NO. 17-5305

IN THE SUPREME COURT OF THE UNITED STATES

ROLANDO DANIEL GARCIA-HERNANDEZ and
MARIO DELGADO CRUZ,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONERS' REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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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.

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PETITIONERS' REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners argue that the "crime of violence" definition in 18 U.S.C. § 16(b) is unconstitutionally vague, as incorporated into an "aggravated felony" definition in two places: (1) § 2L1.2(b)(1)(C) of the pre-November 1, 2016 United States Sentencing Guidelines enhancement, and (2) the statutory-enhancement provision of 8 U.S.C. § 1326(b)(2). Pet. 17-22. Mr. Garcia-Hernandez raises both challenges. Mr. Cruz raises only the application of § 1326(b)(2). Both petitioners ask that their petition for a writ of certiorari be held until this Court renders its decision in Sessions v. Garcia Dimaya, No. 15-1498 (reargument scheduled for October 2, 2017). Pet. 9.

In response, the government argues that the petition should simply be denied because a ruling on the vagueness of § 16(b) would not affect their sentences. The government is incorrect.

With regard to the "aggravated felony" definition of USSG § 2L1.2(b)(1)(C), the government contends that this Court's ruling in Beckles v. United States, 137 S. Ct. 886, 895 (2017), that the Sentencing Guidelines are not subject to a vagueness challenge means that a ruling in Garcia Dimaya on the vagueness of § 16(b) "will have no effect on Garcia-Hernandez's Guidelines calculation." U.S. Mem. Opp. 3. Not so. A declaration that a statute is unconstitutionally vague renders that statute "invalid in toto—and therefore incapable of any valid application." Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982). If § 16(b) is found to be void for vagueness in Garcia Dimaya, the unconstitutional portion of the statute would then become a legal nullity which

could no longer be incorporated into USSG § 2L1.2 either. See id. The government cites no authority for the remarkable proposition that this Court could declare a portion of a federal statute to be unconstitutional, and yet the Sentencing Guidelines would continue to incorporate that invalid portion.

To the contrary, courts have recognized that if a particular portion of a statute is declared unconstitutional, then Guidelines enhancements which incorporate that statute subsequently encompass only the remaining, constitutional portions of the statute. Cf., e.g., United States v. Rodriguez-Pacheco, 475 F.3d 434, 438-442, 444 (1st Cir. 2007) (recognizing that after child pornography definitions previously contained in 18 U.S.C. § 2256(8)(B) and (D) were found unconstitutional because they included virtual minors, defendant could only be subject to enhancement under USSG § 2G2.4(b)(2) (2002), based on the remaining, constitutional portions of incorporated statute that covered real minors); United States v. Lacey, 569 F.3d 319, 324-25 (7th Cir. 2009) (same for application of USSG § 2G2.2(b)(7)(D)'s 600-image enhancement); United States v. Hoey, 508 F.3d 687, 690-91, 693 (1st Cir. 2007) (same for § 2G2.2(b)(4)). A declaration that § 16(b) is unconstitutionally void would similarly render that statutory subsection void in all applications, including in USSG § 2L1.2.

Mr. Garcia-Hernandez's own vagueness challenge to § 16(b), as it is incorporated by reference into USSG § 2L1.2, is distinct from the question this Court addressed in Beckles. Beckles did not involve a challenge to a federal statute. The language asserted to be vague in Beckles was the text of USSG § 4B1.2 itself, Beckles, 137 S. Ct. at 892-93,

whereas the language asserted to be vague by Mr. Garcia-Hernandez is the language of § 16(b), a federal statute, which is then incorporated into the Guidelines via § 2L1.2's reference to the statutory "aggravated felony" definition. See USSG § 2L1.2(b)(1)(C) & cmt. n.3(A). Mr. Garcia-Hernandez's challenge to § 16(b) will have no effect on the language of § 2L1.2 itself. If § 16(b) is declared unconstitutional, the language of § 2L1.2 will be completely unaffected; the Guideline will simply continue to incorporate the remaining, valid portions of 8 U.S.C. § 1101(a)(43) and 18 U.S.C. § 16.

The Guidelines' incorporation of a statute is significantly different from simply interpreting the text of a Guideline itself, because it tethers the Guideline to later amendments to, or case law interpretations of, the statute. This Court explicitly drew that connection in Lopez v. Gonzales, 549 U.S. 47 (2006), where the Court recognized that the definition of "aggravated felony" under immigration law applied to removability determinations as well as to the federal Sentencing Guidelines, because the Sentencing Guidelines incorporated the statutory definition. See id. at 50-51. This Court used that immigration case to resolve a circuit split on the Sentencing Guideline controversies over whether "simple possession" offenses were included within the term "aggravated felony." Id. at 52 n.3. Federal courts subsequently recognized—and the government repeatedly agreed—that the statutory interpretation of Lopez applied with equal force to the Sentencing Guidelines application of the "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C). See United States v. Matamoros-Modesta, 523 F.3d 260, 263 (4th Cir. 2008); United States v. Figueroa-Ocampo, 494 F.3d 1211, 1216 (9th Cir. 2007) (observing

that "it is beyond dispute that Lopez applies in both criminal sentencing and immigration matters"); United States v. Estrada-Mendoza, 475 F.3d 258, 261 (5th Cir. 2007) (concluding that "Lopez ineluctably applies with equal force to immigration and criminal cases"); United States v. Pacheco-Diaz, 506 F.3d 545, 548 (7th Cir. 2007); United States v. Martinez-Macias, 472 F.3d 1216, 1218 (10th Cir. 2007).

In short, a ruling in Garcia Dimaya that § 16(b) is invalid would render the statute a nullity, even as it is incorporated by the Guidelines, and Beckles has no effect on Mr. Garcia-Hernandez's vagueness challenge to § 16(b).

With regard to both petitioners' challenge to § 16(b) as it is incorporated in § 1326(b)(2), the government argues that the petition should simply be denied because petitioners were sentenced below the 10-year statutory maximum that would have applied under 8 U.S.C. § 1326(b)(1), if their convictions were classified as ordinary felonies rather than aggravated felonies. U.S. Mem. Opp. 2-3. The government's argument is not persuasive. It is true (as the government argues) that petitioners' prison sentences fall within the statutory parameters for an offense under § 1326(b)(1). U.S. Mem. Opp. 2-3. However, the written judgment entered by the district court in each case reflects conviction and sentencing under § 1326(b)(2), signifying application of the statutory "aggravated felony" enhancement. Pet. 6.

Petitioners have already outlined the collateral consequences of a determination that their prior convictions qualify as an "aggravated felony" under § 1326(b)(2). Pet. 15. The government argues that these consequences are unrelated to the aggravated felony

determinations in this case. U.S. Mem. Opp. 3-4. The Fifth Circuit disagrees. That court—the only circuit court currently applying § 16(b), see Pet. 12-13—has held specifically that the inclusion of § 1326(b)(2) in the judgment renders an appeal not moot because of collateral consequences, even when the defendant has served his sentence and been deported. United States v. Agrueta-Vasquez, – Fed. Appx. –, 2017 WL 4232517 (5th Cir. Sept. 22, 2017) (unpublished). And that court has repeatedly remanded cases for the purpose of correcting the judgment to reflect conviction and sentencing under 8 U.S.C. § 1326(b)(1), rather than 8 U.S.C. § 1326(b)(2), due to these collateral consequences. See, e.g., United States v. Ovalle-Garcia, 868 F.3d 313, 314 (5th Cir. 2017) (finding that erroneously entering judgment under § 1326(b)(2) "is neither harmless nor moot because the erroneous judgment could have collateral consequences"); United States v. Briceno, 681 Fed. Appx. 334, 338 (5th Cir. 2017) (unpublished); United States v. Oliveros Mejia, 589 Fed. Appx. 296, 297 (5th Cir. 2015) (unpublished); United States v. Jimenez-Laines, 342 Fed. Appx. 978, 979 (5th Cir. 2009) (unpublished); United States v. Gutierrez-Garrido, 75 Fed. Appx. 231, 231-32 (5th Cir. 2003) (unpublished).

For these reasons, the government is incorrect in arguing that there is "no reason" to hold this petition for the decision in Garcia Dimaya, and that the petition should instead be denied. U.S. Mem. Opp. 4.

CONCLUSION

For the foregoing reasons, as well as those set forth in the original petition for writ of certiorari, 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: September 29, 2017

Respectfully submitted,

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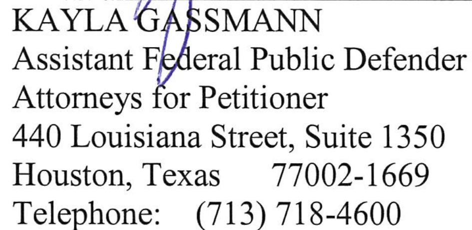

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