

NO. 16-6259

IN THE SUPREME COURT OF THE UNITED STATES

GREGORIO GONZALEZ-LONGORIA,
Petitioner,

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 REHEARING

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PETITION FOR REHEARING

Pursuant to Sup. Ct. R. 44.2, petitioner Gregorio Gonzalez-Longoria (“petitioner” or “Mr. Gonzalez-Longoria”) respectfully petitions this Court for an order (1) granting rehearing, (2) vacating the Court’s May 14, 2018, order denying certiorari, and (3) re-disposing of this case by granting the petition for a writ of certiorari, vacating the judgment, and remanding to the Fifth Circuit for further consideration in light of Sessions v. Dimaya, 138 S. Ct. 1204 (2018), for the purpose of determining whether the judgment of conviction should be reformed to eliminate a description of the instant illegal reentry offense that references the “aggravated felony” classification of 8 U.S.C. § 1326(b)(2).

Mr. Gonzalez-Longoria submits that, on the same day as the denial of his petition, this Court granted petitions for writ of certiorari raising the same issue as that raised in Mr. Gonzalez-Longoria’s case with respect to the statutory classification of the instant offense. He seeks rehearing on that part of the issue raised in his petition for a writ of certiorari. He recognizes that the Court also denied petitions for certiorari raising the same issue with respect to United States Sentencing Guideline enhancements, an issue made moot in his case by his release from imprisonment,¹ and he does not seek rehearing on that aspect of the issue raised in his petition.

As grounds for this petition for rehearing, petitioner states the following:

1. Mr. Gonzalez-Longoria challenged his conviction and sentence for the offense of illegal reentry under 8 U.S.C. § 1326 on two grounds, both tied to his argument that 18

¹ The Bureau of Prisons released Mr. Gonzalez-Longoria on June 10, 2016.

U.S.C. § 16(b) was unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015). First, he argued on appeal that the district court erred by increasing his United States Sentencing Guideline (“USSG”) calculation by eight offense levels under USSG § 2L1.2(b)(1)(C) (2014) because that guideline provision rested on the definition of “aggravated felony” derived from 8 U.S.C. § 1101(a)(43)(F), which in turn relied on 18 U.S.C. § 16(b). Second, he argued that the district court erred by including in his judgment of conviction the description of his offense as being “Alien Unlawfully Found in the United States After Deportation, Having Previously Been Convicted of an Aggravated Felony,” which also ultimately hinged on the § 16(b) definition applied to his prior offense.

2. The Fifth Circuit held that 18 U.S.C. § 16(b) was not unconstitutionally vague in United States v. Gonzalez-Longoria, 831 F.3d 670, 677-78 (5th Cir. 2016) (en banc), and petitioner timely filed his petition for a writ of certiorari asserting the same arguments with respect to both the Guideline calculation and the statutory classification of his offense. See Petition for Writ of Certiorari at 14, Gonzalez-Longoria v. United States, No. 16-6259, (noting importance of statutory classification of instant illegal reentry offense by reference to prior “aggravated felony” conviction under 8 U.S.C. § 1326(b)(2)).

3. On April 17, 2018, the Court issued its opinion in Sessions v. Dimaya, resolving the circuit split with respect to the constitutionality of § 16(b) by upholding the Ninth Circuit’s decision that the statutory subsection was unconstitutionally vague, thereby resolving that split against the Fifth Circuit’s *en banc* decision in petitioner’s case. See Gonzalez-Longoria, 138 S. Ct. at 1212 n.2 & 1223.

4. Although the Court specifically referred to Gonzalez-Longoria in Sessions v. Dimaya, see 138 S. Ct. at 1212 n.2, the Court denied Mr. Gonzalez-Longoria's petition for a writ of certiorari on May 14, 2018. In the same Order List for May 14, 2018, however, the Court granted the writ, vacated the judgment, and remanded for further consideration in light of Sessions v. Dimaya in other cases arising out of the Fifth Circuit where that court applied its Gonzalez-Longoria decision, and this Court did so when those cases raised the same issue with respect to the statutory sentencing classification of an instant illegal reentry offense under 8 U.S.C. § 1326(b)(2) by reference to a prior "aggravated felony" conviction, ultimately, in turn, classified as such by reason of § 16(b).² At the same time, the Court denied the petition for certiorari of consolidated petitioners whose petitions raised only a Sentencing Guideline challenge based on the incorporation of § 16(b) by cross-reference into USSG § 2L1.2(b)(1)(C), but, within the same consolidated petition, granted the petition, vacated the judgment, and remanded for further consideration in light of Sessions v. Dimaya for other petitioners whose individual petitions raised the statutory classification of the instant offense by reference to § 1326(b)(2) in the judgment, even if those individual petitions also raised the Guidelines issue.³

² See Perdomo v. United States, No. 16-7214; Aguirre-Arellano v. United States, No. 16-8675; Alvaro-Velasco v. United States, No. 16-8058; Hernandez-Ramirez v. United States, No. 17-6065; Casabon-Ramirez v. United States, No. 17-7183.

³ See Bello v. United States, No. 16-7667 (granting, vacating and remanding for petitioners Bello, Flores, Olivarez, Martinez-Castillo, Vazquez-Hernandez, Sanabia-Sanchez, Carrillo-Hernandez and Cabrera, but denying petition with respect to petitioners Mayorga-Salazar, Amaya-Guerrero, Guerra-Araniva, Olvera-Castro, Trejo-Dominguez, Reyes-Diaz, and Treviño-Rodriguez); Larios-Villatoro v. United States, No. 16-9660 (granting, vacating and remanding for

5. The granting of the petitions for writ of certiorari in similar cases raising the same issue with regard to statutory sentencing classification constitutes “intervening circumstances of a substantial or controlling effect or other substantial grounds not previously presented” sufficient to warrant rehearing of the order denying certiorari in Mr. Gonzalez-Longoria’s case. Sup. Ct. R. 44.2. The granting of the petitions in those cases indicates that the Court intended to remand for further consideration in light of Sessions v. Dimaya when the issue related to the statutory classification under 8 U.S.C. § 1326(b)(2), and the denial of similar petitions raising only Sentencing Guidelines challenges indicates that the Court intended to deny such petitions only when the requested relief was limited to such Sentencing Guidelines determinations. Mr. Gonzalez-Longoria’s petition for writ of certiorari raised both issues. Mr. Gonzalez-Longoria, therefore, requests that the Court grant rehearing of his petition and grant his petition because he raised a challenge to the statutory classification of his offense by reference to 8 U.S.C. § 1326(b)(2).

6. The proper statutory classification of Mr. Gonzalez-Longoria’s instant illegal reentry offense has important continuing consequences, so that his release from imprisonment does not render moot his separate challenge to the statutory classification of his illegal reentry offense. See Spencer v. Kemna, 523 U.S. 1, 7-8 (1998); United States v.

petitioner Larios-Villatoro, but denying for petitioner Hernandez-Hernandez); see also Castañeda-Morales v. United States, No. 16-8734 (granting consolidated petition in entirety when lead petitioner’s petition raised both statutory and Guideline challenge); Garcia-Hernandez v. United States, No. 17-5305 (petition granted when raising both statutory and Guideline challenge).

Ovalle-Garcia, 868 F.3d 313, 314 (5th Cir. 2017) (recognizing that error in statutory subsection citation for illegal reentry conviction was not moot by release from imprisonment because of continuing collateral consequences). Under 8 U.S.C. § 1101(a)(43)(O), his instant offense of conviction under 8 U.S.C. § 1326 is itself an “aggravated felony” if Mr. Gonzalez-Longoria was previously deported on the basis of a conviction for another form of “aggravated felony” under the same section. And the Fifth Circuit has held that a plea of guilty to a charge under 8 U.S.C. § 1326, when reflected in the judgment as a plea based on a sentencing enhancement for a prior “aggravated felony” under § 1326(b)(2), precludes a challenge to the classification of the prior underlying offense as an “aggravated felony.” See United States v. Gamboa-Garcia, 620 F.3d 546, 549 (5th Cir. 2010); United States v. Piedra-Morales, 843 F.3d 623, 624 (5th Cir. 2016), cert. denied, 137 S. Ct. 1361 (2017). Consequently, unless this Court grants rehearing and the petition for a writ of certiorari in this case, remanding for consideration of the statutory classification reflected on the face of the judgment, Mr. Gonzalez-Longoria’s instant offense will itself constitute an “aggravated felony” raising the statutory maximum penalty to 20 years of imprisonment under 8 U.S.C. § 1326(b)(2) if he ever were to reenter the United States and rendering him permanently inadmissible to the United States. See Ovalle-Garcia, 868 F.3d at 314.

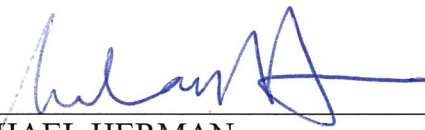
CONCLUSION

For the foregoing reasons, petitioner Gregorio Gonzalez-Longoria prays that this Court (1) grant rehearing of the order denying his petition for writ of certiorari in this case, (2) vacate the Court's May 14, 2018, order denying certiorari, and (3) grant the petition for a writ of certiorari, vacate the judgment and remand to the Fifth Circuit for further consideration in light of Sessions v. Dimaya, 138 S. Ct. 1204 (2018) for the purpose of determining whether the judgment of conviction should be reformed to eliminate a description of the instant illegal reentry offense that references the "aggravated felony" classification of 8 U.S.C. § 1326(b)(2).

Date: May 21, 2018

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.



MICHAEL HERMAN