No. 05-484

In the Supreme Court of the United States

ALBERTO SANCHEZ-VILLALOBOS, AKA FRANCISCO SANCHEZ-SAENZ, AKA VILLALOBOS-SANCHEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior state conviction for possession of a controlled substance was an "aggravated felony" triggering a recommended sentence enhancement under Section 2L1.2(b)(1)(C) of the Sentencing Guidelines.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-8a) is reported at 412 F.3d 572. The judgment of the district court (Pet. App. 11a-18a) is unreported.

JURISDICTION

The court of appeals entered its judgment on June 7, 2005. A petition for rehearing was denied on July 13, 2005 (Pet. App. 9a-10a). The petition for a writ of certiorari was filed on October 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the Western District of Texas, petitioner was

convicted of illegal reentry into the United States after prior deportation, in violation of 8 U.S.C. 1326. The district court sentenced petitioner to 20 months of imprisonment, to be followed by a one-year, non-reporting term of supervised release. Pet. App. 12a-13a, 16a. The court of appeals affirmed.

1. Under 8 U.S.C. 1326, Congress set the baseline maximum sentence for illegal reentry at two years of imprisonment. 8 U.S.C. 1326(a). The Sentencing Guidelines provide a base offense level of eight for illegal reentry and authorize an eight-level upward adjustment if the defendant committed an "aggravated felony" before removal. Sentencing Guidelines § 2L1.2(b)(1)(C). The Sentencing Guidelines adopt the definition of "aggravated felony" contained in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43). See Sentencing Guidelines § 2L1.2, comment. (n.3(A)). Section 1101(a)(43)(B), in turn, defines "aggravated felony" to include a "drug trafficking crime," as defined in 18 U.S.C. 924(c). Finally, Section 924(c)(2) defines a "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*)."

2. In September 2001, petitioner was convicted in Colorado for possession of codeine, a controlled substance. Pet. App. 2a. Under Colorado law, that offense is classified as a class 1 misdemeanor and is punishable by up to 18 months of imprisonment. *Ibid.* (citing Colo. Rev. Stat. § 18-1.3-501(a) (2001)). Petitioner was sentenced to 60 days of imprisonment. Pet. App. 2a. After completing his sentence, he was removed from the United States. *Ibid.* Petitioner reentered the United States illegally, and, in 2004, he pleaded guilty to one charge of illegal reentry, in violation of 8 U.S.C. 1326. Pet. App. 2a.

At sentencing, the district court applied the Sentencing Guidelines' eight-level enhancement for illegal reentry where the prior removal followed the commission of an aggravated felony, based on petitioner's Colorado conviction for codeine possession. Pet. App. 2a. The district court then sentenced petitioner to 20 months of imprisonment, to be followed by a one-year, non-reporting term of supervised release. *Id.* at 2a, 12a-13a.

3. The court of appeals affirmed. Pet. App. 1a-8a. The court held that petitioner's prior controlled substance offense would constitute a "drug trafficking crime" under 18 U.S.C. 924(c)(2), and thus would qualify as an "aggravated felony" for purposes of the Sentencing Guidelines, if "(1) * * * the offense [is] punishable under the Controlled Substances Act," and "(2) * * * the offense [is] a felony under either state *or* federal law." Pet. App. 3a. Because it was "undisputed that [petitioner's] possession of codeine would be punishable under the [Controlled Substances Act], specifically 21 U.S.C. § 844(a)," the court's "central task" was to determine whether the controlled substance offense constitutes a felony under either state or federal law. Pet. App. 3a. The court held that the offense was a felony under federal law on two alternative grounds.

First, the court of appeals concluded that petitioner's codeine possession was a felony because it was punishable by more than one year in prison. Pet. App. 6a. The court noted that the Controlled Substances Act expressly defines a "felony drug offense" as a controlled substance offense under state or federal law "that is punishable by imprisonment for more than one year." *Id.* at 4a (quoting 21 U.S.C. 802(44)); see *id.* at 6a. The court further noted that "federal law traditionally

equates the term felony with offenses punishable by more than one year imprisonment." *Id.* at 6a.

Second, the court held that petitioner's conviction for codeine possession was a qualifying felony because it could have been punished as a felony under the Controlled Substances Act itself. Pet. App. 7a. More specifically, the court noted that petitioner was a recidivist controlled-substance offender, having also been convicted of marijuana possession in 1997. *Ibid.* Accordingly, under 21 U.S.C. 844(a), petitioner's conduct was punishable under the Controlled Substances Act itself by up to two years of imprisonment. Pet. App. 7a.[1]

ARGUMENT

Petitioner's challenge to the court of appeals' unanimous opinion upholding the district court's application of the Sentencing Guidelines does not warrant this Court's review. Petitioner has now completed the term of imprisonment that he challenges and has been removed from the United States. The Court's resolution of this case thus would have little, if any, practical impact on petitioner himself. Furthermore, the question of Sentencing Guidelines construction that petitioner poses can better be resolved, if necessary, by the Sentencing Commission. Finally, it is unlikely that petitioner's case would have been resolved differently in any other circuit. The case accordingly does not reflect the

[1] The court of appeals also rejected petitioner's argument that his sentence violated *United States* v. *Booker*, 543 U.S. 220 (2005), because the district court applied the Sentencing Guidelines as mandatory. The court of appeals refused to consider that claim because petitioner had failed to raise it in his opening brief to the court. Pet. App. 8a. Petitioner has not renewed that claim before this Court.

type of concrete and consequential conflict in courts of appeals' opinions that warrants this Court's review.

1. Petitioner argues (Pet. 8-19) that his term of imprisonment was improper because the district court applied an eight-level increase in his offense level for commission of an aggravated felony before removal. As petitioner acknowledges (Pet. 7), however, he completed the term of imprisonment that he challenges on August 18, 2005, and has been removed to Mexico. "The []incarceration that he incurred * * * is now over, and cannot be undone." *Spencer* v. *Kemna*, 523 U.S. 1, 8 (1998).

Petitioner argues (Pet. 7 n.3) that the case is not moot because he remains on supervised release. But because petitioner no longer resides in the United States, review in this case could not have the type of practical effect on petitioner's sentence that would warrant an exercise of this Court's certiorari jurisdiction, for three reasons.

First, petitioner is on a quite limited form of supervised release. The district court ordered that, if petitioner were removed from the United States after serving his term of imprisonment, his term of supervised release would be a "non-reporting" term. Pet. App. 13a, 16a. The principal condition is that, were petitioner again to enter the United States illegally, his supervised release could be revoked, *id.* at 16a, and the new offense of illegal reentry could result in an enhanced sentence, see 8 U.S.C. 1326(b).

Beyond that, the term of supervised release has no tangible effect on petitioner's liberty. Because petitioner now resides in Mexico, he is not presently under the jurisdiction, custody, or control of the United States government. He has no obligation to report to any United States probation official, and federal probation

officials are not monitoring or constraining his activities in any manner. Such a condition, which has no practical impact on petitioner unless he chooses to engage in further criminal activity by again illegally reentering the United States, does not amount to the type of legal burden that warrants this Court's certiorari review. Cf. *Spencer*, 523 U.S. at 13, 15.[2]

Second, whatever the impact of the aggravated-felony enhancement on petitioner's now-completed term of imprisonment, petitioner does not contend that the increase in his offense level had any effect on the length of his term of supervised release. In fact, Section 3583(b)(3) of Title 18 authorizes a one-year term of supervised release in this case regardless of whether petitioner previously committed an aggravated felony. Further, this Court made clear in *Johnson* v. *United States*, 529 U.S. 53 (2000), that excess prison time cannot be credited against a term of supervised release. It thus appears doubtful that resolution of the questions presented, even if petitioner prevailed, would have any effect on the length of the term of supervised release that petitioner is currently serving.

Third, according to the Bureau of Prisons, petitioner's term of supervised release will expire in eight months (on August 17, 2006). Thus, even were the Court to grant review and decide the case this Term, a decision in petitioner's favor would have at most a fleeting impact on his term of supervised release.

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[2] For that reason, petitioner's reliance (Pet. 7 n.3) on *Jago* v. *Van Curen*, 454 U.S. 14 (1981), is misplaced. There, the release of the defendant on parole did not render a case moot because of the continuing governmental control over the defendant. Here, petitioner is no longer subject to "terms that significantly restrict his freedom." *Jago*, 454 U.S. at 21 n.3.

Petitioner also argues (Pet. 7 n.3) that the case is not moot because of potential collateral consequences of the sentence. That is debatable. *United States* v. *Campos-Serrano*, 404 U.S. 293 (1971), and *United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983), on which petitioner relies (Pet. 7 n.3), are inapt. Those cases were not mooted by a defendant's removal because it was the *government* that sought this Court's review to reinstate an overturned criminal *conviction*. Reinstatement of that conviction could have led to extradition of the defendants, and the existence of the convictions could have had distinct immigration consequences. See *Villamonte-Marquez*, 462 U.S. at 581 n.2; *Campos-Serrano*, 404 U.S. at 295. Here, it is the defendant who seeks review, and only of his criminal sentence—a sentence that is just months away from being fully served and that has no present-day, practical effect on his liberty.

Further, the prospective effect of the soon-to-expire sentence would arise only if petitioner again violates United States law by again reentering the United States illegally. Neither mootness principles nor this Court's certiorari practice is designed to insulate a defendant in advance from the consequences of future crimes by permitting challenges to almost-expired sentences. Petitioner himself is "able—and indeed required by law—to prevent" the adverse consequences he hypothesizes "from occurring." *Spencer*, 523 U.S. at 15 (quoting *Lane* v. *Williams*, 455 U.S. 624, 633 n.13 (1982)).[3]

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[3] Nor is certiorari review warranted because of the mere possibility of unspecified collateral consequences from the length of the petitioner's sentence. Cf. *Spencer*, 523 U.S. at 9-11 (citing *Pollard* v. *United States*, 352 U.S. 354 (1957), which permitted a challenge to the length of a completed sentence based on the non-specific "possibility" of collateral consequence, *id.* at 358, but criticizing *Pollard's* analysis as

Petitioner claims (Pet. 7 n.3) that the potential collateral consequences of the conviction on his future immigration status are sufficient to prolong the controversy and to merit this Court's review. That is incorrect. Petitioner fails to identify any independent impact that classifying his codeine possession conviction as an aggravated felony would have on any future immigration application, given that he already has that prior controlled substance conviction (however classified), a prior marijuana conviction, and now a federal felony conviction for illegal reentry. See 8 U.S.C. 1101(a)(43)(B) and (O).[4]

"offhand[]," effectively "abandon[ing] all inquiry into the actual existence of collateral consequences," and relying upon a misunderstanding of the constitutional importance of standing and mootness principles to the separation of powers); *North Carolina* v. *Rice*, 404 U.S. 244, 247-248 (1971) (per curiam) (challenges to completed sentences require a different mootness analysis than challenges to convictions).

[4] Amici Immigrant Defense Project *et al.* express concern (Br. 5-20) about the potential consequences in immigration cases of differing interpretations of the various statutory provisions that happen to be cross-referenced by the Sentencing Guidelines here. Whether this Court's review of the proper interpretation of the statutory definition of "aggravated felony" in immigration cases is warranted, however, would better be determined in an immigration case that actually presents such consequences and that arises directly under one of those statutory provisions. See Pet. at i, *Lopez* v. *Gonzales*, petition for cert. pending, No. 05-547 (filed Oct. 31, 2005) (presenting the question whether "an immigrant who is convicted in state court of a drug crime that is a felony under the state's law, but that would only be a misdemeanor under federal law, has committed an 'aggravated felony' for purposes of the immigration laws"). A number of courts have recognized that the definition of "aggravated felony" for criminal sentencing purposes may differ from the definition employed administratively in immigration proceedings. Compare *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 919 (9th Cir. 2004) (state drug offense is not an

2. Petitioner makes no claim that his sentence contravened any federal statutory law. Nor could he. Even without a prior aggravated felony, petitioner's 20-month sentence falls within the statutorily authorized sentencing range of two years for an illegal reentry conviction. 8 U.S.C. 1326(a).

This case thus solely concerns the court's interpretation and application of the Sentencing Guidelines. Congress has charged the Sentencing Commission with "periodically review[ing] the work of the courts, and * * * mak[ing] whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). Given the Commission's statutory charge to resolve the type of claims raised by petitioner, this Court has adopted a policy of "restrained and circumscribed" use of its "certiorari power as the primary means of resolving such conflicts," *ibid.*, and there is no reason to depart from that practice here.

Petitioner in fact concedes (Pet. 2 n.1) that this case "formally involves" only a Sentencing Guidelines question, but urges (*ibid.*) a departure from *Braxton* because the courts of appeals' decisions have involved the interpretation of statutory provisions cross-referenced by the

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aggravated felony for immigration purposes unless it is punishable as a felony under federal law), with *United States* v. *Ibarra-Galindo*, 206 F.3d 1337, 1339 (9th Cir. 2000) (felony under state law is an aggravated felony under the Sentencing Guidelines even if it is a misdemeanor under federal law), cert. denied, 531 U.S. 1102 (2001); and compare *Aguirre* v. *INS*, 79 F.3d 315, 317-318 (2d Cir. 1996) (felony under state law is not an aggravated felony precluding waiver from deportation if offense is not a felony under federal law), with *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-146 (2d Cir.) (felony under state law is an aggravated felony for Sentencing Guidelines purposes even if it is a misdemeanor under federal law), cert. denied, 528 U.S. 880 (1999).

relevant Guidelines provision. That is beside the point, because the Commission retains the authority to resolve any interpretive difficulties by either eliminating the statutory cross-references or tailoring their incorporation to conform to the Commission's intended construction. See *Neal* v. *United States*, 516 U.S. 284 (1996) (although statutory definitions control minimum and maximum sentences, noting instance in which the Sentencing Commission adopted other meanings of the same terms to determine the sentence within a statutorily prescribed range).

Indeed, the Commission has already done just that with respect to other aspects of the same Guidelines provision at issue here, adopting Guidelines-specific definitions of "felony" and "drug trafficking offense" for purposes of the upward adjustments authorized by Sentencing Guidelines §§ 2L1.2(b)(1)(A)(i), 2L1.2(b)(1)(B) and 2L1.2(b)(1)(D). Compare Sentencing Guidelines § 2L1.2 comment. (n.1(B)(iv)) (defining "drug trafficking offense" as "an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, export, distribute, or dispense"), with 18 U.S.C. 924(c)(2) (defining "drug trafficking crime" to include mere possession offenses punishable under the Controlled Substances Act and other federal drug statutes). In addition, the Guidelines already define "felony," for purposes of §§ 2L1.2(b)(1)(A), (B) and (D), as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year," *id.* comment. (n.2). Were the Commission to apply that same definitional approach to the subsection at issue here or were it to

prescribe its own clarification of the "aggravated felony" provision's compass, that would eliminate the interpretive problem that petitioner asks this Court to resolve.

3. The variations in the approaches taken by courts of appeals that petitioner identifies are not sufficiently substantial in the Sentencing Guidelines context to have had an identifiable effect on the outcome in this case, much less to warrant this Court's review.

The question presented by petitioner arises only when the prior conviction (i) is punishable by imprisonment for more than one year, but (ii) is denominated a misdemeanor under state law, and (iii) has been preceded by another state-law drug conviction. Almost every court of appeals to consider that question in the sentencing context has determined that a prior conviction like petitioner's would constitute an "aggravated felony" within the meaning of the Sentencing Guidelines, and it does not appear that any circuit would find that petitioner's drug-possession offense was not an aggravated felony.

The First and Ninth Circuits have held, like the Fifth Circuit here (Pet. App. 4a-7a), that the Guidelines' definition of "aggravated felony" includes "misdemeanors under state law that carry a sentence of at least one year." *United States* v. *Cordoza-Estrada*, 385 F.3d 56, 58 (1st Cir. 2004); *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002); cf. *United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 364 (1st Cir. 1996) (state offense need not be punishable as a felony under federal law, as long as the offense conduct is "criminalized under the [Controlled Substances Act]").

The First, Second, Sixth, Eighth, and Tenth Circuits likewise agree with the Fifth Circuit's ruling here (Pet. App. 7a-8a) that, because of his recidivist character, peti-

tioner's conviction for codeine possession would be a felony under federal law and thus qualifies as an aggravated felony for sentencing purposes. See *United States* v. *Forbes*, 16 F.3d 1294, 1301 (1st Cir. 1994); *United States* v. *Simpson*, 319 F.3d 81, 85-86 & n.6 (2d Cir. 2002); *United States* v. *Palacios-Suarez*, 418 F.3d 692, 694-700 (6th Cir. 2005); *United States* v. *Haggerty*, 85 F.3d 403, 406 (8th Cir. 1996); *United States* v. *Miramontes-Lamas*, No. 97-4130, 1998 WL 50955, at * 1 (10th Cir. Feb. 9, 1998) (judgment noted at 139 F.3d 913 (Table)); see *United States* v. *Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir.) (prior drug-possession offense is considered an aggravated felony if the offense is considered a felony under either state or federal law), cert. denied, 519 U.S. 885 (1996).[5]

At bottom, petitioner's broad characterization of the courts of appeals' differing approaches (Pet. 8-14) fails to recognize that *no* court of appeals has held that a recidivist conviction of a state drug offense punishable by more than one year in prison is not an aggravated felony under the Sentencing Guidelines. Petitioner has thus

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[5] The Fourth Circuit has held that a state drug-possession offense categorized by the state as a misdemeanor is not an aggravated felony, even though it was punishable under state law by more than one year of imprisonment. *United States* v. *Amaya-Portillo*, 423 F.3d 427, 430-436 (2005). But the Fourth Circuit has not specifically addressed the question whether the recidivist provision of 18 U.S.C. 844(a) may be considered in determining that the prior offense could have been prosecuted as a felony under federal law. The Fourth Circuit has held, however, that a state-law offense will qualify as an "aggravated felony" if it would be a felony under federal law. *United States* v. *Wilson*, 316 F.3d 506, 512 (4th Cir.), cert. denied, 538 U.S. 1025 (2003). It thus is doubtful that the Fourth Circuit would resolve petitioner's case differently.

failed to show that *his case* implicates any material divergence in circuit court authority.[6]

4. Contrary to petitioner's argument (Pet. 16-18), the court of appeals' decision is consistent with this Court's decisions in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and *Taylor* v. *United States*, 495 U.S. 575 (1990). In *Almendarez-Torres*, this Court held that, when a prior conviction is used to enhance the penalty for an offense, it does not need to be charged in the indictment, because the prior conviction is a sentencing factor, not an element of the offense. Because petitioner's sentence does not exceed the statutory maximum for illegal reentry (with or without a prior aggravated felony), 8 U.S.C. 1326(a), the court of appeals' reference to the recidivist character of his prior drug offense occurred only in the context of determining his appropriate sentence and served only as a sentencing enhancement, which *Almendarez-Torres* specifically permits.

In *Taylor*, *supra*, this Court held that whether an offense constitutes "burglary," for purposes of the definition of "violent felony" in 18 U.S.C. 924(e), is a question of federal law that is not controlled by how a State

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[6] Petitioner's argument (Pet. 10-11) that his case might have been resolved differently if it were a civil immigration proceeding arising under the immigration laws, rather than a criminal sentencing within the framework of the Sentencing Guidelines, does not warrant this Court's review. The Sentencing Commission is not bound to adopt the same definition of sentencing terms that Congress statutorily prescribes for immigration proceedings. See *Gerbier* v. *Holmes*, 280 F.3d 297, 307 (3d Cir. 2002) ("Whatever may be the proper construction in a Sentencing Guidelines case, we do not agree that the plain meaning of 'drug trafficking crime' under § 924(c) in the deportation context encompasses state felony convictions that would merely be misdemeanors under federal law.").

might define "burglary" under state law. 495 U.S. at 590-592; see *id.* at 592-599. That case has little bearing on the questions presented here, other than to confirm the appropriateness of the court of appeals' refusal to allow the state-law characterization of petitioner's prior offense to control the federal question of whether it amounted to an "aggravated felony."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005