

IN THE SUPREME COURT OF THE UNITED STATES

JUAN CARLOS CELAYA-CARTAJENA, AKA CARLOS ALBERTO ROJAZ,
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

BRIAN A. BENCZKOWSKI
Assistant Attorney General

VIJAY SHANKER
Attorney

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

QUESTION PRESENTED

Whether petitioner's within-Guidelines sentence for illegal reentry following removal is procedurally or substantively unreasonable.

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No. 17-8624

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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 673 Fed. Appx. 431.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2017. The petition for a writ of certiorari was not filed until February 27, 2018, and is out of time under Rule 13.1 of the Rules of this Court. 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 illegal reentry after removal, in violation of 8 U.S.C. 1326(a) and (b). Judgment 1. He was sentenced to 50 months of imprisonment. Judgment 2. The court of appeals dismissed petitioner's appeal. Pet. App. 1-2.

1. On January 4, 2016, petitioner, a citizen and national of Mexico, was encountered by immigration officials near Hidalgo, Texas. Presentence Investigation Report (PSR) ¶¶ 4, 9; Re-arraignment Tr. 25-26. Petitioner admitted that he had illegally entered the United States. PSR ¶¶ 4, 10; Re-arraignment Tr. 25. Petitioner was arrested, and a criminal record check revealed that in November 2001, petitioner had been convicted in Texas of aggravated robbery, evading arrest, and unauthorized use of a vehicle. PSR ¶¶ 5-7, 30-32.¹ In addition, petitioner had been removed from the United States in October 2008, PSR ¶ 9, and convicted of illegal reentry in October 2009, PSR ¶ 8. After serving a 48-month term of imprisonment for the 2009 illegal

¹ Petitioner's convictions stemmed from an incident in which petitioner, accompanied by an associate, pointed a .38 caliber revolver at an individual working on a car in a parking lot and threatened to kill him if he did not give petitioner all of his money. PSR ¶ 30. Petitioner then drove away and, when police officers tried to conduct a traffic stop of his car, attempted to evade arrest before crashing into a parked car. Ibid. Petitioner and his accomplice fled on foot but were caught and arrested; petitioner had \$124 in cash and the victim's driver's license. Ibid.

reentry offense, petitioner had again been removed from the United States. PSR ¶¶ 9, 33.

In January 2016, a federal grand jury in the Southern District of Texas returned an indictment charging petitioner with one count of illegally reentering the United States following removal, in violation of 8 U.S.C. 1326(a) and (b). Indictment. Petitioner pleaded guilty to the indictment without a plea agreement. Re-arraignment Tr. 18-19, 25-26; see PSR ¶ 56.

2. In advance of sentencing, the Probation Office prepared a presentence report. Section 2L1.2 of the Sentencing Guidelines provides a base offense level of eight for the offense of illegal reentry after deportation. Sentencing Guidelines § 2L1.2(a) (2015). Until November 1, 2016, the Guidelines provided that a defendant convicted of illegal reentry was subject to a 16-level enhancement if he had previously been convicted of a "crime of violence." Id. § 2L1.2(b)(1)(A). The commentary defined a "[c]rime of violence" to include, inter alia, "robbery," as well as "any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "elements clause"). Id. § 2L1.2, comment. (n.(1)(B)(iii)).

Applying the 2015 Sentencing Guidelines, the Probation Office recommended a 16-level enhancement under Section 2L1.2(b)(1)(A)(ii) because petitioner's Texas aggravated robbery conviction qualified as a "crime of violence." PSR ¶¶ 14, 17. It

also recommended a two-level reduction for acceptance of responsibility. See PSR ¶¶ 15-21, 26; Sentencing Guidelines § 3E1.1(a). The resulting total offense level of 22, combined with a criminal history category III, yielded an advisory Guidelines sentencing range of 51 to 63 months of imprisonment. PSR ¶¶ 27, 34, 54. The statutory maximum applicable to petitioner's offense was 20 years. PSR ¶ 53; see 8 U.S.C. 1326(b)(2).

Petitioner objected to the presentence report, arguing, as relevant here, that the 16-level enhancement under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) was excessive. Addendum to PSR 1A. Petitioner also requested a downward departure under Section 5K2.0(a)(3) on that basis. Ibid. In addition, petitioner requested that the government move for an additional one-level reduction in offense level for acceptance of responsibility under Section 3E1.1(b). Ibid. The government did so.

3. In June 2016, the district court sentenced petitioner. See Sent. Tr. 1. Aside from granting the government's since-filed motion for a third point of reduction in offense level for acceptance of responsibility, the court adopted the presentence report and calculated the advisory Guidelines range as 46 to 57 months. Id. at 4.

Petitioner reiterated his objection to the 16-level enhancement under Section 2L1.2(b)(1)(A)(ii), emphasizing that his Texas aggravated robbery conviction had occurred 15 years earlier

and that he had committed the crime when he was 22 years old. Sent. Tr. 4-5. Petitioner also noted that an amendment to Section 2L1.2 (Amendment 802) was scheduled to go into effect in November 2016. Id. at 5. That amendment replaced the Special Offense Characteristics enhancements provided by Section 2L1.2(b) of the 2015 Guidelines -- including the 16-level enhancement under Section 2L1.2(b)(1)(A) -- with a more particularized system of enhancements. See Sentencing Guidelines § 2L1.2(b) (2016); Sentencing Guidelines App. C, Amend. 802 (Supp. Nov. 1, 2016). Petitioner asserted that if the amendment were already effective, his Guidelines range would be 37 to 46 months. Sent. Tr. 5.

The district court sentenced petitioner to 50 months of imprisonment and imposed no term of supervised release. Judgment 2; Sent. Tr. 13. The court explained that a sentence of at least 48 months was necessary because petitioner's prior 48-month sentence for illegal reentry had not deterred him from unlawfully returning to the country. See Sent. Tr. 11-13. The court noted the forthcoming amendment to Section 2L1.2, but reiterated that the court was "not convinced that a sentence of less than 48 months [is] sufficient in this case." Id. at 12-13. Petitioner preserved "in the event of a possible appeal" an objection that the sentence was greater than necessary under 18 U.S.C. 3553(a), and the court stated that it "did consider all the 3553(a) factors." Sent. Tr. 13.

4. Petitioner appealed. His counsel filed an Anders brief, see Anders v. California, 386 U.S. 738 (1967), and moved for leave to withdraw. See Pet. App. 1. Petitioner did not file a response. See ibid. After reviewing counsel's brief and the relevant portions of the record, the court of appeals, in an unpublished per curiam opinion issued after Amendment 802 took effect, "concur[red] with counsel's assessment that the appeal present[ed] no nonfrivolous issue for appellate review." Id. at 1-2. The court therefore dismissed the appeal. Id. at 2.

ARGUMENT

Petitioner argues (Pet. 5-8) that his within-Guidelines sentence of 50 months is procedurally and substantively unreasonable. The petition for a writ of certiorari is significantly out of time and review should be denied on that basis alone. In any event, the decision below does not conflict with any decision of this Court or of another court of appeals, and petitioner's claims are factbound.

1. As an initial matter, the petition for a writ of certiorari should be denied because it is untimely. The court of appeals issued its decision on January 17, 2017, Pet. App. 1; petitioner neither sought rehearing in the court of appeals nor requested that this Court extend the time within which to file his petition. See Sup. Ct. R. 13.3, 13.5. Thus, the time for filing the petition began to run on January 17, 2017, and expired on April 17, 2017. See Sup. Ct. R. 13.1. But the petition was not filed

until February 27, 2018. Although this Court has discretion to consider an untimely petition in a criminal case, see Schacht v. United States, 398 U.S. 58, 63-65 (1970), and although petitioner is proceeding pro se, petitioner has offered no explanation for his more than ten-month delay in seeking this Court's review. This Court should therefore decline to exercise its discretion to review the petition.

2. In any event, petitioner's arguments do not warrant further review. Petitioner raises (Pet. 4, 6-7) a number of procedural challenges to his sentence. Each of those challenges lacks merit.

a. Petitioner first contends (Pet. 4) that his sentence is procedurally unreasonable because his 2001 conviction for Texas aggravated robbery was too old to qualify as a "crime of violence" supporting a 16-level enhancement under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2015).² In particular, under the 2015 version of Section 2L1.2 applied at petitioner's sentencing, his prior conviction could trigger a 16-level enhancement only if it received criminal history points under Guidelines Chapter Four. Id. § 2L1.2(b)(1)(A). Section 4A1.2(e)(1) (2015), in turn, counts a prior felony sentence for purposes of computing criminal history only if that sentence was imposed within 15 years of the defendant's commencement of the instant offense. Under that

² Petitioner does not contend that his prior conviction was not a "crime of violence" under Sentencing Guidelines § 2L1.2 (2015), which defines that term to include "robbery."

provision, petitioner's prior conviction was properly counted because his Texas sentence was imposed on November 27, 2001, and he committed the instant offense on January 4, 2016 -- less than 15 years later. PSR ¶¶ 4, 30.

b. Petitioner also argues (Pet. 6-7) that the district court procedurally erred by failing to consider the not-yet-effective amendment to Section 2L1.2. The court, however, correctly applied the version of the Guidelines in effect at the time of sentencing. See 18 U.S.C. 3553(a)(4)(A)(ii); Sentencing Guidelines § 1B1.11(a) (2015). A proposed Guidelines amendment, however, takes effect only after a prescribed period of congressional review has elapsed, unless Congress provides otherwise. See 28 U.S.C. 994(p); Stinson v. United States, 508 U.S. 36, 41 (1993) ("Amendments to the Guidelines must be submitted to Congress for a 6-month period of review, during which Congress can modify or disapprove them."). Because no statute had rendered the proposed amendment effective on the date of petitioner's sentence, the district court correctly declined to apply it. Amendment 802 took effect on November 1, 2016, 81 Fed. Reg. 27,262, 27,262 (May 5, 2016), and thus was not effective when petitioner was sentenced on June 14, 2016, Sent. Tr. 1.

The district court, moreover, appeared to recognize that it could permissibly take account of the Sentencing Commission's decision to amend Section 2L1.2 prospectively in determining the appropriate sentence under 18 U.S.C. 3553(a), even if the amendment

did not apply retroactively to petitioner. See Sent. Tr. 12-13. But the court declined to exercise its discretion to vary downward on that basis. See ibid. In particular, the court explained that while it "underst[oo]d" that "come November there will be a change as to where you would fall in the guidelines, * * * I'm not convinced that a sentence of less than 48 months [is] sufficient in this case, because, obviously, that * * * earlier sentence did not convince you that you could not come back into this country no matter what the circumstances." Ibid.

c. To the extent that the petition could be construed to contend (Pet. 6-7) that the district court or court of appeals erred in failing to apply Amendment 802 retroactively, that contention would lack merit.

Although the Sentencing Commission may amend existing Guidelines in ways that reduce the advisory range for certain defendants, see 28 U.S.C. 994(o), such an amendment does not apply retroactively to defendants who already have been sentenced unless the Commission affirmatively elects to make the amendment retroactive. See Dillon v. United States, 560 U.S. 817, 821-822 (2010). When a defendant "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," the defendant may move the district court to reduce his sentence "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2). The Commission has

adopted a policy statement limiting such relief to particular Guidelines amendments that it has concluded should be applied retroactively. Sentencing Guidelines § 1B1.10(a)(1) and (c), p.s.; see id. § 1B1.10, comment. (backg'd.).

Lower courts have recognized a narrow exception to this general rule for amendments to the Guidelines that take effect during the pendency of an appeal and clarify existing Guidelines but do not make substantive changes. See, e.g., United States v. Alexander, 553 F.3d 591, 592 (7th Cir. 2009). Such clarifying amendments, courts have held, “may be applied retroactively to discern the Sentencing Commission’s intent regarding the application of a pre-amendment guideline.” United States v. Geerken, 506 F.3d 461, 465 (6th Cir. 2007).

Petitioner is not entitled to retroactive application of Amendment 802 either on appeal or in a collateral proceeding. The Commission did not make Amendment 802 retroactive, see Sentencing Guidelines § 1B1.10(d), and therefore petitioner may not seek a reduction of his sentence based on that amendment under 18 U.S.C. 3582(c)(2). Amendment 802 also does not fall within the exception that lower courts have identified for clarifying amendments; the amendment did not clarify the existing language of Section 2L1.2, but substantively modified its provisions. See Sentencing Guidelines App. C at 154 (stating that the amendment “significantly revises the illegal reentry guideline”).

3. Petitioner further asserts (Pet. 3, 5-6) that his sentence is substantively unreasonable because it does not properly account for the age of his prior conviction for a crime of violence or the fact that he was 22 years old when he committed it. He also contends (Pet. 4, 5-6) that the district court should have varied downward because he committed the illegal reentry offense when his wife was pregnant and he needed money for his daughter's medical bills.

Petitioner's claims are factbound and do not warrant this Court's review. In any event, the court of appeals correctly upheld petitioner's within-Guidelines sentence, which is reasonable under an abuse-of-discretion standard. See Rita v. United States, 551 U.S. 338, 347 (2007) (holding that an appellate court may apply a presumption of reasonableness to a sentence within a properly calculated Guidelines range); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006) (a sentence within the range suggested by the Guidelines is entitled to a rebuttable presumption of reasonableness). The court expressly considered and rejected petitioner's arguments for a lower sentence, noting that petitioner's prior aggravated robbery offense was serious, that he had not been deterred by his previous 48-month sentence for illegal reentry, and that his personal circumstances did not excuse his unlawful reentry into the country. See Sent. Tr. 9-13. The court, moreover, did not abuse its discretion in declining to lower petitioner's sentence based on the age of his prior crime

of violence. See United States v. Rodriguez, 660 F.3d 231, 234 (5th Cir. 2011) (“[T]he staleness of a prior conviction used in the proper calculation of a guidelines-range sentence does not render a sentence substantively unreasonable and does not destroy the presumption of reasonableness that attaches to such sentences.”).

4. Finally, petitioner contends (Pet. 6) that, under Apprendi v. New Jersey, 530 U.S. 466 (2000), a jury was required to find the fact of his prior conviction beyond a reasonable doubt in order for it to increase his advisory Guidelines range. That argument fails for two reasons. First, the advisory nature of the Guidelines renders Apprendi inapplicable. See United States v. Booker, 543 U.S. 220 (2005). Second, Apprendi held that a jury must find any fact that increases the prescribed statutory maximum “[o]ther than the fact of a prior conviction.” 530 U.S. at 490. Here, the fact at issue is petitioner’s prior conviction for aggravated robbery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

VIJAY SHANKER
Attorney

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