No.___ _

In the
Supreme Court of the United States

JORGE AARON CEJA-VALDEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Petition for Writ of Certiorari

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QUESTION PRESENTED

Does a conviction under California Penal Code § 211 categorically qualify as a generic "theft" offense for purposes of 8 U.S.C. § 1101(a)(43)(G)?

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OPINION BELOW

The unpublished decision of the U.S. Court of Appeals for the Ninth Circuit is reproduced as Appendix A.

JURISDICTION

The court of appeals entered judgment on September 18, 2019. App. A. It denied a petition for rehearing en banc on January 24, 2020. App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 8 U.S.C. § 1101, in relevant part, defines an aggravated felony as constituting "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year." 8 U.S.C. § 1101(a)(43)(G).

California Penal Code§ 211 defines robber as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will by means of force or fear."

STATEMENT OF THE CASE

Petitioner is a Mexican citizen. In 2000, he was convicted by a jury of committing second degree robbery in violation of California Penal Code § 211.

Following his robbery conviction, he was placed in removal proceedings under 8 U.S.C. § 1228(b). Removal proceedings under 8 U.S.C. § 1228(b) are streamlined and apply to non-citizens who were convicted of an "aggravated felony," a term defined in 8 U.S.C. § 110l(a)(43). Immigration authorities ordered Petitioner deported to Mexico, determining that his § 211 conviction qualified as an aggravated felony. Petitioner was placed into removal proceedings again in 2013, this time being deported by an immigration judge who informed him that, because he appeared to be an aggravated felon, he would not be entitled to any relief from deportation.

After the government removed Petitioner, he attempted to return to the United States unlawfully. He was arrested not far from the border. The government did not charge him with simple illegal entry, a misdemeanor under 8 U.S.C. § 1325. Instead, the government charged him with unlawful reentry, a felony under 8 U.S.C. § 1326. The government relied on Petitioner's 2013 removal order to allege the more aggravated crime.

Petitioner moved to dismiss his re-entry charge under 8 U.S.C. §1326(d). He contended that his § 211 conviction did not qualify as an aggravated felony, and that his predicate removal order was therefore "fundamentally unfair." *See* 8 U.S.C. § 1326(d)(3). The district court denied Petitioner's motions to dismiss, concluding that a § 211 conviction

categorically qualified as an "aggravated felony" under 8 U.S.C. § 110l(a)(43)(F).

Prior to the court's denial of Petitioner's motion, he proceeded to a jury trial. The government relied on Petitioner's 2013 removal, and he was convicted of illegal reentry by the jury.

Petitioner appealed, challenging whether his § 211 convictions qualified as an aggravated felony.

The court of appeals affirmed in an unpublished decision. *See* App. A. The court held that a § 211 conviction categorically qualified as generic theft. *Id.* That meant entry of Petitioner's removal order was not fundamentally unfair and that he was not entitled to consideration of any relief from deportation. *Id.*

REASONS FOR GRANTING THE PETITION

This is the rare case where this Court should grant review for purposes of error correction. At issue in this case is whether a conviction under California Penal Code § 211 categorically qualifies as generic theft and therefore an aggravated felony. As explained below, the court of appeals plainly erred by determining that a § 211 conviction categorically qualifies as generic theft.

1. To determine whether a California robbery conviction qualifies as generic theft, this Court must apply the categorical approach. *See Mathis v. United States,* 136 S.

Ct. 2243, 2248 (2016). That approach requires this Court to compare the elements of California robbery with the elements of generic theft. *See id.* If the "elements" of California robbery "are the same as, or narrower than, those of generic theft, there is a categorical match, and California robbery qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). *See Descamps v. United States,* 133 S. Ct. 2276, 2281 (2013). But if the elements of California robbery are broader than the elements of generic theft, there is no categorical match, "even if the defendant actually committed the offense in its generic form." *See id.* at 2283.

To begin, § 211 of the California Penal Code defines robbery as:

> [T]he 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.

Thus, to convict a defendant of California robbery, the State must prove there was a "taking" of property. California case law broadly defines "taking" in § 211 to mean '"gaining possession of the victim's property *and asporting or carrying away the loot.'" See People v. Hill,* 17 Cal. 4th 800, 852 (1998) (emphasis added) (quoting *People v. Cooper,* 53 Cal. 3d 1158, 1165 (Cal. 1991)). In other words, in California, the taking of the property includes conduct *after* the initial acquisition of the property because it includes the asporting of the property. And because the taking includes asporting the property, a robbery in California continues until "the loot . . . being carried away" reaches "a place of temporary safety." *Cooper,* 53 Cal.

3d at 1165.

Importantly, a defendant who merely aids the asportation portion of the robbery will have violated § 211 as a principal under California law. *Id.* at 1161. The California Supreme Court first made this point over two decades ago in *Cooper*. In that case, the court held that a "getaway driver who has no prior knowledge of a robbery, but who forms the intent to aid in carrying away the loot during" its asportation "may properly be found liable as an aider and abettor of the robbery." 53 Cal. 3d at 1161. Thus, because the taking element under California law extends through the asportation of the property, aiding just the asportation portion of the robbery means the defendant has aided the thief in the taking. The dissent in *Cooper* pointed out that the majority had adopted a "novel rule," since someone not involved in the original acquisition of the stolen property would normally be considered "only an accessory after the fact," not an aider and abettor. *Id.* at 1171- 72, 1178 (Kennard, J., dissenting). Nevertheless, the California courts of appeals have since followed the *Cooper* majority's novel extension of robbery liability. *See People v. James,* 2007 WL 60575, at *4-5 (Cal. Ct. App. Jan. 10, 2007); *People v. Dryden,* 2005 WL 1231732, at *5-6 (Cal. Ct. App. May 25, 2005).

A concrete example (following *Cooper* and *Dryden)* demonstrates the broad scope of California robbery. Mr. Snatcher forcefully grabs Ms. Victim's purse. Mr. Snatcher flees and runs into his friend, Mr. Getaway. He explains

to Mr. Getaway that he is trying to escape, and Mr. Getaway agrees to help by driving him to a safe place. Under California law, Mr. Getaway has violated § 211 even though: (1) he did not help Mr. Snatcher secure dominion over the victim's purse; (2) he did not know about the theft until Mr. Snatcher had secured dominion over the purse; and (3) he himself never possessed the purse or secured dominion over it.

Having established the scope of California robbery, the categorical analysis requires an examination of the scope of the generic offense at issue, generic theft (8 U.S.C. § 1101l(a)(43)(G)). Generic theft is defined as the "'taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.'" *Gonzales v. Duenas-Alvarez,* 549 U.S. 183, 189 (2007) (quoting *Penuliar v. Gonzales,* 435 F.3d 961, 969 (2006)).

The initial element of generic theft describes two alternative ways someone can "secur[e] dominion over" the property-(1) taking or (2) an exercise of control over the property. *See* 2 Wayne R. LaFave, Substantive Criminal Law, § 19.3(a) (3d ed. 2003). While theft statutes at common law described the initial acquisition as only a taking, "[m]odern theft statutes" now often articulate the taking element "in terms of exercising control, as does the Model Penal Code[.]" *Id.* § 19.3(a) n.2 (listing statutes).

An exercise of control over property, like taking property, concerns a "discrete act[ ] that [is] satisfied instantaneously," *State v. Taylor,* 349 P.3d 696, 703 (Utah 2015), as it occurs the moment the defendant has secured control over the property, *People v. Robinson,* 459 N.E.2d 483, 484 (N.Y. 1983). Therefore, in states that define theft as an exercise of control, the crime is *not* a continuing offense. *See, e.g., Taylor,* 349 P.3d at 703; *State v. Harrison,* 561 N.W.2d 28, 29-30 (Iowa 1997); *State v. Mullin,* 886 P.2d 376, 377-78 (Mont. 1994); *People v. Kimbro,* 538 N.E.2d 826, 827-28 (Ill. Ct. App. 1989); *State v. Gainer,* 608 P.2d 968, 969-73 (Kan. 1980). In other words, an exercise of control over property is not the same as asporting property. Indeed, "[the] common law asportation requirement is generally of no significance today, as theft offenses in the modern codes are usually defined without resort to that concept." 2 Wayne R. LaFave, Substantive Criminal Law, § 19.3(b) (3d ed. 2003) (listing cases). Simply put, generic theft does not have an asportation component. A generic theft is over as soon as the thief takes the property or exercises control over the property.

In comparing the California robbery statute with generic theft, the California robbery statute "criminalize[s] a broader swath of conduct than the conduct covered" by generic theft, meaning there is no categorical match. *See United States v. Dominguez-Maroyoqui,* 748 F.3d 918, 920 (9th Cir. 2014) (internal

quotation marks omitted).

- Someone like Mr. Getaway will have committed California robbery, but not *generic theft.* Why? Because Mr. Getaway will not have secured dominion over the stolen property-he did not "take" the property, nor did h8 undertake "an exercise of control" over the property. *See Duenas-Alvarez,* 549 U.S. at 189.

- Nor will someone like Mr. Getaway have *aided and abetted a generic theft.* Why? Because by the time Mr. Getaway became involved, Mr. Snatcher already secured dominion over the property. Since the taking was already complete, Mr. Getaway could not have aided and abetted Mr. Snatcher's taking either.

Thus, conduct criminalized under the California robbery statute would not qualify as generic theft or generic aiding and abetting of a theft. At best, Mr. Getaway was a generic accessory after the fact to a generic theft. But a defendant who is an accessory after the fact to a generic offense will have *not* committed the generic offense. *United States v. Vidal,* 504 F.3d 1072, 1077-79 (9th Cir. 2007) (en banc) (citing *Duenas-Alvarez,* 549 U.S. at 189). Accordingly, there is not a match between California robbery and generic theft.

2. In disagreeing, the court of appeals mischaracterized Petitioner's argument as hinging on the idea that someone like Mr. Getaway would be an accessory after the fact *under California law*. Pet. App. 7a. The panel is correct that someone like Mr. Getaway would *not* be an accessory after the fact under California law. But Petitioner never argued otherwise. Rather, he contended that, under California law, someone like Mr. Getaway would be a principal to a

California robbery, *see Cooper,* 53 Cal. 3d at 1161, even though under the generic definition he would be an accessory after the fact to a generic theft. In other words, Mr. Getaway would be an accessory after the fact under generic principles, not under California law. And that's exactly why his conduct—indisputably criminalized under California law—would not qualify as generic theft. *See Vidal,* 504 F.3d at 1077-79.

The court of appeals relied on its prior decision in *United States v. Martinez-Hernandez*, 932 F.3d 1198, 1207 (9th Cir. 2019), which held that, because someone must "form the intent to facilitate or encourage the commission of the robbery before or during the carrying away of the loot," someone like Mr. Getaway must have engaged in the "exercise of control over property without consent of the owner[.]" App. A at 2. That just isn't so. Helping someone escape with stolen goods does not mean you *yourself* have exercised control over those goods. You can help someone escape with stolen goods without exercising control over those goods. For example, if Mr. Getaway helps Mr. Snatcher by just driving him away, Mr. Getaway will not need to take possession of the property that Mr. Snatcher has stolen.

Accordingly, there is no categorical match between § 211 and generic theft. The court of appeals clearly erred by holding to the contrary.

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In short, the court of appeals erred when it determined that Petitioner was properly removed as an aggravated felon. This Court should correct the court of appeal's error and remand to that court for further proceedings.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Date: June 22, 2020

Respectfully submitted,

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