No._____

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL **GARCIA BELLO**, FIDEL **FLORES**, JOSE **SANCHEZ OLIVAREZ**, GENARO **MAYORGA-SALAZAR**, MARIO ALBERTO **AMAYA-GUERRERO**, RUDY **MARTINEZ-CASTILLO**, LUGARDO **VAZQUEZ-HERNANDEZ**, RUDITH VALMORE **GUERRERO-ARANIVA**, TITO **OLVERA-CASTRO**, ANGEL DE JESUS **SANABIA-SANCHEZ**, CARLOS **TREJO-DOMINGUEZ**, EVARISTO **REYES-DIAZ**, LINO ISAAC **CARRILLO-HERNANDEZ**, FRANCISCO DE JESUS **TREVINO-RODRIGUEZ**, and HECTOR ALEXANDER **CABRERA**,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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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

Petitioners were convicted and sentenced in separate proceedings before the United States District Court for the Southern District of Texas, and the United States Court of Appeals for the Fifth Circuit entered separate judgments affirming their convictions and sentences. Because petitioners seek review of these judgments on the basis of identical questions, they jointly file this petition with this Court. See Sup. Ct. R. 12.4.

All parties to petitioners' Fifth Circuit proceedings are named in the caption of the case before this Court.[1]

[1] In the courts below, petitioners Garcia Bello, Sanchez Olivarez, Amaya-Guerrero, Martinez-Castillo, Guerrero-Araniva, Sanabia-Sanchez, Trejo-Dominguez, and Carrillo-Hernandez were also known by the aliases listed in the captions in Appendices A, C, E, F, H, J, K, and M.

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MISCELLANEOUS

PRAYER

Petitioners pray that a writ of certiorari be granted to review the judgments entered by the United States Court of Appeals for the Fifth Circuit in their respective cases.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit in petitioners' cases are attached to this petition as Appendices A through O.

JURISDICTION

For petitioners Flores and Sanchez Olivarez, the judgments and opinions of the United States Court of Appeals for the Fifth Circuit were entered on October 28, 2016. See Appendices B, C. The judgments and opinions were entered on four separate days in November of 2016 for petitioners Garcia Bello (Nov. 16), Mayorga-Salazar (Nov. 18), Martinez-Castillo (Nov. 21), and Guerrero-Araniva (Nov. 23). See Appendices A, D, F, H. And the judgments and opinions were entered on: December 6, 2016, for petitioners Vazquez-Hernandez and Sanabia-Sanchez; on December 13, 2016, for petitioner Amaya-Guerrero; on December 15, 2016, for petitioner Trejo-Dominguez; on December 19, 2016, for petitioner Cabrera; on December 20, 2016, for petitioners Olvera-Castro, Reyes-Diaz, and Carrillo-Hernandez; and on January 12, 2017, for petitioner Trevino-Rodriguez. See Appendices E, G, I-O.

This petition is filed within 90 days after entry of judgment in each case. See Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES 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. USSG § 2L1.2 provides in pertinent part:

§ 2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base offense level: **8**

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

* * *

(C) a conviction for an aggravated felony, increase by **8** levels;

* * *

Commentary

* * *

Application Notes:

* * *

3. *Application of Subsection (b)(1)(C).—*

(A) Definitions.—For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

* * * *

4. 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;

* * * *

5. 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

Petitioners are noncitizens who were each deported, but were later found in the United States after returning without authorization. In separate district court proceedings in the Southern District of Texas, they each pleaded guilty to illegal reentry following deportation, in violation of 8 U.S.C. § 1326.

Prior to petitioners' sentencing hearings, the United States Probation Office prepared a presentence report ("PSR") to assist the district court in sentencing them. In each case, the PSR recommended application of an eight-level enhancement under section 2L1.2(b)(1)(C) of the United States Sentencing Guidelines ("USSG"), which applies to individuals whose prior deportation was preceded by a conviction for an "aggravated felony." Petitioners' predicate convictions fell into one of five categories of Texas offenses:

(1) *Evading arrest with a motor vehicle*, see Tex. Penal Code § 38.04[2];

(2) *Burglary of a motor vehicle*, see Tex. Penal Code § 30.04[3];

(3) *Injury to a child*, see Tex. Penal Code § 22.04[4];

(4) *Felony assault*, see Tex. Penal Code § 22.01(b)[5]; and

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[2] Petitioners Garcia Bello, Flores, Sanchez Olivarez, Mayorga-Salazar, Olvera-Castro, Carrillo-Hernandez, and Cabrera.

[3] Petitioners Martinez-Castillo, Sanabia-Sanchez, and Trejo-Dominguez.

[4] Petitioners Amaya-Guerrero and Guerrero-Araniva.

[5] Petitioners Vazquez-Hernandez and Reyes-Diaz.

(5) *Burglary of a habitation*, see Tex. Penal Code § 30.02(a)(3).[6]

For petitioners Garcia Bello, Flores, Sanchez Olivarez, Martinez-Castillo, Vazquez-Hernandez, Sanabia-Sanchez, Carrillo-Hernandez, and Cabrera, the PSR further recommended application of 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 who returned to the United States after having been deported following an "aggravated felony" conviction.

Both enhancement provisions incorporate 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 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.

Petitioners Garcia Bello, Sanchez Olivarez, Mayorga-Salazar, Vazquez-Hernandez, Trejo-Dominguez, and Carrillo-Hernandez objected to the characterization of their predicate convictions as "aggravated felonies." They argued that § 16(b)—the only statutory provision

[6] Petitioner Trevino-Rodriguez.

that could form the basis for the "aggravated felony" classifications in each of their cases—was unconstitutionally vague in light of this Court's holding in Johnson v. United States, 135 S. Ct. 2551 (2015), that the similarly worded residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), was void for vagueness.[7]

At sentencing, all petitioners were sentenced to higher terms of imprisonment based on the Guidelines enhancement. For petitioners Garcia Bello, Flores, Sanchez Olivarez, Martinez-Castillo, Vazquez-Hernandez, Sanabia-Sanchez, Carrillo-Hernandez, and Cabrera, the written judgment entered by the district court further reflected conviction and sentencing under 8 U.S.C. § 1326(b)(2), signifying application of the statutory "aggravated felony" enhancement.

Each petitioner timely appealed to the United States Court of Appeals for the Fifth Circuit. On appeal, they each challenged the classification of their prior convictions as "aggravated felonies," arguing that § 16(b)—the statutory basis for the classifications—was unconstitutionally vague in light of Johnson. The Fifth Circuit affirmed petitioners' convictions and sentences, concluding that their constitutional arguments were foreclosed by the court's recent en banc decision in United States v. Gonzalez-Longoria, 831 F.3d 670, 674-80 (5th Cir. 2016), pet'n for 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.

[7] The remaining petitioners did not object to the "aggravated felony" classification.

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 *Lynch v. Garcia Dimaya*.

In each of petitioners cases, the decision below rested on the Fifth Circuit's holding in United States v. Gonzalez-Longoria, 831 F.3d 674-79 (5th Cir. 2016) (en banc), pet'n for cert. filed, No. 16-6259 (U.S. Sept. 29, 2016), 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 (2015). Because Garcia Dimaya (No. 15-1498) will likely resolve the split created by Gonzalez-Longoria over § 16(b)'s constitutionality,[8] 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, Lynch v. Garcia Dimaya, No. 15-1498

[8] 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.).

(U.S. Nov. 2016). If a majority of the Court were to accept the 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)).

Last Term, 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).[9]

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. Garcia Bello: 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"

[9] 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)).

definition. See Vivas-Ceja, 808 F.3d at 721-23. And the Ninth Circuit extended its 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), pet'n for 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 panels 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 petitioners' cases 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.[10]

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).[11]

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

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[10] 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.

[11] 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). Under the ranges now achievable through application of the more serious enhancements in the amended version of § 2L1.2 that took effect in November, 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 petitioners, § 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.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be held pending this Court's decision in Lynch 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: January 19, 2017

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20755
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
November 16, 2016
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

DANIEL GARCIA BELLO,
Also Known as Daniel Bello, Also Known as Daniel Garcia,
Also Known as Daniel Belo, Also Known as Daniel R. Garcia,
Also Known as Daniel Rodrigo Garcia, Also Known as Daniel Garcia-Belo,

Defendant–Appellant,

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:15-CR-423-1

Before JOLLY, SMITH, and GRAVES, Circuit Judges.

PER CURIAM:*

Daniel Garcia Bello was convicted of illegal reentry by a previously

* 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.

deported alien after an aggravated felony. He contends that the district court erred by classifying his evading-arrest conviction as an aggravated felony under 8 U.S.C. § 1326(b)(2) and U.S.S.G. § 2L1.2(b)(1)(C). He reasons that his Texas conviction of evading arrest with a motor vehicle is not a crime of violence because the definition of that term in 18 U.S.C. § 16(b), as incorporated by reference into the definition of an aggravated felony in 8 U.S.C. § 1101(a)(43)(F), is unconstitutionally vague on its face in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). He further maintains that we cannot apply § 16(b) without violating due process.

The government moves unopposed for summary affirmance in lieu of filing a brief. Summary affirmance is proper where, among other instances, "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *United States v. Holy Land Found. for Relief & Dev.*, 445 F.3d 771, 781 (5th Cir. 2006) (internal quotation marks and citation omitted). The summary procedure is generally reserved for cases in which the parties concede that the issues are foreclosed by circuit precedent. *United States v. Lopez*, 461 F. App'x 372, 374 n.6 (5th Cir. 2012); *see also United States v. Houston*, 625 F.3d 871, 873 n.2 (5th Cir. 2010) (noting the denial of summary affirmance where an issue was not foreclosed).

Our decision in *United States v. Gonzalez-Longoria*, 831 F.3d 670, 672–77 (5th Cir. 2016) (en banc), forecloses relief on Bello's argument that in light of *Johnson*, § 16(b) is unconstitutionally vague on its face.[1] Bello, however, also raises an as-applied challenge. In *Gonzalez-Longoria*, *id.* at 677–78, we

[1] The grant of certiorari on the issue whether § 16(b) is unconstitutional in light of *Johnson* in *Lynch v. Dimaya*, No. 15-1498, 2016 WL 3232911 (Sept. 29, 2016), does not alter the analysis. This court is bound by its own precedent unless and until it is altered by the Supreme Court. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

addressed an as-applied challenge to a conviction of the Texas offense of Assault Causing Bodily Injury with a Prior Conviction of Family Violence and concluded that the standard provided by § 16(b) could be "straightforwardly applied" to the offense. Because *Gonzalez-Longoria* does not foreclose relief on Bello's as-applied challenge regarding his offense of evading arrest with a motor vehicle, summary affirmance is not appropriate. *See Holy Land Found.*, 445 F.3d at 781.

Nevertheless, the standard of § 16(b) can be straightforwardly applied to Bello's prior conviction, and § 16(b) is not unconstitutionally vague as applied to him. *See Gonzalez-Longoria*, 831 F.3d at 677–78; *see also United States v. Sanchez-Ledezma*, 630 F.3d 447, 450–51 (5th Cir. 2011). Thus, there was no error in the district court's determination that Bello's conviction of evading arrest with a motor vehicle is an aggravated felony for purposes of § 2L1.2(b)-(1)(C) and § 1326(b)(2). In light of our conclusion, further briefing is not necessary.

The motions for summary affirmance and for an extension of time to file a brief are DENIED. The judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
October 28, 2016
Lyle W. Cayce
Clerk

No. 15-41209
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FIDEL FLORES,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:15-CR-439-1

Before KING, DENNIS, and COSTA, Circuit Judges.

PER CURIAM:*

Fidel Flores was convicted of illegal reentry after deportation. On appeal, Flores contends that the district court erred by entering a judgment reflecting that he was convicted under 8 U.S.C. § 1326(b)(2) and by applying an eight-level enhancement under U.S.S.G. § 2L1.2(b)(1)(C). He argues that his prior Texas conviction for the offense of evading arrest with a motor vehicle is not a crime of violence because the definition of crime of violence in 18 U.S.C.

* 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.

§ 16(b), as incorporated by reference into the definition of an aggravated felony in 8 U.S.C. § 1101(a)(43)(F), is unconstitutionally vague on its face in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). He further contends that we cannot apply § 16(b) in this case without violating due process.

The Government has moved unopposed for summary affirmance in lieu of filing a brief. Summary affirmance is proper where, among other instances, "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *United States v. Holy Land Found. for Relief & Dev.*, 445 F.3d 771, 781 (5th Cir. 2006) (internal quotation marks and citation omitted). The summary procedure is generally reserved for cases in which the parties concede that the issues are foreclosed by circuit precedent. *United States v. Lopez*, 461 F. App'x 372, 374 n.6 (5th Cir. 2012); *see also United States v. Houston*, 625 F.3d 871, 873 n.2 (5th Cir. 2010) (noting the denial of summary affirmance where an issue was not foreclosed).[1]

Our recent decision in *United States v. Gonzalez-Longoria*, ___ F.3d ___, No. 15-40041, 2016 WL 4169127, at *2-*6 (5th Cir. Aug. 5, 2016) (en banc), forecloses relief on Flores's argument that in light of *Johnson*, § 16(b) is unconstitutionally vague on its face.[2] However, Flores also raises an as-applied challenge. In *Gonzalez-Longoria*, we addressed an as-applied challenge to the appellant's prior conviction of the Texas offense of Assault

[1] *See Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006) (unpublished opinions issued after January 1, 1996 are not controlling precedent but may be considered persuasive authority); 5th Cir. R. 47.5.

[2] The recent grant of certiorari by the United States Supreme Court on the issue whether § 16(b) is unconstitutional in light of *Johnson* in *Lynch v. Dimaya*, ___ S. Ct. ___, No. 15-1498, 2016 WL 3232911 (Sept. 29, 2016), does not alter the analysis. This court is bound by its own precedent unless and until that precedent is altered by a decision of the Supreme Court. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

Causing Bodily Injury with a Prior Conviction of Family Violence and concluded that the standard provided by § 16(b) could be "straightforwardly applied" to the offense. 2016 WL 4169127, at *5. Our opinion in *Gonzalez-Longoria* does not foreclose relief on Flores's as-applied challenge regarding his offense of evading arrest with a motor vehicle. Accordingly, summary affirmance is not appropriate in this case. *See United States v. Holy Land Found. for Relief & Dev.*, 445 F.3d at 781.

Nevertheless, the standard of § 16(b) can be straightforwardly applied to Flores's prior conviction, and § 16(b) is not unconstitutionally vague as applied to him. *See* 2016 WL 4169127, at *5; *see also United States v. Sanchez-Ledezma*, 630 F.3d 447, 450-51 (5th Cir. 2011). Thus, there was no error in the district court's determination that Flores's prior conviction for evading arrest with a motor vehicle is an aggravated felony for purposes of § 2L1.2(b)(1)(C) and § 1326(b)(2). In light of our conclusion, further briefing is not necessary.

The motions for summary affirmance and for an extension of time to file a brief are DENIED. The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
October 28, 2016
Lyle W. Cayce
Clerk

No. 15-20637
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE SANCHEZ OLIVAREZ, also known as Jose G. Sanchez, also known as Jose Guadalup Olivarez Sanchez, also known as Jose Guadalupe Olivare Sanchez, also known as Jose Guadalupe Sanchez-Olivarez,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:15-CR-355-1

Before WIENER, CLEMENT, and ELROD, Circuit Judges.

PER CURIAM:*

Jose Sanchez Olivarez was convicted of illegal reentry after deportation. On appeal, Sanchez Olivarez contends that the district court erred by entering a judgment reflecting that he was convicted under 8 U.S.C. § 1326(b)(2) and by applying an eight-level enhancement under U.S.S.G. § 2L1.2(b)(1)(C). He argues that his prior Texas conviction for the offense of evading arrest with a

* 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.

motor vehicle is not a crime of violence because the definition of crime of violence in 18 U.S.C. § 16(b), as incorporated by reference into the definition of an aggravated felony in 8 U.S.C. § 1101(a)(43)(F), is unconstitutionally vague on its face and as applied to him in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The Government has moved unopposed for summary affirmance in lieu of filing a brief. Summary affirmance is proper where, among other instances, "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *United States v. Holy Land Found. for Relief & Dev.*, 445 F.3d 771, 781 (5th Cir. 2006) (internal quotation marks and citation omitted). The summary procedure is generally reserved for cases in which the parties concede that the issues are foreclosed by circuit precedent. *United States v. Lopez*, 461 F. App'x 372, 374 n.6 (5th Cir. 2012); *see also United States v. Houston*, 625 F.3d 871, 873 n.2 (5th Cir. 2010) (noting the denial of summary affirmance where an issue was not foreclosed).[1]

Our recent decision in *United States v. Gonzalez-Longoria*, ___ F.3d ___, No. 15-40041, 2016 WL 4169127, at *2-*6 (5th Cir. Aug. 5, 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259), forecloses relief on Sanchez Olivarez's argument that in light of *Johnson*, § 16(b) is unconstitutionally vague on its face.[2] However, Sanchez Olivarez also raises an as-applied

[1] *See Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006) (unpublished opinions issued after January 1, 1996 are not controlling precedent but may be considered persuasive authority); 5TH CIR. R. 47.5.

[2] The recent grant of certiorari by the United States Supreme Court on the issue whether § 16(b) is unconstitutional in light of *Johnson* in *Lynch v. Dimaya*, ___ S. Ct. ___, No. 15-1498, 2016 WL 3232911 (Sept. 29, 2016), does not alter the analysis. This court is bound by its own precedent unless and until that precedent is altered by a decision of the Supreme Court. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

challenge. In *Gonzalez-Longoria*, we addressed an as-applied challenge to the appellant's prior conviction of the Texas offense of Assault Causing Bodily Injury with a Prior Conviction of Family Violence and concluded that the standard provided by § 16(b) could be "straightforwardly applied" to the offense. 2016 WL 4169127, at *5. Our opinion in *Gonzalez-Longoria* does not foreclose relief on Sanchez Olivarez's as-applied challenge regarding his offense of evading arrest with a motor vehicle. Accordingly, summary affirmance is not appropriate in this case. *See Holy Land Found. for Relief & Dev.*, 445 F.3d at 781.

Nevertheless, the standard of § 16(b) can be straightforwardly applied to Sanchez Olivarez's prior conviction, and § 16(b) is not unconstitutionally vague as applied to him. *See Gonzalez-Longoria*, 2016 WL 4169127, at *5; *see also United States v. Sanchez-Ledezma*, 630 F.3d 447, 450-51 (5th Cir. 2011). Thus, there was no error in the district court's determination that Sanchez Olivarez's prior conviction for evading arrest with a motor vehicle is an aggravated felony for purposes of § 2L1.2(b)(1)(C) and § 1326(b)(2). In light of our conclusion, further briefing is not necessary.

The motions for summary affirmance and for an extension of time to file a brief are DENIED. The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
November 18, 2016
Lyle W. Cayce
Clerk

No. 16-40027
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GENARO MAYORGA-SALAZAR,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:15-CR-102-1

Before HIGGINBOTHAM, PRADO, and HAYNES, Circuit Judges.

PER CURIAM:*

Genaro Mayorga-Salazar was convicted of being an alien unlawfully found in the United States after a previous deportation. On appeal, Mayorga-Salazar contends that the district court erred by applying an eight-level enhancement under U.S.S.G. § 2L1.2(b)(1)(C). He argues that his prior Texas conviction for the offense of evading arrest with a motor vehicle is not a crime of violence because the definition of crime of violence in 18 U.S.C. § 16(b), as

* 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.

incorporated by reference into the definition of an aggravated felony in 8 U.S.C. § 1101(a)(43)(F), is unconstitutionally vague on its face in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The Government has moved unopposed for summary affirmance in lieu of filing a brief. Summary affirmance is proper where, among other instances, "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). The summary procedure is generally reserved for cases in which the parties concede that the issues are foreclosed by circuit precedent. *United States v. Lopez*, 461 F. App'x 372, 374 n.6 (5th Cir. 2012); *see also United States v. Houston*, 625 F.3d 871, 873 n.2 (5th Cir. 2010) (noting the denial of summary affirmance where an issue was not foreclosed).[1]

Our recent decision in *United States v. Gonzalez-Longoria*, 831 F.3d 670, 674-77 (5th Cir. 2016) (en banc), *cert. filed*, No. 16-6259 (Sept. 29, 2016), forecloses relief on Mayorga-Salazar's argument that in light of *Johnson*, § 16(b) is unconstitutionally vague on its face.[2] However, Mayorga-Salazar also raises an as-applied challenge. In *Gonzalez-Longoria*, we addressed an as-applied challenge to the appellant's prior conviction of the Texas offense of Assault Causing Bodily Injury with a Prior Conviction of Family Violence and concluded that the standard provided by § 16(b) could be "straightforwardly

[1] *See Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006) (unpublished opinions issued after January 1, 1996 are not controlling precedent but may be considered persuasive authority); 5TH CIR. R. 47.5.

[2] The recent grant of certiorari by the United States Supreme Court on the issue whether § 16(b) is unconstitutional in light of *Johnson* in *Lynch v. Dimaya*, ___ S. Ct. ___, 2016 WL 3232911 (Sept. 29, 2016) (No. 15-1498), does not alter the analysis. This court is bound by its own precedent unless and until that precedent is altered by a decision of the Supreme Court. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

applied" to the offense. *Gonzalez-Longoria*, 831 F.3d at 677-78. Our opinion in *Gonzalez-Longoria* does not foreclose relief on Mayorga-Salazar's as-applied challenge regarding his offense of evading arrest with a motor vehicle. Accordingly, summary affirmance is not appropriate in this case. *See Groendyke*, 406 F.2d at 1162.

Nevertheless, the standard of § 16(b) can be straightforwardly applied to Mayorga-Salazar's prior conviction, and § 16(b) is not unconstitutionally vague as applied to him. *See Gonzalez-Longoria*, 831 F.3d at 677-78; *see also United States v. Sanchez-Ledezma*, 630 F.3d 447, 450-51 (5th Cir. 2011). Thus, there was no error in the district court's determination that Mayorga-Salazar's prior conviction for evading arrest with a motor vehicle is an aggravated felony for purposes of § 2L1.2(b)(1)(C). In light of our conclusion, further briefing is not necessary.

The motions for summary affirmance and for an extension of time to file a brief are DENIED. The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
December 13, 2016
Lyle W. Cayce
Clerk

No. 14-41385
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARIO ALBERTO AMAYA-GUERRERO, also known as Mario A. Amaya,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:14-CR-527-1

Before DAVIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Mario Alberto Amaya-Guerrero pleaded guilty to illegal reentry by a previously deported alien in violation of 8 U.S.C. § 1326. The district court sentenced Amaya-Guerrero to 30 months of imprisonment–a sentence at the top of the recommended guideline imprisonment range. On appeal, Amaya-Guerrero challenges the 8-level "aggravated felony" enhancement he received under U.S.S.G. § 2L1.2(b)(1)(C) based on his prior state conviction for injury to

* 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.

a child in violation of TEX. PENAL CODE § 22.04. He argues that the definition of "aggravated felony," which includes a "crime of violence" as defined in 18 U.S.C. § 16(b), is void for vagueness.

The Government has filed an unopposed motion for summary affirmance, urging that Amaya-Guerrero's arguments are foreclosed by this court's recent decision in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), *pet. for cert. filed* (Sept. 29, 2016) (No. 16-6259). The Government is correct that *Gonzalez-Longoria* forecloses Amaya-Guerrero's facial vagueness challenge to § 16(b),[1] *see id.*, and Amaya-Guerrero does not make a separate as-applied challenge to § 16(b)'s application to his prior Texas offense for injury to a child. Accordingly, the motion for summary affirmance is GRANTED, and the district court's judgment is AFFIRMED. The Government's alternative motion for an extension of time to file a brief is DENIED.

[1] Although the Supreme Court recently granted certiorari on the question of whether § 16(b) is unconstitutionally vague, *see Lynch v. Dimaya*, 2016 WL 3232911 (Sept. 29, 2016) (No. 15-1498), this court is bound by its own precedent unless and until that precedent is altered by a decision of the Supreme Court, *see Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
November 21, 2016
Lyle W. Cayce
Clerk

No. 16-40072
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RUDY MARTINEZ-CASTILLO, also known as Maurio Gonzales, also known as Alfredo Noges-Saucedo, also known as Redolfo Martinez-Castillo, also known as Alfredo Martinez-Savavedra,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:15-CR-204-1

Before REAVLEY, OWEN, and ELROD, Circuit Judges.

PER CURIAM:*

Rudy Martinez-Castillo appeals the sentence imposed following his guilty plea conviction for illegal reentry following deportation in violation of 8 U.S.C. § 1326. He contends that the district court committed reversible plain error by classifying his 1989 Texas conviction for burglary of a vehicle as an aggravated felony for purposes of U.S.S.G. § 2L1.2(b)(1)(C) and § 1326(b)(2).

* 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.

He argues that Texas burglary of a vehicle does not qualify as an aggravated felony pursuant to 8 U.S.C. § 1101(a)(43)(G) because it is not a generic burglary offense as defined in *Taylor v. United States*, 495 U.S. 575, 598 (1990). He also argues that Texas burglary of a vehicle does not qualify as an aggravated felony pursuant to § 1101(a)(43)(F) because, under the reasoning in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the crime of violence definition in 18 U.S.C. § 16(b) is unconstitutionally vague on its face.

The Government has filed an unopposed motion for summary affirmance asserting that Martinez-Castillo's arguments are foreclosed by our recent decision in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259). In the alternative, the Government requests an extension of time in which to file a brief on the merits.

The Government is correct that *Gonzalez-Longoria* forecloses Martinez-Castillo's facial vagueness challenge to § 16(b).[1] *See id.* at 677. Thus, we need not determine whether his Texas burglary of a vehicle conviction, or any other prior conviction, qualifies as an aggravated felony under other provisions of § 1101(a)(43). Accordingly, the Government's motion for summary affirmance is GRANTED, the alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

[1] The Supreme Court's recent grant of certiorari on the issue whether § 16(b) is unconstitutional in light of *Johnson* in *Lynch v. Dimaya*, ___ S. Ct. ___, 2016 WL 3232911 (Sept. 29, 2016) (No. 15-1498), does not alter our analysis. We are bound by our own precedent unless and until that precedent is altered by a decision of the Supreme Court. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
December 6, 2016
Lyle W. Cayce
Clerk

No. 15-41687
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

LUGARDO VAZQUEZ-HERNANDEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:15-CR-507-1

Before REAVLEY, OWEN, and ELROD, Circuit Judges.

PER CURIAM:*

Lugardo Vazquez-Hernandez pleaded guilty to illegal reentry and was sentenced to 18 months of imprisonment. His sentence was based in part on an eight-level enhancement for an aggravated felony pursuant to U.S.S.G. § 2L1.2(b)(1)(C). The enhancement was imposed because Vazquez-Hernandez was convicted in Texas, prior to his removal, of assault of a public servant. Vazquez-Hernandez argues that the district court erred by characterizing the

* 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.

Texas offense of assault of a public servant as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) for the purposes of convicting and sentencing him under 8 U.S.C. § 1326(b)(2). Relying on *Johnson v. United States*, 135 S. Ct. 2551 (2015), Vazquez-Hernandez argues that the definition of a crime of violence in 18 U.S.C. § 16(b), which is incorporated by reference into § 1101(a)(43)(F)'s definition of an aggravated felony, is unconstitutionally vague on its face.

The Government has filed an unopposed motion for summary affirmance, urging that Vazquez-Hernandez's arguments are foreclosed by our recent decision in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259). The Government is correct.[1] *See id.* Accordingly, the motion for summary affirmance is GRANTED, and the district court's judgment is AFFIRMED. The Government's alternative motion for an extension of time to file a brief is DENIED.

[1] The recent grant of certiorari by the United States Supreme Court on the issue whether § 16(b) is unconstitutional in light of *Johnson* in *Lynch v. Dimaya*, ___ S. Ct. ___, 2016 WL 3232911 (Sept. 29, 2016) (No. 15-1498), does not alter our analysis. This court is bound by its own precedent unless and until that precedent is altered by a decision of the Supreme Court. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
November 23, 2016
Lyle W. Cayce
Clerk

No. 15-41370
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RUDITH VALMORE GUERRERO-ARANIVA, also known as Rudith Valmore Araniva-Guerrero,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:15-CR-536-1

Before DAVIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Following the entry of his guilty plea conviction of illegal reentry, Rudith Valmore Guerrero-Araniva was sentenced to 32 months of imprisonment, based in part on an eight-level enhancement pursuant to U.S.S.G. § 2L1.2(b)(1)(C) for his prior conviction of the Texas offense of injury to a child under TEX. PENAL CODE § 22.04. Guerrero-Araniva argues for the first time

* 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.

on appeal that the district court plainly erred by characterizing his 1991 Texas conviction for injury to a child as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) for purposes of applying the § 2L1.2(b)(1)(C) sentencing enhancement and for convicting and sentencing him under 8 U.S.C. § 1326(b)(2). Relying primarily on *Johnson v. United States*, 135 S. Ct. 2551 (2015), Guerrero-Araniva argues that the definition of a crime of violence in 8 U.S.C. § 16(b), which is incorporated by reference into § 1101(a)(43)(F)'s definition of an aggravated felony, is unconstitutionally vague on its face. He further contends that this court cannot apply § 16(b) in this case without violating due process.

The Government has filed an unopposed motion for summary affirmance, urging that Guerrero-Araniva's arguments are foreclosed by our recent decision in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), *pet. for cert. filed* (Sept. 29, 2016) (No. 16-6259). The Government is correct that *Gonzalez-Longoria* forecloses Guerrero-Araniva's facial vagueness challenge to § 16(b), as well as his challenge to our application of § 16(b) on due process grounds.[1] *See id.* Accordingly, the motion for summary affirmance is GRANTED, and the district court's judgment is AFFIRMED. The Government's alternate motion for an extension of time to file a brief is DENIED.

[1] The recent grant of certiorari by the United States Supreme Court on the issue whether § 16(b) is unconstitutional in light of *Johnson* in *Lynch v. Dimaya*, ___ S. Ct. ___, No. 15-1498, 2016 WL 3232911 (Sept. 29, 2016), does not alter our analysis. This court is bound by its own precedent unless and until that precedent is altered by a decision of the Supreme Court. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-41222
Conference Calendar

United States Court of Appeals
Fifth Circuit
FILED
December 20, 2016
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TITO OLVERA-CASTRO,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:14-CR-414-1

Before DENNIS, PRADO, and OWEN, Circuit Judges.

PER CURIAM:*

Appealing the judgment in a criminal case, Tito Olvera-Castro raises an argument that is foreclosed by *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259). In *Gonzalez-Longoria*, we held that 18 U.S.C. § 16(b), which defines a crime of violence when incorporated by reference into U.S.S.G. § 2L1.2(b)(1)(C), is not unconstitutionally vague on its face in light of *Johnson*

* 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.

v. United States, 135 S. Ct. 2551 (2015). *Id.* at 672. Accordingly, the motion for summary affirmance is GRANTED, the alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
December 6, 2016
Lyle W. Cayce
Clerk

No. 14-41123
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANGEL DE JESUS SANABIA-SANCHEZ, also known as Angel Sarabia-Sanchez,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:14-CR-290-1

Before JONES, WIENER, and CLEMENT, Circuit Judges.

PER CURIAM:*

Following his guilty plea conviction for illegal reentry, Angel De Jesus Sanabia-Sanchez was sentenced to 33 months of imprisonment, which sentence included an eight-level enhancement, pursuant to U.S.S.G. § 2L1.2(b)(1)(C), based on his prior Texas conviction for burglary of a motor vehicle. For the first time on appeal, Sanabia-Sanchez argues that the district

* 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.

court committed reversible plain error when it concluded that his prior burglary of a motor vehicle conviction qualified as a "crime of violence" under 18 U.S.C. § 16(b) and thus constituted an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F), triggering the then-applicable § 2L1.2(b)(1)(C) enhancement and the increased statutory maximum under 18 U.S.C. § 1326(b)(2). Relying primarily on *Johnson v. United States*, 135 S. Ct. 2551 (2015), Sanabia-Sanchez argues that the definition of a crime of violence in § 16(b), as incorporated by reference into the definition of an aggravated felony in § 1101(a)(43)(F), is unconstitutionally vague on its face. He further contends that this court cannot apply § 16(b) in this case without violating due process.

The Government has filed an unopposed motion for summary affirmance, urging that Sanabia-Sanchez's arguments are foreclosed by our recent decision in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259). The Government is correct that *Gonzalez-Longoria* forecloses both Sanabia-Sanchez's facial vagueness challenge to § 16(b) and his challenge to our application of § 16(b) on due process grounds.[1] *See id.* Accordingly, the motion for summary affirmance is GRANTED, and the district court's judgment is AFFIRMED. The Government's alternate motion for an extension of time to file a brief is DENIED.

[1] The recent grant of certiorari by the United States Supreme Court on the issue whether § 16(b) is unconstitutional in light of *Johnson* in *Lynch v. Dimaya*, 2016 WL 3232911 (Sept. 29, 2016) (No. 15-1498), does not alter the analysis. This court is bound by its own precedent unless and until that precedent is altered by a decision of the Supreme Court. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20724
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
December 15, 2016
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CARLOS TREJO-DOMINGUEZ, also known as Carlos Dominguez Trejo, also known as Carlos Hernandez-Herrera,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:15-CR-365-1

Before KING, DENNIS, and COSTA, Circuit Judges.

PER CURIAM:*

Appealing the judgment in a criminal case, Carlos Trejo-Dominguez raises an argument that is now foreclosed by *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259). Trejo also contends that the district court erred by entering judgment reflecting a conviction under 8 U.S.C. § 1326(b)(2), but the

* 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.

judgment actually reflects the appropriate conviction under § 1326(b)(1). Accordingly, the government's unopposed motion for summary affirmance is GRANTED, and the judgment of the district court is AFFIRMED. The government's alternative motion for an extension of time to file a brief is DENIED as moot.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-41181
Conference Calendar

United States Court of Appeals
Fifth Circuit
FILED
December 20, 2016
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

EVARISTO REYES-DIAZ,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:14-CR-416-1

Before DENNIS, PRADO, and OWEN, Circuit Judges.

PER CURIAM:*

Appealing the judgment in a criminal case, Evaristo Reyes-Diaz raises an argument that is foreclosed by *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259). In *Gonzalez-Longoria*, we held that 18 U.S.C. § 16(b), which defines a crime of violence when incorporated by reference into U.S.S.G. § 2L1.2(b)(1)(C), is not unconstitutionally vague on its face in light of *Johnson*

* 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.

v. United States, 135 S. Ct. 2551 (2015). *Id.* at 672. Accordingly, the motion for summary affirmance is GRANTED, the alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20731
Conference Calendar

United States Court of Appeals
Fifth Circuit
FILED
December 20, 2016
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

LINO ISAAC CARRILLO-HERNANDEZ, also known as Lino Carrillo-Hernandez, also known as Lino Carillo-Hernandez, also known as Lino Isaac Carrillo, also known as Lino Isaac Hernandez Carrillo, also known as Lino Carrillo Hernandez,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:15-CR-476-1

Before DENNIS, PRADO, and OWEN, Circuit Judges.

PER CURIAM:*

Appealing the judgment in a criminal case, Lino Isaac Carrillo-Hernandez raises an argument that is foreclosed by *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259). In *Gonzalez-Longoria*, we held that 18 U.S.C. § 16(b),

* 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.

which defines a crime of violence when incorporated by reference into U.S.S.G. § 2L1.2(b)(1)(C), is not unconstitutionally vague on its face in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Id.* at 672. Accordingly, the motion for summary affirmance is GRANTED, the alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
January 12, 2017
Lyle W. Cayce
Clerk

No. 14-41091
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FRANCISCO DE JESUS TREVINO-RODRIGUEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:14-CR-588-1

Before HIGGINBOTHAM, PRADO, and HAYNES, Circuit Judges.

PER CURIAM:*

Following his guilty plea conviction for illegal reentry after removal, Francisco De Jesus Trevino-Rodriguez was sentenced above his advisory guidelines range to 41 months of imprisonment. Trevino-Rodriguez argues that the district court erred by convicting, sentencing, and entering judgment against him pursuant to 8 U.S.C. § 1326(b) based upon its determination that his prior conviction for burglary of a habitation in violation of Texas Penal Code

* 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.

§ 30.02(a)(3) and (c)(2) was a crime of violence under 18 U.S.C. § 16(b) and thus was an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). Relying primarily on *Johnson v. United States*, 135 S. Ct. 2551 (2015), he argues that the definition of a crime of violence in § 16(b) is unconstitutionally vague on its face. He further contends that this court cannot apply § 16(b) in this case without violating due process.

The Government has filed an unopposed motion for summary affirmance, urging that Trevino-Rodriguez's arguments are foreclosed by our decision in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 30, 2016) (No. 16-6259). The Government is correct that *Gonzalez-Longoria* forecloses Trevino-Rodriguez's facial challenge to § 16(b). Insofar as he raises an as-applied challenge, the claim is not strictly foreclosed by *Gonzalez-Longoria* because the prior convictions at issue differ. Summary affirmance is, therefore, inappropriate. Nevertheless, additional briefing is unnecessary because, just as in *Gonzalez-Longoria*, § 16(b) "can be straightforwardly applied to [Trevino's] prior offense," and Trevino "was on sufficient notice that his earlier crime of [burglary of a habitation] is one society condemns as violent because it involves a substantial risk that, in the course of its commission, force will be used against another."[1] *Id.* at 677-78; *see Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004). Accordingly, the district court's judgment is AFFIRMED, and the motions for summary affirmance and for an extension of time to file a brief are DENIED.

[1] The recent grant of certiorari by the United States Supreme Court on the issue whether § 16(b) is unconstitutional in light of *Johnson* in *Lynch v. Dimaya*, 137 S. Ct. 31 (2016), does not alter the analysis. This court is bound by its own precedent unless and until that precedent is altered by a decision of the Supreme Court. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-41034
Summary Calendar

United States Court of Appeals
Fif h Circuit
FILED
December 19, 2016
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

HECTOR ALEXANDER CABRERA,

Defendant–Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:15-CR-198-1

Before JOLLY, SMITH, and GRAVES, Circuit Judges.

PER CURIAM:*

Hector Cabrera was convicted of being unlawfully present in the United

* 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.

States after removal and was sentenced to a 38-month term of imprisonment. He contends that the district court erred by applying an eight-level aggravated-felony enhancement under U.S.S.G. § 2L1.2(b)(1)(C) (2014) and by entering a judgment reflecting that he was convicted and sentenced under 8 U.S.C. § 1326(b)(2). He contends that his Texas conviction of evading arrest with a motor vehicle is not an aggravated felony because the definition of "crime of violence" in 18 U.S.C. § 16(b), which is incorporated by reference into the definition of an aggravated felony in 8 U.S.C. § 1101(a)(43)(F) and thus applies for purposes of § 2L1.2(b)(1)(C), is unconstitutionally vague on its face and as applied to him in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Cabrera raised no sentencing objections in the district court, so our review is only for plain error, *see United States v. Juarez*, 626 F.3d 246, 253–54 (5th Cir. 2010), meaning that Cabrera must identify (1) a forfeited error (2) that is clear and obvious and (3) that affects his substantial rights, *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he satisfies those three requirements, this court may, in our discretion, remedy the error, but only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id*. (internal quotation marks and citation omitted).

The government has moved unopposed for summary affirmance in lieu of filing a brief. In the alternative, it moves for an extension of time to file its brief. Although *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259), forecloses relief on Cabrera's theory that, in light of *Johnson*, § 16(b) is unconstitutionally vague on its face, his contention that § 16(b) is unconstitutional as applied to him is not foreclosed by *Gonzalez-Longoria*. Accordingly, we decline to issue a summary affirmance. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Cabrera's "as applied" challenge turns on whether he was "able to apprehend that he could face enhanced punishment because his prior offense naturally involves physical force" and whether "the provision under which he was sentenced [was] not . . . so standardless as to invite arbitrary or discriminatory enforcement." *Gonzalez-Longoria*, 831 F.3d at 677. The Texas offense of evading arrest with a motor vehicle is a crime of violence under § 16(b) and thus is an "aggravated felony." *See United States v. Sanchez-Ledezma*, 630 F.3d 447, 451 (5th Cir. 2011). In *Sanchez-Ledezma*, we noted that that offense "typically involves violent force which the arresting officer must in some way overcome" and "will typically lead to a confrontation with the officer being disobeyed, a confrontation fraught with risk of violence." *Id.* at 450–51 (internal quotation marks and citation omitted). Thus, the standard of § 16(b) can be straightforwardly applied to Cabrera's state conviction, and he was on sufficient notice that that offense is considered violent "because it involves a substantial risk that, in the course of its commission, force will be used against another." *Gonzalez-Longoria*, 831 F.3d at 678.

Accordingly, there was no error, and certainly no clear or obvious error, in the determination that Cabrera's state conviction is an aggravated felony for purposes of §§ 2L1.2(b)(1)(C) and 1326(b)(2). Further briefing is therefore not necessary.

The motion for summary affirmance is DENIED. Because we dispense with further briefing, the alternative motion for an extension of time to file a brief is DENIED. The judgment is AFFIRMED.