No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JUAN BAUTISTA ROSAS CUELLAR and
DANIEL LARIOS-VILLATORO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. May collateral estoppel ever be applied offensively against a criminal defendant, to bar him from relitigating an issue resolved in a previous case?

II. Even if collateral estoppel may sometimes be applied offensively against a criminal defendant, does it bar the defendant from relitigating an issue as to which there has been an intervening change in the law?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in their respective cases.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit in each of petitioners' cases are reproduced in the appendix to this petition. *See* Pet. App. 1a-6a.

JURISDICTION

On September 20, 2018, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Mr. Cuellar's conviction and sentence. Pet. App. 1a-2a.

On April 4, 2017, the United States Court of Appeals for the Fifth Circuit entered its first judgment and opinion affirming Mr. Larios-Villatoro's conviction and sentence. Pet. App. 3a-4a. On May 14, 2018, this Court granted Mr. Larios-Villatoro's petition for a writ of certiorari, vacated the Fifth Circuit's judgment, and remanded for further consideration in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Subsequently on November 2, 2018, the Fifth Circuit entered a new judgment and opinion again affirming the conviction and sentence. Pet. App. 5a-6a.

This petition is filed within 90 days of the Fifth Circuit's final judgment in each case, and therefore is timely. See Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

Definitions

(a) As used in this chapter—

* * *

(43) The term "aggravated felony" means—

* * *

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph. . . .

8 U.S.C. § 1326(b)(2) provides in relevant part that, for previously removed aliens who illegally reenter the United States in violation of 8 U.S.C. § 1326(a), "in the case of any alien. . . (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under [Title 18], imprisoned not more than 20 years, or both . . . ."

United States Sentencing Guideline § 2L1.2 (2015) provides in pertinent part:

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

(b) Specific Offense Characteristic

(1) Apply the Greatest:

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

(C) a conviction for an aggravated felony, increase by **8** levels; . . . .

Application Note 1 to USSG § 2L1.2 provides in pertinent part: "For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in section 1101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43), without regard to the date of conviction for the aggravated felony."

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. The district court sentenced Mr. Cuellar to 23 months of imprisonment and a three-year term of supervised release. The district court sentenced Mr. Larios-Villatoro to 18 months of imprisonment and a three-year term of supervised release.[1]

The statutory maximum term of imprisonment for an illegal reentry offense under § 1326(a) is two years, which is enhanced to 10 years under § 1326(b)(1) if the prior deportation occurred after a conviction for a "a felony (other than an aggravated felony)" and is enhanced to 20 years under § 1326(b)(2) if the prior deportation occurred after a conviction for an "aggravated felony." *See* 8 U.S.C. § 1326. Further, under the pre-November 1, 2016 United States Sentencing Guidelines, a person who is convicted of illegal reentry faces an 8-level Guidelines enhancement if he had, prior to his deportation, a conviction for an "aggravated felony." *See* USSG § 2L1.2(b)(1)(C) (2015).

The term "aggravated felony" for both statutory and Guidelines purposes is defined in 8 U.S.C. § 1101(a)(43). An illegal-reentry conviction is itself an "aggravated felony" if it is "committed by an alien who was previously deported on the basis of a conviction for

[1] In the same proceeding, the district court imposed a consecutive 8-month prison sentence upon revocation of supervised release in another case, resulting in a total term of imprisonment of 26 months.

an offense described in another subparagraph of this paragraph," 8 U.S.C. § 1101(a)(43)(O)—that is, if the illegal reentry is itself committed after a conviction for another aggravated felony.

Both petitioners received the 8-level aggravated-felony sentencing enhancement, over their objections, based on the district court's determination that they had previously been convicted of illegal reentry after an aggravated felony conviction under 8 U.S.C. § 1326(b)(2). Accordingly, both petitioners faced the 20-year statutory maximum punishment under § 1326(b)(2) and the judgments entered by the district court in each of petitioners' cases reflects that petitioners were convicted of illegal reentry by a previously deported alien after an aggravated felony conviction, under 8 U.S.C. § 1326(b)(2).

Mr. Cuellar pleaded guilty in 2012 to illegal reentry after an aggravated felony conviction under § 1326(b)(2). The apparent basis for the aggravated-felony determination in the 2012 case was Mr. Cuellar's 2007 Texas conviction for delivery of a controlled substance. By the time of sentencing in Mr. Cuellar's current case, Fifth Circuit law was clear that, after this Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), a conviction for Texas delivery of a controlled substance no longer qualifies as an aggravated felony. *See United States v. Hinkle*, 832 F.3d 569, 574 (5th Cir. 2016). In the courts below, Mr. Cuellar argued that because of that change in the law, his 2012 illegal-reentry conviction likewise no longer qualified as a separate aggravated felony under § 1101(a)(43)(O). The district court nonetheless applied the 8-level aggravated-felony sentencing enhancement, based on the 2012 illegal-reentry conviction under 8 U.S.C. §

1326(b)(2).The judgment entered by the district court reflects that Mr. Cuellar was convicted of illegal reentry by a previously deported alien after an aggravated felony conviction, under 8 U.S.C. § 1326(b)(2).

Mr. Larios-Villatoro pleaded guilty in 2011 to illegal reentry after an aggravated felony conviction under § 1326(b)(2). The aggravated felony in that case was his 1996 Nebraska conviction for attempted arson. In the courts below, Mr. Larios-Villatoro argued that, in light of this Court's decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) that 18 U.S.C. § 16(b) is unconstitutionally vague, his 1996 Nebraska conviction for attempted arson offense no longer qualified as an aggravated felony, and therefore his subsequent illegal-reentry conviction was likewise not an aggravated felony. The district court applied the 8-level aggravated-felony sentencing enhancement, based on his 2011 illegal-reentry conviction under 8 U.S.C. § 1326(b)(2). The judgment entered by the district court reflects that Mr. Larios-Villatoro was convicted of illegal reentry by a previously deported alien after an aggravated felony conviction, under 8 U.S.C. § 1326(b)(2).

On appeal to the Fifth Circuit, both petitioners challenged the district court's aggravated-felony determination and the two consequences of that determination: the application of the 8-level aggravated-felony sentencing enhancement under USSG § 2L1.2 (2015), and the conviction, sentencing, and entry of judgment against them under 8 U.S.C. § 1326(b)(2). Both petitioners argued that, even if their predicate convictions had qualified as an aggravated felony at the time of their previously illegal-reentry conviction, intervening case law now made clear that none of their prior offenses qualified as an

aggravated felony, and accordingly that their prior illegal-reentry convictions could also not now qualify as separate aggravated felonies.

Fifth Circuit case law precluded petitioners from relitigating the aggravated-felony determinations reflected in Mr. Cuellar's 2012 judgment and Mr. Larios-Villatoro's 2011 judgment. *See United States v. Gamboa-Garcia*, 620 F.3d 546 (5th Cir. 2010); *see also United States v. Piedra-Morales*, 843 F.3d 623 (5th Cir. 2016). In both of petitioners' cases, the Fifth Circuit affirmed the convictions and sentences based on *Gamboa-Garcia*, which held that a defendant is precluded from relitigating a prior aggravated-felony determination, relying on the fact that a previous illegal-reentry judgment reflected that the defendant had pleaded guilty to a § 1326(b)(2) offense. *See id.* at 620 F.3d at 549; Pet. App. 1a-6a.

Although the Inmate Locator feature of the Federal Bureau of Prisons ("BOP") website reflects that Mr. Larios-Villatoro was released from BOP custody on October 11, 2017, Mr. Larios-Villatoro's release does not render this petition moot for two reasons. First, he received a term of supervised release and "this appeal raises a possibility of credit against the term of supervised release for improper imprisonment." *United States v. Flores-Juarez*, 723 Fed. Appx. 84, 86 (3d Cir. 2018) (citations omitted). Second, the district court's determination that Mr. Larios-Villatoro has an aggravated felony conviction is reflected in the judgment and has adverse collateral consequences that survive the expiration of his sentence. *See United States v. Gonzalez-Longoria*, 831 F.3d 670, 674 n.2 (5th Cir. 2016) (en banc) (holding that defendant's release from custody did not render his

appeal of his "aggravated felony" determination moot because an "'aggravated felony' determination [ ] renders [defendant] permanently inadmissible to the United States (among other repercussions), a 'collateral consequence' that [defendant] has a concrete and ongoing interest in avoiding"), *rev'd on other grounds by Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

REASONS FOR GRANTING THE PETITION

I. The Court should grant certiorari to resolve the important and divisive question of whether the doctrine of collateral estoppel/issue preclusion may be applied offensively against a criminal defendant.

In petitioners' cases, the Fifth Circuit, following the lead of its decisions in *United States v. Gamboa-Garcia*, 620 F.3d 546 (5th Cir. 2010), and *United States v. Piedra-Morales*, 843 F.3d 623 (5th Cir. 2016), refused to let petitioners relitigate their "aggravated felon" status. The Fifth Circuit held that Mr. Cuellar was bound by his 2012 plea to, and conviction under, 8 U.S.C. § 1326(b)(2), and that Mr. Larios-Villatoro was similarly bound by his 2011 plea and conviction. Pet. App. 1a-6a. In *Gamboa-Garcia*, the Fifth Circuit cited no authority or legal doctrine in support of its holding that a defendant is bound by a prior plea to a § 1326(b)(2) offense, and may not relitigate the aggravated-felony determination in a subsequent case. *See Gamboa-Garcia*, 620 F.3d at 549. And the Fifth Circuit cited no authority in *Piedra-Morales* except *Gamboa-Garcia* itself. *See Piedra-Morales*, 843 F.3d at 624-25. However, the holdings of *Gamboa-Garcia* and *Piedra-Morales* must rest upon some theory of collateral estoppel, or issue preclusion.

"Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citation omitted). "Collateral estoppel . . . has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy

and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979) (citation omitted).

This Court has noted, however, that collateral estoppel/issue preclusion should be applied much more cautiously in criminal cases than in civil cases, because "'[t]he public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases . . . .'" *Standefer v. United States*, 447 U.S. 10, 25 (1980) (citation omitted). Put another way, a criminal case usually "involves competing policy considerations that outweigh the economy concerns that undergird the estopel doctrine." *Id.* (citations omitted); *see also Ashe v. Swenson*, 397 U.S. 436, 464 (1970) (Burger, C.J., dissenting) ("Very properly, in criminal cases, finality and conservation of private, public, and judicial resources are lesser values than in civil litigation."). Especially problematic in criminal cases is whether the government may use collateral estoppel/issue preclusion "offensively. . . to prevent a defendant from relitigating issues resolved in the earlier proceeding." *Parklane Hosiery*, 439 U.S. at 326 (footnote omitted).

The circuits are divided on whether offensive collateral estoppel is appropriate against a criminal defendant. The Third, Tenth, and Eleventh Circuits have squarely held that the government may not collaterally estop a criminal defendant from relitigating an issue decided against the defendant in a prior proceeding. *See United States v. Gallardo-Mendez*, 150 F.3d 1240, 1241-42 (10th Cir. 1998); *United States v. Pelullo*, 14 F.3d 881, 889 (3d Cir. 1994); *United States v. Harnage*, 976 F.2d 633, 636 (11th Cir. 1992). By contrast, in addition to *Gamboa-Garcia* and *Piedra-Morales*, only the Eighth Circuit has

allowed the use of collateral estopped against a defendant in a criminal case. *See United States v. Rosenberger*, 872 F.2d 240, 242 (8th Cir. 1989).

Multiple circuits have refused to apply collateral estoppel/issue preclusion against a criminal defendant. The Eleventh Circuit has held that a criminal defendant could not be collaterally estopped from relitigating a suppression issue resolved against the defendant in a previous case, expressly holding that "the government may not collaterally estop a criminal defendant from relitigating an issue decided against the defendant in a different court in a prior proceeding." *Harnage*, 976 F.2d at 636. The Eleventh Circuit was unconvinced "that allowing the government to bar a defendant from relitigating an unfavorable determination of the facts in a prior proceeding would serve the original goal of collateral estoppel—judicial economy," and "realize[d] that a defendant's due process rights would also be implicated should the government be allowed to use the doctrine of collateral estoppel." *Id.* at 635, 636 n.2.

Similarly, the Third Circuit has held that in a retrial after appellate remand, the district court erred by giving collateral-estoppel effect to one of the convictions in the same case, which was used as an element of a RICO charge. *See Pelullo*, 14 F.3d at 889. The Third Circuit observed that "[n]either the Supreme Court nor this court has addressed directly the issue of whether collateral estoppel can be applied against the defendant in a criminal case," *id.* at 890, but also noted that "there has been a strong, unelaborated assumption that the doctrine of collateral estoppel cannot be invoked in criminal cases against the defendant." *Id.* at 891. That circuit ultimately held that "applying collateral

estoppel against the defendant in a criminal case interferes with the power of the jury to determine every element of the crime, impinging upon the accused's right to a jury trial," which "is constitutionally invalid." *Id.* at 896; *see also id.* at 894 n.7 ("applying collateral estoppel against the defendant to establish an element of the criminal offense is not a procedural matter, but an interference with the essential function of the jury").

Most relevant to petitioners' circumstances in these cases, the Tenth Circuit has also prohibited the use of collateral estopped against a criminal defendant, holding that a district court had erred by giving collateral-estoppel effect to a defendant's prior guilty plea to, and conviction of, illegal reentry. *See Gallardo-Mendez*, 150 F.3d at 1241-42. That court concluded that the defendant could not be barred from relitigating the alienage element of illegal reentry after deportation, holding that "the government may not use a judgment following a plea of guilty to collaterally estop a criminal defendant from relitigating an issue in a subsequent criminal proceeding." *Id.* at 1246.

The Ninth Circuit, overruling precedent, has adopted the government's concession that "[i]n federal criminal trials, the United States may not use collateral estoppel to establish, as a matter of law, an element of an offense or to conclusively rebut an affirmative defense on which the Government bears the burden of proof beyond a reasonable doubt." *United States v. Arnett*, 353 F.3d 765, 766 (9th Cir. 2003) (en banc) (per curiam order); *see also, e.g., United States v. Smith-Baltiher*, 424 F.3d 913, 920 (9th Cir. 2005).

On the other side of the issue, besides the Fifth Circuit in *Gamboa-Garcia* and *Piedra-Morales*, counsel has located only one Eighth Circuit case that has permitted offensive use of collateral estoppel/issue preclusion against a criminal defendant. In *Rosenberger*, the Eighth Circuit held that a tax-evasion defendant was collaterally estopped from relitigating a suppression issue that he had lost in a pre-indictment proceeding on a motion for return of property. *See Rosenberger*, 872 F.2d at 242. Tellingly, the Eighth Circuit cited only civil cases in support of its holding, and it gave very cursory treatment to the question whether collateral estoppel/issue preclusion should be applied differently in criminal cases. *See id.*

Besides dividing the circuits, the application of collateral estoppel/issue preclusion in criminal cases—especially the offensive use of collateral estoppel/issue preclusion to shut down a defense argument on guilt/innocence or punishment—is an important question that this Court has not yet considered, but should consider. Adherence in criminal cases to a strict, civil-law-like collateral-estoppel/issue-preclusion doctrine prioritizes "the concern for judicial economy" over "[t]he public interest in the accuracy and justice of criminal results"—exactly the opposite of the order of priorities set out by this Court in *Standefer*, 447 U.S. at 25. Because the Fifth Circuit's application of collateral estoppel/issue preclusion in these cases likewise reflects these misordered priorities, this Court should grant the writ of certiorari to consider whether the doctrine of collateral estoppel/issue preclusion may be applied offensively against a criminal defendant.

II. Even if the doctrine of offensive collateral estoppel/issue preclusion could apply, it is well settled that collateral estoppel/issue preclusion will not bar relitigation of a previously decided issue where there has been an intervening change in the controlling law. Because that is the case here, this Court should summarily reverse the judgments below regardless whether the Court chooses to address the first question presented.

As explained in the discussion above, the circuits are divided on the important question of whether collateral estoppel/issue preclusion may be applied offensively against a criminal defendant. But even if that question is answered in the affirmative, it was still wrong for the Fifth Circuit to bar Mr. Cuellar and Mr. Larios-Villatoro from relitigating their aggravated-felon status. Both cases plainly fall into a well-established exception to collateral estoppel/issue preclusion: an intervening change in the law. Even if collateral estoppel/issue preclusion may, as a general rule, be applied to criminal defendants, it would still be error to apply the doctrine to petitioners, where there have been intervening changes in the law which altered the aggravated-felony determinations.

The following facts about Mr. Cuellar's case will illustrate the point. At the time of his 2012 conviction for illegal reentry, his 2007 Texas conviction for delivery of a controlled substance could have qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(B), pursuant to Fifth Circuit law which allowed courts to apply a modified categorical approach to the Texas delivery statute. *See United States v. Ford*, 509 F.3d 714, 717 (5th Cir. 2007); *see also United States v. Tanksley*, 848 F.3d 347, 351 (5th Cir.), *supplemented*, 854 F.3d 284 (5th Cir. 2017) (discussing *Ford*). But if the statute were indivisible, the offense does not qualify because it can be committed via a mere offer to

sell a controlled substance, without requiring possession of the controlled substance, which "is tantamount to solicitation" and is not an aggravated felony. *See United States v. Ibarra-Luna*, 628 F.3d 712, 716 (5th Cir. 2010). After this Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Fifth Circuit recognized that the Texas delivery statute is in fact indivisible. *See Tanksley*, 848 F.3d at 350-52; *United States v. Hinkle*, 832 F.3d 569, 574-76 (5th Cir. 2016). After *Tanksley* and *Hinkle*, it is clear that the Texas delivery offense categorically does not qualify as an aggravated felony. *See United States v. Ayala-Nunez*, 714 Fed. Appx. 345, 351 (5th Cir. 2017) (unpublished). Because the 2007 Texas delivery offense is no longer an aggravated felony, Mr. Cuellar's prior 2012 illegal-reentry conviction was not subsequent to any aggravated felony, and accordingly cannot itself qualify as an aggravated felony under § 1101(a)(43)(O).

Mr. Larios-Villatoro's circumstances are similar. At the time of his 2011 illegal-reentry conviction, his 1996 Nebraska conviction for attempted arson could have qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) and 18 U.S.C. § 16(b), which covers any felony "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." But this Court's decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), held that § 16(b) is unconstitutionally vague.[2] Thus, at the time of this appeal, Mr. Larios-Villatoro's 1996

[2] The Nebraska offense could not have qualified as an "aggravated felony" under 18 U.S.C. § 16(a) because it does not require as an element of the offense that the object of the arson be another person's property. *See* Neb. Rev. Stat. § 28-503(2)(a) (1995); *Sarmientos v. Holder*, 742 F.3d 624, 631 (5th Cir. 2014) (holding that an affirmative defense cannot substitute for an element of the qualifying offense).

Nebraska conviction could not have qualified as an aggravated felony under the invalidated § 16(b). Because the 1996 Nebraska arson offense is no longer an aggravated felony, Mr. Larios-Villatoro's prior 2011 illegal-reentry conviction was not subsequent to any aggravated felony, and accordingly cannot itself qualify as an aggravated felony under § 1101(a)(43)(O).

It is axiomatic that "relitigation of [an] issue in a subsequent action between the parities is not precluded [where] . . . . [t]he issue is one of law and . . . a new determination is warranted in order to take account of an intervening change in the applicable legal context . . . ." Restatement (Second) of Judgments § 28 (1982 & Oct. 2016 Update). "So long as there has been sufficient change to suggest that a new issue of law application is presented, preclusion should be defeated unless there are compelling concerns of repose or reliance." 18 Wright, Miller, Cooper, et al., Federal Practice & Procedure—Jurisdiction and Related Matters § 4425 (3d ed. & Jan. 2017 Update). This Court has likewise held that "a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable." *Commissioner of Internal Revenue Service v. Sunnen*, 333 U.S. 591, 600 (1948) (footnote omitted). In such a case, "the supervening decision cannot justly be ignored by blind reliance upon the rule of collateral estoppel." *Id.* (citations omitted).

In each of petitioners' cases, intervening changes in the law have changed the aggravated-felon question. Since the time of the 2012 aggravated-felony determination in Mr. Cuellar's case and the 2011 aggravated-felony determination in Mr. Larios-Villatoro's

case, intervening law has made it clear that the prior aggravated-felony determinations were erroneous. Thus, even if collateral estoppel/issue preclusion would normally bar petitioners from relitigating the characterization of their prior illegal-reentry convictions as aggravated felonies, there should be no such bar in these cases. Accordingly, this Court should grant certiorari and summarily reverse the judgment below.

CONCLUSION

This Court should grant the petition for certiorari.

Date: December 14, 2018

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
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Lyle W. Cayce
Clerk

No. 18-20109
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JUAN BAUTISTA ROSAS CUELLAR,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CR-405-1

Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

Juan Bautista Rosas Cuellar appeals the within-Guideline 23-month sentence for illegal reentry after an aggravated felony conviction, under 8 U.S.C. § 1326(a) & (b)(2). The district court imposed an 8-level enhancement under former U.S.S.G. § 2L1.2(b)(1)(C) because Cuellar's prior, 2012 illegal reentry offense was an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(O). Cuellar argues that the district court erroneously imposed the § 2L1.2

* 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.

enhancement because the offense underlying his 2012 illegal reentry offense, a Texas offense for delivery of a controlled substance, is not an aggravated felony and thus his 2012 illegal reentry offense is not an aggravated felony. He concedes, however, that his argument is foreclosed by circuit precedent, and he advances it to preserve it for further appellate review.

The Government has filed an unopposed motion for summary affirmance, requesting alternatively an extension of time to file its brief. Summary affirmance is proper where, among other instances, "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

In *United States v. Gamboa-Garcia*, 620 F.3d 546, 549 (5th Cir. 2010), we concluded that the sentencing court was entitled to refer to a prior illegal reentry conviction as an aggravated felony without revisiting whether the underlying prior conviction was an aggravated felony. We emphasized that, in pleading guilty to his prior illegal reentry offense, the defendant acknowledged that he was subject to § 1326(b)(2) because of a prior aggravated felony conviction. *Id.* The circumstances of Cuellar's plea "eliminate[] the interpretive question []he raises here." *See id.* Accordingly, the parties are correct that Cuellar's challenge is foreclosed. *See also United States v. Piedra-Morales*, 843 F.3d 623, 624-25 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1361 (2017).

In view of the foregoing, the Government's motion for summary affirmance is GRANTED. The Government's alternative motion for an extension of time to file a brief is DENIED AS UNNECESSARY. The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 4, 2017
Lyle W. Cayce
Clerk

No. 16-20194
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DANIEL LARIOS-VILLATORO,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:15-CR-629-1

Before JONES, WIENER, and CLEMENT, Circuit Judges.

PER CURIAM:*

Daniel Larios-Villatoro appeals the 18-month sentence imposed when he pleaded guilty to being in the United States illegally after being deported. He contends that his offense level was improperly increased by eight levels due to a 2011 conviction for illegal reentry. He argues that the previous illegal reentry conviction should not have been treated as an "aggravated felony" because the 1996 Nebraska attempted-arson conviction that rendered the

* 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.

illegal reentry aggravated was itself not an aggravated felony. We need not revisit the underlying Nebraska felony because Larios-Villatoro concedes that the prior illegal reentry offense was an aggravated felony when he pleaded guilty in 2011. *See United States v. Gamboa-Garcia*, 620 F.3d 546, 548-49 (5th Cir. 2010).

Moreover, Larios-Villatoro fails to show that the Nebraska conviction was not an aggravated felony. He contends that could only qualify as an aggravated felony under the residual definition of "crime of violence" found at 18 U.S.C. § 16(b), which he says is unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). That contention is foreclosed. *See United States v. Gonzalez-Longoria*, 831 F.3d 670, 675-77 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259). The Government's motion for summary affirmance is granted. We deny, as unnecessary, its alternative motion for an extension of time for briefing, and we affirm the judgment of the district court.

Larios-Villatoro moves for a stay of the appeal until the Supreme Court decides whether § 16(b) is unconstitutionally vague in *Lynch v. Dimaya*, 137 S. Ct. 31 (2016) (granting certiorari). The motion is denied. *Gonzalez-Longoria* is binding precedent unless overruled by this court en banc or by the Supreme Court. *See United States v. Lipscomb*, 299 F.3d 303, 313 & n.34 (5th Cir. 2002). A grant of certiorari does not in itself override this court's precedent. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

JUDGMENT AFFIRMED; MOTION FOR SUMMARY AFFIRMANCE GRANTED; MOTION FOR AN EXTENSION OF TIME DENIED, MOTION TO STAY APPEAL DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
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Clerk

No. 16-20194
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DANIEL LARIOS-VILLATORO,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:15-CR-629-1

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before JONES, WIENER, and CLEMENT, Circuit Judges.

PER CURIAM:*

Daniel Larios-Villatoro appealed the sentence imposed after he pleaded guilty to being in the United States illegally. *See United States v. Larios-Villatoro*, 684 F. App'x 411, 412 (5th Cir. 2017), *vacated*, 138 S. Ct. 1980 (2018). He contended that a sentence increase was improperly based on a 2011 conviction for illegal reentry that qualified as an "aggravated felony" due to a

* 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.

1996 Nebraska conviction for attempted arson. The Nebraska conviction was also regarded as an aggravated felony because it was a "crime of violence." *See* 8 U.S.C. § 1101(a)(43)(F) & (O). Larios-Villatoro argued that the Nebraska crime was not a crime of violence under 8 U.S.C. § 16(b) so that neither that offense nor the 2011 illegal reentry qualified as aggravated felonies.

We affirmed, holding in part that a challenge to the characterization of the Nebraska conviction based on the alleged unconstitutionality of § 16(b) was foreclosed by *United States v. Gonzalez-Longoria*, 831 F.3d 670, 675-77 (5th Cir. 2016) (en banc), *vacated*, 138 S. Ct. 2668 (2018). *See Larios-Villatoro*, 684 F. App'x at 412. But we also held that there was no need to "revisit the underlying Nebraska felony because Larios-Villatoro [had conceded] that the prior illegal reentry offense was an aggravated felony when he pleaded guilty in 2011." *Larios-Villatoro*, 684 F. App'x at 412 (citing *United States v. Gamboa-Garcia*, 620 F.3d 546, 548-49 (5th Cir. 2010)).

However, the Supreme Court subsequently abrogated *Gonzalez-Longoria* by holding that § 16(b) is unconstitutional. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1214-15 (2018). The Court then granted certiorari in the instant case and remanded for our additional consideration in light of *Dimaya*. *Villatoro v. United States*, 138 S. Ct. 1980 (2018).

Dimaya precludes reliance on *Gonzalez-Longoria*. It does not, however, undermine our reasoning that reexamining the Nebraska conviction remains foreclosed because the 2011 judgment specifically showed that Larios-Villatoro pleaded guilty under § 1326(b)(2) to an illegal reentry that was an aggravated felony. *See United States v. Piedra-Morales*, 843 F.3d 623, 624-25 (5th Cir. 2016) (citing *Gamboa-Garcia*, 620 F.3d at 548-49), *cert. denied*, 137 S. Ct. 1361 (2017)). Accordingly, the judgment is AFFIRMED on the alternative ground identified in our prior opinion in this case.