

No. _____

22-6072

ORIGINAL

IN THE
SUPREME COURT OF THE
UNITED STATES

Supreme Court, U.S.
FILED

NOV 14 2022

OFFICE OF THE CLERK

RANDY BELCHER
Petitioner

VS.

UNITED STATES OF AMERICA
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- 1) Tennessee's 'robbery-by-fear' can be committed without the use, attempted use, or threatened use of physical force against the person of another and therefore does not qualify as a 'violent felony'.

LIST OF PARTIES

All parties appear in the caption of the cover page.

RELATED CASES

None

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CITATIONS OF OPINIONS AND ORDERS IN CASE

The original conviction of Petitioner was in the Eastern District of Tennessee at Chattanooga. It is unreported, but is set forth at Appendix A.

Petitioner's sentence was appealed to the United States Court of Appeals for the Sixth Circuit. It was affirmed in an unpublished opinion, *United States v. Randy Belcher*, 40 F.4th 430 (6th Cir 2022), and is set forth at Appendix B.

A petition for Rehearing/Rehearing En Banc was submitted to the Sixth Circuit Court of Appeals. It was denied on September 23, 2022 and is set forth at Appendix C.

TABLE OF AUTHORITIES CITED

Federal Cases

Borden v. United States, 141 S.Ct. 1817 (2021)	<u>3, 4</u>
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Jurisdictional Statement

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 12, 2022. Rehearing/Rehearing En Banc was timely sought but denied on September 23, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 924(e)(1) - In the case of a person who violates section 922(g) of this title [18 USC 922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to such person with respect to the conviction under section 922(g) [18 USC 922(g)].

Tennessee Code Annotated 39-13-401(a) - Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.

STATEMENT OF THE CASE

Petitioner Randy Belcher pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. 922(g)(1). He had five prior Tennessee robbery convictions, which the district court held qualified as 'violent felonies' under the Armed Career Criminal Act's use-of-force clause, 18 U.S.C. 924(e)(2)(B)(1). Relying upon *United States v. Mitchell*, 743 F.3d 1054 (6th Cir. 2014), the district court concluded that Tennessee robbery 'has as an element the use, attempted use, or threatened use of physical force against the person of another'. Accordingly, it applied ACCA's fifteen-year mandatory minimum sentencing enhancement.

On appeal, Petitioner argued that *Elonis v. United States*, 575 US 723 (2015) and *Borden v. United States*, 141 S.Ct. 1817 (2021) had undermined *Mitchell* and that Tennessee robbery was overbroad because it prosecutes threats of intellectual or emotional harm. In response, the government argued that Tennessee's present-day robbery statute is coextensive with common-law robbery, which highlighted exactly how overbroad the Tennessee robbery statute is. In reply, Petitioner explained how the robbery statute can be violated by threatening non-violent harm—specifically, by threatening to accuse another of sodomy.

The panel disregarded this argument, instead focusing solely on Petitioner's other mens rea argument. His sentence was affirmed and Rehearing En Banc was denied. This Petition follows.

REASONS FOR GRANTING WRIT

When applying the categorical approach to determine whether a prior conviction qualifies as a 'violent felony' under the ACCA, 18 U.S.C. 924(e)(2)(B), courts must look to the least culpable conduct covered by the statutory elements of the prior conviction. *Borden v. United States*, 141 S.Ct. 1817, 1832 (2021) ('we must presume that the conviction rested upon nothing more than the least of the acts criminalized'). This premise was ignored by the Sixth Circuit in affirming petitioner's sentence.

It matters not whether the statute in question prosecutes qualifying conduct when it also prosecutes non-qualifying conduct. See *Borden*, 141 S.Ct. at 1832. The only thing that matters is if the 'minimum conduct' prosecuted under the statute falls outside the ACCA's definition of 'violent felony'. See *Moncrieffe v. Holder*, 569 U.S. 184, 133 (2013). 'An offense does not qualify as a 'violent felony' unless the least serious conduct it covers falls within the elements clause.' See *United States v. Burris*, 912 F.3d 386, 396 (6th Cir. 2019).

Tennessee's early adoption of the common law definition of robbery carried with it an express exception to the requirement that robbery-by-fear requires a fear of bodily harm. See *Britt v. State*, 26 Tenn. 45, 46 (Tenn. 1846). That exception still exists in only a handful of jurisdictions today, Tennessee included. This dispositively proves that TN's robbery encompasses intellectual/emotional harm, rendering it overbroad.

I. Tennessee robbery-by-fear can be committed
by threatening to falsely accuse victim.

Tennessee's robbery statute, under which Petitioner was convicted, provides that 'Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.' See Tenn. Code Ann. 39-13-401(a). And, as the government has argued, Tennessee's robbery statute 'is, in substance, the same as at common law'. In interpreting the current robbery statute, the Tennessee Supreme Court explained that 'the General Assembly intended to codify the common law definition of robbery'. See *State v. Owens*, 20 S.W.3d 634, 640 (Tenn. 2000). The Tennessee Supreme Court explained that it is 'required by the General Assembly to construe the statute by reference to the common law'. *Owens*, 20 S.W.3d at 640; Tenn. Code Ann. 39-11-104 (1997).

Importantly - and dispositively - by incorporating common law, Tennessee's robbery statute also incorporates a longstanding exception from the oft-quoted sentence from *Britt v. State* that 'the fear constituting an element of the crime, robbery-by-fear, is fear of present personal peril from violence offered or impending'. 26 Tenn. at 46. This exception shows that fear of certain non-violent harm to reputation is sufficient to prosecute.

It is true, as *Britt v. State* explained, that the general rule is that a person does not commit 'robbery' when the only fear the victim has is fear that the defendant

will falsely accuse the victim of a crime. *Id.* at 45-46. The rationale for this general rule is that 'the fear of being arraigned before those tribunals, whose function it is to protect and vindicate innocence, as well as to ascertain and punish crime, should not shake a firm mind of conscious rectitude so far from its propriety as to induce the surrender of money or other valuable thing to the base accuser...'. *Id.* at 46. But, there is a unique exception to this general rule: A threat to falsely accuse the victim of 'crimen innominatum', also known as 'the nameless crime', the 'crime against nature', and 'sodomy'. See *Id.*; Black's Law Dictionary (11th ed. 2019).

The Tennessee Supreme Court explained that the threat to falsely accuse a victim of 'crimen innominatum' was unique among threats and therefore sufficient to satisfy 'robbery-by-fear' because of the 'overwhelming and withering character of the charge and its damning infamy, so well calculated to unman and subdue the will and alarm the fears of the falsely accused', so as to 'induce the surrender of money or other valuable thing to the base accuser'. See *Britt*, 26 Tenn. at 46. The Tennessee Supreme Court further explained that this exception came directly from the English common law and that 'Tennessee's statutes create no change in this respect'. *Id.* at 47. Thus, even though a threat to falsely accuse one of 'crimen innominatum' requires no use, attempted use, or threatened use of physical force against the person of another, it IS

sufficient to sustain a conviction under the TN robbery statute.

This non-violent aspect of robbery-by-fear persists today. Indeed, as the government previously argued during Petitioner's direct appeal, TN's robbery statute 'is, in substance, the same as at common law'. See Gov't Resp. at 28. *Britt v State* remains good law, as it is cited regularly for its discussion of robbery-by-fear, including as recently as 2020 by the Tennessee Court of Criminal Appeals (*State v Rollins*, No. W2019-00192-CCA-R3-CD, 2020 WL 1231711, at 4 (Tenn. Crim. App. Mar. 12, 2020)), and in 2008 by the Tennessee Supreme Court (*State v Dotson*, 254 S.W.3d 378, 395 (Tenn. 2008)).

While addressing Virginia's common law robbery statute, the Fourth Circuit concluded that it did not qualify as a 'violent felony' because a person today may still be convicted of robbery when they threaten to falsely accuse another of engaging in illegal sex acts. See *United States v. White*, 24 F.4th 378, 381 (4th Cir. 2022) (explaining that Virginia robbery, as 'common law robbery', still allows a conviction for robbery when one threatens to falsely accuse another of an illegal sex act).

Because Tennessee's robbery-by-fear can be accomplished by a mere threat to falsely accuse one's victim of 'sodomy', it cannot be used as a 'violent felony' ACCA predicate because the 'minimum conduct' prosecuted

under the statute does not require the use, attempted use, or threatened use of force against the person of another.

In *United States v. Mitchell*, 743 F.3d 1054 (6th Cir. 2014), the Sixth Circuit emphasized that 'in determining the meaning or scope of robbery, we are bound by the Tennessee Supreme Court's interpretation, including its guidance on the elements of the crime'. *Id.* at 1059; see also *United States v. Souther*s, 866 F.3d 364, 369 (6th Cir. 2017) ('when the state supreme court has defined what conduct is covered by the state's criminal statute, the buck stops there, along with our inquiry, as the state supreme court is the ultimate interpreter of its state law'). In affirming Petitioner's sentence, the Sixth Circuit Court of Appeals willfully ignored this aspect of the law.

The lower courts failed to acknowledge that they are bound by the Tennessee Supreme Court's inclusion within 'robbery-by-fear' of non-violent threats. Hearing of this case by the Court is required to correct this manifest injustice and to align Sixth Circuit precedent with precedent of the Supreme Court.

CONCLUSION

The judgment of the Sixth Circuit Court of Appeals is a departure from the decisions and precedent of the United States Supreme Court requiring the Court to intervene and correct the miscarriage of justice that has occurred.

This Petition for a Writ of Certiorari should therefore be granted.

Dated: 11/3/22

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

No. _____

RANDY BELCHER
Petitioner

VS.

UNITED STATES OF AMERICA
Respondent

As required by Supreme Court Rule 33.1(h), I certify that this Petition for a Writ of Certiorari contains 1,404 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Nov. 3rd, 2022.

Randy Belcher
Signature of Petitioner