

No. 17-7410

IN THE SUPREME COURT OF THE UNITED STATES

SLORNAVEED PATOLILLO GONZALEZ, 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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QUESTION PRESENTED

Whether the court of appeals correctly applied the modified categorical approach to determine that petitioner had a prior Arizona conviction for aggravated assault that qualifies as a "crime of violence," 18 U.S.C. 16, as incorporated into the definition of an "aggravated felony" in 8 U.S.C. 1101(a)(43).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is reprinted at 701 Fed. Appx. 582. The order of the district court (Pet. App. 8a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2017. A petition for rehearing was denied on August 8, 2017 (Pet. App. 7a). On October 5, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 21, 2017. On December 21, 2017, Justice Kennedy

further extended the time to and including January 5, 2018, 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 guilty plea in the United States District Court for the District of Arizona, petitioner was convicted of illegally reentering the United States after removal following a felony conviction, in violation of 8 U.S.C. 1326(a) and (b)(1). Pet. App. 2a, 9a. The district court sentenced him to 41 months of imprisonment, to be followed by three years of supervised release. Judgment 1-2. The court of appeals affirmed. Pet. App. 1a-6a.

1. a. Petitioner is a citizen of Mexico. Presentence Investigation Report (PSR) ¶ 5. In 2002, he was involved in an altercation in Arizona in which he beat with a baseball bat and attempted to shoot a victim who had observed petitioner and several others smoking methamphetamine in a vehicle. PSR ¶ 23. Petitioner was initially charged in Arizona state court with six felonies. D. Ct. Doc. 17-5, at 2 (June 5, 2015). Those felonies included "Count 2": "using a baseball bat, a deadly weapon or dangerous instrument, [to] intentionally place[] [the victim] in reasonable apprehension of imminent physical injury, in violation of A.R.S. §§ 13-1204(A)(2), (B) [and] 13-1203(A)(2)." Id. at 3 (capitalization omitted). Petitioner later entered into a plea agreement pursuant to which he agreed to plead guilty to "COUNT 2,

AGGRAVATED ASSAULT, CLASS 3 FELONY VIOLATING A.R.S. §§ 13-1204 [and] 13-1201." D. Ct. Doc. 17-6, at 2 (June 5, 2015). He was sentenced to three-and-a-half years of imprisonment. D. Ct. Doc. 17-7, at 3 (June 5, 2015).

b. In 2004, Immigration and Customs Enforcement issued a notice that petitioner was removable because his Arizona aggravated assault conviction qualified as an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et. seq. Pet. App. 9a; see 8 U.S.C. 1228(c) ("An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States."). The INA defines the term "aggravated felony" to include "a crime of violence * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F). A "crime of violence," in turn, is defined as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 16(a), or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 16(b).¹ Petitioner admitted the allegations in the notice. Pet. App. 9a. In 2005,

¹ In Sessions v. Dimaya, No. 15-1498, 2018 WL 1800371 (Apr. 17, 2018), this Court held that Section 16(b), as incorporated into the provisions of the INA, is void for vagueness. The question presented in the petition here does not include any issue that would be affected by the Court's decision in Dimaya.

after completing his sentence for aggravated assault, he was removed from the United States. Ibid.

c. At some point thereafter, petitioner returned to the United States without authorization. PSR ¶¶ 5-6. In 2015, police encountered petitioner attempting to steal car parts from a commercial car lot in Phoenix, Arizona. PSR ¶ 30.

2. A federal grand jury charged petitioner with one count of illegally reentering the United States after removal following a felony conviction, in violation of 8 U.S.C. 1326(a) and (b)(1). Pet. App. 2a, 9a. Petitioner moved to dismiss the indictment pursuant to 8 U.S.C. 1326(d), arguing that his due process rights had been violated during his 2005 deportation proceedings because his Arizona aggravated assault conviction had been erroneously categorized as an aggravated felony. Pet. App. 2a.

The district court denied petitioner's motion to dismiss. Pet. App. 8a-12a. It explained that, in order to demonstrate that a defendant's prior removal was "fundamentally unfair," as required for dismissal under 8 U.S.C. 1326(d), the defendant must show both a violation of his due process rights in the deportation proceedings and resulting prejudice. Pet. App. 10a. The court concluded that -- regardless of whether petitioner's prior conviction had been properly categorized as an aggravated felony -- petitioner had not made a plausible showing that he had been

eligible for relief from removal and thus could not demonstrate prejudice. Id. at 11a-12a.

After the district court denied his motion to dismiss, petitioner pleaded guilty, while preserving his right to appeal the denial of his motion. Pet. App. 2a. The district court sentenced him to 41 months of imprisonment, to be followed by three years of supervised release. Judgment 1-2.

3. The court of appeals affirmed petitioner's conviction in an unpublished opinion. Pet. App. 1a-5a. Unlike the district court, the court of appeals considered whether petitioner's Arizona aggravated assault conviction qualified as an aggravated felony for purposes of the INA. Id. at 3a. The court observed that a conviction under Ariz. Rev. Stat. Ann. § 13-1204(A)(2) (Supp. 2002), which incorporates Ariz. Rev. Stat. Ann. § 13-1203(A)(2) (2001), categorically constitutes a crime of violence under 18 U.S.C. 16, and therefore qualifies as an aggravated felony under circuit precedent. Pet. App. 4a (citing United States v. Cabrera-Perez, 751 F.3d 1000, 1007 (9th Cir. 2014)). The court accordingly explained that the relevant question was whether petitioner had in fact been convicted under Ariz. Rev. Stat. Ann. § 13-1204(A)(2). Pet. App. 4a.

The court of appeals acknowledged a "discrepancy in the listing of statutes" between petitioner's plea agreement and his state-court indictment. Pet. App. 4a. It observed, however, that

the plea agreement "specifically stated that [petitioner] agreed to plead guilty to 'COUNT 2, AGGRAVATED ASSAULT, CLASS 3 FELONY.'" Ibid.; see D. Ct. Doc. 17-6, at 2. The court explained that "[b]ecause the plea agreement and judgment specifically referred to 'Count 2,' th[e] court may look to Count 2 in the state court indictment to identify the particular statutes to which [petitioner] pleaded guilty." Pet. App. 4a-5a. And the court determined that the indictment made clear that petitioner had "pleaded guilty to, and was adjudged guilty of, aggravated assault in violation of A.R.S. §§ 13-1204(A)(2) and 13-1203(A)(2)," id. at 5a, which, as petitioner had admitted, "'without a doubt [is] a crime of violence,'" id. at 4a.

Judge Schroeder concurred. Pet. App. 6a. She did not believe that the court of appeals could consult the state-court indictment "in this particular case" because "the plea agreement stated it was amending the charging document." Ibid. Nevertheless, she agreed that the record demonstrated that petitioner had been convicted of an aggravated felony because, in "plead[ing] to a class 3 felony in violation of A.R.S. § 13-1204, he must have admitted to violating either subsections (a)(1) or (a)(2)," each of which "qualified as an aggravated felony." Ibid.

ARGUMENT

Petitioner contends (Pet. 5-14) that the court of appeals erred in relying "on an inoperative charging document," Pet. 5, to

determine that he had been convicted of an aggravated felony under the INA. That contention misapprehends the court's decision. The court construed judicially noticeable documents to determine that petitioner had pleaded guilty to aggravated assault, in violation of Ariz. Rev. Stat. Ann. § 13-1204(A)(2) (Supp. 2002) -- a crime that petitioner acknowledges (Pet. 2-3) "is an aggravated felony." That case-specific determination is correct, and the court's unpublished opinion does not conflict with the decisions of this Court or of any other court of appeals. This case, moreover, would be a poor vehicle for addressing the question presented because petitioner's due process arguments lacked merit on multiple alternative grounds. Further review is therefore unwarranted.

1. The court of appeals correctly determined that petitioner had an aggravated assault conviction under Ariz. Rev. Stat. Ann. § 13-1204(A)(2), which qualifies as an "aggravated felony" under the INA.

Under this Court's decisions, a court seeking to determine whether a defendant's prior conviction qualifies as a "crime of violence," 18 U.S.C. 16, and therefore an "aggravated felony" as that term is used in 8 U.S.C. 1101(a)(43)(F), must employ a "categorical" approach under which it compares the definition of the particular predicate offense to the federal "crime of violence" definition. Leocal v. Ashcroft, 543 U.S. 1, 7 (2004); see Taylor v. United States, 495 U.S. 575, 602 (1990). If the statute

of conviction lists elements in the alternative, however, the district court may apply the "modified categorical approach" and "look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of." Mathis v. United States, 136 S. Ct. 2243, 2249 (2016). In particular, as the Court explained in Shepard v. United States, 544 U.S. 13 (2005), where the defendant was convicted pursuant to a guilty plea, the modified categorical approach permits a court to consider "the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or * * * some comparable judicial record of this information." Id. at 26.

The court of appeals correctly applied the modified categorical approach to determine that petitioner's state conviction qualifies as an "aggravated felony." Petitioner contends (Pet. 3) that the court erred in consulting his state-court indictment because his plea agreement included "language [that] converted the plea agreement itself into the charging document" and because the plea agreement "standing alone, do[es] not establish that petitioner was convicted of an aggravated felony." But the court did not, as petitioner asserts (Pet. 8-9), consult the indictment to determine the facts of petitioner's

crime of conviction. Rather, it sought to decipher petitioner's plea agreement and the judgment of conviction, see Pet. App. 4a-5a, both of which petitioner acknowledges (Pet. 7) to be appropriate Shepard documents.

The court of appeals identified, see Pet. App. 4a, the same anomaly that petitioner highlights: "Unlike the indictment, the plea agreement identified count 2 as in violation of A.R.S. § 13-1204 and, strangely, § 13-1201 -- which identifies the wholly separate crime of reckless endangerment." Pet. 3; compare D. Ct. Doc. 17-5, at 3, with D. Ct. Doc. 17-6, at 2. But the court observed that petitioner's plea agreement unambiguously stated that petitioner had pleaded guilty to "'COUNT 2, AGGRAVATED ASSAULT, CLASS 3 FELONY,'" and that the judgment of conviction unambiguously "adjudged [petitioner] guilty of 'Count 2: Aggravated Assault.'" Pet. App. 4a. Given those specific references to "Count 2," the court reasonably determined that petitioner had pleaded guilty to the charge contained in Count 2 of the indictment. Id. at 4a-5a. Petitioner's challenge to that case-specific application of the modified categorical approach does not warrant review by this Court. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

2. Contrary to petitioner's contention (Pet. 5-7), the court of appeals' factbound application of the modified

categorical approach does not implicate an asserted circuit conflict about whether a court's "reliance on an inoperative charging document is permissible in implementing the modified categorical approach," Pet. 5. As an initial matter, the court of appeals' unpublished decision in this case does not establish circuit precedent and therefore cannot give rise to a disagreement that would warrant this Court's review. Nor did the unpublished decision rely on the original charging document to determine the facts underlying his prior conviction, as petitioner suggests (Pet. 8-9). Instead, the court of appeals consulted the indictment to understand a cross-reference in the indisputably appropriate Shepard materials. See pp. 8-9, supra.

In any event, the decisions that petitioner cites (Pet. 6) do not demonstrate disagreement among the circuits regarding the application of the modified categorical approach when a defendant pleads to an amended (or lesser-included) charge. Those decisions do not preclude all consideration of original allegations that underlie an amended charge to which a defendant unambiguously pleads guilty. See United States v. Antonio-Agusta, 672 F.3d 1209, 1215-1216 (10th Cir.) (approving reliance on indictment that, in conjunction with plea agreement and judgment, "ma[d]e clear" the charges to which the defendant pleaded, and distinguishing prior case where court had expressed "doubt" about the existence and content of an amended charging document), cert.

denied, 568 U.S. 958 (2012). Instead, those decisions indicate that courts must limit their consideration of the charging document “when a defendant pleads to a lesser-included offense” not specified in that document, United States v. Gardner, 649 F.3d 437, 442 (6th Cir. 2011), and may not “rely upon allegations in a superseded indictment to which the defendant did not plead guilty,” United States v. Martinez, 756 F.3d 1092, 1093 (8th Cir. 2014). See Prudencio v. Holder, 669 F.3d 472, 486 (4th Cir. 2012) (declining to consider facts alleged in original charge that was “superseded” by amended charge to which defendant pleaded guilty); Evanson v. Attorney Gen. of the U.S., 550 F.3d 284, 292-293 & n.7 (3d Cir. 2008) (rejecting reliance on criminal complaint that had been “superceded by the criminal information” to which the alien pleaded guilty); United States v. Bonilla, 524 F.3d 647, 652 (5th Cir. 2008) (rejecting reliance on criminal information that “charges a crime of which [the defendant] was not convicted”), cert. denied, 555 U.S. 1105 (2009).

The unpublished decision below is consistent with those propositions, as are the Ninth Circuit’s prior precedential decisions. See Alvarado v. Holder, 759 F.3d 1121, 1131 (2014) (holding that a charging instrument “may not be considered when the original charges are dismissed and the defendant pleads guilty to a different offense”); see also Ruiz-Vidal v. Lynch, 803 F.3d 1049, 1052-1055 (2015) (distinguishing Alvarado line of cases

where alien pleaded guilty to lesser-included offense but Shepard documents established "a clear connection between the plea and" the drug type "alleged in the charging document"). Petitioner does not suggest that his guilty plea was to a lesser-included offense of the original charge. Moreover, the plea agreement neither "dismissed" the original charge, see Alvarado, 759 F.3d at 1131, nor "superseded" the initial charging instrument with respect to Count 2, see Martinez, 756 F.3d at 1093. To the contrary, the plea agreement makes clear that it incorporated "COUNT 2" from petitioner's original indictment and that the plea would result in dismissal of a separate charge, "COUNT 3." See D. Ct. Doc. 17-6, at 2. Therefore, the court of appeals correctly consulted the indictment in determining that petitioner had pleaded guilty to Arizona aggravated assault, in violation of Ariz. Rev. Stat. Ann. § 13-1204(A)(2).

3. Finally, even if the question presented otherwise warranted review, this case would be an unsuitable vehicle for addressing it because petitioner's sentence is subject to affirmance on multiple alternative grounds. First, the concurring judge noted that, though she did not consult petitioner's original indictment, his plea agreement made clear that he had been convicted of a "class 3 felony," meaning a violation of Ariz. Rev. Stat. Ann. § 13-1204(A)(1) or (A)(2). Pet. App. 6a; see Ariz. Rev. Stat. Ann. § 13-1204(B). Under Ninth Circuit precedent, both

of those subsections constitute aggravated felonies, see Pet. App. 6a, and petitioner does not contend otherwise. Although petitioner contends (Pet. 13-14) that the concurrence overlooked a third class-3 felony, that third class-3 felony covers "assault by any means of force which causes temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part, or a fracture of any body part." Ariz. Rev. Stat. Ann. § 13-1204(A)(11) (Supp. 2002); see id. § 13-1204(C) and (D)(2). That subsection thus qualifies as an aggravated felony as well, because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 16(a). Contrary to petitioner's assertion (Pet. 13-14), a prior Ninth Circuit decision finding that a different statute covering injury "without the use of force" did not satisfy that federal definition, United States v. Lopez-Patino, 391 F.3d 1034, 1037 (2004) (per curiam), does not dictate otherwise. The relevant statutory provision here specifically requires not just a substantial injury but also "assault by any means of force." Ariz. Rev. Stat. Ann. § 13-1204(A)(11).

Second, the district court recognized that petitioner's collateral attack on his original removal order required both a due process violation and resulting prejudice. See Pet. App. 10a; see also id. at 14a. The court concluded that, even if petitioner's Arizona aggravated assault conviction were not an

aggravated felony, petitioner could not demonstrate that he had been entitled to relief from his 2005 removal. Id. at 11a-12a. In particular, the court explained that petitioner could not have raised a plausible claim for voluntary departure, in light of his criminal history. Id. at 11a; see Gov't C.A. Br. 22-24. For that reason, too, the court of appeals reached the correct result when it affirmed the district court's rejection of petitioner's motion to dismiss the indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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