No. 16-9319

In the

Supreme Court of the United States

AMILCAR LINARES-MAZARIEGO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO MEMORANDUM IN OPPOSITION

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REPLY TO MEMORANDUM IN OPPOSITION

Petitioner Amilcar Linarez-Mazariego raised two issues in his Petition: (1) whether 18 U.S.C. § 16(b) is unconstitutionally vague; and (2) whether this Court should overrule its still-controversial decision *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). On issue 1, the Government argues that the Court should deny the petition without awaiting the resolution of *Sessions v. Dimaya*, No. 15-1498. The Government's Response does not address issue 2 at all.

I. THE "AGGRAVATED FELONY" FINDING INCREASED PETITIONER'S PRISON TERM.

The Government urges this Court to deny review because the district court's error "in classifying" the vehicle break-in "as an 'aggravated felony' under 8 U.S.C. 1326(b)(2) . . . had no effect on his sentence." U.S. Mem. 2–3. If the Respondent prevails in *Sessions v. Dimaya*, 137 S.Ct. 31 (Sept. 29, 2016), the statutory maximum, Guideline range and judgment (insofar as it identifies 8 U.S.C. §1326(b)(2)) determined by the district court in this case will all be incorrect. Yet the government maintains that this Court should deny relief because Mr. Linares received a sentence below his correct statutory maximum. The government is wrong on multiple fronts.

First, the government assumes that the district court commits no error in adopting an inflated statutory range if it sentences within the correct range. But the incorrect determination of a statutory range represents error, irrespective of the sentence actually imposed. *See Alleyne v. United States*, 133 S.Ct. 2151, 2162 (2013)("Indeed, if a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, even if the defendant

ultimately received a sentence falling within the original sentencing range (i.e., the range applicable without that aggravating fact)."). Given that the error was preserved in this case, the government bears the burden to show that the erroneous range played no part in the selection of the sentence. *See United States v. Olano*, 507 U.S. 725, 734 (1993) (Preservation shifts burden of persuasion on prejudice to the proponent of the sentence). The Government does not even try to shoulder this burden. In fact, there are many reasons why that error would affect the sentence.

The district court must calibrate the factors enumerated at 18 U.S.C. §3553(a) to the entire sentencing range. So a district court considering a range of zero to twenty years would likely reach a different result than one considering a range of zero to ten years imprisonment. Petitioner's 40-month sentence is one-third of his true range—assuming his view of the law—but only one-sixth of the range believed applicable by the district court. In relative terms, it is twice as severe when the true range is known. The mere choice of a mandatory sentencing range—here, the statutory maximum—may affect the sentence ultimately imposed. *Cf. United States v. Paladino*, 401 F.3d 471, 482 (7th Cir. 2005) (observing that a conscientious judge in the era of mandatory Guidelines would attempt to calibrate the defendant's position in the range to his culpability). Indeed, 18 U.S.C. §3553(a) probably demands that the district court consider the statutory range in deciding the sentence, as it requires consideration of "the kinds of sentences available." 18 U.S.C. §3553(a)(3).

Second, a victory for the Respondent in *Dimaya* would likely reveal error in the Guideline range. The government dismisses any such claim as a disguised

vagueness challenge to the Guideline range foreclosed by *Beckles v. United States*, 137 S.Ct. 886 (2017). But it does not defend this characterization. And a decision to invalidate 18 U.S.C. §16(b) would likely reveal non-constitutional Guideline error.

The Commission expressly cited 8 U.S.C. §1101(a)(43) in the prior version of USSG §2L1.2 when it provided for an eight level enhancement. *See* USSG §2L1.2, comment. (n. 3). This express statutory cross-reference distinguishes the Guideline from the provisions at issue in *Beckles* – it signals the Commission's intent to capture only those defendants ***actually subject*** to the consequences of §1101(a)(43). Obviously, in referencing §1101(a)(43) the Commission sought to honor Congress's decision to treat aggravated felons more harshly than other defendants. If *Dimaya* prevails, this will show that the courts cannot know whether Congress actually intended to subject any particular §16(b) alien to the consequences of §1101(a). As the Commission's intent is simply deference to Congress, there is no reason to believe that the Commission would intend an enhanced Guideline range for §16(b) defendants if Congressional intent were unclear.

Indeed, the Commission established the Guidelines with a close eye on the statutory range. *Cf. Kimbrough v. United States*, 552 U.S. 85, 106-108 (2007)(noting that the Commission achieved gradual increase in punishment by creating Guidelines that span the available statutory range in drug cases). The Guideline range intended for re-entry defendants not subject to a 20-year maximum is likely different than that intended for those subject to this maximum. In short, if Dimaya wins, the Commission would not likely regard the Guideline range in this case as

correctly determined. An incorrect Guideline range usually shows prejudice even when error is not preserved. *See Molina-Martinez v. United* States, 136 S. Ct. 1338 (2016). Here, the government makes no effort to show that the same sentence would have been imposed but for the error.

II. THE JUDGMENT ITSELF CARRIES ADVERSE CONSEQUENCES FOR PETITIONER.

Where the district court sets forth the wrong statutory subsection in an illegal re-entry case, the Fifth Circuit's practice is to remand with instructions to amend the judgment. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 369 (5th Cir. 2009). Accordingly, a victory for Dimaya would show that Petitioner in this case is entitled at least to that relief. This is not mere paper-work—an erroneous judgment would bind any future Fifth Circuit courts to the conclusion that Petitioner is an aggravated felon in the event of further litigation. *See United States v. Gamboa-Garcia*, 620 F.3d 546, 549 (5th Cir. 2010); *accord United States v. Piedra-Morales*, 843 F.3d 623, 624 (5th Cir. 2016) (holding that defendant's prior, unchallenged guilty plea to 8 U.S.C. § 1326(b)(2) precluded the argument that his original felony was not "aggravated"). This is so even if *Dimaya* changes the law. *Id.*; *see also United States v. Larios-Villatoro*, 684 F. App'x 411, 412 (5th Cir. April 4, 2017) (unpublished) ("[Defendant] argues that the previous illegal reentry conviction should not have been treated as an 'aggravated felony' because the 1996 Nebraska attempted-arson conviction that rendered the illegal reentry aggravated was itself not an aggravated felony. We need not revisit the underlying Nebraska felony because Larios-Villatoro concedes that the prior illegal reentry offense was an aggravated felony when he

pleaded guilty in 2011."). This is Petitioner's last chance to rid the judgment of error, and the proper phase of litigation in which to do so.

III. ALTERNATIVELY, THIS COURT SHOULD GRANT THE PETITION AND OVERRULE *ALMENDAREZ-TORRES*

If this Court were to overrule *Alemendarez-Torres*, then Petitioner's sentence *would* exceed the lawful statutory maximum of two years in prison. *See* 8 U.S.C. § 1326(a). Thus, even if Petitioner were not entitled to relief under any forthcoming decision in *Dimaya*, the Court could and should grant the petition to revisit the troubling implications of that case. *See*, e.g., *Shepard v. United States*, 544 U.S. 13, 27–28 (2005) (Thomas, J., concurring in part) ("*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.")

CONCLUSION

For all the foregoing reasons, this Court should either hold the Petition until *Dimaya* is decided or grant certiorari and set the case for argument.

Respectfully submitted,

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September 15, 2017