No. 14-30168

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDDIE RAY STRICKLAND, Jr.,

Defendant-Appellant.

Appeal from the United States District Court

for the District of Oregon

Portland Division

BRIEF OF AMICUS CURIAE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF OREGON IN SUPPORT OF DEFENDANT-APPELLANT'S REQUEST FOR REVERSAL

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IDENTITY OF AMICUS CURIAE, STATEMENT OF INTEREST, AND STATEMENT OF AUTHORITY TO FILE

The Federal Public Defender for the District of Oregon, Lisa C. Hay, provides representation to the indigent accused in the District of Oregon pursuant to 18 U.S.C. § 3006A. The Federal Public Defender's office employs 25 lawyers whose exclusive practice is in the representation of the indigent accused in this Circuit, both at trial and on appeal. Many of the lawyers in the office have extensive criminal defense experience practicing in the Oregon state courts and addressing questions of Oregon law in federal court.

The significance of Oregon third-degree robbery convictions under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), is a frequently recurring issue in the representation of our clients. The outcome of this case will affect the sentences of former, current, and potential future clients whose convictions for Oregon robbery in the third degree might be inappropriately considered as predicate offenses under the ACCA or under the identically-worded "crime of violence" definition in the career offender guideline, U.S.S.G. § 4B1.2, and the non-ACCA firearm guideline, U.S.S.G. § 2K2.1.

The defendant-appellant, Eddie Ray Strickland, through counsel Kevin Bons, and the respondent-appellee, through Assistant United States Attorney Kelly Zusman, have consented to the filing of this amicus curiae brief of the Federal Public

Defender for the District of Oregon. Accordingly, Federal Rule of Appellate Procedure 29(a) provides authority to file.

STATEMENT UNDER FEDERAL RULE OF APPELLATE PROCEDURE 29(c)(5)

No party or party's counsel or any person other than employees of amicus curiae authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

By statute, Oregon robbery in the third degree under Or. Rev. Stat. § 164.395 requires the "use or threatened use of physical force." But state case law interpreting that provision makes clear that "physical force" includes only minimal physical contact. By contrast, under controlling Supreme Court authority, a "violent felony" for purposes of the ACCA requires the use or threatened use of strong and violent physical force capable of causing physical pain or injury. *Johnson v. United States*, 559 U.S. 133 (2010). The district court correctly ruled that the Oregon offense of robbery in the third degree does not meet the "use of physical force" requirement of the ACCA.

This case should be remanded for resentencing. The district court imposed a 15-year mandatory minimum sentence based on the conclusion that Oregon robbery in the third degree qualified as a violent felony under the residual clause of the

ACCA. After sentencing, the Supreme Court held that the ACCA's residual clause is unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).[1] As the government concedes, the *Johnson* residual clause holding invalidates the basis for Mr. Strickland's 15-year sentence. Because the force clause fails to provide an alternative basis to affirm the sentence, the case should be remanded, and Mr. Strickland should be resentenced within the statutory maximum of ten years.

LEGAL AND FACTUAL BACKGROUND

The statutory maximum sentence for being a felon in possession of a firearm is ordinarily ten years under 18 U.S.C. § 922(g). The ACCA, however, increases the statutory maximum sentence to life in prison and requires a minimum sentence of 15 years when the defendant has three previous convictions for a violent felony or a serious drug offense. 18 U.S.C. § 924(e). Judges have recognized the harsh results of the ACCA recidivist enhancement. *See United States v. Mayer*, 560 F.3d 948, 953 (9th Cir. 2009) (Kozinski, J., dissenting from denial of en banc rehearing); *see also United States v. Young*, 766 F.3d 621, 632 (6th Cir. 2014) (Stranch, J., concurring) ("The practical problems with—and unfairness of—the ACCA and

[1] The Supreme Court has decided two cases interpreting the Armed Career Criminal Act under the name of *Johnson v. United States*: the case in 2010 interpreting the force clause, and the case in 2015 finding the residual clause unconstitutionally vague. This brief refers to both cases by the short title of "*Johnson*," with the context distinguishing between the force clause *Johnson* and the residual clause *Johnson*.

mandatory minimum sentences in general have long been a concern of legal scholars and many in the judiciary.").

Mr. Strickland has three prior Oregon state robbery convictions. This appeal involves Mr. Strickland's conviction for robbery in the third degree under Or. Rev. Stat. § 164.395, which provides:

> (1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft or unauthorized use of a vehicle . . . the person uses or threatens the immediate use of physical force upon another person with the intent of:
>
> (a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or
>
> (b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft or unauthorized use of a vehicle.

At sentencing, the government argued that the robbery in the third degree conviction qualified as a violent felony in two ways: under the force clause as an offense that "has as an element the use, attempted use, or threatened use of physical force," and also under the residual clause as an offense that "presents a serious potential risk of physical injury to another." ER 110-11.[2]

The district court rejected the government's force clause argument, stating:

> I think the Oregon opinions . . . demonstrate that a person can commit in Oregon third degree robbery using very little force. And I further

[2] Citations to "ER" refer to the appellant's Excerpt of Record, Docket Entry 15, submitted on March 30, 2015.

> think that the force clause only embraces those kinds of offenses that require sufficient force to cause pain or injury. So that disconnect leads me to conclude that it does not qualify under the force clause.

ER 122. However, the district court concluded that third-degree robbery is a violent felony under the residual clause, triggering the ACCA. ER 122-23.

The judge imposed the statutory minimum sentence of 15 years, but noted that Mr. Strickland's difficult upbringing and his family's recent rehabilitation would have otherwise warranted a lower sentence:

> [T]here's absolutely no question in my mind that the challenges Mr. Strickland faced growing up were just about as difficult as anybody ever has to face, just about as hard as it possibly can be to turn out right under those circumstances. Almost everything that could go badly for a young boy went badly for Mr. Strickland.
>
> So if it were up to me, I'd take that into account and say, well, that's part of why he's here today. And I'd take into account that now the family is stronger and better and ready to stand behind him. I think that's important.
>
> But if he's an armed career criminal, then very little of this is up to me. It's a 15-year sentence. That's the lowest it can go.

ER 121-22.

After the district court imposed sentence in this case, the Supreme Court held that the residual clause of the ACCA is unconstitutionally vague because of "grave uncertainty" in its application. *Johnson*, 135 S. Ct. at 2557. The Court held that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges" and that

"[i]ncreasing a defendant's sentence under the clause denies due process of law." *Id.* A sentence imposed in reliance on the residual clause must be vacated and remanded for resentencing. *United States v. McGregor*, No. 13-10384, 2015 WL 4081947, *1 (9th Cir. July 7, 2015) (unpublished memorandum) (remanding for resentencing in light of *Johnson* where district court imposed 15-year mandatory minimum sentence in reliance on the residual clause).

The government has conceded that, in light of *Johnson*, the residual clause has no remaining valid application in this case and that Mr. Strickland's sentence is unlawful unless his conviction for robbery in the third degree constitutes a predicate violent felony under the force clause, contrary to the district court's ruling. Docket Entry 24 (Government's Letter Pursuant to Fed. R. App. P. 28(j)).

ARGUMENT

A. To Categorically Qualify As A Violent Felony, Oregon Robbery In The Third Degree Must Necessarily Involve The "Use, Attempted Use, Or Threatened Use Of Physical Force" As That Phrase Has Been Interpreted In The ACCA Force Clause.

The ACCA defines "violent felony," in part, to mean any felony 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). Determining whether a prior conviction qualifies as a "violent felony" within the meaning of the ACCA requires a three-step inquiry. *Medina-Lara v. Holder*, 771 F.3d 1106, 1111-12 (9th Cir.

2014) (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990), and *Descamps v. United States*, 133 S. Ct. 2276, 2286 (2013)).[3] The first two steps of that analysis consider whether the statute is categorically overbroad, and, if so, whether the statute is indivisible:

> At the first step, we ask whether the statute of conviction is a categorical match to the generic predicate offense; that is, if the statute of conviction criminalizes only as much (or less) conduct than the generic offense. . . . If so, the inquiry ends, because the conviction categorically constitutes a predicate offense. If not, we move on to step two and ask if the statute of conviction's comparatively "overbroad" element is divisible. If not, then our inquiry ends, because a conviction under an indivisible, overbroad statute can *never* serve as a predicate offense.

Medina-Lara, 771 F.3d at 1112 (emphasis in original; citations and footnote omitted). The sentencing court does not reach the third step of the analysis—applying the modified categorical approach—unless the overbroad element of the offense is divisible. *Id*.

To apply the first step of the analysis—the categorical approach—to the force clause, the Court must ask whether the state statute only prohibits conduct that involves the "use, attempted use, or threatened use of physical force." *United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 920 (9th Cir. 2014) (applying categorical

[3] The Supreme Court's jurisprudence on the categorical approach applies in both the criminal and immigration contexts. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Medina-Lara*, 771 F.3d at 1111 ("The *Taylor-Descamps* line of cases developing and refining the categorical and modified categorical approach applies with equal force in both sentencing and immigration proceedings.").

approach to the identical force clause in U.S.S.G. § 2L1.2). If the state statute prohibits a broader swath of conduct than the federal definition, then the offense is not categorically a violent felony. *Id.* Because the categorical approach identifies what the state conviction necessarily involved, reviewing courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (internal quotation marks and alterations omitted). The scope of the state offense depends on state law. *Johnson*, 559 U.S. at 138; *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016 (9th Cir. 2006) ("[I]n determining the categorical reach of a state crime, we consider not only the language of the state statute, but also the interpretation of that language in judicial opinions.").

In this appeal, the government relies solely on the argument that third-degree robbery in Oregon qualifies as a violent felony under the categorical approach, and does not argue that the modified categorical approach should apply. But the elements of Oregon robbery do not require the use of physical force as that phrase has been interpreted in the ACCA force clause. Therefore, the offense cannot categorically qualify as a violent felony.

B. Because "Use Of Physical Force" Under The ACCA Means Strong Physical Force Capable Of Causing Pain Or Injury, A State Offense That Can Be Satisfied By De Minimis Physical Contact Is Categorically Overbroad.

The Supreme Court has interpreted "use of physical force" in the ACCA force clause as requiring "violent force—that is, force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. In *Johnson*, the Court addressed a Florida battery statute that prohibited "[a]ctually and intentionally touching or striking another person[.]" *Id.* at 136. The Court concluded that the word "violent," especially when attached to the noun "felony," clearly "connotes a substantial degree of force." *Id.*

Because of the specialized meaning of physical force in the ACCA, a state statute does not satisfy the force clause simply because it lists "use of physical force" as an element. *United States v. Flores-Cordero*, 723 F.3d 1085, 1087-88 (9th Cir. 2013). Instead, the offense qualifies only if the state has construed that element identically to, or more narrowly than, its specialized meaning. *Id.* If the state construes the element more broadly than the ACCA definition of "physical force"—that is, if the state offense can be satisfied by non-violent physical contact—then the state offense is not a categorical match. *Id.*

In *Flores-Cordero*, this Court considered whether the Arizona offense of resisting arrest, which required the "use or threatened use of physical force against

an officer," qualified as a violent felony under the force clause of U.S.S.G. § 2L1.2. 723 F.3d at 1087.[4] State case law interpreted the resisting arrest statute as applying to a "minor scuffle," where the defendant kicked the officers trying to control her, but did not injury anyone. *Id.* at 1087-88 (citing *State v. Lee*, 217 Ariz. 514, 176 P.3d 712 (Ariz. Ct. App. 2008)). Based on the state case law, this Court held that the state offense "did not necessarily involve force capable of inflicting pain or causing injury as contemplated by the Supreme Court's definition of violence in *Johnson*." *Id.* at 1088. Accordingly, the Court held that "an Arizona conviction for resisting arrest cannot be considered categorically a crime of violence[.]" *Id.*; *see also Flores-Lopez v. Holder*, 685 F.3d 857, 863 (9th Cir. 2012) (holding that California offense requiring the use or threatened use of force or violence did not categorically meet the *Johnson* definition of violence because those terms had been defined to mean any unlawful application of physical force, even if it causes no pain or harm).

Other circuits have used similar reasoning to hold that state robbery convictions do not fall within the force clause when the state does not interpret the statute as requiring violent physical force. For example, in *United States v. Castro-*

[4] This Court has held that "the use, attempted use, or threatened use of physical force" in U.S.S.G. § 2L1.2 has the same meaning as the identical provision in the ACCA. *Dominguez-Maroyoqui*, 748 F.3d at 921.

Vazquez, the First Circuit considered whether Puerto Rico's robbery statute, which prohibited "unlawfully tak[ing] personal property . . . by means of violence or intimidation" was a categorical "crime of violence" under the non-ACCA firearm guideline, U.S.S.G. § 2K2.1(a)(2). No. 13-1508, 2015 WL 5172839, *8 (1st Cir. Sept. 4, 2015). Puerto Rico law defined "intimidation" to include moral or psychological pressure, and it defined "violence" to include the slightest use of force. *Id.* The First Circuit held that, regardless of whether the robbery was accomplished by violence or intimidation, the offense would categorically "fall short" of requiring an element of violent physical force capable of causing physical pain or injury. *Id.*

Similarly, in *United States v. Hollins*, the Third Circuit held that a Pennsylvania robbery statute that prohibited physically taking property from a person "by force, however slight" did not fall within the force clause. 514 F. App'x 264, 267 (3d Cir. 2013). The court concluded that "physical force" under the force clause "must mean something more than any minor contact," and so, "robbery by force, however slight, no longer satisfies this particular definition of a crime of violence." *Id.* at 268. By contrast, in *United States v. Mitchell*, the Sixth Circuit held that Tennessee robbery by violence or fear met the force clause definition because violence meant physical force "exercised so as to injure, damage, or abuse," and fear meant "fear of bodily injury from physical force." 743 F.3d 1054, 1060 (6th Cir. 2014).

In this Circuit, prior robbery convictions have been deemed to qualify as ACCA predicates under the residual clause, rather than under the force clause. *United States v. Prince*, 772 F.3d 1173, 1176-78 (9th Cir. 2014) (holding that California attempted robbery "by means of force or fear" qualified as a violent felony under the residual clause); *United States v. Chandler*, 743 F.3d 648, 654 (9th Cir. 2014) (holding that Nevada conviction for conspiracy to commit robbery qualified as a violent felony under the residual clause), *cert. granted*, 135 S. Ct. 2926 (2015) (vacating judgment and remanding). Only pre-*Johnson* cases, decided without *Johnson*'s narrower interpretation of "use of physical force," and without analysis of state case law, hold that Oregon robbery convictions qualify as violent felonies under the ACCA. *See United States v. Ankeny*, 502 F.3d 829, 840 (9th Cir. 2007) (holding that second-degree robbery qualifies as an ACCA predicate because statutory definition of robbery includes on its face the use or threatened use of physical force); *United States v. Melton*, 344 F.3d 1021, 1026 (9th Cir. 2003) (same as to Virginia robbery).

C. Oregon Robbery In The Third-Degree Does Not Require The Use Of Physical Force Within The Meaning Of The ACCA Because It Can Be Committed With De Minimis Physical Contact.

Oregon defines robbery in the third degree as occurring when, in the course of committing theft or unauthorized use of a vehicle, a person "uses or threatens the immediate use of physical force" to prevent or overcome resistance to the theft or to

compel delivery of the property. Or. Rev. Stat. § 164.395. The government has conceded, based on state case law, that simple purse snatching satisfies the use of force requirement for Oregon third-degree robbery. Gov't Answering Br. at 10 (citing *State v. Williams*, 58 Or. App. 398, 648 P.2d 1354 (1982)).

Indeed, state case law is clear that the use or threatened use of physical force requirement can be satisfied easily without showing the use or threatened use of any particular degree of force. In *State v. Johnson*, the defendant removed the victim's purse from her shoulder in such a manner that the victim did not feel "much of anything." 215 Or. App. 1, 3, 168 P.3d 312, 313, *rev den*, 343 Or. 366 (2007). The Oregon Court of Appeals affirmed the defendant's conviction for third-degree robbery, holding that the use of physical force includes any degree of force used with intent to prevent or overcome the victim's resistance. *Id.* at 5; *see also Williams*, 58 Or. App. at 400-01 (holding that purse-snatching resulting in tug-of-war over the purse satisfied force requirement for robbery in the third degree). Oregon robbery in the third degree could even apply to the attempt to pull away from a security guard after the defendant shoplifted two packages of Twinkies and a carton of flavored milk. *Pereida-Alba v. Coursey*, 356 Or. 654, 657, 667, 342 P.3d 70, 71, 77 (2015); *see also State v. Rios*, 24 Or. App. 393, 395, 545 P.2d 609, 609 (1976) (affirming third-degree robbery conviction for shoplifting Pepsi and wine from a convenience store and, during escape, throwing stolen bottles toward pursuing storekeeper).

Thus, under Oregon law, any theft of property from the person of another without that person's consent could constitute robbery in the third degree, even with minimal physical force actually applied or threatened. Because the ACCA violent felony definition requires more than de minimis contact—a use or threatened use of strong physical force capable of causing pain or injury—the state offense prohibits a broader swath of conduct and is not a categorical match.

While acknowledging the expansive scope of robbery in the third degree as interpreted by Oregon case law, the government contends that the offense categorically falls within the ACCA force clause. The government relies on *Ankeny* and *Melton*, pre-*Johnson* cases that deemed robbery convictions to qualify as predicate offenses when the statute, on its face, required the use of physical force. Gov't Answering Br. at 11 (citing *Ankeny*, 502 F.3d at 840, and *Melton*, 344 F.3d at 1026).

Those cases do not provide the government any support, because they did not engage in the required post-*Johnson* analysis. *Flores-Cordero*, 732 F.3d at 1088 (finding pre-*Johnson* circuit precedent to be superseded by controlling, intervening authority) (citing *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)). *Johnson* not only narrowed the definition of "use of physical force," it also expressly required federal courts to consider the state court's "interpretation of state law, including its determination of the elements" of the state offense. 559 U.S. at 138.

Accordingly, because neither *Ankeny* nor *Melton* considered whether the state offense, as interpreted by state case law, required a showing of strong physical force, those cases have been superseded by intervening Supreme Court authority. In any event, neither case addressed Oregon's broad third-degree robbery statute.

The government further relies on the "ordinary case" analysis to argue that robbery in the third degree falls within the ACCA force clause. Gov't Answering Br. at 14 (citing *Prince*, 772 F.3d at 1176, which held that California attempted robbery qualified under the ACCA residual clause). But "ordinary case" analysis applied only to the residual clause, which has been declared unconstitutionally vague by the Supreme Court. *Johnson*, 135 S. Ct. at 2557. The "ordinary case" has no bearing on the question of whether the state offense is a categorical match for the federal definition. To the contrary, the categorical analysis for the force clause depends on the full scope of the state offense, including the "least of the acts criminalized." *Moncrieffe*, 133 S. Ct. at 1684; *Dominguez-Maroyoqui*, 748 F.3d at 920. Therefore, the government is incorrect that an offense can qualify as a violent felony under the force clause so long as some instances of the offense involve "actual, violent, physical confrontations." Gov't Answering Br. at 14. If the offense also encompasses non-violent touching, it cannot categorically qualify as a violent felony under the force clause.

Conclusion

Because the 15-year mandatory minimum ACCA sentence was not supported by three previous violent felony convictions, this Court should vacate the sentence and remand the case for resentencing, not to exceed the maximum permissible sentence of ten years in prison.

Respectfully submitted this 22nd day of September, 2015.

/s/ Stephen R. Sady
Stephen R. Sady
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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	**CA No. 14-30168**
	)	
v.	)	
	)	
EDDIE RAY STRICKLAND, Jr.,	)	
	)	
Defendant-Appellant.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

1. This brief complies with the type-volume limitation because it contains 3,753 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has

been prepared in a proportionally spaced typeface usingWord 2013, 14-point Times New Roman font.

Dated this 22nd day of September, 2015.

/s/ Stephen R. Sady
Stephen R. Sady
Chief Deputy Federal Public Defender

Elizabeth G. Daily
Research & Writing Attorney

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2015, I electronically filed the foregoing Brief of Amicus Curiae Oregon Federal Public Defenders with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jill C. Dozark
Jill C. Dozark