

No. __-____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH A. PARKER JR.,
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

The United States Sentencing Commission amended the definition of “crime of violence” in the U.S. Sentencing Guidelines effective August 1, 2016, removing the so-called “residual clause” and adding the enumerated offense of “robbery” to the text.

The question presented is whether a theft offense that requires either no force, or only minimal force, is generic robbery and therefore a “crime of violence” under U.S.S.G. § 4B1.2.

PARTIES TO THE PROCEEDINGS

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph A. Parker Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at pages 1a to 3a of the appendix to the petition and is unpublished. *See United States v. Parker*, 716 F. App'x 190 (4th Cir. 2018).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over

Petitioner’s appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court issued its opinion and judgment on February 5, 2018. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

SENTENCING GUIDELINES PROVISIONS 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) (2016) (emphasis added).

STATEMENT OF THE CASE

Proceedings in the District Court

Petitioner Joseph A. Parker Jr. pled guilty to one count of possessing a firearm subsequent to a felony conviction, in violation of 18 U.S.C. § 922(g)(1). C.A.J.A. 8, 11.¹

A probation officer prepared a presentence investigation report (PSR) that, among other things, calculated the sentencing guideline range applicable to Mr. Parker.

¹ “C.A.J.A.” refers to the joint appendix filed in the court of appeals. “Pet. App.” refers to the appendix attached to this petition.

C.A.J.A. 77-97. The probation officer concluded that Mr. Parker’s base offense level was 20 under U.S.S.G. § 2K2.1(a)(4), based on Mr. Parker having a prior conviction for what the probation officer deemed to be a “crime of violence,” Virginia robbery. C.A.J.A. 96-97. Section 2K2.1 incorporates by reference the definition of crime of violence in U.S.S.G. § 4B1.2. *See* U.S.S.G. § 2K2.1 comment. n.1.

Mr. Parker contends that Virginia robbery is not a crime of violence and therefore the applicable base offense level should have been 14, not 20. *See* U.S.S.G. § 2K2.1(a)(6). Mr. Parker is in criminal history category VI. C.A.J.A. 90. With a final offense level of 19, that resulted in a calculated guideline range of 63 to 78 months. *See* U.S.S.G. Chap. 5, part A (table); C.A.J.A. 95. With a properly-calculated final offense level of 13, the guideline range would have been 33 to 41 months. *See* U.S.S.G. Chap. 5, part A (table); C.A.J.A. 41.

Mr. Parker, through counsel, objected to the designation of his prior robbery conviction as a crime of violence. C.A.J.A. 29-40. At the sentencing hearing, the district court ruled that Virginia robbery is a crime of violence under the force clause. C.A.J.A. 51-52. The district court held that the resulting guideline range was 63 to 78 months. C.A.J.A. 53; *see also* C.A.J.A. 98 (statement of reasons). The district court sentenced Mr. Parker to a within-calculated-range sentence of 66 months in prison. C.A.J.A. 64, (transcript), 70 (judgment). Mr. Parker filed a timely notice of appeal. C.A.J.A. 75.

Proceedings in the Court of Appeals

On appeal to the Fourth Circuit, Petitioner argued that his prior conviction for Virginia common law robbery did not qualify as generic robbery and therefore was not a crime of violence.²

A panel of the Fourth Circuit affirmed the district court in an unpublished decision, relying on its decision in *United States v. Gattis*, 877 F.3d 150, 156, 160 (4th Cir. 2017), *cert. denied* __ S.Ct. __, 2018 WL 1278447 (April 16, 2018) (adopting a definition of generic robbery and holding that North Carolina common law robbery falls within the scope of that definition). Pet. App. 2a. The court of appeals held: “Comparing Virginia’s definition of robbery with the generic meaning, we conclude that Virginia robbery is a crime of violence under USSG § 4B1.2(a)’s enumerated offenses clause.” Pet. App. 2a.

The Fourth Circuit held that Virginia robbery, which requires only “de minimis contact,” nonetheless falls within the scope of generic robbery:

Parker seeks to avoid this result by arguing that Virginia robbery is broader than generic robbery because Virginia robbery can be committed through de minimis contact. But, we rejected a nearly identical argument in *Gattis*, 877 F.3d at 158. Parker fails to acknowledge that the amount of force necessary for a robbery offense to meet USSG § 4B1.2(a)’s force clause differs from the amount of force necessary for a robbery offense to

² In the interim between the sentencing and the appeal, the Fourth Circuit had held that Virginia robbery was not a crime of violence under the force-clause definition. *United States v. Winston*, 850 F.3d 677, 679 (4th Cir. 2017); *see* Pet. App. 2a. The Sentencing Commission amended § 4B1.2, effective August 1, 2016, removing the residual clause and adding robbery to the list of offenses enumerated in the text. *See* U.S.S.G. app. C, amend. 798 (2016); U.S.S.G. § 4B1.2 (2016). The sentencing in this case happened on September 8, 2016. C.A.J.A. 49.

meet generic robbery as contemplated by USSG § 4B1.2(a)'s enumerated offenses clause.

Indeed, the amount of force required to sustain a Virginia robbery conviction matches the amount of force required to meet the definition of generic robbery that we have adopted. *Compare Maxwell v. Commonwealth*, 165 Va. 860, 183 S.E. 452, 454 (1936) (stating that violence “need only be slight, for anything which calls out resistance is sufficient”) (internal quotation marks omitted), with *Gattis*, 877 F.3d at 158 (stating that generic robbery requires “only that force which is sufficient to overcome the victim's resistance”). We thus conclude that Parker's force argument fails to show that Virginia defines robbery in a manner that is broader than generic robbery.

Pet. App. 3a (paragraph break added). This petition follows.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD RESOLVE A CIRCUIT SPLIT AND DEFINE GENERIC ROBBERY

The Court should grant review in this case for four reasons. First, the definition of generic robbery presents an important question, unaddressed by this Court, that is the subject of increasing litigation in the wake of the Sentencing Commission's addition of robbery to the list of enumerated offenses in the guideline definition of “career offender,” and the concurrent elimination of the residual clause. Second, the federal courts of appeals are divided as to whether generic robbery requires more than minimal force, and that split necessitates review by this Court to prevent further division and resulting sentencing disparities. 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 includes state crimes that require

only minimal force. But for that erroneous determination, Petitioner’s advisory guideline range would have been lower. Accordingly, Mr. Parker respectfully requests that this Court issue a writ of certiorari.

A. The Definition of Generic Robbery is an Important Question

Section 4B1.2(a)(2) now lists “robbery” as one of the enumerated “crimes of violence” in the career offender provision of the Sentencing Guidelines. U.S.S.G. § 4B1.2(a)(2) (2016). Application of the career offender enhancement often results in significantly longer advisory guideline ranges of imprisonment. *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 sentencing ranges, the question of whether a prior state theft conviction qualifies as generic robbery and thus a “crime of violence” is an important legal issue.

To determine whether a prior state theft conviction qualifies as robbery, courts must first understand what “robbery” means, and the definition of generic robbery proves critical. In determining whether an offense qualifies as a crime of violence, courts employ the categorical approach. *E.g.*, *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013); *Taylor v. United States*, 495 U.S. 575, 600 (1990) (defining generic burglary); *see also Shepard v. United States*, 544 U.S. 13, 26 (2005)

(courts may not look to police reports in making “crime of violence” or “violent felony” determinations).

The generic robbery question is being litigated far more frequently now, 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). Before *Johnson* and the subsequent elimination of the residual clause from the Guidelines by the Commission, robbery was not one of the enumerated crimes listed in the text of the career offender guideline. See U.S.S.G. § 4B1.2 (2015); *United States v. Bell*, 840 F.3d 963, 968 (8th Cir. 2016). Instead, robbery and similar offenses often 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. The Commission, however, did not define “robbery.” Without the residual clause, courts must now decide whether various state theft offenses categorically qualify as the enumerated offense of generic robbery. Because the Sentencing Guidelines do not provide a definition, courts must define “robbery” for themselves. As demonstrated below, the circuit courts already disagree on this issue.

B. There Is a Circuit Split

The federal courts of appeals are divided with regard to the definition of generic robbery, specifically, whether generic robbery requires more than minimal force as an

element of the offense. This Court should eliminate the disagreement by providing a uniform definition of generic robbery.

The Sixth Circuit 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), (generic robbery is “the misappropriation of property under circumstances involving immediate danger to the person” – by means of force, putting in fear, or bodily injury). 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*).

Similarly, the Model Penal Code defines “robbery” in a way that excludes a theft committed by the use of de minimis contact. 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(1).

The Third Circuit, however, 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 “[w]e now join the Seventh and Eleventh

Circuits and hold that generic robbery requires no more than de minimis force”). As the Third Circuit acknowledged, the Seventh and Eleventh Circuits also have at least implied that minimal force satisfies the definition 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 Fourth Circuit has deepened the circuit split, determining that both Virginia and North Carolina common law robbery, each of which require only minimal force, qualify as generic robbery. Pet. App. 3a (citing *Gattis*, 877 F.3d at 160).

Given the division among the lower federal courts, this Court’s guidance is necessary to provide a uniform definition of generic robbery. This Court should provide guidance now, before the split deepens further, and results in additional unwarranted disparities among defendants sentenced in different circuits and with predicate theft convictions from different states. 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”).

C. This Case Is a Good Vehicle For the Court to Define Generic Robbery

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 the classification of the prior robbery conviction as a crime of violence elevated his offense level by six, resulting in a substantially higher guideline range. The six-level enhancement almost doubled the guideline range, and thus Mr. Parker was harmed. Petitioner timely appealed and raised this specific issue before the Fourth Circuit. No

alternative holdings complicate the issue, so it is cleanly presented. Accordingly, this case presents a good vehicle for this Court to consider the question presented.

D. The Fourth Circuit Erred When It Concluded That a Theft Crime That Requires Only Minimal Force Falls Within the Definition of Generic Robbery

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*, 495 U.S. at 602. 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*, 136 S. Ct. at 2248. 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.*

The Fourth Circuit erred when it concluded that Petitioner’s prior conviction for Virginia robbery qualifies as generic robbery. Virginia robbery does not include violent physical force as an element of the offense and therefore is not a crime of violence under the force clause. *Winston*, 850 F.3d at 679. For this reason, Virginia robbery also is broader than generic robbery because it encompasses theft that involves “even a slight degree of force that need not harm a victim.” *Id.* at 685 (“Because Virginia common law robbery can be committed when a defendant uses only a ‘slight’ degree of force that need not harm a victim,

Virginia common law robbery appears to encompass a range of de minimis contact by a defendant.”).

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; *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 Professor 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 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 – like Virginia and North Carolina – hold that the degree of force used during a robbery is “immaterial.” *United States v. Gardner*, 823 F.3d 793, 803 (4th Cir. 2016) (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 the Fourth Circuit explained in *Gardner*, the low threshold for North Carolina common law robbery is illustrated by *State v. Chance*, 191 N.C. App. 252, 662 S.E.2d 405 (2008) (table), in which an 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 *Gattis*, the Fourth Circuit relied primarily on Professor LaFave’s treatise to conclude that generic robbery requires only minimal force. 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 Fourth Circuit 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 minimis 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, *supra*, § 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. Not only is there a circuit split, but the Fourth Circuit is on the wrong side of that split.

In contrast to generic robbery, the offense of Virginia robbery at issue here (like North Carolina robbery, at issue in *Gattis*) encompasses a theft during which the offender uses only minimal force. *Winston*, 850 F.3d at 685. Such conduct does not require physical force or even the threat of physical force. *Id.* (holding that “the minimum conduct necessary to sustain a conviction for Virginia common law robbery does not necessarily include the use, attempted use, or threatened use of ‘violent force ... capable of causing physical pain or injury to another person,’ under *Johnson I*, 559 U.S. at 140 (emphasis omitted)”). The offense thus falls outside of the scope of generic robbery. The Fourth Circuit in *Winston*

examined at some length Virginia precedent about “the meaning of the term robbery ‘by violence or intimidation.’” 850 F.3d at 683-85.

“In addressing Virginia common law robbery by means of violence, the Supreme Court of Virginia has explained that commission of common law robbery by violence requires only a ‘slight’ degree of violence, ‘for anything which calls out resistance is sufficient.’” *Id.* at 684-85 (quoting *Maxwell v. Commonwealth*, 165 Va. 860, 183 S.E. 452, 454 (1936)). The Fourth Circuit continued: “Further, under Virginia law, the ‘violence used [to commit robbery by violence] does not need to be great or cause any actual harm to the victim.’” *Id.* at 685 (quoting *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487, at *3 (Va. Ct. App. Dec. 12, 2000) (unpublished) (citing *Jones v. Commonwealth*, 26 Va.App. 736, 496 S.E.2d 668, 670 (1998)) (alterations in *Winston*). The Fourth Circuit concluded that “[b]ecause Virginia common law robbery can be committed when a defendant uses only a ‘slight’ degree of force that need not harm a victim, Virginia common law robbery appears to encompass a range of de minimis contact by a defendant.” *Id.* After examining the Virginia state court precedent in some detail, The Fourth Circuit concluded: “we hold that Winston’s conviction for Virginia common law robbery does not qualify as a violent felony under the ACCA.” *Id.*

The Fourth Circuit in this case, as in *Gattis*, held that a robbery crime that encompasses a range of de minimis contact by a defendant falls within the scope of generic robbery. Pet. App. 3a. As the Sixth Circuit and other courts have held, the better view is that “the type of force contemplated by the generic definition of robbery is more than minimal.”

Yates, 866 F.3d at 733. Because Virginia common law robbery criminalizes a broader scope of conduct than the generic crime, it is not categorically a crime of violence. The Fourth Circuit therefore erred.

CONCLUSION

For the reasons given above, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari, review the judgment of the Fourth Circuit, resolve the circuit split, and define generic robbery for purposes of federal sentencing law.

Respectfully submitted,

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