No. --

IN THE

SUPREME COURT OF THE UNITED STATES

PAULITO GOVEA-SAN ROMAN,

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 robbery by inflicting injury against a senior or disabled victim satisfies the definition of "crime of violence" found in USSG §2L1.2(2015)?

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

Paulito Govea-San Roman 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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MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Paulito Govea-San Romas, 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Govea-San Roman,* 754 Fed. Appx. 304 (5th Cir. February 26, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The written judgment imposing sentence was entered February 23, 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The judgment and unpublished opinion of the United States Court of Appeals for the Fifth Circuit were filed on February 26, 2019. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

GUIDELINE PROVISION INVOLVED

Application Note 1 (B)(iii) to the 2015 version of Federal Sentencing Guideline 2L1.2 provided:

> (iii) "Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

STATEMENT OF THE CASE

A. District Court Proceedings

Petitioner Paulito Govea-San Roman was removed from the United States in 2009, following a Texas robbery conviction. He was subsequently convicted of illegal re-entry and removed again. Then, on September 20, 2016, he was again found in the country by ICE agents. The government obtained another illegal re-entry indictment, to which he again pleaded guilty.

Probation applied the extant version of the illegal re-entry Guideline, USSG §2L1.2, and found that the defendant's offense level would be 20, adjusted to 17 after acceptance of responsibility. Coupled with a criminal history category of V, this produced a Guideline range of 46-57 months imprisonment. Probation explicitly found that use of the most recent version of USSG §2L1.2 would not violate the ex post facto clause, even though the defendant was found before the effective date of an Amendment to that Guideline.

The district court adopted the Guideline range and imposed sentence of 57 months imprisonment, run consecutively to a 12 month sentence for violating the terms of supervised release.

B. Proceedings in the Court of Appeals

On appeal, Petitioner contended that use of the new re-entry Guideline violated his rights under the *ex post facto* clause. The Guideline in effect at the time of his offense, he maintained, produced a lesser offense level and therefore a shorter recommended term of imprisonment. *See Peugh v. United States*, 569 U.S. 530, 533 (2013). But this contention depended on the conclusion that he was not due a 16-point offense level increase due to his prior Texas conviction for robbery. That conclusion conflicted with *United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006), which held that Texas robbery is equivalent to the "generic" form of "robbery" enumerated by the 2015 version of USSG §2L1.2 as a "crime of violence." The court of appeals applied *Santiesteban-Hernandez* and affirmed. *See* [Appendix A].

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 § 2L1.2. *See* [Appendix A].

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).

The 2015 Guideline 2L1.2 provided for an enhanced offense level when the defendant has sustained a pre-removal conviction for a felony "crime of violence." USSG §2L1.2(b)(1)(2015). The district court determined that Petitioner's Texas simple robbery conviction was a "crime of violence," which increased his offense level under the 2015 version of the Guideline above the level calculated under the current version of USSG §2L1.2. It thus rendered the ex post facto clause useless to him. *See Peugh v. United States*, 569 U.S. 530, 533 (2013).

Under the 2015 version of 2L1.2, the term "crime of violence" was defined as That definition reads as follows:

> "Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

USSG 2L1.2, comment. (n. (1)(B)(iii))(2015).

Thus, an offense could be a "crime of violence" under §2L1.2(2015) because it either: a) had force (including attempted and threatened force) as an element, or b) was 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 robbery offense qualified 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 the

definition of "crime of violence" found in the 2015 version of §2L1.2.

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 robbery in Texas by inflicting injury – or threatening to do so – at any point during the course of the robbery, for any purpose. *See* Tex. Penal Code §29.02. 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).

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 offense, 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).

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 24th day of May, 2019.

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