

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

UNITED STATES OF AMERICA, _____

Plaintiff,

v.

ERIC SCOTT RUSKA,

Defendant.

CASE No. 2:17-CR-25

HON. ROBERT J. JONKER

_____/

SECOND SUPPLEMENTAL NOTICE

Sentencing in this matter is scheduled for February 9, 2018. The Court has invited, and received, briefing from the parties on Section 3559 issues, and the parties have also submitted their standard briefs on other sentencing issues. The Court appreciates the careful detail and thorough discussion provided by both sides. The purpose of this second supplemental notice is to provide the parties with additional, and updated, thoughts from the Court on some of the Section 3559 issues the Court intends to address later this week. To do so, the Court has summarized its inclinations in the below table, and briefly expanded upon them further below. As the Court has previously stated, and emphasizes here, the Court has not made any final decisions, and will not do so until the date and time set for sentencing. The discussion below is intended only to assist the parties in preparing for their presentations.

	Enumerated	Elements	Residual Clause	Affirmative Defense
Assault w/ intent	Does not Qualify	Qualifies under Raybon	Likely Qualifies	Not available per PSR
Kidnapping	Likely Qualifies	Likely Qualifies	Likely Qualifies	Further information needed
CSC 3rd	Likely Qualifies	Likes does Not Qualify	Likely Qualifies	Further information needed

1. Residual Clause

The Court continues to believe the residual clause of Section 3559(c)(2)(F)(ii) is probably constitutionally valid based on the Sixth Circuit's decision in *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016). The Sixth Circuit has recently reaffirmed that decision in *United States v. Henry*, No. 16-2745, 2018 WL 555450 (6th Cir. Jan. 25, 2018). These cases have found the residual clause in Section 924(c)(3)(B) to be much narrower than the statute that was before the Court in *Johnson*. District courts whose circuit court found Section 924(c)(3)(B) to be valid have also found the residual clause in Section 3559(c), which contains language closely mirroring that contained in Section 924(c), to be valid. *See, e.g., Deida v. United States*, No. 3:13-cv-1608, 2017 WL 2661622 (D. Conn. June 20, 2017) (citing *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016)); *Runnels v. United States*, No. 3:08-cr-167, 2017 WL 3447861 (N.D. Tex. June 27, 2017) (Ramirez, M.J) (citing *United States v. Stephens*, 689 F. App'x 251 (mem) (5th Cir. 2017)).

Believing the residual clause is likely valid, the Court is further inclined to find that Defendant's convictions for Assault with Intent to Do Great Bodily Harm Less than Murder, Kidnapping, and Criminal Sexual Conduct-Third Degree (CSC-3) all qualify as serious violent felonies under the residual clause.

2. Elements

Turning to the elements portion of the definition of serious violent felony, the Defendant recognizes there is Sixth Circuit authority that has held the Michigan assault statute, MICH. COMP. LAWS § 750.84, is a crime of violence under the identical guideline language in U.S.S.G. § 4B1.2(a). *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017). While Defendant believes this case was wrongly decided, the Court is inclined to believe this case controls the outcome here, and whatever arguments Defendant has will need to be taken up at the Court of Appeals.

As for Defendant's kidnapping conviction, based on its review of the Michigan court decisions interpreting the statute, the Court believes the kidnapping statute is likely divisible. *See People v. Wesley*, 421 Mich. 375, 383-84, 365 N.W.2d 692, 694 (Mich. 1994); *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016). This would permit a review under the modified categorical approach. From the available *Shepard* documents, the Court believes Defendant's conviction likely qualifies.

Finally, the Court believes that Defendant's CSC-3 probably does not qualify as a serious violent felony under the elements portion of the statute. The Court presently views the various defined forms of force or coercion as amounting to means; that is, that the statutory element is "force or coercion" and the statute then provides a series of means, rather than separate elements. Under this reading, there are some versions of the crime that do not require force in any traditional sense. This tracks the Sixth Circuit's approach to MICH. COMP. LAWS § 750.110, the state breaking and entering statute. *See United States v. Ritchey*, 840 F.3d 310 (6th Cir. 2016).

3. Enumerated

As to the enumerated clause, the Court does not believe Defendant's assault conviction matches any generic offense enumerated in Section 3559(c). But the Court presently believes

that the kidnapping conviction probably does fall within the generic definition of the crime. As defined by Section 3559(c)(2)(E), “the term ‘kidnapping’ means an offense that has as its elements the abduction, restraining, confining, or carrying away of another person by force or threat of force.” *Id.* The parties have each offered different interpretations of the structure and meaning of this language. Even assuming the “by force or threat of force” clause applies to all aspects of the definition, Defendant’s conviction under the divisible version of Michigan’s kidnapping statute that requires force would likely fall within Section 3559(c)(2)(E)’s definition.

The Court also believes Defendant’s CSC-3 conviction likely qualifies as an enumerated serious violent felony. Defendant argues that Section 3559(c) lists only specific federal sexual offenses. But the Court does not see the statute to be so constrained. Section 3559(c)(2)(F) states that a “‘serious violent felony’ means . . . a Federal or State offense, by whatever designation and wherever committed” At present, the Court does not view the CSC-3 statute, MICH. COMP. LAWS § 750.520(d) as containing broader conduct than Section 2241 and 2242.

4. Affirmative Defense

Finally, the Court believes Defendant will not be able to raise the affirmative defense in Section 3559(c)(3) regarding his assault conviction because, as stated in Defendant’s PSR, a firearm was used in the offense. Whether the defense is available to the other convictions will depend upon the Defendant’s presentation during sentencing.

Furthermore the Court does not view the affirmative defense framework as unconstitutional. In *United States v. Gatewood*, 230 F.3d 186 (6th Cir. 2000), the Sixth Circuit determined the issue was governed by the Supreme Court’s decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Though the Supreme Court’s decision in that case has been

called into question by courts, commentators, and even the Court's justices, the Sixth Circuit has stated that any contention the holding in that case has been "whittled away" is "unavailing." *United States v. Young*, 847 F.3d 328, 369 (6th Cir. 2017).

CONCLUSION

The Court looks forward to the parties' presentations later this week. The Court reiterates it has not made a final decision.

Dated: February 7, 2018

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