No. _____

In The
Supreme Court of the United States

JOSE PRISCILIANO GRACIA-CANTU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari From The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This Honorable Court has before it the opportunity to resolve a major split between the Circuit Courts of Appeal regarding the use of the definition of a crime of violence under 8 U.S.C. § 16(a). In this case, the Fifth Circuit, like other Circuits, has unmistakably departed from the clear language of 8 U.S.C. § 16(a) by holding that a conviction under a state statute, which requires no physical force in the causation of an injury, is equal to physical force, and as such, is a crime of violence. Conversely, the First, Second, and Fourth Circuits have held that for use of force to be an element of a statute, the language of the statute must specifically state so. Herein, Petitioner will show that the Fifth Circuit erred and disregarded this Court's precedent when it held that Petitioner's conviction for assault was categorically a crime of violence. If the Fifth Circuit's erroneous interpretation is left untouched, then the door to unconstitutional sentencing enhancements is left wide open. This will have a direct impact on the lives of thousands of people awaiting sentencing for similar crimes. It will also suddenly produce grave immigration consequences for thousands of individuals who will be disqualified from the immigration benefits Congress meant to afford them. Accordingly, the questions presented for review are as follows:

Accordingly, the questions presented for review are as follows:

1. Whether the Court of Appeals for the Fifth Circuit erred as a matter of law in holding that Petitioner's conviction for unlawful entry

QUESTIONS PRESENTED FOR REVIEW—
Continued

warranted an eight-level sentence enhancement under the U.S. Sentencing Guidelines ("U.S.S.G.") because Petitioner's prior conviction for assault in Texas was a crime of violence under 8 U.S.C. § 16(a) and, as a result, an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) and U.S.S.G. § 2L1.2(b)(1)(C) (2016).

2. Whether the standard used by the Courts of Appeal for the Third, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits, to determine if an offense is categorically a crime of violence under 8 U.S.C. § 16(a) is legally erroneous, and the standard for such a determination used by the First, Second, and Fourth Circuits should instead be adopted uniformly across all Circuits.

3. Whether applying the Fifth Circuit's decision in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc), which held, *inter alia*, that for purposes of determining whether a conviction is a crime of violence there is no distinction between direct and indirect force "retroactively" to Petitioner's sentence violated the Constitution's protection against unforeseeable judicial enlargements of criminal statutes.

4. Whether the issues presented in this Petition for Writ of Certiorari will not be moot upon Petitioner's release from incarceration because Petitioner will face harsh collateral immigration consequences due to his assault offense being classified as an aggravated felony by the Fifth Circuit.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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CITATIONS TO THE OPINIONS AND ORDERS BELOW

The judgment of conviction from the United States District Court for the Southern District of Texas, sentencing Petitioner to a term of 41 months imprisonment, is attached herein as App. A.

The amended judgment of conviction from the United States District Court for the Southern District of Texas, is attached herein as App. B.

The opinion of the United States Court of Appeals for the Fifth Circuit, vacating Petitioner's sentence and remanding the case for resentencing, is unpublished and attached herein as App. C.

The substituted opinion of the United States Court of Appeals for the Fifth Circuit, vacating Petitioner's sentence and remanding the case for resentencing, is unpublished and attached herein as App. D.

The order of the Supreme Court of the United States, denying Petitioner's writ of mandamus, is attached herein as App. E.

The substituted opinion of the United States Court of Appeals for the Fifth Circuit, affirming Petitioner's sentence by the United States District Court for the Southern District of Texas, is published as *United States v. Gracia-Cantu*, 920 F.3d 252 (5th Cir. 2019) and is attached herein as App. F.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed Petitioner's sentence by the U.S. District Court on April 2, 2019. App. F, *infra.* Pursuant to 28 U.S.C. § 1254(1), jurisdiction in this Honorable Court is proper by writ of certiorari because Petitioner is a "party to any civil or criminal case, before or after rendition of judgment or decree."

APPLICABLE STATUTES AND SENTENCING GUIDELINES

8 U.S.C. § 1326(a), which states: "(a) In general. Subject to subsection (b), any alien who—(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under title 18, or imprisoned not more than 2 years, or both."

8 U.S.C. § 1326(b)(1), which states: "(b) Criminal penalties for reentry of certain removed aliens.

Notwithstanding subsection (a), in the case of any alien described in such subsection—(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both."

8 U.S.C. § 1101(a)(43)(F), which states: "The term 'aggravated felony' means—(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [of] at least one year."

8 U.S.C. § 16(a), which states: "The term 'crime of violence' means—(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Tex. Pen. Code § 22.01(a)(1), which states: "Assault. (a) A person commits an offense if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse."

Tex. Pen. Code § 22.01(b)(2), which states: "(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against: (2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if: (A) it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this chapter, Chapter 19, or Section 20.03, 20.04, 21.11, or 25.11."

U.S.S.G. § 2L1.2(b)(1)(C) (2016), which states: "(b) Specific Offense Characteristic. (1) Apply the Greatest: If the defendant previously was deported, or unlawfully remained in the United States, after—(C) a conviction for an aggravated felony, increase by 8 levels."

STATEMENT OF THE CASE

The Court of Appeals for the Fifth Circuit Court had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291, which grants a court of appeals jurisdiction over all appeals from final decisions issued by a district court of the United States. On April 2, 2019, the Fifth Circuit affirmed the sentence given to Petitioner by the U.S. District Court. App. F, *infra*. In its decision, the Fifth Circuit held that Petitioner's conviction for assault—family violence—under Texas Penal Code §§ 22.01(a)(1) and (b)(2) qualifies as a crime of violence under 8 U.S.C. § 16(a) and is, therefore, an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) and U.S.S.G. § 2L1.2(b)(1)(C) (2016). *Id.* The Fifth Circuit further held that applying its prior decision in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc) retroactively to Petitioner's sentence did not violate Petitioner's constitutional protection against "unforeseeable judicial enlargements of . . . criminal statutes." *Id.*

Petitioner maintains that the Fifth Circuit's decision is legally erroneous. Specifically, Petitioner

submits that Texas Penal Code §§ 22.01(a)(1) and (b)(2) does not have as a constitutive element the use, attempted use, or threatened use of physical force against another individual. As such, Petitioner contends that his conviction cannot be considered a crime of violence under 8 U.S.C. § 16(a) and, thus, is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) and U.S.S.G. § 2L1.2(b)(1)(C) (2016). Petitioner therefore moves this Honorable Court to vacate the Fifth Circuit's decision and to remand this case for further proceedings.

Petitioner submits that the grant of this Petition for Writ of Certiorari is appropriate because it will permit this Honorable Court to correct the Fifth Circuit's legally erroneous decision. Additionally, it will also resolve the split between the Circuit Courts across the country with respect to what constitutes a crime of violence under 8 U.S.C. § 16(a) and, in turn, what constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) and U.S.S.G. § 2L1.2(b)(1)(C) (2016).

Factual Background and Procedural History

Petitioner, Jose Prisciliano Gracia-Cantu, was convicted for illegally re-entering the United States following an order of deportation pursuant to 8 U.S.C. §§ 1326(a) and (b)(1). App. A, *infra*. Prior to his deportation, Petitioner was convicted of assault—family violence—under Texas Penal Code § 22.01(a)(1) and (b)(2). App. C, *infra*. The pre-sentence report ("PSR") categorized Petitioner's conviction as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) and U.S.S.G.

§ 2L1.2(b)(1)(C) (2016) and, in light of this conclusion, the PSR recommended that Petitioner be given an eight-level sentence enhancement. *Id.* Petitioner pled guilty to the illegal re-entry charge on October 23, 2014 and was sentenced by the U.S. District Court for the Southern District of Texas to a term of 41 months imprisonment on February 2, 2015. App. A, *infra*. Petitioner is scheduled to be released from imprisonment on June 26, 2019.

Petitioner timely appealed his 41-month sentence to the Fifth Circuit. App. C, *infra*. In that appeal, Petitioner contended, like he does here, that his conviction for assault under Texas Penal Code §§ 22.01(a)(1) and (b)(2) was not a crime of violence under 8 U.S.C. § 16, and thus, not an aggravated felony for purposes of 8 U.S.C. § 1101(a)(43)(F) and U.S.S.G. § 2L1.2(b)(1)(C) (2016). *Id*. The Fifth Circuit agreed with Petitioner and vacated his sentence. *Id.* However, rather than issuing a mandate and remanding the case to the District Court, the Fifth Circuit held onto the case and, as a result, Petitioner filed a Writ of Mandamus with this Honorable Court requesting that the Fifth Circuit issue a mandate and remand the case back to the District Court. This Honorable Court denied the Writ on October 15, 2018. App. E, *infra*.

While the Fifth Circuit panel still had the case, the Court decided, en banc, the case of *Reyes-Contreras*. In that case, the Fifth Circuit held that an individual commits a crime of violence if the individual "uses physical force when he knowingly or intentionally applies or employs a force [directly or indirectly] capable of causing physical pain or injury." 910 F.3d at 185.

After *Reyes-Contreras*, the Fifth Circuit panel in Petitioner's case withdrew its previous decision and substituted a new opinion affirming his sentence. App. F, *infra*. Basing its decision on *Reyes-Contreras*, the Fifth Circuit determined that Petitioner's conviction under Texas Penal Code §§ 22.01(a)(1) and (b)(2) was a crime of violence under 8 U.S.C. § 16(a). *Id*. The Court made this determination because it found that the statute for "Assault—Family Violence" meets the requirements to be considered a crime of violence, i.e., the statute requires that the offense be committed "intentionally, knowingly, or recklessly"; the statute requires that the individual cause "bodily injury," i.e., "physical pain, illness, any impairment of a physical condition"; and the statute requires the injury be caused to "another" individual. *Id.*

Petitioner maintains that the Fifth Circuit committed reversible legal error in finding that his conviction was a crime of violence, and thus, an aggravated felony for purposes of an eight-level sentence enhancement. As such, Petitioner files the present Writ with this Honorable Court requesting that the Fifth Circuit's decision be vacated, and this case be remanded for further proceedings.

ARGUMENT FOR GRANTING THE WRIT

Petitioner first asserts that this Writ should be granted because the Fifth Circuit committed reversible legal error in holding that Petitioner's conviction for

assault—family violence—was categorically a crime of violence, and thus, an aggravated felony, such that an eight-level sentence enhancement was appropriate. Second, Petitioner submits that this Writ should be granted because it will afford the Court the opportunity to resolve a split between the Third, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits, which hold that a conviction under a statute requiring bodily or physical injury—without actually requiring physical force in causing the injury—is a crime of violence; and the First, Second, and Fourth Circuits, which hold to the contrary. Petitioner calls on this High Court to resolve the split between these Courts in favor of the First, Second, and Fourth Circuits, and hold that a statute which merely has bodily or physical injury as a by-product or result of an offense without specifically requiring that such bodily or physical injury be caused by physical use of force, does not have as a constitutive element the use, attempted use, or threatened use of force, and thus, is not an offense that constitutes a crime of violence under 8 U.S.C. § 16(a).

Lastly, Petitioner contends that this Writ should be granted because the Fifth Circuit's decision to apply its prior holding in *Reyes-Contreras* retroactively to Petitioner's sentence violated Petitioner's constitutional protection against unforeseeable judicial enlargements of criminal statutes.

A. The Fifth Circuit erred in finding that Petitioner's conviction was a crime of violence

Petitioner maintains that the Fifth Circuit committed reversible legal error in holding that his conviction for assault was a crime of violence under 8 U.S.C. § 16(a), an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) and U.S.S.G. § 2L1.2(b)(1)(C) (2016), and, in turn, Petitioner's conviction for unlawful entry warranted an eight-level sentence enhancement. In Petitioner's view, his conviction for assault was not a crime of violence, and therefore, not an aggravated felony because Texas Penal Code §§ 22.01(a)(1) and (b)(2) does not have as a constitutive element the use, attempted use, or threatened use of force as a specifically enumerated element.

Under U.S.S.G. § 2L1.2(b)(1)(C) (2016), an alien who was deported or unlawfully remained in the United States after committing an aggravated felony (as defined in 8 U.S.C. § 1101(a)(43)), shall be subject to an eight-level sentence enhancement. An aggravated felony is a "crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." The term "crime of violence" means "an offense that has as a constitutive element the use, attempted use, or threatened use of physical force against the person or property of another." 8 U.S.C. § 16(a).

Texas Penal Code § 22.01(a)(1) states that a person commits the offense of assault if he or she

"intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse." An offense committed under § 22.01(a)(1) is a third-degree felony if it is committed against a family member, as defined in the Texas Family Code. Tex. Pen. Code § 22.01(b)(2). Bodily injury is defined as "physical pain, illness, or any impairment of physical condition." *See* Texas Penal Code § 1.07. In this case, the Fifth Circuit determined that the offense of assault—family violence—under Texas Penal Code §§ 22.01(a)(1) and (b)(2) was categorically a crime of violence under 8 U.S.C. § 16(a). Petitioner maintains that this holding is legally erroneous for several reasons.

First, the Fifth Circuit's holding completely contradicts the plain language of the statute in question. A plain reading of Tex. Pen. Code § 22.01(a)(1) necessitates the conclusion that the only two constitutive elements that must be proven beyond a reasonable doubt are that the defendant acted: (1) "intentionally, knowingly, or recklessly," and (2) "cause[d] bodily injury to another." *See Garcia v. State*, No. 01-05-01055-CR, 2006 Tex. App. LEXIS 8825, at *14 (Tex. App.—Houston [1st Dist.] Oct. 12, 2006) (finding that the two elements needed to be proved beyond a reasonable doubt are: (1) the defendant acted "intentionally, knowingly, or recklessly"; and (2) the defendant must have "caused bodily injury to another"; *see also Cox v. Waste Mgmt. of Tex., Inc.*, 300 S.W.3d 424, 439 (Tex. App.—Fort Worth 2009) (same). Noticeably missing as a constitutive element in the statute is the word "force" or the phrase "use of force" or the phrase "physical force."

The Texas legislature could have easily added language in the statute that includes "use of force" as a constitutive element of the offense of assault. For instance, the legislature could have stated: "a person commits the offense of assault if he intentionally, knowingly, or recklessly causes bodily injury to another through the use of force." However, it did not do so and, as a result, because the statutory language is clear and must be given its ordinary meaning, the only logical conclusion to draw is that Tex. Pen. Code §§ 22.01(a)(1) and (b)(2) do not have as a constitutive element, the use, attempted use, or threatened use of physical force. *See BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (noting that it is a proper rule of statutory construction that terms in a statute are generally interpreted according to their ordinary meaning).

The Fifth Circuit's holding in this case demonstrates that a strict construction interpretation was not used. Deciding that "physical force" or "use of force" is a constitutive element of the statute although "physical" or "use of force" is not articulated *per se* in the statute, is akin to determining that the "penumbra" and/or implied constitutive elements are derivable from a penal statute. Such an interpretation runs contrary to this Court's proper rule of statutory construction. Therefore, the Fifth Circuit's holding in this case is plainly erroneous.

Secondly, the Fifth Circuit seems to ignore the critical distinction between "use of force to cause a result" and "causing bodily injury."[1] The former requires some active employment of violent force on the part of the individual to cause physical pain or injury to another. *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004); *Johnson v. U.S.*, 559 U.S. 133, 140 (2010). The latter, on the other hand, merely references the result (injury) of the cause and does not require that the result be achieved using violent force. *See Whyte v. Lynch*, 807 F.3d 463, 469 (1st Cir. 2015) (finding that if there is a "realistic probability" that a person can be convicted under a statute for conduct that results in physical injury and does not require the use of physical force, then the conviction cannot be considered a crime of violence); *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (same); *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012) (same). By conflating "use of force" with "causes bodily injury," the Fifth Circuit has held that all assaults are to be considered as crimes of violence without actually engaging in a categorical analysis as to whether force is an enumerated constitutive element of the statute.

Under the Fifth Circuit's approach, a person would be considered to have committed a crime of violence for committing an act such as leaving a child unattended in a car or selling a controlled substance to another person that causes them to overdose. In the

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[1] In *United States v. Castleman*, 572 U.S. 157, 167 (2014), this Honorable Court expressly declined to reach the issue of whether "causation of bodily injury necessarily entails violent force."

first scenario, the parent, by leaving the child in the car, has not employed any type of active force, either directly or indirectly. Yet, if bodily injury results, it would automatically mean that use of force was employed. Similarly, in the controlled substance context, the dealer could simply give a substance to the purchaser and if the purchaser were to take the substance and then overdose, bodily injury would have resulted without any force being used. It is unlikely that the Texas legislature would have intended such absurd results. Even assuming, as the Fifth Circuit does in this case, that the Texas assault statute contains some implied "use of force" element, the statute would still not be a crime of violence under 8 U.S.C. § 16(a). This is because the degree of force required by the statute would not be enough to amount to a crime of violence, as explained by this Honorable Court in *Johnson* and *Leocal*.

In *Johnson*, the petitioner pled guilty to possession of ammunition by a convicted felon. 559 U.S. at 135. The government sought to enhance petitioner's sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), which authorizes an enhanced penalty for someone who has three prior "violent felony" convictions. *Id.* at 136. A "violent felony" is defined as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). After analyzing the particular statutes at issue, this Honorable Court concluded that in

the context of a statutory definition of violent felony, the phrase physical force means *violent force*—that is, force capable of causing physical pain or injury to another person. *Johnson*, 559 U.S. at 140. Importantly, the Court also took time to explain in detail that a common-law battery, which encapsulates mere offensive touching, would not satisfy the violent force requirement of § 924(e)(2)(B)(i). *Id*. at 141-42.

Similarly, in *Leocal*, this Honorable Court determined that the level of force required to satisfy the crime of violence definition under 8 U.S.C. § 16 is violent, active force. 543 U.S. at 11. This would again seem to suggest that mere touching or light force is simply not enough to constitute a crime of violence.

Applying both *Johnson* and *Leocal* to the statute at issue in this case, it is reasonable to conclude that a conviction for assault can be supported by committing an offense that does not involve active employment of violent force against another. This is evident in the statute's plain language, which only requires "bodily injury," and not "grave bodily injury," or "serious bodily injury," or "grievous bodily injury." Tex. Pen. Code § 22.01(a)(1). The Texas Court of Criminal Appeals has stated that bodily injury is "purposefully broad and seems to encompass even relatively minor physical contacts, so long as they constitute more than mere offensive touching." *Lane v. State*, 763 S.W.2d 785, 786 (Tex. Crim. App. 1989). Bodily injury then, can be committed for example, by tapping, pinching, or gently nudging another person. Such a level of force, in Petitioner's view, cannot be said to be a violent use of force.

As such, the degree of force does not meet this Honorable Court's high threshold to constitute a crime of violence under 8 U.S.C. § 16(a).

Petitioner is aware that this Honorable Court held in *United States v. Castleman*, that in the context of misdemeanor crimes of domestic violence, the common-law meaning of "force," which is satisfied by mere offensive touching, "has, as an element, the use or attempted use of physical force." 572 U.S. at 168. However, Petitioner maintains that *Castleman* simply does not apply to the facts of his case.

In *Castleman*, this Honorable Court confined its analysis to what level of force is required to support a misdemeanor crime of domestic violence. The Honorable Court determined that in the specific context of domestic violence, "a substantial degree of force" is not required to meet the use of force standard. *Id.* at 164-65. *Castleman* did not, in any way, abrogate or alter *Johnson's* and *Leocal's* holdings that violent force was required to meet the use of force requirement under the ACCA or 8 U.S.C. § 16. In fact, the Court explicitly stated that "[m]inor uses of force [such as squeezing a person's arm] may not constitute violence in the generic sense." *Castleman*, 572 U.S. at 165-66.

Accordingly, any reliance on *Castleman* to support the proposition that a minor use of force can satisfy the violent force requirement outlined by this Honorable Court in *Johnson* and *Leocal*, and thus meet the crime of violence definition of 8 U.S.C. § 16(a), is misplaced.

Therefore, the Fifth Circuit erred in finding that Petitioner's conviction was a crime of violence.

B. The Circuit split should be resolved in favor of the First, Second, and Fourth Circuits

Several Circuit Courts of Appeals take the position that a conviction under a statute that requires bodily or physical injury against another person—without specifically requiring force in the causation of that injury—is a crime of violence. These include the Third, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits.

In *United States v. Chapman*, 866 F.3d 129 (3d Cir. 2017), the Third Circuit dealt with the issue of whether a conviction under 18 U.S.C. § 876(c), which criminalizes the act of mailing "any threat to kidnap any person or any threat to injure the person of the addressee or of another," was a felony crime of violence as defined in U.S.S.G. § 4B1.2(a)(1).[2] Relying on this Honorable Court's decision in *Castleman*, the Court held that employing a device, such as mail, to cause harm indirectly "meets the definition of physical force, as used in felony crime of violence." *Chapman*, 866 F.3d at 133. Accordingly, the Court found that a conviction under § 876(c) was a crime of violence and it affirmed the defendant's sentence as a career offender. *Id.* at 136.

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[2] Like 8 U.S.C. § 16(a) and U.S.S.G. § 2L1.2 cmt. 1(B)(iii), U.S.S.G. § 4B1.2(a)(1) defines crime of violence as an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another.

Similarly, the Sixth Circuit, in *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017), was confronted with the issue of whether convictions under 18 U.S.C. §§ 113(a)(3) and (6)[3] constituted crimes of violence that would warrant a career offender designation under U.S.S.G. § 4B1.2(a)(1). The Court held because both 18 U.S.C. §§ 113(a)(3) and (6) are crimes that require "proof of serious physical injury," both "necessarily require proof of violent physical force." *Verwiebe*, 874 F.3d at 261. Accordingly, the Court found that both convictions were for crimes of violence and thus, the defendant's sentence as a career offender was affirmed. *Id.* at 264.

In *U.S. v. Rice*, 813 F.3d 704 (8th Cir. 2016), the Court of Appeals for the Eighth Circuit dealt with the issue of whether a conviction for "intentionally or knowingly . . . caus[ing] physical injury" to another person under Arkansas Code § 5-13-202. The Eighth Circuit concluded that such a conviction did involve the use of force as a constitutive element of the offense because "it is impossible to cause bodily injury without using force capable of producing that result." *Rice*, 813 F.3d at 706. The Court therefore determined that the District Court did not err in finding that the defendant warranted a sentence enhancement for his firearms conviction under U.S.S.G. § 2K2.1.

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[3] Under 18 U.S.C. § 113(a)(3), it is a crime to commit "an assault with a dangerous weapon, with intent to do bodily harm." Under § 113(a)(6), it is a crime to commit "[a]ssault resulting in serious bodily injury."

In *United States v. Villavicencio-Burruel*, 608 F.3d 556 (9th Cir. 2010), the Ninth Circuit was presented with the issue of whether a conviction for making threats under California Penal Code § 422(a)[4] constituted a crime of violence under U.S.S.G. § 2L1.2 (2010), the very same sentencing guideline that is at issue in this case. The Ninth Circuit concluded that under the plain language of the statute, "§ 422's elements necessarily include a threatened use of physical force capable of causing physical pain or injury to another person." *Villavicencio-Burruel*, 608 F.3d at 562. The defendant's sentence enhancement was thus affirmed.

In *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017), the Tenth Circuit was asked to review whether a conviction for second-degree assault in violation of Colorado Rev. Stat. § 18-3-203(1)(g) was a crime of violence for purposes of the ACCA. The Court determined that because "Colorado second-degree assault requires intentional causation of serious bodily

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[4] California Penal Code § 422 states, in relevant part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

harm," it meets the standard for violent force, and thus, is a conviction for a crime of violence. *Ontiveros*, 875 F.3d at 538. The Court therefore affirmed the District Court's sentence enhancement under U.S.S.G. § 2K2.1(a)(1).

Similarly, in *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013), the Eleventh Circuit Court of Appeals was presented with the issue of whether a conviction for aggravated assault under Florida Stat. § 784.021 was a violent felony for purposes of the ACCA. The Court found that because the Florida statute includes an assault, "which is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with the apparent ability to do so," the statute "will always include as an element the threatened use of physical force against the person of another." *Turner*, 709 F.3d at 1338. As such, the Court affirmed the finding that the defendant's conviction was a violent felony under the ACCA. *Id.*

By contrast, three Circuits—the First, Second, and Fourth—have taken the position that a conviction under a statute is only a crime of violence if the statute specifically states that use of force is a constitutive element of the offense. In *Whyte*, for instance, the First Circuit Court of Appeals was tasked with reviewing whether a conviction for third-degree assault under Conn. Gen. Stat. § 53a—61(a)(1) constituted a crime of violence under 8 U.S.C. § 16(a). The First Circuit concluded that it did not. *Whyte*, 807 F.3d at 468-69. The Court first found that under the plain language of the Connecticut statute only two elements need to be

proven: "(i) the intent to cause physical injury to another person," and "(ii) causing such injury to such person or to a third person." *Id.* As the Court noted, "[m]issing from [the] text is any indication that the offense also requires the use, threatened use, or attempted use of violent force." *Id.* Accordingly, the Court concluded that there was a "realistic probability" under the statute, that a person can be convicted for conduct that *results* in "physical injury" and yet *does not* require the "use of physical force." *Id.* at 469. For that reason, the Court held that a conviction for assault was not a crime of violence under 8 U.S.C. § 16(a).

In *Chrzanoski*, the Second Circuit was presented with the exact same issue as in *Whyte*. Just like the First Circuit, the Second Circuit determined that an assault in violation of Conn. Gen. Stat. § 53a—61(a)(1), was not a crime of violence because it did not have the use, attempted use, or threatened use of force as a constitutive element of the offense. *Chrzanoski*, 327 F.3d at 194-95. For support of that holding, the Court noted that nothing in the language of Conn. Gen. Stat. § 53a—61(a)(1) requires the government "prove that force was used in causing the injury," and moreover, no state courts in Connecticut instruct juries that they must find beyond a reasonable doubt that force was used in the commission of the offense *Id.* at 193.

Importantly, the Court also noted that there is a significant difference "between the causation of an injury [the end] and an injury's causation by the use of physical force [the means]." *Id.* at 194. As the Court states:

> There are many crimes that involve a substantial risk of injury but do not involve the use of force. Crimes of gross negligence or reckless endangerment, such as leaving an infant alone near a pool, involve a risk of injury without the use of force. Statutes criminalizing the use, possession and/or distribution of dangerous drugs and other controlled substances also underscore the fact that some criminal conduct may involve a substantial risk of injury or harm without at the same time involving the use of physical force. *Id.* at 194-95.

Based on that reasoning, the Second Circuit concluded that "just as risk of injury does not necessarily involve the risk of the use of force, the intentional causation of injury does not necessarily involve the use of force." *Id.* at 195. Accordingly, the Court determined a conviction for assault under Conn. Gen. Stat. § 53a—61(a)(1), which requires proof that force was used in causing the physical injury, was not categorically a crime of violence under 8 U.S.C. § 16(a).

In *Torres-Miguel*, the Court of Appeals for the Fourth Circuit was presented with the same issue as the Ninth Circuit in *Villavicencio-Burruel*, that is, whether § 422(a) of the California Penal Code was a crime of violence for purposes of a sentence enhancement under U.S.S.G. § 2L1.2. Finding the Ninth Circuit's reasoning unpersuasive, the Fourth Circuit split with its sister Circuit and held that a conviction under California Penal Code § 422(a) was categorically not a crime of violence because the statute did not have a

use of force element specified within it. *Torres-Miguel*, 701 F.3d at 168. Employing a similar line of reasoning as the First and Second Circuits, the Court noted that the plain language of California Penal Code § 422(a) requires only that the defendant threaten to commit an offense that results in death or great bodily injury. *Id.* As the Court put it: "no element of § 422(a) necessarily includes a threatened use of physical force to accomplish that result." *Id.*

Moreover, just as the First and Second Circuits did, the Fourth Circuit also felt the need to emphasize the distinction between the use of force and the result of injury. *Id.* at 169. In particular, the Fourth Circuit stated:

> An offense that *results* in physical injury, but does not involve the use or threatened use of force, simply does not meet the Guidelines definition of a crime of violence. Not to recognize the distinction between a *use* of force and a *result* of injury is not to recognize the logical fallacy . . . that simply because all conduct involving a risk of the use of physical force also involves a risk of injury then the converse must also be true. *Id.* at 168-69 (internal quotations omitted) (emphasis added).

In sum, the First, Second, and Fourth Circuits have all recognized that for a conviction to be considered a crime of violence, the statute of conviction must specifically state that the use, attempted use, or threatened use of force is a constitutive element of the offense. If it does not, then the conviction cannot categorically be considered a crime of violence.

In the case at bar, the Fifth Circuit elected not to follow the First, Second, and Fourth Circuits' approach and instead adopted the reasoning of the other Circuits in holding that a conviction for assault under Texas Penal Code §§ 22.01(a)(1) and (b)(2) was categorically a crime of violence under 8 U.S.C. § 16(a). App. F, *infra*. The Court indicated:

> First, the statute requires that the offense be committed intentionally, knowingly, or recklessly. Second, the statute requires that the defendant cause bodily injury, which is defined as physical pain, illness, or any impairment of physical condition. Third, the statute requires that the injury be caused to another—specifically, against a family member, as defined by certain provisions of the Texas Family Code. This statute therefore meets the definition of a crime of violence under § 16(a). *Id.* (internal citations and quotations omitted).

Petitioner maintains that the Fifth Circuit's reasoning is flawed, and that the First, Second, and Fourth Circuits' approach to whether a conviction necessarily is a crime of violence is correct. In Petitioner's view, these Circuits are the only ones that recognize two crucial things that the other Circuits, like the Fifth, ignore: (1) that the statute of conviction must specifically recognize a use of force element by its plain language; and (2) that there is a critical distinction between the use of force (the means) and the result of physical or bodily injury (the end). Accordingly, Petitioner moves this Honorable Court to resolve the

conflict amongst the Circuits in favor of the First, Second, and Fourth Circuits.

C. The Fifth Circuit's decision to apply *Reyes-Contreras* retroactively violated Petitioner's constitutional protection against unforeseeable judicial enlargements of criminal statutes

In *Bouie v. Columbia*, this Honorable Court determined that an individual is deprived of "the right of fair warning," and thus, deprived of a due process right when there is an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language." 378 U.S. 347, 352 (1964); *see also Pierce v. United States*, 314 U.S. 306, 311 (1941) ("[J]udicial enlargement of a criminal Act by interpretation is at war with the fundamental concept of the common law that crimes must be defined with appropriate definiteness."). "If a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect." *Bouie*, 378 U.S. at 354 (internal quotations omitted).

In this case, Petitioner maintains that the Fifth Circuit violated his right to fair warning and due process because it impermissibly broadened the language of Texas Penal Code § 22.01(a)(1) and (b)(2) and applied it retroactively to Petitioner's conviction. Essentially, the Fifth Circuit panel in *Reyes-Contreras* read into the statute an implied use of force element when

no such element exists. 910 F.3d at 183, 185. In doing this, the Fifth Circuit took the "narrow and precise statutory language" of the Texas assault statute and effectively expanded its reading and, after doing so, retroactively applied it to Petitioner's case. *Bouie*, 378 U.S. at 352. This resulted in Petitioner's conviction for assault being classified as a crime of violence under 8 U.S.C. § 16(a) and U.S.S.G. § 2L1.2(b)(1)(C) (2016), while such a conviction was not previously classified as such. The prohibition of *ex post facto* application of penal laws, as mandated by Article I, Section 9, Clause 3 of the United States Constitution, disallows such a retroactive application. Therefore, Petitioner maintains that the Fifth Circuit violated his right to fair notice and in turn, his due process rights, by means of unforeseeable judicial enlargement of criminal statute.

D. Mootness

As noted above, Petitioner is scheduled to be released from incarceration for his illegal re-entry conviction on June 26, 2019. However, Petitioner asserts the issues argued in this Petition would not become moot upon his release because Petitioner would face harsh immigration consequences as a result of the Fifth Circuit classifying his conviction as an aggravated felony. *See*, *e.g.*, *Padilla v. Kentucky*, 559 U.S. 356 (2010).

This High Court has held that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron v. New*

York, 392 U.S. 40, 57 (1968). Collateral legal consequences include such things as harsher subsequent convictions or potential infringement of the rights of those convicted. *Id.* at 55. Even a "remote" possibility of such consequences is enough to save a criminal case from becoming moot. *Benton v. Maryland*, 395 U.S. 784, 790-91 (1969).

In this case, once Petitioner gets released, he will most assuredly be transferred into the custody of the Immigration and Customs Enforcement ("ICE") and will be processed for removal from the United States. Once removed, Petitioner will be ineligible to re-apply for admission to the U.S. "at any time." *See* 8 U.S.C. § 1182(a)(9)(A)(i)-(ii). Further, even if Petitioner could waive this inadmissibility and be allowed to re-enter the United States, he would be ineligible to apply for a whole host of immigration benefits due to his conviction for assault being incorrectly classified as an aggravated felony by the Fifth Circuit. For example, Petitioner would be ineligible to ever become a naturalized U.S. citizen. *See* 8 C.F.R. § 316.10(b)(1)(ii) (stating that an aggravated felony conviction that occurs after November 19, 1990 is permanently barred from establishing good moral character for purposes of naturalization). Further, if Petitioner re-enters the U.S. because he has a credible fear of persecution in his home country, he would also be ineligible for asylum, and possibly even withholding of removal if his assault conviction is considered to be a "particularly serious" crime. *See* 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i); 1231(b)(3)(A)(ii). Such harsh immigration consequences, and thus

infringements of rights, are entirely possible simply because Petitioner was deemed to have committed an aggravated felony.

On the other hand, if the High Court were to determine that the issues in this case were not moot, hear the case, and reverse the Fifth Circuit's erroneous finding, Petitioner's conviction would no longer be an aggravated felony and the aforementioned immigration consequences would not apply to him. In sum, Petitioner maintains that because he will suffer serious legal consequences which will necessarily infringe on his immigration rights in the future, the issues raised in this Petition will not be moot even following his release from incarceration.

CONCLUSION

For the reasons explained above, Petitioner asks that his Petition for Writ of Certiorari be GRANTED, and that he be given the opportunity to present his arguments before this Honorable Court.

Respectfully Submitted,

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