No. 17-6065

IN THE SUPREME COURT OF THE UNITED STATES

RAMON HERNANDEZ-RAMIREZ, AKA RAMON HERNANDEZ, AND
JOSE ARMANDO RAMOS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a conviction for aggravated assault, in violation of Tex. Penal Code Ann. § 22.02 (West 2009) or Tex. Penal Code § 22.02 (West 2011), qualified as "aggravated assault" under the commentary to the since-repealed version of Sentencing Guidelines § 2L1.2(b)(1)(A) (2015).

2. Whether 18 U.S.C. 16(b), as incorporated into the definition of the term "aggravated felony" in 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A22-A23) (Hernandez-Ramirez) is not published in the Federal Reporter but is reprinted at 693 Fed. Appx. 371. The opinion of the court of appeals (Pet. App. C26-C27) (Ramos) is not published in the Federal Reporter but is reprinted at 690 Fed. Appx. 880. The orders of the district court are unreported.

JURISDICTION

The judgments of the court of appeals were entered on June 19, 2017 (Ramos) and July 19, 2017 (Hernandez-Ramirez). Petitioner

Ramos did not seek rehearing; petitioner Hernandez-Ramirez's petition for rehearing was denied on August 23, 2017 (Pet. App. B24-B25). The petition for a writ of certiorari was filed on September 18, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in separate proceedings in the United States District Court for the Southern District of Texas, petitioners were convicted of unlawfully reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(2). Hernandez-Ramirez Judgment 1; Ramos Judgment 1; see Pet. 6. Petitioner Hernandez-Ramirez was sentenced to 30 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. Petitioner Ramos was sentenced to 51 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed in separate decisions. Pet. App. A22-A23, C26-C27.

1. The offense of illegal reentry after having been removed carries a default maximum term of imprisonment of two years. 8 U.S.C. 1326(a). If a defendant is convicted of illegal reentry after a prior felony conviction, however, the maximum term of imprisonment is ten years, and if the defendant was previously convicted of an "aggravated felony," the maximum term of imprisonment is 20 years. 8 U.S.C. 1326(b)(1)-(2). An "aggravated

felony" includes a "crime of violence" as defined in 18 U.S.C. 16(b), i.e., an offense "that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." See 8 U.S.C. 1326(b)(2) (referring to the definition of "aggravated felony" in 8 U.S.C. 1101(a)(43), which in turn includes the definition of a "crime of violence" in 8 U.S.C. 16(b)). In addition, until November 1, 2016, the Sentencing Guidelines provided that a defendant convicted of illegal reentry faced a 16-level enhancement if he had previously been convicted of a "crime of violence," which the commentary defined to include "aggravated assault." Sentencing Guidelines § 2L1.2(b)(1)(A) (2015); id. § 2L1.2, comment. (n.(1)(B)(iii)).

To determine whether a prior conviction constitutes a "crime of violence," courts apply the "categorical approach," which as relevant here involves comparing the elements of the statute of conviction to the elements of a "generic" offense listed in the statute or the Guidelines. See Mathis v. United States, 136 S. Ct. 2243, 2249 (2016). If the statute of conviction consists of elements that are the same as, or narrower than, the generic offense, the prior offense categorically qualifies as a "crime of violence." See ibid. But if the statute of conviction defines a crime broader than the generic offense, the defendant's prior conviction does not qualify as a "crime of violence" unless

(1) the statute is "divisible" into multiple crimes with different elements, and (2) the government can show (using a limited set of record documents) that the jury necessarily found, or the defendant necessarily admitted, the elements of the generic offense. Ibid.; see Descamps v. United States, 133 S. Ct. 2276, 2284 (2013); Shepard v. United States, 544 U.S. 13, 26 (2005).

2. Hernandez-Ramirez

a. In November 2010, petitioner Hernandez-Ramirez, a citizen and national of Mexico who had previously been removed from the United States, pleaded guilty to aggravated assault with a deadly weapon (specifically, a motor vehicle), in violation of Tex. Penal Code Ann. § 22.02 (West 2009). Presentence Investigation Report (PSR) ¶¶ 6, 7, 29; see 11/24/10 Tex. Judgment 1-2. The indictment alleged that in May 2010, Hernandez-Ramirez was found intoxicated and passed out behind the wheel of a car with the engine running. PSR ¶ 29. When a security officer woke Hernandez-Ramirez, he "became physically aggressive," "grabbed" the officer's wrist, and "pulled [the officer] into the vehicle." Ibid. Hernandez-Ramirez then "drove at a high rate of speed with [the officer's] right arm pinned inside the vehicle" and refused the officer's order to stop. Ibid. After driving roughly 100 to 150 yards, Hernandez-Ramirez "suddenly slammed on the brake and made a sharp left turn," which caused the officer to be "thrown from the vehicle." Ibid. The car then "ran over [the officer's]

upper right shoulder and arm." Ibid. Hernandez-Ramirez was convicted of assault with a deadly weapon (a vehicle) and sentenced to four years of imprisonment. Ibid.; see PSR ¶ 6; 9/29/10 Tex. Judgment 1-2. In September 2012, he was again removed from the United States. PSR ¶ 6.

b. On March 15, 2016, U.S. Border Patrol agents found Hernandez-Ramirez in Texas after he had illegally crossed the U.S.-Mexico border earlier that day. PSR ¶ 5. Hernandez-Ramirez had not obtained permission from the U.S. government to enter the country. PSR ¶¶ 6-8. Hernandez-Ramirez was charged with, and pleaded guilty to, illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(2). PSR ¶¶ 1-2; Judgment 1.

In advance of Hernandez-Ramirez's sentencing, the Probation Office prepared a PSR. The PSR calculated a base offense level of 8 (Sentencing Guidelines § 2L1.2(a)); recommended a 16-level enhancement because Hernandez-Ramirez's Texas conviction for aggravated assault with a deadly weapon qualified as a "crime of violence" (Sentencing Guidelines § 2L1.2(b)(1)(A)(ii)); and recommended a three-level reduction for acceptance of responsibility (Sentencing Guidelines § 3E1.1). PSR ¶¶ 14-22.[1]

[1] Although the PSR does not identify which version of the Guidelines it used, it is likely that the PSR applied the 2015 Guidelines. The sentencing hearing was conducted in August 2016, and the Guidelines instruct that when consistent with the Ex Post Facto Clause, courts should apply the Guidelines in effect at the

The resulting total offense level of 21, combined with a criminal history category III, yielded an advisory Guidelines sentencing range of 46 to 57 months of imprisonment. PSR ¶¶ 23, 31, 52. The PSR also determined that Hernandez-Ramirez's Texas aggravated assault conviction qualified as a "crime of violence" under 8 U.S.C. 16(b) and concluded that he faced a statutory sentencing range of zero to 20 years of imprisonment under 8 U.S.C. 1326(b)(2). PSR ¶ 51.

Hernandez-Ramirez objected to the PSR, arguing that his Texas aggravated assault conviction did not constitute "a '[c]rime of [v]iolence' for purposes of U.S.S.G. § 2L1.2" because Texas Penal Code § 22.02(a) (West. 2009) "is overbroad and indivisible." Objections to PSR 1, 6. Specifically, Hernandez-Ramirez contended that "generic aggravated assault" under the Guidelines requires a mens rea greater than recklessness, but a defendant may be convicted of aggravated assault in Texas based on reckless conduct, and the statute is not divisible by mental state. Ibid. (internal quotation marks omitted); see id. at 1-6. Hernandez-Ramirez did not challenge the applicability of the 20-year statutory maximum. Id. at 1-6.

The district court overruled Hernandez-Ramirez's objection to the 16-level enhancement and adopted the recommendations in the

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time of sentencing. See Sentencing Guidelines § 1B1.11 (2015); see also Pet. 5.

PSR. Statement of Reasons 1; Sent. Tr. 11-12. After calculating a Guidelines range of 46-57 months, the court imposed a below-Guidelines sentence of 30 months and stated that the sentence "is sufficient and not greater than necessary to meet the goals of [18 U.S.C.] 3553(a)." Hernandez-Ramirez Sent. Tr. 15; see id. at 12-15; Hernandez-Ramirez Statement of Reasons 3.

c. The court of appeals affirmed. Pet. App. A22-A23. Relying on circuit precedent, it rejected Hernandez-Ramirez's argument "that Texas aggravated assault is broader than generic aggravated assault." Id. at A23 (citing United States v. Shepherd, 848 F.3d 425, 427-428 (5th Cir. 2017); United States v. Villasenor-Ortiz, 675 Fed. Appx. 424 (5th Cir.) (per curiam), cert. denied, No. 16-9422 (Oct. 2, 2017); and United States v. Guillen-Alvarez, 489 F.3d 197, 198 (5th Cir.), cert. denied, 552 U.S. 967 (2007)). The court thus did not disturb the district court's holding that Hernandez-Ramirez's Texas aggravated assault conviction constituted a "crime of violence" under the 2015 version of Sentencing Guidelines 2L1.2(b)(1)(A)(ii) then in effect. Ibid. The court of appeals also rejected Hernandez-Ramirez's argument -- made for the first time on appeal -- that the district court committed reversible plain error by not holding that the definition of "crime of violence" in 18 U.S.C. 16(b) is unconstitutionally vague. Ibid. (citing United States v. Gonzalez-Longoria, 831 F.3d

670, 672-679 (5th Cir.) (en banc), petition for cert. pending, No. 16-6259 (filed Sept. 29, 2016).

3. Ramos

a. In March 2015, petitioner Ramos, a citizen and national of El Salvador who had previously been removed from the United States, pleaded guilty to aggravated assault with a deadly weapon, in violation of Tex. Penal Code Ann. § 22.02 (West 2011). PSR ¶¶ 5, 7, 26, 28-29; see also 3/6/15 Tex. Judgment 1. Court records reflect that Ramos's crime involved stabbing two victims with a knife. PSR ¶¶ 7, 26. Ramos was sentenced to two years of imprisonment. PSR ¶ 26. In December 2015, he was again removed from the United States. Ibid.

b. On April 18, 2016, U.S. Border Patrol agents found Ramos in the United States after he had illegally crossed the U.S.-Mexico border earlier that day. PSR ¶ 5. Ramos had not received permission from the U.S. government to enter the country. PSR ¶ 8. Ramos was charged with, and pleaded guilty to, illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b). PSR ¶¶ 2-3; Judgment 1.

The Probation Office prepared a PSR, which applied the 2015 Sentencing Guidelines and included the same Sentencing Guidelines calculations that had been recommended for Hernandez-Ramirez: a base offense level of 8 (Section 2L1.2(a)); a 16-level enhancement for having previously been convicted of a crime of violence

(Section 2L1.2(b)(1)(A)(ii)); and a three-level reduction for acceptance of responsibility (Section 3E1.1). PSR ¶¶ 15-22. The resulting offense level of 21, combined with Ramos's criminal history category II, resulted in an advisory Guidelines sentencing range of 41-51 months of imprisonment. PSR ¶¶ 24, 27, 56. In light of Ramos's Texas conviction for aggravated assault, the PSR also concluded that Ramos was subject to a statutory sentencing range of zero to 20 years of imprisonment. PSR ¶ 55 (citing 8 U.S.C. 1326(a) and (b)).

Ramos did not object to the 16-level enhancement or to the 20-year statutory maximum. See Pet. App. C26-C27; Sent. Tr. 3-4. The district court adopted the PSR without change, and imposed a Guidelines sentence of 51 months of imprisonment. See Ramos Statement of Reasons 1; Ramos Sent. Tr. 4, 7-8.

c. The court of appeals affirmed. Pet. App. C26-C27. Because Ramos had not objected to the 16-level enhancement or the 20-year statutory maximum in the district court, the court of appeals reviewed his challenges to them for plain error. Ibid. Relying on the same precedent as it had in Hernandez-Ramirez's case, the court determined that (1) "a conviction for aggravated assault in violation of Texas Penal Code § 22.02 qualifies as the enumerated offense of aggravated assault, and, thus, a crime of violence for purposes of § 2L1.2(b)(1)(A)(ii)," and (2) the district court did not commit plain error by failing to hold that

the definition of "crime of violence" in 18 U.S.C. 16(b) is unconstitutionally vague. Pet. App. C26-27.

ARGUMENT

Petitioners contend (Pet. 9-19) that the court of appeals erred in its determination that their prior Texas convictions for aggravated assault qualified as crimes of violence under former Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2015). Review of the court of appeals' decision is unwarranted because it interprets the advisory Sentencing Guidelines and because the Sentencing Commission has since amended Section 2L1.2 to remove the crime-of-violence enhancement at issue here. Moreover, while petitioners allege that the courts of appeals are divided on the question presented, the division is far narrower than petitioners suggest.

Petitioners also contend (Pet. 20) that the definition of "crime of violence" in 18 U.S.C. 16(b) is unconstitutionally vague, and they ask the Court to hold the petition for a writ of certiorari pending the Court's decision in Sessions v. Dimaya, No. 15-1498 (reargued Oct. 2, 2017), and then dispose of it as appropriate in light of that decision. Because petitioners' sentences would be lawful even if the Court holds in Dimaya that Section 16(b) is unconstitutionally vague, there is no reason to hold the petition for Dimaya.

1. Petitioners' contention (Pet. 9-19) that the court of appeals erred in determining that Texas's aggravated assault statute corresponds to generic aggravated assault raises only an issue of interpretation of a now-repealed provision of the advisory Sentencing Guidelines and does not warrant review. This Court has recently and repeatedly denied review in other cases involving whether a particular state offense constitutes "aggravated assault" under the 2015 version of Sentencing Guidelines § 2L1.2,[2] and the same result is appropriate here.

a. This Court does not ordinarily review disputes over the interpretation of the Guidelines because the Sentencing Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991); see United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."); Buford v. United States, 532 U.S. 59, 66 (2001) ("Insofar as greater uniformity is necessary, the Commission can

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[2] See Cervantes-Sandoval v. United States, 137 S. Ct. 2266 (No. 16-8192); Hernandez-Cifuentes v. United States, 137 S. Ct. 2264 (No. 16-7689); Saldierna-Rojas v. United States, 137 S. Ct. 2269 (No. 16-8536); Torres-Jaime v. United States, 137 S. Ct. 1373 (No. 16-5853).

provide it."). After Booker, this Court's longstanding reluctance to decide interpretive questions about the Guidelines is even more appropriate. Regardless of the merit of petitioners' arguments, each sentencing court was free to examine the record evidence -- not just petitioners' offenses of conviction -- when determining the most appropriate sentence to impose. Indeed, each district court did exactly that. For example, in sentencing Hernandez-Ramirez, the court varied downward from the calculated range of 46 to 57 months of imprisonment to impose a sentence of 30 months. See Sent. Tr. 12 (court applying 16-level enhancement, stating that the court "still ha[s] to decide what [it] think[s] is right," and considering a wide array of factors in imposing a below-Guidelines sentence of 30 months).

Adherence to the Court's longstanding practice is especially warranted here, as the Sentencing Commission recently exercised its power with respect to the specific provision at issue in this case and amended Section 2L1.2, effective November 1, 2016, eliminating the "crime of violence" enhancement and replacing it with enhancements based on the length of the sentence imposed for the prior offense. See Sentencing Guidelines Supp. App. C, Amend. 802. Although a similar definition of "crime of violence" still exists under Section 4B1.2(a)(2) of the Guidelines, see Pet. 14, the Commission's amendment to Section 2L1.2 substantially reduces the importance of the question presented in this case.

Furthermore, the Sentencing Commission continues to study the "statutory and guideline definitions relating to the nature of a defendant's prior conviction (e.g., 'crime of violence,' 'aggravated felony' * * *) and the impact of such definitions on the relevant statutory and guideline provisions," including Section 4B1.2(a)(2). 81 Fed. Reg. 37,241, 37,241 (June 9, 2016). The Commission also continues to work "to resolve conflicting interpretations of the guidelines by the federal courts." Ibid. And even if the proper application of "crime of violence" in Sentencing Guideline 4B1.2(a)(2) warranted review, this case does not present that question because the court of appeals did not address that provision's applicability to either petitioner. See Pet. App. A22-23; id. at C26-27.

b. Petitioners assert (Pet. 9-19) that the courts of appeals are divided on the question whether a statute criminalizing reckless assault is a categorical match for generic "aggravated assault" under the Sentencing Guidelines. As discussed above, however, any disagreement on that question would not warrant this Court's review because the issue arises under a now-defunct Sentencing Guidelines provision. In any event, any division of authority is far narrower than petitioners suggest.

Texas Penal Code Section 22.01 criminalizes assault, defined to include "intentionally, knowingly, or recklessly caus[ing] bodily injury to another." Tex. Penal Code Ann. § 22.01(a)(1)

(West 2009); Tex. Penal Code Ann. § 22.01(a)(1) (West 2011). Section 22.02 renders that assault "[a]ggravated" if the defendant "causes serious bodily injury" to the victim or "uses or exhibits a deadly weapon during the commission of the assault. Tex. Penal Code Ann. § 22.02(a)(1)-(2) (West 2009); Tex. Penal Code Ann. § 22.02(a)(1)-(2) (West 2011).

Petitioners maintain (Pet. 9) that "[t]he Fourth, Sixth, and Ninth Circuits have held that generic aggravated assault does not include offenses that were committed with a merely reckless state of mind." But although a 50-state survey by the Ninth Circuit appears to have viewed the statute as requiring a lesser mens rea requirement than the one it ascribed to generic aggravated assault, see United States v. Garcia-Jimenez, 807 F.3d 1079, 1086 n.7 (2015), neither the Sixth nor the Ninth Circuit has directly confronted a case involving the question whether Section 22.02 constitutes generic aggravated assault, see United States v. Cooper, 739 F.3d 873, 880 (6th Cir.), cert. denied, 134 S. Ct. 1528 (2014); United States v. McFalls, 592 F.3d 707, 716-717 (6th Cir. 2010); United States v. Esparza-Herrera, 557 F.3d 1019, 1022-1025 (9th Cir. 2009). And although the Fourth Circuit decided that question differently from the court below, see United States v. Barcenas-Yanez, 826 F.3d 752, 756-757 (2016), the Fourth Circuit's disagreement with the Fifth Circuit on the proper classification of a particular Texas offense under a repealed

provision of the Sentencing Guidelines does not warrant this Court's review.

Review is particularly unwarranted because, although the court of appeals did not pass on the issue here, a conviction under Section 22.02, even if not generic aggravated assault, would separately qualify as a "crime of violence" for purposes of the Sentencing Guidelines because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 2L1.2 comment. (n.1(B)(iii)) (2015); see United States v. Calvillo-Palacios, 860 F.3d 1285, 1292-1293 & n.10 (9th Cir. 2017) (holding that conviction under Tex. Penal Code § 22.02(a) is a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii)'s "element prong"); United States v. Shepherd, 848 F.3d 425, 427-428 (5th Cir. 2017) (holding that conviction under Tex. Penal Code § 22.02(a) qualifies as a "crime of violence" under the similarly worded provision of Sentencing Guidelines § 4B1.2); United States v. Mendez-Henriquez, 847 F.3d 214, 220-222 (5th Cir.) (holding that reckless conduct suffices under the "elements clause" of Sentencing Guidelines § 2L1.2), cert. denied, 137 S. Ct. 2177 (2017); United States v. Howell, 838 F.3d 489, 499-502 (5th Cir. 2016) (holding that reckless conduct suffices under the "elements clause" of Sentencing Guidelines § 4B1.2), cert. denied, 137 S. Ct. 1108 (2017). But see Barcenas-Yanez, 826 F.3d at 758

n.4 (rejecting this argument without analysis). That issue, however, is not encompassed within the question presented. See Pet. i.

2. Petitioners separately contend (Pet. 20) that the definition of the term "crime of violence" in 18 U.S.C. 16(b), as incorporated into the definition of an "aggravated felony" in 8 U.S.C. 1101(a)(43), is unconstitutionally vague. They note (Pet. 20) that the same issue is pending before this Court in Dimaya, supra, and they request that this Court hold their petition for a writ of certiorari until Dimaya is decided. Contrary to petitioners' suggestion, their petition should be denied because the resolution of Dimaya will have no bearing on their convictions or sentences.

Petitioners suggest (Pet. 20) that the district court improperly classified their prior felony convictions for aggravated assault as crimes of violence (and thus as aggravated felonies) under Section 16(b), subjecting them to a 20-year statutory maximum sentence under 8 U.S.C. 1326(b)(2). Even if this Court holds in Dimaya that Section 16(b) is unconstitutionally vague, however, that ruling would not affect petitioners' convictions or sentences. Petitioners do not dispute that they each were previously convicted of a felony; they merely dispute whether their prior crimes were aggravated felonies. See Pet. 13 n.3. As such, petitioners each would be subject to at least a

ten-year statutory maximum sentence under Section 1326(b)(1). Hernandez-Ramirez was sentenced to 30 months of imprisonment and Ramos was sentenced to 51 months -- both well below that ten-year maximum. Any error in classifying petitioners' prior convictions as aggravated felonies under 8 U.S.C. 1326(b)(2) thus had no effect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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