

FILED

AUG 08 2018

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

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

STANDING ORDER NO. 6

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”), and May 2, 2018 (“Standing Order No. 5”), 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).¹

¹ Standing Order No. 2 and Standing Order No. 4 modified the June 2, 2016, Standing Order in light of *Beckles v. United States*, 137 S. Ct. 886 (2017), which addressed whether *Johnson*’s constitutional holding applies to cases challenging sentences enhanced under the residual clause of the career offender guideline, U.S.S.G. § 4B1.2(a)(2).

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 or 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, at *1 (D.C. Cir. Aug. 3, 2018). It therefore found section 924(c)(3)(B) void for vagueness. *Id.* The government intends to request that the D.C. Circuit reconsider this decision *en banc*. Therefore, 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 both to 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 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.

After the D.C. Circuit has denied the government’s petition for rehearing *en banc* or granted the petition and issued its *en banc* decision, this Court will issue a supplemental Standing Order setting the date by which the supplemental motions in the above-referenced cases must be filed. The Federal Public Defender shall not be prohibited from filing motions in individual cases seeking to litigate the case before the D.C. Circuit rules on the petition for rehearing *en banc* in *United States v. Eshetu*, No. 15-3020, 2018 WL 3673907 (D.C. Cir. Aug. 3, 2018), nor shall the government be prohibited from opposing such motions.

This Order is effective immediately.

SO ORDERED.

Date: August 8, 2018



Handwritten signature of Beryl A. Howell in black ink.

BERYL A. HOWELL
Chief Judge