

No.

IN THE
SUPREME COURT OF THE UNITED STATES

—————
JESUS MALDONADO-LANDAVERDE,
also known as Jesus Maldonado, also known as Jesus Maldonado-Andaverde,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

—————
On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit
—————

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QUESTION PRESENTED FOR REVIEW

I. Whether this Court should hold this petition for certiorari pending a decision in *Sessions v. Dimaya*, No. 15-1498, argued January 17, 2017.

PARTIES

Jesus Maldonado-Landaverde is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jesus Maldonado Landaverde, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished order of summary affirmance of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Jesus Maldonado-Landaverde*, No. 15-10626 (5th Cir. February 21, 2017), and is provided in the Appendix to the Petition. [Appx. A]. No petitions for rehearing were filed.

JURISDICTIONAL STATEMENT

The District Court's judgment and sentence were entered on June 19, 2015, and are attached to this petition [Appx. B.] The judgment and order of the United States Court of Appeals for the Fifth Circuit were filed on February 21, 2017. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

18 U.S.C. § 16 provides the following:

§ 16. Crime of violence defined

The term "crime of violence" means –

(b) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and 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.

The Fifth Amendment to the United States Constitution provides:

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Facts and Proceedings Below

This is a criminal case on direct appeal. On January 21, 2015, Jesus Maldonado-Landaverde (Maldonado) was indicted for one count of illegal re-entry after deportation, in violation of 8 U.S.C. § 1326(a) and (b)(1)(2). On March 6, 2015, Maldonado pleaded guilty to the one count indictment, pursuant to a written plea agreement. (ROA.28).¹

Following Maldonado's guilty plea, the probation office prepared a Pre-sentence Report (PSR). (ROA.88) Applying U.S.S.G. §2L1.2, the PSR concluded that Maldonado's base offense level was a level 8, and included an 8-level enhancement pursuant to U.S.S.G. §2L1.2(b)(1)(B) because the probation officer had found that Maldonado had been previously convicted of the felony offense of evading arrest with a vehicle. (ROA.93). After a three-level reduction for acceptance of responsibility, the probation officer calculated Hernandez's total offense level to be a level 13. (ROA.93). Maldonado received four criminal history points, resulting in a criminal history category III. (ROA.96). With a total offense level of 13 and a criminal history category III, Maldonado's advisory imprisonment range was 18-24 months. (ROA.99).

Maldonado filed no objection to the PSR. At the sentencing hearing, the district court imposed a 21 month sentence with a three-year term of supervised release, no fine and a \$100 mandatory special assessment. (ROA.81-82).

B. The Appeal

Petitioner appealed his sentence, arguing, that the residual clause under Section 16(b) was unconstitutionally vague pursuant to this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015)(Foreclosed in the Fifth Circuit by *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) The court of appeals summarily

¹ For the convenience of the Court and the parties, Petitioner has included citations to the appeal record before the Fifth Circuit Court of Appeals.

affirmed Maldonado-Landaverde's sentence in an unpublished opinion. See [Appendix A].

REASONS FOR GRANTING THE PETITION

I. This Court should hold this petition for certiorari pending its decision in *Sessions v. Dimaya*, No. 15-1498, argued on January 17, 2017.

U.S.S.G. §2L1.2(b)(1)(B) provides for an 8 level enhancement to the base offense level for a deportation or removal that occurs after a conviction for an “aggravated felony”. The term “aggravated felony” has the same meaning given that term in 8 U.S.C. § 1101(a)(43). See U.S.S.G. §2L1.2, application note 3(A).

8 U.S.C. 1101(a)(43)(F) defines an “aggravated felony” as “a crime of violence (as defined by Section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment (sic) at least one year.”

Title 18 U.S.C. § 16 defines a crime of violence to include, *inter alia*, “any other offense that is a felony and 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.” This language is referred to as the “residual clause” in the definition for “crime of violence.”

In Maldonado's case, the probation officer found that the defendant's prior conviction for evading arrest with a motor vehicle was a “crime of violence” and, therefore an “aggravated felony,” relying on *Sykes v. United States*, 131 S. Ct. 2267 (2011). In *Sykes*, the Supreme Court found that the Indiana statute making it a crime to flee from law enforcement with a vehicle was a “crime of violence” under the “residual clause” of the definition of “violent felony” in 18 U.S.C. § 924(e).

After *Sykes*, in *United States v. Johnson*, 135 S. Ct. 2551 (2015), this Court held that the “residual clause” in 18 U.S.C. § 924(e) was unconstitutionally vague.

Maldonado now objects to the similar residual clause in 18 U.S.C. § 16 as also unconstitutionally vague on the same grounds as in *Johnson* and objects to the use of this clause in determining that his prior conviction for evading arrest with a motor vehicle qualifies as an “aggravated felony” for the purposes of the 8 level enhancement in U.S.S.G. §2L1.2(b)(1)(B).

This argument was previously foreclosed by the Court of Appeals for the Fifth Circuit’s decision in *United States v United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc). Maldonado raised this issue to preserve it for further appellate review. On February 21, 2017, the Fifth Circuit summarily affirmed Maldonado’s sentence.

Every circuit to consider the issue—other than the Fifth Circuit—has held that 18 U.S.C. § 16(b) is unconstitutionally vague. *See Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016) (“Having carefully considered these principles and precedents, we agree with the Sixth, Seventh, and Ninth Circuits that 18 U.S.C. § 16(b) is not meaningfully distinguishable from the ACCA’s residual clause and that, as a result, § 16(b), and by extension 8 U.S.C. § 1101(a)(43)(F), must be deemed unconstitutionally vague in light of *Johnson*”).

On January 17, 2017, this precise issue was argued to this Court in *Sessions v. Dimaya*, No. 15-1498, a case out of the Ninth Circuit. That case still awaits this Court’s adjudication. Maldonado asks this Court to hold its evaluation of his petition pending *Dimaya*, because that decision will, in part, directly affect Maldonado’s petition.

This issue was not raised in the trial court, and any error must therefore meet the requirements of Federal Rule of Criminal Procedure 52(b) to merit relief. Unpreserved error may be reversed only where it is plain, where the defendant’s substantial rights have been affected, and where the error affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507

U.S. 725, 732 (1993). But the plain-ness of error is determined at the time of appeal, not at the time of trial proceedings. *See Henderson v. United States*, __ U.S. __, 133 S.Ct. 1121, 1124-1125 (2013). And this Court has recently emphasized that an effect on substantial rights will ordinarily follow from proof of a Guideline error. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) (holding, “Nothing in the text of Rule 52(b), its rationale, or the Court’s precedents supports a requirement that a defendant seeking appellate review of an unpreserved Guideline error make some further showing of prejudice beyond the fact that the erroneous, and higher, Guidelines range, set the wrong framework for the sentencing proceedings.”).

In any case, GVR is not a decision on the merits. *See Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001); *accord State Tax Commission v. Van Cott*, 306 U.S. 511, 515-516 (1939). Accordingly, procedural obstacles to reversal – such as the consequences of non-preservation – should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964)(*per curiam*)(GVR “has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent”); *Torres-Valencia v. United States*, 464 U.S. 44 (1983)(*per curiam*)(GVR utilized over government’s objection where error was conceded; government’s harmless error argument should be presented to the Court of Appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting)(speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945)(remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the Court of Appeals).

CONCLUSION

Petitioner respectfully asks this Court to grant *certiorari* and to reverse the judgment below, and/or to vacate the judgment and remand for reconsideration in light of any relevant forthcoming authority.

Respectfully submitted this 22nd day of May, 2017.

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