No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL KEVIN HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

1. The Armed Career Criminal Act (ACCA) requires a sentence not less than 15 years' imprisonment for a defendant convicted of unlawfully possessing a firearm if the defendant has three or more prior convictions for a "violent felony." In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that one part of the ACCA's definition of "violent felony," the residual clause, is unconstitutionally vague. Now, only two clauses of the ACCA's "violent felony" definition remain: (i) the enumerated-offenses clause, which lists burglary, arson, and extortion as violent felonies, and (ii) the elements clause, which defines "violent felony" to include crimes that have violent force as an element of the offense. In the wake of *Johnson*, litigation has focused on the elements clause, which has replaced the residual clause as a possible "catch-all" provision. This case presents a question about the meaning of the elements clause, 18 U.S.C. § 924(e)(2)(B)(i), which has divided the circuits: Does robbery, as defined at common law, have violent force as an element, as the Tenth and Eleventh Circuits have held, or is the force necessary to commit common law robbery too slight to qualify as violent force, as the Fourth and Eighth Circuits have held?

2. Under *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), whether an offense qualifies as a "violent felony" depends on whether "the minimum conduct criminalized by the state statute" measures up to the federal definition of "violent felony." Frequently, however, no decision of the state's highest courts explicitly delineates the "minimum conduct" required. When a state court applying the common law uses a common law term of art, like "force" or "violence," to describe the elements of an offense, should federal courts applying *Moncrieffe* consult common law authorities to determine the minimum conduct connoted by the common law term of art, as the Fifth Circuit has done, or should federal courts assume that "force" and "violence" carry the ordinary meanings given by general-usage dictionaries, as the Tenth Circuit did in this case?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Statutes and Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORI

Petitioner, Michael Kevin Harris, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

DECISION BELOW

The opinion of the court of appeals (App. A) is reported at 844 F.3d 1260. The order of the district court denying Mr. Harris's motion to vacate is unreported and unavailable in electronic databases, but that order is attached as App. B.

JURISDICTION

The Tenth Circuit entered judgment in this case on January 4, 2017. No petition for rehearing was filed. This Petition is being filed within 90 days after the entry of the judgment below, so it is timely under Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act provides, in pertinent part:

> (e)(1) In the case of a person who ... has three previous convictions ... for a violent felony ..., such person shall be ... imprisoned not less than fifteen years ....
>
> (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 ....

18 U.S.C. § 924(e).

STATEMENT OF THE CASE

Petitioner Michael Harris pleaded guilty to one count of unlawfully possessing a firearm, in violation of 18 U.S.C. § 922(g). Ordinarily, the maximum sentence for a conviction under § 922(g) is ten years' imprisonment, 18 U.S.C. § 924(a)(2), plus a three-year term of supervised release, 18 U.S.C. § 3583(b)(2). In this case, however, the sentencing court found that Mr. Harris qualified for an increased sentence under the Armed Career Criminal Act (ACCA).

Under the ACCA, if a defendant convicted of unlawfully possessing a firearm "has three previously convictions ... for a violent felony or a serious drug offense, or both," then the defendant must be "imprisoned not less than fifteen years." 18 U.S.C. § 924(e). A defendant sentenced under the ACCA also may be required to serve a five-year term of supervised release (*i.e.*, two additional years). 18 U.S.C. § 3583(b)(1).

The sentencing court found that Mr. Harris had four convictions for a violent felony or a serious drug offense within the meaning of the ACCA: a robbery conviction from Colorado, a burglary conviction from Colorado, and two convictions for distrubtion of a controlled substance. Based on those findings, the sentencing court imposed fifteen years' imprisonment, followed by five years of supervised release, for Mr. Harris's offense. R. vol. II at 3–9.[1]

Years later, this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), which ruled unconstitutional part of the ACCA's definition of the term "violent

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[1] Citations to the record are to the 4-volume record on appeal filed in the court below. *See* Docket, *United States v. Harris*, No. 16-1237 (10th Cir. June 15, 2016).

felony." The ACCA defines "violent felony" as a felony that satisfies one of the following criteria:

(1) The elements clause: "has as an element the use, attempted use, or threatened use of physical force against the person of another," § 924(e)(2)(B)(i);

(2) The enumerated-offenses clause: "is burglary, arson, or extortion, [or] involves use of explosives," § 924(e)(2)(B)(ii);

(3) The residual clause: "otherwise involves conduct that presents a serious potential risk of physical injury to another," § 924(e)(2)(B)(ii).

Johnson ruled that the residual clause is unconstitutionally vague. 135 S. Ct. at 2557. The Court made clear, however, that the elements and enumerated-offenses clauses remain valid. *Id.* at 2563. The following year, in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Court held that *Johnson* applies retroactively to cases on collateral review.

In the wake of *Johnson* and *Welch*, Mr. Harris timely filed a motion to vacate pursuant to 28 U.S.C. § 2255, claiming that his sentence was increased based on the residual clause and, thus, is unconstitutional. Specifically, Mr. Harris argued that his Colorado robbery and burglary convictions could have qualified as convictions for a violent felony only under the residual clause, which left just two qualifying convictions (the two drug convictions). In its Answer, the Government confessed that the burglary conviction could not be used to sustain Mr. Harris's sentence. R. vol. III at

22–24.[2] The Government maintained, however, that relief should be denied because Colorado robbery qualified as a "violent felony," not under the residual clause, but under the elements clause, which remains valid. The district court agreed with the Government and denied relief on that basis.

On appeal, the Tenth Circuit affirmed for the same reason as the district court. *See United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017). The Tenth Circuit correctly explained that "[a] two-step inquiry" is required to resolve whether an offense "has as an element the use ... of physical force" under the elements clause. *Id.* at 1264. A court must first "identify the minimum 'force' required" to commit the offense "and then determine if *that* force" is greater than or equal to "physical force" within the meaning of 18 U.S.C. § 924(e)(2)(B)(i). *Harris*, 844 F.3d at 1264. The minimum force required to commit Colorado robbery, *Harris* explained, was the same amount of force required to commit robbery at common law, "[b]ecause Colorado remains committed

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[2] As the Government recognized, Colorado burglary doesn't qualify as "burglary" for the purposes of 18 U.S.C. § 924(e)(2)(B)(ii) because it is broader than generic burglary. In *Taylor v. United States*, 495 U.S. 575 (1990), this Court held "that an offense constitutes 'burglary' for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." *Id.* at 602. The Court further held (1) that "the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime" and (2) that offenses that "define burglary more broadly, *e.g.*, by ... including places, such as automobiles and vending machines, other than buildings" do not substantially correspond to generic burglary. *Id.* at 598–99. The burglary offense of which Mr. Harris was convicted allowed for conviction based on the unlawful entry into "a ship, trailer, sleeping car, airplane, or other vehicle." Colo. Rev. Stat. § 18-4-101(a). Thus, the Government correctly admitted that "it is broader than generic burglary." R. vol. III at 23.

to the common law definition of robbery." *Id.* at 1266–67. The *Harris* Court recognized that, in *Curtis Johnson v. United States*, 559 U.S. 133 (2010), this Court held that "physical force" under § 924(e)(2)(B)(i) signifies more than an offensive touching; it "'means *violent* force—that is, force capable of causing physical pain or injury to another person.'" *Harris*, 844 F.3d at 1264 (quoting *Curtis Johnson*, 559 U.S. at 140)). Emphasizing that, under the common law, "'[t]here can be no robbery without violence,'" *id.* at 1266 (quoting *People v. Borghesi*, 66 P.3d 93, 99 (Colo. 2003)), the Tenth Circuit held that the force needed to commit robbery at common law "comports with the definition of physical force provided by the Supreme Court in [*Curtis*] *Johnson*," *id.* at 1271.

This Petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the circuits are divided over whether robbery, as defined at common law, is a "violent felony" for purposes of the Armed Career Criminal Act (ACCA), which defines "violent felony" to include offenses that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(i). "The notion that robbery is not a 'violent felony'" is "counterintuitive to say the least." *United States v. Parnell*, 818 F.3d 974, 982 (9th Cir. 2016) (Watford, J., concurring). Nevertheless, a careful examination of the elements of the offense reveals a close question. The vast majority of American jurisdictions, including Colorado, still define the amount force necessary to commit robbery according to traditional, common law principles. As demonstrated

below, under the common law, and in the bulk of American jurisdictions today, "violence" is a term of art in robbery law that signifies conduct by the thief sufficient to overcome any degree of resistance to the theft offered by the victim or to break an attachment holding the property to the victim's person or clothing. This Court should grant certiorari to resolve division among the circuits over whether this is enough force to make robbery a violent felony.[3]

The argument for granting certiorari in this case makes the most sense if the reasons are given out of the usual order. This petition argues: first, that common law robbery is not a violent felony and the decision below is wrong; second, that the issue is important because a majority of jurisdictions still follow the traditional common law of robbery in all relevant respects; third, that the circuits are split over whether robbery, as defined at common law, is a violent felony; and fourth, that this case squarely presents the question over which the circuits are divided.

I. The Decision Below Is Wrong; Common Law Robbery Is Not a Violent Felony.

Robbery, as defined at common law and in Colorado, does not qualify as a violent felony under the elements clause, 18 U.S.C. § 924(e)(2)(B)(i).

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[3] The second question presented is included within and subsidiary to the first; the second question is discussed in Section I.C., *infra*.

A. Under *Curtis Johnson*, an Offense Qualifies as a Violent Felony If It Has as an Element Violent Force Capable of Causing Physical Pain or Injury to Another Person.

An offense is a violent felony under the elements clause if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). "Physical force," at least in this statute, "means *violent* force—that is, force capable of causing physical pain or injury to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). Further characterizing the amount of force, *Curtis Johnson* explained that the language of § 924(e)(2)(B)(i) "connotes a substantial degree of force" and "strong" or "'extreme physical force'" akin to that required to commit "'murder, forcible rape, and assault and battery with a dangerous weapon.'" *Id.* at 140–41 (quoting the definition of "violent felony" from Black's Law Dictionary). The Court contrasted violent force with the degree of force needed to commit common law battery, which had an element labeled "force" but could be committed "by even the slightest touching." *Id.* at 139. This sort of "force," the Court held, was not enough to constitute "physical force" within the meaning of § 924(e)(2)(B)(i). *Id.* at 139–41.

This Court's precedents also direct how to determine whether the required degree of force is an element of the offense under consideration. The Court has held that the ACCA requires a "categorical approach," meaning that a crime must be examined "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008). The test is whether "the minimum conduct" that would

permit conviction entails the use of violent force. *Cf. Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013) (applying the categorical approach developed for ACCA cases to an analogous question under the Immigration and Nationality Act). Where the language of the statute creating the offense appears facially consistent with § 924(e)(2)(B)(i), the offense qualifies as a violent felony unless there is "a realistic probability, not a theoretical possibility" that a defendant could be convicted of the offense based on conduct that falls short of violent force. *Cf. Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (applying the categorical approach in an immigration case).

B. Common Law Robbery Does Not Have "Violent Force," in the *Curtis Johnson* Sense, as an Element of the Offense.

The minimum conduct required to commit common law robbery, both traditionally and in Colorado, does not meet *Curtis Johnson*'s "violent force" standard. To be sure, common law robbery unquestionably has an element labeled "violence." *See* 2 Joel Prentis Bishop, *Commentaries on the Criminal Law* § 966 (2d ed. 1858) [hereinafter Bishop, *Commentaries*] (defining robbery as "larceny committed by violence"); 4 William Blackstone, *Commentaries on the Laws of England*, 241 (1st ed. 1765) [hereinafter Blackstone, *Commentaries*] ("Larciny 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 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). But, as another common law authority explains, notwithstanding this apparent disjunctive, all robberies involve "violence," properly understood:

> The words of the definition [of robbery], as given at the beginning of the Chapter, are in the alternative, "violence *or* putting in fear;" and it appears that if the property be taken by *either* of these means ... such taking will be sufficient to constitute robbery. The principle, indeed, of robbery is violence; but it has been often holden, that actual violence is not the only means by which a robbery may be effected, but that it may also be effected by fear, which the law considers as constructive violence.

2 William Russell, *A Treatise on Crimes and Indictable Offenses* 67 (2d ed. 1828) [hereinafter Russell, *Crimes and Indictable Offenses*].

The "sudden taking of a thing unawares from the person," without more, did not involve "violence" and so was mere larceny, not robbery. 2 East, *Pleas of the Crown* 708. Russell describes a number of common law cases illustrating the point:

> With respect to the degree of actual "violence," ... it appears to be well settled that a sudden taking or snatching from a person unawares is not sufficient. Thus, where a boy was carrying a bundle along the street in his hand, after it was dark, when the prisoner ran past him and snatched it suddenly away, it was holden that the act was not done with the degree of force and terror necessary to constitute robbery. [*Macauley's Case* (Old Bailey 1783).] ... The same doctrine was also holden in two other cases; in one of which the hat and wig of a gentleman were snatched from his head in the street [*Steward's Case* (Old Bailey 1690)]; and in the other, an umbrella was snatched suddenly out of the hand of a woman, as she was walking along the street [*Horner's Case* (Old Bailey 1790)].

Crimes and Indictable Offenses 67–68.

Still, 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). "Violence" did not imply a substantial degree of

force. *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."). "The law d[id] not require that one be beaten up before he submit[ted] 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.

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; Russell, *Crimes and Indictable Offenses* 68; *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 (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 (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 are "violent," but in a very specialized sense of that word. The prosecutor does 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 *Curtis Johnson* made clear 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. Accordingly, common law robbery is not a violent felony. "Because Colorado remains committed to the common law definition of robbery," and specifically defines the required amount of force "consistent with the common law," *Harris*, 844 F.3d at 1267, 1270, it necessarily follows that Colorado robbery is not a violent felony.

C. The Tenth Circuit's Failure to Consider the Background Legal Framework That Gives Meaning to Robbery's "Violence" Element Is Erroneous and Conflicts With a Decision of the Fifth Circuit.

In holding otherwise, the Tenth Circuit committed two related errors. First, the Tenth Circuit thought it was critical that Colorado courts use the label "violence" to describe an element of the offense. *Harris*, 844 F.3d at 1266–67. "In law as in life, however, the same words, placed in different contexts, sometimes mean different things." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015); *see Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) ("[T]he label a State assigns to a crime—whether 'burglary,' 'breaking and entering,' or something else entirely—has no relevance to whether that offense is an ACCA predicate."); *Curtis Johnson*, 559 U.S. at 137–38 (deeming it immaterial for ACCA purposes that Florida courts had held that battery is not a "forcible felony" for purposes of its "violent career criminal" statute); *id.* at 138–42 (holding that common law battery does not have "physical force" as an element for ACCA purposes even though it has an element traditionally labeled as "force"); *Logan v. United States*, 552 U.S. 23 (2007) (offense that the state labeled as a misdemeanor qualified as a felony for ACCA purposes). That Colorado robbery has an element that it labels "violence" "has no relevance to whether that offense is an ACCA predicate," *Mathis*, 136 S. Ct. at 2252; the proper inquiry is whether the *minimum conduct* that could realistically result in a conviction for the offense meets the bar set by § 924(e)(2)(B)(i), *Moncrieffe*, 133 S. Ct. at 1684–85.

Second, to the extent that the Tenth Circuit went beyond labels, and considered the minimum force that could realistically result in a conviction for Colorado

robbery, it did so incorrectly. In his Appellant's Brief below at pp. 12, 19–22, Mr. Harris argued that, because the Colorado Supreme Court has explicitly adopted the traditional common law of robbery, the court should consider that "violence" for common law purposes is a term of art that means any physical conduct sufficient to overcome a victim's resistance or to break an attachment holding property to the victim's person or clothing. Rather than looking to Blackstone, East, Hawkins, or Wharton to determine the underlying conduct signified by the element labeled "violence," the Tenth Circuit consulted "the dictionary" and so declared that "violence" signified conduct "'characterized by extreme force,'" *Harris*, 844 F.3d at 1267 n.4 (quoting Webster's New International Dictionary 2554 (3d ed. 1961)); *contra Parsons*, 87 P. at 351 ("[T]he degree of force used was immaterial."). The Colorado Supreme Court, however, has explicitly held that it follows "the usual and customary meaning of ... the common law terms" of robbery law, *Borghesi*, 66 P.3d at 99, so "violence" for Colorado robbery purposes stands for the body of law detailed above, not for the conduct described in Webster's New International Dictionary.

This was not an error of state law; it was an error regarding how federal courts should determine the minimum conduct that could realistically result in a conviction under *Duenas-Alvarez* and *Moncrieffe*. Disregarding the doctrinal framework that gives meaning to the word "violence" in robbery law in favor of an ordinary-meaning dictionary is as oversimple as saying that "freedom of speech" in the First Amendment protects only the "exercise of the vocal organs," *Oxford English Dictionary* (3d ed. 2001) ("speech, *n.1*") *available at* www.oed.com, and not expressive conduct, such

as wearing a black arm band to exhibit disapproval of the Vietnam War, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The Tenth Circuit's unsophisticated manner of applying the categorical approach would produce not only false positives but also false negatives. While robbery "violence" is broader than ordinary-meaning "violence," sometimes the term of art will be narrower than the ordinary meaning. *Compare* 2 *Wharton's Criminal Law* § 201 (defining the common law offense of "mayhem" as "depri[ving] another of any part of his body which was used for offensive or defensive fighting"), *with Oxford English Dictionary* ("mayhem, *n.*") ("Rowdy confusion, chaos, disorder.").

The flaw in the Tenth Circuit's analysis is illustrated by its reliance on the Colorado Supreme Court's statement that "'[t]here can be no robbery without violence, and there can be no larceny with it." *Harris*, 844 F.3d at 1226 (quoting *Borghesi*, 66 P.3d at 99). That maxim originally derives from a leading early American robbery case, *Long v. State*, 12 Ga. 293, 318 (1852) ("There can be no *robbery* without violence, and there can be no *larceny* with it."), *reprinted in* William Clark, *Selected Cases on Criminal Law* 412–15 (1895). Significantly, after commenting that there can be "no robbery without violence," *Long* explained: "[I]f there is any struggle by the party to keep possession of the property before it is taken from him, there will be sufficient force or actual violence to constitute robbery. This is a matter so easily understood, that I must dwell no longer upon it." 12 Ga. at 320.

The Tenth Circuit's approach to determining the elements of an offense for ACCA purposes conflicts with the decision in *United States v. Najera-Mendoza*, 683

F.3d 627 (5th Cir. 2012). In *Najera-Mendoza*, the Fifth Circuit considered whether Oklahoma kidnapping had as an element force capable of causing physical pain or injury under *Curtis Johnson*. There was no dispute that "forcible seizure" was an element of the offense, but no Oklahoma statute or case defined how much force was required. The Fifth Circuit, however, held that an offense does not satisfy the elements clause "merely because it include[s] as an element the word 'force'":

> Under the common law, the commission of kidnapping had to be "forcible," but did not require force capable of causing physical pain or injury; and in Oklahoma, as elsewhere, it is the rule that in construing a statute containing words which have a fixed meaning at common law, and the statute nowhere defines such words, that they will be given the same meaning they have at common law. The universally accepted definition of the common-law offense of kidnapping is: The forcible abduction or stealing away of a person from his own country, and selling him into another. In discussing this definition, commentators have explained that such an offense could be "forcible" without involving actual physical force, much less force capable of causing physical pain or injury. ... Therefore, the common-law meaning of "forcible" supports the conclusion that the element of "forcibly" in Oklahoma's modern kidnapping statute encompasses lesser degrees of force than that capable of causing physical pain or injury.

Id. at 631–62 (citations omitted). The Fifth Circuit's sensible approach to dealing with surface-level uncertainty in state law would have produced relief for Mr. Harris.

This Court should grant certiorari because the Tenth Circuit's decision is wrong and in conflict with a decision of the Fifth Circuit.

II. A Majority of American Jurisdictions Still Adhere to the Traditional, Common Law Understanding of Robbery's "Violence" Element.

The questions presented in this case warrant the Court's attention because the answers to those questions would determine whether robbery offenses all across the country will count as a violent felony for ACCA purposes. Colorado is hardly alone in

adhering to the definition of robbery at common law. "American statutes do not generally spell out" all the elements of robbery but, instead, "define the crime of robbery ... often in the somewhat undetailed language used by Blackstone, Hawkins, Hale, and East in defining common-law robbery," or even "punish robbery without defining it." LaFave, *Substantive Criminal Law* § 20.3. "For the most part, notwithstanding statutory development over the years, the common-law conception of robbery has survived intact." 4 Charles Torcia, *Wharton's Criminal Law* § 468 (15th ed. 2016). The American Law Institute's Model Penal Code tried to advance the position "that only an infliction of 'serious bodily injury'" should suffice to elevate a larceny to robbery, but legislatures and courts "have consistently rejected such a limitation." LaFave, *Substantive Criminal Law* § 20.3. The overwhelming majority of modern cases that have considered how much "violence" is needed to commit robbery have followed the common law principles set forth above.

In particular, *Davies' Case* remains black-letter law today.[4] LaFave summarizes the current state of the law as follows:

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[4] *See, e.g.*, *United States v. Reynolds*, 20 M.J. 118, 120–21 (C.M.A. 1985); *Casher v. State*, 469 So. 2d 679, 680–81 (Ala. 1985); *People v. Burns*, 92 Cal. Rptr. 3d 51, 55–57 (Ct. App. 2009); *Robinson v. State*, 692 So. 2d 883, 886–87 (Fla. 1997); *Bellamy v. State*, 750 S.E.2d 395, 396 (Ga. Ct. App. 2013); *State v. Gaetz*, 313 P.3d 708, 710–11, 716–17 (Haw. 2013); *People v. Hay*, 840 N.E.2d 459, 466–67 (Ill. Ct. App. 2005); *Ryle v. State*, 549 N.E.2d 81, 84 n.5 (Ind. Ct. App. 1990); *West v. State*, 539 A.2d 231, 233–35 (Md. Ct. Spec. App. 1988); *People v. Hicks*, 675 N.W.2d 599, 609 (Mich. Ct. App. 2003); *Cobb v. State*, 734 So. 2d 182, 184 (Miss. Ct. App. 1999); *State v. Childs*, 257 S.W.3d 655, 660 (Mo. Ct. App. 2008); *State v. Sein*, 590 A.2d 665 (N.J. 1991); *People v. Moses*, 556 N.Y.S.2d 890, 892 (App. Div. 1990); *State v. Elkins*, 707 S.E.2d 744, 748–49 (N.C. Ct. App. 2011); *Commonwealth v. Brown*, 484 A.2d 738, 741

> [W]hen the owner, aware of an impending snatching, resists it, or when, the thief's first attempt being ineffective to separate the owner from his property, a struggle for the property is necessary before the thief can get possession thereof, there is enough force to make the taking robbery. Taking the owner's property by stealthily picking his pocket is not taking by force and so is not robbery; but if the pickpocket or his confederate jostles the owner, or if the owner, catching the pickpocket in the act, struggles unsuccessfully to keep possession, the pickpocket's crime becomes robbery.

LaFave, *Substantive Criminal Law* § 20.3 (collecting cases); *see also* 4 Torcia, *Wharton's Criminal Law* § 460 ("The degree of force used is not material .... Where the victim resists the taking of his property, the defendant's use of force is sufficient if it overcomes such resistance ...."). In *Butts v. State*, for example, the court found sufficient force to sustain a robbery conviction where the defendant "engaged in a tugging match" with the victim over her purse—*i.e.*, "grabbed her purse and tried to wrest it from her while she held on and resisted his efforts." 53 P.3d 609, 612–13 (Alaska Ct. App. 2002). The court explained that "generally accepted law on this issue" holds that "the act of 'wresting' or 'wrenching' (as opposed to merely 'grabbing' or 'snatching') ... makes the offense a robbery." *Id.* at 613.

Similarly, nearly all American jurisdictions still follow the rule of *Rex v. Mason*. *See* 4 Torcia, *Wharton's Criminal Law* § 460; LaFave, *Substantive Criminal Law*

(Pa. 1984); *Ali v. Commonwealth*, 701 S.E.2d 64, 68 (Va. 2010); *cf. United States v. Depass*, 510 F. App'x 119, 120–21 (3d Cir. 2013) (unpublished) (holding that evidence that the defendant "pushed" the victim out of the way so that he could steal a package from her car sufficed to show that the taking was "by violence" for purpose of sustaining a robbery conviction under 18 U.S.C. § 2114(a), which incorporated the "common law meaning" of robbery).

§ 20.3; *see also United States v. Rodriguez*, 925 F.2d 1049, 1052 (7th Cir. 1991) (upholding a robbery conviction where the victim's "key chain was attached to his clothing, and [defendant] had to pull the chain once or perhaps twice to snatch the keys," citing *Mason* in construing a federal robbery statute, 18 U.S.C. § 2114); *United States v. Bell*, 158 F. Supp. 3d 906, 918–20 (N.D. Cal. 2016) (holding that a different federal robbery statute, 18 U.S.C. § 2112, incorporates "the common law rule that there is sufficient force to constitute robbery where the property is so attached to the victim's person or clothing as to create resistance to the taking"); *Reynolds*, 20 M.J. at 120 ("Any amount of force is enough to constitute robbery if the force ... suffices to overcome the resistance offered by a chain or other fastening by which the article is attached to the person." (construing 10 U.S.C. § 922)); *State v. Harris*, 650 S.E.2d 845, 847 (N.C. Ct. App. 2007) ("The majority of states that have considered the level of force required for robbery have held that a snatching involves sufficient force if the article taken is so attached to the person of the victim as to afford resistance."); *State v. Robertson*, 740 A.2d 330, 333 (R.I. 1999) ("The overwhelming majority of states that have considered this issue have held that a snatching involves sufficient force to support a conviction of robbery if the article taken is so attached to the person or the clothes of the victim as to afford resistance."); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. Ct. App. 1997) ("According to the majority rule, robbery is committed when attached property is snatched or grabbed by sufficient force so as to overcome the resistance of attachment.").

So, when the Court below held that "a *violent* taking consistent with the common law" of robbery "comports with with the definition of physical force provided by the Supreme Court in [*Curtis*] *Johnson*," *Harris*, 844 F.3d at 1270, it was effectively holding that a conviction for robbery in most jurisdictions in the United States would be a conviction for a violent felony under the ACCA. A grant of certiorari in this case would thus have nationwide impact.

III. The Circuits Are Split Over Whether the "Violence" Required for a Common Law Robbery Conviction Is Enough to Make Robbery a Violent Felony.

The Court should grant certiorari because the lower courts are divided over whether the "violence" required for common law robbery equates to the use of physical force under § 924(e)(2)(B)(i). *Compare Harris*, 844 F.3d at 1270, *and United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), *with United States v. Winston*, No. 16-7252, 2017 WL 977031 (4th Cir. Mar. 13, 2017) (published), *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016), *and United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016).

A. The Tenth and Eleventh Circuits Hold That Common Law Robbery's "Violence" Element Equates to "Physical Force" Under § 924(e)(2)(B)(i).

In the view of the Tenth and Eleventh Circuits, the "violence" needed to sustain a common law robbery conviction is enough to render robbery a violent felony. *Harris*, 844 F.3d 1270; *Fritts*, 841 F.3d at 943. The Eleventh Circuit not only reached the same conclusion as the Tenth, it did so for the same reason. In *Fritts*, the Eleventh Circuit addressed whether Florida robbery is a violent felony. Florida, like Colorado, follows the common law of robbery. *See, e.g., Fritts*, 841 F.3d at 943 (explaining that, under Florida law, "the snatching or grabbing of property without ... resistance by

the victim amounts to theft rather than robbery" but that any degree of force suffices to elevate theft to robbery so long as it "overcome[s] the victim's resistance") (citing *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), *McCloud v. State*, 335 So. 2d 257 (Fla. 1976), and *Montsdoca v. State*, 93 So. 157 (Fla. 1922)). In finding this sufficient to satisfy § 924(e)(2)(B)(i) under *Curtis Johnson*, the Eleventh Circuit (like the Tenth) found it dispositive that the state supreme court had said, "'[t]here can be no robbery without violence, and there can be no larceny with it.'" *Id.* at 943 (quoting *Montsdoca*, 93 So. at 159).

The Tenth Circuit suggested that several other courts had addressed the first question presented and reached the same result, *Harris*, 844 F.3d at 1268 n.8, but, admittedly, that isn't quite right. Although it rejected an argument that Indiana's robbery offense fails the elements clause, the Seventh Circuit's decision in *United States v. Duncan*, 833 F.3d 751 (7th Cir. 2016), did not address the first question presented in this Petition. Indiana does follow traditional common law principles in defining robbery, requiring "violence" but defining "violence" to include a struggle for possession or the breaking of attachment. *See Ryle*, 549 N.E.2d at 84 n.5 (reproducing the LaFave quotation set forth in Section II, *supra*, and explaining that Indiana law is in accord with "the majority views" set forth in the LaFave passage). However, in upholding a district court ruling that Indiana robbery satisfies the elements clause, *Duncan* considered only whether the "constructive violence" means of committing robbery—*i.e.*, a larceny accomplished by inducing "fear of physical injury"—satisfied the elements clause, because that was all the defendant argued. *Duncan*, 833 F.3d at

754–55 ("[R]obbery by 'putting any person in fear' is Indiana's equivalent of taking from the person of another by threat *of physical injury*, so it ... qualifies ... under the elements clause and is thus a violent felony."). At issue in this Petition is whether committing robbery by "actual violence"—*e.g.*, by struggling for possession or breaking an attachment—satisfies the *Curtis Johnson* standard. *Duncan* did not address that issue.

Nor did the Sixth Circuit address the first question presented in *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015). *But cf. Harris*, 844 F.3d at 1268 n.8 (citing *Priddy* in support of its holding). In *Priddy*, the Sixth Circuit held that Tennessee robbery qualifies as a violent felony under § 924(e)(2)(B)(i). *See* 808 F.3d at 686. *Priddy*, however, did not address common law robbery "violence" because Tennessee is among the minority of jurisdictions that do not follow the common law of robbery. In contrast to Colorado's Supreme Court, the Tennessee Supreme Court has held that the reference to "violence" in its robbery statute refers, not to the expansive, common law concept of robbery "violence," but rather to the narrower, dictionary definition of the term. *See State v. Fitz*, 19 S.W.3d 213, 216 (Tenn. 2000), *cited as authoritative in Priddy*, 808 F.3d at 868. As a result, only a "severe degree of force," exerted "to injure, damage or abuse," suffices to commit Tennessee robbery. *Fitz*, 19 S.W.3d at 216–17, *quoted in Priddy*, 808 F.3d at 868. It was this narrowed definition of robbery that the Sixth Circuit held had as an element the use of "physical force" within the meaning of § 924(e)(2)(B)(i). *See Priddy*, 808 F.3d at 686; *accord United States v. Doctor*, 842

F.3d 306, 312 (4th Cir. 2016) (holding that South Carolina robbery satisfies the elements clause because South Carolina law departs from the traditional principle that any degree of force is sufficient so long as it compels the victim to part with his property).

In short, the Tenth and Eleventh Circuits stand on one side of the circuit split.

B. The Fourth and Eighth Circuits Have Held That Common Law Robbery's "Violence" Element Is Not Enough to Make the Offense a Violent Felony Under § 924(e)(2)(B)(i).

The Fourth and Eighth Circuits stand opposed to the Tenth and Eleventh Circuits and hold that common law robbery is not a violent felony. In *Gardner*, the Fourth Circuit assessed North Carolina's robbery offense. North Carolina, like Colorado, follows the traditional, common law rule that "violence" is an element of robbery. *See State v. Garcell*, 678 S.E.2d 618, 648 (N.C. 2009) ("[C]ommon law robbery involves an inherent element of violence."); *id.* 648 n.4 ("[B]y definition the crime of common law robbery involves the use, or threatened use, of violence."). But, as the Fourth Circuit recognized, "violence" for common law robbery purposes just means whatever degree of force "'is sufficient to compel the victim to part with his property.'" *Gardner*, 823 F.3d at 803 (quoting *State v. Sawyer*, 29 S.E.2d 37, 37 (N.C. 1944)). This, the Fourth Circuit held, was not "'*violent* force'" but, rather, more akin to the "'offensive touching'" that this Court found insufficient to trigger § 924(e)(2)(B)(i). *Id.* (quoting *Curtis Johnson*, 559 U.S. at 139–40). Because "even *de minimis* contact can constitute the 'violence' necessary for a common law robbery conviction," *Gardner*

reasoned, robbery "does not qualify ... as a 'violent felony' under the ACCA." *Id.* at 804.

The Fourth Circuit followed *Gardner* in *Winston*, which held that Virginia robbery is not a violent felony. Virginia, like Colorado and North Carolina, defines robbery according to traditional, common law principles. *See Brookman v. Commonwealth*, 145 S.E. 358 (Va. 1929) (citing East, Bishop, and Wharton to define robbery); *Williams v. Commonwealth*, 685 S.E.2d 178, 180 (Va. 2009) (robbery remains "a common-law offense"). The Fourth Circuit held that Virginia robbery is indistinguishable from North Carolina robbery, and that the slight degree of force needed to commit the offense appeared to encompass "a range of de minimis contact" by the defendant similar to that deemed insufficient in *Curtis Johnson*. *Winston*, 2017 WL 977031, at *6. In so holding, *Winston* specifically rejected the position (adopted by the Tenth and Eleventh Circuits) that it was enough that the offense had an element labeled "violence." *Id.* at *5. The court also rejected the Government's argument that force sufficient to overcome a victim's resistance categorically satisfied the elements clause. *Id.* at *6 ("Contrary to the government's position in the present case, such resistance by the victim does not necessarily reflect use of 'violent force' by the defendant.").

The Eighth Circuit, assessing a robbery conviction from Missouri, has also held that robbery's traditional "violence" element is insufficient to qualify as "physical force" under the elements clause. *See Bell*, 840 F.3d at 964–67 (describing *Gardner*,

823 F.3d at 803–04, as "consist with" its view of the issue).[5] Like Colorado, Missouri holds that "'[t]he distinctive characteristic of robbery is violence to the victim.'" *State v. Gridiron*, 180 S.W.3d 1, 5 (Mo. Ct. App. 2005) (quoting *State v. Hayes*, 518 S.W.2d 40, 45 (Mo. 1975)). Also like Colorado, Missouri follows traditional common law rules in defining the degree of "violence" needed to commit robbery. In *State v. Lewis*, 466 S.W.3d 629, 632 (Mo. Ct. App. 2015), the Missouri Court of Appeals explained: "'[S]natching a valuable article from another is robbery where force is exercised in overcoming the resistance of the person robbed or in detaching the article taken when it is fastened to the clothing or person of the victim, but where the article is merely snatched from the hand of another the offense is stealing not robbery.'") (quoting *State v. Adams*, 406 S.W.2d 608, 611 (Mo. 1966) (adopting "the rule prevailing in most jursdictions")).

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[5] Although *Bell* does not mention the case, the Eighth Circuit had earlier reached a contrary conclusion in *United States v. Forrest*, 611 F.3d 908 (8th Cir. 2010). The court in *Bell* may have recognized that *Forrest* is no longer good law after *Moncrieffe v. Holder*, 135 S. Ct. 1678, 1685 (2013), which held that the analysis must "focus on the minimum conduct criminalized by the state statute." *Compare Gardner*, 823 F.3d at 804 (indicating that prior Fourth Circuit decisions assessing whether robbery is a violent felony are no longer good law "because they pre-date the Supreme Court's decision in *Moncrieffe*, and do not evaluate the minimum conduct to which there is a realistic probability that a state would apply the law"), *with United States v. Eason*, 829 F.3d 633, 641 (8th Cir. 2016) (holding that Arkansas robbery is not a violent felony despite a previous Eighth Circuit decision to the contrary because the rule of *stare decisis* "does not apply when the earlier panel decision is cast into doubt by an intervening Supreme Court decision"). Regardless, the contrast between *Bell* and *Forrest* further illustrates the confusion in the lower courts over how to analyze robbery offenses. *Forrest*, like *Harris* (10th) and *Fritts* (11th), holds that common law robbery is a violent felony because it has an element labeled "violence." 611 F.3d at 911.

Citing *Lewis*, the Eighth Circuit held that "[t]he amount of physical force required for a person to be convicted of second-degree robbery in Missouri does not ... necessarily rise to the level of physical force required" by federal law. *Bell*, 840 F.3d at 965–67 (emphasis omitted) (construing the elements clause of U.S.S.G. § 4B1.2(a)(1)); *see United States v. Swopes*, No. 16-1797, 2017 WL 942670 (8th Cir. Mar. 10, 2017) (published) (applying *Bell* in an ACCA case to hold that Missouri robbery is not a violent felony under § 924(e)(2)(B)(i)). The court reasoned that, because a defendant could be convicted of Missouri robbery without causing physical pain or injury, "there is a 'reasonable probability'" that a defendant could commit the offense through conduct "not '*capable* of causing physical pain or injury.'" *Bell*, 840 F.3d at 966 (first quoting *Moncrieffe*, 133 S. Ct. at 1685, then quoting *Curtis Johnson*, 559 U.S. at 140)) (emphasis added by *Bell*). Judge Gruender dissented in *Bell*, expressing the view that "force capable of preventing or overcoming resistance" was equivalent to force "'capable of causing physical pain or injury to another person.'" *Bell*, 840 F.3d at 969–70 (Gruender, J., dissenting) (quoting *Curtis Johnson*, 559 U.S. at 140).

In a brief footnote in the opinion below, the Tenth Circuit suggested that the robbery offenses at issue in *Gardner* and *Bell* might be different from Colorado robbery. *Harris*, 844 F.3d at 1268 n.8. But all three offenses follow the same traditional common law principles detailed above. *Compare People v. Borghesi*, 66 P.3d 93, 99 (Colo. 2003) (treating Blackstone's definition of robbery as authoritative), *with State v. Lawrence*, 136 S.E.2d 595, 596–97 (N.C. 1964) ("Common law robbery has been repeatedly and consistently defined by this Court in accordance with the Blackstone

definition."), *and West*, 539 A.2d at 234 (treating Blackston'e definition as authoritative). Indeed, the Colorado Supreme Court has relied upon both the North Carolina Supreme Court and the Missouri Supreme Court to define its robbery offense. *See, e.g.*, *Rowan v. People*, 26 P.2d 1066, 1067 (Colo. 1933) (quoting *State v. Burke*, 73 N.C. 83, 89 (1875), and *State v. Howerton*, 58 Mo. 581, 582 (1875)), *cited with approval in Borghesi*, 66 P.3d at 100. The only reason the Tenth Circuit thought the robbery offenses addressed *Gardner* and *Bell* might be different is that misapplied *Moncrieffe* and *Duenas-Alvarez*; it ignored the well-established doctrinal framework giving content to robbery's "violence" element in favor of an ordinary-meaning dictionary definition of "violent." *See* Section I.C., *supra*.[6]

Though not fairly characterized as squarely contradicting the decision below, the opinion in *United States v. Redrick*, 841 F.3d 478, 482 (D.C. Cir. 2016), also deserves mention. In *Redrick*, the D.C. Circuit assessed whether the elements clause covered Maryland's robbery offense, *id.*—which follows all the common law rules discussed above, *West*, 539 A.2d at 233–35; *accord* Brief of the United States at 26 n.19, *Redrick*, 841 F.3d 478 (No. 14-3053), 2016 WL 1388529 (stating that Maryland follows "the standard common law definition of robbery"). The court in *Redrick* noted as significant *West*'s holding "that Maryland simple robbery includes larceny so long as

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[6] The Tenth Circuit is right, however, that the decisions in *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016), and *United States v. Eason*, 829 F.3d 633 (8th Cir. 2016), do not address the questions presented here. *See Harris*, 844 F.3d 1267–68. Those cases also held that robbery is not a violent felony, but the particular robbery offenses at issue in those cases were materially broader than common law robbery.

'the victim resisted the taking and ... her resistance had been overcome,' even absent physical injury or force directed at the victim's person." 841 F.3d at 482. The court then commented as follows:

> The government has conceded that Maryland common law robbery is not a violent felony. To be sure, the government made that concession in the Fourth Circuit; whereas in a footnote in our case, it declines to make the same concession. We would find such a divergence in Justice Department policy quite troubling if it were truly pressed, but the government really makes no positive argument that Maryland common law robbery is a violent felony, so we will rest on its Fourth Circuit concession.

Id. at 482. Although the *Redrick* opinion does not say so, the reference is to *United States v. Martin*, 657 F. App'x 193, 203 (4th Cir. Sept. 16, 2016) (unpublished), which reversed an ACCA sentence based on the government's concession that Maryland robbery does not qualify as a violent felony after *Johnson*.

C. Resolving the Circuit Split Would Allow the Court to Clarify *Curtis Johnson*, Which Has Been Applied Inconsistently.

The lower courts need further guidance more broadly on what § 924(e)(2)(B)(i) means, and resolving the circuit split in this case would allow the Court to provide that guidance. The principle this Court articulated in *Curtis Johnson*, that "physical force" in § 924(e)(2)(B)(i) means "*violent* force," has been applied inconsistently in the lower courts and requires elaboration. This Court explained that, by "*violent* force," it meant "force capable of causing physical pain or injury." *Curtis Johnson*, 559 U.S. at 134 (second emphasis added). This formulation leaves ambiguity about how likely it must be that the force would cause pain or injury. Is a near certainty required, or is any appreciable risk enough? A few opinions will illustrate the point.

Consider *United States v. Tavares*, 843 F.3d 1 (1st Cir. 2016), which held that a Massachusetts resisting arrest offense satisfies the elements clause. The Court reasoned that conduct such as "stiffening one's arm to avoid being handcuffed," or refusing to get into a police cruiser while "pull[ing] away" from the officers, is "capable of causing physical pain or injury." *Id.* at 10–11. The First Circuit's decision in *Tavares* is similar to the Eleventh Circuit's decision in *United States v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012), which held that a Florida offense for resisting arrest satisfies the elements clause. The Eleventh Circuit held that a state appellate case that had affirmed a conviction where the defendant resisted arrest "by pushing, struggling, kicking and flailing arms and legs"—but had not caused anyone pain or injury—"undeniably" rests on force "capable of causing physical pain or injury to another person." *Id.* at 1250.

Contrast *Tavares* and *Romo-Villalobos* with two Ninth Circuit decisions. In *United States v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013), the court held that an Arizona resisting arrest offense fails to satisfy the elements clause. The Arizona statute explicitly requires the "use or threatened use of physical force against an officer." *Id.* at 1087. The Ninth Circuit nevertheless held that the statute does not require "*violent* force" under *Curtis Johnson*; the state supreme court had once upheld a conviction where the defendant "struggle[d] to keep from being handcuffed" and "kicked the officers" during the struggle, which the Ninth Circuit thought "did not necessarily involve force capable of inflicting pain or injury." *Id.* at 1088. The court's subsequent decision in *United States v. Dominguez-Maroyoqui*, 748 F.3d 918 (9th Cir. 2014), held

that assault on a federal officer under 18 U.S.C. § 111(a) does not satisfy the elements clause. The statute explicitly requires that the defendant's conduct be a "forcibl[e]" assault. *Id.* at 919–20. The Ninth Circuit nevertheless concluded that the offense does not meet "*violent* force" standard of *Curtis Johnson*, reasoning that conduct such as chasing a federal officer down the street and bumping into him, or walking up to a federal officer and "jolting her arm and shoulder," was "below th[e] threshold" of "force capable of causing physical pain or injury." *Id.* at 921. *See also Gardner*, 823 F.3d at 803–04 (pushing a store clerk, causing her to fall onto shelves was not violent force under *Curtis Johnson*).

These cases represent incongrous understandings of the elements clause. Granting certiorari to address common law robbery would not only allow the Court to resolve the circuit split over that particular offense; it would also provide the Court with an opportunity to provide further clarity about what § 924(e)(2)(B)(i) means more generally.

A consistent application of § 924(e)(2)(B)(i) is especially important following this Court's 2015 decision in *Johnson* stricking down § 924(e)'s so-called residual clause. Absent the residual clause, § 924(e)(2)(B)(i) will solely determine whether an offense qualifies as a violent felony, unless the offense qualifies as generic burglary, generic arson, generic extortion, or involves explosives under § 924(e)(2)(B)(ii). As a result, the elements clause will now affect many more sentences than it did when this Court decided *Curtis Johnson*.

* * *

This Court should grant certiorari to resolve the division in the circuits over whether § 924(e)(2)(B)(i) applies to common law robbery and to clarify the meaning of that statute.

IV. This Case Is an Ideal Vehicle for Addressing the Questions Presented.

Mr. Harris's case arrives at this Court without any of the procedural snarls that sometimes come with post-conviction cases, and it fairly presents both of questions that Mr. Harris submits for review: (1) whether common law robbery is a violent felony under 18 U.S.C. § 924(e)(2)(B)(i) and (2) whether courts must consider well-established background legal principles in applying the so-called categorical approach.

First, both the district court and the court of appeals decided this case exclusively on the ground that robbery qualifies as a violent felony under 18 U.S.C. § 924(e)(2)(B)(i). *Harris*, 844 F.3d at 1263–71; R. vol. III at 50–55. Indeed, both the district court and the court of appeals acknowledged that this was the only *possible* basis for deciding the case. As the district court put it, "the sole issue" disputed by the parties "is whether robbery in Colorado has as an element the use, attempted use, or threatened use of physical force against the person of another." R. vol. III at 52. The court of appeals explained the situation this way:

> In response to *Johnson* and *Welch*, Harris moved to vacate his sentence under 28 U.S.C. § 2255. He argued that without the residual clause, he no longer had three qualifying violent felony convictions. The government conceded Harris's second-degree burglary conviction no longer qualified as a violent felony, but maintained his robbery conviction remained a violent felony under the elements clause in § 924(e)(2)(B)(i).

> Thus, the parties agreed that whether Harris had a third qualifying conviction was based on whether Colorado's robbery statute satisfies the elements clause, meaning whether it has as an element the use or threatened use of physical force against another person.

Harris, 844 F.3d at 1263. In short, both the district court and the court of appeals recognized that whether Mr. Harris was due relief under § 2255 turned entirely on the first question presented.

Second, Mr. Harris explicitly urged both the district court (R. vol. III at 37–44) and the court of appeals (Appellant's Br. at 12, 19–22) to rule in his favor on Question 2, *i.e.*, to use well-established background legal principles to determine the elements of Colorado robbery. Both courts refused and, as a result, simplistically equated ACCA "violence" with the "violence" that is necessary to commit common law robbery. *Harris*, 844 F.3d at 1266–67; R. vol. III at 50–55. Admittedly, this refusal was implicit, so Question 2, standing alone, might not warrant a grant of certiorari. Still, the argument was specifically preserved, which gives this Court options in deciding how broadly or narrowly to address Question 1.

Third, there is no question of jurisdiction. Mr. Harris's motion to vacate, R. vol. III at 10–18, obviously "claim[ed] a 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 sentence was in excess of the maximum authorized by law," 28 U.S.C. § 2255(a), so the district court had subject-matter jurisdiction. Mr. Harris had not

previously filed a § 2255 motion attacking the judgment at issue,[7] so the jurisdiction-stripping provisions of 28 U.S.C. § 2255(h) do not apply. The district court granted a certificate of appealability,[8] so the Tenth Circuit had jurisdiction under 28 U.S.C. § 2253.

Although Mr. Harris's term of imprisonment is projected to end on December 27, 2017,[9] there is no possibility of this case becoming moot. Mr. Harris's term of imprisonment is just the first part of his sentence; upon his release from prison, Mr. Harris will begin serving his five-year term of supervised release, R. vol. II at 27, a term two years longer than the maximum that could be imposed absent application of the ACCA. *Compare* 18 U.S.C. § 3583(b) (authorizing a term of supervised release of "not more than five years" for a Class A felony but of "not more than three years" for a Class C felony), *with* 18 U.S.C. § 3559(a) (classifying unlawful possession of a firearm as a Class C felony absent application of the ACCA, but as a Class A felony if the ACCA is applied). Mr. Harris's five-year term of supervised release represents a "substantial restriction of freedom," *Gall v. United States*, 552 U.S. 38, 48 (2007), and a victory in this case would reduce Mr. Harris's term of supervised release by two

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[7] R. vol. III at 20 (Government's Answer asserts that "Harris has not filed any other post-conviction motions"); *see generally* Docket Report, *United States v. Harris*, No. 04-cr-158 (D. Colo.).

[8] Order Granting Certificate of Appealability, *United States v. Harris*, No.04-cr-158 (D. Colo. June 10, 2016).

[9] Bureau of Prisons, *Find an Inmate*, https://www.bop.gov/inmateloc/ (search BOP Register Number 32599-013) (last visited Mar. 28, 2017).

years. Thus, this case will not be mooted by Mr. Harris's release from prison. *See Jones v. Cunningham*, 371 U.S. 236, 242–43 (1963).

Fourth and finally, this Court would not be able to decide this case on non-jurisdictional procedural grounds. Issues like procedural default, the time bar, and nonretroactivity are affirmative defenses and not jurisdictional. *See* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 22.1, at 1247–48 (7th ed. 2016). The Government forwent any such affirmative defenses both in the district court (R. vol. III at 19–29) and in the Tenth Circuit (Answer Br.). It affirmatively asserted in its Answer that "Harris's [§ 2255] motion is timely." R. vol. III at 20. The Government probably opted not to raise any procedural defenses because they would have been plainly meritless. *Compare Welch*, 136 S. Ct. at 1264–65 (holding that *Johnson* is a new and retroactive constitutional rule of criminal procedure), *and Johnson*, 135 S. Ct. at 2563 (explicitly overruling prior cases that had upheld the ACCA's residual clause), *with* 28 U.S.C. § 2255(f)(3) (post-conviction motions based on new and retroactive rules of constitutional rights are timely if filed within one year of the date on which the right was initially recognized by this Court), *and Reed v. Ross*, 468 U.S. 1, 12–20 (1984) (holding that the doctrine of procedural default does not bar a claim asserted for the first time in post-conviction proceedings if, during the time for direct appeal, the claim was contrary to one of this Court's precedents).

In short, there is no risk that, upon granting certiorari, this Court would be able to decide the case on another ground and thus not reach the point upon which there is a conflict.

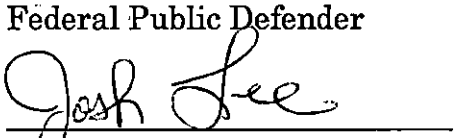
CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender



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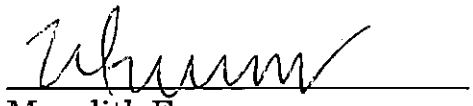

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