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## Note

### ***STOKELING v. UNITED STATES: BLURRING THE LINE OF WHAT CONSTITUTES PHYSICAL FORCE UNDER THE ELEMENTS CLAUSE OF THE ARMED CAREER CRIMINAL ACT***

TAYLOR HALLOWELL\*

In *Stokeling v. United States*,<sup>1</sup> the Court addressed whether the elements clause of the Armed Career Criminal Act (“ACCA”) encompasses Florida’s robbery offense, which requires an offender to use force sufficient to overcome the victim’s resistance.<sup>2</sup> Although the Court in *Johnson v. United States (Johnson I)*<sup>3</sup> declined to apply the common law definition of “force” to interpret whether a battery qualifies as a predicate offense under the elements clause of the ACCA,<sup>4</sup> the Court in *Stokeling* relied on the common law definition of force when considering a robbery conviction in the same context.<sup>5</sup> As a result, the Court held that all state robbery statutes requiring a defendant to use force sufficient to overcome the victim’s resistance categorically qualify as “violent felon[ies]” under the ACCA’s elements clause—no matter how minimal that force is.<sup>6</sup> The Court incorrectly decided the case, because the minimal amount of force that can satisfy Florida robbery does not fit the definition of “physical force” set forth by the Court in *Johnson I*.<sup>7</sup> The Court also failed to align its holding with the underlying purpose of the ACCA<sup>8</sup> and misconstrued the statutory history of the ACCA.<sup>9</sup> Lastly, the Court erroneously decided the case on broad grounds that overlooked idiosyncrasies of Florida robbery, such as minimal force being sufficient and merely requiring offenders to carry a firearm for armed robbery.<sup>10</sup> The

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1. 139 S. Ct. 544 (2019).
2. *Id.* at 548.
3. 559 U.S. 133 (2010).
4. *Id.* at 139–40.
5. *Stokeling*, 139 S. Ct. at 551–52.
6. *Id.* at 555.
7. *See infra* Section IV.A.
8. *See infra* Section IV.B.
9. *See infra* Section IV.C.
10. *See infra* Section IV.D.

*Stokeling* decision is at odds with how the Fourth Circuit has historically treated robbery.<sup>11</sup> Maryland robbery, which, like Florida robbery, can be satisfied by minimal force, will now most likely join Florida robbery as a crime of violence under the elements clause of the ACCA.<sup>12</sup>

## I. THE CASE

Petitioner, Denard Stokeling, was an employee at Tongue & Cheek, a restaurant in Miami Beach, Florida.<sup>13</sup> On July 27, 2015, police identified Stokeling as a suspect of a burglary that occurred at the restaurant early that morning.<sup>14</sup> A criminal background check revealed that Stokeling had previous convictions of home invasion, kidnapping, and robbery.<sup>15</sup> When the Miami Beach Police confronted Stokeling, Stokeling confessed to having a gun in his backpack.<sup>16</sup> Police then opened his backpack to discover a nine-millimeter semiautomatic firearm, a magazine, and twelve rounds of ammunition.<sup>17</sup> Stokeling pleaded guilty in federal court to possessing a firearm and ammunition as a convicted felon.<sup>18</sup> The probation office recommended sentencing Stokeling as an armed career criminal under the “elements clause” of the ACCA, which requires an individual who violates Title 18, section 922(g) of the United States Code and has three or more prior convictions for a “violent felony” to be sentenced to at least fifteen years in prison.<sup>19</sup> Stokeling claimed that his 1997 Florida robbery conviction did not qualify as a predicate offense under the elements clause “because Florida robbery does not have ‘as an element the use, attempted use, or threatened use of physical force.’”<sup>20</sup>

The United States District Court for the Southern District of Florida held that Stokeling’s robbery conviction did not qualify as a “violent felony,”

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11. *See infra* Section IV.E.

12. *See infra* Section IV.E.

13. *Stokeling v. United States*, 139 S. Ct. 544, 549 (2019).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*; *see* 18 U.S.C. § 922(g)(1) (2012) (“It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm or ammunition.”).

19. *Stokeling*, 139 S. Ct. at 549; *see* Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i) (defining “violent felony” as “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”).

20. *Stokeling*, 139 S. Ct. at 549 (quoting 18 U.S.C. § 924(e)(2)(B)(i)); *see* FLA. STAT. ANN. § 812.13(1) (West 2016) (defining “robbery” as “the taking of money or other property . . . from the person or custody of another, . . . when in the course of the taking there is the use of force, violence, assault, or putting in fear”).

though the court reached this conclusion by applying the incorrect test.<sup>21</sup> The United States Court of Appeals for the Eleventh Circuit reversed, holding that Florida robbery categorically qualifies as a “violent felony” under the elements clause.<sup>22</sup> The court reasoned “[t]he force element of Florida robbery satisfies the elements clause of the [ACCA]”<sup>23</sup> because Florida robbery requires “resistance by the victim that is overcome by the physical force of the offender.”<sup>24</sup> In his concurring opinion, Judge Martin argued the precedent the majority applied was wrongly decided.<sup>25</sup> The United States Supreme Court granted certiorari to decide “whether the ‘force’ required to commit robbery under Florida law qualifies as ‘physical force’ for purposes of the [ACCA’s] elements clause.”<sup>26</sup>

## II. LEGAL BACKGROUND

Before 1984, convicted felons prosecuted for possessing a firearm under Title 18, section 922(g) of the United States Code were punished with up to ten years of imprisonment.<sup>27</sup> Then, in 1984, Congress passed the ACCA.<sup>28</sup> The ACCA provides sentencing enhancements for individuals who violate section 922(g) and have three previous convictions for a “violent felony.”<sup>29</sup> Thereafter, when an individual is prosecuted for possessing a firearm as a convicted felon, an important determination is whether they have three or more “violent felony” convictions.<sup>30</sup> Section II.A discusses the ACCA as it was originally enacted in 1984.<sup>31</sup> Section II.B describes the amendments that

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21. *Stokeling*, 139 S. Ct. at 549. The Supreme Court has held that courts must apply the “categorical approach” when determining whether a prior conviction qualifies as a violent felony under the ACCA. *Taylor v. United States*, 495 U.S. 575, 600–02 (1990). Instead of following the categorical approach by looking only to the statutory definition of Florida robbery, the district court incorrectly based its decision on the particular facts underlying *Stokeling*’s conviction. *Stokeling*, 139 S. Ct. at 549. The court ruled that *Stokeling*’s attempt at removing the victim’s necklaces as she held onto them did not justify an enhanced prison sentence. *Id.*

22. *United States v. Stokeling*, 684 F. App’x 870, 871 (11th Cir. 2017) (“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).” (quoting *United States v. Fritts*, 841 F.3d 937, 941 (11th Cir. 2016) and citing *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011))), *aff’d*, 139 S. Ct. 544 (2019).

23. *Id.*

24. *Id.* at 872 (quoting *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997)).

25. *Id.* at 876 (Martin, J., concurring) (“*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.”).

26. *Stokeling*, 139 S. Ct. at 550.

27. *Johnson v. United States (Johnson II)*, 135 S. Ct. 2551, 2555 (2015).

28. *Taylor v. United States*, 495 U.S. 575, 581 (1990); *see also* H.R. REP. NO. 98-1073, at 1 (1984) (explaining the purpose of the ACCA).

29. *Stokeling*, 139 S. Ct. at 549.

30. *Id.*

31. *See infra* Section II.A.

Congress made to the ACCA in 1986.<sup>32</sup> Section II.C surveys the key treatment of the ACCA by the Supreme Court.<sup>33</sup> Section II.D explores the relationship between Florida robbery and the elements clause of the ACCA.<sup>34</sup> Section II.E examines the treatment of Florida robbery in the federal circuits.<sup>35</sup> Lastly, Section II.F compares Florida robbery with Maryland robbery.<sup>36</sup>

#### A. *The Original Enactment of the ACCA*

In 1984, Congress passed the ACCA in an effort to “curb armed, habitual (career) criminals.”<sup>37</sup> Some individuals are more likely than others to intentionally cause harm with a firearm. The ACCA is concerned with preventing the danger created when those individuals possess a gun.<sup>38</sup> The ACCA originally prescribed a minimum of fifteen years in jail for individuals who possessed a firearm following three prior convictions “for robbery or burglary.”<sup>39</sup> The House Committee chose to originally target only robbery and burglary because it viewed those crimes as “the most damaging crimes to society.”<sup>40</sup> When Senator Arlen Specter introduced the bill, he noted that “[r]obberies and burglaries occur with far greater frequency than other violent felonies, affect many more people, and cause the greatest losses.”<sup>41</sup> Senator Specter also highlighted that “[a] high percentage of robberies and burglaries are committed by a limited number of repeat offenders.”<sup>42</sup> It is irrefutable that at this point in time, a generic version of robbery qualified as a predicate offense under the ACCA.<sup>43</sup>

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32. *See infra* Section II.B.

33. *See infra* Section II.C.

34. *See infra* Section II.D.

35. *See infra* Section II.E.

36. *See infra* Section II.F.

37. H.R. REP. NO. 98-1073, at 1 (1984).

38. *Begay v. United States*, 553 U.S. 137, 146 (2008) (holding that a felony conviction for driving under the influence of alcohol is not a “violent felony” because it does not “show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger”).

39. *Stokeling v. United States*, 139 S. Ct. 554, 550 (2019) (quoting 18 U.S.C. App. § 1202(a) (Supp. II 1982)); H.R. REP. NO. 99-849, at 6 (1986) (describing changes made to the original language of the ACCA). Robbery was defined as “any crime punishable by a term of imprisonment exceeding one year and consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily harm.” H.R. REP. NO. 99-849, at 7 (highlighting the 1984 definition of robbery that was proposed to be omitted from the ACCA in 1986).

40. H.R. REP. NO. 98-1073, at 3.

41. *Id.*

42. *Id.*

43. H.R. REP. NO. 99-849, at 6–7 (1986).

*B. The 1986 Amendment to the ACCA*

In 1986, Congress amended the ACCA, removing any mention of “robbery” and substituting the language that is still applicable today.<sup>44</sup> The overarching purpose of the 1986 amendment was “to increase the participation of the Federal law enforcement system in efforts to curb armed, habitual drug traffickers and violent criminals.”<sup>45</sup> In other words, Congress sought to improve the armed career criminal concept by expanding the number of predicate offenses.<sup>46</sup>

In order to qualify as a violent felony, a crime must first be “punishable by imprisonment for a term exceeding one year.”<sup>47</sup> The crime must then satisfy at least one of the three clauses created in the 1986 amendment—the elements clause,<sup>48</sup> the enumerated clause,<sup>49</sup> or the residual clause<sup>50</sup>—which describe different qualifications of a violent felony.<sup>51</sup> Under the elements clause,<sup>52</sup> a qualifying crime must have “as an element the use, attempted use, or threatened use of physical force against the person of another.”<sup>53</sup> The enumerated clause lists generic crimes that Congress intended to be violent felonies.<sup>54</sup> These include: burglary, arson, extortion, and crimes involving the use of explosives.<sup>55</sup> Importantly, the 1986 amendment removed the explicit reference to “robbery” found in the original statute, while preserving “burglary” in the enumerated clause.<sup>56</sup> The residual clause provided that a felony that “otherwise involves conduct that presents a serious potential risk of physical injury to another” should be treated as a “violent felony.”<sup>57</sup> For

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44. Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402(a), 100 Stat. 3207 (“Section 924(e)(1) of title 18, United States Code, is amended by striking out ‘for robbery or burglary, or both,’ and inserting in lieu thereof ‘for a violent felony or a serious drug offense, or both.’”); *see also* H.R. REP. NO. 99-849, at 1 (reporting Congress’s reasoning for amending the ACCA).

45. H.R. REP. NO. 99-849, at 1.

46. *Id.* at 3–4.

47. 18 U.S.C. § 924(e)(2)(B) (2012).

48. *Id.* § 924(e)(2)(B)(i) (“has as an element the use, attempted use, or threatened use of physical force against the person of another”).

49. *Id.* § 924(e)(2)(B)(ii) (“is burglary, arson, or extortion, involves use of explosives”).

50. *Id.* (“or otherwise involves conduct that presents a serious potential risk of physical injury to another”).

51. Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402(b), 100 Stat. 3207; *see* Stokeling v. United States, 139 S. Ct. 544, 556 (2019) (Sotomayor, J., dissenting) (“Clause (i) is often called the ‘elements clause’ . . . . The first part of clause (ii) is often called the ‘enumerated clause,’ . . . . The final part of clause (ii) [is] often called the ‘residual clause,’ . . . .”).

52. The elements clause is also sometimes referred to as “the force clause.” *See* United States v. Doctor, 842 F.3d 306, 308 (4th Cir. 2016).

53. 18 U.S.C. § 924(e)(2)(B)(i).

54. *Id.* § 924(e)(2)(B)(ii); Stokeling v. United States, 139 S. Ct. 544, 556 (2019) (Sotomayor, J., dissenting).

55. 18 U.S.C. § 924(e)(2)(B)(ii).

56. H.R. REP. NO. 99-849, at 6–7 (1986); *see infra* note 186 and accompanying text.

57. 18 U.S.C. § 924(e)(2)(B)(ii).

decades, these three clauses encompassed the three ways by which a prior conviction could qualify as a violent felony.<sup>58</sup> Courts often interpreted the residual clause broadly to include a large range of offenses<sup>59</sup> until 2015 when the Supreme Court in *Johnson v. United States (Johnson II)*<sup>60</sup> struck the residual clause down for being unconstitutionally vague.<sup>61</sup>

*C. The Supreme Court's Treatment of the Elements Clause of the ACCA*

The Supreme Court has held that sentencing courts must apply the “categorical approach” to determine whether a prior conviction qualifies as a violent felony under the ACCA.<sup>62</sup> Instead of looking to the particular underlying facts, courts using the categorical approach look “only to the fact of conviction and the statutory definition of the prior offense.”<sup>63</sup> Courts apply this approach when interpreting both the elements clause and the enumerated clause.<sup>64</sup> A fact-finding process for every defendant would be impracticable and unfair, especially when defendants immediately pleaded guilty to prior offenses.<sup>65</sup> While the categorical approach has been challenged in several recent Supreme Court dissents,<sup>66</sup> it is still good law.<sup>67</sup>

In the context of the elements clause, the categorical approach requires courts to assess whether the least culpable conduct covered by the statute for the prior conviction “has as an element the use, attempted use, or threatened use of physical force against the person of another.”<sup>68</sup> According to *Johnson I*, physical force in the context of the ACCA means “*violent* force—that is, force capable of causing physical pain or injury.”<sup>69</sup>

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58. See *Johnson v. United States (Johnson II)*, 135 S. Ct. 2551, 2563 (2015) (holding “that imposing an increased sentence under the residual clause . . . violates the Constitution’s guarantee of due process”).

59. *Id.* at 2556–57.

60. *Id.* at 2563.

61. *Id.*

62. *Taylor v. United States*, 495 U.S. 575, 600–02 (1990).

63. *Id.* at 602.

64. *Id.* at 600–01.

65. *Id.* at 601–02.

66. See, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204, 1252 (2018) (Thomas, J., dissenting) (asserting that the Court should abandon the categorical approach); *Mathis v. United States*, 136 S. Ct. 2243, 2269–70 (2016) (Alito, J., dissenting) (arguing that if “it is perfectly clear” from the record that a crime occurred, then the conviction should be counted); *Descamps v. United States*, 133 S. Ct. 2276, 2295 (2013) (Alito, J., dissenting) (“When it is clear that a defendant necessarily admitted or the jury necessarily found that the defendant committed the elements of generic burglary, the conviction should qualify.”).

67. *Stokeling v. United States*, 139 S. Ct. 544, 549 (2019).

68. Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i) (2012); *Johnson v. United States (Johnson I)*, 559 U.S. 133, 137 (2010).

69. *Johnson I*, 559 U.S. at 140.

In *Johnson I*, the Supreme Court considered whether Florida battery categorically qualified as a crime of violence under the elements clause.<sup>70</sup> The Court explicitly rejected the common law definition of “force” in the context of battery, which required only minimal contact.<sup>71</sup> The Court recognized the general rule that common law terms, such as battery, should be interpreted with their common law meaning<sup>72</sup> as long as the common law definition makes sense in context.<sup>73</sup> However, when common law definitions do not fit, “context determines meaning.”<sup>74</sup> The Court ultimately ruled that, in the context of a “violent felony,” the common law definition of battery is a “comical misfit.”<sup>75</sup> At common law, battery could be “satisfied by even the slightest offensive touching.”<sup>76</sup> The slightest touch does not rise to the level of force required for a crime of violence.<sup>77</sup> Therefore, “force” under the elements clause should be understood as violent force, rather than battery’s common law definition of force.<sup>78</sup> Battery is not a violent felony under the ACCA.<sup>79</sup>

While “physical force” means “violent force” in the context of violent felonies,<sup>80</sup> the Supreme Court has held that “physical force” can take on its common law definition in other statutory provisions, like domestic violence.<sup>81</sup> In *United States v. Castleman*,<sup>82</sup> Castleman pleaded guilty to injuring “the mother of his child,” in violation of the Tennessee statute.<sup>83</sup> Castleman argued that his conviction should not be interpreted as a “misdemeanor crime of domestic violence” because the statute did not meet the requisite physical force required by the ACCA.<sup>84</sup> The Court rejected Castleman’s argument, distinguishing the ACCA from domestic violence statutes and holding that the degree of force that satisfies common law battery qualifies as physical force in the context of domestic violence.<sup>85</sup> As a result,

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70. *Id.* at 138.

71. *Id.* at 139–40 (“The common law held [battery’s] element of ‘force’ to be satisfied by even the slightest offensive touching.”).

72. *Id.* at 139 (citing *United States v. Turley*, 352 U.S. 407, 411 (1957)).

73. *Id.* (citing *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

74. *Id.*

75. *Id.* at 145.

76. *Id.* at 139–40.

77. *Id.*

78. *Id.*

79. *Id.* at 145.

80. *Id.* at 139–49.

81. *United States v. Castleman*, 572 U.S. 157, 162–63 (2014) (holding that “force” takes on its common law meaning of “offensive touching” in the context of “a misdemeanor crime of domestic violence”).

82. 572 U.S. 157 (2014).

83. *Id.* at 161 (citing TENN. CODE ANN. § 39-13-111(b) (Supp. 2002). App. 27).

84. *Id.* (quoting 18 U.S.C. § 921(a)(33)(A)(ii) (2012)).

85. *Id.* at 167–68.



Castleman's conviction qualified as a misdemeanor crime of domestic violence.<sup>86</sup>

The Court reasoned that Congress likely "meant to incorporate the misdemeanor-specific meaning of 'force' in defining a 'misdemeanor crime of domestic violence.'"<sup>87</sup> The Court distinguished domestic violence from a violent felony by noting that domestic violence is "a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context."<sup>88</sup> The Court in *Castleman* further supported its conclusion by stating that "a contrary reading would have rendered [section] 922(g)(9) inoperative in many States at the time of its enactment."<sup>89</sup> If the Court had not interpreted offensive touch to constitute physical force under section 922(g)(9), the statute would not have been applicable in California and at least nine other states.<sup>90</sup> States with domestic abuse statutes that prohibit only the causation of bodily injury would remain unaffected.<sup>91</sup> However, some states prohibit both offensive bodily contact and the causation of bodily injury.<sup>92</sup> Section 922(g)(9) would become inoperative in these states if offensive touching did not satisfy the statute's physical force requirement.<sup>93</sup>

The Court took a similar approach in *Voisine v. United States*,<sup>94</sup> denying an interpretation of section 922(g)(9) that would render it inoperative in thirty-five jurisdictions.<sup>95</sup> In *Voisine*, Voisine pleaded guilty to violating Maine's domestic abuse statute, which prohibits causing offensive bodily contact or bodily injury with the mental state of purpose, knowledge, or recklessness.<sup>96</sup> Voisine argued that he should not be subject to section 922(g)(9)'s prohibition of firearms for people convicted of domestic violence, since Maine's statute can be satisfied by recklessness.<sup>97</sup> The Court rejected his argument, holding that reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" in part because so many state laws include recklessness.<sup>98</sup> Two thirds of states punish domestic assault the

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86. *Id.*

87. *Id.* at 164.

88. *Id.* at 165 (defining acts of domestic violence to include "[h]itting, slapping, shoving, grabbing, pinching, biting, [and] hair pulling" (alterations in original) (quoting DOJ, OFFICE ON VIOLENCE AGAINST WOMEN, DOMESTIC VIOLENCE, <http://www.ovw.usdoj.gov/domviolence.htm>)).

89. *Id.* at 167.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. 136 S. Ct. 2272 (2016).

95. *Id.* at 2280.

96. *Id.* at 2277.

97. *Id.*

98. *Id.* at 2280

same regardless of whether it is committed with the *mens rea* of recklessness, knowledge, or intent.<sup>99</sup>

When determining whether a crime qualifies as a predicate offense for the ACCA, the Supreme Court also considers whether offenders of the crime would be more dangerous with a gun.<sup>100</sup> In *Begay v. United States*,<sup>101</sup> the Court held that driving under the influence is not a violent felony under the ACCA because individuals who drive under the influence are not necessarily more likely to commit intentionally violent crimes.<sup>102</sup> Driving under the influence—despite being objectively dangerous—does not make an individual more dangerous with a gun.<sup>103</sup>

#### D. *The Requirements of Florida Robbery*

When determining if a state crime qualifies as a “violent felony” under the ACCA, “federal courts look to, and are constrained by, state courts’ interpretations of state law.”<sup>104</sup> Florida law defines robbery as “the taking of money or other property . . . from the person or custody of another, . . . when in the course of the taking there is the use of force, violence, assault, or putting in fear.”<sup>105</sup> In *Robinson v. State*,<sup>106</sup> the Florida Supreme Court interpreted the “use of force” to mean “force sufficient to overcome a victim’s resistance.”<sup>107</sup> However, “[t]he degree of force used is immaterial,” and can be minimal.<sup>108</sup> Federal courts are constrained by the Florida Supreme Court’s interpretation that the elements of robbery can be satisfied where an offender uses only minimal force.<sup>109</sup>

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99. *Id.* at 2278.

100. *Begay v. United States*, 553 U.S. 137, 146 (2008).

101. 553 U.S. 137 (2008).

102. *Id.* at 147–48. The *Begay* Court considered whether a conviction for driving under the influence qualified as a violent felony under the now struck-down residual clause. *Id.* at 140, 144.

103. *Id.* at 146.

104. *United States v. Stokeling*, 139 S. Ct. 544, 556 (2019) (Sotomayor, J., dissenting) (citing *Johnson v. United States* (Johnson I), 559 U.S. 133, 138 (2010)).

105. FLA. STAT. ANN. § 812.13(1) (West 2016).

106. 692 So. 2d 883 (Fla. 1997).

107. *Id.* at 887.

108. *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922); *see also* *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976) (“Any degree of force suffices to convert larceny into a robbery.”). *But see* *United States v. Stokeling*, 684 F. App’x 870, 872 (11th Cir. 2017) (Martin, J., concurring) (suggesting that *Robinson* “abrogated” *McCloud*’s “any degree of force” holding).

109. *See* *Johnson v. United States* (Johnson I), 559 U.S. 133, 138 (2010).

*E. Federal Circuit Courts' Treatment of Florida Robbery Convictions Under the ACCA*

Federal circuit courts have disagreed about whether Florida robbery qualifies as a “violent felony” under the elements clause of the ACCA.<sup>110</sup> The Eleventh Circuit has held that “Florida robbery is ‘undeniably . . . a violent felony’” under the elements clause of the ACCA both before *Robinson*<sup>111</sup> and after.<sup>112</sup> On the other hand, the Ninth Circuit has been critical of the Eleventh Circuit’s treatment of Florida robbery as a “violent felony,” suggesting that the Eleventh Circuit has focused too much on “the use of force sufficient to overcome the victim’s resistance,” while overlooking that the force can be minimal.<sup>113</sup> In *United States v. Geozos*,<sup>114</sup> the Ninth Circuit held that robbery under Florida law is *not* a “violent felony” because the statute “proscribes the taking of property even when the force used to take that property is minimal.”<sup>115</sup> The court reasoned that the Florida robbery statute therefore does not require the force used to be violent.<sup>116</sup> The Eleventh and Ninth Circuits are the only Circuit Courts to publish decisions directly addressing whether Florida robbery is a violent felony under the ACCA and they are split on their interpretation.<sup>117</sup>

*F. The Relationship Between Florida Robbery and Maryland Robbery*

Florida robbery and Maryland robbery share two significant similarities: 1) both require force sufficient to overcome resistance of the victim,<sup>118</sup> and

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110. Compare *United States v. Lee*, 886 F.3d 1161, 1164–65 (11th Cir. 2018) (citing *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006)) (holding that Florida robbery *is* categorically a violent felony), with *United States v. Geozos*, 870 F.3d 890, 901 (9th Cir. 2017) (holding that Florida robbery *is not* categorically a violent felony).

111. *Lee*, 886 F.3d at 1164 (quoting *Dowd*, 451 F.3d at 1255).

112. *Id.* (citing *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011)).

113. *Geozos*, 870 F.3d at 901 (“[W]e think that the Eleventh Circuit, in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, has overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily *violent* force.”).

114. 870 F.3d 890 (9th Cir. 2017).

115. *Id.* at 901.

116. *Id.*

117. While the United States Court of Appeals for the Fourth Circuit has held that Florida robbery qualifies as a crime of violence for purposes of the ACCA, *United States v. Orr*, 685 F. App’x 263, 267 (4th Cir. 2017), the opinion is unpublished and has since been criticized by the Fourth Circuit itself. *United States v. Dinkins*, 928 F.3d 349, 356 n.5 (4th Cir. 2019) (“To the extent that our unpublished decision in [*Orr*] suggests that there is a distinction between North Carolina common law robbery and Florida robbery, that decision did not have the benefit of the Supreme Court’s analysis in *Stokeling*. Further, as an unpublished decision, *Orr* is not binding precedent.”).

118. See *Robinson v. State*, 692 So. 2d 883, 887 (Fla. 1997); *Cooper v. State*, 9 Md. App. 478, 480, 265 A.2d 569, 571 (1970).

2) both may be satisfied by minimal force.<sup>119</sup> Under Maryland common law, robbery is “the felonious taking and carrying away of the personal property of another from his person by the use of violence or by putting in fear.”<sup>120</sup> In Maryland, robbery maintains its common law definition<sup>121</sup> with two exceptions: 1) “robbery includes obtaining the service of another by force or threat of force;”<sup>122</sup> and 2) “robbery requires proof of intent to withhold property of another.”<sup>123</sup>

The Court of Special Appeals of Maryland issued two decisions in 1970 holding that the “fear” element of robbery may be satisfied by “fear . . . of injury to the person *or to property*, as for example, a threat to burn down a house.”<sup>124</sup> While these rulings have never been overturned, the United States Court of Appeals for the Fourth Circuit has considered the discussion of the “fear” element to be mere dicta, since neither case was decided based on fear of injury to property.<sup>125</sup>

The degree of force required to constitute “violence” for Maryland robbery is functionally equivalent to the degree of force necessary for Florida robbery.<sup>126</sup> In Maryland—like in Florida—robbery requires force sufficient to overcome resistance of the victim.<sup>127</sup> However—as in Florida—the force used may be minimal.<sup>128</sup> The Maryland Court of Appeals has held that “the degree of force used . . . [is] immaterial ‘so long as it is sufficient to compel the victim to part with his property.’”<sup>129</sup> Similarly, the Court of Appeals has stated that “[i]f . . . the use of force enables the accused to retain possession of the property in the face of immediate resistance from the victim, then the taking is properly considered a robbery.”<sup>130</sup> On the other hand, sudden

119. See *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976); *Cooper*, 9 Md. App. at 480, 265 A.2d at 571.

120. *Williams v. State*, 302 Md. 787, 792, 490 A.2d 1277, 1280 (1985).

121. MD. CODE ANN., CRIM. LAW § 3-401(e) (2012).

122. *Id.* § 3-401(e)(1).

123. *Id.* § 3-401(e)(2).

124. *Giles v. State*, 8 Md. App. 721, 723, 262 A.2d 806, 807 (1970) (emphasis added); *Douglas v. State*, 9 Md. App. 647, 654, 267 A.2d 291, 295 (1970) (“That the fear be of *great bodily harm* is not a requisite. *Nor need the fear be of bodily injury at all.*” (emphasis added)).

125. *United States v. Bell*, 901 F.3d 455, 471 (4th Cir. 2018) (“[T]he dicta on which Bell relies have apparently never been repeated by any Maryland court in the nearly five decades since *Douglas* and *Giles* were decided.”).

126. See *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976) (holding that “[a]ny degree of force suffices to convert larceny into a robbery” in Florida); *Cooper v. State*, 9 Md. App. 478, 480, 265 A.2d 569, 571 (1970) (holding that, for Maryland robbery, “the degree of force used is immaterial . . .”).

127. *Cooper*, 9 Md. App. at 480, 265 A.2d at 571 (“[S]ufficient force must be used to overcome resistance and the mere force that is required to take possession, when there is no resistance, is not enough.”).

128. *Id.*

129. *West v. State*, 312 Md. 197, 205, 539 A.2d 231, 234 (1988) (quoting *Cooper*, 9 Md. App. at 480, 265 A.2d at 569).

130. *Ball v. State*, 347 Md. 156, 188, 699 A.2d 1170, 1185 (Md. 1997).

snatching does not amount to robbery in Maryland.<sup>131</sup> Therefore, Maryland robbery and Florida robbery require equivalent degrees of force.

### III. THE COURT'S REASONING

In 2019 the Supreme Court had the opportunity to directly address “whether the ‘force’ required to commit robbery under Florida law qualifies as ‘physical force’ for purposes of the elements clause” in *Stokeling v. United States*.<sup>132</sup> Writing for the majority, Justice Thomas determined that the level of “force” necessary for Florida robbery—force sufficient to overcome the resistance of the victim—equates to the use of “physical force” under the elements clause of the ACCA.<sup>133</sup> Therefore, Florida robbery, along with all other state robbery statutes requiring the offender to overcome the victim’s resistance, categorically qualifies as a “violent felony” under the ACCA.<sup>134</sup>

The Court first drew parallels between the common law definition of robbery, the Florida robbery statute, and the language of the ACCA.<sup>135</sup> Specifically, the Court asserted that the definition of robbery in the original 1984 ACCA was “a clear reference” to common law robbery because both required “force or violence.”<sup>136</sup> The Court then reasoned that since robbery had its common law meaning in the 1984 ACCA, then the mention of “force” in the elements clause of the amended ACCA must retain the common law definition of “force.”<sup>137</sup> Subsequently, the Court stated that Florida robbery must qualify under the elements clause because Florida robbery requires the same degree of “force” as what was necessary to commit robbery at common law.<sup>138</sup>

The Court then discussed how its understanding of “physical force” comports with precedent.<sup>139</sup> In *Johnson I*, the Court held that “‘physical force’ means *violent* force—that is, force capable of causing physical pain or injury.”<sup>140</sup> The Court reasoned that, though battery did not amount to “physical force,” robbery is distinguishable.<sup>141</sup> The Court argued that “the force

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131. *See West*, 312 Md. at 206, 539 A.2d at 235 (“As in *Cooper*, the victim here was never placed in fear; she did not resist; she was not injured.”).

132. 139 S. Ct. 544, 550 (2019).

133. *Id.* at 555.

134. *Id.*

135. *Id.* at 550–52.

136. *Id.* at 551.

137. *Id.* at 551–52 (“By replacing robbery as an enumerated offense with a clause that has ‘force’ as its touchstone, Congress made clear that ‘force’ retained the same common-law definition that undergirded the original definition of robbery adopted a mere two years earlier.”).

138. *Id.* at 555.

139. *Id.* at 552–53.

140. *Johnson v. United States (Johnson I)*, 559 U.S. 133, 140 (2010).

141. *Stokeling*, 139 S. Ct. at 553.

necessary to overcome a victim's physical resistance is inherently "violent," while the "slightest offensive touching" is not.<sup>142</sup>

Finally, the Court described the consequences of ruling for Stokeling.<sup>143</sup> The Court highlighted that "many States' robbery statutes would not qualify as ACCA predicates under Stokeling's reading."<sup>144</sup> The Court also rejected Stokeling's proposed definition for "physical force"—force "reasonably expected to cause pain or injury"<sup>145</sup>—because it would be difficult for lower courts to assess whether a crime is categorically expected to cause bodily injury.<sup>146</sup>

In her dissent joined by Chief Justice Roberts, Justice Ginsberg, and Justice Kagan, Justice Sotomayor criticized the majority for "distort[ing] *Johnson*."<sup>147</sup> Contrary to the majority's holding, Justice Sotomayor found the minimal force that can satisfy Florida robbery<sup>148</sup> does not rise to the level of "violent force" required by *Johnson I*.<sup>149</sup> Justice Sotomayor also argued that the Florida robbery statute is so broad that not all offenders "present the increased risk of gun violence" that the ACCA seeks to target.<sup>150</sup> Additionally, Justice Sotomayor suggested the effects of ruling for Stokeling were not as extreme as the majority insinuated, since neither party offered evidence of how many state robbery statutes are satisfied by minimal force.<sup>151</sup>

#### IV. ANALYSIS

In *Stokeling v. United States*, the Supreme Court held that Florida robbery qualifies as a "violent felony" under the ACCA because the term "physical force" in the elements clause includes the amount of force necessary to overcome a victim's resistance.<sup>152</sup> The Court's holding was ultimately incorrect because it is inconsistent with the Court's previous holding in *Johnson I*.<sup>153</sup> In addition, the Court failed to align its holding with the underlying

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142. *Id.*

143. *Id.* at 554.

144. *Id.* at 552.

145. *Id.* at 554.

146. *Id.* ("We decline to impose yet another indeterminable line-drawing exercise on the lower courts.")

147. *Id.* at 555 (Sotomayor, J., dissenting).

148. *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922) (holding that "[t]he degree of force used is immaterial"); *see also* *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976) ("Any degree of force suffices to convert larceny into a robbery."). *But see* *United States v. Stokeling*, 684 F. App'x 870, 871 (11th Cir. 2017) (Martin, J., concurring) (suggesting that *Robinson* "abrogated" *McCloud*'s "any degree of force" holding).

149. *Stokeling*, 139 S. Ct. at 558 (Sotomayor, J., dissenting); *see also supra* Section II.C.

150. *Id.* at 559 (citing *Begay v. United States*, 553 U.S. 137, 146 (2008)).

151. *Id.* at 563–64.

152. *Id.* at 555.

153. *See infra* Section IV.A.

purpose of the ACCA,<sup>154</sup> and misconstrued the statutory history of the ACCA.<sup>155</sup> Furthermore, the Court erroneously decided the case on broad grounds that overlooked idiosyncrasies of Florida robbery.<sup>156</sup> The decision is at odds with how the Fourth Circuit has treated robbery statutes satisfied by minimal force, and will most likely transform Maryland robbery into being a crime of violence under the elements clause.<sup>157</sup>

A. *The Court's Holding Is Incorrect Because It Is Inconsistent with Johnson I*

The Court improperly reasoned that *Johnson I* is distinguishable from *Stokeling*.<sup>158</sup> In *Johnson I*, the Supreme Court held that “in the context of a statutory definition of ‘violent felony,’ the phrase ‘physical force’ means *violent* force—that is, force capable of causing physical pain or injury to another person.”<sup>159</sup> Rather than looking at the word “capable” in context, the majority turned to dictionary definitions, insisting that the word “does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality.”<sup>160</sup> The *Johnson I* Court, however, could not have meant “capable” as “potentiality,” because the battery statute that the *Johnson I* Court rejected as being a “violent felony” covered actions with the potentiality of causing injury.<sup>161</sup> In her dissent, Justice Sotomayor noted, “As any first-year torts student (or person with a shoulder injury) quickly learns, even a tap on the shoulder is ‘capable of causing physical pain or injury’ in certain cases.”<sup>162</sup> The slightest touch has the potential of causing pain.<sup>163</sup>

Florida robbery does not meet the *Johnson I* Court’s definition of “physical force” because Florida robbery—similar to battery—is satisfied by minimal force.<sup>164</sup> Most notably, the Florida Supreme Court has held that “[a]ny degree of force suffices to convert larceny into a robbery.”<sup>165</sup> For example, a thief who “peel[s] [his victim’s] fingers back in order to get the money” is

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154. See *infra* Section IV.B.

155. See *infra* Section IV.C.

156. See *infra* Section IV.D.

157. See *infra* Section IV.E.

158. *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019) (Sotomayor, J., dissenting).

159. *Johnson v. United States*, 559 U.S. 133, 140 (2010); see also *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003) (holding that the word “force” in the “legal community” must mean force that is “violent in nature—the sort that is intended to cause bodily injury, or at a minimum likely to do so”).

160. *Stokeling*, 139 S. Ct. at 554.

161. *Id.* at 558 (Sotomayor, J., dissenting).

162. *Id.*

163. *Id.*

164. *Id.*

165. *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976); see also *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922) (“The degree of force used is immaterial.”).

a robber in Florida, even though the victim does not “put up greater resistance.”<sup>166</sup> The *Stokeling* majority focused on the fact that Florida robbery requires force sufficient to overcome the resistance of a victim,<sup>167</sup> while overlooking that the force can be minimal.<sup>168</sup> Because Florida robbery can be conducted with minimal force, the least culpable conduct of Florida robbery is outside the scope of the *Johnson I* Court’s definition of physical force.<sup>169</sup>

The practical result of the Court’s holding is that there are now two definitions of “physical force” within a single statutory provision—one definition for battery and another for robbery.<sup>170</sup> The Court in *Johnson I* expressly rejected ascribing the common law definition of “force” to physical force in the context of battery.<sup>171</sup> By construing “physical force” in the context of robbery to have the common law definition of “force,”<sup>172</sup> the Court has created two different meanings for a phrase within a single statutory provision.<sup>173</sup> This “is a radical and unsupportable step” leading to “a brave new world of textual interpretation.”<sup>174</sup> The Court’s reasoning should have been grounded in the precedent set in *Johnson I*, which would have led to Florida robbery not qualifying as a “violent felony” under the ACCA.<sup>175</sup>

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166. *Sanders v. State*, 769 So. 2d 506, 507 (Fla. Dist. Ct. App. 2000); *see also* *Robinson v. State*, 692 So. 2d 883, 887 n.10 (Fla. 1997) (explaining that a theft in Florida would transform into a robbery if a victim were to catch a pickpocket’s arm and the pickpocket then pulled free). *Compare Sanders*, 769 So. 2d at 507, with *Goldsmith v. State*, 573 So. 2d 445, 445 (Fla. Dist. Ct. App. 1991) (holding that snatching money without contacting the victim’s hand is not robbery in Florida).

167. *Stokeling*, 139 S. Ct. at 555; *Robinson v. State*, 692 So. 2d 883, 887 (Fla. 1997) (interpreting the “use of force” in the context of a purse snatching to mean “force sufficient to overcome a victim’s resistance”).

168. *Montsdoca*, 93 So. at 159 (“The degree of force used is immaterial.”); *see also* *McCloud*, 335 So. 2d at 258 (“Any degree of force suffices to convert larceny into a robbery.”). *But see* *United States v. Stokeling*, 684 F. App’x 870, 871 (11th Cir. 2017) (Martin, J., concurring) (suggesting that *Robinson*’s requirement of force sufficient to overcome resistance of the victim repudiated *McCloud*’s “any degree of force” holding).

169. *Stokeling*, 139 S. Ct. at 558 (Sotomayor, J., dissenting).

170. *Id.* at 560.

171. *Johnson v. United States (Johnson I)*, 559 U.S. 133, 139–40 (2010).

172. *Stokeling*, 139 S. Ct. at 555.

173. *Id.* at 560 (Sotomayor, J., dissenting).

174. *Id.* In contrast, holding “physical force” to have two different definitions within two different statutory provisions is not problematic. *United States v. Castleman*, 572 U.S. 157, 162–63 (2014) (holding that “physical force” takes on its common law meaning of “offensive touching” in the context of a “misdemeanor crime of domestic violence”).

175. *Stokeling*, 139 S. Ct. at 555 (Sotomayor, J., dissenting).



*B. The Court Failed to Align Its Holding with the Underlying Purpose of the ACCA*

The nature of Florida robbery does not comport with the underlying purpose of the ACCA.<sup>176</sup> In *Begay v. United States*,<sup>177</sup> the Supreme Court explained the ACCA was designed to target “the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun.”<sup>178</sup> The *Begay* Court then held that a felony conviction for driving under the influence of alcohol is not a violent felony because it does not “show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.”<sup>179</sup> Similarly, the Florida robbery statute is so broad that not all offenders “bear the hallmarks of being the kind of people who are likely to point a gun and pull the trigger.”<sup>180</sup> An individual can be convicted for robbery in Florida by merely “engaging in a tug-of-war over the victim’s purse.”<sup>181</sup> This minimal amount of force does not make an individual more likely to be dangerous with a gun,<sup>182</sup> and misses the statutory purpose of controlling violent crimes committed by violent career criminals.<sup>183</sup> The *Stokeling* decision has made the ACCA too overinclusive. The ACCA can now treat individuals who have only ever used minimal force as violent career criminals. Three counts of robbery with minimal force should not equate to a minimum of fifteen years in prison. The ACCA ought to only be applied in cases where the offender is likely to be violent with a firearm.

*C. The Court Misconstrued the Statutory History of the ACCA*

The statutory history of the ACCA does not suggest a common law definition of “force” in the context of robbery, as the *Stokeling* Court proposed.<sup>184</sup> When Congress amended the ACCA in 1986, it removed a reference to robbery while keeping the word burglary.<sup>185</sup> When Congress deletes a statutory provision while retaining other language, the Court generally has

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176. See H.R. REP. NO. 98-1073, at 1 (1984) (describing Congress’s intended purpose of the ACCA).

177. 553 U.S. 137 (2008).

178. *Id.* at 146; see also *supra* note 38 and accompanying text.

179. *Begay*, 553 U.S. at 146.

180. *Stokeling*, S. Ct. at 559 (Sotomayor, J., dissenting).

181. *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. Dist. Ct. App. 2011) (citing *McCloud v. State*, 335 So. 2d 257, 258–59 (Fla. 1976)).

182. *Stokeling*, 139 S. Ct. at 559 (Sotomayor, J., dissenting).

183. *Taylor v. United States*, 495 U.S. 575, 594 (1990).

184. *Stokeling*, 139 S. Ct. at 562–63 (Sotomayor, J., dissenting).

185. H.R. REP. NO. 99-849, at 6–7 (1986) (describing changes made to the original language of the ACCA).

“no trouble concluding that” Congress does so with purpose.<sup>186</sup> Congress most likely had a purpose for deleting robbery because Congress had the choice to enumerate robbery alongside burglary in the amended ACCA, but chose not to do so.<sup>187</sup> Moreover, since robbery and burglary were the only two crimes enumerated in the original ACCA,<sup>188</sup> “it is inconceivable that Congress simply lost track of robbery.”<sup>189</sup> Perhaps Congress deleted robbery and added the elements clause both as a way to 1) limit robbery convictions to those requiring a threshold degree of force, and 2) expand then number of predicate offenses involving physical force.

The Court argued that Congress’ “stated intent to expand the number of qualifying offenses” supports the notion of reading “force” to include the crime of robbery under the elements clause.<sup>190</sup> The Court, however, overlooked the fact that the amended version of the ACCA would encompass many more predicate crimes even if no robbery statutes were to qualify.<sup>191</sup> The elements clause, the lengthened enumerated clause, and the residual clause all allowed for many more predicate offenses to qualify under the amended ACCA.<sup>192</sup> Moreover, even if Congress had wanted robbery to remain a predicate offense, it is possible that Congress could have intended for it to fall under the now struck-down residual clause.<sup>193</sup> For example, before the Court struck down the residual clause in *Johnson II*, the Court of Appeals for the Eleventh Circuit considered Florida robbery to be a violent felony under the residual clause.<sup>194</sup>

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186. *Dir. of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 324 (2001) (stating that if Congress had deleted a sentence limiting a tax exemption while retaining the sentence granting the exemption, then it would have been clear that Congress intended the exemption to apply to cooperatives without limitation).

187. *See id.* (suggesting that when Congress deletes some statutory language while keeping surrounding language, it has motivation to do so).

188. H.R. REP. NO. 99-849, at 6–7 (describing changes made to the original language of the ACCA).

189. *Stokeling*, 139 S. Ct. at 561–62 (Sotomayor, J., dissenting).

190. *Id.* at 551 (majority opinion).

191. *Id.* at 562 (Sotomayor, J., dissenting).

192. *Id.*

193. *Id.*; *Johnson v. United States (Johnson II)*, 135 S. Ct. 2551, 2563 (2015) (holding “that imposing an increased sentence under the residual clause . . . violates the Constitution’s guarantee of due process”); *see also* *United States v. Welch*, 683 F.3d 1304, 1312 (11th Cir. 2012) (concluding that Florida’s “robbery by sudden snatching” presented “‘a serious risk of physical injury to another’ under the residual clause”). Crimes previously housed under the residual clause now must satisfy the elements clause to be considered violent felonies. *See* Conrad Kahn & Danli Song, *A Touchy Subject: The Eleventh Circuit’s Tug-of-War over What Constitutes Violent “Physical Force,”* 72 U. MIAMI L. REV. 1130, 1135 (2018) (“Without the residual clause, the validity of thousands of ACCA enhancements now depends on whether predicate convictions qualify under the elements clause . . .”).

194. *Welch*, 683 F.3d at 1312.

*D. The Court Erroneously Decided the Case on Broad Grounds That Overlooked Idiosyncrasies of Florida Robbery*

The effects of ruling for Stokeling are not as extreme as the Court suggested.<sup>195</sup> The Court asserted that finding for Stokeling would effectively exclude the majority of state robbery statutes from qualifying as violent felonies because a majority of states define robbery as requiring force that overcomes the resistance of the victim.<sup>196</sup> This reasoning is flawed.<sup>197</sup> Importantly, neither party offered information on how many states allow minimal force to satisfy their requirement of overcoming the victim's resistance.<sup>198</sup> While some states do have robbery laws that may be satisfied by minimal force,<sup>199</sup> other state laws are more like South Carolina's, which requires more than minimal force when overcoming a victim's resistance.<sup>200</sup> Thus, the Court should have framed this case more narrowly, as presenting only the question of "whether a robbery offense that has as an element the use of force sufficient to overcome a victim's resistance—even if that resistance is minimal—necessitates the use of 'physical force' within the meaning of the ACCA."<sup>201</sup> Under *Johnson I*, the answer to that question is a resounding "no."<sup>202</sup> Even if the Court's ruling would disallow many robbery statutes from qualifying as predicate offenses under the ACCA, this alone is not a compelling reason for the Court's decision.<sup>203</sup> The number of possible violent felonies was also decreased when Congress chose not to enumerate robbery<sup>204</sup> and when the Court struck down the residual clause.<sup>205</sup>

195. *Stokeling*, 139 S. Ct. at 563–64 (Sotomayor, J., dissenting).

196. *Id.* at 552 (majority opinion).

197. *Id.* at 563 (Sotomayor, J., dissenting).

198. *Id.*

199. *See, e.g.,* *United States v. Gardner*, 823 F.3d 793, 803–04 (4th Cir. 2016) (holding that "North Carolina common law robbery does not categorically match the force clause of the ACCA" because it requires only "minimal contact"); *United States v. Lattanzio*, 232 F. Supp. 3d 220, 229 (D. Mass. 2017) (holding that Massachusetts robbery is not a violent felony under the ACCA because Massachusetts robbery can be satisfied by minimal force); *United States v. Dunlap*, 162 F. Supp. 3d 1106, 1114–15 (D. Or. 2016) (holding that Oregon robbery does not qualify as a predicate offense under the ACCA because Oregon robbery "requires only minimal force").

200. *United States v. Doctor*, 842 F.3d 306, 312 (4th Cir. 2016) (holding that South Carolina robbery meets the physical force threshold because "there is no indication that South Carolina robbery by violence can be committed with minimal actual force"); *see also* *United States v. Harris*, 844 F.3d 1260, 1267–68 (10th Cir. 2017) (holding that Colorado robbery is categorically a crime of violence under the ACCA because "robbery in Colorado requires a *violent* taking").

201. *Stokeling v. United States*, 139 S. Ct. 544, 563 n.3 (2019) (Sotomayor, J., dissenting) (emphasis added).

202. *Id.* at 555. Minimal force is not necessarily "violent force." *See* *Johnson v. United States* (*Johnson I*), 559 U.S. 133, 140 (2010) (defining "physical force" as "*violent* force—that is, force capable of causing physical pain or injury").

203. *Stokeling*, 139 S. Ct. at 563 (Sotomayor, J., dissenting).

204. *See supra* Section II.B; *see also supra* text accompanying note 169.

205. *See supra* note 193 and accompanying text.

The Court also feared that ruling for *Stokeling* would exclude many armed robbery statutes.<sup>206</sup> Admittedly, holding that basic Florida robbery does not qualify under the ACCA would also exclude Florida armed robbery<sup>207</sup> from qualifying under the ACCA.<sup>208</sup> However, “there is scant reason to believe” that many other state armed robbery statutes would be affected, because Florida armed robbery “stems from the idiosyncrasy” of merely requiring offenders to carry a firearm, without necessarily displaying it.<sup>209</sup>

The Court’s broad inclusion of all robbery statutes that require offenders to overcome resistance of the victim will have the effect of enhancing prison sentences for individuals who have only ever used minimal force.<sup>210</sup> Classifying individuals who use only minimal force as violent felons misses the purpose of the ACCA, which is to “incarcerat[e] dangerous career criminals.”<sup>211</sup>

#### *E. Impact of the Stokeling Decision on Maryland Law*

Maryland may be among the states affected by the *Stokeling* decision. Since the Court in *Stokeling* held that all state robbery statutes requiring a defendant to use force sufficient to overcome the victim’s resistance categorically qualify as violent felonies under the ACCA’s elements clause,<sup>212</sup> Maryland robbery is now most likely a violent felony. The one caveat is that *Giles v. State*<sup>213</sup> and *Douglas v. State*<sup>214</sup>—the two decisions stating that Maryland robbery may be satisfied by fear of harm to property—are still good law.<sup>215</sup> Even though the Maryland Court of Appeals has criticized the rulings as dicta that have never again been relied upon,<sup>216</sup> it is possible that Maryland could rely on these cases in the future to circumvent the *Stokeling* decision.

206. *Stokeling*, 139 S. Ct. at 552 (majority opinion).

207. FLA. STAT. ANN. § 812.13(2)(a) (West 2016).

208. *See Stokeling*, 139 S. Ct. at 552 (“Florida requires the same element of ‘force’ for both armed robbery and basic robbery.”); *State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004) (quoting FLA. STAT. ANN. § 812.13) (implying that Florida has the same “force” requirement for both basic and armed robbery).

209. *Stokeling*, 139 S. Ct. at 564 (Sotomayor, J., dissenting); *see also Burris*, 875 So. 2d at 413.

210. *See Stokeling*, 139 S. Ct. at 558 (Sotomayor, J., dissenting) (“While [Florida robbery] can, of course, be accomplished with more than minimal force, [it] need not be.”). The Court’s holding will perhaps have the largest effect on Florida. Stephen R. Sady, *ACCA Lessons: The Armed Career Criminal Act—What’s Wrong with “Three Strikes, You’re Out”?*, 7 FED. SENT. R. 69, 70 (1994) (noting that from 1991 to 1994, “Florida’s three Districts had the same number of ACCA convictions as forty-five other districts put together”).

211. Sady, *supra* note 210, at 69.

212. *Stokeling*, 139 S. Ct. at 555.

213. 8 Md. App. 721, 723, 261 A.2d 806, 807 (1970).

214. 9 Md. App. 647, 652–53, 267 A.2d 291, 295 (1970).

215. *See supra* notes 124–125 and accompanying text.

216. *United States v. Bell*, 901 F.3d 455, 471 (4th Cir. 2018) (“[T]he dicta on which Bell relies have apparently never been repeated by any Maryland court in the nearly five decades since *Douglas* and *Giles* were decided.”).

The ACCA defines a “violent felony” as a crime that “has as an element the use, attempted use, or threatened use of physical force *against the person of another*.”<sup>217</sup> So, if a Maryland court were to rely on the dicta construing robbery to include threats against property in a precedential opinion, then the “application of force to property” would be “insufficient to trigger an ACCA enhancement.”<sup>218</sup> On the other hand, if Maryland were to either overrule or continue to ignore the *Giles* and *Douglas* dicta, then the *Stokeling* decision would cause Maryland robbery to be a violent felony for the purposes of the ACCA enhancement.

Prior to *Stokeling*, however, Maryland robbery has not generally been considered a violent felony.<sup>219</sup> While the United States Court of Appeals for the Fourth Circuit has never directly ruled on whether Maryland robbery constitutes a violent felony under the elements clause of the ACCA,<sup>220</sup> the court’s treatment of other states’ robbery laws sheds light onto how it would view Maryland robbery. For example, in *United States v. Gardner*,<sup>221</sup> the Fourth Circuit considered whether North Carolina common law robbery qualified as a “violent felony” under the elements clause of the ACCA.<sup>222</sup> Like Maryland robbery, “North Carolina common law robbery . . . requires the taking of property by means of ‘violence’ or ‘fear.’”<sup>223</sup> The Fourth Circuit emphasized that “even *de minimis* contact can constitute the ‘violence’ necessary for a common law robbery conviction under North Carolina law.”<sup>224</sup> The court then turned to *Johnson I*, and held that the minimal force that can satisfy North Carolina robbery does not rise to the level of “violent force” necessary to qualify as a “violent felony” under the elements clause.<sup>225</sup> Thus, the Fourth

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217. 18 U.S.C. § 924(e)(2)(B)(i) (2012) (emphasis added).

218. *United States v. Clarke*, 171 F. Supp. 3d 449, 455 n.7 (D. Md. 2016).

219. *See, e.g.*, *United States v. Taylor*, 272 F. Supp. 3d 127, 143 (D.D.C. 2017).

220. The Fourth Circuit did rule in *United States v. Wilson* that Maryland robbery is a “crime of violence” under the elements clause, 951 F.2d 586, 588 (4th Cir. 1991), but this was before the Supreme Court’s holding in *Moncrieffe v. Holder*, which requires courts to evaluate the minimum conduct to which there is a realistic probability that a state would apply the law, 569 U.S. 184, 191 (2013). The Fourth Circuit in *Wilson* did not look to such minimum conduct. *United States v. Gardner*, 823 F.3d 793, 803 (4th Cir. 2016).

221. 823 F.3d 793 (4th Cir. 2016).

222. *Id.* at 801–04.

223. *Id.* at 801; *see also* *State v. Smith*, 292 S.E.2d 264, 270 (N.C. 1982) (defining North Carolina common law robbery as “the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear”).

224. *Gardner*, 823 F.3d at 803; *see also* *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944) (“Although actual force implies personal violence, the degree of force used is immaterial, so long as it is sufficient to compel the victim to part with his property . . .”).

225. *Gardner*, 823 F.3d at 803–04 (holding that because North Carolina robbery includes acts involving “even minimal contact” with the victim, “the minimum conduct necessary to sustain a conviction . . . does not necessarily include the use, attempted use, or threatened use of ‘force capable of causing physical pain or injury to another person,’ as required by the force clause of the ACCA” (quoting *Johnson v. United States* (*Johnson I*), 559 U.S. 133, 140 (2010))).

Circuit has treated robbery requiring only minimal force—like Maryland robbery—as not qualifying as a “violent felony” under the elements clause of the ACCA. The *Stokeling* decision will therefore affect how robbery is interpreted in the Fourth Circuit, since the Supreme Court’s ruling is in direct contradiction to past Fourth Circuit precedent.

Courts from other circuits have historically asserted that Maryland robbery is not a crime of violence. For instance, in 2017, the United States District Court for the District of Columbia ruled that Maryland robbery is not a violent felony under the elements clause of the ACCA because it does “not require the requisite use of physical force.”<sup>226</sup> The district court has also stated that Maryland robbery does not qualify as a predicate offense because the minimal amount of “force required to overcome resistance and support a conviction for Maryland [r]obbery does not necessarily rise to the level of violent force capable of causing physical injury.”<sup>227</sup> In addition, the United States District Court for the Middle District of Pennsylvania has held that “Maryland robbery . . . does not qualify as a predicate offense under the ACCA.”<sup>228</sup> The *Stokeling* decision, however, will most likely cause Maryland robbery to join Florida robbery as a “violent felony” under the elements clause of the ACCA. As a result, individuals convicted of three Maryland robberies who violate section 922(g) could be considered violent career criminals and sentenced to over fifteen years in prison, even if they have only ever used minimal force.

## V. CONCLUSION

In *Stokeling v. United States*, the Supreme Court held that all state robbery statutes requiring the amount of force necessary to overcome the victim’s resistance categorically qualify as “violent felonies” under the elements clause of the ACCA.<sup>229</sup> The Court incorrectly decided the case because the minimal amount of force that can satisfy Florida robbery does not fit the definition of “physical force” set forth by the Court in *Johnson I*.<sup>230</sup> By qualifying Florida robbery as a “violent felony,” the Court failed to align its holding with the underlying purpose of the ACCA—to target *violent* career criminals.<sup>231</sup> The Court also misconstrued the statutory history of the ACCA by going to great lengths to compare common law definitions, while failing to give proper weight to the fact that Congress chose to delete “robbery” and

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226. *United States v. Taylor*, 272 F. Supp. 3d 127, 143 (D.D.C. 2017); *see also* *United States v. Butler*, 253 F. Supp. 3d 133, 145 (D.D.C. 2017).

227. *United States v. Wilson*, 249 F. Supp. 3d 305, 318 (D.D.C. 2017).

228. *United States v. Giles*, No. 1:18-CR-0068, 2019 U.S. Dist. LEXIS 98467, at \*5 (M.D. Pa. June 12, 2019).

229. *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019).

230. *See supra* Section IV.A.

231. *See supra* Section IV.B.

keep “burglary.”<sup>232</sup> Lastly, the Court erroneously framed the case too broadly, overlooking the idiosyncrasies of Florida robbery.<sup>233</sup> The *Stokeling* decision directly contradicts how the Fourth Circuit has historically ruled on robbery.<sup>234</sup> Maryland robbery, which, like Florida robbery, can be satisfied by minimal force, will now most likely join Florida robbery as a crime of violence under the elements clause of the ACCA.<sup>235</sup>

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232. *See supra* Section IV.C.

233. *See supra* Section IV.D.

234. *See supra* Section IV.E.

235. *See supra* Section IV.E.