No. --

IN THE

SUPREME COURT OF THE UNITED STATES

STEVIE ELBERT JONES,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

CHRISTOPHER A. CURTIS
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 TAYLOR STREET, ROOM 9A10
FORT WORTH, TEXAS 76102
(817)-978-2753

QUESTION PRESENTED FOR REVIEW

Whether, after *Stokeling v. United States*, __U.S.__, 139 S.Ct. 544 (2019), the Texas offense of robbery satisfies the definition of "crime of violence" found in USSG §4B1.2 for the purposes of the career offender guideline, USSG §4B1.1

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

Stevie Elbert Jones 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, Stevie Elbert Jones, 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Jones,* 768 Fed. Appx. 290 (April 25, 2019), (unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The written judgment imposing sentence was entered August 9, 2018, and is 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The judgment and unpublished opinion of the United States Court of Appeals for the Fifth Circuit were filed on April 25, 2019. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

GUIDELINE PROVISION INVOLVED

USSG §4B1.2 defines "crime of violence as::

> (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 an element the use, attempted use or threatened us 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 18 U.S.C. § 841(c).

STATEMENT OF THE CASE

A. District Court Proceedings

Appellant Stevie Elbert Jones pleaded guilty to one count of bank robbery. (ROA.77-132).[1] A Presentence Report (PSR) concluded that he was properly subject to the career offender enhancements of § 4B1.1 of the United States Sentencing Guidelines. (ROA.155). It premised this conclusion on two Texas convictions for robbery. (ROA.155).

The defense objected to the career offender designation on the grounds that the robbery convictions did not represent predicate crimes of violence" within the meaning of the guidelines. (ROA.189-99). The district court overruled the objection. (ROA.135). It thus concluded that Appellants Guideline range should be enhanced under USSG §4B1.1 to an offense level of 29. (ROA.137). Coupled with a criminal history category of VI, this produced a Guideline range of 151-188 months imprisonment. (ROA.137). The court imposed a sentence of 151 months. (ROA.144).

B. Proceedings in the Court of Appeals

On direct appeal, the Petitioner raised the argument that a Texas robbery is not a "crime of violence" under the definition in USSG §4B1.2. That argument was foreclosed in the Fifth Circuit *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". 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].

[1] For the convenience of the Court and the parties, Petitioner has included page number citations to the record on appeal below.

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).

Section 4B1.1 of the Guidelines provide for a severe sentencing enhancement if the offense of conviction is a crime of violence and the defendant has two prior convictions for a crime of violence." The term "crime of violence is defined in USSG §4B1.2.

The 2016 version of USSG §4B1.2 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 an element the use, attempted use or threatened us 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 18 U.S.C. § 841(c).

Thus, an offense could be a "crime of violence" under §4B1.2 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).

Petitioner contends that this case would 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 Petitioner's briefing deadlines.[2]

[2] Petitioner filed his brief on January 7, 2019. *Stokling* was decided on January 15, 2019. The Government filed a motion for summary affirmance on February 6, 2019, noting that the issue was foreclosed in this Circuit by *Sebastian-Hernandez*, but not citing *Stokling*.

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 July, 2019.

/s/ Christopher A. Curtis
CHRISTOPHER A. CURTIS
COUNSEL OF RECORD
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 TAYLOR STREET, ROOM 9A10
FORT WORTH, TEXAS 76102
(817) 978-2753
TEXAS STATE BAR NO. 05270900