No. _____

IN THE
Supreme Court of the United States

MICHAEL A. MAYS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The broad question presented by this case is whether the Eleventh Circuit Court of Appeals erroneously denied Mr. Mays a certificate of appealbility ("COA") on the issue of whether he was sentenced above the statutory maximum for his offense of conviction. More specifically, the narrow question presented is whether reasonable jurists can, at a minimum, debate the issue of whether a Florida conviction for robbery qualifies as a "violent felony" under the elements clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e).

Since this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*), striking down the ACCA's residual clause as unconstitutionally vague, several circuit courts of appeals have issued published decisions on whether various state robbery statutes qualify as "violent felon[ies]" under the ACCA's elements clause. As a result of the differing conclusions these courts have reached, a direct conflict has emerged about the degree of force necessary for a robbery offense to qualify as a "violent felony."

In Florida, a robbery occurs where an individual commits a taking using only the amount of force necessary to overcome a victim's resistance. Thus, if a victim's resistance is minimal, then the force needed to overcome that resistance need only be minimal. Two terms ago, in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), this Court left open the question of whether a Florida conviction for robbery qualifies as a "violent felony" under the ACCA's elements clause. Since then, the issue has placed the Eleventh and Ninth Circuit at odds. *Compare United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), *with United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017). Given the split that has emerged, Mr. Mays submits that at a minimum, he should have been granted a COA on the issue, because reasonable jurists can (and do) debate this issue.

This Court's resolution of the issue presented by this petition would not only resolve the direct conflict between the Ninth and Eleventh Circuits, but would provide much-needed guidance

on how to determine whether a state offense has as an element the use of "physical force," as that term was defined in *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Johnson I*). It is respectfully submitted that this petition presents an ideal vehicle to clarify the requirements for the issuance of COAs, as well as the scope of the ACCA's elements clause.

LIST OF PARTIES

Petitioner, Michael A. Mays, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Michael A. Mays respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Mays' application for a COA in Appeal No. 17-11861 is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Mays' case under 18 U.S.C. § 3231. The district court denied Mr. Mays' 28 U.S.C. § 2255 motion on January 26, 2017. Mr. Mays subsequently filed a notice of appeal and application for a COA in the Eleventh Circuit, which was denied on August 9, 2017. *See* Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case involves the application of the ACCA, 18 U.S.C. § 924(e). The ACCA's enhanced sentencing provision provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]

18 U.S.C. § 924(e)(1).

In relevant part, the ACCA defines a "violent felony" as:

> [A]ny 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; or

> **(ii)** is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

18 U.S.C. § 924(e)(2)(B).

The Antiterrorism and Effective Death Penalty Act of 1996 provides, in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253(c).

The Florida robbery statute in effect at the time of Mr. Mays' conviction provides, in relevant part:

> "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 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.

Fla. Stat. § 812.13(1) (1994).

STATEMENT OF THE CASE

Mr. Mays pled guilty to, among other counts, possession of a firearm by a convicted felon (count two), and on February 17, 2012, he was sentenced on that count to 188 months' imprisonment under the Armed Career Criminal Act (ACCA).[1] At the time of sentencing, Mr. Mays had three Florida convictions that qualified as ACCA predicate offenses—two convictions for sale or delivery of cocaine and a 1994 conviction for robbery. Mr. Mays did not file a direct appeal.

On January 14, 2016, Mr. Mays moved to vacate his sentence under 28 U.S.C. § 2255, arguing that his ACCA sentence was unconstitutional after *Johnson II*. Because Mr. Mays' right to relief turns on whether his Florida conviction for robbery qualifies as a "violent felony" under the ACCA's elements clause, the district court granted the government's unopposed motion to stay Mr. Mays' § 2255 proceedings pending the Eleventh Circuit's decision in *United States v. Fritts*, appeal number 15-15699. On November 8, 2016, the Eleventh Circuit issued its decision in *Fritts*, holding that a Florida conviction for armed robbery categorically qualifies as a "violent felony." 841 F.3d 937 (11th Cir. 2016).

In light of *Fritts*, the government filed an unopposed motion to lift the stay, which the district court granted. Mr. Mays, in turn, filed an unopposed motion to adopt the arguments set forth in the appellant's briefs in *Fritts*, maintaining for the purpose of further appellate review that *Fritts* was wrongly decided, and that his robbery offense does not qualify as a "violent felony." He therefore requested a COA on the issue of whether he was unconstitutionally sentenced above

[1] Mr. Mays also pled guilty to two counts of possession of cocaine base with the intent to distribute, and sentenced to 188 months' imprisonment on those counts. All of Mr. Mays' sentences were ordered to run concurrently.

the statutory maximum in light of *Johnson II*. The district court allowed Mr. Mays to adopt the arguments set forth in *Fritts*, but denied the § 2255 motion based on *Fritts*, and denied a COA. Mr. Mays filed a timely notice of appeal.[2]

On May 25, 2017, Mr. Mays filed an application for a COA with the Eleventh Circuit, requesting a COA on the issue of whether he was erroneously sentenced above the statutory maximum for his conviction. In his application, he recognized that the Eleventh Circuit's binding precedent precluded a finding that his robbery conviction was not a "violent felony," but maintained that the court's precedent was incorrect and reasonable jurists could still debate the issue. Mr. Mays also noted that since *Fritts* was rendered, both circuit and district judges in the Eleventh Circuit had granted COAs on the issue. Regarding the merits of the issue, Mr. Mays explained, among other things, that under Florida law, a robbery committed "by force" requires minimal force and therefore cannot qualify as a "violent felony" under the ACCA's elements clause.

On July 12, 2017, the Eleventh Circuit denied Mr. Mays' application for a COA in a two-sentence order. The Court stated, "Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Appellant's motion for leave to proceed *in forma pauperis* is DENIED AS MOOT."

[2] The district court granted Mr. Mays an extension of time to file his notice of appeal.

REASONS FOR GRANTING THE WRIT

The Ninth and Eleventh Circuits' Conflict About Whether a Florida Conviction for Robbery Qualifies as a "Violent Felony" under the ACCA's Elements Clause Shows that Reasonable Jurists Can Debate the Issue.

Under Florida's robbery statute, a robbery occurs where a taking is accomplished using enough force to overcome a victim's resistance. *See Robinson v. State*, 692 So. 2d 883 (Fla. 1997). Thus, if a victim's resistance is minimal, the force needed to overcome that resistance is similarly minimal. Indeed, a review of Florida case law clarifies that a defendant may convicted of robbery even if he uses only a *de minimis* amount of force. A conviction may be imposed if a defendant: (1) bumps someone from behind;[3] (2) engages in a tug-of-war over a purse;[4] (3) pushes someone;[5] (4) shakes someone;[6] (5) struggles to escape someone's grasp;[7] (6) peels back

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[3] *Hayes v. State*, 780 So. 2d 918, 919 (Fla. 1st DCA 2001).

[4] *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011).

[5] *Rumph v. State*, 544 So. 2d 1150, 1151 (Fla. 5th DCA 1989).

[6] *Montsdoca v. State*, 93 So. 157, 159–160 (Fla. 1922).

[7] *Colby v. State*, 46 Fla. 112, 114 (Fla. 1903). In *Colby*, the defendant was caught during an attempted pickpocketing. *Id.* The victim grabbed the defendant's arm, and the defendant struggled to escape. *Id.* Under the robbery statute in effect at the time, the Florida Supreme Court held it was not a robbery because the force was used to escape, rather than secure the money. *Id.* However, the Florida Supreme Court has made clear that this conduct would have qualified as a robbery under the current robbery statute, which is at issue in this case. *See Robinson v. State*, 692 So. 2d 883, 887 n.10 (Fla. 1997) ("Although the crime in *Colby* was held to be larceny, it would be robbery under the current version of the robbery statute because the perpetrator used force to escape the victim's grasp."). Indeed, Florida courts have made clear that if a pickpocket "jostles the owner, or if the owner, catching the pickpocket in the act, struggles to keep possession," a robbery has been committed. *Rigell v. State*, 782 So. 2d 440, 441 (Fla. 4th DCA 2001) (quoting W. LaFave, A. Scott, Jr., *Criminal Law* § 8.11(d), at 781 (2d ed. 1986)); *Fine v. State*, 758 So. 2d 1246, 1248 (Fla. 5th DCA 2000).

someone's fingers;[8] or (7) pulls a scab off someone's finger.[9] Indeed, under Florida law, a robbery conviction may be upheld based on "ever so little" force. *Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th DCA 1986).[10]

The Ninth Circuit recently recognized this in *Geozos*, where it held that a Florida conviction for robbery, regardless of whether it is armed or unarmed, fails to qualify as a "violent felony" under the elements clause. 870 F.3d at 898–901.[11] In so holding, the Ninth Circuit relied on Florida caselaw which clarified that an individual may violate Florida's robbery statute without using violent force, such as engaging "in a non-violent tug-of-war" over a purse. *Id.* (citing *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2d DCA 2011)). And while both the Ninth and Eleventh Circuits have recognized the Florida robbery statute requires an individual use enough force to overcome a victim's resistance, the Ninth Circuit, in coming to a decision that it recognized was at "odds" with this Eleventh Circuit's holding in *Fritts*, stated that it believed the

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[8] *Sanders v. State*, 769 So. 2d 506, 507 (Fla. 5th DCA 2000).

[9] *Johnson v. State*, 612 So. 2d 689, 690–91 (Fla. 1st DCA 1993).

[10] In *Santiago*, the defendant reached into a car and pulled two gold necklaces from around the victim's neck, causing a few scratch marks and some redness around her neck. *Santiago*, 497 So. 2d at 976.

[11] The *Geozos* Court correctly stated that whether a robbery was armed or unarmed made no difference because an individual may be convicted of armed robbery for "merely carrying a firearm" during the robbery, even if the firearm is not displayed and the victim is unaware of its presence. 870 F.3d at 898–901; *see State v. Baker*, 452 So. 2d 927, 929 (Fla. 1984); *State v. Burris*, 875 So. 2d 408, 413 (Fla. 2004); *Williams v. State*, 560 So. 2d 311, 314 (Fla. 1st DCA 1990); *see also Parnell v. United States*, 818 F.3d 974, 978–81 (9th Cir. 2016) (holding that a Massachusetts conviction for *armed* robbery, which requires only the possession of a firearm (without using or even displaying it), does not qualify as a "violent felony" under the ACCA's elements clause).

Eleventh Circuit "overlooked the fact that, if resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." *Id.*

Florida is not alone in its use of a resistance-based standard. In fact, most states permit robbery convictions where the degree of force used is sufficient to overcome a victim's resistance. Indeed, at least fifteen states use some variation of this standard in the text of their statutes,[12] and several others have adopted it through case law.[13] Since this Court struck down the ACCA residual clause in *Johnson II*, several circuits have had to reevaluate whether these robbery statutes and others still qualify as "violent felon[ies]" under the ACCA's elements clause.[14] These courts have reached differing conclusions, and as a result, significant tension has arisen regarding the degree of force a state robbery statute must require to categorically satisfy the "physical force" prong of the elements clause. *See Johnson I*, 559 U.S. at 140 (defining "physical force" as "*violent* force . . . force capable of causing physical pain or injury to another person.") (emphasis in original). The Fourth Circuit's decisions in *United States v. Gardner*, 823 F.3d 793 (4th Cir.

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[12] *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).

[13] *See, e.g., Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989); *State v. Stecker*, 108 N.W.2d 47, 50 (S.D. 1961); *State v. Robertson*, 740 A.2d 330, 334 (R.I. 1999); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. 1997); *West v. State*, 539 A.2d 231, 234 (Md. 1988); *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).

[14] *See United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016); *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016); *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016); *United States v. Eason*, 829 F.3d 633 (8th Cir. 2016); *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016); *United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017); *United States v. Doctor*, 843 F.3d 306 (4th Cir. 2016); *United States v. Duncan*, 833 F.3d 751 (7th Cir. 2016); *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015).

2016), and *United States v. Winston*, 850 F.3d 677, 683–86 (4th Cir. 2017), are instructive in this regard.

In *Winston*, the Fourth Circuit held that a Virginia conviction for common law robbery committed by "violence" does not categorically require the use of "physical force." *Id.* Such a robbery is committed where a defendant employs "anything which calls out resistance." *Id.* (quoting *Maxwell v. Commonwealth*, 165 Va. 860 (1936)). Indeed, a conviction may be imposed even if a defendant does not "actual[ly] harm" the victim. *Id.* (quoting *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487 (Va. Ct. App. Dec. 12, 2000)). Rejecting the government's argument that overcoming resistance requires violent "physical force," the Fourth Circuit held that the *de minimis* force required under Virginia law does not rise to the level of violent "physical force." *Id.*

In *Gardner*, the Fourth Circuit held that the offense of common law robbery in North Carolina does not qualify as a "violent felony" under the elements clause because it does not categorically require the use of "physical force." 823 F.3d at 803–04. A North Carolina common law robbery may be committed by force so long as the force is "is sufficient to compel a victim to part with his property." *Id.* (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)). "This definition," the Fourth Circuit stated, "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 then discussed two North Carolina state cases that supported that conclusion. *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)). Based on these 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 therefore the offense does not categorically qualify as a "violent felony" under the elements clause. *Id.*

Like the Virginia offense described in *Winston* and the North Carolina offense addressed in *Gardner*, a Florida robbery may be committed by force sufficient to overcome a victim's resistance. As the Fourth Circuit recognized, this definition implicitly suggests that so long as a victim's resistance is slight, a defendant need only use *de minimis* force to commit a robbery. And, as explained above, Florida case law confirms this point.

Given the circuit split between the Ninth and Eleventh Circuits, and the tension among the other circuits, reasonable jurists can (and do) debate whether Mr. Mays' conviction for robbery qualifies as a "violent felony" after *Johnson II*. This case presents an ideal vehicle for the Court to resolve the circuit split discussed herein and reinforce what it said in *Johnson I* — that "physical force" requires "a substantial degree of force." 559 U.S. at 140. At a minimum, it requires more than the *de minimis* force required for a robbery conviction under Florida law.

The issue presented by this petition was fully preserved below and is dispositive — if Mr. Mays' prior robbery conviction does not qualify as a "violent felony" under the ACCA's elements clause, then Mr. Mays is ineligible for enhanced sentencing under the ACCA.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11861-E

MICHAEL A. MAYS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Appellant's motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

No. _____

IN THE

Supreme Court of the United States

MICHAEL A. MAYS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

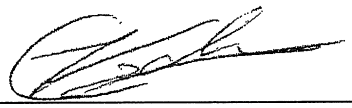
CERTIFICATE OF SERVICE

I CERTIFY, pursuant to Supreme Court Rule 29.5(b), that on November 2, 2017, copies of the Petition for Writ of Certiorari and the Motion for Leave to Proceed *In Forma Pauperis* were mailed in an envelope to the Clerk, United States Supreme Court, One First Street, N.E., Washington, D.C. 20543; and to the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

All parties required to be served have been served.

EXECUTED on November 2, 2017.

Donna Lee Elm
Federal Defender



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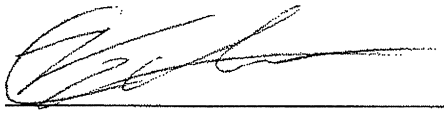
MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner, Michael A. Mays, respectfully requests leave to file the enclosed Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis* in accordance with Supreme Court Rule 39. The filing of this petition is a continuation of the representation of the Petitioner under a Criminal Justice Act (18 U.S.C. § 3006A) appointment of the Office of the Federal Public Defender for the Middle District of Florida, by the United States District Court.

WHEREFORE, Petitioner Michael A. Mays respectfully requests leave to proceed *in forma pauperis*.

Respectfully submitted,

Donna Lee Elm
Federal Defender



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