No.____________

IN THE SUPREME COURT OF THE UNITED STATES

JOSE MARIO RUBIO-SORTO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In Johnson v. United States, 135 S. Ct. 2551 (2015), this Court held that the residual clause of the Armed Career Criminal Act's "violent felony" definition, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. The categorical inquiry required under the residual clause both denied fair notice to defendants and invited arbitrary enforcement by judges, because it "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." Johnson, 135 S. Ct. at 2557. The "crime of violence" definition in 18 U.S.C. § 16(b), as incorporated into the statutory enhancement provision of 8 U.S.C. § 1326(b)(2), likewise requires a categorical assessment of the degree of risk presented in the "ordinary case" of a crime.

The question presented is whether 18 U.S.C. § 16(b) violates the Constitution's prohibition of vague criminal laws by requiring application of an indeterminate risk standard to the "ordinary case" of an individual's prior conviction.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

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MISCELLANEOUS

PRAYER

Petitioner Jose Mario Rubio-Sorto respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on December 15, 2017.

OPINION BELOW

The Westlaw version of the opinion of the Court of Appeals is attached as an appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals, affirming Mr. Rubio-Sorto's conviction and sentence, was entered on December 15, 2017. This petition is filed within 90 days of that date and therefore is timely. See Sup. Ct. R. 13.1 and 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const. amend V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 8 U.S.C. § 1326 provides in pertinent part:

(a) In general

Subject to subsection (b) of this section, any alien who–

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection–

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

* * * *

3. 8 U.S.C. § 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * *

(43) The term "aggravated felony" means—

* * *

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year;

* * * *

4. 18 U.S.C. § 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

STATEMENT OF THE CASE

Petitioner Jose Mario Rubio-Sorto, a citizen of El Salvador, was removed from the United States on October 15, 2015. On June 7, 2015, he was found in the United States after returning to the country without authorization. He later pleaded guilty, in the United States District Court for the Southern District of Texas, to illegally reentering the United States in violation of 8 U.S.C. § 1326.

Before Mr. Rubio-Soto's sentencing, the United States Probation Office prepared a presentence report ("PSR") to assist the district court. The PSR concluded that his 2008 Illinois conviction for second-degree murder (under 720 Ill. Comp. Stat. 5/9-2(a)(2) (West 1995)) triggered the statutory sentencing enhancement provided in 8 U.S.C. § 1326(b)(2), which raises the maximum term of imprisonment to 20 years for illegal-reentry defendants found in the United States after having been deported following a conviction for an "aggravated felony."

Section 1326(b)(2) incorporates the definition of "aggravated felony" provided in section 1101(a)(43) of the Immigration and Nationality Act ("INA"). That definition includes a "crime of violence," as that term is defined in 18 U.S.C. § 16, "for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). Section 16, in turn, defines "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

The district court sentenced Mr. Rubio-Sorto to a 57-month term of imprisonment, to be followed by a three-year term of supervised release. The written judgment reflected that he was convicted and sentenced under "8 U.S.C. §§ 1326(a) and (b)(2)."

Mr. Rubio-Soto timely appealed to the Fifth Circuit. On appeal, along with another issue not here relevant, he challenged the classification of his prior conviction as one for an "aggravated felony," arguing that § 16(b)—the statutory basis for the classification—is unconstitutionally vague in light of Johnson. The Fifth Circuit affirmed his conviction and sentence, concluding that his constitutional arguments was foreclosed by the court's recent en banc decision in United States v. Gonzalez-Longoria, 831 F.3d 670, 674-80 (5th Cir. 2016), cert. filed, No. 16-6259 (U.S. Sept. 29, 2016), in which a divided court held, contrary to the decisions of five of its sister circuits, that § 16(b) did not raise the same vagueness concerns that this Court identified in Johnson.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

ARGUMENT

A. This Court should hold this petition pending its decision in *Sessions v. Garcia Dimaya.*

The decision below rested on the Fifth Circuit's holding in Gonzalez-Longoria that 18 U.S.C. § 16(b) is not unconstitutionally vague. On September 29, 2016, this Court granted the Attorney General's petition for writ of certiorari to review the Ninth Circuit's opposite holding in Garcia Dimaya v. Lynch, 803 F.3d 1110, 1114-20 (9th Cir. 2015). Because Garcia Dimaya (No. 15-1498) will likely resolve the split created by Gonzalez-Longoria over § 16(b)'s constitutionality,[1] this Court should hold this petition pending its decision in Garcia Dimaya, and then dispose of the petition as appropriate in light of that decision.

B. In the event that *Garcia Dimaya* does not resolve § 16(b)'s constitutionality in the criminal context, this Court should grant the petition.

Although Garcia Dimaya squarely presents the issue raised here, the Solicitor General has asserted a threshold argument in that case that is unique to its immigration context: that the INA's removal provisions should be subject to a less exacting vagueness standard than criminal laws. See Brief for the Petitioner at 13-25, Sessions v. Garcia Dimaya, No. 15-1498 (U.S. Nov. 2016). If a majority of the Court were to accept the

[1] Five courts of appeals have held, contrary to the Fifth Circuit, that the "ordinary case" inquiry required to classify prior convictions under 18 U.S.C. § 16(b), as incorporated into the INA's "aggravated felony" definition in 8 U.S.C. § 1101(a)(43)(F), is void for vagueness in light of Johnson. See Baptiste v. Att'y Gen., 841 F.3d 601, 615-21 (3d Cir. 2016); Golicov v. Lynch, 837 F.3d 1065, 1069-75 (10th Cir. 2016); Shuti v. Lynch, 828 F.3d 440, 446-51 (6th Cir. 2016); United States v. Vivas-Ceja, 808 F.3d 719, 721-23 (7th Cir. 2015); Garcia Dimaya v. Lynch, 803 F.3d 1110, 1114-20 (9th Cir. 2015), cert. granted, 137 S. Ct. 31 (2016) (mem.).

Solicitor General's position, its review of § 16(b) under a watered-down vagueness standard would not control the disposition of the question presented here, which implicates the more demanding vagueness scrutiny applicable in criminal cases. In the event that the Court's disposition of Garcia Dimaya does not resolve § 16(b)'s constitutionality in the criminal context, this Court should grant the petition because the circuits are also split on that issue, the issue is important, and the Fifth Circuit's decision in Gonzalez-Longoria is incorrect.

1. The circuits are divided with respect to § 16(b)'s vagueness in the criminal sentencing context.

The courts of appeals are also split two-to-one over the more specific issue of whether the "ordinary case" inquiry required to classify prior convictions under § 16(b) is void for vagueness—because it shares the same two features that this Court held rendered the residual clause of the Armed Career Criminal Act ("ACCA") vague in Johnson v. United States, 135 S. Ct. 2551 (2015)—when incorporated into federal statutory and Sentencing Guidelines sentencing provisions.

In Johnson, the Court made clear that the need to imagine the "ordinary case" of a crime was central to both features that "conspired" to make the residual clause inquiry unconstitutional. By "t[ying] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, [and] not to real-world facts or statutory elements," the residual clause created "grave uncertainty about how to estimate the risk posed by a crime." Johnson, 135 S. Ct. at 2557. At the same time, the residual clause created "uncertainty about how much risk" was enough to qualify a crime as a "violent felony," because while "[i]t is one thing to apply an imprecise 'serious potential risk' standard to real-world facts[,] it is quite another to apply it to a judge-imagined abstraction." Id. at 2558. Critically, the problematic "ordinary case" inquiry stemmed from the need to apply the categorical approach, an unavoidable consequence of ACCA's focus on past "convictions." Id. at 2557, 2561-62 (citing Taylor v. United States, 495 U.S. 575, 599-602 (1990)).

In Welch v. United States, 136 S. Ct. 1257 (2016), the Court reiterated that the need to imagine the "ordinary case" was dispositive of Johnson's vagueness analysis. "The vagueness of the residual clause rest[ed] in large part on its operation under the categorical approach," which required courts "to determine whether a crime involved a 'serious potential risk of physical injury' by considering not the defendant's actual conduct but an 'idealized ordinary case of the crime.'" Welch, 136 S. Ct. at 1262. Thus, "[t]he residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." Id.

The Court has addressed 18 U.S.C. § 16 only once, in Leocal v. Ashcroft, 543 U.S. 1 (2004). As relevant here, Leocal held that classifying prior convictions under § 16(a) and (b) likewise requires application of the categorical approach: courts must "look to the elements and the nature of the offense of conviction, rather than to the particular facts" of the predicate crime. Leocal, 543 U.S. at 7. Subsequently, borrowing from this Court's ACCA jurisprudence, every court of appeals to address the question has held that § 16(b) requires judges to assess the risk that force might be used in the "ordinary case" of the conduct encompassed by the elements of the defendant's prior statue of conviction—the same mode of analysis required under the residual clause. E.g., United States v. Keelan, 786 F.3d 865, 871 (11th Cir. 2015) (collecting cases and adopting the "uniform rule" that "the 'ordinary case' standard established in James v. United States, 550 U.S. 192, 208 (2007), also applies to § 16(b)"); see also, e.g., Baptiste, 841 F.3d at 609-10 (same). Accordingly, even before Johnson was decided, litigants recognized that if the Court found the residual clause's "ordinary case" inquiry unconstitutionally vague, its reasoning would extend to the "ordinary case" inquiry required under § 16(b).[2]

After Johnson, the courts of appeals have consistently reached the same conclusion. In the immigration context, the Third, Sixth, Ninth, and Tenth Circuits have held that § 16(b) is unconstitutionally vague when relied upon to classify a prior conviction as an "aggravated felony" under the INA in removal proceedings. See Baptiste, 841 F.3d at 615-21(3d Cir.); Golicov, 837 F.3d at 1072-75 (10th Cir.); Shuti, 828 F.3d at 446-51 (6th Cir.); Garcia Dimaya, 803 F.3d at 1114-20 (9th Cir.). In the criminal context, the Seventh Circuit has applied Johnson's reasoning to hold § 16(b) void for vagueness in the same context it was applied to Mr. Rubio-Soto: as the basis for increasing the statutory maximum punishment under 8 U.S.C. § 1326(b)(2), which in turn incorporates the INA's "aggravated felony" definition. See Vivas-Ceja, 808 F.3d at 721-23. And the Ninth Circuit extended its

[2] See, e.g., Supplemental Brief for the United States, Johnson v. United States, 2015 WL 1284964, at *22-*23 (2015) (arguing that § 16(b) is "equally susceptible" to the central vagueness objection to the residual clause because "[l]ike the ACCA, Section 16[(b)] requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters" (alterations added)).

holding in Garcia Dimaya to the eight-level "aggravated felony" enhancement called for under the illegal-reentry Sentencing Guideline, USSG § 2L1.2(b)(1)(C), which also expressly incorporates § 16(b) through the INA. See United States v. Hernandez-Lara, 817 F.3d 651, 653 (9th Cir. 2016), cert. filed, No. 16-617 (U.S. Nov. 7, 2016).

Only the Fifth Circuit has reached the opposite conclusion. In United States v. Gonzalez-Longoria, the case relied upon by the panel below, a divided en banc panel of the Fifth Circuit concluded that § 16(b) was not vague as incorporated into the Sentencing Guidelines' "aggravated felony" enhancement. See 831 F.3d at 674-80. The majority acknowledged that, like ACCA's residual clause, § 16(b) requires judges to make a categorical assessment of the "ordinary case" of a prior conviction, and that its "substantial risk" standard is indeterminate, id. at 675, but concluded that textual distinctions between the statutes' risk standards made § 16(b) "notably more narrow" and "more bounded" than the residual clause. Id. at 676. Finding these distinctions dispositive of the vagueness inquiry, the majority held that assessing the risk involved in the "ordinary case" of an offense under § 16(b) did not implicate the same due process concerns that plagued ACCA's residual clause. See id. at 677.

Four judges dissented. They agreed that § 16(b) shared both features identified in Johnson, but reasoned that the distinctions drawn by the majority made § 16(b) at most "slightly less indeterminate" than the residual clause, and thus were "not salient enough to constitutionally matter." Id. at 685 (Jolly, J., dissenting). The dissenting judges explained that, by magnifying trivial differences in the statutes' language, the majority had drifted "into the miasma of the minutiae," id. at 684, and had erred "by losing track of the entirety: [both] statutes, in constitutional essence, say the same thing." Id. at 686.

The Fifth Circuit's holding in Gonzalez-Longoria conflicts with those of the Third, Sixth, Seventh, Ninth, and Tenth Circuits. And it has further created a more specific divide with the Seventh and Ninth Circuits, which also addressed § 16(b)'s application in the criminal sentencing context. Accordingly, should the Court adopt a lower standard of vagueness scrutiny for immigration proceedings in Garcia Dimaya, and conclude that § 16(b) is not vague under that standard, that decision would not resolve the split over the statute's constitutionality as applied in criminal proceedings.

2. Whether § 16(b) is vague in the criminal context is important.

Garcia Dimaya is the third case in which this Court has granted certiorari to resolve circuit conflicts regarding Johnson's application outside of its specific context. See also Welch v. United States, 136 S. Ct. 1257 (2016); Beckles v. United States, 136 S. Ct. 2510 (2016) (mem.). If Garcia Dimaya does not decide whether § 16(b) is vague under the standard applicable to criminal laws, then this Court should grant certiorari in petitioner's case to resolve the split over that more specific question. Resolving the division over § 16(b)'s constitutionality in criminal cases is no less important than doing so in the immigration context. If left intact, the Fifth Circuit's decision will result in drastically different outcomes for similarly situated criminal defendants in the two circuits that span the lion's share of the United States border with Mexico and, consequently, adjudicate the largest proportion of illegal-reentry proceedings in the nation.[3]

For noncitizens who are prosecuted for returning to the United States following a previous removal, the classification of a prior conviction as an "aggravated felony" has three important consequences. First, it raises the statutory maximum for the instant illegal-reentry offense to 20 years (without the necessity of a jury finding). See 8 U.S.C. § 1326(b)(2). Second, it renders the individual's instant illegal-reentry offense also an "aggravated felony" under the INA, see 8 U.S.C. § 1101(a)(43)(O), meaning that the reentry offense itself triggers a permanent admissibility bar, see 8 U.S.C. § 1182(a)(9)(A), and is sufficient to raise the statutory maximum in any future illegal-reentry prosecution. Third, it can trigger an eight-level enhancement of the defendant's advisory sentencing range under the United States Sentencing Guidelines. See USSG § 2L1.2(b)(1)(C).[4]

Leaving the Fifth Circuit's decision in place means that individuals in the class

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[3] In fiscal year 2013, 18,498 federal illegal-reentry cases were prosecuted in the United States, 40 percent of which involved offenders that had a predicate offense classified as an "aggravated felony." U.S. Sentencing Comm'n, Illegal Reentry Offenses, at 8, 9 (Apr. 2015). Of the top five districts adjudicating these cases, two were located in the Fifth Circuit—Southern Texas (3,853, or 20.8%) and Western Texas (3,200, or 17.3%)—two were located in the Ninth—Arizona (2,387, or 12.9%) and Southern California (1,460, or 7.9%)—and one was located in the Tenth—New Mexico (2,837, or 15.3%). Id. at 9. Combined, these five districts made up 74.2% of all illegal-reentry cases. Id.

[4] Effective November 1, 2016, the Sentencing Commission amended § 2L1.2 to condition the severity of sentencing enhancements on the length of prison time imposed in the defendant's prior convictions, rather than their aggravated nature, and thus eliminated the eight-level enhancement under subsection (b)(1)(C). See USSG § 2L1.2(b) (Nov. 1, 2016). Regardless, the INA's "aggravated felony" definition will remain critical in illegal-reentry cases where the defendant's Guidelines imprisonment range reaches terms in excess of ten years. See 8 U.S.C. § 1326(b)(1) and (b)(2). Under the ranges now achievable through application of the more serious enhancements in the amended version of § 2L1.2 that took effect in November of 2016, such a scenario, while highly improbable before, is now a realistic possibility.

described above with convictions for identical crimes will receive drastically different treatment in criminal proceedings, depending solely on where those proceedings are initiated. At this moment, a conviction only classifiable as an "aggravated felony" under § 16(b) renders noncitizens located in the Fifth Circuit subject to enhanced statutory and Guideline punishment ranges in illegal-reentry prosecutions. The same conviction, however, would not result in enhancement (or permanent inadmissibility) for noncitizens in the Seventh and Ninth Circuits.

Resolution of the split is also important to the judges and attorneys charged with adjudicating and advising noncitizens in criminal proceedings. The Fifth Circuit concluded that defining and measuring the "ordinary case" of any predicate crime is "predictively more sound" under § 16(b), Gonzalez-Longoria, 831 F.3d at 677, yet that court offered no guidance to lower courts respecting how exactly to isolate the "ordinary case" prior to measuring its riskiness. Thus, district judges in the Fifth Circuit are left with no ascertainable standard to guide their individual, subjective conception of a predicate crime's ordinary case. And, now that amendments to the Sentencing Guidelines raise the real prospect of sentencing ranges in excess of the 10-year cap applicable in the absence of an "aggravated felony" finding, district and magistrate judges conducting guilty-plea proceedings in the Fifth Circuit have no way to reliably advise defendants of the ***statutory*** range applicable to their reentry offenses.

Attorneys defending noncitizens in criminal matters need this Court to step in even more so. Defense counsel must advise clients as to the potential immigration consequences of the crimes they are charged with. See Padilla v. Kentucky, 559 U.S. 356, 367-68 (2010). Advising a noncitizen client regarding the probability that the elements of his or her prior conviction will be held to have required force, or match those of a generic crime, is difficult enough; but forecasting what conduct a particular district judge will view as the "ordinary case" of the crime, and whether that judge will find that conduct substantially risks the use of force, is impossible. See Johnson, 135 S. Ct. at 2557 ("How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'" (quoting United States v. Mayer, 560 F.3d 948, 952 (9th Cir. 2009)) (Kozinski, J., dissenting from denial of rehearing en banc).

3. The Fifth Circuit's decision is incorrect.

Although a petition for writ of certiorari is not primarily concerned with addressing the merits of the question presented, there are serious concerns with the result reached by the Fifth Circuit.

In rejecting the vagueness challenge to § 16(b) in Gonzalez-Longoria, the Fifth Circuit acknowledged that the statute combines the "ordinary case" abstraction with an indeterminate risk standard, and thus "shares" the same "two features" that Johnson deemed constitutionally deficient in ACCA's residual clause. Gonzalez-Longoria, 831 F.3d at 675. The Fifth Circuit nevertheless found that two textual distinctions—§ 16(b)'s focus on risk presented by conduct occurring "in the course of committing the offense," and the absence of a confusing list of enumerated offenses—made imagining the "ordinary case" under § 16(b) "notably more narrow" and "predictively more sound" than under the residual clause. Id. at 676-77. Placing dispositive weight on these two distinctions, the court held "that the concerns raised by th[is] Court in Johnson with respect to [ACCA]'s residual clause do not cause the same problems in the context of 18 U.S.C. § 16(b)." Id. at 677. But, as the dissent aptly observed, the court's overemphasis on the distinctions in § 16(b)'s risk standard led it astray. See id. at 684-86.

To begin with, the Fifth Circuit's determination that these two distinctions add greater precision to the § 16(b) inquiry is dubious. As the Sixth and Ninth Circuits have pointed out, the lack of enumerated offenses arguably makes § 16(b) "a 'broad[er]' provision, as it 'cover[s] ***every*** offense that involved a substantial risk of the use of physical force against the person or property of another.'" Shuti, 828 F.3d at 448 (quoting Begay v. United States, 553 U.S. 137, 144 (2008)) (emphasis and alterations in original); see also Garcia Dimaya, 803 F.3d at 1118 n.13 ("[I]t could well be argued that, if anything, § 16(b) is more vague than the residual clause because of its lack of enumerated examples."). And as the Third Circuit has noted, "the lack of examples in § 16(b) introduces at least as much vagueness into the provision as the presence of confusing examples introduced into the residual clause"; while the enumerated offenses provided at least some guidance as an interpretive "baseline" for the residual clause, "[s]uch guidance is absent from § 16(b)." Baptiste, 841 F.3d at 620 (citations omitted).

Nor does the majority's conclusion that § 16(b) forbids "courts to consider conduct or events occurring after the crime is complete," Gonzalez-Longoria, 831 F.3d at 676, necessarily follow from the phrase "in the course of committing the offense." The Ninth Circuit soundly rejected this reasoning in Garcia Dimaya, noting that it had, prior to Johnson, consistently held that California's burglary statute defined a crime of violence under § 16(b) "precisely because of the risk that violence will ensue after the defendant has committed the acts necessary to constitute the offense." Garcia Dimaya, 803 F.3d at 1118. Indeed, Johnson cited burglary—the "classic" § 16(b) crime, Leocal, 543 U.S. at 10—as an example of a crime that requires courts to consider conduct beyond "the physical acts that make up the offense." Johnson, 135 S. Ct. at 2557. This makes sense, as the Ninth Circuit has observed, because "[b]y the time the risk of physical force against an occupant arises," a burglar "has frequently already satisfied the elements" of the applicable burglary statute. Garcia Dimaya, 803 F.3d at 1118 (citing Cal. Penal Code § 459); see also Baptiste, 841 F.3d at 618 n.19 (rejecting the Fifth Circuit's conclusion on this point for the same reasons).

In any event, the Fifth Circuit's analysis should have ended with its conclusion that § 16(b) shares the two features that combined to make ACCA's residual clause vague. Johnson squarely held that the need to imagine the "ordinary case" of the defendant's predicate crime—an unavoidable consequence of coupling a qualitative risk standard with the categorical approach—was at the heart of ***both*** features, and was thus the core constitutional defect in the residual clause. See Johnson, 135 S. Ct. at 2557-58 (tying both features to the "ordinary case" requirement). Nowhere did the Court suggest that a more precise risk standard could make imagining the "ordinary case" less arbitrary or more predictable. See Gonzalez-Longoria, 831 F.3d at 686 (Jolly, J., dissenting) (noting that Johnson did not purport to draw a line signaling that any statute clearer than the residual clause is constitutional); Shuti, 828 F.3d at 448 ("[A] marginally narrower abstraction is an abstraction all the same."). To the contrary, the Court made a clear distinction: applying the imprecise "serious potential risk" standard to "real-world facts" or "real-world conduct" would not violate due process; but applying that same standard to the "idealized ordinary case" does. See Johnson, 135 S. Ct. at 2558, 2561.

Johnson's stare decisis discussion provides further evidence that the residual clause's vagueness did not hinge on imprecisions unique to its "serious potential risk" standard. While "[t]he brief discussions of vagueness in James and Sykes homed in on the imprecision of the phrase 'serious potential risk,'" the Court explained, "neither opinion evaluated the uncertainty introduced by the need to evaluate the riskiness of an abstract ordinary case of a crime." Id. at 2563 (citing James, 550 U.S. at 210 n.6, and Sykes v. United States, 564 U.S. 1, 15-16 (2011)). And in Welch, this Court eliminated all reasonable doubt that the "ordinary case" inquiry was central to Johnson's vagueness holding: "The residual clause failed not because it adopted a 'serious potential risk' standard, but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." Welch, 136 S. Ct. at 1262. The Court's authoritative explication of Johnson's reasoning in Welch was not even acknowledged by the en banc Fifth Circuit. Cf. Golicov, 837 F.3d at 1074 (noting that Welch clarified any ambiguity respecting the basis of Johnson's reasoning).

Because applying § 16(b)'s "substantial risk" standard under the categorical approach also requires courts to assess the hypothetical risk posed by the abstract "ordinary case" of an individual's prior conviction, "rather than to the particular facts relating to the [individual's] crime," Leocal, 543 U.S. at 7, it directly and necessarily follows from Johnson's reasoning that "it too is unconstitutionally vague." Vivas-Ceja, 808 F.3d at 723; see also Baptiste, 841 F.3d at 620-21 (reaching this same conclusion); Golicov, 837 F.3d at 1072-73 (same); Shuti, 828 F.3d at 446-47 (same); Garcia Dimaya, 803 F.3d at 1115 (same). Tellingly, in rejecting this conclusion, the Fifth Circuit failed to mention Johnson's emphasis on the distinction between applying a qualitative risk standard to "real-world conduct" as opposed to the "idealized ordinary case," which both the majority, see Johnson, 135 S. Ct. at 2561-62, and the dissent, see id. at 2577 (Alito, J., dissenting), recognized as dispositive of the Court's vagueness analysis. ***That*** distinction—and not those cited by the Fifth Circuit—is also dispositive of § 16(b)'s vagueness.

In sum, in the context it was applied to Mr. Rubio-Soto, § 16(b) shares the fundamental due process concern Johnson isolated in ACCA's residual clause: the need to gauge the risk presented by a past conviction "by considering not the defendant's actual conduct but an 'idealized ordinary case of the crime.'" Welch, 136 S. Ct. at 1262 (quoting Johnson, 135 S. Ct. at 2561). In breaking from the circuits that have found § 16(b) equally susceptible to this reasoning, the Fifth Circuit pointed to no standard or guiding principle that makes defining the "ordinary case" of a crime under § 16(b) any less subjective; and it offered no limiting construction of the statute that would allow judges to reliably and consistently ascertain the "ordinary case" without resorting to imagination. The Fifth Circuit's holding thus leaves in place a rubric for increasing criminal sentences that is too arbitrary and unpredictable for the Due Process Clause to tolerate. That error warrants this Court's review.

4. Petitioner has a concrete and ongoing interest in avoiding the consequences of being convicted and sentenced under 8 U.S.C. § 1326(b)(2), rather than 8 U.S.C. § 1326(b)(1).

The written judgment entered by the district court in this case reflects conviction and sentencing under 8 U.S.C. § 1326(b)(2), signifying application of the statutory "aggravated felony" enhancement. As a purely statutory matter, there is a greater stigma to being convicted and sentenced under § 1326(b)(2) than under § 1326(b)(1). See Apprendi v. New Jersey, 530 U.S. 466, 495 (2000) (referring to "the heightened stigma associated with an offense the legislature had selected as worthy of greater punishment"); see also id. at 484 (where defendant faces a greater potential maximum sentence, "the stigma attaching to the offense [is] heightened."). And it is not merely a question of stigma: as the Fifth Circuit has recognized, "a conviction under § 1326(b)(2) — involving a prior conviction of an aggravated felony — is itself an aggravated felony, rendering the defendant permanently inadmissible to the United States." United States v. Ovalle-Garcia, 868 F.3d 313, 314 (5th Cir. 2017) (internal quotation and brackets omitted) (remanding case for the purpose of correcting the judgment to reflect conviction and sentencing under § 1326(b)(1), rather than § 1326(b)(2)). Mr. Rubio-Soto has a concrete and ongoing interest in avoiding these consequences.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be held pending this Court's decision in Sessions v. Garcia Dimaya, No. 15-1498, and then disposed of as appropriate in light of that decision. In the event that Garcia Dimaya does not resolve the question presented here, the petition for a writ of certiorari should be granted.

Date: March 12, 2018

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-41661

United States Court of Appeals
Fifth Circuit
FILED
December 15, 2017
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JOSE MARIO RUBIO-SORTO,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:15-CR-677-1

Before DENNIS, CLEMENT, and GRAVES, Circuit Judges.

PER CURIAM:*

Jose Mario Rubio-Sorto pleaded guilty without a plea agreement to illegal reentry following deportation in violation of 8 U.S.C § 1326. The presentence report calculated Rubio-Sorto's total offense level as 21, which included a 16-level crime of violence enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii) based upon Rubio-Sorto's 2012 Illinois conviction for second degree murder. The PSR calculated Rubio-Sorto's Guidelines range as 46–57

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

months. The district court adopted the findings and recommendations in the PSR and sentenced Rubio-Sorto to 57 months' imprisonment and 3 years' supervised release.

Rubio-Sorto raises two issues on appeal, neither of which he raised below. First, he argues that the district court erroneously applied the 16-level enhancement because his Illinois conviction for second degree murder did not constitute a crime of violence under the Sentencing Guidelines. Second, he contends that he was erroneously convicted under § 1326(b)(2) for having been deported after being convicted of an aggravated felony. Review is for plain error only.

A. Crime of Violence Enhancement

A defendant convicted of illegal reentry is subject to a 16-level enhancement if he was previously deported after a felony conviction for a crime of violence, and the conviction received criminal history points under Chapter Four of the Guidelines. *See* § 2L1.2(b)(1)(A)(ii). For purposes of the enhancement, crimes of violence include an enumerated list—including murder—as well as any crime "that has as an element the use, attempted use, or threatened use of physical force against the person of another." § 2L1.2, n.1(B)(iii).

Rubio-Sorto argues that Illinois second degree murder does not fit within the generic definition of "murder" for purposes of the Guidelines, nor does it have as an element the use or threatened use of force. This court recently faced an almost identical argument. In *United States v. Hernandez-Morales*, 681 F. App'x 362 (5th Cir. 2017), the defendant also argued that his prior Illinois conviction for second degree murder did not qualify as a crime of violence for purposes of § 2L1.2(b)(1)(A)(ii). Review in that case was also for plain error. We noted that "we have never before considered whether the Illinois . . . murder statute is broader than the enumerated offense of murder, nor have we even adopted a definition of generic murder." *Id.* at 366. We have repeatedly explained that "[w]e ordinarily do not find plain error when we have not previously addressed an issue." *Id.* (internal quotation marks omitted) (quoting *United States v. Evans*, 587 F.3d 667, 671 (5th Cir. 2009)). Accordingly, "[i]n the absence of any authority on point, we . . . decline to conclude that any error committed by the district court was plain." *Id.*

B. Aggravated Felony

Rubio-Sorto also contends that the district court erred in entering judgment against him under § 1326(b)(2), because his Illinois conviction for second degree murder did not qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43). That provision lists "murder" as an aggravated felony, *see* § 1101(a)(43)(A), and further incorporates the definition of "crime of violence" as articulated in 18 U.S.C. § 16. *See* 8 U.S.C. § 1101(a)(43)(F). 18 U.S.C. § 16 in turn includes two provisions: (a) defines crime of violence in relevant part as "an offense that has as an element the use, attempted use, or threatened use of physical force"; and (b) includes "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense." Rubio-Sorto argues that Illinois second degree murder does not fall under "murder" as defined in § 1101(a)(43), nor does it contain the use of force element required under § 16(a). He does not argue that Illinois second degree murder falls outside the scope of § 16(b), but argues that § 16(b) has been declared unconstitutionally vague by *Johnson v. United States*, 135 S. Ct. 2251 (2015).

Rubio-Sorto's argument as to the facial unconstitutionality of § 16(b) is foreclosed by this court's opinion in *United States v. Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016) (en banc) ("[W]e hold that 18 U.S.C. § 16(b) is not unconstitutionally vague on its face."). *Gonzalez-Longoria* does not foreclose Rubio-Sorto's argument insofar as he contends that § 16(b) is unconstitutionally vague as applied to this particular case.[1] *See id.* at 677–78 (rejecting facial attack on § 16(b) but then giving full consideration to as-applied challenge). Nonetheless, because our review is for plain error only, and because Rubio-Sorto does not cite to any on-point authority suggesting that § 16(b) is unconstitutionally vague as applied here, we decline to say that the district court erred in entering judgment against Rubio-Sorto under 8 U.S.C. § 1326(b)(2). *See Hernandez-Morales*, 681 F. App'x at 366. Since this provides a sufficient basis for affirming, we express no opinion on whether Illinois second degree murder qualifies as "murder" under § 1101(a)(43)(A), or whether it contains the use of force element required under § 16(a).

We AFFIRM the judgment of the district court.

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[1] Rubio-Sorto's brief does not expressly state whether his challenge to § 16(b) is a facial or an as-applied challenge. As the Supreme Court has recognized, however, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). That distinction is particularly difficult to draw in cases involving the categorical approach and § 16(b)'s residual clause.