No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MELVIN LEWIS ANDREWS
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

BRETT D. BOONE
Counsel of Record for Petitioner Andrews
6205 Airport Freeway
Fort Worth, Texas 76117
(817) 831-0100
(817) 831-0537 Facsimile
Email: bboone@flash.net
Texas State Bar No: 02626800

QUESTIONS PRESENTED

1. Should this Court exercise its supervisory powers where a circuit court of appeals continues to allow trial courts to apply "crime of violence" analyses that are contrary to Johnson v. United States, 130 S.Ct. 1265 (2010)?

2. Does a plain and prejudicial miscalculation of a Guidelines sentencing range call for a court of appeals to vacate a defendant's sentence in the ordinary case?

PARTIES TO THE PROCEEDINGS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

1. United States of America

2. Melvin Lewis Andrews

3. Honorable Reed O'Connor, United States District Judge for the Northern District of Texas

4. Honorable Jeffrey Cureton, United States Magistrate Judge for the Northern District of Texas

5. Dan Cole, Assistant United States Attorney for the Northern District of Texas

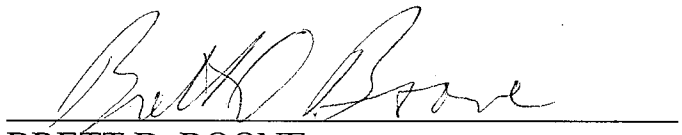
6. Erin Nealy Cox, United States Attorney for the Northern District of Texas

7. James (Wes) W. Hendrix, Assistant United States Attorney for the Northern District of Texas.

8. William A. Glaser, Assistant United States Attorney, Appellate Section, Washington, D.C.

9. William Barr, Attorney General of the United States.

10. Matthew S. Miner, Deputy Assistant Attorney General.



BRETT D. BOONE
6205 Airport Freeway
Fort Worth, Texas 76117
(817) 831-0100
(817) 831-0537 Facsimile
Email: bboone@flash.net
Texas State Bar No: 02626800

ATTORNEY FOR ANDREWS

TABLE OF CONTENTS

Subject Index

INDEX TO APPENDICES

Table of Authorities

Case: **Page:**

Statutes and Rules **Page:**

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MELVIN LEWIS ANDREWS

V.

UNITED STATES OF AMERICA

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

PETITION FOR WRIT OF CERTIORARI

Comes now, Petitioner, MELVIN LEWIS ANDREWS, who submits this his petition for writ of certiorari as follows. Petitioner is currently confined in the United States Bureau of Prisons pursuant to the judgment and sentence of the District Court below.

OPINION BELOW

This opinion of the Fifth Circuit Court of Appeals is available at *United States*

v. Melvin Lewis Andrews, (#17-11371, 5th Cir. April 11, 2019)(not designated for publication). A copy of the opinion is attached at Appendix A-1.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254, as an appeal from final judgment of the Fifth Circuit Court of Appeals. This Writ of Certiorari is timely because it is filed within 90 days of judgment from the Fifth Circuit Court of Appeals under Rule 13 of the Rules of the Supreme Court of the United States.

STATEMENT OF CASE

I. Nature of the Case

Defendant Andrews pled guilty to one-count of an Indictment charging Andrews and others of Interference with Commerce by Robbery and Aiding and Abetting in violation of 18 U.S.C. §§1951(a) and (2). (Hobbs Act robbery).

II. Course of Proceedings and Disposition in the Court Below

MELVIN LEWIS ANDREWS pled guilty and sentencing was held on November 6, 2017. The Court imposed a sentence of 188 months. Petitioner filed a timely Notice of Appeal. The Fifth Circuit affirmed by unpublished opinion dated April 11, 2019. Petitioner now brings this Writ of Certiorari.

III. Statement of the Facts

The District Court found Andrews to be a career offender under U.S.S.G. §§ 4B1.1 and 4B1.2, based on a "prior" conviction for robbery under California Penal Code, Part 1, Title 8, Chapter 4, Section 211 (CPC §211), that the Court found to be a crime of violence.

The District Court and the 5th Circuit both erred in their application of categorical analysis of the California Statute. The California Statute is broader than generic robbery. Generic robbery generally requires immediate danger of force directed towards a person but the California Statute is satisfied by force used against property.

REASONS FOR GRANTING CERTIORARI

1. **This Court in Johnson v. United States, 130 S.Ct. 1265, at 1271 (2010), indicated that in the context of a violent felony, physical force means violent force against a person. The California Robbery Statute allows a conviction even if force is only used against property. Despite this, the 5th Circuit continues to categorize such convictions as crimes of violence to allow enhanced punishments. This is contrary to Johnson. The principles set forth in Johnson will continue to be thwarted if the Supreme Court does not intervene.**

   The Ninth Circuit and Fifth Circuit are split on the decision of whether California Robbery (CPC§211) is a violent crime under a Johnson analysis. The Ninth Circuit has decided that it is not, and the Fifth Circuit has decided that it is. This Supreme Court should resolve the issue, in favor of the Ninth Circuit.

2. The Fifth Circuit rulings continue to defy the instructions of the United States Supreme Court in Molina-Martinez v. United States, 136 S.Ct. 1338 (2016) and Rosales-Mireles v. United States, 138 S.Ct. 1897 (2018).

I. Standard of Review

The Circuit Court of Appeals reviews the trial court's determination that an offense qualifies as a "crime of violence" under the United States Sentencing Guidelines as a legal question subject to *de novo* review. United States v. Jones, 752 F.3d 1039 (5th Cir. 2014).

II. Discussion

Melvin Andrews was sentenced to 188 months consecutive to a California state prison sentence of three (3) years pursuant to Andrews' prior conviction under California's "robbery" statute. The probation officer had calculated Andrews' guideline imprisonment range at 110 to 137 months in the Presentence Report (PSR). The probation officer considered Andrews' conviction and determined that it should not be used for enhancement under U.S.S.G. §§ 4B1.1 and 4B1.2, citing Mathis v. United States, 136 S.Ct. 2243 (2016). At the urging of the United States Attorney, and over objection by defense counsel, the trial court found that Andrews' California conviction should cause him to be a "career offender" under 4B1.1 and 4B1.2 and that Andrews' sentencing should therefore be enhanced.

U.S.S.G. § 4B1.1 states in pertinent part:

"(a) A defendant is a career offender 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.S.G. § 4B1.2 states in pertinent part:

"(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..."

Andrews was convicted in California in 2016 of Robbery. The California robbery statute is found at CPC §211 which states:

> "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

The statute itself seems be "indivisible" for federal "violent felony" analysis purposes, and has been held so in United States v. Dixon, 805 F.3d 1193, 1198 (9th Cir. 2015).

Where the statute is not divisible, the analysis of it is subject to the classical categorical approach. United States v. Herrold, 883 F.3d 517 (5th Cir. 2018), citing Mathis v. United States, 136 S.Ct. 2243, 2248 (2016). Consequently, the California statute should be compared to a "generic" definition of robbery. If the California statute is broader, and can include conduct that would not be included in the generic definition, then a previous conviction under the California statute should be not usable for enhancement under U.S.S.G. §§ 4B1.1 and 4B1.2.

The Model Penal Code § 222.1 states:

> "(1) Robbery Defined. 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."

Generic robbery requires the infliction, threat, or apprehension of "serious bodily injury"; the California statute does not. Generic robbery is more narrow than CPC §211.

Consider for example, the following scenario. A store patron at the point of sale, could extract a debit card from his or her wallet, set down their wallet on the

counter, in order to operate a card reader, and thereby make a payment to complete the sale. Meanwhile, the next patron in line might snatch the wallet and run out of the store, without any physical confrontation between the second patron and any other person. The conduct in this scenario would not be sufficient for a conviction for generic robbery under the Model Penal Code. However, such conduct would satisfy the California robbery statute, CPC §211. Appellant contends that generic robbery involves the use of force or fear against a person as an essential means of illegally obtaining control of property. The California robbery statute seems to be broader, allowing a conviction for the use of force against property, as opposed to a person. Because CPC §211 is broader than generic robbery, §211 should not qualify as a "robbery" or "crime of violence" for purposes of sentence enhancement under U.S.S.G. §§ 4B1.1 and 4B1.2. This is supported by case law in the Ninth Circuit. See United States v. Dixon, 805 F.3d 1193 (9th Cir. 2015); United States v. Bankston, 901 F.3d 1100 (9th Cir. 2018).

The analysis and reasoning by the trial court and the 5th Circuit run contrary to the reasoning of this Supreme Court in Johnson v. United States, 130 S.Ct. 1265 (2010). This Supreme Court states in Johnson, at 1271:

"...We think it clear that in the context of a statutory definition of "*violent* felony," the phrase "physical force" means *violent* force - that is, force capable of causing physical pain or injury to another person. See *Flores v. Ashcroft*, 350 F.3d 666, 672 (C.A.7 2003)(Easterbrook,J.). Even by itself, the word "violent" in §924(e)(2)(B) connotes a substantial degree of force. Webster's Second 2846 (defining "violent" as "[m]oving, acting, or characterized, by physical force, esp. by extreme and sudden or by unjust or improper force; furious; severe; vehement..."); 19 Oxford English Dictionary 656 (2d ed. 1989) ("[c]haracterized by the exertion of great physical force or strength"); Black's 1706 ("[o]f, relating to, or characterized by strong physical force"). When the adjective "violent" is attached to the noun "felony," its connotation of strong physical force is even clearer. See *id.*, at 1188 (defining "violent felony" as "[a] crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon"); see also *United States v. Doe*, 960 F.2d 221, 225 (C.A.1 1992) (Breyer, C.J.). ("[T]he term to be defined, 'violent felony'...calls to mind a tradition of crimes that involve the possibility of more closely related, active violence.")."

The trial court and the 5th Circuit erred by applying the career offender crime of violence enhancement to Melvin Andrews. The trial court found the guideline sentencing range to be 151 to 188 months, and sentenced Andrews to 188 months, consecutive to the time Andrews was serving on the California conviction at issue. A proper application of the guidelines would have resulted in a guideline imprisonment range of 110 to 137 months.

When the defendant is sentenced under an incorrect guideline range...the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent error. Molina-Martinez v. United States, 136 S.Ct. 1338,

1345 (2016). Appellant shows his substantial rights to have been harmed. The error is not harmless. Andrews requests remand.

Andrews prays this Court find that the career offender provisions of U.S.S.G. §§ 4B1.1 and 4B1.2 were improperly applied, and that this case be remanded for sentencing consistent therewith.

The Fifth Circuit decision in Andrews and others, *e.g.* United States v. Tellez-Martinez, 517 F.3d 813 (5th Cir. 2008), is contrary to the decisions in other Circuits. The Fifth Circuit views a threat or force against property to be sufficient under U.S.S.G. §4B1.2(a). However, the Sixth, Ninth, and Tenth Circuits have held that U.S.S.G. §4B1.2(a) requires that the wrongful use of force, fear, or threat must be directed against a person, not property. See United States v. Camp, 903 F.3d 594, at 603 (6th Cir. 2018); United States v. Edling, 895 F.3d 1153, at 1157 (9th Cir. 2018); and United States v. O'Connor, 874 F.3d 1147, at 1155 (10th Cir. 2017). Indeed, these cases envision that a Hobbs Act robbery itself might statutorily not qualify as a violent crime under U.S.S.G. §4B1.2(a).

Point on Plain Error

At the circuit court, as to Andrews second point of error, the government admitted that Andrews' California conviction did not fit the definition of "prior" as applied in U.S.S.G. §4B1.2(c) and thus should not have been used. As the

government's brief, at page 21, stated:

> "The government recognizes that Andrews' California robbery should not have been counted as a prior felony conviction under the career offender guideline."

This was because Andrews California conviction occurred after the commission of the instant offense - the 2014 Hobbs Act robbery.

This was error and this error is clear from a reading of the guidelines. Even though clearly an error in the sentencing of Andrews, the Fifth Circuit and the Department of Justice refuses to remedy it. This error was missed by the District Court, by the Probation Department, by the United States Attorney, and by defense counsel at the time of sentencing. The man who suffers for it is Andrews. Because this error was not raised in the trial court, the court of appeals reviewed for plain error. United States v. Huerra, 884 F.3d 511, 519 (5th Cir. 2018).

The government admits this fulfills the first and second prongs of plain-error review, namely that (1) there is an error, and (2) the error is clear or obvious, rather than subject to reasonable dispute.

The government contends that the third and fourth requirements for plain error review are not met, namely: (3) the error affected the appellant's substantial rights..., and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. United States v. Marcus, 560 U.S. 258, 262 (2010).

Defendant contends all four prongs are satisfied and that he is entitled to remand to be resentenced. The Fifth Circuit's refusal to remand is in direct contravention of the instructions given the Fifth Circuit by this United States Supreme Court in Molina-Martinez v. United States, 136 S.Ct. 1338 (2016), to-wit:

> "The Court of Appeals for the Fifth Circuit stands generally apart from the other Courts of Appeals with respect to its consideration of unpreserved Guidelines errors. This Court now holds that its approach is incorrect."

If Andrews is not remanded, the Fifth Circuit will continue to overrule the instructions from the United States Supreme Court.

This Court previously instructed that plain error affects substantial rights in most cases where error was prejudicial and affected the outcome of the district court proceedings. United States v. Olano, 507 U.S. 725, 734 (1993). Here the error prejudiced Andrews by causing the Court to apply to Andrews an incorrect, and mistakenly high Guidelines sentencing range. The trial court and the 5th Circuit erred by applying the career offender crime of violence enhancement to Melvin Andrews. The trial court found the guideline sentencing range to be 151 to 188 months, and sentenced Andrews to 188 months, consecutive to the time Andrews was serving on the California conviction at issue. A proper application of the guidelines would have resulted in a guideline imprisonment range of 110 to 137 months.

When the defendant is sentenced under an incorrect guideline range - whether or not the defendant's ultimate sentence falls within the correct range - the error itself can, and most often will, be sufficient to show a reasonable probability of a different out-come absent the error. Molina-Martinez v. United States, 136 S.Ct. 1338, 1345 (2016). Appellant shows his substantial rights to have been harmed. The error is not harmless.

The fourth prong of Olano's plain-error review is whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings. That requirement is presumably satisfied here according to this Supreme Court. See Rosales-Mireles v. United States, 138 S.Ct. 1897 (2018) holding that a miscalculation of a Guidelines sentencing range that is plain and affects the defendant's substantial rights calls for a court of appeals to exercise its discretion...to vacate the defendant's sentence in the ordinary case. The court noted that remands for resentencing are relatively inexpensive proceedings. Ensuring the accuracy of the Guidelines determinations furthers the Sentencing Commission's goal of achieving uniformity and proportionality in sentencing. As stated in Rosales-Mireles, an error resulting in a higher range than the Guidelines provides usually establishes a reasonable probability that a defendant will serve a prison sentence greater than necessary to fulfill the purposes of incarceration (citing 18 U.S.C. §3553(a) and Molina-Martinez,

supra).

Surely fairness of a judicial proceeding is affected where an error results in a sentence that is longer than the court's own rules deem to be necessary. Surely the recognition of error and blatant refusal to remedy it affects the integrity and public reputation of the judicial proceedings.

CONCLUSION

Petitioner, MELVIN LEWIS ANDREWS requests this Court grant relief and grant the Petition for Certiorari.

Respectfully submitted,

BRETT D. BOONE
6205 Airport Freeway
Fort Worth, Texas 76117
(817) 831-0100
(817) 831-0537 Facsimile
Texas State Bar No: 02626800
Email: bboone@flash.net
Attorney for Petitioner Andrews

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MELVIN LEWIS ANDREWS
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

CERTIFICATE OF SERVICE

I, BRETT D. BOONE, Counsel of Record for MELVIN LEWIS ANDREWS, being first duly sworn according to law, depose and say that the required number of the following documents:

1. Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit; and

2. Motion for Leave to Proceed in Forma Pauperis;

were filed with this Court and served on counsel for the United States on this same

date, by depositing the required number of originals and copies of the documents into the United States Mail in sealed envelopes, first class United States postage prepaid or by delivery to a third-party commercial carrier for delivery within 3 calendar days and addressed to: Supreme Court of the United States, Office of the Clerk, 1 First Street N.E., Washington, DC 20543, and United States Attorney for the Northern District of Texas, 801 Cherry Street, Suite 1700, Fort Worth, TX 76102 (Phone: 817-252-5253)(counsel for Respondent) and Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001 (Phone: 202-514-2217)(counsel for Respondent).

Date: June 26, 2019

BRETT D. BOONE
Attorney for Petitioner Andrews