

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROSA OROZCO

Petitioner

vs.

JEFFERSON B. SESSIONS, III, U.S. ATTORNEY GENERAL

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should exercise its grant, vacate and removal power and hold petitioner's challenge to the constitutionality of 18 U.S.C. § 16(b) as applied to the definition of an aggravated felony in Immigration and Naturalization Act ("INA") § 101(a)(3)(F) on the docket pending the Court's decision in *Dimaya v. Sessions*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (2016), which raises the same issue.

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OPINIONS BELOW

The summary order of the United States Court of Appeals for the Fifth Circuit is unreported. The Fifth Circuit granted respondent's opposed motion for summary disposition and denied the petition for the review of the March 2, 2017 decision and order of the Board of Immigration Appeals, which is unreported. The Board of Immigration Appeals dismissed petitioner's appeal of the unreported October 6, 2016 decision and order of the Immigration Court in Houston, Texas, which ordered petitioner's removal. See Appendices A-C.

STATEMENT OF JURISDICTION

The Fifth Circuit's order was entered on August 4, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 United States Code § 1101(a)(43)(F)
Immigration & Naturalization Act § 101(a)(43)(F)

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 at least one year;
1231(B)(3)

18 United States Code § 16

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.

28 United States Code § 2106

Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Texas Penal Code § 38.04

Evading Arrest or Detention

(a) A person commits an offense if he intentionally flees from a person he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain him.

(b) An offense under this section is a Class A misdemeanor, except that the offense is:

(1) a state jail felony if:

(A) the actor has been previously convicted under this section; or

(B) the actor uses a vehicle or watercraft while the actor is in flight and the actor has not been previously convicted under this section;

(2) a felony of the third degree if:

(A) the actor uses a vehicle or watercraft while the actor is in flight and the actor has been previously convicted under this section; or

(B) another suffers serious bodily injury as a direct result of an attempt by the officer or investigator from whom the actor is fleeing to apprehend the actor while the actor is in flight; or

(1) a state jail felony if the actor has been previously convicted under this section;

(2) a felony of the third degree if:

(A) the actor uses a vehicle while the actor is in flight;

(B) another suffers serious bodily injury as a direct result of an attempt by the officer or investigator from whom the actor is fleeing to apprehend the actor while the actor is in flight;
or

(C) the actor uses a tire deflation device against the officer while the actor is in flight; or

(3) a felony of the second degree if:

(A) another suffers death as a direct result of an attempt by the officer or investigator from whom the actor is fleeing to apprehend the actor while the actor is in flight; or

(B) another suffers serious bodily injury as a direct result of the actor's use of a tire deflation device while the actor is in flight.

(c) In this section:

(1) "Vehicle" has the meaning assigned by Section 541.201, Transportation Code.

(2) "Tire deflation device" has the meaning assigned by Section 46.01.

(3) "Watercraft" has the meaning assigned by Section 49.01.

(d) A person who is subject to prosecution under both this section and another law may be prosecuted under either or both this section and the other law.

STATEMENT OF THE CASE

The sole ground for Orozco's removal was her status as an aggravated felon as defined in INA § 101(a)(3)(F) based on the determination that under Fifth Circuit precedent her conviction under Texas law for fleeing arrest while using a vehicle was a crime of violence as defined in 18 U.S.C. § 16(b). The constitutionality of § 16(b) as applied to immigration law is presently before the Court in *Dimaya v. Sessions*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (2016), which was reargued on October 2, 2017. In *Dimaya*, the Ninth Circuit followed the reasoning adopted in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and rejected "ordinary case" inquiry as the methodology for determining what is a crime of violence under immigration law because of the inherent uncertainty involved in assessing the hypothetical risk raised by an abstract, generic version of a crime. The Fifth Circuit reached the opposite conclusion in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (*en banc*), *petition for cert. filed* (Sept. 29, 2016). While that precedent was binding on the Fifth Circuit when this case was before it, the petition for certiorari filed in *Gonzalez-Longoria* remains on the Court's docket. Because Orozco's petition raises the same issue as *Gonzales-Longoria* it should also be docketed and await the Court's decision in *Dimaya*. A holding affirming the Ninth Circuit's conclusion that the definition of a "crime of violence" in § 16(b) is not viable as applied to immigration law would then warrant exercise of the Court's grant, vacate, and removal power.

Proceedings Below

Orozco is a 61-year old native and citizen of Costa Rica. She came to the United States as a conditional permanent resident on January 14, 1999. The conditions were removed on March 26, 2004. Appendix A at 3.

Orozco received her residence through her United States citizen husband, a Marine veteran. Her husband died in 2001 and Orozco has been receiving a monthly pension since then from the Veterans' Administration. Orozco also receives medical coverage from the Veterans' Administration and is currently taking medication to treat arthritis, high blood pressure, diabetes, and a heart murmur. Appendix A at 3-4.

On September 15, 2014, Orozco pled guilty in the district court of Ector County Texas, 244th Judicial District to evading arrest while using a vehicle, in violation of Texas Penal Code § 38.04, a third-degree felony. She was given an Order of Deferred Adjudication and placed on probation for three years. On October 12, 2015, the trial court revoked her probation and sentenced her to two years imprisonment. Appendix A at 4, 7. She spent 11 months in jail and was placed in removal proceedings upon her release.

Orozco feared returning to Costa Rica because she is very ill and will lose her medical coverage from the Veterans Administration as well as her pension. Although Orozco has four children residing in Costa Rica, she was not certain whether they would assist her upon her removal. Appendix A at 4-5.

The Department of Homeland Security ("DHS") placed Orozco in removal proceedings pursuant to INA § 237(a)(2)(A)(iii) based solely on allegations that she has been convicted of

an aggravated felony as defined in INA § 101(a)(3)(F), namely, a crime of violence (as defined in section 16 of Title 18 United States Code, but not including a purely political offense) for which the term of imprisonment ordered is at least one year. Appendix A at 1.

At a hearing on September 1, 2016, Orozco, appearing pro se, admitted the factual allegations in the Notice to Appear. The Immigration Judge sustained the charge of removability without concession by Orozco and gave her the opportunity to apply for withholding of removal under INA § 241(b)(3) and the Convention Against Torture. Appendix A at 2. (Because of her aggravated felony conviction, Orozco was ineligible for asylum and voluntary departure.)

At the October 6, 2016 hearing DHS declined to exercise prosecutorial discretion and the Immigration Judge issued an oral decision and order determining that Orozco was subject to removal as an aggravated felon because, under the Fifth Circuit's precedent, her conviction under Texas law for fleeing arrest while using a vehicle was a crime of violence as defined by 16 U.S.C. § 16(b). Appendix A at 6-11. The Immigration Judge denied Orozco's application for withholding of removal under INA § 241(b)(3) and the United Nations Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. Although Orozco testified credibly, the Immigration Judge found that she had not established either past or fear of future persecution on account of membership in a particular social group. Appendix A at 11-14.

Orozco filed a timely notice of appeal to the Board of Immigration Appeals ("BIA") from the Immigration Judge's decision and order on October 11, 2016. On March 2, 2017, the BIA

dismissed Orozco's appeal. The BIA held that Orozco's conviction was a "crime of violence" under Fifth Circuit precedent, which was binding because the case fell within that Circuit's territorial jurisdiction, and declined to hold her case in abeyance pending the United States this Court's resolution of *Dimaya v. Sessions*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (2016). Appendix B at 1.

Orozco filed a timely petition for review on March 17, 2017. While the petition for review was pending, Orozco was removed to Costa Rica. In a summary order filed on August 4, 2017, the Fifth Circuit granted the Attorney General's opposed motion for summary judgment dismissing the petition and denied Orozco's motion to stay further proceedings pending the Court's decision in *Dimaya v. Session*. Appendix C at 1.

REASONS FOR ALLOWANCE OF THE WRIT

- I. THE COURT SHOULD EXERCISE ITS GRANT, VACATE AND REMOVAL POWER AND HOLD THIS PETITION ON ITS DOCKET BECAUSE IT RAISES THE SAME CHALLENGE TO THE CONSTITUTIONALITY OF 18 U.S.C. § 16(B) AS APPLIED TO THE DEFINITION OF AN AGGRAVATED FELONY IN THE IMMIGRATION AND NATURALIZATION ACT ("INA") THAT THE COURT WILL BE ADDRESSING IN THE PENDING CASE OF *DIMAYA V. SESSIONS***

The Court's power to grant certiorari, vacate the judgment below and remand the case (GVR) is rooted in 28 U.S.C. § 2106:

The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The GVR order has become an "integral part" of the Court's practice and has been employed in light of a wide range of developments. *Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (listing

examples of GVR orders). In an appropriate case, a GVR order “alleviates the ‘[p]otential for unequal treatment’ that is inherent in our inability to grant plenary review of all pending cases raising similar issues.” *Id.* at 167 (quoting *United States v. Johnson*, 457 U.S. 537, 555 n.16 (1982)).

GVR orders are perhaps used most frequently where there has been an intervening decision after the petition for certiorari was filed. *See, e.g., Moore v. United States*, 555 U.S. 1, 3 (2008); *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 416-17 (2001). They are also employed where there is a pending case on point likely to affect the outcome below, in which case the Court holds the petition until the decision is issued. “We regularly hold cases that involve the same issue on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be ‘GVR’d’ when the case is decided.” *Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) (emphasis in original). For example, during the October 2014 term the Court held a number of petitions pending the decision in *Johnson v. U.S.*, 576 U.S. ___, 135 S. Ct. 1251 (2015) and then vacated the decision below and remanded. *Langston v. United States*, No. 14-850, June 30, 2015 Order List, Certiorari-Summary Dispositions. *See also Johnson v. Manis*, No. 15-1, May 23, 2016 Order List, Certiorari-Summary Dispositions (Court held many cases pending decision in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016)).

This matter falls squarely within the above category of cases where the Court has held petitions until plenary review of a case raising the same issue can be completed and then exercised its GVR power.

The sole ground for removal asserted in the Notice to Appear was Orozco's conviction of an aggravated felony as defined in INA § 101(a)(3)(F), namely, a crime of violence (as defined in section 16 of Title 18 United States Code, but not including a purely political offense) for which the term of imprisonment ordered is at least one year. Appendix A at 1. 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.

The Immigration Judge held that under Fifth Circuit precedent apply the ordinary meaning of the term, Orozco's conviction under Texas Penal Code § 38.04(b)(2)(A), fleeing arrest using a vehicle, was a crime of violence under § 16(b). Appendix A at 6-11. The BIA affirmed this determination, and the Fifth Circuit denied Orozco's petition for review. Appendix B at 1; Appendix C at 1.

Focusing on the "ordinary" or "typical" meaning of the term "crime of violence" is known as "ordinary case" analysis. The application of the "ordinary case" test in immigration law has been called into question by *Johnson v. United States*, 135 S. Ct. 2551 (2015). In that case the Court invalidated the residual clause of the Armed Career Criminal Act's ("ACCA") "violent felony" definition (18 U.S.C. § 924(e)(2)(B)(ii)) as unconstitutionally vague.

The Court identified two features of ACCA's residual clause defining a "violent felony" that combined to produce "more unpredictability and arbitrariness than the Due Process

Clause tolerates." *Johnson*, 135 S. Ct. at 2558. First, it left "grave uncertainty" about "deciding what kind of conduct the 'ordinary case' of a crime involves" because it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* at 2557-58. Second, the residual clause left uncertainty "about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. As the Court subsequently reaffirmed in *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016), the residual clause failed because applying the "serious potential risk" standard under the categorical approach "required courts to assess the hypothetical risk posed by an abstract generic version of the offense."

In *Dimaya v. Sessions*, which arose out of a conviction for first degree residential burglary under California law, the Ninth Circuit held that the Court's reasoning in *Johnson* applies with equal force to the similar statutory language and identical mode of analysis used to define a crime of violence for purposes of the INA:

As with ACCA, section 16(b) . . . requires courts to 1) measure the risk by an indeterminate standard of a "judicially imagined 'ordinary case,'" not by real world facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial.

803 F.3d at 1120. The Ninth Circuit found that the uncertainty involved in assessing the hypothetical risk raised by an abstract, generic version of a crime is the same "whether the inquiry considers the risk of violence posed by the commission and the aftereffects of a crime, or whether it is limited to consideration of the risk of violence posed by acts necessary to satisfy the elements of the offense." 803 F.3d at 1118-19. Moreover, while the Court acknowledged in

Johnson that the four enumerated crimes added to the residual clause's uncertainty, the fundamental reason for *Johnson's* holding was the residual clause's application of the "serious potential risk" standard to an idealized ordinary case of the crime. *Id.* at 1117-18. Other circuit courts of appeal considering the language of § 16(b) have reached the same conclusion about its unconstitutionality as applied to a "crime of violence" aggravated felony. *Baptiste v. Attorney General*, 841 F.3d 601, 615-16, 618-20 (3d Cir. 2016), *petition for cert. filed* (Nov. 8, 2016); *Shuti v. Lynch*, 828 F.3d 440, 446-50 (6th Cir. 2016), *rehearing en banc denied* (November 15, 2016), *petition for cert. filed* (Feb. 13, 2017); *United States v. Vivas-Ceja*, 808 F.3d 719, 722-23 (7th Cir. 2016), *rehearing en banc denied* (March 14, 2016); *Gollicov v. Lynch*, 837 F.3d 1065, 1072-75 (10th Cir. 2016), *petition for cert. filed* (Feb. 2, 2017).

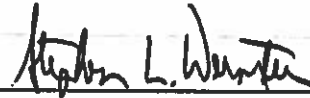
The Fifth Circuit reached the opposite conclusion in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (*en banc*), *petition for cert. filed* (September 29, 2016). While agreeing that § 16(b) shares the two features with ACCA's residual clause that this Court found constitutionally suspect, the Fifth Circuit nevertheless found that neither feature causes "the same level of indeterminacy" in the context of § 16(b). 831 F.3d at 675. It found § 16(b) to be more definite because it required courts to determine the risk of "physical force" as opposed to "physical injury" and because it required that the risk arise "in the course of committing" the offense. *Id.* at 676. The Fifth Circuit also did not think that the concern about how much risk it takes for a crime to qualify as "violent" was as pressing in the context of § 16(b) because that determination was not linked to a confusing list of examples, unlike the residual clause which enumerated four unrelated crimes. *Id.* at 677.

Gonzalez-Longoria was binding precedent in the Fifth Circuit at the time Orozco petitioned for review of the BIA decision. However, the certiorari petition filed in *Gonzalez-Longoria* is still on the Court's docket and awaits the Court's decision in *Dimaya*. This matter should also be placed on the docket pending the Court's conclusion of its plenary review of the constitutionality of § 16(b) as applied to immigration law. A decision in *Dimaya* that it is unconstitutional would eliminate the sole grounds for Orozco's removal and thus present a situation where the Court's exercise of its GVR power is appropriate.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Court docket this matter and then grant review, vacate the decision of the Fifth Circuit, and remand consistent with its decision in *Dimaya v. Sessions*.

Respectfully submitted,



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