No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

JULIO CESAR DE LA ROSA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court's holding in *Voisine v. United States*, __U.S..__,136 S.Ct. 2272 (2016), that recklessness is consistent with the "use of physical force" extends beyond the definition of "misdemeanor crime of violence" at issue in that case?

PARTIES

Julio Cesar De La Rosa is the Petitioner; he was the defendant-appellant below.

The United States of America is the Respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Julio Cesar De La Rosa respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. De La Rosa*, No. 17-10487, 2019 WL 177958 (5TH Cir. January 11, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on January 11, 2019. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. §16 provides:

> 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 prop-erty 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.

Tex. Penal Code §22.01 provides in relevant part:

> (a) A person commits an offense if the person:
> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse
>
> ***
>
> (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:

(1) a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant

STATEMENT OF THE CASE

Petitioner Julio Cesar De La Rosa pleaded guilty to illegally re-entering the country. He received an enhanced statutory maximum under 8 U.S.C. §1326(b)(2) because the district court regarded his prior Texas conviction for assaulting a public servant as a "crime of violence" under 18 U.S.C. §16, and therefore as an "aggravated felony" under 8 U.S.C. §1101(a)(43). The same conclusion led the district court to enhance the defendant's Guideline range under the 2015 version of USSG §2L1.2. The defense objected unsuccessfully to this conclusion, noting that the Texas offense could be committed by reckless conduct, which it argued to be inconsistent with 18 U.S.C. §16.

The district court overruled the objection and imposed sentence at the high end of the enhanced Guideline range, 41 months imprisonment. In the judgment, it described the offense of conviction as 8 U.S.C. §§1326(a) & (b)(2), the provisions applicable when the defendant returns to the country following an aggravated felony. *See* [Appx. B, at p.1]

On appeal, Petitioner renewed his contention that the Texas offense falls outside the definition of "crime of violence" found in 18 U.S.C. §16. Among other arguments, he maintained that it does not require the use of force against the person or property of another because it may be committed recklessly. The court of appeals disagreed, finding that recklessness is consistent with the "use of physical force" under 18 U.S.C. §16(a). *See* [Appx. A, at pp.5-6][citing *United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018) (*en banc*)]

REASONS FOR GRANTING THE WRIT

I. The lower courts are divided as to whether the recklessness holding of *Voisine v. United States*, __U.S.__, 136 S.Ct. 2272 (2016), extends to provisions other 18 U.S.C. §921(a)(33)(A).

Section 16(a) of Title 18 classifies as a "crime of violence" any offense that as "has an element the use, attempted use, or threatened use of physical force against the person or property of another." *In Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court thought this language inconsistent with an offense that might be committed accidentally. *Leocal*, 543 U.S. at 8-12. Following *Leocal*, most courts of appeals believed that offenses that may be committed recklessly likewise lacked "the use of force against" another as an element. *See United States v. Castleman*, 572 U.S. 157, 169, n.8 (2014))("Although *Leocal* reserved the question whether a reckless application of force could constitute a use' of force the Courts of Appeals have almost uniformly held that recklessness is not sufficient.")(internal citations omitted)

The issue became more complicated, however, following this Court's decision in *Voisine v. United States*, 136 S.Ct. 2272 (2016). Voisine and a co-petitioner were convicted of possessing firearms following their convictions for misdemeanor crimes of violence under 18 U.S.C. §922(g)(9). *See Voisine*, 136 S.Ct. at 2277. Both had been previously convicted under domestic assault statutes that could be violated by reckless conduct. *See id.* But this Court held that the causation of reckless injuries may constitute "the use or attempted use of physical force" within the meaning of 18 U.S.C. §921(a)(3)(A), which defines "misdemeanor crime of violence" for the purposes of 18 U.S.C. §922(g)(9). *See id.* at 2278. This holding, however, followed some consideration of the misdemeanor domestic assault statutes, which generally do capture reckless offenses. *See id.* at 2278-2280. A

definition of "misdemeanor domestic violence" that excluded recklessness, observed the *Voisine* court, would render the statute "broadly inoperative." *Id.* at 2280.

In the wake of *Voisine*, the courts of appeals have divided sharply as to whether its holding extends to provisions other than 18 U.S.C. §922(g)(9). The court below, in common with the Sixth, Eighth, Tenth and D.C. Circuits have understood *Voisine*'s interpretation of the "use of force" to apply to other provisions that contain the same language, including the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(c)(3)(A), USSG §4B1.2(a), USSG §2L1.2(b)(2015), and, here, 18 U.S.C. §16(a). *See United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018)(*en banc*) (USSG §2L1.2(b)*)*; *United States v. Howell*, 838 F.3d 489, 500-01 (5th Cir. 2016) (USSG §4B1.2(a)); *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017)(USSG §4B1.2)(a)); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016)(ACCA); *United States v. Pam*, 867 F.3d 1191, 1207-08 (10th Cir. 2017) (ACCA); *United States v. Mann*, 899 F.3d 898, 905 (10th Cir. 2018)(18 U.S.C. §924(c)(3)(A)); *United States v. Haight*, 892 F.3d 1271, 1280–1281 (D.C. Cir. 2018)(ACCA).

By contrast, the First Circuit and a two judge panel concurrence in the Fourth Circuit understand *Voisine*'s holding as cabined by its statutory context. *See United States v. Windley*, 864 F.3d 36, 37 (1st Cir. 2017); *United States v. Middleton*, 883 F.3d 485, 499-500 (4th Cir. 2018)(Floyd, J. concurring and joined by Harris, J.). They have thus declined to hold that reckless offenses satisfy the "force clause" of ACCA. *See Windley*, 864 F.3d at 37; *Middleton*, 883 F.3d at 499-500 (Floyd, J. concurring and joined by Harris, J.). A divided panel of the Eighth Circuit has likewise declined to hold that reckless offenses constitute the "use of force" under USSG §4B1.2 if they may be committed by reckless *driving. See United States v. Fields*, 863 F.3d 1012, 1015-1016 (8th Cir. 2017).

This far-reaching circuit split over the meaning of *Voisine* has already implicated five different definitional provisions that employ the phrase "use of force," not counting §921(a)(33)(A) itself. Further, it has reached at least seven circuits and produced divergent results, between circuits, within circuits, and within individual panels. It will not spontaneously resolve, and should be addressed by this Court.

The present case is an apt vehicle. Petitioner's prior Texas assault offense may unquestionably be committed by reckless injury. *See* Tex. Penal Code §22.01. Although the court below addressed only 18 U.S.C. §16(a), the "crime of violence" designation cannot be salvaged by reference to 18 U.S.C. §16(b), which has been held unconstitutionally vague. *See Sessions v. Dimaya*, __U.S.__,138 S.Ct. 1204 (2018).[1] In any case, any distinction between 18 U.S.C. §§16(a) and 16(b) as to reckless offenses would be doubtful, since §16(b) also requires that the relevant offense pose a substantial risk that physical force "maybe *used* against the person or property of another." 18 U.S.C. §16(b)(emphasis added); *Leocal*, 543 U.S. at 11 ("Thus, while § 16(b) is broader than § 16(a) in the sense that physical force need not actually be applied, it contains the same formulation we found to be determinative in § 16(a): the use of physical force against the person or property of another.").

Petitioner is set to be released in December, but this does not mean that he cannot receive relief in the event this Court grants the Petition. If the court below concludes (or, here, is instructed) that a re-entry defendant was wrongly subjected to an enhanced statutory maximum under 8 U.S.C.

1 Potentially, the court of appeals might hold Petitioner's Guideline range unaffected by its misapplication of §16(a). It has held that re-entry defendants may receive a higher Guideline range on the basis of §16(b), even though it is unconstitutionally vague. *See United States v. Godoy*, 890 F.3d 531 (5th Cir. 2018). This holding, however, does not extend to the district court's choice of statutory maximum, which is of course subject to the void for vagueness doctrine. *See Johnson v. United States*, __U.S.__, 135 S.Ct. 2551 (2015). Nor, as explained below, would it prevent Petitioner from receiving the benefit of a modification of judgment to strike any reference to §1326(b)(2).Indeed, the Appellant in *Godoy* – which held *Dimaya* inapplicable to the Guidelines – himself received the benefit of a judgment modification. *See Godoy*, 890 F.3d at 541-542.

1326(b)(2), it will strike any reference to that provision from the judgment. S*ee United States v. Mondragon-Santiago*, 564 F.3d 357, 369 (5th Cir. 2009); *United States v. Reyes-Hernandez*, 727 F. App'x 90, 90 (5th Cir. 2018) (unpublished); *United States v. Hermoso*, 484 F. App'x 970, 972-73 (5th Cir. 2012) (unpublished); *United States v. Ayala-Nunez*, 714 F. App'x 345, 345, 351-52 (5th Cir. 2017) (unpublished); *United States v. Pineda-Oyuela*, 644 F. App'x 309, 310 (5th Cir. 2016) (unpublished). This ensures that no preclusive effect is given to the district court's "aggravated felony" determination in future civil or criminal proceedings. *See United States v. Garcia-Gamboa*, 620 F.3d 546, 549 (5th Cir. 2010)(according a prior aggravated felony determination preclusive effect in a subsequent criminal proceeding); *United States v. Piedra-Morales*, 843 F.3d 623, 624-25 (5th Cir. 2016) (same). This issue cannot be mooted by his release.

Conclusion

Petitioner respectfully prays that this Honorable Court grant *certiorari*, vacate the judgment below and either determine whether Petitioner is entitled to relief, or remand to the court of appeals for such proceedings as it may deem appropriate.

Respectfully submitted this 11th day of April, 2019.

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