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SECOND CIRCUIT REVIEW

Expert Analysis

Crimes of Violence and Risk-of-Force Clauses

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In September, the Second Circuit decided that the Armed Career Criminal Act's (ACCA) §924(c)(3)(B) "risk-of-force clause," which defines "crime of violence" for the purposes of the ACCA's firearms-related sentencing enhancements, is still constitutional despite the Supreme Court's recent *Johnson* and *Dimaya* decisions, two cases that struck down similar provisions as unconstitutionally vague. In *United States v. Barrett*, the court held that conspiracy to commit Hobbs Act robbery was a "crime of violence" under the ACCA's "risk-of-force clause" and that the constitutional vagueness issues articulated by the Supreme Court in *Johnson* and *Dimaya* did not apply.

Risk of Force Clauses and the Categorical Approach

The ACCA imposes sentencing enhancements, ranging from five years to life imprisonment, for defendants who use, carry, or possess firearms during the commission of "any crime of violence or drug trafficking crime." 18 U.S.C. §924(c)(1)(A). While the ACCA explicitly defines drug trafficking crimes, it defines a "crime of violence" as any felony that either (a) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (the "force clause"), or (b) "by its nature, involves a substantial risk that physical force" may be used against the person or property of another while committing the crime (the "risk-of-force clause" or "residual clause"). §924(c)(3).

To discern what crimes fit within the risk-of-force clause, courts have traditionally used the categorical approach, looking only at the fact of conviction and the statutory definition of the offense instead of the particular underlying facts. Courts "ask whether 'the ordinary case' of an offense poses the requisite risk." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018). This allows the courts to avoid the judicial inefficiency that would result from having to reconstruct the facts of the underlying convictions, often long after these convictions occurred, as well as avoid potential Sixth Amendment issues regarding subsequent judicial fact-finding proceedings. *United States v. Barrett*, 903 F.3d 166, 179-80 (2d. Cir. 2018).

'Johnson', 'Hill' and 'Dimaya'

Since its enactment in 1984, the ACCA has been the subject of extensive Supreme Court litigation. Most recently, in *Johnson v. United States*, the Supreme Court analyzed the ACCA's "violent felony" provision, which imposes a sentencing enhancement, ranging from 15 years to life, for defendants who have at least three prior convictions for violent felonies. 135 S. Ct. 2551, 2557 (2015). This provision's residual clause defined a violent

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felony as any felony that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." §924(e)(1)(B)(ii). *Johnson* held that this residual clause was unconstitutionally vague because applying the categorical approach to this clause created difficulties in determining what constituted the "ordinary case." 135 S. Ct. at 2557.

In 2016, the Second Circuit first considered the applicability of the ACCA to Hobbs Act robbery in *United States v. Hill*, 832 F.3d 135, 144, 150 (2d Cir. 2016). Congress passed the Hobbs Act in 1946, making robbery and extortion that affect interstate commerce, or attempts or conspiracies to commit such acts, federal crimes. Elvin Hill, who had been convicted and sentenced to 43 years for violating the ACCA by shooting and killing a taxi driver during a Hobbs Act robbery, argued on appeal that, in light of *Johnson*, Hobbs Act robbery was not a crime of violence as defined by the ACCA. In *Hill*, the Second Circuit held that, as a matter of first impression, Hobbs Act robbery was a "crime of violence" under either the ACCA's force or risk-of-force clauses. The opinion, written by Judge Debra Ann Livingston and joined by Judges Dennis Jacobs and Christopher Droney, reasoned that Hobbs Act robbery fell within the ACCA's force clause because an element of the crime included the "threatened use of physical force." Id. at 142-44. The Second Circuit additionally held that, even if Hobbs Act robbery was not a crime of violence under the force clause, it qualified as a crime of violence under the risk-of-force clause. The court grappled with *Johnson*'s holding, but in the end, the Second Circuit declined to extend *Johnson*'s "violent felony" residual clause holding to the ACCA's risk-of-force clause, distinguishing *Johnson* because of differences in the two clauses' language.

In April 2018, the Supreme Court decided *Sessions v. Dimaya*, 138 S. Ct. at 1216, holding that a risk-of-force clause defining a "crime of violence" in the Immigration and Nationality Act (INA), which was worded identically to the provision in the ACCA, was unconstitutional. In its holding, the court applied *Johnson*'s reasoning to find that the categorical approach rendered the risk-of-force clause's application in the INA impermissibly vague. As a result of *Dimaya*, in May 2018 the Second Circuit revised its *Hill* opinion, removing the section related to the risk-of-force clause holding. 890 F.3d 51 (2d. Cir. 2018).

'Barrett' found that 'Hill' was controlling in its determination that Hobbs Act robbery was a crime of violence under the ACCA's force clause.

Extending 'Hill' to Conspiracy To Commit Hobbs Act Robbery

On March 19, 2013, a jury found Dwayne Barrett guilty of, among other things, conspiracy to commit Hobbs Act robbery, and he was sentenced to ninety years. On appeal, Barrett conceded that the trial evidence showed that he was a member of a violent conspiracy, but he argued that in light of the Supreme Court's *Johnson* and *Dimaya* decisions, conspiracy to commit Hobbs Act robbery was not a crime of violence under the ACCA.

In an opinion written by Judge Reena Raggi and joined by Judges Ralph Winter and Droney, the *Barrett* court extended *Hill* by holding that conspiracy to commit Hobbs Act robbery was a crime of violence under the ACCA. 903 F.3d at 177. Notwithstanding *Johnson* and *Dimaya*, *Barrett* found that *Hill* was controlling in its determination that Hobbs Act robbery was a crime of violence under the ACCA's force clause. Further, the court noted the long-held circuit precedent "that a conspiracy to commit a crime of violence is itself a crime of violence" because the agreement element of a conspiracy to commit a violent crime "so heightens the likelihood that the violent objective will be achieved that the conspiracy itself can be held categorically to present a substantial risk of physical force." Id. at 175, 177.

As in *Hill*, however, the court analyzed both the ACCA's force and risk-of-force clauses. After finding that conspiracy to commit Hobbs Act robbery was a crime of violence under the ACCA's force clause, the court went on to hold that even if it was not, conspiracy to commit Hobbs Act robbery was a crime of violence under the ACCA's risk-of-force clause. While the court once again distinguished *Johnson*, and this time also distinguished *Dimaya*, what sets *Barrett* apart

from *Hill* is that the Second Circuit found a way to avoid the constitutional issues raised in those prior Supreme Court precedents.

Judge Raggi explained the difficulties the categorical approach posed, which in turn led to the *Johnson* and *Dimaya* decisions. Both *Johnson* and *Dimaya* acknowledged, however, that the constitutional infirmities present in those cases would not exist in situations where a risk-of-force clause was applied to specific conduct.

The 2018 revision to 'Hill' unsettled the Second Circuit's jurisprudence as to whether the ACCA's §924(c)(3)(B) risk-of-force clause survived the Supreme Court's 'Johnson' and 'Dimaya' decisions. For now, 'Barrett' has settled this dispute, at least in the Second Circuit.

Additionally, *Johnson* and *Dimaya* dealt with determinations by a court of whether prior convictions qualified as crimes of violence. Taken together, Judge Raggi posited that while the categorical approach treated risk-of-force as a question of law, particularly when courts were assessing prior convictions, during a pending prosecution it could be a question of fact submitted to the jury. Judge Raggi explained that while in *Johnson* and *Dimaya* the court was unable to avoid both the vagueness and Sixth Amendment issues because the lower courts had been tasked with assessing the substance of past criminal convictions, the Sixth Amendment issue could be avoided during pending prosecutions. And while submitting the question to the jury may lead to inconsistent results, with the same crime potentially being defined as a crime of violence in some situations but not others, this occurred in other legal situations and was preferable to the alternative: The jury being told "that neither offense is a violent crime." Id. at 183.

Having reasoned that the conduct-specific approach saved §924(c)(3)(B) so long as the determination was made by a jury, the court was left with one final task. Finding that in Barrett's case the "real-world evidence [could] only support a finding that the charged conspiracy, by its nature, involved a substantial risk of the use of physical force," the court found that the failure to submit this question to the jury in the instant case was harmless error beyond a reasonable doubt. Id. at 184.

Implications of the 'Barrett' Decision

The effects of *Barrett* are already visible. On Oct. 4, 2018, in *United States v. Fiseku*, the Second Circuit noted that while it did not need to pass on the issue at that time, *Barrett* was "persuasive authority" that conspiracy to commit Hobbs Act robbery would meet the definition of a "crime of violence" under the identically-worded United States Sentencing Guidelines clause. 906 F.3d 65, 76 n.7 (2d Cir. 2018). And because *Hill* and *Barrett* are now the law of the circuit, defendants challenging district courts' findings that Hobbs Act robbery and conspiracy to commit Hobbs Act robbery are crimes of violence under the ACCA in the wake of *Johnson* and *Dimaya* are having their appeals disposed of in summary orders. See *United States* v. *Climico*, No. 14-4304-CR, 2018 WL 5371442, at *3 (2d Cir. Oct. 29, 2018). While these impacts are predictable, what we have not yet seen are the far more interesting ramifications that will take time to bubble up through the system, such as challenges to jury instructions, as well as appeals of convictions based on Judge Raggi's new construction of §924(c)(3)(B).

Conclusion

The 2018 revision to *Hill* unsettled the Second Circuit's jurisprudence as to whether the ACCA's §924(c)(3)(B) risk-of-force clause survived the Supreme Court's *Johnson* and *Dimaya* decisions. For now, *Barrett* has settled this dispute, at least in the Second Circuit. But while *Barrett* is the law of the circuit, Judge Raggi's statutory construction is untested. And as other circuits wrestle with this same issue, it may be only a matter of time before this issue finds its way up to the Supreme Court. See *Brown v. United States*, 906 F.3d 159, 162-63 (1st Cir. 2018).