

Rudy Davis

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Subject: Bad News

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I just got the news that the 11th circuit, sitting en banc, ruled that 924(c)(3)(B) is constitutional. The court overruled its own precedent by saying that the categorical approach does not apply to a 924(c) analysis. Instead the court applied, on the government's urging, a conduct specific approach. The case was sent back to the district court to analyze the specific conduct the defendant used to violate the statute and to determine whether it was violent or not.

The case is the OVALLES case I spoke of before. I understand there was some very powerful dissents in OVALLES explaining why and how the majority got it wrong.

This deepens the circuit split, as the 2nd circuit in Barrett ruled the same way. The DC, 10th and 5th circuits all ruled that the categorical approach applies and therefore 924(c)(3)(B) is unconstitutional.

If we get back into court, Jason and I, will be looking real good because during our trial we argued that the conduct specific approach applied. This means the jury must decide whether the offense is a crime of violence. The government countered by saying the categorical approach applied and the crime of violence question was one for the judge to decide. This means in our case the government is precluded from arguing the conduct specific approach applies under the judicial theory of judicial estoppel and/or the argument has been waived.

This is bad news. This could mean at least another year or more in prison before the issue is resolved. Or if the 1st circuit rules in our favor (via the DOUGLAS case they heard on Oct. 3rd) we could still be on schedule to go home in the near future.