

IN THE
Supreme Court of the United States

GEOFFREY THOMAS GATTIS,
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 theft offenses requiring minimal force and no violence or threat of violence qualify as generic robbery for purposes of the career offender provision of the United States Sentencing Guidelines.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
GUIDELINE PROVISION INVOLVED.....	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
I. This Case Presents an Important Question Receiving Increasing Scrutiny.....	5
II. Review is Necessary to Resolve a Circuit Split.....	7
III. This Case Presents an Ideal Vehicle for Deciding the Question Presented	8
VI. The District Court and Fourth Circuit Erred in Holding that Generic Robbery Requires Only Minimal Force.....	9
CONCLUSION	13
APPENDIX A: Opinion of the U.S. Court of Appeals for the Fourth Circuit (Dec. 4, 2017)	1a

TABLE OF AUTHORITIES

CASES

<i>Beckles v. United States</i> , 137 S. Ct. 886 (2017)	6
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015)	6
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016)	10
<i>State v. Chance</i> , 191 N.C. App. 252, 662 S.E.2d 405 (2008)	11-12
<i>State v. Sawyer</i> , 224 N.C. 61, 29 S.E.2d 34 (1944)	11
<i>Taylor v. United States</i> , 495 U.S. 575 (1990)	10
<i>United States v. Becerril-Lopez</i> , 541 F.3d 881 (9th Cir. 2008)	7-8
<i>United States v. Bell</i> , 840 F.3d 963 (8th Cir. 2016)	6
<i>United States v. Duncan</i> , 833 F.3d 751 (7th Cir. 2016)	8
<i>United States v. Gardner</i> , 823 F.3d 793 (4th Cir. 2016)	9, 11-13
<i>United States v. Gattis</i> , 877 F.3d 150 (4th Cir. 2017)	1, 4, 8, 12
<i>United States v. Graves</i> , 877 F.3d 381 (3d Cir. 2017)	8, 9, 12
<i>United States v. House</i> , 825 F.3d 494 (8th Cir. 2016)	10

<i>United States v. Lockley</i> , 632 F.3d 1238 (11th Cir. 2011)	8
<i>United States v. Rodriguez</i> , 711 F.3d 541 (5th Cir. 2013)	7
<i>United States v. Santiesteban-Hernandez</i> , 469 F.3d 376 (5th Cir. 2006)	7-8, 10
<i>United States v. Yates</i> , 866 F.3d 723 (6th Cir. 2017)	7-8, 10-13
CONSTITUTIONAL PROVISION AND STATUTES	
U.S. Const. amend. V (due process clause)	1
18 U.S.C. § 922(g)(1)	2
18 U.S.C. § 924	2
18 U.S.C. § 3553(a)(6)	8
SENTENCING GUIDELINES	
U.S.S.G. § 2K2.1(a)(4)(A)	3
U.S.S.G. § 2K2.1(a)(6)	3
U.S.S.G. § 4B1.1(a)	2, 6
U.S.S.G. § 4B1.2(a)	<i>passim</i>
U.S.S.G. § 4B1.2(a)(2) (2015)	6
U.S.S.G. § 4B1.2 cmt. n.1	7
OTHER AUTHORITIES	
Wayne R. LaFave, <i>Substantive Criminal Law</i> (2d ed. 2003)	10-12
Model Penal Code § 222.1	11

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PETITION FOR WRIT OF CERTIORARI

Petitioner Geoffrey Thomas Gattis 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 published opinion is available at 877 F.3d 150 (4th Cir. 2017); *see also infra*, Pet. App. 1a.

JURISDICTION

The Fourth Circuit issued its opinion on December 4, 2017. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”

GUIDELINE PROVISION INVOLVED

Section 4B1.2(a) of the United States Sentencing Guidelines defines the term “crime of violence” as:

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.S.G. § 4B1.2(a) (emphasis added).

STATEMENT OF THE CASE

A. District Court Proceedings

On January 12, 2016, a police officer in Henderson, North Carolina, stopped a car in which Petitioner was a passenger. (Fourth Circuit Joint Appendix 27; hereinafter “J.A.”). When the officer asked the occupants to step out of the car, Petitioner attempted to run away. When officers caught him, he had a loaded handgun. Review of Petitioner’s criminal history showed that he had at least one felony conviction. He was subsequently indicted and pled guilty to violating 18 U.S.C. §§ 922(g)(1) and 924 by possessing a firearm as a felon. (J.A. 8-10; 11-30). He did not have a plea agreement with the government. (J.A. 24).

Following the plea, the probation office prepared a presentence investigation report. (J.A. 88-100). The presentence report asserted, among other things, that Petitioner’s prior felony conviction for common law robbery constituted a “crime of

violence.” The term “crime of violence” includes the enumerated offense of “robbery.” U.S.S.G. § 4B1.2(a)(2).

Petitioner submitted several objections to the presentence report. (J.A. 99-100). Pertinent to the instant petition, Petitioner objected to the calculation of his base offense level, asserting that he had no felony convictions for a crime of violence. Accordingly, Petitioner argued that his base offense level should be 14. *See* U.S.S.G. § 2K2.1(a)(6) (base offense level of 14 for prohibited persons).

At the sentencing hearing, the district court rejected Petitioner’s argument that his prior North Carolina conviction for common law robbery did not qualify as a crime of violence. (J.A. 40-41; 70). The district court determined that North Carolina common law robbery categorically qualifies as “robbery” under the Guidelines and is therefore a crime of violence. Accordingly, the court found that the base offense level was 20. *See* U.S.S.G. § 2K2.1(a)(4)(A) (designating base offense level of 20 if “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”).

The district court overruled the remaining objections and determined that the total offense level was 25, for a recommended imprisonment range of 70 to 87 months. (J.A. 71). Ultimately, the court imposed a sentence of 70 months of imprisonment and three years of supervised release. (J.A. 75; 80-86). Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Fourth Circuit. (J.A. 87).

B. Court of Appeals Proceedings

On appeal to the Fourth Circuit, Petitioner argued, among other things, that his prior conviction for common law robbery did not qualify as generic robbery and thus did not constitute a crime of violence under U.S.S.G. § 4B1.2. Petitioner asserted that the district court therefore miscalculated the advisory sentencing range. The Fourth Circuit rejected this argument and affirmed the judgment of the district court. The Fourth Circuit held that North Carolina common law robbery, which, the court acknowledged, requires only “*de minimis* contact,” is nonetheless “subsumed within—and is a categorical match with—generic robbery.” *Gattis*, 877 F.3d at 158. This petition followed.

THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question of whether a theft offense that requires minimal contact, with no violence or threat of violence, like North Carolina common law robbery, may nonetheless qualify as generic robbery was presented to the Fourth Circuit. The Court of Appeals determined that North Carolina common law robbery meets the definition of generic robbery and affirmed Petitioner’s sentence. 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 should grant review in this case for four reasons. *First*, the generic definition of robbery presents an important question, unaddressed by this Court, that is the subject of ever-increasing litigation in the wake of the Sentencing

Commission's elimination of the residual clause and the addition of robbery to the career offender guideline. *Second*, the federal courts of appeals are divided as to whether generic robbery requires more than minimal force as an element of the offense, and that split necessitates review by this Court to prevent further division among the courts and the resulting sentencing disparities that arise from such division. *Third*, this case presents an excellent vehicle for addressing the question presented, as the issue is fully preserved and cleanly presented. *Finally*, the district court and the Fourth Circuit erred in determining that generic robbery requires only minimal force. But for the courts' erroneous determination, Petitioner's advisory imprisonment range would have been significantly lower. Accordingly, Petitioner respectfully requests that this Court issue a writ of certiorari in this case.

I. This Case Presents an Important Question Receiving Increasing Scrutiny.

Robbery is a designated "crime of violence" under the career offender provision of the Sentencing Guidelines. U.S.S.G. § 4B1.2(a)(2). Application of the career offender provision results in significantly longer advisory imprisonment ranges. *See* U.S.S.G. § 4B1.1; *accord Beckles v. United States*, 137 S. Ct. 886, 901 (2017) (Sotomayor, J., concurring in the judgment) (noting that "had the career-offender Guideline *not* applied to Beckles, the Guidelines range calculated by the District Court would have been significantly lower"). Because application of the career offender provision substantially affects the sentencing range, the question of whether a prior state theft conviction qualifies as generic robbery and thus a "crime

of violence” presents a significant issue at sentencing. To determine whether a prior state theft conviction qualifies as “robbery,” courts must first, of course, understand what “robbery” means. For this reason, the definition of generic robbery proves critical.

Moreover, this critical issue of generic robbery is receiving ever-increasing scrutiny following the Sentencing Commission’s elimination of the “residual clause” from the career offender provision in the wake of this Court’s decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Prior to *Johnson* and the elimination of the residual clause, robbery was not one of the specifically-enumerated crimes listed in the text of the career offender guideline. *See* U.S.S.G. § 4B1.2(a)(2)(2015); *United States v. Bell*, 840 F.3d 963, 968 (8th Cir. 2016). Instead, robbery and similar offenses typically qualified as crimes of violence under the residual clause. *Bell*, 840 F.3d at 968. Effective August 1, 2016, the Sentencing Commission amended the career offender guideline and eliminated the residual clause. The Commission also added robbery as an enumerated offense to the text of the career offender guideline. However, the Commission did not define “robbery.” Without the residual clause, courts must now decide whether various state theft offenses categorically qualify as the enumerated offense of “robbery.” Because the Sentencing Guidelines do not provide a standard generic definition of robbery, courts must decide for themselves what generic robbery entails. As demonstrated below in Section II, the circuit courts disagree on this issue. Specifically, the courts of appeals are divided as to whether generic robbery requires more than minimal force as an element of the

offense. This Court should eliminate the disagreement by providing a uniform generic definition of robbery that the lower courts can apply.

II. Review is Necessary to Resolve a Split Among the Courts of Appeals.

The federal courts of appeals are divided as to whether generic robbery requires more than minimal force. The Sixth Circuit Court of Appeals has determined that “the type of force contemplated by the generic definition of robbery is more than minimal.” *United States v. Yates*, 866 F.3d 723, 733 (6th Cir. 2017).

Likewise, the Fifth Circuit Court of Appeals has suggested that generic robbery requires something more than minimal force. *See United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380-81 (5th Cir. 2006), *abrogated on other grounds by United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013). The Ninth Circuit Court of Appeals has come to the same conclusion. *United States v. Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008) (adopting the Fifth Circuit's rationale from *Santiesteban-Hernandez*).

However, the Third Circuit has explicitly disagreed with this conclusion, finding that generic robbery requires only minimal force. *United States v. Graves*, 877 F.3d 494, 503 (3d Cir. 2017) (describing circuit split and holding “that generic robbery requires no more than *de minimis* force”). Less explicitly, the Seventh and Eleventh Circuits have implied that minimal force satisfies the elements of generic robbery. *United States v. Duncan*, 833 F.3d 751, 755-56 (7th Cir. 2016); *United States v. Lockley*, 632 F.3d 1238, 1244 (11th Cir. 2011).

The instant case deepens the division, with the Fourth Circuit determining that North Carolina common law robbery, which requires only minimal force, qualifies as generic robbery. *Gattis*, 877 F.3d at 160. Given the division among the lower federal courts, this Court's guidance is necessary to provide the courts with a uniform definition of generic robbery. This Court should provide guidance now, before the split deepens further, resulting in additional unwarranted disparities among defendants sentenced in different circuits. *See* 18 U.S.C. § 3553(a)(6) (in sentencing, courts must consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct").

III. This Case Presents an Ideal Vehicle for Deciding the Question.

This case presents an ideal vehicle for this Court's consideration of the question presented. Petitioner objected to the calculation of his base offense level before the district court and specifically argued that his prior conviction for common law robbery did not constitute generic robbery. The classification of Petitioner's prior conviction as a crime of violence elevated his offense level by six, resulting in a substantially higher advisory sentence. Petitioner timely appealed and brought the specific issue forward on appeal to the Fourth Circuit. The Fourth Circuit heard oral argument and issued a published decision squarely addressing the issue. Accordingly, this case presents an ideal opportunity for this Court to consider the question presented.

IV. The District Court and Fourth Circuit Erred in Holding that Generic Robbery Requires Only Minimal Force.

The district and appellate courts erred in concluding that Petitioner's prior North Carolina conviction for common law robbery qualifies as generic robbery. North Carolina common law robbery does not include physical force as an element of the offense. *See, e.g., United States v. Graves*, 877 F.3d 494, 502 (3d Cir. 2017) ("North Carolina common law robbery requires only the use of *de minimis* force."); *United States v. Gardner*, 823 F.3d 793, 804 (4th Cir. 2016) ("[W]e conclude that the minimum conduct necessary to sustain a conviction for North Carolina common law robbery does not necessarily include the use, attempted use, or threatened use of 'force capable of causing physical pain or injury to another person,' as required by the force clause of the ACCA."). For this reason, North Carolina common law robbery is broader than generic robbery because, unlike generic robbery, it encompasses any theft that involves "even minimal contact" with the victim. *Gardner*, 823 F.3d at 803-04.

To determine whether a prior conviction qualifies as a generic crime of violence, the courts apply a categorical approach, focusing on "the fact of conviction and the statutory definition of the prior offense," rather than the conduct underlying the offense. *Taylor v. United States*, 495 U.S. 575, 602 (1990). The label used by the state is not dispositive. *Id.* at 589, 598. Once the court establishes the generic definition of the offense, the court decides whether the prior state conviction at issue categorically constitutes a conviction of the generic offense. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). A prior state conviction will qualify as

a conviction for the generic offense only if the elements of the prior state conviction “are the same as, or narrower than, those of the generic offense,” regardless of the defendant’s actual conduct. *Id.*

This Court has never defined generic robbery. However, numerous circuits have recognized that generic robbery is “the misappropriation of property under circumstances involving immediate *danger* to a person.” *Yates*, 866 F.3d at 733 (emphasis added); accord *United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016); *Santiesteban-Hernandez*, 469 F.3d at 380-81 (quoting Wayne R. LaFave, *Substantive Criminal Law* § 20.3 intro., (d)(2) (2d ed. 2003)). This “immediate danger” element “is what makes robbery deserving of greater punishment than that provided for larceny.” *Santiesteban-Hernandez*, 469 F.3d at 380-81. According to LaFave, most states define robbery to require “that the taking be accomplished by means of force or putting in fear.” LaFave, *supra*, § 20.3 intro. LaFave does not indicate how most states define “force”; however, in discussing this element, he further observes that in most jurisdictions, “robbery requires that the taking be done by means of *violence* or intimidation.” *Id.* at § 20.3(d) (emphasis added). As the Sixth Circuit has observed, “[t]his mention of violence indicates that the type of force contemplated by the generic definition of robbery is more than minimal.” *Yates*, 866 F.3d at 733.

The Model Penal Code likewise defines “robbery” in a way that excludes a theft committed by the use of minimal force. Specifically, the Code provides that a person:

is guilty of robbery if, in the course of committing a theft, he: (a) inflicts serious bodily injury upon another; or (b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or (c) commits or threatens immediately to commit any felony of the first or second degree.

Model Penal Code § 222.1. The Code further states that “the core of the robbery offense is the combination of theft and the fact or threat of injury.” Model Penal Code, Part II, Volume II, at 98; *see also id.* at 95 (“Robbery is distinguished from ordinary larceny by the presence of the victim and the use or threat of violence.”).

In contrast to the majority of jurisdictions and the Model Penal Code, a few states—like North Carolina—hold that the degree of force used during a robbery is “immaterial.” *Gardner*, 823 F.3d at 803 (quoting *State v. Sawyer*, 224 N.C. 61, 29 S.E.2d 34 (1944)). In these states, a robbery conviction is possible even where the offender does not threaten the victim and uses only minimal force to take an item from the victim’s possession. As explained in *Gardner*, the low threshold for common law robbery in North Carolina is illustrated by *State v. Chance*, 191 N.C. App. 252, 662 S.E.2d 405 (2008), where the unarmed defendant stole a carton of cigarettes by doing nothing more than “pushing the victim’s hand off of [the] carton.” *Gardner*, 823 F.3d at 803; *accord Graves*, 877 F.3d at 502 (citing *Chance* to conclude that “North Carolina common law robbery requires only the use of *de minimis* force”).

In rejecting Petitioner’s appeal, the Fourth Circuit relied primarily on LaFave to conclude that generic robbery requires only minimal force. *Gattis*, 877 F.3d at 156. Although the Fourth Circuit agreed that generic robbery is defined as

“the misappropriation of property under circumstances involving immediate danger to the person,” the circuit court erroneously concluded that such “danger” may be satisfied by the use of minimal force. *Id.* at 156-157. But LaFave confirms that only a minority of states define robbery broadly enough to cover such *de minimus* conduct: “The great weight of authority . . . supports the view that there is not sufficient force to constitute robbery when the thief snatches the property from the owner’s grasp so suddenly that the owner cannot offer any resistance to the taking.” LaFave at § 20.3(d)(1). If state law permits a robbery conviction based on the fact pattern described in *Chance*—where no threat of force was made, and the only force used was that necessary to remove the item from the unresisting owner’s grasp—then the state’s robbery offense is broader than the generic offense.

Thus, the Fourth Circuit erred in determining that the “danger” element of generic robbery may be satisfied by the use of minimal force. Instead, the Fourth Circuit should have concluded, as the Sixth Circuit has held, “that the type of force contemplated by the generic definition of robbery is more than minimal.” *Yates*, 866 F.3d at 733. In contrast to generic robbery, as *Gardner* and *Chance* make clear, the offense of North Carolina common law robbery encompasses a theft during which the offender uses only minimal force. Such conduct does not require physical force or even the threat of physical force. The offense thus falls outside of the scope of generic robbery. Because North Carolina common law robbery criminalizes a broader scope of conduct than the generic crime, it is not categorically a crime of violence. The district court therefore erred in enhancing Petitioner’s sentence, and

the Fourth Circuit likewise erred in affirming the district court. 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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