

IN THE
Supreme Court of the United States

JOHNNIE O'NEIL LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether theft offenses requiring no more than minimal force and no violence or threat of violence categorically constitute generic “robbery” for purposes of the Career Offender definition of a crime of violence, U.S.S.G. § 4B1.2(a)(2).

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Petitioner Johnnie O'Neil Lewis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's Opinion affirming Mr. Lewis's sentence is attached at Pet. App. 1a. The Fourth Circuit's Order denying his Motion for rehearing and rehearing en banc is attached at Pet. App. 3a.

JURISDICTION

The Fourth Circuit issued its opinion on July 23, 2018. Pet. App. 1a. It denied Mr. Lewis's petition for rehearing and rehearing en banc on September 24, 2018. Pet. App. 3a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

SENTENCING GUIDELINES PROVISION INVOLVED

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2(a).

North Carolina defines robbery at common law, so no statutory provision exists.

INTRODUCTION

In 2016, the United States Sentencing Commission amended the Career Offender guideline definition of a crime of violence. U.S.S.G., Appx. C, Amend. 798. The Commission eliminated the definition's "residual clause" and listed new offenses as crimes of violence, including "robbery." U.S.S.G. § 4B1.2(a)(2).

The Guidelines do not define robbery, so this definitional change requires the courts to decide what state offenses categorically meet the elements of generic robbery. The circuit courts cannot agree on an answer and have issued inconsistent opinions on what type of theft offenses are "robberies." The Sixth Circuit holds that generic robbery must involve the taking of property with more than minimal force. In contrast, the Third, Fourth, and Eleventh Circuits hold that theft offenses that require no more than *de minimis* force can be generic robbery.

Because the Career Offender guideline can have such a large effect on a criminal defendant's sentence, this circuit split is not merely academic. Defendants with identical criminal conduct and criminal histories will receive sentences

differing by years based solely on the happenstance of which federal circuit court interprets the Career Offender guideline for their sentencing court.

The circuit courts have now had three years to address the new crime of violence definition. In that time, a deep and irreconcilable split has developed. Further waiting will not cure this split. Mr. Lewis has preserved this issue throughout his case, and this petition presents this issue cleanly. This petition is the appropriate vehicle to address the question presented.

This Court should grant review to resolve the split that has developed in the federal circuits over whether state theft offenses that require no more than minimal force are generic “robbery” for purposes of the Career Offender guideline.

STATEMENT OF THE CASE

A. Offense Conduct

The facts underlying Mr. Lewis’s case are simple and undisputed. Substance addiction brought Mr. Lewis into the criminal justice system. When Mr. Lewis was a child, his drug-dealing father often used him to deliver drugs to his customers. His mother abused drugs and could not provide for her family, leaving young Mr. Lewis and his siblings living at times without heat or electricity.

He did not get to have a childhood. His grandfather abused him. His stepmother abused him. At age fifteen, he had to take on the role of father figure and provider for his siblings. Sadly, and unsurprisingly, he developed a serious drug and alcohol addiction starting when he was fourteen years old.

Equally sadly and unsurprisingly, he began committing crimes at age 16. Relevant to this petition, North Carolina convicted him of common law robbery in 2005. In June, 2017, Henderson (NC) police responded to reports of gunshots and found Mr. Lewis, intoxicated, on the street with a gun. A grand jury in the Eastern District of North Carolina indicted him in August on one count of being a felon in possession of a firearm. He pleaded guilty two months later.

B. Objection to classification of North Carolina common law robbery as a crime of violence and appeal to the Fourth Circuit.

In preparation for sentencing, the United States Probation Office prepared a Presentence Report ("PSR"), which recommended a total offense level of 17 and a criminal history category of IV, for an advisory Guidelines range of 37-46 months of imprisonment. Mr. Lewis objected to this range, arguing that the PSR improperly calculated his total offense level because it erroneously classified his prior conviction for North Carolina common law robbery as a crime of violence.

North Carolina "[c]ommon law robbery is the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700 (1982). A defendant may be convicted of North Carolina common law robbery even if he does not use violent force against his victim because "even minimal contact may be sufficient to sustain a robbery conviction if the victim forfeits his or her property in response."

United States v. Gardner, 823 F.3d 793, 803 (4th Cir. 2016). "[T]he minimum conduct necessary to sustain a conviction for North Carolina common law robbery does not necessarily include the use, attempted use, or threatened use of force

capable of causing physical pain or injury to another person.” *Id* at 804 (internal quotation omitted).

Mr. Lewis contended that generic robbery, as used in Section 4B1.2(a) of the Sentencing Guidelines, is a theft offense that involves the use or threatened use of more than *de minimis* force against another. Because North Carolina common law robbery does not require that level of force, it is not “robbery.” Had the PSR properly classified that prior offense, Mr. Lewis continued, he would have had a total offense level of 12 and a criminal history category of IV, for an advisory Guidelines range of 27-33 months of imprisonment. *Compare U.S.S.G. § 2K2.1(a)(4)(a) with § 2K2.1(a)(6).*

The district court overruled the objection and adopted the advisory Guidelines range of 37-46 months of imprisonment. The government moved for an upward departure from that range based on its argument that the range did not properly account for Mr. Lewis’s criminal history. The government argued that a criminal history category of VI better captured Mr. Lewis’s criminal history, which resulted in an advisory Guidelines range of 51-63 months of imprisonment. The district court granted the government’s motion and sentenced Mr. Lewis to 63 months—the top of the post-departure Guidelines range. Mr. Lewis timely appealed, raising as his sole issue whether the district court erred in holding that his North Carolina common law robbery conviction was a crime of violence.

A panel of the Fourth Circuit, relying on that court’s prior published decision in *United States v. Gattis*, 877 F.3d 150 (4th Cir. 2017), rejected this argument and

affirmed Mr. Lewis' sentence. Pet. App. 1a. Mr. Lewis timely petitioned for rehearing and rehearing en banc. The Fourth Circuit denied the petition. Pet. App. 3a.

This petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant review for three reasons. *First*, the generic definition of robbery presents an important question that is the subject of ever-increasing litigation in the wake of the Sentencing Commission's elimination of the residual clause and the addition of robbery to the Career Offender guideline. Sup. Ct. R 10(c). *Second*, the federal courts of appeals are divided about whether generic robbery requires more than minimal force as an element of the offense. Sup. Ct. R. 10(a). *Finally*, *Gattis* incorrectly holds that generic robbery requires only minimal force, and review would allow this Court to correct that error.

A. This case presents an important question.

The definition of generic robbery has become newly important following the Sentencing Commission's elimination of the "residual clause" from the Career Offender crime of violence definition in response to this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Before *Johnson* and the elimination of the residual clause, the guideline did not enumerate robbery as a crime of violence. *See* U.S.S.G. § 4B1.2(a)(2)(2015); *United States v. Bell*, 840 F.3d 963, 968 (8th Cir. 2016). Instead, robbery and similar offenses typically qualified as crimes of violence under the residual clause. *Bell*, 840 F.3d at 968. Effective August 1, 2016, the

Sentencing Commission amended the Career Offender guideline, eliminated the residual clause, and added robbery as an enumerated offense to the text of the crime of violence definition. U.S.S.G., Appx. C, Amend. 798.

But the Commission did not define “robbery,” so the courts must apply the generic definition of the offense to determine whether a predicate crime qualifies. *Accord Mathis v. United States*, 136 S. Ct. 2243, 2247-48 (2016) (discussing enumerated offenses under the Armed Career Criminal Act). The circuit courts cannot agree on this definition because they are divided about whether generic robbery requires more than minimal force as an element of the offense.

B. The courts of appeals are split on the correct resolution of this question.

The federal courts of appeals are divided over whether generic robbery requires more than minimal force. The Sixth Circuit Court of Appeals has determined that “the type of force contemplated by the generic definition of robbery is more than minimal.” *United States v. Yates*, 866 F.3d 723, 733 (6th Cir. 2017).

But the Third Circuit has explicitly disagreed with this conclusion, finding that generic robbery requires only minimal force. *United States v. Graves*, 877 F.3d 494, 503 (3d Cir. 2017) (“We now join the Seventh and Eleventh Circuits and hold that generic robbery requires no more than *de minimis* force.”). The Eleventh Circuit addressed this question before the Sentencing Commission eliminated the residual clause. *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011). It nonetheless reached the question and held that an offense that requires only minimal force or mere intimidation can be generic robbery. *Id* at 1244.

The Fourth Circuit, with *Gattis*, joined the Third and Eleventh Circuits on the *de minimis* side of the argument, holding that generic robbery requires force only sufficient to “jostle[] the owner” of the property “or uses only that force which is sufficient to overcome the victim’s resistance.” 877 F.3d at 158 (internal quotation omitted). It also holds that North Carolina Common Law Robbery “hews precisely to the same line.” *Id.* *Gattis* thus concludes that North Carolina Common Law Robbery meets the definition of generic robbery and is a crime of violence. *Id.* at 160. As shown below, this holding is incorrect.

C. *Gattis* incorrectly holds that generic robbery can be committed with minimal force and no violence or threat of violence.

North Carolina Common Law Robbery is not generic robbery. This Court has never defined generic robbery. But many circuits have recognized that generic robbery is “the misappropriation of property under circumstances involving immediate *danger* to a person.” *Yates*, 866 F.3d at 733 (emphasis added); *accord United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016). According to LaFave, most states define robbery to require “that the taking be accomplished by means of force or putting in fear.” Wayne R. LaFave, *Substantive Criminal Law* § 20.3 introduction (2d ed. 2003). LaFave does not say how most states define “force,” but he observes that in most jurisdictions, “robbery requires that the taking be done by means of *violence* or intimidation.” *Id.* § 20.3(d) (emphasis added). As the Sixth Circuit has observed, “[t]his mention of violence indicates that the type of force contemplated by the generic definition of robbery is more than minimal.” *Yates*, 866 F.3d at 733.

The Model Penal Code likewise defines “robbery” in a way that excludes a theft committed by the use of minimal force. The Code provides that a person:

is guilty of robbery if, in the course of committing a theft, he: (a) inflicts serious bodily injury upon another; or (b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or (c) commits or threatens immediately to commit any felony of the first or second degree.

Model Penal Code § 222.1. The Code also states that “the core of the robbery offense is the combination of theft and the fact or threat of injury.” Model Penal Code, Part II, Volume II, at 98; *see also id.* at 95 (“Robbery is distinguished from ordinary larceny by the presence of the victim and the use or threat of violence.”).

Unlike most jurisdictions and the Model Penal Code, a few states—like North Carolina—hold that the degree of force used during a robbery is “immaterial.”

United States v. Gardner, 823 F.3d at 803 (quoting *State v. Sawyer*, 224 N.C. 61 (1944)). In these states, a robbery conviction is possible even where the offender does not threaten the victim and uses only minimal force to take an item from the victim’s possession. For example, in North Carolina, a defendant can be guilty of common law robbery for an offense involving no more force than stealing a carton of cigarettes by just “pushing the victim’s hand off of [the] carton.” *Gardner*, 823 F.3d at 803 (citing *State v. Chance*, 662 S.E.2d 405 (N.C. Ct. App. 2008)); *accord Graves*, 877 F.3d at 502 (concluding that “North Carolina common law robbery requires only the use of *de minimis* force”).

In *Gattis*, the panel relied mainly on LaFave to conclude that generic robbery requires only minimal force. *Gattis*, 877 F.3d at 156. Although the *Gattis* panel

agreed that generic robbery is defined as “the misappropriation of property under circumstances involving immediate danger to the person,” it erroneously concluded that such “danger” may be satisfied by the use of minimal force. *Id.* at 156-157. But LaFave confirms that only a minority of states define robbery broadly enough to cover such *de minimis* conduct: “The great weight of authority . . . supports the view that there is not sufficient force to constitute robbery when the thief snatches the property from the owner’s grasp so suddenly that the owner cannot offer any resistance to the taking.” LaFave § 20.3(d)(1). If state law permits a robbery conviction when the defendant made no threat of force and the only force used was that necessary to remove the item from the unresisting owner’s grasp—then that robbery offense is broader than the generic offense.

Thus, *Gattis* incorrectly holds that the “danger” element of generic robbery may be satisfied by the use of minimal force. Instead, *Gattis* should have concluded “that the type of force contemplated by the generic definition of robbery is more than minimal.” *Yates*, 866 F.3d at 733. Unlike generic robbery, North Carolina Common Law Robbery encompasses a theft during which the offender uses only minimal force. This conduct does not require physical force or even the threat of physical force. The offense thus falls outside the scope of generic robbery. Because North Carolina common law robbery criminalizes a broader scope of conduct than the generic crime, it is not categorically a crime of violence. The district court erred in enhancing Mr. Lewis’ sentence.

D. This case presents an ideal vehicle for addressing the question presented.

This case presents an ideal vehicle for addressing the question presented for two reasons. First, Mr. Lewis properly preserved this issue in the district court and in the Fourth Circuit. Second, the Fourth Circuit has already held in another case that the predicate crime at issue here, North Carolina common law robbery, is a theft offense that requires no more than minimal force to commit. Thus, granting this petition will allow this Court to address the question presented with no undue complications that might result from difficulties in interpreting state law. Everyone agrees that North Carolina common law robbery does not require more than minimal force to commit; the only question remaining here is the one presented in this petition: whether such an offense is generic robbery for purposes of the Career Offender guideline.

1. The question presented is properly preserved and ready for this Court's review. Mr. Lewis objected to the PSR's designation of North Carolina common law robbery as a Section 4B1.2 crime of violence. He renewed that objection at sentencing. He raised the issue in his brief to the Fourth Circuit, and the Fourth Circuit addressed and rejected his argument on the merits. Pet. App. a1.

2. This case presents an ideal vehicle for addressing the question presented because no dispute exists over the fact that North Carolina common law robbery requires only *de minimis* force to commit. North Carolina "[c]ommon law robbery is the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691,

700 (1982). In *United States v. Gardner*, the Fourth Circuit addressed whether this crime categorically met the Armed Career Criminal Act's force clause. 823 F.3d 793, 801 (4th Cir. 2016). It conducted an in-depth examination of North Carolina case law and held that "even minimal contact may be sufficient to sustain a robbery conviction if the victim forfeits his or her property in response." *Id.* at 803. Thus, the Fourth Circuit "conclude[d] that the minimum conduct necessary to sustain a conviction for North Carolina common law robbery does not necessarily include the use, attempted use, or threatened use of force capable of causing physical pain or injury to another person." *Id.* at 804 (internal quotation omitted).

In *Gattis*, the Fourth Circuit did not dispute this classification of North Carolina common law robbery. It still held that that crime was generic robbery because "to commit generic robbery by taking property through the use of force, the defendant need not use a level of force capable of causing physical pain or injury to another person. Rather, it is sufficient if the defendant 'jostles the owner' or uses only that force which is sufficient to overcome the victim's resistance." *Gattis*, 877 F.3d at 158 (internal citation omitted).

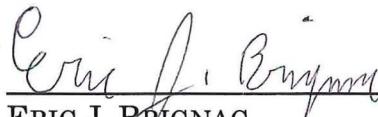
This petition thus squarely and cleanly provides this Court with an opportunity to resolve the circuit split outlined in the question presented.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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