



Office of the Attorney General
Washington, D.C. 20530

June 21, 2016

The Honorable Paul Ryan
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *United States v. Raul Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015)

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you concerning the above-referenced case. A copy of the decision of the United States Court of Appeals for the Seventh Circuit is enclosed.

This case concerns the constitutionality of 18 U.S.C. 16(b), part of a definitional provision that is incorporated into other federal laws. The defendant in this criminal prosecution is a citizen of Mexico who has been removed from the United States on three prior occasions. In September 2013, the defendant was arrested at an airport in Madison, Wisconsin, for illegally reentering the United States once again. A federal grand jury returned an indictment charging the defendant with illegal reentry after a prior removal following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(b); and with presenting a false document to a government official, in violation of 18 U.S.C. 1001. The defendant pleaded guilty, pursuant to a plea agreement, to the illegal-reentry charge.

In advance of sentencing, the Probation Office determined that the defendant's prior conviction for vehicular flight in violation of Wisconsin law qualified as a "crime of violence" under federal law and, as a result, was also an aggravated felony under the immigration laws, 8 U.S.C. 1101(a)(43)(F). The relevant federal law defines the term "crime of violence" to include a felony offense 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(b). The defendant's qualifying conviction for an aggravated-felony crime of violence meant that his statutory maximum was 20 years rather than 10 years, see 8 U.S.C. 1326(b)(1) and (2), and caused the Probation Office to recommend an eight-level increase to his advisory range under Sentencing Guidelines § 2L1.2(b)(1)(C).

The district court overruled the defendant's objection to the Probation Office's determination, calculated an advisory sentencing range that included the eight-level enhancement, and imposed a sentence of 21 months of imprisonment—the midpoint of the advisory range. The court did not impose a term of supervised release.

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The court of appeals reversed. The court held that the crime-of-violence definition in 18 U.S.C. 16(b) is unconstitutionally vague in light of the Supreme Court's intervening decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the "residual clause" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii). The court concluded that the language of Section 16(b) "is materially the same" as that of the ACCA residual clause, 808 F.3d at 722, and that determining whether a conviction qualifies as a crime of violence under Section 16(b) requires an "indeterminate two-step approach" that is "identical" to the one that had "rendered the [residual] clause unconstitutionally vague," *id.* at 723. In reaching that conclusion, the court rejected the government's arguments that Section 16(b) is distinguishable from the residual clause because it is not preceded by a confusing list of enumerated crimes and has not, like that clause, "produced a shifting and irreconcilable body of caselaw." *Id.* at 723.

The Solicitor General authorized a petition for rehearing en banc. On March 14, 2016, after ordering the defendant to respond, the court of appeals denied the petition.

The Department has defended the constitutionality of the crime of violence definition in 18 U.S.C. 16(b) and will continue to do so. In particular, on June 10, 2016, the Solicitor General filed a petition for a writ of certiorari seeking Supreme Court review of the Ninth Circuit's decision in *Dimaya v. Lynch*, 803 F.3d 1110 (2015), which held that 18 U.S.C. 16(b), as applied in removal proceedings under the Immigration and Nationality Act, is unconstitutionally vague.

This case, however, is not a suitable vehicle for further review because it has become moot. The defendant was released from the custody of the Bureau of Prisons on March 7, 2016, and is not subject to a federal term of supervised release. Because the defendant's constitutional challenge affected only his term of imprisonment, and because that term has expired, this case no longer presents a live controversy. See *Lane v. Williams*, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

Because the case became moot before the due date for filing a petition for a writ of certiorari (June 12, 2016), no petition was filed.

Please let me know if we can be of further assistance in this matter.

Sincerely,

A handwritten signature in black ink that reads "Loretta E. Lynch". The signature is written in a cursive, flowing style.

Loretta E. Lynch
Attorney General