

No. 17-7173

IN THE SUPREME COURT OF THE UNITED STATES

MIGUEL ANGEL MARTINEZ-CERDA, 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 IN OPPOSITION

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QUESTION PRESENTED

Whether a conviction for aggravated assault, in violation of Tex. Penal Code Ann. § 22.02 (West Supp. 2010), qualified as “aggravated assault” under the commentary to the since-repealed version of Sentencing Guidelines § 2L1.2 comment. (n.1(B)(iii)) (2015).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 697 Fed. Appx. 398.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2017. A petition for initial hearing en banc was denied on September 18, 2017 (Pet. App. C1). The petition for a writ of certiorari was filed on December 18, 2017 (Monday). 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 Northern District of Texas, petitioner was convicted of illegal reentry after deportation, in violation of 8 U.S.C. 1326(a)(1), (b)(1) and (2). Pet. App. B1. He was sentenced to 41 months of imprisonment, to be followed by two years of supervised release. Id. at B1-B2. The court of appeals affirmed. Id. at A1-A2.

1. Section 2L1.2 of the Sentencing Guidelines provides a base offense level of eight for the offense of illegal reentry after deportation. 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 "[c]rime 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)).

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." See ibid. 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. In 2012, petitioner pleaded guilty to aggravated assault with a deadly weapon, in violation of Tex. Penal Code Ann. § 22.02 (West Supp. 2010). 6/20/16 Presentence Investigation Report (PSR) ¶ 28; see PSR ¶ 8. The charge stemmed from an incident in which petitioner choked his wife and threatened her and their three children with a knife. PSR ¶ 28. Petitioner was sentenced to two years of imprisonment. Ibid. While petitioner was in custody, immigration officials determined that he is a citizen of Mexico and that he was illegally present in the United States. Ibid. In September 2012, petitioner was released from prison, after which he was removed. Ibid. Around 2013, petitioner returned to the United States unlawfully. PSR ¶ 46.

In March 2016, a Blue Mound, Texas police officer conducted a traffic stop of petitioner after noticing that his license plate was partially obstructed. PSR ¶ 6. A records check revealed that petitioner was subject to an immigration warrant for being a removed felon. Ibid. Later that day, federal Immigration and Customs Enforcement officers determined that petitioner was unlawfully present in the United States. PSR ¶ 7. Petitioner was charged with, and pleaded guilty to, one count of illegal reentry after removal, in violation of 8 U.S.C. 1326(a) and (b)(1)-(2). See 4/5/16 Indictment 1-2; 4/22/16 Rearrangement Tr. 1-23.

In advance of sentencing, the Probation Office prepared a PSR. Applying the 2015 Sentencing Guidelines, the PSR calculated a base offense level of eight (Sentencing Guidelines § 2L1.2(a)); recommended a 16-level enhancement because petitioner's Texas conviction for aggravated assault with a deadly weapon qualified as a "crime of violence" (Sentencing Guidelines § 2L1.2(b)(1)(A)(ii)); and recommended a three-level reduction for acceptance of responsibility (Sentencing Guidelines § 3E1.1). PSR ¶¶ 14-23, 28. The resulting total offense level of 21, combined with a criminal history category II, yielded an advisory Guidelines sentencing range of 41 to 51 months of imprisonment. PSR ¶¶ 24, 29, 55.

Petitioner objected to the PSR, arguing, as relevant here, that his Texas conviction for aggravated assault "is not a generic aggravated assault and likewise is not a crime of violence under

[Guidelines] § 2L1.2.” 7/6/16 Def.’s Objections to the Presentence Report 1; see id. at 1-3. As a result, he contended, “the 16-level crime of violence enhancement does not apply.” Id. at 1.

The district court overruled petitioner’s objection and adopted the recommendations in the PSR. 8/11/16 Statement of Reasons 1; 1/17/17 Sent. Tr. 7-8. After calculating a Guidelines range of 41 to 51 months of imprisonment, the court imposed a sentence of 41 months, stating that the sentence “adequately and appropriately address[es] all the factors the Court should consider in sentencing under” 18 U.S.C. 3553(a). Sent. Tr. 10-11.

3. The court of appeals affirmed. Pet. App. A1-A2. Relying on circuit precedent, it rejected petitioner’s argument that the 16-level enhancement in Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2015) does not apply because “Texas aggravated assault is broader than generic aggravated assault.” 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); and United States v. Mungia-Portillo, 484 F.3d 813, 816-817 (5th Cir.), cert. denied, 552 U.S. 931 (2007)). The court did not address whether petitioner’s prior Texas aggravated assault conviction qualified as a “crime of violence” because it “involved the use of force.” Ibid.; see also U.S.S.G. 2L1.2 comment. (n.(1)(B)(iii)).

ARGUMENT

Petitioner contends (Pet. 4-7) that the court of appeals erred in its determination that his prior Texas conviction for aggravated assault qualified as a crime of violence under former Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2015). Review of the court of appeals' decision is unwarranted because it interprets 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 petitioner alleges that the courts of appeals are divided on the question presented, the division is far narrower than petitioner suggests.

1. Petitioner's contention (Pet. 4-5) 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 2015 version of Sentencing Guidelines § 2L1.2,* and the same result is appropriate here.

* See Saldierna-Rojas v. United States, 137 S. Ct. 2269 (2017) (No. 16-8536); 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); Torres-Jaime v. United States, 137 S. Ct. 1373 (2017) (No. 16-5853). Three other pending petitions for a writ of certiorari present the same question. See Hernandez-Ramirez v. United States, No. 17-6065 (filed Sept. 18, 2017); Martinez-Rivera v. United States, No. 17-

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. 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 petitioner’s arguments, the sentencing court was free to examine the record evidence -- not just petitioner’s offense of conviction -- when determining the most appropriate sentence to impose. Indeed, the district court did exactly that, explaining that it “really can’t find in the record anything that would -- or based on anything I’ve heard this morning that would cause me to think that there should be a below the advisory guideline range sentence.” Sent. Tr. 10; see id. at 10-11.

6338 (filed Oct. 10, 2017); Saucedo-Rios v. United States, No. 17-6562 (filed Oct. 25, 2017).

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 the prior offense. 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. 6, 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,' 'aggravated felony' * * *) 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 that provision was not applied to petitioner. See PSR ¶¶ 15-24; Pet. App. A1-A2.

2. Petitioner asserts (Pet. 4-5) 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 the question presented 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 petitioner suggests.

a. Texas Penal Code Annotated 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 Supp. 2010). 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.” Tex. Penal Code Ann. § 22.02(a)(1)-(2) (West Supp. 2010).

Petitioner maintains (Pet. 5) that the Fourth, Sixth, and Ninth Circuits have held that generic aggravated assault does not include offenses that may be committed with a mens rea of mere recklessness. But although a 50-state survey by the Ninth Circuit appears to have viewed the Texas offense 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 (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.

b. Review is particularly unwarranted because, although the court of appeals did not pass on the issue here, see Pet. App. A2, 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 Tex. 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 Tex. Penal Code § 22.02(a) (2003) 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).

Petitioner contends (Pet. 6–7) that a conviction for Texas aggravated assault would not qualify as a “crime of violence” under the elements clause in light of the Fifth Circuit’s decision in United States v. Rico-Mejia, 859 F.3d 318, 321–323 (2017), among other cases. But following Rico-Mejia, which addressed the Arkansas crime of terroristic threatening, the Fifth Circuit has continued to recognize 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), cert. denied, 138 S. Ct. 668 (2018); United States v. Zamora-Alonso, 693 Fed. Appx. 370, 371 (per curiam), cert. denied, 138 S. Ct. 486 (2017); United States v. Cruz, 691 Fed. Appx. 204, 205 (per curiam), cert. denied, 138 S. Ct. 411 (2017). Moreover, while petitioner suggests (Pet. 7) disagreement among the courts of appeals on the question whether an offense requires 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," that question is not encompassed within the question presented. See Pet. ii. Thus, the question presented does not even contemplate definitive resolution of the question whether a conviction under Texas's aggravated assault statute triggers an enhancement under former Sentencing Guidelines § 2L1.2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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