

No. _____

In the
Supreme Court of the United States

Jordan Jenkins,

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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QUESTION PRESENTED

Whether generic robbery requires the taking of property from another person or from the immediate presence of an-other person by force or by intimidation?

PARTIES TO THE PROCEEDING

Petitioner is Jordan Jenkins, 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 Jordan Jenkins seeks 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The unpublished opinion of the court of appeals is reported at *United States v. Jenkins*, No. 21-11033, 2022 WL 1314696 (5th Cir. May 3, 2022)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on May 3, 2022. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT FEDERAL SENTENCING GUIDELINE

Guideline 4B1.2(a) reads:

(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 and Proceedings in District Court

Petitioner Jordan Jenkins pleaded guilty to possessing a firearm in spite of a prior conviction. *See* (Record in the Court of Appeals, at 37-39). The defendant

admitted that the firearm had previously traveled across state lines. *See* (Record in the Court of Appeals, at 37-39). But he did not admit when the firearm crossed state lines, nor whether it did so in response to anything he did. *See* (Record in the Court of Appeals, at 37-39).

A Presentence Report applied an elevated base offense level on the ground that Appellant's prior Texas conviction for robbery constituted a "crime of violence" under USSG §§2K2.1 and 4B1.2. *See* (Record in the Court of Appeals, at 167-168). It thus found a final offense level of 21 and a criminal history category of IV, resulting in a Guideline range of 57-71 months imprisonment. *See* (Record in the Court of Appeals, at 1176). The district court agreed, and imposed a sentence of 58 months, one month above the bottom of the range it believed applicable. *See* (Record in the Court of Appeals, at 108, 137). It then said that it would have imposed the same sentence irrespective of the Guidelines. *See* (Record in the Court of Appeals, at 108, 137, 147).

B. Appellate Proceedings

Petitioner appealed, challenging, *inter alia*, the district court's conclusion that his Texas robbery conviction constituted a "crime of violence" under USSG §4B1.2. The court of appeals affirmed. *See* [Appendix A]; *United States v. Jenkins*, 2022 WL 1314696, at *1 (May 3, 2022)(unpublished). It cited *United States v. Adair*, 16 F.4th 469 (5th Cir. 2021), which held that Texas robbery is equivalent to the enumerated offense of "robbery," as the term is used in USSG §4B1.2(a)(2). *See Jenkins*, 2022 WL 1314696, at *1.

REASONS FOR GRANTING THE PETITION

The courts of appeals are divided as to the generic definition of robbery. This Court should hold the instant petition pending resolution of the conflict.

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). That Guideline 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).

The court below found that Appellant’s Texas robbery offense falls within Subsection (2) of the above definition, which says that a “crime of violence” includes “robbery.” *See* [Appendix A]; *United States v. Jenkins*, 2022 WL 1314696, at *1 (May 3, 2022)(unpublished). It is thus necessary to determine whether Appellant’s Texas robbery conviction was equivalent to the “enumerated offense” of robbery found in USSG §4B1.2(a)(2). In such cases, sentencing courts should determine the “generic” version of the enumerated offense, here robbery, and then compare it to the

defendant's prior statutory offense of conviction. *See Taylor v. United States*, 495 U.S. 575, 599 (1990). If the defendant's prior statutory offense of conviction is broader than the generic version of the offense, that is, if it may be violated without committing the generic offense, the prior conviction does not qualify. *See Taylor*, 495 U.S. at 599.

In Texas, robbery is committed:

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.

Tex. Penal Code §29.02(a).

The court below has held that the Texas offense of robbery is equivalent to the generic definition of “robbery.” *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380 (5th Cir. 2006), *reaffirmed in relevant part by United States v. Adair*, 16 F.4th 469 (5th Cir. 2021). It defines generic robbery as “misappropriation of property under circumstances involving [immediate] danger to the person.” *Santiesteban-Hernandez*, 469 F.3d at 380 (quoting Wayne R. LaFave, *Substantive Criminal Law* § 20.3 intro., (d)(2) (2d ed.2003)), *reaffirmed in relevant part by United States v. Adair*, 16 F.4th 469 (5th Cir. 2021)). The Eighth Circuit agrees with this definition. *See United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016).

But two circuits have adopted a substantially narrower definition of “generic robbery.” These employ the common law formulation: “the taking of property from another person or from the immediate presence of another person by force or by intimidation.” *United States v. McCants*, 952 F.3d 416, 428–429 (3d Cir. 2020); *see*

also *United States v. Lockley*, 632 F.3d 1238, 1244 (11th Cir. 2011)(“Accordingly, we find the generic definition of robbery to be ‘the taking of property from another person or from the immediate presence of another person by force or intimidation.’”).

These definitions are in material conflict. The common law formulation requires that the defendant use sufficient force to overcome the resistance of the defendant. See *Stokeling v. United States*, 139 S.Ct. 544, 551 (2019)(“...the level of ‘force’ or ‘violence’ needed at common law was by this time well established: ‘Sufficient force must be used to overcome resistance ... however slight the resistance.’”)(quoting W. Clark & W. Marshall, *Law of Crimes* 553 (H. Lazell ed., 2d ed. 1905)). But the Texas offense, and, necessarily, any generic definition that includes it, do not require that the defendant use any force at all. Rather, he or she may commit robbery by inflicting injury by accident during a theft. See *Craver v. State*, 2015 WL 3918057, *2 (Tex. App., June 25, 2015)(unpublished).

Further, the common law offense requires that the defendant acquire property “by” force or intimidation, that is, that there be a causal relationship between the use of violence and the acquisition of property. *Commonwealth v. Jones*, 283 N.E.2d 840, 843 (Mass. 1986) (holding that state’s common law robbery offense required “a causal connection between the defendant’s use of violence or intimidation and his acquisition of the victim’s property.”)(citing Anderson, *Wharton’s Criminal Law & Procedure*, § 559; 46 *Am. Jur.*, *Robbery*, § 19; *Commonwealth v. Novicki*, 87 N.E. 2d 1, 5 (Mass. 1941); Hale, P. C., *Historia Placitorum Coronae: The History of the Pleas of the Crown*, (1847 ed.) 534; 77 C.J.S., *Robbery*, §§ 11–14)). The Texas robbery statute, and the

generic definition that include, require no such thing. Rather, it is sufficient that someone be recklessly injured any time during the course of a theft, even when the defendant has discarded any stolen property. *See Smith v. State*, 2013 WL 476820, at *3 (Tex. App. – Houston [14th Dist.] 2013).

Finally, the common law version adopted in the Third and Eleventh Circuits, *see McCants*, 952 F.3d at 428–429; *Lockley*, 632 F.3d at 1244, and a definition adopted in the Second Circuit, *see United States v. Pereira-Gomez*, 903 F.3d 155, 163 (2d Cir. 2018), require that the defendant acquire property from the immediate presence of the victim. The Texas statute, however, has been interpreted to include cases where the victim and defendant were not even in the same room. *See Howard v. State*, 333 S.W.3d 137, 137-38 (Tex. Crim. App. 2011)(armed defendant entered store and stole, frightening clerk who watched in the back on closed circuit TV).

Accordingly, the difference between the circuits directly implicates the instant case.¹ Admittedly, this case involves plain error review, *see Fed. R. Crim. P. 52(b)*, which may prove an insurmountable obstacle to a plenary grant of certiorari. This Court will shortly have before it another Petition raising the same issue after full preservation in district court. *See United States v. Williams*, 2022 WL 1171058 (April 20, 2022)(unpublished), *pet. for reh'g denied* June 7, 2022. This Court should grant

¹ The definition of “crime of violence” also include offenses that have as an element the use, attempted use, or threatened use of physical force against the person of another. *See* USSG §4B1.2(a)(1). The Fifth Circuit has said that the portion of the Texas offense criminalizing robbery-by-injury does not to satisfy this language. *United States v. Garrett*, 24 F.4th 485, 488-489 (5th Cir. 2022)(“If the statute is indivisible and thus only states one crime, Garrett's conviction does not qualify under *Borden* as an ACCA violent felony because robbery can be committed recklessly.”). No cognizable document – no indictment, no judgement, no judicial confession from the prior case -- in the record excludes this as a basis of conviction.

certiorari in that case, hold the instant petition, and, if the defendant prevails in *Williams*, grant certiorari in this case, vacate the judgment below, and remand for reconsideration. *See Lawrence on behalf of Lawrence v. Chater*, 516 U.S. 163, 167-168 (1996).

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.

Respectfully submitted this 1st day of August, 2022.

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