

No. 18-

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IN THE  
SUPREME COURT OF THE UNITED STATES

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LUIS DELPRADO

*Petitioner*

v.

UNITED STATES OF AMERICA

*Respondent*

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On Petition for Writ of Certiorari  
To The United States Court of Appeals for the Fifth Circuit

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the following cases pending before this Court create a reasonable probability of a different result in the instant case insofar as the address the required fit between a defendant's prior statute of conviction and a "generic" offense for the purposes of a criminal history enhancement: *Quarles v. United States*, No. 17-778 (Petition for Certiorari filed November 24, 2017); *Herrold v. United States*, No. 17-9127 (Government's Petition for Certiorari filed April 18, 2018); *United States v. Stitt*, No. 17-765, 138 S.Ct. 1592 (Petition for Certiorari granted April 23, 2018)?

II. Whether this Court's forthcoming opinion in *Stokeling v. United States*, No. 17-5554, 138 S.Ct. 1438 (Petition for Certiorari granted April 2, 2018), creates sufficient uncertainty about the accuracy of the result below as to merit holding the instant case until the resolution of *Stokeling*?

### PARTIES

Luis Delprado, is the petitioner, who was the defendant-appellant below. The United States of America is the respondent, who was the plaintiff-appellee below.

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### PETITION FOR A WRIT OF CERTIORARI

Petitioner, Luis Delprado, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

### OPINIONS BELOW

The United States District Court for the Northern District of Texas sentenced Petitioner by written judgment on December 15, 2017, which judgment is attached in the Appendices. [Appx. A]. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit affirming this sentence is captioned as *United States v. Delprado*, 733 Fed. Appx. 800 (5th Cir. August 3, 2018)(unpublished), and is also provided in the Appendices to the Petition. [Appx. B].

### JURISDICTIONAL STATEMENT

The Fifth Circuit affirmed the district court's judgment on August 3, 2018. [Appx. B]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### STATUTES AND FEDERAL SENTENCING GUIDELINES INVOLVED

Federal Sentencing Guideline 4B1.2(a) provides:

(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).

Texas Penal Code §29.02 provides:

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) An offense under this section is a felony of the second degree.

Texas Penal Code §29.03 provides:

(a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:

(1) causes serious bodily injury to another;

(2) uses or exhibits a deadly weapon; or

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:

(A) 65 years of age or older; or

(B) a disabled person.

(b) An offense under this section is a felony of the first degree.

(c) In this section, “disabled person” means an individual with a mental, physical, or developmental disability who is substantially unable to protect himself from harm.

## STATEMENT OF THE CASE

### **A. Facts and Proceedings in District Court**

Petitioner Luis Delprado was caught with a firearm during a traffic stop, in spite of his prior felony convictions. *See* (ROA.29-33, 106).<sup>1</sup> He pleaded guilty to a violation of 18 U.S.C. §922(g), which forbids gun possession by felons. *See* (ROA.29-33).

A Presentence Report (PSR) calculated a Guideline range of 46-57 months imprisonment, owing to a base offense level of 20, a three level reduction for acceptance of responsibility, and a criminal history category of V. *See* (ROA.108, 116). Probation applied a base offense level of 20 because it regarded Mr. Delprado's prior Texas aggravated robbery conviction as a "crime of violence" under USSG §4B1.2. *See* (ROA.108); USSG §2K2.1(a). In the absence of this conclusion, the base offense level would have been 14. *See* USSG §2K2.1(a). The ultimate Guideline range, following a two level reduction for acceptance of responsibility (*see* USSG §3E1.1(a)), would have been just 27-33 months imprisonment. *See* USSG Ch. 5A.

Probation attached to the PSR certain judicial records related to the prior robbery conviction. *See* (ROA.119-127). These showed that Mr. Delprado was charged with threatening another with a deadly weapon. *See* (ROA.119-127). The district court adopted the PSR's recommended range of 46-57 months imprisonment. *See* (ROA.96-97). It imposed sentence within this range, and gave no indication that the sentence would have been the same under different Guidelines. *See* (ROA.96-97).

### **B. The Appeal**

On appeal, Petitioner argued that his prior Texas robbery convictions were not "crimes of violence" under §§2K2.1 and 4B1.2, though he conceded that the claim could be reviewed only for plain error. Further, he conceded that the claim was foreclosed by

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<sup>1</sup>Citations to the record on appeal are included in hopes that they are of use to the government in answering the Petition or the Court in evaluating it.

*United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380-81 (5th Cir. 2006), *overruled on other grounds by United States v. Rodriguez*, 711 F.3d 541, 547-63 (5th Cir. 2013) (en banc), which held that Texas robbery constituted the generic offense of “robbery,” as the term is used in Guidelines definitions of a “crime of violence.” Nonetheless, he contended that *Santiesteban-Hernandez* was wrongly decided because the Texas offense diverged from the generic contemporary meaning of the term “robbery” in multiple respects. Specifically: 1) Texas robbery, unlike the majority of state robbery offenses, lacks a force requirement; 2) Texas robbery may be committed by inflicting or causing minor injury, while the generic definition of robbery requires the acquisition of property by force or intimidation, and, 3) the Texas offense requires only that injury or intimidation occur sometime in the course of the theft, not that it be the way that the robber acquire property.

The court of appeals affirmed, noting its prior opinion in *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380-81 (5th Cir. 2006), *overruled on other grounds by United States v. Rodriguez*, 711 F.3d 541, 547-63 (5th Cir. 2013) (en banc). See [Appx. B, at 2].

## REASONS FOR GRANTING THE PETITION

- I. **The following cases may create a reasonable probability of a different result in the instant case insofar as they address the required fit between a defendant's prior statute of conviction and a "generic" offense for the purposes of a criminal history enhancement: *Quarles v. United States*, No. 17-778 (Petition for Certiorari filed November 24, 2017); *Herrold v. United States*, No. 17-9127 (Government's Petition for Certiorari filed April 18, 2018); *United States v. Stitt*, No. 17-765, 138 S.Ct. 1592 (Petition for Certiorari granted April 23, 2018).**

Petitioner received an enhanced Guideline sentence due to his prior Texas robbery convictions. Guideline 2K2.1 provides an enhanced offense level when the defendant has been previously convicted of a "crime of violence" under USSG §§2K2.1 and 4B1.2. The definition used in connection with these Guidelines says that "crime of violence" includes "robbery." See USSG §4B1.2(a)(2). On appeal, the Fifth Circuit affirmed Mr. Delprado's enhanced sentence on the grounds that it constituted this enumerated offense of "robbery." See [Appx. D, at 2].

This Court's seminal opinion in *Taylor v. United States*, 495 U.S. 575 (1991), addressed the required fit between a defendant's prior offense and an offense enumerated in a criminal history enhancement. In *Taylor*, the defendant had been convicted of a Missouri offense denominated "burglary." See *Taylor*, 495 U.S. at 599. That conviction was thought by the lower courts to be equivalent to "burglary" as the Armed Career Criminal Act (ACCA) used the term – ACCA defines burglary as a "violent felony." See *id.* at 579-580. This Court first identified a "generic" definition of "burglary," which it thought to correspond roughly to the "burglary" offense set forth in the majority of state codes. See *id.* at 598-599. A state offense that shares all of the elements of "generic burglary," this Court held, can be used to enhance a defendant's sentence under ACCA. See *id.* at 599. A prior offense substantially broader than "generic burglary," that is, an offense that criminalizes conduct outside the generic

definition, cannot be so used. *See id.* at 599-602.

In *United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5<sup>th</sup> Cir. 2006), the Fifth Circuit applied the *Taylor* “generic offense” methodology to the enumerated offense of “robbery” in USSG §2L1.2. *See Santiesteban-Hernandez*, 469 F.3d at 378-382. It recognized that most states define “robbery” differently, and in certain respects more narrowly, than Texas. *See id.* at 381. Specifically, while most states require a threatened use of force, Texas permits conviction upon a finding of bodily injury inflicted in connection with the theft. *See id.* The *Santiesteban-Hernandez* court might also have noted that Texas does not require that the defendant acquire property by force, intimidation or injury. Instead, it requires only that injury or threat occur in the course of a theft, which extends beyond the completion of the robbery, and, indeed, even beyond the moment that a thief discards property. *See Smith v. State*, 2013 Tex. App. LEXIS 1146, at \*6-8 (Tex. App. Houston 14th Dist. Feb. 7 2013)(unpublished). By contrast, the majority of states require that the defendant’s violence be ***the way that*** he or she acquires of property – that is, most robbery offenses require a causal connection between violence and the acquisition of property. *See Santiesteban-Hernandez*, 469 F.3d at 380 (“The majority of states require property to be taken from a person or a person's presence ***by*** means of force or putting in fear.”)(emphasis added). Nonetheless, *Santiesteban-Hernandez* treated the Texas offense as “generic robbery” on the theory that any differences were minor.

The Fifth Circuit has extended *Santiesteban-Hernandez* to USSG §4B1.2, which also defines “robbery” as a “crime of violence” for its purposes. *United States v. Flores-Vasquez*, 641 F.3d 667, 670 n.1 (5<sup>th</sup> Cir. 2011). *Santiesteban-Hernandez* was cited in the opinion below. *See* [Appx. B, at 2].

This Court has before it several petitions that address the necessary fit between a defendant’s prior statute of conviction and a generic, enumerated offense. In *Quarles*

*v. United States*, No. 17-778, Petition for Certiorari, at p. I (filed November 24, 2017), a defendant Petitioner has asked the Court to address whether an offense may be “generic burglary,” even if it does not require that the defendant form an intent to commit a crime at the time of a burglar’s trespassory entry. In *Herrold v. United States*, No. 17-9127, Petition for Certiorari, at p. I (Government’s Petition for Certiorari filed April 18, 2018), the government asked the Court to address the same question. And in *United States v. Stitt*, 17-765, Petition for Certiorari, at p. I (filed November 21, 2017), this Court has agreed to determine whether a crime may be “generic burglary” even if it may be committed against a vehicle.

The courts of appeals are divided as to how substantial the differences may be between a prior offense and an enumerated offense without defeating a criminal history enhancement. **Compare** *United States v. Mungia-Portillo*, 484 F.3d 813, 816-817 (5<sup>th</sup> Cir. 2007) **with** *United States v. Esparza-Herrera*, 557 F.3d 1019, 1023 (9<sup>th</sup> Cir. 2009). Each of the cases discussed above can and should resolve that divisive question. That question is the precisely the question on which *Santiesteban-Hernandez* and the opinion below turn.

This Court “regularly hold(s) cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be ‘GVR’d’ when the case is decided.” *Lawrence v. Chater*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting). Ultimately, GVR is appropriate if the decision “reveal(s) a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation...” *Lawrence*, 516 U.S. at 167. It is reasonably probable that the court will reach a different result as to the validity of *Santiesteban-Hernandez* in one or more of the cases discussed above. Specifically, if this Court

declines to overlook any of the differences between the defendant’s statute of conviction and the generic offense of “burglary” in these cases, *Santiesteban-Hernandez* will be plainly and severely undercut.

It is true that a non-enumerated offense may also be a “crime of violence” under §4B1.2 if it has as an element “the use, attempted use, or threatened use of physical force against the person of another.” USSG §4B1.2(a)(1). Yet the Fifth Circuit has repeatedly – and recently – reaffirmed that the mere infliction of bodily injury does not constitute “the use of force” for the purpose of a Guidelines “crime of violence” enhancement. See *United States v. Villegas-Hernandez*, 468 F.3d 874 (5<sup>th</sup> Cir. 2006); *United States v. Rico-Mejia*, 859 F.3d 318, 322-323 (5<sup>th</sup> Cir. 2017); *United States v. Fennell*, 695 Fed. Appx. 780 (5<sup>th</sup> Cir. August 16, 2017)(unpublished); *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276-277 (5<sup>th</sup> Cir. 2010); *United States v. Johnson*, 286 Fed. Appx. 155, 157 (5<sup>th</sup> Cir. 2008)(unpublished); *United States v. De La Rosa-Hernandez*, 264 Fed. Appx. 446, 449 (5<sup>th</sup> Cir. 2008)(unpublished) *United States v. Martinez-Mata*, 393 F.3d 625, 629 (5<sup>th</sup> Cir. 2003); *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5<sup>th</sup> Cir. 2004)(*en banc*). Indeed, it said as much regarding the Texas simple robbery statute. See *United States v. Burris*, 896 F.3d 320 (5<sup>th</sup> Cir. June 18, 2018). The government’s Petition for Rehearing En Banc is pending in that case.

In *United States v. Lerma*, 877 F.3d 628 (5<sup>th</sup> Cir. 2017), the court below held that aggravated robbery with a deadly weapon does involve force as an element. But *Lerma* plainly does not survive that court’s more recent *en banc* decision in *United States v. Herrold*, 883 F.3d 517 (5<sup>th</sup> Cir. Feb. 20, 2018)(*en banc*). *Lerma* relies solely on the simple disjunctive structure of the Texas aggravated robbery statute to conclude that it is a divisible statute. See *Lerma*, 877 F.3d at 633-635. The *Lerma* panel hence concluded that commission of the offense by deadly weapon is distinct offense from commission of simple robbery against a disabled or senior victim. See *Lerma*, 877 F.3d



at 633-635.

But *Herrold* rejects the notion that the disjunctive structure of a prior statute of conviction can render it divisible for the purposes of the categorical approach. See *Herrold*, 883F.3d at \*526-529. Rather, under *Herrold*, the government must show that the defendant would have enjoyed a right to jury unanimity on each statutory alternative it wishes to isolate using the modified categorical approach. See *id.* Here, the Texas courts have rejected that right of unanimity as to the factors that render simple Texas robbery aggravated robbery. See *Woodard v. State*, 294 S.W.3d 605, 609 (Tex. App. - Houston [1st Dist.] 2009). Accordingly, the judicial records introduced below may not be used to exclude the possibility that the defendant received an aggravated robbery conviction for committing simple robbery against an elderly or disabled victim, rather than for committing it with a deadly weapon. This alternative lacks the use of force under Fifth Circuit precedent. And as the offense of aggravated robbery is an indivisible statute, the offense lacks the use or threatened use of force as an element.

The court below reviewed Petitioner's argument for plain error, as it was not preserved in district court. See Fed. R. Crim. P. 52(b). But error may become plain any time on direct review. See *Henderson v. United States*, \_\_U.S. \_\_, 133 S.Ct. 1121 (2013). And plain Guideline error is usually reversible even when it is not preserved. It tends to affect the sentence imposed, see *Molina-Martinez v. United States*, \_\_U.S. \_\_, 136 S.Ct. 1338, 1346 (2016), and the fairness of the proceedings, see *United States v. Price*, 516 F.3d 285, 290 (5<sup>th</sup> Cir. 2008); *United States v. Andino-Ortega*, 608 F.3d 310, 311-312 (5<sup>th</sup> Cir. 2010).

In any case, GVR is not a decision on the merits. See *Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001); accord *State Tax Commission v. Van Cott*, 306 U.S. 511, 515-516 (1939). Accordingly, procedural obstacles to reversal should be decided in the first

instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964)(*per curiam*)(GVR “has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent”); *Torres-Valencia v. United States*, 464 U.S. 44 (1983)(*per curiam*)(GVR utilized over government’s objection where error was conceded; government’s harmless error argument should be presented to the Court of Appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting)(speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945)(remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the court of Appeals).

This Court has multiple pending cases that stand to shed significant light on the fit required between generic offenses and a past statute of conviction. That is the dispositive issue in this case. Fairness demands that this forthcoming relevant authority be considered in the appeal.

**II. There is a reasonable probability that the forthcoming opinion in *Stokeling v. United States*, No. 17-5554, 138 S.Ct. 1438 (Petition for Certiorari granted April 2, 2018), will show error in the judgment below.**

In *Stokeling v. United States*, No. 17-5554, 138 S.Ct. 1438 (Petition for Certiorari granted April 2, 2018), this Court will decide whether Florida’s simple robbery offense possesses the “use of physical force against the person of another” as an element for the purposes of the Armed Career Criminal Act (ACCA). Petitioner Stokeling argues that this element is lacking because the Florida offense may be committed by the application of only slight force, specifically, the minimum force necessary to overcome the resistance of the victim.

There is at least one way that the forthcoming *Stokeling* opinion stands to undermine *Santiesteban-Hernandez*, discussed above. Answering Stokeling's contention that Florida robbery lacks the "use of force" as an element, the government has pointed to a prior version of ACCA that expressly included the enumerated offense of "robbery." See Brief for the United States in *Stokeling v. United States*, No. 17-5554, 2018 WL 3727777, at \*11-20 (Filed August 3, 2018). This version of ACCA, the government has argued, demonstrates that Congress intended to capture at least "robbery" as the term is usually understood. See Brief for the United States in *Stokeling*, 2018 WL 3727777, at \*19. And according to the government, the essence of "robbery" as Congress used the term is a "taking[] that involved the use of force sufficient to overcome the victim's resistance." See *Stokeling v. United States*, No. 17-5554, Tr. Oral Argument, at p.30 (Argued October 9, 2018).

If this Court agrees with this particular contention of the government, the result will provide important, controlling, guidance on the generic meaning of "robbery." And it is impossible to square the government's proffered understanding of "robbery" in *Stokeling* with the Texas offense of robbery. A defendant in Texas need not "overcome the victim's resistance" by threat or use of any force to accomplish a robbery. Rather, he need only inflict or threaten injury at any point during the course of a theft. See *Smith v. State*, 2013 Tex. App. LEXIS 1146, at \*6-8 (Tex. App. Houston 14th Dist. Feb. 7 2013)(unpublished); Tex. Penal Code § 29.02(a). An injury inflicted that is entirely extraneous to the defendant's acquisition of property will bring the defendant's conduct into the Texas statute. Indeed, Texas courts have upheld robbery convictions where the defendant inflicted injury *after* having already discarded the stolen property. See *Smith*, 2013 Tex. App. LEXIS 1146, at \*6-8.

The requirement of force-sufficient-to-overcome-resistance, proffered by the government as the essence of generic robbery in *Stokeling*, effectively demands a nexus

between the acquisition of property and the use or threat of violence. That nexus is wholly absent from the Texas offense.

And this is merely one way that *Stokeling* may intersect (or conflict) with *Santiesteban-Hernandez*. The parties have disputed the number of state robbery statutes that include force requirements of varying intensity. **Compare** Brief for the United States in *Stokeling*, 2018 WL 3727777, at \*19 **with** Reply for the Petitioner in *Stokeling v. United States*, No. 17-5554, 2018 WL 4275547 at \*22-24 (Filed September 4, 2018). Resolution of that dispute could likewise prove critical for the viability of *Santiesteban-Hernandez*: the majority of state codes is of enormous importance to the task of defining a generic or enumerated offense. See *Esquivel-Quintana v. Sessions*, \_\_\_U.S.\_\_\_, 137 S. Ct. 1562, 1571 (2017) (“As in other cases where we have applied the categorical approach, we look to state criminal codes for additional evidence about the generic meaning of sexual abuse of a minor.”) In short, it is difficult to imagine that this Court’s exploration of robbery statutes – their common features, history, and the distinctions between them – will not create controlling authority regarding the meaning of “robbery” as the term is used in the Guidelines. This Court should at least hold the Petition until it decides the case.

## CONCLUSION

Petitioner respectfully prays that this Honorable Court hold the instant case until it renders a decision in *Quarles v. United States*, No. 17-778 (Petition for Certiorari filed November 24, 2017); *Herrold v. United States*, No. 17-9127 (Government's Petition for Certiorari filed April 18, 2018); *United States v. Stitt*, No. 17-765, 138 S.Ct. 1592 (Petition for Certiorari granted April 23, 2018), and/or some other case addressing the required fit between a defendant's prior statute of conviction and a "generic" offense for the purposes of a criminal history enhancement. Alternatively, he prays that the case be held in light of *Stokeling v. United States*, No. 17-5554, 138 S.Ct. 1438 (Petition for Certiorari granted April 2, 2018). He further prays that it grant *certiorari*, vacate the judgment below, and remand for reconsideration. He finally prays for such relief as to which he may be justly entitled.

Respectfully submitted this 1st day of November 2018.

/s/Kevin Joel Page  
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