No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAMON HERNANDEZ-RAMIREZ and
JOSE ARMANDO RAMOS,
Petitioners,

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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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Does the federal generic aggravated assault offense require more than a merely reckless mens rea, as determined by the Fourth, Sixth and Ninth Circuits and supported by a 50-state survey of state codes, or can it be committed with mere recklessness, as the Fifth Circuit has held?

II. Is the "aggravated felony" definition in 18 U.S.C. § 16(b) unconstitutionally vague under Johnson v. United States, 135 S. Ct. 2551 (2015), because it requires application of an indeterminate risk standard to the "ordinary case" of an individual's prior conviction?

PARTIES TO THE PROCEEDINGS

Petitioners were convicted and sentenced in separate proceedings before the United States District Court for the Southern District of Texas, and the United States Court of Appeals for the Fifth Circuit entered separate judgments affirming their convictions and sentences. Because petitioners seek review of these judgments on the basis of identical questions, they jointly file this petition with this Court. See Sup. Ct. R. 12.4.

All parties to petitioners' Fifth Circuit proceedings are named in the caption of the case before this Court.[1]

[1] In the courts below, petitioners were also known by the aliases listed in the captions in Appendices A-C.

TABLE OF CONTENTS

TABLE OF CONTENTS – (Cont'd)

Page

TABLE OF CITATIONS

Page

CASES

TABLE OF CITATIONS – (Cont'd)

Page

CASES – (Cont'd)

STATUTES AND RULES

TABLE OF CITATIONS – (Cont'd)

Page

STATUTES AND RULES – (Cont'd)

SENTENCING GUIDELINES

TABLE OF CITATIONS – (Cont'd)

Page

SENTENCING GUIDELINES – (Cont'd)

MISCELLANEOUS

PRAYER

Petitioners pray that a writ of certiorari be granted to review the judgments entered by the United States Court of Appeals for the Fifth Circuit in their respective cases.

OPINION AND ORDER BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit in petitioners' cases are attached to this petition as Appendices A through C.

JURISDICTION

The judgment and opinion was entered on July 19, 2017, for Mr. Hernandez-Ramirez. See Appendix A. His petition for en banc rehearing was denied on August 23, 2017. See Appendix B. The judgment and opinion was entered on June 19, 2017, for Mr. Ramos. See Appendix C.

This petition is filed within 90 days after entry of judgment in each case. See Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

1. USSG § 2L1.2 (2015) provides in pertinent part:

§ 2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base offense level: **8**

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

a conviction for a felony that is. . . (ii) a crime of violence. . . increase by 16 levels if the conviction receives criminal history points under Chapter 4. . . .

* * *

Application Notes:

* * *

1. *Application of Subsection (b)(1).—*

(B) Definitions.—For purposes of subsection (b)(1):

* * *

(iii) "Crime of violence" means any of the following under federal, state or local law: . . . aggravated assault. . . .

2. 8 U.S.C. § 1326 provides in pertinent part:

(a) In general

Subject to subsection (b) of this section, 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 an 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) of this section, in the case of any alien described in such subsection–

*** * ***

(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. 8 U.S.C. § 1101 provides in pertinent part:

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;

* * *

4. 18 U.S.C. § 16 provides:

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, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

STATEMENT OF THE CASE

Petitioners are noncitizens who were each deported, but were later found in the United States after returning without authorization. In separate district court proceedings in the Southern District of Texas, they each pleaded guilty to illegal reentry following deportation, in violation of 8 U.S.C. § 1326.

Under the pre-November 1, 2016 Sentencing Guidelines, a person who is convicted of illegal reentry faces a 16-level Guideline sentencing enhancement if he had, prior to his deportation, a felony conviction for a "crime of violence." USSG § 2L1.2(b)(1)(A)(ii) (2015). The definition of "crime of violence" in the application note lists several enumerated offenses that qualify, including "aggravated assault." USSG § 2L1.2, cmt. n.(1)(B)(iii) (2015).

Prior to petitioners' sentencing hearings, the United States Probation Office prepared a presentence report ("PSR") to assist the district court in sentencing them. In both cases, the PSR recommended application of a 16-level crime of violence enhancement under § 2L1.2(b)(1)(A)(ii) (2015), based on each petitioner's pre-deportation Texas conviction for aggravated assault under Tex. Penal Code § 22.02. Each PSR determined that a conviction for Texas aggravated assault qualifies as a "crime of violence." Mr. Hernandez-Ramirez objected to the enhancement, arguing that the Texas offense was broader than federal generic aggravated assault because it can be committed recklessly and is indivisible as to state of mind. Mr. Ramos did not object to the enhancement. In each case, the district court applied the 16-level enhancement, substantially increasing the

petitioners' recommended sentencing ranges.

In both cases, the PSR also recommended application of the statutory sentencing enhancement provided in 8 U.S.C. § 1326(b)(2), which raises the maximum term of imprisonment to 20 years for illegal-reentry defendants who returned to the United States after having been deported following an "aggravated felony" conviction. Section 1326(b)(2) incorporates the definition of "aggravated felony" provided in 8 U.S.C. § 1101(a)(43). That definition includes a "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 "crime of violence" as:

> (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, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16. In Mr. Hernandez-Ramirez's case, the PSR expressly stated that § 1326(b)(2) applied based on his prior Texas conviction for aggravated assault. In Mr. Ramos's case, the PSR did not specify the basis for the application of § 1326(b)(2), but his Texas aggravated assault conviction is his only prior conviction, and thus must have been the basis for applying the enhanced statutory maximum. Neither petitioner objected to the application of § 1326(b)(2). For both petitioners, the written judgment entered by the district court reflected conviction and sentencing under 8 U.S.C. § 1326(b)(2), signifying application of the statutory "aggravated felony" enhancement.

Each petitioner timely appealed to the United States Court of Appeals for the Fifth Circuit. On appeal, they each raised two issues. First, they challenged the application of the 16-level crime of violence enhancement, arguing that Texas aggravated assault is not the equivalent of generic aggravated assault because it can be committed with a merely reckless mens rea. Second, they challenged the classification of their prior convictions as aggravated felony convictions, arguing that § 16(b)—the statutory basis for the classifications—was unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015).

In both cases, the Fifth Circuit affirmed petitioners' convictions and sentences. The court concluded that petitioners' challenge to the 16-level enhancement was foreclosed by the court's prior decisions holding that Texas aggravated assault qualifies as generic aggravated assault. See, e.g., United States v. Guillen-Alvarez, 489 F.3d 197, 198 (5th Cir. 2007). The court also concluded that petitioners' challenge to the vagueness of § 16(b) was foreclosed by the court's en banc decision in United States v. Gonzalez-Longoria, 831 F.3d 670, 674-80 (5th Cir. 2016), petition for cert. filed, No. 16-6259 (U.S. Sept. 29, 2016), in which a divided court held, contrary to the decisions of five of its sister circuits, that § 16(b) did not raise the same vagueness concerns that this Court identified in Johnson.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

I. The definition of federal generic aggravated assault presents an important question warranting this Court's consideration.

A. The circuits are divided on whether generic aggravated assault includes offenses committed with a merely reckless state of mind.

Both petitioners received sentencing enhancements based on the lower courts' determination that their prior Texas convictions for aggravated assault under Tex. Penal Code § 22.02 qualify as generic aggravated assault. In Texas, aggravated assault can be committed by the reckless causation of bodily injury, which is aggravated by either the causation of serious bodily injury or the use or exhibition of a weapon. See Tex. Penal Code §§ 22.01, 22.02. The aggravated assault offense is not divisible as to mens rea or the aggravating factors, and thus it cannot be narrowed to one that would exclude a reckless assault. See Gomez-Perez v. Lynch, 829 F.3d 323, 327 (5th Cir. 2016); Landrian v. State, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008). See generally Mathis v. United States, 136 S. Ct. 2243 (2016).

The circuits are divided on the question of whether an assault that can be committed recklessly is included within the federal generic definition of aggravated assault. The 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. See United States v. Barcenas-Yanez, 826 F.3d 752, 756 (4th Cir. 2016); United States v. Garcia-Jimenez, 807 F.3d 1079, 1086 (9th Cir. 2015); United States v. Cooper, 739 F.3d 873, 880 & n.1 (6th Cir. 2014); United States v. McFalls, 592 F.3d 707, 716-717 (6th Cir. 2010); United States

v. Esparza-Herrera, 557 F.3d 1019 (9th Cir. 2009). By contrast, the Fifth Circuit has held that generic aggravated assault does include reckless offenses. See United States v. Guillen-Alvarez, 489 F.3d 197 (5th Cir. 2007); United States v. Mungia-Portillo, 484 F.3d 813 (5th Cir. 2007); see also United States v. Shepherd, 848 F.3d 425, 427-28 (5th Cir. 2017) (reaffirming Guillen-Alvarez).

The Fifth Circuit has relied on the Model Penal Code to define generic aggravated assault, and held that the generic offenses includes ordinary recklessness. See Mungia-Portillo, 484 F.3d at 814, 816-17. Subsequently, in Guillen-Alvarez, 489 F.3d at 200-01, the Fifth Circuit extended its holding to the Texas aggravated assault statute and held that even if it assumed that an aggravated assault under § 22.02 was committed recklessly, the offense is equivalent to generic aggravated assault. The court reaffirmed these precedents in petitioners' cases.

Three other circuits have rejected this holding. In Esparza-Herrera, the Ninth Circuit held that the federal generic definition of aggravated assault required at least extreme recklessness, and that ordinary recklessness was not included in the generic offense. See Esparza-Herrera, 557 F.3d at 1023-1025. It expressly rejected the Fifth Circuit's contrary reasoning. See id. at 1023. Similarly, the Sixth Circuit has found ordinary recklessness insufficient to qualify as the enumerated offense of aggravated assault found in USSG § 4B1.2. See McFalls, 592 F.3d at 716-717. Later, in Cooper, the Sixth Circuit continued to follow McFalls, and cited and rejected the Fifth Circuit's contrary authority. See Cooper, 739 F.3d at 880 n.1.

In Garcia-Jimenez, the Ninth Circuit extended Esparza-Herrera to conclude that generic aggravated assault does not include even extreme recklessness. See Garcia-Jimenez, 807 F.3d at 1085-86. The court conducted a survey of all 50 states' aggravated assault and battery offenses, and found that 33 states and the District of Columbia "do not punish as aggravated assault offenses committed with only extreme-indifference recklessness." Id. at 1085 & nn.5 & 6. "That a substantial majority of U.S. jurisdictions require more than extreme indifference recklessness to commit aggravated assault is a compelling indication that the federal generic definition of aggravated assault also requires more than that mental state." Id. at 1086. The court thus held that no prior conviction for aggravated assault would qualify as generic aggravated assault unless it required that serious bodily injury be caused knowingly or intentionally. See id.

In Barcenas-Yanez, the Fourth Circuit considered whether Tex. Penal Code § 22.02—the same statute at issue in petitioners' cases—is equivalent to generic aggravated assault, and held that "inclusion of a mere reckless state of mind renders the statute broader than the generic offense." Barcenas-Yanez, 826 F.3d at 756 (citation omitted). Barcenas-Yanez relied on the Ninth Circuit's 50-state survey in Garcia-Jimenez, 807 F.3d at 1086, for the federal definition of generic aggravated assault.

There is thus a clear circuit split on the definition of generic aggravated assault, with the Fourth, Sixth and Ninth Circuits all holding that the generic offense does not include merely reckless assaults, and the Fifth Circuit holding to the contrary. Specifically with regard to Texas aggravated assault, the Fourth and Fifth Circuits have split on whether the

Texas offense qualifies as generic aggravated assault. And the split between the Fifth and Ninth Circuits, in particular, results in unjustifiably disparate sentences based only on geography because it results in drastically different outcomes for similarly situated criminal defendants in the two circuits that span the lion's share of the United States border with Mexico and, consequently, adjudicate the largest proportion of illegal-reentry proceedings in the nation.[2]

In short, if the petitioners had been prosecuted for illegal reentry in the Fourth, Sixth or Ninth Circuits, their offenses would not qualify as generic aggravated assault because their prior Texas aggravated assault offenses could have been committed with a reckless mens rea. In the Fifth Circuit, however, their offenses qualify as generic aggravated assault, and accordingly they received an additional 16-level enhancement.

B. The federal generic definition of aggravated assault is an important question of federal sentencing law with significant consequences for these petitioners, and for criminal defendants in other cases.

Years of imprisonment turn on the question presented. Substantial enhancements under the Sentencing Guidelines in illegal-reentry and career-offender cases turn on the definition of generic aggravated assault. The applicability of those enhancements should not depend on the circuit in which a person is prosecuted.

[2] In fiscal year 2013, 18,498 federal illegal-reentry cases were prosecuted in the United States. U.S. Sentencing Commission, Illegal Reentry Offenses, at 8 (Apr. 2015). Of the top five districts adjudicating these cases, two were located in the Fifth Circuit—Southern Texas (3,853, or 20.8%) and Western Texas (3,200, or 17.3%)—two were located in the Ninth—Arizona (2,387, or 12.9%) and Southern California (1,460, or 7.9%)—and one was located in the Tenth—New Mexico (2,837, or 15.3%). Id. at 9. Combined, these five districts made up 74.2% of all illegal-reentry cases. Id.

The enumerated offense of aggravated assault triggers a 16-level Guideline enhancement for illegal re-entry defendants found in the United States before November 1, 2016, as it did for petitioners. See USSG § 2L1.2, cmt. n.(1)(B)(iii) (2015). In the typical reentry case where the defendant receives a three-level adjustment for acceptance of responsibility, a 16-level increase in the defendant's range more than doubles the minimum of the Guideline range in every criminal history category. See USSG § 2L1.2; USSG Ch. 5A.

The operation of the crime of violence enhancement in petitioners' cases illustrates the significance of the issue. Each petitioner was subject to a substantially enhanced sentencing range based on his previous Texas conviction for aggravated assault. Because of the aggravated assault determination, Mr. Ramos's sentencing range was increased from, at most, [3] 15 to 21 months, to 41 to 51 months; he was sentenced to 51 months of imprisonment. And Mr. Hernandez-Ramirez's sentencing range was increased from, at most, 18 to 24 months to 46 to 57 months; he was sentenced to 30 months of imprisonment.

[3] Petitioners say "at most" because they do not concede that any one of their prior convictions qualifies as an "aggravated felony," which would garner an 8-level enhancement under the 2015 Guidelines. With no qualifying "aggravated felony" conviction, the maximum enhancement would be a 4-level enhancement under USSG § 2L1.2(b)(1)(D) (2015), for a prior felony conviction. However, for purposes of illustrating the effect of the 16-level enhancement, petitioners provide calculations including an 8-level enhancement, because this Court need not reach that question. It is sufficient to hold that the imposition of the 16-level enhancement was erroneous, leaving the question of the applicability of the 8-level enhancement for the lower courts to decide in the first instance. See, e.g., United States v. Calderon-Peña, 383 F.3d 254, 262 (5th Cir. 2004) (en banc) (reversing 16-level enhancement under § 2L1.2(b)(1)(A)(ii), but "leav[ing] it to the district court to determine on remand whether Calderon-Peña's prior offense can be considered an 'aggravated felony' that would call for application of § 2L1.2's eight-level sentence enhancement").

Although USSG § 2L1.2 has now been amended to eliminate the crime of violence enhancement, this does not reduce the need for a uniform national definition of aggravated assault. As Mr. Martinez-Rivera's case illustrates, the earlier Guideline may still be applied to illegal-reentry defendants found in the country before November 1, 2016. See Peugh v. United States, 133 S.Ct. 2072, 2078 (2013).

Moreover, a previous aggravated assault conviction is also used as a career-offender predicate under the current version of USSG § 4B1.2, and "aggravated assault" remains an enumerated offense in § 4B1.2's definition of "crime of violence." See USSG § 4B1.2(a)(2). That Guideline is of immense practical impact: the Commission has been instructed to recommend a sentence "at or near" the statutory maximum for defendants who have been thrice convicted of a controlled substance offense or "crime of violence." 28 U.S.C. § 994(h). The Commission uses § 4B1.2 to define "crime of violence" for this purpose, and has promulgated sizable increases in the defendant's offense level and a mandatory criminal history category of VI when the defendant is subject to its provisions. See USSG § 4B1.1.

This Court should not hesitate to exercise its certiorari power to resolve this circuit split on the interpretation of the Guidelines, because the Sentencing Commission has indicated that it does not intend to address the split. This Court has previously stated that it might be "more restrained and circumspect" in exercising certiorari power to resolve conflicts regarding Guideline interpretation, due to the Sentencing Commission's authority to revise the Guidelines. See Braxton v. United States, 500 U.S. 344, 348 (1991). But that

concern carries less force in the circumstances of this case, where the Sentencing Commission has recently considered and declined to clarify the generic definition of enumerated crimes of violence, including aggravated assault.

In its 2016 report to Congress, the Sentencing Commission stated that it considered adding definitions of all the enumerated offenses to § 4B1.2, but ultimately added definitions for just two offenses: "forcible sex offense" and "extortion." It did not add definitions for the remaining enumerated offenses, including aggravated assault, because the Commission determined that "it was best not to disturb the case law that has developed over the years." U.S. Sentencing Commission, Report to the Congress: Career Offender Sentencing Enhancements 54 (August 2016), available at https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements. Thus, the Commission has signaled that it does not intend to revise the Guidelines to address the split on the definition of generic aggravated assault. This Court should thus address that split.

C. The Fifth Circuit erred by continuing to rely on the Model Penal Code to define the federal generic offense of aggravated assault, when the results of a 50-state survey dictate a different generic definition.

Finally, the Fifth Circuit's definition of generic aggravated assault not only conflicts with multiple other circuits, but it is also incorrect.

In Guillen-Alvarez and Mungia-Portillo, the Fifth Circuit relied only on the Model Penal Code to define generic aggravated assault, see Guillen-Alvarez, 489 F.3d at 200; Mungia-Portillo, 484 F.3d at 817. In Mungia-Portillo, 484 F.3d at 814, the Fifth Circuit

recognized that the Model Penal Code definition requires an aggravated assault offense to be committed with recklessness manifesting extreme disregard for the value of human life, rather than ordinary recklessness. See id. at 816-817; see also Model Penal Code § 211.1. Yet the Fifth Circuit found that the Tennessee statute at issue, which encompassed causing serious injury by ordinary recklessness, presented only a "minor" difference from the Model Penal Code definition. See id. The Fifth Circuit reaffirmed the holding that generic aggravated assault includes mere recklessness in Guillen-Alvarez, 489 F.3d at 200, as well as in each of petitioners' cases.

But the correct definition of the generic offense of aggravated assault can be found in the analysis of the Ninth and Fourth Circuits. In Garcia-Jimenez, the Ninth Circuit reviewed all 50 states' aggravated assault and battery offenses, and found that 33 states and the District of Columbia "do not punish as aggravated assault offenses committed with only extreme-indifference recklessness." Garcia-Jimenez, 807 F.3d at 1085 & nn.5 & 6. As that court held, the fact that a majority of states require a mens rea higher than recklessness also indicates that the federal generic definition requires more than recklessness. See id. at 1086. The Fourth Circuit also adopted this definition of the generic offense when it held that Tex. Penal Code § 22.02 is broader than generic aggravated assault because it includes "a mere reckless state of mind." Barcenas-Yanez, 826 F.3d at 756.

The Fifth Circuit's continued reliance on the Model Penal Code to define the generic aggravated assault offense, see Guillen-Alvarez, 489 F.3d at 200; Mungia-Portillo, 484

F.3d at 817, where the majority of state statutes deviate from the Code, see Garcia-Jimenez, 807 F.3d at 1086-87, contravenes this Court's holding in Taylor v United States, 495 U.S. 575, 598 (1990), that the meaning of an enumerated offense in federal law is "the generic sense in which the term is now used in the criminal codes of most States." Accordingly, where the current treatment of an offense in the majority of states does not "approximate[] that" found in the Model Penal Code, see Taylor, 495 U.S. at 598-99 & n.8, because a majority of states have deviated from the Code, the Code is no longer a reliable indicator of the "contemporary" meaning of an offense. See Garcia-Jimenez, 807 F.3d at 1086-87.

Under this Court's instructions in Taylor regarding the categorical approach, the majority of the states' modern treatment of an enumerated offense is a better indicator of the "contemporary meaning" of a generic offense, Taylor, 495 U.S. at 598, than secondary sources like the Model Penal Code. The Model Penal Code, and other secondary sources such as treatises, are only useful as compilations or reviews of the states' actual treatment of offenses, and thus as proxies for what the majority of modern states do. The Model Penal Code is relevant to the extent that it is an indicator of how many or most states treat a particular offense. It has not been used—and should not be used—as a source with independent authority to define an offense, without reference to modern state codes. See Garcia-Jimenez, 807 F.3d at 1086-87.

Notably, in Taylor, this Court used the Model Penal Code and Professor LaFave's treatise only as indicators of the majority of states' treatment of burglary, not as sources with independent definitional authority. See Taylor, 495 U.S. at 598-99 & n.8 (citing

Professor LaFave's treatise for its discussion of "modern states" and "the prevailing view in the modern codes," and noting that current usage in the states "approximates that" usage found in the Model Penal Code). And, of course, in Taylor, this Court ultimately adopted the definition of generic burglary that "roughly correspond[ed] to the definitions of burglary in a majority of States' criminal codes." Id. at 589; see also Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1571 (2017) ("As in other cases where we have applied the categorical approach, we look to state criminal codes for additional evidence about the generic meaning of sexual abuse of a minor."); Gonzales v. Duenas-Alvarez, 549 U.S. 183, 184 (2007) (interpreting "theft" in the Immigration and Nationality Act according to "the generic sense in which. . . 'theft' is now used in the criminal codes of most States").

And even the other sources of the contemporary meaning of a generic offense typically relied on by this Court support that the Fifth Circuit incorrectly defines generic aggravated assault. Contrary to Mungia-Portillo's statement that "LaFave's treatise makes no special note of the degree of the mental culpability typical of an aggravated battery," Mungia-Portillo, 484 F.3d at 816-17, Professor LaFave's treatise now also provides that a "higher degree of battery" often depends on whether "the defendant inflicts serious bodily injury," and that most state statues of this type "***require also that this higher level of harm have been intentionally or knowingly done***." Wayne R. LaFave, Substantive Criminal Law § 16.2 (2d ed.) (October 2016 Update) (emphasis added). Texas aggravated assault, of course, can be committed by the reckless causation of serious bodily injury.

In sum, as multiple other circuits have already held, the federal generic definition

of aggravated assault requires more than the mere reckless causation of bodily injury. The Fifth Circuit's holding to the contrary is erroneous. Because that error is also in conflict with other circuits, it warrants this Court's review.

II. If the Court does not grant the petition on the first Question Presented, this Court should hold this petition pending its decision in *Sessions v. Garcia Dimaya* to resolve the constitutionality of 18 U.S.C. § 16(b).

In each petitioner's case, the decision below that Texas aggravated assault qualifies as an aggravated felony under 8 U.S.C. § 1326(b)(2) and 18 U.S.C. § 16(b) rested on the Fifth Circuit's holding in United States v. Gonzalez-Longoria, 831 F.3d 674-79 (5th Cir. 2016) (en banc), petition for cert. filed, No. 16-6259 (U.S. Sept. 29, 2016), that § 16(b) is not unconstitutionally vague. On September 29, 2016, this Court granted the Attorney General's petition for writ of certiorari to review the Ninth Circuit's opposite holding in Garcia Dimaya v. Lynch, 803 F.3d 1110, 1114-20 (2015). Garcia Dimaya squarely presents the issue raised here. The Court heard argument on January 17, 2017. On June 26, 2017, the Court ordered that the case be reargued during the upcoming term. Because Garcia Dimaya (No. 15-1498) will likely resolve the split created by Gonzalez-Longoria over § 16(b)'s constitutionality,[4] this Court should hold this petition pending its decision in Garcia Dimaya, and then dispose of the petition as appropriate in light of that decision.

[4] Five courts of appeals have held, contrary to the Fifth Circuit, that the "ordinary case" inquiry required to classify prior convictions under 18 U.S.C. § 16(b), as incorporated into the INA's "aggravated felony" definition in 8 U.S.C. § 1101(a)(43)(F), is void for vagueness in light of Johnson. See Baptiste v. Att'y Gen., 841 F.3d 601, 615-21 (3d Cir. 2016); Golicov v. Lynch, 837 F.3d 1065, 1069-75 (10th Cir. 2016); Shuti v. Lynch, 828 F.3d 440, 446-51 (6th Cir. 2016); United States v. Vivas-Ceja, 808 F.3d 719, 721-23 (7th Cir. 2015); Garcia Dimaya v. Lynch, 803 F.3d 1110, 1114-20 (9th Cir. 2015), cert. granted, 137 S. Ct. 31 (2016) (mem.).

CONCLUSION

For the reasons stated above, Question Presented, this Court should grant the writ of certiorari as to the first Question Presented to resolve the circuit split regarding the definition of the federal generic offense of aggravated assault.

Alternatively, for the reasons stated in the discussion of the second Question Presented, the petition for writ of certiorari should be held pending this Court's decision in Sessions v. Garcia Dimaya, No. 15-1498, and then disposed of as appropriate in light of that decision.

Date: September 18, 2017

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41253
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
July 19, 2017
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RAMON HERNANDEZ-RAMIREZ, also known as Ramon Hernandez,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:16-CR-492-1

Before HIGGINBOTHAM, PRADO, and HAYNES, Circuit Judges.

PER CURIAM:*

Ramon Hernandez-Ramirez appeals the 30-month sentence imposed following his guilty plea conviction for illegal reentry. He contends that the district court reversibly erred by imposing a 16-level enhancement under the crime of violence provision of U.S.S.G. § 2L1.2(a)(1)(A)(ii) (2015) and by imposing judgment under 8 U.S.C. § 1326(b)(2) based on his prior Texas felony conviction of aggravated assault with a deadly weapon.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Hernandez-Ramirez argues that Texas aggravated assault is broader than generic aggravated assault and, furthermore, does not require the use or threatened use of force for purposes of § 2L1.2(a)(1)(A)(ii). He concedes that his argument is foreclosed by *United States v. Guillen-Alvarez*, 489 F.3d 197, 198 (5th Cir. 2007), but he argues that *Guillen-Alvarez* and *United States v. Villasenor-Ortiz*, No. 16-10366, ___ F. App'x ___, 2017 WL 113917, 3 (5th Cir. Jan. 11, 2017), were wrongly decided. This court recently held that *Guillen-Alvarez*'s holding remains valid after the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016). *United States v. Shepherd*, 848 F.3d 425, 427-28 (5th Cir. 2017). Moreover, this court is bound by its own precedent unless and until it is altered by the Supreme Court. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986). It is unnecessary to consider whether his conviction involves the use of force.

He also argues that the entry of judgment under § 1326(b)(2) was plainly erroneous because Texas aggravated assault with a deadly weapon is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), which defines aggravated felony by reference to 18 U.S.C. § 16. His conviction does not fall within § 16(a). *See United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006). Hernandez-Ramirez recognizes that this court has rejected a challenge to the constitutionality of § 16(b) based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See United States v. Gonzalez-Longoria*, 831 F.3d 670, 672-79 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259). He notes, however, that the Supreme Court has granted certiorari in *Sessions v. Dimaya*, 137 S. Ct. 31 (2016), to resolve a circuit split over *Johnson*'s effect on § 16(b). The grant of certiorari in *Dimaya* does not alter this court's holding in *Gonzalez-Longoria*. *See Wicker*, 798 F.2d at 157-58.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41253

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

RAMON HERNANDEZ-RAMIREZ, also known as Ramon Hernandez,

Defendant - Appellant

Appeal from the United States District Court for the
Southern District of Texas, Laredo

ON PETITION FOR REHEARING EN BANC

(Opinion 7/19/17, 5 Cir., _____, _____ F.3d _____)

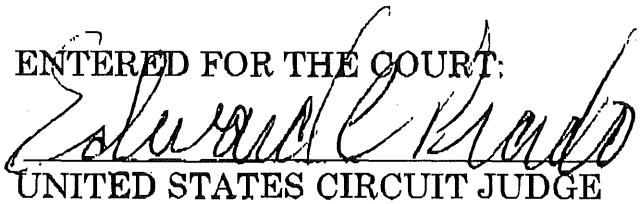
Before HIGGINBOTHAM, PRADO, and HAYNES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
June 19, 2017
Lyle W. Cayce
Clerk

No. 16-41483
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE ARMANDO RAMOS, also known as Jose Marquez-Ramos,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:16-CR-380-1

Before REAVLEY, OWEN, and ELROD, Circuit Judges.

PER CURIAM:*

Jose Armando Ramos appeals following his conviction for illegal reentry. He argues that his prior conviction for aggravated assault in violation of Texas Penal Code § 22.02 was improperly characterized as a crime of violence for purposes of U.S.S.G. § 2L1.2(b)(1)(A)(ii). He also argues that the entry of judgment under 8 U.S.C. § 1326(b)(2) was erroneous because Texas aggravated assault is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), which

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defines aggravated felony by reference to 18 U.S.C. § 16. Ramos failed to object to these determinations in the district court; therefore, we review for plain error. *See United States v. Henao-Melo*, 591 F.3d 798, 801 (5th Cir. 2009); *see also Puckett v. United States*, 556 U.S. 129, 135 (2009).

In *United States v. Guillen-Alvarez*, 489 F.3d 197, 199-01 (5th Cir. 2007), we held that a conviction for aggravated assault in violation of Texas Penal Code § 22.02 qualifies as the enumerated offense of aggravated assault, and, thus, a crime of violence for purposes of § 2L1.2(b)(1)(A)(ii). *Guillen-Alvarez* remains valid after *Mathis v. United States*, 136 S. Ct. 2243 (2016). *United States v. Shepherd*, 848 F.3d 425, 427-28 (5th Cir. 2017). We are bound by our own precedent unless and until that precedent is altered by a decision of the Supreme Court or this court sitting en banc. *See United States v. Setser*, 607 F.3d 128, 131 (5th Cir. 2010).

We have also rejected a challenge to the constitutionality of § 16(b) based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See United States v. Gonzalez-Longoria*, 831 F.3d 670, 672-79 (5th Cir.) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259). The grant of certiorari in *Lynch v. Dimaya*, 137 S. Ct. 31 (2016), does not alter our holding in *Gonzalez-Longoria*. *See Setser*, 607 F.3d at 131. The judgment of the district court is AFFIRMED.