No. 19-5325

IN THE SUPREME COURT OF THE UNITED STATES

ALAN VICTOR GOMEZ GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FINNUALA K. TESSIER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Texas offense of aggravated assault, in violation of Tex. Penal Code Ann. § 22.02(a) (West Supp. 2010), is a "crime of violence" under 18 U.S.C. 16(a) that qualifies as an "aggravated felony" under 8 U.S.C. 1326(b)(2).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Tenn.):

United States v. Gomez Gomez, No. 17-cr-148 (Aug. 22, 2017)

United States Court of Appeals (5th Cir.):

United States v. Gomez Gomez, No. 17-20526 (Feb. 26, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

____

No. 19-5325

ALAN VICTOR GOMEZ GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

____

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

____

BRIEF FOR THE UNITED STATES

____

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 917 F.3d 332.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 2019. A petition for rehearing was denied on April 23, 2019 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on July 19, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of illegally reentering the United States after removal following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). Judgment 1. He was sentenced to 19 months of imprisonment, to be followed by one year of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A4.

1. Petitioner is a citizen of Mexico. Presentence Investigation Report (PSR) ¶ 4. In 2011, he was convicted of two counts of aggravated assault with a deadly weapon, in violation of Tex. Penal Code Ann. § 22.02(a) (West Supp. 2010). PSR ¶¶ 5, 26-27. After he was released from prison, he was removed from the United States. PSR ¶ 7.

At some point thereafter, petitioner reentered the United States without authorization. See PSR ¶¶ 8-9. In March 2017, he was arrested in Texas and admitted that he had illegally reentered the United States. PSR ¶ 8. He pleaded guilty to illegally reentering the United States, in violation of 18 U.S.C. 1326(a). Judgment 1. But he reserved the right to contest whether his prior conviction qualified him for application of 8 U.S.C. 1326(b)(2), which applies to removal following a conviction for an aggravated felony, as opposed to 8 U.S.C. 1326(b)(1), which applies to removal following a conviction for a felony. See Gov't C.A. Br. 5.

Under 8 U.S.C. 1326, any alien who has been "deported[] or removed" from the United States "and thereafter * * * enters * * * or is at any time found in[] the United States" without obtaining consent from the Attorney General (except in certain specific circumstances in which such consent is not required) shall be fined or imprisoned or both. 8 U.S.C. 1326(a). For an alien who violates Section 1326(a) and "whose removal was subsequent to a conviction for * * * a felony (other than an aggravated felony)," the maximum term of imprisonment is ten years. 8 U.S.C. 1326(b)(1). For an alien who violates Section 1326(a) and "whose removal was subsequent to a conviction for commission of an aggravated felony," the maximum term of imprisonment is 20 years. 8 U.S.C. 1326(b)(2). The term "aggravated felony" is defined in 8 U.S.C. 1101(a)(43), which sets forth a list of qualifying offenses and categories of offenses. Among those are any "crime of violence" as defined in 18 U.S.C. 16 for which the term of imprisonment is at least one year. 8 U.S.C. 1101(a)(43)(F). Section 16, in turn, defines a "crime of violence" to include "an offense that 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).

2. Before sentencing, the Probation Office prepared a presentence report recommending a total offense level of 13 and a criminal history category of III, resulting in an advisory Sentencing Guidelines range of 18 to 24 months of imprisonment.

PSR ¶ 47. The presentence report also determined that Section 1326(b)(2) applied, based on petitioner's prior convictions for aggravated assault with a deadly weapon, in violation of Tex. Penal Code Ann. § 22.02(a) (West Supp. 2010). See PSR ¶¶ 16-17. That statute defines aggravated assault to include the commission of an assault -- defined as "intentionally, knowingly, or recklessly caus[ing] bodily injury to another" -- in which the defendant either "causes serious bodily injury to another" or "uses or exhibits a deadly weapon." Tex. Penal Code Ann. § 22.01(a), 22.02(a) (West Supp. 2010).

Petitioner argued that Texas aggravated assault should not qualify as an "aggravated felony" under Section 1326(b)(2) because "the elements of the crime are causation of injury, which can be caused in ways other than through the use of force." C.A. ROA 90-91 (citing United States v. Villegas-Hernandez, 468 F.3d 874, 879-883 (5th Cir. 2006), cert. denied, 549 U.S. 1245 (2007), overruled by United States v. Reyes-Contreras, 910 F.3d 169 (5th Cir. 2018) (en banc)). The district court rejected petitioner's argument. Sent. Tr. 4-5. The court entered judgment, referencing 8 U.S.C. 1326(a) and (b)(2), and sentenced petitioner to 19 months of imprisonment, to be followed by one year of supervised release. Judgment 1-3.

3. The court of appeals affirmed. Pet. App. A1-A4.

On appeal, petitioner again contended that Texas aggravated assault "is not a crime of violence, because the offense can be

committed through indirect as well as direct uses of force." Pet. App. A2; see Pet. C.A. Br. 8-17. The court of appeals rejected that contention, explaining that its recent en banc decision in United States v. Reyes-Contreras, 910 F.3d 169 (5th Cir. 2018), had eliminated "the distinction between direct and indirect force" that its prior precedent had drawn. Pet. App. A3. The court observed that Reyes-Contreras had relied on this Court's decision in United States v. Castleman, 572 U.S. 157, 162-168 (2014), to find that that "the 'use of force' under 18 U.S.C. § 16(a) * * * includes indirect as well as direct applications of force." Pet. App. A2.

The court of appeals rejected petitioner's argument that "retroactively applying Reyes-Contreras to his sentence would violate the Ex Post Facto Clause." Pet. App. A2. The court explained that "Reyes-Contreras did not make previously innocent activities criminal," but instead "merely reconciled" circuit precedent with this Court's decision in Castleman. Id. at A3.

DISCUSSION

Petitioner contends (Pet. 14-24) that his prior convictions for aggravated assault under Tex. Penal Code Ann. § 22.02(a) (West Supp. 2010) do not qualify as aggravated felonies under 8 U.S.C. 1326(b)(2), on the theory that an offense that can be committed recklessly does not include as an element the "use, attempted use, or threatened use of physical force against the person or property of another" under 18 U.S.C. 16(a). The Court should hold this

case pending its disposition of the petitions for writs of certiorari in Borden v. United States, No. 19-5410 (filed July 24, 2019), and Walker v. United States, No. 19-373 (filed Sept. 19, 2019), and then dispose of it as appropriate. The courts of appeals are divided as to whether crimes that can be committed with a mens rea of recklessness can satisfy the definition of a "violent felony" under a similarly worded provision of the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(2)(B)(i). As the government has explained in its briefs in response in Borden and Walker, the conflict on the ACCA question warrants this Court's review.[1] Either Borden or Walker would provide a suitable vehicle for deciding that question; here, in contrast, the question presented was not raised below, involves the classification of petitioner's offense under a different statute, and would have no effect on petitioner's sentence.

1. Petitioner's convictions for Texas aggravated assault -- which required that he commit assault with a dangerous weapon or cause serious bodily injury, Tex. Penal Code Ann. § 22.02(a) (West Supp. 2010) -- involved the "use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 16(a), and thus qualify as "crime[s] of violence" under 18 U.S.C. 16 and "aggravated felon[ies]" under 8 U.S.C. 1101(a)(43). That determination follows from this Court's

[1] We have served petitioner with a copy of the government's brief in Walker.

decision in Voisine v. United States, 136 S. Ct. 2272 (2016). In Voisine, the Court held, in the context of 18 U.S.C. 921(a)(33)(A)(ii), that the term "use . . . of physical force" includes reckless conduct. 136 S. Ct. at 2278 (citation omitted). Although Voisine itself had no occasion to decide whether its holding extends to other statutory contexts, id. at 2280 n.4, the court below has correctly recognized that Voisine's logic is similarly applicable to other statutes that refer to offenses that have as an element the "use" of force. See United States v. Burris, 920 F.3d 942, 951 (5th Cir.), petition for cert. pending, No. 19-6186 (filed Oct. 3, 2019).

This Court explained in Voisine that the word "'use'" in that context requires the force to be "volitional" but "does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so." 136 S. Ct. at 2279. The Court observed that the word "'use'" "is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." Ibid. Moreover, the Court noted, "nothing in Leocal v. Ashcroft," 543 U.S. 1 (2004), which addressed the mens rea requirement for the "crime of violence" definition in 18 U.S.C. 16(a), "suggests a different conclusion -- i.e., that 'use' marks a dividing line between reckless and knowing conduct." Voisine, 136 S. Ct. at 2279.

Rather, the Court indicated, the key "distinction [was] between accidents and recklessness." Ibid. Thus, under Voisine, "[a]s long as a defendant's use of force is not accidental or involuntary, it is 'naturally described as an active employment of force,' regardless of whether it is reckless, knowing, or intentional." United States v. Haight, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (Kavanaugh, J.) (quoting Voisine, 136 S. Ct. at 2279), cert. denied, 139 S. Ct. 796 (2019).

2. As explained in the government's brief in response (at 9-12) in Walker, supra (No. 19-373), a circuit conflict exists on the question whether Voisine's logic applies to the similarly worded elements clause in the ACCA, and this Court's review of that question is warranted. The Court should accordingly grant review in either Borden or Walker, each of which appears to offer a suitable vehicle in which to consider that question.

This case, by contrast, does not provide an appropriate vehicle for further review, for several reasons. First, the court of appeals did not address the question presented. See Pet. App. A1-A4. Petitioner first raised the argument identified in his petition -- that Texas aggravated assault should not qualify as a crime of violence because it covers reckless conduct -- in a supplemental letter brief. See Pet. C.A. Supplemental Br. 2-3 (Jan. 3, 2019). And even then, he merely included a brief argument about reckless driving between two arguments relating to his original contention about the indirect use of physical force. See

id. at 2-4. The Fifth Circuit does not address arguments that are not raised in a party's "original brief as required by Fed. R.[]App. P. 28." United States v. Ogle, 415 F.3d 382, 383 (5th Cir. 2005) (per curiam). And it did not address petitioner's recklessness argument in this case, instead focusing entirely on petitioner's argument about indirect force. See Pet. App. A1-A4.

Second, this case does not involve the ACCA, which, as explained (at 9-12) in the government's brief in Walker, supra (No. 19-373), is the primary context in which the courts of appeals are divided.

Third, the question presented had no practical effect on petitioner's sentence. Petitioner was sentenced to only 19 months of imprisonment -- well below the ten-year statutory maximum that would have applied under 8 U.S.C. 1326(b)(1) for illegal reentry after removal following a felony conviction (as opposed to the 20-year statutory maximum that applied under 8 U.S.C. 1326(b)(2) for illegal reentry after removal following an aggravated-felony conviction). See Judgment 2. The classification of his prior convictions as aggravated felonies thus did not affect the length of his sentence and would be relevant, at most, in a future immigration or criminal proceeding. In addition, petitioner's 19-month term of imprisonment has already expired, and he was released on July 30, 2018. See Fed. Bureau of Prisons, Find an Inmate, https://www.bop.gov/inmateloc (search for register number 24380-479).

3. If, however, the Court grants the petition for a writ of certiorari in Borden or Walker, it should hold the petition in this case pending its decision there. The elements clause in Section 16(a) is similar in many respects to the elements clause in the ACCA, 18 U.S.C. 924(e)(2)(B)(i). The Court's resolution of the more frequently arising question of the ACCA's application to prior convictions for crimes that can be committed recklessly could therefore potentially affect the court of appeals' disposition of this case, subject to any determination that the court of appeals would make about the effect of petitioner's failure to mention the issue before a late stage of the appellate proceedings.

CONCLUSION

If this Court grants review in Borden v. United States, No. 19-5410 (filed July 24, 2019), or Walker v. United States, No. 19-373 (filed Sept. 19, 2019), the petition for a writ of certiorari should be held pending the disposition of that case and then disposed of as appropriate. If this Court grants review in neither

Borden nor Walker, the petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FINNUALA K. TESSIER
Attorney

OCTOBER 2019