I. Robbery, in violation of California Penal Code § 211, is not a crime of violence.

To qualify as a "crime of violence," an offense must either (1) have as an element to use, attempted use or threatened use of physical force (i.e., qualify under the "force clause"); or (2) qualify as a categorical match with the offenses enumerated in the Guideline (i.e., qualify as an "enumerated offense"). *See* U.S.S.G. § 4B1.2(a). To determine whether an offense qualifies as a crime of violence, the Court must employ the categorical approach outlined in *Taylor v. United States*, 495 U.S. 575, 600 (1990). *See United States v. Simmons*, 782 F.3d 510, 513 (9th Cir. 2015). Under *Taylor*, only the statutory definition—i.e., the elements—of the predicate crime are relevant to determine whether the conduct criminalized by the statute, including the most innocent conduct, qualifies as a "crime of violence." 495 U.S. at 599-601. Determination of whether a criminal offense is categorically a crime of violence is done by "assessing whether the 'full range of conduct covered by [the statute] falls within the meaning of that term.'" *United States v. Grajeda*, 581 F.3d 1186, 1189 (9th Cir. 2009) (citation omitted). To do this, courts must look "at the least egregious end of [the. . . statute's] range of conduct." *United States v. Baza-Martinez*, 464 F.3d 1010, 1014 (9th Cir. 2006) (quoting *United States v. Lopez-Solis*, 447 F.3d 1201, 1206 (9th Cir. 2006)). In other words, under the categorical approach, a prior offense can qualify as a "crime of violence" only if all of the criminal conduct covered by a statute—"including the most innocent conduct"—matches or is narrower than the "crime of violence" definition. *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012). If the statute punishes some conduct that would qualify as a crime of violence and some conduct that would not, it does not categorically constitute a crime of violence. *Grajeda*, 581 F.3d at 1189.

Here, Penal Code § 211 does not qualify as a crime of violence. *See United States v. Nickles*, ___F. Supp. 3d___, No. 16-CR-00356-PJH, 2017 WL 1398661, at *2 (N.D. Cal. Apr. 17, 2017), *appeal docketed* No. 17-10206 (9th Cir. May 12, 2017) (holding that Penal Code § 211 is not a crime of violence under the 2016 Guidelines). First, the Ninth Circuit has already expressly held that section 211 does not qualify as a violent felony under the

identically worded "force clause" of the Armed Career Criminal Act ("ACCA"). *See United States v. Dixon*, 805 F.3d 1193, 1197-98 (9th Cir. 2015); *see also United States v. Crews*, 621 F.3d 849, 856 (9th Cir. 2010) ("[[T]he terms 'violent felony' in the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), and 'crime of violence' in Guidelines section 4B1.2, are interpreted according to the same precedent."). Specifically, the Ninth Circuit held that section 211 does not satisfy the force clause because under California law, a defendant may be guilty of robbery if he or she *accidentally* uses force. *See id.* (holding that to qualify under the force clause, an offense must have a mens rea requiring *intentional* use of force). Therefore, section 211 will qualify as a crime of violence only if it qualifies as an enumerated offense.

Previously, the Ninth Circuit held that section 211 qualified as a "crime of violence" under the now-abrogated version of the guideline that applied to illegal-reentry offenses: U.S.S.G. § 2L1.2. *See United States v. Becerril-Lopez*, 541 F.3d 881, 891-93 (9th Cir. 2008). The Ninth Circuit reasoned that section 211 was broader than the generic "robbery," one of the offenses enumerated in section 2L1.2, because section 211 encompassed takings accomplished merely through threats to property. *See id.* at 891. (noting that § 211 is broader than "generic robbery" because the statute encompasses "encompasses mere threats to property"). But the Ninth Circuit nevertheless held that section 211 qualified as a crime of violence under the old version of section 2L1.2 because it concluded that such takings through mere threats to property were consistent with the definition of "generic extortion," another offense enumerated in section 2L1.2. *See id.* at 891-92 (defining "generic extortion" as "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats").

Critically, however, since the Ninth Circuit decided *Becerril-Lopez* in 2008, the Sentencing Commission in 2016 amended section 4B1.2 to provide a narrower definition for generic "extortion," which the Guidelines themselves had not previously defined. *See* U.S.S.G. § 4B1.2 cmt. n.1. Specifically, the Commission defined "extortion" as "obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury." *Id.* In promulgating this new commentary to the

career-offender Guideline, the Sentencing Commission noted that most courts—like the Ninth Circuit in *Becerril-Lopez*—had defined "extortion" as "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats." U.S.S.G. App. C, Amend. 798; *see also Becerril-Lopez*, 541 F.3d at 891 (defining "generic extortion" as "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats"). The Sentencing Commission, however, consistent with its goal of including only the most serious offenses under the career-offender Guideline, "narrow[ed] the generic definition of extortion by limiting the offense to those having an element of force or an element of fear or threats 'of physical injury,' as opposed to non-violent threats such as injury to reputation." U.S.S.G. App. C, Amend. 798.

Here, the new, narrower definition of "generic extortion" means that Penal Code § 211 now criminalizes conduct that qualifies neither as generic robbery nor as generic extortion, and thus section 211 is overbroad and no longer qualifies as a crime of violence. Specifically, the Ninth Circuit itself in *Becerril-Lopez* gave examples of how section 211 "encompasses mere threats to property, such as 'Give me $10 or I'll key your car' or 'Open the cash register or I'll tag your windows.'" 541 F.3d at 891. Under the new, narrower definition of "generic extortion" such threats only to property do not rise to the level of extortion because they entail no threat of "physical injury." *See* U.S.S.G. § 4B1.2 cmt. n.1; U.S.S.G. App. C, Amend. 798. Indeed, California's robbery statute itself unambiguously covers taking through fear only to the victim's property. *See* Cal. Penal Code § 212 (defining "fear" under § 211 as, inter alia, "an unlawful injury to the person or property of the person robbed"); *see also* Judicial Council of California Criminal Jury Instructions (2016 ed.), CALCRIM No. 1600 "Robbery" ("Fear, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property.)").[1]

[1] Moreover, because California's jury instructions do not require a jury to make any specific finding concerning whether a section 211 defendant used force, fear, or threats—let alone whether the defendant used fear of injury to the victim's person or property—the modified-categorical approach is inapposite. *See Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014).

Therefore, "the least egregious end of [section 211's] range of conduct," e.g., demanding money from a victim based on fear of damage the victim's property, is not a categorical match for generic extortion, which now must be based on threats of "physical injury." *See Baza-Martinez*, 464 F.3d at 1014; U.S.S.G. § 4B1.2 cmt. n1. Judge Hamilton recently adopted precisely this reasoning, stating that "the commentary to § 4B1.2 has also been amended to include a definition of 'extortion' that is more restrictive than the generic definition of extortion, which was applied by the court in *Becerril-Lopez*." *Nickles*¸2017 WL 1398661 at *1. Judge Hamilton further reasoned because mere threats to property are sufficient under section 211, California robbery does not qualify as crime of violence because it is broader than the new, narrower definition of "generic extortion." *See id*. at *2. Accordingly, because section 211 is broader than both generic robbery and extortion, it cannot qualify as a crime of violence under section 4B1.2 as an enumerated offense.[2] *See id.*

[2] The Ninth Circuit's recent opinion reaffirming *Becerril-Lopez* in the context of the now-abrogated illegal-reentry guideline, U.S.S.G. 2L1.2 (2015), has no bearing on this case. *See United States v. Chavez-Cuevas*, ___F.3d___, No. 15-50480, 2017 WL 2927635 (9th Cir. July 10, 2017). In *Chavez-Cuevas*, the Ninth Circuit was interpreting the 2015 Guidelines Manual. *See id.* at *1, *2 (providing for 16-level enhancement for a prior crime of violence). Accordingly, the Ninth Circuit applied the same definition of "generic extortion" that it used in *Becerril-Lopez*, requiring only threats to property. *See id.* at *5 n.1. Therefore, *Chavez-Cuevas* does not apply to the section 4B1.2 under the 2016 Guidelines Manual, with its different definition of generic extortion. Indeed, in *Chavez-Cuevas* the Ninth Circuit gave a specific example of conduct that violated section 211, which would not satisfy the new, narrower definition of "extortion" in the commentary to section 4B1.2. *See id.* ("For example, the acquisition of property through a threat towards property ('I'll shred your book of family photos unless you give me that diamond ring') that satisfies the elements of § 211 would not constitute generic robbery . . . .").