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Rudy and Erin,

This correspondence is for one purpose, to explain how Sessions v Dimaya (decided April 17, 2018) affects prisoners.

In 2015 The Supreme Court (S. Ct.), in a case known as Johnson, struck down part of the "violent felony" definition found at 18 U.S.C. § 924(e)(2)(B)(ii). The part struck down stated: "... otherwise involves conduct that presents a serious potential risk of physical injury to another." The S. Ct. ruled this language was unconstitutionally vague. This language is often referred to as the risk-clause or residual-clause.

Johnson was a case that involved the Armed Career Criminal Act (ACCA). When a felon is charged with being in possession of a firearm the max sentence he can receive is 10 years. But if the felon has three prior felony convictions for a violent felony the felon has to be sentenced to a minimum of 15 years. When looking back at prior convictions to determine if they are violent felonies the court uses an analysis called the categorical approach. This analysis, according to the S. Ct, is dictated by Congress, because of the general terms used in the statute, like felony, convictions, etc. The statute basically does not ask to find circumstance specific facts. The S. Ct. also had a concern that little mini trials would be held in front of a judge to determine the underlying facts of how the crime was committed, and these facts would then be used to enhance the defendant's sentence in violation of the 6th Amendment, because a judge found the facts not a jury.

Since facts cannot be used to make the violent felony determination the S. Ct. said the court must imagine the way a crime ordinarily is committed and then ask if a serious potential risk of physical injury existed. This way the crime was either a violent felony for everyone who commits it or not a violent felony, regardless of how the crime was committed. The S. Ct. said this was Congress's intent. The categorical approach acts like an on-off switch in this effect.

This imagined crime coupled with the imprecise risk standard leads to too much indeterminancy, thus the vagueness conclusion. While arguing Johnson the government warned the court that if it finds the risk-clause of § 924(e) unconstitutional, then the risk-clause of § 16 would be in jeopardy.

Most statutes that entail a crime of violence within them incorporate the definition of crime of violence found at 18 U.S.C. § 16. The risk-clause part of the definition is found

at § 16(b) and states: "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." This is identical to the risk-clause definition of § 924(c), found at § 924(c)(3)(B).

In Dimaya the question was did Johnson's reasoning also invalidate § 16(b)? The government argued the language of § 16(b) made the definition narrower, less vague. The court ruled the distinctive textual features were a distinction without a difference. The dual indeterminancies still existed: The judge imagined ordinary case and the imprecise risk standard. Therefore § 16(b) must fall too. The gov't argued if § 16(b) falls then § 924(c)(3)(B) is put in jeopardy.

Justice Thomas's dissent in Dimaya, like Johnson, urges the tossing of the categorical approach when applying the risk-clause. Throughout these two cases the government has agreed with the statutory construction the court has given these statutes. As the S. Ct. said in Dimaya, § 16(b)'s text, best read, demands the categorical approach. In other words, the way the statutes are worded is equivalent to Congress ordering the court to use the categorical approach. To throw out the categorical approach would over turn about 30 years of precedent

Now § 924(c)(3)(B) is up to bat. At the circuit court level most have upheld it, while one circuit (7th) has struck it down. The circuits that upheld it used the textual distinctions to do so. We now know that Dimaya has dismissed that argument. The new premise these circuit courts have come up with to try an save § 924(c)'s risk clause, is that the categorical approach does not apply to § 924(c) cases because the offense is contemperaneous to the enhancement, unlike the ACCA, which looked at stale convictions. These circuit courts completely disregard S. Ct. precedent that dictates they apply the categorical approach. Three cases: Leocal v Ashcroft 543 US 1 (2004); Nijhawan v Holder 557 US 29 (2009); and Descamps v US 133 S. Ct. 2276 (2013) all determined the general words used in the statute, like "offense," "felony," "by its nature," all show Congress's intent that it wanted crimes under this statute to fall into categories so all defendants are treated equally. Either the offense is a crime of violence for everyone who commits it, or for no one. In a circumstance-specific analysis, where the court looks to the facts of the way the crime was committed, allows the same offense to be a crime of violence for some and not for others. In Nijhawan the court interpreted a statute that required a circumstance-specific analysis. This statute explicitedly says the fraud must have caused loses of $10,000 before it can be considered an aggravated felony. The S. Ct. determined the facts of the crime must be considered to find whether the loss amounted to $10,000 or not.

There was many §924(c)(3)(B) cases stayed pending Dimaya. In supplemental briefing, the government appears to now be arguing Justice Thomas's dissent, that the categorical approach should not apply, pushing the whole contemporaneous thing. As precedent stands right now the categorical approach must apply to risk-clause analysis. But these lower courts are mostly corrupt and want to side with the government so bad, they may say to hell with precedent and take the government's side.

Decisions on whether Dimaya and Johnson invalidated §924(c)(3)(B) will start coming out in the lower courts in the next few months. So we'll see what happens. The government's arguments to save §924(c)(3)(B) are weak at best. §16(b) applies to contemporaneous offenses like §924(c). The whole vagueness conclusion depends on whether the categorical approach applies or not. That is the question. If its answered in the affirmative, the vagueness question is forgone concluded.

I hope this helped in your understanding of how Dimaya affects §924(c)(3)(B).