No. 19-5763

IN THE SUPREME COURT OF THE UNITED STATES

JOSE LARA-GARCIA, 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

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QUESTION PRESENTED

Whether the Texas offense of aggravated assault, in violation of Tex. Penal Code Ann. § 22.02(a) (West Supp. 2008), 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 (S.D. Tex.):

United States v. Lara-Garcia, No. 14-cr-9 (Feb. 2, 2015)

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

United States v. Lara-Garcia, No. 15-40108 (June 10, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is not published in the Federal Reporter but is reprinted at 772 Fed. Appx. 100. Prior opinions of the court of appeals are not published in the Federal Reporter but are reprinted at 671 Fed. Appx. 248 and 734 Fed. Appx. 319.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2019. The petition for a writ of certiorari was filed on August 28, 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 46 months of imprisonment. Judgment 2. The court of appeals affirmed. 671 Fed. Appx. 248. Petitioner filed a petition for a writ of certiorari, and this Court remanded for further consideration in light of Sessions v. Dimaya, 138 S. Ct. 1204 (2018). The court of appeals vacated its original decision and ordered supplemental briefing. 734 Fed. Appx. 319. After supplemental briefing, the court of appeals affirmed. Pet. App. 1.

1. Petitioner is a citizen of Mexico. Presentence Investigation Report (PSR) ¶ 6. In 2012, he was convicted in Texas state court and sentenced to six years of imprisonment for, inter alia, aggravated assault with a deadly weapon, in violation of Tex. Penal Code Ann. § 22.02(a) (West Supp. 2008). PSR ¶ 25.

Petitioner was subsequently removed from the United States. PSR ¶ 7. At some point thereafter, he illegally reentered the United States. See PSR ¶¶ 6-7. In December 2013, he was arrested in Texas. PSR ¶ 6. He pleaded guilty to illegally reentering the United States, in violation of 18 U.S.C. 1326(a). Judgment 1.

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 21 and a criminal history category of III, resulting in an advisory Sentencing Guidelines range of 46 to 57 months of imprisonment. PSR ¶ 46. The presentence report also determined that Section 1326(b)(2) applied, based on petitioner's prior conviction for

aggravated assault with a deadly weapon, in violation of Tex. Penal Code Ann. § 22.02(a) (West Supp. 2008). See PSR ¶¶ 13, 25, 45. 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. 2008).

Petitioner did not object to the PSR. See Gov't C.A. Br. 6. The district court entered judgment, referencing 8 U.S.C. 1326(a) and (b)(2), and sentenced petitioner to 46 months of imprisonment. Judgment 1-2.

3. Petitioner appealed. 671 Fed. Appx. 248. His counsel initially filed an Anders brief and a motion to withdraw, but later filed a merits brief after the court of appeals ordered him to brief whether petitioner had been properly sentenced under Section 1326(b)(2). See Gov't C.A. Br. 7.

The court of appeals affirmed, determining that Texas aggravated assault constitutes an aggravated felony under 18 U.S.C. 16(b), the "residual clause" of the definition of a "crime of violence." 671 Fed. Appx. 248. Petitioner filed a petition for a writ of certiorari, and this Court remanded for further consideration in light of Sessions v. Dimaya, 138 S. Ct. 1204 (2018), which held that Section 16(b)'s residual clause was unconstitutionally vague. The court of appeals vacated its

original decision and ordered supplemental briefing. 734 Fed. Appx. 319.

4. After supplemental briefing, the court of appeals affirmed in an unpublished per curiam decision. Pet. App. 1.

Petitioner argued that Texas aggravated assault is not a crime of violence under the "elements clause" of Section 16(a) because it "does not have the requisite physical force element because the offense can be committed by any of a number of acts, without use of destructive or violent force, such as by making poison available to the victim." Pet. C.A. Br. 12 (citation and internal quotation marks omitted). The court of appeals noted that it would review that claim only for plain error, as petitioner had "challenge[d] the characterization of his prior conviction as a crime of violence" for "the first time on appeal." Pet. App. 1. The court then rejected petitioner's challenge, relying on its recent decisions in United States v. Reyes-Contreras, 910 F.3d 169 (5th Cir. 2018) (en banc), and United States v. Gomez Gomez, 917 F.3d 332 (5th Cir. 2019), petition for cert. pending, No. 19-5325 (filed July 19, 2019). Pet. App. 1. The court explained that those decisions "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)." Ibid.

DISCUSSION

Petitioner contends (Pet. 13-23) that his prior conviction for aggravated assault under Tex. Penal Code Ann. § 22.02(a) (West

Supp. 2008) does not qualify as an aggravated felony 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.* 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 conviction 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)

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

(West Supp. 2008) -- 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 qualifies as a "crime of violence" under 18 U.S.C. 16 and an "aggravated felony" under 8 U.S.C. 1101(a)(43). That determination follows from this Court's 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 1. In his opening brief in the court of appeals, petitioner argued that Texas aggravated assault is not a crime of violence under

Section 16(a) "because the offense can be committed by any of a number of acts, without use of destructive or violent force, such as by making poison available to the victim." Pet. C.A. Br. 12 (citation and internal quotation marks omitted). 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 his reply brief, filed after the court of appeals' decision in United States v. Reyes-Contreras, 910 F.3d 169 (5th Cir. 2018) (en banc). See Pet. C.A. Reply Br. 7-8. 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. 1.

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 46 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 1. 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 46-month term of imprisonment has already expired, and he was released on April 21, 2017. See Fed. Bureau of Prisons, Find an Inmate, https://www.bop.gov/inmateloc (search for register number 58916-379).

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.

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