States,* No. 17-6664 (petition filed Nov. 2, 2017); *Hardy v. United States,* No. 17-6829 (petition filed Nov. 9, 2017); *Baxter v. United States*, No. 17-6991 (petition filed Dec. 4, 2017); *Pace v. United States*, No. 17-7140 (petition filed Dec. 18, 2017). For the Fourth Circuit petition, see *Orr v. United States,* No. 17-6577 (petition filed Oct. 26, 2017).

Florida robbery offense categorically requires the *Curtis Johnson* level of violent force. The conflict actually extends much farther.

B. Other circuits have considered analogous robbery offenses with the same "overcoming resistance" element that derives from the common law, and their conclusions likewise conflict with the Eleventh Circuit

Florida, notably, is not alone in its use of an "overcoming resistance" standard. In fact, most states permit robbery convictions where the degree of force used is sufficient to overcome a victim's resistance. Indeed, at least fifteen states use some variation of this standard in the text of their statutes,[4] while many others (including Florida, North Carolina, Virginia, Colorado, and Ohio) have judicially adopted it through case law.[5]

As has been detailed in several petitions for certiorari now pending before this Court, *see, e.g., Harris v. United States*, No. 16-8616; *Stokeling v. United States*, No. 17-5554; and *Conde v. United States*, No. 17-5772, this widely-applied requirement of "victim resistance" in state robbery offenses has deep roots in the

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[4] *See* Ala. Code § 13A-8-43(a)(1); Alaska Stat. § 11.41.510(a)(1); Ariz. Rev. Stat. §§ 13-1901, 1902, 1904; Conn. Gen. Stat. § 53a-133(1); Del. Code Ann. tit. 11, § 831(a)(1); Haw. Rev. Stat. § 708-841(1)(a); Me. Rev. Stat. tit. 17-A, § 651(1)(B)(1); Minn. Stat. § 609.24; Mo. Rev. Stat. §§ 570.010(13), 570.025(1); Nev. Stat. § 200.380(1)(b); N.Y. Penal Law § 160.00(1); Okla. Stat. tit. 21, §§ 791, 792, 793; Or. Rev. Stat. § 164.395(1)(a); Wash. Rev. Code § 9A.56.190; Wis. Stat. § 943.32(1)(a).

[5] *See, e.g., Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989); *State v. Stecker*, 108 N.W.2d 47, 50 (S.D. 1961); *State v. Robertson*, 740 A.2d 330, 334 (R.I. 1999); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. 1997); *West v. State*, 539 A.2d 231, 234 (Md. 1988); *State v. Blunt*, 193 N.W.2d 434, 435 (Neb. 1972); *State v. Sein*, 590 A.2d 665, 668 (N.J. 1991); *Winn v. Commonwealth,* 462 S.E.2d 911, 913 (Va. 1995); People v. Davis, 935 P.2d 79, 84 (Colo. App. 1996); *State v. Robertson*, 531 S.E.2d 490 (N.C. Ct. A pp. 2000); *State v. Juhasz*, 2015 WL 5515826 at *2 (Ohio Ct. App. 2015).

common law. Common law robbery had an element labeled "violence," but the term "violence" did ***not*** imply a "substantial degree of force." The general rule at common law was that the degree of force used was "immaterial," so long as it compelled the victim to give up money or property.

In this vein, the Florida appellate courts, notably, have long recognized that the underlying robbery offense originally described in Fla. Stat. § 812.13(1) ***was*** common law robbery. *See Montsdoca*, 93 So. at 159 (reiterating the common law rules that "[t]here can be no robbery without violence, and there can be no larceny with it," and that "the degree of force used is immaterial"); *State v. Royal*, 490 So.2d 44, 45-46 (Fla. 1986) (acknowledging that "the common law definition of robbery" was "set forth in subsection (1)). As the Florida Supreme Court expressly recognized in *Royal*, the requirement in § 812.13(1) that the taking be by "force, violence, assault, or putting in fear" not only derived from the common law; the Court thereafter interpreted that provision "consistent with the common law." *Id.* at 46 (citing *Williams v. Mayo*, 126 Fla. 871, 875, 172 So. 86, 87 (1937)).

The only change to the common law robbery offense incorporated into that statutory provision occurred immediately after – and in response to – *Royal*, when the Florida Legislature broadened the statutory offense to include the use of "force" not only during a taking, but after it as well. *See, e.g., Foster v. State*, 596 So.2d 1099, 1107-1108 (Fla. 5th DCA 1992). Other than that, however, there has been no change to the underlying "common law definition of robbery set forth in subsection (1)," *Royal*, 490 So.2d at 46, to this day.

Given that the "overcoming resistance" element in Florida robbery derives from the common law and has been interpreted consistently with the common law, the conflict between the Ninth and Eleventh Circuit actually extends to other circuits that have considered analogous common law robbery offenses. Notably, the Fourth Circuit has now recognized that both North Carolina common law robbery and Virginia common law robbery can be committed without violent force and are not proper ACCA predicates for that reason. And the Sixth Circuit has held similarly, with regard to Ohio statutory robbery, which – like Florida statutory robbery – is modeled on common law robbery.

In *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2015), the Fourth Circuit held that the offense of common law robbery by "violence" in North Carolina did not qualify as a "violent felony" under the ACCA's elements clause because it did not categorically require the use of "physical force." 823 F.3d at 803-804. In reaching that conclusion, however, the Fourth Circuit did not simply rely upon common law principles. Rather, consistent with the categorical approach as clarified by this Court in *Moncrieffe*, *Descamps*, and *Mathis*, the court thoroughly reviewed North Carolina appellate law to determine the least culpable conduct for a North Carolina common law robbery conviction. And notably, it was only after its thorough survey of North Carolina law, that the Fourth Circuit concluded that a North Carolina common law robbery by means of "violence" may be committed by any force "sufficient to compel a victim to part with his property," and that "'[t]he degree of force used is immaterial.'" *Id.* (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C.

1944)). In fact, the Fourth Circuit noted, *Sawyer*'s definition "suggests that even *de minimis* contact can constitute the 'violence' necessary for a common law robbery conviction under North Carolina law." *Id.* (emphasis in original).

The Fourth Circuit discussed two supportive North Carolina appellate decisions in detail. *Id.* (discussing *State v. Chance*, 662 S.E.2d 405 (N.C. Ct. App. 2008), and *State v. Eldridge*, 677 S.E.2d 14 (N.C. Ct. App. 2009)). In *Chance*, the Fourth Circuit noted, a North Carolina court had upheld a robbery conviction where the defendant simply pushed the victim's hand off a carton of cigarettes; that was sufficient "actual force." And in *Eldridge*, a different court upheld a robbery conviction where a defendant merely pushed the shoulder of a store clerk, causing her to fall onto shelves while the defendant took possession of a TV. Based on those decisions, the Fourth Circuit concluded that "the minimum conduct necessary to sustain a conviction for North Carolina common law robbery" does not necessarily require "physical force," and that the offense does not categorically qualify as a "violent felony" under the elements clause. *Id.*[6]

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[6] Although the Fourth Circuit did not discuss *State v. Robertson*, 531 S.E.2d 490 (N.C. Ct. App. 2000) in *Gardner*, the government had discussed *Robertson* in in its *Gardner* brief, and had correctly described *Robertson* as holding that mere "purse snatching" does not involve sufficient force for a common law robbery conviction in North Carolina. Brief of the United States in *United States v. Gardner*, No. 14-4533 at 46-49, 53 (4th Cir. Aug. 21, 2015). *Robertson* had expressly recognized that North Carolina followed "'[t] rule prevailing in most jurisdictions" that "'the force used . . . must be of such a nature as to show that it was intended to *overpower the party robbed or prevent his resisting, and not merely to get possession of the property stolen.*'" *Id.* at 509 (quoting *State v. John*, 50 N.C. 163, 169 (1857)(emphasis added by *Robertson*)). The Fourth Circuit in *Gardner* was undoubtedly aware from *Robertson* that North Carolina robbery required overcoming victim resistance.

Thereafter in *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), the Fourth Circuit held that a conviction for Virginia common law robbery, which may be committed by either "violence or intimidation," does not qualify as a "violent felony" within the ACCA's elements clause since – as confirmed by Virginia caselaw – such an offense can be committed by only slight, non-violent force. *Id.* at 685.

The Fourth Circuit acknowledged in *Winston* that prior to *Curtis Johnson*, it had held that a Virginia common law robbery conviction qualified as a "violent felony" within the elements clause. However, citing *Gardner*, the Fourth Circuit rightly found that such precedent was no longer controlling after (1) this Court in *Curtis Johnson* not only redefined "physical force" as "violent force" but made clear that federal courts applying the categorical approach were bound by the state courts' interpretation of their own offenses, and (2) in *Moncrieffe* "instructed that we must focus on the 'minimum conduct criminalized' by state law." *Id.* at 684.

Consistent with these intervening precedents, the Fourth Circuit carefully examined for the first time in *Winston* how the Virginia state courts interpreted a robbery "by violence or intimidation." While noting that its prior decision in *Gardner* was "persuasive," the Fourth Circuit rightly acknowledged that its "conclusion that North Carolina robbery does not qualify as a violent felony" did not itself "compel a similar holding in the present case" because the court was required to "defer to the [Virginia] courts' interpretations of their own [] common law offenses." *Winston*, 850 F.3d at 685 n. 6.

Accordingly, as it had done in *Gardner*, the Fourth Circuit undertook a thorough survey of Virginia appellate decisions on common law robbery. *See id.* at 684-685 (discussing in particular, and finding significant: *Maxwell v. Commonwealth*, 165 Va. 860, 183 S.E. 452, 454 (1936); *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487, at * 3 (Va. Ct. App. Dec. 12, 2000) (unpublished); and *Jones v. Commonwealth*, 26 Va. App. 736, 496 S.E.2nd 668, 670 (1998)). Citing these three decisions, the Fourth Circuit concluded that a Virginia common law robbery "by violence" requires only a "'slight' degree of violence;" that "anything which calls out resistance is sufficient;" and "such resistance by the victim does not necessarily reflect use of 'violent force.'" *Winston*, 850 F.3d at 684-685. And therefore, the Fourth Circuit expressly rejected the precise assumption made by the Eleventh Circuit in *Fritts* without considering a single Florida decision: namely, that force sufficient to overcome resistance in Florida necessarily involves *violent* force. *Winston, id.* at 683. To the contrary, the Fourth Circuit held, the "minimum conduct necessary to sustain a conviction for Virginia common law robbery does not necessarily include [] 'violent force.'" *Id.* at 685.

In *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017), the Sixth Circuit expressly aligned itself with the Fourth Circuit, in holding that the Ohio statutory robbery offense does not qualify as an ACCA violent felony, given Ohio appellate decisions confirming that a robbery by "use of force" under the statute could be accomplished by the minimal amount of force necessary to snatch a purse

involuntarily from an individual, or simply "bumping into an individual." *Yates*, 866 F.3d at 730-731 (noting accord with the Fourth Circuit in *Gardner*, 823 F.3d at 803-804, where "even minimal contact may be sufficient to sustain a robbery conviction if the victim forfeits his or her property in response.") The force applied by the defendant in such circumstances, the Sixth Circuit noted, was demonstrably "lower than the type of violent force required by [*Curtis*] *Johnson*." 866 F.3d at 729.

The Sixth Circuit noted with significance that in *State v. Carter*, 29 Ohio App.3d 148, 504 N.E.2d 469 (1985), a purse snatching case, the court had affirmed a robbery conviction where the victim simply had a firm grasp of her purse, the defendant pulled it from her, and then pulled her right hand off her left hand where she was holding the bottom of the purse. *Id.* at 470-471(explaining that this simple incident involved the requisite degree of actual force, "*however miniscule*" to constitute a robbery; citing as support *State v. Grant*, 1981 WL 4576 at *2 (Ohio Ct. App. Oct. 22, 1981), which had held that a mere "bump is an act of violence" within the meaning of the robbery statute, "even though only mildly violent, as the statute does not require a high degree of violence").

And in another Ohio purse snatching case, *In re Boggess*, 2005 WL 3344502 (Ohio Ct. App. 2005), the Sixth Circuit noted, the appellate court had clarified that the "force" requirement in the Ohio robbery statute would be satisfied so long as the offender "physically exerted force upon the victim's arm so as to remove the purse from her *involuntarily*." 866 F.3d at 731 (emphasis added). In *Boggess*, the defendant simply grabbed the victim's purse, then jerked her arm back, and kept

running." *Id.* at 729. Finally, in *State v. Juhasz*, 2015 WL 5515826 (Ohio Ct. App. 2015), an Ohio court confirmed that so long as there was "a *struggle* over control of an individual's purse" in any degree, that would be sufficient to establish the "element of force" in the statute. The "struggle need not be prolonged or active; the act of forcibly removing a purse from an individual's shoulder is sufficient." *Id.* at 729-730. While the *Juhasz* court did not specifically discuss the common law roots of the "struggle" concept in the Ohio robbery caselaw, that is a concept that derives directly from the common law.

Based upon the Ohio caselaw highlighted in *Yate*s, the Sixth Circuit found a "realistic probability" that Ohio applied its robbery statute "in such a way that criminalizes a level of force lower than the type of force required by [*Curtis*] *Johnson*." 2017 WL 3402084 at *5 (citing *Moncrieffe*, 133 S.Ct. at 1684). And notably, Florida caselaw – like North Carolina, Virginia, and Ohio caselaw – likewise confirms that *violent* force is ***not*** necessary to overcome victim resistance, and commit a robbery under Fla. Stat. § 812.13(1) either. Like the North Carolina common law robbery offense addressed in *Gardner*, the Virginia common law robbery offense addressed in *Winston*, and the Ohio statutory robbery offense addressed in *Yates*, a Florida statutory robbery may also be committed by the slight force sufficient to overcome a victim's slight resistance. Indeed, as the Ninth Circuit correctly noted in *Geozos*, Florida's own appellate law easily confirms this point.[7]

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[7] Notably, the Ninth Circuit has just ruled similarly for the Arizona statutory robbery offense. *See United States v. Molinar*, ___ F.3d ___, 2017 WL 5760565 at *4 (9th Cir. Nov. 29, 2017) (Ariz. Rev. Stat. § 1904 did not meet the career offender elements clause because Arizona courts had not required the "overpowering force"

Had the Fourth and Sixth Circuits considered the Florida courts of appeals decisions in *Hayes*, *Benitez-Saldana*, *Sanders*, and *Winston Johnson* – and compared them to the state appellate decisions they considered in *Gardner*, *Winston*, and *Yates* – these circuits would likely have recognized that a Florida statutory robbery (just like a North Carolina common law robbery, a Virginia common law robbery, and an Ohio statutory robbery) requires only minimal force to overcome victim resistance. And for that reason, these circuits – like the Ninth Circuit – would likely have found Petitioner's robbery convictions were no longer ACCA "violent felonies."

As noted *supra*, it has always been the law in Florida (as in North Carolina, and other common law robbery states) that the degree of force used in a robbery is "immaterial." *Montsdoca v. State*, 93 So. at 159. And, as the Fourth Circuit recognized in *Gardner*, a standard requiring that force overcome resistance, but reaffirming that the degree of force used is "immaterial," suggests that so long as a victim's resistance is slight, a defendant need only use minimal force to commit a robbery. The standards in *Sawyer* and *Montsdoca* are similarly worded and functionally indistinguishable.

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element "to be violent in the sense discussed by the Supreme Court in *Johnson*;" they had recognized that if an article is attached in some way, "so 'as to create resistance however slight," the offense becomes robbery;" thus, "minor scuffles," including those involving bumping or grabbing where the victim was not harmed, are "insufficiently violent to qualify as force under *Johnson*"); *United States v. Jones*, ___ F.3d ___, 2017 WL 6495827 (9th Cir. Dec. 15, 2017) (*Molinar*'s holding applied equally to whether Arizona armed robbery was a "violent felony" under the ACCA's elements clause).

Plainly, the act of peeling back the victim's fingers in *Sanders* is functionally equivalent to the act of pushing away the victim's hand in *Chance*. Both acts allowed the defendants to overcome the victim's resistance and remove the cigarettes (in *Chance*) and the cash (in *Sanders*) from the victim's grasp. But neither act rises to the level of "*violent* force' required by *Curtis Johnson*. And plainly, the "bump" in *Hayes* is indistinguishable from the "bump" in *Grant*, and the "push" in *Eldridge*. If anything, the "push" in *Eldridge* was more forceful in that it caused the victim to fall onto shelves, while the victims in *Hayes* and *Grant* did not even fall.

Moreover, the "bump" in *Hayes* appears to involve even less than the "extent of resistance" in the Virginia *Jones* case – which was the defendant's "jerking" of the victim's purse, which caused her to "turn and face" the defendant, but was not strong enough to cause the victim to fall down. *Winston*, 850 F.3d at 685 (citing *Jones*, 496 S.E. 2nd at 669-670). And while the purse snatching accompanied by the jerking of the victim's arm in the Ohio *Boggess* case is analogous to the purse snatching that the Fourth Circuit found insufficiently violent in *Jones*, Florida law notably suggests that something even less than either a "bump" or the "jerking" of the victim's arm during a purse snatching – namely, such *de minimis* conduct as simply "jostling" a victim during a pickpocketing, *see Rigell v. State*, 782 So.2d 440, 442 (Fla. 4th DCA 2001)(approving LaFave's example) – will constitute sufficient "force" to "overcome resistance," take a person's property, and seal a Florida robbery conviction.

Had Petitioner's case been decided by the *Gardner*, *Winston*, or *Yates* courts – rather than an Eleventh Circuit panel bound by *Fritts* – Petitioner would not be facing an enhanced ACCA sentence today.

C. The decision below is wrong

The decision below is wrong because *Fritts* is wrong. The Eleventh Circuit made unwarranted assumptions in *Fritts* as to the level of force required to overcome resistance. Not only did the court disregard the common law roots of this requirement; it disregarded that the Florida courts' interpretation of "overcoming resistance" to this day has been consistent with the approach at common law: the degree of force used is "immaterial." As the Ninth Circuit correctly noted in *Geozos*, the "Eleventh Circuit, in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, has overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." 870 F.3d at 901. In overlooking that key point, and failing to consult the intermediate appellate decisions illuminating the scope of Florida's "overcoming resistance" element, the court below committed a clear error of law under this Court's precedents that infected its ultimate conclusion.

The Eleventh Circuit has consistently ignored this Court's precedents, which confirm that not all "force" qualifies as "physical force" for purposes of the ACCA elements clause. Notably, when *Curtis Johnson* defined the term "physical force" as "violent force—that is, force capable of causing pain or injury to another person,"

559 U.S. at 140, both before and after that 15-word definition, the Court made clear that "violent force" was measured by the "degree" or "quantum" of force. *Id.* at 139, 140, 142 (referring to "substantial degree of force" involving "strength," "vigor," "energy," "pressure," and "power"). While a mere nominal touching did not meet that standard, the only specific conduct *Curtis Johnson* mentioned as necessarily involving the requisite degree of "violent force" was a "slap in the face," since the force used in slapping someone's face would necessarily "inflict pain." *Id.* at 143. Beyond that single example of a classic battery by striking, the Court did not mention any other category of conduct that would inflict an "equivalent" degree of pain or injury to categorically meet its new "violent force" definition.

Thereafter, in *United States v. Castleman*, 572 U.S. __, 134 S. Ct. 1405 (2014), in the course of adopting the broader common-law definition of "physical force" for a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9), rather than *Curtis Johnson*'s "*violent* force" definition, the Court emphasized that that "domestic violence" encompasses a range of force broader than 'violence' *simpliciter*." *Id.* at 1411 n.4 (emphasis in original). Relevant here, the Court observed that "most physical assaults committed against women and intimates are relatively minor," and include "pushing, grabbing, [and] shoving." *Id.* at 1412 (citations omitted). The Court opined that such "[m]inor uses of force may not constitute 'violence' in the generic sense." *Id.* As one such "example," the Court pointed out that, in *Curtis Johnson*, it had cited "with approval" *Flores v. Ashcroft*,

350 F.3d 666, 670 (7th Cir. 2003), where the Seventh Circuit had noted that it was 'hard to describe . . . as 'violence'" "a squeeze of the arm [that] causes a bruise." *Id.*

That deliberate approval suggests that the dividing line between violent and non-violent "force" lies somewhere between a slap to the face and a bruising squeeze of the arm. On that view, certainly the "bump" (without injury) in *Hayes* would constitute similarly "minor" and thus non-violent force. The same is also true of unpeeling the victim's fingers without injury in *Sanders.* And even though the grabbing of an arm during a tug-of-war in *Benitez-Saldana* caused "an abrasion," and there was a "slight injury" to the victim's hand by the offender's grabbing money and tearing off a scab in *Winston Johnson,* just like the bruising squeeze to the arm discussed in *Castleman,* which likewise resulted in a minor injury, such conduct does not constitute "violence" in the generic sense.

Finally, it is notable that Justice Scalia—writing only for himself—opined in *Castleman* that shoving, grabbing, pinching, and hair pulling would all meet the *Curtis Johnson* definition of "*violent* force," since (in his view) each of these actions was "capable of causing physical pain or injury." *Id.* at 1421-1422 (Scalia, J., concurring in the judgment). Significantly, however, no other member of the Court joined that view. That is so because such conduct—constituting more than an unwanted touch, but less than a painful slap to the face—entails only a minor use of force, not strength, vigor, or power. It thus lacks the degree of force necessary to qualify as violent. And because Florida robbery may unquestionably be committed

by such conduct, it is not categorically a violent felony under the ACCA's elements clause.

D. This is an ideal vehicle for certiorari

Given the direct circuit split between the Ninth and Eleventh Circuits, the tension between *Fritts* and decisions of other circuits reviewing analogous common law robbery offenses, and the clear error in the decision below, this case presents an ideal vehicle for the Court to resolve the inconsistencies among the lower courts, and reinforce what it said in *Curtis Johnson* — that "physical force" requires "*violent* force," and that is "a substantial degree of force." 559 U.S. at 140. At a minimum, the Court should clarify, "*violent* force" requires more than the type of minor conduct that has sufficed for robbery convictions in Florida and other common law robbery states: namely, bumping the victim, unpeeling the victim's fist clenching money, or engaging in a tug-of-war over a purse.

Notably, the issue as to whether such minor conduct involved in overcoming resistance under the Florida statute necessitates the *Curtis Johnson* level of "violent force" was fully preserved before the court of appeals in this case. Petitioner specifically urged the Eleventh Circuit to follow *Benitez-Saldana* – the precise Florida appellate decision that convinced the Ninth Circuit that a Florida robbery does not necessitate "violent force," and resulted in the direct conflict between the Eleventh and Ninth Circuits. After *Fritts* was decided, he raised the broader conflict with other circuits before the district court and on appeal. And

after *Geozos* was decided, he alerted the Eleventh Circuit to the direct conflict with the Ninth Circuit, to no avail.

Most importantly, resolution of that conflict in his favor will be case-dispositive. If Petitioner's Florida armed robbery conviction does not qualify as an ACCA predicate, his 188-month sentence must be vacated. He will be ineligible for his current sentence, which far exceeds the otherwise applicable 10-year statutory maximum. And he will face a much lower term under the Guidelines.

And plainly, a grant of certiorari in this case will not only be important for Petitioner. It will be important for the many similarly-situated defendants facing enhanced ACCA sentences based upon Florida robbery, and those potentially facing enhanced sentences based upon analogous common law robbery offenses throughout the country. Moreover, a grant of certiorari on the issue raised herein would be independently important for an additional reason: In the three decades that have passed since Congress amended the original version of the ACCA to delete "robbery" and "burglary" as automatic ACCA predicates, replacing those two specific crimes with broader "violent felony" definitions designed to better target the most dangerous gun offenders – three decades in which the Court has granted certiorari multiple times to determine whether state burglary offenses were proper ACCA predicates. *See, e.g., Taylor v. United States*, 495 U.S. 575 (1990); *James v. United States*, 550 U.S. 192 (2007); *Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276 (2013); and *Mathis v. United States*, ___ U.S. ___, 136 S.Ct. 2243 (2016) – the Court has never considered whether *any* state robbery conviction fell within either the

elements (or residual) clauses. That question looms large after elimination of the residual clause, since the elements clause has taken center stage in ACCA litigation, and robbery remains to this day one of the most common ACCA predicates.

The Court expressly left open the Florida robbery elements-clause question in *Welch v. United States*, 578 U.S. ___, 136 S.Ct. 1257, 1268 (2016). The time has come for a definitive resolution.

CONCLUSION

The disparate treatment of identically-situated defendants is inequitable, and must come to an end. The Court should grant the writ.

Respectfully submitted,

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