No. _____

In the

Supreme Court of the United States

_____

Johnny Jasper Williams,

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

_____

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

QUESTION PRESENTED

Whether "generic robbery" is equivalent to the common law form of the offense, or whether, instead, it carries a broader definition?

PARTIES TO THE PROCEEDING

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

TABLE OF CONTENTS

INDEX TO 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 Johnny Jasper Williams seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's judgment and sentence is attached as Appendix A. The first unpublished opinion of the Court of Appeals affirming the judgment is available at *United States v. Williams*, 848 Fed. Appx. 176 (5th Cir. May 19, 2021)(unpublished). It is reprinted in Appendix B to this Petition. The order of this Court vacating the judgment of the Court of Appeals, *Williams v. United States*, 142 S.Ct. 891 (January 24, 2022)(unpublished), is reprinted as Appendix C. The second opinion of the Court of Appeals affirming the judgment in spite of the remand is available at *United States v. William*s, 2022 WL 1171058 (April 20, 2022)(unpublished), and reprinted as Appendix D. Finally, the June 7, 2022 order of the Court of Appeals denying Petitioner's timely Petition for Rehearing is reprinted as Appendix E.

JURISDICTION

The Fifth Circuit denied a timely Petition for Rehearing on June 7, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND GUIDELINES

Texas 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.

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).

STATEMENT OF THE CASE

A. Proceedings in District Court

Petitioner Johnny Jasper Williams pleaded guilty to possessing a firearm in spite of a prior conviction. *See* (Record in the Court of Appeals at 100). A Presentence Report applied an elevated base offense level on the ground that Petitioner'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 144). Petitioner objected because the offense could be committed recklessly, which, he argued, should take the offense outside the definition of a "crime of violence" found in USSG §4B1.2. *See* (Record in the Court of Appeals at 158). The district court overruled the objection and imposed a sentence of 84 months, within the range it believed applicable. *See* (Record in the Court of Appeals at 108, 132).

B. First Proceedings in the Court of Appeals

Petitioner appealed, contending, *inter alia*, that his Texas conviction for robbery did not constitute a "crime of violence" under USSG §4B1.2. See Initial Brief in United States v. Williams, No. 20-11110, 2021 WL 807854 (Filed 5th Cir. March 1, 2021)("First Initial Brief"). He successfully moved to supplement the record with judicial records of his prior robbery conviction, demonstrating that he had been convicted of causing injury during a theft, as opposed to threatening another or placing someone in fear. He thus showed that his Texas robbery offense could be committed recklessly. That possibility, he contended, should defeat any suggestion that the offense has the use of force against the person of another as an element. *See*

First Initial Brief, at **6-7. Further, he contended that Texas robbery-by-injury fell outside the "generic" form of robbery enumerated in USSG §4B1.2. *See id*. at **8-9.

The court below rejected the argument as foreclosed by *United States v. Burris,* 920 F.3d 942, 945 (5th Cir. 2019), *vacated and remanded* 141 S.Ct. 2781 (June 21, 2021), *on remand* 856 Fed. Appx. 547 (5th Cir. August 19, 2021)(unpublished), which held that even reckless robbery-by-injury possesses the use of force against another as an element. *See* [Appx. B]; *United States v. Williams*, 848 Fed. Appx. 176, 176 (5th Cir. March 21, 2021)(unpublished). Subsequently, this Court issued *Borden v. United States*, __U.S.__, 141 S.Ct 1817 (June 10, 2021), holding that reckless offenses lack as an element the use of physical force against the person of another.

C. Proceedings in this Court

Petitioner sought *certiorari* from this Court, arguing that *Borden* represented an intervening development that created a reasonable probability of a different result. *See* Petition for Certiorari in *Williams v. United States*, No. 21-6028, at *5 (Filed October 18, 2021)("First Petition for Certiorari"), *available at* *https://www.supremecourt.gov/DocketPDF/21/21-6028/196660/20211018124811203_Williams%20Cert%20FINAL.pdf* , *last visited September 2, 2022*. Specifically, he contended that the *Borden* decision demonstrated that the Texas robbery offense lacked any element requiring "the use of physical force against the person of another." *See* First Petition for Certiorari, at **5-6. As such, he noted that *Borden* eliminated USSG §4B1.2(a)(1)—the "force clause" of the "crime of

violence" definition -- as an available theory to bring Texas robbery within the definition of a "crime of violence." *See id.*

Petitioner conceded that the court below had previously held that the offense constituted the generic offense "robbery," and therefore conceded that it Fifth Circuit law placed it inside USSG §4B1.2(a)(2). *See id.* at *7 (citing *United States v. Santiesteban-Hernandez*, 469 F.3d 369, 379-382 (5th Cir. 2006)). But he contended that he had a plausible challenge to Fifth Circuit law in that regard. *See id.* at **7-8. He explained that he and other litigants had been previously unable to present that challenge to *Santiesteban-Hernandez*, the relevant Fifth Circuit case equating Teas robbery and the enumerated offense of "robbery." *See id.* at *7. Until *Borden*, he explained, the offense was considered a qualifying offense under USSG §4B1.2(a)(1), the provision's "force clause." *See id.*

The generic definition of "robbery," the Petition contended, had been implicitly decided by *Stokeling v. United States*, __U.S.__, 139 S.Ct. 544 (2019), which recognized that the majority of contemporary robbery statutes define use the common law definition of robbery to define that offense. *See id.* at **7-8; *Stokeling*, 139 S.Ct. at 552. Texas, he argued, employs a definition of "robbery" that exceeds the common law form of the offense in material ways. *See id.*

This Court granted certiorari, vacated the judgment below, and remanded for reconsideration, in spite of *Santiesteban-Hernandez*, which equates Texas robbery with generic robbery. See [Appx. C]; Williams v. United States, No. No. 21-6028, 142 S.Ct. 891 (June 24, 2021). As such, it implicitly found that Petitioner presented a

challenge to *Santiesteban-Hernandez* with a reasonable probability of success. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996)(counseling in favor of GVR where Petitioner can show an "intervening development … reveal(ing) 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…").

D. Second Proceedings in the Court of Appeals

On remand, the Fifth Circuit affirmed again, citing *Santiesteban-Hernandez* for the proposition that "the elements of the Texas robbery statute "substantially correspond to the basic elements of the generic offense." [Appx. D]; *United States v. Williams*, No. 20-11110, 2022 WL 1171058, at *1 (5th Cir. Apr. 20, 2022).

Petitioner sought rehearing *en banc* to reconsider *Santiesteban-Hernandez*. *See* Petition for Rehearing *En Banc* in *United States v. Williams*, No. 20-11110 (Filed 5th Cir. May 25, 2022)("Petition for Rehearing"). In this Petition, he contended that *Santiesteban-Hernandez* conflicted with this Court's precedent, including *Stokeling*, *Borden*, and *Johnson v. United States*, 559 U.S. 133 (2015). *See* Petition for Rehearing, at **6-11. And he pointed to a difference between *Santiesteban-Hernandez* and generic definitions employed in three other circuits. *See id*. at **12-13 (citing *United States v. Pereira-Gomez*, 903 F.3d 155, 163 (2d Cir. 2018); *United States v. McCants*, 952 F.3d 416, 428–429 (3d Cir. 2020); *United States v. Lockley*, 632 F.3d 1238, 1244 (11th Cir. 2011)).

The court of appeals denied the Petition for Rehearing in a single sentence order. *See* [Appx E].

REASONS FOR GRANTING THE PETITION

The generic definition of "robbery" employed below conflicts with multiple precedents of this Court, and reflects a long-standing circuit split on this question.

A. The definition employed below

The court below held that the Texas offense of robbery-by-injury constitutes "generic robbery," a concept used to construe the enumerated offense of "robbery" found in USSG §4B1.2(a)(2). *See* [Appx. D]; *United States v. Williams*, No. 20-11110, 2022 WL 1171058, at *1 (5th Cir. April 20, 2022)(unpublished). In doing so, it endorsed the definition of "generic robbery" found in *United States v. Santiesteban-Hernandez*, 469 F.3d 369 (5th Cir. 2006): "'aggravated larceny,' containing at least the elements of 'misappropriation of property under circumstances involving [immediate] danger to the person.'" *Santiesteban-Hernandez*, 469 F.3d at 380 (quoting LaFave, *Substantive Criminal Law* § 20.3); *see also Williams*, 2022 WL 1171058, at *1 (citing *Santiesteban-Hernandez*).

The Texas offense of robbery-by-injury may be committed by the reckless infliction of injury in the course of a theft. *See* Tex. Penal Code §29.02(a)(1). There need be no causal connection between the injury and the defendant's acquisition of stolen property, nor even between the injury and the *retention* of stolen property. To the contrary the Texas robbery defendant may be convicted for injuring another after the property has been discarded. *See Smith v. State*, 2013 WL 476820, at *3 (Tex. App. – Houston [14th Dist.] 2013)(unpublished)(defendant inflicted injury on security guard after he "pushed the shopping cart holding the (stolen) television into the wall

and ran"). And, of course, the reckless *means rea* means that the Texas robbery defendant need not intend injury at all, and accordingly need not intend to use force for the purpose of acquiring or retaining property. *See Craver v. State*, No. 02-14-00076-CR, 2015 WL 3918057, at *1 (Tex. App.—Fort Worth June 25, 2015, pet. ref'd)(unpublished)(defendant convicted of recklessly jumping off upper floor of department store, injuring by-stander, in flight from theft). Finally, cases from both the robbery-by-injury and robbery-by-threat context show that the Texas robbery defendant need not take property from the immediate presence of the victim. *See Craver*, 2015 WL 3918057, at *1; *State v. Howard*, 333 S.W.3d 137, 140 (Tex. Crim. App. 2011)(robbery-by-threat conviction affirmed where armed defendant stole from convenience store counter, while clerk observed via closed circuit television from another room).

As will be seen, the Texas offense of robbery – held by the court below to constitute "generic robbery" -- is broader than the generic definition of robbery employed by multiple other circuits. It is also broader than the generic definition of counseled by this Court's precedent. This Court should intervene to rectify the division of authority.

B. Conflict with Supreme Court precedent

1. Conflict with Stokeling v. United States

This Court surveyed and carefully examined the standard definition of "robbery" in *Stokeling v. United States*, 139 S.Ct. 544 (2019). *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 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* U.S.S.G. § 4B1.2, cmt., n.1 (1987).

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*. at 550 (quoting 2 J. Bishop, *Criminal Law* § 1156, p. 860 (9th ed. 1923)).

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).

Texas, however, plainly does not require that property be taken *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 obtaining nor even retaining property. This is clear from *Smith v. State*, 2013 WL 476820, at *3 (Tex. App. – Houston [14th Dist.] 2013), in which the defendant inflicted injury against a security guard only after he had discarded the stolen property entirely. Likewise, in *Craver v. State*, No. 02-14-00076-CR, 2015 WL 3918057, at *1 (Tex. App.—Fort Worth June 25, 2015, pet. ref'd), a Texas court affirmed the conviction of a a surreptitious shoplifter who "conceal[ed] merchandise" while a security guard watched him on video. When confronted, the defendant recklessly "lung[ed] over the railing" to escape capture, and he inadvertently "landed on a lady customer in the mall." *Id.* The taking was not from the presence of anyone, and the injury served no purpose at all. A case from the robbery-by-threat context also shows that robbery need not involve theft from the immediate presence of the victim: in *State v. Howard*, 333 S.W.3d 137, 140 (Tex. Crim. App. 2011), the Texas High Court affirmed a robbery conviction was affirmed even though the victim occupied the back of the store during the theft, watching it on television.

These cases show that Texas—unlike most states—does not "require force that overcomes a victim's resistance." Rather, the Texas statute captures injuries inflicted for no reason at all, by accident, or after property has been discarded, provided that they happen to occur during or after a theft or attempted theft. In no sense did the defendants in *Craver* or *Smith* exercise force to overcome a victim's resistance to the deprivation of property.

Stokeling recognizes the prominence of the common-law formulation of robbery, both in federal law and in most American jurisdictions. In particular, the classic requirements of force-to-overcome-resistance and in-person-confrontation persist in most places, and they make up part of the prevailing contemporary understanding of "robbery." They are not requirements of Texas robbery.

2. Conflict with Borden v. United States

Santiesteban-Hernandez also stands in tension with this Court's recent decision in *Borden*. In *Borden*, five justices agreed that reckless offenses fall outside the ACCA's definition of a "violent felony." 141 S. Ct. at 1821–1822 (plurality op.); *id.* at 1835 (Thomas, J., concurring). The primary opinion recognized a mismatch between the ordinary understanding of the term "violent felony" and offenses that can be committed by a reckless accident. *Id*. at 1831. To illustrate this mismatch, the plurality opinion recited the facts of *Craver*, a 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 exclude that same crime. *See 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).

3. Conflict with Johnson v. United States

Santiesteban-Hernandez created a definition of "robbery" designed to capture the federal/common-law formulation as well as Texas's broader definition: "misappropriation of property under circumstances involving immediate danger to the person." *Santiesteban-Hernandez*, 469 F.3d at 381.

Intervening years have shown the impossibility of applying uncertain risk-based standards to the judicially imagined ordinary case of a crime. *Johnson v. United States*, 576 U.S. 591 (2015), casts serious doubt on the workability of *Santiesteban-Hernandez*'s definition. *Johnson* concluded that federal courts cannot reliably determine which offenses, committed in their usual and ordinary fashion,

pose a serious potential risk of physical injury to the person of another. *Johnson*, 576 U.S. at 603. But that is exactly the type of inquiry invited by *Santiesteban-Hernandez*. Deciding whether the elements of an offense involve "immediate danger to a person" can only be expected to yield indeterminate and unpredictable results.

4. Conflict among the circuits

Several courts of appeals have adopted definitions of generic robbery that correspond to the common-law formulation, rather than the broader *Santiesteban-Hernandez* formulation. To be sure, some circuits have cited the *Santiesteban-Hernandez* formulation with approval. *See*, e.g., *United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016). But the vast majority of those cases involve robbery offenses that use the common-law formulation. Those decisions do not shed much light on crimes like Texas's robbery-by-injury, which meet the broader *Santiesteban-Hernandez* definition but not the common-law formulation. *Cf. United States v. Yates*, 866 F.3d 723, 734 (6th Cir. 2017) (declining to decide whether the "immediate danger" element should be defined "with reference to the serious bodily injury suffered by or threatened against the victim or with reference to the force used by the defendant).

But where the distinction makes a difference—i.e., where the robbery statute is broader than the common-law formulation—other circuits embrace the common-law view. For example, 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, that "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.*

Accordingly, it is likely that Petitioner would have succeeded in obtaining relief from his substantial term of imprisonment – imposed for the simple possession of a

gun following a felony conviction – in other courts. His sentence, and the meaning of federal law generally, should not depend on accidents of geography.

C. The conflicts merits this Court's review.

The accuracy of Petitioner's sentence depends on the notion that his Texas offense equates to the generic definition of "robbery," an offense enumerated in USSG §4B1.2's definition of a crime of violence. *See* USSG §4B1.2(a)(2). The Guideline, a creature of statutory direction, *see* 28 U.S.C. §994(h), can add many years of imprisonment to a criminal sentence, *see* USSG §4B1.1(b), and is heavily litigated. Indeed, a simple Westlaw search reveals 358 cases citing the Guideline in the past 12 months. Further, the very particular question on which this case turns – the generic definition of "robbery" – appears itself to arise with some frequency. Another Westlaw search of the term "generic robbery" in the field of federal district and appellate opinions (without the time limitation) produces 266 results.

The case, in other words, turns on a question that is of immense importance to federal criminal justice system. Ideally, of course, circuit splits involving the Guidelines would be resolved by the Sentencing Commission. *See Buford v. United States*, 532 U.S. 59 (2001). Here, however, some division of authority has persisted for more than ten years, with no effort to address the question. ***Compar****e 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***.'")(emphasis added) ***with*** *Santiesteban-Hernandez*, 469 F.3d at 380 (holding 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***.'") (quoting LaFave, *Substantive Criminal Law* § 20.3)(emphasis added). Further, the definition of generic robbery may implicate important statutory provisions, which the Sentencing Commission cannot construe. *See e.g. Thompson v. United States*, No. 4:06CR31, 2022 WL 441613, at *4 (E.D. Va. Feb. 11, 2022)("Although the dispositive analysis in this case turns on the comparison of California § 211 robbery to the three exemplar federal robbery crimes listed in § 3559(c)(2)(F)(i), as both parties acknowledge, case law analyzing 'generic' robbery is instructive, as is consideration of Congress's past treatment of the person/property divide when classifying 'violent" crimes.'").

At any rate, the case involves a clear and important circuit split that the Sentencing Commission has not resolved. This Court should do so.

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 6th day of September 2022.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner