

IN THE SUPREME COURT OF THE UNITED STATES

AMILCAR LINARES-MAZARIEGO, 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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No. 16-9319

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Petitioner contends (Pet. 5) 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. He notes (Pet. 5) that the same issue is pending before this Court in Sessions v. Dimaya, No. 15-1498 (reargument scheduled for Oct. 2, 2017), and he requests that this Court grant his petition and dispose of it as appropriate in light of Dimaya. Contrary to petitioner's suggestion, the petition should be denied.

Petitioner was 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). Petitioner asserts (Pet. 4) that his prior felony conviction was deemed to be a crime of violence (and thus an aggravated felony) under Section 16(b), subjecting him 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 petitioner's conviction or sentence. Petitioner does not dispute that he was previously convicted of a felony (Texas vehicular burglary, see Pet. 4); he merely disputes whether his crime was an aggravated felony. As such, petitioner would at least be subject to a ten-year statutory maximum sentence under Section 1326(b)(1). Petitioner was sentenced to a 40 months of imprisonment. See Judgment 2. Any error in classifying petitioner's prior felony

offense as an "aggravated felony" under 8 U.S.C. 1326(b)(2) thus had no effect on his sentence.¹

Classifying petitioner's prior offense as an aggravated felony did affect the calculation of his advisory sentencing range under the United States Sentencing Guidelines. See Pet. App. 10a; see also 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 petitioner's Guidelines calculation.

Because petitioner was sentenced below the statutory maximum that would have applied if his prior offense was classified as an ordinary felony rather than an aggravated one, and because the

¹ Petitioner contends (Pet. 4) that classifying his prior offense as an "aggravated felony" also rendered his illegal reentry offense a "[C]lass C felony," resulting in a maximum term of supervised release of three years. See 18 U.S.C. 3583(b)(2) (providing for up to three years of supervised release for a "Class C or Class D felony"). Federal law defines a "Class C felony" as an offense that carries a maximum punishment of "ten or more years" of imprisonment but less than 25 years. 18 U.S.C. 3559(a)(3). Because petitioner's maximum sentence would have been ten years even without the aggravated felony enhancement, the application of that enhancement had no effect on his maximum term of supervised release. In any event, petitioner received only one year of supervised release. Judgment 3.

application of the Sentencing Guidelines in this case is not susceptible to a constitutional vagueness challenge, no reason exists to grant this petition or to hold it for Dimaya.

The petition for a writ of certiorari should be denied.²

Respectfully submitted.

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² The government waives any further response to the petition unless this Court requests otherwise.