No. _______

IN THE

Supreme Court of the United States

ROGELIO SANCHEZ MOLINAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sentencing Guidelines define a "crime of violence" for purposes of recidivist sentencing enhancements to include "robbery." U.S.S.G. § 4B1.2(a).

Under this Court's categorical approach, in applying this Guideline courts must employ a "uniform, categorical definition" of the generic crime, *see Taylor v. United States*, 495 U.S. 575, 590 (1990), to "ensure[] that all defendants . . . will be treated consistently, and thus predictably, under federal law," *Moncrieffe v. Holder*, 569 U.S. 184, 205 n.11 (2013). Sentencing courts must also "correctly calculat[e] the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007).

The Ninth Circuit defined the generic crime of "robbery" to encompass any degree of force sufficient to overcome resistance or to compel acquiescence, as well as any "circumstances reasonably calculated" to create "an objectively reasonable fear of harm," such as a "face-to-face confrontation that inherently presents a risk of violence."

The questions presented are:

1. Is the Ninth Circuit's definition of the generic crime of "robbery" consistent with this Court's precedents?

2. Does generic robbery require a threat of violence or injury, as the Sixth Circuit Court of Appeals has held?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Rogelio Sanchez Molinar, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the court of appeals (App. 1a-29a) is reported at 881 F.3d 1064.

JURISDICTION

The court of appeals entered judgment on November 29, 2017 (App. 1a), and it denied a petition for rehearing and rehearing en banc on February 5, 2018 (App. 4a). This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 2K2.1(a)(4)(A) of the United States Sentencing Commission *Guidelines Manual* provides for an enhanced 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." U.S.S.G. § 2K2.1(a)(4)(A) (2014).

"'Crime of violence' has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2." U.S.S.G. § 2K2.1, cmt. n.1 (2014).

Section 4B1.2(a) provided:

> (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 [the "force clause"], or

> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a) (2014).

Application Note 1 of the Commentary to § 4B1.2 provided, "[f]or purposes of this guideline— . . . '[c]rime of violence includes . . . *robbery*" and "attempting to commit such offenses." U.S.S.G. § 4B1.2(a), cmt. n.1 (2014) (emphasis added).[1]

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[1] Although the Sentencing Commission amended § 4B1.2(a) effective August 1, 2016, U.S.S.G. Supp. App. C, amend. 798, the revised definition of a "crime of violence" continues to include "robbery," without defining that term:

> (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.S.G. § 4B1.2(a) (2016) (emphasis added). As discussed in Part III, *infra*, numerous current Guidelines provisions continue to incorporate § 4B1.2's "crime of violence" definition, including in "career offender," firearms, and immigration cases. U.S.S.G. §§ 2K1.3, 2K2.1, 2L1.2, 2S1.1, 4A1.1, 4B1.1, 5K2.17, 7B1.1 (2016).

STATEMENT OF THE CASE

Mr. Molinar pleaded guilty without a plea agreement to federal charges of Possession of Ammunition by a Prohibited Possessor, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). App. 5a.

At sentencing in August of 2015, he argued that the Guidelines range under U.S.S.G. § 2K2.1 should have been 27 to 33 months rather than 46 to 57 months because his prior conviction for Attempted Armed Robbery, in violation of Arizona Revised Statutes §§ 13-1001, 13-1902, and 13-1904(A)(1), does not categorically qualify for a recidivist "crime of violence" enhancement. *See* App. 5a-6a, 9a-10a.

The district court concluded that Arizona's robbery statute categorically qualified as a "crime of violence" under the force clause of § 4B1.2(a)(1), and it applied a six-level "crime of violence" enhancement under § 2K2.1(a)(4)(A). App. 4a-6a. The district court imposed two concurrent sentences of 44 months of imprisonment. *Id.*

The Ninth Circuit affirmed the sentence on a different basis. The court of appeals held that Arizona's armed robbery statute does not categorically qualify under the force clause of § 4B1.2(a)(1), but, over Judge Fletcher's dissent, that it is a categorical match to generic "robbery" under the commentary to § 4B1.2, and that Arizona's attempt statute is a categorical match to generic "attempt." App. 4a-5a, 13a.

The Ninth Circuit's starting point was its existing definition of generic robbery: "aggravated larceny, containing at least the elements of misappropriation of property under circumstances involving immediate danger to the person." App. 13a (quoting *United States v. Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008)). The court of appeals acknowledged that it had "not previously examined" the meaning of "immediate danger to the person" and held that most states implement the "notion" by requiring "property to be taken . . . by means of force or putting in fear." App. 14a. However, as the dissenting judge opined, the majority then proceeded to "define[] force and fear so broadly that neither word necessarily entails such circumstances," and it "effectively read[] 'immediate danger to the person' out of the definition of generic robbery." App. 29a (W. Fletcher, J., dissenting).

First, the majority interpreted generic "force" to mean any degree of force sufficient to overcome resistance or "compel acquiescence to the taking of or escaping with the property." App. 14a-16a (quoting *United States v. Harris*, 572 F.3d 1065, 1066 (9th Cir. 2009) (quoting Nev. Rev. Stat. § 200.380)). The majority held that such force includes picking a person's pocket while "jostling, pushing, or crowding him" and, although not essential to the holding, the "snatching of an object attached to the person . . . if force is used to tear or break the attachment." App. 16a & n.8.

Second, the majority interpreted "putting in fear" to mean "acts, words, or circumstances reasonably calculated" to "create an objectively reasonable fear [or apprehension] of harm." App. 17a-20a & n.10. Such circumstances, in the majority's view, broadly includes a "face-to-face confrontation that inherently presents a risk of violence." App. 18a-20a & n.10 (citations omitted).

Under this indeterminate standard, the majority held in a "close question" that Arizona's robbery statute categorically requires "danger to the person," even though it covers merely pulling a wallet from a person's grasp (App. 18a), and "entering the confined space of the car" without any verbal threat or physical contact (App. 20a).

The Ninth Circuit denied a petition for rehearing and rehearing en banc.

Mr. Molinar is currently in the custody of the Bureau of Prisons serving the 44-month sentence in this case, with a projected release date of January 23, 2019.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With This Court's Precedents.

A. The Ninth Circuit's indeterminate definition of generic robbery conflicts with this Court's requirement to employ a "uniform definition" of the generic crime.

The categorical approach ensures that sentencing enhancements are not triggered merely because a crime "happened to be labeled 'robbery' or 'burglary' by the laws of the State of conviction." *Taylor v. United States*, 495 U.S. 575, 588-89 (1990). Instead, this Court requires that "a uniform definition of [the generic crime] be applied." *Id.* at 580. To determine the uniform definition of a common-law crime such as robbery, the Court looks to "the generic sense in which the term is now used in the criminal codes of most States," *id.* at 598; *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190 (2007), and it "err[s] on the side of underinclusiveness" under the rule of lenity, *Moncrieffe v. Holder*, 569 U.S. 184, 205 (2013). The elements of the generic crime are then matched against the elements of the crime of conviction. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). This Court requires "certainty" in determining that a defendant was convicted of a generic offense. *Id.* at 2257 (quoting *Shepard v. United States*, 544 U.S. 13, 21 (2005)).

Here, the categorical approach applies because the Guidelines require that the defendant sustained a "conviction" for—not that he *committed*—a qualifying prior felony offense. U.S.S.G. § 2K2.1(a)(4)(A); *see Taylor*, 495 U.S. at 600-01.

The Ninth Circuit applied the categorical approach but its indeterminate definition of generic robbery will result in the exact differential treatment that the categorical approach is designed to prevent. In leaving it to each sentencing judge to discern the generic crime's "circumstances reasonably calculated" to create an "objectively reasonable fear of harm" (App. 17a-20a & n.10), the decision turns the categorical approach on its head by failing to define the generic crime in a way that may be applied in a uniform manner.

This Court has held that "Taylor's chief concern in adopting the categorical approach" was to "ensure[] that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law." *Moncrieffe*, 569 U.S. at 205 n.11. But as the Ninth Circuit implements the categorical approach with respect to the Guidelines, sentencing courts may interpret and apply the generic definition differently, resulting in inconsistent treatment of offenders who were convicted of the same offense, even in the same jurisdiction. Such "circumstance-specific review is just what the categorical approach precludes." *Descamps v. United States*, 570 U.S. 254, 277 (2013). Under the Ninth Circuit's subjective and variable standard, there is no generic definition at all. Instead, "[a]ll is in the eye of the beholder, and prone to endless manipulation." *Id.* at 276.

Therefore, the court of appeals' definition subverts the categorical approach and conflicts with this Court's requirement to employ a "uniform definition" of the generic crime that will produce certainty, consistency, fairness, and predictability.

B. The Ninth Circuit's indeterminate definition of generic robbery violates this Court's instruction to begin all sentencing proceedings by correctly calculating the Guidelines range.

In defining generic robbery under the categorical approach to encompass "acts, words, or circumstances reasonably calculated" to "create an objectively reasonable fear of harm," App. 17a-20a & n.10, the court of appeals requires sentencing courts to apply either a factual rather than categorical approach, or to apply a judge-imagined abstraction of what an ordinary case of robbery looks like. Either approach conflicts with this Court's precedent, as the Court has explained.

In *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court explained that the residual clause in the Armed Career Criminal Act ("ACCA") failed in *Johnson v. United States*, 135 S. Ct. 2551, 2557-58 (2015), "not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." *Welch*, 136 S. Ct. at 1262.

Similarly, here, if does not require a prohibited factual approach, the Ninth Circuit's definition of generic robbery offers "no reliable way to choose between . . . competing accounts" of what generic robbery looks like in the ordinary case. *Johnson*, 135 S. Ct. at 2558. Trying to discern the hypothetical circumstances in which an act is reasonably calculated to cause fear, as well as how much fear is objectively reasonable, is "a task . . . which at best could be only guesswork." *Id.* at 2560.

The Ninth Circuit's only guidance for applying its definition is equally indeterminate and variable: if the conduct creates a "face-to-face confrontation that inherently presents a risk of violence." App. 19a-20. Indeed, the Ninth Circuit cited in support of its generic definition an ACCA case that this Court vacated in light of *Johnson*, 135 S. Ct. at 2559, which had held that an Arizona conviction for attempted robbery categorically presents a "serious risk of potential injury . . . in the ordinary case." App. 19a-20 (citing *United States v. Prince*, 772 F.3d 1173, 1176 (9th Cir. 2014), *vacated*, 135 S. Ct. 2936 (2015)). The *Johnson* Court squarely rejected the view that a sentencing court applying the categorical approach may discern the degree of risk posed in the ordinary case of a crime because no "generally applicable test" exists "that prevents the risk comparison . . . from devolving into guesswork and intuition." *Johnson*, 135 S. Ct. at 2559. The Ninth Circuit repeats the same error here in requiring a sentencing judge to imagine the "circumstances reasonably calculated" to "create an objectively reasonable fear of harm" under an abstract version of generic robbery. App. 17a-20a & n.10.

Although the void-for-vagueness doctrine at issue in *Johnson* does not apply to the Sentencing Guidelines, *Beckles v. United States*, 137 S. Ct. 886, 890 (2017), *Johnson*'s reasoning renders the court of appeals' definition of generic robbery too inscrutable to apply evenhandedly at sentencing. This Court has held that a district court must "begin all sentencing proceedings by correctly calculating the applicable Guidelines range," and that a failure to do so constitutes a procedural error and an abuse of discretion. *Gall v. United States*, 552 U.S. 38, 49 (2007). But without any discernible legal framework beyond guesswork, "correctly calculating" the Guidelines range using the Ninth Circuit's definition of generic robbery is impossible.

As Judge Ikuta presaged in her dissenting opinion in *United States v. Lee*, 821 F.3d 1124, 1136 (9th Cir. 2016), although the residual clause in the pre-2016 version of § 4B1.2 is not unconstitutionally vague, its "inscrutability" nonetheless violates this Court's instruction to begin all sentencing proceedings by correctly calculating the Guidelines range. "If *Johnson* so undermines the residual clause that it cannot be accurately interpreted, a district court would commit a procedural error and abuse its discretion if it used the Guidelines residual clause to calculate the Guidelines range." *Id.* (Ikuta, J., dissenting).

Similarly, here, the Ninth Circuit's definition of generic robbery produces "anything but evenhanded, predictable, or consistent" results because it requires a sentencing court to apply a judge-imagined abstraction of an ordinary case of robbery under the categorical approach. *Johnson*, 135 S. Ct. at 2563. Thus, a district court would abuse its discretion in using that inscrutable definition to calculate the Guidelines range.

Therefore, in leaving it to sentencing judges to guess what the generic crime looks like, the Ninth Circuit's formulation of generic robbery runs afoul of this Court's instruction to correctly calculate the Guidelines range. By defining generic "robbery" in a way that sanctions an *ad hoc* definition in every case, the Ninth Circuit's decision calls for an exercise of this Court's supervisory powers. *Cf. Descamps*, 570 U.S. at 267 ("By this point, it should be clear that the Ninth Circuit's new way of identifying ACCA predicates has no roots in our precedents.").

II. The Decision Below Creates a Circuit Split in Defining Generic Robbery.

The Ninth Circuit's sweeping definition of generic robbery broadly encompasses any degree of force sufficient to overcome resistance and "de minimis force sufficient to compel acquiescence to the taking of or escaping with property." App. 15a-16a, 18a. Not only does this definition effectively read the element of "'immediate danger to the person' out of the definition of generic robbery," App. 29a (W. Fletcher, J., dissenting), it also conflicts with the authoritative decision of the Sixth Circuit in *United States v. Yates*, 866 F.3d 723, 733 (6th Cir. 2017), which defined generic robbery to require a threat of *violence or injury*.

In *Yates*, 866 F.3d at 733-34, the Sixth Circuit held that Ohio's robbery statute, which is similar to Arizona's, does not categorically qualify as generic robbery under § 4B1.2. Interpreting the same definition of generic robbery, the *Yates* court held that the element of "immediate danger to the person" requires "a confrontation that at the very least implies the threat of *violence*," i.e., a use or threat of force that "is more than minimal." *Id.* at 733 (citing WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 20.3(d) (2d ed. 2003)) (hereinafter "LaFave") (emphasis added). *Yates* held,

> Professor LaFave in his treatise looks to the majority definition of robbery, listing as an element of the offense "that the taking be accomplished by means of force or putting in fear." LaFave, *supra*, § 20.3 intro. In discussing this element, he further observes that "robbery requires that the taking be done by means of violence or intimidation." *Id.* at § 20.3(d) (emphasis added). This mention of violence indicates that the type of force contemplated by the generic definition of robbery is more than minimal. *See id.* at § 20.3 intro.

Yates, 866 F.3d at 733.

The *Yates* court concluded that Ohio's robbery statute does not require a confrontation that implies a threat of violence where it encompasses, *inter alia*, a brief "struggle" to remove a purse from a person's shoulder, as well as a purse snatching that does not merely remove the property from the person but does so by "jerk[ing] her arm back." *Id.* at 734 (citations omitted).

Arizona similarly applies its robbery statute to confrontations that do not imply a threat of violence or injury. *See State v. Moore*, No. 1 CA-CR 13-0649, 2014 WL 4103951, at *1-2 (Ariz. Ct. App. Aug. 14, 2014) (unpublished) (affirming a robbery conviction involving a brief "struggle" to pull a wallet from a person's grasp that caused the person's arm to "fl[y] back"; "although the force Moore used was not . . . particularly violent," a taking is a robbery "'if there [is] a struggle to keep' the property, 'or any violence, or disruption'") (quoting *Lear v. State*, 6 P.2d 426, 427 (Ariz. 1931)); *State v. Lewis*, No. 1 CA-CR 09-0294, 2010 WL 173308, at *3 (Ariz. Ct. App. Jan. 19, 2010) (unpublished) (affirming a robbery conviction for a tug-of-war over a purse where the victim, an acquaintance, "testified [that the] defendant did not threaten, push, or hit him," and rejecting an argument that robbery in Arizona requires "some threat, intimidation or violence").

Generic robbery must require a realistic "danger to the person" because that is the essence of robbery. According to LaFave, the "danger" element is what makes robbery "deserving of a greater punishment than that provided for larceny." LaFave, § 20.3. The Model Penal Code also makes "danger" the *sine qua non* of robbery. Although its proposed definition of robbery has not been widely accepted (because it goes farther and requires inflicting or threatening "*serious* bodily injury"), its rationale supports the inclusion of a true "danger" element in the generic crime:

> Any taking from the person will involve some use of "force" and perhaps "fear" in some general sense of being startled. But it is force or threat of force directed at placing the victim in serious fear for his safety that justifies the escalated penalties of the robbery offense.

MODEL PENAL CODE § 222.1, cmt. at 108 (1980). Thus, if generic robbery is to be distinguished from generic theft, the "force" or "fear" required must be of a type that creates a realistic threat of violence or injury.

In addition, generic robbery must require a realistic danger to the person, i.e., a threat of violence or injury, because it is enumerated alongside other violent, dangerous crimes in a sentencing enhancement provision labeled as a "crime of violence." *See* U.S.S.G. § 4B1.2(a), cmt. n.1 (2014) ("'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling," as well as "[u]nlawfully possessing a [certain particularly dangerous] firearm[s]"); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (holding that the term "crime of violence" in 18 U.S.C. § 16 "suggests a category of violent, active crimes"); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017) (holding that "sexual abuse of a minor" in 8 U.S.C. § 1101(a)(43)(A), in context of "surrounding provisions" that list "murder" and "rape," encompasses "only especially egregious felonies"); *Johnson v. United States*, 559 U.S. 133, 140 (2010) (holding that the "physical force" in the ACCA's definition of "violent felony" means "violent" force); *James v. United States*, 550 U.S. 192, 222 (2007) (Scalia, J., dissenting), *overruled on other grounds by Johnson*, 135 S. Ct. at

2563 (opining that generic extortion in the ACCA's definition of "violent felony," which lists other crimes characterized by the "potential for violence and . . . physical harm," must encompass only violent conduct).[2] Thus, even if many state robbery statutes require only the force sufficient to overcome resistance or to compel acquiescence, generic robbery in § 4B1.2 must include an element of "danger to the person" characterized by a threat of violence or injury.

This Court should resolve the circuit split.

III. The Questions Presented are Recurring and Important.

It is clear for two reasons that the Ninth Circuit's definition of generic "robbery" will be applied broadly. *First*, it applies not only to offenders like Mr. Molinar who were sentenced under the 2014 *Guidelines Manual*, but also to offenders who have been or will be sentenced under the current *Guidelines Manual*. *Compare* U.S.S.G. § 4B1.2, cmt. n.1 (2014) *with* U.S.S.G. § 4B1.2(a)(2) (2016).

Second, it applies not only to offenders like Mr. Molinar who are sentenced under § 2K2.1 for firearms and ammunition offenses, but also to certain offenders who are sentenced under other Guidelines provisions, including "career offenders," immigration offenders, and offenders subject to a revocation of supervised release. U.S.S.G. §§ 2K1.3, 2K2.1, 2L1.2, 2S1.1, 4A1.1, 4B1.1, 5K2.17, 7B1.1 (2016).

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[2] Indeed, the Sentencing Commission recently revised the list of enumerated "crimes of violence" in § 4B1.2 to "focus on the most dangerous repeat offenders." U.S.S.G. Supp. App. C, amend. 798 (eff. Nov. 1, 2016) (Reason for Amendment). The revised definition continues to list "robbery" alongside other violent or dangerous crimes. *See* U.S.S.G. § 4B1.2(a)(2) (2016) (listing "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of [certain dangerous] firearm[s] . . . or explosive material").

"Crime of violence" enhancements are routinely applied nationwide and often double or triple a defendant's advisory Guidelines range. In Mr. Molinar's case, the enhancement approximately doubled his Guidelines range, from 27 to 33 months to 46 to 57 months. And of all firearms offenders who were sentenced under § 2K2.1 in Fiscal Year 2016, more than 31 percent (1,838 defendants) received the same enhancement he did under § 2K2.1(a)(4)(A), for a prior crime of violence or controlled substance offense, and more than 14 percent (851 defendants) received an enhancement under § 2K2.1(a)(2), for two prior crimes of violence or controlled substance offenses. U.S. Sentencing Comm'n, *Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based, Fiscal Year 2016*, p. 55.[3]

The impact of "crime of violence" enhancements is even greater for "career offenders" sentenced under § 4B1.2. Career offenders alone "now account for more than 11 percent of the total [federal prison] population" and receive "an average sentence of more than 12 years." U.S. Sentencing Comm'n, *Report to the Congress: Career Offender Sentencing Enhancements*, 2, 18 (Aug. 2016) ("Career Offender Report").[4] In Fiscal Year 2017, 1,593 defendants received career offender status. U.S.

[3] *Available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2016/Use_of_SOC_Guideline_Based.pdf (last visited Mar. 26, 2018).

[4] *Available at* https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf (last visited Mar. 26, 2018).

Sentencing Comm'n, *2017 Sourcebook of Federal Sentencing Statistics*, Tbl. 22 n.1.[5] In Fiscal Year 2014, 2,269 defendants received career offender status. Career Offender Report at 18. Of those, more than 60 percent "had a combination of drug trafficking and violent offenses as their instant and prior convictions," and "12.7 percent had only violent offenses among their instant and prior offenses." *Id.* at 28. In the latter category, "[r]obbery was the most serious, common prior offense . . . , with 56.1 percent of those offenders having robbery as their most serious prior conviction." *Id.* at 30.

The prevalence and importance of the issue and the need for uniform treatment of similarly-situated defendants warrants this Court's attention.

IV. This Case Is an Ideal Vehicle.

This case is an ideal vehicle for consideration of the questions presented. *First*, the case arises on direct review and the relevant issues were fully preserved below. *Second*, the definition of generic robbery, which the Ninth Circuit had "not previously examined" (App. 14a), was dispositive below. *Third*, because the ACCA does not enumerate generic robbery, 18 U.S.C. § 924(e)(2)(B)(ii), this Court will not resolve the questions presented here in *Stokeling v. United States*, 684 F. App'x 870 (11th Cir. 2017), *cert. granted*, --- S. Ct. ---- (U.S. Apr. 2, 2018) (No. 17-5554). Nevertheless, if the Court believes that another pending case should be resolved first, Mr. Molinar asks that the Court hold his case pending resolution of the common issues.

[5] *Available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table22.pdf (last visited Mar. 26, 2018).

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 4th day of April, 2018.

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s/ *Jeremy Ryan Moore*
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