

No. 17-7939

IN THE SUPREME COURT OF THE UNITED STATES

DAMIEN CASTILLO-MURION, AKA HECTOR RAUL CHAIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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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)/(2), and was sentenced to 50 months of imprisonment, to be followed by three years of supervised release. Pet. App. B1-B2. He appears (Pet. 8) to renew his contention (Pet. App. A1) that his prior conviction for assault on a public servant under Texas law was not an "aggravated felony" under the now-superseded Sentencing Guidelines § 2L1.2(b)(1)(C) (2015), which increased a defendant's offense level by eight if the defendant was previously removed following a conviction for an

"aggravated felony." Petitioner argues that the former version of Section 2L1.2, which defined an "aggravated felony" to include a "crime of violence" under 18 U.S.C. 16(b), is unconstitutionally vague in light of this Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015). See Sentencing Guidelines § 2L1.2, comment. (n.3(A)) (2015) (incorporating definition of "aggravated felony" in 8 U.S.C. 1101(a)(43)); 8 U.S.C. 1101(a)(43)(F) (defining "aggravated felony" to include "a crime of violence * * * as defined in section 16 of Title 18" for which the term of imprisonment is at least one year).

After the petition for a writ of certiorari in this case was filed, this Court held in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), that the definition of a "crime of violence" in 18 U.S.C. 16(b) is unconstitutionally vague. 138 S. Ct. at 1223. There is, however, no reason to vacate the court of appeals' judgment in light of Dimaya. The court of appeals correctly determined that petitioner's challenge to the classification of his prior conviction as a "crime of violence" -- and therefore as an "aggravated felony" -- was "factually baseless" because "none of [petitioner's] prior convictions was categorized as an aggravated felony." Pet. App. A1. Rather, the Probation Office and the district court treated his prior conviction for assault on a public servant as a non-aggravated felony for purposes of calculating both the statutory maximum sentence and the recommended Sentencing

Guidelines range. See Presentence Investigation Report (PSR) Add. 1-3 (accepting petitioner's objection to proposed classification of his prior conviction for assault on a public servant as an aggravated felony and amending the PSR to remove the enhancement and reflect that petitioner "does not have a prior conviction for an aggravated felony"); Sent. Tr. 5 (district court adopting Guidelines calculations in the PSR "as modified or supplemented by the addendum"). Accordingly, this Court's holding in Dimaya that the definition of "crime of violence" in 18 U.S.C. 16(b) is unconstitutionally vague has no bearing on petitioner's recommended Guidelines sentence or any other issue in his case.

Moreover, because petitioner's challenge to Sentencing Guidelines § 2L1.2(b)(1)(C) (2015) is ultimately a vagueness challenge to a provision of the advisory Guidelines, it is foreclosed by this Court's decision in Beckles v. United States, 137 S. Ct. 886 (2017), which held that "the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause." Id. at 895. This Court has recently denied multiple petitions for a writ of certiorari challenging Guidelines Section 2L1.2(b)(1)(C) in light of Johnson. See, e.g., Ontiveros-Cedillo v. United States, No. 17-6721 (May 14, 2018); Gutierrez-Lopez v. United States, No. 17-6751 (May 14, 2018); Rodriguez v. United States, No. 17-5476 (May 14, 2018); Maldonado-Landaverde v. United States, No. 16-9318 (May 14, 2018).

The petition for a writ of certiorari should be denied.*

Respectfully submitted.

NOEL J. FRANCISCO
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* The government waives any further response to the petition unless this Court requests otherwise.