No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE LARA-GARCIA,
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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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a statute has as an element the use of force against the person of another when a conviction under that statute can be based on a reckless mental state.[1]

[1] The petition for a writ of certiorari in *Alan Victor Gomez Gomez v. United States*, No. 19-5325 (filed July 25, 2019), raises the same issue as is raised in this petition.

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

None.

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MISCELLANEOUS

PRAYER

Petitioner Jose Lara-Garcia prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Westlaw version of opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Lara-Garcia's case is attached to this petition as an Appendix. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit's opinion was entered on June 10, 2019. *See* Appendix. This petition is filed within 90 days after that opinion. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to any alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisonment not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other

sentence[;] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

* * * *

8 U.S.C. § 1101(a)(43)(F)

The term "aggravated felony" means--

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year;

* * * *

18 U.S.C. § 16

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 property 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. Assault

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;

(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

* * * *

Tex. Penal Code § 22.02. Aggravated assault

(a) A person commits an offense if the person commits assault as defined in [Tex. Penal Code] § 22.01 and the person:

(1) causes serious bodily injury to another, including the person's spouse; or

(2) uses or exhibits a deadly weapon during the commission of the assault.

* * * *

STATEMENT OF THE CASE

I. Statutory framework

A person who is convicted of the crime of illegal reentry, that is, of being found unlawfully present in the United States after a previous deportation, faces up to two years in prison. 8 U.S.C. § 1326(a). That penalty increases to 10 years if the person has pre-deportation felony conviction. 8 U.S.C. § 1326(b)(1). If the person has a pre-deportation conviction for an "aggravated felony," however, he or she is subject to a term of 20 years in prison. 8 U.S.C. § 1326(b)(2).

The term "aggravated felony" is defined to include, among other things, "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense" for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). Section 16 of Title 18, in turn, defines crime of violence as:

> (a) an offense that that has as an element the use, attempted use, or threatened use of physical force against the person or property 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.

18 U.S.C. § 16.

Since § 16(b), the "residual clause," is void for vagueness, *see Sessions v. Dimaya*, 138 S. Ct. 1204, 1213-15 (2018), that leaves only § 16(a), the "force clause," for analyzing whether a prior conviction qualifies as a "crime of violence"-type of "aggravated felony."

Like § 16, the Armed Career Criminal Act ("ACCA") has a force clause. *See* 18

U.S.C. § 924(e)(1)(B)(i). Under ACCA, a person who commits the offense of unlawful possession of a firearm or ammunition after three convictions for a "violent felony" faces a mandatory minimum sentence of 15 years in prison. 18 U.S.C. § 924(e)(1). ACCA defines "violent felony" to include (in relevant part) "any crime punishable by imprisonment for a term exceeding one year . . . that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(1)(B)(i). The only difference between the two force clauses is that § 16 includes property but ACCA does not. Because the force clauses are nearly identical, courts typically treat the two clauses as interchangeable. *See, e.g.*, *United States v. Ramos*, 744 Fed. Appx. 215, 217 (5th Cir. 2018) (unpublished); *United States v. Holston*, 471 Fed. Appx. 308, 308 (5th Cir. 2012) (unpublished).

Interpreting the applicability of these force clauses requires courts to employ the categorical approach. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575 (1990). Under that approach, courts examine whether the elements in the statute of the prior conviction meets the requirements of the force clause, without regard to the underlying facts, or means, that are "extraneous to the crime's legal requirements." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). To determine whether a statute contains elements or means, courts must decide whether the statute's alternatives are indivisible because they create a single crime that can be committed in various ways or whether the alternatives are divisible because they define separate crimes. *See, e.g.*, *id.* at 2250-57. If the statute's alternatives are elements, the modified categorical approach permits courts to examine the prior conviction

documents to determine which offense the defendant committed, and then determine whether that offense satisfies the force clause. *See id.* at 2253-54. If the statute's alternatives are means, however, the modified categorical approach has no role to play, and courts must decide whether the least of the acts sufficient to meet the statute's elements satisfies the force clause. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017).

In Texas, a person commits simple assault in one of three ways: (1) "intentionally, knowingly, or recklessly caus[ing] serious bodily injury to another"; (2) intentionally or knowingly threaten[ing] another with imminent bodily injury"; or (3) "intentionally or knowingly caus[ing] physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative." Tex. Penal Code § 22.01(a). Texas defines aggravated assault as committing a simple assault as defined in Tex. Penal Code § 22.01 with either one of the following aggravating factors: (1) "caus[ing] serious bodily injury to another" or (2) "us[ing] or exhibit[ing] a deadly weapon during the commission of the assault." Tex. Penal Code § 22.02(a).

Although the three types of Texas simple assault are divisible because they are elements comprising separate crimes, the culpable mental states in the Texas simple assault statute, as well as the aggravating factors in the Texas aggravated assault statute, are alternative means and therefore indivisible. *See, e.g.*, *United States v. Howell*, 838 F.3d 489, 498-99 (5th Cir. 2016); *Landrian v. State*, 268 S.W.3d 532, 537-39 (Tex. Crim. App. 2008). As a result, a person's conviction cannot be narrowed under the modified categorical approach except to the type of simple assault with the minimum mental state under the

statute (*e.g.*, reckless bodily injury assault) with an aggravating factor.

Because of how Texas has chosen to define these offenses, Texas aggravated assault reaches some unexpected conduct, including drunk or reckless driving that results in serious bodily injury. In Texas, a "deadly weapon" includes a vehicle driven by a drunk person. *See Tyra v. State*, 897 S.W.2d 796, 798 (Tex. Crim. App. 1995) (holding that, where the defendant was too drunk to control the vehicle and accidentally killed a man, the vehicle was "a deadly weapon" because "a thing which actually causes death is, by definition, 'capable of causing death'"). So too is a recklessly driven automobile, even if the driver did not intend to use the car as a weapon. *Walker v. State*, 897 S.W. 2d 812, 814 (Tex. Crim. App. 1995); *see also Pogue v. State*, No. 05-12-00883-CR, 2013 WL 6212156, *4-*5 (Tex. App.—Dallas Nov. 27, 2013, no pet.) (unpublished); *McNair v. State*, No. 02-10-00257-CR, 2011 WL 5995302, at *9 (Tex. App.—Fort Worth Nov. 23, 2011, no pet.) (unpublished). With this broad definition of "deadly weapon," Texas aggravated assault extends to when a drunk driver causes serious bodily injury. *See Stanley v. State*, 470 S.W.3d 664, 667 (Tex. App.—Dallas, no pet.) (aggravated assault indictment based on drunk driving). An aggravated assault conviction can also be secured based on a person's reckless driving—including by speeding—that causes serious bodily injury. *See Venegas v. State*, 560 S.W.3d 337, 351 (Tex. App.—San Antonio 2018, no pet.) (To obtain an aggravated assault conviction, "the State was required to prove beyond a reasonable doubt that Venegas intentionally, knowingly, or recklessly caused serious bodily injury to Ramos by failing to maintain a reasonable speed or driving in a manner that disregarded the safety

of other motorists on the roadway.").

Another unusual application of the Texas aggravated assault statute involves consensual sexual contact. Texas has convicted defendants of aggravated assault where consensual sexual contact passed a virus to the unwitting partner, under both the "serious bodily injury" aggravating factor and the "deadly weapon" aggravating factor. *See, e.g.*, *Billingsley v. State*, No. 11-13-00052-CR, 2015 WL 1004364, at *2 (Tex. App.—Eastland Feb. 27, 2015, pet. ref'd) (unpublished). In fact, in *State v. Zakikhani*, Case No. 151228901010 (Crim. Dist. Ct. No. 176, Harris Co., Tex., June 20, 2018), the defendant was convicted of aggravated assault for transmitting HIV through consensual intercourse, where one complainant made clear that the actus reus was not physically forceful and the defendant was friendly and charming.[2]

Finally, the State of Texas has charged a man with aggravated assault with a deadly weapon by sending a Tweet with an animation that induced the victim to have a seizure. *See* Indictment, *State v. Rivello*, Case No. F-1700215-M (Crim. Dist. Ct. No. 5, Dallas Co. Tex., Mar. 20, 2017).

II. Factual background

On January 7, 2014, Petitioner Jose Lara-Garcia was charged by indictment with being found in the United States without the consent of the Attorney General or Secretary of the Department of Homeland Security after previously having been deported, in

[2] Tera Robertson & Jace Larson, *Man may be knowingly infecting victims with HIV, police say*, Click2Houston.com, June 9, 2016, https://www.click2houston.com/news/investigates/man-may-be-knowingly-infecting-victims-with-hiv-police-say (last visited July 17, 2019).

violation of 8 U.S.C. § 1326. On February 7, 2014, he pleaded guilty to the indictment. At the rearraignment, the prosecutor proffered the following factual basis:

> [PROSECUTOR]: The defendant is a native and citizen of Mexico with no documents allowing him to enter, travel through or remain in the United States. The defendant has been removed from the United States on or about May 16, 2013 from Laredo, Texas. The defendant thereafter was found in the United States on or about December 21st, 2013 at or near Laredo, Texas[.]
>
> The defendant has never applied for or received the permission of either the United States attorney general or the secretary of the department of Homeland Security to reenter the United States or reapply for admission into the United States after his removal.

On January 26, 2015, the district court sentenced Mr. Lara-Garcia to 46 months of imprisonment, but to no term of supervised release. The court imposed a $100 special assessment, but no fine. The written judgment entered by the district court on February 13, 2015, states that Mr. Lara-Garcia was convicted of "[r]e-entry of a deported alien" in violation of "8 U.S.C. §§ 1326(a) and (b)(2)."

Mr. Lara-Garcia filed a timely notice of appeal on January 28, 2015. On appeal, he argued that the district court committed reversible plain error when it convicted, sentenced, and entered judgment against him under 8 U.S.C. § 1326(b)(2) because a conviction for Texas aggravated assault does not qualify as an "aggravated felony" within the meaning of 8 U.S.C. § 1101(a)(43). Originally, Mr. Lara-Garcia made this argument by contending that 18 U.S.C. § 16(b) was unconstitutionally vague and that his prior aggravated assault office did not qualify as a "crime of violence" under 18 U.S.C. § 16(a) based on Fifth Circuit precedent distinguishing between crimes with the use of force as an element and

crimes with the mere reckless causation of injury as an element. However, the Fifth Circuit overruled this precedent in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (*en banc*). Following this Court's holding in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), that § 16(b) is unconstitutionally vague, Mr. Lara-Garcia argued that Texas aggravated assault is not a "crime of violence"-type of "aggravated felony" because a conviction for that offense can be sustained based on (1) a drunk/reckless driving accident that results in death or serious bodily injury; (2) a defendant transmitting a virus to an unwitting partner during consensual sexual contact; and (3) a defendant sending a Tweet with animation that induced the victim to have a seizure. The Fifth Circuit affirmed the district court's judgment based on its opinions in *Reyes-Contreras*, 910 F.3d at 182, and *United States v. Gomez Gomez*, 917 F.3d 332, 333-34 (5th Cir. 2019), and held that Texas aggravated assault is a crime of violence under 18 U.S.C. § 16(a). *United States v. Lara-Garcia*, No. 15-40108, 2019 WL 2427216 (5th Cir. June 10, 2019) (unpublished).

Mr. Lara-Garcia now seeks to have this Court settle the circuit split on whether a statute with a reckless mental state has as an element the use of physical force against the person of another.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

> Whether a reckless offense has as an element the use of force against another person is a question on which the circuits have acknowledged that they are divided, and this Court's intervention is therefore necessary to resolve this important and recurring question of federal sentencing and immigration law.

In *Leocal v. United States*, 543 U.S. 1 (2004), this Court considered whether a prior conviction for driving under the influence of alcohol and causing serious bodily injury qualified as a "crime of violence" under 18 U.S.C. § 16's force clause. The unanimous Court said "no," reasoning that "negligent or merely accidental conduct" does not satisfy "the critical aspect" and "key phrase" of the force clause: the "use . . . of physical force *against the person or property of another*." *Leocal*, 543 U.S. at 9 (emphasis in original). In doing so, the Court emphasized that, "when interpreting a statute that features as elastic a word as 'use,' [the Court] construe[s] language in its context and in light of the terms surrounding it." *Id.* And in the context of § 16, with its phrase "against the person of another," the Court found that "[i]n no 'ordinary or natural' sense can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury." *Id.* at 11. Context was very important to the Court's decision: "[W]e cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Id.*; *see also Curtis Johnson v. United States*, 559 U.S. 133, 140-41 (2010) (contrasting "the context of a statutory definition of '*violent* felony'" with "a meaning derived from a common-law *misdemeanor*") (emphasis in original).

The Court in *Leocal* did not decide whether a reckless offense qualifies as a crime of violence. *Id.* at 13. But after *Leocal*, the circuit courts uniformly held that reckless

offenses, like negligent or strict liability offenses, did not satisfy § 16 either. *See United States v. Fish*, 758 F.3d 1, 10 & n.4 (1st Cir. 2014) (collecting cases); *see also United States v. Orona*, 923 F.3d 1197, 1200, 1202 (9th Cir. 2019) (explaining how the Ninth Circuit, after *Leocal*, determined *en banc* that a reckless assault did not qualify as a § 16(a) "crime of violence" and thereby "brought the law of [that] circuit in line with that of several of [the court's] sister circuits").

Then came this Court's decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016), which has unsettled that uniformity. *Voisine* concerned 18 U.S.C. § 922(g)(9), a statute that prohibits a person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. The phrase "misdemeanor crime of domestic violence" is further defined as an offense involving a domestic relationship that "has, as an element, the use of physical force," and the Court held that the statute includes reckless domestic assaults. *Voisine*, 136 S. Ct. at 2278. The Court acknowledged *Leocal*, but found nothing in that opinion suggesting "that 'use' marks a dividing line between reckless and knowing conduct." *Id.* at 2279. However, the Court expressly noted that its decision in *Voisine* involving "misdemeanor crimes of domestic violence" did not resolve whether a "crime of violence" under § 16 encompasses reckless conduct and further acknowledged that "[c]ourts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes." *Voisine*, 136 S. Ct. at 2280 n.4.

Since *Voisine*, the circuit courts have diverged on whether a reckless offense qualifies as either a "crime of violence" under § 16 or the United States Sentencing

Guidelines or a "violent felony" under the Armed Career Criminal Act ("ACCA"). The First Circuit has held that reckless offenses do not qualify as either a "crime of violence" or a "violent felony." In *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017), the First Circuit found that a prior conviction for Massachusetts assault and battery with a dangerous weapon did not qualify as a "violent felony" under ACCA due to that statute's reckless mental state. The First Circuit reasoned that, although the Massachusetts statute required "that the wanton or reckless act be committed intentionally," the statute "does not require that the defendant intend to cause injury" or "be aware of the risk of serious injury that any reasonable person would perceive." *Id.* at 39. The First Circuit specifically pointed to cases where a conviction under the Massachusetts statute involved "reckless driving that results in a non-trifling injury." *Id.* at 38. Similarly, in *United States v. Rose*, 896 F.3d 104 (1st Cir. 2018), the First Circuit held that a prior conviction for Rhode Island assault with a dangerous weapon was not a "violent felony" under ACCA because that statute required "a mental state of only recklessness." *Rose*, 896 F.3d at 114.

Both *Windley* and *Rose* relied heavily on the First Circuit's opinion in *Bennett v. United States*, 868 F.3d 1, 9 (1st Cir.), *opinion withdrawn and vacated*, 870 F.3d 34 (1st Cir. 2017). That opinion was withdrawn and vacated due to the petitioner's death, but before that happened, the court in *Windley* "endorse[d] and adopt[ed] [*Bennett*'s] reasoning as its own." *Windley*, 864 F.3d at 37 n.2. In *Bennett*, a panel including Justice Souter carefully examined this Court's opinion in *Leocal*, recognizing that both ACCA and § 16 contain "a follow-on 'against' phrase" to which "*Leocal* gave significant weight . . . in

concluding that Florida's driving-under-the-influence offense was not a 'crime of violence' under § 16." *Bennett*, 868 F.3d at 9-10. The *Bennett* opinion further evaluated the potential impact of *Voisine* on the recklessness question, acknowledging the division among the circuits after *Voisine*. *Bennett*, 868 F.3d at 15-16. Ultimately, the *Bennett* opinion determined that ACCA's context, with the "against" phrase, "arguably does convey the need for the perpetrator to be knowingly or purposefully (and not merely recklessly) causing the victim's bodily injury in committing an aggravated assault" and that it is unclear whether it would be "natural to say that a person who chooses to drive in an intoxicated state uses force 'against' the person injured in the resulting, but unintended, car crash." *Id.* at 18. Given that uncertainty, the *Bennett* opinion invoked the rule of lenity to hold that Maine aggravated assault, which encompasses drunk driving through its reckless mental state variant, does not have as an element the use of force against another person. *Id.* at 22-24.

A panel of the Fourth Circuit has agreed with the First Circuit's approach to reckless offenses. In *United States v. Middleton*, 883 F.3d 485, 487 (4th Cir. 2018), Judge Gregory authored a majority opinion holding that a conviction for South Carolina involuntary manslaughter did not qualify as a violent felony under ACCA because that statute covered the illegal sale of alcohol to a minor that resulted in a drunk driver's death. *Id.* at 489-93. Judge Floyd authored a separate opinion concurring in part and concurring in the judgment, with Judge Harris joining Parts II.A and B. Those two subparts concluded that "South Carolina involuntary manslaughter sweeps more broadly than the ACCA because an

individual can be convicted of this offense based on reckless conduct, whereas the ACCA force clause requires a higher degree of *mens rea*." *Id.* at 497 (concurring opinion). Drawing on the First Circuit's *Bennett* and *Windley* opinions, Judge Floyd and Judge Harris emphasized the phrase "against the person of another" as the critical feature distinguishing ACCA from the statute involving misdemeanor crimes of domestic violence in *Voisine*. *Middleton*, 883 F.3d at 498-99 (concurring opinion).

Although the Eighth Circuit has held, after *Voisine*, that some reckless offenses have the use of force against another,[3] the Eighth Circuit has squarely held that an offense that can be committed by reckless driving does not have the requisite force element. In *United States v. Fields*, 863 F.3d 1012, 1013 (8th Cir. 2017), *reh'g denied* (Nov. 7, 2017), the Eighth Circuit evaluated whether a prior conviction for Missouri second-degree assault was categorically a "crime of violence" for purposes of applying a sentencing enhancement under the United States Sentencing Guidelines. The Missouri statute defined the offense at issue as "recklessly caus[ing] serious physical injury to another person." *Fields*, 863 F.3d at 1014 (brackets in original omitted). The Eighth Circuit held that, because the Missouri statute encompassed reckless driving resulting in injury, it did not qualify as a "crime of violence." *Id.*

The Eighth Circuit in *Fields* reaffirmed its pre-*Voisine* decision in *United States v. Ossana*, 638 F.3d 895 (8th Cir. 2011). In *Ossana*, the Eighth Circuit relied on this Court's

[3] *See, e.g.*, *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (holding that reckless discharge of a firearm qualifies as a violent felony under ACCA).

decision in *Begay v. United States*, 553 U.S. 137 (2008),[4] which "distinguished crimes that show a mere 'callousness toward risk' from crimes that 'also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.'" *Ossana*, 638 F.3d at 902 (quoting *Begay*, 553 U.S. at 146). More specifically, *Begay* pointed to reckless polluting and reckless tampering with consumer products as "crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals.'" *Ossana*, 638 F.3d at 903 (quoting *Begay*, 553 U.S. at 146). Without "any meaningful distinction between" reckless tampering with consumer products and assault statutes "encompassing reckless driving that results in an injury," the Eighth Circuit applied *Begay* to find that reckless driving was not a crime of violence. *Ossana*, 638 F.3d at 903. Although the government sought rehearing of the Eighth Circuit's decision in *Fields* to reaffirm *Ossana* after *Voisine*, the court denied the petition. *See Fields*, 863 F.3d at 1012 n.*.

Similar to the Eighth Circuit, but on a broader scale, the Ninth Circuit has re-affirmed its pre-*Voisine*, *en banc* decision that a reckless assault does not qualify as a crime of violence under § 16(a). *See Orona*, 923 F.3d at 1202-03. After *Leocal*, the *en banc* Ninth Circuit revisited (and expressly overruled) its precedent that a crime of violence included reckless offenses. *See Orona*, 923 F.3d at 1200-01 (discussing *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (*en banc*)). In its *en banc* decision in *Fernandez-*

[4] *Begay* primarily concerned the residual clause and was abrogated in that respect when the residual clause was later held to be void for vagueness. *See Samuel Johnson v. United States*, 135 S. Ct. 2251 (2015). But if a crime does not even create the serious potential *risk* of physical injury necessary to satisfy the residual clause, it clearly does not have the use of force *as an element*.

Ruiz, the Ninth Circuit had "relied on 'the bedrock principle of *Leocal* . . . that to constitute a federal crime of violence an offense must involve the intentional use of force against the person or property of another." *Orona*, 923 F.3d at 1201 (quoting *Fernandez-Ruiz*, 466 F.3d at 1132). In *Orona*, the Ninth Circuit examined *Voisine* in detail but concluded that *Voisine* did not "wholly undercut the theory or reasoning of *Fernandez-Ruiz*" because the Ninth Circuit remained persuaded, even after *Voisine*, that "'running a stop sign solely by reason of voluntary intoxication and causing physical injury to another'—similar to the conduct at issue in *Leocal*, could not 'in the ordinary sense be called active or violent.'" *Orona*, 923 F.3d at 1203 (quoting *Fernandez-Ruiz*, 466 F.3d at 1130). The Ninth Circuit acknowledged the First Circuit's similar conclusion in *Rose* as well as the opposing views of other circuits. *See Orona*, 923 F.3d at 1202-03.

Four circuits have reached the opposite conclusion. The D.C. Circuit in *United States v. Haight*, 892 F.3d 1271 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019), held that the defendant's argument that D.C. assault with a dangerous weapon was not a violent felony because it included a mental state of reckless "contravenes" *Voisine*. *Haight*, 892 F.3d at 1281. The court expressed the view that "[t]he statutory provision at issue in *Voisine* contains language nearly identical to ACCA's violent felony provision." *Haight*, 892 F.3d at 1280. Unlike the First Circuit, the D.C. Circuit was unpersuaded that the differentiating phrase "against the person of another" carried significance. *See id.* at 1281. The D.C. Circuit expressly recognized the First Circuit's conclusion on reckless offenses in *Windley* but disagreed with that decision. *Haight*, 892 F.3d at 1281. The Fifth, Sixth, and Tenth

Circuits have likewise extended *Voisine* to the "crime of violence" or "violent felony" contexts. *See, e.g.*, *United States v. Mendez-Henriquez*, 847 F.3d 214, 220-22 (5th Cir. 2017); *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017); *United States v. Mann*, 899 F.3d 898, 905 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2637 (2019). A three-judge panel of the Sixth Circuit, however, explained that they would have held that merely reckless conduct is not the use of force against another person, had they been writing on a clean slate and not been bound by circuit precedent. *United States v. Harper*, 875 F.3d 329, 33032 (6th Cir. 2017), *cert. denied*, 139 S. Ct. 53 (2018). Like some other circuits, the Sixth Circuit panel was persuaded that "against the person of another" is "a restrictive phrase that describes the particular type of 'use of physical force' necessary to satisfy" the force clause. *Id.* at 331.

As the above discussion demonstrates, a number of circuits have weighed in on the question presented in thoughtful and comprehensive opinions with express consideration of contrary opinions. The division among the circuits is therefore unlikely to be resolved on its own, and further percolation among the circuit courts is not necessary. Through *Bennett*, *Windley*, and *Rose*, a majority of First Circuit judges in regular active service have authored or joined opinions concluding, after extensive analysis, that reckless offenses are excluded from qualifying under § 16 and ACCA's force clauses, and so it is highly unlikely that the First Circuit will change its mind. The D.C. Circuit recognized the First Circuit's work on this subject but still reached the opposite conclusion. *Haight*, 892 F.3d at 1281. The Eighth Circuit had the opportunity to revisit its opinion on reckless driving, but

declined to do so. *See Fields*, 863 F.3d at 1012 n.*. It will therefore remain the situation, until this Court decides the issue, that whether a person's prior conviction qualifies as having the use of force against another—and the serious consequences flowing from that designation—will depend on the happenstance of geography.

The Court's guidance on the question presented is further necessary because of the conflict, or at the very least tension, between the Court's decisions in *Leocal* and *Begay* and the holding of circuits like the Fifth Circuit that drunk driving that results in injury constitutes the use of force. Twice this Court has found that a statute prohibiting drunk driving does not qualify as either a "crime of violence" or a "violent felony." *Leocal*, 543 U.S. at 8-10; *see also Begay*, 553 U.S. at 141-46. In fact, the Court has held that a statute prohibiting drunk driving does not even have a substantial *risk* that force against another person will be used. *Leocal*, 543 U.S. at 10; *see also Begay*, 553 U.S. at 146 (citing with approval *United States v. Begay*, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part), which described drunk driving as "a crime of negligence or recklessness, rather than violence or aggression"). Yet the Fifth Circuit has held that Texas aggravated assault has the use of force as an element, even though Texas courts have construed that statute to cover the exact same conduct: "operating a vehicle while intoxicated and causing injury." *Leocal*, 543 U.S. at 11.

Whether a prior conviction qualifies as a "crime of violence" under 18 U.S.C. § 16 or a "violent felony" under ACCA is a question with enormous consequences. Years of imprisonment turn on the answer. The penalties faced by a person convicted of being a

felon in possession of a firearm increase dramatically under ACCA if that person has three previous convictions for a violent felony. The mandatory minimum prison sentence skyrockets from zero to 15 years. *Compare* § 924(a)(2), *with* § 924(e)(1). The maximum prison sentence escalates from 10 years to life. *Compare* § 924(a)(2), with § 924(e)(1).

The force clause appears in a variety of other criminal statutes as well. *See, e.g.*, 18 U.S.C. § 924(c)(1)(A), 924(c)(1)(C), 924(c)(1)(D)(3)(A) (firearms offenses); 18 U.S.C. § 1959(a) (RICO); 18 U.S.C. § 3142(f)(1)(A) (bail); 18 U.S.C. § 3553(f)(1)(C), (g) (eff. Dec. 21, 2018) (eligibility for "safety valve" relief from mandatory minimum drug sentences).

And, the interpretation of the force clause carries severe immigration consequences. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (rendering an alien deportable for committing a crime of violence); *id.* § 1229b(a)(3) (rendering an alien ineligible for cancellation of removal). Indeed, "a conviction under [8 U.S.C.] § 1326(b)(2)—involving a prior conviction of an aggravated felony—is itself an aggravated felony, 'rendering [the defendant] permanently inadmissible to the United States.'" *United States v. Ovalle-Garcia*, 868 F.3d 313, 314 (5th Cir. 2017) (quoting *United States v. Briceno*, 681 Fed. Appx. 334, 337 (5th Cir. 2017) (unpublished)) (brackets added in *Ovalle-Garcia*).

Given the high stakes and widespread use of force clauses in federal criminal and immigration law, this issue raised in this case is worthy of the Court's attention. Accordingly, the Court should grant Mr. Lara-Garcia's petition for certiorari to resolve the entrenched circuit conflict over the important question of whether a reckless offense has as an element the use of force against another person and thus qualifies as a "crime of

violence" or "violent felony." *See* Sup. Ct. R. 10(c). [5]

[5] If the petitioner in *Alan Victor Gomez Gomez v. United States*, No. 19-5325 (filed July 25, 2019), prevails in this Court, *see supra* text, at i n.1, then the error here would be plain and warrant a remand for an analysis of the other prongs of plain-error review. *See Henderson v. United States*, 568 U.S. 266, 279 (2013) (holding that, under plain-error review, it is sufficient for an error to be plain at the time of appellate consideration); *see also Tapia v. United States*, 564 U.S. 319, 335 (2011) (remanding for determination of third and fourth prongs of plain-error review); *United States v. Marcus*, 560 U.S. 258, 266-67 (2010) (same).

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: August 28, 2019

Respectfully submitted,

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This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee
v.
Jose LARA-GARCIA, Defendant-Appellant

No. 15-40108
|
Summary Calendar
|
Filed June 10, 2019

Appeal from the United States District Court for the Southern District of Texas, USDC No. 5:14-CR-9-1

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Jose Lara-Garcia, Pro Se

Before DAVIS, HAYNES, and GRAVES, Circuit Judges.

Opinion

PER CURIAM: *

**1 Jose Lara-Garcia pleaded guilty to illegally reentering the United States after deportation. The district court sentenced him under 8 U.S.C. § 1326(b)(2) based upon the conclusion that his prior Texas conviction for aggravated assault constituted a crime of violence under 18 U.S.C. § 16 and thus, was an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). For the first time on appeal, Lara-Garcia challenges the characterization of his prior conviction as a crime of violence.

We review for plain error. *See Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). To prevail on plain error review, Lara-Garcia must identify (1) a forfeited error (2) that is "clear or obvious, rather than subject to reasonable dispute," and (3) that affects his substantial rights. *Puckett*, 556 U.S. at 135, 129 S.Ct. 1423. If he does so, we have the discretion to correct the error if it "seriously affect[s] the fairness, integrity or *101 public reputation of judicial proceedings." *Id.* (internal quotation marks and citation omitted). The law at the time of appeal governs our plain error appellate review. *See Henderson v. United States*, 568 U.S. 266, 273, 133 S.Ct. 1121, 185 L.Ed.2d 85 (2013).

Our published opinions in *United States v. Reyes-Contreras*, 910 F.3d 169, 182 (5th Cir. 2018), and *United States v. Gomez Gomez*, 917 F.3d 332, 333-34 (5th Cir. 2019), now make clear that Texas aggravated assault is a crime of violence under § 16(a) and thus, is an aggravated felony for purposes of §§ 1101(a)(43)(F) and 1326(b)(2). *See Henderson*, 568 U.S. at 273, 133 S.Ct. 1121; *Puckett*, 556 U.S. at 135, 129 S.Ct. 1423; In *Gomez Gomez*, we also rejected the argument made by Lara-Garcia that retroactively applying *Reyes-Contreras* violates due process. *See Gomez Gomez*, 917 F.3d at 334.

The judgment of the district court is AFFIRMED.

All Citations

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Footnotes

* 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.

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