No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES NUNLEY, JR.

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Texas offense of aggravated robbery constitutes a "crime of violence" under USSG §4B1.2?

PARTIES

James Earl Nunley, Jr. is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Nunley, Jr. 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 district court entered judgment on June 15, 2018, which judgment is attached as an appendix. [Appendix A]. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Nunley*, 771 Fed. Appx. 554 (5th Cir. May 31, 2019)(unpublished), and is provided as an appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on May 31, 2019. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

FEDERAL SENTENCING GUIDELINE 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. Facts

Petitioner James Earl Nunley, Jr. was involved in a car accident, after which police found him in possession of a firearm. Consequently, he pleaded guilty to a federal charge of possessing a firearm following a felony conviction. A Presentence Report (PSR) calculated a Guideline range of 63-78 months imprisonment. That calculation stemmed from Probation's application of an elevated base offense level under USSG §2K2.1. In particular, Probation regarded Petitioner's 2003 Texas conviction for aggravated robbery as a "crime of violence" under USSG §4B1.2, which conclusion increased the base offense level from 14 to 20. In the absence of this conclusion, Petitioner's final offense level would have been 13, and his Guideline range just 33-41 months imprisonment.

At the sentencing hearing, the district court expressly adopted "as the conclusions of the Court the conclusions expressed in the presentence report." It ultimately settled on a sentence of 90 months, but did not state that it would have imposed the same sentence irrespective of the Guideline range. Indeed, its sentence was an even one-year above the top of the Guideline range it believed applicable.

B. Proceedings on appeal

On appeal, Petitioner raised two grounds: he contended that the district court plainly failed to consider the Guideline recommendations in USSG §5G1.3 before ordering the federal sentence served consecutively to certain anticipated state sentences, and he argued that it plainly erred in treating his aggravated robbery conviction as a "crime of violence" under USSG §4B1.2. The last brief filed was the Appellee's Brief, on January 4, 2019. Eleven days later, this Court issued *Stokeling v. United States*, __U.S.__, 139 S.Ct. 544 (2019), addressing the application of 18 U.S.C. §924(e)'s definition of "violent felony" to a Florida robbery statute.

Without citing *Stokeling*, the court below rejected both claims. [Appendix B]. It regarded the latter claim as foreclosed by *United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006),

which holds that the Texas offense of robbery is equivalent to the generic, enumerated form of robbery that appears in the Guidelines. [Appendix B].

REASONS FOR GRANTING THE WRIT

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 district court determined that Petitioner's Texas aggravated robbery conviction was a "crime of violence," substantially affecting his offense level.

USSG §2K2.1 uses the definition of "crime of violence" found at USSG §4B1.2. *See* USSG §2K2.1, comment. (n.1). 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 aggravated robbery offense qualifies as a "crime of violence" under either theory.

Stokeling addressed the application of 18 U.S.C. §924(e)(2)(B)(i) (The Armed Career Criminal Act's (ACCA) "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. But a Texas simple robbery may be aggravated not merely by the use of a deadly weapon, but also by choosing a senior of disabled victim. *See* Tex. Penal Code 29.03(a)(3).These factors plainly cannot transform an act that lacks force as an element into one that possesses it. *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). The Texas courts, moreover, have held that the factors transforming simple robbery into aggravated robbery do not represent the elements of distinct offenses, and need not be proven to the unanimous satisfaction of a jury. *See Woodard v. State*, 294 S.W.3d 605, 609 (Tex. App. - Houston [1st Dist.] 2009). They are, instead, merely statutory alternative means of proving a single offense. *See Woodard*, 294 S.W.3d at 609. And the court below subsequently recognized *en banc* that unanimity is the *sine qua non* of a statute's divisibility. *See United States v. Herrold*, 883 F.3d 517, 527 (5th Cir. Feb. 20, 2018)(*en banc*), *vacated by* __U.S.__, 139 S.Ct. 2712 (June 17, 2019). Though this decision was later vacated by this Court on other grounds following *Quarles v. United States*, __U.S.__, 139 S.Ct. 914 (2019), it was plainly correct in its application of *Mathis v. United States*, __U.S.__, 136 S.Ct. 2243 (2016), which holds that the absence of a right to jury unanimity defeats the divisibility

of a prior statute of conviction. *See Mathis*, 136 S.Ct. at 2249. As such, *Lerma* is not a correct statement of the controlling law.

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* 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 last filed brief.

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 prior 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 29th day of August, 2019.

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