

No.

In the

Supreme Court of the United States

Jarmaine Carter,

Petitioner,

v.

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 A WRIT OF CERTIORARI

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November 27, 2023

QUESTION PRESENTED

Whether Ohio robbery under Ohio Revised Code § 2911.02(A)(2) categorically matches the enumerated offense of “extortion” under United States Sentencing Guidelines § 4B1.2(a)(2), thus making it a crime of violence?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States v. Carter, No. 22-3699, Dkt. No. 41-1 (order denying petition for rehearing and rehearing en banc, issued August 29, 2023)

United States v. Carter, No. 22-3699, Dkt. No. 31-2, 69 F.4th 361 (6th Cir.) (opinion affirming the sentence, issued June 2, 2023)

United States v. Carter, No. 3:21-CR-00420-JRK(1), Dkt. No. 29 (ND OH) (Judgment in a Criminal Case, filed August 11, 2022)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jarmaine Carter respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case. The Sixth Circuit's decision in *United States v. Carter* presents an important question of federal law that has yet to be, and should be, decided by this Court. This is an opportunity to clarify for lower courts going forward whether Ohio robbery under Ohio Revised Code 2911.02(A)(2) qualifies as a crime of violence under the enumerated offense of extortion under Guidelines § 4B1.2(a)(2).

This determination matters. Old convictions that qualify as crimes of violence have a significant impact on defendants facing sentencing in federal courts. Crimes of violence can, as in Mr. Carter's case, be used to increase base offense levels, resulting in higher advisory guidelines ranges and potentially higher sentences of imprisonment. Crimes of violence also matter for determining who qualifies as career offenders under the Guidelines, which also serves to dramatically increase offense levels and sentences of imprisonment.

Mr. Carter is not the only person to have ever been convicted of robbery under Ohio Revised Code § 2911.02(A)(2) prior to facing sentencing on a federal crime. As such, this situation will continue to arise. And unless this Court rights the incorrect decision of the Sixth Circuit, the Circuit's decision will stand and continue to burden defendants.

For these reasons, the petition should be granted.

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals in *United States v. Carter* was issued June 2, 2023 and is attached at Petitioner Appendix 7a to 12a. The opinion was published with the citation *United States v. Jarmaine Carter*, 69 F.4th 361 (6th Cir. 2023). On August 29, 2023, the Sixth Circuit Court of Appeals issued an order denying Mr. Carter's petition for rehearing and rehearing en banc.

JURISDICTION

The Sixth Circuit Court of Appeals issued its opinion affirming Mr. Carter's sentence on June 2, 2023. On August 29, 2023, the Sixth Circuit Court of Appeals issued an order denying Mr. Carter's petition for rehearing and rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Question Presented implicates United States Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2, including Application Note 1 (2021) and Ohio Revised Code § 2911.02(A)(2).

United States Sentencing Guidelines § 2K2.1(a)(4)(A) (2021 version)
(a) Base Offense Level (Apply the Greatest):

(4) **20**, if—

(A) 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; or

United States Sentencing Guidelines § 4B1.2(a) – Definitions of Terms Used in Section 4B1.1, including Application Note 1 (2021 version)

(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).

Application Notes:

1. **Definitions.**—For purposes of this guideline—

“**Crime of violence**” and “**controlled substance offense**” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

“**Forcible sex offense**” includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

“**Extortion**” is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a “controlled substance offense.”

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a “controlled substance offense.”

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense facilitated) was a “controlled substance offense.”

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a “controlled substance offense.”

A violation of 18 U.S.C. § 924(c) or § 929(a) is a “crime of violence” or a “controlled substance offense” if the offense of conviction established that the underlying offense was a “crime of violence” or a “controlled substance offense”. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a

single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

“Prior felony conviction” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

Ohio Revised Code § 2911.02 Robbery

(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control;
- (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;
- (3) Use or threaten the immediate use of force against another.

(B) Whoever violates this section is guilty of robbery. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

(C) As used in this section:

- (1) “Deadly weapon” has the same meaning as in section 2923.11 of the Revised Code.
- (2) “Theft offense” has the same meaning as in section 2913.01 of the Revised Code.

STATEMENT OF THE CASE

In June 2021, Jarmaine Carter was indicted on one count of possessing a firearm after sustaining a felony conviction in violation of 18 U.S.C. § 922(g)(1). The United States District Court for the Northern District of Ohio had original jurisdiction over

Mr. Carter's cases, pursuant to 18 U.S.C. § 3231, as he was charged with a federal crime. On December 14, 2021, Mr. Carter pled guilty to the indictment.

The Presentence Investigation Report, in calculating Mr. Carter's advisory guidelines range, started with base offense level 20, pursuant to United States Sentencing Guidelines § 2K2.1(a)(4)(A). This provision directs the application of a base offense level of 20 when the defendant has committed the offense of conviction after being convicted of, relevant here, a crime of violence. U.S.S.G. § 2K2.1(a)(4)(A) (2021). "Crime of violence" is defined in Guidelines § 4B1.2(a) and its commentary. *Id.* at cmt. n.1.

By the time the parties were submitting their sentencing memoranda, this Court had issued its decision in *United States v. Borden*, holding that criminal offenses requiring a mens rea of only recklessness cannot qualify as violent felonies under the Armed Career Criminal Act. 141 S.Ct. 1817, 1834 (2021). And at that time the Sixth Circuit was considering whether Ohio robbery under Ohio Revised Code § 2911.02(A)(2), when predicated on an unspecified theft offense, is a crime of violence under Guidelines § 4B1.2(a)(1) – the elements clause – after this Court's decision in *Borden*. See *United States v. Butts*, 40 F.4th 766 (6th Cir. 2022). So the parties in Mr. Carter's case briefed arguments on whether Mr. Carter's prior robbery conviction was a crime of violence under either subsection of Guidelines § 4B1.2 – the elements clause in subsection (a) and the enumerated-offense clause in subsection (b). Robbery is an enumerated offense under Guidelines § 4B1.2(a)(2). By the time of Mr. Carter's sentencing, the Sixth Circuit had ruled, finding that Ohio robbery under Ohio Revised

Code § 2911.02(A)(2), predicated on an unspecified theft offense, is not a crime of violence under Guidelines § 4B1.2(a)(1). *Id.* at 774.

This therefore left for the district court only the question of whether Mr. Carter's prior robbery conviction was a crime of violence under Guidelines § 4B1.2(a)(2). This determination required the district court to determine whether Ohio robbery under Ohio Revised Code § 2911.02(A)(2) was a categorical match for the generic definition of robbery. *United States v. Yates*, 866 F.3d 723, 733 (6th Cir. 2017).¹

The district court ultimately found Mr. Carter's prior conviction was a crime of violence under the enumerated offense of robbery in Guidelines § 4B1.2(a)(2). On August 11, 2022, the lower court sentenced Mr. Carter to 38 months imprisonment.

On August 12, 2022, Mr. Carter appealed his sentence, giving the Sixth Circuit jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). Mr. Carter appealed the procedural reasonableness of his sentence, arguing that robbery under Ohio Revised Code § 2911.02(A)(2) lacked a mens rea requirement. As such, it swept more broadly than the generic definition of robbery, precluding it from qualifying as a crime of violence under the Guidelines, following the decisions in *Borden* and *Butts*.

On appeal, the government maintained its argument that Mr. Carter's robbery conviction fell within the generic definition of robbery. The government also argued, for the first time, that even if robbery under Ohio Revised Code § 2911.02(A)(2) did not

¹ At the time, there was no Guidelines definition of "robbery." A definition was added with the amendments that took effect on November 1, 2023.

categorically match the generic definition of robbery, the statute did qualify as extortion under Guidelines § 4B1.2(a)(2).

The Sixth Circuit ultimately held that the elements of robbery under Ohio Revised Code § 2911.02(A)(2) either aligned or were narrower than the Guidelines definition of “extortion,” making it a crime of violence. *United States v. Carter*, 69 F.4th 361, 365 (6th Cir. 2023). In coming to this conclusion, the Sixth Circuit pointed to the difficulty of applying the categorical approach in determining whether the Ohio offense categorically matched the generic definition of robbery. *Id.* at 363. So the appellate court skipped instead to the question of whether Ohio robbery qualifies as Guidelines extortion, which had a Guidelines definition. *Id.* The Sixth Circuit therefore undertook the categorical approach in comparing robbery under Ohio Revised Code § 2911.02(A)(2) to the Guidelines definition of extortion, finding what it found to be a match. *Id.* at 363-65. The Sixth Circuit thus affirmed Mr. Carter’s sentence. *Id.* at 365.

On July 17, 2023, Mr. Carter filed a petition for rehearing and rehearing en banc. He challenged the Sixth Circuit’s decision on four grounds. First, Mr. Carter challenged the Circuit’s reliance on the Guidelines definition of extortion,” which at that time was found in the commentary to the Guideline, not the text of the Guideline, and which differed from the generic definition of extortion in that it omitted express reference to the element of gaining the victim’s consent. Because the Guidelines commentary is not subject to congressional review or the prescribed notice-and-comment procedure, it serves to interpret the text of the Guidelines, not to modify it, as explained in *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019). Mr. Carter therefore argued the

commentary definition should not be read as changing the generic definition.

Mr. Carter further argued that the Sixth Circuit erred in concluding that the enumerated offense of extortion includes attempts, as neither the generic definition of extortion, the commentary definition of extortion, nor the enumerated-offense clause expressly included attempts. And in *Havis*, the Sixth Circuit held that the commentary note purporting to expand the definition of a “controlled substance offense” did not control. *Id.* at 386-87. Instead, the text of the Guidelines did. *Id.* This holding applied equally to the enumerated-offense clause, argued Mr. Carter. As such, extortion under the Guidelines did not include attempt offenses. Ohio robbery, on the other hand, does include attempts, thus making it broader than Guidelines extortion. *See* O.R.C. § 2911.02(A)(2).

Third, Mr. Carter argued that the Sixth Circuit had based its analysis on only a partial definition of “theft” under Ohio law. And finally, Mr. Carter argued that Ohio robbery swept broader than extortion with respect to the force element, as the force for extortion must be directed at the victim, while the force for Ohio robbery need not be directed at the victim.

The Sixth Circuit directed the government to respond. Following the government’s response, the Sixth Circuit denied Mr. Carter’s petition for rehearing and rehearing en banc.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit’s decision in *United States v. Carter* presents an important question of federal law that has yet to be, and should be, decided by this Court. This is

an opportunity to clarify for lower courts going forward whether Ohio robbery under Ohio Revised Code 2911.02(A)(2) qualifies as a crime of violence under the enumerated offense of extortion under Guidelines § 4B1.2(a)(2).

This determination matters. Old convictions that qualify as crimes of violence have a significant impact on defendants facing sentencing in federal courts. Crimes of violence can, as in Mr. Carter's case, be used to increase base offense levels, resulting in higher advisory guidelines ranges and potentially higher sentences of imprisonment. Crimes of violence also matter for determining who qualifies as career offenders under the Guidelines, which also serves to dramatically increase offense levels and sentences of imprisonment.

Mr. Carter is not the only person to have ever been convicted of robbery under Ohio Revised Code § 2911.02(A)(2) prior to facing sentencing on a federal crime. As such, this situation will continue to arise. And unless this Court rights the incorrect decision of the Sixth Circuit, the Circuit's decision will stand and continue to burden defendants.

CONCLUSION

The Court should grant this petition for a writ of certiorari

Respectfully submitted,

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APPENDIX A

United States v. Carter, No. 22-3699 (order denying petition for rehearing and rehearing en banc, issued August 29, 2023)

United States v. Carter, No. 22-3699, 69 F.4th 361 (6th Cir.) (opinion affirming the sentence, issued June 2, 2023)

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