

No. --

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL ANGEL MARTINEZ-CERDA,

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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QUESTION PRESENTED FOR REVIEW

Whether the Texas offense of aggravated assault is equivalent to the “generic” form of that offense?

PARTIES

Miguel Angel Martinez-Cerda is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Miguel Angel Martinez-Cerda, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Martinez-Cerda*, 697 Fed. Appx. 398 (5th Cir. September 19, 2017)(unpublished), and is provided in the Appendix to the Petition. [Appendix A]. That court also denied a motion to hear the case *en banc*. [Appendix C]. The judgment of conviction and sentence was entered August 11, 2016, and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on September 19, 2017. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL SENTENCING GUIDELINES INVOLVED

Application Note 1(B)(iii) to USSG §2L1.2 in the 2015 version of the Federal Sentencing Guidelines states:

Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or 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.

USSG §2L1.2, n. (1)(B)(iii)(2015).

STATEMENT OF THE CASE

Petitioner Miguel Angel Martinez-Cerda pleaded guilty to one count of illegally reentering the country following removal. *See* (ROA.28-29).¹ His criminal history consisted of a single 2010 Texas conviction for aggravated assault. *See* (ROA.102). Because Probation regarded the conviction as a “crime of violence” under USSG §2L1.2, he received a 16 level adjustment to his offense level. *See* (ROA.102). The result was a final offense level of 21, a criminal history category of II, and a Guideline range of 41-51 month imprisonment. *See* (ROA.106).

Probation attached to the Presentence Report (PSR) an indictment from the prior case. *See* (ROA.109). This document alleged that the defendant intentionally, knowingly, and recklessly caused injury to another with a deadly weapon. *See* (ROA.109). Probation did not attach a judicial confession.

The defense filed a detailed objection to the PSR’s conclusion that his prior conviction should be considered a “crime of violence.” *See* (ROA.114-116). It argued that the prior statute of conviction was indivisible under *Mathis v. United States*, ___U.S.___, 136 S.Ct. 2243 (2016), *see* (ROA.114-116), and it cited the Fourth Circuit case of *United States v. Barcenas-Yanez*, 826 F.3d 752, 756 (4th Cir. 2016), for the proposition that the undivided statute fell outside the definition of a “crime of violence.” *See* (ROA.114-116).

The district court overruled the objection and imposed sentence at the bottom of the range it believed applicable, 41 months. *See* (ROA.83, 87-88).

B. Appeal

Petitioner appealed, arguing that the Texas offense of aggravated assault is not equivalent to the generic definition of the offense, and that it is not otherwise a “crime of violence” because it lacks the use, attempted use, or threatened use of physical force as an element. Noting adverse precedent on the generic definition, he sought *en banc* review in the first instance, but this Petition

¹ Record citations are included in hopes they are of use to the government in answering the Petition or the Court in evaluating it.

was denied. [Appx. C]. Resolving the case, the court of appeals cited its prior opinions in *United States v. Guillen-Alvarez*, 489 F.3d 197, 198 (5th Cir. 2007), which held that the Texas aggravated assault offense is in all cases equivalent to generic aggravated assault. [Appx. A]. On this basis, and without addressing the question of whether the Texas offense has force as an element, it affirmed. [Appx. A].

REASON FOR GRANTING THE PETITION

The courts are divided on the generic definition of “aggravated assault,” and, in particular, whether the Texas offense falls within this generic definition. That division of authority implicates an important and recurring issue in cases involving the categorical approach: whether sentencing courts should tolerate “minor differences” between the generic definition of an offense and the prior statute of conviction, and, if so, how to determine what kinds of differences are minor.

At the time Mr. Martinez-Cerda was found in the United States, USSG §2L1.2 provided for a 16-level enhancement if a defendant was deported after a conviction for a felony crime of violence. *See* USSG §2L1.2(b)(1)(2015). The definition of “crime of violence” in the application note includes several enumerated offenses, among them “aggravated assault.” USSG §2L1.2, comment. (n.(1)(B)(iii))(2015). In cases where a criminal history enhancement is triggered by a series of enumerated offenses, those offenses are given their “ordinary, contemporary meaning,” and accorded a “generic definition.” *See Taylor v. United States*, 495 U.S. 575, 598 (1990).

In *United States v. Mungia-Portillo*, 484 F.3d 813 (5th Cir. 2007), the Fifth Circuit held that convictions under the Tennessee aggravated assault statute may be treated as equivalent to the enumerated offense of aggravated assault found in USSG §2L1.2. *See Mungia-Portillo*, 484 F.3d at 814. That court recognized that generic aggravated assault required recklessness manifesting extreme disregard for the value of human life, not ordinary recklessness. *See id.* at 816-817. Though the Tennessee statute permitted conviction for causing serious injury by ordinary recklessness, that court found that difference to be “minor.” *See id.* It reached this conclusion based on the definition of aggravated assault found in Black’s Law Dictionary and a criminal law treatise:

LaFave’s treatise makes no special note of the degree of the mental culpability typical of an aggravated battery, and neither does Black’s Law Dictionary. *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, § 16.2(d); BLACK’S LAW DICTIONARY 162 (8th ed. 2004). We infer from this that a defendant’s mental state in committing an aggravated assault, whether exhibiting “depraved heart” recklessness or “mere” recklessness, is not dispositive of whether the aggravated assault falls within or outside the plain, ordinary meaning of the enumerated offense of aggravated assault.

Id. In *United States v. Guillen-Alvarez*, 489 F.3d 197 (5th Cir. 2007), that court extended this holding to the Texas aggravated assault statute. *See Guillen-Alvarez*, 489 F.3d at 200-201.

Mungia-Portillo and *Guillen-Alvarez* have been rejected by three different courts of appeals. See *United States v. Esparza-Herrera*, 557 F.3d 1019 (9th Cir. 2009); *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1086 (9th Cir. 2015); *United States v. Barcenas-Yanez*, 826 F.3d 752, 756 (4th Cir. 2016); *United States v. McFalls*, 592 F.3d 707, 716-717 (6th Cir. 2010); *United States v. Cooper*, 739 F.3d 873, 880, n.1 (6th Cir. 2014).

In *Esparza-Herrera*, the Ninth Circuit held that the generic definition of aggravated assault required at least extreme recklessness, and that ordinary recklessness was not equivalent. See *Esparza-Herrera*, 557 F.3d at 1023-1025. It expressly rejected *Muniga-Portillo*'s contrary reasoning. See *id.* at 1023. Similarly, the Sixth Circuit found ordinary recklessness insufficient to qualify as the enumerated offense of aggravated assault found in USSG §4B1.2. See *United States v. McFalls*, 592 F.3d 707, 716-717 (6th Cir. 2010). Later, in *United States v. Cooper*, 739 F.3d 873 (6th Cir. 2014), it cited and rejected the Fifth Circuit's opinion in *Mungia-Portillo*. See *Cooper*, 739 F.3d at 880, n.1.

In *United States v. Garcia-Jimenez*, 807 F.3d 1079 (9th Cir. 2015), the Ninth Circuit revisited *Esparza-Herrera*, and found that it did not go far enough. See *Garcia-Jimenez*, 807 F.3d at 1086. In that case, the Ninth Circuit surveyed all state aggravated assault statutes and found that a large majority require not extreme recklessness but intentional conduct. See *id.* It thus held that no prior conviction for aggravated assault would qualify as aggravated assault unless it required that serious bodily injury be caused knowingly or intentionally. See *id.* The Fourth Circuit recently agreed with this analysis, and held that the Texas aggravated assault statute – Mr. Martinez-Cerda's offense – was non-qualifying. See *United States v. Barcenas-Yanez*, 826 F.3d 752, 756 (4th Cir. 2016).

In short, every court of appeals that has considered the reasoning or result of *Mungia-Portillo* and *Guillen-Alvarez* has rejected it, even when the Texas statute was presented. See *Barcenas-Yanez*, 826 F.3d at 756. The proper treatment of the Texas aggravated assault offense should not depend on where a case happens to arise. Too many years of imprisonment turn on this question for it to have so arbitrary an answer.

This Court has previously said that it disfavors the resolution of Guideline issues in its

certiorari docket. *See Braxton v. United States*, 500 U.S. 344, 348 (1991). But there are special reasons to address **this** division of circuit authority. First, the generic definition of “aggravated assault” affects defendants under more than one provision of the Guidelines. *See* USSG §§ 2L1.2, comment. (n. (1)(B)(iii))(2015), USSG 4B1.2(a)(2). Its use in §4B1.2's definition of a “crime of violence,” moreover, produces extraordinary increases in the recommended sentences, as the Commission has been instructed to recommend a sentence “at or near” the statutory maximum for defendants subject to this provision. 28 U.S.C. §994(h). The case thus presents a special Guideline issue with unusual influence over federal sentencing.

Second, this Court’s stated rationale for withholding review of Guideline issues is that the Sentencing Commission can address inconsistencies in their application by amendment. But here the direct circuit conflict has existed since 2009, without any sign of resolution. Indeed, the Commission has expressly declined to resolve the division. *See* U.S. Sentencing Commission, *Report to the Congress: Career Offender Sentencing Enhancements* 54 (August 2016)(declining to add a definition of enumerated offenses, including “aggravated assault” because it believed “it ... best not to disturb the case law that has developed over the years.”), *available at* <https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements>.

Third, the present case does not merely implicate a division about the application of a single enhancement to a single statute of conviction. Rather, the circuits addressing Texas aggravated assault have divided on the broadly applicable question of whether “minor differences” between a statute and a generic definition may be overlooked when applying the “categorical approach.” *See Esparza-Herrera*, 557 F.3d at 1023 (“The Fifth Circuit's reasoning is not without insight but is foreclosed by our precedent.”)

Finally, the case cannot be resolved on the alternate ground that Petitioner’s offense has as an element the use, attempted use, or threatened use of force against the person of another. The court below has held that “result oriented offenses” – offenses that require injury but do not enumerate

the mechanism by which it is caused – do not involve force as an element. *See United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004)(*en banc*); *United States v. Villegas-Hernandez*, 468 F.3d 874, 878-879 (5th Cir. 2006); *United States v. Rico-Mejia*, 859 F.3d 318 (5th Cir. 2017). Accordingly, if this Court simply addressed the generic definition and remanded the case, there is a good probability that Petitioner would receive relief. Alternatively, if this Court wished to address the force question itself, it could helpfully resolve another important issue that has divided the courts of appeals. The courts of appeals disagree about whether an offense possesses the use of force for the purpose of provisions like §2L1.2 if it requires “bodily injury,” but does not specify the mechanism by which such injury is inflicted and/or permits conviction upon proof of recklessness. **Compare** *United States v. Hill*, 832 F.3d 135, 143-144 (2d Cir. 2016)(finding such offenses possess force as an element), *United States v. Chapman*, ___ F.3d ___, 2017 U.S. App. LEXIS 14360 (3d Cir. Aug. 4, 2017)(same), *United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir. 2016)(same), *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016)(same), and *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1131-1132 (9th Cir. 2016)(same), **with** *Whyte v. Lynch*, 807 F.3d 463, 470 (1st Cir. 2015)(injury is not equivalent to force), and *United States v. Fields*, 863 F.3d 1012 (8th Cir. 2017)(reckless causation of injury is not the use of force).

CONCLUSION

Petitioner respectfully submits that this Court, grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit, vacate the judgment below, and remand for reconsideration in light of any pertinent authority. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 18th day of December, 2017.

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