

No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 2007

OSCAR ARREGUIN-AGUILAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Oscar Arreguin-Aguilar's sentence was enhanced by the district court based on a finding that his 2005 Florida state conviction for carrying a concealed firearm was a "crime of violence" for purposes of the sentencing guideline (USSG §2L1.2) applicable to his offense of conviction, 8 U.S.C. § 1326. This finding had the effect of increasing Mr. Arreguin-Aguilar's sentence of imprisonment by at least two years. The Court of Appeals affirmed this finding. Apparent, however, on the face of the decision of the Court of Appeals is the fact that both lower courts applied the wrong definition of "crime of violence" to Mr. Arreguin-Aguilar's prior conviction for carrying a concealed firearm. There can be, moreover, no dispute that Mr. Arreguin-Aguilar's carrying-a-concealed-firearm conviction is not a "crime of violence" under the correct definition, that of §2L1.2, or that the error affected his substantial rights. As a result, the question presented becomes the following:

Whether this Court should exercise its discretionary certiorari jurisdiction and grant certiorari, vacate the judgment below, and remand the case so that the Court of Appeals can correct the obvious error affecting Mr. Arreguin-Aguilar's substantial rights.

LIST OF PARTIES

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UNITED STATES OF AMERICA, *Respondent*.

**On Petition for Writ of Certiorari to the
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for the Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

The petitioner, **OSCAR ARREGUIN-AGUILAR**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on November 14, 2007.

OPINION BELOW

The unpublished *per curiam* opinion of the Court of Appeals (App., *infra*, 1a-2a) is reported at 2007 WL 3355457.

JURISDICTION

The petitioner, **OSCAR ARREGUIN-AGUILAR**, was prosecuted by a one-count indictment in the United States District Court for the Northern District of Florida, for violation of 8 U.S.C. § 1326. He appealed his sentence to the Eleventh Circuit Court of Appeals invoking the court's jurisdiction under 28 U.S.C. § 1291. His sentence was affirmed by an order entered November 14, 2007.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of USSG §§2L1.2, 4B1.1, and 4B1.2 (2006) are set forth in Appendices B, C, and D, respectively.

Section 790.01, Florida Statutes (2005) provides in pertinent part that “A person who carries a concealed firearm on or about his or her person commits a felony of the third degree.”

STATEMENT OF THE CASE

Petitioner Oscar Arreguin-Aguilar pleaded guilty in the district court to a one-count violation of the illegal reentry statute, 8 U.S.C. § 1326. The date of the offense was December 14, 2006. The presentence investigation report (“PSR”) prepared in his case enhanced his base offense level by sixteen levels pursuant to USSG §2L1.2(b)(1)(A)(ii), which provides that “if the defendant previously was deported, or unlawfully remained in the United States, after . . . a conviction for a felony that is . . . a crime of violence . . . increase by 16 levels.” The PSR found that Mr. Arreguin-Aguilar’s 2005 Florida state conviction for carrying a concealed .22 pistol – sustained prior to his deportation from the United States – was a “crime of violence” under §2L1.2(b)(1)(A)(ii). Then

court-appointed counsel for Mr. Arreguin-Aguilar made no objections to the PSR, and the district court, after adopting the findings of the PSR, sentenced Mr. Arreguin-Aguilar to 46 months' imprisonment.¹

A timely notice of appeal pursuant to 28 U.S.C. § 1291 was filed. On appeal court-appointed counsel raised, *inter alia*, an issue questioning whether Mr. Arreguin-Aguilar's carrying-a-concealed-firearm conviction was a "crime of violence" warranting the sixteen-level enhancement under USSG §2L1.2(b)(1)(A)(ii). He stated, however, that he believed that the issue was foreclosed by *United States v. Gilbert*, 138 F.3d. 1371 (11th Cir. 1998), in which the Eleventh Circuit had held that carrying a concealed weapon in violation of Florida law is a "crime of violence" under USSG §4B1.2(1) (the career offender guideline). The United States agreed that *Gilbert* was the controlling law, and the Court of Appeals, in reliance on *Gilbert*, affirmed Mr. Arreguin-Aguilar's sentence. As explained in depth below, however, this was error, as the parties and the Court of Appeals all overlooked the fact that the illegal reentry guideline has its own definition of "crime of violence," one that differs materially from the definition found in the career offender guideline, and under which there can be no dispute that Mr. Arreguin-Aguilar's 2005 firearm conviction would not qualify as a "crime of violence" under §2L1.2(b)(1)(A)(ii).

¹Undersigned counsel did not represent Mr. Arreguin-Aguilar in the district court or before the Court of Appeals.

REASONS FOR GRANTING THE PETITION

This Court Should Exercise its Discretionary Certiorari Jurisdiction and Grant Certiorari, Vacate the Judgment Below, and Remand the Case So That the Court of Appeals Can Correct the Obvious Error Affecting Mr. Arreguin-Aguilar's Substantial Rights.

Mr. Arreguin pleaded guilty to having unlawfully re-entered the United States following deportation in violation of 8 U.S.C. § 1326. The date of the offense was December 14, 2006. The district court enhanced Mr. Arreguin-Aguilar's base offense level by sixteen levels and sentenced him to forty-six month's imprisonment based on a finding that Mr. Arreguin-Aguilar's prior Florida state conviction for carrying a concealed firearm was a crime of violence for purposes of the illegal reentry guideline, USSG §2L1.2.

The courts and the parties below believed that this finding was required by the Eleventh Circuit's precedent in *United States v. Gilbert*, 138 F.3d 1371 (11th Cir. 1998), which holds that carrying a concealed weapon in violation of Florida law is a "crime of violence" under USSG §4B1.1 (the career offender guideline). Then court-appointed counsel for Mr. Arreguin-Aguilar stated in his Issue I of appellant's initial brief that *Gilbert* was dispositive of the issue, but that he was presenting the argument because Mr. Arreguin-Aguilar had requested that he do so. The United States, in its responsive brief in opposition, wrote that

Counsel is quite correct in advising the defendant that this Court has held a conviction for carrying a concealed firearm under Florida law qualifies as "a crime of violence" under the Sentencing Guidelines. That holding is well established by a long line of cases beginning with *United States v. Gilbert*, 138 F.3d 1371, 1372 (11th Cir. 1998), ***which remains the controlling law on this issue.***

See United States v. Arreguin-Aguilar, No. 07-12071, p. 15 (Brief of Plaintiff-Appellee United States

of America) (emphasis supplied).

Thus on November 14, 2007, the Court of Appeals issued its decision holding that:

A line of cases from this court establishes as a matter of law that a conviction for carrying a concealed firearm in Florida is a crime of violence under the Guidelines. *United States v. Gilbert*, 138 F.3d 1371, 1372 (11th Cir. 1998) (**interpreting § 4B 1.1**); *United States v. Williams*, 435 F.3d 1350, 1354 (11th Cir. 2006) (**same**). We are bound by our prior rulings. See *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (*en banc*). In sum, the district court committed no error in finding that appellant's prior conviction was a crime of violence.

United States v. Arreguin-Aguilar, 2007 WL 3355457 (11th Cir. 2007) (unpublished disposition) (emphasis supplied) (attached as Appendix A).

Overlooked by the parties and the courts, however, is the salient fact that the illegal reentry guideline, USSG §2L1.2, contains **its own definition** of “crime of violence” that differs materially from the one found in the career offender guideline. The career offender definition of “crime of violence,” found at USSG §4B1.2(a), provides that:

The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or **otherwise involves conduct that presents a serious potential risk of physical injury to another.**

USSG §4B1.2(a) (2006) (emphasis supplied). The Eleventh Circuit in *Gilbert*, in deciding whether the Florida crime of carrying a concealed firearm was a crime of violence under the career offender guideline, wrote that “[t]he elements of a concealed firearm offense do not include any use of force; knowing carrying and concealment suffice. Carrying a concealed firearm, therefore, is a “crime of violence” only if it “presents a serious potential risk of physical injury.” *Gilbert*, 138

F.3d at 1372 (internal citation omitted) (emphasis supplied). The Court went on to hold that carrying a concealed firearm *did* involve conduct that presents a serious potential risk of physical injury and was thus a crime of violence under the career offender guideline. *Id.*

The illegal reentry guideline definition of crime of violence, as amended November 1, 2001,² ***does not contain the residual provision providing that any “offense that involves conduct that presents a serious potential risk of physical injury to another” is also a crime of violence.*** The §2L1.2 definition of “crime of violence” is as follows:

“Crime of violence” means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

USSG §2L1.2, comment. (n. 1(B)(iii)) (2006). The Florida crime of carrying a concealed firearm is not one of the enumerated offenses under the §2L1.2 “crime of violence” definition. And the Eleventh Circuit in *Gilbert* made clear that the elements of a concealed firearm offense do not include any use of force. 138 F.3d at 1372.³ It is obvious, then, that Mr. Arreguin-Aguilar’s prior conviction for carrying a concealed firearm cannot be a “crime of violence” for purposes of the illegal reentry guideline or for purposes of the sixteen-level increase under USSG

²It is perhaps this amendment that is the cause of the confusion on this issue. Before 2001 the §2L1.2 definition of “crime of violence” simply referenced the one found at §4B1.2(a).

³*See also* Fla.Std.Jury Instr. (Crim.) 10.1: To prove the crime of carrying a concealed firearm, the State must prove the following two elements beyond a reasonable doubt: (1) that the defendant knowingly carried on or about his or her person the weapon alleged, and (2) the weapon alleged was concealed from the ordinary sight of another person.

§2L1.2(b)(1)(A)(ii).⁴ Whether it may be an “aggravated felony,” resulting in an eight-level increase under §2L1.2(b)(1)(C), or simply a prior felony conviction, resulting in an four-level increase §2L1.2(b)(1)(D), is best left at this point be decided in the district court. In any case it means a difference of at least eight offense levels to Mr. Arreguin-Aguilar, which in turn translate to a sentence more than two years lower, thus greatly affecting his substantial rights.

Mr. Arreguin-Aguilar requests, therefore, that this Court exercise its discretionary certiorari jurisdiction, grant certiorari, vacate the judgment below, and remand the case (“GVR”) so that the Court of Appeals can correct the obvious error affecting Mr. Arreguin-Aguilar’s substantial rights. Title 28 U.S.C. § 2106 confers upon this Court a broad power to GVR, the power to remand to a lower federal court any case raising a federal issue that is properly before it in its appellate capacity.

⁴Although §2L1.2(b)(1)(A)(iii) also provides for a sixteen-level increase for a prior conviction for a “firearms offense,” the §2L1.2 definition of “firearms offenses” makes clear that these are only aggravated offenses of a kind not to include the mere carrying a concealed caliber .22 pistol. *See* USSG §2L1.2, comment. (n. 1(B)(v)) (2006):

“Firearms offense” means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. 921, or of an explosive material as defined in 18 U.S.C. 841(c).

(II) An offense under Federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. 5845(a), or of an explosive material as defined in 18 U.S.C. 841(c).

(III) A violation of 18 U.S.C. 844(h).

(IV) A violation of 18 U.S.C. 924(c).

(V) A violation of 18 U.S.C. 929(a).

(VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

Lawrence v. Chater, 516 U.S. 163, 166, 116 S.Ct. 604, 606 (1996). “The GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices.” *Id.* “[T]he GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit [this Court’s] plenary review.” *Id.* at 168, 116 S.Ct. at 606; *see also Stutson v. United States*, 516 U.S. 193, 116 S.Ct. 600 (1996) (applying *Lawrence* to a criminal case).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, **OSCAR ARREGUIN-AGUILAR**, asks leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed *in forma pauperis* in accordance with Supreme Court Rule 39. Undersigned counsel has agreed to handle this matter on a *pro bono* basis.

Attached hereto is the **Affidavit or Declaration in Support of Motion for Leave to Proceed *In Forma Pauperis*** that has been completed and signed by Petitioner, Oscar Arreguin-Aguilar.

WHEREFORE, Petitioner, Oscar Arreguin-Aguilar, asks leave to proceed *in forma pauperis*.

DATED this 12th day of February, 2008.

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PROOF OF SERVICE

I, WILLIAM MALLORY KENT, do declare that on this date, February 12, 2008, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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