

No. 16-8734

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IN THE SUPREME COURT OF THE UNITED STATES

RAMIRO CASTANEDA-MORALES, HECTOR RUBEN MORALES-CARDENAS, JOEL
VELASQUEZ-RIOS, JOSE GUADALUPE VEGA-ZAPATA, CANDIDO PEREZ-CONDE,
PETITIONERS

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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Petitioners contend (Pet. 19-23) that the definition of the term "crime of violence" in 18 U.S.C. 16(b), as incorporated into the definition of an "aggravated felony" in 8 U.S.C. 1101(a)(43), is unconstitutionally vague. They note (Pet. 10) that the same issue is pending before this Court in Sessions v. Dimaya, No. 15-1498 (restored to the calendar for reargument on June 26, 2017), and suggest that their petition for a writ of certiorari be held until Dimaya is decided. Contrary to petitioners' suggestion, their petition should be denied.

Petitioners were convicted of illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326. If a defendant commits that offense after having been convicted of a felony, the statutory 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" is defined to include a "crime of violence" under 18 U.S.C. 16(b). See 8 U.S.C. 1101(a)(43)(F). Petitioners assert (Pet. 6-7, 16) that their prior felony convictions were deemed to be crimes of violence (and thus aggravated felonies) under Section 16(b), subjecting them to an enhanced 20-year statutory maximum sentence.

Even if this Court holds in Dimaya that Section 16(b) is unconstitutionally vague, that ruling would not affect petitioners' convictions or sentences. Petitioners do not dispute that they were previously convicted of felonies; they merely dispute whether their crimes were aggravated felonies. As such, petitioners would at least be subject to a ten-year statutory maximum sentence under Section 1326(b)(1). Petitioners were sentenced to terms of imprisonment well below ten years:

Petitioner	Term of Imprisonment
Castaneda-Morales	18 months
Morales-Cardenas	30 months
Velasquez-Rios	60 months
Vega-Zapata	36 months
Perez-Conde	27 months

Any error in classifying petitioners' prior felony offenses as aggravated felonies under 8 U.S.C. 1326(b)(2) thus had no effect on their sentences.

Classifying petitioners' prior offenses as aggravated felonies may have affected the calculation of their advisory sentencing ranges under the United States Sentencing Guidelines. See Sentencing Guidelines § 2L1.2(b)(1)(C) (2014) (providing an eight-level enhancement if the defendant was removed following "a conviction for an aggravated felony"). But "the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause," Beckles v. United States, 137 S. Ct. 886, 890 (2017), and thus the decision in Dimaya will have no effect on petitioners' Guidelines calculations.

Because petitioners were sentenced below the statutory maximum that would have applied if their prior offenses were classified as ordinary felonies rather than aggravated ones, and because the application of the Sentencing Guidelines in these cases

is not susceptible to a constitutional vagueness challenge, no reason exists to hold this petition for the decision in Dimaya. The petition for a writ of certiorari should instead be denied.*

Respectfully submitted.

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Counsel of Record

JULY 2017

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