

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL LARIOS-VILLATORO AND
JAIME ADRIAN HERNANDEZ-HERNANDEZ, 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. 16-9660

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Petitioners contend (Pet. 17-22) 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. 9) 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 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" includes a "crime of violence" under 18 U.S.C. 16(b). See 8 U.S.C. 1101(a)(43)(F).

Petitioner Larios-Villatoro asserts (Pet. 5-6, 15) that the district court improperly classified his prior felony conviction for arson as a crime of violence (and thus an aggravated felony) under Section 16(b), subjecting him to a 20-year statutory maximum sentence under 8 U.S.C. 1326(b)(2). Even if this Court holds in Dimaya that Section 16(b) is unconstitutionally vague, however, that ruling would not affect Larios-Villatoro's conviction or sentence. Larios-Villatoro does not dispute that he was previously convicted of a felony; he merely disputes whether his crime was an aggravated felony. As such, Larios-Villatoro would be subject to at least a ten-year statutory maximum sentence under Section 1326(b)(1). Larios-Villatoro was sentenced to 18 months of imprisonment, well below that ten-year maximum. See Pet. App. 24. Any error in classifying Larios-Villatoro's prior arson offense as an aggravated felony under 8 U.S.C. 1326(b)(2) thus had no effect on his sentence.

Petitioner Hernandez-Hernandez acknowledges (Pet. 5-6) that he was not convicted or sentenced under the aggravated felony provision in Section 1326(b)(2). He contends, however, that his prior offense (felony evading arrest) was improperly classified as an aggravated felony in calculating his advisory sentencing range 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, 895 (2017), and thus the decision in Dimaya will have no effect on Hernandez-Hernandez's Guidelines calculation. Regardless, Hernandez-Hernandez was sentenced to 41 months of imprisonment, see Pet. App. 27, well below the ten-year statutory maximum that would otherwise have applied.

Petitioners contend (Pet. 15) that convictions for illegal reentry following conviction for an aggravated felony under Section 1326(b)(2) will have collateral consequences if they commit other crimes or seek admission to the United States in the future. Petitioner Larios-Villatoro is the only one with standing to make that argument; as explained, petitioner Hernandez-Hernandez was not convicted or sentenced under Section 1326(b)(2). And in any event, neither possibility presents a reason to hold

the petition. The possibility that petitioners will suffer adverse sentencing consequences if they commit future illegal reentry offenses is irrelevant; petitioners "are able -- and indeed required by law -- to prevent such a possibility from occurring." Spencer v. Kemna, 523 U.S. 1, 15 (1998) (citation omitted). Moreover, aliens (like petitioners) who illegally reenter the United States after being removed are permanently inadmissible, regardless of whether they committed an aggravated felony. See 8 U.S.C. 1182(a)(9)(C)(i); see also 8 U.S.C. 1182(a)(9)(A)(iii), (a)(9)(C)(ii) (providing that aliens deemed permanently inadmissible due to either past illegal reentry or conviction for an aggravated felony may seek lawful admission only if the government consents).

No reason exists, therefore, to hold this petition for the decision in Dimaya. The petition for a writ of certiorari should instead be denied.*

Respectfully submitted.

JEFFREY B. WALL
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AUGUST 2017

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