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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,
Plaintiff,

v.

THONGSOUK THENG LATTANAPHOM;
MINH HUYNH,
Defendants.

CR. NO. 2:99-00433 WBS

MEMORANDUM AND ORDER RE:
DEFENDANTS' MOTION TO DISMISS
COUNTS TWO, THREE, FIVE, SEVEN,
AND NINE

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Defendant Thongsouk Theng "Kevin" Lattanaphom moves to dismiss counts two, three, seven, and nine of the Indictment in this action pursuant to a recent Supreme Court decision, Johnson v. United States, 135 S. Ct. 2551 (2015). (Docket No. 1646.) Defendant Minh Huynh joined in this motion and additionally asks the court to dismiss count five--a count on which Huynh, but not Lattanaphom, was convicted. (Docket Nos. 1648, 1657.)

1 I. Factual & Procedural History

2 The government charged Lattanaphom, Huynh, and several
3 other defendants with conspiracy to commit a robbery affecting
4 interstate commerce, 18 U.S.C. § 1951(a) (counts one, four, six,
5 and eight); use of a firearm during a crime of violence, 18
6 U.S.C. § 924(c) (counts two, five, seven, and nine); and death
7 caused by use of a firearm during a crime of violence and aiding
8 and abetting, then-numbered 18 U.S.C. §§ 924(i)(1)-(2) (count
9 three). (Indictment (Docket No. 1).) Lattanaphom was not
10 charged with counts four or five. A jury found defendants guilty
11 of all charges. (See Docket Nos. 1413, 1525.) This court
12 sentenced Lattanaphom to life plus 540 months and Huynh to life
13 plus 780 months. (Id.)

14 On direct appeal, the Ninth Circuit affirmed this
15 court's judgment in part, reversed in part, and remanded. (Ninth
16 Cir. Mandate (Docket No. 1624).) The Ninth Circuit's mandate
17 directs this court to vacate the conviction and sentence only on
18 count two for use of a firearm during a crime of violence under
19 § 924(c). (Id. at 6.) In addition, "because vacatur of the
20 first § 924(c) conviction affects the treatment of any 'second or
21 subsequent' § 924(c) convictions," the mandate requires
22 resentencing on count five for Huynh and count seven for
23 Lattanaphom. (Id.) Defendants' sentences of life imprisonment
24 on count three were not affected by the mandate.

25 Defendants now move to dismiss all counts charged under
26 § 924(c): counts two, three, five, seven, and nine. (Docket Nos.
27 1646, 1657.)

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1 II. Authority to Consider Defendants' Motion to Dismiss

2 According to the rule of mandate, when a case has been
3 decided by an appellate court and remanded to the lower court,
4 "whatever was before" the appellate court, "and disposed of by
5 its decree, is considered as finally settled." In re Sanford
6 Fork & Tool Co., 160 U.S. 247, 255 (1895). The lower court is
7 "bound by the decree as the law of the case, and must carry it
8 into execution according to the mandate." Id. However, lower
9 courts are free to "consider and decide any matters left open by
10 the mandate." Id. at 256.

11 In "determining 'what was heard and decided' by the
12 appellate court . . . the lower court may consider the opinion
13 the mandate purports to enforce as well as the procedural posture
14 and substantive law from which it arises." United States v.
15 Kellington, 217 F.3d 1084, 1093 (9th Cir. 2000) (citation
16 omitted). The "ultimate task" of the lower court is therefore to
17 "distinguish matters that have been decided on appeal, and are
18 therefore beyond the jurisdiction of the lower court, from
19 matters that have not." Id.

20 In Kellington, following a jury conviction, the
21 defendant moved for judgment of acquittal and for a new trial.
22 Id. at 1091. The district court granted the motion for judgment
23 of acquittal and denied the motion for new trial as moot. Id.
24 The government appealed the judgment of acquittal and the Ninth
25 Circuit reversed and remanded for entry of judgment and for
26 sentencing. Id. 1091-92. On remand, defendant renewed his
27 motion for new trial and the district court granted it. Id. at
28 1092. The government again appealed and the Ninth Circuit

1 affirmed. Id. at 1095. The Ninth Circuit explained that the
2 motion for new trial was never before it and there could “be no
3 implication that, in reversing the judgment of acquittal, the
4 Kellington I court implicitly disposed of the merits of the
5 motion for new trial.” Id. at 1094. As a result, the district
6 court “did not exceed its authority on remand by reinstating the
7 motion for new trial.” Id. at 1095.

8 In contrast, in Ernst v. Western States Chiropractic
9 College, 40 Fed. App’x 557, 578 (9th Cir. 2002), the district
10 court denied plaintiff’s motion for attorney’s fees and
11 defendant’s motion to review the jury’s punitive damages award
12 for excessiveness on remand on the ground that the Ninth
13 Circuit’s mandate “precluded consideration of the motion[s].”
14 When the parties appealed, the Ninth Circuit found that the
15 district court had “misread the import of Ernst I”—its mandate
16 did not explicitly address attorney’s fees or punitive damages
17 and, as a result, “those issues remained open for consideration”
18 by the district court. Id. at 578-80. Though “the law of the
19 case and the rule of mandate prevent further consideration of
20 issues already decided, they do not prevent further consideration
21 of an issue that was left undecided and that a party had no
22 obligation to raise in the earlier appeal.” Id. at 580.

23 Lastly, in EEOC v. Sears, Roebuck & Co., 417 F.3d 789,
24 796 (7th Cir. 2005), the Seventh Circuit found that the district
25 court had authority to reexamine an issue resolved in an earlier
26 appeal because it reasonably believed there had been a relevant
27 change in the law. The court made clear that though an issue
28 “conclusively decided by” the court of appeal generally may not

1 be reconsidered by the district court on remand, an “appellate
2 mandate does not turn a district judge into a robot, mechanically
3 carrying out orders that become inappropriate in light of
4 subsequent factual discoveries or changes in the law.” Id. at
5 796 (citation omitted). “Our decisions do not bind the district
6 court when there has been a relevant intervening change in the
7 law.” Id.

8 In this case, the Ninth Circuit reviewed defendants’
9 convictions on appeal and remanded only for resentencing on one
10 count. (Ninth Cir. Mandate at 6.) Despite the validity of the
11 convictions having been in front of the Ninth Circuit, defendants
12 argue that the Supreme Court’s intervening case, Johnson v.
13 United States, 135 S. Ct. 2551 (2015), calls into question the
14 constitutionality of 18 U.S.C. § 924(c), under which defendants
15 were sentenced, and provides new grounds for dismissal. This
16 issue was not briefed by the parties or in front of the Ninth
17 Circuit since Johnson was not decided until two months after the
18 Ninth Circuit filed its memorandum disposition.¹

19 Due to the fact that Johnson was not and could not have
20 been considered by the Ninth Circuit on appeal and that
21 defendants reasonably argue that it represents an intervening
22 change in the law, this court finds that it has authority to
23 consider defendants’ motion to dismiss.

24 Furthermore, the court finds defendants’ motion to
25 dismiss to be procedurally proper. Generally, a motion to
26 dismiss must be brought before trial. Fed. R. Crim. P. 12(b)(3).

27 ¹ The Ninth Circuit filed its memorandum on April 29,
28 2015 (Docket No. 1623) and its mandate on July 17, 2015 (Docket
No. 1624). Johnson was decided on June 26, 2015.

1 However, a motion that the indictment fails to charge an offense
2 or "that the court lacks jurisdiction may be made at any time
3 while the case is pending." Id. at 12(b)(2)-(3). A "case is no
4 longer 'pending' within the meaning of Rule 12(b) after the
5 judgment becomes final." United States v. Rios-Hernandez, Cr.
6 No. 3:93-00091 HDM, 2013 WL 4857952, at *1 (D. Nev. Sept. 10,
7 2013); see also, United States v. Valadez-Camarena, 402 F.3d
8 1259, 1261 (10th Cir. 2005) (finding defendant's case was no
9 longer pending since it had been "reduced to judgment, affirmed
10 on appeal, and rejected for certiorari review"). Defendants'
11 case has been remanded to this court for resentencing and is
12 therefore still pending.

13 III. Johnson v. United States

14 In Johnson, the Supreme Court recently held that the
15 language in the residual clause of the Armed Career Criminal Act
16 of 1984 ("ACCA"), 18 U.S.C. § 924(e), is facially void for
17 vagueness. 135 S. Ct. at 2557. The "void-for-vagueness doctrine
18 requires that a penal statute define the criminal offense with
19 sufficient definiteness that ordinary people can understand what
20 conduct is prohibited and in a manner that does not encourage
21 arbitrary and discriminatory enforcement." Kolender v. Lawson,
22 461 U.S. 352, 357 (1983). "It is a fundamental tenet of due
23 process that '[n]o one may be required at peril of life, liberty
24 or property to speculate as to the meaning of penal statutes.'" United States v. Batchelder, 442 U.S. 114, 123 (1979) (citation
25 omitted). This principle applies to both vague criminal statutes
26 and vague sentencing provisions. Id.

28 The ACCA provides sentence enhancements for any person

1 who illegally ships, possesses, or receives firearms and has
2 three or more earlier convictions for a "serious drug offense" or
3 "violent felony." 18 U.S.C. § 924(e)(1). The Act defines the
4 term "violent felony" as:

5 [A]ny crime punishable by imprisonment for a term
6 exceeding one year, or any act of juvenile delinquency
7 involving the use or carrying of a firearm, knife, or
8 destructive device that would be punishable by
9 imprisonment for such term if committed by an adult,
10 that--

11 (i) has as an element the use, attempted use, or
12 threatened use of physical force against the person of
13 another; or

14 (ii) is burglary, arson, or extortion, involves use of
15 explosives, or otherwise involves conduct that presents
16 a serious potential risk of physical injury to another.

17 Id. § 924(e)(2)(B) (emphasis added).

18 In Johnson, the Court found that the residual clause,
19 underscored above, "both denies fair notice to defendants and
20 invites arbitrary enforcement by judges." 135 S. Ct. at 2557.
21 The Court explained that "[t]wo features of the residual clause
22 conspire to make it unconstitutionally vague." Id. First, it
23 "ties the judicial assessment of risk to a judicially imagined
24 'ordinary case' of a crime, not to real-world facts or statutory
25 elements." Id. The court must use a categorical approach,
26 picturing in abstract terms whether the kind of conduct
27 ordinarily involved in the crime presents a serious potential
28 risk of physical injury. Id. The Supreme Court questioned how
one goes "about deciding what kind of conduct the 'ordinary case'
of a crime involves"--does the ordinary instance of witness
tampering, for example, involve offering a witness a bribe or
threatening a witness with violence? Id. Does attempted
burglary consist of an armed would-be burglar being spotted by a

1 homeowner who may give chase, thus giving rise to a potentially
2 violent encounter? Or does it consist of an occupant yelling,
3 "Who's there?" from the window and the burglar running away? Id.
4 at 2558. The Court concluded that the "residual clause offers no
5 reliable way to choose between these competing accounts of what"
6 the ordinary crime involves. Id.

7 Second, it is unclear from the residual clause "how
8 much risk it takes for a crime to qualify as a violent felony."
9 Id. There is uncertainty in how to apply the "serious potential
10 risk" standard to a judge-imagined abstraction, rather than real-
11 world facts. Id. Furthermore, there is also indeterminacy in
12 interpreting "serious potential risk" in light of the four
13 enumerated crimes--burglary, arson, extortion, and crimes
14 involving the use of explosives. Id. These offenses are "far
15 from clear in respect to the degree of risk each poses." Id.
16 (citation omitted).

17 IV. Application of Johnson to 18 U.S.C. § 924(c)

18 Existing authority in the Ninth Circuit compels this
19 court to extend Johnson to the residual clause of 18 U.S.C.
20 § 924(c), a portion of the federal statute with language similar
21 to that of the ACCA residual clause. Like the ACCA, § 924(c)
22 provides sentence enhancements for any person who, "during and in
23 relation to any crime of violence or drug trafficking crime . . .
24 uses or carries a firearm, or who, in furtherance of any such
25 crime, possesses a firearm." 18 U.S.C. § 924(c)(1)(A). The
26 statute defines "crime of violence" as a felony that:

1 (A) has as an element the use, attempted use, or
2 threatened use of physical force against the person or
3 property of another, or
4 (B) that by its nature, involves a substantial risk
5 that physical force against the person or property of
6 another may be used in the course of committing the
7 offense.

8 Id. § 924(c)(3) (emphasis added).

9 As with the ACCA, in deciding whether a crime is
10 encompassed by the § 924(c) residual clause, the court must apply
11 a categorical approach. United States v. Amparo, 68 F.3d 1222,
12 1224 (9th Cir. 1995). "This categorical approach is in contrast
13 to the circumstantial or case-by-case method that requires the
14 district court to inquire into the facts of the particular case."
15 United States v. Mendez, 992 F.2d 1488, 1490 (9th Cir. 1993).
16 Thus, the court must undertake the ambiguous task of deciding
17 what kind of conduct the ordinary case of a crime involves.

18 The court also faces similar difficulties in
19 determining what degree of risk is "substantial" under the
20 § 924(c) residual clause. As the Court in Johnson discussed with
21 regard to the interpretation of "serious potential risk" under
22 the ACCA, the § 924(c) residual clause requires the court to
23 apply an imprecise standard to a judicial abstraction of a crime.

24 The Court made it clear in Johnson that it was not
25 invalidating all "criminal laws that use terms like 'substantial
26 risk,' 'grave risk,' and 'unreasonable risk.'" 135 S. Ct. at
27 2561. It noted that most criminal statutes do not link "a phrase
28 such as 'substantial risk' to a confusing list of examples." Id.
However, the Court also emphasized that the ACCA residual clause
was distinguishable because most criminal statutes "require

1 gauging the riskiness of conduct in which an individual defendant
2 engages on a particular occasion." Id. While the § 924(c)
3 residual clause does not include a confusing list of examples, it
4 does require the assessment of riskiness in isolation from any
5 particularized facts or conduct.

6 The application of Johnson to § 924(c) is also
7 supported by the Ninth Circuit's recent decision, Dimaya v.
8 Lynch, 803 F.3d 1110 (9th Cir. 2015). In Dimaya, a lawful
9 permanent resident sought review of the Board of Immigration
10 Appeals' determination that a conviction for burglary is
11 categorically a "crime of violence" as defined by 8 U.S.C.
12 § 1101(a)(43)(F). Id. at 1111. That statute defines a "crime of
13 violence" by reference to 18 U.S.C. § 16, which contains
14 identical language to that in the § 924(c) residual clause.² The
15 Ninth Circuit held that this definition of a crime of violence
16 "suffers from the same indeterminacy as" the ACCA's residual
17 clause at issue in Johnson and, as a result, "is also void for
18 vagueness." Id. at 1111. Thus, the Ninth Circuit reviewed
19 language identical to that at issue in this case and found that
20 it was unconstitutionally vague.

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23 ² The statute at issue in Dimaya defines a "crime of
24 violence" as:

- 25 (a) an offense that has as an element the use,
26 attempted use, or threatened use of physical force
27 against the person or property of another, or
28 (b) any other offense that is a felony and that, by its
nature, involves a substantial risk that physical force
against the person or property of another may be used
in the course of committing the offense.

18 U.S.C. 16.

1 Judge Callahan dissented from the Dimaya opinion,
2 reasoning that Johnson “does not infect 18 U.S.C. § 16(b)--or
3 other statutes--with unconstitutional vagueness.” Dimaya, 803
4 F.3d at 1120. Unlike the ACCA, Judge Callahan argued § 16(b)
5 does not have the same list of confusing examples and has not
6 “proven to be unworkably vague.” Id. at 1127-29. To the
7 contrary, the Supreme Court established over a decade ago that
8 § 16(b) covers offenses that naturally involve a person “acting
9 in disregard of the risk” that physical force might be used
10 against another in committing the offense. Id. at 1129.
11 Furthermore, the Court in Johnson made clear that it did not
12 intend to abandon the categorical approach altogether because
13 there were good reasons for adopting this approach, “one of which
14 is the ‘utter impracticability of requiring a sentencing court to
15 reconstruct, long after the original conviction, the conduct
16 underlying that conviction.’” Id. at 1127 (quoting Johnson, 135
17 S. Ct. at 2562). She concluded by stating: “I fear that we have
18 again ventured where no court has gone before and that the
19 Supreme Court will have to intervene to return us to our proper
20 orbit.” Id. at 1129. Despite Judge Callahan’s dissent, the
21 Ninth Circuit recently denied respondent’s petition for rehearing
22 en banc. As a result, the Dimaya opinion is final and this court
23 must recognize it as binding precedent.

24 The Ninth Circuit is not alone in extending the reach
25 of Johnson. In United States v. Vivas-Ceja, 808 F.3d 719, 720
26 (7th Cir. 2015), the Seventh Circuit similarly held that “§ 16(b)
27 is materially indistinguishable from the ACCA’s residual clause”
28 and “it too is unconstitutionally vague according to the

1 reasoning of Johnson.” The court found that § 16(b) “requires
2 the identical indeterminate two-step approach” as the ACCA
3 residual clause: the court must first determine what constitutes
4 the “ordinary case” of a crime and then how much risk qualifies
5 as “substantial” without any guidance from the statute. Id. at
6 722-23.

7 The Ninth Circuit has yet to rule specifically on the
8 constitutionality of the § 924(c) residual clause or the
9 application of Johnson and Dimaya to that statute. However, just
10 last week, Judge Orrick in the Northern District of California,
11 in a well-reasoned decision held that the § 924(c) residual
12 clause “cannot stand under Johnson.” United States v. Bell, Cr.
13 No. 15-00258 WHO, 2016 WL 344749, at *12 (N.D. Cal. Jan. 28,
14 2016). Judge Orrick found that the “core of the Johnson II
15 analysis is focused on the indeterminacy created by application
16 of the categorical approach to the broad language of the ACCA
17 residual clause.” He concluded that the analysis of Johnson,
18 Dimaya, and Vivas-Ceja must be applied “with equal force” to the
19 § 924(c) residual clause. Id.

20 This court recognizes that many districts outside of
21 the Ninth Circuit have declined to extend Johnson to the § 924(c)
22 residual clause. However, none of those courts are bound by the
23 Ninth Circuit and its decision in Dimaya. For example, the
24 Eastern District of Virginia denied defendant’s motion to dismiss
25 several counts on the grounds that § 924(c) is unconstitutionally
26 vague after Johnson. United States v. Hunter, Cr. No. 2:12-124
27 RAJ, 2015 WL 6443084, at *2-3 (E.D. Va. Oct. 23, 2015). The
28 court held that the “ACCA had faced significantly more confusion

1 in the lower courts, was a much broader clause than § 924(c), and
2 required courts to analyze conduct outside of that conduct
3 required for the charged offense.” Id. at *2. It concluded that
4 the Supreme Court did not intend for Johnson to invalidate the
5 residual clause of § 924(c). Id. However, the court also
6 recognized that the “Ninth Circuit very recently came to the
7 opposite conclusion on the Johnson question in Dimaya v. Lynch.”
8 Id. at *3; see also, United States v. Tsarnaev, Cr. No. 13-10200
9 GAO, 2016 WL 184389, at *13 (D. Mass. Jan. 15, 2016) (finding
10 that Johnson does not require the conclusion that § 924(c)’s
11 residual clause is unconstitutionally vague); United States v.
12 Lusenhop, Cr. No. 1:14-122 SSB, 2015 WL 5016514, at *3 (S.D. Ohio
13 Aug. 25, 2015) (“Nothing in Johnson reasonably suggests that if
14 presented with the question, the Supreme Court would conclude
15 that Section 924(c)(3)(B) is unconstitutionally vague.”); United
16 States v. Prickett, Cr. No. 3:14-30018 PKH, 2015 WL 5884904, at
17 *2-3 (W.D. Ark. Oct. 8, 2015) (finding that the court need not
18 engage in a categorical analysis to ensure consistent application
19 of § 924(c) and therefore Johnson is inapplicable); United States
20 v. Checora, Cr. No. 2:14-457 DAK, 2015 WL 9305672, at *8-9 (D.
21 Utah Dec. 21, 2015) (finding that the language of § 924(c)
22 differs in significant respects from the ACCA residual clause).

23 The only binding authority in the Ninth Circuit compels
24 this court to find § 924(c) void for vagueness. The Dimaya court
25 extended Johnson to a statute with identical language as that in
26 the § 924(c) residual clause and cannot be distinguished.
27 Accordingly, this court must reach the same conclusion as Judge
28 Orrick and find the § 924(c) residual clause unconstitutional.

1 IT IS THEREFORE ORDERED that defendants' motion to
2 dismiss counts two, three, five, seven, and nine of the
3 Indictment be, and the same hereby is, GRANTED.

4 Dated: February 1, 2016



5 WILLIAM B. SHUBB

6 UNITED STATES DISTRICT JUDGE

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