No. _____

In the

Supreme Court of the United States

_____

Justin Cornelius Harris,

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

_____

Jessica Graf
**Counsel of Record*
Assistant Federal Public Defender
Federal Public Defender's Office
Northern District of Texas
525 South Griffin
Suite 629
Dallas, Texas 75202
(214) 767-2746
Jessica_Graf@fd.org

QUESTIONS PRESENTED

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

PARTIES TO THE PROCEEDING

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

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Justin Cornelius Harris*, 3:20-CR-482-S, United States District Court for the Northern District of Texas. Judgment and sentence were entered on November 12, 2021.

2. *United States v. Justin Cornelius Harris*, No. 21-11151, 2022 WL 1652835 (5th Cir. May 24, 2022), Court of Appeals for the Fifth Circuit. The judgment affirming the conviction and sentence was entered on May 24, 2022.

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

United States Sentencing Guidelines

State Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Justin Cornelius Harris seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was not published but is available at *United States v. Justin Cornelius Harris*, No. 21-11151, 2022 WL 1652835 (5th Cir. May 24, 2022), and is reprinted in Appendix A to this petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The Fifth Circuit entered judgment on May 24, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United Stats Sentencing Guideline 4B1.2(a):

> (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).

Texas Penal Code § 29.02 Robbery:

> (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.

STATEMENT OF THE CASE

Petitioner Justin Cornelius Harris pleaded guilty to possessing a firearm after felony conviction. (ROA.31–34). A Presentence Report applied an elevated base offense level on the ground that Petitioner's prior Texas robbery conviction constituted a "crime of violence" under USSG §§ 2K2.1 and 4B1.2. (ROA.129). 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:

> 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 as an element, or b) is one of the "enumerated offenses," among them "robbery."

Petitioner objected to the PSR, arguing that his Texas robbery prior does not qualify as a crime of violence. (ROA.148). He argued that the elements clause does not apply because his conviction was for robbery by causing bodily injury, which may be committed recklessly. (ROA.149). After *Borden v. United States*, 141 S. Ct. 1817 (2021), Texas robbery by causing bodily injury no longer qualifies under the elements

clause because it does not necessitate use of force. (ROA.149–150). Petitioner also argued that Texas robbery does not qualify as an enumerated offense under USSG § 4B1.2(a)(2). He contended that *Stokeling v. United States*, 139 S. Ct. 544 (2019), overruled the Fifth Circuit's decision in *United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006). (ROA.150–151). Because the Texas statute criminalizes assaultive conduct occurring "in the course of" a theft, whether or not it is undertaken to overcome the victim's resistance to the theft, Texas robbery is not generic. (ROA.151). Petitioner clarified that, in light of *United States v. Adair*, 16 F.4th 469 (5th Cir. 2021), his objection to the base offense level was foreclosed in the Fifth Circuit and made for purposes of further review. (ROA.205).

The district court overruled Petitioner's objection, resulting in a Guideline range of 37–46 months. (ROA.139). The court sentenced Petitioner to 45 months of imprisonment, which was the top of the Guidelines range with one month deducted to account for time in state custody. (ROA.86,98).

Petitioner appealed, challenging the district court's conclusion that his Texas robbery conviction constituted a crime of violence under USSG § 4B1.2, again arguing that the Fifth Circuit's precedent regarding the definition of generic robbery is wrong. The court of appeals affirmed. *See* [Appendix A]; *United States v. Harris*, 2022 WL 1652835, at *1 (5th Cir. May 24, 2022). 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 id.* at *1.

REASON TO GRANT THIS PETITION

This Court should grant the petition to resolve the entrenched circuit split over the generic definition of robbery.

A. The Fifth Circuit refuses to let go of its outdated definition of generic robbery, despite intervening authority from this Court.

The Texas robbery statute is an outlier. Unlike the majority of states, Texas does not require the defendant take property from or in the presence of another person. The statute defines two ways to commit the offense:

> (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.

Tex. Pen. Code § 29.02(a). To prove "robbery," "the majority of states require property to be taken from a person or a person's presence by means of force or putting in fear." *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380 (5th Cir. 2006). Texas robbery-by-reckless-injury does not fit this formulation. It does not require taking "from the person or presence of the victim"; it does not require that force be the means of overcoming the victim's resistance (or even that the owner of the property is the victim of the injury); and it even allows conviction where the thief recklessly injures someone while trying to get away. Tex. Pen. Code § 29.02(a)(1); *see United States v. Burris*, 856 F. App'x 547 (5th Cir. 2021).

In most jurisdictions, recklessly causing injury while fleeing a botched theft would not constitute a "robbery." Of the 50 states and District of Columbia, only three, including Texas, expressly include reckless conduct. *See* Haw. Rev. Stat. Ann. § 708-841(1)(c); Me. Rev. Stat. tit. 17-A, § 651(1)(A); Tex. Penal Code. 29.02(a)(1). By contrast, the language of a substantial majority of contemporary statutes excludes reckless-fleeing injuries. Many—at least 24 jurisdictions—require proof that the property be taken "by" assaultive conduct.[1]

Even so, the Fifth Circuit chose a definition for generic robbery broad enough to include the Texas statute. *Id.* at 380. Specifically, *United States v. Santiesteban-Hernandez* decided that the generic definition of robbery is "'aggravated larceny,' containing at least the elements of 'misappropriation of property under circumstances involving [immediate] danger to the person.'" 469 F.3d at 380 (quoting LaFave, *Substantive Criminal Law* § 20.3). In crafting this definition, the Fifth Circuit turned its back on the "everyday understanding" of the offense of robbery.

This Court instructed that courts should first look to the "everyday understanding of" an undefined enumerated offense, with that understanding gleaned from "reliable dictionaries." *See Esquival-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017). Those reliable dictionaries define *robbery* using the

[1] *See* Cal. Penal Code § 211; Colo. Rev. Stat. Ann. § 18-4-301; D.C. Code Ann. § 22-2801; Ga. Code Ann. § 16-8-40; Idaho Code Ann. § 18-6501; 720 Ill. Comp. Stat. Ann. 5/18-1; Ind. Code Ann. § 35-42-5-1; Kan. Stat. Ann. § 21-5420; La. Stat. Ann. § 14:65; Mass. Gen. Laws Ann. ch. 265, §19; Miss. Code. Ann. § 97-3-73; Neb. Rev. Stat. Ann. § 28-234; N.M. Stat. Ann. § 30-16-2; Okla. Stat. Ann. tit. 21, § 791; SDCL § 22-30-1; Tenn. Code Ann. § 39-13-401; Utah Code Ann. § 76-6-301; W. Va. Code Ann. § 61-2-12; Wis. Stat. Ann. § 943.32; *Snowden v. State*, 583 A.2d 1056, 1059 (Md. 1991); *State v. Smith*, 292 S.E.2d 264, 270 (N.C. 1992); *State v. Rolon*, 45 A.3d 518, 524 (R.I. 2012*); State v. Hiott*, 276 S.E.2d 163, 167 (S.C. 1981); *Morris v. Commonwealth*, 609 S.E.2d 92, 96 (Va. 2005).

federal/common-law formulation. *See* "robbery," *Black's Law Dictionary* (11th ed. 2019) ("The illegal taking of property from the person of another, or in the person's presence, by violence or intimidation."); *Webster's New World Dictionary* 1161 (3d Coll. ed. 1988) (same); Bryan A. Garner, *A Dictionary of Modern Legal Usage* 774 (2d ed. 1995) (same). The same is true with regard to treatises. *See*, e.g., 67 Am. Jur. 2d Robbery § 12 ("[Robbery] is the taking, with intent to steal, personal property of another, *from his or her person or in his or her presence*, against his or her will, *by violence, intimidation, or by threatening the imminent use of force*.") (emphasis added).

And in *Stokeling v. United States*, 139 S. Ct. 544 (2019), this Court carefully examined the standard definition of robbery. *Stokeling* arose under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e), and held "that the elements clause" of that provision, "encompasses robbery offenses that require the criminal to overcome the victim's resistance." *Stokeling*, 139 S. Ct. at 550. The overcoming-resistance element, *Stokeling* explained, stems from the common law offense of robbery, which was "'committed if sufficient force [was] exerted to overcome the resistance encountered.'" *Id*. (quoting 2 J. Bishop, *Criminal Law* § 1156, p. 860 (9th ed. 1923).

This Court helpfully observed a feature common to a large majority of contemporary state codes the year that the ACCA was enacted: "[i]n 1986, a significant majority of the States defined nonaggravated robbery as requiring force that overcomes a victim's resistance." *Id*. at 552. Indeed, the government said that 43 states defined robbery in these terms, a group that did not include Texas. *See id*.; *see*

also Respondent's Brief in *Stokeling v. United States*, No. 17-5554, 2018 WL 3727777, *13aa (Filed August 3, 2018). The same "generic" understanding of robbery surely existed the next year, when the Sentencing Commission first enumerated "robbery" as an enumerated example of a "crime of violence." *See* USSG. § 4B1.2, cmt., n.1 (1987).

The clear implication of *Stokeling* is that the common law formulation is still the dominant contemporary understanding of "robbery." *See Stokeling*, 139 S. Ct. at 550–552. And the federal/common-law formulation of robbery (a) presupposes the *presence* and *proximity* of the victim during the theft—taking of property *from the person or presence of another*—and (b) requires "a causal connection between the defendant's use of violence or intimidation and his acquisition of the victim's property." *Commonwealth v. Jones*, 283 N.E.2d 840, 843 (Mass. 1986) (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. (1847 ed.) 534; 77 C. J. S., *Robbery*, §§ 11-14).

This Court recently pointed to a striking example of the non-generic nature of the Texas robbery statute. In *Borden v. United States*, fives justices of this Court agreed that reckless offenses fall outside the ACCA's definition of "violent felony," recognizing a mismatch between the ordinary understanding of the term "violent felony" and offenses that can be committed by reckless accident. 141 S. Ct. at 1821–1822 (plurality op.); *id.* at 1835 (Thomas, J., concurring). This Court specifically pointed to a Texas reckless-injury-robbery case:

> Or take some real-life non-driving examples. ***A shoplifter jumps off a mall's second floor balcony while fleeing security only to land on a customer.*** *See Craver v. State*, 2015 WL 3918057, *2 (Tex. App., June 25, 2015). An experienced skier heads straight down a steep, mogul-filled slope, "back on his skis, arms out to his sides, off-balance"—until he careens into someone else on the hill. *People v. Hall*, 999 P.2d 207, 211 (Colo. 2000). Or a father takes his two-year-old go-karting without safety equipment, and injures her as he takes a sharp turn. *See State v. Gimino*, 2015 WL 13134204, *1 (Wis. App., Apr. 15, 2015).
>
> Are these really ACCA predicates? All the defendants in the cases just described acted recklessly, taking substantial and unjustified risks. And all the defendants hurt other people, some seriously, along the way. But ***few would say their convictions were for "violent felonies."***

Id. (citing *Leocal v. Ashcroft*, 543 U.S. 1, 4 (2004)) (emphasis added). The same kind of analysis applies to "crime of violence," a phrase that exists in both statute and guideline text. *See Leocal*, 543 U.S. at 4. In the same way that the term "violent felony" (as commonly understood) excludes Texas's uncommonly broad definition of robbery, the term "crime of violence" (as commonly understood) should also that same crime. *Leocal*, 543 U.S. at 11 (finding that the "ordinary meaning" of "crime of violence" in 18 U.S.C. § 16 naturally excluded injurious accidents).

Texas plainly does not require that the defendant take property *from the person or presence* of the victim, nor does it insist on a taking *by* force or threat. Indeed, the defendant's injurious act need not even be undertaken for the purpose of retaining property. *See Smith v. State*, 2013 WL 476820, at *3 (Tex. App.—Houston [14th Dist.] 2013) (defendant injured a security guard only after he had discarded the stolen property entirely); *Craver v. State*, No. 02-14-00076-CR, 2015 WL 3918057, at *1 (Tex. App.—Fort Worth June 25, 2015, pet. ref'd).

Even with mountains of intervening authority from this Court, the Fifth Circuit holds tight to its old definition of generic robbery. Despite ample opportunity to correct this error, the Fifth Circuit maintains that its 2006 analysis remains good law. *See* [Appx. A]; *United States v. Williams*, 2022 WL 1171058 (April 20, 2022) (unpublished), *pet. for reh'g denied* June 7, 2022; *see also United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016) ("[A]n offense qualifies as robbery if it contains the elements of generic robbery which is defined as aggravated larceny, or the misappropriation of property under circumstances involving immediate danger to a person.").

B. The Fifth Circuit and Eighth Circuits' definition conflicts with authoritative decisions in the Second, Third, Fourth, and Eleventh Circuits.

At least three circuit disagree with the Fifth and Eighth Circuits' generic robbery definition. The Second Circuit held "that the generic definition of robbery includes, as an element, that the stolen property be taken 'from the person or in the presence of' the owner or victim." *United States v. Pereira-Gomez*, 903 F.3d 155, 163 (2d Cir. 2018). The Court explained:

> The statutes and decisions of the highest courts in at least twenty-seven states and the District of Columbia include the presence element in their definitions of robbery. The presence element is also found in law treatises and legal dictionaries. And the United States Code includes a presence element in its definition of robbery.

Id. (footnotes omitted). Based on that analysis, *Pereira-Gomez* held that New York's definition of robbery—which, like Texas's, is defined by causing injury—is non-generic. *Id.* at 163–164 (discussing N.Y. Penal Law § 160.10).

Similarly, the Third Circuit has held, and the Government even agreed, "the generic definition of robbery" is "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). The court recently reiterated that the common-law formulation is the generic definition. *See United States v. Scott*, 14 F.4th 190, 196 (3d Cir. 2021).

The Eleventh Circuit, too, has chosen the majority/common-law formulation rather than *Santiesteban-Hernandez*'s broader rule: "to the extent that the definitions differ, we believe the generic, contemporary form of robbery is better reflected in the majority definition." *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.'" *Id.*

Even those circuits that appear to *agree* with the *Santiesteban-Hernandez*, also seem committed to the common-law formulation. *See United States v. Gattis*, 877 F.3d 150, 157 (4th Cir. 2017) ("[L]arceny from the person" "becomes 'robbery' in the generic sense only when the offender takes property *by using force or by threatening immediate physical harm*.") (emphasis added).

These definitions are in material conflict. The circuits require guidance from this Court.

C. This case presents an ideal vehicle to resolve the circuit split.

This case would be an idea vehicle for the Court to address the circuit split over the definition of generic robbery. Petitioner fully preserved appellate review by

objecting in the district court and raising the issue before the Fifth Circuit. Petitioner also cited state appellate decisions directly addressing the non-generic definition of Texas robbery in briefing below. *See Smith*, 2013 WL 476820; *Craver*, 2015 WL 3918057. The Fifth Circuit rejected that authority in favor of its outdated definition of generic robbery.

CONCLUSION

Petitioner respectfully requests this Court grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Jessica Graf
Jessica Graf
Assistant Federal Public Defender
Northern District of Texas
525 S Griffin, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: Jessica_Graf@fd.org

August 22, 2022