No. 19-6055

IN THE SUPREME COURT OF THE UNITED STATES

EDWIN RICARDO FLORES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's collateral challenge to a prior removal order in the context of his prosecution for being an alien unlawfully found in the United States after removal, in violation of 8 U.S.C. 1326, was properly rejected on the ground that his prior California felony conviction for receipt of stolen property was an aggravated felony under 8 U.S.C. 1101(a)(43)(G).

2. Whether the court of appeals erroneously deferred to the Board of Immigration Appeals' interpretation of Section 1101(a)(43)(G) under Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Cal.):

United States v. Flores, No. 15-cr-0268 (Mar. 3, 2016)

United States Court of Appeals (9th Cir.):

United States v. Flores, No. 16-50096 (Aug. 28, 2018)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 901 F.3d 1150.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2018. A petition for rehearing was denied on April 24, 2019 (Pet. App. B1). On July 12, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 21, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of California, petitioner was convicted of being an alien unlawfully found in the United States after a prior removal, in violation of 8 U.S.C. 1326. Judgment 1. He was sentenced to 40 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A17.

1. Petitioner is a citizen of Mexico who has repeatedly entered the United States illegally, committed crimes in the United States, and been removed. See Pet. App. A5-A6 & nn.1-2. Among other crimes, petitioner was convicted in California state court in 2001 of three felony counts of receiving stolen property, in violation of California Penal Code § 496(a) (West 2000), and was sentenced to two years of imprisonment. Pet. App. A5 & n.1. In September 2002, following petitioner's release, the Immigration and Naturalization Service ordered petitioner removed on the ground that his California conviction for receipt of stolen property qualified as an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq. Pet. App. A5-A6. The INA defines the term "'aggravated felony'" to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G) (footnote omitted).

Between 2002 and 2009, petitioner was found in the United States, and had his administrative order of removal reinstated, three more times. Pet. App. A6. In 2009, after he presented a counterfeit identification document at a port of entry, petitioner was removed following expedited removal proceedings. Ibid. After that removal, petitioner illegally reentered the United States, and was removed, several more times. Id. at A6 n.2. Most recently, petitioner attempted to reenter the United States in January 2015, but was apprehended about half a mile north of the United States-Mexico border. Id. at A6; Presentence Investigation Report (PSR) ¶ 5.

2. A federal grand jury indicted petitioner on one count of being an alien unlawfully found in the United States after a prior removal, in violation of 8 U.S.C. 1326(a) and (b). Indictment 1-2. Petitioner moved to dismiss the indictment under 8 U.S.C. 1326(d), arguing that his administrative removal in 2002 was an invalid predicate order of removal because it rested on the theory that receipt of stolen property in violation of California law was an aggravated felony, and that his expedited removal in 2009 was also an invalid predicate because his due-process rights had been violated. Pet. App. A6.

The district court denied petitioner's motion to dismiss. Pet. App. A6. Petitioner was convicted following a bench trial. Ibid. In calculating petitioner's sentencing range under the

Sentencing Guidelines, the court applied an eight-level sentencing enhancement under Sentencing Guidelines § 2L1.2(b)(1)(C) (2015), on the ground that petitioner's prior California felony convictions for receiving stolen property were aggravated felonies under the Guidelines. Sent. Tr. 3; see PSR ¶ 13. The court sentenced petitioner to 40 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. A1-A17.

The court of appeals rejected petitioner's contention that his 2002 administrative order of removal was an invalid predicate for his conviction. Pet. App. A7-A12. The court observed that the INA defined an "aggravated felony" to include "'a theft offense (including receipt of stolen property),'" and that petitioner had been convicted in California of receiving stolen property. Id. at A7-A8 (citation omitted). The court rejected petitioner's contention that, because the court had previously interpreted "theft offense" to require a lack of consent on the part of the original owner, and because California defined receipt of stolen property to include of receipt of property taken with the consent of the owner (for instance, through fraud rather than through larceny), California's offense of receipt of stolen property did not constitute "a theft offense (including receipt of stolen property)." Id. at A7-A10 (citation omitted).

Perceiving "inherent ambiguity" in the word "including," the court of appeals explained that Congress could have used the term "to add a theft-related crime, receipt of stolen property, into the list of qualifying offenses even though it may not otherwise technically be a generic 'theft offense.'" Pet. App. A8. The court explained that "[r]eading 'including' in this way is consistent with the distinct function of the term 'stolen' in 'receipt of stolen property'" because, "unlike the adjective 'theft' in 'theft offense,' which indicates the nature of the offender's conduct, 'stolen' describes the nature of the property involved in the offense, independent of the offender's conduct." Ibid. Invoking Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the court deferred to the interpretation adopted by the Board of Immigration Appeals (BIA) and determined that "'receipt of stolen property' is a distinct aggravated felony independent of theft and the property received need not have been stolen by means of 'theft' as generically defined." Pet. App. A10. The court then found that the elements of the California offense categorically match the elements of the generic crime of receipt of stolen property, as defined by the BIA. Id. at A10-A12.

The court of appeals separately rejected petitioner's contention that his 2009 expedited removal order was an invalid predicate for his conviction. Pet. App. A12-A15. The court

explained that, even assuming that petitioner was correct that his due-process rights were violated at the expedited-removal proceeding, petitioner had failed to demonstrate prejudice from the violation. Id. at A13-A14.

ARGUMENT

Petitioner contends (Pet. 6-12) that receipt of stolen property in violation of California law does not qualify as an aggravated felony under the INA. Petitioner also contends (Pet. 12-17) that the court of appeals erred in deferring to the BIA's interpretation of the INA. The court of appeals correctly affirmed petitioner's conviction and its decision does not implicate any conflict with a decision of another court of appeals that would warrant this Court's review. Moreover, this case would be an unsuitable vehicle for reviewing petitioner's contentions, because an alternative ground that petitioner has not challenged here independently supports the judgment below. Further review is unwarranted.

1. Petitioner's challenge to the classification of California's offense of receipt of stolen property as an aggravated felony does not warrant this Court's review.

a. The INA "lists a set of offenses" -- known as "aggravated felon[ies]" -- "conviction for any one of which subjects certain aliens to removal from the United States." Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185 (2007); see 8 U.S.C. 1101(a)(43). As

a general matter, the courts of appeals use a "'categorical approach'" to determine "whether a conviction * * * falls within the scope of a listed offense." 549 U.S. at 185-187 (citation omitted). The courts have concluded that, in the present context, that approach generally requires courts "to come up with a 'generic' version of a crime" -- "that is, the elements of 'the offense as commonly understood'" -- and to "ask whether the elements of the state offense match those of the generic crime." Shular v. United States, No. 18-6662, 2020 WL 908904, at *2-*3 (Feb. 26, 2020) (citation omitted); see Duenas-Alvarez, 549 U.S. at 186-187.

The INA defines the term "aggravated felony" to include "a theft offense (including receipt of stolen property)." 8 U.S.C. 1101(a)(43)(G). The court of appeals defined the generic offense of "'receipt of stolen property'" to require "receipt, possession, concealment, or retention of property," "knowledge or belief that the property has been stolen," and "intent to deprive the owner of his property." Pet. App. A11 (quoting In re Deang, 27 I. & N. Dec. 57, 59-63 (B.I.A. 2017)); see 3 Wayne R. LaFave, Substantive Criminal Law, § 20.2(a) (3d ed. 2018) ("[T]he usual definition of the crime requires (1) the receiving of (2) stolen property, (3) knowing it to be stolen property, and (4) done with intent to deprive the owner of his property."); Model Penal Code § 223.6(1) (1980) ("A person is guilty of theft if he purposely receives,

retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with purpose to restore it to the owner.").

The court of appeals correctly determined that the generic crime of receipt of stolen property does not require a further showing that the property was originally taken without the owner's consent (for instance, through larceny) rather than with the owner's consent (for instance, through fraud). See Pet. App. A5. The Model Penal Code explains that "it is inappropriate to make the liability of the receiver turn on the method by which the original thief acquired the property" and that "[n]ew codes and proposals have unanimously so provided." Model Penal Code § 223.6 cmt. 4(c), at 241 (1980). And a "survey of state law indicates that most jurisdictions broadly define 'stolen'" in the offense of receipt of stolen property "beyond the common law offenses of theft and larceny to include property obtained by [other] unlawful means." In re Alday-Dominguez, 27 I. & N. Dec. 48, 51 n.6 (B.I.A. 2017).

Petitioner contends that the courts of appeals have generally agreed that a generic "theft offense" requires "a taking of property 'without consent,'" and he argues that such a requirement must also carry forward to the phrase "including receipt of stolen property." Pet. 7 (citations omitted). That contention is

mistaken. Multiple courts of appeals have in fact explained that "the modern, generic and broad definition of the entire phrase 'theft offense (including receipt of stolen property)' [requires] a taking of property or an exercise of control over property without consent." Hernandez-Mancilla v. INS, 246 F.3d 1002, 1009 (7th Cir. 2001) (emphasis added); see Burke v. Mukasey, 509 F.3d 695, 697 (5th Cir. 2007); United States v. Vasquez-Flores, 265 F.3d 1122, 1125 (10th Cir. 2001), cert. denied, 534 U.S. 1165 (2002). So long as the defendant controls the property -- e.g., by receiving it without consent -- it does not matter whether consent existed at the time of the original taking. See Burke, 509 F.3d at 697; Vasquez-Flores, 265 F.3d at 1125; Hernandez-Mancilla, 246 F.3d at 1009. And since receipt of stolen property "entail[s] a knowing exercise of control over another's property without consent," it qualifies as a generic theft offense. Vasquez-Flores, 265 F.3d at 1125; see Verdugo-Gonzalez v. Holder, 581 F.3d 1059, 1061 (9th Cir. 2009).

Contrary to petitioner's contention (Pet. 11-12), that interpretation provides "independent significance" to 8 U.S.C. 1101(a)(43)(M)(i), which defines "'aggravated felony'" to include "an offense that * * * involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." See Nijhawan v. Holder, 557 U.S. 29, 40 (2009); Pet. 10-12. The provision at issue here, 8 U.S.C. 1101(a)(43)(G), applies only to certain offenses

for which the term of imprisonment is at least one year; the provision petitioner cites, by contrast, applies only to certain offenses for which the loss exceeds $10,000. Those subsections (and others in Section 1101(a)(43)) overlap to some degree, but such an overlap is unproblematic because a particular conviction can qualify as an "aggravated felony" under multiple provisions. See Al-Sharif v. United States Citizenship & Immigration Services, 734 F.3d 207, 210 (3d Cir. 2013) (en banc).

b. Petitioner contends the court of appeals' decision has "created a circuit split over whether lack of consent is an element of" the generic offense in Section 1101(a)(43)(G). Pet. 7 (emphasis omitted). Contrary to petitioner's contention (Pet. 9), however, the decision below does not conflict with the Fifth Circuit's decision in Burke v. Mukasey, supra, the Seventh Circuit's decision in Hernandez-Mancilla v. INS, supra, or the Tenth Circuit's decision in United States v. Vasquez-Flores, supra. In each of those cases, the court concluded, as the court of appeals here did, that a state crime of receipt of stolen property was an aggravated felony, reasoning in each case that the crime involved "exercise of control over property without consent." Hernandez-Mancilla, 246 F.3d at 1009; see Burke, 509 F.3d at 697; Vasquez-Flores, 265 F.3d at 1125 (same). In none of those cases did the court suggest, as petitioner asserts here,

that the generic offense of receipt of stolen property requires a showing that the original taking was without consent.

Petitioner also relies on Mena v. Lynch, 820 F.3d 114 (4th Cir. 2016). There, a divided panel concluded that an alien's conviction for receipt of embezzled property under 18 U.S.C. 659 was not a "theft offense" because embezzlement involves property "that came into the initial wrongdoer's hands with the owner's consent." 820 F.3d at 119-120. The court considered itself bound by its decision in Soliman v. Gonzales, 419 F.3d 276 (4th Cir. 2005), which concluded that a conviction for fraudulent use of a credit card did not categorically constitute a "theft offense" because the relevant statute covered activities that did not "involve[] the 'taking of property.'" Id. at 285; see id. at 285-286. But as the dissent in Mena explained, Soliman involved a statute prohibiting credit card fraud, and the court thus "did not consider how to evaluate receipt offenses under the INA." Mena, 820 F.3d at 123 (Wilkinson, J., dissenting). But to the extent that the Fourth Circuit's conclusion that receipt of embezzled property does not qualify as an aggravated felony might suggest that it would reach a similar conclusion if presented with the California receipt-of-stolen-property offense here, that tension does not warrant this Court's review.

2. A writ of certiorari also is not warranted to review petitioner's contention (Pet. 12-17) that the court of appeals

erroneously deferred to the BIA's interpretation of the INA in determining that California's offense of receipt of stolen property matched the generic offense of receipt of stolen property. The result in this case does not turn on that issue. For the reasons just explained, the ordinary rules of statutory interpretation establish that the generic offense of receipt of stolen property does not require a taking without the consent of the owner. It was thus unnecessary for the court of appeals to resort to deference to uphold the government's interpretation, and the validity of petitioner's conviction does not depend on such deference.

In addition, petitioner's characterization of the decision below (Pet. 13-17) is inapt. The government did not seek and the court of appeals did not grant any deference with respect to the substantive criminal statute that petitioner was charged with violating: 8 U.S.C. 1326, which prohibits reentry after a previous removal. Rather, in the course of this criminal case, petitioner "collaterally attack[ed] his underlying 2002 removal order" on the ground that that earlier order rested on an incorrect interpretation of the aggravated-felony provision. Pet. App. A7. That underlying aggravated-felony provision appears in a civil immigration statute, and it was entered in a civil removal proceeding.

3. In any event, this case would be an unsuitable vehicle for reviewing petitioner's contentions, because the Ninth Circuit also rested its judgment on an alternative ground that petitioner has not challenged. To establish an illegal reentry under Section 1326, the government must prove that petitioner had been removed and thereafter entered the United States. 8 U.S.C. 1326(a). One predicate removal suffices, but in this case, the government identified two independent predicates: petitioner's removal in 2001 and his removal in 2009. See Pet. App. A12-A15. Petitioner's arguments in this Court concern the 2001 removal order, but the court of appeals determined that the 2009 removal order was also a valid predicate, and petitioner has not sought review of the latter determination. See ibid. Petitioner accordingly has forfeited any challenge to that alternative determination, which fully suffices to support the court of appeals' judgment affirming petitioner's conviction. See Sup. Ct. R. 14.1(a); Radzanower v. Touche Ross & Co., 426 U.S. 148, 151 n.3 (1976); see also Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945) (explaining that this Court's "power is to correct wrong judgments, not to revise opinions," and that, "if the same judgment would be rendered" by the court below "after [this Court] corrected" one part of its opinion, review would be "advisory").

Petitioner acknowledges (Pet. 26) that "it might appear superficially that the conviction could be affirmed without

reaching [the] aggravated-felony questions because was another removal order." Petitioner seeks to overcome that problem by arguing (ibid.) that "the validity of the [other] removal order also depends on the aggravated-felony question." But contrary to petitioner's contention (Pet. 27), the court of appeals did not "focus[] on the aggravated-felony determination to conclude that" petitioner had not demonstrated "the necessary prejudice" to set aside the 2009 removal order. Although it mentioned the determination in a footnote, Pet. App. 14 n.1, its consideration focused on petitioner's "extensive criminal history" as a whole as well as his numerous unlawful entries, factors that petitioner "concede[d]" weighed against him. Pet. App. A13-A14.

Petitioner also argues that the court of appeals' resolution of the aggravated-felony question was "essential to [his] sentence," "because, under the 'illegal reentry' Guideline that applied at [his] sentencing, the eight-level enhancement he received depended on the 'aggravated felony' determination." Pet. 23 (emphasis omitted). Petitioner, however, has already served the entire term of imprisonment to which that Guideline was relevant. Furthermore, this Court typically declines to review contentions that district courts misinterpreted or misapplied the Sentencing Guidelines. Braxton v. United States, 500 U.S. 344, 348 (1991). The Court instead typically leaves questions regarding the meaning of the Guidelines to the Sentencing Commission, which

is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Ibid.

The Guidelines provision at issue here exemplifies that process. Effective November 1, 2016, the Sentencing Commission adopted an amendment to Section 2L1.2 that eliminates any need to categorize a defendant's pre-removal conviction as an aggravated or non-aggravated felony. See Sentencing Guidelines App. C Supp., Amend. 802. As applied to petitioner, the current Guidelines would require the same eight-level upward adjustment that petitioner received under the 2015 Guidelines provision that petitioner challenges. See Sentencing Guidelines § 2L1.2(b)(2). Petitioner identifies no sound reason for this Court to review the interpretation and application of a superseded provision of the Guidelines that was relevant only to a term of imprisonment that he has already completed.

Indeed, even invalidating petitioner's conviction under Section 1326 would have limited practical significance. Although convictions ordinarily have "collateral consequences adequate to meet Article III's injury-in-fact requirement," Spencer v. Kemna, 523 U.S. 1, 14 (1998), any collateral consequences in petitioner's case are attenuated. Here, petitioner was removed from the United States after his term of imprisonment concluded. Petitioner's limited stake in the resolution of the questions he raises is

further reason that his case is a poor vehicle for review of those questions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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