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Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STANDING ORDER NO. 7

RE: RETROACTIVE APPLICATION OF JOHNSON V. UNITED STATES

This Standing Order supplements and modifies the Standing Orders issued by this Court on June 2, 2016 (“Standing Order”), October 14, 2016 (“Standing Order No. 3”), May 2, 2018 (“Standing Order No. 5”), and August 8, 2018 (“Standing Order No. 6”), concerning the retroactive application of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Pursuant to the original Standing Order, issued June 2, 2016, this Court authorized the Office of the Federal Public Defender to file abridged motions seeking relief pursuant to 28 U.S.C. § 2255 by June 26, 2016, in order to meet the filing deadline for retroactive application of *Johnson*. It further required the filing of a supplemental motion fully briefing the issues raised in any such abridged motion by October 26, 2016. In Standing Order No. 3, issued on October 14, 2016, this Court extended the deadline for filing such a supplemental motion until after the Supreme Court issued a decision in *Sessions v. Dimaya*, No. 15-1498 (formerly captioned *Lynch v. Dimaya*) in any case in which the defendant had filed an abridged motion that (1) only raises challenges to the definition of “crime of violence” set forth in 18 U.S.C. § 924(c)(3)(B), based on *Johnson v. United States*, 135 S. Ct. 2551 (2015); or (2) raises challenges to both the definition of “crime of violence” set forth in 18 U.S.C. § 924(c)(3)(B) and to the definition of “crime of violence” set forth in U.S.S.G. § 4B1.2(a)(2), based on *Johnson v. United States*, 135 S. Ct. 2551 (2015).

On April 17, 2018, the Supreme Court issued a decision in *Sessions v. Dimaya*, No. 15-1498, holding that the residual clause of the definition of a “crime of violence” in 18 U.S.C. § 16(b) is unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Prior to the

Supreme Court's decision in *Dimaya*, however, the D.C. Circuit held, in *United States v. Eshetu*, 863 F.3d 946 (D.C. 2017), that the residual clause in 18 U.S.C. § 924(c)(3)(B), a "statutory provision nearly identical" to 18 U.S.C. § 16(b), is not unconstitutionally vague. *Eshetu*, 862 F.3d at 955-56. One of the appellants in *Eshetu*, Pablo Lovo, filed a petition for rehearing and rehearing en banc, and the D.C. Circuit ordered that the petition be held in abeyance until after a decision in *Dimaya*.

After *Dimaya* was decided, Standing Order No. 5 extended the time to file supplemental motions in cases involving § 924(c) convictions until after the D.C. Circuit decided Pablo Lovo's rehearing petition.

On August 3, 2018, the D.C. Circuit granted rehearing, and held that the decision and reasoning of *Dimaya* also applied to the residual clause of § 924(c). See *United States v. Eshetu*, No. 15-3020, 2018 WL 3673907 (D.C. Cir. Aug. 3, 2018). It therefore found section 924(c)(3)(B) void for vagueness. *Id.* On August 31, 2018, the government filed a petition for rehearing *en banc*. Standing Order No. 6 extended the time to file supplemental motions in cases involving § 924(c) convictions until after the D.C. Circuit either (1) denies the government's petition for rehearing *en banc* filed in connection with *United States v. Eshetu*, No. 15-3020, 2018 WL 3673907 (D.C. Cir. Aug. 3, 2018), or (2) grants the petition and issues an *en banc* decision. On February 13, 2019, the D.C. Circuit issued an order denying the government's petition for rehearing *en banc* filed in connection with *United States v. Eshetu*, No. 15-3020, 2018 WL 3673907 (D.C. Cir. Aug. 3, 2018).

However, on January 4, 2019, the United States Supreme Court granted the government's petition for a writ of certiorari in *United States v. Davis*, No. 18-431. The issue presented in *Davis* is whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. The case is set for oral

argument on April 17, 2019, and, in keeping with the Supreme Court's typical practice, an opinion is expected by no later than June 24, 2019, the last day of the Supreme Court's October 2018 term.

In light of the Supreme Court's grant of certiorari in *Davis*, the Court further supplements and modifies its June 2, 2016, Standing Order as indicated below. In all other respects, the original Standing Order remains in full force and effect.

In any case in which the defendant had filed an abridged motion that (1) only raises challenges to the definition of "crime of violence" set forth in 18 U.S.C. §924(c)(3)(B), based on *Johnson v. United States*, 135 S. Ct. 2551 (2015); or (2) raises challenges to both the definition of "crime of violence" set forth in 18 U.S.C. § 924(c)(3)(B) and to the definition of "crime of violence" set forth in U.S.S.G. § 4B1.2(a)(2), based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), the scheduled October 26, 2016, date for filing a supplemental motion fully briefing the issues presented in an abridged motion shall be extended until after the Supreme Court issues an opinion in *United States v. Davis*, No. 18-431.

After the Supreme Court issues a decision in *Davis*, this Court will issue a supplemental Standing Order setting the date by which the supplemental motions in the above-referenced cases must be filed.

This Standing Order does not in any manner prohibit the Federal Public Defender from filing supplemental motions in individual cases before the Supreme Court issues a decision in *United States v. Davis*, No. 18-431, and also does not prohibit the government from seeking a stay in such individual cases, or otherwise extending the government's time to respond to such supplemental motions, until after the Supreme Court issues a decision in *Davis*.

This Order is effective immediately.

SO ORDERED.

Date:

March 19, 2019


BERYL A. HOWELL
Chief Judge