

No. \_\_\_\_\_

**In the Supreme Court of the United States**

**OCTOBER TERM, 2018**

**JOSE RAMON ZUNIGA, JR., PETITIONER**

*v.*

**UNITED STATES OF AMERICA, RESPONDENT.**

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

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**PETITION FOR WRIT OF CERTIORARI**

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### **QUESTION PRESENTED**

1. Whether a Guideline which incorporates by reference § 16(b)'s residual clause may serve as the basis for increasing the defendant's offense level under the Guidelines and thereby the "lodestar" for the court's exercise of its discretion in determining a sentence sufficient but not greater than necessary to achieve the statutory goals of sentencing.

### **PARTIES TO THE PROCEEDING**

1. United States of America: Respondent.
2. Jose Ramon Zuniga: Petitioner.

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**JOSE RAMON ZUNIGA, PETITIONER**

**v.**

**UNITED STATES OF AMERICA, RESPONDENT.**

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **PRAYER**

Petitioner respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *United States v. Zuniga*, 735 Fed. Appx. 147 (5th Cir. 2018)

## **OPINIONS BELOW**

On August 21, 2018, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Jose Ramon Zuniga's sentence in an unpublished opinion. *United States v. Zuniga*, 735 Fed. Appx. 147. The opinion is reproduced and attached at Appendix A.

## **JURISDICTION**

The court of appeals entered its judgment affirming Jose Ramon Zuniga's sentence on August 21, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## **STATEMENT OF THE CASE**

### **A. Course of Proceedings.**

Mr. Zuniga entered a guilty plea to a single-count indictment charging him with illegal re-entry into the United States following a felony conviction in violation of 8 U.S.C.A. § 1326(a) and 1326(b)(1) (West). (ROA.9: Indictment; ROA.129) Mr. Zuniga appealed his sentence challenging the use of his prior Texas burglary conviction as the basis for applying the eight-level upward adjustment under USSG § 2L1.2(b)(1)(C) considering this Court's holding in *Sessions v. Dimaya*, 138 S.Ct.



1204 (2018). The Fifth Circuit agreed with Mr. Zuniga’s argument that that his prior Texas burglary conviction was broader than the definition of generic burglary under *Taylor’s* categorical approach and therefore didn’t qualify as a “burglary offense” under § 1101(a)(43)(G). *United States v. Zuniga*, 735 Fed. Appx. 147, 148 (5<sup>th</sup> Cir. 2018) However, the Fifth Circuit rejected Mr. Zuniga’ argument that this Court’s holding in *Dimaya* that 18 U.S.C. § 16(b)’s residual clause was unconstitutionally vague prohibited using the prior burglary conviction as the predicate for the “aggravated felony” enhancement under USSG § 2L1.2(b)(1)(C). The court cited binding Fifth Circuit precedent holding that this Court’s holding in *Dimaya* that § 16(b) was unconstitutionally vague did not ‘forbid using § 16(b) to calculate recommended sentences under the nonbinding Guidelines’”. *United States v. Zuniga*, 735 Fed. Appx. 147, 149 (5<sup>th</sup> Cir. 2018) quoting *United States v. Godoy*, 890 F.3d 531, 541 (5<sup>th</sup> Cir. 2018). The Fifth Circuit therefore affirmed the judgment.

## **B. Statement of Relevant Facts.**

### **BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT**

This case was brought as a federal criminal prosecution under 8 U.S.C. § 1326(a) and (b)(1). The district court therefore had jurisdiction under 18 U.S.C. § 3231.

### **REASON FOR GRANTING THE WRIT**

- I. This Court should grant the petition to resolve whether a Guideline which incorporates by reference § 16(b)’s residual

clause may serve as the basis for increasing the defendant's offense level under the Guidelines and thereby the "lodestar" for the court's exercise of its discretion in determining a sentence sufficient but not greater than necessary to achieve the statutory goals of sentencing.

**A. A guideline's incorporation by reference of 16(b)'s residual clause to calculate the sentencing range that will serve as the baseline for the district court's exercise of its discretion in fashioning an appropriate sentence violates due process.**

USSG § 2L1.2(b)(1)(C) provides for an eight-level enhancement if the defendant was deported after having been convicted of an "aggravated felony." Application Note 3 provides that "[f]or purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act[...]." USSG § 2L1.2, comment. (n. 3) (U.S.C.A. 2014) citing 8 U.S.C.A. § 1101(a)(43) (West) Under the Immigration and Nationality Act ("INA"), an "aggravated felony" includes a "crime of violence as [...] as defined in section 16 of Title 18 [...]". 8 U.S.C.A. § 1101(a)(43)(F). Under the INA, "aggravated felony" also includes a "burglary offense." 8 U.S.C.A. § 1101(a)(43)(G). The Fifth Circuit agreed with Mr. Zuniga that his prior Texas burglary conviction couldn't serve as a basis for the sentencing enhancement under the "categorical approach." *United States v. Zuniga*, 735 Fed. Appx. 147, 148 (5<sup>th</sup> Cir. 2018). The issue was therefore limited to

whether the Guideline’s incorporation by reference of § 16(b)’s residual clause would support application of the sentencing enhancement under USSG § 2L1.2(b)(1)(C).

18 U.S.C. § 16(b)’s residual clause defines a “crime of violence” to include:

Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.

18 U.S.C. § 16(b).

In *Sessions v. Dimaya*, this Court held that § 16(b)’s residual clause was void for vagueness when applied to “burglary” under the INA’s definition of “aggravated felony.” *Sessions v. Dimaya*, 138 S.Ct. 1204, 1216 (2018). Mr. Zuniga therefore argued that application of the 8-level enhancement under USSG § 2L1.2(b)(1)(C) was error because 8 U.S.C.A. § 1101(a)(43) cross reference to § 16(b)’s residual clause violated due process under this Court’s holding in *Dimaya*.

However, in *United States v. Godoy*, 890 F.3d 531 (5<sup>th</sup> Cir. 2018) the Fifth Circuit held that a Texas burglary conviction could serve as a predicate conviction of an “aggravated felony” because this Court’s holding in *Dimaya* that § 16(b)’s residual clause was unconstitutionally vague didn’t “forbid using § 16(b) to calculate recommended sentences under the nonbinding Guidelines.” *United States v. Godoy*, 890 F.3d 531, 541 (5<sup>th</sup> Cir. 2018) In *Beckles*, this Court’s stated “[t]he advisory Guidelines ... do not implicate the twin concerns underlying vagueness doctrine – providing notice and preventing arbitrary enforcement.” *Beckles v. United States*, 137 S.Ct. 886, 892 (2017). The Fifth Circuit therefore reasoned that the due process

concerns underlying this Court's decisions in *Dimaya* 138 S.Ct. at 1212 and *Johnson* 135 S.Ct. 2552, at 2557 (2015) aren't implicated "when § 16(b) is used by the nonbinding Guidelines solely for definitional purposes" because the Guidelines are non-binding and therefore only guide the court's exercise of discretion rather than establishing permissible ranges of sentences. *Godoy*, 890 F.3d at 539 citing *Beckles*, 137 S.Ct. at 892. The Fifth Circuit therefore concluded that "until Congress acts or we are presented with binding authority to the contrary, § 16(b) remains incorporated into the advisory-only Guidelines for definitional purposes." *Godoy*, 890 F.3d at 540.

But this Court's decision in *Beckles* addressed whether a provision of the Guidelines could be challenged for vagueness: Not whether the Guideline's incorporation by reference of a statute held unconstitutionally vague could properly serve as the basis for a sentencing enhancement under the Guidelines. *Beckles*, 137 S.Ct. at 891. This Court noted in *Beckles* that its holding "does not render the advisory guidelines immune from constitutional scrutiny." *Beckles*, 895. Furthermore, the incorporation by reference of § 16(b)'s residual clause has a substantial affect on the sentences ultimately imposed by district courts since the Guidelines are "the starting point and the initial benchmark" for sentencing. *Gall v. United States*, 552 U.S. 38, 49, 50 (2007) The Guidelines are "in a real sense[,] the basis for the sentence." *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1345 (2016) quoting *Peugh v. United States*, 133 S.Ct. 2072, 2083 (2013) The Guidelines "anchor both the district court's discretion and the appellate review process." *Peugh v. United States*, 133 S.Ct.

at 2087. The eight-level increase of a defendant's offense level, which will then serve as the district court's baseline for exercising its sentencing discretion, through the Guidelines' incorporation by reference of an unconstitutionally vague statute allows for arbitrary sentencing determinations and violates due process.

**B. This case is an excellent vehicle for resolving this issue.**

The district court's sentence of 39 months was within the Guideline range as calculated based on Mr. Zuniga's prior Texas burglary conviction serving as a predicate "aggravated felony." Absent the eight-level enhancement based on the Guidelines' incorporation of § 16(b)'s residual clause, Mr. Zuniga's applicable Guideline range would have been 24-30 months of imprisonment. This 24 to 30-month sentence would have set the baseline for the district court's exercise of discretion in determining a sentence sufficient but not greater than necessary to satisfy the statutory goals of sentencing. Furthermore, the court of appeal's decision in this case turned on its holding in *Godoy* that this Court's holding in *Dimaya* didn't prohibit the Guideline's incorporation of § 16(b)'s residual clause to calculate the Guideline range which would then serve as the basis of the district court's exercise of its discretion to determine a sentence sufficient but not greater than necessary to achieve the statutory goals of sentencing.

**CONCLUSION**

Mr. Zuniga therefore respectfully requests that this Court grant certiorari.

Respectfully submitted,

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