No. _____

In the

Supreme Court of the United States

Refugio Quintanar,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the defendant has the burden to deny and discredit the factual allegations of a Presentence Report that increase his or her sentence?

2. Whether parties to a criminal proceeding must make timely objections to the procedural unreasonableness of a sentence?

   Subsidiary question: whether the case should be held pending *Holguin-Hernandez*, __U.S.__, 139 S.C.t 2666 (June 3, 2019), and potentially remanded in light of that forthcoming authority

3. Whether defendants enjoy the right to proof beyond a reasonable doubt and confrontation as to some facts that alter the likely sentence within a mandatory range of punishment?

   Subsidiary question: whether the case should be remanded in light of *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369 (2019)?

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

   Subsidiary question: whether the case should be remanded in light of *Stokeling v. United States*, __U.S.__, 139 S.Ct. 544 (2019)?

PARTIES TO THE PROCEEDING

Petitioner is Refugio Quintanar, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Refugio Quintanar seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The written judgment of conviction and sentence was entered October 6, 2017, and is reprinted as Appendix A. The unpublished opinion of the Court of Appeals is available as *United States v. Quintanar*, 2019 WL 2484261 (5th Cir. June 13, 2019) (unpublished). It is reprinted in Appendix B to this Petition.

JURISDICTION

The opinion and order of the Court of Appeals affirming the sentence was issued June 13, 2019. *See* [Appx. B]. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL CONSTITUTIONAL PROVISIONS, RULES, AND SENTENCING GUIDELINES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have

been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 3553(a) of Title 18 of the United States Code provides:

> (a)Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for—
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
> (5) any pertinent policy statement—
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to

such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

Tex. Penal Code §29.02 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.
(b) An offense under this section is a felony of the second degree.

Federal Rule of Criminal Procedure 32 provides in relevant part:

Sentencing and Judgment

***

(c) Presentence Investigation.
(1) Required Investigation.
(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:
(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or
(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

***

(d) Presentence Report.
(1) Applying the Advisory Sentencing Guidelines. The presentence report must:
(A) identify all applicable guidelines and policy statements of the Sentencing Commission;
(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;
(D) identify any factor relevant to:
(i) the appropriate kind of sentence, or
(ii) the appropriate sentence within the applicable sentencing range; and
(E) identify any basis for departing from the applicable sentencing range.
(2) Additional Information.The presentence report must also contain the following:
(A) the defendant's history and characteristics, including:
(i) any prior criminal record;
(ii) the defendant's financial condition; and
(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;
(B) information that assesses any financial, social, psychological, and medical impact on any victim;
(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;
(D) when the law provides for restitution, information sufficient for a restitution order;
(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation;
(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and
(G) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).
(3) Exclusions. The presentence report must exclude the following:
(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;
(B) any sources of information obtained upon a promise of confidentiality; and
(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.
(1) Time to Disclose. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.
(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) Sentence Recommendation. By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.
(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.
(2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.
(3) Action on Objections. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure From Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.
(1) In General. At sentencing, the court:
(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;
(B) must give to the defendant and an attorney for the government a written summary of--or summarize in camera--any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;
(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.
(2) Introducing Evidence; Producing a Statement. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.
(3) Court Determinations. At sentencing, the court:
(A) may accept any undisputed portion of the presentence report as a finding of fact;
(B) must--for any disputed portion of the presentence report or other controverted matter--rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and
(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

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Federal Rule of Criminal Procedure 51 provides:

Preserving Claimed Error

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

Federal Sentencing Guideline 4B1.2(a) 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 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).

Federal Sentencing Guidelines 6A1.3 provides:

Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R. Crim. P.

STATEMENT OF THE CASE

A. District Court Proceedings

Petitioner Refugio Quintanar was caught possessing four pieces of ammunition, in spite of his prior felony convictions. *See* (Record in the Court of Appeals, at 87). He pleaded guilty to a violation of 18 U.S.C. §922(g), which forbids gun and ammunition possession by felons. *See* (Record in the Court of Appeals, at 35-36).

Probation calculated a Guideline range of 46-57 months imprisonment, owing to a base offense level of 20, a three level reduction for acceptance of responsibility, and a criminal history category of V. *See* (Record in the Court of Appeals, at 114-115, 141). The base offense level of 20 stemmed from the court's conclusion that the defendant's prior Texas robbery conviction constituted a "crime of violence" under USSG §4B1.2. *See* (Record in the Court of Appeals, at 114); USSG §2K2.1(a). In the absence of this conclusion, the base offense level would have been 14, and the Guideline range would have been just 27-33 months imprisonment. *See* USSG §2K2.1(a); USSG Ch. 5A.

The defense objected in writing to Probation's conclusion that the robbery conviction constituted a "crime of violence." *See* (Record in the Court of Appeals, at 133-134). And though neither Probation nor the government ever produced any judicial record from the robbery cases, the court overruled the objection. *See* (Record in the Court of Appeals, at 87).

Citing the defendant's criminal history, the district court imposed an above-

range sentence of 96 months imprisonment. *See* (Record in the Court of Appeals, at 98). It gave no indication that the sentence would have been the same under a different Guideline range. *See* (Record in the Court of Appeals, at 93-98). In explaining its reasons for the sentence – essentially a summary of the defendant's criminal history – it made a series of findings regarding the defendant's prior unadjudicated conduct, much of which occurred during his childhood. *See* (Record in the Court of Appeals, at 93-98). Specifically, it noted "incident reports" while Petitioner was an imprisoned child; it also noted his unadjudicated juvenile referrals:

> The records of the Texas Youth Commission showed that he had 280 incident reports totaling 559 pages, so he apparently was having a difficult time abiding by the rules and avoiding other problems.
>
> Those things included assaulting other youth without causing bodily injury, threats, disruption of the program, refusal to follow staff instructions, dangerous to others, and so on.
>
> Then he had other referrals while he was a juvenile, even going back to age 11. And I can tell from the information contained in paragraphs 33, 34, and 35 of the Presentence Report that he engaged in inappropriate conduct as described in each of those paragraphs, and I so find from a preponderance of the evidence.

(Record in the Court of Appeals, at.93-94).

The defense objected to these findings under the due process clause and Sixth Amendment, to which objection the court did not respond. *See* (Record in the Court of Appeals, at 97-98).

B. Proceedings on Appeal

Petitioner appealed, contending that the district court erred in basing his sentence on two sets of unreliable allegations: the accusations of misconduct during

his childhood imprisoned, and the three unadjudicated accusations of criminal conduct while he was a child in the care of his mother. He noted that the Constitution, Federal Rule of Criminal Procedure 32, and the Sentencing Guidelines all contemplate a threshold of reliability for the resolution of factual sentencing disputes.

The allegations of misconduct while in youth detention, he argued, were no more detailed than the "bare arrest records," the court below had previously instructed district courts not to consider at sentencing. *See United States v. Windless*, 719 F.3d 415, 420 (5th Cir. 2013). And the arrests sustained outside of juvenile prison, he argued, were not based on adequately reliable information. Some of these arrests, he noted, were premised on the complainants' unverified statements, as related by a police officer with strong incentives to separate parties to a domestic disturbance. To preserve review, he also contended that the constitution provided him the right to cross-examine witnesses at sentencing, conceding that the claim was foreclosed by *United States v. Mitchell*, 484 F.3d 762, 776 (5th Cir. 2007). Further, and also to preserve review, he renewed his contention that Texas robbery is not a "crime of violence" under USSG §4B1.2, conceding that it was foreclosed by that court's decision in *United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006).

The court of appeals affirmed. It concluded that Petitioner's childhood misconduct in prison had not been challenged by an adequate objection. *See* [Appendix B, at p.3]. And it found that any reliance on these allegations could not

be shown to constitute plain error affecting substantial rights. *See* [Appendix B, at p.3].

Petitioner's remaining reliability challenge – his claim that the district court erred in finding that he committed childhood crimes outside of prison -- was held preserved, but rejected on the merits. *See* [Appendix B, at p.4]. In assessing this claim, the court said that a Presentence Report (PSR) was presumptively reliable. *See* [Appendix B, at p.4]. Further, it held, in line with extensive Fifth Circuit precedent, that "[t]he defendant bears the burden of presenting rebuttal evidence to demonstrate that the information in the PSR is inaccurate or materially untrue." [Appendix B, at p.4][citing *United States v. Cervantes*, 706 F.3d 603, 620–21 (5th Cir. 2013) (brackets omitted by opinion below) (quoting *United States v. Scher*, 601 F.3d 408, 413 (5th Cir. 2010) (*per curiam*))]. Finally, it found that Petitioner had failed to discharge this burden because "he did not claim the facts were inaccurate nor did he provide any rebuttal evidence to demonstrate the information in the PSR was unreliable." [Appendix B, at p.5].

It rejected all other claims as foreclosed. *See* [Appendix B, at p,2, nn. 1, 2].

REASONS FOR GRANTING THIS PETITION

I. The circuits are divided as to whether federal criminal defendants bear a burden of denying and discrediting damaging allegations that appear in a Presentence Report.

A. The courts are divided

A federal district court must impose a sentence no greater than necessary to achieve the goals in18 U.S.C. §3553(a)(2), after considering the other factors enumerated §3553(a), including the defendant's Guideline range. *See* 18 U.S.C. §3553(a)(2); *United States v. Booker*, 543 U.S. 220, 245-246 (2005). The selection of an appropriate federal sentence depends on accurate factual findings. Only by accurately determining the facts can a district court determine the need for deterrence, incapacitation and just punishment, identify important factors regarding the offense and offender, and correctly calculate the defendant's Guideline range.

At least three authorities combine to safeguard the accuracy of fact-finding at federal sentencing. Most fundamentally, the due process clause demands that evidence used at sentencing be reasonably reliable. *See United States v. Tucker*, 404 U.S. 443, 447 (1972). The Federal Guidelines likewise require that information used at sentencing exhibit "sufficient indicia of reliability to support its probable accuracy." USSG §6A1.3(a). And Federal Rule of Criminal Procedure 32 offers a collection of procedural guarantees that together "provide[] for the focused, adversarial development" of the factual and legal record. These include: a presentence report that calculates the defendant's Guideline range, identifies potential bases for departure from the Guidelines, describes the defendant's criminal record, and assesses victim impact, (Fed. R. Crim. P. 32(d)); the timely disclosure of the presentence report, (Fed.

R. Crim. P. 32(e)); an opportunity to object to the presentence report, (Fed. R. Crim. P. 32(f)); an opportunity to comment on the presentence report orally at sentencing, (Fed. R. Crim. P. 32(i)(1)), and a ruling on "any disputed portion of the presentence report or other controverted matter" that will affect the sentence, (Fed. Crim. P. 32(i)(3)).

Several circuits, including the court below, have interpreted these authorities to impose on the defendant a burden of production. *See United States v. Prochner*, 417 F.3d 54, 65-66 (1st Cir. 2005); *United States v. O'Garro*, 280 F. App'x 220, 225 (3d Cir. 2008); *United States v. Campbell*, 295 F.3d 398, 406 (3d Cir. 2002); *United States v. Valencia*, 44 F.3d 269, 274 (5th Cir. 1995); *United States v. Lang*, 333 F.3d 678, 681-682 (6th Cir. 2003); *United States v. Mustread*, 42 F.3d 1097, 1102 (7th Cir. 1994); *United States v. Rodriguez-Delma*, 456 F.3d 1246, 1253 (10th Cir. 2006). In these circuits, a district court may adopt the factual findings of a presentence report "without further inquiry" absent competent rebuttal evidence offered by the defendant. *United States v. Valdez*, 453 F.3d 252, 230 (5th Cir. 2006); *see also Prochner*, 417 F.3d at 66; *Lang*, 333 F.3d at 681-682; *Mustread*, 42 F.3d at 1102; *Rodriguez-Delma*, 456 F.3d at 1253.

But the D.C., Second, Eighth, Ninth, and Eleventh Circuits have all rejected this reasoning. In each of these cases, an objection to facts stated in a PSR shifts the burden of production to the government. *See United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005)("the Government may not simply rely on assertions in a presentence report if those assertions are contested by the defendant."); *United States v. Helmsley,*

941 F.2d 71, 98 (2d Cir. 1991) (“If an inaccuracy is alleged [in the PSR], the court must make a finding as to the controverted matter or refrain from taking that matter into account in sentencing. If no such objection is made, however, the sentencing court may rely on information contained in the report.”); *United States v. Poor Bear*, 359 F.3d 1038, 1041 (8th Cir. 2004) ("If the defendant objects to any of the factual allegations . . . on which the government has the burden of proof, such as the base offense level. . . the government must present evidence at the sentencing hearing to prove the existence of the disputed facts."); *United States v. Ameline*, 409 F.3d 1073, 1085-86 (9th Cir. 2005) (*en banc*)(“However, when a defendant raises objections to the PSR, the district court is obligated to resolve the factual dispute, and the government bears the burden of proof . . . . The court may not simply rely on the factual statements in the PSR. “); *United States v. Martinez*, 584 F.3d 1022, 1026 (11th Cir. 2009) (“It is now abundantly clear that once a defendant objects to a fact contained in the [PSR], the government bears the burden of proving the disputed fact by a preponderance of the evidence.”). An examination of each these circuits reveals that the division of authority is sharp, consistent, and significant to the outcome of cases.

The D.C. Circuit has held “the Government may not simply rely on assertions in a presentence report if those assertions are contested by the defendant.” *United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005). Rather, the Government must “demonstrate [information in a PSR] is based on a sufficiently reliable source to establish [its] accuracy . . . .” *Id.* (citing *United States v. Richardson*, 161 F.3d 728, 737-38 (D.C. Cir. 1998)). Further, the government’s burden is triggered “whenever a

defendant disputes the factual assertions in the report," and the defendant "need not produce *any evidence*, *for the Government carries the burden* to prove the truth of the disputed assertion." *Id.* (citing *United States v. Pinnick*, 47 F.3d 434, 437 (D.C. Cir. 1995))(emphasis added).

Similarly, the Second Circuit has repeatedly emphasized that the burden of proof shifts to the government when the defense objects to the PSR's factual assertions. *See Helmsley*, 941 F.2d at 90; *Streich*, 987 F.2d 104, 107 (2d Cir. 1993)("The government's burden is to establish material and disputed facts [in the PSR] by the preponderance of the evidence."); *United States v. Brown*, 52 F.3d 415, 419 (2d Cir. 1995) ("The defendant offered no evidence to controvert the government's proffers which is not to say or even intended to suggest the burden of proof *ever shifted from the government.*")(emphasis added).

The Eighth Circuit permits the district court to adopt any portion of the PSR that is not attacked by specific objection. *See United States v. Tabor*, 439 F.3d 826, 830 (8th Cir. 2006); *United States v. Moser*, 168 F.3d 1130, 1132 (8th Cir. 1999); *United States v. Coleman*, 132 F.3d 440, 441 (8th Cir. 1998). It distinguishes between objections to "the facts themselves," on the one hand, and to "recommendation[s] based on those facts," on the other. *United States v. Bledsoe*, 445 F.3d 1069, 1072-1073 (8th Cir. 2006). The latter type of objection triggers no burden for the government. *See United States v. Mannings*, 850 F.3d 404, 409-410 (8th Cir. 2017); *United States v. Humphrey*, 753 F.3d 813, 818 (8th Cir. 2014); *Bledsoe*, 445 F.3d at 1072-1073; *Moser*, 168 F.3d at 1132. But the former type of objection triggers an

obligation on the part of the government to support the PSR. *See United States v. Sorrells*, 432 F.3d 836, 838-839 (8th Cir. 2005)("Given the Government's failure to present substantiating evidence, the district court erred in using the PSR's allegations of the uncharged conduct to increase Sorrells's base offense level."); *Poor Bear*, 359 F.3d at 1041; *United States v. Greene*, 41 F.3d 383, 386 (8th Cir. 1994) ("If the sentencing court chooses to make a finding with respect to the disputed facts, it must do so on the basis of evidence, and not the presentence report."). This is because in the Eighth Circuit, "[t]he presentence report is not evidence…" *United States v. Reid*, 827 F.3d 797, 801 (8th Cir. 2016).

These principles remain the law in the Eighth Circuit. As recently as 2017, that jurisdiction has applied the distinction between objections to the facts, and to the inferences drawn therefrom, recognizing the government's burden of proof in the former situation. *See Mannings*, 850 F.3d at 409-410. Further, these are not mere abstract principles, but frequently determine the outcome of appeal. The Eighth Circuit has repeatedly vacated the sentence due to the government's failure to support a PSR's factual finding in the face of appropriate objection. *See Sorrells*, 432 F.3d at 838-839, and cases cited therein.

The Ninth Circuit has similarly held, *en banc*, that a court "may not simply rely on the factual statements in the PSR," in the face of objection. *See Ameline*, 409 F.3d at 1085-86. As one would expect of a statement of law found in an *en banc* opinion, this principle remains the law of the Circuit today. *See United States v. Khan*, 701 Fed. Appx. 592, 595 (9th Cir. 2017)(unpublished)("A district court may not simply

rely on the factual statements in a PSR when a defendant objects to those facts."). And as in the Eighth Circuit, the principle is not merely abstract, but has instead given rise to reversals when the government failed to offer evidence in favor of the PSR. *See United States v. Showalter*, 569 F.3d 1150, 1158-1160 (9th Cir. 2006); *Khan*, 701 Fed. Appx. at 595.

Likewise the Eleventh Circuit has found it well settled that "once a defendant objects to a fact contained in the [PSR], the government bears the burden of proving the disputed fact by a preponderance of the evidence." *Martinez*, 584 F.3d at 1026 (citing *United States v. Rodriguez*, 398 F.3d 1291, 1296 (11th Cir. 2005), *United States v. Liss*, 265 F.3d 1220, 1230 (11th Cir. 2001), *United States v. Lawrence*, 47 F.3d 1559, 1566 (11th Cir. 1995), and *United States v. Bernardine*, 73 F.3d 1078, 1080 (11th Cir. 1996)); *see also United States v. Rosales–Bruno,* 676 F.3d 1017, 1023 (11th Cir.2012) (defendant's objections to statements in his PSI placed "on the government the burden of proving [the disputed] facts."); *Liss*, 265 F.3d at 1230 ("When a defendant challenges one of the bases of his sentence as set forth in the PS[I], the government has the burden of establishing the disputed fact by a preponderance of the evidence."). That burden shifting regime has been recognized as recently as 2015 in *United States v. Arroyo-Jaimes*, 608 F. App'x 843 (11th Cir. 2015)(unpublished), which held that an objection to facts in the PSR sufficed "to place the burden on the government to produce evidence in support of that fact." *Arroyo-Jaimes*, 608 F. App'x at 846. Finally, as in the Eighth and Ninth Circuits, the Eleventh Circuits has vacated solely for want of "*undisputed* evidence in the PSI." *Martinez*, 584 F.3d at 1028 (emphasis added).

As can be seen, there is a stark contrast between the courts of appeals regarding the function of the PSR. The court below and six other circuits have held that it is the defendant's burden to discredit the allegations of the PSR. But five courts have rejected this interpretation of Rule 32, and instead held that it is the government's burden to support the PSR, not the defendant's burden to discredit it. This conflict is current, balanced, and widespread, and it is frequently material to the outcome.

B. The conflict merits review.

This Court should resolve the conflict between the circuits as to the defendant's burden of proof at sentencing. The issue is hardly isolated, but rather recurring. Indeed, it is endemic and fundamental to federal sentencing. Virtually every federal criminal case has a potential sentencing dispute, and it matters a great deal whether the defendant carries a burden of rebuttal.

C. The present case is an ideal vehicle to address the conflict.

The Court should take this case to resolve the division in the courts of appeals. The court below passed explicitly on the question presented, assigning a burden of production to the defendant to rebut the PSR. *See* [Appendix B, at p.4]. Had the burden of production been assigned to the government to prove independently that Petitioner committed the acts in question, the outcome may well have been different. All of the disputed allegations leveled against the defendant – that he wrote graffiti when he was 11, that he abused inhalants and hit his mother when he was 12, and that he hit his mother's drug-abusing boyfriend when he was 13 – were based on the

reports of complaining witnesses. *See* (Record in the Court of the Appeals, at pp.118-119). They were never confirmed by judicial action of any kind, save a "supervisory caution" for the graffiti. *See* (Record in the Court of the Appeals, at pp.118-119). Yet the court of appeals affirmed the sentence solely because the PSR is presumed reliable, and the defendant did not rebut it. *See* [Appendix B, at pp.4-5].

Moreover, the court below never suggested that these findings – the district court's conclusions that he committed crimes in his childhood when he was outside of prison -- might be harmless. *See* [Appendix B, at pp.4-5]. This is notable, because it expressly found that he could not show an effect on his substantial rights as respects the findings about his childhood misconduct in prison. *See* [Appendix B, at pp.4-5].

The outcome of the case, both on appeal and in district court, turned on an important question that divides the courts of appeals. *Certiorari* is appropriate.

II. There is a reasonable probability of a different result if the court below is instructed to reconsider its decision in light of *Holguin-Hernandez*, __U.S.__, 139 S.Ct. 2666 (June 3, 2019).

As noted, the length of a federal sentence is determined by the district court's application of 18 U.S.C. §3553(a). *See Booker*, 543 U.S. at 261. A district court must impose a sentence that is adequate, but no greater than necessary, to achieve the goals set forth in 18 U.S.C. §3553(a)(2). *See* 18 U.S.C. §3553(a)(2). The district court's compliance with this dictate is reviewed for reasonableness. *See Rita v. United States*, 551 U.S. 338, 359 (2007). In *Gall v. United States*, 552 U.S. 38 (2007), this Court emphasized that all federal sentences, "whether inside, just outside, or significantly

outside the Guidelines range" are reviewed on appeal "under a deferential abuse-of-discretion standard." *Gall*, 552 U.S. at 51.

The court of appeals treats as a species of "substantive reasonableness" whether the district court "gives significant weight to an irrelevant or improper factor…" *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009); *accord United States v. Broussard*, 669 F.3d 537, 551 (5th Cir. 2012). Accordingly, when the district court considered unsubstantiated (and undetailed) allegations of misconduct in youth prison, it exposed the sentence to attack as substantively unreasonable.

Yet the court below has also held that a defendant must make specific objection to preserve a substantive reasonableness claim. *See United States v. Peltier*, 505 F.3d 389 (5th Cir. 2007); *United States v. Duhon*, 541 F.3d 391, 397 (5th Cir. 2008). And that proved to be dispositive here; applying plain error, the court below affirmed for want of clear error or an adequate showing of an effect on substantial rights. [Appendix B, at pp. 3-4].

This Court will decide whether substantive reasonableness challenges require specific objection in *Holguin-Hernandez v. United States*, __U.S.__, 139 S.Ct. 2666 (June 3, 2019)(granting certiorari). In the event that this Court holds that such objections are not necessary, there is a reasonable probability of a different result. The court below, after all, has held that a bare arrest record is an improper basis for sentencing. *See Windless*, 719 F.3d at 420. The allegations of misconduct while Petitioner was an imprisoned child were no more detailed than a "bare arrest record," as the court below defines the term. *See id.* ("An arrest record is "bare" when it refers

to the 'to the mere fact of an arrest—i.e.[,] the date, charge, jurisdiction and disposition—without corresponding information about the underlying facts or circumstances regarding the defendant's conduct that led to the arrest.'")(quoting *United States v. Harris*, 702 F.3d 226, 229 (5th Cir.2012)). They contain nothing more than the name of the defendant's alleged infraction, without any detail as to the conduct, and without even a date and time. *See* (Record in the Court of Appeals, at 118).

It follows that Petitioner may have a strong claim that the district court's sentence is unreasonable because it "gives significant weight to an irrelevant or improper factor…" *Cooks*, 589 F.3d at 186. Under these circumstances, it is appropriate to hold the instant petition, and if the petitioner prevails in *Holguin-Hernandez*, grant the instant petition, vacate the judgment below and remand for reconsideration. *See Lawrence*, 516 U.S. at 167.

III. There is a reasonable probability of a different result if the court below is instructed to reconsider its decision in light of *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369 (2019).

The Fifth and Sixth Amendments to the United States Constitution provide federal criminal defendants with the right to have each element of their offense found by a grand jury and placed in the indictment, then proven to a jury beyond a reasonable doubt. *See United States v. Cotton*, 535 U.S. 625, 627 (2002). Unless it is proven with non-testimonial hearsay, his or her offense must also be proven with evidence subject to confrontation. *See Crawford v. Washington*, 541 U.S. 36 (2004).

Facts relevant to punishment that are not elements of the defendant's offense, however, need not be found by a grand jury, need not be proven to a jury, need not be proven beyond a reasonable doubt, and need not be proven with evidence subject to confrontation. *See Williams v. New York*, 337 U.S. 241 (1949). The defendant's procedural protections, therefore, depend critically on whether they are characterized as "elements" of the defendant's offense, or merely "sentencing factors."

In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), this Court held that the constitution does not require a state legislature to treat the defendant's possession of a firearm as an element of his or her offense, even if that fact triggers a mandatory minimum punishment. *See McMillan*, 477 U.S. at 91-92. According to the *McMaillan* court, this fact could be proven to judge by a mere preponderance of the evidence. *See id*. *McMillan* acknowledged, however, "that there are constitutional limits to the State's power in this regard; in certain limited circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged." *Id*. at 86.

The *McMillan* court found that the Pennsylvania law did not transgress these limits because it did not establish a presumption or shift any burden to the defendant. *See id*. 87. Further, it noted that the finding did not increase the statutory maximum of the offense. *See id*. 87. And it saw no evidence that the Pennsylvania legislature "had restructure[ed] existing crimes in order to "evade" the commands of *Winship*…" *Id*. As such, this Court concluded that the statute at issue "gives no impression of

having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id*. at 88.

A decade later, this Court began to revisit the distinction between elements of an offense and facts that go only to sentencing. In *United States v. Watts*, 519 U.S. 148 (1997), it held that a district court may increase the defendant's Guideline range on the basis of conduct of which the defendant has been acquitted. *See Watts*, 519 U.S. at 156. *En route* to that conclusion, it reaffirmed *McMillan*'s holding that "application of the preponderance standard at sentencing generally satisfies due process." *Id*. (citing *McMillan*, 477 U.S. at 91-92, and *Nichols v. United States*, 511 U.S. 738, 747-748 (1994)). But it added a caveat: the circuits had offered diverging opinions "as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence," and it expressly declined to resolve this divergence of opinion. *Id*. Further, it limited *McMillan*'s blessing for the preponderance standard to cases where "there was no allegation that the sentencing enhancement was 'a tail which wags the dog of the substantive offense'". *Id*. at 156, n.2 (quoting *McMillan*, 477 U.S. at 88). As such, after *Watts* it was certainly arguable that the relaxed constitutional protections typically applicable at sentencing might sometimes be constitutionally inadequate, even if the fact at issue did not alter the statutory range of punishment.

Almendarez-Torres v. United States, 523 U.S. 224 (1998), confirmed that the effect of a fact on the sentencing range is not the sole or dispositive factor in determining whether it must be treated as an element. This case held that the fact of

a prior conviction need not be treated as an element of the defendant's offense even if it increases the maximum punishment. *See Almendarez-Torres*, 523 U.S. at 247. That holding stemmed from this Court's recognition that "recidivism … is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Id*. at 243. Relying heavily on this observation and a collection of factors named in *McMillan*, this Court thus held that 8 U.S.C. §1326's use of a prior conviction to elevate a maximum sentence for illegally re-entering the country provided no reason "to think Congress intended to 'evade' the Constitution, either by 'presuming' guilt or 'restructuring' the elements of an offense." *Id* at 246 (quoting *McMillan*, at 86-87, 89-90). Yet this Court closed the opinion with the same caveat it offered in *Watts*: it "express(ed) no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence." *Id*. 248.

Apprendi v. New Jersey, 530 U.S. 466 (2000), finally set a bright line rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. For the purpose of a defendant's constitutional protections, *Apprendi* largely discarded the significance of legislative labels, holding that "the relevant inquiry is one not of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id*. at 494. Other than the fact of a prior conviction, facts that increase the maximum penalty are to be treated as elements of

the offense, not sentencing factors, whatever the legislature intended. *See id*. at 476. That analysis would quickly be extended by the Supreme Court to the right to have facts placed in the indictment, *see Cotton*, 535 U.S. at 627, and by lower courts to the right of confrontation, *see United States v. Mills*, 446 F.Supp.2d 1115 (C.D.Cal.2006); *United States v. Gray*, 362 F.Supp.2d 714, 725 (S.D.W.Va.2005); *United States v. Jordan*, 357 F. Supp. 2d 889, 902-904 (E.D. Va. 2005); *United States v. Bodkins*, 2005 WL 1118158, at *5 (W.D. Va. May 11,2005) (unpublished). Twelve years after *Apprendi*, this Court extended its holding to facts that established a mandatory minimum, largely overruling *McMillan*. *See Alleyne v. United States*, 570 U.S. 99 (2013). Facts that establish a mandatory minimum punishment must now be proven to a jury beyond a reasonable doubt. *See Alleyne*, 570 U.S. at 107.

To summarize: before *Apprendi*, this Court's analysis in *McMillan*, *Watts*, and *Almendarez-Torres* held or strongly suggested that some facts relevant to sentencing could be due elemental treatment if they came to resemble a "tail that wags the dog of the substantive offense," or presented a risk that constitutional guarantees could be "evaded" at sentencing. Factors that influenced this holistic determination – sentencing factor or disguised element – included: the nature of the finding, *see Almendarez-Torres*, 523 U.S. at 247, whether it involved a prior conviction, *see id*., the impact on the sentence or sentencing range, *see McMillan*, 477 U.S. at 88-89; *Watts*, 519 U.S. at 156, n.2, and the allocation of the burden of proof, *see McMillan*, 477 U.S. at 87.

Apprendi and *Alleyne* showed that one of these factors – an effect on the sentencing range – would *always* transform a sentencing factor into an element, unless it involved a sentencing factor. But they did not hold that other factors *could not* combine to do so. An effect on the mandatory sentencing range, in other words, became a sufficient condition for a fact's elemental status, but it was not clear whether it was also a necessary one. But such holistic comparisons were discouraged by language in this Court's 2004 decision of *Blakely v. Washington*, 542 U.S. 296 (2004), which poked fun at the "tail that wags the dog" standard. *See Blakely v. Washington*, 542 U.S at 311, n. 13. In this opinion, the Court, writing through Justice Scalia, observed that *Apprendi* "has prevented full development of this line of jurisprudence." *Id.*

This Court's recent decision in *Haymond v. United States*, __U.S. __, 139 S.Ct. 2369 (June 26, 2019), however, rather strongly suggests that facts may be due elemental treatment based on a holistic evaluation of their similarity to elements, and the risk that constitutional guarantees will be "evaded." *Haymond* addressed the constitutionality of 18 U.S.C. 3583(k), which requires a five year term of imprisonment for supervised release revokees subject to sex offender registration who commit one of a specified list of sex offenses. *See Haymond*, 139 S.Ct. at 2375 (Gorsuch, J., plurality op.). Five Justices found that the provision (Subsection (k)), violates the jury trial guarantee of the Sixth Amendment, though they did not join a common opinion. *See Haymond*, 139 S.Ct. at 2385 (Gorsuch, J., plurality op.); *Haymond*, 139 S.Ct. at 2386 (Breyer, J., concurring).

A plurality opinion authored by Justice Gorsuch applied *Apprendi* and *Alleyne*, to find that the five year penalty required by Subsection (k) added time to the defendant's minimum punishment, and thus required the protections of a jury trial and proof beyond a reasonable doubt under *Alleyne*. *See Haymond*, 139 S.Ct. at 2379-2380 (Gorsuch, J., plurality op.). Notably, these four Justices expressed concern that the use of judicial fact-finding at revocation hearings could be used to evade the defendant's right to a jury trial:

> If the government and dissent were correct, Congress could require anyone convicted of even a modest crime to serve a sentence of supervised release for the rest of his life. At that point, a judge could try and convict him of any violation of the terms of his release under a preponderance of the evidence standard, and then sentence him to pretty much anything.

Haymond, 139 S.Ct. at 2380 (Gorsuch, J., plurality op.). Manifestly, these Justices regarded the risk of "evasion" realistic in the context of provisions like Subsection (k). And this appraisal influenced the outcome.

Justice Breyer concurred in the decision. He believed that supervised release is generally akin to parole, which may be revoked based on preponderance findings without the benefit of a jury. *See Haymond*, 139 S.Ct. at 2385 (Breyer, J., concurring). But he nonetheless believed that proceedings arising under §3583(k) are "less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach." *Haymond*, 139 S.Ct. at 2365 (Breyer, J., concurring). Specifically, he noted that §3583(k) hinged on proof of a discrete set of federal crimes, and imposed a determinate, mandatory penalty. *See Haymond*, 139 S.Ct. at 2365 (Breyer, J., concurring).

The outcome of *Haymond* unmistakably turned on factors other than the effect of a disputed fact on the defendant's sentencing range. Justice Gorsuch's plurality, like the majorities in *McMillan*, and *Almendarez-Torres*, was influenced by the risk that legislatures might seek to evade constitutional guarantees to punish criminal conduct apart from the offense of conviction. Justice Breyer's concurrence undertook a global comparison of Subsection (k) findings to "traditional elements." In this respect, it echoed the "tail that wags the dog" standard applied in *McMillan*, *Watts*, and *Almendarez-Torres*.

A global assessment of the factual findings made here, and an objective assessment of the risk that sentencing has been used to "evade" constitutional guarantees, provides a reasonable argument that the district court's findings regarding Petitioner's juvenile conduct should be treated as elements of the defendants offense. As such, it is reasonably probable after *Haymond* that such facts must be decided on the basis of facts subject to confrontation, not mere testimonial hearsay drawn from a police report.

All of the allegations at issue in this case – graffiti, drug abuse, and assault -- involved actual criminal conduct, not mere aggravating circumstances of the instant offense. As such, they resemble the findings of a "distinct criminal offense" that Breyer regarded as disguised elements in *Haymond*. *See Haymond*, 139 S.Ct. at 2365 (Breyer, J., concurring). Because of the Fifth Circuit's view that all allegations in a PSR must be rebutted by the defendant, discussed above, it cannot be said here, as it could in *McMillan*, that Petitioner has been subject to no presumption of guilt. *See*

McMillan, 477 U.S. at 86-87. Further, the facts at issue here, have not, like the prior conviction in *Almendarez-Torres*, resulted from other criminal proceedings at which the defendant enjoyed the rights of trial by jury, proof beyond a reasonable doubt, and confrontation. *See Apprendi*, 530 U.S. at 488 (distinguishing *Almendarez-Torres* because in *Almendarez-Torres* the "three earlier convictions for aggravated felonies … all … had been entered pursuant to proceedings with substantial procedural safeguards of their own …").

For that reason, findings like that made by the district court here carry a serious risk that they will stand in for criminal trials in cases where the prosecution cannot (or does not care to) shoulder the burden of proving guilt without testimonial hearsay. The juvenile prosecuting authorities made no effort to prove the defendant's childhood misconduct in 2002, 2003 and 2004. *See* (Record in the Court of Appeals, at 118-119). More than a decade later, however, a federal court considered that alleged misconduct, and imposed some added quantum of punishment. And it did so in a setting where he enjoys no right of jury trial, proof beyond a reasonable doubt, or confrontation. The risk of abuse in similar situations is palpable.

At the time of the decision below, Fifth Circuit law was clear that federal defendants simply didn't have a right of confrontation at sentencing. *See United States v. Mitchell*, 484 F.3d 762, 776 (5th Cir. 2007). That conclusion has been sufficiently complicated by *Haymond* – which postdates the opinion below -- as to merit remand. *See Lawrence*, 516 U.S. at 167.

IV. There is a reasonable probability of a different result if the court below is instructed 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 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 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 or threatening injury at any point during the course of the robbery, for any purpose. *See* Tex. Penal Code §29.02. The injury 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.)."

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.

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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