

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States v. Carreon

No. 16-11239, United States Court of Appeals for the Fifth Circuit (May 6, 2020)

SUMMARY

In this unpublished Fifth Circuit case, the court granted habeas relief under 28 U.S.C. § 2255, vacating a defendant's 18 U.S.C. § 924(c) conviction for using a firearm during a kidnapping, because kidnapping no longer qualifies as a crime of violence after *\*Davis v. United States\**, 139 S. Ct. 2319 (2019), which held § 924(c)(3)(B)'s residual clause unconstitutional. The government conceded both that *\*Davis\** rendered the petition timely under 28 U.S.C. § 2244(d)(2) and that kidnapping cannot satisfy § 924(c)(3)(A)'s elements clause. The court also vacated the kidnapping sentence and remanded for resentencing, noting the district court may have imposed a lower kidnapping sentence because of the now-invalidated consecutive § 924(c) sentence.

CASE DETAILS

|                       |                                                             |
|-----------------------|-------------------------------------------------------------|
| COURT                 | United States Court of Appeals for the Fifth Circuit        |
| WRITING FOR THE COURT | Edith H. Jones; Jennifer Walker Elrod; Stephen A. Higginson |
| JURISDICTION          | Federal                                                     |
| DECIDED               | May 6, 2020                                                 |
| DOCKET                | 16-11239                                                    |
| DISPOSITION           | vacated_and_remanded                                        |
| PROCEDURAL POSTURE    | Appeal from denial of 28 U.S.C. § 2255 habeas petition      |
| STANDARD OF REVIEW    | de novo (for legal issues)                                  |
| PRECEDENTIAL VALUE    | unpublished                                                 |
| PARTIES               | Lavada Carreon v. United States of America                  |

TOPICS

- habeas corpus
- criminal procedure
- sentencing
- due process
- statutory interpretation

PRACTICE AREAS

- Criminal Law
- Habeas Corpus
- Sentencing

QUESTIONS PRESENTED

1. Whether Carreon's § 2255 motion was filed timely.
2. Whether Carreon's § 924(c) conviction for using a firearm during a kidnapping is constitutionally sound after *Davis v. United States*, 139 S. Ct. 2319 (2019), which held that § 924(c)(3)(B)'s residual clause is void for vagueness, and whether kidnapping qualifies as a crime of violence under the elements clause, § 924(c)(3)(A).

## HOLDINGS

1. The government waived its timeliness defense by affirmative concession, so the motion is timely.
2. Following *Davis*, which held that § 924(c)(3)(B)'s residual clause is unconstitutional, kidnapping cannot be defined as a crime of violence under the elements clause, so the § 924(c) conviction must be vacated.

## KEY QUOTATIONS

*"the government now 'concedes that Davis renders Carreon's motion timely under 28 U.S.C. § 2244(d)(2).' Accordingly, the government 'affirmatively waives its timeliness defense.'"* (2)

*"The government concedes that [kidnapping cannot be defined as a crime of violence under the elements clause.]"* (3)

*"Carreon's Section 924(c) conviction is VACATED, and Carreon's sentence on the kidnapping count is VACATED and REMANDED to the district court for resentencing."* (4)

## FACTUAL BACKGROUND

In 2009, Carreon and her co-defendants kidnapped at gunpoint the brother of a man who owed them drug money. Based on Carreon's involvement, she was convicted of kidnapping in violation of 18 U.S.C. § 1201(a) and using a firearm during the commission of a crime of violence in violation of 18 U.S.C. § 924(c).

## PROCEDURAL HISTORY

Carreon was convicted of kidnapping and using a firearm during a crime of violence. She filed a § 2255 petition arguing that her § 924(c) conviction was unconstitutional under *Johnson*. The district court denied the petition. The Fifth Circuit initially denied a certificate of appealability. The Supreme Court granted certiorari, vacated, and remanded for reconsideration in light of *Sessions v. Dimaya*. On remand, the Fifth Circuit granted a COA on two issues: (1) whether Carreon's § 2255 motion was timely, and (2) whether her § 924(c) conviction is constitutionally sound.

## DISPOSITION

vacated\_and\_remanded

## REMAND INSTRUCTIONS

The district court is to resentence Carreon on the kidnapping count, leaving the sentence to the district court's discretion.

## CASES CITED

- Johnson v. United States, 135 S. Ct. 2551 (2015)
- United States v. Reece, 938 F.3d 630 (5th Cir. 2019)
- Sessions v. Dimaya, 138 S. Ct. 1204 (2018)
- Carreon v. United States, 138 S. Ct. 1985 (2018)
- Davis v. United States, 139 S. Ct. 2319 (2019)
- Day v. McDonough, 547 U.S. 198 (2006)
- United States v. Pierce, 489 F. App'x 767 (5th Cir. 2012)
- United States v. McRae, 795 F.3d 471 (5th Cir. 2015)
- Dean v. United States, 137 S. Ct. 1170 (2017)

## OPINION

### PER CURIAM.

Case: 16-11239 Document: 00515406167 Page: 1 Date Filed: 05/06/2020 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT United States Court of Appeals No. 16-11239 Fifth Circuit FILED May 6, 2020 UNITED STATES OF AMERICA, Lyle W. Cayce Clerk Plaintiff - Appellee v. LAVADA CARREON, Defendant - Appellant Appeal from the United States District Court for the Northern District of Texas USDC No. 4:16-CV-591 Before JONES, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:\* We granted a certificate of appealability allowing appellant Lavada Carreon to appeal the district court's denial of her 28 U.S.C. § 2255 habeas petition. In light of the government's recent concessions, we vacate and remand for resentencing.

In 2009, Carreon and her co-defendants kidnapped at gunpoint the brother of a man who owed them drug money. Based on Carreon's involvement, she was convicted of kidnapping in violation of \* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.

R. 47.5.4. Case: 16-11239 Document: 00515406167 Page: 2 Date Filed: 05/06/2020 No. 16-11239 18 U.S.C. § 1201(a) and using a firearm during the commission of a crime of violence in violation of 18 U.S.C. § 924(c). The kidnapping conviction was the predicate crime of violence for the Section 924(c) conviction.

After Carreon's convictions were affirmed on direct appeal, she filed a Section 2255 habeas petition, arguing that her Section 924(c) conviction should be vacated because Johnson v. United States, 135 S. Ct. 2551 (2015) rendered Section 924(c)(3)(B)'s crime of violence definition unconstitutional. But Johnson did not address Section 924(c)(3)(B). See United States v. Reece, 938 F.3d 630, 633 n.2 (5th Cir.

2019). The district court thus denied Carreon's petition, and we denied a certificate of appealability. The Supreme Court nevertheless granted Carreon's subsequent petition for certiorari, vacated our decision, and remanded the case for reconsideration in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). See *Carreon v. United States*, 138 S. Ct. 1985 (2018).

*Dimaya* did not address the constitutionality of Section 924(c)(3)(B) either. See *Reece*, 938 F.3d at 633 n.2. On remand, we granted a certificate of appealability on two issues: "(1) whether Carreon's § 2255 motion was filed timely and (2) whether her § 924(c) conviction is constitutionally sound." While the appeal was pending, the Supreme Court squarely held that Section 924(c)(3)(B)'s crime of violence definition is unconstitutional.

See *Davis v. United States*, 139 S. Ct. 2319 (2019). We therefore ordered supplemental briefing on *Davis*'s effect on Carreon's appeal. As to the timeliness of Carreon's habeas petition, the government now "concedes that *Davis* renders Carreon's motion timely under 28 U.S.C. § 2244(d) (2)." Accordingly, the government "affirmatively waives its timeliness defense." We thus turn to the second certified issue.

See *Day v. McDonough*, 547 U.S. 198, 205, 210 n.11, 126 S. Ct. 1675, 1681, 1684 n.11 2 Case: 16-11239 Document: 00515406167 Page: 3 Date Filed: 05/06/2020 No. 16-11239 (2006) (recognizing that untimeliness under the AEDPA is not a jurisdictional defect; it is an affirmative defense that the government may waive); *United States v. Pierce*, 489 F. App'x 767, 768 (5th Cir.

2012). Carreon argues her Section 924(c) conviction is unconstitutional because kidnapping is no longer a crime of violence under *Davis*. Section 924(c) defines "crime of violence" in two alternative ways. An offense qualifies if it is a felony and (1) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (the elements clause); or (2) "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" (the residual clause).

18 U.S.C. § 924(c)(3)(A) & (B). As noted, *Davis* held that Section 924(c)(3)(B)'s residual clause definition is unconstitutional. 139 S. Ct. at 2336. Thus, following *Davis*, Carreon's Section 924(c) conviction "can be sustained only if [kidnapping] can be defined as a [crime of violence] under § 924(c)(3)'s element's clause." *Reece*, 938 F.3d at 635.

The government concedes that it cannot. We therefore vacate Carreon's Section 924(c) conviction. We note, however, that "[o]ur court's practice when one, but not all counts, within a multipart conviction has been vacated has generally been to remand to allow the district court to resentence in the first instance." *United States v. McRae*, 795 F.3d 471, 483 (5th Cir.

2015). Indeed, the *Davis* majority relied on this practice in addressing the concerns of its dissenters. 139 S. Ct. at 2336 ("[W]hen a defendant's § 924(c) conviction is invalidated, courts of

appeals routinely vacate the defendant's entire sentence on all counts so that the district court may increase the sentences for any remaining counts if such an increase is warranted.”).

Carreon was sentenced to ninety months of imprisonment on her kidnapping count despite a significantly higher 3 Case: 16-11239 Document: 00515406167 Page: 4 Date Filed: 05/06/2020 No. 16-11239 guidelines range. The record indicates the district court may have issued that lower sentence because of the mandatory consecutive sixty-month sentence Carreon received on her Section 924(c) count.

We therefore find it appropriate to vacate Carreon's sentence on the kidnapping count and remand for resentencing, leaving it to the district court's sound discretion to determine an appropriate sentence. See *Dean v. United States*, 137 S. Ct. 1170, 1175 (2017).

For the foregoing reasons, Carreon's Section 924(c) conviction is VACATED, and Carreon's sentence on the kidnapping count is VACATED and REMANDED to the district court for resentencing. 4