

NO. 17-6721

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN BOLANOS-GALVAN,
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 Martin Bolanos-Galvan (“petitioner” or “Mr. Bolanos-Galvan”) 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 his 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) and Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

Mr. Bolanos-Galvan 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 his case with respect to the propriety of an eight-level “aggravated felony” enhancement under the 2015 edition of the United States Sentencing Guidelines (“USSG”). In addition, this Court’s decision in Esquivel-Quintana, issued after Mr. Bolanos-Galvan filed his petition for certiorari, makes clear that none of his prior convictions qualify for the statutory classification of his illegal-reentry offense under 8 U.S.C. § 1326(b)(2). For these reasons, he seeks rehearing on his petition for a writ of certiorari.

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

Mr. Bolanos-Galvan was sentenced for his illegal-reentry offense within a Guidelines range that included an eight-level “aggravated felony” enhancement, USSG § 2L1.2(b)(1)(C), based on his “crime of violence” of Texas felony assault on a police officer. The Guidelines definition of “aggravated felony” incorporates the definition of “aggravated felony” in 8 U.S.C. § 1101(a)(43), which, in turn, includes a “crime of

violence” as defined in 18 U.S.C. § 16. Mr. Bolanos-Galvan challenged the application of the “crime of violence”-type “aggravated felony” enhancement because § 16(b) was the only statutory provision that could form the basis for the “aggravated felony” classification, and § 16(b) is unconstitutionally vague in light of this Court’s holding in Johnson v. United States, 135 S. Ct. 2251 (2015). The Fifth Circuit, relying on its opinion in United States v. Gonzalez-Longoria, 831 F.3d 670, 677-78 (5th Cir. 2016) (en banc), held that 18 U.S.C. § 16(b) was not unconstitutionally vague. Mr. Bolanos-Galvan filed a petition for certiorari, challenging the “aggravated felony” enhancement and noting the split among the circuits on the application of Johnson to § 16(b).

On April 17, 2018, this Court issued its opinion in Dimaya, resolving the circuit split with respect to the constitutionality of § 16(b) against the Fifth Circuit. Dimaya, 138 S. Ct. at 1210. Although the Court agreed with the Ninth Circuit—and Mr. Bolanos-Galvan—that § 16(b) is unconstitutionally vague under Johnson, the Court denied Mr. Bolanos-Galvan’s petition for 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 Dimaya in other cases arising out of the Fifth Circuit where that court applied its Gonzalez-Longoria decision and the petitioners had challenged only the eight-level “aggravated felony” enhancement.¹ Moreover, Mr. Bolanos-Galvan’s claim is not moot because he has not yet been released from the custody of the Federal

¹ See Ramiro Castaneda-Morales, aka Marco Vargas-Bustos, et al. v. United States, No. 16-8734 (U.S. 2018) (order granting, vacating, and remanding for petitioners Hector Ruben Morales-Cardenas, Joel Velasquez-Rios, Jose Guadalupe Vega-Zapata, and Candido Perez-Conde).

Bureau of Prisons (“BOP”).²

The granting of the petitions for writ of certiorari in similar cases raising the same issue 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. Bolanos-Galvan’s case. Sup. Ct. R. 44.2. And as this Court has said before, “the basic principle of justice that like cases should be decided alike.” Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005). Mr. Bolanos-Galvan, therefore, requests that the Court grant rehearing of his petition and grant his petition.

Mr. Bolanos-Galvan also requests that the Court grant rehearing of his petition for a second reason: in light of this Court’s decisions in Dimaya and Esquivel-Quintana, Mr. Bolanos-Galvan no longer has a prior conviction that qualifies as an “aggravated felony” within the meaning of 8 U.S.C. § 1326(b)(2).

Mr. Bolanos-Galvan was convicted of and had judgment entered against him for illegal reentry by a previously deported alien after an “aggravated felony” conviction, in violation of 8 U.S.C. § 1326(a) and 1326(b)(2). At the time he was sentenced, there were two possible bases for this “aggravated felony” finding. First, he was convicted of Texas assault on a peace officer and sentenced to two years’ imprisonment. See 8 U.S.C. § 1101(a)(43)(F) (defining “aggravated felony” to include “crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of

² According to the BOP inmate locator, Mr. Bolanos-Galvan’s release date is April 19, 2019. See <https://www.bop.gov/inmateloc> (last visited May 22, 2018). Petitioners Morales-Cardenas and Velasquez-Rios—referenced above, see supra text, at n.1—have also not yet been released from custody. See id.

imprisonment [is] at least one year”). Second, he was convicted of Texas indecency with a child by contact. See 8 U.S.C. § 1101(a)(43)(A) (defining “aggravated felony” to include “sexual abuse of a minor”).

As discussed above, this Court held in Dimaya that the residual clause of the “crime of violence” definition in 18 U.S.C. § 16(b) is unconstitutionally vague. Dimaya, 138 S. Ct. at 1210. As a result, Mr. Bolanos-Galvan’s prior conviction for Texas assault on a peace officer can qualify as an “aggravated felony” only if it satisfies the “crime of violence” definition in 18 U.S.C. § 16(a) by having “as an element the use, attempted use, or threatened use of physical force against the person or property of another.” But, under current precedent in the Fifth Circuit, it does not because the offense has causing bodily injury—not the use of force—as an element. See United States v. Rico-Mejia, 859 F.3d 318, 322-323 (5th Cir. 2017); United States v. Villegas-Hernandez, 468 F.3d 874, 879 (5th Cir. 2006).

That leaves Mr. Bolanos-Galvan’s prior conviction for Texas indecency with a child by contact. After Mr. Bolanos-Galvan filed his petition for certiorari, this Court held in Esquivel-Quintana that, for a prior conviction to qualify categorically as generic “sexual abuse of a minor,” the victim must be younger than 16 years old. Esquivel-Quintana, 137 S. Ct. at 1568. However, the offense of Texas indecency with a child by contact defines “minor” as “a child younger than 17 years” old. Tex. Penal Code § 21.11(a). Accordingly, Mr. Bolanos-Galvan’s prior Texas conviction for indecency with a child no longer qualifies as an “aggravated felony” conviction in light of Esquivel-Quintana.

The issuance of the Court’s decision in Esquivel-Quintana 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. Bolanos-Galvan’s case. Sup. Ct. R. 44.2. Mr. Bolanos-Galvan, therefore, requests that the Court grant rehearing of his petition, grant his petition, vacate the judgment, and remand for the Fifth Circuit for consideration of his challenge to the statutory classification of his offense by reference to 8 U.S.C. § 1326(b)(2).

The proper statutory classification of Mr. Bolanos-Galvan’s instant illegal reentry offense has important 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. Bolanos-Galvan 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. Piedra-Morales, 843 F.3d 623, 624 (5th Cir. 2016), cert. denied, 137 S. Ct. 1361 (2017); United States v. Gamboa-Garcia, 620 F.3d 546, 549 (5th Cir. 2010). 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. Bolanos-Galvan’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 United States v. Ovalle-Garcia, 868 F.3d 313, 314 (5th Cir. 2017).


CONCLUSION

For the foregoing reasons, petitioner Martin Bolanos-Galvan 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), and Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

Date: May 25, 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.


KATHRYN SHEPHARD