No. 17-6065

IN THE SUPREME COURT OF THE UNITED STATES

RAMON HERNANDEZ-RAMIREZ and
JOSE ARMANDO RAMOS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONERS' REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

KAYLA GASSMANN
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
Telephone: (713) 718-4600

QUESTIONS PRESENTED

I. Does the federal generic aggravated assault offense require more than a merely reckless mens rea, as determined by the Fourth, Sixth and Ninth Circuits and supported by a 50-state survey of state codes, or can it be committed with mere recklessness, as the Fifth Circuit has held?

II. Is the "aggravated felony" definition in 18 U.S.C. § 16(b) unconstitutionally vague under Johnson v. United States, 135 S. Ct. 2551 (2015), because it requires application of an indeterminate risk standard to the "ordinary case" of an individual's prior conviction?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

PETITIONERS' REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION 1

CONCLUSION 8

TABLE OF CITATIONS

Page

CASES

Billingsley v. State, No. 11-13-00052-CR, 2015 WL 1004364 (Tex. App. 2015) (unpublished) 3

Garcia Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015), cert. granted, 137 S. Ct. 31 (2016) 5, 7

Gomez-Perez v. Lynch, 829 F.3d 323 (5th Cir. 2016) 2

Johnson v. United States, 135 S. Ct. 2551 (2015) i

Landrian v. State, 268 S.W.3d 532 (Tex. Crim. App. 2008) 2

Mathis v. United States, 136 S. Ct. 2243 (2016) 2

Mathonican v. State, 194 S.W.3d 59 (Tex. App. 2006) 4

Saenz v. State, 479 S.W.3d 939 (Tex. App. 2016) 3

Seaton v. State, 385 S.W.3d 85 (Tex. App. 2012) 4

United States v. Agrueta-Vasquez, 697 Fed. Appx. 419 (5th Cir. 2017) (unpublished) 7

United States v. Briceno, 681 Fed. Appx. 334 (5th Cir. 2017) (unpublished) 7

United States v. Calvillo-Palacios, 860 F.3d 1285 (9th Cir. 2017) 2

United States v. Gonzalez-Longoria, 831 F.3d 670 (5th Cir. 2016) (en banc) 7

TABLE OF CITATIONS – (Cont'd)

Page

CASES – (Cont'd)

United States v. Gutierrez-Garrido, 75 Fed. Appx. 231
(5th Cir. 2003) (unpublished) 7

United States v. Guzman, 797 F.3d 346
(5th Cir. 2015) 4

United States v. Howell, 838 F.3d 489
(5th Cir. 2016) 4-5

United States v. Jimenez-Laines, 342 Fed. Appx. 978
(5th Cir. 2009) (unpublished) 7

United States v. Mendez-Henriquez, 847 F.3d 214
(5th Cir. 2017) 4-5

United States v. Oliveros Mejia, 589 Fed. Appx. 296
(5th Cir. 2015) (unpublished) 7

United States v. Ovalle-Garcia, 868 F.3d 313
(5th Cir. 2017) 7

United States v. Rico-Mejia, 859 F.3d 318
(5th Cir. 2017) 3, 5

United States v. Shepherd, 848 F.3d 425
(5th Cir. 2017) 4

United States v. Vargas-Duran, 356 F.3d 598
(5th Cir. 2004) (en banc) 3

United States v. Villegas-Hernandez, 468 F.3d 874
(5th Cir. 2006) 3

STATUTES AND RULES

8 U.S.C. § 1101(a)(43)(F) 1, 5

TABLE OF CITATIONS – (Cont'd)

Page

STATUTES AND RULES – (Cont'd)

8 U.S.C. § 1101(a)(43)(O) 6

8 U.S.C. § 1182(a)(9)(A) 6-7

8 U.S.C. § 1326(b)(1) 6-7

8 U.S.C. § 1326(b)(2) 5-7

18 U.S.C. § 16(b) ..... i, 1, 5, 7

Tex. Penal Code § 22.01 2

Tex. Penal Code § 22.01(a) 2

Texas Penal Code § 22.02 ..... 1-2, 5

Texas Penal Code § 22.02(a) 2

SENTENCING GUIDELINES

USSG § 2L1.2 1-2

USSG § 2L1.2 (2015) 1

USSG § 2L1.2, comment. (n.(1)(B)(iii)) (2015) 2

USSG § 2L1.2(b)(1)(C) (2015) 6

USSG § 4B1.2 ..... 1, 4

MISCELLANEOUS

State v. Rivello, Case No. F-1700215-M (Dallas Country District Court), available at https://www.scribd.com/document/342512688/John-Rivello-Indictment-Dallas County-Tex-Case-No-F1700215-M 4

PETITIONERS' REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners have raised two questions for this Court's review: the federal generic definition of "aggravated assault" in USSG § 2L1.2 (2015)—which is the same as the definition found in USSG § 4B1.2—and the vagueness of 18 U.S.C. § 16(b), as it is incorporated into the aggravated felony definition in 8 U.S.C. § 1101(a)(43)(F).

A. The generic definition of aggravated assault is the only basis for the application of the § 2L1.2 "crime of violence" enhancement in petitioners' cases, and thus the use-of-force clause of USSG § 2L1.2 does not present a reason to deny review.

With regard to the first issue, petitioners assert that their prior Texas convictions for aggravated assault, Texas Penal Code § 22.02, do not qualify as generic aggravated assault under USSG § 2L1.2 (2015). Petitioners argue that the generic definition of aggravated assault does not include reckless assaults, but Texas aggravated assault can be committed recklessly. Pet. 9-19. The government does not respond to the question of whether generic aggravated assault includes reckless assaults. Instead, the government asserts that review of this question is unwarranted because, even if a conviction under Texas Penal Code § 22.02 does not qualify as generic aggravated assault, it would separately qualify as a "crime of violence" under § 2L1.2 because the offense has the use of force against the person of another as an element. U.S. Memo. Opp. 15. The government is incorrect. In the Fifth Circuit, the generic definition of aggravated assault is the only basis for classifying a Texas aggravated assault offense as a "crime of violence" under § 2L1.2.

To respond to the government's arguments, petitioners must first sketch out the

divisibility of the Texas aggravated assault offense. Texas aggravated assault is a simple assault aggravated by either (1) the causation of serious bodily injury or (2) by the use or exhibition of a deadly weapon. See Tex. Penal Code § 22.02(a). Simple assault, in turn, can be premised on: (1) intentionally, knowingly, or recklessly causing bodily injury; (2) intentionally or knowingly threatening bodily injury; or (3) intentionally or knowingly causing offensive physical contact. See Tex. Penal Code § 22.01(a). Landrian v. State, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008), together with the clear means-versus-elements rule of Mathis v. United States, 136 S. Ct. 2243 (2016), establish that § 22.01 is divisible as to the types of simple assault, but § 22.02 is not divisible to determine which mens rea or which aggravating factor was involved in an aggravated assault offense. See Gomez-Perez v. Lynch, 829 F.3d 323, 327-38 (5th Cir. 2016); see also United States v. Calvillo-Palacios, 860 F.3d 1285, 1289 (9th Cir. 2017).

Thus, the modified categorical approach can be used to determine that Mr. Hernandez-Ramirez and Mr. Ramos were convicted of assault because each intentionally, knowingly, or recklessly caused bodily injury, which was aggravated because he either caused serious bodily injury or because he used or exhibited a deadly weapon. Under Mathis, the Texas aggravated assault offense cannot be further narrowed.

Returning to the government's use-of-force argument, the 2015 version of USSG § 2L1.2 defines the term "crime of violence" to include offenses "that have as an element the use, attempted use, or threatened use of physical force against the person of another." USSG § 2L1.2, comment. (n.(1)(B)(iii)) (2015). But the Fifth Circuit has recently

reaffirmed that result-oriented offenses like Texas assault—offenses that require the causation of injury without specifying the mechanism—do not have the use of physical force as an element. See United States v. Rico-Mejia, 859 F.3d 318, 321-23 (5th Cir. 2017); see also United States v. Vargas-Duran, 356 F.3d 598, 606 (5th Cir. 2004) (en banc). This rule recognizes that an offense committed via indirect causation of injury does not require that a use of force actually cause the injury. See United States v. Villegas-Hernandez, 468 F.3d 874, 878-879 (5th Cir. 2006). "Such injury," the Fifth Circuit has explained, can "result from any of a number of acts, without use of destructive or violent force," such as "making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim." Villegas-Hernandez, 468 F.3d at 879. "To convict a defendant under any of these scenarios, the government would not need to show the defendant used physical force against the person or property of another." Id. Thus, the use of physical force is not an element of Texas assault offenses premised on the causation of bodily injury. See id.; see also Rico-Mejia, 859 F.3d at 321-23.

Notably, the possibility of a Texas aggravated assault conviction for causing injury with non-physical or indirect force—such as poison, deception, vehicle accident, chemical insult, or cyber-attack—is not abstract or hypothetical. See Saenz v. State, 479 S.W.3d 939 (Tex. App. 2016) (aggravated assault conviction for placing bleach in an IV); Billingsley v. State, No. 11-13-00052-CR, 2015 WL 1004364, at *1-*2 (Tex. App. 2015) (unpublished) (causing the victim to contract the human immunodeficiency virus (HIV) is

an assault); Seaton v. State, 385 S.W.3d 85 (Tex. App. 2012) (affirming conviction for aggravated assault where defendant police officer failed to use emergency lights while speeding through an intersection resulting in a crash that caused the defendant's car to strike the victim); Mathonican v. State, 194 S.W.3d 59, 69-71 (Tex. App. 2006) (the seminal fluid or saliva of an HIV-positive man is considered a "deadly weapon"); Indictment, State v. Rivello, Case No. F-1700215-M (Dallas Country District Court), available at https://www.scribd.com/document/342512688/John-Rivello-Indictment-Dallas-County-Tex-Case-No-F1700215-M (defendant charged with aggravated assault with a deadly weapon for sending a tweet that caused the victim to have a seizure).

The cases relied on by the government do not establish that Texas assault has the use of force as an element. U.S. Mem. Opp. 15. United States v. Shepherd, 848 F.3d 425, 427-28 (5th Cir. 2017), held only that there was no plain error in the district court's ruling that a Texas conviction for aggravated assault qualified as a "crime of violence" under USSG § 4B1.2, relying on United States v. Guzman, 797 F.3d 346, 348 (5th Cir. 2015). Guzman was not a case concerning a Texas assault premised on the causation of bodily injury, but was about a Texas assault committed by a threat. Id. at 347-48. That case, then, concerned a different Texas assault offense than the one at issue here, and does not implicate the Fifth Circuit's rule that the causation of bodily injury is not equivalent to the use of force. See supra text, at 2 (noting that Texas assault is divisible between assaults by threat, and assaults by causation of bodily injury). United States v. Mendez-Henriquez, 847 F.3d 214, 220-222 (5th Cir. 2017), and United States v. Howell, 838 F.3d 489, 499-502

(5th Cir. 2016), are simply inapposite. Both of those cases concern the distinct issue of whether a reckless use of force can qualify as the "use of force," but neither addresses nor disturbs the separate Fifth Circuit rule holding that the causation of injury is not equivalent to the use of force. See Mendez-Henriquez, 847 F.3d at 220-21; Howell, 838 F.3d at 501-02. Indeed, subsequent to both Mendez-Henriquez and Howell, the Fifth Circuit reaffirmed its rule that the causation of injury is not equivalent to the use of physical force. See Rico-Mejia, 859 F.3d at 321-23.

In short, both petitioners' prior convictions under Texas Penal Code § 22.02 were premised on the causation of bodily injury, and in the Fifth Circuit, the causation of bodily injury is not equivalent to the use of force. The crime of violence enhancement in this case thus depends entirely on the generic definition of aggravated assault, and the use of force clause is not a reason to deny review.

With regard to the government's remaining arguments regarding the importance of the first Question Presented, petitioners have already addressed these points in their petition for a writ of certiorari. Pet. 9-19.

B. In the alternative, this petition should be held for *Garcia Dimaya* because a conviction for illegal reentry subsequent to an aggravated felony under 8 U.S.C. § 1326(b)(2) has collateral consequences.

With regard to petitioners' alternative argument that if review is not granted on the first Question Presented, this petition should be held for Garcia Dimaya v. Lynch to resolve the question of the vagueness of 18 U.S.C. § 16(b), as it is incorporated into the aggravated felony definition in 8 U.S.C. § 1101(a)(43)(F), the government argues that the petition

should not be held. Instead, the government argues that the petition should be denied because petitioners were sentenced below the ten-year statutory maximum that would have applied under 8 U.S.C. § 1326(b)(1), if their convictions were classified as ordinary felonies rather than aggravated felonies. U.S. Mem. Opp. 16-17. The government's argument is not persuasive.

For noncitizens who are prosecuted for returning to the United States following a previous removal, the classification of a prior conviction as an "aggravated felony" has three important consequences. First, it raises the statutory maximum for the instant illegal-reentry offense to 20 years (without the necessity of a jury finding). See 8 U.S.C. § 1326(b)(2). Second, it renders the individual's instant illegal-reentry offense also an "aggravated felony" under the INA, see 8 U.S.C. § 1101(a)(43)(O), meaning that the reentry offense itself triggers a permanent admissibility bar, see 8 U.S.C. § 1182(a)(9)(A), and is sufficient to raise the statutory maximum in any future illegal-reentry prosecution. Third, it can trigger an eight-level enhancement of the defendant's advisory sentencing range under the prior versions of the United States Sentencing Guidelines. See USSG § 2L1.2(b)(1)(C) (2015). It is true, as the government asserts, that petitioners' prison sentences fall within the statutory parameters for an offense under § 1326(b)(1). U.S. Mem. Opp. 16-17. But the government's argument with regard to the statutory maximum addresses only one of the consequences resulting from the aggravated felony determination.

Specifically, the written judgment entered by the district court in each case reflects

conviction and sentencing under § 1326(b)(2), signifying the aggravated felony determination. Pet. 6. This determination would trigger the permanent inadmissibility bar of 8 U.S.C. § 1182(a)(9)(A). See United States v. Gonzalez-Longoria, 831 F.3d 670, 674 n.2 (5th Cir. 2016) (en banc). Indeed, the Fifth Circuit has held specifically that the inclusion of § 1326(b)(2) as the statute of conviction in the judgment renders an appeal not moot because of collateral consequences, even when the defendant has served his sentence and been deported. See id.; United States v. Agrueta-Vasquez, 697 Fed. Appx. 419, 419 (5th Cir. 2017) (unpublished). And that court has repeatedly remanded cases for the purpose of correcting the judgment to reflect conviction and sentencing under 8 U.S.C. § 1326(b)(1), rather than 8 U.S.C. § 1326(b)(2), due to these collateral consequences. See, e.g., United States v. Ovalle-Garcia, 868 F.3d 313, 314 (5th Cir. 2017) (finding that erroneously entering judgment under § 1326(b)(2) "is neither harmless nor moot because the erroneous judgment could have collateral consequences"); United States v. Briceno, 681 Fed. Appx. 334, 338 (5th Cir. 2017) (unpublished); United States v. Oliveros Mejia, 589 Fed. Appx. 296, 297 (5th Cir. 2015) (unpublished); United States v. Jimenez-Laines, 342 Fed. Appx. 978, 979 (5th Cir. 2009) (unpublished); United States v. Gutierrez-Garrido, 75 Fed. Appx. 231, 231-32 (5th Cir. 2003) (unpublished).

The government is thus incorrect in arguing that a ruling that 18 U.S.C. § 16(b) is vague would have "no effect" in petitioners' cases. U.S. Mem. Opp. 17. If review is not granted on the first Question Presented, this petition should be held pending the resolution in Garcia Dimaya.

CONCLUSION

For the reasons stated above, as well as those set forth in the petition for a writ of certiorari, this Court should grant the writ of certiorari as to the first Question Presented to resolve the circuit split regarding the definition of the federal generic offense of aggravated assault.

Alternatively, for the reasons stated in the discussion of the second Question Presented, as well as those set forth in the petition for a writ of certiorari, the petition for writ of certiorari should be held pending this Court's decision in Sessions v. Garcia Dimaya, No. 15-1498, and then disposed of as appropriate in light of that decision.

Date: December 13, 2017

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By _____
KAYLA GASSMANN
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
Telephone: (713) 718-4600