

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL RAMIRO MARTINEZ-RIVERA, AND
JOSE GUADALUPE TELLO-SEGUNDO, PETITIONERS

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 IN OPPOSITION

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QUESTION PRESENTED

Whether a conviction for aggravated assault, in violation of Tex. Penal Code Ann. § 22.02 (West 2003) or Tex. Penal Code Ann. § 22.02 (West Supp. 2004), qualified as "aggravated assault" under the commentary to the since-repealed version of Sentencing Guidelines § 2L1.2(b)(1)(A) (2014 & 2015).

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OPINIONS BELOW

The opinion of the court of appeals in petitioner Martinez-Rivera's case (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 696 Fed. Appx. 169. The opinion of the court of appeals in petitioner Tello-Segundo's case (Pet. App. B1-B2) is not published in the Federal Reporter but is reprinted at 693 Fed. Appx. 331.

JURISDICTION

The judgments of the court of appeals were entered on July 13, 2017 (Tello-Segundo) and August 22, 2017 (Martinez-Rivera).

The petition for a writ of certiorari was filed on October 10, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in separate proceedings in the United States District Court for the Southern District of Texas, petitioners were convicted of unlawfully reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b). Martinez-Rivera Judgment 1; Tello-Segundo Judgment 1; see Pet. 4. Petitioner Martinez-Rivera was sentenced to 57 months of imprisonment, to be followed by three years of supervised release. Martinez-Rivera Judgment 2-3. Petitioner Tello-Segundo was sentenced to 32 months of imprisonment, with no term of supervised release. Tello-Segundo Judgment 2. The court of appeals affirmed in separate decisions. Pet. App. A1-A2, B1-B2.

1. Section 2L1.2 of the Sentencing Guidelines provides a base offense level of eight for the offense of illegal reentry after having been removed. Sentencing Guidelines § 2L1.2(a) (2015). Until November 1, 2016, the Sentencing Guidelines provided that a defendant convicted of illegal reentry faced a 16-level enhancement if he had previously been convicted of a "crime of violence." Id. § 2L1.2(b)(1)(A). The commentary defined a "crime of violence" to include, inter alia, "aggravated assault," as well as "any other offense under federal, state, or local law that has

as an element the use, attempted use, or threatened use of physical force against the person of another” (the elements clause). Id. § 2L1.2, comment. (n.(1)(B)(iii)); see Pet. 12 n.3 (noting that the 2014 version of Section 2L1.2 is substantively identical to the 2015 version).

To determine whether a prior conviction constitutes a “crime of violence,” courts apply the “categorical approach,” which as relevant here involves comparing the elements of the statute of conviction to the elements of a “generic” offense listed in the Guidelines. See Mathis v. United States, 136 S. Ct. 2243, 2249 (2016). If the statute of conviction consists of elements that are the same as, or narrower than, the generic offense, the prior offense categorically qualifies as a “crime of violence.” But if the statute of conviction defines a crime broader than the generic offense, the defendant’s prior conviction does not qualify as a “crime of violence” unless (1) the statute is “‘divisible’” into multiple crimes with different elements, and (2) the government can show (using a limited set of record documents) that the jury necessarily found, or the defendant necessarily admitted, the elements of the generic offense. Ibid. (quoting Descamps v. United States, 133 S. Ct. 2276, 2283 (2013)); see Shepard v. United States, 544 U.S. 13, 26 (2005).

2. a. In July 2003, petitioner Martinez-Rivera, a citizen and national of Mexico, pleaded guilty to aggravated assault

causing serious bodily injury, in violation of Tex. Penal Code Ann. § 22.02(a)(1) (West 2003). Presentence Investigation Report (PSR) ¶¶ 7, 28; see Tex. Judgment 1-3. An offense report reflected that Martinez-Rivera's crime involved stabbing the victim with a cane sword during a fight outside of a party. PSR ¶ 28. Martinez-Rivera was sentenced to seven years of imprisonment. Ibid. In May 2009, after serving his sentence, he was removed from the United States. Ibid.

In February 2013, Martinez-Rivera reentered the United States and was apprehended; he then pleaded guilty to unlawfully reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(2). PSR ¶ 28; see Judgment 1. Martinez-Rivera was sentenced to 41 months of imprisonment, to be followed by two years of supervised release. PSR ¶ 29. On March 11, 2016, after serving his sentence, he was removed from the United States again. Ibid.

b. On March 22, 2016, U.S. Border Patrol agents found Martinez-Rivera near Laredo, Texas. PSR ¶ 6. During questioning, Martinez-Rivera admitted that he was a citizen of Mexico and that he had not obtained permission from the U.S. government to enter or attempt to re-enter the United States. Ibid. Martinez-Rivera was charged with, and pleaded guilty to, illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(2). PSR ¶¶ 1-2; Judgment 1.

In advance of sentencing, the Probation Office prepared a PSR. The initial PSR applied the 2015 Sentencing Guidelines and recommended a base offense level of eight (Section 2L1.2(a)); a 16-level increase because Martinez-Rivera's prior Texas aggravated assault conviction qualified as a "crime of violence" (Section 2L1.2(b)(1)(A)(ii)); and a three-level reduction for acceptance of responsibility (Section 3E1.1). PSR ¶¶ 14-25. The resulting total offense level of 21, combined with a criminal history category IV, yielded an advisory Guidelines sentencing range of 57 to 71 months of imprisonment. PSR ¶¶ 26, 32, 63.

Martinez-Rivera objected to the PSR, arguing that his Texas aggravated assault conviction "is overbroad and indivisible, rendering it inapplicable as a 'crime of violence' for purposes of U.S.S.G. § 2L1.2." Martinez-Rivera Obj. to PSR 2-7 (capitalization and emphasis altered). Specifically, Martinez-Rivera contended that generic aggravated assault under the Guidelines requires a mens rea greater than recklessness, but a defendant may be convicted of aggravated assault in Texas based on reckless conduct, and the statute is not divisible by mental state. Ibid.

The Sentencing Commission subsequently amended Section 2L1.2 of the Sentencing Guidelines, effective November 1, 2016. The 2016 Guidelines eliminated the "crime of violence" enhancement in Section 2L1.2 and replaced it with enhancements based on the length of the sentence imposed for a prior conviction. Sentencing

Guidelines § 2L1.2 (2016). Because Martinez-Rivera was scheduled to be sentenced in December 2016, the Probation Office recalculated his advisory Guidelines range under the revised version of Section 2L1.2. Supp. Add. PSR ¶¶ 1-13. Under the 2016 Guidelines, the PSR recommended: a base offense level of eight (Section 2L1.2); a four-level increase because the instant offense occurred following a felony illegal reentry conviction (Section 2L1.2(b)(1)); a ten-level increase because Martinez-Rivera was convicted of an offense for which the sentence was five years or more prior to his first deportation (Section 2L1.2(b)(2)); and a three-level reduction for acceptance of responsibility (Section 3E1.1). Ibid. The resulting total offense level of 19, combined with a criminal history category IV, yielded an advisory Guidelines sentencing range of 46 to 57 months of imprisonment. Ibid. Martinez-Rivera did not object to the 2016 Guidelines calculations. Id. at 1.

The district court overruled Martinez-Rivera's objection to the 16-level increase under the 2015 version of the Guidelines but ultimately adopted the PSR's calculations under the 2016 version of the Guidelines, which were more favorable to Martinez-Rivera. Sentencing Tr. 4, 23; Supp. Add. PSR 1.¹ After calculating a

¹ A representative from the Probation Office mistakenly told the district court that Martinez-Rivera's Guidelines range "actually stays at the same range" under both the 2015 and 2016 versions of the Guidelines. Sentencing Tr. 4. Defense counsel

Guidelines range of 46-57 months, the court considered the sentencing factors provided in 18 U.S.C. 3553(a) and sentenced Martinez-Rivera to 57 months of imprisonment, to be followed by three years of supervised release. Sentencing Tr. 21. The court explained that it decided to sentence Martinez-Rivera at the “high end” of the Guidelines range because he had been arrested just 11 days after having been removed and just after serving a 41-month sentence for another illegal reentry conviction. Id. at 19-21; see id. at 6. In addition, because Martinez-Rivera had been on supervised release for his prior illegal reentry conviction when he was arrested, the district court imposed a six-month sentence for the violation of supervised release. Id. at 21. The court ordered that three of the six months run concurrent to the 57-month sentence, resulting in a total term of 60 months. Ibid.

c. The court of appeals affirmed. Pet. App. A1-A2. Relying on circuit precedent, the court held that “Texas aggravated assault is an enumerated crime of violence for purposes of § 2L1.2(a)(1)(A)(ii) (2015).” Id. at A2 (citing United States v. Shepherd, 848 F.3d 425, 427-428 (5th Cir. 2017); United States v. Guillen-Alvarez, 489 F.3d 197, 198 (5th Cir.), cert. denied, 552 U.S. 967 (2007)).

clarified that “the old PSR in this case” put his sentencing range at 57 to 71 months. Id. at 6.

3. a. In September 2005, petitioner Tello-Segundo, a citizen and national of Mexico who was then using the name Jorge Lopez, pleaded guilty to aggravated assault with a deadly weapon, in violation of Tex. Penal Code Ann. § 22.02 (West Supp. 2004). PSR ¶ 23; Tex. Judgment 1. According to an arrest report, Tello-Segundo had shot a handgun at a group of men during an altercation outside of a nightclub. PSR ¶ 23. One of the victims was injured by a bullet that grazed his calf area. Ibid. Tello-Segundo was sentenced to four years deferred adjudication probation. PSR ¶ 14.

b. On May 2, 2015, U.S. Border Patrol agents found petitioner Tello-Segundo after he had illegally crossed the U.S.-Mexico border earlier that day. PSR ¶ 4. An immigration record check revealed that Tello-Segundo had been removed from the United States in April 2015. PSR ¶ 6. Tello-Segundo had not obtained permission from the U.S. government to enter the United States. PSR ¶ 7. Tello-Segundo was charged with, and pleaded guilty to, illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b). PSR ¶¶ 1-2; Judgment 1.

The Probation Office prepared a PSR, which applied the 2014 Guidelines and calculated a base offense level of eight (Section 2L1.2(a)); a 16-level increase for having previously been convicted of a crime of violence (Section 2L1.2(b)(1)(A)(ii)); and a two-level reduction for acceptance of responsibility (Section 3E1.1). PSR ¶¶ 12-21. The resulting offense level of 22, combined

with Tello-Segundo's criminal history category I, resulted in an advisory Guidelines sentencing range of 41-51 months of imprisonment. PSR ¶¶ 21, 24, 44.

Tello-Segundo did not object to the 16-level increase. See Pet. App. B1-B2. The district court adopted the PSR's calculations, except that it granted the government's motion for an additional one-point reduction for acceptance of responsibility, resulting in an advisory Guidelines range of 37 to 46 months of imprisonment. Sentencing Tr. 4. The court imposed a below-Guidelines sentence of 32 months, with no term of supervised release. Id. at 8-9.

c. The court of appeals affirmed. Pet. App. B1-B2. Because Tello-Segundo had not objected to the 16-level increase under Section 2L1.2 in the district court, the court of appeals reviewed his challenge for plain error. Id. at B2. Relying on the same circuit precedent as it had in Martinez-Rivera's case, the court held that Texas aggravated assault "qualifies as generic aggravated assault and is thus a crime of violence for purposes of § 2L1.2 (2014)." Ibid.

ARGUMENT

Petitioners contend (Pet. 8-18) that the court of appeals erred in its determination that their prior Texas convictions for aggravated assault qualified as crimes of violence under former Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2014 & 2015). Review of the court of appeals' decisions is unwarranted because they

interpret the advisory Sentencing Guidelines and because the Sentencing Commission has since amended Section 2L1.2 to remove the crime-of-violence enhancement at issue here. Moreover, while petitioners allege that the courts of appeals are divided on the question presented, the division is far narrower than petitioners suggest.

1. Petitioners' contention (Pet. 8-18) that the court of appeals erred in determining that Texas's aggravated assault statute corresponds to generic aggravated assault raises only an issue of interpretation of a now-repealed provision of the advisory Sentencing Guidelines and does not warrant review. This Court has recently and repeatedly denied review in other cases involving whether a particular state offense constitutes "aggravated assault" under the prior version of Sentencing Guidelines § 2L1.2,² and the same result is appropriate here.

This Court does not ordinarily review disputes over the interpretation of the Guidelines because the Sentencing Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991); see United States v.

² See Cervantes-Sandoval v. United States, 137 S. Ct. 2266 (2017) (No. 16-8192); Hernandez-Cifuentes v. United States, 137 S. Ct. 2264 (2017) (No. 16-7689); Saldierna-Rojas v. United States, 137 S. Ct. 2269 (2017) (No. 16-8536); Torres-Jaime v. United States, 137 S. Ct. 1373 (2017) (No. 16-5853).

Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."); Buford v. United States, 532 U.S. 59, 66 (2001) ("Insofar as greater uniformity is necessary, the Commission can provide it."). After Booker, this Court's longstanding reluctance to decide interpretive questions about the Guidelines is even more appropriate. Regardless of the merit of petitioners' arguments, each sentencing court was free to examine the record evidence -- not just petitioners' offenses of conviction -- when determining the most appropriate sentence to impose. Indeed, each district court did exactly that. For example, in sentencing Tello-Segundo, the district court considered both the "very serious conviction" in his record and the fact that he "didn't reoffend" after it, ultimately deciding to "grant [him] a slight departure" from the calculated range of 37 to 46 months to a sentence of 32 months. Sentencing Tr. 7-8.

Adherence to the Court's longstanding practice is especially warranted here, as the Sentencing Commission recently exercised its power with respect to the specific provision at issue in this case and amended Section 2L1.2, effective November 1, 2016, eliminating the "crime of violence" enhancement and replacing it with enhancements based on the length of the sentence imposed for

various prior offenses. See Sentencing Guidelines App. C Supp., Amend. 802. Although a similar definition of "crime of violence" still exists under Section 4B1.2(a)(2) of the Guidelines, see Pet. 13-14, the Commission's amendment to Section 2L1.2 substantially reduces the importance of the question presented in this case.

Furthermore, the Sentencing Commission continues to study the "statutory and guideline definitions relating to the nature of a defendant's prior conviction (e.g., 'crime of violence,' * * *) and the impact of such definitions on the relevant statutory and guideline provisions," including Section 4B1.2(a)(2). 81 Fed. Reg. 37,241, 37,241 (June 9, 2016). The Commission also continues to work "to resolve conflicting interpretations of the guidelines by the federal courts." Ibid. And even if the proper application of "crime of violence" in Sentencing Guideline 4B1.2(a)(2) warranted review, this case does not present that question because the court of appeals did not address that provision's applicability to either petitioner. See Pet. App. A1-A2; id. at B1-B2.

2. Petitioners assert (Pet. 8-18) that the courts of appeals are divided on the question whether a statute criminalizing reckless assault is a categorical match for generic "aggravated assault" under the Sentencing Guidelines. As discussed above, however, any disagreement on that question would not warrant this Court's review because the issue arises under a now-defunct

Sentencing Guidelines provision. In any event, any division of authority is far narrower than petitioners suggest.

Texas Penal Code Section 22.01 criminalizes assault, defined to include "intentionally, knowingly, or recklessly caus[ing] bodily injury to another." Tex. Penal Code Ann. § 22.01(a)(1) (West 2003). Section 22.02 renders that assault "[a]ggravated" if the defendant "causes serious bodily injury" to the victim or "uses or exhibits a deadly weapon during the commission of the assault." Id. § 22.02(a)(1)-(2).

Petitioners maintain (Pet. 8) that "[t]he Fourth, Sixth, and Ninth Circuits have held that generic aggravated assault does not include offenses that were committed with a merely reckless state of mind." But although a 50-state survey by the Ninth Circuit appears to have viewed the statute as requiring a lesser mens rea than the one it ascribed to generic aggravated assault, see United States v. Garcia-Jimenez, 807 F.3d 1079, 1086 n.7 (2015), neither the Sixth nor the Ninth Circuit has directly confronted a case involving the question whether Section 22.02 constitutes generic aggravated assault, see United States v. Cooper, 739 F.3d 873, 880 (6th Cir.), cert. denied, 134 S. Ct. 1528, and 134 S. Ct. 1910 (2014); United States v. McFalls, 592 F.3d 707, 716-717 (6th Cir. 2010); United States v. Esparza-Herrera, 557 F.3d 1019, 1022-1025 (9th Cir. 2009) (per curiam). And although the Fourth Circuit decided that question differently from the court below, see United

States v. Barcenas-Yanez, 826 F.3d 752, 756-757 (2016), the Fourth Circuit's disagreement with the Fifth Circuit on the proper classification of a particular Texas offense under a repealed provision of the Sentencing Guidelines does not warrant this Court's review.

Review is particularly unwarranted because, although the court of appeals did not pass on the issue here, a conviction under Section 22.02, even if not generic aggravated assault, would separately qualify as a "crime of violence" for purposes of the Sentencing Guidelines because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 2L1.2 comment. (n.1(B)(iii)) (2015)); see United States v. Calvillo-Palacios, 860 F.3d 1285, 1292-1293 & n.10 (9th Cir. 2017) (holding that conviction under Texas Penal Code § 22.02(a) is a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii)'s "element prong"); United States v. Shepherd, 848 F.3d 425, 427-428 (5th Cir. 2017) (holding that conviction under Texas Penal Code § 22.02(a) qualifies as a "crime of violence" under the similarly worded provision of Sentencing Guidelines § 4B1.2); United States v. Mendez-Henriquez, 847 F.3d 214, 220-222 (5th Cir.) (holding that reckless conduct suffices under the "elements clause" of Sentencing Guidelines § 2L1.2), cert. denied, 137 S. Ct. 2177 (2017); United States v. Howell, 838 F.3d 489, 499-502

(5th Cir. 2016) (holding that reckless conduct suffices under the “elements clause” of Sentencing Guidelines § 4B1.2), cert. denied, 137 S. Ct. 1108 (2017). But see Barcenas-Yanez, 826 F.3d at 758 n.4 (rejecting this argument without analysis). That issue, however, is not encompassed within the question presented. See Pet. i.³

3. Finally, even if the question presented warranted review, Tello-Segundo failed to object to the 16-level enhancement in the district court, and the court of appeals reviewed it only for plain error. Pet. App. B2. Moreover, Tello-Segundo’s claim is now moot. His term of imprisonment has expired and, according to the Federal Bureau of Prisons, Tello-Segundo was released on

³ In a recent reply filing in support of another petition for a writ of certiorari raising the question presented, the petitioners contended that a conviction for Texas aggravated assault would not qualify as a “crime of violence” under the elements clause due to the logic of the Fifth Circuit’s decision in United States v. Rijo-Mejia, 859 F.3d 318, 321-323 (2017). See Pet. Reply Br. at 2-3, Hernandez-Ramirez v. United States, No. 17-6065 (Dec. 13, 2017). But following Rijo-Mejia, which addressed the Arkansas crime of terroristic threatening, the Fifth Circuit has continued to hold that the Texas offense of aggravated assault qualifies as a crime of violence under the elements clause of Sections 2L1.2 and 4B1.2. See, e.g., United States v. Owen, 700 Fed. Appx. 384, 384 (2017) (per curiam); United States v. Favors, 694 Fed. Appx. 281, 282 (2017) (per curiam), petition for cert. pending, No. 17-6505 (filed Oct. 24, 2017); United States v. Zamora-Alonso, 693 Fed. Appx. 370, 371 (per curiam), cert. denied, No. 17-6403 (2017); United States v. Cruz, 691 Fed. Appx. 204, 205 (per curiam), cert. denied, No. 17-6077 (2017).

September 19, 2017.⁴ Tello-Segundo was not required to serve a term of supervised release. Sentencing Tr. 9. Because Tello-Segundo's Guidelines challenge affects only the length of his sentence rather than his underlying conviction, the case became moot on the date of his release. See Lane v. Williams, 455 U.S. 624, 631 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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⁴ See Fed. Bureau of Prisons, Find an Inmate, <https://www.bop.gov/inmateloc/> (last visited Dec. 19, 2017) (search for inmate register number 87586-379).