

PRACTICE ADVISORY*

July 6, 2015

How *Johnson v. United States* May Help Your Crime of Violence Case

Introduction

The Supreme Court issued a significant constitutional ruling in a federal sentencing-enhancement case that could be consequential for immigration law too. On June 26, 2015, the Court held that a sentencing enhancement provision in the one of the most common federal sentencing statutes is unconstitutionally vague. *United States v. Johnson*,--- S. Ct. ---, 2015 WL 2473450 (June 26, 2015). In *Johnson*, the Court interpreted the so-called “residual clause” of the Armed Career Criminal Act (ACCA).

Because of the similarities both in the language and the judicial application of the sentencing provision at issue in *Johnson* and 18 U.S.C. § 16(b), the statute referenced in the aggravated felony crime of violence and crime of domestic violence definitions, *Johnson* may have wide repercussions for immigration law as well. This advisory covers (1) the holding of *Johnson*; (2) how *Johnson* supports arguments that 18 U.S.C. § 16(b) is also void for vagueness; and (3) how *Johnson* invalidates the “ordinary case” analysis in the context of §16(b).

I. Holding of *Johnson*

The ACCA imposes heightened sentences for certain firearm offenders if s/he has three or more prior convictions for a “violent felony.” 18 U.S.C. § 924(e)(2)(B). The ACCA defines “violent felony” as a felony that:

“(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*” § 924(e)(2)(B).

At issue in *Johnson* was whether this statute’s “residual clause” (italicized portion above) was unconstitutionally vague. A criminal law violates due process where it “fails to give

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ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, --- S. Ct. ----, 2015 WL 2473450 *4 (June 26, 2015). Under this test, Justice Scalia, writing for a six-member majority of the Court, held the residual clause violates due process because it is void for vagueness. *Id.* The Court overruled its contrary holdings in *James v. United States*, 550 U.S. 192 (2007) and *Sykes v. United States*, 564 U.S. 1 (2011). *Id.* at *11.

The Court reasoned that two particular aspects of the residual clause make it void for vagueness. *Id.* at *5. First, the Court explained that there is no clarity as to how courts are to determine *the potential risk posed* by a defendant’s conviction. In *James v. United States*, the Supreme Court tied the “assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements.”¹ 550 U.S. 192, 208. Thus, deciding whether the residual clause covers a crime requires a court to imagine how the *idealized ordinary case* of the crime plays out and to guess whether that abstraction presents a serious potential risk of physical injury. *Johnson*, 2015 WL 2473450, at *4. The Court noted the speculative nature of the inquiry and the lack of connection to the statutory elements of the offense: “To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence?” *Id.* at *5 The problem is that the residual clause offers no reliable way to choose between these competing accounts of what “ordinary” witness tampering involves. *See also id.* (“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?”) (citing *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C. J., dissenting from denial of rehearing en banc)).

Second, the Court found that the residual clause leaves uncertainty about *how much risk* is needed for a crime to qualify as a violent felony. *Id.* at *5. In particular, the Court noted that by asking whether the crime “*otherwise* involves conduct that presents a serious potential risk,” the residual clause forces courts to interpret “serious potential risk” as compared to the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. *Id.* And these offenses are “far from clear in respect to the degree of risk each poses.” *Id.*

Taken together, the uncertainties of how to measure a crime’s risk and how much risk of violence the crime entails produce an unpredictable and arbitrary inquiry that violates due process.

¹ Courts must use the categorical approach when deciding whether a conviction is a violent felony under the ACCA, looking to the statutory definition and not to the actual conduct underlying the conviction. *See Taylor v. United States*, 495 U.S. 575 (1990). *James*’s claim to apply the categorical approach is oxymoronic. *James* applied the “ordinary case” standard, looking to imagined *conduct*, rather than the elements of the offense. If anything, *James* runs contrary to the categorical approach.

II. Implications for §16(b) Crimes of Violence

A. *Johnson's* reasoning provides arguments that §16(b) crime of violence is also void for vagueness

The Court's reasoning in *Johnson* provides a path to argue that 18 U.S.C. § 16(b) is also void for vagueness. A crime of violence under §16(b) is defined as:

"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."

Convictions that qualify as a crime of violence under §16(b) serve as a grounds for removal as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) and are cross-referenced in the domestic violence ground of deportability. Convictions that qualify as a §16(b) crime of violence also enhance criminal sentences for illegal reentry.²

Does the doctrine of vagueness apply to the civil removal context?

The government may argue that the vagueness doctrine does not apply in the removal context. But both *Johnson* and other decisions suggest otherwise. While the majority in *Johnson* framed the vagueness doctrine as applying only to criminal statutes, the constitutional hook emanates from the Due Process notice requirements, *see Johnson*, 2015 WL 2473450, at *4, which also apply to immigration law. Moreover, in his concurrence, Justice Thomas points out that the vagueness doctrine applies equally in the penal and non-penal contexts. *Johnson*, 2015 WL 2473450, at *14 (Thomas, J., concurring).

Significantly, while the Supreme Court has not previously found any statutory grounds for deportation void for vagueness, it has long acknowledged that unconstitutionally vague statutory grounds would not be enforceable. *See Boutillier v. I.N.S.*, 387 U.S. 118, 123 (1967); *Jordan v. De George*, 341 U.S. 223, 231 (1951) ("Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation.").

Additionally, practitioners should point to *Padilla* and *Mellouli*, in which the Supreme Court acknowledged the importance of deportation consequences to a noncitizen defendant's decision to plead guilty and of defense counsel's role in negotiating "safe harbor" pleas. *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Mellouli v. Lynch*, No. 13-1034, 2015 WL 2464047 (June 1,

² Congress uses the term "aggravated felony" as defined in Section 1101(a)(43) to enhance the maximum penalty for the criminal offense of illegal reentry. 8 U.S.C. § 1326(b)(2). Federal courts also apply this same aggravated felony definition in calculating criminal sentences under the United States Sentencing Guidelines. U.S.S.G. § 2L1.2(b)(1)(C).

2015). Because the §16(b) inquiry is so arbitrary and shapeless, defense attorneys lack the ability to accurately advise their clients about the immigration consequences of a particular offense as required, thereby leaving their clients unable to make knowing and intelligent pleas. The vagueness of §16(b) thus brings significant uncertainty to the criminal justice system.

Criminal practitioners are already challenging § 16(b) in the criminal sentencing context. *See, e.g., United States v. Perez-Juarez*, 2:15-cr-63 KJM (E.D. Cal.). Those cases arise in the same context as *Johnson*, leaving the government no argument that the vagueness doctrine does not apply.

Why is §16(b) vague under Johnson?

As explained earlier, the Court found that two problematic aspects of the residual clause in combination make it void for vagueness: 1) the impossibility of assessing the risk under the “ordinary case” standard and 2) the complexity of determining how much risk is necessary to satisfy the test. Because both difficulties are also present in §16(b) determinations, an argument opens that this provision too is void for vagueness.

First, most circuits have imported the same *James* “ordinary case” standard into the §16(b) jurisprudence that was found unconstitutional in *Johnson*.³ This is so because §16(b) defines the term “crime of violence” in “probabilistic” terms virtually identical to the residual clause in § 924(e)(2)(B)(ii). The Board of Immigration Appeals (BIA) also recently reaffirmed its adoption of the “ordinary case” standard in §16(b) cases.⁴ While the risk assessed in §16(b) concerns the use of physical force and not physical injury, the same uncertainty and lack of guidance accompany the inquiry. For example, how should courts measure the risk and determine the “ordinary” case—through competing statistics? Surveys of state law? Expert evidence? Common sense? In practice, factfinders have used all of the above. Indeed, in the course of litigating *Johnson*, the Solicitor General agreed that §16(b) proves equally

³ *See United States v. Keelan*, 786 F.3d 865 (11th Cir. 2015) (“All other circuits to have examined the issue have held the proper inquiry under § 16(b) is whether the conduct encompassed by the elements of the offense raises a substantial risk the defendant may use physical force in the ‘ordinary case’, even though, at the margin, some violations of the statute may not raise such a risk”); *United States v. Avila*, 770 F.3d 1100, 1107 (4th Cir. 2014) (applying “ordinary case” standard to § 16(b) analysis); *United States v. Fish*, 758 F.3d 1, 10 (1st Cir. 2014) (same); *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 854 (9th Cir. 2013) (same); *Van Don Nguyen v. Holder*, 571 F.3d 524, 530 (6th Cir. 2009) (same); *United States v. Sanchez–Garcia*, 501 F.3d 1208, 1213 (10th Cir. 2007) (same); *Perez-Munoz v. Keisler*, 507 F.3d 357, 362-64 (5th Cir. 2007) (same).

⁴ *See Matter of Francisco Alonzo*, 26 I&N Dec. 594 (BIA 2015). *See also Matter of Singh*, 25 I&N Dec. 67, 677-78 (BIA 2012) (“Although the statute at issue in *James v. United States* is different from 18 U.S.C. § 16(b), we consider the rationale of that case to be applicable here because both statutes require a focus on the inherent “risk” that a crime will be accompanied by a particular consequence...”).

problematic: “Although [18 U.S.C. § 16(b)] refers to the risk that force will be used rather than that injury will occur, it is equally susceptible to petitioner's central objection to the residual clause: Like the ACCA, [18 U.S.C. § 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 confrontation and other violent encounters.” Resp’t Br. at 22-23. In future litigation, the U.S. government should be held to this significant admission.

The second uncertainty is also present in §16(b). Here, too, the statutory language “by its nature, involves a substantial risk” of force fails to inform the factfinder how much risk is required to satisfy the test. Any slight differences in the application of the residual clause and §16(b) are not significant, and certainly do not cure the uncertainty.⁵ For one, the residual clause’s “serious potential risk” must be gauged in light of four enumerated crimes, none of which are clear as to the degree of risk involved. While §16(b) is not preceded by a comparable list of offenses, the “substantial risk” standard is also probabilistic and prescribes no clear metric. In fact, §16(b) arguably provides even less direction because of the absence of comparable crimes. As a result, factfinders in the removal context too have consistently failed to agree on “the nature of the inquiry” and the relevant “factors.” *Johnson*, at *7. For example, factfinders have disagreed on both the level of risk required,⁶ and the level of intent required.⁷ Moreover, §16(b)'s instruction that the court divine the abstract “nature” of the offense also requires a “wide-ranging inquiry,” “denies fair notice,” and “invites arbitrary enforcement by judges.” *Id.* at *4.

The government will likely argue that §16(b)'s unconstitutionality is preempted by *Johnson*'s disclaimer that other risk-based definitions are not void. *Johnson* at *8 (“The Government and the dissent next point out that dozens of federal and state criminal laws use terms like “substantial risk,” “grave risk,” and “unreasonable risk,” suggesting that to hold the residual clause unconstitutional is to place these provisions in constitutional doubt Not at all.). Importantly, however, the Court qualified this disclaimer: “More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant

⁵ Although the Ninth Circuit has treated both definitions as the same. *See United States v. Martinez*, 771 F.3d 672 (9th 2014) (assuming that the Supreme Court’s decision in *Sykes*, 131 S. Ct. 2267 (2011) (involving the residual clause) could not be reconciled with the Court’s prior decision in *Penuliar v. Mukasey*, 528 F.3d 603 (2008) (involving § 16(b))).

⁶ Compare *De La Paz Sanchez v. Gonzales*, 473 F.3d 133 (5th 2006) (finding Texas conviction for unauthorized use of a motor vehicle carrying a “substantial risk” of violence to property) with *United States v. Sanchez-Garcia*, 501 F.3d 1208 (10th 2007) (finding that a similar unauthorized use offense did not carry “substantial risk” of violence).

⁷ Compare *Matter of Singh*, 25 I&N Dec. 67, 677-78 (BIA 2012) (“the focus in assessing whether an offense is a crime of violence under § 16(b) is not on the mens rea of the crime itself but is, instead, on whether there is a substantial risk that the perpetrator will resort to intentional physical force in the course of committing the crime”) with *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir.2006) (en banc) (“[T]he reckless use of force is accidental and crimes of recklessness cannot be crimes of violence [under § 16].”).

engages on a particular occasion. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as “substantial risk” to real-world conduct.” *Id.* So there is no vagueness problem where the factfinder is assessing the risk posed by the offender’s *actual conduct*. But §16(b) does not look to actual conduct because, like the residual clause, it applies the categorical approach to the imagined ordinary case. Because it does not look to actual conduct, §16(b) would not fall within the Court’s carve out.

In sum, *Johnson*’s overwhelming focus is on the impossibility of the ordinary case analysis. Because, the BIA and courts have applied that unworkable standard to §16(b), it is also arguably void for vagueness.

What actions should practitioners take?

Practitioners should begin to preserve the void for vagueness argument before immigration judges so they may eventually argue it before the circuit courts. Practitioners in pending cases should consider filing 28(j) letters and motions to reopen.⁸ Courts in some circuits have already asked for supplemental briefing on how *Johnson* impacts §16(b) cases.

B. *Johnson* establishes that the ordinary case analysis is no longer valid in the context of 16(b)

Alternatively (and should the factfinder not agree that §16(b) is void), *Johnson* demonstrates that the ordinary case analysis is no longer valid in the context of §16(b). This is a separate argument from the constitutional vagueness of the provision, aimed instead at the judicial interpretation of the provision which *Johnson* shows to be unworkable and unfair. *Johnson* gutted the ordinary case analysis and overruled *James*. It also reaffirmed the use of the categorical approach when analysing risk-based definitions. *Id.* at 9 (rejecting the dissent’s suggestion of looking to the *actual* conduct to save the statute and confirming that the “only plausible interpretation of the law, therefore, requires use of the categorical approach”). Taken together, practitioners should argue that *Johnson* abrogates *Matter of Francisco Alonzo*, in which the BIA applied the ordinary case standard and rejected the “least culpable conduct” standard. 26 I&N Dec. 594 (BIA 2015). Rather, the BIA and courts should apply the strict categorical approach in this context.

Under this approach, the factfinder must “presume that the conviction rested on nothing more than the least of the acts criminalized and then determine whether those acts” pose a substantial risk. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (citing *Johnson v. United States*, 559 U.S. 133, 137 (2010)). For example, California residential burglary requires entering a residence with a felonious intent. See California Penal Code § 459. There is no

⁸ For general strategies on cases impacted by a new Supreme Court decision, see IDP and NIP-NLG, [Mellouli v. Lynch: Further Support for a Strict Categorical Approach for Determining Removability under Drug Deportation and other Conviction-Based Removal Grounds \(June 8, 2015\)](#), Section III.

element of unlawful entry or remaining so it reaches many technical burglaries such as theft or fraud by an invitee. In one published case, the defendant was convicted for entering a victim's house in response to a newspaper ad and purchasing items with a bad check. That is the least culpable conduct, and the question is whether such a privileged entry burglary carries a substantial risk of force. Practitioners have argued that privileged entry burglary does not carry a "substantial" risk of violence because there is no per se intruder—no immediate likelihood of confrontation upon discovery. Another example where the strict categorical approach should help is where the least culpable conduct is reckless conduct. Most circuits have found that reckless conduct is not sufficiently purposeful to qualify as a crime of violence. *See, e.g., United States v. Fish*, 758 F.3d 1 (1st Cir. 2014).

This argument comes second, but is no less important to press. The courts may well feel more inclined and empowered to overturn judge-made standards than an act of Congress.

III. Implications for other removal grounds

Practitioners should also consider arguing that the application of the statutory removal grounds for crimes involving moral turpitude and sexual abuse of a minor are void for vagueness. Detailed information is beyond the scope of this advisory, but *Johnson* creates ample space to argue that the Board's ad hoc approach in these contexts too "fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson*, 2015 WL 2473450, at*4.⁹ For assistance in these areas, contact Sejal Zota at sejal@nipnl.org.

⁹ For example, Kara Hartzler has filed a cert petition on whether crimes involving moral turpitude are void for vagueness in *Leal v. Lynch*. And the National Immigration Project with other groups is arguing before the Sixth Circuit that the BIA's failure to define sexual abuse of a minor may be void for vagueness.