

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

JAY ANTHONY RICHITELLI,

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

MICHAEL CARUSO
Federal Public Defender
Chantel R. Doakes
Assistant Federal Public Defender
Counsel for Petitioner
1 East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436

QUESTIONS PRESENTED FOR REVIEW

- I. Whether 18 U.S.C. § 3559(c)'s residual clause, is unconstitutionally vague after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*)?¹
- II. Whether Conspiracy to Commit Hobbs Act robbery, has as an element the “use, attempted use, or threatened use of physical force against the person or property of another,” under § 3559(c)(2)(F)(ii)?
- III. Whether Attempted Hobbs Act robbery, has as an element the “use, or threatened use of physical force against the person or property of another,” under § 3559(c)(2)(F)(ii)?
- IV. Whether 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)?

1 The issue of whether the identically-worded residual clause in 18 U.S.C. § 16(b) is unconstitutionally vague after *Samuel Johnson* is currently before this Court in *Lynch v. Dimaya*, 137 S. Ct. 31 (2016).

INTERESTED PARTIES

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

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On Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

Jay Anthony Richitelli, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-10482-G in that court on October 25, 2017, denying Petitioner's application for a Certificate of Appealability.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, denying Petitioner's application for a certificate of appealability, is contained in Appendix A-1. The district court's order denying Petitioner's 28 U.S.C. § 2255 motion to vacate sentence and denying Petitioner a certificate of appealability is unreported and reproduced in Appendix A-2.

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 was entered on October 25, 2017. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY PROVISIONS INVOLVED

Mr. Richitelli intends to rely on the following constitutional and statutory provisions:

28 U.S.C. § 2255(a)

Subsection (a) of section 2255 of Title 28, United States Code states:

(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.

28 U.S.C. § 2255(a).

28 U.S.C. § 2253(c)

Subsection (c) of Section 2253 of Title 28, United States Code states:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(B) the final order in a proceeding under Section 2255. . . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) A certificate of appealability under paragraph

(1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

18 U.S.C. § 3559(c) and (F) – “The Three Strikes” Statute

(c) Imprisonment of certain violent felons.--

(1) Mandatory life imprisonment.--Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if—

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of—

(i) 2 or more serious violent felonies; or

(ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

(F) the term “serious violent felony” means--

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that,

by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense;

18 U.S.C. § 16 (“Crime of violence defined”)

Title 18 U.S.C. § 16 provides, in pertinent part:

The term “crime of violence” means—

* * *

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 1951 (Hobbs Act Robbery)

Title 18 U.S.C. § 1951 provides, in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects interstate commerce or the movement of any article or commodity in commerce by robbery, or extortion, or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b)(1) The term “robbery,” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

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 November 17, 2009, Mr. Richitelli was charged in a six-count superseding indictment with the following offenses: 1) Count one: conspiracy to commit Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a); 2) Count two: attempted Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a); 3) Count three: conspiracy to use a firearm during the commission of a crime of violence, in violation of 18 U.S.C. § 924(o); 4) Count four: use of a firearm during the commission of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A); 5) Count six: possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

On February 7, 2010, the government filed a Three-Strikes enhancement notice pursuant to 21 U.S.C. § 851 and 18 U.S.C. § 3559(c). It listed the following prior convictions as § 3559 predicates:

OFFENSE(S)	CONVICTED	COUNTY	CASE#
Armed Burglary; Robbery with a Gun	1/26/87	Broward	86-07879
Conspiracy to Commit Armed Burglary; Armed Burglary of a Dwelling; 3 counts Armed Robbery with a Firearm; 2 counts Kidnaping with a Firearm; Unlawful Possession of Firearm while engaged in a criminal offense	4/17/87	Miami-Dade	86-07926
Armed Burglary with Battery;	1/26/87	Broward	86-14110

2 counts Armed Robbery			
Escape	3/27/95	Broward	93-22449
Aggravated assault on a LEO; Resisting w/ violence	3/20/95	Broward	94-10547
Arson	3/20/95	Broward	94-12547
Racketeering/Racketeering conspiracy; Conspiracy to commit armed robbery; and multiple counts of robbery with a deadly weapon, conspiracy to commit robbery; Armed Burglary; Grand Theft; Falsely Personating Officer and False Imprisonment (total of 42 offenses of conviction)	4/3/98	Broward	95-11685

Mr. Richitelli proceeded to trial and was subsequently found guilty by the jury on February 11, 2010. The district court sentenced Mr. Richitelli to life imprisonment on Counts one and two of the superseding indictment pursuant to 18 U.S.C. § 3559(c). The court also imposed 240 months imprisonment as to Count three, and 180 months imprisonment under the Armed Career Criminal Act (“ACCA”) as to Count six, all to run concurrent. Mr. Richitelli also received a 60-month sentence as to Count four, to run consecutively to Counts one, two, three and six.

Mr. Richitelli filed a timely notice of appeal and on March 10, 2011, the Eleventh Circuit issued a mandate affirming Mr. Richitelli’s conviction and sentence. This Court issued a writ denying certiorari on April 25, 2011. On April

11, 2012, Mr. Richitelli filed a motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255. The district court issued an order denying the § 2255 motion on August 4, 2014. Mr. Richitelli filed an application for authorization to file a second or successive § 2255 motion on May 23, 2016. On June 21, 2016, the Eleventh Circuit granted Mr. Richitelli authorization to file this second or successive § 2255 motion only as to the § 3559(c) claim. See Case No. 16-12795 (11th Cir.).

On June 25, 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, Mr. Richitelli moved to vacate his sentence under 28 U.S.C. § 2255. In that motion, Mr. Richitelli argued that as a result of *Samuel Johnson* he was no longer subject to the mandatory life sentence under 18 U.S.C. § 3559(c). On October 25, 2016, the magistrate judge entered a Report and Recommendation ("R&R"), recommending that the district court deny Mr. Richitelli's § 2255 motion and further deny a certificate of appealability. The magistrate judge did not address whether *Johnson* invalidated § 3559(c)'s residual clause, rather the magistrate judge analyzed the predicate offenses under § 3559(c)'s elements and enumerated offense clauses and found that the offenses categorically qualified as "serious violent felonies" under the statute.

Mr. Richitelli filed objections to the R&R, namely arguing that his prior convictions for attempted Hobbs Act robbery, conspiracy to commit Hobbs Act robbery and for Florida robbery did not qualify as "serious violent felonies" under § 3559(c). On November 30, 2016, the district court entered an Order adopting the

magistrate judge's R&R denying Mr. Richitelli's §2255 motion and further denying him a certificate of appealability.

On February 2, 2017, Mr. Richitelli filed an application for a certificate of appealability with the Eleventh Circuit, requesting a certificate of appealability on the issue of whether his life sentence is unconstitutional in light of *Samuel Johnson*. In his application, Mr. Richitelli noted that reasonable jurists were actually debating (i) whether *Samuel Johnson* invalidated § 3559(c)'s residual clause, as evidenced by a split among the Circuits; (ii) whether conspiracy to commit Hobbs Act robbery qualifies as a "serious violent felony" under § 3559(c)'s elements or enumerated offense clause; (iii) whether attempted Hobbs Act robbery qualifies as a "serious violent felony" under § 3559(c)'s elements or enumerated offense clause; and (iv) whether Florida robbery qualifies as a "serious violent felony" under § 3559(c)'s elements or enumerated offense clause.

Mr. Richitelli's motion argued that pursuant to *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000), a certificate of appealability should issue when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Specifically, Mr. Richitelli argued that the language of § 3559(c) is almost identical to the definition of crime of violence set forth in 18 U.S.C. §16(b) and there is an existing split among the Circuits on whether 18 U.S.C. § 16(b) is unconstitutionally vague after *Samuel*

Johnson. This precise issue is also currently before this Court in *Sessions v. Dimaya*, 137 S.Ct. 31 (2016).

Accordingly, Mr. Richitelli also cited a number of decisions from other district courts that have held that conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery and Florida armed robbery do not qualify as serious violent felonies under § 3559(c)'s elements or enumerated offenses clause. Thus, Mr. Richitelli argued, reasonable jurists were presently debating the precise issues for which he sought the certificate of appealability and therefore a certificate of appealability should issue. On October 25, 2017, Circuit Judge Carnes denied a Mr. Richitelli a certificate of appealability in an order that summarily stated that he failed to show that he was entitled to relief from his life sentence pursuant to *Samuel Johnson*.

REASONS FOR GRANTING THE WRIT

I. Reasonable jurists could debate whether § 3559(c)'s residual clause is unconstitutionally vague.

This Court granted certiorari in *Lynch v. Dimaya*, 137 S. Ct. 31 (2016), because the circuits are split regarding whether § 16(b)'s residual clause is unconstitutionally vague in light of *Samuel Johnson*. Compare *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016) (holding that § 16(b)'s residual clause is unconstitutional), and *Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016) (same), with *United States v. Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016) (en banc) (holding that § 16(b)'s residual clause is constitutional). *Samuel Johnson*'s reasoning applies with equal force to § 3559(c)'s residual clause. The language of § 3559(c)'s residual clause is almost identical to the definition of crime of violence set forth in 18 U.S.C. § 16(b). Cf., 18 U.S.C. § 16(b); 18 U.S.C. § 3559(F)(ii).

Based on this Court's consideration of the materially-identical provision in *Dimaya*, and the circuit split concerning the constitutionality of § 3559(c)'s residual clause, Mr. Richitelli respectfully seeks this Court's review. Should this Court decide in *Dimaya* that § 16(b) is unconstitutionally vague, that decision will confirm Mr. Richitelli's position that § 3559(c)'s residual clause is unconstitutionally vague. At a minimum, these splits show that reasonable jurists may debate whether § 3559(c)'s residual clause is unconstitutionally vague.

The courts have recognized that § 16(b) is similar to ACCA; thus, they have required the same "categorical" approach used in ACCA to be used for § 16(b).

Dimaya v. Lynch, 803 F.3d 1110, 1114 (9th Cir. 2015); *United States v. Vivas-Ceja*, 2015 WL 9301373, *1 (Dec. 22, 2015). Moreover, courts have recognized that the language “by their nature” in § 16(b)’s residual clause requires application of the “ordinary case” standard that was used in ACCA and that was so highly criticized in *Johnson*. *Dimaya*, 803 F.3d at 1115; *Vivas-Ceja*, 2015 WL 9301373, *3.

Additionally, § 16(b)’s “substantial risk” standard, like ACCA’s “serious potential risk,” standard is undefined and subject to varying interpretations by the courts. *Dimaya*, 803 F.3d at 1116 n.9 & 1120; *Vivas-Ceja*, 2015 WL 9301373, *3. The § 16(b) analysis, therefore, mirrors the analysis under ACCA’s residual clause, and consequently, suffers the same deficiencies that make ACCA’s residual clause void for vagueness. Indeed, the Solicitor General and the courts that have analyzed § 16(b)’s residual clause in light of *Johnson*, have concluded that § 16(b)’s residual clause is void for vagueness for the same reasons that ACCA’s residual clause is void for vagueness under *Johnson*. *Dimaya*, 803 F.3d at 1116; *Vivas-Ceja*, 2015 WL 9301373, *4; *Johnson*, 135 S. Ct. 2551 (2015) (No. 13-7120), Supplemental Brief for Respondent (the Solicitor General conceded that § 16(b)’s residual clause, like ACCA’s residual clause, required a court to identify the “ordinary case” of the commission of the offense, and thus was “equally susceptible” to challenges on vagueness grounds).

Since § 3559(c) is nearly identical to § 16(b) and contains the same “by its nature” and “substantial risk” language, § 3559(c) has the same vagueness defects as § 16(b) and ACCA. *See Dimaya*, 803 F.3d at 1120; *Vivas-Ceja*, 2015 WL 9301373,

*3; *Johnson*, 135 S. Ct. at 2558. Thus, for the reasons set forth above, § 3559(c), like the ACCA's residual clause is void for vagueness and at a minimum, reasonable jurists may debate the issue.

II. Reasonable jurists could debate whether Conspiracy to Commit Hobbs Act robbery, which may be committed by a verbal or written agreement, has as an element the “use, attempted use, or threatened use of physical force against the person or property of another.”

Hobbs Act conspiracy is not one of the enumerated offenses listed in § 3559(c). Whether conspiracy to commit Hobbs Act robbery qualifies as a “crime of violence” under § 3559(c)’s elements clause is a question that must be answered categorically—that is, by reference to the elements of the offense, and not the actual facts of the defendant’s conduct. See *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013). Pursuant to this categorical approach, if conspiracy to commit Hobbs Act robbery may be committed without “the use, attempted use, or threatened use of physical force,” then that crime may not qualify as a “crime of violence” under § 3559(c)’s elements clause. The term “physical force” under the elements clause “connotes a substantial degree of force.” *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*). It means “violent force . . . force that is capable of causing physical pain or injury to another person.” *Id.* Conspiracy to commit Hobbs Act robbery may be committed without the use of violent “physical force.” Therefore, it does not qualify as a “crime of violence” under § 3559(c)’s elements clause.

“To convict on a Hobbs Act conspiracy, the government must show that (1) two or more people agreed to commit a Hobbs Act robbery; (2) that the defendant knew of

the conspiratorial goal; and (3) that the defendant voluntarily participated in furthering that goal.” *United States v. Ransfer*, 749 F.3d 914, 929 (11th Cir. 2014); *see also United States v. Verbitskaya*, 406 F.3d 1324, 1335 (11th Cir. 2005) (quoting *United States v. Pringle*, 350 F.3d 1172, 1176 (11th Cir. 2003)). Critically, however, there is no requirement that the defendant engage in an overt act in furtherance of the conspiracy. *United States v. Pistone*, 177 F.3d 957, 959–60 (11th Cir. 1999). Nor is there any requirement that the defendant was “even capable of committing” the underlying Hobbs Act offense. *Ocasio v. United States*, 136 S. Ct. 1423, 1432 (2016). Rather, “[i]t is sufficient to prove that the conspirators agreed that the underlying crime be committed by a member of the conspiracy who was capable of committing it.” *Id.* (emphasis omitted).

Thus, under the least-culpable act rule, this Court must presume that Mr. Richitelli’s conspiracy offense was committed by a verbal or written agreement to commit Hobbs Act robbery. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *see, e.g., Pistone*, 177 F.3d at 959 (upholding conviction for conspiracy to commit Hobbs Act robbery where defendant did no more than agree and plan to commit robbery, but took no overt act). Committing the offense in this way clearly lacks the use, attempted use, or threatened use of violent, physical force. As a result, conspiracy to commit Hobbs Act robbery is categorically overbroad and cannot qualify as a “crime of violence.”

Several courts around the country and in the Southern District of Florida have already persuasively so held. *See, e.g., United States v. Edmundson*, 153 F.

Supp. 3d 857, 859 (D. Md. 2015) (“The parties have not cited, nor has my own research revealed, any authority that Hobbs Act Conspiracy . . . constitutes a crime of violence under the § 924(c) force clause, which is unsurprising considering the fact that this clause only focuses on the elements of an offense to determine whether it meets the definition of a crime of violence, and it is undisputed that Hobbs Act Conspiracy can be committed even without the use, attempted use, or threatened use of physical force against the person or property of another.”); *Duhart v. United States*, No. 08-60309-CR, 2016 WL 4720424, at *6 (S.D. Fla. Sept. 9, 2016) (“[C]onspiracy to commit Hobbs Act robbery . . . cannot be a ‘crime of violence’ under the elements clause of § 924(c).”); *United States v. Baires-Reyes*, 191 F. Supp. 3d 1046, 1049 (N.D. Cal. 2016) (“[C]onspiracy to commit Hobbs Act robbery is not a crime of violence as defined by the force clause.”); *United States v. Ledbetter*, No. 2:14-CR-127, 2016 WL 3180872, at *6 (S.D. Ohio June 8, 2016) (“[T]his Court agrees” that conspiracy to commit Hobbs Act robbery “qualifie[d] *only* under the ‘residual clause’ from § 924(c)(3)(B)”); *United States v. Luong*, No. CR 2:99-00433 WBS, 2016 WL 1588495, at *3 (E.D. Cal. Apr. 20, 2016) (“The court therefore finds that conspiracy to commit Hobbs Act robbery does not have as an element the use or attempted use of physical force and is not a crime of violence under the force clause.”).

In sum, it appears that several courts that have addressed the issue after *Samuel Johnson* have concluded that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under § 924(c)’s force clause. The same is true here

and as such, conspiracy to commit Hobbs Act robbery cannot satisfy § 3559(c)'s elements clause. At a minimum, reasonable jurists can debate the issue.

III. Reasonable jurists could debate whether attempted Hobbs Act robbery, which may be committed by causing an individual to fear financial loss, has as an element the “use, attempted use, or threatened use of physical force against the person or property of another.”

Similarly, attempted Hobbs Act Robbery is not listed as a § 3559(c) enumerated offense. Therefore, in order for it to constitute a “serious violent felony” it would have to qualify pursuant to § 3559(c)'s elements clause. The Hobbs Act statute, 18 U.S.C. § 1951, in pertinent part, defines the term “robbery” in subsection (b)(1) to mean:

the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

An “attempt” requires intent to commit the crime and a “substantial step” toward committing the crime. “A ‘substantial step’ is an important action leading up to committing of an offense....It must be an act that would normally result in committing the offense.” See 11th Cir. Pattern Jury Instr. 11 (2010).

As noted above, in evaluating whether an offense qualifies as a “crime of violence” under the elements clause, sentencing courts must employ the categorical approach. *Descamps v. United States*, 133 S. Ct. 2275, 2283 (2013); *United States v. Estrella*, 758 F.3d 1239, 1244-45 (11th Cir. 2014). And application of the

post-*Descamps*, elements-driven categorical approach to attempted Hobbs Act robbery yields the conclusion that it is *not* a “serious violent felony.”

Notably, by its terms, Hobbs Act robbery under 18 U.S.C. § 1951 can be committed by putting one in fear of future injury to his person or property. And this Court’s pattern jury instructions make clear that Hobbs Act robbery is an indivisible offense. See 11th Cir. Pattern Jury Instr. 70.3 (2010) (listing as the second, indivisible element of the offense – without any bracketed alternatives – that the government must prove beyond a reasonable doubt that “the Defendant took the property against the victim’s will by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future”).

As a threshold matter, because Hobbs Act robbery can be accomplished by placing somebody in fear of injury to his *property*, it does not require the use of violent physical force in every case. Notably, “[t]he concept of ‘property’ under the Hobbs Act is an expansive one” that includes “*intangible assets*, such as rights to solicit customers and to conduct a lawful business.” *United States v. Arena*, 180 F.3d 380, 392 (2d. Cir. 1999); *abrogated in part on other grounds by Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003) (emphasis added). See also 11th Cir. Pattern Jury Instruction 70.3 (“Property includes . . . intangible rights that are a source or element of income or wealth”); *United States v. Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that the Circuits “are unanimous in extending Hobbs Act to protect intangible as well as tangible property”). For example, Hobbs Act robbery can be committed via

threats to cause a devaluation of some economic interest. *United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction when boss threatened “to slow down or stop construction projects unless his demands were met”). Such threats to economic interests are certainly *not* threats of “violent force.” And even where a Hobbs Act robbery is committed by “causing the victim to fear harm, either immediately or in the future,” this Court has explained in its pattern instruction that the term “fear” “includes the fear of financial loss as well as fear of physical violence.”

Second, even if the “fear of injury” aspect of the statute *required* placing the victim in fear of “physical violence” and therefore, bodily injury – which it certainly does *not* in every case – federal cases interpreting the analogous “intimidation” element in the federal bank robbery statute (18 U.S.C. § 2113(a)) compel the conclusion that the statute is overbroad vis-a-vis an offense within § 3559(c)’s elements clause. Notably, federal bank robbery may be accomplished by “intimidation,” which means placing someone in fear of bodily harm. And notably, the standard is an objective, “reasonable person” test. *See United States v. Woodrop*, 86 F.3d 359, 364 (4th Cir. 1996) (“intimidation” under federal bank robbery statute means “an ordinary person in the [victim’s position] reasonably could infer a threat of *bodily harm* from the defendant’s acts”) (emphasis added); *see also United States v. Pickar*, 616 F.3d 821, 825 (2010) (same); *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) (same); *United States v. Yockel*, 320 F.3d 818,

824 (8th Cir. 2003) (same); *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987) (same).

“Intimidation” is satisfied under the bank robbery statute “whether or not the defendant actually intended the intimidation,” as long as “an ordinary person in the [victim’s] position reasonably could infer a threat of bodily harm from the defendant’s acts.” *Woodrup*, 86 F.3d at 36. Indeed, “[w]hether a particular act constitutes intimidation is viewed objectively, and a defendant can be convicted under [the federal bank robbery statute] even if he did not intend for an act to be intimidating.” *Kelley*, 412 F.3d at 1244 (internal citation omitted). *See also United States v. Yockel*, 320 F.3d 818, 821 (8th Cir. 2003) (upholding bank robbery conviction even though there was no evidence that defendant intended to put teller in fear of injury: defendant did not make any sort of physical movement toward the teller and never presented her with a note demanding money, never displayed a weapon of any sort, never claimed to have a weapon, and by all accounts, did not appear to possess a weapon); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993) (same). In other words, a defendant may be found guilty of federal bank robbery even though he did not intend to put another in fear of injury. It is enough that the victim reasonably fears injury from the defendant’s actions – whether or not the defendant actually *intended* to create that fear.

But the elements clause in § 3559(c) requires that a defendant *intentionally* place another in fear of injury. *See Garcia v. Gonzalez*, 455 F.3d 465, 468 (4th Cir. 2006) (analyzing 18 U.S.C. § 16(a)’s identical elements clause, and holding that an

offense can only constitute a “crime of violence” under the [elements] clause if it has an element that requires an “*intentional* employment of physical force [or threat of physical force]”). Due to the lack of this intent, federal bank robbery criminalizes conduct that does not require an intentional threat of physical force. And for the same reason that federal bank robbery therefore squarely fails to qualify as a “crime of violence,” *see id.*, the “fear of injury” component of the Hobbs Act statute renders that statute as well categorically overbroad.

Finally, even if the statute required the causation or threat of physical injury to the person of another – which again, it does *not* – the statute would still not necessarily require the use or threatened use of any physical force, let alone violent physical force. *See, e.g., United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012) (evaluating Cal. Penal Code § 422(a) and reasoning that “[o]f course, a crime may *result* in death or serious injury without involving *use* of physical force”); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 194 (2d Cir. 2003) (noting that “there is a difference between the causation of an injury . . . and an injury’s causation by the use of physical force”); *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010) (holding that statute criminalizing threatening to commit a crime which will result in death or great bodily injury to another person is not a crime of violence because it does not necessarily involve the use of force); *United States v. Perez-Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005) (explaining that although Colorado assault statute required causation of bodily injury, imposing injury does

not “necessarily include the use or threatened use of ‘physical force’ as required by the Guidelines”).

As the Second Circuit has explained, “human experience suggests numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital medicine from a sick patient” or someone who causes physical impairment by placing a tranquilizer in the victim’s drink. *Chrzanoski*, 327 F.3d. at 195-96. Likewise, the Tenth Circuit has reasoned that “several examples [exist] of third degree assault that would not use or threaten the use of physical force: . . . intentionally placing a barrier in front of a car causing an accident, or intentionally exposing someone to hazardous chemicals.” *Perez-Vargas*, 414 F.3d at 1286. The same is true of Hobbs Act robbery. It, too, can be accomplished without using or threatening to use physical force.

In short, the full range of conduct covered by the Hobbs Act robbery statute does not require the use or threat of “violent force” in every case. Because of this, an attempted Hobbs Act Robbery conviction cannot qualify as a “serious violent felony” under § 3559(c). Thus, reasonable jurists can debate the issue.

IV. The Eleventh and Ninth Circuits are intractably divided on whether a Florida Robbery conviction categorically requires the *Curtis Johnson* level of “violent force.”

The Eleventh Circuit has repeatedly held (without reviewing *any* Florida appellate decisions) that simply *because* Florida robbery requires overcoming “victim resistance,” the offense is categorically an ACCA violent felony. See *United States v. Seabrooks*, 839 F.3d 1326, 1340-1341, 1346, 1352 (11th Cir. 2016) (separate

decisions by Hull, Baldock, and Martin, JJ.) (narrowly agreeing that *Seabrooks*' 1997 Florida robbery conviction was a "violent felony" according to *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) since *Seabrooks*' conviction post-dated the Florida Supreme Court's decision in *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997) which clarified that a Florida robbery offense requires overcoming victim resistance); *United States v. Fritts*, 841 F.3d 937, 940-944 (11th Cir. 2016) (following not only *Lockley* but its even earlier "precedent," *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), to hold that all Florida robbery convictions, including those before *Robinson*, categorically qualify as ACCA "violent felonies" since *Robinson* clarified what the Florida robbery statute "always meant").

In both *Seabrooks* and *Fritts*, the appellants informed the Eleventh Circuit in their briefing that Florida caselaw made clear that overcoming "resistance" did *not* require violent force in every case. They urged the Eleventh Circuit to specifically consider Florida decisions like *Sanders v. State*, 769 So.2d 506, 507-508 (Fla. 5th DCA 2000) which confirmed *violent* force was not necessary to overcome resistance where the resistance itself was slight. *See, e.g.*, Reply Brief of the Appellant in *United States v. Seabrooks*, 2016 WL 137 *See, e.g.* 5906 at **14-15 (11th Cir. March 4, 2016); Reply Brief of the Appellant in *United States v. Fritts*, 2016 WL 3136766 at *18 (11th Cir. June 2, 2016).

Both *Seabrooks* and *Fritts* argued that the analysis in *Lockley* and *Dowd* had been abrogated by this Court's intervening precedents in *Descamps*, *Moncrieffe*, and

Mathis. But in *Seabrooks*, the Eleventh Circuit reflexively adhered to its prior precedent in *Lockley*, and ignored the appellant's argument that *Lockley*'s analysis had not survived the Court's clarification of the categorical approach in *Moncrieffe*, *Descamps*, and *Mathis*. And thereafter in *Fritts*, the Eleventh Circuit not only followed *Lockley*, but *Dowd*, which had demonstrably misapplied the "modified categorical approach" and contained no other analysis. In *Seabrooks* and *Fritts*, the Eleventh Circuit steadfastly refused to review *any* Florida caselaw – deferring completely to its prior precedents in *Lockley* and *Dowd* which preceded *Moncrieffe*, and did not consult Florida law to determine the least culpable conduct for conviction.

In *United States v. Geozos*, 870 F.3d 890 (9th Cir. Aug. 29, 2017), however, the Ninth Circuit was asked to consider the same question as in *Seabrooks* and *Fritts* – whether a Florida robbery conviction categorically qualified as an ACCA violent felony. And analyzing the identical issue on a clean slate, consistently with the dictates of *Moncrieffe* and *Mathis*, the Ninth Circuit concluded that a Florida robbery conviction did *not* categorically qualify as an ACCA violent felony since Fla. Stat. § 812.13(1) – by its text, and as interpreted by the Florida courts – did *not* require the use of "violent force." *Id.* at 900.

First, the Ninth Circuit found significant that "force" and "violence" were used separately in § 812.13(1), which suggested "that not all 'force' that is covered by the statute is 'violent force.'" *Id.* That, in and of itself, led the Ninth Circuit to "doubt

whether a conviction for violating section 812.13 qualifies as a conviction for a ‘violent felony.’ *Id.* But ultimately, it was Florida caselaw (ignored by the Eleventh Circuit) that made it clear to the Ninth Circuit that “one can violate section 812.13 without using violent force.” *Id.* The Ninth Circuit acknowledged that according to *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997), a conviction under Fla. Stat. § 812.13(1) requires that there “be resistance by the victim that is overcome by the physical force of the offender.” *Id.* at 886. However, the Ninth Circuit pointed out, Florida caselaw both prior and subsequent to *Robinson* confirmed that “the amount of resistance can be minimal,” and therefore, that one could violate § 812.13 “without using violent force.” *Id.*

For instance, the Ninth Circuit noted with significance, prior to *Robinson* in *Mims v. State*, 342 So.2d 883, 886 (Fla. 3rd DCA 1977), a Florida appellate court had held that “Although purse snatching is not robbery if no more force or violence is used than necessary to physically remove the property from a person who does not resist, if the victim does resist *in any degree* and this resistance is overcome by the force of the perpetrator, the crime of robbery is complete.” *Geozos*, 870 F.3d at 900 & n. 9 (adding the emphasis to the words “*in any degree*” in *Mims* and noting that *Mims* was “cited with approval in *Robinson*”).

And after *Robinson*, the Ninth Circuit also found significant, in *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011) another Florida appellate court had held that a robbery conviction “may be based on a defendant’s act of engaging in a tug-of-war over the victim’s purse.” In the Ninth Circuit’s view,

such an act “does not involve the use of violent force within the meaning of the ACCA;” rather, it involves “something less than violent force within the meaning of *Johnson I.*” *Geozos*, 870 F.3d at 900 (citing *United States v. Strickland*, 860 F.3d 1224 (9th Cir. 2017)).

The Ninth Circuit acknowledged that its conclusion that a Florida robbery offense was not categorically an ACCA “violent felony” put it “at odds” with the Eleventh Circuit, which held just the opposite in *Lockley* and *Fritts*. But in the Ninth Circuit’s view, *Lockley* and *Fritts* were unpersuasive since they overlooked the crucial point – confirmed by Florida caselaw (and emphasized by Mr. Richitelli before the district court) – that violent force is unnecessary to “overcome resistance” in Florida. The Ninth Circuit explained:

[W]e think 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. *See Montsdoca v. State*, 84 Fla. 82, 93 So. 157, 159 (Fla. 1922) (“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.”)

Geozos, 870 F.3d at 901. For that reason, the Ninth Circuit held, a Florida robbery conviction was not a proper ACCA predicate. Accordingly, it reversed the lower court’s erroneous denial of *Geozos*’ § 2255 motion, and ordered that *Geozos*’ ACCA sentence be vacated and he be released from his illegal custody.²

² The *Geozos* court correctly found that whether a Florida robbery was armed or unarmed made no difference because an individual may be convicted of armed

As is clear from *Geozos*, the Ninth and Eleventh Circuits are now directly in conflict on an important and recurring question of Federal law. The conflict is demonstrably intractable at this point, and it will not be resolved without the 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*. Not only in Mr. Richitelli's case, but in multiple other cases as well, the Eleventh Circuit has affirmed ACCA sentences predicated upon Florida robberies based upon *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.” After the Ninth Circuit issued its decision in *Geozos* – rejecting the view set forth in *Fritts* – the Court directed the Solicitor General to respond to pending petitions for certiorari in two Eleventh Circuit ACCA cases following *Fritts*. See *Denard Stokeling v. United States* (No. 17-5554), and *Kenneth Conde v. United States* (No. 17-5772). And notably, after these two responses were ordered, the Solicitor General itself agreed that responses were warranted in two

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 900-901. That ruling was consistent with *State v. Baker*, 452 So.2d 927, 929 (Fla. 1984). Notably, the same point was made to the Eleventh Circuit by the defendants in both *Seabrooks* and *Fritts*, and neither panel disputed it. Rather, the Eleventh Circuit found in both cases that the defendants' armed robbery convictions qualified as “violent felonies,” because their underlying *unarmed* robbery offenses categorically qualified as “violent felonies.” It is thus of no legal moment here that Mr. Richitelli was convicted of armed robbery.

other ACCA cases predicated upon Florida robbery convictions, *Latellis Everett v. United States* (No. 17-6054), and *Anthony Williams v. United States* (No. 17-6026).

In *Everette*, notably, the appellant filed a request for an initial en banc hearing with the hope that the Eleventh Circuit would reconsider *Fritts*' holding that all Florida robbery offenses categorically qualify as ACCA "violent felonies." But not one judge in active service on the court voted for en banc consideration, and *Everette*'s request was summarily denied. *United States v. Everette*, Slip op. (11th Cir. July 31, 2017).

Even after the Ninth Circuit harshly criticized the Eleventh Circuit in *Geozos* and reached a conflicting result on precisely the same predicate – and several appellants urged the Eleventh Circuit to follow Florida law as the Ninth Circuit did in *Geozos* – the Eleventh Circuit continued to disregard Florida law, and rigidly adhere to *Fritts*. See *Repress v. United States*, ___ Fed. Appx. ___, 2017 WL 4570661 (11th Cir. Oct. 13, 2017); *United States v. Pace*, ___ Fed. Appx. ___, 2017 WL 4329718 (11th Cir. Sept. 29, 2017).³

With this spate of recent decisions, the Eleventh Circuit has made undeniably clear that its conflict with the Ninth Circuit is intractable. The Eleventh Circuit will not reconsider whether a Florida robbery offense categorically requires the *Curtis Johnson* level of violent force. And notably, the circuit conflict actually extends much farther than the Ninth and Eleventh Circuits.

³ Petitions for writ of certiorari were filed in both *Repress*, 17-7391 and *Pace*, 17-7140.

Notably, in permitting a conviction for robbery based on the use of force so long as the degree of force used is sufficient to overcome a victim's resistance, *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), Florida is like the majority of states. At least fifteen states have now expressly included some variation of this standard in the text of their statutes,⁴ and many others (including Florida, North Carolina, Virginia, Colorado, and Ohio) have judicially recognized an "overcoming resistance" element through their caselaw.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 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

⁴ *See* Ala. Code § 13A-8-43(a)(1); Alaska Stat. § 11.41.510(a)(1); Ariz. Rev. Stat. §§ 13-1901, 1902; 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. 1998); *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. App. 2000); *State v. Juhasz*, 2015 WL 5515826 at *2 (Ohio Ct. App. 2015).

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 unarmed robbery offense originally described in Fla. Stat. § 812.13(1) *was* common law robbery. See *Montsdoca v. State*, 84 Fla. 82, 86 (1922) (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, but the Court had 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 described above extends much further than the Ninth and Eleventh Circuits. 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

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

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 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.

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.2d 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 both *Seabrooks* and *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*, 205 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 *Yates*, 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*, a simple survey of Florida's own appellate law (consistently ignored by the Eleventh Circuit) easily confirms this point.

In addition to *Mims* and *Benitez-Saldana* which were cited in *Geozos*, at least three other Florida decisions support the Ninth Circuit's conclusion that whenever a victim's resistance is slight in a Florida robbery, only slight force by the offender is necessary to overcome it and seal the conviction. In *Johnson v. State*, 612 So.2d 689 (Fla. 1st DCA 1993), for instance, a Florida appellate court found force sufficient to

tear a scab off a victim's finger was enough to sustain conviction for robbery. *Id.* at 690. In *Sanders v. State*, 769 So. 2d 506 (Fla. 5th DCA 2000), another Florida appellate court affirmed a strongarm robbery conviction where the defendant merely peeled back the victim's fingers before snatching money from his hand. The court explained that the victim's "clutching of his bills in his fist as Sanders pried his fingers open could have been viewed by the jury as an act of resistance against being robbed by Sanders," thus confirming that no more resistance, or "force" than that was necessary for a strong arm robbery conviction under § 812.13(1)). *Id.* at 507-508. And in *Hayes v. State*, 780 So.2d 918, 919 (Fla. 1st DCA 2001), a final Florida court upheld a conviction for robbery by force based upon testimony of the victim "that her assailant 'bumped' her from behind with his shoulder and probably would have caused her to fall to the ground but for the fact that she was in between rows of cars when the robbery occurred," and did not fall.

Had the Fourth and Sixth Circuits considered the above Florida decisions – and compared them to those 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 Mr. Richitelli's robbery convictions were no longer ACCA "violent felonies."

Notably, 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.157, 159 (Fla. 1922). 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.

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.

Reading *Montsdoca* as it read *Sawyer*, reasoning as it did in both *Gardner* and *Winston*, and consulting *all* of the pertinent Florida caselaw here, the Fourth Circuit would likely have come to the same conclusion as the Ninth Circuit did in *Geozos* on Florida robbery. It would have held that a Florida statutory robbery – despite the fact that it necessitates overcoming some “victim resistance” – does not categorically require the use of “*violent* force” in every case, and thus falls outside the ACCA’s elements clause. And based upon the reasoning in *Yates*, it is likely the Sixth Circuit would have so concluded as well.

The Eleventh Circuit’s complete disregard of Florida caselaw, its presumptive approach to the “overcoming resistance” issue, and its contrary conclusion in *Fritts* thus places it in conflict with not simply one, but at least three other circuits at this time.⁷ And notably, the only court that has even somewhat aligned itself with the

⁷ Until June 17th of this year, the Eleventh Circuit’s approach in *Fritts* also conflicted with that of the Eighth Circuit in *United States v. Bell*, 840 F.3d 963, 965-967 (8th Cir. 2016) (holding that Missouri second degree robbery was not a “crime of violence” under the Guidelines), and *United States v. Swopes*, 850 F.3d 979, 981 (8th Cir. 2017)(following *Bell* to conclude that such a crime was likewise not a “violent felony” under the ACCA). However, on June 17th, the Eighth Circuit vacated *Swopes* and set that case for rehearing en banc. The case was recently

presumptive approach of Eleventh Circuit, is the Tenth. In *United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017), the Tenth Circuit – much like the Eleventh – resolved the “violent felony” question with “blindness” on. Rather than surveying the relevant Colorado appellate caselaw to determine the least culpable conduct under the Colorado robbery statute, and in particular, how the Colorado courts interpreted the “violence” element in their statute, the Ninth Circuit instead chose to defer to a dictionary definition of “violence.” *See id.* at 1266-1268 (acknowledging that “Colorado remains committed to the common law definition of robbery,” and defines the required amount of force “consistent with the common law;” finding, however, that Colorado statutory robbery remains an ACCA “violent felony” due to the Colorado Supreme Court’s statement in *People v. Borghesi*, 66 P.3d 93, 99 (Colo. 2003) that “there can be no robbery without violence, and there can be no larceny with it;” finding the dictionary’s definition of “violent” dispositive, rather than surveying the true meaning of “violence” according to Colorado appellate court decisions), *pet. for cert. filed* April 4, 2017 (No. 16-8616).

Like the Eleventh Circuit in *Fritts*, the Tenth Circuit in *Harris* refused to delve beneath the surface of that statement in *Borghesi*, and recognize that “violence” was simply a common law term of art with a unique meaning. Indeed, the Tenth Circuit summarily rejected the defendant’s argument that given *People v. Davis*, 935 P.2d 79, 84 (Colo. App. 1996), where a Colorado court held as a matter of

argued to the en banc court. It has not yet been resolved.

require any more than slight force to “overcome resistance” if the resistance itself is slight.

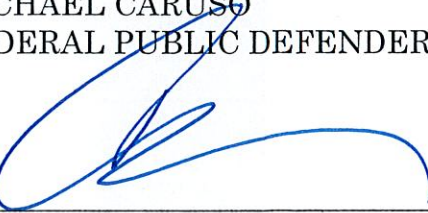
Given the important and recurring nature of this issue, Mr. Richitelli respectfully seeks this Court’s review. The Court should therefore grant the petition and issue a certificate of appealability.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: 

Chantel R. Doakes
Assistant Federal Public Defender
Counsel for Mr. Richitelli

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