

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In this unpublished Fifth Circuit case, the court granted habeas relief under 28 U.S.C. § 2255, vacating a defendant's 18 U.S.C. § 924(c) conviction for using a firearm during a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PRECEDENTIAL VALUE	unpublished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)