

No. 17-_____

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL MORIN,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Whether there is a reasonable probability of a different result if this Court grants certiorari and rules in favor of the defendant in *Quarles v. United States*, No. 17-778 (Petition for Certiorari filed November 24, 2017); *United States v. Stitt*, No. 17-765 (Petition for Certiorari filed November 21, 2017); *Martinez-Cerda v. United States*, No. 17-7173 (Petition for Certiorari filed September 19, 2017); *Allen v. United States*, No. 17-5684 (Petition for Certiorari filed December 27, 2017), and/or some other case addressing the required fit between a defendant's prior statute of conviction and a "generic" offense for the purposes of a criminal history enhancement?

PARTIES

Daniel Morin, is the petitioner, who was the defendant-appellant below. The United States of America is the respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Daniel Morin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Morin*, 706 Fed. Appx. 218 (5th Cir. December 18, 2017)(unpublished), and is provided in the Appendices to the Petition. [Appx. B]. The judgment of conviction and sentence was entered by the district court on January 13, 2017 and this judgment is included in the Appendices as well. [Appx. A].

JURISDICTIONAL STATEMENT

The Fifth Circuit affirmed the district court's judgment on December 18, 2017. [Appx. B]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND FEDERAL SENTENCING GUIDELINES INVOLVED

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).

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.

Texas Penal Code §29.03 provides:

(a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:

(1) causes serious bodily injury to another;

(2) uses or exhibits a deadly weapon; or

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:

(A) 65 years of age or older; or

(B) a disabled person.

(b) An offense under this section is a felony of the first degree.

(c) In this section, “disabled person” means an individual with a mental, physical, or developmental disability who is substantially unable to protect himself from harm.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Daniel Morin was caught possessing a firearm in a gun store, in spite of his prior felony convictions. *See* (ROA.87).¹ He pleaded guilty to a violation of 18 U.S.C. §922(g), which forbids gun possession by felons. *See* (ROA.86-87).

A Presentence Report (PSR) calculated a Federal Sentencing Guideline range of 41-51 months imprisonment, owing to a base offense level of 22, a two level reduction for acceptance of responsibility, and a criminal history category of III. *See* (ROA.203, 212). Probation calculated a base offense level of 22 because it regarded the defendant's two related Texas aggravated robbery convictions as "crimes of violence" under USSG §4B1.2. *See* (ROA.203); USSG §2K2.1(a). In the absence of this conclusion, the base offense level would have been 20, because the defendant possessed a firearm capable of accepting a large capacity magazine. *See* USSG §2K2.1(a). Further, in the absence of the crime of violence designation, the criminal history score would have been 3 rather than 4, and the criminal history category would have been II, rather than III. *See* (ROA.205-206, 212); USSG Ch. 5A. Probation added one criminal history point because USSG §4A1.1(e) calls for an extra point when a "crime of violence" is disregarded due to the related case rule of USSG §4A1.2. *See* (ROA.206); USSG §4A1.1(e).

Neither Probation nor the government ever produced any judicial record from the prior robbery cases to substantiate them. Nonetheless, the district court adopted the PSR and its recommended range of 41-51 months imprisonment. *See* (ROA.181-182). Citing the defendant's criminal history, it imposed a sentence of 70 months imprisonment. *See* (ROA.186-188). It gave no indication that the sentence would have

¹Citations to the record on appeal are included in hopes that they are of use to the government in answering the Petition or the Court in evaluating it.

been the same under a different Guideline range. *See* (ROA.186-188).

B. The Appeal

On appeal, Petitioner argued that his prior Texas aggravated robbery convictions were not “crimes of violence” under §§2K2.1 and 4B1.2. The court of appeals rejected the argument as foreclosed by *United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006). *See* [Appx. B, at 2].

REASONS FOR GRANTING THE PETITION

- I. **There is a reasonable probability of a different result if this Court grants certiorari and rules in favor of the defendant in *Quarles v. United States*, No. 17-778 (Petition for Certiorari filed November 24, 2017); *United States v. Stitt*, No. 17-765 (Petition for Certiorari filed November 21, 2017); *Martinez-Cerda v. United States*, No. 17-7173 (Petition for Certiorari filed September 19, 2017); *Allen v. United States*, No. 17-5684 (Petition for Certiorari filed December 27, 2017), and/or some other case addressing the required fit between a defendant’s prior statute of conviction and a “generic” offense for the purposes of a criminal history enhancement.**

Petitioner Daniel Morin received an enhanced Guideline sentencing due to his prior Texas robbery conviction. Guideline 2K2.1 provides an enhanced offense level under the Guidelines when the defendant had been previously convicted of a “crime of violence” under USSG §§2K2.1 and 4B1.2. The definition used in connection with these Guidelines says that “crime of violence” includes “robbery.” See USSG §4B1.2(a)(2). On appeal, the Fifth Circuit affirmed this enhanced sentence on the grounds that it constituted this enumerated offense of “robbery.” See [Appx. B, at 2].

This Court’s seminal opinion in *Taylor v. United States*, 495 U.S. 575 (1991), addressed the required fit between a defendant’s prior offense and an offense enumerated in a criminal history enhancement. In *Taylor*, the defendant had been convicted of a Missouri offense denominated burglary. See *Taylor*, 495 U.S. at 599. That conviction was thought by the lower courts to be equivalent to “burglary” as the Armed Career Criminal Act (ACCA) used the term – ACCA defines burglary as a “violent felony.” See *id.* at 579-580. This Court first identified a “generic” definition of burglary, which it thought to correspond roughly to the “burglary” offense set forth in the majority of state codes. See *id.* at 598-599. A state offense that shared all of the elements of “generic burglary,” this Court held, could be used to enhance the sentence under ACCA. See *id.* at 599. A prior offense substantially broader than “generic burglary,” that is, an offense that criminalized conduct outside the generic definition,

could not be so used. *See id.* at 599-602.

In *United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006), the Fifth Circuit applied the *Taylor* “generic offense” methodology to the enumerated offense of “robbery” in USSG §2L1.2. *See Santiesteban-Hernandez*, 469 F.3d at 378-382. It recognized that most states define “robbery” differently, and in certain respects more narrowly, than Texas. *See id.* at 381. Specifically, while most states require a threatened use of force, Texas permits conviction upon a finding of bodily injury inflicted in connection with the theft. *See id.* The *Santiesteban-Hernandez* court might also have noted that Texas does not require that the defendant acquire property by force, intimidation or injury. Instead, it requires only that injury or threat occur in the course of a theft, which extends beyond the completion of the robbery, and, indeed, even beyond the moment that a thief discards property. *See Smith v. State*, 2013 Tex. App. LEXIS 1146, at *6-8 (Tex. App. Houston 14th Dist. Feb. 7 2013)(unpublished). By contrast, the majority of states require that the defendant’s violence be the way that he or she acquires of property – that is, they require a causal connection. *See Santiesteban-Hernandez*, 469 F.3d at 380 (“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.”)(emphasis added). Nonetheless, *Santiesteban-Hernandez* qualified the Texas offense as “generic robbery” on the theory that any differences were minor. *Santiesteban-Hernandez* was used in the opinion below to qualify the same offense under USSG §4B1.2. *See* [Appx. B, at 2].

This Court has before it several petitions that address the necessary fit between a defendant’s prior statute of conviction and a generic, enumerated offense. In *Quarles v. United States*, No. 17-778, Petition for Certiorari, at p. I (filed November 24, 2017), a defendant Petitioner has asked the Court to address whether an offense may be “generic burglary,” even if it does not require that the defendant form an intent to

commit a crime at the time of trespassory entry. In *United States v. Stitt*, 17-765, Petition for Certiorari, at p. I (filed November 21, 2017), the Solicitor General has asked the Court to determine whether a crime may be “generic burglary” even if it may be committed against a vehicle. In *Martinez-Cerda v. United States*, 17-7173, at pp.4-5 (filed September 19, 2017), the defendant Petitioner asks this Court to decide whether an offense may be considered “generic aggravated assault” even if it is committed recklessly. And in *Allen v. United States*, No. 17-5684, *Petition for Certiorari*, at pp.12-13 (filed December 27, 2017), the defendant Petitioner asks this Court to consider, perhaps incidentally to other questions, whether a burglary statute may be considered generic even if it can be committed against the curtilage of a home.

The courts of appeals are divided as to how substantial the differences may be between a prior offense and an enumerated offense without defeating a criminal history enhancement. **Compare** *United States v. Mungia-Portillo*, 484 F.3d 813, 816-817 (5th Cir. 2007) **with** *United States v. Esparza-Herrera*, 557 F.3d 1019, 1023 (9th Cir. 2009). In the event that the Court grants *certiorari* in one or more of these cases, it can and should resolve that divisive question. That question is the precisely the question on which *Santiesteban-Hernandez* and the opinion below turn.

This Court “regularly hold(s) cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be ‘GVR’d’ when the case is decided.” *Lawrence v. Chater*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting). Ultimately, GVR is appropriate if the decision “reveal(s) 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...” *Lawrence*, 516 U.S. at 167. In the event that this Court grants certiorari on one of these issues and rules for the defendant, it is

reasonably probable that the court will reach a different result as to the validity of *Santiesteban-Hernandez*.

It is true that an offense may also be a “crime of violence” under §4B1.2 if it has as an element “the use, attempted use, or threatened use of physical force against the person of another.” USSG §4B1.2(a)(1). Yet the Fifth Circuit has repeatedly – and recently – reaffirmed that the mere infliction of bodily injury does not constitute “the use of force” for the purpose of Guidelines “crime of violence” enhancement. *See United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006) *United States v. Reyes-Contreras*, ___F.3d ___, 2018 U.S. App. LEXIS 2885 (February 6, 2018); *United States v. Rico-Mejia*, 859 F.3d 318, 322-323 (5th Cir. 2017); *United States v. Fennell*, 695 Fed. Appx. 780 (5th Cir. August 16, 2017)(unpublished); *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276-277 (5th Cir. 2010); *United States v. Johnson*, 286 Fed. Appx. 155, 157 (5th Cir. 2008)(unpublished); *United States v. De La Rosa-Hernandez*, 264 Fed. Appx. 446, 449 (5th Cir. 2008)(unpublished) *United States v. Martinez-Mata*, 393 F.3d 625, 629 (5th Cir. 2003); *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004)(*en banc*). Indeed, it said as much regarding the Texas robbery statute in *Santiesteban-Hernandez*. *See Santiesteban-Hernandez*, 469 F.3d at 379 (“As a preliminary matter, Santiesteban argues that Texas Penal Code § 29.02 is not a crime of violence because it does not define ‘robbery’ in terms of the use or threat of force. If our analysis were to focus on the second prong of the crime of violence definition, which has a force requirement, this omission would be dispositive.”)(*dicta*).

The Fifth Circuit has recently held that aggravated robbery with a deadly weapon represents a distinct offense that qualifies as the use of force. *See United States v. Lerma*, 877 F.3d 628 (5th Cir. December 14, 2017). But here, there were no documents narrowing Mr. Morin’s prior robbery offense to this version of the statute. Accordingly, the cognizable records in the case fail to exclude the commission of

aggravated robbery by means other than a deadly weapon, such as the commission of simple robbery against an elderly or disabled victim. *See* Tex. Penal Code §29.03.² This version of the offense would not change the use of force analysis.

It is also true that the court below reviewed Petitioner’s argument for plain error, as it was not preserved in district court. *See* Fed. R. Crim. P. 52(b). But error may become plain any time on direct review. *See Henderson v. United States*, __U.S. __, 133 S.Ct. 1121 (2013). And plain Guideline error is usually reversible even when it is not preserved, because it tends to affect the sentence imposed, *see Molina-Martinez v. United States*, __U.S. __, 136 S.Ct. 1338, 1346 (2016), and the fairness of the proceedings, *see United States v. Price*, 516 F.3d 285, 290 (5th Cir. 2008); *United States v. Andino-Ortega*, 608 F.3d 310, 311-312 (5th Cir. 2010).

In any case, GVR is not a decision on the merits. *See Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001); *accord State Tax Commission v. Van Cott*, 306 U.S. 511, 515-516 (1939). Accordingly, procedural obstacles to reversal – such as the consequences of non-preservation – should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964)(*per curiam*)(GVR “has been our practice in analogous situations where, not certain that the case was free from all obstacles to

²Further, it is doubtful that *Lerma* survives the Fifth Circuit’s more recent *en banc* decision in *United States v. Herrold*, __F.3d__, 2018 U.S. App. LEXIS 4068 (5th Cir. Feb. 20, 2018). *Lerma* relies solely on the simple disjunctive structure of the Texas aggravated robbery statute to conclude that it is a divisible statute, and hence to conclude that commission of the offense by deadly weapon is distinct offense from commission of simple robbery against a disabled or senior victim. *See Lerma*, 877 F.3d at 633-635. But *Herrold* (properly, *see Mathis v. United States*, __U.S. __, 136 S.Ct. 2243 (2016)) rejects the notion that the disjunctive structure of a prior statute of conviction can render it divisible for the purposes of the categorical approach. *See Herrold*, __F.3d__, 2018 U.S. App. LEXIS 4068, at *15-18. Rather, under *Herrold*, the government must show that the defendant would have enjoyed a right to jury unanimity on each statutory alternative it wishes to isolate. *See id.* Here, the Texas courts have rejected that right of unanimity as to the factors that render simple Texas robbery aggravated robbery. *See Woodard v. State*, 294 S.W.3d 605, 609 (Tex. App. - Houston [1st Dist.] 2009). Accordingly, even if the government had introduced the proper records – and it did not – it could not exclude the possibility that the defendant received an aggravated robbery conviction for committing simple robbery against an elderly or disabled victim, rather than for committing it with a deadly weapon. In such case, the offense would plainly lack the use of force under Fifth Circuit precedent.

reversal on an intervening precedent”); *Torres-Valencia v. United States*, 464 U.S. 44 (1983)(*per curiam*)(GVR utilized over government’s objection where error was conceded; government’s harmless error argument should be presented to the Court of Appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting)(speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945)(remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the court of Appeals).

CONCLUSION

Petitioner respectfully prays that this Honorable Court hold the instant case until it renders a decision in *Quarles v. United States*, No. 17-778 (Petition for Certiorari filed November 24, 2017); *United States v. Stitt*, No. 17-765 (Petition for Certiorari filed November 21, 2017); *Martinez-Cerda v. United States*, No. 17-7173 (Petition for Certiorari filed September 19, 2017); *Allen v. United States*, No. 17-5684 (Petition for Certiorari filed December 27, 2017), and/or some other case addressing the required fit between a defendant’s prior statute of conviction and a “generic” offense for the purposes of a criminal history enhancement. He further prays that it grant *certiorari*, vacate the judgment below, and remand in light of that case. He finally prays for such relief as to which he may be justly entitled.

Respectfully submitted this 19th day of March 2018.

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