
In the Supreme Court of the United States
at Washington, District of Columbia

OMAR ORLANDO RODRIGUEZ,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit at New Orleans, Louisiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner's offense level was increased by eight levels because he was previously convicted in 2008 of evading arrest, which the district court found was an "aggravated felony" which includes the definition of "crime of violence" as defined in 18 U.S.C. § 16(b), 8 U.S.C. § 1101(a)(43)(F), and U.S.S.G. §2L1.2(b)(1)(C) (Nov. 1, 2014). This court held that similar language in another statute (the Armed Career Criminal Act) was unconstitutionally vague in *Johnson v. United States*, 135 S.Ct. 2551 (U.S. 2015). Petitioner's appeal was foreclosed by the Fifth Circuit's *en banc* opinion in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016 *en banc*), *cert. filed* as No. 16-6259, distributed for conference Jan. 6, 2017, which held that this statute was not unconstitutionally vague, permitting the enhancement. The Ninth Circuit held that this statute was unconstitutionally vague based on *Johnson* in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), which is pending in this court as No. 15-1498, *Sessions v. Dimaya*, set for reargument Monday, Oct. 2, 2017, which would strike down the eight level enhancement applied to petitioner. Which circuit's ruling is correct?

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(ROA.17-40041.41 to ROA.17-40041.56)

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In the Supreme Court of the United States
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OMAR ORLANDO RODRIGUEZ,

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vs.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit at New Orleans, Louisiana

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE UNITED STATES SUPREME COURT:

NOW COMES Petitioner OMAR ORLANDO RODRIGUEZ, who
files this Petition for a Writ of Certiorari, and respectfully states as follows:

Statement of Jurisdiction

The judgment or order sought to be reviewed was entered July 13,
2017 in an unpublished opinion by the United States Court of Appeals for
the Fifth Circuit, which will be reported in an upcoming volume of the

Federal Appendix. The Fifth Circuit granted petitioner's unopposed motion for summary affirmance since the issue presented is foreclosed by *United States v. Gonzalez-Longoria*, 831 F.3d 670, 672-677 (5th Cir. 2016 *en banc*), *cert. filed* as No. 16-6259 on Sept. 29, 2016, distributed for conference of Jan. 9, 2017). That case is being held because the opposite result was reached by the Ninth Circuit in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. filed* as No. 15-1498, *Sessions v. Dimaya*, which will be reargued on Monday, October 2, 2017. This certiorari petition asks for this court to grant, vacate and remand if the Ninth Circuit's reasoning in *Dimaya v. Lynch* (now *Sessions v. Dimaya*) is affirmed, and the Fifth Circuit's reasoning in *United States v. Gonzalez-Longoria*, is reversed.

A copy of both the district court's amended judgment of conviction and sentence, and the Fifth Circuit's opinion, are attached in the appendix. This petition will be timely if mailed within ninety (90) days of the date of the Fifth Circuit's opinion, or by October 10, 2017. Sup. Ct. Rule 13.1.

Statement of the Case and Argument Amplifying
the Reasons for Granting the Writ

This is an appeal from a 33 month sentence for one count of illegal reentry following deportation. Petitioner's sentence was increased by eight levels because his objection to consideration of his 2008 conviction for

evading arrest as an “crime of violence” and “aggravated felony,” ROA.17-40041.136 to ROA.17-40041.138 (Petitioner’s objections to PSR), was rendered moot by the Fifth Circuit’s *en banc* opinion in *United States v. Gonzalez-Longoria*, 831 F.3d 1110 (5th Cir. 2016), ROA.126-127 (sentencing hearing transcript). That case held that the same statutes and guideline at issue in petitioner’s case were not unconstitutionally vague under this court’s opinion in *Johnson v. United States*, 135 S.Ct. 2551 (U.S. 2015), which held that it was unconstitutionally vague to enhance someone’s sentence based upon a felony conviction that “involves conduct that presents a serious risk of physical injury to another,” the language used in the Armed Career Criminal Act.

U.S.S.G. § 2L1.2(b)(1)(C) (Nov. 1, 2014) permits an eight level increase to the offense level if the defendant previously was deported, or remained unlawfully in the United States, after a conviction for an aggravated felony. “Aggravated felony” is defined in 8 U.S.C. § 1101(a)(43)(F) to include “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 defines “crime of violence” as either “(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 language in 18 U.S.C. § 16(b) is very similar to the language in the residual clause in the Armed Career Criminal Act, “involves conduct that presents a serious risk of physical injury to another,” that this court held was unconstitutionally vague in *Johnson*.

Although the Fifth Circuit held in *Gonzalez-Longoria*, that the language defining “crime of violence” and “aggravated felony” in the guideline and statutes just discussed was not unconstitutionally vague, the Ninth Circuit reached the opposite result in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), which held that this language was unconstitutionally vague based upon this court’s reasoning in *Johnson*. Petitions for a writ of certiorari were filed in both *Gonzalez-Longoria* (No. 16-6259, distributed for Jan. 6, 2017 conference) and *Dimaya v. Lynch*, now styled *Sessions v. Dimaya*, No. 15-1498, which is set for reargument on Monday, Oct. 1, 2017. This writer believes that *Gonzalez-Longoria* is being held in this court to await a decision on *Sessions v. Dimaya*. The Sixth Circuit also found this

language in 8 U.S.C. § 1101(a)(43)(F) and 18 U.S.C. § 16(b) unconstitutionally vague in *Shuti v. Lynch*, 828 F.3d 440, 451 (6th Cir. 2016, *cert. filed* as No. 16-991, *Sessions v. Shuti*, distributed for May 18, 2017 conference). That case also appears to be held by this court pending a decision in *Sessions v. Dimaya*.

Petitioner filed a motion for summary affirmance in the Fifth Circuit, noting that his objection to the eight level increase based on his 2008 evading arrest conviction, was foreclosed by the Fifth Circuit's *en banc* opinion in *United States v. Gonzalez-Longoria*, which is now pending in this court. When that motion was filed in March 2017, it asked the Fifth Circuit to wait until this court ruled on *Sessions v. Dimaya*, which at that time was believed to be by June 30, 2017. However, this court has since set that case for reargument on Monday, October 1, 2017. Therefore, the Fifth Circuit granted petitioner's motion for summary affirmance in its July 13, 2017 opinion, since no decision has yet been reached by this court in *Gonzalez-Longoria*. As a result, petitioner now files this petition for a writ of certiorari, and asks this court to grant, vacate the Fifth Circuit's opinion in petitioner's case if this court holds that the Fifth Circuit's opinion in

Gonzalez-Longoria was incorrectly decided, and Ninth Circuit's opinion in *Dimaya v. Lynch*, now *Sessions v. Dimaya*, was correctly decided.

Conclusion and Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, Petitioner OMAR ORLANDO RODRIGUEZ respectfully asks this Court to grant this petition for a writ of certiorari, and vacate and remand to the Fifth Circuit for consideration of this court's opinion affirming the Ninth Circuit's opinion in *Dimaya v. Lynch*, 083 F.3d 1110 (9th Cir. 2015), *cert. filed* as No. 15-1498, *Sessions v. Dimaya*, which will be reargued on Monday, October 2, 2017, and reversing the Fifth Circuit's contrary *en banc* opinion in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (*en banc, cert. filed* as No. 16-6259 on Sept. 29, 2016, distributed for conference of Jan. 9, 2017), if those results occur. However, if this court instead finds that *Dimaya v. Lynch* was incorrectly decided, and that *Gonzalez-Longoria* was correctly decided, then this petition for a writ of certiorari should be denied, since the Fifth Circuit granted summary affirmance based upon its opinion in *Gonzalez-Longoria*.

Respectfully submitted,

A handwritten signature in blue ink that reads "Gregory Sherwood". The signature is written in a cursive style and is positioned above a horizontal line.

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APPENDIX

FIFTH CIRCUIT OPINION

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-40041
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

July 13, 2017

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

OMAR ORLANDO RODRIGUEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:15-CR-1314-1

Before JOLLY, DAVIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Omar Orlando Rodriguez pleaded guilty to illegal reentry following deportation and was sentenced to a 33-month term of imprisonment. On appeal, he renews his challenge to the district court's application of the eight-level aggravated felony enhancement of U.S.S.G. § 2L1.2(b)(1)(C). The gravamen of his position is that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), the definition of a crime of violence in 18 U.S.C. § 16(b) is

* 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.

No. 17-40041

unconstitutionally vague on its face. Therefore, he contends, his Texas conviction of evading arrest with a motor vehicle does not qualify as a crime of violence under § 16(b) and thus is not an aggravated felony for purposes of 8 U.S.C. § 1101(a)(43)(F) and § 2L1.2(b)(1)(C).

As Rodriguez concedes, his argument is foreclosed by *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, Rodriguez's unopposed motion for summary disposition is GRANTED, and the district court's judgment is AFFIRMED. Rodriguez's alternative motion to hold his appeal in abeyance pending decisions by the Supreme Court in *Gonzalez-Longoria* and *Sessions v. Dimaya*, 137 S. Ct. 31 (2016) is DENIED. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

AMENDED JUDGMENT IN A CRIMINAL CASE

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in McAllen

ENTERED
December 13, 2016
David J. Bradley, Clerk

UNITED STATES OF AMERICA **AMENDED JUDGMENT IN A CRIMINAL CASE**
V.
OMAR ORLANDO RODRIGUEZ

CASE NUMBER: **7:15CR01314-001**
USM NUMBER: 85963-179

See Additional Aliases.

Date of Original Judgment: September 27, 2016
(or Date of Last Amended Judgment)

Oscar Vega *
Defendant's Attorney

Reason for Amendment

- Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- Correction for Clerical Mistake (Fed. R. Crim. P. 36)
- Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))
- Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- Direct Motion to District Court Pursuant to 28 U.S.C. § 2255 or 18 U.S.C. § 3559(c)(7)
- Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- pleaded guilty to count(s) 1 of a single-count Indictment on November 3, 2015.
- pleaded nolo contendere to count(s) _____ which was accepted by the court.
- was found guilty on count(s) _____ after a plea of not guilty.

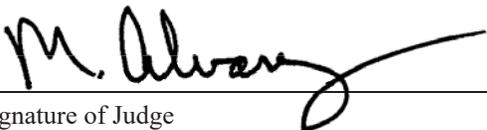
The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
8 U.S.C. § 1326(a) and 1326(b)	Being found in the U.S. after previous deportation.	09/01/2015	1

- See Additional Counts of Conviction.
The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.
- The defendant has been found not guilty on count(s) _____
- Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 27, 2016
Date of Imposition of Judgment


Signature of Judge

MICAELA ALVAREZ
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

December 13, 2016
Date

DEFENDANT: **OMAR ORLANDO RODRIGUEZ**
CASE NUMBER: **7:15CR01314-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 33 months.

- See Additional Imprisonment Terms.
- The court makes the following recommendations to the Bureau of Prisons:
- The defendant is remanded to the custody of the United States Marshal.

- The defendant shall surrender to the United States Marshal for this district:
 - at _____ a.m. p.m. on _____ .
 - as notified by the United States Marshal.

- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before 2 p.m. on _____.
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

DEFENDANT: **OMAR ORLANDO RODRIGUEZ**
CASE NUMBER: **7:15CR01314-001**

SUPERVISED RELEASE

Upon release from imprisonment you will be on supervised release for a term of: 3 years.

See Additional Supervised Release Terms.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
6. You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

See Special Conditions of Supervision.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **OMAR ORLANDO RODRIGUEZ**CASE NUMBER: **7:15CR01314-001**

SPECIAL CONDITIONS OF SUPERVISION

If deported, the defendant is not to re-enter the United States illegally. If the defendant is deported during the period of probation or the supervised release term, supervision by the probation office becomes inactive. If the defendant returns, the defendant shall report to the nearest U.S. Probation Office immediately. Supervision by the probation officer reactivates automatically upon the defendant's reporting.

DEFENDANT: **OMAR ORLANDO RODRIGUEZ**
CASE NUMBER: **7:15CR01314-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00		

- See Additional Terms for Criminal Monetary Penalties.
- The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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- See Additional Restitution Payees.

TOTALS	<u>\$0.00</u>	<u>\$0.00</u>	
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- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:
- Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **OMAR ORLANDO RODRIGUEZ**
CASE NUMBER: **7:15CR01314-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payment of \$100.00 due immediately, balance due
 - not later than _____, or
 - in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or
- D Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:
 - Payable to: Clerk, U.S. District Court
 - Attn: Finance
 - P.O. Box 5059
 - McAllen, TX 78502

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number

Defendant and Co-Defendant Names
(including defendant number)

Total Amount

Joint and Several
Amount

Corresponding Payee,
if appropriate

- See Additional Defendants and Co-Defendants Held Joint and Several.
- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:
- See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

17-40041.46