

Crime of Violence Redefined

By Erin P. Brown

Few concepts under our current federal framework are under more consistent scrutiny than laws governing deportable or removable offenses under the Immigration and Nationality Act (INA). Under INA §101(a) (43) an “aggravated felony” includes any crime of violence as defined in 18 USC §16 for which the term of imprisonment imposed (regardless of any suspension) is at least one year. A crime of violence is defined under §16(a) as “any offense that has as an element the use or attempted use or threatened use of physical force against the person or property of another;” or §16(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 aggravated felony definition also includes a host of other possible criminal offenses, including drug trafficking, thefts and fraud offenses.

The Board of Immigration Appeals (BIA) prior definition for a crime of violence included any offense where either: (a) the elements of the offense must be such that the use, attempted use, or threatened use of physical force is an element; or (b) the nature of the crime, as evidenced by the generic elements of the offense, must be such that its commission ordinarily would present risks that physical force would be used against the person or property of another irrespective of whether the risk develops or harm actually occurs. The BIA’s interpretation of a “crime of violence” has often left both practitioners and adjudicators unsure of actual outcomes, thereby making the ability to provide cogent advice to potential clients a minefield of uncertainty.

In June 2015 the Supreme Court weighed in to attempt to bring clarity to this muddled section of law. The Court’s decision in *Johnson v. United States*, may change some felony offenses from crimes of violence to non-crimes of violence for immigration purposes, thus eliminating some offenses from the ambit of the crimes of violence definition. *Johnson* held that another federal definition of crime of violence, which uses language similar to 18 USC §16(b) is

unconstitutionally vague. Writing for the Court, Justice Scalia declared that the residual clause in the Armed Career Criminal Act of 1984 (ACCA) violated the due process clause of the Fifth Amendment because it was void for vagueness. The Supreme Court determined that the “ordinary case” standard may no longer be used to determine if an offense is a crime of violence, and reaffirmed that the “minimum conduct” standard of the categorical approach must be used.

Under the categorical approach Courts may only “assess whether a crime qualifies as a violent felony in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.” The decision explained that the residual clause “tie[d] the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements,” leaving judges to speculate on what conduct most typically gives rise to a particular conviction. Not only did judges have to guess what constituted a typical crime, but they also had to guess how much risk that ordinary case had to pose in order to be a violent felony.

On Sept. 29, 2016, the Supreme Court granted certiorari in *Lynch v. Dimaya* to determine whether crime of violence under U.S. immigration law is unconstitutionally vague. In this case, Dimaya was convicted for burglary under California law. The BIA held that Dimaya’s conviction constituted a categorical “crime of violence” as defined under federal law. Following the Supreme Court’s 2015 decision in *Johnson v. United States*, holding that the Armed Career Criminal’s Act’s (ACCA) residual clause definition of a “violent felony” was unconstitutionally vague, Dimaya claimed that the language and definition of his burglary conviction is of similar construction to the definition of “crime of violence” under federal law. On appeal, the Ninth Circuit Court of Appeals agreed with Dimaya’s argument that the Supreme Court’s decision in *Johnson* was controlling for crimes defined as “crimes of violence” under U.S. immigration law. The government is now

appealing that decision and oral argument before the Supreme Court will be held during the October 2016 term.

The outcome of *Dimaya* can have lasting and overarching consequences upon a slew of potential criminal defendants, changing an otherwise resolvable criminal offense to one that may carry greater immigration-related penalties. As a category, individuals with aggravated felonies convictions are often eligible for far fewer benefits and avenues for relief compared to other non-citizens with convictions. As such, the expansion of crimes included under the “aggravated felony” umbrella could potentially result in a wider segment of the foreign population being subject to removal proceedings and mandatory detention provisions that accompany such convictions. While the Supreme Court seems to be bending in favor of limiting the application of the term “crime of violence” to the universe of potential offenses, the passing of Justice Scalia and the unwillingness of the United States Senate to move forward on confirmation hearings for a replacement justice will continue to place outsized focus on the machinations of the Court in clarifying an otherwise doggedly complex section of current immigration law.

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