

No. 17-7781

IN THE SUPREME COURT OF THE UNITED STATES

JOSE LUIS RAMIREZ GALVAN, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's challenge to the district court's determination that the Texas offense of sexual assault of a child is an "aggravated felony" for purposes of 8 U.S.C. 1326(b)(2) is moot.

2. Whether the district court's aggravated-felony determination was plainly erroneous.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. C, at 1-3) is not published in the Federal Reporter but is reprinted at 699 Fed. Appx. 314.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2017. A petition for rehearing was denied on November 16, 2017 (Pet. App. B, at 1). The petition for a writ of certiorari was filed on February 13, 2018. 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 Northern District of Texas, petitioner was convicted of unlawfully reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a). Pet. App. D, at 1. The district court sentenced petitioner to 24 months of imprisonment. Id. at 2. The court of appeals affirmed. Pet. App. C, at 1-3.

1. Petitioner is a native and citizen of Mexico. See Presentence Investigation Report (PSR) ¶ 38. In 2011, petitioner was convicted and sentenced to two years of imprisonment in Texas for sexually assaulting a child. PSR ¶¶ 8, 29. In 2013, petitioner was released from state prison and was removed to Mexico. PSR ¶ 8. He reentered the United States illegally shortly thereafter and was discovered by immigration officers in Texas following a 2015 arrest for drunk driving. PSR ¶ 9.

A federal grand jury charged petitioner with unlawfully reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(2). C.A. Record on Appeal (ROA) 6. A violation of Section 1326 carries a default maximum sentence of two years of imprisonment. 8 U.S.C. 1326(a). If a defendant commits that offense 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," 8 U.S.C. 1101(a) (43) (F), which is defined to include a felony offense "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). Whether a defendant has a prior conviction that warrants a higher statutory maximum sentence under Section 1326(b) (1) or (2) is a "sentencing factor" that is found by the district court. Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998).

2. Petitioner pleaded guilty to violating Section 1326(a). ROA 23-26, 32, 66-70. In its presentence report, the Probation Office determined that petitioner faced a statutory maximum term of 20 years of imprisonment under 8 U.S.C. 1326(b) (2), apparently based on the view that petitioner's prior sexual-assault conviction was a "crime of violence" under 18 U.S.C. 16(b). PSR ¶¶ 18, 60. The Probation Office further recommended an eight-level enhancement of petitioner's offense level under Sentencing Guidelines § 2L1.2(b) (2) (B) (2016), because his prior offense was a felony resulting in at least two years of imprisonment. Second PSR Add. ¶ 16. With that enhancement and other adjustments, petitioner's Guidelines offense level was 13 and his criminal history category was III, resulting in an advisory sentencing range of 18 to 24 months of imprisonment. Second PSR Add. ¶ 62.

Petitioner objected to the application of the 20-year statutory maximum in 8 U.S.C. 1326(b)(2), on the theory that the government was required to prove his prior conviction to a jury beyond a reasonable doubt. ROA 109-110. He acknowledged, however, that his objection was foreclosed by this Court's decision in Almendarez-Torres. ROA 78, 109. The district court overruled the objection and adopted the sentencing recommendations in the presentence report. ROA 78. After considering the relevant sentencing factors in 18 U.S.C. 3553(a), the court sentenced petitioner to 24 months of imprisonment. ROA 85-86.

3. The court of appeals affirmed. Pet. App. C, at 1-3. The court rejected petitioner's argument, made for the first time on appeal, that his earlier conviction for sexual assault of a child did not constitute an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F). Pet. App. C, at 2-3. The court observed that Texas's sexual-assault statute "punishes conduct that goes beyond mere sexual contact and specifically covers explicit sexual acts involving a child." Ibid. (citing Tex. Penal Code Ann. § 22.011(a)(2) and (c)(1) (West 2011)). The court determined that violations of that statute thus present "'a significant likelihood that physical force may be used to perpetrate the crime,'" rendering the offense a "crime of violence" under 18 U.S.C. 16(b) and thus an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F). Pet. App. C, at 2 (citation omitted). The court therefore found

no plain error in the district court's decision to adopt the Probation Office's determination that petitioner was subject to an enhanced 20-year maximum sentence under 8 U.S.C. 1326(b)(2). Pet. App. C, at 3.

ARGUMENT

Petitioner contends (Pet. 5-8) that the definition of a "crime of violence" in 18 U.S.C. 16(b) is unconstitutionally vague. In Sessions v. Dimaya, 138 S. Ct. 1204 (2018), this Court held that Section 16(b), as incorporated into the definition of an "aggravated felony" in 8 U.S.C. 1101(a)(43)(F), is void for vagueness. See 138 S. Ct. at 1223. That decision, however, does not provide a basis for relief in this case. Petitioner has finished serving his sentence and has been removed to Mexico. His challenge to the enhanced statutory maximum for aggravated felons in 8 U.S.C. 1326(b)(2) is therefore moot. And in any event, review of petitioner's constitutional challenge is limited to plain error due to his failure to raise that claim in the courts below. Petitioner cannot demonstrate reversible plain error because the legal classification of his prior sexual-assault offense as an aggravated felony had no effect on his sentence. The petition for a writ of certiorari should be denied.

1. This Court lacks jurisdiction to consider petitioner's challenge because it is moot. Petitioner does not challenge the bases for his guilty plea and subsequent conviction under Section

1326(a). Rather, he challenges only the enhanced statutory maximum for defendants who were previously removed following conviction for an aggravated felony, which is a "sentencing factor" rather than an element of the offense. Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998); see Pet. 6-8 (arguing that the classification of petitioner's offense as an aggravated felony was a "sentencing error" that "affected [his] statutory sentencing range").

Petitioner completed his sentence (which did not include a term of supervised release, Pet. App. D, at 2) on November 6, 2017, see Fed. Bureau of Prisons, Find an Inmate, <https://www.bop.gov/inmateloc> (last visited May 18, 2018) (search inmate register number 53857-177), and the Department of Homeland Security has informed the Solicitor General's Office that he was removed from the United States on that date. Any challenge to petitioner's sentence became moot once that sentence expired. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

The completion of a criminal defendant's sentence will not normally moot an appeal challenging the conviction because criminal convictions generally have "continuing collateral consequences" beyond just the sentences imposed. Spencer v. Kemna, 523 U.S. 1, 8 (1998). But a "presumption of collateral

consequences" does not extend beyond criminal convictions. Id. at 12. Therefore, when a defendant challenges only the length of his term of imprisonment, his completion of that prison term moots an appeal, unless the defendant can show that the challenged action continues to cause "collateral consequences adequate to meet Article III's injury-in-fact requirement," id. at 14, and that those consequences are "'likely to be redressed by a favorable judicial decision,'" id. at 7 (citation omitted).

Petitioner has not made that showing here. Petitioner suggests that the district court's classification of his sexual-assault offense as an "aggravated felony" could bind a court in future proceedings if he again enters the country illegally. Pet. 8 (citing United States v. Gamboa-Garcia, 620 F.3d 546, 549 (5th Cir. 2010)). But the possibility that petitioner will suffer adverse consequences if he commits future crimes is irrelevant; petitioner is "able -- and indeed required by law -- to prevent such a possibility from occurring." Spencer, 523 U.S. at 15 (citation omitted); see United States v. Sanchez-Gomez, No. 17-312 (May 14, 2018), slip op. 10, 12 (observing that the possibility that a defendant will commit future crimes is irrelevant to whether a claim is moot) (citing cases).

Petitioner also asserts (Pet. 8) that his "aggravated felony designation" could have a "stigmatizing" effect in future "immigration proceedings, criminal litigation, and civil society."

This Court has explained, however, that “the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review.” St. Pierre v. United States, 319 U.S. 41, 43 (1943) (per curiam). Petitioner identifies no other concrete, collateral consequences that would be likely to arise from the district court’s aggravated-felony determination.*

2. Even if the Court had jurisdiction to consider petitioner’s claim, the petition should be denied. Petitioner did not challenge the constitutionality of Section 16(b) in the courts below. Rather, in the district court, he contended that the enhanced statutory maximum sentence for aliens who reenter the United States after having been removed following conviction for

* An aggravated-felony determination renders an alien inadmissible to the United States and ineligible for asylum. See 8 U.S.C. 1158(b)(2)(B)(i), 1182(a)(9)(A)(i). Those consequences, however, would likely apply to petitioner in any event because he illegally reentered the United States after being removed. An illegal reentrant is inadmissible, regardless of whether he was convicted of 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-iii) (providing that aliens deemed inadmissible due to either past illegal reentry or conviction for an aggravated felony may seek lawful admission only if the government authorizes them to do so). An illegal reentrant is also ineligible for asylum if (as is typical) his earlier removal order is reinstated, even if he has no other prior convictions. See 8 U.S.C. 1231(a)(5). And in any event, a prior offense need not be an aggravated felony to bar asylum. See, e.g., Delgado v. Holder, 648 F.3d 1095, 1106-1107 (9th Cir. 2011) (noting that a conviction for any “particularly serious crime” disqualifies an alien from seeking asylum, regardless of whether the conviction was for an aggravated felony) (citing 8 U.S.C. 1158(b)(2)(A)(ii)). Nor has petitioner suggested any likelihood that he would qualify or apply for asylum at any point in the future.

an aggravated felony is an element of the offense that should have been submitted to a jury -- an argument that he acknowledged was foreclosed by this Court's decision in Almendarez-Torres. See ROA 78, 109-110. In the court of appeals, petitioner asserted that the Texas offense of sexual assault of a minor was not an aggravated felony because it did not categorically qualify as the enumerated offense of "sexual abuse of a minor," see 8 U.S.C. 1101(a)(43)(A), but he did not address whether the offense alternatively qualified as an aggravated felony because it was a "crime of violence" under 8 U.S.C. 1101(a)(43)(F) and 18 U.S.C. 16(b). See Pet. C.A. Br. 5-6.

Because petitioner did not challenge the constitutionality of Section 16(b) in the courts below, he has forfeited the argument. Any review of petitioner's claim would therefore be limited to plain error. See United States v. Olano, 507 U.S. 725, 732-736 (1993); see also Pet. 5-6 (acknowledging that plain-error review would apply to his claim). In light of Dimaya, *supra*, petitioner could establish that the district court committed an error and that the error was "plain," thus satisfying the first two prongs of the plain-error standard. See Henderson v. United States, 568 U.S. 266, 279 (2013) (holding that error may be "plain" at the time of appellate review). But petitioner could not satisfy the third plain-error prong, which requires him to establish that the error affected his substantial rights. See Olano, 507 U.S. at

734. An effect on substantial rights usually requires "that the error [be] prejudicial," meaning that "[i]t must have affected the outcome of the district court proceedings." Ibid. Where, as here, "the rights acquired by the defendant relate to sentencing, the outcome he must show to have been affected is his sentence." Puckett v. United States, 556 U.S. 129, 142 n.4 (2009) (internal quotation marks omitted).

The district court's determination that petitioner's statutory maximum sentence was 20 years of imprisonment under 8 U.S.C. 1326(b)(2), which the court of appeals affirmed on the ground that his sexual-assault offense qualified as a "crime of violence" under 18 U.S.C. 16(b) and thus was an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F), did not affect his actual sentence. As petitioner acknowledges (Pet. 6), the classification of his offense as an aggravated felony "did not affect his advisory Guideline range." See Second PSR Add. ¶ 16 (applying offense-level enhancement based on fact that petitioner's offense was a felony resulting in at least two years of imprisonment). Petitioner's 24-month sentence was within the statutory range authorized for any illegal-reentry offense, see 8 U.S.C. 1326(a), and it was substantially below the ten-year statutory maximum that would have applied based solely on the fact that petitioner's prior offense was a felony, see 8 U.S.C. 1326(b)(1). And although the district court noted at sentencing that sexual assault of a minor

"is one of the more serious kinds of crimes a person can commit," Pet. 6 (quoting ROA 84), it did not suggest that the legal classification of that offense as an "aggravated felony" under 8 U.S.C. 1326(b)(2) had any effect on petitioner's sentence. In light of those circumstances, petitioner is not entitled to relief under the plain-error standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

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