



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

June 27, 2016

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

Re: *United States v. Pawlak*, No. 15-3566, 2016 WL 2802723 (6th Cir. May 13, 2016)

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 Sixth Circuit is enclosed.

This case concerns the constitutionality of the residual clause in the career-offender provision of the Sentencing Guidelines, which defines the term “crime of violence” to include an offense punishable by more than one year in prison that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” See Sentencing Guidelines § 4B1.2(a)(2). That definition is materially identical to the “residual clause” of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), which the Supreme Court held unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The defendant in this criminal prosecution sold firearms to an undercover officer on four occasions. He pleaded guilty to four counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). In calculating the applicable Guidelines range, the district court determined that the defendant’s prior burglary conviction was a “crime of violence” under Guidelines § 2K2.1(a)(1), which incorporates the career-offender guideline’s definition of “crime of violence.” Guidelines § 2K2.1 comment. (n.1). The defendant’s advisory Guidelines range was 121-151 months of imprisonment, and the court imposed a below-range sentence of 105 months.

On direct appeal, the Sixth Circuit vacated the defendant’s sentence and remanded for resentencing. *Pawlak*, 2016 WL 2802723, at *1. The court held that the Supreme Court’s decision in *Johnson* applied to the “textually identical” residual clause in the career-offender guideline. 2016 WL 2802723, at *1. The court relied on *Peugh v. United States*, 133 S. Ct. 2072 (2013), in which the Supreme Court held that the advisory Guidelines are subject to challenges under the Ex Post Facto Clause, explaining that *Peugh* rested on the “same principles of fair notice and avoiding arbitrary enforcement underlying the doctrine of due process” that led the Court to invalidate the ACCA residual clause in *Johnson*. 2016 WL 2802723, at *3-*4. Observing that the Supreme Court had emphasized the advisory Guidelines’ “considerable influence on sentencing determinations,” the court concluded that “[p]ost-*Johnson* and *Peugh*, the fact that the Guidelines are not mandatory is a distinction without a difference” and that

The Honorable Paul Ryan
Page Two

“*Johnson*’s rationale applies with equal force to the Guidelines’ residual clause.” *Id.* The court noted that its conclusion was consistent with the Tenth Circuit’s decision in *United States v. Madrid*, 805 F.3d 1204, 1210-1211 (2015), and explained that it disagreed with the Eleventh Circuit’s contrary conclusion in *United States v. Matchett*, 802 F.3d 1185, 1193-1196 (2015), petition for reh’g en banc pending, No. 14-10396 (11th Cir. filed Oct. 13, 2015). *Pawlak*, 2016 WL 2802723, at *5-*6.

A petition for a writ of certiorari would be due on August 11, 2016. The Department has concluded, however, that further review of the Sixth Circuit’s decision will not be sought. First, that decision is consistent with the government’s position that *Johnson*’s vagueness holding applies to the identically worded residual clause in the career-offender guideline and other Guidelines provisions that contain the identical language the Court invalidated in *Johnson*. See U.S. Br. 38 n.9, *Welch v. United States*, S. Ct. No. 15-6418 (filed Feb. 9, 2016). In addition, the issue of *Johnson*’s application to the career-offender guideline is of limited prospective importance. On August 7, 2015, three days after the Department advised United States Attorneys’ Offices of the government’s position that *Johnson*’s vagueness holding applies to the identical language in the Guidelines, the Sentencing Commission announced that it had voted to seek comment on proposed changes to the Guidelines definition of “crime of violence” that, among other things, would eliminate the residual clause. See News Release (Aug. 7, 2015), www.ussc.gov/about/news/press-releases/august-7-2015 (noting that the proposal was “primarily intended to make the guidelines consistent with *Johnson*”). The Commission has since promulgated an amendment deleting the residual clause from the career-offender guideline; that amendment is scheduled to take effect on August 1, 2016. See 81 Fed. Reg. 4741, 4743 (Jan. 27, 2016).

For these reasons, the Department will not seek further review of the legal issue addressed by the Sixth Circuit in this case, or in any additional decisions holding the residual clause in the current career-offender guideline unconstitutional in light of *Johnson*.

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

Sincerely,



Loretta E. Lynch
Attorney General

Enclosure