

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JULIO CESAR DE LA ROSA,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

No. 17-10487

FILED

January 11, 2019

UNITED STATES OF AMERICA,

Lyle W. Cayce
Clerk

Plaintiff - Appellee,

v.

JULIO CESAR DE LA ROSA,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-488-1

Before JONES, HAYNES, and OLDHAM, Circuit Judges.

PER CURIAM:*

Julio Cesar De La Rosa kicked a peace officer in the genitals. He pleaded guilty to assault on a peace officer and was sentenced to three years in prison. The question presented is whether that constitutes a crime of violence (“COV”) under the Sentencing Guidelines. The district court said yes. We affirm.

I.

De La Rosa entered the United States illegally at least ten times. He was granted voluntary departure after his first five detentions: on May 30,

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

2001; April 23, 2003; September 26, 2007; February 13, 2008; and June 30, 2008. After his next four, De La Rosa was formally removed: on July 11, 2008; December 30, 2009; December 10, 2010; and December 6, 2012.

After his eighth illegal entry—to be more precise, the eighth shown in this record—De La Rosa was arrested in Dallas, Texas. He was charged with attempted retaliation, unlawful carrying of a weapon, and failure to identify. He pleaded guilty to those charges and was sentenced to five months in jail. While serving his sentence, De La Rosa kicked a correctional officer in the genitals. De La Rosa was angry because he wanted a toothbrush. He pleaded guilty to assault on a peace officer and was sentenced to three years in prison.¹ The United States again removed him.

He again came back (for at least the tenth time). He again was arrested. And he again was indicted for illegal reentry under 8 U.S.C. § 1326(a) and (b)(2). De La Rosa again pleaded guilty. This marked the fourth time he was convicted of unlawful entry or reentry.

At sentencing, the district court imposed an eight-level COV enhancement for De La Rosa's assault conviction. Under the applicable 2015 version of the U.S. Sentencing Guidelines Manual ("Guidelines"), that enhancement applies "[i]f the defendant previously was deported, or unlawfully remained in the United States, after . . . a conviction for an aggravated felony." U.S.S.G. § 2L1.2(b)(1)(C) (2015). The Guidelines' definition of "aggravated felony" incorporates the "crime of violence" definition from 18 U.S.C. § 16. *See* U.S.S.G. § 2L1.2 cmt. 3(A); 8 U.S.C. § 1101(a)(43)(F). Accordingly, an aggravated felony includes:

¹ He was convicted and sentenced under the name "Julio Delacerda." That is one of De La Rosa's eight known aliases. For ease of reference, we refer to him as De La Rosa throughout.

- (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 [use-of-force clause], 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 [residual clause].

18 U.S.C. § 16. The presentence report (“PSR”) concluded assaulting a peace officer was an aggravated felony conviction and recommended an eight-level enhancement. U.S.S.G. § 2L1.2(b)(1)(C) (2015). That brought De La Rosa’s offense level to 13. His lengthy and violent criminal record placed him in criminal history category VI. That produced an advisory sentencing range of 33 to 41 months of imprisonment.

De La Rosa objected that assaulting a peace officer is not a COV. His objections were threefold: (1) Texas assault can be committed recklessly; (2) “the Texas assault statute lacks force as an element”; and (3) the residual clause is unconstitutionally vague. The district court disagreed and accepted the PSR. It sentenced De La Rosa to 38 months in prison. De La Rosa appeals the COV enhancement.²

II.

We review De La Rosa’s “preserved challenge to the district court’s application of the Sentencing Guidelines *de novo*.” *United States v. Piedra-Morales*, 843 F.3d 623, 624 (5th Cir. 2016) (per curiam). To determine whether the district court erred by applying the eight-level sentencing enhancement,

² De La Rosa also argues his sentence violates the Due Process Clause because the indictment did not allege a certain prior conviction that was used to invoke the sentencing enhancement in 18 U.S.C. § 1326(b)(2). But, as he properly concedes, that argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998); *see also United States v. Pineda-Arellano*, 492 F.3d 624, 625 (5th Cir. 2007) (“Because the Supreme Court treats *Almendarez-Torres* as binding precedent, [appellant’s] argument is fully foreclosed from further debate.”). De La Rosa does not otherwise challenge the statute of conviction, instead focusing his arguments on the Guidelines enhancement.

we must decide whether De La Rosa’s assault conviction constitutes a COV under 18 U.S.C. § 16. This, of course, requires us to identify the crime of conviction and determine what De La Rosa necessarily admitted when he pleaded guilty. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Then we must assess whether the statutory elements of that offense satisfy either the use-of-force clause or the residual clause. *See United States v. Reyes-Contreras*, 910 F.3d 169, 179 (5th Cir. 2018) (en banc). They do, so we affirm.

A.

To determine whether a defendant’s prior conviction is a COV, we apply a categorical approach. *See United States v. Hernandez-Avila*, 892 F.3d 771, 773 (5th Cir. 2018) (per curiam). The categorical approach requires us to look at the statutory elements of the predicate offense, “not to the facts of [the] defendant’s conduct.” *Taylor v. United States*, 495 U.S. 575, 600–02 (1990). But when we face “an alternatively phrased statute,” as we do here, we face a threshold inquiry—whether a statute is divisible into multiple offenses with distinct elements, or whether it merely lists different ways of committing a single offense. *See Mathis*, 136 S. Ct. at 2256.

If a statute is divisible, we apply the modified categorical approach: We “look beyond the statute to certain conclusive records made or used in adjudicating guilt in order to determine which particular statutory alternative applies to the defendant’s conviction, and apply the categorical approach to that version of the crime.” *United States v. Ceron*, 775 F.3d 222, 227 (5th Cir. 2014) (per curiam) (quotation omitted). Even employing the modified categorical approach, we do not consider “[h]ow a given defendant actually perpetrated the crime,” but only whether the elements of the crime of conviction fit within the COV definition. *Mathis*, 136 S. Ct. at 2251.

In this case, De La Rosa effectively concedes divisibility. Both parties agree De La Rosa was convicted of a particular assault offense—assault on a

peace officer under Texas Penal Code § 22.01(b)(1). We agree. The judgment of conviction expressly states De La Rosa was convicted of “Assault On a Peace Officer,” making it easy to identify the specific elements of his predicate offense. *See Mathis*, 136 S. Ct. at 2256–57 (allowing judges to look at “the record of a prior conviction itself” to determine the elements of the offense). To commit this type of assault, a person must:

intentionally, knowingly, or recklessly cause[] bodily injury to . . . 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.

TEX. PENAL CODE § 22.01(a)(1), (b)(1) (2009). Thus, the only question before us is whether these statutory elements make assaulting a peace officer a COV under 18 U.S.C. § 16.

B.

For assault on a peace officer to qualify as a COV, it must satisfy either the use-of-force clause or the residual clause. The government argues assaulting a peace officer satisfies both. De La Rosa counters it satisfies neither and, even if it satisfies the residual clause, that clause is unconstitutionally vague. Because we conclude assaulting a peace officer is a COV under the use-of-force clause, we need not reach the parties’ arguments about the residual clause.

Under the use-of-force clause, an offense is a COV if it “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 16(a). As we recently explained while sitting *en banc*, “the ‘use of force’ does not require intent because it can include knowing or reckless conduct.” *Reyes-Contreras*, 910 F.3d at 183. Nor does § 16(a) contain a “directness-of-force requirement for a COV.” *Id.* Instead, assaulting a peace officer is a COV under § 16(a) if a conviction requires

proving the defendant (1) intentionally, knowingly, or recklessly (2) “employs a force capable of causing physical pain or injury” (3) against the person of another. *See id.* at 183, 185.

Assault on a peace officer requires all three. First, the defendant must have acted “intentionally, knowingly, or recklessly.” TEX. PENAL CODE § 22.01(a)(1) (2009). Second, the defendant must have “cause[d] bodily injury,” *id.*, which is defined as “physical pain, illness, or any impairment of physical condition,” *id.* § 1.07(a)(8). That definition necessarily means the defendant has used “force capable of causing physical pain or injury.” *Reyes-Contreras*, 910 F.3d at 185; *see also United States v. Castleman*, 572 U.S. 157, 169–70 (2014) (explaining “the knowing or intentional causation of bodily injury necessarily involves the use of physical force” and “a ‘bodily injury’ must result from ‘physical force.’”).³ Finally, the offense requires the use of force against the person of another—specifically, a public servant. TEX. PENAL CODE § 22.01(b)(1) (2009). A conviction for assaulting a peace officer is therefore a COV under the use-of-force clause.

The sentence is AFFIRMED.

³ We assume without deciding that “impairment of physical condition,” TEX. PENAL CODE § 1.07(a)(8), could be interpreted to include an injury that occurred without physical force, *see Castleman*, 572 U.S. at 170 (acknowledging, without deciding, that when “bodily injury” is defined broadly it may contain forms of injury that do not require violent force). But that theoretical possibility is insufficient to show assaulting a peace officer is not a COV. Rather, “there must be a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the [use-of-force clause].” *Reyes-Contreras*, 910 F.3d at 184 & n.35 (quotation omitted). “In short, without supporting state case law, interpreting a state statute’s text alone is simply not enough to establish the necessary ‘realistic probability.’” *United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). De La Rosa failed to make this realistic probability showing.

APPENDIX B

APR 27 2017

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

v.

JULIO CESAR DE LA ROSA

§ JUDGMENT IN A CRIMINAL CASE
 § CLERK, U.S. DISTRICT COURT
 § By _____ Deputy _____
 § Case Number: 3:16-CR-00488-M(I)
 § USM Number: 05585-280
 § Lauren Anita Woods
 § Defendant's Attorney

THE DEFENDANT:

<input type="checkbox"/>	pleaded guilty to count(s)	
<input checked="" type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	Count 1 of the Indictment, filed November 9, 2016
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense

8 U.S.C. § 1326(a) & (b)(2)

Illegal Reentry After Removal From the United States

Offense Ended

10/14/2016

Count

1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)
 Count(s) is are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 26, 2017

Date of Imposition of Judgment

Signature of Judge

BARBARA M. G. LYNN
CHIEF UNITED STATES DISTRICT JUDGE

Name and Title of Judge

April 27, 2017

Date

DEFENDANT: JULIO CESAR DE LA ROSA
CASE NUMBER: 3:16-CR-00488-M(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **THIRTY-EIGHT (38) MONTHS**. The defendant shall receive credit for time already served since November 14, 2016.

The court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at a.m. p.m. on

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JULIO CESAR DE LA ROSA
CASE NUMBER: 3:16-CR-00488-M(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **THREE (3) YEARS.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JULIO CESAR DE LA ROSA
CASE NUMBER: 3:16-CR-00488-M(1)

SPECIAL CONDITIONS OF SUPERVISION

As a condition of supervised release, upon completion of his term of imprisonment, the defendant is to be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Naturalization Act, 8 U.S.C. §§ 1101 et seq. As a further condition of supervised release, if ordered deported, the defendant shall remain outside the United States.

In the event the defendant is not deported immediately upon release from imprisonment, or should the defendant ever be within the United States during any portion of his term of supervised release, he shall also comply with the standard conditions contained in this Judgment and shall comply with the mandatory and special conditions stated herein:

The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.

DEFENDANT: JULIO CESAR DE LA ROSA
 CASE NUMBER: 3:16-CR-00488-M(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	\$100.00	\$0.00	\$0.00

The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution amount ordered pursuant to plea agreement \$

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

<input type="checkbox"/> the interest requirement is waived for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution
<input type="checkbox"/> the interest requirement for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JULIO CESAR DE LA ROSA
CASE NUMBER: 3:16-CR-00488-M(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payments of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00, for Count 1, which shall be paid immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.