NO:

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" categorically a "violent felony" under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i)(an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?

INTERESTED PARTIES

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

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

OPINION BELOW

The Eleventh Circuit's opinion vacating Mr. Stokeling's non-ACCA sentence, and remanding for resentencing as an Armed Career Criminal, *United States v. Stokeling*, __ Fed. Appx. ___, 2017 WL 1279086 (11th Cir. April 6, 2017) is included in the Appendix at A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals vacating Mr. Stokeling's sentence was entered on April 6, 2017. Mr. Stokeling sought, and the Court granted, a 30-day extension of the time until August 4th for filing a petition for writ of certiorari. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

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

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

Fla. Stat. § 812.13. Robbery (1997)

> (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.

STATEMENT OF THE CASE

The Charges and Plea

On October 20, 2015, a federal grand jury charged Denard Stokeling 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 March 2, 2016, Mr. Stokeling pled guilty to that charge.

The PSI and Sentencing

In the PSI, the Probation Officer opined that Mr. Stokeling 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" or "serious drug offenses:" namely, his Sept. 27, 2997 conviction in Dkt. #F96-11220 for unarmed Florida robbery; his conviction on that same date in Dkt. #F97-14434 for armed robbery/home invasion/kidnapping; and his February 10, 19997 conviction in Dkt. #F97-1221 for sale/manufacture/delivery of cocaine.

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 V, his recommended advisory guideline range as an Armed Career Criminal was 180-188 months imprisonment.

Mr. Stokeling objected to the counting of both his robbery convictions as ACCA predicates, arguing that such convictions did not categorically require the

use of violent force. The government responded that they did, since in each case Mr. Stokeling was convicted after the Florida Supreme Court's decision in *Robinson v. State of Florida*, 692 So.2d 883 (1997) which had clarified that every robbery offense in Florida requires "resistance by victim that is overcome by the physical force of the offender."

At the August 28, 2016 sentencing, the district court granted the defense objection to the counting of his 1997 unarmed robbery conviction in Dkt. #96-11220 as an ACCA predicate, based upon the facts set forth in the PSI – which in the court's view "did not justify the enhancement." Without the ACCA enhancement, the court found that Mr. Stokeling's applicable Guideline range was 70-87 months imprisonment, and sentenced him to a term of 73 months imprisonment, followed by 2 years supervised release.

The Government's Appeal

The government appealed the district court's determination that Mr. Stokeling's 1997 unarmed robbery conviction was not an ACCA "violent felony," on two bases. First, it argued, the district court had impermissibly based that determination on whether the facts alleged in the PSI sounded "sufficiently violent," when this Court had repeatedly held that district courts are prohibited from basing the "violent felony" upon such judicial fact-finding. Second, the government argued, the 1997 unarmed robbery conviction categorically qualified as an ACCA violent felony pursuant to two prior Eleventh Circuit precedents: *United States v. Lockley*, 632 F.3d 1238, 1244-1245 (11th Cir. 2011), holding that a 2001 Florida robbery

conviction was categorically a "crime of violence" under the elements clause of the Guidelines, and *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), holding that a 1974 Florida armed robbery conviction qualified as a "violent felony" under the elements clause of the ACCA. The government emphasized, as it had below, that Mr. Stokeling was convicted after the Florida Supreme Court's decision in *Robinson* clarifying that the force used to commit a robbery offense in Florida must be enough to overcome "victim resistance."

Mr. Stokeling responded that the Court could and should affirm his sentence on any ground even if not considered by the district court, and specifically, here it should affirm for a number of reasons, including that it was clear from Florida law that overcoming victim resistance did not categorically require the type of "*violent* force" this Court had required in *Curtis Johnson v. United States*, 559 U.S. 133 (2010). As support, he pointed out that in *Sanders v. State*, 769 So.2d 506 (Fla. 5th DCA 2000), a Florida appellate court had affirmed a robbery conviction under Fla. Stat. § 812.13(1), where the State simply showed that the defendant had peeled back the victim's fingers before snatching money out of his hand. According to the *Sanders* court, 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," and no more resistance, or "force," than that was necessary to uphold Sanders' strongarm robery conviction under § 812.13(1). *Id.* at 507. Mr. Stokeling also cited *Benitez-Saldana v. State*, 67 So.3d 320 (Fla. 2nd DCA 2011), where another Florida appellate court had specifically rejected the defendant's argument

that actual "violence" was necessary for a robbery conviction in Florida, holding that the mere act of "engaging in a tug-of-war over the victim's purse" was sufficient for conviction. *Id.* at 323.

It was clear from these cases, Mr. Stokeling argued, that if the victim's resistance was itself slight, the "force" necessary to overcome it in Florida could also be slight. The *Curtis Johnson* level of "*violent* force" was not categorically necessary to overcome victim resistance, and seal a conviction, for Florida robbery. And therefore, under this Court's recent precedents clarifying the proper application of the categorical approach (*Descamps*, *Moncrieffe*, and *Mathis*), a conviction for that offense was not a qualifying ACCA predicate.

In reply, the government pointed out that the Eleventh Circuit had just decided *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016) in a fractured opinion, where the only point of agreement between the three panelmembers was that a Florida robbery conviction after the Florida Supreme Court's April 24, 1997 decision in *Robinson* was a categorically a "violent felony" within the ACCA's elements clause. Under *Seabrooks*, the government argued, Mr. Stokeling's 1997 conviction for unarmed robbery was clearly a "violent felony," and he should have been sentenced as an Armed Career Criminal. However, the government added, *Dowd* and *Lockley* were also "correct that all Florida robbery convictions, regardless of whether they were committed before or after *Robinson*, are violent felonies."

And notably, several weeks later, the Eleventh Circuit expressly so held in *United States v. Fritts*, 841 F.3d 937 (11th Cir. Nov. 8, 2016). *See id.* at 942-943

(holding "based on our precedent in *Dowd* and *Lockley*," and in light of the Florida Supreme Court's decision in *Robinson*, that a 1989 (pre-*Robinson*) armed robbery categorically qualifies as a violent felony under the ACCA's elements clause; *Robinson* reaffirmed that mere snatching – "without resistance by the victim and the use of physical force to overcome the victim's resistance" – did not constitute a robbery under § 812.13, and *Robinson* "tells us what that statute always meant").

On April 6, 2017, the Eleventh Circuit vacated Mr. Stokeling's sentence and remanded for resentencing as an Armed Career Criminal, due to the district court's improper fact-finding in making the "violent felony" determination, and because *Fritts* had held that "a conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the [ACCA]." *United States v. Stokeling*, ___ Fed. Appx. ___, 2017 WL 1279086 at *1 (11th Cir. April 6, 2017). According to the court, *Fritts* was clear that it was "bound" by *Lockley*'s holding that "Florida robbery is categorically a crime of violence under the elements of even the least culpable of the[] acts criminalized by Florida Statutes § 812.13(1)." *Stokeling, id.* at *1 (citing *Fritts*, 841 F.3d at 941). And, the court added, Stokeling "cannot circumvent this holding "even if he presents arguments the prior panel did not consider." *Stokeling, id.* (citing *Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234 (11th Cir. 2006)).[1] Relying on *Fritts*, the court held that the "force element" of Florida robbery satisfies the elements clause of the ACCA, because

[1] *Lockley*, notably, had not considered whether the robbery statute was divisible, what the least culpable act under the statute was according to Florida caselaw, or what level of force was necessary for a robbery "by force" (since the appellant in *Lockley* had focused his argument on a robbery by "putting in fear").

Robinson had clarified that the use of "force" "requires 'resistance by the victim that is overcome by the physical force of the offender.'" *Id.* at *2.

Judge Martin concurred, agreeing with the majority that Circuit precedent "dictates that Mr. Stokeling's prior robbery conviction under Fla. Stat. § 812.13 qualifies as a violent felony" under the ACCA," since he was convicted after the Florida Supreme Court's decision in *Robinson*. *Id.* at *2 (Martin, J., concurring) She wrote separately, however, to explain that she believed *Fritts* was wrongly decided, to the extent it held pre-*Robinson* Florida robbery convictions required the use of violent force. She acknowledged, however, that such a mistake "does not affect Mr. Stokeling." *Id.* at **2-5.[2]

Mr. Stokeling is currently set to be resentenced as an Armed Career Criminal on September 13, 2017.

[2] This Court denied certiorari in both *Seabrooks* and *Fritts* on June 19, 2017.

REASON FOR GRANTING THE WRIT

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" 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 question of whether state robbery convictions necessarily have *violent* force "as an element" was not a pressing question for this Court when the ACCA's residual clause remained in existence. 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 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 as the easiest route to an ACCA enhancement in *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015), however, lower courts have 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, 141 (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, at least one circuit – the Fourth 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." 130 S.Ct. at 141 (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 caselaw 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").

By contrast, the Eleventh Circuit – interpreting a statutory robbery offense based upon common law robbery, and which includes the same "resistance" element as the common law robbery offenses construed in the Fourth Circuit cases – 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' 1997 Florida robbery conviction was a "violent felony" according to *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) since Seabrooks' conviction post-dated the Florida Supreme Court's decision in *Robinson v. State,* 692 So.2d 883, 886 (Fla. 1997) which clarified that a Florida robbery offense requires overcoming victim resistance); *United States v. Fritts*, 841 F.3d 937, 940-944 (11th Cir. 2016) (following not only *Lockley* but 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 in their briefing that Florida caselaw made clear that overcoming "resistance" did not require violent force in every case. They urged the Eleventh Circuit, as Mr. Stokeling did here, 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*, as well as in the case below, the Eleventh Circuit has steadfastly refused to review ***any*** Florida caselaw – deferring completely to its prior precedents in *Lockley* and *Dowd* which preceded *Moncrieffe*, and did not consult Florida law to determine the least culpable conduct for conviction.

In this regard, 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 caselaw 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. filed* April 4, 2017 (No. 16-8616).

As such, the decisions of these three circuits are in direct conflict at this time.[3] For the following reasons, that conflict is intractable, untenable, and potentially far-reaching. It should be resolved by the Court forthwith.

[3] Until June 17th of this year, 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* 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.

A. The common law roots of the "overcoming resistance" requirement

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,[1] many others (including Florida, North Carolina, Virginia, and Colorado) have judicially recognized an "overcoming resistance" element through their caselaw.[2]

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) ("Larciny from the person is either by privately stealing; or by open and

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[1]*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).

[2]*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).

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). 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 (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 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 be by "force, violence, assault, or putting in fear" not only derived from the common law, but the Court had thereafter interpreted that provision "consistent with the common law." *Id.* at 46 (citing *Williams v. Mayo*, 126 Fla. 871, 875, 172 So. 86, 87 (1937)).

The only change to the common law robbery offense incorporated into that statutory provision occurred immediately after – and in response to – *Royal*, when the Florida Legislature broadened the statutory offense to include the use of "force" not only during a taking, but after it as well. *See, e.g., Foster v. State*, 596 So.2d

1099, 1107-1108 (Fla. 5th DCA 1992). Other than that, however, there has been no change to the underlying "common law definition of robbery set forth in subsection (1)," *Royal*, 490 So.2d at 46, to this day.

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 careful review of Colorado caselaw, 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 gavamen 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* 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 caselaw 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.

B. 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 *supra*. 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]

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[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 in its *Gardner* brief, and had correctly described *Robertson* as holding that mere "purse snatching" does not involve sufficient force for a common law robbery conviction in North Carolina. Brief of the United States in *United States v. Gardner*, No. 14-4533 at 46-49, 53 (4th Cir. Aug. 21, 2015). *Robertson* had expressly recognized that North Carolina followed "'[t] rule prevailing in most jurisdictions" that "'the force used . . . must be of such a nature as to show that it was intended to *overpower the party robbed or prevent his resisting, and not merely to get possession of the property stolen.*'" *Id.* at 509 (quoting *State v. John*, 50 N.C. 163, 169 (1857)(emphasis added

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 caselaw – such an offense can be committed by only slight, non-violent force. *Id.* at 685.

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

Consistent with these intervening precedents, the Fourth Circuit carefully examined for the first time in *Winston* how the Virginia state courts interpreted a robbery "by violence or intimidation." While noting that its prior decision in *Gardner* was "persuasive," the Fourth Circuit rightly acknowledged that its "conclusion that North Carolina robbery does not qualify as a violent felony" did not itself "compel a similar holding in the present case;" because 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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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 an thorough survey of Virginia appellate decisions on common law robbery. *See id.* at 684-685 (discussing in particular, and finding significant: *Maxwell v. Commonwealth*, 165 Va. 860, 183 S.E. 452, 454 (1936); *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487, at * 3 (Va. Ct. App. Dec. 12, 2000) (unpublished); and *Jones v. Commonwealth*, 26 Va. App. 736, 496 S.E.2nd 668, 670 (1998)). Citing these three decisions, the Fourth Circuit concluded that a Virginia common law robbery "by violence" requires only a "'slight' degree of violence;" that "anything which calls out resistance is sufficient;" and "such resistance by the victim does not necessarily reflect use of 'violent force.'" *Winston*, 850 F.3d at 684-685. And therefore, the Fourth Circuit expressly rejected the precise assumption made by the Eleventh Circuit in both *Seabrooks* and *Fritts*, without considering a single Florida decision: namely, that force sufficient to overcome resistance in Florida necessarily involves *violent* force. *Winston, id.* at 683. To the contrary, the Fourth Circuit held, the "minimum conduct necessary to sustain a conviction for Virginia common law robbery does not necessarily include [] 'violent force.'" *Id.* at 685.

Notably, Florida caselaw – like North Carolina and Virginia caselaw – likewise confirms that *violent* force is ***not*** necessary to overcome victim resistance under Fla. Stat. § 812.13(1). Like the North Carolina common law robery 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) easily confirms this point.

In *Johnson v. State*, 612 So. 2d 689 (Fla. 1st DCA 1993), a Florida appellate court found force sufficient to tear a scab off a victim's finger was enough to sustain conviction for robbery. *Id.* at 690. In *Sanders v. State*, 769 So. 2d 506 (Fla. 5th DCA 2000), another Florida appellate court affirmed a strongarm robbery conviction where the defendant merely peeled back the victim's fingers before snatching money from his hand. The court explained that the victim's "clutching of his bills in his fist as Sanders pried his fingers open could have been viewed by the jury as an act of resistance against being robbed by Sanders," thus confirming that no more resistance, or "force" than that was necessary for a strongarm 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 most recently, 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 strongarm 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 Mr. Stokeling's case, and specifically considered this Florida caselaw 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 caselaw 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.

B. The circuit conflict is intractable and untenable. It is prejudicing Tenth and Eleventh Circuit defendants, and should be resolved

In a series of recent decisions since *Fritts*, the Eleventh Circuit – which applies its "prior panel precedent rule" more rigidly than any other circuit in this country[5] – has adhered rigidly to *Fritts*. Not only in Mr. Stokeling's case, but in multiple other cases as well, the Eleventh Circuit continues to affirm ACCA sentences predicated upon Florida robberies based upon *Fritts*. *See, e.g.*, *United*

[5] *See* the pending petition for writ of certiorari in *Warren Golden v. United States*, No. 17-5050, where certiorari has been sought on that basis.

States v. Conde, ___ Fed. Appx. ___, 2017 WL 1485021 (11th Cir. April. 26, 2017); *United States v. Hughes*, ___ Fed. Appx. ___, 2017 WL 2471207 (11th Cir. June 8, 2017); *United States v. Smith*, ___ Fed. Appx. ___, 2017 WL 2477356 at *2 (11th Cir. June 8, 2017); *United States v. Williams*, ___ Fed. Appx. ___, 2017 WL 2712964 at *2 (11th Cir. June 23, 2017); *United States v. Burke*, ___ F.3d ___, 2017 WL 3044623 (11th Cir. July 19, 2017); *United States v. Everette*, ___ F.3d ___, 2017 WL 3309732 (11th Cir. Aug. 3, 2017).[6]

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

Accordingly, with this spate of recent decisions, the Eleventh Circuit has made undeniably clear that its conflict with the Fourth Circuit is intractable. The Eleventh Circuit will not reconsider whether a Florida robbery offense categorically requires the *Curtis Johnson* level of *violent* force. And it is unlikely that the Tenth Circuit will reconsider whether a Colorado robbery, or any other common law robbery offense, is categorically an ACCA predicate either.

The only hope for defendants in these circuits, plainly, is for this Court to grant certiorari to resolve this conflict once and for all. The instant case presents the Court with a perfect vehicle in which to do that for several reasons. First, the

[6] Certiorari will be sought in all of these cases.

"overcoming resistance" issue raised herein was specifically pressed below. That is not true of all current Eleventh Circuit cases in the pipeline to this Court. Second, if Mr. Stokeling's prior Florida robbery convictions do not qualify as "violent felonies" under the ACCA's elements clause for the reasons raised herein, he was ineligible for enhanced sentencing under the ACCA as the district court originally found. The Eleventh Circuit will have erred in vacating and remanding his case for enhanced sentencing now as an Armed Career Criminal. Mr. Stokeling should serve out the remainder of his 73 month sentence and be released. Finally, this case comes to the Court on direct appeal, and it raises a single discrete issue for review. There are no side issues here, as there often are on collateral review.

Nevertheless, if the Court believes that either another pending Eleventh Circuit case or *Harris* presents a better vehicle for resolving the circuit conflict presented herein, Mr. Stokeling asks that the Court hold his case pending its resolution of the common issues these cases share.

CONCLUSION

Resolution of the elements clause questions raised by Stokeling will have far reaching impact not only for other Eleventh Circuit defendants, but for Tenth Circuit defendants as well. And potentially, it could impact defendants in other circuits with common law robbery convictions or statutory robbery convictions that are based on common law robbery. Until this Court definitively resolves the current circuit conflict on whether overcoming "victim resistance" categorically meets the

ACCA elements clause, other circuits might follow *Fritts* or *Harris* and more defendants will be prejudiced.

The ACCA's elements clause, notably, is identical to the elements clause used in the Career Offender provision of the Guidelines, as well as in the commentary to the reentry guideline, U.S.S.G. § 2L2.1, comment. n. 2. And it is virtually identical to the elements clause in both 18 U.S.C. § 16(a), and in 18 U.S.C. 924(c)(3)(A). Therefore, the Court's resolution of the questions in this case will not only affect which robbery offenses are properly counted as "violent felonies" under the ACCA, and "crimes of violence" under the Guidelines, but potentially (depending upon the Court's resolution of the residual clause question in *Sessions v. Dimaya*, No. 15-1498 (argued Jan. 17, 2017)), which state robbery offenses will qualify as "aggravated felonies" pursuant to 8 U.S.C. 1101(a)(43)(F)(which incorporates the "crime of violence" definition in § 16). Indeed, the questions raised herein might even impact whether federal robbery offenses such as Hobbs Act robbery in violation of 18 U.S.C. § 1951 qualify as § 924(c) predicates going forward.
This case is an excellent vehicle for certiorari for these reasons as well.

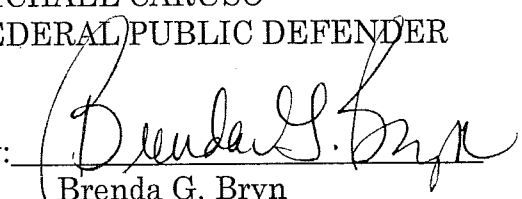
Finally, in the three decades that have passed since Congress amended the ACCA to delete "robbery" and "burglary" as automatic ACCA predicates, replacing those two specific crimes with broader "violent felony" definitions designed to better target the most dangerous gun offenders, the Court has granted certiorari multiple times to determine whether state burglary offenses were proper ACCA predicates. It has never, however, considered an ACCA sentence predicated upon a state

robbery offense. And the time has come to test the government's repeated assertions, accepted now by two circuits with little or no analysis, that *any* robbery offense that requires overcoming "victim resistance" is sufficiently dangerous that it deserves enhanced punishment under the ACCA.

The direct circuit conflict that currently exists on that issue is prejudicing defendants in two federal circuits, and the disparate treatment of defendants in these circuits must come to an end. The Court should grant the writ.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: 
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August 4, 2017

APPENDIX

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See Fed. Rule of Appellate Procedure 32.1
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See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Denard **STOKELING**, Defendant-Appellee.

No. 16-12951
|
(April 6, 2017)

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:15-cr-20815-JLK-1

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Before WILLIAM PRYOR, MARTIN, and BOGGS, * Circuit Judges.

* Honorable Danny J. Boggs, United States Circuit Judge for the Sixth Circuit, sitting by designation.

Opinion

PER CURIAM:

***1** This appeal presents the question whether a conviction for Florida robbery, Fla. Stat. § 812.13, from before Florida passed a "robbery by sudden snatching" statute in 1999, Fla. Stat. § 812.131, categorically qualifies as a violent felony under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The district court did not enhance the sentence of Denard Stokeling under the Act because it held that his robbery conviction was not a violent felony. The United States appealed. Stokeling argues that before 1999, Florida robbery included robbery by sudden snatching, so it did not always require sufficient force to constitute a violent felony. But this argument is foreclosed by our precedents. *E.g.*, *United States v. Fritts*, 841 F.3d 937, 943–44 (11th Cir. 2016). We vacate and remand.

We have held many times that a conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the Act, even if it occurred before 1999. *See, e.g.*, *id.* at 938, 943–44 (conviction from 1989); *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006) (conviction from 1974). And in *Fritts*, we specifically rejected the argument that the sudden-snatching statute changed the elements of Florida robbery. 841 F.3d at 942–44. We explained that the Florida Supreme Court has held that Florida robbery "has *never* included a theft or taking by mere snatching because snatching is theft only and does not involve the degree of physical force needed to sustain a robbery conviction." *Id.* at 942. "Th [e] new sudden snatching statute was apparently needed *because* ... [ ]robbery [ ] did not cover sudden snatching where there was no resistance by the victim and no physical force to overcome it." *Id.* at 942 n.7 (emphasis added).

Our precedents apply to Florida robbery as well as armed robbery because the elements are identical, differing only in what "the offender carried" "in the course of committing the robbery." Fla. Stat. § 812.13. Our precedents rely on the shared force element in section 812.13(1) and do not mention the additional requirements for armed robbery in section 812.13(2). For example, this Court is bound by *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011), which held that "Florida robbery is categorically a crime of violence under the elements of even the least culpable of these acts criminalized by Florida Statutes § 812.13(1)." *Fritts*, 841 F.3d at 941. Stokeling cannot circumvent this holding, even if he presents arguments the prior panel did not consider. *See Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234 (11th Cir. 2006).

The district court also applied the incorrect method to determine whether a conviction is a violent felony under the Act. The parties agree that the district court erroneously looked to the underlying facts of Stokeling's crime. But the district court should have applied the "categorical approach," which "look[s] only to the elements of the crime, not the underlying facts of the conduct," *United States v. Braun*, 801 F.3d 1301, 1304–05 (11th Cir. 2015).

*2 The force element of Florida robbery satisfies the elements clause of the Act. The Act defines a violent felony as any crime that "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). An element of Florida robbery is "the use of force, violence, assault, or putting in fear," Fla. Stat. § 812.13, which requires "resistance by the victim that is overcome by the physical force of the offender." *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997).

We **VACATE** Stokeling's sentence and **REMAND** for resentencing.

MARTIN, Circuit Judge, concurring:

I agree with the majority that our Circuit precedent dictates that Mr. Stokeling's prior robbery conviction under Fla. Stat. § 812.13 qualifies as a violent felony as that term is defined by the elements clause of the Armed Career Criminal Act ("ACCA"). 18 U.S.C. § 924(e). See United States v. Fritts, 841 F.3d 937, 943–44 (11th Cir. 2016). However, I believe Fritts was wrongly decided.

The Fritts panel did not engage in the categorical analysis the Supreme Court instructed us to use when deciding whether a person's prior conviction requires a longer sentence under ACCA. When it turned its back on the required categorical approach, the Fritts panel failed to give proper deference to McCloud v. State, 335 So.2d 257 (Fla. 1976), the controlling Florida Supreme Court case interpreting § 812.13 from 1976 to 1997. In McCloud, Florida's highest court held that taking by "any degree of force" was sufficient to justify a robbery conviction. Id. at 258–59 (emphasis added). The result of the mistakes in Fritts is that people like Mr. Fritts will serve longer prison sentences that are not authorized by law. Although Mr. Stokeling is not one of those people (he was convicted after the Florida Supreme Court decided Robinson v. State, 692 So.2d 883 (Fla. 1997), which abrogated McCloud's "any degree of force" holding), our reliance on Fritts here gives me the opportunity to talk about what went wrong in that case and why it matters.

I.

The ACCA caps a federal prison sentence for a felon in possession of a firearm at ten years. 18 U.S.C. § 924(a)(2). That is except when the felon has three or more felony convictions, and those felonies are violent or are otherwise serious crimes, his sentence cannot be less than fifteen years. Id. § 924(e). The ACCA defines "violent felony" in more than one way. Id. § 924(e)(2)(B). The Supreme Court has told us that one of those definitions—the "residual clause"—is unconstitutionally vague. Johnson v. United States, 576 U.S. ——, 135 S.Ct. 2551, 2557–58, 192 L.Ed.2d 569 (2015). As a result, a person's prior robbery conviction can serve as a basis for an ACCA sentence enhancement only if it meets another definition of "violent felony" from what is known as ACCA's "elements clause." 18 U.S.C. § 924(e)(2)(B)(i) ("As used in this subsection ... the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year ... that has as an element the use, attempted use, or threatened use of physical force against the person of another."). So a prior robbery conviction can serve as an ACCA predicate only if it has "as an element the use, attempted use, or threatened use of physical force against the person of another." Id.

When deciding whether a person's prior conviction qualifies as one requiring a longer sentence under ACCA, courts must first apply what is called the formal categorical approach. Under this approach, we do not look at the facts that resulted in the earlier conviction. Descamps v. United States, 570 U.S. ——, 133 S.Ct. 2276, 2283, 186 L.Ed.2d 438 (2013). Instead, Supreme Court precedent requires us to look only to the elements of the statute under which the person was convicted. See Mathis v. United States, 579 U.S. ——, 136 S.Ct. 2243, 2251, 195 L.Ed.2d 604 (2016). We must decide whether, in order to be convicted under a given statute, a person was required to use, attempt to use, or threaten to use physical force against another person.

*3 In keeping with this, I will apply the formal categorical approach to decide whether a conviction under § 812.13 counts as a violent felony under the ACCA. If a defendant

could have been convicted under § 812.13 without the use, attempted use, or threatened use of "violent force," Curtis Johnson v. United States, 559 U.S. 133, 140, 130 S.Ct. 1265, 1271, 176 L.Ed.2d 1 (2010) (interpreting "physical force" in the elements clause), or a "substantial degree of force," United States v. Owens, 672 F.3d 966, 971 (11th Cir. 2012) (holding that second-degree rape in Alabama doesn't require "physical force" as defined by Curtis Johnson), against another person, then that defendant's prior conviction under § 812.13 can't be a "violent felony" under the ACCA's elements clause.

In recent years, the Supreme Court has clarified the analytical steps that make up the formal categorical approach. In taking that approach, we must first "presume that the conviction rested upon nothing more than the least of the acts criminalized" by the state statute. Moncrieffe v. Holder, 569 U.S. ——, 133 S.Ct. 1678, 1684, 185 L.Ed.2d 727 (2013) (alterations adopted and quotation omitted). This is often referred to as the "least culpable conduct." See Donawa v. U.S. Att'y Gen., 735 F.3d 1275, 1283 (11th Cir. 2013) (citing Moncrieffe, 133 S.Ct. at 1685). To identify the least culpable conduct criminalized by the statute, we look to the state courts' interpretations of the statute. See Curtis Johnson, 559 U.S. at 138, 130 S.Ct. 1265 ("We are [ ] bound by the Florida Supreme Court's interpretation of state law ... in determining whether a felony conviction for battery under Fla. Stat. § 784.03(2) meets the definition of 'violent felony' in 18 U.S.C. § 924(e)(2)(B)(i)."); see also United States v. Rosales-Bruno, 676 F.3d 1017, 1021 (11th Cir. 2012) ("[W]e look to Florida case law to determine whether a conviction under § 787.02 necessarily involves the employment of 'physical force' as that term is defined by federal law."). And as part of this step, we have to analyze "the version of state law that the defendant was actually convicted of violating." McNeill v. United States, 563 U.S. 816, 821, 131 S.Ct. 2218, 2222, 180 L.Ed.2d 35 (2011).

Second, after identifying the least culpable conduct, we then have to figure out whether "those acts are encompassed by the generic federal offense." Moncrieffe, 133 S.Ct. at 1684 (alteration adopted). In the elements clause context, this means we examine whether the least culpable conduct involved the use, attempted use, or threatened use of violent force or a substantial degree of force. If it didn't, then under the formal categorical approach, the defendant's earlier conviction is not a violent felony.

II.

These recent Supreme Court cases tell us that a § 812.13 unarmed robbery conviction sustained while McCloud was controlling Florida law does not fall within the ACCA's elements clause. First, heeding the Supreme Court's instruction that we should "turn[ ] to the version" of § 812.13 that a defendant was "actually convicted of violating," McNeill, 563 U.S. at 821, 131 S.Ct. at 2222, we must look to what the Florida state courts said about the conduct that could support a robbery conviction under § 812.13 at the time the defendant was convicted. More to the point, we must look to how Florida courts defined the least culpable conduct—in this case, the smallest degree of force—sufficient to support a § 812.13 robbery conviction at that time.

Section 812.13 defines robbery as the taking of money or property with intent to deprive when "in the course of the taking there is the use of force, violence, assault, or putting in fear." From 1976 to 1997, the controlling precedent from the Florida Supreme Court held that "[a]ny degree of force suffices to convert larceny into a robbery." McCloud, 335 So.2d at 258 (emphasis added). So during that time period, Florida law was clear that conduct involving "any degree of force," like sudden snatching, was enough to justify a robbery conviction.

*4 In keeping with the deference federal courts owe states' interpretations of their own criminal statutes, this Court has recognized and accepted Florida's view of what it took to sustain a conviction under the Florida robbery statute when McCloud was the controlling precedent. In United States v. Welch, 683 F.3d 1304 (11th Cir. 2012), this Court used the formal categorical approach to determine that sudden snatching was the least culpable conduct that could support a 1996 Florida robbery conviction. Id. at 1311–12. This decision was necessary to Welch's holding that the 1996 Florida robbery conviction was categorically a violent felony under the residual clause. Id. at 1313–14. Our precedent therefore binds us to Welch's conclusion that sudden snatching was the least culpable conduct covered by § 812.13 when McCloud was the controlling Florida case defining that statute.

Having identified the least culpable conduct, we are next required to decide whether this conduct necessarily involves the use, attempted use, or threatened use of violent force or a substantial degree of force. It doesn't. Sudden snatching with "any degree of force," McCloud, 335 So.2d at 258, plainly does not require the use of "a substantial degree of force." Owens, 672 F.3d at 971. Neither does it necessarily entail "violent force—that is, force capable of causing physical pain or injury to another person." Curtis Johnson, 559 U.S. at 140, 130 S.Ct. at 1271. This means a conviction for Florida unarmed robbery during the time McCloud was controlling should not count as a violent felony within the meaning of the elements clause.

III.

In reaching its (erroneous) conclusion that a 1989 armed robbery conviction under § 812.13 falls within the elements clause under the formal categorical approach, the Fritts panel sidestepped McCloud's "any degree of force" holding by looking instead to our own court's previous decision in United States v. Lockley, 632 F.3d 1238 (11th Cir. 2011). See Fritts, 841 F.3d at 940–42. And when it did, that panel stretched Lockley well past its limits.

Lockley held that a 2001 Florida attempted robbery conviction under § 812.13(1) categorically counts as a "crime of violence" within the meaning of the identically-worded elements clause of the Sentencing Guidelines. See 632 F.3d at 1240–41, 1244–45. But Lockley looked to Florida law as it existed in 2001, when Mr. Lockley was convicted, and not as it existed in 1989, when Mr. Fritts was convicted. Id. at 1240 n.1, 1242. Again, the year of conviction matters because the least culpable conduct sufficient to support a robbery conviction under Fla. Stat. § 812.13 changed in 1997. As I've set out above, the controlling Florida Supreme Court case from 1976 to 1997 (McCloud) held that conduct involving "any degree of force," was enough for a robbery conviction. 335 So.2d at 258. However, in 1997 the Florida Supreme Court shifted course and held that robbery requires the perpetrator to use "more than the force necessary to remove the property from the person"—that is, "physical force" that "overcome[s]" the "resistance [of] the victim." Robinson, 692 So.2d at 886.

A Florida robbery conviction could no longer be supported by "any degree of force" after the Florida Supreme Court decided Robinson in 1997. For that reason, the Lockley court correctly identified "[p]utting in fear"—and not sudden snatching—as the least culpable conduct in its categorical analysis of Mr. Lockley's 2001 attempted robbery conviction. 632 F.3d at 1244. But again, the Supreme Court has told us to look at what state courts required for a conviction at the time of that conviction. See McNeill, 563 U.S. at 821, 131 S.Ct. at 2222. And our 2011 federal court ruling doesn't change the fact that before the 1997 Florida Supreme Court ruling in Robinson the least culpable conduct for which someone could be convicted of robbery in Florida was sudden snatching with any degree of force. Lockley looked, as it should have, to a different time, so it did not apply to Mr. Fritts's appeal and has no bearing on any robbery convictions sustained while the Florida Supreme Court's 1976 ruling in McCloud was still good law.

*5 The Fritts panel insisted that Lockley isn't limited to post-Robinson robberies—but instead applies to all Florida robberies—because § 812.13 has never included sudden snatching. Fritts, 841 F.3d at 943. As support, it pointed to language in Robinson suggesting that § 812.13 has always required more than sudden snatching. Id. It also emphasized that when the Florida Supreme Court interprets a Florida statute, "it tells us what that statute always meant." Id. But again, this reasoning ignores what the Supreme Court told us about how to conduct the categorical analysis. [1] See McNeill, 563 U.S. at 821, 131 S.Ct. at 2222 ("The only way to answer this backward-looking question is to consult the law that applied at the time of that conviction."). McCloud was controlling Florida Supreme Court law from 1976 to 1997, and it said "any degree of force" could support a robbery conviction. 335 So.2d at 258. Regardless of how the Florida Supreme Court characterized McCloud in its Robinson decision, there is no erasing the fact that conduct involving minimal force was prosecuted as robbery when McCloud was the controlling precedent. See, e.g., Santiago v. State, 497 So.2d 975, 976 (Fla. 4th DCA 1986) (upholding a robbery conviction because robbery required only "ever so little" force).

1 It's generally true that when a court interprets a statute it tells us what the statute has always meant. But here our interest is not in divining the true meaning of § 812.13. Rather, our interest is in

> understanding what conduct could have resulted in convictions under the statute between 1976 and 1997, even if Florida courts were misinterpreting the statute during that time.

Another problem with Fritts's reliance on Robinson for the proposition that § 812.13 has never included sudden snatching is that it was plainly foreclosed by our own decision in Welch. In looking to the version of § 812.13 under which Mr. Welch was convicted, the Welch panel acknowledged and even discussed Robinson, but it did not adopt Robinson's suggestion that sudden snatching had never been sufficient to support a conviction under § 812.13. Welch, 683 F.3d at 1311–12. Rather, it identified sudden snatching as the least culpable conduct for which a person could be convicted under the statute because Mr. Welch pleaded guilty in 1996—before Robinson was decided. Id. And 1996 was "a time when the controlling Florida Supreme Court authority held that 'any degree of force' would convert larceny into a robbery." Id. at 1311 (quoting McCloud, 335 So.2d at 258–59).

* * *

Fritts was wrong to suggest that all unarmed robbery convictions under Fla. Stat. § 812.13 are violent felonies as defined by ACCA's elements clause because use of "any degree of force" could support a § 812.13 conviction from 1976 to 1997. This mistake will continue to have enormous consequences for many criminal defendants who come before our Court. For that reason, and even though Fritts's mistakes do not affect Mr. Stokeling, I feel compelled to explain the error in Fritts's statement, relied on here by the majority, that § 812.13 "has never included a theft or taking by mere [sudden] snatching." Fritts, 841 F.3d at 942.

All Citations

--- Fed.Appx. ----, 2017 WL 1279086 (Mem)

End of Document

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

15-20815-CR-KING/TORRES

CASE NO._____

18 U.S.C. § 922(g)(1)
18 U.S.C. § 924(e)(1)
18 U.S.C. § 924(d)(1)

UNITED STATES OF AMERICA

vs.

DENARD STOKELING,

Defendant.
_____/

INDICTMENT

The Grand Jury charges that:

On or about August 27, 2015, in Miami-Dade County, in the Southern District of Florida, the defendant,

DENARD STOKELING,

having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1).

FORFEITURE ALLEGATIONS

1. The allegations of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which the defendant, **DENARD STOKELING**, has an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 922(g)(1), as alleged in this Indictment, the defendant, **DENARD STOKELING**, shall forfeit to the United States of America any firearm or ammunition involved in or used in the commission of such violation.

All pursuant to Title 18, United States Code, Section 924(d)(1), and the procedures set forth in Title 21, United States Code, Section 853, as made applicable by Title 28, United States Code, Section 2461(c).

A TRUE BILL

FOREPERSON

WIFREDO A. FERRER
UNITED STATES ATTORNEY

DAYA NATHAN
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA **CASE NO.** _____

v.

DENARD STOKELING,

Defendant.
_____ /

Superseding Case Information:

Court Division: (Select One)

X	Miami	___	Key West		
___	FTL	___	WPB	___	FTP

New Defendant(s) Yes ____ No ___
Number of New Defendants ____
Total number of counts ____

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) No
List language and/or dialect _____

4. This case will take 2-3 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

	(Check only one)		(Check only one)	
I	0 to 5 days	x	Petty	____
II	6 to 10 days	____	Minor	____
III	11 to 20 days	____	Misdem.	____
IV	21 to 60 days	____	Felony	x
V	61 days and over	____		

6. Has this case been previously filed in this District Court? (Yes or No) No
If yes:
Judge: Case No. _____
(Attach copy of dispositive order)
Has a complaint been filed in this matter? (Yes or No) No
If yes:
Magistrate Case No. _____
Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of _____
Defendant(s) in state custody as of August 27, 2015 (released on bond October 5, 2015)
Rule 20 from the District of
Is this a potential death penalty case? (Yes or No) No

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? Yes ____ No x

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? Yes ____ No x

_____
DAYA NATHAN
ASSISTANT UNITED STATES ATTORNEY
FLORIDA BAR NO. 74392

*Penalty Sheet(s) attached

REV 4/8/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: DENARD STOKELING

Case No: _____

Count #: 1

Possession of a Firearm and Ammunition by a Convicted Felon

Title 18, United States Code, Sections 922(g)(1) and 924(e)(1)

***Max. Penalty:** Life Imprisonment

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

A-3

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

DENARD STOKELING

JUDGMENT IN A CRIMINAL CASE

Case Number - 1:15-20815-CR-KING-001

USM Number: 08673-104

Counsel For Defendant: Stewart G. Abrams, AFPD
Counsel For The United States: Daya Nathan, AUSA
Court Reporter: Glenda Powers

The defendant pleaded guilty to Count One of the Indictment.
The defendant is adjudicated guilty of the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 922(g)(1) and 924(e)	Possession of a firearm and ammunition by a convicted felon	August 27, 2015	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
4/28/2016

JAMES LAWRENCE KING
United States District Judge

April 28, 2016

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **SEVENTY-THREE (73) Months to run concurrent with State case no. F15017823.**

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to a State of Florida facility.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **TWO (2) Years.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$100.00		

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DENARD STOKELING
CASE NUMBER: 1:15-20815-CR-KING-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$100.00** due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution,(7) penalties, and (8) costs, including cost of prosecution and court costs.

No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

DECLARATION VERIFYING TIMELY FILING

Petitioner, Denard Stokeling, through undersigned counsel, and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the Petition for Writ of Certiorari filed in the above-styled matter was placed in the U.S. mail in a prepaid first class envelope, addressed to the Clerk of the Supreme Court of the United States, on the 4th day of August, 2017.

MICHAEL CARUSO
Federal Public Defender

Fort Lauderdale, Florida
August 4, 2017

By: _____

Brenda G. Bryn
Assistant Federal Public Defender
One East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1842
Telephone No. (954) 356-7436

No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

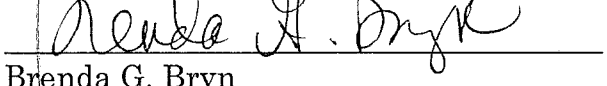
Respondent.

CERTIFICATE OF SERVICE

I certify that on this 4th day of August, 2017, in accordance with SUP. CT. R. 29, eleven copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed *In Forma Pauperis*, (3) Certificate of Service, and (4) Declaration Verifying Timely Filing, were served by U.S. mail upon the 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 4, 2017

By: 

Brenda G. Bryn
Assistant Federal Public Defender
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Fort Lauderdale, Florida 33301-1842
Telephone No. (954) 356-7436

No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Denard Stokeling, pursuant to SUP CT. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed *in forma pauperis*.

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Southern District of Florida was appointed to represent Petitioner pursuant to 18 U.S.C. § 3006A. Therefore, in reliance upon RULE 39.1 and § 3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. § 1746.

MICHAEL CARUSO
Federal Public Defender

Fort Lauderdale, Florida
August 4, 2017

By: _____

Brenda G. Bryn
Assistant Federal Public Defender
One East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1842
Telephone No. (954) 356-7436