No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

ALEJANDRO PLAZA-MONTECILLO

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

KEVIN J. PAGE
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746

QUESTION PRESENTED

Whether the Texas offense of aggravated robbery constitutes a "crime of violence" under 18 U.S.C. §16?

PARTIES

Alejandro Plaza-Montecillo 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 Alejandro Plaza-Montecillo 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 8, 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 The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Plaza-Montecillo*, 772 Fed. Appx. 84 (5th Cir. June 6, 2019)(unpublished), and is provided as an appendix to the Petition.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 June 6, 2019. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. §16 provides:

> The term "crime of violence" means--
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Tex. Penal Code 29.02(a) 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.

STATEMENT OF THE CASE

A. Facts

Petitioner Alejandro Plaza-Montecillo pleaded guilty to re-entering the country after having been previously removed. A Presentence Report (PSR) concluded that his statutory range of imprisonment should be 20 years imprisonment, under 8 U.S.C. §1326(b)(2).This elevated statutory maximum is reserved for re-entry defendants who re-entered the country after having sustained an "aggravated felony." 8 U.S.C. §1326(b)(2).

The defense objected to this determination, and an Addendum to the PSR named two convictions that it thought to qualify as "aggravated felonies": a Texas simple robbery conviction, and a Texas conviction for possession of a controlled substance with intent to deliver it.

At sentencing, the court adopted the PSR, but otherwise declined to rule on the defense objection. It imposed 41 months imprisonment, the high end of the applicable Guideline range. The judgment named 8 U.S.C. §1326(b)(2) as the statute of conviction.

B. Proceedings on appeal

On appeal, Petitioner argued that neither of his convictions constituted "aggravated felonies." The court of appeals disagreed on the sole basis that his Texas simple robbery conviction constituted "a crime of violence" within the meaning of 8 U.S.C. §1101(a)(43)(F) and 18 U.S.C. §16(a)[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).

Section 1326 of Title provides for an elevated statutory maximum when the defendant re-enters the country following an "aggravated felony," within the meaning of 8 U.S.C. §1101(a)(43). That definition includes certain drug offenses, *see* 8 U.S.C. §1101(a)(43)(B), and certain "crimes of violence" as defined by 18 U.S.C. §16.

A "crime of violence" includes offenses that have a risk of the use of force, but that portion of the definition has been invalidated as unconstitutionally vague. It also includes offenses that have as an element, "the use, attempted use, or threatened use of force against the person or property of another." This "force clause" is substantially identical to a clause appearing in the Armed Career Criminal Act ("ACCA"), save that ACCA's "force clause" does not include crimes involving force against property.

The court of appeals affirmed the sentence (and judgment, which references 8 U.S.C. §1326(b)(2), the portion of the illegal re-entry statute applicable to removal following an "aggravated felony") on the sole ground that Petitioner's Texas simple robbery conviction constituted a "crime of violence," under 18 U.S.C. §16(a). [Appendix B]. But 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 qualifies as a "crime of violence" under that theory.

Stokeling addressed the application of ACCA's "force 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.

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)). 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 (or threatening) injury at any point during the course of the robbery, for any purpose. *See* Tex. Penal Code §29.02. The injury or threat 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*. 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).

It is true that Petitioner has another serious felony conviction – for the Texas offense possession of a controlled substance with intent to distribute it – but it is clear that this is not a

qualifying aggravated felony under the law of the court below. That court has held that the Texas offense of delivering a controlled substance is not an "aggravated felony" when it is committed by "offer to sell." *See United States v. Ibarra-Luna*, 628 F.3d 712 (5th Cir. 2010). Further, it has held that possession with intent to deliver and "offer to sell" are but two means of committing the same offense, not two severable offenses. *See United States v. Tanksley*, 848 F.3d 34 (5th Cir. 2017). It follows that possession with intent to deliver can no longer be fit into the definition of "aggravated felony." *See Mathis v. United States*, __U.S.__, 136 S.Ct. 2243 (2016).

It is also true that robbery requires the commission of a theft under Texas law, and that certain "theft offenses" also constitute "aggravated felonies." *See* 8 U.S.C. §1101(a)(G). But Texas theft offenses may be committed by fraud, and the court below has issued conflicting opinions on the question of whether such offenses constitute "theft offenses" within the meaning of 8 U.S.C. §1101(a)(G). *See Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008); *United States v. Rodriguez-Salazar*, 768 F.3d 437 (5th Cir. 2014).

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."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.

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 30th day of August, 2019.

/s/ Kevin Joel Page
Kevin J. Page
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746