



U.S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

September 28, 2020

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *Henry Wainwright v. United States*, No. 19-cv-62364 (S.D. Fla. Apr. 6, 2020), appeal pending, No. 20-12921 (11th Cir.); *Jay Anthony Richitelli v. United States*, No. 16-cv-61345 (S.D. Fla. Dec. 6, 2016), appeal pending, No. 17-10482 (11th Cir.)

Dear Madam Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you concerning the above-referenced decisions of the United States District Court for the Southern District of Florida. Copies of the district court's orders of December 6, 2016, and April 6, 2020, are enclosed.

Under 18 U.S.C. 3559(c), a district court is required to impose a sentence of life imprisonment for a defendant convicted of committing a "serious violent felony" if the defendant has previously been convicted of two or more "serious violent felon[ies]." Under the "substantial-risk clause" in 18 U.S.C. 3559(c)(2)(F)(ii), a "serious violent felony" is defined to include "any other offense punishable by a maximum term of imprisonment of 10 years or more . . . that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense."

In 2010, co-defendants Jay Anthony Richitelli and Henry Wainwright were convicted after separate jury trials of, among other things, conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and of attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a). The district court determined that those offenses both qualified as serious violent felonies under Section 3559(c)(2)(F) and that each defendant also had two or more prior qualifying felony convictions for purposes of Section 3559(c). Accordingly, the district court imposed mandatory life sentences on those two counts of conviction for each defendant. Those convictions were upheld on direct appeal and in collateral proceedings under 28 U.S.C. 2255.

In 2015, the Supreme Court held that the "residual clause" of the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(2)(B), which is worded similarly to Section 3559(c)(2)(F)(ii)'s

substantial-risk clause, is unconstitutionally vague. *See Johnson v. United States*, 576 U.S. 591, 597 (2015). Richitelli later filed an authorized second-or-successive post-conviction motion under Section 2255, seeking to vacate his two life sentences on the theory that the substantial-risk clause of Section 3559(c)(2)(F)(ii) is unconstitutionally vague in light of *Johnson*. On December 6, 2016, the district court denied Richitelli's motion without addressing the constitutionality of the substantial-risk clause; the court instead determined that Richitelli's life sentences could be sustained on alternative grounds that did not rely on the substantial-risk clause. Richitelli's appeal from that decision is currently pending before the U.S. Court of Appeals for the Eleventh Circuit as No. 17-10482. The court of appeals has stayed the appeal pending the resolution of ongoing proceedings in district court concerning other counts of conviction not at issue here.

In 2019, the Supreme Court held that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B), which is nearly identical to Section 3559(c)(2)(F)(ii)'s substantial-risk clause, is unconstitutionally vague for the same reasons that had led the Court to find ACCA's residual clause unconstitutional in *Johnson*. *See Davis v. United States*, 139 S. Ct. 2319, 2325-2327 (2019). Wainwright later filed an authorized second-or-successive post-conviction motion under Section 2255 seeking to vacate his two life sentences on the theory that the substantial-risk clause of Section 3559(c)(2)(F)(ii) is unconstitutionally vague in light of *Davis*. On April 6, 2020, the district court granted Wainwright's motion. The court concluded that Section 3559(c)(2)(F)(ii) is unconstitutionally vague under *Davis* and that, contrary to its earlier decision in Richitelli's post-conviction proceedings, the life sentences that the court had imposed in this case relied upon the now-invalid substantial-risk clause and could not be sustained on an alternative ground. The court resentenced Wainwright to a term of 204 months of imprisonment. The government's appeal from those proceedings is currently pending before the U.S. Court of Appeals for the Eleventh Circuit as No. 20-12921. The government's opening brief is due on October 13, 2020.

The Department of Justice has reluctantly determined that no reasonable basis exists to distinguish the substantial-risk clause in Section 3559(c)(2)(F)(ii) from the provision the Supreme Court found to be unconstitutionally vague in *Davis*. The substantial-risk clause in Section 3559(c)(2)(F)(ii) is almost identical to Section 924(c)(3)(B), which was at issue in *Davis*. *Compare* 18 U.S.C. 3559(c)(2)(F)(ii) (an offense "that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense"), *with* 18 U.S.C. 924(c)(3)(B) (an 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"). The substantial-risk clause in Section 3559(c)(2)(F)(ii) has also been interpreted to require the same "categorical approach" to the classification of predicate offenses as the provision at issue in *Davis*, and the Court in *Davis* indicated that the statutory language compelled such an interpretation. *See Davis*, 139 S. Ct. at 2327-2329. Accordingly, the Department has concluded that *Davis* rendered the substantial-risk clause of Section 3559(c)(2)(F)(ii) unconstitutional.

The Department has also determined not to contest the district court's conclusion that the particular life sentences imposed here depended on the substantial-risk clause of Section 3559(c)(2)(F)(ii) and cannot be sustained on alternative grounds under other still-valid provisions in Section 3559(c). The Department has therefore decided to withdraw its appeal in Wainwright's proceedings (No. 20-12921) and to agree in Richitelli's appeal (No. 17-10482) that the court of appeals should remand the case to the district court for Richitelli to be resentenced. The Department

has also determined that it will similarly acknowledge that *Davis* rendered the substantial-risk clause of Section 3559(c)(2)(F)(ii) unconstitutional in other cases in which the issue arises. Please let me know if we can be of further assistance.

Sincerely,

Jeffrey B. Wall
Acting Solicitor General

Enclosure