

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2017

GENE WARD, Jr.,	)
Petitioner,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
Respondent.	)

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, by his undersigned counsel, asks leave to file a Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39 of the Supreme Court Rules. Counsel was appointed in the lower court pursuant to 18 U.S.C. § 3006.

This the 27th day of March, 2018.

Respectfully submitted,

/s/ Stephen C. Gordon
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NO. 17-

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GENE WARD, Jr.,
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Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTION PRESENTED

Whether theft offenses requiring minimal force d no violence or threat of violence qualify as generic robbery for purposes of the “crime of violence” definition of the United States Sentencing Guidelines.

LIST OF PARTIES TO PROCEEDING BELOW

United States of America

Gene Ward, Jr.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered in this case on December 27, 2017.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the district court's denial of Petitioner's motion for a reduction of sentence is found at 707 Fed. Appx. 165 (4th Cir. 2017) (Appendix 1, *infra*) and is unpublished.

JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Fourth Circuit dismissing Petitioner's appeal issued on December 27, 201. (Appendix 1, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS 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.”

U.S.S.G. § 4B1.2(a) 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, kidnaping, 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).

STATEMENT OF THE CASE

According to the government, on October 16th, 2015, a detective with the Greenville, North Carolina, Police Department, saw Petitioner get into a car. (J.A. 15). The detective knew police were seeking Petitioner for absconding from probation. (J.A. 15). The detective saw Petitioner duck down in the backseat of the car, as though were trying to avoid being seen. (J.A. 15). When the car drove off, the detective radioed another police officer, who stopped the vehicle. (J.A. 15).

When the detective arrived at the scene, he took Petitioner out of the car. (J.A. 15). The detective then saw a pistol on the floorboard of the backseat, “close to being under the front seat” where Petitioner’s feet would have been. (J.A. 15). The police arrested Petitioner. (J.A. 15). As he was being driven off, Petitioner yelled back that he, and not the other two people who had been in car with him, had possessed the gun. (J.A. 15).

In January of the following year, a federal grand jury charged Petitioner with being a felon in possession of a firearm. 18 U.S.C. § 922(g)(1). (J.A. 7). He pled guilty to the charge some nine months later. (J.A. 10, 14, 29).

Following the plea, the probation officer prepared a report that calculated Petitioner’s guideline imprisonment range at 77 to 96 months. (J.A. 45 ¶45). The range in part derived from a four-level enhancement the probation officer assigned Petitioner because, the officer said, the gun had an obliterated serial number. *See* U.S.S.G. § 2K2.1(b)(4)(B) (2016). (J.A. 45 ¶35). Petitioner objected to this enhancement, and the district court later sustained the objection at the sentencing hearing. (J.A. 22, 47 #1).

As a result of the objection, Petitioner's imprisonment range became 51 to 63 months. (J.A. 22-23, 47). *That* range in part resulted from the probation officer's assigning Petitioner a base offense level of 20 under U.S.S.G. § 2K2.1(a)(4)(A)(2016). (J.A. 44 ¶34). That guideline sets a higher base offense level when the defendant has a prior conviction for a "crime of violence," as defined by U.S.S.G. § 4B1.2(a)(2016). The officer believed a conviction Petitioner sustained in 2011 North Carolina conviction for common law robbery to be a violent crime for purposes of fixing § 2K2.1's base offense level. (J.A. 47-48 #2). Petitioner objected to the probation officer's guideline calculation, arguing that common law robbery did not fall within § 4B1.2's "crime of violence" definition. (J.A. 47 #2).

Petitioner's case came on for sentencing on January 19, 2017. (J.A. 18). At the hearing, he renewed his objection to his base offense level. (J.A. 20). He argued that, in light of United States Court of Appeal for the Fourth Circuit's decision in *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016), North Carolina common law robbery was not a crime of violence under § 4B1.2's definition and that it was "not generic robbery under the revised guidelines." (J.A. 20).

The district court denied Petitioner's objection, observing that "the facts of this conviction are that on May 17th, 2011, [Petitioner] was armed with a 12-gauge shotgun and he committed a robbery."¹ (J.A. 20-21). The following exchange between the court and defense counsel ensued.

¹The probation officer had said Petitioner, armed with a shotgun, assaulted an individual and grabbed a \$120 necklace from the neck of another person. (J.A. 40 ¶11). The State dismissed charges of assault with a deadly weapon inflicting serious injury and assault by pointing a gun, and Petitioner was convicted of common law robbery. (J.A. 40 ¶11).

“[COUNSEL]: And I respect that, Your Honor. I just want to note for the record that you don't get to look at the facts of the robbery when making the determination. It's categorically whether the crime can be committed in ways that are not violent.

THE COURT: I know justice is blind, but it doesn't have to be dumb also, so I think that a 12-gauge shotgun facilitating a robbery is, at a minimum, a violent crime.”

(J.A. 21).

The Court sentenced Petitioner to imprisonment for a term of 51 months, the low end of the revised guideline range. (J.A. 26, 30). He appealed to the Fourth Circuit, arguing that North Carolina common law robbery was not a crime of violence for purposes of § 4B1.2, and that it did not constitute generic robbery for purposes of the guideline definition under the 2015 version of the guidelines. (J.A. 35). In an opinion issued on December 27, 2017, the Court of Appeals affirmed Petitioner's sentence, noting it had previously held North Carolina common law robbery categorically qualified as a crime of violence. *See United States v. Gattis*, 877 F.3d 150 (2017).

**MANNER IN WHICH THE FEDERAL QUESTION
WAS RAISED AND DECIDED BELOW**

The question 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. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975)

REASONS FOR GRANTING THE WRIT

BY AFFIRMING PETITIONER'S SENTENCE, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

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 appeal 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 Fourth Circuit erred by necessarily determining that generic robbery requires only minimal force. But for the court's 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). Because of the difference that an offense's designation as a crime of violence can make under the guidelines, the question whether a prior

state conviction for a crime such as common law robbery will present a significant issue at sentencing. To determine whether a prior state theft conviction qualifies as “robbery,” a 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 “crime of violence” definition 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 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.” As demonstrated below in Section II, the circuit courts disagree on this issue. Specifically, the courts of appeal 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 for the lower courts to apply.

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

The federal courts of appeal 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 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 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 these courts' conclusions, finding instead 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, supra*, 877 F.3d at 160. Given the division among the lower federal courts, this Court's guidance is necessary to provide them with a uniform definition of generic robbery. This Court should provide guidance now, before the fissure widens, 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. Accordingly, this case presents an ideal opportunity for this Court to consider the question presented.

IV. Fourth Circuit Erred in Holding that “Robbery” Requires Only Minimal Force.

The Fourth Circuit by holding 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., Graves, supra*, 877 F.3d at 502 (“North Carolina common law robbery requires only the use of *de minimis* force.”); *Gardner, supra*, 823 F.3d at 804 (“[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, it 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, supra*, 866 F.3d at 733; *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 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, “this 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 put 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—such as 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”).

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 issue the writ in this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

This the 27th day of March, 2018.

Respectfully submitted,

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