

IN THE SUPREME COURT OF THE UNITED STATES

JESUS RAMIREZ-HIDALGO, 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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QUESTIONS PRESENTED

1. Whether petitioner's challenge to the district court's determination that the Texas offense of evading arrest with a vehicle 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 affected petitioner's sentence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 707 Fed. Appx. 850.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2018. The petition for a writ of certiorari was filed on February 15, 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 Southern 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). Judgment 1. The district court sentenced petitioner to 21 months of imprisonment, to be followed by one year of supervised release. Id. at 3-4. The court of appeals affirmed. Pet. App. 1-2.

1. Petitioner is a native and citizen of Mexico. See Presentence Investigation Report (PSR) ¶ 4. In 2014, petitioner was convicted and sentenced to two years of imprisonment in Texas for evading arrest with a motor vehicle. PSR ¶¶ 5, 26. In 2015, petitioner was released from state prison and was removed to Mexico. PSR ¶¶ 6, 26. He reentered the United States illegally shortly thereafter and was discovered by immigration officers in Texas following a 2015 arrest for money laundering. PSR ¶¶ 7-8.

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). Indictment 1. 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). Rearrangement Tr. 8-10. 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 evading-arrest conviction qualified as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F). PSR ¶¶ 16, 52. The Probation Office further recommended an eight-level enhancement of petitioner's offense level under Sentencing Guidelines § 2L1.2(b)(1)(C) (2015), which applied to defendants who had a prior conviction for an aggravated felony. PSR ¶ 16. With that enhancement and other adjustments, petitioner's Guidelines offense level was 13 and his criminal history category was IV, resulting in an advisory sentencing range of 24 to 30 months of imprisonment. PSR ¶ 53.

Petitioner objected to the application of the 20-year statutory maximum under Section 1326(b)(2) and the Guidelines

enhancement under Section 2L1.2(b)(2)(B), on the theory that the classification of his prior offense as an aggravated felony was based on the application of the definition of a "crime of violence" in 18 U.S.C. 16(b), which he contended was unconstitutionally vague. D. Ct. Doc. 23, at 1-3 (Jan. 17, 2017). Petitioner acknowledged, however, that his objection was foreclosed by then-existing Fifth Circuit precedent which had held that Section 16(b) was not unconstitutionally vague. Id. at 1 (citing United States v. Gonzalez-Longoria, 831 F.3d 670 (5th Cir. 2016) (en banc), abrogated by Sessions v. Dimaya, 138 S. Ct. 1204 (2018), and cert. denied, No. 16-6259 (May 14, 2018)).

At sentencing, the district court noted that the question of whether Section 16(b) was unconstitutionally vague was then pending before this Court in Dimaya, supra. See Sent. Tr. 17-19. The court decided to "give [petitioner] the benefit of the doubt" on whether Section 16(b) was unconstitutional and granted petitioner a downward variance to reflect the Guidelines range of 15 to 21 months of imprisonment that would have applied without the Section 2L1.2(b)(2)(B) enhancement. Ibid.; see id. at 4. After considering the relevant sentencing factors in 18 U.S.C. 3553(a), the court imposed a sentence of 21 months of imprisonment. Sent. Tr. 19. The court subsequently explained in the statement of reasons accompanying its judgment that it had granted petitioner a downward variance under the Guidelines on the assumption that Section 16(b) would be deemed unconstitutionally vague in Dimaya.

Statement of Reasons 3. The court's judgment, however, indicated that petitioner could have received a sentence of up to 20 years of imprisonment under Section 1326(b)(2) because he had previously been removed "after an aggravated felony conviction." Judgment 1.

3. The court of appeals affirmed. Pet. App. 1-2. As relevant here, petitioner argued on appeal that the district court erred in determining that his evading-arrest offense was an aggravated felony that would have allowed for a sentence of up to 20 years of imprisonment under Section 1326(b)(2). Pet. C.A. Br. 15-21. Petitioner renewed his contention that classifying his offense as an aggravated felony depended on application of the "crime of violence" definition in Section 16(b), which he argued was unconstitutionally vague. Ibid. Petitioner sought a remand for the purpose of correcting the judgment to "correctly reflect[]" that his prior offense was, instead, an ordinary felony for which the maximum sentence would be ten years of imprisonment under Section 1326(b)(1). Id. at 21.

The court of appeals noted that petitioner's constitutional challenge to Section 16(b) was foreclosed by its decision in Gonzalez-Longoria, and it therefore affirmed the district court's judgment. Pet. App. 1-2.

ARGUMENT

Petitioner contends (Pet. 7-20) 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 application of the enhanced statutory maximum for aggravated felons in 8 U.S.C. 1326(b)(2) is therefore moot. And in any event, the district court's determination of the statutory maximum did not affect its decision to sentence him to 21 months of imprisonment. 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. 14 (acknowledging that, in the context of an illegal-reentry prosecution under 8 U.S.C. 1326, the aggravated-felony determination is relevant only to whether "enhanced statutory and [Sentencing] Guideline[s] punishment ranges" should apply).

Petitioner completed his term of imprisonment on April 13, 2018, see Fed. Bureau of Prisons, Find an Inmate,

<https://www.bop.gov/inmateloc> (last visited May 23, 2018) (search inmate register number 18821-479), and the Department of Homeland Security has informed the Solicitor General's Office that he was removed from the United States on April 18, 2018. Any challenge to the district court's determination that he was subject to an enhanced maximum sentence under Section 1326(a) became moot once his 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.").¹

¹ Petitioner's challenge to the application of Section 1326(b)(2) is moot notwithstanding the fact that he remains subject to a one-year term of supervised release. Judgment 4. The classification of petitioner's prior offense as an aggravated felony affected his statutory maximum term of incarceration but not the imposition or length of his term of supervised release. See, e.g., 18 U.S.C. 3583; PSR ¶¶ 56-58; cf. United States v. Johnson, 529 U.S. 53, 54 (2000) (holding that a prisoner who serves too long a term of incarceration is not entitled to receive credit against his term of supervised release). Although an alien who has been removed may in some circumstances challenge an underlying criminal conviction, see United States v. Campos-Serrano, 404 U.S. 293, 294 n.2 (1971), or an unexpired term of supervised release, United States v. Heredia-Holguin, 823 F.3d 337, 343 (5th Cir. 2016) (en banc), he may not challenge the calculation of a term of imprisonment to which he is no longer subject, id. at 342 n.3 (citing cases). In any event, petitioner's removal means that his supervised release will be of no "practical consequence[]" unless he violates the conditions of his release by illegally reentering the United States. United States v. Vera-Flores, 496 F.3d 1177, 1181 (10th Cir. 2007); see Rearraignment Tr. 7. That possibility does not present a live controversy. See, e.g., 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).

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 the application of a provision that only affects 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 contends (Pet. 20) that the classification of his evading-arrest offense as an aggravated felony will render him inadmissible to the United States. But aliens (like petitioner) who illegally reenter the United States after being removed are inadmissible regardless of whether they have been 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).

Petitioner also asserts (Pet. 20) that "greater stigma" attaches to a finding that a defendant committed an aggravated felony as opposed to an ordinary felony. 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

2. Even if the Court had jurisdiction to consider petitioner's claim, the petition should be denied. Although petitioner's constitutional challenge to Section 16(b) was foreclosed by Fifth Circuit precedent at the time of sentencing, the district court nonetheless assumed that the challenge had merit and granted a downward variance to reflect the lower Guidelines range that would have applied without the application of the

² An aggravated-felony determination renders an alien ineligible for asylum. 8 U.S.C. 1158(b)(2)(B)(i). That consequence, however, would likely apply to petitioner in any event because he illegally reentered the United States after being removed. An illegal reentrant is 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.

enhancement for defendants who had previously committed an aggravated felony. Sent. Tr. 19; see Statement of Reasons 3. The court imposed a 21-month sentence, which was within the statutory range authorized for any illegal-reentry offense, see 8 U.S.C. 1326(a), and was substantially below the ten-year statutory maximum that would have provided the upper bound of petitioner's sentence based solely on the fact that his prior offense was a felony, see 8 U.S.C. 1326(b)(1). Nothing in the record of petitioner's sentencing indicates that the court's view that a sentence of up to 20 years would have been permissible under Section 1326(b)(2) had any effect on petitioner's actual sentence. Under those circumstances, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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