

IN THE SUPREME COURT OF THE UNITED STATES

FRANCISCO ALVARO-VELASCO, ARTURO MONTES BENAVIDES, JUAN CASTRO-CASTRO, JOSE PRUDENCIO CANALES-BONILLA, EDWIN GARRIDO, DANIEL GONZALEZ-BAUTISTA, JOSE LARA-GARCIA, JUAN MORALES-LEON, JESUS MORALES-SANCHEZ, CARLOS ALBERTO PEREZ-DE LEON, ELDER ROCAEL TZACIR-GARCIA, HELBER VALDEZ, 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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No. 16-8058

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Petitioners contend (Pet. 16-21) 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. 8) that the same issue is pending before this Court in Sessions v. Dimaya, No. 15-1498 (reargument scheduled for Oct. 2, 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. 5-6, 14) 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
Alvaro-Velasco	48 months
Benavides	Time served
Castro-Castro	41 months
Canales-Bonilla	41 months
Garrido	57 months
Gonzalez-Bautista	84 months
Lara-Garcia	46 months
Morales-Leon	46 months
Morales-Sanchez	41 months
Perez-De Leon	66 months
Tzacir-Garcia	41 months
Valdez	30 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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* The government waives any further response to the petition unless this Court requests otherwise.