

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANGEL MONDRAGON 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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should grant certiorari, vacate the judgment below and remand for further consideration in light of this Court's recent decision in *Borden v. United States*, 141 S. Ct. 1817 (2021)?

PARTIES TO THE PROCEEDINGS

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

DIRECTLY RELATED CASES

- *United States v. Mondragon Garcia*, No. 5:19-cr-2156, U.S. District Court for the Southern District of Texas. Judgment entered June 5, 2020.
- *United States v. Mondragon Garcia*, No. 20-40377, U.S. Court of Appeals for the Fifth Circuit. Judgment entered March 8, 2021.

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PRAYER

Petitioner Angel Mondragon 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 opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Mondragon 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 judgment was entered on March 8, 2021. *See* Appendix. This petition is filed within 150 days of that date. *See* Sup. Ct. Order of Mar. 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION 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. Definitions

(a) As used in this chapter –

...

(43) 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. Crime of violence defined

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,

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

This case involves the question of whether the district court incorrectly entered judgment in this illegal reentry prosecution by reference to the enhanced 20-year maximum term of imprisonment under 8 U.S.C. § 1326(b)(2) based on prior conviction for the Texas offense of aggravated assault when that state offense can be committed with a *mens rea* of recklessness and such *mens rea* is indivisible from the other alternatives under the statute. This Court's recent decision in *Borden* answers that question definitively in the negative and in effect overrules the Fifth Circuit precedent on which that court relied in denying Mr. Mondragon Garcia's appeal. The Court has recently granted petitions for certiorari, vacated the judgment and remanded to the Fifth Circuit on exactly this same question: whether judgment may be entered under 8 U.S.C. § 1326(b)(2) based on a conviction for a Texas aggravated assault. See *Segovia-Lopez v. United States*, __ S. Ct. __, 2021 WL 2519041 (2021); *Arreola-Mendoza v. United States*, __ S. Ct. __, 2021 WL 2519056 (2021); *Gomez Gomez v. United States*, __ S. Ct. __, 2021 WL 2302069 (2021). Petitioner Mondragon Garcia petitions the Court for the same relief in his case.

A. Original proceedings, indictment, and plea.

On November 19, 2019, Petitioner Angel Mondragon Garcia, was charged by indictment with having entered, attempted to enter, and been found in the United States subsequent to deportation, in violation of 8 U.S.C. § 1326. On January 9, 2020, Mr. Mondragon Garcia entered a plea of guilty to the indictment. To support his plea, the prosecutor offered as the factual basis for the plea that Mr. Mondragon Garcia was a citizen of Mexico who had been deported on September 24, 2015, and was found illegally present

within the United States on October 25, 2019. Mr. Mondragon Garcia was admonished that the maximum punishment under the statute of conviction would be two, ten or twenty years, depending on his prior criminal history.

B. Sentencing.

The district court ordered the Probation Office to prepare a presentence report (“PSR”) to assist the court in sentencing Mr. Mondragon Garcia. The PSR confirmed that Mr. Mondragon Garcia had been deported from the United States on September 24, 2015, following his conviction for the Texas felony offense of aggravated assault with serious bodily injury, a crime for which he was sentenced to two years of imprisonment. The PSR also noted that Mr. Mondragon Garcia had been convicted in 2012 of the same federal felony offense of illegal reentry, and that judgment had been entered under 8 U.S.C. § 1326(b)(2), which, therefore, rendered the current illegal reentry prosecution subject to the enhancement of 1326(b)(2) because the prior illegal reentry conviction would qualify itself as an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(O).

At sentencing, on June 3, 2020, the district court determined that the statutory maximum term of imprisonment was twenty years. The district court then sentenced Mr. Mondragon Garcia to serve 37 months of imprisonment followed by a three-year term of supervised release.

C. Judgment.

On June 5, 2020, the district court entered judgment. The judgment states that Mr. Mondragon Garcia was convicted of “[r]e-entry of a deported alien,” in violation of “8 U.S.C. §§ 1326(a) & 1326(b)(2).”

D. Appeal.

Mr. Mondragon Garcia filed a timely notice of appeal on June 4, 2020. He challenged whether the district court had erred in assessing punishment and entering judgment under 8 U.S.C. § 1326(b)(2), arguing that the inclusion of a *mens rea* of recklessness as an indivisible alternative means of commission of the Texas offense of aggravated assault rendered Mr. Mondragon Garcia's prior conviction for that crime outside the proper scope of the phrase "use of physical force against the person . . . of another" under 18 U.S.C. § 16(a) and, therefore, outside the scope of an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). He recognized that his argument was foreclosed by reason of *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc), and *United States v. Gracia-Cantu*, 920 F.3d 252 (5th Cir.), *cert. denied*, 140 S. Ct. 157 (2019). In his appeal, he also argued for correction of an error in the judgment with regard to a fine.

On March 8, 2021, the Fifth Circuit issued its opinion affirming the district court's judgment with respect to classification of Mr. Mondragon Garcia's current offense as being punished under 8 U.S.C. § 1326(b)(2). (The Fifth Circuit remanded for correction of the judgment with respect to the erroneous notation of a fine).

Mr. Mondragon Garcia now requests this Court grant this petition, vacate the judgment and remand to the Fifth Circuit for reconsideration in light of *Borden*.

**BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT**

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

REASONS FOR GRANTING THE PETITION

In light of this Court’s holding in *Borden v. United States*, 141 S. Ct. 1817 (2021), holding that the statutory phrase “use of physical force against the person of another” did not encompass offenses committed with a reckless *mens rea*, the district court entered judgment in this case with reference to an inapplicable statutory enhancement that raised the statutory maximum sentence of imprisonment. This Court should therefore grant the petition for certiorari, vacate the judgment below and remand for further consideration in light of *Borden*.

I. In light of *Borden*, Mr. Mondragon Garcia’s prior Texas conviction for aggravated assault does not qualify as a “crime of violence” and, consequently, is not an “aggravated felony” that would permit entry of judgment under 8 U.S.C. § 1326(b)(2).

The Court in *Borden* held that an offense requiring the “use of physical force against the person of another” does not include offenses with a *mens rea* of recklessness. *Borden*, 141 S. Ct. 1817, 2021 WL 2367312 at *5. Although *Borden* specifically addressed the “elements” clause under 18 U.S.C. § 924(e)(2)(B)(i), *id.* at * 3, *4, the same reasoning applies in the context of the definition of “aggravated felony” applicable in this case. The *Borden* Court based its opinion on the discussion in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) of the same “elements” clause in the definition of “crime of violence” found at 18 U.S.C. §16(a). The *Borden* Court essentially equated the two “elements” clauses as having the same meaning. *See Borden*, 141 S. Ct. 1817, 2021 2367312 at *5, *7, *9-*10. The Court’s holding therefore applies to the interpretation of the “use of physical force against the person . . . of another” under Section 16(a) with equal force. In that light, the *Borden* ruling controls the determination of whether a prior Texas aggravated assault conviction constitutes an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(F).

In this case, the Fifth Circuit upheld the classification of Mr. Mondragon Garcia’s prior Texas aggravated assault conviction as an “aggravated felony” by relying on its prior holdings in *Reyes-Contreras* and *Gracia-Cantu*, in which the Fifth Circuit had held that offenses committed with a reckless *mens rea* could qualify as the “use of physical force against” the person of another. *See Reyes-Contreras*, 910 F.3d at 183 and *Gracia-Cantu*, 920 F.3d at 253-55. *Borden* now makes clear that those holdings were in error.

The reckless *mens rea* is an indivisible part of the Texas statute. A person commits aggravated assault in Texas “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.” Tex. Penal Code § 22.02(a)(1) & (2). An assault under Tex. Penal Code § 22.01 is committed when a 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 § 22.01(a)(1)-(3).

The subsections of the Texas assault statute are divisible. *See United States v. Torres*, 923 F.3d 420, 425 (5th Cir. 2019). However, neither the aggravating factors under Tex. Penal Code § 22.02 nor the various *mens rea* under each subsection of the assault statute, Tex. Penal Code § 22.01, are divisible because Texas courts have ruled that jury

unanimity is not required with respect to those factors and various *mens rea*. See *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016); *Landrian v. State*, 268 S.W.3d 532, 536-39 (Tex. Crim. App. 2008); see also *Gomez-Perez v. Lynch*, 829 F.3d 323, 328 (5th Cir. 2016) (holding that the alternative mental states in § 22.01(a)(1) are indivisible and that an offense under that section thus is not a crime of moral turpitude); cf. *United States v. Howell*, 838 F.3d 489, 498 (5th Cir. 2016) (holding that the same alternative mental states in Tex. Penal Code § 22.01(b)(2)(B) are indivisible).

The only document in the record from Mr. Mondragon Garcia’s state aggravated assault conviction is the judgment, which shows that he was convicted of aggravated assault with serious bodily injury, in violation of Tex. Penal Code § 22.02, which indicates that his offense was under Tex. Penal Code § 22.01(a)(1), incorporating all three *mens rea* of intentional, knowing, or reckless causation of injury. Mr. Mondragon Garcia’s prior conviction, therefore, necessarily included the possibility of conviction based on a *mens rea* of recklessness.

Under *Borden*, the Texas offense of aggravated assault, premised on the form of assault incorporating recklessness as an indivisible *mens rea*, cannot qualify as the “use of physical force against the person . . . or another” for purposes of 18 U.S.C. § 16(a) and, therefore, cannot qualify as an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(F). The Fifth Circuit erred in upholding the district court’s entry of judgment under 8 U.S.C. § 1326(b)(2) on that basis.

II. The Court should grant certiorari, vacate the judgment and remand to the Fifth Circuit for further consideration in light of *Borden*.

“A GVR is appropriate when ‘intervening developments ... reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome’ of the matter.” *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (internal citations omitted). Here, the only basis for the Fifth Circuit’s decision was that court’s prior set of opinions holding that reckless conduct included within Texas’s assault statute could qualify as the use of physical force. *See Mondragon Garcia*, 838 Fed. Appx. at 901. In light of *Borden* there is at least a reasonable probability that the Fifth Circuit will reconsider its decision. Moreover, this Court has recently granted petitions for certiorari, vacated the judgment and remanded to the Fifth Circuit Court of Appeals to reconsider exactly the same issue presented in Mr. Mondragon Garcia’s case. *See Segovia-Lopez v. United States*, ___ S. Ct. ___, 2021 WL 2519041 (2021); *Arreola-Mendoza v. United States*, ___ S. Ct. ___, 2021 WL 2519056 (2021); *Gomez Gomez v. United States*, ___ S. Ct. ___, 2021 WL 2302069 (2021). Petitioner Mondragon Garcia petitions the Court for the same relief in his case.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded to the Fifth Circuit for further proceedings in light of *Borden*.

Date: July 1, 2021

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