UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC SCOTT RUSKA,

Defendant.

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CASE No. 2:17-CR-25

HON. ROBERT J. JONKER

FIRST SUPPLEMENTAL NOTICE

In an effort to further streamline sentencing presentations on this matter, the Court is providing this First Supplemental Notice to the parties of its present inclinations on some of the Section 3559 issues the parties have just finished briefing. The Court has not made any final decisions, and will not do so until hearing from the parties at sentencing. However, a summary of present inclinations based on briefing to date may assist the parties in tailoring their sentencing presentations.

1. The Court is inclined to believe that the residual clause of Section 3559(c)(2)(F)(ii) is constitutionally valid. *Johnson v. United States*, 135 S. Ct. 2551 (2015) invalidated the residual clause of the ACCA on vagueness grounds, but that clause was appended to a list of enumerated offenses and focused on "crime . . . [that] otherwise involves conduct that presents a serious potential risk of physical injury to another . . . ." 18 U.S.C. § 924(e)(2)(B)(ii). The clause at issue here is part of an elements (or force) clause, and covers only an "offense . . . that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the

offense[.]" 18 U.S.C. § 3559(c)(2)(F)(ii). This is considerably narrower, and almost identical to the residual clause that the Sixth Circuit validated after Johnson in *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016) (holding that Section 924(c)(3)(B) is not void for vagueness).

2. The Court is presently inclined to conclude that each of Defendant's three potential predicate offenses qualify as a "serious violent felony" under at least the residual clause. In addition, as all parties acknowledge, the prior assault with intent conviction has already been held by the Sixth Circuit to qualify under the elements (or force) clause. *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017). The affirmative defense of Section 3559(c)(3)(A) would be in play for any predicate offense that qualifies only under the elements (or force) or residual clauses. Based on the PSR's descriptions of the offenses, only the Kidnapping and CSC-Third convictions would appear to have potential for the affirmative defense because the assault conviction involved a firearm.

3. The Court presently sees viable arguments for each side on whether any of the potential predicates qualifies on a categorical or modified categorical basis for one of the enumerated offenses, which would not trigger the affirmative defense possibility. The Court's present inclination is to believe that CSC-Third is probably a State offense that satisfies the elements of aggravated sexual abuse and sexual abuse (as described in 18 U.S.C. §§ 2241 and 2242). The Court presently sees Kidnapping as a closer call simply because the statute's definition appears to need the entire phrase "of another person by force or violence" to modify each of the operative elements of the crime ("abduction, restraining, confining, or carrying away"). If so, the Michigan definition is probably broader than the federal definition and indivisible.

The Court emphasizes it has made no final decisions on any of these issues. The Court also recognizes the parties have briefed additional issues under Section 3559. The Court's purpose in providing this First Supplemental Notice is to continue being as transparent as possible so the parties can marshal and prepare their best and most focused sentencing presentations on February 9, 2018.

Dated: January 17, 2018

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE