NO: 17-5554

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

SECOND SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, Petitioner Denard Stokeling wishes to alert the Court to the Ninth Circuit Court of Appeals' recent decision in *United States v. Geozos*, ___ F.3d ___, 2017 WL 3712155 (9th Cir. Aug. 29, 2017) which directly conflicts with the Eleventh Circuit's decision in his case. In *Geozos*, the Ninth Circuit considered a robbery conviction under the *exact* statute here at issue, Fla. Stat. § 812.13(1), and held that a Florida robbery conviction did not categorically qualify as an ACCA violent felony since § 812.13(1) – both by its text, and as interpreted by the Florida courts – did *not* require the use of "violent force." *Id.* at *7.

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

For instance, the Ninth Circuit noted with significance, in *Mims v. State*, 342 So.2d 883, 886 (Fla. 3rd DCA 1997), a Florida appellate court had held that "Although purse snatching is not robbery if no more force or violence is used than necessary to physically remove the property from a person who does not resist, if the victim does resist *in any degree* and this resistance is overcome by the force of the perpetrator, the crime of robbery is complete." *Geozos*, 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*").

After *Robinson*, the Ninth Circuit also found significant, in *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011) – a case Mr. Stokeling specifically cited to the Eleventh Circuit and to this Court – another Florida appellate court had held that a robbery conviction "may be based on a defendant's act of engaging in a tug-of-war over the victim's purse." 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)).

The Ninth Circuit acknowledged that its conclusion that a Florida robbery offense was not categorically an ACCA "violent felony" put it "at odds" with the Eleventh Circuit, which held just the opposite in *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011), and *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016) (following *Lockley*). However, the Ninth Circuit rightly found *Lockley* and

Fritts unpersuasive since they overlooked the crucial point – confirmed by Florida caselaw – 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.")

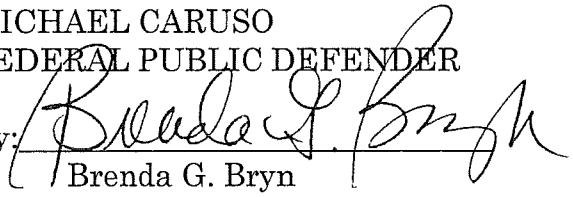
Geozos, 2017 WL 3712155 at *8.

In light of the Ninth Circuit's well-founded criticism of the Eleventh Circuit in *Geozos* and indeed, its acceptance of the very arguments articulated by Mr. Stokeling to the Eleventh Circuit, it is clear that Mr. Stokeling would have had his non-ACCA sentence upheld had his case been heard by the Ninth Circuit. And plainly, going forward, scores of identically-situated Ninth and Eleventh Circuit defendants with identical prior convictions will be sentenced disparately unless this Court intervenes. The circuit conflict is unquestionably direct at this point, the issue is ripe for resolution, there is no valid reason to delay its resolution, and the instant case presents an ideal vehicle for its resolution. By granting certiorari in this case, the Court will not only be able to resolve the direct conflict that now exists between the Ninth and Eleventh Circuits on whether Florida robbery convictions qualify as ACCA violent felonies, but also the broader circuit conflict on whether robbery offenses that include the common law "overcoming resistance" element categorically require the use of violent force.

As such, the Court should grant Mr. Stokeling's petition and definitively resolve this important and recurring elements clause issue that now squarely divides the circuits, and is unfairly prejudicing many identically-situated defendants. Notably, the precise issue raised herein is also before the Court in a second case, *Kenneth Roy Conde v. United States*, No. 17-5772 (pet. for cert. filed Aug. 24, 2017, government's response due Sept. 28, 2017). *Conde*, like Mr. Stokeling's case, comes to the Court on direct review, squarely tees up the question presented, and involves no side issues or potential obstacles to review. Either one of these cases would present an ideal vehicle to resolve the question presented. Accordingly, if the Court chooses to resolve it in *Conde*, Mr. Stokeling's case should be held pending resolution of that case.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: 
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August 31, 2017

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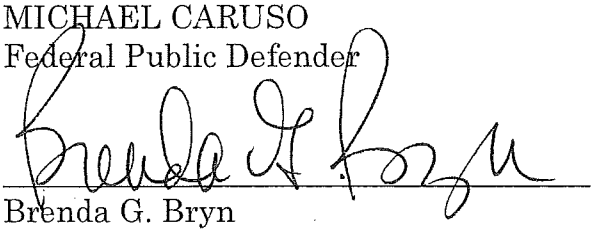
CERTIFICATE OF SERVICE

I certify that on this 31st day of August, 2017, in accordance with SUP. CT. R. 29, eleven (11) copies of the Second Supplemental Brief for the Petitioner, and Certificate of Service were served by Federal Express upon Jeffrey B. Wall, Acting Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

MICHAEL CARUSO
Federal Public Defender

Fort Lauderdale, Florida
August 31, 2017

By: 

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