No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSE GOMEZ-AGUILAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals err in holding that robbery in violation of D.C. Code § 22-2801 categorically qualifies as an aggravated felony theft offense under 8 U.S.C. § 1101(a)(43)(G)?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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Petitioner Jose Gomez-Aguilar respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 19, 2019. App. A.

OPINION BELOW

The court of appeals' memorandum (*id.*) is designated "Not for Publication," but is available at 769 F. App'x. 412. The pertinent district court ruling (App. C) is unreported.

JURISDICTION

The United States District Court for the District of Arizona had jurisdiction over the government's federal charge against Mr. Gomez-Aguilar pursuant to 18 U.S.C. § 3231. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 19, 2019. App. A at 1. That court denied Mr. Gomez-Aguilar's timely petition for panel rehearing on July 25, 2019. App. C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

District of Columbia Code § 22-2801 reads as follows:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.

8 U.S.C. § 1101(a)(43)(G) reads as follows:

> **(a)** As used in this chapter –
>
> * * *
>
> **(43)** The term "aggravated felony" means –
>
> * * *
>
> **(G)** a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year[.]

STATEMENT OF THE CASE

Jose Gomez-Aguilar is a 47-year-old restaurant and construction worker and native and citizen of El Salvador. During his youth, he lived through El Salvador's civil war. After the war he fled to Canada, where he sought asylum. In 1997 he returned to El Salvador to collect documents supporting his asylum petition. But he had trouble getting the documents, and the next year he left El Salvador again, this time fleeing gang members who had extorted, beaten, and threatened to kill him. He crossed into the United States at or near Eagle Pass, Texas in December of 1998.

In 2001, Mr. Gomez-Aguilar was convicted of Robbery in the Superior Court of the District of Columbia, and sentenced to five years of imprisonment. On February 15, 2005, United States Immigration and Customs Enforcement (ICE) issued a Notice of Intent to Issue a Final Administrative Removal Order (Notice of Intent) to Mr. Gomez-Aguilar. The notice asserted that Mr. Gomez-Aguilar was subject to "expedited administrative removal proceedings," conducted "without a hearing before an immigration judge," because his Robbery conviction was an

"aggravated felony" as defined in the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(43).

The next day, ICE Special Agent Barry Sands visited Mr. Gomez-Aguilar with the Notice of Intent. Special Agent Sands advised Mr. Gomez-Aguilar in Spanish (Mr. Gomez-Aguilar does not speak English) that he "had a final conviction for an aggravated felony" and "was ineligible for any relief from removal that the Secretary of Homeland Security may grant in an exercise of discretion."

Mr. Gomez-Aguilar signed the Notice of Intent "based on what [Special Agent Sands] told [him], but not understanding what [he] was signing." The portion of the Notice of Intent that Mr. Gomez-Aguilar signed indicated that he admitted the allegations in the notice, was deportable and ineligible for any form of relief from removal, waived his right to contest his removal, and wished to be removed to El Salvador. On March 25, 2005, a Supervisory Deportation Officer signed a Final Administrative Removal Order, and on April 22, 2005, Mr. Gomez-Aguilar was removed to El Salvador.

That same year, Mr. Gomez-Aguilar married Ester Rosa de Gomez. The couple had two sons. In 2013, Mr. Gomez-Aguilar and Ester were running a small store in El Salvador when gang members targeted them for extortion. When Mr. Gomez-Aguilar refused to pay, his older son was run over by a car and sustained significant head trauma. After this incident, Mr. Gomez-Aguilar moved his family to Mexico. His wife and children later moved to Brooklyn, New York. Mr. Gomez-Aguilar's older son still suffers from seizures and is unable to walk.

According to a 2015 Notice of Intent/Decision to Reinstate Prior Order, Mr. Gomez-Aguilar illegally reentered the United States at or near Sasabe, Arizona in the summer of 2015. Mr. Gomez-Aguilar was convicted of illegal reentry in violation of 8 U.S.C. § 1326(a), and was sentenced in January of 2016 to 13 months of incarceration. In August of that year he was removed to El Salvador.

Mr. Gomez-Aguilar settled in Chiapas, Mexico, and was "doing well" there, until his wife informed him that she had leukemia and needed his help caring for their children. Mr. Gomez-Aguilar returned to the United States and was found at or near Casa Grande, Arizona in April of 2017. The government procured an indictment charging Mr. Gomez-Aguilar with unlawful reentry in violation of 8 U.S.C. § 1326(a), "enhanced by (b)(1)." Section 1326(a) provides that an alien who has been removed from the United States and subsequently reenters the country may be imprisoned for up to two years. Section 1326(b)(1) raises the maximum penalty to ten years where the alien's removal was subsequent to a conviction for a felony. Mr. Gomez-Aguilar's 2005 administrative removal was the predicate for the unlawful-reentry charge.

Mr. Gomez-Aguilar pleaded not guilty and filed a motion to dismiss the indictment. He argued that his 2005 administrative removal was unlawful because he "was wrongfully categorized as an aggravated felon, wrongfully deprived of the opportunity to seek relief, and he was prejudiced when he was wrongfully deported." Mr. Gomez-Aguilar argued that his D.C. Robbery conviction was not a "categorical" match to the INA's "aggravated felony" definition.

Mr. Gomez-Aguilar was referencing a body of caselaw holding that a court determining whether an alien's prior conviction constituted an aggravated felony under the INA generally must employ the "categorical" approach in assessing the statute of conviction. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018). A court applying categorical analysis must "look only to the elements of the [offense], not to the facts of [the] defendant's conduct." *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) (internal quotation marks omitted). The only exception is for statutes that have a "divisible" structure, meaning that, instead of "set[ting] out a single (or 'indivisible') set of elements to define a single crime," they "list elements in the alternative, and thereby define multiple crimes." *Id*. at 2248-49. Only if the statute is divisible may the court employ the "modified categorical approach," which permits it to examine "a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id*. at 2249.

Mr. Gomez-Aguilar argued that the Notice of Intent was deficient because it failed to specify which of the many categories of aggravated felony his Robbery conviction allegedly matched. In addition, he noted that the conviction did not categorically match the two categories of the INA's aggravated felony definition that appeared potentially applicable: "crime of violence," and "theft offense." Because his Robbery conviction was not categorically an aggravated felony, Mr. Gomez-Aguilar argued, his 2005 removal was unlawful, and could not be used as the predicate for unlawful reentry after removal.

The government in response argued that the D.C. Robbery statute was divisible, and thus subject to the modified categorical approach. The government proffered documents from the D.C. Robbery prosecution, and argued that they established that the offense qualified as an aggravated felony pursuant to the modified categorical approach.

The district court conducted a hearing on Mr. Gomez-Aguilar's motion to dismiss. App. B. After hearing argument from both parties, the district court stated that the D.C. Circuit's opinion in *United States v. Sheffield*, 832 F.3d 296 (D.C. Cir. 2016), as well as that court's earlier opinion in *In re Sealed Case*, 548 F.3d 1085 (D.C. Cir. 2008), established that the D.C. Robbery statute was divisible. App. B at 11-15. The court accordingly employed the modified categorical approach, examined the case-specific documents that the parties had proffered, concluded that they showed that Mr. Gomez-Aguilar's Robbery conviction qualified as a crime of violence, and on this ground denied Mr. Gomez-Aguilar's motion to dismiss. *Id*.

The parties subsequently entered into a conditional plea agreement in which Mr. Gomez-Aguilar admitted to reentering the country after having been previously removed, and the parties agreed that he would receive a sentence at or below the middle of the United States Sentencing Guidelines range. The agreement included an appeal waiver that expressly preserved Mr. Gomez-Aguilar's right to appeal the district court's denial of his motion to dismiss the indictment. The district court accepted Mr. Gomez-Aguilar's guilty plea and sentenced him to 30 months of

imprisonment, followed by a three-year term of supervised release. Mr. Gomez-Aguilar then filed an appeal in the court of appeals.

In his appeal, Mr. Gomez-Aguilar argued that the D.C. Robbery statute is not divisible, that D.C. robbery does not categorically qualify as a "crime of violence" or theft offense, and that accordingly the district court erred in denying his motion to dismiss the indictment. Abandoning the argument it had made below, the government conceded in the court of appeals that the D.C. Robbery statute is not divisible, and that the crime does not categorically qualify as a "crime of violence" pursuant to 8 U.S.C. § 1101(a)(43)(F). But the government urged the court of appeals to affirm Mr. Gomez-Aguilar's conviction nevertheless, on the premise that D.C. Robbery categorically qualifies as a "Theft" offense under 8 U.S.C. § 1101(a)(43)(G). The court of appeals accepted this argument, holding that D.C. Robbery categorically qualifies as a "Theft" offense, and rejecting Mr. Gomez-Aguilar's arguments to the contrary. App. A. As Mr. Gomez-Aguilar shows below, that conclusion was erroneous.

REASON FOR GRANTING THE WRIT

The court of appeals affirmed the district court's denial of Mr. Gomez-Aguilar's motion to dismiss the indictment in this case based on its conclusion that D.C. robbery in violation of D.C. Code § 22-2801 categorically qualifies as a "Theft" offense under 8 U.S.C. § 1101(a)(43)(G). But that is a wrongheaded conclusion that should be rejected by this Court. D.C. Robbery does not categorically qualify as a "Theft" offense because it does not require that the item taken be "property"; it does

not require that the item be taken with the intent to deprive the owner of rights and benefits of ownership; it does not require that the item be taken without consent; and it applies to accessories after the fact. For any or all of these reasons, this Court should reject the court of appeals' misguided analysis and confirm that D.C. Robbery does not categorically fall within the generic definition of a Theft offense pursuant to 8 U.S.C. § 1101(a)(43)(G).

ARGUMENT

This Court should reject the court of appeals' misguided holding that D.C. robbery categorically qualifies as a "Theft" offense under 8 U.S.C. § 1101(a)(43)(G).

A. D.C. Robbery does not require that the item taken be property.

The D.C. robbery statute refers to the taking of "*anything of value*," rather than "property." D.C. Code § 22-2801 (emphasis added). And D.C. caselaw provides that the offense is "a crime against *possession*" that does not require any showing that the item taken was property. *Jones v. United States*, 362 A.2d 718, 719 (D.C. 1976) (emphasis added).

Despite these facts, the court of appeals found, relying on a summary of the elements of D.C. Robbery in *Lattimore v. United States*, 684 A.2d 357 (D.C. 1996), and the D.C. Criminal Jury Instructions, that D.C. Robbery requires the taking of property. App. A at 3. In relying on these authorities, the court of appeals overlooked four important points of law.

First, the pertinent statement in *Lattimore* is dictum. The appellants in *Lattimore* did not challenge the sufficiency of the evidence regarding the nature of

the items taken; they challenged only the sufficiency of the evidence of their "'taking,' 'asportation' or 'carrying away,' and 'intent to steal[]'" those items. *Lattimore*, 684 A.2d at 359. In other cases, the court of appeals had rightly refused to determine the meaning of a jurisdiction's criminal law by extrapolating from dicta in cases in which the pertinent issue was not joined. In *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc), for example, the court rejected the government's reliance on language from a state-court decision that appeared to preclude accessory-after-the-fact liability. *Id*. at 1083. The court there noted that "the prosecution never *claimed* that the defendant was an accessory after the fact, so it is doubtful that the court's statement was meant to relate to that theory at all." *Id*. (emphasis added).

Second, the *Lattimore* dictum is lifted from a federal (rather than a D.C.) decision, which in turn relies, not on any D.C. statute or opinion, but on a treatise. *Lattimore*, 684 A.2d at 359 (*quoting United States v. McGill*, 487 F.2d 1208, 1209 (D.C. Cir. 1973) (*citing* 2 Wharton, *Criminal Law and Procedure* § 545 (12th ed. 1957)). (The D.C. Circuit's *McGill* opinion, having been issued after February 1, 1971, does not "constitute the case law of the District of Columbia." *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).) Thus, even as dicta go, the *Lattimore* dictum is a singularly poor source for ascertaining the substance of D.C. law.

Third, the *Lattimore* dictum flies in the face of the D.C. Robbery statute's plain language, which describes the taking of "*anything of value*" (D.C. Code § 22-2801 (2001)), rather than the taking of "personal property of value." *Lattimore*, 684

A.2d at 359 (emphasis added; internal quotation marks omitted). The D.C. Code defines the phrase "anything of value" to include "not only things possessing intrinsic value," but also papers and writings that merely "*represent* value." D.C. Code § 22-1802 (emphasis added). And D.C. lawmakers plainly know how to extend a criminal statute to the taking of "property" when they want to, having done just that in several other statutes. *See*, *e.g.*, D.C. Code § 22-3211(b) (Theft) ("property of another"); *id.* § 22-3213 (Shoplifting) ("personal property of another"); *id.* § 22-3216 (Taking Property Without Right) ("property of another"). A statement in a state-court opinion should not be read as constricting the scope of a state criminal statute where that statement "ignor[es] the plain text" of the statute. *Vidal*, 504 F.3d at 1083; *see also United States v. Valdivia-Flores*, 876 F.3d 1201, 1208 (9th Cir. 2017) (rejecting government's characterization of state law that contradicted "the clear statutory language and the most authoritative state case law").

Fourth, model jury instructions are mere "'recommendations'" that "cannot serve to modify [a] statute or override the decisions of the [state] courts." *United States v. Frega*, 179 F.3d 793, 806 n.14 (9th Cir. 1999) (internal quotation marks omitted). Relying on the model instructions, rather than contrary on-point D.C. caselaw, to ascertain the scope of D.C. Robbery is thus improper.

The court of appeals also noted that D.C. Robbery does not include theft of services or means of transportation. App. A at 3. This reasoning overlooked important points of law.

Means of transportation or services are not the *only* items that can have value but are not property. The Robbery statute's plain language extends its reach to the taking of "*anything* of value" – and another statute broadly defines this phrase to include papers that merely "*represent* value." D.C. Code §§ 22-1802, 22-2801 (emphases added). Moreover, the D.C. courts have authoritatively construed the statute as applicable to the taking of items that were formerly the property of a person who was deceased at the time of the taking. *Ulmer v. United States*, 649 A.2d 295, 296-98 (D.C. 1994).

The court of appeals' assertion that D.C. Robbery may apply to the taking of items from a dead person "only if the requisite intent was formed prior to the victim's death" (App. A at 4) is incorrect. In support of this assertion, the court of appeals cites a statement in *Ulmer* observing that the appellant "'intended to steal before he killed the victim.'" *Id.* (*quoting Ulmer*, 649 A.2d at 299). But this is not a statement as to what D.C. Robbery law *requires* – it is a statement as to what the trial jury necessarily *found*, in light of the evidence and instructions. The *Ulmer* court noted that "the trial court, during its instruction on felony murder, explained to the jurors" that they could convict the defendant of felony murder only if they disbelieved his testimony that he took the victim's property "as an after-thought" after committing the homicide. *Ulmer*, 649 A.2d at 298-99 (emphasis removed). In light of this instruction, the court of appeals observed, the jury's guilty verdict on felony murder necessarily reflected the jury's conclusion "that appellant intended to steal before he killed the victim." *Id.* at 299.

Notwithstanding this observation as to what the jury necessarily found in Ulmer's trial, the *Ulmer* court in an earlier passage categorically stated that under D.C. law, "a robbery would still exist even though the victim was either dead or unconscious *at the time appellant decided to take his property*." *Id*. at 298 (emphasis added). In support of this proposition, the court cited *Smothers v. United States*, 403 A.2d 306 (D.C. 1979), which observed that it was "settled law in this jurisdiction that a dead person can be a robbery victim, at least where the taking and the death occur in close proximity" (*id*. at 313 n.6); *United States v. Butler*, 455 F.2d 1338 (D.C. Cir. 1971), which noted that it was "the settled law of this jurisdiction that a dead man is a 'person' within the robbery statute" (*id*. at 1339 n.1); and *Carey v. United States*, 296 F.2d 422 (D.C. Cir. 1961), in which the court *rejected* the defendant's argument that, "assuming the intent of taking [the victim's] money did not occur until after she was dead, as a matter of law he could not be guilty of the crime of robbery" (*id*. at 426). The *Ulmer* court made the same observation in rejecting the defendant's argument that his offense constituted larceny rather than robbery because he did not form the intent to take the victim's items until after her death, observing: "*Even if we accept appellant's version of the facts* . . . his conduct following the stabbing would still be viewed as a robbery." *Ulmer*, 649 A.2d at 297 (emphasis added).

In light of the D.C. Court of Appeals' definitive statement that a D.C. Robbery may exist even where the victim was dead "at the time [the robber] decided to take his property" (*id*. at 298 (emphasis added)), the court of appeals' assertion

that a person may be guilty of D.C. Robbery "only if the requisite intent was formed prior to the victim's death" (App. A at 4) is mistaken. And because the D.C. Robbery statute thus applies to the taking of items formerly owned by a person now deceased – which have value but are not property – the court of appeals' mistake regarding the substance of D.C. law caused it to overlook this manner in which D.C. Robbery extends beyond the generic offense of Theft.

The court of appeals further reasoned that D.C. Robbery and generic theft are alike in that they "do[] not require proof of ownership." App. A at 3. But, notwithstanding this similarity, the two offenses are different insofar as the former applies to the taking of "anything of value," whereas the latter applies only to the taking of "property." There is a difference between being required to identify the *owner* of property, and being required to show that the item is "property" *at all*. And authoritative D.C. caselaw shows that for D.C. Robbery, even the latter showing is not required. The fact that the generic offense does not require proof as to *whose* "property" was taken is thus immaterial.

B. D.C. Robbery does not require that the item be taken with the intent to deprive the owner of rights and benefits of ownership.

Mr. Gomez-Aguilar further argued that the D.C. Robbery statute does not require that the defendant act with the intent to deprive the owner of the rights and benefits of ownership. Indeed, in this respect the Robbery statute stands in sharp contrast to D.C.'s Theft statute, which expressly requires the taking of the "property of another" with the intent "[t]o deprive the other of a right to the property or a

benefit of the property." D.C. Code § 22-3211(b); *cf.* App. A at 3 (noting contrast between D.C. Robbery statute and D.C. statutes pertaining to theft of services or means of transportation). Mr. Gomez-Aguilar observed that it is impossible to reconcile D.C. caselaw applying the Robbery statute to the taking of items from deceased victims with the notion that the statute requires an intent to deprive the owner of the rights and benefits of ownership. Corpses, after all, have no rights and benefits of ownership. *Ulmer*, 649 A.2d at 296-98.

The court of appeals disagreed, relying on the D.C. criminal jury instructions' reference to the defendant's "inten[t] to steal." App. A at 4. As noted above, the court of appeal's reliance on jury instructions in the face of contrary D.C. caselaw was flawed. *Frega*, 179 F.3d at 806 n.14. Moreover, an intent to "steal" is not tantamount to an intent to deprive the owner of rights and benefits of ownership, because a person can "steal" something as to which the possessor has no rights and benefits of ownership. And while the court of appeals posits that D.C.'s Robbery statute applies to the taking of items from a dead person "only if the requisite intent was formed prior to the victim's death" (App. A at 4), that assertion is mistaken, as discussed above.

C. D.C. Robbery does not require that the item be taken "without consent."

Mr. Gomez-Aguilar observed that D.C. Robbery may apply even where an item was taken with the consent of the possessor. In fact, the statute has been applied to the taking of a wallet from an undercover police officer whose

"assignment" was to make himself an appealing target and "let someone rob [him]." *Noaks v. United States*, 486 A.2d 1177, 1178 (D.C. 1985).

The court of appeals disagreed, relying (erroneously, as noted above) on D.C.'s criminal jury instructions and *Lattimore*. App. A at 5. The court of appeals distinguished *Noaks* on the rationale that "knowledge does not equate to consent." *Id*. But the officer in *Noaks* did not merely *know* that his wallet was being taken; he affirmatively *wanted* it to be taken. In fact, that was the entire purpose of his assignment. *Noaks*, 486 A.2d at 1178. The court of appeals' observation about mere knowledge is thus inapposite.

D. D.C. Robbery applies to accessories after the fact.

Finally, Mr. Gomez-Aguilar noted that D.C. Robbery extends to accessories after the fact, rendering it overbroad. The court of appeals disagreed, reasoning that "[a]ccessories after the fact are charged under a different section of the D.C. Code – § 22-1806 (formerly § 22-106)." App. A at 5. This reasoning misconstrues both the nature of § 22-1806 and the substance of D.C. accessory-after-the-fact liability.

Section 22-1806 caps the sentence for a defendant convicted of being an accessory after the fact to a crime:

> Whoever shall be convicted of being an accessory after the fact to any crime punishable by death shall be punished by imprisonment for not more than 20 years. Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment, or both, as the case may be, not more than 1/2 the maximum fine or imprisonment, or both, to which the principal offender may be subjected.

D.C. Code § 22-1806.

As its text makes plain, Section 22-1806 is not a statute that defendants are "charged under." Rather than creating a crime, the statute "provides only the *penalties* authorized for persons convicted as accessories." *Heard v. United States*, 686 A.2d 1026, 1029 (D.C. 1996) (emphasis added). The *substance* of D.C. accessory-after-the-fact liability comes, not from Section 22-1806 or any other statute, but from the "common law of Maryland," which was absorbed into D.C. law. *Id.*; *cf. Verdugo-Gonzalez v. Holder*, 581 F.3d 1059, 1062 (9th Cir. 2009) (noting that California accessory-after-the-fact liability is governed by a separate state statute "that specifically imposes criminal liabilities on accessories"). Thus in D.C., unlike in jurisdictions like California "which have broken with the common law by statute," accessory-after-the-fact liability is not "separate and distinct from the underlying felony." *Heard*, 686 A.2d at 1030 n.2 (internal quotation marks omitted). To the contrary, D.C. adheres to the common-law principle pursuant to which "the accessory after the fact was spoken of also as guilty of the original felony." *Id.* at 1030 (internal quotation marks omitted).

In light of these established principles of D.C. law, the court of appeals erred in suggesting that *Little v. United States*, 709 A.2d 708 (D.C. 1998), establishes that accessories after the fact are "charged under" § 22-1806. App. A at 5. The *Little* opinion merely mentions § 22-106 in referring to a person convicted of second-degree murder on an accessory-after-the-fact theory of liability. *Little*, 709 A.2d at 709. This glancing and unexplained reference does not alter the substance of D.C. law with respect to accessory-after-the-fact liability.

In sum, the court of appeals erred in holding that D.C. Robbery categorically matches generic Theft, thereby falling within 8 U.S.C. § 1101(a)(43)(G).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted on October 23, 2019.

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