No. --

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD RAY CROSBY,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

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QUESTION PRESENTED FOR REVIEW

Whether, after *Stokeling v. United States*, __U.S.__, 139 S.Ct. 544 (2019), the Texas offense of aggravated robbery by inflicting injury against a senior or disabled victim satisfies the definition of "crime of violence" found in USSG §4B1.2?

Subsidiary question: whether there is a reasonable probability of relief if the court below were to reconsider its decision in this case in light of *Stokeling*?

PARTIES

Edward Ray Crosby is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL SENTENCING GUIDELINES

MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Edward Ray Crosby, 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Crosby,* 753 Fed. Appx. 325 (5th Cir. February 14, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The written judgments imposing sentence of an aggregate sentence of imprisonment of 180 months were entered March 26, 2018, and are also provided in the Appendix to the Petition. [Appx. B].

JURISDICTIONAL STATEMENT

The judgment and unpublished opinion of the United States Court of Appeals for the Fifth Circuit were filed on January 30, 2019. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

GUIDELINE PROVISION INVOLVED

Federal Sentencing Guideline 4B1.2 provides in relevant part:

> (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).

STATEMENT OF THE CASE

A. District Court Proceedings

Edward Ray Crosby pleaded guilty to one count of possessing a firearm after having sustained a prior felony conviction, one count of possessing a controlled substance with intent to distribute it. He also pleaded true multiple violations of the conditions of his supervised release.

A Presentence Report (PSR) calculated a Guideline range of 140-175 months imprisonment on the firearm offense, which range was adopted by the court. He also faced an advisory range of 18-24 months imprisonment following revocation of the conditions of release.

The Guideline range for the new crimes stemmed from a base offense level of 24, applied because the court determined that Appellant has previously sustained two convictions for "crimes of violence." In particular, the court treated Appellant's two 2002 Texas convictions for aggravated robbery as one "crime of violence" – because they shared a common arrest date – and a subsequent 2014 Texas conviction for aggravated robbery as a second "crime of violence." The indictments and judicial confession related to the 2002 convictions showed that the defendant inflicted bodily injury during the course of a theft on a victim who had attained the age of 65 years. The same documents in the 2014 case showed that the defendant threatened injury with a deadly weapon in the course of a theft.

The district court added eight levels to the base offense level for possessing a stolen firearm, possessing three firearms, and possessing a firearm in connection with another felony. It determined that the criminal history score was ten, and that the criminal history category was therefore V. One criminal history point was assessed for the second of Appellant's 2002 aggravated robbery convictions – the Guidelines add an additional criminal history point for every "crime of violence" that is disregarded due to a common arrest date. *See* USSG §4A1.1(e). In the absence of this one criminal history point, it would have been category IV.

It imposed sentence within the Guideline range, assessing 168 months on the drug count, 120 months on the firearm count, and a term of 24 months for violating the terms of supervised release.

Twelve months of the revocation sentence were run concurrently with the punishment for the new offenses, to create an aggregate sentence of 180 months imprisonment.

B. Proceedings in the Court of Appeals

On appeal, Petitioner contended that none of his robbery convictions constituted "crimes of violence" under USSG §4B1.2. He conceded, however, that Fifth Circuit precedent equated all offenses under Texas robbery the statutes to the enumerated, generic offense of "robbery" named in USSG §4B1.2. *See United States v. Santiesteban-Hernandez*, 469 F.3d 376, 379-382 (5th Cir. 2006).

After the briefing deadlines, but before the opinion below, this Court issued *Stokeling v. United States*, __U.S.__,139 S.Ct. 544 (January 15, 2019), which discussed the application of the Armed Career Criminal Act (ACCA) to a Florida robbery offense. The court of appeals did not cite *Stokeling* – it simply cited *Santiesteban-Hernandez* for the proposition that Texas robbery offenses are equivalent to the enumerated offense of "robbery" found in USSG § 4B1.2. *See* [Appx. A]. It thus affirmed.

REASON FOR GRANTING THE PETITION

There is a reasonable probability of a different result in this case if the court below were to reconsider its decision in light of *Stokeling v. United States*, __U.S.__, 139 S.Ct. 544 (2019).

Guideline 2K2.1 provides for an enhanced base offense level when the defendant has sustained a prior conviction for a felony "crime of violence." USSG §2K2.1(a)(4)(A). The determination that a prior offense is a "crime of violence" also has implications for the calculation of a defendant's criminal history score. A defendant will generally not receive criminal history points for both of two "related cases." USSG §4A1.2(a)(2). But when the sentence that would otherwise be disregarded is a "crime of violence," that sentence is assessed an extra point under USSG §4A1.1(e). The district court determined that Petitioner's 2002 aggravated robbery convictions – committed by injuring a senior victim – were "crimes of violence," affecting both his offense level and his criminal history category.

Both USSG §§2K2.1 and 4A1.1(e) use the definition of "crime of violence" found at USSG §4B1.2. *See* USSG §§2K2.1, comment. (n.1); 4A1.1(e), comment. (n. 5). That definition reads as follows:

> 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).

USSG §4B1.2(a).

Thus, an offense may be a "crime of violence" under §4B1.2 because it either: a) has force (including attempted and threatened force) as an element, or b) is one of the "enumerated offenses," among them "robbery." This Court's recent opinion in *Stokeling v. United States*, __U.S.__,139 S.Ct. 544 (January 15, 2019), casts doubt as to whether Petitioner's 2002 offenses qualify as a "crime of violence" under either theory.

Stokeling addressed the application of 18 U.S.C. §924(e)(2)(B)(i) (ACCA's "elements clause") to a Florida robbery offense. *See Stokeling*,139 S.Ct. at 550. Specifically, it considered whether the Florida offense, which required only such force as was necessary to overcome the resistance of the victim, had as an element "the use, attempted use, or threatened use of physical force against another." *See id.* at 549-550. The same elements clause is tracked precisely by §4B1.2's definition of "crime of violence."

Stokeling held that ACCA's "elements clause" was modeled after the definition of "common law robbery," an offense that required "'sufficient force [was] exerted to overcome the resistance encountered.'" *Id*. at 550 (quoting J. Bishop, Criminal Law § 1156, p. 862 (J. Zane & C. Zollman eds., 9th ed. 1923)). As it discussed the potential impact of a contrary rule, *Stokeling* explained that the clear majority of state robbery (and armed robbery) statutes likewise require sufficient force to overcome a victim's resistance. *See id.* at 552.

The Texas offense at issue here does not require the defendant to use force to overcome the resistance of a victim. To the contrary, the defendant may commit aggravated robbery in Texas by inflicting injury at any point during the course of the robbery, for any purpose. *See* Tex. Penal Code §§29.02, 29.03. The injury, which may even be reckless, need have nothing to do with the acquisition of property. *See* Tex. Penal Code §29.02(a)(1). Indeed, a Texas court has affirmed a defendant's robbery conviction for inflicting injury after stolen property was already discarded. *See Smith v. State*, 2013 Tex. App. LEXIS 1146, at *6-8 (Tex. App. Houston 14th Dist. Feb. 7 2013)(unpublished).

It follows that the Texas offense is not the sort of robbery offense envisioned by the elements clause, as construed by *Stokeling*. Nor is it consistent with the majority of contemporary state codes that define an offense of "robbery." As such, it is unlikely to be the kind of offense envisioned by the Commission, when it defined "crime of violence" to include the generic offense of "robbery." *See Taylor v. United States*, 495 U.S. 575, 589 (1990)(defining the generic offense of "burglary" as an offense that contains all of the elements present in a majority of contemporary state codes).

This conclusion is not altered by the Fifth Circuit's recent decision in *United States v. Burris*, 920 F.3d 942 (5th Cir. April 10, 2019), which held that Texas simple robbery has the use of force against another. That decision did not consider whether the absence of any required nexus between the defendant's acquisition of property and the use of force was consistent with *Stokeling*. And the court below has held that precedent does not bind subsequent panels as to arguments not made. *See Thomas v. Tex. Dep't of Criminal Justice*, 297 F.3d 361, 370 n.11 (5th Cir. 2002)("Where an opinion fails to address a question squarely, we will not treat it as binding precedent."); *accord United States v. Herrera-Alvarez*, 753 F.3d 132, 136-137 (5th Cir. 2014), *overruled on other grounds by United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018)(*en banc*); *see also Webster v. Fall*, 266 U.S. 507, 511 (1925)(*"*Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *United States v. Booker*, 543 U.S. 220, 241 (2005)(declining to accord precedential value to *Edwards v. United States*, 523 U.S. 511 (1998), because the petitioners "failed to make [the] argument" that judicial fact-finding under the Guidelines violated the Sixth Amendment).

Nor is the conclusion foreclosed by *United States v. Lerma*, 877 F.3d 628, 631, 635 (5th Cir. 2017), which held that the Texas offense of aggravated robbery by threat involving a deadly weapon involves the threatened use of force. Here, the defendant's 2002 robbery convictions were termed "aggravated" because of the status of the victim, not the mechanism of violence. The court below has already held that the identity of the victim does not transform an offense lacking force as an element into one that possesses such an element. *See United States v. Fierro-Reyna*, 466 F.3d 324, 329-330 (5th Cir. 2006)(status of an assault victim does not transform simple assault into a "crime of violence" under USSG §2L1.2).

Because the issue was not preserved in district court, Petitioner concedes that the case may not be an appropriate one for a plenary grant of *certiorari*. But it would nonetheless be appropriate to grant *certiorari*, vacate the judgment below, and remand ("GVR") in light of *Stokeling*. As this Court explained in *Lawrence v. Chater*, 516 U.S. 163 (1996):

> Where intervening developments, or recent developments that [this Court has] reason to believe the court below did not fully consider, reveal 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, a GVR order is, we believe, potentially appropriate.

Lawrence, 516 U.S. at 167. As discussed above, there is a reasonable probability that *Stokeling* would show error in the designation of Petitioner's offense as a "crime of violence" under USSG §4B1.2. And while *Stokeling* just preceded the opinion below, it is nonetheless a "recent development" and there is "reason to believe the court below did not fully consider" it. *Lawrence*, 516 U.S. at 167. *Stokeling* was not cited below, and it postdated the briefing deadlines.

Finally, this Court should not be deterred by the absence of preservation in district court. Because Petitioner did not object in the district court, his claim is subject to the plain error standard, which requires a showing of: 1) error, 2) that is clear or obvious, 3) that affects substantial rights, and 4) that merits discretionary remand because it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993). But error may become plain at any time on direct appeal. *See Henderson v. United States*, 568 U.S. 266 (2013). And there is now plainly a mismatch between Petitioner's 2002 offenses, on the one hand, and the robbery offenses contemplated by the elements clause and the majority of contemporary codes, on the other. Further, a change in the Guideline range of the magnitude at issue here presumptively affects substantial rights, *see Molina-Martinez v. United States*, __U.S. __, 136 S.Ct. 1338, 1346 (2016), and the fairness, integrity, and public reputation of judicial proceedings, *see Rosales-Mireles v. United States*, __U.S.__, 138 S.Ct. 1897, 1903 (2018).[1]

[1]If the district court had not classified Petitioner's aggravated robbery convictions as "crimes of violence," it could have found only one prior "crime of violence" and could have assessed a base offense level of only 22 rather than 24. *See* USSG §2K2.1(a)(2). This two point reduction in the final offense level (reducing it from 29 to 27) would have been accompanied by a one point criminal history reduction, because the court's assessment of an additional criminal history point under USSG §4A1.1(e) depended on the conclusion that the aggravated robbery by injury against an elderly or disabled victim convictions were for crimes of violence. *See* USSG §4A1.1(e). As such, the classification produced a one category increase in the criminal history category, and an increase in the Guidelines associated with the firearm offense from 100-125 months imprisonment to 140-175 months imprisonment. *See* USSG Ch. 5A.

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 such as preservation of error 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).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit, vacate the judgment below, and remand for reconsideration in light of *Stokeling*. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 15th day of May, 2019.

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