

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-73153

LUDWIN ISRAEL LOPEZ-AGUILAR
Petitioner,
v.

WILLIAM P. BARR
Respondent

On Petition for Review of an Order of the Board of Immigration Appeals

**BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS
ASSOCIATION, FLORENCE IMMIGRANT & REFUGEE RIGHTS
PROJECT, AND INNOVATION LAW LAB
IN SUPPORT OF PETITIONER'S REQUEST
FOR REHEARING AND REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae American Immigration Lawyers Association, Florence Immigrant & Refugee Rights Project, and Innovation Law Lab state that they, their subsidiaries and any corporate interests involved in this matter, do not have any monetary interest in the outcome of this case.

FRAP RULE 29 STATEMENT OF CONSENT

Pursuant to Federal Rules of Appellate Procedure, Rule 29(a) and Circuit Rule 29-3, attorneys representing both of the parties consent to the filing of this amicus brief. Amici state that no counsel for the party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amici and their counsel contributed money that was intended to fund the preparing or submitting of the brief.

INTEREST OF AMICI CURIAE

Amici are non-profit organizations providing direct legal services to noncitizens and advice, training, and technical support to counsel and advocates in California, Arizona, Oregon, and nationally. Amici has an interest in ensuring that the immigration laws, including the generic definition of a theft offense, are applied fairly and uniformly.

The American Immigration Lawyers Association ("AILA") is a national non-profit association with more than 15,000 members throughout the United

States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. As part of its mission, AILA provides trainings, information, and practice advisories to practitioners providing direct services to noncitizens, and, increasingly, to counsel representing noncitizens accused of criminal offenses in federal and state courts.

The Florence Immigrant and Refugee Rights Project (“the Florence Project”) is a 501(c)(3) nonprofit legal service organization providing free legal services to men, women, and unaccompanied children in immigration custody in Arizona and technical assistance to counsel and advocates nationwide. The Florence Project redresses the lack of counsel in immigration proceedings, both locally and nationally through direct service, partnerships with the community, and advocacy and outreach efforts. The Florence Project’s vision is to ensure that all immigrants facing removal have access to counsel, understand their rights under the law, and are treated fairly and humanely.

The Innovation Law Lab (“the Law Lab”) is a nonprofit organization established to promote and improve due process in immigration proceedings. The

Law Lab uses empirical analysis, technology, and litigation to ensure the fair and just administration of our immigration laws. The Law Lab has a direct interest in promoting rule-of-law principles in immigration adjudications, and in advocating for the correct analysis of the immigration consequences of Oregon criminal convictions.

INTRODUCTION

Amici respectfully submits that *Lopez-Aguilar v. Barr*, 921 F.3d 898 (9th Cir. 2019) misapprehends Oregon law when holding that Oregon Revised Statutes § 164.395 (“ORS § 164.395”), third-degree robbery, is a categorical match to the generic definition of theft.

First, the historical origins of robbery are critical to understanding this case. At common law, the crime of larceny, when combined with force, was elevated to the more serious offense of robbery. The presence of force was essential, because instead of robbery being a form of a crime against property, robbery became a crime against a person. “[T]he degree of robbery varies according to the severity of the threat or danger of harm to the person, not according to the value of the property that is the subject of the theft or attempted theft.” *State v. Dillman*, 34 Or. App. 937, 941 (1978). States that follow the pure common law version of robbery will criminalize a narrow range of conduct as a robbery, only when the force occurs before or during the taking of property. A variation of this rule, which is

followed by Oregon, will criminalize a taking as robbery if force is used in the retention of the property.

By contrast, the Model Penal Code recommended a broader definition of robbery, which has been adopted by 10 states. Under the approach of the American Law Institute Model Penal Code “the ensuing flight is considered part and parcel of a robbery until such time as the criminal purpose, including carrying away of the spoils of the crime, is completed.” *State v. Case*, 190 Mont. 450, 454–55 (1980).

What this means is that if someone shoplifts an item from a store, and on the way out, punches a security guard, the common law jurisdictions do not prosecute that conduct as robbery—rather the person is guilty of the two crimes of larceny and assault. In defense of the narrow common law approach, as explained by the Kansas Supreme Court, “the offense of robbery should not be extended to situations where a purse snatcher grabs a purse without violence or injury to the person of the owner, leaves the scene, and then later uses his fist to effect his escape.” *State v. Aldershof*, 220 Kan. 798, 800 (1976). “Violence or intimidation by the thief subsequent to the taking will not render the act robbery.” *Id.* at 800–01. This is true because “the person who snatched the purses was a sneak thief. He cannot properly be placed in the category of a robber or highway-man.” *Id.* at 804.

A second approach, which is the variation of the common law, slightly expanded the definition of robbery to criminalize this conduct as robbery when force was in retention, or movement, of property after the taking. This is what Oregon follows.

A third, and the most expansive approach, advanced by the Model Penal Code, defines robbery broadly so that even if force is used well past the initial taking and during an escape, that conduct will elevate an assault followed by larceny, into the crime of robbery.

As set forth in the attached 50-state survey, *see* Appendix A, 21 states, including Oregon, still follow the common law versions of the crime that limit force to be involved in the taking or retention of the property. 10 states follow the Model Penal Code approach that criminalize force used during an escape to turn larceny and assault into robbery. *Id.*

Although Oregon has adopted many crimes suggested by Model Penal Code, robbery is not one. With respect to robbery, on the issue of force, Oregon follows the common law approach so that robbery will be found only when “there is a relationship, not a mere concurrence, of force and theft.” *State v. Jackson*, 40 Or. App. 759, 763 (1979) (reversing attempted robbery conviction “[b]ecause the defendant had abandoned his attempt to commit theft prior to the use of force”).

Second, what the majority decision misapprehended is, that when determining if a robbery statute is overbroad to the generic theft offense, there are two ways then by which a robbery offense may do so. In the first way, which is not relevant here, the Modern Penal Code approach—that separates out force from the initial taking—potentially permits someone who enters the criminal scheme after the taking of the goods to be roped in for full liability for robbery. Stated another way: an unwitting getaway driver—a person who simply gives a robber a ride without prior knowledge of the robbery—may be liable for robbery. If so, that conduct is overbroad to the generic theft offense because the unwitting getaway driver did not participate in the theft. That is the issue presented in California’s very unique robbery statute, which has a pending en banc petition in *United States v. Martinez Hernandez*, 912 F.3d 1207, 1214 (9th Cir. 2019).

The second way, which at issue in Oregon’s statute, is that if a state departs from having only larceny be a predicate act to robbery, the predicate consensual (albeit deceptive) taking, accompanied by force, falls outside of the generic theft offense.

To restate the earlier hypothetical, that means that if someone buys a store item with a bad check or stolen credit card (theft by deception or trick or false pretenses), and on the way out, punches a security guard, the common law and the majority of Model Penal Code jurisdictions do not prosecute that conduct as

robbery—not because of the timing of force, but because the initial taking was predicated on fraud. Rather, the person is guilty of the two crimes of *fraud* and assault.

Oregon, by contrast, would criminalize this conduct as robbery, because ORS § 164.395 is among a small minority of states that define robbery as predicated on fraud. In footnote 1, the majority argued that it is Oregon’s definition of a security guard as an “owner” that permits such prosecution for robbery. *See Lopez-Aguilar*, 921 F.3d at 904 n.1. But what the majority overlooks is that Oregon is overbroad to the generic theft statute—not based on who is the owner, and not based on the timing of the force—but because the initial taking of property can be secured by fraud, and not just larceny, which was the historical origins of the crime.

Third, the key issue in Oregon’s robbery statute is that it criminalizes consensual takings. As noted by both the majority and dissent, the Oregon legislature contemplated consensual takings to be a predicate act to robbery on the face of the statute. Although no case has facts such as above in which the initial taking is predicated on fraud, followed by force, the textual inclusion of this conduct in the robbery statute is quite notable.

The attached 50-state survey, *see* Appendix A, shows that only 2 states have cases in which fraud served as a predicate act to robbery (California, Michigan)

and 2 more (New York and Oregon) permit receiving stolen property as a predicate act. Oregon’s inclusion of fraud—instead of simply larceny’s trespass—as a predicate act for robbery is significant. It’s very much a departure from the more limited scope of what conduct was covered under common law and even modernized definitions of robbery. The Oregon legislature’s intent to broaden what conduct can be a predicate act to robbery then must be given effect.

ARGUMENT

As set forth below, ORS § 164.395 is a substantial departure from how the other 50 states and District of Columbia define the elements of robbery, and as a result, its decision to include fraud as a predicate act to robbery renders ORS § 164.395 overbroad to the generic definition of theft.

I. UNDER THE COMMON LAW, CONDUCT THAT WOULD BE PROSECUTED AS LARCENY, FOLLOWED BY ASSAULT, FORMS INTO A SINGLE COUNT OF ROBBERY

The crime of robbery began as a form of aggravated larceny. That is why, “at common law, a robbery required that the force, violence, or putting in fear occur *before or contemporaneous with* the larcenous taking.” *People v. Randolph*, 466 Mich. 532, 546 (2002) (emphasis added), *superseded by statute on other grounds as stated in People v. March*, 499 Mich. 389, 886 (2016).

As explained by the Michigan Supreme Court, when someone committed an assault after a theft, that conduct could not support a common law robbery

conviction “because the defendant did not use force, violence, assault, or putting in fear *to accomplish* his taking of property. . . .” 466 Mich. at 551 (emphasis added) (reversing robbery conviction in absence of evidence that force was used to effectuate the taking).

The use of force was still actionable. But the person would be prosecuted for the crimes of assault and theft, and not for robbery. *See Royal v. State*, 490 So. 2d 44, 46 (Fla. 1986) (based on the robbery statute in effect at the time, reversing the robbery conviction based on conduct in which two persons stuffed clothing in a bag, pushed a store detective out of their way to exit the store, and pointed a gun at employees whom they encountered in the parking lot. “[W]e find that petitioners could have been charged separately with theft, for the taking of the goods that occurred in the store; assault and battery, for the incident that occurred while petitioners were leaving the store; and aggravated assault, for the incident that occurred in the parking lot.”).

As set forth in Appendix A, 21 states still follow the common law definition of robbery in this manner. *See generally Sweed v. State*, 351 S.W.3d 63, 69 (Tex. Crim. App. 2011) (reversing robbery conviction to instruct jury on lesser included offense of theft because “based upon the evidence presented, that the assault was a separate event from the theft”).

Oregon is one of those states. With respect to robbery, on the issue of force, Oregon follows a variation of the common law approach so that robbery will be found only when “there is a relationship, not a mere concurrence, of force and theft.” *Jackson*, 40 Or. App. at 763. In *Jackson*, a man was convicted of attempted robbery after he had broken into a car and used a tire iron to pry open a glove box that contained over \$500 in cash. *Id.* at 761. The owner of the car, who was in a bar at the time of crime, heard noises and ran out to his car. *Id.* He arrived before Mr. Jackson had taken any money. *Id.* Mr. Jackson hit the car owner with the tire iron, and when the owner wrestled it away from him, Mr. Jackson fled. *Id.*

The Oregon Court of Appeals reversed the attempted robbery conviction for insufficient evidence because the “case does not involve force used in the course of attempting to commit theft. Rather, it involves force used in flight following an abandoned attempt to commit theft.” *Jackson*, 40 Or. App. at 763. Because the force occurred after the intent to steal was fully abandoned, the force did not elevate the attempted theft, followed by an assault, into the more serious crime of robbery. *Cf. Case*, 190 Mont. at 454–55 (explaining that Montana’s robbery statute, which adopted the Model Penal Code approach, criminalizes an assault after the robbers escaped from a bar where they stole money because “the ensuing

flight is considered part and parcel of a robbery until such time as the criminal purpose, including carrying away of the spoils of the crime, is completed.”).

As stated above, in footnote 1, the majority’s focus on the timing of force in Oregon’s robbery statute is not what makes it overbroad. *See Lopez-Aguilar*, 921 F.3d at 904 n.1. Rather, the overbreadth of ORS § 164.395 as a theft offense arises in its variation from the common law definition that limited robbery to the underlying crime of larceny.

II. ORS § 164.395 IS OVERBROAD TO THE GENERIC THEFT OFFENSE BECAUSE THE TEXT OF THE STATUTE JOINS ONLY TWO OTHER STATE COURTS THAT PERMIT “THE SNEAK THIEF” TO BE PROSECUTED AS A ROBBER

Because fraud falls outside of the generic definition of theft, and because only two state supreme courts have upheld robbery convictions based on fraud, it is highly consequential that the text of ORS § 164.395 contemplates consensual takings as predicate acts to robbery. This breadth then permits Oregon to prosecute robbery based on fraud, which is both overbroad to the generic theft offense, and renders Oregon to be in the small minority of states that prosecute such conduct as robbery.

A. Only Two State Supreme Courts Have Held that Fraud May Be a Predicate Act to Robbery

The generic definition of theft is limited to takings by larceny. In *Carrillo-Jaime v. Holder*, California’s “chop shop” statute was held overbroad to the

generic theft offense because the statute criminalized fraudulent takings. 572 F.3d 747, 754 (9th Cir. 2009). This is true because “theft occurs without consent, while fraud occurs with consent that has been unlawfully obtained.” *Soliman v. Gonzales*, 419 F.3d 276, 282 (4th Cir. 2005) (quoting Black’s Law Dictionary (6th ed. 1951)) (credit card fraud statute is overbroad to the generic theft statute because the statute criminalizes fraud); see *Martinez v. Mukasey*, 519 F.3d 532, 540 (5th Cir. 2008) (federal bank fraud statute is overbroad to the generic theft offense because it permits property to be taken by fraud).

What is highly relevant to this case is that only two state supreme courts have expressly held that their robbery statutes will include acts that are not limited to just larceny.

In California, in *People v. Williams*, California’s Supreme Court reversed a robbery conviction for a man who had obtained gift cards by false pretenses and then later shoved a guard, which was alleged to be sufficient force to elevate the theft into robbery. 57 Cal. 4th 776, 779 (2013). In reversing the robbery conviction, the California Supreme Court, in an opinion authored by Justice Joyce Kennard, clarified that this holding was predicated on the fact that “***theft by false pretenses***, unlike larceny, has no requirement of asportation.” *Id.* at 787. (emphasis added). When a taking occurs by false pretenses, California’s robbery statute follows the traditional common law approach, which does not let a

subsequent assault elevate a prior taking into a robbery. *See Randolph*, 466 Mich. at 546 (discussing common law definitions of robbery that required the force to be part of the taking).

Williams explained, however, that this limitation applied only to takings by false pretenses. Larceny and larceny-by-trick remained predicate acts to California's robbery statute. *See* 57 Cal. 4th at 788–89 (discussing why theft by false pretenses is not a predicate act to robbery but theft by larceny and theft by trick are). Indeed, after *Williams*, California courts repeatedly upheld robbery convictions for defendants who argued that the initial peaceful or duplicitous takings predicated on fraud are takings that are criminalized by California's definition of robbery. *See People v. Bailey*, No. A147673, 2017 WL 3699875, at *4 (Cal. Ct. App. Aug. 28, 2017) (tricking a victim to voluntarily give her phone to a defendant, followed by assault, is robbery); *In Re William M.*, A145191, 2016 WL 193411, at *2 (Cal. Ct. App. Jan. 1, 2016) (upholding robbery conviction when possession of phone obtained by trick); *In Re Moises R.*, G050550, 2015 WL 7721175, at *4 (Cal. Ct. App. Nov. 30, 2015) (upholding robbery conviction when possession of property was obtained peacefully).

In Michigan, fraud also appears to be a predicate act to robbery. In *People v. Cherry*, a man surreptitiously shoplifted from a store, and departed. 467 Mich. 901, 901 (2002) (Markman, J., concurring). In the parking lot, the security guard

confronted him and a struggle ensued. *Id.* The Supreme Court reversed the robbery conviction the basis that the force occurred after the taking was completed. *Id.* The Court remanded the case to permit the entry of a conviction for “first-degree retail fraud.” *Id.* at 901. Because the only error discussed was the force, and not the predicate act, the dicta shows that a fraudulent taking may be a proper predicate for robbery.

By contrast, four states expressly have held that a taking without larceny is not a predicate act to robbery. *See Thomas v. State*, 91 Ala. 34, 36 (1890) (reversing robbery because item obtained by trick, followed by assault, is not robbery); *People v. Moore*, 184 Colo. 110, 111 (1974) (extortion may not be predicate to robbery); *Leeson v. State*, 293 Md. 425, 436 (1982) (insurance fraud is not predicate to robbery because the victim consented to the scheme); *State v. Shipley*, 920 S.W.2d 120, 123 (Mo. Ct. App. 1996) (stealing by deceit cannot be predicate act to robbery that criminalizes only “stealing,” which is similar to generic larceny).

B. The Majority and Dissent Both Recognize that the Text of ORS § 164.395 Criminalizes Fraudulent Takings

Both the majority and dissent recognize that the text of ORS § 164.395 criminalizes consensual takings. “[T]he text of the statute could theoretically cover situations involving consensual takings.” *Lopez-Aguilar*, 921 F.3d at 903; *see also id.* at 907 (“Oregon law expressly provides that the first element—theft or

attempted theft—can be satisfied through a consensual taking.”) (Berzon, J., dissenting).

The majority identified two hypothetical situations in which this could arise:

“under subsection (a), a defendant could be convicted if he entered a residential building, obtained property from a resident through deception, and used force against a security guard on his way out of the building in order to retain the property.” *Lopez-Aguilar*, 921 F.3d at 903. “Under subsection (b), a defendant could be convicted if she convinced an owner, by deception, to give her property but used force against a third party to compel that third party to deliver the consensually obtained property to her.” *Id.* “In either scenario, the property would have been taken by consent of the owner, and the force used would not negate the owner’s consent because the force was used against a third party without the owner’s knowledge.” *Id.*

This breadth of ORS § 164.395 is a notable departure from the common law definition of robbery. When defending the common law’s limited definition of robbery to conduct that involved force that was used before or during a larceny, the Kansas Supreme Court explained that “the person who snatched the purses was a ***sneak thief***. He cannot properly be placed in the category of a robber or highway-man.” *Aldershof*, 220 Kan. at 804 (emphasis added). What the panel misapprehended is that by criminalizing fraud as a predicate act to robbery, Oregon

criminalized the “sneak thief” as a robber, a designation that the Kansas Supreme Court explains is contrary to the original social harm that the robbery statutes sought to police and protect against. The panel rendered its decision without the benefit of the attached 50-state survey that shows that Oregon then joins only two other states—California and Michigan—that have state supreme court decisions that contemplate that fraud may serve as a predicate act to robbery.

C. ORS § 164.395 is Overbroad to the Generic Theft Statute and is Among the Minority of States to Criminalize Fraud as a Predicate Act of Robbery

Because the generic theft offense is limited to larceny and because the text of ORS § 164.395 includes fraud as a predicate act to robbery, the “least of the acts” presumption demands that ORS § 164.395 fall outside the generic definition of theft. *See Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (“Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction rested upon . . . the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense.”).

Of note, this rule is not a proverbial “windfall”¹ to those convicted of robbery crimes in the Ninth Circuit. Of the states in the Ninth Circuit, only California has a

¹ This statement presumes that avoiding collateral consequences for criminal convictions is a windfall rather than asking why so many civil consequences even

state supreme court recognizing that its robbery statute criminalizes fraud. *See* Appendix B. Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, and Washington do not. *Id.* Unless those state robbery statutes also criminalize fraud clearly in their text, this panel’s decision would be limited to what appears to be at most California and Oregon. *But see Martinez Hernandez*, 912 F.3d at 1214 (holding California’s robbery statute a categorical match to the generic theft offense) (en banc petition is pending).

attach to criminal convictions. As noted by Judge Frederic Block, when granting probation instead of imposing the recommended prison term for a woman convicted of a drug crime, there are “nearly 50,000 federal and state statutes and regulations that impose penalties, disabilities, or disadvantages on convicted felons.” *United States v. Nesbeth*, 188 F. Supp. 3d 179, 184 (E.D.N.Y. 2016). In Judge Block’s words, “[t]here is a broad range of collateral consequences that serve no useful function other than to further punish criminal defendants after they have completed their court-imposed sentences.” *Id.* at 180.

Even outside of the immigration context, these collateral consequences have dire consequences: “Myriad laws, rules, and regulations operate to discriminate against ex-offenders and effectively prevent their reintegration into the mainstream society and economy. These restrictions amount to a form of ‘civil death’ and send the unequivocal message that ‘they’ are no longer part of ‘us.’” *Id.* at 180 (quoting Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 142 (The New Press 2010)).

For those who are not citizens, “deportation is a drastic measure and at times the equivalent of banishment or exile.” *Costello v. INS*, 376 U.S. 120, 128 (1964) (internal citations and quotation marks omitted). Such drastic measures for a third-degree criminal offense, which is what issue here, is worthy for Congressional reconsideration and reform.

Petitioner is not seeking to redefine the generic theft offense. Petitioner is not proposing a new rule. Petitioner is not advancing an argument that will permit the majority of robbery statutes—either in the country or even in the Ninth Circuit—to fall outside of the definition of an aggravated felony. To the contrary, the proper interpretation of Oregon’s robbery statute simply establishes that ORS § 164.395 is very much an outlier among robbery statutes and is overbroad to the generic definition of theft.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court grant the petition for rehearing or rehearing en banc and hold that ORS § 164.395 is overbroad to the generic crime of theft.

Dated: June 7, 2019

Respectfully submitted,

s/ Kari E. Hong
KARI E. HONG
Counsel for Amici Curiae

AMICI CURIAE SIGNATORIES

American Immigration Lawyers Association

Florence Immigrant & Refugee Rights Project

Innovation Law Lab

CERTIFICATE OF COMPLIANCE

I certify that: Pursuant to Fed. R. App. P., Rule 32(a)(7)(B) and (C), Rule (a)(5) and (6), and Ninth Circuit Rules 32-1 and 32-4, the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains approximately 4,181 words, exclusive of the table of contents, table of authorities, corporate disclosure statement, certificates of counsel, signature block, and attached appendix, which is does not exceed the 4,200 word-limit for an amicus brief. The word count includes the FRAP RULE 29 Statement and footnotes.

CERTIFICATE OF SERVICE

I, Kari Hong, hereby certify that I electronically filed the foregoing 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.

Dated: June 7, 2019

Respectfully submitted,

/s Kari Hong
KARI HONG

APPENDIX A

Chart of State Robbery Laws: Force Must Be Used Before or During Taking And Fraud As Predicate Act

| State | Robbery Statute Citation | Must force be used before or during taking? | Can fraud be a predicate act? | Authority. |
|---------------|--|---|--|---|
| Totals | | <i>Yes – 21 No – 10 Not decided – 20</i> | <i>Yes – 4 No – 5 Not decided – 42</i> | <i>States in Ninth Circuit jurisdiction are highlighted</i> |
| AL | Robbery in the first degree: Ala. Code § 13A-8-41 (2018) Robbery in the second degree: Ala. Code § 13A-8-42 (2018) Robbery in the third degree: Ala. Code § 13A-8-43 (2018) | <u>Yes.</u> In comments to Ala. Code § 13A-8-44 explains how new robbery offense was broadened from the common law reversion. | <u>No.</u> | Thomas v. State, 91 Ala. 34 (1890): Force must be used in the taking. Robbery conviction reversed when item obtained by trick and then pointed gun at owner. |
| AK | Robbery in the first degree: Alaska Stat. § 11.41.500 (2017) Robbery in the second degree: Alaska Stat. § 11.41.510 (2017) | <u>Yes.</u> Ward v. State, 120 P.3d 204 (2005): Robbery includes violence “subsequent to the taking of the property. . . .” | <u>Not expressly addressed.</u> | |

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| AZ | Robbery: Ariz. Rev. Stat. Ann. § 13-1902 (2018) Aggravated Robbery: Ariz. Rev. Stat. Ann. § 13-1903 (2018) Armed Robbery: Ariz. Rev. Stat. Ann. § 13-1904 (2018) | <u>No.</u> State v. Comer, 165 Ariz. 413 (1990) (taking must occurring during or before taking) | Not expressly addressed. | |
| AR | Robbery: Ark. Code Ann. § 5-12-102 (2018) Aggravated Robbery: Ark. Code Ann. § 5-12-103 (2018) | <u>Yes.</u> Routt v. State, 61 Ark. 594, 34 S.W. 262, 263 (1896) (force must be part of taking) | Not expressly addressed in case law | |
| CA | Robbery: Cal. Penal Code § 211 (West 2018) | <u>No</u> | <u>Yes.</u> | People v. Bailey, No. A147673, 2017 WL 3699875, at *4 (Cal. App. 1st Dist. Aug. 28, 2017): robbery upheld with larceny by trick occurred, followed by the use of force. |
| CO | Colo. Rev. Stat. § 18-4-301 (2017) | Issue pending before Colorado Supreme Court. <i>People v. Delgado</i> , cert. granted, No. 17SC29, 2017 WL 6278291 | No. | Robbery reversed because extortion not predicate act to robbery. People v. Moore, 184 Colo. 110, 111, 518 P.2d 944, 945 (1974) |

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| | | (Colo. Dec. 11, 2017) | | |
| CT | Robbery: Conn. Gen. Stat. § 53a-133 (2018) Robbery in the first degree: Conn. Gen. Stat. § 53a-134 (2018) Robbery in the second degree: Conn. Gen. Stat. § 53a-135 (2018) Robbery in the third degree: Conn. Gen. Stat. § 53a-136 (2018) | <u>Yes.</u> Force must be used before, during, or immediately after to secure possession. <i>State v. Preston</i> , 248 Conn. 472, 479, 728 A.2d 1087, 1091 (1999) | Not expressly addressed in case law | |
| DE | Robbery in the first degree: Del. Code Ann. tit.11, § 832 (2018) Robbery in the second degree: Del. Code Ann. tit.11, § 831 (2018) | <u>Yes.</u> Dixon v. State, 673 A.2d 1220 (1996) : reversing robbery conviction because force used after taking not related to taking | Not expressly addressed in case law | |
| DC | D.C. Code § 22-2801 (current through May 4, 2018) | <u>Yes.</u> <i>Gray v. United States</i> , 155 A.3d 377, 387 (D.C. 2017) | Not expressly addressed | |

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| | | (robbery conviction overturned because the assault was separate from the taking) | | |
| FL | Fla. Stat. § 812.13 (2018) | No. <i>Rockmore v. State</i> , 140 So. 3d 979, 984 (Fla. 2014) (force can occur after taking) | Not expressly addressed in case law | |
| GA | Robbery: Ga. Code Ann. § 16-8-40 (2017) Armed robbery: Ga. Code Ann. § 16-8-41 (2017) | <u>Yes.</u> <i>Hicks v. State</i> , 232 Ga. 393 (1974): Armed robbery conviction was reversed because the billfold was not taken by force. | Not expressly addressed. | |
| HI | Robbery in the first degree: Haw. Rev. Stat. Ann. § 708-840 (LexisNexis 2018) Robbery in the second degree: Haw. | <u>Yes</u> <i>State v. Arlt</i> , 9 Haw. App. 263 (1992): Defendant stole a bottle of tequila without force. When he returned to the | Not expressly addressed in case law | |

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| | Rev. Stat. Ann. § 708-841 (LexisNexis 2018) Robbery; “in the course of committing a theft”: Haw. Rev. Stat. Ann. § 708-842 (LexisNexis 2018) | store with the bottle, he hit the storeowner. The force was not used in the course of committing theft, so it was not robbery. | | |
| ID | Idaho Code § 18-6501 (2018) | Not expressly addressed in case law | Not expressly addressed in case law | |
| IL | Robbery; aggravated robbery: 720 Ill. Comp. Stat. 5/18-1 (2018) | <u>Yes.</u> <i>People v. Huntington</i> , 115 Ill. App. 3d 943, 945, 451 N.E.2d 923, 924 (1983) (taking without force is not robbery) | Not expressly addressed in case law | |
| IN | Ind. Code Ann. § 35-42-5-1 (West 2017) | <u>Yes.</u> <i>Young v. State</i> , 725 N.E.2d 78 (Ind. 2000) | Not expressly addressed in case law | |
| IA | Robbery defined: Iowa Code Ann. § 711.1 (West 2013) Robbery in the first | Not expressly addressed in case law | Not expressly addressed in case law | |

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| | <p>degree: Iowa Code Ann. § 711.2 (West 2018))</p> <p>Robbery in the second degree: Iowa Code Ann. § 711.3 (West 2016)</p> <p>Robbery in the third degree: Iowa Code Ann. § 711.3A (West 2016)</p> | | | |
| KS | Kan. Stat. Ann. § 21-5420 (2018) | <p><u>Yes</u></p> <p>State v. Aldershof, 220 Kan. 798 (1976): "...the offense of robbery should not be extended to situations where a purse snatcher grabs a purse without violence or injury to the person of the owner, leaves the scene, and then later uses his fist to effect his escape."</p> | Not expressly addressed in case law | |
| KY | <p>Robbery in the first degree: Ky. Rev. Stat. Ann. § 515.020 (West 2018)</p> | Not expressly addressed in case law | Not expressly addressed in case law | |

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| | Robbery in the second degree: Ky. Rev. Stat. Ann. § 515.030 (West 2018) | | | |
| LA | Robbery in the first degree: La. Rev. Stat. Ann. § 14:64.1 (2018) Robbery in the second degree: La. Rev. Stat. Ann. § 14:64.4 (2018) | Not expressly addressed in case law | Not expressly addressed in case law | |
| ME | Me. Rev. Stat. Ann. tit. 17, § 651 (2017) | Not expressly addressed in case law | Not expressly addressed in case law | |
| MD | Robbery definition: Md. Code Ann., Crim. Law § 3-401 (LexisNexis 2018) Robbery: Md. Code Ann., Crim. Law § 3-402 (LexisNexis 2018) Robbery with dangerous weapon: Md. Code Ann., Crim. Law § 3- | Not expressly addressed in case law | No. | Leeson v. State, 293 Md. 425, 436, 445 A.2d 21, 27 (1982) Robbery reversed because evidence shows it was part of insurance fraud scheme |

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| | 403 (LexisNexis 2018) | | | |
| MA | Armed robbery: Mass. Gen. Laws Ann. ch. 265, § 17 (West 2018) Unarmed robbery: Mass. Gen. Laws Ann. ch. 265, § 19 (West 2018) | Not expressly addressed in case law | Not expressly addressed in case law | |
| MI | Robbery: Mich. Comp. Laws Ann. § 750.530 (West 2018) Armed robbery: Mich. Comp. Laws Ann. § 750.529 (West 2018) | <u>Yes.</u> <i>People v.</i> <i>Randolph</i> , 466 Mich. 532, 648 N.W.2d 164 (2002) (robbery reversed when force was after taking) | <u>Yes.</u> | <i>People v. Cherry</i> , 467 Mich. 901, 653 N.W.2d 182 (2002) (fraud was predicate act, reversed because taking occurred without force) |
| MN | Simple robbery: Minn. Stat. Ann. § 609.24 (West 2018) Aggravated robbery: Minn. Stat. Ann. § 609.245 (West 2018) | Not expressly addressed in case law | Not expressly addressed in case law | |
| MS | Robbery: Miss. Code Ann. § 97-3-73 (2017) | <u>Yes.</u> Fear after taking insufficient evidence. | Not expressly addressed in case law | |

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| | Robbery; use of deadly weapon: Miss. Code Ann. § 97-3-79 (2017) Robbery; threat to injure person or relative at another time: Miss. Code Ann. § 97-3-77 (2017) | <i>Washington v. State</i> , 794 So. 2d 253, 257 (Miss. Ct. App. 2001) | | |
| MO | Robbery in the first degree: Mo. Ann. Stat. § 570.023 (West 2017) Robbery in the second degree: Mo. Ann. Stat. § 570.025 (West 2017) | Not expressly addressed in case law | <u>No.</u> | State v. Shipley, 920 S.W.2d 120, 123 (Mo. Ct. App. 1996) (stealing by deceit cannot be predicate act to robbery) |
| MT | Mont. Code Ann. § 45-5-401 (West 2017) | <u>No.</u> Force may be used during asportation. <i>State v. Case</i> , 190 Mont. 450, 453, 621 P.2d 1066, 1069 (1980) | Not expressly addressed in case law | |
| NE | Neb. Rev. Stat. Ann. § 28-324 (LexisNexis 2018) | No. Force may be used during asportation. <i>State v. Bell</i> , 194 Neb. 554, 556, | Not expressly addressed in case law | |

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| | | 233 N.W.2d 920, 922 (1975) | | |
| NV | Nev. Rev. Stat. Ann. § 200.380 (LexisNexis 2017) | Not expressly addressed in case law | Not expressly addressed in case law | |
| NH | N.H. Rev. Stat. Ann. § 636:1 (2018) | Not expressly addressed in case law | Not expressly addressed in case law | |
| NJ | N.J. Stat. Ann. § 2C:15-1 (West 2018) | <u>Yes.</u> State v. Lopez, 187 N.J. 91, 101, 900 A.2d 779, 785 (2006) (force must be before or during taking, no “afterthought robbery”) | Not expressly addressed in case law | |
| NM | N.M. Stat. Ann. § 30-16-2 (2018) | <u>Yes.</u> State v. Lewis, 116 N.M. 849 (1993): Force used to retain property or to facilitate escape did not satisfy the force element necessary for the crime of robbery. | Not expressly addressed in case law | |
| NY | Robbery defined: N.Y. Penal Law § 160.00 (McKinney 2018) Robbery in the first | <u>No.</u> Force may be used in asportation. <i>People v. Dekle</i> , 83 A.D.2d 522, | <u>Yes.</u> | <i>Matter of Jerry H.</i> , 49 A.D.2d 925, 925, 373 N.Y.S.2d 647, 648 (1975) (possession of stolen property may be predicate of robbery) |

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| | degree: N.Y. Penal Law § 160.15 (McKinney 2018) *(PL) Robbery in the second degree: N.Y. Penal Law § 160.10 (McKinney 2018) *(PL) Robbery in the third degree: N.Y. Penal Law § 160.05 (McKinney 2018) | 522, 441 N.Y.S.2d 261, 262 (1981), <i>aff'd</i> , 56 N.Y.2d 835, 438 N.E.2d 101 (1982) | | |
| NC | Robbery with firearms or other dangerous weapons: N.C. Gen. Stat. § 14-87 (2017) | Not expressly addressed in case law | Not expressly addressed in case law | |
| ND | N.D. Cent. Code § 12.1-22-01 (2017) | Not expressly addressed in case law | Not expressly addressed in case law | |
| OH | Robbery: Ohio Rev. Code Ann. § 2911.02 (LexisNexis 2018) Aggravated Robbery: Ohio Rev. Code Ann. § 2911.01 | <u>Yes.</u> State v. Thomas, 106 Ohio St. 3d 133 (2005): (reversed robbery conviction because force was too far after taking) | Not expressly addressed in case law | |

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| | (LexisNexis 2018) | | | |
| OK | Robbery defined: Okla. Stat. Ann. tit. 21, § 791 (West 2018) Degeres of robbery: Okla. Stat. Ann. tit. 21, § 797 (West 2018) Robbery or attempted robbery with dangerous weapon or imitation firearm a felony: Okla. Stat. Ann. tit. 21, § 801 (West 2018) | <u>No</u> | Not expressly addressed in case law | |
| OR | Robbery in the first degree: Or. Rev. Stat. Ann. § 164.415 (West 2018) Robbery in the second degree: Or. Rev. Stat. Ann. § 164.405 (West 2018) Robbery in third degree: Or. Rev. Stat. Ann. § 164.395 (West 2018) | <u>Yes.</u> State v. Jackson, 40 Ore. App. 759 (1979) (reversing robbery conviction because force was used after the completion of the attempted theft) | <u>Yes.</u> | State v. Boucher, 13 Or. App. 339, 341, 509 P.2d 1228, 1230 (1973) (theft by receiving goods may be predicate act to robbery) |

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| PA | 18 Pa. Stat. and Cons. Stat. Ann. § 3701 (West 2018) | <u>No.</u> Force during asportation permitted. <i>Com. v. Ford</i> , 539 Pa. 85, 650 A.2d 433 (1994) | Not expressly addressed in case law | |
| RI | Penalty for robbery: 11 R.I. Gen. Laws § 11-39-1 (2018) | <u>Yes.</u> <i>State v. Holley</i> , 604 A.2d 772 (1992): (vacating robbery conviction because taking occurred without force) | Not expressly addressed in case law | |
| SC | Robbery and attempted robbery while armed with deadly weapon: S.C. Code Ann. § 16-11-330 (2018) | <u>No.</u> Force must be accompanying taking, which includes asportation. <i>State v. Moore</i> , 374 S.C. 468, 474, 649 S.E.2d 84, 86 (Ct. App. 2007) affirm | Not expressly addressed in case law | |
| SD | Robbery defined: S.D. Codified Laws § 22-30-1 (2018) Requisite force or fear: S.D. Codified Laws § 22-30- | Not expressly addressed in case law | Not expressly addressed in case law | |

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| | <p>2 (2018) Fear of force necessary to robbery: S.D. Codified Laws § 22-30-3 (2018) Taking without knowledge of victim not robbery: S.D. Codified Laws § 22-30-4 (2018) Degrees of robbery: S.D. Codified Laws § 22-30-6 (2018)</p> | | | |
| TN | <p>Robbery: Tenn. Code Ann. § 39-13-401 (2018) Aggravated robbery: Tenn. Code Ann. § 39-13-402 (2018) Especially aggravated robbery: Tenn. Code Ann. § 39-13-403 (2018)</p> | <p><u>Yes</u> State v. Owens, 20 S.W.3d 634 (2000) (reversing robbery because assault arose after taking)</p> | <p>Not expressly addressed in case law</p> | |
| TX | <p>Robbery: Tex. Penal Code Ann. § 29.02 (West 2017) Definitions:</p> | <p>Yes. <i>Sweed v. State</i>, 351 S.W.3d 63, 69 (Tex. Crim. App. 2011)</p> | <p>Not expressly addressed in case law</p> | |

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| | Tex. Penal Code Ann. § 29.01 (West 2017) Aggravated Robbery: Tex. Penal Code Ann. § 29.03 (West 2017) | | | |
| UT | Robbery: Utah Code Ann. § 76-6-301 (LexisNexis 2018) Aggravated robbery: Utah Code Ann. § 76-6-302 (LexisNexis 2018) | Not expressly addressed in case law | Not expressly addressed in case law | |
| VT | Assault and robbery: Vt. Stat. Ann. tit. 13, § 608 (2018) | Not expressly addressed in case law | Not expressly addressed in case law | |
| VA | Robbery; how punished: Va. Code Ann. § 18.2-58 (2017) | <u>Yes</u> Branch v. Commonwealth, 225 Va. 91 (1983) (common law robbery to mean that the violence of a robbery must occur before at the time of the taking) | Not expressly addressed in case law | |
| WA | Robbery definition: Wash. Rev. | No | Not expressly | |

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| | Code. Ann. § 9A.56.190 (West 2011) Robbery in the first degree: Wash. Rev. Code. Ann. § 9A.56.200 (West 2018) Robbery in the second degree: Wash. Rev. Code. Ann. § 9A.56.210 (West 2011) | | addressed in case law | |
| WV | Robbery or attempted robbery; penalties: W. Va. Code § 61-2-12 (2018) | Not expressly addressed in case law | Not expressly addressed in case law | |
| WI | Wis. Stat. Ann. § 943.32 (West 2018) | Not expressly addressed in case law | Not expressly addressed in case law | |
| WY | Wyo. Stat. Ann. § 6-2-401 (2018) | Not expressly addressed in case law | Not expressly addressed in case law | |