

No. 16-9318

IN THE
SUPREME COURT OF THE UNITED STATES

—————
JESUS MALDONADO-LANDAVERDE,
also known as Jesus Maldonado, also known as Jesus Maldonado-Andaverde,

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

CHRISTOPHER CURTIS
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 TAYLOR STREET, ROOM 9A10
FORT WORTH, TX 76102
(817) 978-2753

GROUNDS FOR REHEARING

Pursuant to Sup. Ct. R. 44.2, Petitioner, Jesus Maldonado-Landaverde asks this Court: (1) to grant rehearing in this case; (2) to vacate the May 14, 2018 order denying certiorari; and (3) to grant the petition, vacate the Fifth Circuit’s judgment, and remand for further consideration in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), for the purposes of whether his sentence should be vacated and remanded¹ and for the purpose of whether the judgment of conviction should be reformed to eliminate the description of the instant illegal reentry offense that references the “aggravated felony” classification of 8 U.S.C. § 1326 (b)(2).

Petitioner notes that, on the same day the Court denied certiorari in this case, the Court granted several other petitions for certiorari in other cases raising the same issue, including some cases where the petitioner had already been released from custody.² What the Court might not have known at the time it denied certiorari here is that Petitioner has been re-imprisoned on the same case, and thus (unlike many other defendants throughout the country) he stands to tangibly benefit from a GVR.

1. On January 21, 2015, Jesus Maldonado-Landaverde (Maldonado) was indicted for one count of illegal re-entry after deportation. The Indictment cited 8 U.S.C. § 1326(a) and (b)(1)/(2). 5th Cir. R. 6. At sentencing, the district court concluded that his prior Texas conviction for evading arrest with a motor vehicle was a “crime of violence” and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). *See* U.S.S.G. §2L1.2(b)(1)(C). 5th Cir. R. 93. Petitioner’s advisory Sentencing Guideline

¹ Maldonado-Landaverde is not scheduled for release from BOP custody until May 21, 2020.

² *See Perez-Jimenez v. United States*, No. 16-8453; *Perdomo v. United States*, No. 16-7214; *Aguirre-Arello 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.

range was 18–24 months. The district court imposed a sentence near the middle: 21 months in prison. Without the “aggravated felony” enhancement, Petitioner’s guideline range would have been 10–16 months in prison. The district court’s written judgment cited both § 1326(b)(1) (removal after *felony*) and § 1326(b)(2) (removal after *aggravated felony*). 5th Cir. R. 41.

2. On appeal, Petitioner argued that his evading arrest conviction could not be considered an aggravated felony because 18 U.S.C. § 16(b) was unconstitutionally vague under *Johnson v. United States*, 135 S. Ct. 2551 (2015). At the time, that claim was foreclosed by the Fifth Circuit. *See United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016), *overruled by Dimaya*. The court of appeals summarily affirmed Maldonado-Landaverde’s sentence in an unpublished opinion.

3. While the certiorari petition was pending, this Court issued its opinion in *Sessions v. Dimaya*. *Dimaya* overruled *Gonzalez-Longoria* and held that 18 U.S.C. § 16(b)’s residual clause was unconstitutionally vague and that crimes could not be counted as “aggravated felonies” under the INA based on that provision alone. 138 S. Ct. at 1216. This Court has vacated and remanded for reconsideration several pending cases as cited above in light of *Sessions v. Dimaya*.

4. While the direct appeal was pending, Petitioner completed his initial imprisonment term and was deported. The Court may have concluded that any sentencing issues were moot, or at least that no relief could benefit him. However, in April of 2017, Petitioner was accused of returning to the United States without permission. On November 21, 2017, the District Court for the Western District of Texas revoked the supervised release from this case and ordered him to be reimprisoned for 8 months. *See United States v. Maldonado-Landaverde*, No. 2:17-CR-342 (W.D. Tex. Nov. 21, 2017). That term was run consecutive to another new sentence, meaning Petitioner will remain in BOP custody until at least 2020.

5. Unlike several other petitioners who have been released and deported, Petitioner remains imprisoned on the case from which he appeals (supervised release revocation sentence). If the case were remanded to the Fifth Circuit, he would at least be able to obtain reformation of the judgment. He could also seek a reduction in his original sentence due to the mistake in applying the aggravated felony enhancement. If the original prison term were shortened, the excess time he spent could be credited against his current revocation sentence. *See* Bureau of Prisons Policy Statement 5880.28, at page 1-14D (“If a prisoner is released late (‘past due’) because of staff error, a court order or executive clemency and is later returned as a supervised release or probation violator, the late release time shall be awarded on the supervised release or probation violator term.”); *see also Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006) (District court has authority to “alter” or eliminate the defendant’s “period of supervised release pursuant to 18 U.S.C. § 3583(e)(2), if it determines that he has served excess prison time.”).

6. One panel of the Fifth Circuit has held that the 2015 Sentencing Guidelines continue to incorporate the unconstitutionally vague portion of § 16(b). *See United States v. Godoy*, ___ F.3d ___, No. 17-10838, 2018 WL 2207909, at *4 (5th Cir. May 14, 2018). But the defendant in that case has requested rehearing en banc, and there are reasons to believe that *Godoy* was wrongly decided and should be overturned. Chief among those is the failure to grapple with § 334(e) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, Div. C (Sept. 30, 1996). That statute instructed the Sentencing Commission to amend the guideline applicable to illegal reentry so that it would include all recent statutory amendments to the definition of “aggravated felony.” As the Commission explained in its Reason for Amendment 562, it eliminated the Commission’s own Guideline-specific definition for “aggravated felony” and replaced it with a reference to the statutory definition so that

the Guideline enhancement and the “statutory penalties for these offenses” would be coextensive. In other words, the Commission did not merely incorporate a separate Congressional definition by way of shorthand reference; the Commission followed Congress’s instruction to ensure that the “aggravated felony” guideline enhancement would apply if and only if the statutory enhancement would apply. In any event, the Fifth Circuit should have the opportunity to consider all of Petitioner’s argument, particularly where the so-called aggravated felony was evading arrest (the quintessential “residual clause” crime) and where Petitioner continues to suffer actual imprisonment that could be reduced if the courts revised the earlier error.

7. Even if his guideline challenge failed, Petitioner would still be entitled to reformation of the judgment under *Godoy*, 2018 WL 2207909, at *4. The reference to § 1326(b)(2) would be deleted if this Court grants the petition for rehearing. That alone is reason to warrant rehearing and a grant, vacate, and remand order.

CONCLUSION

Petitioner respectfully requests this Court enter an order (1) granting rehearing; (2) vacating the May 14, 2018 order denying certiorari; (3) granting the petition for certiorari; (4) vacating the Fifth Circuit’s judgment; and (5) remanding for further consideration in light of *Dimaya*.

Respectfully submitted this 8th day of June, 2018.

/S/ Christopher A. Curtis
CHRISTOPHER CURTIS
Counsel of Record
FEDERAL PUBLIC DEFENDER’S OFFICE
NORTHERN DISTRICT OF TEXAS
819 TAYLOR STREET, ROOM 9A10
FORT WORTH, TX 76102
(817) 978-2753
TEXAS BAR NUMBER 05270900