

No. \_\_\_\_\_

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In the  
Supreme Court of the United States

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JOSE LUIS RAMIREZ GALVAN,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent,*

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**On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Fifth Circuit**

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PETITION FOR A WRIT OF CERTIORARI

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KEVIN JOEL PAGE  
*COUNSEL OF RECORD*  
FEDERAL PUBLIC DEFENDER'S OFFICE  
NORTHERN DISTRICT OF TEXAS  
525 GRIFFIN STREET, SUITE 629  
DALLAS, TEXAS, 75202  
(214) 767-2746

*Counsel for Petitioner*

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**QUESTIONS PRESENTED**

Whether this Court should hold the instant petition in light of *Sessions v. Dimaya*, 15-1498, \_\_U.S.\_\_, 137 S.Ct. 31 (Sept. 29, 2016)?

**PARTIES TO THE PROCEEDING**

Petitioner is Jose Luis Ramirez Galvan, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

**TABLE OF CONTENTS**

|                                                                                                                                                             |     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| QUESTIONS PRESENTED.....                                                                                                                                    | i   |
| PARTIES TO THE PROCEEDING. ....                                                                                                                             | ii  |
| TABLE OF CONTENTS.....                                                                                                                                      | iii |
| INDEX TO APPENDICES. ....                                                                                                                                   | iv  |
| TABLE OF AUTHORITIES.....                                                                                                                                   | v   |
| OPINIONS BELOW. ....                                                                                                                                        | 1   |
| JURISDICTION. ....                                                                                                                                          | 1   |
| STATUTORY PROVISIONS INVOLVED.....                                                                                                                          | 1   |
| STATEMENT OF THE CASE. ....                                                                                                                                 | 3   |
| REASONS FOR GRANTING THE PETITION.....                                                                                                                      | 5   |
| I.     The Court should hold the instant petition in light of <i>Sessions v.</i><br><i>Dimaya</i> , 15-1498, __U.S.__, 137 S.Ct. 31 (Sept. 29, 2016).. .... | 5   |
| CONCLUSION. ....                                                                                                                                            | 9   |

**INDEX TO APPENDICES**

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Order Denying Petition for Rehearing

Appendix C Revised Judgment and Opinion of Fifth Circuit

Appendix D Judgment and Sentence of the United States District Court for  
the Northern District of Texas

## TABLE OF AUTHORITIES

### Cases:

|                                                                                    |         |
|------------------------------------------------------------------------------------|---------|
| <i>Esquivel-Quintana v. Sessions</i> , 137 S. Ct. 1562 (2017).....                 | 4, 5    |
| <i>Henderson v. United States</i> , __ U.S. __, 133 S. Ct. 1121 (2013). ....       | 6       |
| <i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....                                 | 7       |
| <i>Lawrence v. Chater</i> , 516 U.S. 163 (1996).....                               | 5       |
| <i>Sessions v. Dimaya</i> , 15-1498, __U.S.__, 137 S.Ct. 31 (Sept. 29, 2016)...    | 5, 6, 7 |
| <i>United States v. Andino-Ortega</i> , 608 F.3d 305 (5th Cir. 2010).....          | 8       |
| <i>United States v. Dominguez-Benitez</i> , 542 U.S. 74 (2004). ....               | 7       |
| <i>United States v Galvan</i> , 699 Fed. Appx. 314 (October 17, 2017). ....        | 1       |
| <i>United States v. Gamboa-Garcia</i> , 620 F.3d 546 (5th Cir. 2010).....          | 8       |
| <i>United States v. Jones</i> , 527 U.S. 373 (1999). ....                          | 6       |
| <i>United States v. Medrano-Camarillo</i> , 653 Fed. Appx. 239 (5th Cir. 2016).... | 8       |
| <i>United States v. Mondragon-Santiago</i> , 564 F.3d 357 (5th Cir. 2009).....     | 8       |
| <i>United States v. Ovalle-Garcia</i> , 868 F.3d 313 (5th Cir. 2017).....          | 4       |
| <i>United States v. Paladino</i> , 401 F.3d 471 (7th Cir. 2005).....               | 7       |
| <i>United States v. Price</i> , 516 F.3d 285 (5th Cir. 2008).....                  | 8       |
| <i>United States v. Rodriguez</i> , 711 F.3d 541 (5th Cir. 2013).....              | 4       |
| <i>United States v. Saro</i> , 24 F.3d 283 (D.C. Cir. 1992). ....                  | 8       |
| <i>United States v. Saucedo</i> , 2016 U.S. App. LEXIS 15405 (5th Cir. 2016)....   | 8       |

### Rules

|                             |   |
|-----------------------------|---|
| Fed. R. Crim. P. 52(b)..... | 6 |
|-----------------------------|---|

### Federal Statutes

|                                |      |
|--------------------------------|------|
| 8 U.S.C. § 1101(a)(43).....    | 1, 3 |
| 8 U.S.C. § 1101(a)(43)(F)..... | 4, 5 |
| 8 U.S.C. § 1326(a). ....       | 3    |

|                        |      |
|------------------------|------|
| 8 U.S.C. § 1326(b).    | 2    |
| 8 U.S.C. § 1326(b)(2). | 3, 8 |
| 18 U.S.C. § 16.        | 2    |
| 18 U.S.C. § 16(b).     | 4, 5 |
| 18 U.S.C. § 3553(a).   | 6, 7 |
| 28 U.S.C. § 1254(1).   | 1    |

### **State Statutes**

|                                 |   |
|---------------------------------|---|
| Tex. Penal Code § 22.011(c)(1). | 5 |
|---------------------------------|---|

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Jose Luis Ramirez Galvan respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

An unreported opinion of the court of appeals affirming the sentence was issued October 17, 2017, and is reprinted as Appendix A. A Petition for Panel Rehearing was denied on the merits November 16, 2017, which denial is reprinted as Appendix B. Contemporaneous with the denial, the court of appeals issued a revised opinion, which also affirmed the sentence. That opinion may be accessed as *United States v Galvan*, 699 Fed. Appx. 314 (October 17, 2017)(unpublished), and is reprinted as Appendix C. The district court's sentencing decision was documented in a written judgment, reprinted as Appendix D.

## JURISDICTION

The judgment of the court of appeals was entered on November 16, 2017. The order denying the Petition for Rehearing was denied November 16, 2017. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

8 U.S.C. §1101(a)(43) provides in part:

The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

\*\*\*

(F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year;

\*\*\*

8 U.S.C. §1326(b) provides in part:

Criminal penalties for reentry of certain removed aliens. Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, United States Code, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

\*\*\*

18 U.S.C. §16 provides:

The term "crime of violence" means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) 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.

## STATEMENT OF THE CASE

### 1. Facts and Proceedings in District Court

Petitioner Jose Luis Ramirez Galvan is a Mexican national. *See* (ROA.25-26).<sup>1</sup> He was previously convicted of the Texas offense of sexual assault of a child, under an indictment alleging that he had sexual intercourse with a minor. *See* (ROA.103-106). He received a two-year term of imprisonment and suffered removal from the country. *See* (ROA.95).

After he returned, the federal government charged him with illegal re-entry, the instant case. *See* (ROA.6-7). He pleaded guilty, *see* (ROA.23-26), and Probation ultimately calculated an advisory Guideline range of 18-24 months imprisonment. *See* (ROA.119). It also determined that the statutory maximum was 20 years imprisonment, probably because Petitioner's prior conviction was believed to constitute an "aggravated felony" under 8 U.S.C. §1101(a)(43). *See* (ROA.100).

The defense objected that the prior aggravated felony should have been proven to a jury beyond a reasonable doubt, conceding that the argument was foreclosed. *See* (ROA.109-111). The court overruled that objection, *see* (ROA.78), and imposed sentence of 24 months, *see* (ROA.86). The judgment described the offense as "8 U.S.C. 1326(a) & (b)(2)." (ROA.39). Subsection (b)(2) of the statute referenced in the judgment provides the enhanced maximum for re-entries following an aggravated felony conviction. 8 U.S.C. §1326(b)(2).

### II. Appeal

On appeal, Petitioner unsuccessfully argued that his prior conviction did not represent an aggravated felony because it could be committed by sexual

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<sup>1</sup> Citations to the record in the court of appeals are included in hopes they are of use to the government in answering the Petition or the Court in evaluating it.

activity with a 17 year old victim who assented thereto. He conceded that the issue was foreclosed by *United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013) (*en banc*), which defined the term “sexual abuse of a minor” to include all illegal sexual acts with a person under the age of 18. But he noted the pendency of *Esquivel-Quintana v. Sessions*, No. 16-54, \_\_U.S.\_\_, 137 S.Ct. 368 (2016)(granting certiorari), *decision rendered at* 137 S.Ct. 1562 (2017), which would address whether the generic offense of “sexual abuse of a minor” required a victim under the age of 16.

After Petitioner filed his brief, *Esquivel-Quintana* was decided in favor of the petitioner in that case, holding that “in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16.” *Esquivel-Quintana*, 137 S. Ct. at 1568.

In spite of *Esquivel-Quintana*, a panel of the Fifth Circuit affirmed, finding that the Texas statute did in fact qualify as an aggravated felony because it represented a “crime of violence” under 18 U.S.C. §16(b) and 8 U.S.C. §1101(a)(43)(F). [Appx. A]. Specifically, it held that the offense involved a substantial risk that force would be used against the victim to complete the offense. [Appx. A]. Petitioner then sought rehearing, arguing that *United States v. Ovalle-Garcia*, 868 F.3d 313 (5<sup>th</sup> Cir. 2017), precluded the offense’s treatment as an aggravated felony on any theory. The court of appeals issued a revised opinion, holding that *Ovalle-Garcia* did not preclude the “aggravated felony” designation under 18 U.S.C. §16(b). [Appx. C].

## REASONS FOR GRANTING THE PETITION

### I. The Court should hold the instant petition in light of *Sessions v. Dimaya*, 15-1498, \_\_U.S.\_\_, 137 S.Ct. 31 (Sept. 29, 2016).

The sole basis for the decision below is that Petitioner’s prior conviction constitutes an aggravated felony under 18 U.S.C. §16(b). Plainly, it can no longer constitute an aggravated felony on the ground that it represents the enumerated offense of “sexual abuse of a minor.” That enumerated offense requires, as an element, that the victim be less than 16 years of age, *see Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017), while Petitioner’s Texas offense may be committed against older victims, *see* Tex. Penal Code §22.011(c)(1).

The constitutionality of 18 U.S.C. §16(b), as incorporated into 8 U.S.C. §1101(a)(43)(F), is currently before this Court in *Sessions v. Dimaya*, 15-1498, \_\_U.S.\_\_, 137 S.Ct. 31 (Sept. 29, 2016). In the event that *Dimaya* rules this provision unconstitutional, there will plainly be no valid basis upon which to conclude that Petitioner’s conviction is an aggravated felony.

This Court “regularly hold(s) cases that involve the same issue as a case on which *certiorari* has been granted and plenary review is being conducted in order that (if appropriate) they may be ‘GVR’d’ when the case is decided.” *Lawrence v. Chater*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting). Ultimately, a GVR is appropriate where intervening developments reveal a reasonable probability that the outcome below rests upon a premise that the lower court would reject if given the opportunity for further consideration. *See Lawrence*, 516 U.S. at 168.

It is true that the aggravated felony designation was not contested in district court. Nonetheless, a different result is reasonably probable if the

petitioner prevails in *Dimaya*. Unpreserved error is reviewed under the plain error standard. *See* Fed. R. Crim. P. 52(b). Reversible plain error consists of 1) error, 2) that is plain or obvious, 3) that affects substantial rights, and 4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings, meriting discretionary remand. *See United States v. Jones*, 527 U.S. 373, 389 (1999).

As noted, a victory for the alien in *Dimaya* will plainly leave no valid basis for the aggravated felony designation. And the plain-ness of error is determined at the time of appeal, not at the time of trial. *See Henderson v. United States*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 1121 (2013).

Further, there is at least a reasonable probability of a different outcome if the error is recognized. Petitioner concedes that the “aggravated felony” determination did not affect his advisory Guideline range. The district court’s appraisal of the defendant’s prior offense, however, did appear to influence its conclusion that a sentence at the top of the Guideline range was appropriate. *See* (ROA.84)(“I think the government pointed out an important point with regard to having someone in the country with that kind of a crime, which is one of the more serious kinds of crimes a person can commit, unnoticed or don't know anything about it.”). It is reasonably probable that the district court would have moderated the sentence had it been aware that Congress did not believe that statute to warrant an aggravated felony designation.

In addition, the aggravated felony determination affected Petitioner’s statutory sentencing range, doubling the maximum from ten to twenty years. The district court must calibrate the factors enumerated at 18 U.S.C. §3553(a) to the entire sentencing range. So it is reasonably probable that a district court considering a range of zero to twenty years would reach a different result than

one considering a range of zero to ten years imprisonment. Petitioner's two year sentence is a fifth of his true range – assuming his view of the law – but only a tenth of the range believed applicable by the district court. It is, in relative terms, twice as severe when the true range is known. A court's conclusion about the defendant's mandatory sentencing range – here the statutory maximum – may affect the sentence ultimately imposed. This is so even if the court had not contemplated a sentence outside of the correct range. *Cf. United States v. Paladino*, 401 F.3d 471, 482 (7th Cir. 2005)(observing that a conscientious judge in the era of mandatory Guidelines would attempt to calibrate the defendant's position in the range to his culpability). Indeed, 18 U.S.C. §3553(a) probably demands that the district court consider the statutory range in deciding the sentence, as it requires consideration of “the kinds of sentences available.” 18 U.S.C. §3553(a)(3).

Importantly, a court of appeals will reverse on plain error where a party shows a reasonable probability of a different result. *See United States v. Dominguez-Benitez*, 542 U.S. 74, 83 n. 9 (2004). And this Court has cautioned that “[t]he reasonable probability standard [on plain error] is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for the error things would have been different.” *Dominguez-Benitez*, 542 U.S. at 83 n. 9 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). This forgiving standard of prejudice – a reasonable probability of a different result, less than a preponderance of the evidence – must then be multiplied by itself in the GVR context. Petitioner has met this standard.

Further, **some** form of relief is virtually certain if the alien prevails in *Dimaya*. In this event, the court below will, at a minimum, strike the judgment's

reference to 8 U.S.C. §1326(b)(2). *See United States v. Mondragon-Santiago*, 564 F.3d 357, 369 (5<sup>th</sup> Cir. 2009). That form of relief is no mere nicety – the erroneous judgment classifying his prior conviction as an aggravated felony could bind any future courts. *See United States v. Gamboa-Garcia*, 620 F.3d 546, 549 (5<sup>th</sup> Cir. 2010).

Finally, the error is likely to merit discretionary relief under the fourth prong. Because it condemns persons to serve unnecessary imprisonment, sentencing error with a likely affect on the outcome tends to merit discretionary remand in the court below. *See United States v. Andino-Ortega*, 608 F.3d 305, 311-312 (5<sup>th</sup> Cir. 2010); *United States v. Price*, 516 F.3d 285, 290 (5<sup>th</sup> Cir. 2008). Further, the balance of equities tends to weigh more heavily in favor of remand in cases involving sentencing error than in trial error. “When an error in sentencing is at issue ... the problem of finality is lessened, for a resentencing is nowhere near as costly or as chancy an event as a trial.” *United States v. Saro*, 24 F.3d 283, 288 (D.C. Cir. 1992).

Here, moreover, the district court imposed sentence with a large misimpression as to the statutory range and the Congressional view of the prior offense. The fairness of judicial proceedings is implicated when a judge imposes sentence believing it to be, in terms relative to the statutory maximum, half as severe as it would be under the correct principles.

The aggravated felony designation, moreover, is stigmatizing in immigration proceedings, criminal litigation, and civil society. Errors in its application are not left uncorrected by the court, even on plain error. *See Mondragon-Santiago*, 564 F.3d at 369; *United States v. Saucedo*, 2016 U.S. App. LEXIS 15405, at \*2 (5<sup>th</sup> Cir. 2016)(unpublished); *United States v. Medrano-Camarillo*, 653 Fed. Appx. 239, 240 (5<sup>th</sup> Cir. 2016)(unpublished).

**CONCLUSION**

For all the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

/s/ KEVIN JOEL PAGE  
KEVIN JOEL PAGE  
*Counsel of Record*  
Federal Public Defenders Office  
Northern District of Texas  
525 Griffin Street, Suite 629  
Dallas, Texas, 75202  
(214) 767-2746

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