No. 19-___

IN THE

Supreme Court of the United States

CHRISTOPHER OMAR HINTON,
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 North Carolina attempted robbery with a dangerous weapon qualifies as a crime of violence under Section 4B1.2 of the United States Sentencing Guidelines.

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Petitioner Christopher Hinton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Fourth Circuit's unpublished opinion is available at __F. App'x ___, 2019 U.S. App. LEXIS 30364, 2019 WL 5078848 (4th Cir. Oct. 10, 2019); *see also infra*, Pet. App. 1a.

LIST OF PRIOR PROCEEDINGS

(1) *United States v. Christopher Omar Hinton*, District Court No. 5:18-CR-61-BO, Eastern District of North Carolina (final judgment entered Aug. 26, 2018).

(2) *United States v. Christopher Omar Hinton*, United States Court of Appeals for the Fourth Circuit, No. 18-4612 (decision issued October 10, 2019).

JURISDICTION

The Fourth Circuit issued its opinion on October 10, 2019. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

SENTENCING GUIDELINE PROVISIONS INVOLVED

Section 2K2.1(a)(3) of the United States Sentencing Guidelines provides that the base offense level for a felon-in-possession conviction is 22 if:

> (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense.

Section 4B1.2 of the Sentencing Guidelines defines a crime of violence as:

> any offense under federal or state law that is 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).

STATEMENT OF THE CASE

A. District Court Proceedings

According to the factual proffer by the government at the arraignment hearing, Petitioner Christopher Hinton and his co-defendant, Terry Lavelle Ingram, robbed a sweepstakes store located in Raleigh, North Carolina, on April 23, 2017. Security surveillance cameras captured the robbery on video. Neither man wore a mask

during the incident, and both men brandished guns. During the robbery, the men forced two employees into a bathroom and blocked the door with a gaming console. Police subsequently identified Petitioner and Ingram by comparing their photos to the images of the robbers on the security video. Security footage also identified a Chevy Tahoe with distinctive trim on the scene that police traced to Petitioner. When police searched the Tahoe, they found clothing and firearms resembling the ones on the security footage. Petitioner was thereafter federally indicted in the Eastern District of North Carolina and pled guilty without a plea agreement to being a felon in possession of a firearm. (Fourth Circuit Joint Appendix 25-26; 39-42; hereinafter "J.A.").

Following Petitioner's plea, the probation officer prepared a presentence investigation report in his case. (J.A. 83-98). Among other things, the presentence report asserted that under U.S.S.G. § 2K2.1(a)(3), Petitioner's base offense level was 22. (J.A. 94). This was so, the probation officer said, because Petitioner had a prior North Carolina conviction for a "crime of violence"—specifically, attempted robbery with a dangerous weapon. After all additions and deductions, Petitioner's total offense level was 27. Based upon the total offense level of 27 and Petitioner's criminal history category of V, the guideline imprisonment range was 120 to 150 months. (J.A. 95). However, because the maximum sentence under the statute was ten years, the guideline range became 120 months.

Petitioner objected to the presentence report's calculation of the base offense level, arguing that his prior North Carolina conviction for attempted robbery with a

dangerous weapon did not qualify as a crime of violence. (J.A. 97). He contended that the total offense level was therefore properly calculated at 25, for a guideline imprisonment range of 100 to 125 months. (J.A. 45). At sentencing, the district court overruled Petitioner's objection to the presentence report and sentenced him to 120 months' imprisonment and three years of supervised release. (J.A. 50; 65-71). The court entered its judgment on August 26, 2018. (J.A. 12). Petitioner timely appealed to the United States Court of Appeals for the Fourth Circuit. (J.A. 79).

B. Court of Appeals Proceedings

On appeal to the Fourth Circuit, Petitioner argued that the district court erred in calculating the applicable guideline range because his prior conviction for attempted robbery did not qualify as a crime of violence under Section 4B1.2 of the Guidelines. The Fourth Circuit rejected this argument and affirmed the judgment of the district court. This petition followed.

THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner argued to the Fourth Circuit that the district court miscalculated the applicable guideline range. The Court of Appeals rejected Petitioner's argument and affirmed the district court. Thus, the federal claim was properly presented and reviewed below and is appropriate for this Court's consideration.

REASONS FOR GRANTING THE PETITION

The Court of Appeals erred in affirming the judgment, because the district court miscalculated Petitioner's guideline range, resulting in an unreasonable sentence. The miscalculation occurred when the district court erroneously

categorized Petitioner's prior attempted robbery conviction as a "crime of violence." The erroneous classification of Petitioner's prior conviction as a crime of violence elevated his base offense level from 20 to 22. U.S.S.G. § 2K2.1(a)(3).

Petitioner's North Carolina attempted robbery conviction is not a crime of violence because the offense does not match the elements of generic robbery and therefore does not fall within § 4B1.2(a)'s "enumerated offenses" clause. Further, attempted robbery under North Carolina law does not include physical force against a person as an element of the offense. Accordingly, attempted robbery cannot qualify under the "force clause" of § 4B1.2(a). Because attempted robbery does not fall within either clause of § 4B1.2(a), it is not a crime of violence.

With no prior convictions for a crime of violence, the district court should have found that Petitioner's base offense level was 20. U.S.S.G. § 2K2.1(a)(4)(B). The correct guideline range for Petitioner was 100-125 months, not 120 months, as the district court found. Because the district court sentenced Petitioner based on an improperly calculated guideline range, this Court should remand the case for resentencing. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (noting that a guidelines miscalculation ordinarily justifies resentencing under the correct range).

Under § 2K2.1 of the Guidelines, the base offense level for a felon-in-possession conviction is 22 if the offense involves (1) a semiautomatic firearm capable of accepting a large capacity magazine and (2) the defendant has a prior "felony conviction of either a crime of violence or a controlled substance offense." U.S.S.G.

§2K2.1(a)(3). The term "crime of violence" is defined by cross-reference to U.S.S.G. § 4B1.2, the career-offender guideline. U.S.S.G. § 2K2.1 cmt. n.1. Section 4B1.2 defines a crime of violence as "any offense under federal or state law that is 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 [the force clause], 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) [the enumerated offenses clause].

U.S.S.G. § 4B1.2(a). The commentary to § 4B1.2 also states that a "crime of violence" includes "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." *Id.* at cmt. n.1.

To determine whether an offense qualifies as a crime of violence, courts apply the categorical approach. *United States v. Davis*, 139 S. Ct. 2319, 2328 (2019). When employing the categorical approach, courts focus on the elements of the offense rather than the conduct underlying the offense. *Taylor v. United States*, 495 U.S. 575, 602 (1990). Under the categorical approach, a predicate offense qualifies as a crime of violence if all of the conduct criminalized by the statute matches or is narrower than the definition of crime of violence under § 4B1.2(a). If the predicate offense can be committed without satisfying the definition of crime of violence, then it is overbroad and not a categorical match. *Taylor*, 495 U.S. at 602. Thus, to be a crime of violence, the predicate offense must categorically match the definition set

forth under § 4B1.2(a)'s enumerated offenses clause or the force clause. If the predicate offense does not fit within either clause, it is not a crime of violence.

A. North Carolina attempted robbery is not generic robbery.

Attempted robbery with a dangerous weapon does not qualify as generic robbery and therefore does not fall within § 4B1.2(a)'s "enumerated offenses" clause. Generic robbery is defined as the "misappropriation of property under circumstances involving immediate danger to the person." *United States v. Gattis*, 877 F.3d 150, 156 (4th Cir. 2017) (brackets, quotation marks and citation omitted); *accord Stokeling v. United States*, 139 S. Ct. 544, 550 (2019) (acknowledging that "[a]t common law, an unlawful taking was merely larceny unless the crime involved 'violence'"). Thus, one of the elements required by generic robbery is an unlawful taking. *Stokeling*, 139 S. Ct. at 550.

Attempted robbery with a dangerous weapon, by contrast, does not require a taking. Under North Carolina law, the substantive offense of robbery with a dangerous weapon does not include a taking as a necessary element of the offense—only an attempt to do so. N.C. Gen. Stat. § 14-87(a) ("Any person . . . who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . . shall be guilty of a Class D felony."); *see also State v. Spratt*, 144 S.E.2d 569, 571 (N.C. 1965) (holding that "an attempt to take money or other personal property from another under the circumstances delineated by G.S. 14-87 constitutes, by the

terms of that statute, an accomplished offense, and is punishable to the same extent as if there was an actual taking."); *accord State v. Van Trusell*, 612 S.E.2d 195, 198 (N.C. App. 2005) (noting that "a showing of a taking is not a necessary element of the crime of robbery with a dangerous weapon"). Thus, unlike generic robbery, robbery with a dangerous weapon—like attempted robbery with a dangerous weapon—does not include a taking as an element of the offense.

Because attempted robbery with a dangerous weapon does not include the same elements as the generic offense of robbery, the offense is broader than generic robbery and thus cannot fall within the enumerated offenses clause of § 4B1.2(a)(2). *See James v. United States*, 550 U.S. 192, 197 (2007) (explaining that the crime of attempted burglary does not meet the definition of generic burglary because the two crimes do not share the same elements; thus, attempted burglary does not fall within the enumerated offenses clause of the Armed Career Criminal Act).

B. Attempted robbery with a dangerous weapon does not require, as an element of the offense, the use, attempted use or threatened use of physical force against a person.

To qualify under the force clause, the offense in question must have "as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). Physical force means "violent force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). Attempted robbery with a dangerous weapon, however, does not categorically require the use, attempted use, or threatened use of physical force against a person and thus does fall within the force

clause of § 4B1.2(a)(1). In North Carolina, there are "two elements of an attempt to commit a crime . . . : (1) An intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense." *State v. Floyd*, 794 S.E.2d 460, 463 (N.C. 2016). Such an overt act would not necessarily involve the use, attempted use, or threatened use of physical force against a person. Accordingly, attempted common law robbery cannot qualify as a crime of violence under the force clause.

C. The commentary cannot expand the text of the Guidelines.

The plain text of the "crime of violence" definition does not include attempt and other inchoate offenses. The Sentencing Commission has no power to expand this text via application notes in the commentary. In *Stinson v. United States*, 508 U.S. 36, 42 (1993), this Court explained that commentary may "interpret [a] guideline or explain how it is to be applied[;]" however, commentary cannot "add" to a definition in the text of the guidelines because commentary has no "independent" force. *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016). And when commentary adds to a guideline, it is "necessarily inconsistent with the text of the guideline itself." *Id.* When such conflict occurs, *Stinson* dictates that the guideline text controls: "If . . . commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline." 508 U.S. at 43.

Here, the commentary's inclusion of "attempt" conflicts with § 4B1.2(a)'s text. Thus, the Commission has improperly added to the text rather than interpreted it.

This expansion means that this Court must ignore the commentary and abide by the text of the guideline itself, which includes only completed crimes, not inchoate ones, like attempt. Because attempted robbery with a dangerous weapon does not satisfy the definitions set forth in § 4B1.2(a)'s force clause or the enumerated offenses clause, it is not a crime of violence.

In sum, the district court erred by concluding that Petitioner's conviction for attempted robbery was a crime of violence under § 4B1.2. The court's erroneous classification led to a miscalculation of Petitioner's base offense level and, consequently, the guideline imprisonment range. Absent the error, Petitioner's guideline range would have been 100-125 months, not 120 months, as the district court found. Because the district court sentenced Petitioner based on an improperly calculated guideline range, the sentence is unreasonable. *Rosales-Mireles*, 138 S. Ct. at 1908. The Court of Appeals therefore erred in affirming the judgment. For these reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

CONCLUSION

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

Respectfully submitted,

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JANUARY 8, 2020