

No. 17-5305

IN THE SUPREME COURT OF THE UNITED STATES

ROLANDO DANIEL GARCIA-HERNANDEZ AND
MARIO DELGADO CRUZ, 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. 9-22) 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).

Petitioners assert (Pet. 5-6) that the district court improperly classified their prior felony convictions for assault causing bodily injury and burglary of a habitation as crimes of violence (and thus aggravated felonies) under Section 16(b), subjecting them to 20-year statutory maximum sentences 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 their sentences. Petitioners do not dispute that they were previously convicted of felonies; they merely dispute whether their crimes were aggravated felonies. The maximum punishment for illegal reentry following conviction for a felony is ten years of imprisonment. 8 U.S.C. 1326(b)(1). Petitioner Garcia-Hernandez was sentenced to 30 months of imprisonment and petitioner Cruz was sentenced to 32 months of imprisonment, well below ten years. See 16-cr-197 Judgment 3 (Garcia-Hernandez); 16-cr-168 Judgment 3 (Cruz). Any error in classifying petitioners' prior offenses as

aggravated felonies under 8 U.S.C. 1326(b)(2) thus had no effect on their sentences.

Petitioner Garcia-Hernandez also contends (Pet. 5) that his prior offense 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 Garcia-Hernandez's Guidelines calculation.

Finally, petitioners contend (Pet. 15) that their convictions for illegal reentry following conviction for an aggravated felony under Section 1326(b)(2) will have collateral consequences "in any future illegal-reentry prosecution." But 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). Nor would the application of the enhanced statutory maximum for a prior aggravated-felony conviction in this case have any practical effect on petitioners' ability to seek lawful admission to the United States in the

future. 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) and (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.

NOEL J. FRANCISCO
Solicitor General

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