No. --

IN THE

SUPREME COURT OF THE UNITED STATES

KEVIN CONTRERAS,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Texas offense of aggravated assault is equivalent to the "generic" form of that offense?

II. 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?

III. Whether 18 U.S.C. 924(a) provides for criminal liability in the absence of a showing that the defendant knew of his felony status, or of his firearm's interstate movement?

PARTIES

Kevin Contreras is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Kevin Contreras, 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Contreras,* 754 Fed. Appx. 286 (5th Cir. February 21, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appendix A]. The judgment of conviction and sentence was entered March 9, 2018, and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on February 21, 2019. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND FEDERAL SENTENCING GUIDELINES INVOLVED

Federal Sentencing Guideline 4B1.2 provides in relevant part:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

18 U.S.C. § 922(g) provides in relevant part:

> It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable for a term of imprisonment exceeding one year... to ship or transport in interstate or foreign commerce, or possess in or effecting commerce, any firearm or ammunition....

18 U.S.C. § 924(a) provides in relevant part:

> (2) Whoever knowingly violates subsection...(g)... of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

Petitioner Kevin Contreras pleaded guilty to one count of illegally possessing a firearm after a felony conviction. Because Probation regarded the conviction as a "crime of violence" under USSG §4B1.2, he received a base offense level of 20 rather than 14. *See* USSG §2K2.1. The result was a final offense level of 23, a criminal history category of V, and a Guideline range of 84-105 months imprisonment. In the absence of this enhancement, the range would have been no greater than 37-46 months, the product of a final offense level of 15, and a criminal history category of V. *See* USSG §2K2.1; USSG Ch. 5A.

Probation attached to the Presentence Report (PSR) an indictment from the old aggravated assault case. This document alleged that the defendant intentionally and knowingly caused serious bodily injury to another. A judicial confession admitted the allegations of the indictment.

The defense filed a detailed objection to the PSR's "crime of violence" determination. The objection acknowledged *United States v. Guillen-Alvarez*, 489 F.3d 197 (5th Cir. 2007), which held the Texas offense of aggravated assault to constitute the generic, enumerated offense of "aggravated assault." But it argued that *Guillen-Alvarez* conflicted with *United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013)(en banc), and *United States v. Dominguez-Ochoa*, 386 F.3d 639 (5th Cir. 2004). And it further noted that the rationale of *Guillen-Alvarez* had been uniformly rejected by all other circuits to consider the issue. *See United States v. Esparza-Herrera*, 557 F.3d 1019 (9th Cir. 2009); *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1086 (9th Cir. 2015); *United States v. Barcenas-Yanez*, 826F.3d 752, 756 (4th Cir. 2016); *United States v. McFalls*, 592 F.3d 707;716-717 (6th Cir. 2010); *United States v. Cooper*, 739 F.3d 873, 880, n.1 (6th Cir. 2014).

The district court overruled the objection and imposed sentence at the top of the range it believed applicable, 105 months imprisonment.

B. Appeal

Petitioner appealed, arguing that the Texas offense of aggravated assault is not equivalent to the generic definition of the offense, and that it is not otherwise a "crime of violence" because it

lacks the use, attempted use, or threatened use of physical force as an element. Resolving the case, the court of appeals cited its prior opinions in *United States v. Guillen-Alvarez*, 489 F.3d 197, 198 (5th Cir. 2007), which held that the Texas aggravated assault offense is in all cases equivalent to generic aggravated assault. [Appx. A]. On this basis, and without addressing the question of whether the Texas offense has force as an element, it affirmed. [Appx. A].

REASON FOR GRANTING THE PETITION

I. The courts are divided on the generic definition of "aggravated assault," and, in particular, whether the Texas offense falls within this generic definition. That division of authority implicates an important and recurring issue in cases involving the categorical approach: whether sentencing courts should tolerate "minor differences" between the generic definition of an offense and the prior statute of conviction, and, if so, how to determine what kinds of differences are minor.

Guidelines 2K2.1 and 4B1.2 provide for an enhanced base offense level when the defendant has been previously convicted of a "crime of violence." *See* USSG §§2K2.1, 4B1.2. The definition of "crime of violence" in §4B1.2 includes several enumerated offenses, among them "aggravated assault." USSG §4B1.2(a)(2). In cases where a criminal history enhancement is triggered by a series of enumerated offenses, those offenses are given their "ordinary, contemporary meaning," and accorded a "generic definition." *See Taylor v. United States*, 495 U.S. 575, 598 (1990).

In *United States v. Mungia-Portillo*, 484 F.3d 813 (5th Cir. 2007), the Fifth Circuit held that convictions under the Tennessee aggravated assault statute may be treated as equivalent to the enumerated offense of "aggravated assault." *See Mungia-Portillo*, 484 F.3d at 814. That court recognized that generic aggravated assault required recklessness manifesting extreme disregard for the value of human life, not ordinary recklessness. *See id*. at 816-817. Though the Tennessee statute permitted conviction for causing serious injury by ordinary recklessness, that court found that difference to be "minor." *See id.* It reached this conclusion based on the definition of aggravated assault found in Black's Law Dictionary and a criminal law treatise:

> LaFave's treatise makes no special note of the degree of the mental culpability typical of an aggravated battery, and neither does Black's Law Dictionary. *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, § 16.2(d); BLACK'S LAW DICTIONARY 162 (8th ed. 2004). We infer from this that a defendant's mental state in committing an aggravated assault, whether exhibiting "depraved heart" recklessness or "mere" recklessness, is not dispositive of whether the aggravated assault falls within or outside the plain, ordinary meaning of the enumerated offense of aggravated assault.

Id. In *United States v. Guillen-Alvarez*, 489 F.3d 197 (5th Cir. 2007), that court extended this holding to the Texas aggravated assault statute. *See Guillen-Alvarez*, 489 F.3d at 200-201.

Mungia-Portillo and *Guillen-Alvarez* have been rejected by three different courts of appeals. *See United States v. Esparza-Herrera*, 557 F.3d 1019 (9th Cir. 2009); *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1086 (9th Cir. 2015); *United States v. Barcenas-Yanez*, 826 F.3d 752, 756 (4th Cir. 2016);*United States v. McFalls,* 592 F.3d 707, 716-717 (6th Cir. 2010); *United States v. Cooper*, 739 F.3d 873, 880, n.1 (6th Cir. 2014).

In *Esparza-Herrera*, the Ninth Circuit held that the generic definition of aggravated assault required at least extreme recklessness, and that ordinary recklessness was not equivalent. *See Esparza-Herrera*, 557 F.3d at 1023-1025. It expressly rejected *Muniga-Portillo*'s contrary reasoning. *See id.* at 1023. Similarly, the Sixth Circuit found ordinary recklessness insufficient to qualify as the enumerated offense of aggravated assault found in USSG §4B1.2. *See United States v. McFalls,* 592 F.3d 707, 716-717 (6th Cir. 2010). Later, in *United States v. Cooper*, 739 F.3d 873 (6th Cir. 2014), it cited and rejected the Fifth Circuit's opinion in *Mungia-Portillo*. *See Cooper*, 739 F.3d at 880, n.1.

In *United States v. Garcia-Jimenez*, 807 F.3d 1079 (9th Cir. 2015), the Ninth Circuit revisited *Esparza-Herrera*, and found that it did not go far enough. *See Garcia-Jimenez*, 807 F.3d at 1086. In that case, the Ninth Circuit surveyed all state aggravated assault statutes and found that a large majority require not extreme recklessness but intentional conduct. *See id.* It thus held that no prior conviction for aggravated assault would qualify as aggravated assault unless it required that serious bodily injury be caused knowingly or intentionally. *See id.* The Fourth Circuit recently agreed with this analysis, and held that the Texas aggravated assault statute – Mr. Contreras's offense – was non-qualifying. *See United States v. Barcenas-Yanez*, 826 F.3d 752, 756 (4th Cir. 2016).

In short, every court of appeals that has considered the reasoning or result of *Mungia-Portillo* and *Guillen-Alvarez* has rejected it, even when the Texas statute was presented. *See Barcenas-Yanez*, 826 F.3d at 756. The proper treatment of the Texas aggravated assault offense should not depend on where a case happens to arise. Too many years of imprisonment turn on this question for it to have so arbitrary an answer.

This Court has previously said that it disfavors the resolution of Guideline issues in its

certiorari docket. *See Braxton v. United States*, 500 U.S. 344, 348 (1991). But there are special reasons to address *this* division of circuit authority. First, the generic definition of "aggravated assault" affects defendants under more than one provision of the Guidelines. *See* USSG §§ 2L1.2, comment. (n. (1)(B)(iii))(2015), and 4B1.2(a)(2). Its use in §4B1.2's definition of a "crime of violence," moreover, produces extraordinary increases in the recommended sentences, as the Commission has been instructed to recommend a sentence "at or near" the statutory maximum for defendants subject to this provision. 28 U.S.C. §994(h). The case thus presents a special Guideline issue with unusual influence over federal sentencing.

Second, this Court's stated rationale for withholding review of Guideline issues is that the Sentencing Commission can address inconsistencies in their application by amendment. But here the direct circuit conflict has existed since 2009, without any sign of resolution. Indeed, the Commission has expressly declined to resolve the division. *See* U.S. Sentencing Commission, *Report to the Congress: Career Offender Sentencing Enhancements* 54 (August 2016)(declining to add a definition of enumerated offenses, including "aggravated assault" because it believed "it ... best not to disturb the case law that has developed over the years."), *available at https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements*.

Third, the present case does not merely implicate a division about the application of a single enhancement to a single statute of conviction. Rather, the circuits addressing Texas aggravated assault have divided on the broadly applicable question of whether "minor differences" between a statute and a generic definition may be overlooked when applying the "categorical approach." *See Esparza-Herrera*, 557 F.3d at 1023 ("The Fifth Circuit's reasoning is not without insight but is foreclosed by our precedent.")

The present case is the appropriate vehicle to address this issue. The generic definition of aggravated assault was the sole ground of decision below. And while Petitioner's prior offense might be termed a "crime of violence" on the ground that it requires the use of force as an element, the

courts of appeals are divided as to whether reckless offenses have the use of force for purposes other than 18 U.S.C. §921(a)(33)(A). The present case cannot be decided without resolving at least one circuit split, and may present the efficient opportunity to resolve two of them at once.

II. 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).

Similar to USSG §4B1.2(a), 18 U.S.C. §16(a) 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*, __U.S.__,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), and18 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. De La Rosa*, 2019 U.S. App. LEXIS 1029 (5th Cir. 2019)(unpublished);(18 U.S.C. §16(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.

This case presents the issue and is an apt vehicle to resolve it. Petitioner's prior Texas aggravated assault offense may unquestionably be committed by reckless injury. *See* Tex. Penal Code §22.01, 22.02. Although the indictment and judicial confession in this case referenced only knowing and intentional conduct, the court below has held that commission of the offense by recklessness and commission under some higher grade of *mens rea* represent only indivisible means of committing a single offense, not distinct offenses. *See Howell*, 838 F.3d at 498-99. As such, it has recognized that Texas assault-by-injury offenses possess the use of force as an element for the purposes of §4B1.2 only if reckless injury constitutes the use of force. *See id.*

And while the present case involves the Guidelines rather than a statute, the relevant language appears in a range of statutory and Guideline provisions. Determining the meaning of the phrase "use of force against the person of another" would offer guidance for a large number of federal criminal cases. Finally, the issue is fully preserved.

III. There is a reasonable probability of a different result in this case if *Rehaif v. United States*, No. 17-9560, __U.S.__, 139 S.Ct. 914 (Jan. 11, 2019), is decided favorably to the Petitioner in that case.

Section 922(g) of Title 18 makes it "unlawful" for certain disfavored populations to possess firearms in interstate commerce. People who have been convicted of a prior felony are one such population. 18 U.S.C. §922(g)(1). Aliens illegally in the United States are another such population. 18 U.S.C. §922(g)(5).

Section 924(a) of Title 18 provides for criminal punishment to anyone who "knowingly violates subsection ... (g)." In *Rehaif v. United States*, No. 17-9560, __U.S.__, 139 S.Ct. 914 (Jan. 11, 2019), this Court agreed to decide whether an alien "knowingly violates" §922(g) if he or she does not know of his or her illegal status. If the answer to that question is no, it is difficult or impossible to see how a felon would violate 18 U.S.C. §922(g) if he or she did not know of her felon status. Nor is it easy to see how one would "knowingly violate" §922(g) without knowing that the possessed firearm has moved in interstate commerce. It is the same phrase – "knowingly violate" –

in the same clause, of the same sentence, of the same statute, that imposes the *mens rea* requirement for all of §922(g). The phrase cannot mean "to act with knowledge of all facts that make the conduct criminal" in some cases, but only "to act with knowledge of the firearm" in others. *See Clark v. Martinez*, 543 U.S. 371, 382 (2005).

This Court "regularly hold(s) cases that involve the same issue as a case on which *certiorari* has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." *Lawrence v. Chater*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting). Ultimately, a GVR is appropriate where intervening developments reveal a reasonable probability that the outcome below rests upon a premise that the lower court would reject if given the opportunity for further consideration. *See Lawrence*, 516 U.S. at 168. Petitioner's factual resume does not admit that he knew he was a felon, nor that he knew his firearm had traveled in interstate commerce at the time he possessed it. As such, if the Petitioner prevails in *Rehaif*, the district court will have plainly erred in taking the plea. *See* Fed. R. Crim. P. 11(b)(3).

It is no barrier to relief that the issue was raised for the first time in a petition for *certiorari*. There is some authority in the Fifth Circuit for the proposition that arguments not raised until after the opinion may be raised only in "extraordinary circumstances." *United States v. Hernandez-Gonzalez*, 405 F.3d 260 (5th Cir. 2005). But an earlier decision of the court below applies plain error to claims made by the defendant for the first time in a *certiorari* petition. *See United States v. Clinton*, 256 F.3d 311 (5th Cir. 2001). The defendant in *Clinton* was convicted of a federal drug crime without a jury determination of drug quantity, and failed to raise any claim of Sixth Amendment error in the district court or before the court of appeals. *See Supplemental Brief for the United States in United States v. Clinton*, 2001 WL 34353823, at *3 (5th Cir. 2001). After this Court granted *certiorari*, vacated the sentence, and remanded in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), however, the *Clinton* court reached a very different conclusion about its obligations in light of this Court's order than did the *Hernandez-Gonzalez* court. Prior to reaching the merits of the *Apprendi* issue, the court below held:

> This case is on remand from the United States Supreme Court for further consideration in light of *Apprendi. Apprendi* was decided after this Court affirmed criminal defendant Johnny Clinton's drug trafficking convictions and sentences on direct appeal and the arguments presented herein were not presented to the district court or this Court on initial appeal. We have, therefore, carefully considered the record in light of Clinton's arguments on remand and the plain error standard of review. Having concluded that review, we find no remediable error and once again affirm Clinton's criminal convictions as well as the sentences imposed by the district court.

Clinton, 256 F.3d at 313 (internal citations omitted). Because *Clinton* predates *Hernandez-Gonzalez*, the court below is bound to apply *Clinton* and review for plain error. *See United States v. Miro*, 29 F.3d 194, 199 n.4 (5th Cir. 1994)("When faced with conflicting panel opinions, the earlier controls our decision."). As noted, a victory for *Rehaif* will establish plain error. And, indeed, the court below has recently granted relief when the defendant secured GVR on a basis raised for the first time in a petition for *certiorari*. *See United States v. Wright*, 2017 U.S. App. LEXIS 4563, at *6 (5th Cir. March 15, 2017)(unpublished).

In any case, GVR is not a decision on the merits. *See Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001); *accord State Tax Commission v. Van Cott*, 306 U.S. 511, 515-516 (1939). Accordingly, procedural obstacles to reversal – such as the consequences of non- preservation – should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964)(*per curiam*)(GVR "has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres-Valencia v. United States*, 464 U.S. 44 (1983)(*per curiam*)(GVR utilized over government's objection where error was conceded; government's harmless error argument should be presented to the Court of Appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting)(speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945)(remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the Court of Appeals). If there is doubt about the outcome in

light of the procedural hurdles to relief, this Court should vacate and remand.

CONCLUSION

Petitioner respectfully submits that this Court, grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 22d day of May, 2019.

/s/ Kevin Joel Page
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