No._____

IN THE SUPREME COURT OF THE UNITED STATES

RAMIRO **CASTANEDA-MORALES**, HECTOR RUBEN **MORALES-CARDENAS**, JOEL **VELASQUEZ-RIOS**, JOSE GUADALUPE **VEGA-ZAPATA**, and CANDIDO **PEREZ-CONDE**,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

PHILIP G. GALLAGHER
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
Telephone: (713) 718-4600

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 Castaneda-Morales and Vega-Zapata were also known by the aliases listed in the captions in Appendices A and D.

TABLE OF CONTENTS

TABLE OF CONTENTS – (Cont'd)

TABLE OF CITATIONS

Page

CASES

TABLE OF CITATIONS - (Cont'd)

Page

CASES - (Cont'd)

CONSTITUTIONAL AMENDMENT

STATUTES AND RULES

TABLE OF CITATIONS - (Cont'd)

Page

STATUTES AND RULES - (Cont'd)

TABLE OF CITATIONS - (Cont'd)

Page

SENTENCING GUIDELINES

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 E.

JURISDICTION

The judgments and opinions were entered on: January 20, 2017, for petitioner Castaneda-Morales, see Appendix A; February 21, 2017, for petitioners Morales-Cardenas and Velasquez-Rios, see Appendices B and C; March 2, 2017, for petitioner Vega-Zapata, see Appendix D; and March 21, 2017, for petitioner Perez-Conde. See Appendix E.

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. At the time of petitioners' sentencings, USSG § 2L1.2 provided 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 offenses:

(1) *Oregon assault in the third degree*, see Or. Rev. Stat. § 163.165;[2]

(2) *Texas evading arrest with a motor vehicle*, see Tex. Penal Code § 38.04;[3]

(3) *Texas burglary of a habitation*, see Tex. Penal Code § 30.02(a)(3);[4]

(4) *Texas assault on a public servant*, see Tex. Penal Code § 22.01(b)[5]; and

---

[2] Petitioner Castaneda-Morales.

[3] Petitioners Morales-Cardenas and Velasquez-Rios.

[4] Petitioner Velasquez-Rios.

[5] Petitioner Vega-Zapata.

(5) *North Carolina assault with a firearm or deadly weapon on a government officer or employee*, see N.C. Gen. Stat. § 14-34.2.[6]

For petitioners Castaneda-Morales, Velasquez-Rios and Perez-Conde, the PSR further recommended application of the statutory sentencing enhancement provided in 8 U.S.C. § 1326(b)(2),[7] 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.

---

[6] Petitioner Perez-Conde.

[7] The PSRs prepared to assist in sentencing Petitioners Velasquez-Rios and Perez-Conde did not specifically mention 8 U.S.C. § 1326(b)(2), but the PSRs did report that the petitioners were subject to a 20-year statutory maximum sentence.

Petitioners Morales-Cardenas, Vega-Zapata and Perez-Conde objected to the characterization of their predicate convictions as "aggravated felonies." They argued that § 16(b)—the only statutory provision 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.[8]

At sentencing, all petitioners were sentenced to higher terms of imprisonment based on the Guidelines enhancement. For petitioner Castaneda-Morales, 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,[9] concluding that their constitutional arguments were foreclosed

---

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

[9] In petitioner Perez-Conde's case, the Fifth Circuit assumed without deciding that the district court erred in classifying Mr. Perez-Conde's offense under N.C. Gen. Stat. § 14-34.2 as a crime of violence under § 16(b) but affirmed the sentence based on a finding that Mr. Perez-Conde's substantial rights were not affected because his conviction for attempted assault inflicting serious bodily injury under N.C. Gen. Stat. § 14-32.4 qualified as a crime of violence under § 16(b).

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.

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,[10] 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

---

[10] 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.).

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 (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).[11]

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

[11] 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)).

"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. Castaneda-Morales: 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" 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.[12]

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

[12] 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.

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).[13]

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

[13] 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.

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: April 13, 2017

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By _____
PHILIP G. GALLAGHER
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
Telephone: (713) 718-4600

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-41653
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
January 20, 2017
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RAMIRO CASTANEDA-MORALES, also known as Marco Vargas-Bustos,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:15-CR-660-1

Before JONES, WIENER, and ELROD, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Ramiro Castaneda-Morales appeals the 18-month within-guidelines sentence imposed following his guilty plea conviction of illegal reentry. *See* 8 U.S.C. § 1326(a)(1), (b)(2). The two issues raised on appeal were not raised in the district court, so we review for plain error. *See United States v. Arviso-Mata*, 442 F.3d 382, 384 (5th Cir. 2006). To demonstrate plain error, a defendant must show (1) an error or defect, i.e.,

* 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.

"some sort of deviation from a legal rule"; (2) that is clear or obvious; and that (3) affects his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009) (internal quotation marks, modification, and citation omitted). If the defendant makes such a showing, we have the discretion to correct the error, but we will do so only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* "In considering whether an error is clear or obvious we look to the state of the law at the time of appeal, and we must decide whether controlling circuit or Supreme Court precedent has reached the issue in question, or whether the legal question would be subject to reasonable dispute." *United States v. Fields*, 777 F.3d 799, 802 (5th Cir. 2015) (internal quotation marks and footnoted citations omitted); *see also Henderson v. United States*, 133 S. Ct. 1121, 1130 (2013) (holding that the "requirement that an error be 'plain' means that lower court decisions that are questionable but not *plainly* wrong . . . fall outside" the scope of plain error).

First, Castaneda-Morales claims that the district court plainly erred in assigning criminal history points under U.S.S.G. § 4A1.1(e) to the sentences for three of his prior Oregon third-degree assault convictions, which necessarily required a finding that those convictions were for crimes of violence, as defined in U.S.S.G. § 4B1.2(a) and comment. (n.5) (Nov. 1, 2014). He contends that the only basis for characterizing his Oregon offenses as crimes of violence was § 4B1.2's residual clause, which he insists is unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). We have not addressed the constitutionality of § 4B1.2's residual clause, so Castaneda-Morales cannot show error, if any, that is clear or obvious. *See United States v. Howell*, 838 F.3d 489, 492 (5th Cir. 2016) (declining to address the issue); *Henderson*, 133 S. Ct. at 1130; *Fields*, 777 F.3d at 802. Neither has he shown that the district court erred, clearly or otherwise, to the

extent it determined that the Oregon offenses were categorically crimes of violence, either as enumerated aggravated assault offenses or under the elements clause. *See Henderson*, 133 S. Ct. at 1130; *Fields*, 777 F.3d at 802.

Second, Castaneda-Morales asserts that the district court plainly erred by characterizing his prior Oregon convictions for third-degree assault as aggravated felonies under 8 U.S.C. § 1101(a)(43)(F) for purposes of applying a sentencing enhancement under U.S.S.G. § 2L1.2(b)(1)(C) (Nov. 1, 2014) and for convicting and sentencing him under § 1326(b)(2). Relying primarily on *Johnson v. United States*, 135 S. Ct. 2551 (2015), he contends 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. Castaneda-Morales's reasoning is foreclosed by our 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 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 this 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).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-41206
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

HECTOR RUBEN MORALES-CARDENAS,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:15-CR-1113-1

Before JOLLY, PRADO, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Appealing the judgment in a criminal case, Hector Ruben Morales-Cardenas 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) (2014), is not unconstitutionally vague on its face in light of

* 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.

Johnson v. United States, 135 S. Ct. 2551 (2015). *Gonzalez-Longoria*, 831 F.3d at 672. Accordingly, the motion for summary disposition is GRANTED, and the judgment of the district court is AFFIRMED.

30

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-41517
Conference Calendar

United States Court of Appeals
Fifth Circuit
FILED
February 21, 2017
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOEL VELASQUEZ-RIOS,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:15-CR-732-1

Before JOLLY, PRADO, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Appealing the judgment in a criminal case, Joel Velasquez-Rios 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) (2014), is not unconstitutionally vague on its face in light of *Johnson v. 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, 135 S. Ct. 2551 (2015). *Gonzalez-Longoria*, 831 F.3d 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
March 2, 2017
Lyle W. Cayce
Clerk

No. 16-41219
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE GUADALUPE VEGA-ZAPATA, also known as Ricardo Gonzalez, also known as Victor Guadalupe Medina,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:15-CR-580-1

Before KING, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:*

Jose Guadalupe Vega-Zapata pleaded guilty to illegal reentry and was sentenced to a 36-month term of imprisonment. On appeal, Vega-Zapata renews his challenge to application of the eight-level aggravated felony enhancement of U.S.S.G. § 2L1.2(b)(1)(C). The gravamen of his argument is that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), the definition

* 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.

of a crime of violence (COV) in 18 U.S.C, § 16(b) is unconstitutionally vague on its face. Therefore, he contends, neither his prior Texas conviction for evading arrest with a motor vehicle nor his prior Texas conviction for assault of a public servant is a COV under § 16(b), and thus neither prior conviction is an aggravated felony for purposes of 8 U.S.C. § 1101(a)(43)(F) and § 2L1.2(b)(1)(C).

As Vega-Zapata concedes, his argument is foreclosed by our decision in *United States v. Gonzalez-Longoria*, 831 F.3d 670, 672-77 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259), in which we rejected a constitutional challenge to § 16(b) as facially vague. Accordingly, Vega-Zapata's motion for summary disposition is GRANTED, and the district court's judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-41375

United States Court of Appeals
Fifth Circuit
FILED
March 21, 2017
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

CANDIDO PEREZ-CONDE,

Defendant–Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:15-CR-743-1

Before REAVLEY, OWEN, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Perez-Conde pleaded guilty to reentering the country illegally after having been deported. He appeals the district court's imposition of an 8-level enhancement under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(C). We affirm.

* 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.

I

Perez-Conde, a citizen of Mexico, pleaded guilty to reentering the United States illegally following deportation in violation of 8 U.S.C. § 1326. Applying the 2014 version of the United States Sentencing Guidelines, the district court imposed an 8-level enhancement for a prior conviction for assault and sentenced Perez-Conde to 27 months of imprisonment.

Section 2L1.2 of the Guidelines provides a base level offense of 8 for unlawfully entering or remaining in the United States. Under § 2L1.2(b)(1)(A)(ii), the base offense level is increased by 16 levels if the defendant was previously deported following a conviction for a "crime of violence." The Guidelines commentary defines "crime of violence" as it applies in § 2L1.2(b)(1)(A)(ii), enumerating a number of specific offenses that qualify, including aggravated assault, as well as other offenses that have "as an element the use, attempted use, or threatened use of physical force against the person of another."[1]

Perez-Conde had two prior convictions under North Carolina law: assault with a firearm upon a governmental officer and attempted assault inflicting serious bodily injury.[2] The presentence report (PSR) concluded that Perez-Conde's prior conviction for assault with a firearm upon a governmental officer was a "crime of violence" either because it qualified as an "aggravated assault," which is specifically enumerated as a crime of violence, or because it had as an element the use, attempted use, or threatened use of physical force against another person.[3] As a crime of violence under § 2L1.2(b)(1)(A)(ii), it qualified for a 16-level enhancement. The PSR concluded that Perez-Conde's

[1] U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 2L1.2 cmt. n.1(B)(iii) (U.S. SENTENCING COMM'N 2014).

[2] N.C. GEN. STAT. § 14-34.2; *id.* § 14-32.4.

[3] *See* U.S.S.G. § 2L1.2 cmt. n.1(B)(iii).

other prior conviction, attempted assault inflicting serious bodily injury, could be committed through "culpable negligence" under North Carolina law and, therefore, that this conviction did not qualify as a crime of violence but did constitute a "conviction for any other felony" under § 2L1.2(b)(1)(D), which would result in a 4-level enhancement. Applying the greatest enhancement, as directed by the Guidelines,[4] the PSR recommended a 16-level sentencing enhancement.

Perez-Conde filed written objections to the PSR, contending that assault with a firearm upon a governmental officer under North Carolina General Statutes § 14-34.2 "is not an enumerated offense under U.S.S.G § 2L1.2(b)(1)(A)(ii), comment n.1(B)(iii) or otherwise a crime of violence." Specifically, Perez-Conde argued that § 14-34.2 includes a less culpable mens rea than generic aggravated assault such that a conviction under the North Carolina statute cannot qualify as a crime of violence under § 2L1.2(b)(1)(A)(ii). He also objected that the state statute "does not have as an element the use of force because a defendant can be convicted under that statute absent an intentional use of force."

At sentencing, the Government agreed that the 16-level enhancement was "not appropriate," but recommended that the court instead apply an 8-level enhancement for deportation after being convicted of an "aggravated felony."[5] As used in § 2L1.2(b)(1)(C), "aggravated felony" is given the meaning provided by 8 U.S.C. § 1101(a)(43). Section 1101(a)(43)(F) defines an aggravated felony as "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." 18 U.S.C. § 16 in turn defines "crime of violence" as:

[4] § 2L1.2(b)(1).
[5] *See* § 2L1.2(b)(1)(C).

> (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.

The district court imposed an 8-level enhancement. Perez-Conde objected, arguing that 18 U.S.C. § 16(b) was unconstitutionally vague because the Supreme Court's reasoning in *Johnson v. United States*[6] applied equally to § 16(b). The district court overruled this objection and sentenced Perez-Conde to 27 months of imprisonment.

II

The parties dispute whether the standard of review applicable to the district court's imposition of the 8-level enhancement is de novo or plain error review. "If preserved for appeal, the district court's characterization of a prior offense as an aggravated felony or as a crime of violence is a question of law that we review de novo."[7] If not preserved, the plain error standard applies.[8] "[A]n argument is preserved when the basis for objection presented below gave the district court the opportunity to address the gravamen of the argument presented on appeal."[9] Perez-Conde filed written objections to the proposed

[6] 135 S. Ct. 2551, 2563 (2015) (holding that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague). Perez-Conde specifically objected as follows:

> We'd like to object to the plus-8, specifically, that the Section 16(b), that the Government is relying on is similar to the . . . residual clause, and that under *Johnson*, that particular clause has been unconstitutional, so we would make the same argument that that analysis would also apply in this situation and for those reasons, the plus-8 would be inappropriate at this time.

[7] *United States v. Narez-Garcia*, 819 F.3d 146, 149 (5th Cir. 2016).

[8] *United States v. Jaurez*, 626 F.3d 246, 253-54 (5th Cir. 2010).

[9] *Narez-Garcia*, 819 F.3d at 149 (quoting *United States v. Garcia-Perez*, 779 F.3d 278, 281-82 (5th Cir. 2015)).

16-level enhancement under § 2L1.2(b)(1)(A), arguing that his North Carolina assault with a firearm conviction could not be classified as a crime of violence under the Guidelines because it did not fall within the generic meaning of aggravated assault and did not contain an element of use of force. He objected at the sentencing hearing to the 8-level enhancement under a different subsection, § 2L1.2(b)(1)(C), on the ground that 18 U.S.C. § 16(b) was unconstitutionally vague. He did not, however, object that his prior conviction for assault with a firearm upon a governmental officer does not qualify as an "aggravated felony." We therefore review for plain error.[10]

"We find plain error when (1) there was an error or defect; (2) the legal error was clear or obvious, rather than subject to reasonable dispute; and (3) the error affected the defendant's substantial rights."[11] An error affects substantial rights if it "affected the outcome of the district court proceedings."[12] If all three elements are satisfied, "we may exercise our discretion to correct the error if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"[13]

III

We first address Perez-Conde's argument that the 8-level sentencing enhancement for a prior "aggravated felony" conviction does not apply because 18 U.S.C. § 16(b) is unconstitutionally vague. Perez-Conde argued that the reasoning in the Supreme Court's decision in *Johnson v. United States*, which

[10] *See id.*, 819 F.3d at 150 (reviewing a sentencing enhancement for plain error because the defendant "did not object to the enhancement on the specific ground he now raises on appeal").

[11] *Juarez*, 626 F.3d at 254.

[12] *Puckett v. United States*, 556 U.S. 129, 135 (2009) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)).

[13] *United States v. John*, 597 F.3d 263, 285 (5th Cir. 2010) (quoting *Puckett*, 556 U.S. at 135)).

held similar, but not identical, language in the Armed Career Criminal Act[14] was unconstitutionally vague, applies to the definition of crime of violence in § 16(b).[15] After Perez-Conde filed his opening brief, this court, sitting en banc in *United States v. Gonzalez-Longoria*, held that the reasoning in *Johnson* did not lead to the conclusion that the crime of violence definition included within § 16(b) is unconstitutionally vague.[16] The argument is thus foreclosed in this circuit.[17]

IV

Perez-Conde argues that his prior conviction under North Carolina General Statutes § 14-34.2 for assault with a firearm upon a governmental officer is not an "aggravated felony" under § 2L1.2(b)(1)(C) because it is not a "crime of violence" as defined in 18 U.S.C. § 16(b) and therefore that the district erred in imposing an 8-level enhancement. To qualify as a crime of violence under § 16(b), an offense must be a felony "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] Perez-Conde correctly notes that our court has construed § 16(b) to mean "that section 16(b) applies only when the nature of the offense is such that there is a substantial likelihood that the perpetrator will intentionally employ physical force against another's person or property in the commission thereof. [This] approach requires recklessness as regards a substantial risk that intentional force will be utilized

[14] 18 U.S.C. § 924(e)(2)(B)(i) (defining "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another").

[15] 135 S. Ct. 2551, 2563 (2015).

[16] 831 F.3d 670, 677 (5th Cir. 2016) (en banc), *petition for cert. filed*, (U.S. Sept. 29, 2016) (No. 16-6259).

[17] We recognize that Perez-Conde preserves this issue for possible further review.

[18] 18 U.S.C. § 16(b).

by the defendant to effectuate commission of the offense."[19] Perez-Conde contends that the mens rea element of § 14-34.2 can be satisfied by "culpable negligence" and, therefore, that the offense cannot qualify as a crime of violence.

Assuming, without deciding, that the district court did err in classifying an offense under § 14-34.2 as a crime of violence, we conclude that any error did not affect Perez-Conde's substantial rights. Perez-Conde's other prior conviction, for attempted assault inflicting serious bodily injury under § 14-32.4, qualifies as a crime of violence under § 16(b) and thus as an aggravated felony under the Guidelines. Perez-Conde cannot show an error that affected his substantial rights because he would have received the same 8-level enhancement, and therefore he would have been subject to the same Guidelines range and sentence had the district court imposed the enhancement under the attempted assault conviction.[20] We recognize that the PSR concluded Perez-Conde's prior conviction for attempted assault did not constitute a crime of violence because the offense could be committed through negligence. It appears, however, that the PSR did not analyze the prior conviction as an attempt offense, as described below. We may affirm a sentencing enhancement on any ground supported by the record.[21]

We use a categorical approach to determine whether a defendant's prior conviction constitutes a "crime of violence" under 18 U.S.C. § 16(b).[22] "This means that the particular facts of the defendant's prior conviction do not matter."[23] The proper inquiry is whether the elements of a defined offense

[19] *United States v. Chapa-Garza*, 243 F.3d 921, 925 (5th Cir. 2001).
[20] *See United States v. Garcia-Gonzalez*, 714 F.3d 306, 317 (5th Cir. 2013).
[21] *Id.* at 314.
[22] *United States v. Echeverria-Gomez*, 627 F.3d 971, 974 (5th Cir. 2010) (per curiam).
[23] *Chapa-Garza*, 243 F.3d at 924.

constitute a crime of violence under § 16(b).[24] "Only if the 'defendant's prior conviction is under a statute that identifies several separate offenses, some violent and others not,' will we 'apply the modified categorical method and look to [the indictment] to determine "which statutory phrase was the basis for the conviction."'"[25]

Section 14-32.4 provides that "any person who assaults another person and inflicts serious bodily injury is guilty of a Class F felony."[26] "Serious bodily injury" is defined under the statute and includes "bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization."[27]

North Carolina common law recognizes two definitions of assault.[28] The first defines assault as "an overt act or attempt, with force or violence, to do some immediate physical injury to the person of another, which is sufficient to put a person of reasonable firmness in fear of immediate physical injury."[29] The second defines assault as "a show of violence accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed."[30] Under North Carolina law, the elements of an attempt to commit a crime are: "(1) [a]n intent to commit [the substantive

[24] *Id.*

[25] *Echeverria-Gomez*, 627 F.3d at 975 (quoting *United States v. Hughes*, 602 F.3d 669, 674 (5th Cir. 2010)).

[26] N.C. GEN. STAT. § 14-32.4(a).

[27] *Id.*

[28] *State v. Floyd*, 794 S.E.2d 460, 464-65 (N.C. 2016).

[29] *State v. Jones*, 538 S.E.2d 917, 922 (N.C. 2000) (quoting *State v. Porter*, 457 S.E.2d 716, 721 (N.C. 1995)).

[30] *Floyd*, 794 S.E.2d at 465 (quoting *State v. Roberts*, 155 S.E.2d 303, 305 (N.C. 1967)).

offense], and (2) an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense."[31] "The crime of attempt requires an act done with the specific intent to commit the underlying offense."[32]

Perez-Conde contends that an offense under § 14-32.4 cannot qualify as a crime of violence for the same reason that an offense under § 14-34.2 cannot—a defendant can be convicted if he "actually intended to assault the victim *or* if he acted with 'culpable negligence from which intent may be implied.'"[33] The North Carolina Supreme Court defines "culpable negligence" as "such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others."[34] This court, in an unpublished decision, has recognized that "culpable negligence," as employed under North Carolina law, is "similar to ordinary negligence and lesser than plain recklessness."[35] Because we have previously held that to qualify as a "crime of violence" under § 16(b), an offense must have a mens rea of at least recklessness,[36] Perez-Conde contends that attempted assault conviction cannot qualify.

[31] *Id.* at 463 (quoting *State v. Powell*, 178 S.E.2d 417, 421 (N.C. 1971)); *accord State v. Coble*, 527 S.E.2d 45, 46 (N.C. 2000). Although the first common law definition of assault includes "attempt" within it, perhaps suggesting that attempted assault is not an offense under North Carolina law, the North Carolina Supreme Court has recognized attempted assault as an offense under North Carolina law, relying on the second common law definition of assault. *Floyd*, 794 S.E.2d at 465-66.

[32] *Coble*, 527 S.E.2d at 46.

[33] *See State v. Padgett*, No. COA10-1045, 2011 WL 2714212, at *3, 714 S.E.2d 209 (N.C. Ct. App. July 5, 2011) (unpublished table decision).

[34] *Jones*, 538 S.E.2d at 923 (quoting *State v. Weston*, 159 S.E.2d 883, 886 (N.C. 1968)).

[35] *United States v. Ocampo-Cruz*, 561 F. App'x 361, 364 (5th Cir. 2014) (per curiam unpublished) (concluding that the North Carolina offense of assault with a deadly weapon inflicting serious injury does not fall within the generic meaning of aggravated assault warranting a 16-level enhancement under the Guidelines because a defendant could be convicted under the statute with either an actual intent to inflict injury or culpable or criminal negligence from which such intent may be implied).

[36] *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir. 2001).

We disagree. Under North Carolina law, Perez-Conde must have been found to have had the specific intent to commit the underlying substantive offense,[37] which means that he was convicted of having the specific intent to assault another person and inflict serious bodily injury. He could not have committed that offense negligently or "culpably negligently." The North Carolina Supreme Court has held, in construing a similar statute, that "'[a] person who intends to 'assault[ ] another person with a deadly weapon and inflict[ ] serious injury,' and who does an overt act for that purpose going beyond mere preparation, but who ultimately fails to complete all the elements of this offense—for example, by failing to inflict a serious injury—would be guilty of the attempt rather than the completed offense."[38]

Section 2L1.2(b)(1) of the Guidelines provides that prior convictions for enumerated offenses include attempts to commit such offenses.[39] Perez-Conde's prior conviction for attempted assault inflicting serious bodily injury qualifies as an aggravated felony subject to an 8-level sentencing enhancement. Because any error did not affect the outcome of the district court proceedings, Perez-Conde's substantial rights were not affected. Thus, the district court did not plainly err.

* * *

For the foregoing reasons, we AFFIRM the judgment of the district court.

[37] *See State v. Floyd*, 794 S.E.2d 460, 463 (N.C. 2016).
[38] *Id.* at 463-64 (quoting N.C. GEN. STAT. § 14-32(b)).
[39] U.S.S.G. § 2L1.2 cmt. n.5.