

No. 17-7183

IN THE SUPREME COURT OF THE UNITED STATES

ESTEBAN CASABON-RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the definition of the term "crime of violence" in 18 U.S.C. 16(b), as incorporated into the definition of the term "aggravated felony" in 8 U.S.C. 1101(a)(43), is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-2A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2017. The petition for a writ of certiorari was filed on December 19, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of unlawful presence in the United States after removal, in violation of 8 U.S.C. 1326. Judgment 1. The court sentenced petitioner to 20 months of imprisonment. Judgment 2. The court of appeals affirmed. Pet. App. 1A-2A.

1. Petitioner is a citizen of Mexico. Pet. 4. In 2005, petitioner was removed from the United States. Ibid. Petitioner returned to the United States without authorization and was found in August 2016. Ibid. A federal grand jury charged petitioner with one count of unlawful presence in the United States after having previously been removed, in violation of 8 U.S.C. 1326. Indictment 1. Petitioner pleaded guilty. Pet. 4.

2. If a defendant commits a violation of Section 1326 after having been convicted of a felony, the maximum term of imprisonment is ten years. 8 U.S.C. 1326(b)(1). If the defendant was previously convicted of an "aggravated felony," the maximum term of imprisonment is 20 years. 8 U.S.C. 1326(b)(2). An "aggravated felony" includes a "crime of violence" under 18 U.S.C. 16(b). See 8 U.S.C. 1101(a)(43)(F).

Prior to sentencing, the Probation Office concluded that petitioner had previously been convicted of an "aggravated felony" under 8 U.S.C. 1326(b)(2). See Pet. 4. The Probation Office

determined that petitioner's prior New York state conviction for sexual abuse in the first degree constituted a "crime of violence" under 18 U.S.C. 16(b), and thus, an "aggravated felony" under the Immigration and Nationality Act. Pet. 4. Based on that prior conviction, the Probation Office determined that petitioner was subject to a maximum sentence of 20 years of imprisonment. See 8 U.S.C. 1326(b)(2); Pet. 4. The district court sentenced petitioner to 20 months of imprisonment. Judgment 2.

Petitioner appealed, arguing that the definition of "crime of violence" in 18 U.S.C. 16(b) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015). The court of appeals summarily affirmed, holding that petitioner's challenge was foreclosed by the court's decision in United States v. Gonzalez-Longoria, 831 F.3d 670, 672-677 (5th Cir. 2016) (en banc), petition for cert. pending, No. 16-6259 (filed Sept. 29, 2016). See Pet. App. 1A-2A.

ARGUMENT

Petitioner contends (Pet. 7-21) that the definition of the term "crime of violence" in 18 U.S.C. 16(b), as incorporated into the definition of an "aggravated felony" in 8 U.S.C. 1101(a)(43), is unconstitutionally vague. He notes (Pet. 7) that the same issue is pending before this Court in Sessions v. Dimaya, No. 15-1498 (reargued Oct. 2, 2017), and suggests that his petition for a writ of certiorari be held pending a decision in Dimaya. Contrary to

petitioner's suggestion, his petition should be denied, because the questions presented here and in Dimaya have no bearing on the ultimate disposition of his case.

Petitioner contends (Pet. 15-20) that the district court improperly classified his prior felony conviction for sexual abuse in the first degree as a crime of violence (and thus an aggravated felony) under Section 16(b), subjecting him to a 20-year statutory maximum sentence under 8 U.S.C. 1326(b)(2). But any error in determining the statutory maximum sentence for his offense had no effect on his conviction or the sentence that he received. Petitioner does not dispute that he was previously convicted of a felony; he merely disputes whether his prior conviction for sexual abuse in the first degree was an aggravated felony. The maximum punishment for illegal reentry following conviction for a felony is ten years of imprisonment. 8 U.S.C. 1326(b)(1). Petitioner was sentenced to 20 months of imprisonment, well below ten years. Pet. 5. Petitioner does not identify any way in which his conviction or sentence was affected by the classification of his prior offense as an aggravated felony.

Petitioner also contends (Pet. 13-14) that his conviction for illegal reentry following conviction for an aggravated felony under Section 1326(b)(2) will have collateral consequences "in any future illegal-reentry prosecution." But the possibility that petitioner will suffer adverse sentencing consequences if he

commits future illegal reentry offenses is irrelevant; petitioner is "able -- and indeed required by law -- to prevent such a possibility from occurring." Spencer v. Kemna, 523 U.S. 1, 15 (1998) (citation omitted). The lower courts' conclusion that the enhanced statutory maximum sentence for a prior aggravated-felony conviction applied in this case also will not have any practical effect on petitioner's ability to seek lawful admission to the United States in the future. Aliens like petitioner who illegally reenter the United States after being removed are permanently inadmissible, regardless of whether they previously committed an aggravated felony. See 8 U.S.C. 1182(a)(9)(C)(i); see also 8 U.S.C. 1182(a)(9)(A)(iii) and (C)(ii) (providing that aliens deemed permanently inadmissible due to either past illegal reentry or conviction for an aggravated felony may seek lawful admission only if the government consents).*

* Petitioner contends (Pet. 13) that classification of a prior conviction as an aggravated felony "can trigger an eight-level enhancement" of the advisory sentencing range under the United States Sentencing Guidelines. But petitioner acknowledges that, in the 2016 version of the Guidelines that were applied in his case, see Presentence Investigation Report ¶ 10, the Sentencing Commission "eliminated" consideration of whether a prior conviction was an aggravated felony for purposes of the enhancement that applies under Guidelines Section 2L1.2(b)(1). Pet. 13 n.5. In any event, "the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause," Beckles v. United States, 137 S. Ct. 886, 895 (2017), and thus the decision in Dimaya will have no effect on any defendant's Guidelines calculation.

No reason exists, therefore, to hold this petition for Dimaya.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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