

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JUAN JOSE ESPINOZA-BAZALDUA,
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 WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. In Gonzales v. Duenas-Alvarez, 549 U.S. 182 (2007), the Court explained that, under the categorical approach, a defendant must demonstrate a “realistic probability” that the state would apply its statute in a non-generic, overbroad manner. The en banc Fifth Circuit has interpreted Duenas-Alvarez as requiring defendants to produce a case demonstrating that the government actually prosecutes its statute in the non-generic manner before the court will find that the statute does not categorically qualify as the generic offense, even if the state statute is plainly overbroad on its face. However, the First, Third, Sixth, Ninth, Tenth, and Eleventh Circuits do not require production of such a case when the text of the statute demonstrates its overbreadth. Which approach is correct?
- II. Is a conviction for Indiana dealing in marijuana, in violation of Ind. Code § 35-48-4-10, categorically a “drug trafficking offense” when the statute plainly includes financing the delivery of a drug but the generic offense does not?

PARTIES TO THE PROCEEDINGS

All parties to petitioners' Fifth Circuit proceedings are named in the caption of the case before this Court.

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PRAYER

Petitioner Juan Jose Espinoza-Bazaldua prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Westlaw version of opinion of the United States Court of Appeals for the Fifth Circuit in petitioner's case is attached to this petition as the Appendix. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit's judgment and opinion was entered on October 16, 2017. See Appendix. This petition is filed within 90 days after entry of judgment. See Sup. Ct. R. 13.1 & 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

1. USSG § 2L1.2 (2015) provides in pertinent part:

§ 2L1.2. Unlawfully Entering or Remaining in the United States

- (a) Base offense level: **8**
- (b) Specific Offense Characteristic

- (1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

- (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months . . . increase by 16 levels if the conviction receives criminal history points under Chapter 4. . . .

* * *

Application Notes:

1. Application of Subsection (b)(1).—

* * *

- (B) Definitions.—For purposes of subsection (b)(1):

* * *

(iv) “Drug trafficking offense” means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

2. Indiana Code § 35-48-4-10 (2005) provides:

§ 35-48-4-10 Dealing in marijuana, hash oil, hashish, or salvia

Sec. 10. (a) A person who:

(1) knowingly or intentionally:

- (A) manufactures;
- (B) finances the manufacture of;
- (C) delivers; or
- (D) finances the delivery of;

marijuana, hash oil, or hashish, pure or adulterated; or

(2) possesses, with intent to:

- (A) manufacture;
- (B) finance the manufacture of;
- (C) deliver; or
- (D) finance the delivery of;

marijuana, hash oil, or hashish, pure or adulterated;

commits dealing in marijuana, hash oil, or hashish, a Class A misdemeanor, except as provided in subsection (b).

(b) The offense is:

(1) a Class D felony if:

- (A) the recipient or intended recipient is under eighteen (18) years of age;
- (B) the amount involved is more than thirty (30) grams but less than ten (10) pounds of marijuana or two (2) grams but less than three hundred (300) grams of hash oil or hashish; or
- (C) the person has a prior conviction of an offense involving marijuana, hash oil, or hashish; and

(2) a Class C felony if the amount involved is ten (10) pounds or more of marijuana or three hundred (300) or more grams of hash oil or hashish or the person delivered or financed the delivery of marijuana, hash oil, or hashish:

(A) on a school bus; or

(B) in, on, or within one thousand (1,000) feet of:

(i) school property;

(ii) a public park;

(iii) a family housing complex; or

(iv) a youth program center.

STATEMENT OF THE CASE

Petitioner Juan Jose Espinoza-Bazaldua pleaded guilty to illegally reentering the United States in violation of 8 U.S.C. § 1326(a) and (b). At sentencing, the district court assessed a 16-level “drug trafficking offense” enhancement under USSG § 2L1.2(b)(1)(A)(ii) (2015) based on Mr. Espinoza-Bazaldua’s 2006 Indiana conviction for dealing in marijuana under Ind. Code § 35-48-4-10. With the enhancement, Mr. Espinoza-Bazaldua was subject to a Guidelines imprisonment range of 46 to 57 months.

Mr. Espinoza-Bazaldua objected to application of the 16-level enhancement, arguing that (1) Ind. Code § 35-48-4-10 is broader than the generic definition of “drug trafficking offense” because the Indiana statute criminalizes financing the delivery of a drug, which the generic definition does not include; and (2) the statutory alternatives in Ind. Code § 35-48-4-10 are indivisible. The district court overruled the objection and sentenced Mr. Espinoza-Bazaldua to 37 months of imprisonment.

Mr. Espinoza-Bazaldua timely appealed and reurged his challenge to the 16-level enhancement, arguing that the Indiana statute is overbroad and indivisible. On October 16, 2017, the Fifth Circuit issued its opinion in which the court did not decide the divisibility question because it rejected Mr. Espinoza-Bazaldua’s overbreadth argument. Relying on its prior en banc opinion, the Fifth Circuit explained, that “the defendant arguing on appeal that a state statute is nongeneric cannot ‘rest’ on statutory text, even if the text seems facially broader than the conduct covered by the generic definition.” United States v. Espinoza-Bazaldua, No. 16-41069, 2017 WL 4641264, at *4 (5th Cir. Oct. 16, 2017)

(unpublished) (citing United States v. Castillo-Rivera, 853 F.3d 218, 222 (5th Cir. 2017) (en banc)). Rather, the Fifth Circuit “requires a defendant arguing that a state statute is broader than the generic definition to point to a case in which the state applied the statute ‘in the special (nongeneric) manner for which he argues.’” Espinoza-Bazaldua, 2017 WL 4641264, at *5. The Fifth Circuit concluded that Mr. Espinoza-Bazaldua had not supplied the requisite case. Id. at *6.

The Fifth Circuit’s en banc decision in Castillo-Rivera relied on this Court’s decision in Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007). See Castillo-Rivera, 853 F.3d at 222-23. The Court in Duenas-Alvarez said that the overbreadth inquiry “requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.” Duenas-Alvarez, 549 U.S. at 193. According to the minority in Castillo-Rivera, however, the Fifth Circuit majority’s interpretation of Duenas-Alvarez was “distorted” and “stretch[ed] far beyond its original meaning.” Castillo-Rivera, 853 F.3d at 237 (Dennis, J., dissenting, joined by Stewart, C.J., and Smith, Prado, and Graves, JJ., and with respect to Part I only by Higginson and Costa, JJ.). In fact, as the minority pointed out, the Fifth Circuit’s version of the Duenas-Alvarez rule “directly conflicts with holdings from the First, Third, Sixth, Ninth, and Eleventh Circuits.” Id. at 241.

Mr. Espinoza-Bazaldua seeks to have this Court settle the circuit split over the appropriate standard under the categorical approach for determining whether a prior state statute of conviction is overbroad.

BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

- I. The courts of appeals have adopted divergent interpretations of the rule set forth in *Gonzales v. Duenas-Alvarez* as applied to facially overbroad statutes, which creates an entrenched and problematic circuit split.

Mr. Espinoza-Bazaldua's argued in the district court and the Fifth Circuit that his prior Indiana conviction for dealing in marijuana did not qualify as a "drug trafficking offense" under the categorical approach because the Indiana statute is overbroad and indivisible. In particular, Mr. Espinoza-Bazaldua argued that the Indiana statute's inclusion of "financing" rendered the statute overbroad. In support, he cited a Seventh Circuit decision, *Lopez v. Lynch*, 810 F.3d 484 (7th Cir. 2016), in which the court had found overbreadth with respect to a materially identical Indiana drug statute that differed only as to drug type.

The Fifth Circuit rejected Mr. Espinoza-Bazaldua's overbreadth argument (and thus did not reach his indivisibility argument) based on its conclusion that he did not point the court to a case establishing that the state applies its statute in an overbroad manner. The court relied on its en banc decision in *Castillo-Rivera*, which established the standard requiring the defendant to point to a case. That en banc decision, in turn, interpreted this Court's decision in *Duenas-Alvarez* in a way that is directly at odds with decisions of the First, Third, Sixth, Ninth, and Eleventh Circuits. Since then, the Tenth Circuit has joined the majority view. Mr. Espinoza-Bazaldua asks this Court to review his case to resolve this significant and important circuit split that will erroneously expose untold defendants—in the Fifth Circuit only—to an increased sentence.

A. The Fifth Circuit’s *en banc* decision creates a clear conflict with the First, Third, Sixth, Ninth, Tenth, and Eleventh Circuits.

In Duenas-Alvarez, this Court provided some guidance on how to apply the generic-offense prong of the categorical approach. In particular, the Court held that finding a state statute to be overbroad “requires more than the application of legal imagination to a state statute’s language.” Duenas-Alvarez, 549 U.S. at 193. Rather, a state statute is overbroad when there is “a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.” Duenas-Alvarez, 549 U.S. at 193. The Court further explained that the “realistic probability” standard requires an offender to point to his own case or another state case “in which the state courts in fact did apply the statute in the special (nongeneric manner for which he argues).” Id.

The Fifth Circuit judges in Castillo-Rivera strongly disagreed about how to interpret Duenas-Alvarez. The majority opinion, joined by eight of the fifteen judges who heard the case, interpreted Duenas-Alvarez as establishing a rigid requirement that demands that the defendant produce a state case holding “as a matter of law” that the state statute covers non-generic conduct. Castillo-Rivera, 853 F.3d at 226.

The seven dissenting judges interpreted Duenas-Alvarez as imposing a less rigid requirement that serves to extinguish fanciful arguments about the interpretation of state statutes. Castillo-Rivera, 853 F.3d at 239. The dissent accused the majority of “distort[ing]” Duenas-Alvarez and “stretch[ing it] far beyond its original meaning.” Id. at 237. According to the dissent, Duenas-Alvarez is limited to defendants who make overbreadth arguments “by hypothesizing that [the state statute] might be applied in some fanciful or unlikely

way—through the application of legal imagination.” Id. at 239. But Duenas-Alvarez should not be read to preclude arguments based on the plain language of the state statute. Id.

The dissenting opinion supported its view with the Ninth Circuit’s en banc opinion in United States v. Grisel, 488 F.3d 844 (9th Cir. 2007) (en banc). There, the Ninth Circuit held that a state statute is overbroad if the text of that statute plainly exceeds the scope of the generic definition of the crime. Grisel, 488 F.3d at 850. The Ninth Circuit explained that its holding comports with Duenas-Alvarez because, when “the state statute’s greater breadth is evident from its text,” it requires “no ‘legal imagination’” (the concern in Duenas-Alvarez) to find “a realistic probability exists that the state will apply its statute” in an overbroad manner. Grisel, 488 F.3d at 850.

In addition to conflicting with the en banc Ninth Circuit, the Fifth Circuit’s en banc opinion conflicts with the First, Third, Sixth, Tenth, and Eleventh Circuits. In the First Circuit, Duenas-Alvarez’s “sensible caution against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes” has no role to play when the state statute clearly applies more broadly than the generic offense under the statute’s plain meaning. Swaby v. Yates, 847 F.3d 62, 66 (1st Cir. 2017). Indeed, the First Circuit found it “surprising” that the Board of Immigration Appeals would hold the view that state statute’s “should not be given their plain meaning” under the categorical approach. Id.

The Second Circuit likewise has held that the Duenas-Alvarez “realistic probability” language does not apply when “the elements of the crime of conviction are not the same as

the elements of the generic federal offense.” Singh v. Attorney General, 839 F.3d 273, 286 n.10 (3d. Cir. 2016). So too does the Sixth Circuit, because a contrary interpretation of Duenas-Alvarez would “require[] [the court] to ignore the clear language of the state statute.” Mendieta-Robles v. Gonzales, 226 Fed. Appx. 564, 572 (6th Cir. 2007).

In the Tenth Circuit, a defendant “does not have to make [the] showing” that the government has or would prosecute the prior statute of conviction in the overbroad way when “the statute specifically says” that it reaches the overbroad conduct. United States v. O’Connor, 874 F.3d 1147, 1154 (10th Cir. 2017). The same rule governs the Eleventh Circuit: “Duenas-Alvarez does not require [a] showing [that the state would prosecute non-generic conduct] when the statutory language itself, rather than ‘the application of legal imigation’ to that language, creates the ‘realistic probability’ that a state would apply the statute to conduct beyond the generic definition.” Vassell v. U.S. Attorney General, 839 F.3d 1352, 1362 (11th Cir. 2016) (quoting Ramos v. U.S. Attorney General, 709 F.3d 1066, 1071-72 (11th Cir. 2013)).

The Fifth Circuit’s expansive reading of Duenas-Alvarez requires that the defendant produce a specific case where the government prosecuted the statute in an overbroad manner even when the statute is plainly overbroad on its face. That view is irreconcilable with these holdings from the First, Third, Sixth, Tenth, and Eleventh Circuits.

B. The Fifth Circuit’s decision also creates considerable tension with this Court’s other decisions on the categorical approach.

Not only does the Fifth Circuit’s heightened view of Duenas-Alvarez create a circuit split, but it also creates considerable tension with this Court’s decisions in Mathis v. United

States, 136 S. Ct. 2243 (2016), and Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017). As the Court explained in Mathis, the categorical approach is all about elements and “cares not a whit” about facts that have no legal effect or consequence. Mathis, 136 S. Ct. at 2248. In its simplest form, the categorical inquiry requires courts to line up the elements of the offense of conviction “alongside those of the generic offense and see[] if they match.” Id.

But under the Fifth Circuit’s approach to Duenas-Alvarez, the inquiry is not so simple. In the Fifth Circuit, it is not enough for the written elements of the statute of prior conviction to be plainly broader than the elements of the generic offense during the side-by-side comparison. Rather, the defendant must come forward with a case demonstrating that the government actually prosecutes the state in that plainly overbroad way. This departs from the elements-only focus of Mathis. And, as the Tenth Circuit has observed, the Court in Mathis limited its analysis to a comparison of the text of the state burglary statute to the elements of the generic definition of burglary and “did not seek or require instances of actual prosecutions for the means that did not satisfy [the Armed Career Criminal Act].” O’Connor, 874 F.3d at 1154.

The Court conducted a similarly limited analysis in Esquivel-Quintana. There, the Court simply applied the plain language of the California statute of conviction to determine that “the least of the acts criminalized by the state statute” was “consensual sexual intercourse between a victim who is almost 19 and a perpetrator who just turned 21.” Esquivel-Quintana, 137 S. Ct. at 1568. The Court then “presume[d] that [petitioner’s] conviction was based on acts that were no more criminal than that.” Id. Ultimately, the

Court held: “Petitioner has ‘show[n] something *special* about California’s version of the doctrine’—that the age of consent is 18, rather than 16—and *needs no more to prevail.*” Id. at 1572 (second emphasis added (quoting Duenas-Alvarez, 549 U.S. at 191). The Court in Esquivel-Quintana even quoted Duenas-Alvarez, but still required nothing more than the plain language of the state statute to establish that it was broader than the generic crime’s elements. The Fifth Circuit’s approach is therefore in considerable tension with the Court’s analysis in Esquivel-Quintana, as well as the Court’s decision in Mathis.

C. The correct application of the categorical approach is an important question of federal sentencing law with significant consequences for criminal defendants in many cases.

Years of imprisonment turn on the correct answer to the overbreadth question presented by this case. Although the illegal-reentry Guideline has been amended, the categorical approach continues to apply to a variety of other Guidelines provisions, including career offender. See USSG § 4B1.1 (2016). Moreover, the categorical approach determines whether a defendant faces harsh mandatory minimum sentencing under the Armed Career Criminal Act. See, e.g., Mathis, 136 S. Ct. at 2251. And, it determines whether a person being deported carries an “aggravated felony” conviction resulting in “the equivalent of banishment or exile” from the United States for life. Fang Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

Due to the significant consequences of the categorical approach in both criminal and immigration law, this petition presents a question of importance that warrants review by this Court.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari to clarify the application of the overbreadth analysis of the categorical approach and resolve the entrenched and well-developed circuit split on that issue.

Date: January 16, 2018

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