

RECORD NO. _____

In The
Supreme Court of The United States

SAIYDIN ABDULLAN MUHAMMAD,

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

Lisa S. Costner, Esq.
N.C. State Bar #14308
LISA S. COSTNER, P.A.
952 W. 4th Street. Ste. 200
Winston-Salem, NC 27101
(336) 748-1885
lisa@lisacostnerlaw.com

*Counsel of Record for Petitioner
Saiydin Abdullan Muhammad*

QUESTION PRESENTED

Whether North Carolina common law robbery qualifies as a predicate offense to support a designation of career offender

TABLE OF CONTENTS

OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
UNITED STATES SENTENCING GUIDELINE PROVISIONS INVOLVED ..	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	8

INDEX TO APPENDICES

<i>United States v. Muhammad</i> , No. 16-4508 (4 th Cir. May 10, 2016)(unpublished)	App. A
--	--------

TABLE OF AUTHORITIES CITED

CASES

<i>Beckles v. United States</i> , 137 S. Ct. 886 (2017)	5
<i>United States v. Gardner</i> , 823 F.3d 793 (4th Cir. 2016)	6,7,8
<i>United States v. Gattis</i> , ___ F.3d ___, Number 16-4663, 2017 WL 6001522 (4th Cir. Dec. 4, 2017)	5,7

CONSTITUTIONAL PROVISION AND STATUTE

U.S. Const. amend. V (due process clause)	2
18 U.S.C. § 924	3
18 U.S.C. §§ 1951	3
28 U.S.C. § 1254	2

SENTENCING GUIDELINES

U.S.S.G. § 2B3.1(a)	4
U.S.S.G. § 4B1.1	4,5
U.S.S.G. § 4B1.2(a)	2,4,6

OTHER AUTHORITES

Wayne R. LaFave, <i>Substantive Criminal Law</i> (2d ed. 2003)	7
Model Penal Code § 222.1	7

IN THE
SUPREME COURT OF THE UNITED STATES

SAIYDIN ABDULLAN MUHAMMAD,

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

The Petitioner, Saiydin Abdullan Muhammad, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeal for the Fourth Circuit.

OPINION BELOW

On January 3, 2019, the Court of Appeals for the Fourth Circuit entered its opinion affirming Mr. Muhammad's conviction. A copy of the Opinion which is unpublished, is reproduced in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on

January 3, 2019. The jurisdiction of the Supreme Court of the United States is invoked pursuant to the provision of 28 U.S.C. § 1254(a), having timely filed this petition for a writ of certiorari within ninety days of the Court of Appeal's judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part that “[n]o person shall be deprived of life, liberty or property without due process of law.”

UNITED STATES SENTENCING GUIDELINE INVOLVED

Section 4B1.2(a) of the United States Sentencing Guidelines defines the term "crime of violence" as:

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).

STATEMENT OF THE CASE

A. District Court Proceedings

The charges against Mr. Muhammad arose out of a series of armed robberies of retail businesses that occurred between early November 2013 through December 31, 2013 in various counties in North Carolina;. The robberies occurred in much the same way: a man matching Mr. Muhammad's physical description, wearing a hoodie with the hood over his head and sunglasses, entered the business, approached a store employee at the cash register, and demanded money. Witnesses described a short, heavy black man clutching a bluish or gray bag. Most, but not all witnesses reported observing a firearm displayed in the bag as it was held by the robber.

Mr. Muhammad was subsequently charged in a thirteen count indictment. Eleven counts were Hobbs Act robbery charges, in violation of 18 U.S.C. §§ 1951(a) and he was charged in two counts with brandishing a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). (JA 17-32, 50-66) Mr. Muhammad pled guilty to count eleven of the indictment, one of the Hobbs Act counts, which alleged that he robbed a Home Depot in Burlington, North Carolina. The plea was entered pursuant to a plea agreement. (JA 133-39) A presentence report (PSR) was prepared, and Mr. Muhammad's base

offense base level was calculated to be 20, pursuant to U.S.S.G. § 2B3.1(a). (JA 204) According to the PSR, Mr. Muhammad qualified as a career offender, pursuant to U.S.S.G. § 4B1.1(a)(3), based on prior convictions of North Carolina felony common law robbery and one count of robbery with a dangerous weapon.

(JA 204) The PSR concluded that Muhammad's total offense level was 29. (JA 204) Mr. Muhammad's criminal history category was VI, based on a criminal history score of 16, and also due to his designation as a career offender. (JA 214)

The resulting advisory guideline range was 151-188 months imprisonment. (JA

225) Mr. Muhammad filed several objections to the PSR. (JA 238-40) Most of the objections were factual in nature and had no impact on his advisory guideline range. He also objected to the career offender designation, specifically to the common law robbery convictions as predicate offenses for career offender. (JA 238)

At the sentencing hearing, the district court found that the prior North Carolina common law robbery convictions constituted crimes of violence and that Mr. Muhammad qualified as a career offender. (JA 159) The district court did not grant a downward variance and sentenced Muhammad to a mid-range advisory guideline sentence of 168 months imprisonment, followed by three (3) years of supervised release, \$11,846.61 restitution and a \$100.00 special assessment. (JA

181-83) Mr. Muhammad filed a timely notice of appeal on August 15, 2016. (JA 195)

B. Court of Appeals Proceedings

In his appeal, Mr. Muhammad argued that his prior convictions for common law robbery did not qualify as predicate offenses which would support the application of the career offender guideline in his case. The case was placed in abeyance pending this Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017). After the *Beckles* decision, the case was again placed in abeyance, pending the Fourth Circuit Court of Appeals' decision in *United States v. Gattis*, 877 F.3d 150 (4th Cir. 2017), *cert. denied*, 138 S.Ct. 1572 (2018). On January 3, 2019, in an unpublished opinion, the Fourth Circuit affirmed the decision of the district court, finding that North Carolina common law robbery was a valid career offender predicate, citing the *Gattis* case.

REASONS FOR GRANTING THE WRIT

The district and appellate courts erred in determining that Mr. Muhammad's prior convictions for North Carolina common law robbery qualified as a generic robbery, thus resulting in its use as a predicate offense to support enhanced penalties for purposes of career offender, under U.S.S.G. § 4B1.1(a)(3). In Mr. Muhammad's case, the 2015 United States Sentencing Guidelines Manual was

utilized to calculate his advisory guideline range.¹ (JA 204) At the time of sentencing, U.S.S.G. § 4B1.2 defined a crime of violence as:

- (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 burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2 (U.S. Sentencing Comm'n 2015) Application Note 1 to the Guideline listed robbery as one of the enumerated offenses covered by the guideline. U.S.S.G. § 4B1.2 cmt. n. 1. The Fourth Circuit, in reviewing Mr. Muhammad's case, noted that he was sentenced prior to the 2016 amendments, but found that the prior common law robbery conviction was a valid career offender predicate, noting that it would “also satisfy the residual clause.”

In *United States v. Gardner*, 823 F.3d 793, 801-04 (4th Cir. 2016), the Fourth Circuit addressed the issue of whether the North Carolina common law robbery qualified as a “violent felony” under the force clause of the Armed Career Criminal Act, which at the time, was identical to the force clause in § 4B1.2(a)(1).

¹In August, 2016, the Sentencing Commission revised §1B1.2's definition of “crime of violence,” however, this definition was not in effect on July 21, 2016, the date of Mr. Muhammad's sentencing hearing.

The Court in *Gardner* used the categorical approach to determine whether North Carolina common law robbery matched the definition of a violent felony under the which does not satisfy the condition of “violent force” required by federal law for application of the ACCA enhancement,” and held that North Carolina common law robbery was not a violent felony under the force clause. *Id.* at 804.

In *United States v. Gattis*, 877 F.3d 150 (4th Cir. 2017), *cert. denied*, 138 S.Ct. 1572 (2018), the Fourth Circuit held that North Carolina common law robbery did qualify as a “robbery as that term is used within U.S.S.G. § 4B1.2(a)(2).” *Gattis* was a post 2016 amendment case. In its analysis, the court considered the issue of the definition of generic robbery. *Id.* at 155-6. The court first considered the Model Penal Code, noting that it defines generic robbery as requiring proof that “in the course of committing a theft,” the defendant inflicte[ed] *serious bodily injury*,” “threaten[ed] another with or purposefully put[] him in fear of immediate *serious bodily injury*,” or “commit[ed] or threaten[ed] immediately to commit any felony of the first or second degree.” *Id.* at 156, quoting Model Penal Code § 222.1. The court then looked to the meaning of robbery as defined by LaFave’s *Substantive Criminal Law* treatise, and noted that LaFave defines robbery as the “misappropriation of property under circumstances involving [immediate] danger to the person. *Id.* at 12. (quoting 3 Wayne r.

LaFave, *Substantive Criminal Law* § 20.3(d)(2), at 187. The court then opted to apply the LaFave definition to the North Carolina statute, and based on that comparison, found that common law robbery qualifies as a crime of violence for purposes of the application of the career offender guideline. In so doing, the Fourth Circuit erred in its determination. As was noted in *Gardner*, the offense of North Carolina common law robbery could be committed with no force other than to take the property by pushing it away from the hands of the victim. *United States v. Gardner*, 823 F.3d 793 at 803 (4th Cir. 2016) Because North Carolina common law robbery encompasses conduct that is broader than the scope of the generic definition of robbery, it does not qualify as a crime of violence.

Mr. Muhammad's sentence should not have been subject to an enhanced sentence as a Career Offender.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted, April 2, 2019.

Lisa S. Costner

Lisa S. Costner
N.C. State Bar #14308
Lisa S. Costner, P.A.
952 W. 4th St., Ste 200
Winston-Salem, NC 27101
336/748-1885
Lisa@lisacostnerlaw.com

Attorney for Petitioner

RECORD NO. _____

In The
Supreme Court of The United States

SAIYDIN ABDULLAN MUHAMMAD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Lisa S. Costner, Esq.
N.C. State Bar #14308
LISA S. COSTNER, P.A.
952 W. 4th Street. Ste. 200
Winston-Salem, NC 27101
(336) 748-1885
lisa@lisacostnerlaw.com

*Counsel of Record for Petitioner
Saiydin Abdullan Muhammad*

APPENDIX

United States v. Muhammad, No. 16-4508

(4th Cir. May 10, 2016)(unpublished) App. A

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 16-4508

UNITED STATES OF AMERICA,**Plaintiff - Appellee,****v.****SAIYDIN ABDULLAN MUHAMMAD,****Defendant - Appellant.**

**Appeal from the United States District Court for the Middle District of North Carolina, at
Greensboro. William L. Osteen, Jr., District Judge. (1:14-cr-00353-WO-1)**

Submitted: December 21, 2018**Decided: January 3, 2019**

Before GREGORY, Chief Judge, MOTZ and WYNN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

**Lisa S. Costner, LISA S. COSTNER, P.A., Winston-Salem, North Carolina, for
Appellant. Matthew G.T. Martin, United States Attorney, Terry M. Meinecke, Assistant
United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro,
North Carolina, for Appellee.**

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Saiydin Abdullan Muhammad appeals from his 168-month sentence imposed pursuant to his guilty plea to interference with commerce by robbery. On appeal, Muhammad challenges his career offender status, asserting that the district court erred in determining that Muhammad's prior North Carolina common law robbery convictions were proper predicate offenses. We affirm.

We review "de novo the question whether a prior state conviction constitutes a predicate felony conviction for purposes of a federal sentence enhancement." *United States v. Valdovinos*, 760 F.3d 322, 325 (4th Cir. 2014). The district court correctly applied the career offender enhancement to Muhammad if: "(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S. Sentencing Guidelines Manual § 4B1.1(a).

Prior to 2016, a "crime of violence" was an offense punishable by more than a year of imprisonment that "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another [the force clause], or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives [the enumerated clause], or otherwise involves conduct that presents a serious potential risk of physical injury to another [the residual clause]." USSG § 4B1.2(a). At the time, Application Note 1 to the Guideline listed robbery as one of several enumerated offenses expressly covered by the

definition. USSG § 4B1.2 cmt. n.1. Effective August 1, 2016, the “crime of violence” definition was amended to expressly include robbery as an enumerated offense in USSG § 4B1.2(a)(2), rather than relegating it to the commentary. In addition, the residual clause was removed. See USSG § 4B1.2(a)(2).

Muhammad, who was sentenced prior to the 2016 amendments, does not challenge the authority of Application Note 1, and as such, we conclude that robbery was part of the pre-2016 version of § 4B1.2(a). We have previously ruled that North Carolina common law robbery categorically qualified as “robbery,” as that term is used in § 4B1.2. *See United States v. Gattis*, 877 F.3d 150, 156-60 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 1572 (2018). As such, Muhammad’s common law robbery conviction was a valid career offender predicate even prior to the 2016 amendments. In addition, we further note that North Carolina common law robbery would also satisfy the residual clause of § 4B1.2.

Accordingly, we affirm Muhammad’s sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED