No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

XAVIER JONES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can reasonable jurists debate whether Florida armed robbery and attempted armed robbery qualify as violent felonies under the Armed Career Criminal Act after *Johnson v. United States*, 135 S. Ct. 2551 (2015)?

2. Can reasonable jurists debate whether Florida attempted first-degree murder qualifies as a violent felony under the Armed Career Criminal Act after *Johnson v. United States*, 135 S. Ct. 2551 (2015)?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion denying Mr. Jones a certificate of appealability is reproduced as Appendix ("App.") A.

JURISDICTION

The court of appeals issued its opinion on June 27, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(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 (2002)

> **(1)** "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear. ...

(3)(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

Fla. Stat. § 777.04 (2002)

(1) A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt, ranked for purposes of sentencing as provided in subsection (4). Criminal attempt includes the act of an adult who, with intent to commit an offense prohibited by law, allures, seduces, coaxes, or induces a child under the age of 12 to engage in an offense prohibited by law.

STATEMENT OF THE CASE

The Charges and Plea

On October 1, 2014, a federal grand jury charged Xavier Jones 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). On January 5, 2015, Mr. Jones pled guilty to that charge.

The PSI and Sentencing

In the PSI, the Probation Officer opined that Mr. Jones was subject to enhanced sentencing as an Armed Career Criminal under 18 U.S.C. § 924 (e) because three of his prior convictions were qualifying "violent felonies:" namely, his January 12, 2014 conviction for Florida armed robbery; his February 24, 2003 convictions for one count of Florida armed robbery and one count of armed burglary; and his convictions on the same date in a different case for one count of attempted first-degree murder and one count of attempted armed robbery. (PSI ¶¶ 18, 24, 25, and 27).

Accordingly, the Probation Officer recommended that pursuant to U.S.S.G. § 4B1.4(b)(3)(B), his otherwise-applicable Chapter 2 offense level of 24 under § 2K2.1(a)(2), be increased to a level 33. With a 3-level reduction for acceptance of responsibility, his total recommended offense level was 30. And, at a Criminal History of IV, his recommended advisory guideline range as an Armed Career Criminal was 135-168 months imprisonment. However, as an armed career

criminal, he was subject to the 15-year minimum mandatory sentence. On March 16, 2015, the court sentenced Mr. Jones to 180 months imprisonment.

On June 24, 2016, Mr. Jones filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. Mr. Jones argued that after the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), he was no longer an armed career criminal under § 924(e). The government responded on August 12, 2016. Mr. Jones filed a reply on September 12, 2016. On October 27, 2016, Magistrate Judge Jonathan Goodman issued a report and recommendation recommending that the district court deny Mr. Jones's motion. Mr. Jones filed objections to the recommendation. In his motion, reply, and objections to the recommendation, Mr. Jones argued that none of the stated prior convictions qualified as violent felony predicates under the ACCA after this Court's decision in *Johnson*.

On February 3, 2017, District Court Judge Joan Lenard denied Mr. Jones's motion. Civ. DE 11. The court initially found that Mr. Jones's motion was timely. It then reviewed Mr. Jones's priors. The court found that Mr. Jones's two priors for armed robbery qualify as violent felonies under *United States v. Seabrooks*, 839 F.3d 1326, 1339 (11th Cir. 2016) and *United States v. Fritts*, __ F.3d __, 2016 WL 6599553 (11th Cir. Nov. 8, 2016). The court also found that Mr. Jones's attempted robbery conviction was still a violent felony under the same *Seabrooks* and *Fritts* decisions. As a result, Mr. Jones still qualified as an armed career criminal. The court did not analyze whether Mr. Jones's prior convictions for attempted murder or armed burglary qualified as violent felonies. It simply concluded that because

armed robbery was a violent felony, Mr. Jones still had three prior convictions that qualified him as an armed career criminal. In addition to denying Mr. Jones's motion, the district court also denied a certificate of appealability.

Mr. Jones filed a notice of appeal in this case on March 30, 2017. On April 4, 2017, Mr. Jones filed a Motion for Certificate of Appealability on the following question:

> Whether the district court erred by denying Mr. Jones's motion to vacate, set aside, or correct his sentence, brought pursuant to 28 U.S.C. § 2255, alleging that he was illegally sentenced as an armed career criminal after *Johnson v. United States*, 135 S. Ct. 2551 (2015).

On June 27, 2017, the Eleventh Circuit denied Mr. Jones a Certificate of Appealability, stating only that he "failed to make a substantial showing of the denial of a constitutional right." App. A.

In his motion for a certificate of appealability, Mr. Jones argued that reasonable jurists could debate whether any of the predicate convictions remained violent felonies after *Johnson*. However, if Florida armed robbery alone is no longer a violent felony, Mr. Jones is not an armed career criminal because he no longer has three predicate convictions. Thus, if reasonable jurists could debate whether Florida armed robbery is a violent felony, then a COA should have been granted. Additionally, even if the court found that armed robbery is a violent felony, Mr. Jones could still prevail if the court found that *attempted* armed robbery and *attempted* first-degree murder were not violent felonies. If reasonable jurists could

debate whether attempted armed robbery and attempted first-degree murder are violent felonies, then a COA should have been granted.

REASONS FOR GRANTING THE PETITION

THE CIRCUITS ARE SPLIT ON WHETHER FLORIDA ARMED ROBBERY IS A VIOLENT FELONY UNDER THE ELEMENTS CLAUSE OF THE ARMED CAREER CRIMINAL ACT. THUS, REASONABLE JURISTS COULD DEBATE WHETHER MR. JONES IS AN ARMED CAREER CRIMINAL.

I. Legal Standard for Certificate of Appealability

A certificate of appealability ("COA") must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] that 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.'" *Slack v. McDaniel*, 529 U.S. 473, 484, (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). When the district court denies a claim on procedural grounds without reaching the underlying claim, a COA should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

As the Supreme Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not

demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Supreme Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. The Supreme Court recently reiterated this standard in *Buck v. Davis*, 137 S.Ct. 759 (2017), holding that a "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable.'" *Id.* at 774. The Court further stated that when a reviewing court "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits, it has placed too heavy a burden on the prisoner *at the COA stage*." *Id.*

Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

The Supreme Court recently applied this standard in *Welch v. United States*, 136 S. Ct. 1257 (2016), which arose from the denial of a COA. *Id.* at 1263-64. In that case, the Court broadly held that *Johnson* announced a substantive rule that applied retroactively in cases on collateral review. *Id.* at 1268. But, in order to

resolve the particular case before it, the Court also held that the Court of Appeals erred by denying a COA, because "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence." *Id.* at 1264, 1268. In that case, the parties disputed whether his robbery conviction would continue to qualify as a violent felony absent the residual clause, and there was no binding precedent resolving that question. *See id.* at 1263-64, 1268. Accordingly, the Court held that a COA should issue.

Similarly, a COA should have issued in Mr. Jones's case. Like in *Welch*, the parties disputed whether Mr. Jones's robbery convictions should continue to qualify as violent felonies absent the residual clause. While there is Eleventh Circuit precedent stating robbery is a violent felony, the Ninth Circuit recently held the opposite. Thus, there is a clear circuit split and a COA should be granted. Additionally, the parties disputed whether attempted robbery and attempted first-degree murder continued to qualify as violent felonies. And like in *Welch*, there was no binding precedent resolving this question. Thus, a COA should be granted on that issue as well.

II. Reasonable jurists could debate whether Florida armed robbery has as an element the use, attempted use, or threatened use of force and thus qualifies as a violent felony after *Johnson*.

The Circuits are split on whether Florida armed robbery has as an element the use, attempted use, or threatened use of violent force and thus qualifies as a violent felony absent the ACCA's residual clause. The Eleventh Circuit in *Seabrooks* and *Fritts* held that Florida armed robbery has as an element the use, threatened

use, or attempted use of violent physical force and thus would qualify as a violent felony. In contrast, the Ninth Circuit held in *United States v. Geozos*, ___ F.3d ___, 2017 WL 3712155 (9th Cir. Aug. 29, 2017) that Florida robbery does not qualify as a violent felony.

Additionally, the Circuits are in conflict over whether a conviction for a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance,"—as does Florida's robbery statute at issue here—is categorically a "violent felony" under the ACCA, if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance. The Fourth Circuit held it is not, while the Tenth and Eleventh Circuits held it is.

As a result of the above Circuit splits, reasonable jurists could debate, and indeed are debating, whether Florida armed robbery qualifies as a violent felony after *Johnson*. Thus, Mr. Jones should have been granted a certificate of appealability.

A. The Ninth and Eleventh Circuits are in direct conflict about whether Florida armed robbery qualifies as a violent felony after *Johnson*.

The question whether state robbery convictions necessarily have *violent* force "as an element" was not a pressing question for this Court before it invalidated the ACCA's residual clause as unconstitutionally vague in *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015). Many circuits, including the Eleventh, had easily concluded that the residual clause extended to categorically non-violent crimes due

to the mere "risk" of physical injury during a robbery, or in its aftermath. In that vein, the Eleventh Circuit had held in *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012), that even a robbery by "sudden snatching," a crime which by definition requires no more force than that necessary to snatch money or an item from the victim's hand, and neither victim resistance nor injury was required, was nonetheless a "violent felony" and proper ACCA predicate within the residual clause because "[s]udden snatching ordinarily involves substantial risk of physical injury to the victim." *Id.* at 1313.

Once this Court eliminated the residual clause, however, lower courts have had to reconsider whether state robbery crimes – long counted as "violent felonies" within the residual clause, or within the elements clause before this Court clarified the meaning of "physical force" as "*violent* force" in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), or the categorical approach in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Descamps v. United States*, 133 S. Ct. 2276 (2013); and *Mathis v. United States*, 136 S. Ct. 2243 (2016) – would qualify as "violent felonies" under these intervening precedents.

Some circuit courts have risen to that task. Unlike the Eleventh Circuit, they have carefully re-examined their prior elements clause robbery precedents; strictly applied the dictates of the now-clarified categorical approach; carefully conducted the now-mandated threshold "divisibility" inquiry, *Mathis*, 136 S. Ct. at 2256; sought out the state courts' interpretation of the elements of their robbery offenses as mandated by *Curtis Johnson*, 559 U.S. at 138, and *Mathis*, 136 S. Ct. at 2256;

and determined the minimum conduct necessary for conviction as required by *Moncrieffe*, 133 S. Ct. at 1680. *See, e.g.*, *United States v. Gardner*, 823 F.3d 793, 801-804 (4th Cir. 2016); *United States v. Winston*, 850 F.3d 677, 682-686 (4th Cir. 2017); *United States v. Parnell*, 818 F.3d 974, 978-981 (9th Cir. 2016); *United States v. Redrick*, 841 F.3d 478, 484 (D.C. Cir. 2016).

Notably, after conducting a proper analysis under the now-clarified categorical approach, the Ninth Circuit held in *United States v. Geozos*, ___ F.3d ___, 2017 WL 3712155 (9th Cir. Aug. 29, 2017), that Florida robbery is not a violent felony after *Johnson*. In *Geozos*, the Ninth Circuit considered a robbery conviction under the exact same statute here at issue, Fla. Stat. § 812.13(1), and held that it did not qualify as a violent felony under the elements clause, because it did not require the use of "violent force" under *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). As to the text of § 812.13(1), the Ninth Circuit found significant that the terms "force" and "violence" were used separately, which suggested "that not all 'force' that is covered by the statute is 'violent force.'" *Id.* at *7. 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.* In addition, Florida case law made "clear" 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 § 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, Florida case law both prior and subsequent to *Robinson* confirmed that "the amount of resistance can be minimal." *Id.*

For instance, the Ninth Circuit noted with significance that, in *Mims v. State*, 342 So.2d 883, 886 (Fla. 3rd DCA 1997), a Florida appellate court had held that, "[a]lthough 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*, 2017 WL 3712155, at *7 & n.9 (adding the emphasis to the words "*in any degree*" in *Mims* and noting that *Mims* was "cited with approval in *Robinson*").

The Ninth Circuit also found significant that, after *Robinson*, in *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011), another Florida appellate court 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." And 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*, 2017 WL 3712155 at *7 (citing *United States v. Strickland*, 860 F.3d 1224 (9th Cir. 2017)).

By contrast, the Eleventh Circuit has 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' Florida robbery conviction was a "violent felony" under *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 an 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 court of appeals in their briefing that Florida case law made clear that overcoming "resistance" did not require violent force in every case. They urged the Eleventh Circuit to specifically consider decisions such as *Sanders v. State*, 769 So.2d 506, 507-508 (Fla. 5th DCA 2000) and *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011), which confirmed that *violent* force was not necessary to overcome resistance where the resistance itself was slight. 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*.

Nevertheless, in *Seabrooks* the Eleventh Circuit reflexively adhered to its prior precedent in *Lockley*, ignoring 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 case law – 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.

Importantly, the Ninth Circuit acknowledged that its conclusion that Florida robbery was not a "violent felony" put it "at odds" with the Eleventh Circuit. However, the Ninth Circuit correctly found *Lockley* and *Fritts* unpersuasive because they overlooked the crucial point – confirmed by Florida case law – that violent force was unnecessary to overcome resistance. It 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.")

In light of the Ninth Circuit's criticism of the Eleventh Circuit, it is now clear that Mr. Jones would have at least obtained a certificate of appealability had his motion been heard by the Ninth Circuit. The circuit conflict demonstrates that reasonable jurists could debate whether Florida robbery is a violent felony. Thus, Mr. Jones should have been granted a certificate of appealability.

This precise question is also presented in at least two other pending cases: *Conde v. United States* (No. 17-5772) (cert. petition filed Aug. 24, 2017); and *Stokeling v. United States* (No. 17-5554) (cert. petition filed Aug. 4, 2017). Notably, this Court has recently called for a response to the pending petition in *Stokeling*.

B. The Circuits are in conflict over whether a conviction for a state robbery offense, like Florida's, that includes "as an element" the common law requirement of overcoming "victim resistance" is categorically a "violent felony" under the ACCA, if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance.

Florida's robbery statute incorporates the common law definition of robbery and requirement that a person merely overcome the victim's resistance. The Circuits are split on whether such a common law robbery statute qualifies as a violent felony absent the residual clause.

The Fourth Circuit in both *Gardner* and *Winston* has concluded that two different common law robbery offenses, both of which require overcoming "victim resistance," do ***not*** categorically require the *Curtis Johnson* level of "*violent* force." 559 U.S. at 140 (defining "*violent* force" as "force capable of causing physical pain or injury to another person," which is "a substantial degree of force;" the word "violent" connotes "strong physical force"). *See Gardner*, 823 F.3d at 803 (North Carolina common law robbery "by violence" does not qualify as an ACCA "violent felony" because it is clear from North Carolina case law that *de minimis* contact with the victim was sufficient for conviction, and the degree of force used was "immaterial"); *Winston*, 850 F.3d at 684-6855 (Virginia common law robbery by "violence" does not

qualify as an ACCA "violent felony" because, as confirmed by Virginia appellate decisions, the minimum conduct sufficient to overcome resistance can be "slight;" thus, the offense does not require "violent force").

Conversely, the Tenth Circuit has aligned itself with the Eleventh Circuit. Indeed, in construing the offense of Colorado statutory robbery – which like Florida statutory robbery is based upon common law robbery – the Tenth Circuit chose to defer to a dictionary definition of "violence" instead of surveying the relevant Colorado appellate case law to determine the least culpable conduct under the statute. *See United States v. Harris*, 844 F.3d 1260, 1266-1268 (10th Cir. 2017) (acknowledging that "Colorado remains committed to the common law definition of robbery," but finding Colorado statutory robbery remains an ACCA "violent felony" due to the Colorado Supreme Court's statement 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. pending* (U.S. No. 16-8616) (distributed June 22, 2017 for conference on September 25, 2017).

As such, the decisions of these three circuits are in direct conflict at this time.[1] Thus, Mr. Jones met the standard for issuance of a certificate of appealability and should have been granted such.

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[1] Until June 17, 2017, the decisions of the Tenth and Eleventh Circuits also conflicted with the Eighth Circuit's decisions 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*

i. The Common Law Roots of "Overcoming Resistance"

Florida, like the majority of states, permits 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. *See Robinson v. State*, 692 So. 2d 883 (Fla. 1997). Although at least fifteen states have now expressly included some variation of this standard in the text of their statutes,[2] many others (including Florida, North Carolina, Virginia, and Colorado) have judicially recognized an "overcoming resistance" element through their case law.[3]

Notably, 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." *See* 2 Joel Prentis Bishop, *Commentaries on the Criminal Law* § 966 (2nd ed. 1858) (defining robbery as "larceny committed by violence"); 4 William Blackstone, *Commentaries on the Laws of England* 241 (1st ed. 1765) ("Larceny from the person is either by privately stealing; or by open and violent assault, which is usually called robbery."); 3 Edward Coke, *Institutes of the*

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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.

[2] *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).

[3] *See, e.g., Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989); *State v. Stecker*, 108 N.W2d 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).

Laws of England 68 (1629) (explaining that robbery is a common law felony in which property is taken "by a violent assault"). It was sometimes said that robbery was a larceny committed "by violence *or* putting in fear." *E.g.*, 2 Edward Hyde East, *Pleas of the Crown* 707 (2d ed. 1806) (emphasis added). Although the "sudden taking of a thing unawares from the person," without more, did not involve "violence" and so was mere larceny, not robbery, *id.* at 708, as LaFave has noted, the difference between the two offenses was, in reality, a "fine distinction[]"; "[t]he line between robbery and larceny from the person (between violence and lack of violence)" was "not always easy to draw." 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.3 (2d ed. 2016).

Nonetheless, the term "violence" did ***not*** imply a "substantial degree of force" at common law. *See Mahoney v. People*, 48 How. Pr. 185, 189 (N.Y. 1874) ("it is not the extent and degree of force which make the crime, but the success thereof.") *see also State v. Parsons*, 87 P. 349, 351 (Wash. 1906) ("[T]he degree of force used was *immaterial* as long as it was sufficient to compel the prosecuting witness to part with his property.") (emphasis added).

"The law d[id] not require that one be beaten before he submitted to the robbery to constitute the offense." *Gordon v. State*, 187 S.W. 913, 915 (Ark. 1916). No bodily injury or threat of bodily injury was necessary. Rather, it was "sufficient that so much force . . . be used as might . . . oblige a man to part with his property without or against his consent." 4 Blackstone, *Commentaries* 242.

As such, two recurring fact patterns defined the boundaries of "violence" for purposes of common law robbery. First, any "struggle for possession of the property" between the criminal and the victim constituted "violence" sufficient to render the taking a robbery. 2 East, *Pleas of the Crown* 708; 2 William Russell, *Crimes and Indictable Offenses* 68 (2d ed. 1828); *State v. Trexler*, 4 N.C. 188, 192-93 (N.C. 1815). For example, in *Davies' Case* (Old Bailey, 1712), the court held that an offense was robbery (not merely larceny) where the defendant tried to surreptitiously snatch a sword from a gentleman's side, but "the gentleman perceived" the effort and "himself laid hold of [the sword] at the same time and struggled for it" before the defendant obtained possession. John Rood, *A Digest of Important Cases on the Law of Crimes* § 149 (1906). Similarly, in *Williams v. Commonwealth*, 50 S.W. 240, 240 (Ky. 1899), the court explicitly applying the common law of robbery, upheld a robbery conviction against the defendant's contention that he only committed a larceny where the defendant "wrenched [a] pocketbook out of [the victim's] left hand" and obtained possession because he was "stronger" than she was. The court explained: "It is not necessary that a blow should be struck or the party be injured, to be a violent taking; but if the robber overcomes resistance by force, he is guilty." *Id*. at 241; *see also* William Clark & William Marshall, *A Treatise on the Law of Crimes* 553 (2d ed. 1905) ("[I]f the victim] resists the attempt to rob him, and his resistance is overcome, there is sufficient violence to make the taking robbery, however slight the resistance." (citing *Davies' Case*)).

Second, even in the absence of a struggle between the parties, the "snatching" of an article "constitute[d] robbery" at common law if "the article [wa]s so attached to the person or clothes as to create resistance, however slight." 2 Bishop, *Commentaries* § 968; *accord* 1 William Odgers, *The Common Law of England* 333 (2d ed. 1920). For this proposition, Bishop and Odgers cite *Rex v. Mason*, 168 Eng. Rep. 876, 876 (1820), in which the theft of a watch was deemed a robbery because the defendant used "actual force" to break a chain that had been holding the watch around the victim's neck and thereby "overc[a]me the resistance" created by the chain. Early American common law cases explicitly followed (and arguably extended) *Mason*. For example, in *State v. McCune*, 5 R.I. 60 (R.I. 1857), the court held that a defendant "used violence" sufficient to sustain a robbery conviction when he pulled and broke "a silk ribbon" holding a watch around the victim's neck. *Id*. at 61-62 (citing *Mason*). And in *State v. Broderick*, 59 Mo. 318 (Mo. 1875), the court held that "[t[he violence used was sufficient" to sustain a robbery conviction where the defendant stole a watch chain by "seizing [it]" and "br[ea]k[ing] it loose from the watch and the button hole" to which it was attached. *Id*. at 319-21 (citing *Mason*).

Thus, all common law robberies were "violent," but in a very specialized sense of that word. The prosecutor did not need to show that the defendant caused or threatened to cause pain or injury or otherwise used force that was "substantial," "strong," or "extreme," as *Curtis Johnson* requires. 559 U.S. at 140-41. Indeed, courts and commentators often describe robbery as "a battery plus larceny." 4

Wharton's Criminal Law § 454; *see* 3 LaFave, *Substantive Criminal Law* § 20.3 ("Since it is a battery to administer a drug to an unsuspecting victim, it seems clear that such conduct is 'force' which will do for robbery." (citation omitted)); *Morris v. State*, 993 A.2d 716, 735 (Md. Ct. Spec. App. 2010) ("Robbery is a larceny from the person accomplished by either an assault (putting in fear) or a battery (violence)."). And this Court was clear in *Curtis Johnson* that a simple battery does not require the use of physical force within the meaning of § 924(e)(2)(B)(i). 559 U.S. at 139-40. Common law battery is not a violent felony.

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 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.

While the Eleventh Circuit has never acknowledged in its precedential robbery decisions (*Dowd*, *Lockley*, *Seabrooks*, or *Fritts*) that the unarmed robbery offense in Florida *is* essentially common law robbery, the Tenth Circuit in *Harris* did at least acknowledge that "Colorado remains committed to the common law definition of robbery," and defines the required the amount of force "consistent with the common law." *Harris*, 844 F.3d at 1267, 1270. It should have followed from that, and a careful review of Colorado case law, that Colorado robbery is not a violent felony. *See, e.g., People v. Davis*, 935 P.2d 79, 84 (Colo. App. 1996) (holding as a matter of first impression that a purse snatching satisfied the "overcoming resistance" requirement of robbery, if the force was "of an extent that the victim is unable to retain control;" citing other state decisions holding similarly).

But like the Eleventh Circuit in *Fritts*, the Tenth Circuit in *Harris* refused to even consider the significance of *Davis*' facts or holding, given the Colorado Supreme Court's subsequent decision in *People v. Borghesi*, 66 P.3d 93, 99 (Colo. 2003) stating that "the gravamen of the offense of robbery is the *violent* nature of the taking." *Harris*, 844 F.3d at 1267 (emphasis added). Rather than 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, the Tenth Circuit summarily

rejected the defendant's argument that the Colorado Supreme Court might not have meant "violent" when it used the term "violence." Rather than deferring to *Davis*, as *Moncrieffe****Error! Bookmark not defined.*** and *Mathis* dictate, the Tenth Circuit deferred to the dictionary definition of "violent." *Id.*

Had the Tenth and Eleventh Circuits strictly applied the categorical approach as it has been clarified by this Court's recent precedents, and had the Tenth and Eleventh Circuits carefully analyzed the relevant state appellate case law as the Fourth Circuit did in *Gardner* and *Winston*, they would have concluded that neither Colorado robbery nor Florida robbery are categorically violent felonies under the ACCA.

ii. The Tenth and Eleventh Circuits are in direct Conflict with the Fourth Circuit as to whether "overcoming resistance" categorically requires "violent force."

In *Gardner*, 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, the Fourth Circuit did not simply rely upon the common law principles set forth above. 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.*[4]

[4] 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 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*

Thereafter in *Winston*, 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 case law – such an offense can be committed by only slight, non-violent force. 850 F.3d 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 it was required to "defer to the [Virginia] courts' interpretations of their own [] common law offenses." *Winston*, 850 F.3d at 685 n. 6.

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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.

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. *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.

Notably, Florida case law – like North Carolina and Virginia case law – likewise confirms that *violent* force is ***not*** necessary to overcome victim resistance under Fla. Stat. § 812.13(1). Like the North Carolina common law robbery offense addressed in *Gardner*, and the Virginia common law robbery offense addressed in *Winston*, a Florida statutory robbery may also be committed by the minimal force

sufficient to overcome a victim's minimal resistance. Indeed, a simple survey of Florida's own appellate law (consistently ignored by the Eleventh Circuit) confirms this point.

In *Johnson v. State*, 612 So. 2d 689 (Fla. 1st DCA 1993), a Florida appellate court found that 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 strong-arm 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. In *Hayes v. State*, 780 So.2d 918, 919 (Fla. 1st DCA 2001), a 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. And, in *Benitez-Saldana v. State*, 67 So.3d 320 (Fla. 2nd DCA 2011), one final Florida appellate court decisively rejected a defendant's argument that actual "violence" was necessary for a strong-arm robbery conviction in Florida, and that his act of "engaging in a tug-of-war over the victim's purse" could not constitute robbery because it "was not done with violence or the threat of violence." That simple act of

"tugging," the court held, was sufficient to prove "the use of force to overcome the victim's resistance." *Id.* at 323.

Had the Fourth Circuit heard this case, and specifically considered this Florida case law that, it would have found that like the robbery offense in *Gardner*, Florida robbery may be committed by using only a *de minimis* degree force, and therefore does not categorically require the use of "physical force." It has always been the law in Florida (as in North Carolina) that the degree of force 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 *de minimis* 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 "push" in *Eldridge*. If anything, the "push" in *Eldridge* was more forceful in that it caused the victim to fall onto shelves, while the victim in *Hayes* did not even fall. And the "bump" in *Hayes* also appears to involve less than the "extent of resistance" in *Jones* – 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). Moreover, Florida law even suggests that something even less than a "bump" – namely, such *de minimis* conduct as "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 robbery conviction. Reading *Montsdoca* as the Fourth Circuit read *Sawyer*, and consulting the pertinent Florida case law here, the Court should come to the same conclusion as the Fourth Circuit did first in *Gardner*, and thereafter in *Winston*. It should hold, specifically, that a Florida statutory robbery – despite the fact that it necessitates overcoming "victim resistance" – does not categorically require the use of "*violent* force" in every case. Such an offense falls outside the ACCA's elements clause.

Given the Circuit splits, it is clear that reasonable jurists are debating whether Florida robbery qualifies as a violent felony. Thus, Mr. Jones should have been granted a COA.

III. Reasonable jurists could debate whether attempted armed robbery is a violent felony under the ACCA post *Johnson*.

Even should the Court find that reasonable jurists could not debate whether Florida armed robbery is a violent felony, reasonable jurists could debate whether *attempted* armed robbery is a violent felony and Mr. Jones' motion for a COA should have been granted. This is so because the Eleventh Circuit has not yet addressed

this issue with respect to the ACCA. Thus, there is no precedential ruling and for the reasons stated below, reasonable jurists could debate whether attempted armed robbery is a violent felony.

In order to commit an attempted crime, Florida law requires only that a person "does **any** act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof." Fla. Stat. § 777.04(a) (emphasis added). For an attempted crime to qualify as a violent felony, the overt act must always involve the use, attempted use, or threatened us of violent physical force. And under *Moncrieffe*, the Court must analyze attempted armed robbery looking at the "least of the acts' criminalized." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2011). Because an attempt only requires that a person do *any* act toward the commission of armed robbery, there is a wide array of behavior that would constitute attempted armed robbery that would not involve violent physical force.

Indeed, Florida courts have supported this notion in upholding convictions for attempted robbery when no physical violence toward another person was present. In *Grant v. State*, 138 So.3d 1079 (4th DCA 2014), the Fourth District held the evidence was sufficient to support a conviction for attempted armed robbery where the defendant parked his vehicle in a secluded area near the store and took a route minimizing potential observation; he covered his face with a cloth and wore a hooded sweatshirt and gloves on a hot day; he forcefully yanked twice on the store's door but it did not open; he took flight immediately upon his failed entry; and

handcuffs and a purple velvet bag were found on defendants person, suggesting a plan to take jewelry from the store. *Grant*, 138 So. 3d at 1038. *Grant* is a perfect example of how someone can commit attempted armed robbery without using violence or the threat of violence towards another person. In fact, the defendant in that case did not interact with any other person.

Similarly, in *Mercer v. State*¸ 347 So. 2d 733 (4th DCA 1977), the court upheld an attempted robbery conviction where the defendant had stopped at a convenience store and talked to an employee, seeking to enlist his help in robbing the station the following day. He told the employee that he would come back the next day with a gun to rob the store. Right on time the next day the defendant and another man came to the station and asked for the manager, but left after finding that the manager, who had the only key to the safe, was not there. *Id.* at 734. A later search of the defendant's car revealed a sawed-off shotgun, gloves, binoculars, shoelaces, and a knife. In its decision finding this was sufficient for a conviction of attempted robbery, the *Mercer* court relied primarily on a 1912 Florida case in which the court upheld attempted robbery convictions for two defendants where one defendant pushed open the swinging doors of a saloon, "thrust his head within, and seeing that there were about 12 men in the saloon, withdrew and crossed the street and joined his codefendant." *People v. Moran*, 122 P. 969 (1912). The two men walked away, but were found later, each with a pistol and a handkerchief around his neck that was designed to serve as a mask.

These cases make clear that Florida attempted armed robbery does not require the use or threatened use of violence or even the involvement of another person. Therefore, reasonable jurists could at the very least debate whether attempted armed robbery qualifies as a violent felony under the ACCA.

IV. Reasonable jurists could debate whether Florida attempted first-degree murder qualifies as a violent felony after *Johnson*.

First and foremost, prior to denying Mr. Jones' motion for a certificate of appealability, the Eleventh Circuit had already issued a certificate of appealability on the question of whether a movant's convictions for Florida attempted first-degree murder qualify as a "violent felonies" under the ACCA after *Johnson*. *See Phillips v. United States*, No. 16-17106-H (11th Cir. Mar. 8, 2017). The order granting the certificate of appealability noted that Florida attempted first-degree murder "is not an enumerated crime," and "does not appear to have 'as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* at 4-5. Accordingly, the order explained that "[a]lthough we have not addressed in a published opinion whether this offense qualifies as a violent felony under the elements clause, it does not appear to qualify because it could be committed without the use of 'physical force' if, for example, the defendant poisoned the victim." *Id*. at 5.

This accords with its position on July 7, 2016, in *In re Curtis Anderson*, No. 16-13453 (11th Cir. July 7, 2016), in which the Eleventh Circuit expressed grave doubts as to whether Florida attempted first-degree murder qualified as an ACCA

predicate and granted leave for a movant to file a successive § 2255. Specifically, the Eleventh Circuit explained:

> [I]t is unclear if [movant]'s conviction for [Florida] attempted first-degree murder qualifies as a violent felony under the elements clause of the ACCA.
>
> Florida law provides that the "the unlawful killing of a human being . . . when perpetrated from a premeditated design to affect the death of a person killed or any human being . . . is murder in the first degree." Fla. Stat. Ann. § 782.04(1)(a)(1) (1996).
>
> A person commits criminal attempt by "attempt[ing] to commit an offense prohibited by law and in such attempt does any act toward he commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof." Fla. Stat. Ann.
>
> ***We have not addressed whether Florida attempted first-degree murder qualifies as violent felony under the ACCA's elements clause.***
>
> ***However, Florida attempted first-degree murder does not appear to qualify under the elements clause because it could be committed without the use of "physical force." See 18 U.S.C. § 924****Error! Bookmark not defined.****(e)(2)(B)(i).***

Slip op. at 11 (emphasis added).

To commit murder in the first or second degree, Florida law requires only that a victim is dead, the death was caused by a criminal act of the defendant, and that the defendant possessed a certain mental state. *See* Fla. Stat. §' 782.04(1)(a), (2).

For example, a defendant who knows that a victim is deathly allergic to nuts and wishes harm to the victim can commit murder in the first degree by lying when

the victim inquires as to whether a certain food contains nuts or by sprinkling ground-up nuts into the victim's food.

In those instances, all of the elements required to prove Florida murder in the first degree because the victim is dead (due to an allergic reaction after ingesting the nuts), the death was caused by a criminal act of the defendant (lying to the victim or sprinkling ground-up nuts in the victim's food), and the defendant possessed the requisite mental state (defendant knew that if the victim ingested nuts, the victim would die and the defendant acted with the intention of bringing about that result).

As noted by the *Anderson* court, this demonstrates that Florida first degree murder does not have as an element the use, attempted use, or threatened use of violent, physical force. *See Johnson v. United States*, 559 U.S. 133, 138 (2010); *see, e.g.*, *Trepal v. State*, 621 So.2d 1361, 1362-65 (Fla. 1993) (upholding convictions for first-degree murder by poison). The Fifth Circuit has expressly so held in a persuasive, published opinion with regard to Florida manslaughter, *United States v. Garcia-Perez*, 779 F.3d 278, 282-84 (5th Cir. 2015), which is a lesser included offense of first-degree murder.

Not only is Florida first degree murder categorically overbroad because it lacks the requisite element of the use, attempted use, or threatened use of violent, physical force, but Mr. Jones' conviction is for **attempted** Florida first degree murder. As stated above, for an attempt, Florida law requires only that the defendant "does **any** act toward the commission of such offense, but fails in the

perpetration or is intercepted or prevented in the execution thereof." *See* Fla. Stat. § 777.04(a). Thus, applying the example above, if the defendant had ground up the nuts, but dropped them prior to sprinkling them into the victim's food, the defendant would have satisfied the requirements for attempted Florida first degree murder—all without the use, attempted use, or threatened use of the sort of injury-causing, pain-provoking violent physical force required by the Supreme Court in *Curtis Johnson*.

Florida case law demonstrates that "violent, physical force" is not a part of every attempted first-degree murder conviction thereby rendering it categorically overbroad.

It is a well-settled rule from the Supreme Court—applied by many prior panels of this Court in other cases—that a federal court **must** defer to the state court's interpretation of the elements of its own statutes. *See United States v. Rosales-Bruno*, 676 F.3d 1017, 1021 (11th Cir. 2012) (citing *Curtis Johnson*, 599 U.S. at 138 for the principle "We are, [when deciding whether a prior conviction is a 'violent felony' under the ACCA], bound by the [state] Supreme Court's interpretation of state law, including its determination of the elements of [the statute of conviction];" considering decisions of the Florida courts of appeals as to the elements of false imprisonment); *Howard*, 742 F.3d at 1346 n. 5 (holding *Rosales-Bruno* remained binding on that point); *United States v. Lockett*, 810 F.3d 1262, 1270 (11th Cir. 2016) (citing *Howard* for that point; reviewing South Carolina court of appeals' decisions to determine elements of S.C. burglary); *Mathis v. United*

States, 136 S.Ct. 2243, 2249 (2016) (confirming that in determining whether a state conviction qualifies as an ACCA violent felony federal courts must defer to state court decisions definitively interpreting the elements of the statute of conviction). In the absence of a definitive Florida Supreme Court decision interpreting the elements of an offense, this Court has repeatedly recognized that it is "bound to follow the decisions of Florida's intermediate appellate courts." *See, e.g., United States v. Shannon*, 631 F.3d 1187, 1193 (11th Cir. 2011).

Florida appellate courts have sustained convictions for attempted first-degree murder where the defendant surreptitiously drugged or poisoned the victim. *See State v. Carter*, 177 So.3d 1028, 1029-30 (Fla. 5th Dist. Ct. App. 2015) (defendant provided higher dosage than prescribed of narcotics to developmentally disabled son); *Trepal v. State*, 621 So.2d 1361, 1362-63 (Fla. 1993) (defendant gave poison-laced sodas to victims); *Nelson v. State*, 450 So.2d 1223, 1224-25 (Fla. 4th Dist. Ct. App. 1984) (defendant administered poison and Valium to wife). Other circuits have concluded that offenses that can be violated by the drugging or poisoning of another do not satisfy the force clause. *See United States v. Garcia-Perez*, 779 F.3d 278, 283-84 (5th Cir. 2015) (Florida manslaughter); *United States v. Torres-Miguel*, 701 F.3d 165, 167-69 (4th Cir. 2012); *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006); *United States v. Rodriguez-Enriquez*, 518 F.3d 1191, 1195 (10th Cir. 2008); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 195 (2d Cir. 2003).

Generally, inchoate offenses—such as the attempt at issue in this case—qualify only under the residual clause. *See, e.g., James v. United States*, 550 U.S.

192, 197 (2007) (attempted burglary does not qualify under elements clause, but qualifies under residual clause).

Indeed, this Court recently expressed grave doubts as to whether Florida attempted first-degree murder continues to qualify as an ACCA predicate post-*Johnson*. *See In re Curtis Anderson*, No. 16-13453 (11th Cir. July 7, 2016) (granting authorization to movant to proceed with a successive § 2255 challenging his ACCA enhancement under *Johnson*). Specifically, the Eleventh Circuit explained:

> [I]t is unclear if [movant]'s conviction for [Florida] attempted first-degree murder qualifies as a violent felony under the elements clause of the ACCA. Florida law provides that the "the unlawful killing of a human being . . . when perpetrated from a premeditated design to affect the death of a person killed or any human being . . . is murder in the first degree." Fla. Stat. Ann. § 782.04(1)(a)(1) (1996).
>
> A person commits criminal attempt by "attempt[ing] to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof." Fla. Stat. Ann. § 777.04(1) (1997).
>
> ***We have not addressed whether Florida attempted first-degree murder qualifies as violent felony under the ACCA's elements clause. However, Florida attempted first-degree murder does not appear to qualify under the elements clause because it could be committed without the use of "physical force." See 18 U.S.C. § 924 (e)(2)(B)(i).***

In re Curtis Anderson at *11 (emphasis added).

The degree of force required to knowingly or intentionally cause death is not "**necessarily**" violent in every case—and thus, Florida attempted first-degree murder is categorically overbroad and does not qualify under the elements clause. "Force" and "injury" are no longer terms that by their mere presence in the

statutory text automatically transform an offense into a qualifying "crime of violence."

In the following examples, the defendant would have the "premeditated design to kill" and would have committed "an act intending to cause death that went beyond thinking or talking about it," but "someone prevented the defendant from killing the victim or the defendant failed to do so." *In re Standard Jury Instrs. In Crim. Cases*, 137 So.3d 995, 997 (Fla. 2014). A mere touching, standing alone, does not require the use of physical force, because the phrase "physical force" means violent force. None of the following examples involve the sort of injury-provoking, pain-inducing violent physical force required by *Curtis Johnson*. To the contrary, the methods listed below do not even require "mere touching" between the defendant and victim and result in no violent pain or injury to the victim, demonstrating that Florida attempted first-degree murder does not require *Curtis Johnson* violent, physical force in every case. In fact, carbon monoxide, propofol, lorazepam, gradual blood loss, oxycodone, and nitrous oxide were all chosen for the examples below because they induce euphoria, reduce or eliminate pain, and do not result in physical injury to the victim—as supported by their prevalence in accidental deaths and assisted suicides.

- Defendant blocks victim's gas water heater's ventilation ducts, causing lethal colorless, odorless carbon monoxide gas to build up. Before the victim loses consciousness, the obstructions placed by the defendant on the ducts are blown away.

- Defendant, who is a doctor, administers propofol and lorazepam, respectively a powerful sedative and anti-anxiety medication, which would cause the victim, who sought the doctor's help in dealing with his insomnia, to grow drowsy and feel calm, fall asleep, slow his breathing, and eventually stop breathing. Before the victim stops breathing completely, someone discovers the victim and calls 911.
- Defendant is a phlebotomist volunteering at a local blood drive, and victim arrives to donate blood. Victim consents to donate blood, expecting the standard one pint of donation. Defendant commences the blood donation, replacing the pint bag once full and misrepresenting to the victim that several more are needed. Victim loses consciousness due to blood loss but defendant is stopped before draining all of victim's blood.
- Defendant works at a local smoothie shop. He grinds up oxycodone tablets into a smoothie that he provides to the victim, who purchases them at the end of the day. He knows that victim is currently taking other painkillers. Victim becomes sedated and euphoric before falling asleep. Victim is awakened from his overdose and receives the naloxone, the overdose-reversing drug.
- Defendant pumps laughing gas (nitrous oxide) into a private room at a nightclub and seals off the ventilation. The victim begins giggling and feels euphoric and pain-free. Before the victim asphyxiates due to lack of oxygen,

the nightclub owner opens the door to room, allowing oxygenated air to enter the room.

Therefore, because the *Curtis Johnson* level of "**violent** force" has plainly **not** been required for conviction in **every** Florida attempted first-degree murder case, it does not qualify under the ACCA's elements clause. *Estrella*, 758 F.3d at 1244 (if the state need establish "beyond a reasonable and without exception, an element involving the use, attempted use, or threatened use of [violent force] against a person for **every charge** brought under a statute," the conviction does not categorically meet the elements clause) (emphasis added).

For the above reasons, reasonable jurists could debate whether Florida attempted first-degree murder is a violent felony after *Johnson*. Therefore, a COA should have been issued in Mr. Jones' case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES