No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GABINO MEDINA OSORIO, JOEL VELASQUEZ-RIOS,
and JOSE GUADALUPE VEGA-ZAPATA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In Sessions v. Dimaya, 138 S. Ct. 1204 (2018), this Court held that the definition of "crime of violence" found at 18 U.S.C. § 16(b), as incorporated into the definition of "aggravated felony" found at 8 U.S.C. § 1101(a)(43)(F), was unconstitutionally vague. Id. at 1215. The case came before the Court in the context of a challenge to an order of removal issued under the immigration statute. Id. at 1211-12. Previously, in Beckles v. United States, 137 S. Ct. 886, 895 (2017), the Court held that the federal Sentencing Guidelines are not subject to due process vagueness challenges.

In United States v. Godoy, 890 F.3d 531, 541-42 (5th Cir. 2018), the Fifth Circuit held that Beckles precluded the application of Sessions v. Dimaya in the context of the application of the enhancements under the illegal-reentry Sentencing Guideline. That Guideline incorporates by reference the § 16(b) definition declared unconstitutional in Dimaya, and enhances sentences based on that definition. In each of Petitioners' cases, the Fifth Circuit applied its reasoning in Godoy to deny each Petitioner's challenge to his sentence.

The question presented is:

> Can a statute that this Court has held to be unconstitutionally void for vagueness nevertheless still be applied when incorporated by reference into the federal Sentencing Guidelines?

PARTIES TO THE PROCEEDINGS

Petitioners were convicted and sentenced in separate proceedings before the United States District Court for the Southern District of Texas, and the United States Court of Appeals for the Fifth Circuit entered separate judgments affirming their convictions and sentences. Because petitioners seek review of these judgments on the basis of identical questions, they jointly file this petition with this Court. See Sup. Ct. R. 12.4.

All parties to petitioners' Fifth Circuit proceedings are named in the caption of the case before this Court.[1]

[1] In the courts below, petitioners were also known by the aliases listed in the captions in appendix. See Pet. App. 1a, 17a.

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PRAYER

Petitioners respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in their respective cases.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit in petitioners' cases are reproduced in the appendix to this petition. See Pet. App. 1a-18a.

JURISDICTION

On May 22, 2018, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Petitioner Medina's judgment of conviction and sentence. Pet. App. 1a-12a. On July 23, 2018, the Fifth Circuit denied a timely petition for rehearing in his case. Pet. App. 13a-14a.

On July 18, 2018, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Petitioner Velasquez-Rios's judgment of conviction and sentence. Pet. App. 15a-16a.

On August 20, 2018, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Petitioner Vega-Zapata's judgment of conviction and sentence. Pet. App. 17a-18a.

This petition is filed within 90 days of the Fifth Circuit's judgment or denial of rehearing in each case, and therefore is timely. See Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND SENTENCING GUIDELINE

1. USSG § 2L1.2 (2014) and USSG § 2L1.2 (2015) both provide in relevant part:

§ 2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: **8**

(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; . . . .

USSG § 2L1.2 (2014 & 2015).

Application Note 1 to USSG § 2L1.2 provides in pertinent part: "For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in section 1101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43), without regard to the date of conviction for the aggravated felony." USSG § 2L1.2, comment. (n.3(A)) (2014 & 2015).

2. 8 U.S.C. § 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * *

(43) 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 [is] at least one year[.]

3. 18 U.S.C. § 16 provides:

Crime of violence defined

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, or

(b) any other 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.

STATEMENT OF THE CASE

Petitioners are noncitizens who were each deported, but were later found in the United States after returning without authorization. In separate district court proceedings in the Southern District of Texas, they each pleaded guilty to illegal reentry following deportation, in violation of 8 U.S.C. § 1326.

Under the pre-November 1, 2016 Sentencing Guidelines, a person who is convicted of illegal reentry faces an 8-level Guidelines enhancement if he had, prior to his deportation, a conviction for an "aggravated felony." See USSG § 2L1.2(b)(1)(C) (2015). To define "aggravated felony," the Guideline expressly incorporates the statutory definition of 8 U.S.C. § 1101(a)(43) which, in turn, includes within the definition of "aggravated felony" a "crime of violence" as defined in 18 U.S.C. § 16.

Under the illegal-reentry Guideline, each petitioner received the 8-level enhancement. Mr. Medina received the enhancement, over his objection, based on the district court's determination that his 1994 Texas conviction for aggravated assault qualified as a "crime of violence" under § 16(b), and therefore qualified as an "aggravated felony." That enhancement increased his Guidelines range from 15 to 21 months, up to 24 to 30 months. Mr. Velasquez-Rios received the 8-level enhancement based on prior Texas felony convictions for burglary of a habitation and evading arrest, increasing his advisory range from 21 to 27 months, up to 30 to 37 months. Mr. Velasquez-Rios did not object to the 8-level enhancement. Mr. Vega-Zapata received the 8-level enhancement, over his objection, based on prior Texas felony convictions for assault of a public servant and

evading arrest with a motor vehicle. That enhancement increased his advisory range from 24 to 30 months, up to 33 to 41 months.

In Mr. Medina's and Mr. Velasquez-Rios's cases, the district court imposed an upward variance from the advisory Guidelines range in light of the factors enumerated under 18 U.S.C. § 3553(a). However, each variance used the incorrect, higher range as the basis for the variance. The district court sentenced Mr. Medina to 71 months. The district court sentenced Mr. Velasquez-Rios to 60 months. The district court sentenced Mr. Vega-Zapata to a within-Guidelines sentence of 36 months.

Each petitioner timely appealed to the United States Court of Appeals for the Fifth Circuit. On appeal, Petitioners argued that none of their prior convictions qualified as an "aggravated felony" because all the convictions could only qualify under 8 U.S.C. § 1101(a)(43)(F) in reliance on the residual clause of 18 U.S.C. § 16(b), which was unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015). Petitioners recognized that their arguments were then foreclosed by the Fifth Circuit's decision in United States v. Gonzalez-Longoria, 831 F.3d 670, 672 (5th Cir. 2016) (en banc). In Mr. Velasquez-Rios's case and Mr. Vega-Zapata's case, the Fifth Circuit affirmed the sentence based on Gonzalez-Longoria, the petitioners' sought a writ of certiorari from this Court, and this Court granted the writ, vacated the judgment, and remanded to the Fifth Circuit for reconsideration in light of Sessions v. Dimaya.

In all three of Petitioners' cases, the Fifth Circuit ultimately affirmed the sentences on the basis of United States v. Godoy, 890 F.3d 531, 537-40 (5th Cir. 2018), which held

that § 16(b) remained valid as it was incorporated by reference into the illegal-reentry Guideline, because the Guidelines are not subject to a vagueness challenge. See Pet. App. 3a-4a, 16a, 18a.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's decision that the Sentencing Guidelines continue to incorporate 18 U.S.C. § 16(b), after this Court invalidated that statute, is in conflict with this Court's precedent and with other circuits.

The question raised by this case is whether 18 U.S.C. § 16(b), which this Court held unconstitutional in Sessions v. Dimaya, is still valid for purposes of applying the Sentencing Guidelines, when the Guidelines incorporate that statute by reference.

Under the pre-November 1, 2016 Sentencing Guidelines, a person who is convicted of illegal reentry faces an 8-level Guidelines enhancement if he had, prior to his deportation, a conviction for an "aggravated felony." See USSG § 2L1.2(b)(1)(C) (2015). To define "aggravated felony," the Guideline expressly incorporates the statutory definition of 8 U.S.C. § 1101(a)(43), providing that: "For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in section 1101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony." USSG § 2L1.2, comment. (n.3(A)). Section 1101(A)(43)(F) includes within the definition of "aggravated felony" a "crime of violence" as defined in 18 U.S.C. § 16, for which the term of imprisonment was at least one year. Section 16, in turn, provides:

> The term "crime of violence" means –
>
> (a) an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other 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.

18 U.S.C. § 16.

In Sessions v. Dimaya, this Court held that the definition of "crime of violence" in 18 U.S.C. § 16(b), as incorporated into the definition of "aggravated felony" found at 8 U.S.C. § 1101(a)(43)(F), was unconstitutionally vague. Id. at 1215. Although the case came before the Court in the context of a challenge to an order of removal issued under the immigration statute, id. at 1211-12, the Court did not limit its analysis to that particular context or in any other way indicate that its holding would not apply to that statute as it applied in the context of criminal sentencing. On the contrary, the Court acknowledged that its holding directly related to a criminal statute, 18 U.S.C. § 16(b), and rejected the government's argument that a less exacting vagueness standard should apply because the statute was incorporated into an immigration statute rather than being applied strictly in the criminal context. Id. at 1212-13. And the Court recited that it had granted certiorari to resolve the circuit conflict that had developed precisely on the aggravated felony definition, and cited the application of § 16(b) in the Guidelines as among the conflicting decisions to be resolved. Id., at 1212 n.2 (citing inter alia United States v. Gonzalez-Longoria, 831 F.3d 670 (5th Cir. 2016) (en banc)).

In Beckles v. United States, 137 S. Ct. 886 (2017), this Court held that the Sentencing Guidelines themselves were not subject to a due process vagueness challenge like that made in Sessions v. Dimaya or Johnson v. United States, 135 S. Ct. 2551 (2017). See Beckles, 137 S. Ct. at 897. And in Godoy, the Fifth Circuit extended the reasoning of Beckles to hold that § 16(b), as incorporated into the Sentencing Guidelines (USSG §

2L1.2(b)(1)(C)) through the commentary's adoption of the definition of "aggravated felony" in 8 U.S.C. § 1101(a)(43), remained validly incorporated into the Sentencing Guideline. See Godoy, 890 F.3d at 537-40. The Fifth Circuit reasoned that even though that statute was unconstitutionally vague in light of Sessions v. Dimaya, § 16(b) remained validly incorporated into the illegal-reentry Guideline, because the Guidelines themselves were not subject to a vagueness challenge:

> The Guidelines are not subject to vagueness challenges. So it does not necessarily follow from Dimaya that § 16(b) is unconstitutionally vague in the Guidelines context. To the contrary, any distinction between a vagueness challenge to a statute incorporated into a Guideline and a vagueness challenge to the Guideline itself is untenable. As Godoy's counsel conceded at oral argument, if the language of § 16(b) were cut-and-pasted directly into the Guidelines themselves, Godoy could not bring a void-for-vagueness challenge. This is no less true where the language of § 16(b) is incorporated into the Guidelines by reference.

Godoy, 890 F.3d at 537-38 (cleaned up). In Petitioners' cases, the Fifth Circuit applied Godoy to affirm application of the 8-level "aggravated felony" sentencing enhancement in each case. Pet. App. 3a-4a, 16a, 18a. The Eighth Circuit has taken a similar approach, holding that § 16(b) remains incorporated into the illegal-reentry Guideline, even though § 16(b) was held to be unconstitutionally vague in Sessions v. Dimaya. See United States v. Sanchez-Rojas, 889 F.3d 950, 952 (8th Cir. 2018) ("We see no meaningful difference between a Guidelines section that uses the same language as a statute [like the Guideline at issue in Beckles] and a section that incorporates the statutory language by reference . . . .").

The Fifth Circuit's Godoy decision (and that of the Eighth Circuit in Sanchez-Rojas)

misapplies Beckles by extending it to statutes already declared unconstitutionally vague but incorporated into a Guideline. The decisions of the Fifth Circuit in Godoy and the Eighth Circuit in Sanchez-Rojas miss the important distinction that a statute, once declared unconstitutional, is unconstitutional whether applied directly or by incorporation. This Court held that when a statute is declared unconstitutionally vague, that renders the statute "invalid in toto—and therefore incapable of any valid application." Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982).

This distinction was clear to the Fifth Circuit panel in United States v. Gonzalez-Longoria, in which a Fifth Circuit panel held that § 16(b), as it was incorporated into the Sentencing Guideline, was unconstitutionally vague. United States v. Gonzalez-Longoria, 813 F.3d 225, 228 (5th Cir.), on reh'g en banc, 831 F.3d 670 (5th Cir. 2016), cert. denied, 138 S. Ct. 1975, 201 L. Ed. 2d 247 (2018), order vacated on reh'g, 138 S. Ct. 2668 (2018), and cert. granted, judgment vacated, 138 S. Ct. 2668 (2018). That panel decision was subsequently reversed by the en banc Fifth Circuit, which held that § 16(b) was not vague—a decision that this Court vacated after Dimaya held to the contrary. In the original Gonzalez-Longoria panel decision, the majority noted that a vagueness challenge to a Guideline itself is distinct from a vagueness challenge to a statute, as that statute is incorporated into a Guideline. See Gonzalez-Longoria, 813 F.3d at 228. The panel majority observed that "[i]f § 16 is unconstitutional, it becomes a legal nullity, and can have no further effect. Accordingly, § 2L1.2(b) would not be able to incorporate that nullity by reference and Gonzalez-Longoria's sentence should not have been enhanced." Id.

Other federal courts of appeals have applied this principle when an invalidated statute has been incorporated into a federal Sentencing Guideline, easily recognizing that Guidelines enhancements which incorporate that statute subsequently encompass only the remaining, constitutional portions of the statute. See e.g., United States v. Rodriguez-Pacheco, 475 F.3d 434, 438-442, 444 (1st Cir. 2007) (recognizing that after child pornography definitions previously contained in 18 U.S.C. § 2256(8)(B) and (D) were found unconstitutional because they included virtual minors, defendant could only be subject to enhancement under USSG § 2G2.4(b)(2) (2002), based on the remaining, constitutional portions of incorporated statute that covered real minors); United States v. Lacey, 569 F.3d 319, 324-25 (7th Cir. 2009) (same for application of USSG § 2G2.2(b)(7)(D)'s 600-image enhancement); United States v. Hoey, 508 F.3d 687, 690-91, 693 (1st Cir. 2007) (same for § 2G2.2(b)(4)).

The Guidelines' incorporation of a statute is significantly different from simply interpreting the text of a Guideline itself, because it tethers the Guideline to later amendments to, or case law interpretations of, the statute. This Court explicitly drew that connection in Lopez v. Gonzales, 549 U.S. 47 (2006), where the Court recognized that the definition of "aggravated felony" under immigration law applied to removability determinations as well as to the federal Sentencing Guidelines, because the Sentencing Guidelines incorporated the statutory definition. See id. at 50-51. This Court used that immigration case to resolve a circuit split on the Sentencing Guideline controversies over whether "simple possession" offenses were included within the term "aggravated felony."

Id. at 52 n.3. Federal courts subsequently recognized—and the government repeatedly agreed—that the statutory interpretation of Lopez applied with equal force to the Sentencing Guidelines application of the "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C). See United States v. Matamoros-Modesta, 523 F.3d 260, 263 (4th Cir. 2008); United States v. Figueroa-Ocampo, 494 F.3d 1211, 1216 (9th Cir. 2007) (observing that "it is beyond dispute that Lopez applies in both criminal sentencing and immigration matters"); United States v. Estrada-Mendoza, 475 F.3d 258, 261 (5th Cir. 2007) (concluding that "Lopez ineluctably applies with equal force to immigration and criminal cases"); United States v. Pacheco-Diaz, 506 F.3d 545, 548 (7th Cir. 2007); United States v. Martinez-Macias, 472 F.3d 1216, 1218 (10th Cir. 2007).

Moreover, when the Sentencing Commission wanted to adopt a fixed, Guidelines-specific definition of a particular term, insulated from any statutory changes, it did so. For example, Application Note 1 to USSG § 1B1.1 sets forth definitions for a number of terms, such as "bodily injury" and "firearm," that apply throughout the Guidelines. See USSG § 1B1.1, comment. (n.1). Dozens of individual Guidelines similarly provide definitions of terms that are specific to that particular Guideline. But when the Commission chooses to incorporate a statutory definition by reference, it tethers that definition to changes in statutory interpretation or constitutional invalidation of statutes.

The distinction between adoption of a fixed definition within the Guidelines itself and incorporation of a statutory definition by reference is not undermined by Beckles. The language asserted to be vague in Beckles was the text of USSG § 4B1.2 itself, Beckles,

137 S. Ct. at 892-93, whereas the language challenged by Petitioners is the language of § 16(b), a federal statute already invalidated by this Court, which is then incorporated into the Guidelines via § 2L1.2's reference to the statutory "aggravated felony" definition. See USSG § 2L1.2(b)(1)(C) & cmt. n.3(A). Unlike in Beckles, where a successful challenge would have required invalidation of the Guideline, Petitioners' challenge to § 16(b) will have no effect on the language of USSG § 2L1.2 itself. The Guideline will simply continue to incorporate the remaining, valid portions of 8 U.S.C. § 1101(a)(43) and 18 U.S.C. § 16.

By failing to adhere to these precedents, the Fifth Circuit decisions in Godoy and in Petitioners' cases, and the Eighth Circuit's decision in Sanchez-Rojas, are directly contrary to this Court's precedent and the precedent of other federal courts of appeals on the effect of incorporation into a Sentencing Guideline of a statute already declared unconstitutional.

II. The interplay between an invalidated statute and the Sentencing Guidelines that incorporate that statute is an important question of federal sentencing law that warrants this Court's attention.

Although USSG § 2L1.2 has now been amended to eliminate the crime of violence enhancement, this does not reduce the need to resolve the question in this case. As Petitioners' cases illustrate, the earlier illegal-reentry Guideline may still be applied to defendants found in the country before November 1, 2016. See Peugh v. United States, 133 S.Ct. 2072, 2078 (2013).

Moreover, the question of the interplay between an invalidated, or even narrowed, statute and a Sentencing Guideline that incorporates that statute is likely to arise in other cases. Under the approach taken by the Fifth Circuit, a statute can mean one thing when it

is applied directly, and yet mean something else when it is incorporated into the Guidelines by reference, depending on the reason why the statute was invalidated, narrowed or interpreted in a particular way, and depending on whether that constitutional reason or interpretative principle also applies to the Guidelines. But this cannot be the result intended by the Sentencing Commission when it incorporated many statutory definitions throughout the Guidelines.

Incorporation of statutory definitions by reference is a feature of dozens of Sentencing Guidelines, to the extent that citation of all of them would be unwieldy. For example, Application Note 1 to the theft Guideline, USSG § 2B1.1, incorporates seven statutory definitions by reference, while Application Note 10 to that Guideline incorporates five different statutory definitions and Note 15 incorporates ten more statutory definitions. See USSG § 2B1.1, comment. (nn.1, 10, 15). USSG § 2M6.1, the Guideline applicable to offenses involving weapons of mass destruction, incorporates 11 statutory definitions by reference. See USSG § 2M2.1, comment. (n.1). The sexual abuse Guideline, the trespass Guidelines, the child enticement Guideline, the sexual exploitation of a minor Guideline, and the eavesdropping Guidelines all incorporate five or more statutory definitions by reference. See USSG §§ 2A3.4, comment. (n.1); USSG § 2B2.3, comment. (n.1); USSG § 2G1.3, comment. (n.1); USSG § 2G2.1, comment. (nn.1 & 2), and USSG § 2H3.1, comment. (n.4). Countless other Guidelines incorporate at least one statutory definition by reference.

Most courts have approached the question much more straightforwardly than the

Fifth Circuit in Godoy. For example, as discussed above, in United States v. Rodriguez-Pacheco, the First Circuit recognized that after the child pornography definitions previously contained in 18 U.S.C. § 2256(8)(B) and (D) were found unconstitutional because they included virtual minors, a defendant could only be subject to enhancement under USSG § 2G2.4(b)(2) (2002), based on the remaining, constitutional portions of the incorporated statute, which covered real minors. See Rodriguez-Pacheco 475 F.3d at 438-442, 444; see also Lacey, 569 F.3d at 324-25 (same for application of USSG § 2G2.2(b)(7)(D)'s 600-image enhancement); Hoey, 508 F.3d at 690-91, 693. Those courts did not pretend that the ghost of the invalidated statute might still exist under the Guidelines. Nor did those courts ask a second question of whether the Guidelines themselves could be subject to the same First Amendment challenge that invalidated the statutes. Instead, they easily recognized that the Guidelines continued to incorporate only the valid portions of the statute.

The Fifth Circuit's more cumbersome approach to the connection between the Guidelines and a statute incorporated therein by reference should be rejected. If any of the dozens of statute incorporated by reference into the Guidelines are invalidated, or narrowed, by a court based on constitutional rules or principles of statutory construction, the only logical result is that the Guideline also incorporates the changed statutory interpretation. Any holding otherwise would be unworkable, requiring a complicated analysis of the reason the statute was invalidated or interpreted a particular way, and whether that same reason also applies to the Guidelines.

For the reasons gives above, this Court should grant certiorari in Petitioners' cases to review the judgments of the Court of Appeals. See Sup. Ct. R. 10(a), (c).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 11, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20681

United States Court of Appeals
Fifth Circuit
FILED
May 22, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

GABINO MEDINA OSORIO, also known as Gabino Medina, also known as Gambino Medina, also known as Gabino Osorie Medina, also known as Gabino Osorio Medina,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CR-79-1

Before REAVLEY, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Gabino Medina Osorio pled guilty to illegal reentry after a prior removal. The district court determined that his 1994 aggravated assault conviction was for a "crime of violence" under 18 U.S.C. § 16(b). On appeal, Medina Osorio argues that Section 16(b) is unconstitutionally vague and that his aggravated assault conviction is not a crime of violence under Section 16(b). Though the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Supreme Court recently agreed Section 16(b) was too vague insofar as it required deportation, this court even more recently has held that Section 16(b)'s vagueness does not affect its use under the discretionary Sentencing Guidelines. We reform the judgment in one respect and AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2011, police in Houston, Texas, arrested Gabino Medina Osorio. He admitted to being a citizen of Mexico illegally in the United States after being previously removed, thereby violating 8 U.S.C. § 1326. He pled guilty without a plea agreement to a violation of 8 U.S.C. § 1326(a) and (b)(2).

The pre-sentencing report ("PSR") applied the 2015 United States Sentencing Guidelines. Medina Osorio's Section 1326 conviction received a base offense level of eight pursuant to Guidelines Section 2L1.2. The PSR also recommended an enhancement for his 1994 conviction for aggravated assault under Texas Penal Code § 22.02(a). The final PSR determined that the 1994 conviction was a crime of violence under 18 U.S.C. § 16, which meant that it was an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(f) and Guidelines Section 2L1.2(b)(1)(C), warranting an eight-level enhancement. Medina Osorio objected to this categorization. Medina Osorio's criminal history put him in Category IV. Taking into account his base level of eight, an eight-level enhancement, and a three-level reduction for acceptance of responsibility, his advisory Guidelines range was 24–30 months.

At the sentencing hearing in the United States District Court for the Southern District of Texas, Medina Osorio argued that his 1994 conviction for aggravated assault did not warrant an eight-level enhancement. The district court disagreed, concluding the offense was a crime of violence under Section 16(b) and thus an aggravated felony. The Government requested an upward

variance. The district court agreed and imposed a sentence of 71 months. Medina Osorio timely appealed.

DISCUSSION

Medina Osorio challenges his eight-level sentencing enhancement. The relevant enhancement in Section 2L1.2(b)(1)(C) provides for an increase of eight levels if the predicate offense is an aggravated felony under 8 U.S.C. § 1101(a)(43). Aggravated felonies include "crimes of violence," defined as

> (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, or
>
> (b) any other 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.

18 U.S.C. § 16. Medina Osorio argues first that Section 16(b) as incorporated into the Guidelines is unconstitutionally vague. He also argues that even if we disagree with him on vagueness, his 1994 conviction did not satisfy the definition of Section 16(b), so it did not warrant the enhancement. Last, he argues that even if resentencing is not warranted, his judgment should be corrected because Section 16(b) as incorporated into Section 1326(b)(2) is unconstitutionally vague.

I. Constitutional vagueness of Section 16(b)

To challenge his eight-level enhancement, Medina Osorio renews the argument first made at sentencing that Section 16(b) is unconstitutionally vague. Because Section 16(b) is unconstitutionally vague, Medina Osorio continues, the district court erred in using that definition to hold that his 1994 conviction was an aggravated felony under Section 1101(a)(43)(F), which is

what warranted the eight-level enhancement under Guidelines Section 2L1.2(b)(1)(C). In the district court, the Government cited authority that Section 16(b) was not vague. Since its original brief on appeal, the Government has also argued that the Guidelines are not subject to vagueness challenges.

Uncertainties at the time of sentencing have largely been eliminated. The Supreme Court has held that Section 16(b) as incorporated in the removal provisions of the Immigration and Nationality Act is unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018). That Court had also held that the Guidelines themselves are not subject to a vagueness challenge. *Beckles v. United States*, 137 S. Ct. 886, 890 (2017). The *Beckles* Court emphasized an important distinction between Guidelines and vague statutes: because the Guidelines simply guide the discretion of the sentencing court as it chooses an appropriate sentence, they do not present the due process concerns of lack of notice to those who might break the law. *Id*. at 892.

The final question is how *Dimaya* and *Beckles* are to be read together. Yet again, we have a resolution of that issue. Another panel of the court held that because *Beckles* determined that the Guidelines are not subject to vagueness challenges, neither is the language of a statute that is incorporated by reference into the Guidelines. *United States v. Godoy*, 17-10838, 2018 WL 2207909, at *5 (5th Cir. May 14, 2018). Even after *Dimaya*, then, the language of Section 16(b) is as usable as a definition for the Guidelines as it would have been had the language been, figuratively, cut and pasted into them. *Id.* at *7. We thus reject Medina Osorio's vagueness argument.

II. The 1994 conviction as a crime of violence

Medina Osorio argues that even if Section 16(b) is still relevant under the Guidelines, the eight-level enhancement contained in Guidelines Section 2L1.2(b)(1)(C) should not have been applied because his conviction did not

satisfy the requirements of Section 16(b)'s definition. The Government bears the burden of proving by a preponderance of the evidence that the conviction qualifies for an enhancement. *See United States v. Herrera-Solorzano*, 114 F.3d 48, 50 (5th Cir. 1997). This court reviews the district court's determination of whether a conviction is a predicate offense *de novo*. *United States v. Medina-Anicacio*, 325 F.3d 638, 643 (5th Cir. 2003).

To determine if a conviction is a predicate offense under the Guidelines, this court applies the categorical approach, looking at the elements of the prior state law offense rather than facts specific to the conviction. *See United States v. Conde-Castaneda*, 753 F.3d 172, 175 (5th Cir. 2014) (citing *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013)). If a statute is divisible, meaning that it includes alternative elements, a modified categorical approach is applied. *Mathis v. United States*, 136 S. Ct. 2243, 2248–49 (2016).

Elements are components of the offense's legal definition that require jury unanimity. *Id.* at 2248. These are to be distinguished from means, which are the various factual bases for committing an offense. *Id.* at 2249. If a statute is divisible, then under the modified categorical approach, a court determines which elements applied to the defendant's conviction by examining the charging instrument, plea agreement, or plea colloquy. *Id.* (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)). If a particular statute is not divisible, then the court determines "whether the least culpable act constituting a violation of that statute constitutes" a predicate offense. *United States v. Moreno-Florean*, 542 F.3d 445, 449 (5th Cir. 2008) (quoting *United States v. Gonzalez-Ramirez*, 477 F.3d 310, 315–16 (5th Cir. 2007)).

Both parties agree that Medina Osorio's 1994 aggravated assault conviction requires examining two Texas statutes, one for the base offense of simple assault and another for the aggravating factors.

Under Texas law, an assault occurs when a person

> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse; or
> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
> (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the conduct as offensive or provocative.

TEX. PENAL CODE § 22.01(a) (West 1993).

> An assault is aggravated when a person
>
> (1) causes serious bodily injury to another, including the person's spouse;
> (2) threatens with a deadly weapon or threatens to cause bodily injury [to specified employees, including peace officers], when the person knows or has been informed the person assaulted is [one of the specified public employees]:
> (A) while the [specified public employee] is lawfully discharging an official duty; or
> (B) in retaliation for or on account of an exercise of official power or performance of an official duty as a [specified public employee]; or
> (3) causes bodily injury to a participant in a court proceeding when the person knows or has been informed the person assaulted is a participant in a court proceeding:
> (A) while the injured person is lawfully discharging an official duty; or
> (B) in retaliation for or on account of the injured person's having exercised an official power or performed an official duty as a participant in a court proceeding; or
> (4) uses a deadly weapon.

Id. § 22.02(a).

The parties agree that Section 22.01 contains three different offenses for simple assault. Applying the modified-categorical approach, the parties also agree that Medina Osorio was previously convicted of bodily-injury assault under Section 22.01(a)(1) with an additional aggravating factor under Section 22.02. Because the parties agree that the statute containing the aggravating

factors is indivisible, the case turns on whether the least culpable conduct constituting an offense under the statute is a crime of violence under Section 16(b). The parties agree that the least culpable offense is recklessly causing bodily injury to a peace officer.

The district court concluded that Medina Osorio's 1994 aggravated assault conviction was a crime of violence under Section 16(b). Because his conviction was for a crime of violence, which is an aggravated felony under Section 1101(a)(43)(F), it applied the eight-level enhancement in Guidelines Section 2L1.2(b)(1)(C). Medina Osorio challenges this determination, and the Government maintains that the conviction is for a crime of violence either under Section 16(b) or at least under Section 16(a).

Under Section 16(b), a felony offense 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" is a crime of violence. 18 U.S.C. § 16(b). The requisite force under Section 16 is "destructive or violent force." *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) (citation omitted). The risk of the use of force does not have to occur in every offense. *United States v. Galvan-Rodriguez*, 169 F.3d 217, 219 (5th Cir. 1999). Rather, the analysis asks whether there is "a strong probability" that the application of physical force will occur during the commission of the particular crime. *Id.* The strong probability or "[t]he 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct." *Leocal v. Ashcroft*, 543 U.S. 1, 10 n.7 (2004).

Medina Osorio argues that the bodily-injury assault on a peace officer in Texas can be committed through the reckless, indirect causation of injury and thus without the use of the violent or destructive physical force that Section 16(b) requires. The Government responds that though reckless assault on a peace officer may be committed without violence, the nature of confronting a

peace officer makes the risk of the use of physical force more likely. The Government cites several Texas aggravated assault cases in which a confrontation with a peace officer involved the defendant's use of physical force.

In resolving the issue, we first note that recklessness is a sufficient mens rea for a crime of violence under Section 16. *United States v. Sanchez-Espinal*, 762 F.3d 425, 431 (5th Cir. 2014). Similarly, hypotheticals about ways that bodily-injury assault may be committed without force are not dispositive. "Being able to imagine unusual ways the crime could be committed without the use of physical force does not prevent it from qualifying as a crime of violence under § 16(b)." *Perez-Munoz v. Keisler*, 507 F.3d 357, 364 (5th Cir. 2007) *abrogated on other grounds by Mathis*, 136 S. Ct. at 2243. Instead, this court looks to the context of the specific offense at issue to determine whether it involves a "strong probability" of the use of physical force. *Sanchez-Espinal*, 762 F.3d at 431.

In *Sanchez-Espinal*, we determined whether a conviction for aggravated criminal contempt qualified as a crime of violence under Section 16(b). *Id.* at 430. The statute of conviction made it a crime to "cause physical injury to a victim for whose benefit an order of protection ha[d] been previously issued against the defendant." *Id.* at 431. We held that the offense was a crime of violence under Section 16(b). *Id.* In making this determination, we considered the context for the offense. *Id.* These protective orders were often issued in domestic violence or family offense cases in which tension in the relationship between the victim and the defendant already existed. *Id.* Further, a defendant committing this offense would be knowingly violating the court's order. *Id.* at 431–32. "These elements — a discordant history between the victim and the defendant leading to a court order of protection, which the

defendant knowingly violates" — supported finding that the offense, "by its nature, entails a high probability that physical force will be used." *Id.* at 432.

We also held that the same was true for convictions for "'intentionally, knowingly, or recklessly caus[ing] bodily injury to another,' committed against a household or family member, or person in a dating relationship with the defendant." *United States v. Gonzalez-Longoria*, 831 F.3d 670, 678 (5th Cir. 2016) (en banc) (citation omitted), *cert. denied*, No. 16-6259, 2018 WL 2186220 (U.S. May 14, 2018), *abrogated in part by Dimaya*, 138 S. Ct. at 1223. Our en banc decision, released before the Supreme Court in *Beckles* held that the Guidelines were not subject to vagueness challenges, remains relevant to applying the Guidelines. We held that the offense, like the one in *Sanchez-Espinal*, involved "a substantial risk that, in the course of its commission, force will be used against another." *Id.* at 678.

As to assaults on peace officers, an assailant must know that the target is a peace officer, and the peace officer must be "lawfully discharging an official duty." TEX. PENAL CODE § 22.02(a)(2). This, like the offense in *Sanchez-Espinal*, requires the defendant to flout the officer's authority and necessarily involves a risk of a violent confrontation with the officer.

Medina Osorio identifies several cases arising under this provision where the use of requisite force allegedly was not present.[1] These cases do not compel a contrary conclusion. For example, he discusses an instance of bodily-injury assault on a peace officer where the defendant kicked the rear window of a police cruiser, which later shattered and injured the police officer standing in front of it. *Riley v. State*, No. 03-10-00229-CR, 2011 WL 5335387, at *1, *5

[1] In addition to these three cases, Medina Osorio cited *Seaton v. Texas*, 385 S.W.3d 85 (Tex. App.—San Antonio 2012, pet. ref'd). There, though, the aggravating factor was for an assault committed "by a public servant acting under color of the servant's office or employment." *Id.* at 88 (quoting TEX. PENAL CODE ANN. § 22.02(b)(2)(A)). Our focus here is on assault on a peace officer, not assault by a peace officer.

(Tex. App.—Austin Nov. 4, 2011, pet. ref'd) (mem. op., not designated for publication). There, though, it appeared that the use of force (the kicking of the window) was intentional, while the resulting injury to the police officer was only reckless. *Id.* at *4–5. As the Supreme Court in *Leocal* made clear, the focus is on the use of force and not its effect. 543 U.S. at 10 n.7.

Medina Osorio also cites a case where the defendant was convicted for assault on a peace officer after kicking the door of a police car, causing the police officer, who was responding to the 911 call, to fall and injure his elbow. *Rodriguez v. State*, No. 13-10-406-CR, 2011 WL 345934, at *1, *4 (Tex. App.—Corpus Christi Feb. 3, 2011, pet. ref'd, untimely filed) (mem. op., not designated for publication). Similarly, there it seems the kick was intentional, as it was accompanied by a statement from the defendant that "he was not going to jail." *Id.* at *1.

In one final case, the defendant was convicted of assault because his jerking away from the officer caused the officer to fall. *Caldwell v. State*, No. 05-04-01243-CR, 2005 WL 1667555, at *2 (Tex. App.—Dallas July 18, 2005, no pet.) (not designated for publication). The officer was responding to a domestic disturbance call. *Id.* at *1. When the officer attempted to make the arrest, the defendant struggled with the officer, causing the fall that injured the officer. *Id.* at *2. Admittedly, this conduct may not reach the level of "destructive or violent force" required by Section 16(b). *See United States v. Herrera-Alvarez,* 753 F.3d 132, 141 (5th Cir. 2014). Section 16(b), though, does not require the use of force in every instance of the offense. *See Galvan-Rodriguez*, 169 F.3d at 219. Instead, we examine the offense to determine if there is a strong probability of the use of force. *Id.* Notably, in each of these instances, the victim's role as a police officer contributed in some way to the escalation that ultimately resulted in the injury.

Considering the context of a bodily-injury assault on a police officer, we conclude that the offense involves a substantial risk of the use of physical force and is thus a crime of violence under Section 16(b). As a result, the district court did not err in sentencing Medina Osorio to 71 months.

III. Correction of the judgment

Medina Osorio also argues that Section 16(b) is unconstitutionally vague as it is incorporated into Section 1326(b)(2). Even if resentencing is not warranted, he argues that the judgment should be corrected to reflect the appropriate statute. The district court's conclusion that Medina Osorio had previously been convicted of a Section 16 crime of violence meant that he was subject to the twenty-year statutory maximum contained in Section 1326(b)(2) as opposed to the ten-year maximum contained in Section 1326(b)(1).

We held in *Godoy* "that *Dimaya* very clearly speaks to situations where a sentencing maximum or minimum is statutorily fixed." 2018 WL 2207909, at *8. As a result, a Section 16(b) offense may not be used as the basis of a Section 1326(b)(2) conviction. *Id.* at *9.

The Government has an alternative argument, namely, that Medina Osorio's conviction is a crime of violence under Section 16(a) because the use of force is an element of the offense. The Government concedes that we have previously held that the use of force is not an element of the underlying assault offense. *See Villegas-Hernandez*, 468 F.3d at 879. The Government asserts that this decision was abrogated by the Supreme Court. *See Voisine v. United States*, 136 S. Ct. 2272, 2279 (2016); *United States v. Castleman*, 134 S. Ct. 1405, 1412 (2014). The Government's abrogation argument also is foreclosed. *United States v. Rico-Mejia*, 859 F.3d 318, 322–23 (5th Cir. 2017).

Medina Osorio's 1994 conviction is not a crime of violence under Section 16(a). In *Godoy*, we reformed the judgment to indicate that Godoy was

sentenced under Section 1326(b)(1). We do the same now. As was the case in *Godoy*, and as the parties concede here, this conclusion requires only that the judgment be corrected. A remand for resentencing is not necessary.

We AFFIRM the judgment as REFORMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20681

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

GABINO MEDINA OSORIO, also known as Gabino Medina, also known as Gambino Medina, also known as Gabino Osorie Medina, also known as Gabino Osorio Medina,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CR-79-1

ON PETITION FOR PANEL REHEARING

Before REAVLEY, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:

Gabino Medino Osorio seeks rehearing of our decision to affirm his conviction and sentence for illegal reentry after removal. Though affirming the conviction, we reformed the district court's judgment to reflect that he was sentenced according to 8 U.S.C. § 1326(b)(1), not Section 1326(b)(2). In his petition for panel rehearing, Osorio asked the court to delay ruling on his petition until the court has resolved the petition for rehearing on *United States*

v. Godoy, 890 F.3d 531 (5th Cir. 2018), a case we had cited as controlling precedent. We have delayed, but the resolution of the petition in *Godoy* brings no benefits to Osorio.

We deny rehearing but address certain recent developments in the caselaw. *Godoy* had relied in part on this court's en banc *Gonzalez-Longoria* opinion and indicated that the Supreme Court had denied a petition for writ of certiorari in that case. *Godoy*, 890 F.3d at 535 (citing *United States v. Gonzalez-Longoria*, 831 F.3d 670, 675–77 (5th Cir. 2016) (en banc), *abrogated by Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)).[1] Subsequently, the Supreme Court vacated its earlier denial of certiorari, vacated our en banc judgment, and remanded for consideration of *Dimaya*. *United States v. Gonzalez-Longoria*, No. 16-6259, 2018 WL 3013812, at *1 (June 18, 2018). After that remand, Gonzalez-Longoria informed the court that he sought only that his judgment be corrected to reflect that his illegal reentry was not after a previous conviction for an aggravated felony. *United States v. Gonzalez-Longoria*, 15-40041, 2018 WL 3421086, at *1 (5th Cir. July 13, 2018). We remanded to the district court for that purpose and otherwise dismissed the appeal. *Id.*

These changes do not affect our decision in the present case. The petition for rehearing in *Godoy* was denied as it pertained to Section 16(b)'s incorporation into the Sentencing Guidelines. Even after *Dimaya* was decided and *Gonzalez-Longoria* was vacated, the revised *Godoy* opinion held that Section 16(b) "remains incorporated into the advisory-only Guidelines for definitional purposes." *Godoy*, 890 F.3d at 540.

PETITION DENIED.

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[1] We also relied on *Gonzalez-Longoria* in our opinion in this case as an example of the analysis used to determine whether an offense was a crime of violence under Section 16(b). The vacating of *Gonzalez-Longoria* does not change our conclusion here.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-41517
Conference Calendar

United States Court of Appeals
Fifth Circuit
FILED
July 18, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JOEL VELASQUEZ-RIOS,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:15-CR-732-1

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before JOLLY and SOUTHWICK, Circuit Judges.*

PER CURIAM:**

Joel Velasquez-Rios pleaded guilty to being found in the United States after having been deported. This Court granted the Government's unopposed motion for summary affirmance because Velasquez-Rios's constitutional vagueness challenge to 18 U.S.C. § 16(b), incorporated into the definition of

* This matter is being decided by a quorum due to Judge Edward Prado's retirement on April 2, 2018. *See* 28 U.S.C. § 46(d).

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

"aggravated felony" for purposes of sentence enhancement under U.S.S.G. § 2L1.2(b)(1)(C) (2014), was foreclosed by *United States v. Gonzalez-Longoria*, 831 F.3d 670, 672 (5th Cir. 2016) (en banc), *abrogated by Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). *United States v. Velasquez-Rios*, 677 F. App'x 186 (5th Cir. 2017). The Supreme Court granted certiorari, vacated the judgment, and remanded the case to us for further consideration in the light of *Dimaya*'s holding that Section 16(b) is unconstitutionally vague. *See Dimaya*, 138 S. Ct. at 1210.

In supplemental letter briefs submitted at this Court's request, the parties agree that Velasquez-Rios's challenge to the sentencing enhancement for having been deported after having committed an aggravated felony is foreclosed by this Court's decision in *United States v. Godoy*, 890 F.3d 531, 541–42 (5th Cir. 2018). The parties further agree that because the written judgment does not contain any indication of a prior "aggravated felony" and does not reflect that Velasquez-Rios was convicted and sentenced under 8 U.S.C. § 1326(b)(2), which provides for a maximum sentence of 20 years for defendants previously convicted of an aggravated felony, there is no need to remand for the purpose of correction of the judgment. The judgment is therefore AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 20, 2018
Lyle W. Cayce
Clerk

No. 16-41219
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE GUADALUPE VEGA-ZAPATA, also known as Ricardo Gonzalez, also known as Victor Guadalupe Medina,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:15-CR-580-1

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before KING, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:*

Jose Guadalupe Vega-Zapata pleaded guilty to illegal reentry and was sentenced to a 36-month term of imprisonment. Vega-Zapata appealed application of the eight-level aggravated felony enhancement of U.S.S.G. § 2L1.2(b)(1)(C) on the ground that the definition of "crime of violence" that it

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

incorporates from 18 U.S.C, § 16(b) is unconstitutionally vague. We summarily affirmed because *United States v. Gonzalez-Longoria*, 831 F.3d 670, 672–77 (5th Cir. 2016) (en banc), had rejected the vagueness challenge.

In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Supreme Court disagreed with our view and held that the "crime of violence" definition in 18 U.S.C, § 16(b) is unconstitutional. It then granted Vega-Zapata's petition for a writ of certiorari, vacated our judgment, and remanded for further consideration in light of *Dimaya*.

Post-*Dimaya*, we have already considered another challenge to a Sentencing Guidelines enhancement that incorporates the definition from the now-unlawful federal statute. Relying on the Supreme Court's holding that the Guidelines are not subject to vagueness challenges, we held that *Dimaya* does not prevent application of a Guideline that incorporates the statutory "crime of violence" definition. *United States v. Godoy*, 890 F.3d 531, 541–42 (5th Cir. 2018). The parties agree that *Godoy* requires affirming Vega-Zapata's sentence.

AFFIRMED.