

No. _____

In the

Supreme Court of the United States

Deshawn McCarter,

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 A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the California robbery statute criminalize a broader swath of conduct than generic robbery or generic extortion in light of the fact that California robbery includes a threat to injure property?

PARTIES TO THE PROCEEDING

Petitioner is Deshawn McCarter, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. McCarter*, 805 F. App'x 327 (5th Cir. 2020)
- *United States v. McCarter*, No. 3:17-cr-00285-N-1 (N.D. Tex. Sept. 16, 2019)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 14.1(b)(iii) STATEMENT	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY AND RULES PROVISIONS	1
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THIS PETITION.....	4
California robbery is not a “crime of violence” under U.S. Sentencing Guidelines Manual § 2K2.1 because it criminalizes a broader range of conduct than generic robbery or generic extortion.....	4
CONCLUSION.....	6
APPENDICES	
Fifth Circuit Opinion.....	App. A
Judgment of the District Court.....	App. B

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>United States v. Bankston</i> , 901 F.3d 1100 (9th Cir. 2018)	4, 5
<i>United States v. Camp</i> , 903 F.3d 594 (6th Cir. 2018)	6
<i>United States v. McCarter</i> , 805 F. App'x 327 (5th Cir. 2020)	1
<i>United States v. O'Connor</i> , 874 F.3d 1147 (10th Cir. 2017)	5
<i>United States v. Santiesteban-Hernandez</i> , 469 F.3d 376 (5th Cir. 2006)	4
<i>United States v. Tellez-Martinez</i> , 517 F.3d 813 (5th Cir. 2008)	3, 4, 5
Statutes	
18 U.S.C. § 922(g)(1)	3
28 U.S.C. § 1254(1)	1
Cal. Pen. Code § 211	1, 4, 5
Cal. Pen. Code § 212	1, 4
California Penal Code §§ 211 and 212	1
USSG § 2K2.1	5
USSG § 4B1.2 cmt. n.1	6

PETITION FOR A WRIT OF CERTIORARI

Petitioner Deshawn McCarter seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is *United States v. McCarter*, 805 F. App'x 327 (5th Cir. 2020). It is reprinted in Appendix A to this Petition. The district court did not issue a written opinion.

JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on May 19, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This petition involves California Penal Code §§ 211 and 212:

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.

Cal. Pen. Code § 211.

The fear mentioned in Section 211 may be either:

1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or,
2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery.

Cal. Pen. Code § 212.

This petition also involves the U.S. Sentencing Guidelines Manual's definition of "crime of violence":

- (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, 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. Sentencing Guidelines Manual § 4B1.2(a).

STATEMENT OF THE CASE

On August 3, 2016, police officers were told of a person standing outside with a firearm. When the officers arrived at the location, they encountered Deshawn McCarter, Appellant, and observed a small handgun in his vehicle. After concluding that Mr. McCarter was intoxicated and confirming that he had active warrants, the officers arrested Mr. McCarter and recovered two rounds of ammunition from his pocket in a search incident to arrest. A criminal history check revealed that Mr. McCarter had a prior felony conviction for robbery in California.

The government indicted Mr. McCarter on one count of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). On October 17, 2017, Mr. McCarter pleaded guilty to the one-count indictment. When U.S. Probation prepared its presentence investigation report (PSR), it increased Mr. McCarter’s base offense level from 14 to 20 based on its conclusion that Mr. McCarter’s prior California robbery conviction was a “crime of violence” as defined in U.S. Sentencing Guidelines Manual (USSG) §§ 2K2.1 and 4B1.2. Counsel for Mr. McCarter filed a timely written objection to the enhanced base offense level but conceded that it was foreclosed, at this time, in the Fifth Circuit. At sentencing, the district court imposed a sentence of imprisonment of 37 months, which was a downward departure from the advisory guidelines range. This appeal follows to challenge the Fifth Circuit’s erroneous holding in *United States v. Tellez-Martinez*, 517 F.3d 813 (5th Cir. 2008).

REASONS FOR GRANTING THIS PETITION

California robbery is not a “crime of violence” under U.S. Sentencing Guidelines Manual § 2K2.1 because it criminalizes a broader range of conduct than generic robbery or generic extortion.

When evaluating whether a prior conviction qualifies as a “crime of violence,” courts use the categorical approach, which compares the breadth of the statute of conviction with the generic version of the enumerated offense. *See United States v. Tellez-Martinez*, 517 F.3d 813, 814-15 (5th Cir. 2008). Here, the question is whether California Penal Code § 211 criminalizes a broader swath of conduct than generic robbery. It does.

California defines robbery as “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.” Cal. Pen. Code § 211. “Fear,” for purposes of this statute, includes fear of unlawful injury to the person *or property* of the person robbed. Cal. Pen. Code § 212. The Fifth Circuit has defined generic robbery as “aggravated larceny containing at least misappropriation of property under circumstances involving immediate danger to the person.” *United States v. Tellez-Martinez*, 517 F.3d 813, 815 (5th Cir. 2008); *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380 (5th Cir. 2006).

California’s bifurcated definition of “fear”—injury to person or property—has led the Ninth Circuit to conclude that California robbery is categorically broader than generic robbery and thus not a “crime of violence” under the Guidelines. *United States v. Bankston*, 901 F.3d 1100, 1103 (9th Cir. 2018) (“California robbery is thus not a

categorical match for generic federal robbery” because generic robbery “does not extend to threats to property.”). The Tenth Circuit has similarly concluded that “generic robbery encompasses a threat to a person but not to property alone.” *United States v. O’Connor*, 874 F.3d 1147, 1155 (10th Cir. 2017). The Ninth Circuit reached its conclusion based on the simple observation that California robbery can be committed by impersonal threats to property alone, such as “Give me \$10 or I’ll key your car,” or “Open the cash register or I’ll tag your windows.” *Bankston*, 901 F.3d at 1103 (quoting *United States v. Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008)).

The Fifth Circuit disagreed that such threats to property can be impersonal in *Tellez-Martinez*, explaining that because the California offense requires that the taking must be from the victim or in the victim’s immediate presence, “the property has been misappropriated in circumstances involving immediate danger to the person.” 517 F.3d at 815 (cleaned up). But this conclusion does not dispel the concerns inherent in the Ninth Circuit’s examples involving impersonal threats to harm property. In fact, it is easy to imagine many scenarios in which a person can commit larceny by way of instilling fear of harm to property. This places California in the minority of states. *United States v. Estrada-Borjas*, No. 05-40739, Appellant’s Br. 12–14 & nn.3–4 (5th Cir. Oct. 6, 2005) (noting that 37 states limit robbery to exclude force or threats against property only). Because § 211 reaches conduct broader than that reached by the generic, contemporary definition of “robbery,” a conviction under it does not qualify as a “crime of violence” under USSG § 2K2.1. The district court and Fifth Circuit erred in concluding otherwise.

If Mr. McCarter is correct that the California robbery statute is broader than generic federal robbery, he still must contend with another enumerated offense: extortion. On this point, the Ninth Circuit also provides valuable guidance. In *United States v. Nickles*, the government argued that any conduct covered by California's robbery statute that is broader than generic robbery is included within § 4B1.2(a)(2)'s definition of "extortion." 735 F. App'x 450, 451 (9th Cir. 2018) (unpub.). The court rejected the government's argument based on the reasoning of an earlier case, *United States v. Edling*, in which the Ninth Circuit held that the definition of extortion in USSG § 4B1.2 cmt. n.1 "requir[es] that the wrongful use of force, fear, or threats be directed against the person of another, not property." 895 F.3d 1153, 1157 (9th Cir. 2018). The Sixth Circuit reached the same conclusion in *United States v. Camp*, 903 F.3d 594, 603 (6th Cir. 2018) ("Guidelines extortion does not include threats against property"). These conclusions are correct, especially in light of the U.S. Sentencing Commission's recent guidance in Amendment 798, stating that it has narrowed the definition of "extortion" to offenses "having an element of force or an element of fear or threats 'of physical injury,' as opposed to non-violent threats such as injury to reputation." U.S. Sentencing Guidelines Manual, Amend. 798, Supp. App'x C (Nov. 1, 2018).

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument.

Respectfully submitted,

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