Nos. 17-3306 & 17-3307

In the
United States Court of Appeals
for the Seventh Circuit

DEDRICK BUFKIN and DIAMOND TONEY,
Petitioners-Appellees,

v.

UNITED STATES OF AMERICA,
Respondent-Appellant.

On Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 2:16-CV-236 & 2:16-CV-181
Hon. Joseph S. Van Bokkelen, *Judge*.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

THOMAS L. KIRSCH II
United States Attorney

DAVID E. HOLLAR
Assistant United States Attorney
Chief, Appellate Division

NATHANIEL L. WHALEN
Assistant United States Attorney
United States Attorney's Office
5400 Federal Plaza, Suite 1500
Hammond, IN 46320
(219) 937-5500

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

INTRODUCTION

The United States files this supplemental brief addressing the impact on this appeal of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). *Dimaya* represents a new substantive rule of law that, in the view of the government, requires 18 U.S.C. § 924(c)(3)(B) to be interpreted using an underlying conduct approach rather than a categorical approach. In light of *Dimaya*'s alteration of the relevant legal landscape, the government withdraws in its entirety its opening brief arguments and restates the issue statements, facts, and arguments in this supplemental brief.

ISSUE STATEMENTS

1. Does 18 U.S.C. § 924(c)(3)(B) require the jury to find—or defendants to admit—defendants' underlying conduct by its nature involved a substantial risk that physical force may be used? If so, should this Court affirm defendants' § 924(c) convictions when any reasonable jury would have found their kidnapping involved such risk?
2. If not, should this Court remand for the district court to resentence defendants and enter judgment on the kidnapping crime they admitted to committing? Alternatively, should this Court reinstate the kidnapping count and remand for further proceedings?

STATEMENT OF THE CASE

I. Nature of the case

This is a government appeal of the district court's order granting petitioners Dedrick Bufkin and Diamond Toney post-conviction relief under 28 U.S.C. § 2255. (Gov. App. 1-4).[1] Bufkin and Toney each pled guilty in 2013 to brandishing a firearm during and in relation to a crime of violence, namely kidnapping, in violation of 18 U.S.C. § 924(c). (R. 15, 27, 38). In 2017, the

[1] Citations to the district court docket entries are designated as "R" followed by the PDF page number. Citations to Toney's change of plea hearing (R. 151) are designated as "Toney COP," and to Bufkin's change of plea hearing (R. 150) as "Buf. COP." Citations to the appendix attached to government's opening brief (7th Cir. Dkt. 15) are designated as "Gov. App."

district court vacated the convictions, concluding that, in light of *United States v. Jenkins*, 849 F.3d 390, 393-394 (7th Cir. 2017), *vacated by* 2018 U.S. LEXIS 2897 (May 14, 2018), kidnapping is not a crime of violence, so petitioners were actually innocent of the sole offense to which they pled guilty. (Gov. App. 3-4). The government filed an opening brief (7th Cir. Dkt. 15), but received permission from this Court to file this supplemental brief addressing *Dimaya*'s impact on the appeal. (7th Cir. Dkt. 32).

II. Offense conduct

Toney and Bufkin set up an on-line dating profile and lured a man from Illinois to Merrillville, Indiana in March 2013. (Buf. COP 28-29, 32-34; Toney COP 30-31, 33, 35-36). The victim believed he was going on a date with Toney; Toney and Bufkin intended to rob and kidnap him. (Buf. COP 29-33; Toney COP 30-31, 33, 35-36).

Once the victim arrived at the agreed-upon intersection, Bufkin came out of hiding and pointed a firearm at the victim. (Buf. COP 29-30, 32-34; Toney COP 35-36). Defendants robbed the victim of his money and cell phone. (Buf. COP 32-33; Toney COP 31, 35-36). Toney then tied up the victim with duct tape and placed him in his own trunk. (Buf. COP 30-31, 32-33; Toney COP 35-36). Defendants held the victim against his will, drove him around for about five hours, and ultimately let him go. (Buf. COP 30-31, 32-33; Toney COP 35-

36; *see also* R. 61 ¶¶ 5-12 (Toney Presentence Report); R. 44 ¶¶ 4-11 (Bufkin Presentence Report)).

III. Procedural history

A grand jury charged defendants in a two-count indictment with (1) kidnapping, in violation of 18 U.S.C. § 1201(a)(1), and (2) knowingly brandishing a firearm during and in relation to a crime of violence, "to wit: kidnapping," in violation of 18 U.S.C. § 924(c). (R. 15).

Bufkin agreed to plead guilty to the § 924(c) count pursuant to a plea agreement. (R. 24). In exchange, the government agreed to dismiss the kidnapping count and consider filing a motion under U.S.S.G. § 5K1.1 based on Bufkin's agreement to cooperate against Toney. (R. 24, ¶¶ 7(c)-(e)). As part of the agreement, Bufkin expressly agreed to waive his right to contest his conviction on any ground, including through a Section 2255 motion. (R. 24, ¶ 7(f)). Bufkin further agreed that if he violated any provision of his plea agreement, the government could at its option "seek to have the Court declare this entire plea agreement null and void, in which event [he could] then be prosecuted for all criminal offenses that [he] may have committed." (R. 24, ¶ 9). Bufkin told the court during the change of plea colloquy that he understood the waivers and consequences of violating the agreement. (Buf. COP 21-24).

Toney similarly pled guilty to Count 2 with an appeal waiver, an agreement to dismiss the kidnapping count, and a proviso that the plea agreement could be declared null and void if she appealed. (R. 32, ¶¶ 7(c)-(e), 9). Her agreement contained no cooperation provision. (R. 32). Toney likewise told the court during her change of plea colloquy she understood her waivers and the consequences of violating the agreement. (Toney COP 22, 24-25).

At the change of plea hearings (R. 150, 151), the court told each defendant that the government had to prove they committed the kidnapping to prove they violated § 924(c), and the court then set forth the elements of kidnapping. (Buf COP 14-15; Toney COP 13). The court then told Bufkin and Toney, respectively, that the government would have to prove he brandished the firearm and she aided that brandishing. (Buf. COP 15; Toney COP 13). Each defendant said they understood those charges and were guilty of violating § 924(c) by brandishing a firearm during the kidnapping. (Buf COP 15, 28; Toney COP 13-14, 30). The court accepted their pleas.

The court sentenced Bufkin to 60 months' imprisonment and two years' supervised release. (R. 52, 56). The court sentenced Toney to 84 months' imprisonment and three years' supervised release. (R. 65, 69).

In 2016, Defendants filed motions to vacate their § 924(c) convictions under 28 U.S.C. § 2255 in light of *Johnson v. United States*, 135 S. Ct. 2551

(2015). (R. 71, 74). They argued kidnapping could only qualify as a crime of violence under the statute's "residual clause." 18 U.S.C. § 924(c)(3)(B). (R. 71, at 3-9; R. 74, at 3-9). They further contended that the residual clause is unconstitutionally vague in light of *Johnson*. (R. 71, at 10-17; R. 74, at 10-17). The district court granted both defendants' motions and vacated their convictions in light of this Court's conclusion in *Jenkins* that kidnapping is not a crime of violence. (Gov. App. 1-4). The court entered separate civil judgments vacating each defendant's § 924(c) conviction. (Gov. App. 5-6).

After the parties filed their opening briefs, the Supreme Court decided in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), that 18 U.S.C. § 16(b) is unconstitutionally vague. The Court subsequently vacated this Court's decision in *Jenkins* and remanded that case for further consideration. 2018 U.S. LEXIS 2897 (May 14, 2018).

ARGUMENT

I. Defendants' convictions should be affirmed since their convictions still qualify as crimes of violence under 18 U.S.C. § 924(c)(3)(B).

A. *Dimaya* applies retroactively

18 U.S.C. § 924(c)(1)(A) makes it a crime for any person "during and in relation to any crime of violence" that could be prosecuted as a federal offense, to brandish a firearm. Subsection (c)(3) defines "crime of violence" as any felony

that either (A) "has as an element the use, attempted use, or threatened use of physical force" (the "elements clause") or (B) 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. § 924(c)(3). Federal kidnapping does not satisfy the provisions of the elements clause, and thus can only qualify as a crime of violence under 18 U.S.C. § 924(c)(3)(B). *United States v. Green*, 521 F.3d 929, 932-33 (8th Cir. 2008); *see also Jenkins*, 849 F.3d at 393-94.

In *Dimaya*, the Supreme Court found unconstitutional 18 U.S.C. § 16(b), a statute worded identically to 18 U.S.C. § 924(c)(3)(B). *Dimaya* is a new substantive rule of law that applies retroactively to Defendants' Section 2255 proceedings and to all other cases on collateral review. *See generally Welch v. United States*, 136 S. Ct. 1257, 1264-1265 (2016) (finding *Johnson*'s invalidation of 18 U.S.C. § 924(e)(2)(B)(ii) is retroactive). *Dimaya* is a substantive rule because, by invalidating statutory language as unconstitutionally vague it "alters … the class of persons that the law punishes." *Welch*, 136 S. Ct. at 1264-1265. *Dimaya* is also new. *Dimaya* was not "*dictated* by precedent," or "merely an application of the principle that governed a prior decision." *Chaidez v. United States*, 568 U.S. 342, 347-348 (2013). Instead, *Dimaya* resolved a circuit split and extended *Johnson*'s

vagueness holding despite linguistic differences between the two statutes at issue.

B. *Dimaya* left open the question of whether this Court should adopt a case specific approach for 18 U.S.C. § 924(c)(3)(B).[2]

In *Dimaya*, the Supreme Court determined that "[t]wo features" on which it previously relied to invalidate a clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), were likewise present in § 16(b). *Dimaya*, 138 S. Ct. at 1213 (quoting *Johnson*, 135 S. Ct. at 2557). The Court applied the "categorical approach" and explained that § 16(b), like ACCA's residual clause, "calls for a court to identify a crime's 'ordinary case' in order to measure the crime's risk, " and creates "uncertainty about the level of risk that makes a crime 'violent.'" *Id.* at 1215.

Though *Dimaya* found § 16(b) unconstitutionally vague, it emphasized that the "substantial risk" feature gave rise to constitutional concerns only when combined with the "categorical approach" feature. 138 S. Ct. at 1214-16. *Dimaya* disavowed the view that the substantial-risk feature "is alone problematic," and it "'d[id] not doubt' the constitutionality of applying" a

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[2] The issue of whether to adopt an underlying-conduct approach for § 924(c)'s residual clause is also briefed for this Court in *United States v. Brazier, Fields, and Mzembe* (Nos. 16-4258, 17-2268, 17-1060, 17-1412, & 17-2269) and *Sandoval v. United States*, Nos. 18-1778 & 18-1780).

"'substantial risk [standard] to real-world conduct.'" *Id.* at 1215 (quoting *Johnson*, 135 S. Ct. at 2561).

Dimaya also did not hold that language like § 16(b)'s invariably mandates a categorical approach. A plurality of the Supreme Court viewed § 16(b)—which often, as in *Dimaya* itself, is applied to classify a prior conviction entered by another court in otherwise unrelated proceedings—as "[b]est read" to require such an approach. *Id.* at 1217 (opinion of Kagan, J.); *see id.* at 1216-18. The plurality observed, however, that the government had not asked the Court to abandon the categorical approach in the § 16(b) context. *Id.* at 1217. Justice Gorsuch, concurring in part and concurring in the judgment, similarly stressed that the government had conceded the categorical-approach issue in *Dimaya* and expressed his willingness to consider "in another case" whether "precedent and the proper reading of language" like § 16(b)'s in fact requires a categorical approach. *Id.* at 1233 (opinion of Gorsuch, J.). And Justice Thomas, joined by Justices Kennedy and Alito, filed a dissenting opinion advocating that the Court "should abandon [the categorical] approach" entirely under § 16(b). *Id.* at 1242 (opinion of Thomas, J.).

This Court, like the government, has previously viewed § 924(c)(3)(B) to require a categorical approach. *United States v. Cardena*, 842 F.3d 959, 995-96 (7th Cir. 2016). But it has done so without analysis and has simply

"assum[ed] that the clause required use of the categorical approach" because the Supreme Court has applied it to similarly worded statutes. *Cross v. United States*, 892 F.3d 288, n.1 (7th Cir. 2018); see also *Cardena*, 842 F.3d at 996; *United States v. Enoch*, 865 F.3d 575, 579 (7th Cir. 2017); *Bush v. Pitzer*, 133 F.3d 455, 457 (7th Cir. 1997).

None of these decisions considered the Supreme Court's reasons for adopting the categorical approach or the fact that § 924(c)(3)(B)'s statutory and jurisprudential context differs from § 16(b) and ACCA. Because this Court's prior decisions simply assume without deciding that the categorical approach applies, a panel holding that § 924(c)(3)(B) requires an underlying-conduct approach would not conflict with, or require overruling, any of the Court's prior precedents.

To the extent this Court believes adopting an underlying-conduct approach conflicts with prior precedent, *Dimaya* and *Johnson* each constitute an "intervening on-point Supreme Court decision" that "requires [this Court] to reconsider" its previous position. *Castellanos v. Holder*, 652 F.3d 762, 765 (7th Cir. 2011). The Supreme Court's actions further suggest that it expects the Court to reexamine the issue. It recently granted government certiorari petitions in two cases where this Court reversed convictions on the ground that § 924(c)(3)(B) is unconstitutionally vague. *See United States v. Jackson*, 2018

U.S. LEXIS 2936 (vacating *Jackson*, 865 F.3d 946 (7th Cir. 2017)) and *United States v. Jenkins*, 2018 U.S. LEXIS 2897 (May 14, 2018) (vacating *Jenkins*, 849 F.3d 390 (7th Cir. 2017)). The only reason to remand for further consideration would be for this Court to take a fresh look at that legal question.

Courts are "obligated to construe [a] statute to avoid [constitutional] problems" if it is "fairly possible" to do so. *INS v. St. Cyr*, 533 U.S. 289, 300 (2001). As discussed below, the Court should construe § 924(c)(3)(B) to require a case-specific approach that considers the defendants' own conduct rather the categorical "ordinary case" approach. Such a case-specific approach makes particular sense in the context of § 924(c) which—unlike § 16(b) or ACCA—employs the term "crime of violence" exclusively to describe the circumstances of the conduct for which the defendant is *presently* charged.

C. Section 924(c)(3)(B) should be interpreted to require a case specific approach.

Convictions under § 924(c) require a jury to find that the defendants "committed all the acts necessary to be subject to punishment for" a qualifying federal crime and that their commission of that crime had a sufficient nexus to their use, carrying, or possession of a firearm. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). The jury's role thus inherently requires consideration of, and determinations about, the unlawful course of conduct charged as a "crime of violence" under § 924(c)(3)(B). Unlike a recidivist

sentencing enhancement (like ACCA) or the classification of a prior offense for purposes of determining an alien's removability (like § 16(b) in *Dimaya*), § 924(c)(3)(B)'s definition of a "crime of violence" is never applied to a prior conviction, the specific facts of which may not be before the court. Instead, a prosecution under § 924(c) will by necessity involve a "developed factual record" about the underlying crime. *United States v. St. Hubert*, 883 F.3d 1319, 1335 (11th Cir. 2018) (citing *United States v. Robinson*, 844 F.3d 137, 141 (3d Cir. 2016)). That feature of § 924(c) cases enables the finder of fact to apply the "crime of violence" definition in § 924(c)(3)(B) in a case-specific manner that considers a defendant's own conduct. Construing the statute to incorporate such an approach "makes good sense," *id.* at 1334, and is consistent with its text and context, as well as Supreme Court precedent.

1. The text of § 924(c)(3)(B) is consistent with a case-specific approach.

In order for an "offense" to be a crime of violence under § 924(c)(3)(B), it must, "by its nature, involve[ ] a substantial risk that physical force … may be used in the course of committing the offense." That language comports with a case-specific approach.

As the Supreme Court recognized in *Nijhawan v. Holder*, "in ordinary speech words such as 'crime,' 'felony,' 'offense,' and the like … sometimes refer to the specific acts in which an offender engaged on a specific occasion." 557

U.S. 29, 33-34 (2009). The Court interpreted a provision that used the term "offense" to "call[] for a 'circumstance-specific,' not a 'categorical,' interpretation." *Id.* at 36; *cf. United States v. Hayes*, 555 U.S. 415, 426 (2009) (construing statute referring to "an offense … committed by a current or former spouse," as contemplating a factual, rather than a categorical, inquiry); *see also Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) (language at issue in *Hayes* was exact type Congress would employ as an instruction "to look into the facts" of a crime). Section 924(c)(3)(B)'s similar reference to "committing the offense" can thus reasonably be understood to refer to the specific criminal conduct at issue in the § 924(c) prosecution.

Section 924(c)(3)(B) also uses the term "involves," a term Congress repeatedly used in other provisions of the Comprehensive Crime Control Act of 1984 (the enactment that contained § 924(c)'s original "crime of violence" definition) in a manner that requires courts to consider a defendant's underlying conduct. *See, e.g.*, Pub. L. No. 98-473, § 4243, 98 Stat. 1837, 2059 (Oct. 12, 1984) (elevating burden of proof for release in offenses "involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage"); *id.* at § 502, 98 Stat. 2068 (establishing penalties for drug offenses "involving" specific quantities and types of drugs); *id.* at § 1952B, 98 Stat. 2137 (defining violent crimes in

aid of racketeering to include "attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury"). Although the rule is not invariable, it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (citations omitted). Applying that canon makes particular sense in this context because the Supreme Court has previously relied on the *absence* of the word "involves" as indicating that a categorical approach *is* required. *See Taylor v. United States*, 495 U.S. 575, 600-01.

A jury can readily determine whether a defendant's underlying "offense … by its nature, involves" the use of physical force in the course of its commission without needing to consider what the "ordinary case" of that offense might be. The term "nature" refers to "the basic or inherent features, character, or qualities of something." Oxford Dictionary of English 1183 (3d ed. 2010). That "something" can be the defendant's own crime, rather than a stylized "ordinary case." Congress has, for example, instructed sentencing courts to consider "the nature and circumstances of the offense"—naturally understood as the defendant's own conduct—in determining the appropriate sentence in a federal criminal case. 18 U.S.C. § 3553(a)(1); *see also Dimaya*, 138 S. Ct. at 1254 n.7 (Thomas, J., dissenting) (citing other examples). A jury

finding the facts of a particular offense is equally well positioned to determine that offense's "nature," specifically whether it involved a substantial risk that force would be used in committing the offense.

2. The context of § 924(c)(3)(B) supports a case-specific approach.

The position and function of § 924(c)(3)(B) further suggest an inquiry that goes beyond the legal definition of an offense. As noted above, § 924(c)(3)(B) operates in tandem with § 924(c)(3)(A). By focusing solely on the "elements" of the crime, § 924(c)(3)(A) requires courts to look at the "statutory definition to see whether the elements of the offense" involve the use, threatened use, or attempted use of force. *Cardena*, 842 F.3d at 996-97. Section 924(c)(3)(B), however, is necessarily understood to cover offenses *other* than those covered by § 924(c)(3)(A). And because § 924(c)(3)(A) already covers all offenses that have the legal element of physical force, § 924(c)(3)(B)'s substantial-risk-of-force standard naturally invites an inquiry that goes outside the four corners of an offense's legal definition.

The customary way to apply a "qualitative standard such as 'substantial risk'" is to do so by reference "to real-world conduct," not Platonic legal constructs. *Johnson*, 135 S. Ct. at 2561. "[D]ozens of federal and state criminal laws" use such terms, and "almost all" of them "require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*."

Id. (emphasis in original). An "ordinary case" categorical approach is an anomaly, not the norm, and § 924(c)(3)(B)'s "substantial risk" inquiry can thus readily be understood as the kind of mixed question of law and fact that juries have long determined. *United States v. Gaudin*, 515 U.S. 506, 509-15 (1995). Juries have resolved mixed questions of law and fact in light of the case record before them since the Founding, *see id.* at 511-15, and they are fully capable of doing so in the context of § 924(c)(3)(B).

3. The reasons for applying the categorical approach to other statutes do not apply to § 924(c)(3)(B).

The Supreme Court has required an "ordinary case" categorical approach only in the context of statutes classifying prior convictions. The reasons for applying the categorical approach in that context do not extend to § 924(c)(3)(B), which instead applies only to the conduct giving rise to the current prosecution.

The Court first endorsed the categorical approach in *Taylor* for reasons largely specific to ACCA's focus on prior convictions. 495 U.S. at 600-02; *see also St. Hubert*, 883 F.3d at 1335. At the "heart of the decision" was a limitation on the amount of evidence about the circumstances underlying prior convictions parties could introduce for the first time at sentencing. *Shepard v. United States*, 544 U.S. 13, 23 (2005); *see Taylor*, 495 U.S. at 601 (explaining "the practical difficulties and potential unfairness of a factual approach" in

that context). Prior convictions "that are counted for an ACCA enhancement are often adjudicated by different courts in proceedings that occurred long before the defendant's sentencing." *Robinson*, 844 F.3d at 142. In such cases, the categorical approach serves the "'practical' purpose[]" of "promot[ing] judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact." *Moncrieffe v. Holder*, 569 U.S. 184, 200-01 (2013). The same is true for many statutes that incorporate § 16(b), including the immigration statute in *Dimaya*. *See Dimaya*, 138 S. Ct. at 1218 (plurality opinion) (observing that "utter impracticability" and "associated inequities" of fact-based approach are "as great" in the context of classifying prior convictions under § 16(b) as they were under ACCA).

As explained in cases following *Taylor*, a judge's resolution of the disputed facts underlying a defendant's prior conviction at sentencing would also be "too much like" the kind of factfinding that the Sixth Amendment requires the jury to conduct. *Shepard*, 544 U.S. at 25 (plurality opinion). Thus, in the context of ACCA's residual clause, the categorical approach was necessary to comply with the "rule of reading statutes to avoid serious risks of unconstitutionality." *Id.* The same is true of many criminal statutes that incorporate § 16(b). *See, e.g.*, 8 U.S.C. §§ 1326(b)(2), 1101(a)(43)(F).

For those practical and constitutional reasons, "[t]he categorical approach serves a purpose when evaluating prior state convictions committed long ago in fifty state jurisdictions with divergent laws." *St. Hubert*, 883 F.3d at 1336. But it does not serve that purpose in the context of § 924(c)(3)(B), where a jury has the facts of the underlying federal offense before it and must determine whether the defendant committed that offense before deciding whether the defendant's use, carrying, or possession of a gun violated § 924(c). In that circumstance, "[t]he remedial effect of the 'categorical' approach is not necessary." *Robinson*, 844 F.3d at 141.

This Court has considered this fact-specific approach when interpreting the definitions of "crime of violence" and "controlled substance offense" in U.S.S.G. § 4B1.2. *United States v. Musgraves*, 883 F.3d 709, 714-15 (7th Cir. 2018). Though it did not decide the "question of first impression," it acknowledged that the categorical framework perhaps should not apply to the "offense of conviction" as compared with prior convictions. *Id.*; *see also, e.g.*, *United States v. Perez-Jiminez*, 654 F.3d 1136, 1140-41 (10th Cir. 2011) ("[T]he practical difficulties of conducting an ad hoc mini-trial[ ] require application of the categorical approach to *past* convictions," but court "may apply a conduct-specific inquiry to *instant* offenses because these concerns do not apply when the court is examining the conduct of the defendant in the instant offense.").

Nor does an underlying-conduct approach give rise to any Sixth Amendment concerns. "[A]ny fact that increases the penalty for a crime" under § 924(c) *is* "submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see Robinson*, 844 F.3d at 143.

In the context of § 924(c)(3)(B), constitutional concerns counsel in favor of a case-specific, rather than a categorical, approach. A court is "obligated to construe [a] statute to avoid [constitutional] problems" if it is "'fairly possible'" to do so. *St. Cyr*, 533 U.S. at 300; *see Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). That is particularly true where, absent a reasonable limiting construction, a statute could be deemed void for vagueness. *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909). This Court should not, therefore, lightly conclude that Congress intended § 924(c)(3)(B) to be applied in a manner that would render the statute unconstitutionally vague. Instead, the better interpretation of § 924(c)(3)(B) in light of *Dimaya* is that the statute permits a jury to consider the defendant's real-world conduct in determining whether his offense qualifies as a crime of violence.

D. Under the case-specific approach, Defendants have not shown their convictions are plainly erroneous.

For the reasons explained above, § 924(c)(3)(B) does not require the categorical approach. Consequently, it is not unconstitutionally vague. The

district court thus erred in concluding that, as a matter of law, kidnapping could not qualify as a crime of violence. On this record, it is not plain that the constitutional rights of the defendants were violated. They therefore are not entitled to relief.

Since defendants pled guilty and did not challenge their § 924(c) convictions on direct appeal, they have procedurally defaulted their claim. *Bousley v. United States*, 523 U.S. 614, 621 (1998). They are thus entitled to have their claim reviewed only if they can show that they are "'actually innocent'" of violating § 924(c). *Id.* at 623. Actual innocence "means factual innocence, not mere legal insufficiency." *Id.*, citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992).

Adopting the case-specific approach, the defendants cannot show that they are factually innocent of violating § 924(c). A defendant violates the statute if he or she possesses (or aids and abets the possession of) a firearm in furtherance of a kidnapping, and if that kidnapping involved a substantial risk that physical force against another may be used. A risk is "substantial" if it is "[o]f ample or considerable amount," as opposed to unlikely, small, or negligible. *Life Technologies Corp. v. Promega Corp.*, 137 S. Ct. 734, 740 (2017) (internal quotation marks omitted). And "physical force" means "'force capable of causing physical pain or injury'" to a person. *Dimaya*, 138 S. Ct. at 1220

(quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)). The "threshold" for physical force "is not a high one; a slap in the face will suffice." *United States v. Duncan*, 833 F.3d 751, 754 (7th Cir. 2016).

At the change of plea hearing, each defendant accepted the government's factual basis. (Buf. Tr. 32-33; Toney Tr. 33-36). Both admitted that Bufkin, at Toney's direction, pointed a firearm at the victim. They used this threat of force to cause the victim to submit to being duct-taped and stuffed in his own car. He was driven around for five hours. The active brandishing of the firearm, the duct-taping of the victim, and the placement of the victim in his car trunk all presented a significant risk of physical pain or injury. The defendants are not actually innocent, and thus cannot mount a successful attack on their convictions.

Even if the Court were to excuse the procedural default, the defendants are not entitled to withdraw their guilty pleas. It is true that at the change of plea hearings the district court (understandably) did not tell the defendants the government would have to prove their crime involved a substantial risk that physical force against another may be used. Yet to prevail on their claims now, the defendants must show a reasonable probability that, but for this error, they would not have pled guilty. *United States v. Dominguez Benitez*, 542 U.S. 74, 82-83 (2004). Here the evidence that the defendants' kidnapping

involved a substantial risk that physical force may be used was strong. Moreover, the defendants received significant benefits by pleading guilty. Each had the kidnapping charge against them dropped, despite their confession to committing that offense. Bufkin benefited even further from a government motion under U.S.S.G. § 5K1.1 based on his agreement to cooperate. There is no reason at all to think that the defendants, had they been informed of the additional element, would have declined to plead guilty to the § 924(c) offense.

For all these reasons, this Court should affirm both defendants' § 924(c) convictions.

II. If this Court finds plain error in defendants' convictions, it should either order resentencing on the kidnapping offense or allow the kidnapping count to go forward.

If this Court disagrees with the government's position and finds § 924(c)(3)(B) unconstitutional, it should vacate Toney and Bufkin's § 924(c) convictions. However, rather than wipe defendants' records clean when they undisputedly committed violent acts, this Court should remand for resentencing and entry of judgment on the kidnapping offense. Alternatively, the Court should unwind the plea agreement, allowing the case to proceed solely on the kidnapping count.

1. This Court should remand for resentencing on the kidnapping count.

Convictions under § 924(c) require a jury to find (or the defendant to admit through a plea) that the defendant "committed all the acts necessary to be subject to punishment for" a qualifying federal crime and that his commission of that crime had a sufficient nexus to his brandishing of a firearm. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999); *United States v. Moore*, 763 F.3d 900, 908 (7th Cir. 2014) (government has to prove each element of "crime of violence" to obtain § 924(c) conviction). Thus, the elements of a crime of violence are "a subset of those [elements] of the greater offense," meaning the crime of violence is a lesser-included offense of the § 924(c) count. *United States v. Jones*, 600 F.3d 847, 855 (7th Cir. 2010); *see also Rutledge v. United States*, 517 U.S. 292, 297-98 (1996) (setting forth test of lesser included offenses).

In pleading guilty to a § 924(c) offense, a defendant necessarily admits all the elements of an underlying federal offense. Here the district court told the defendants that the government would have to prove they committed a kidnapping, and each admitted they committed that crime. Defendants likewise admitted all facts necessary to show they violated 18 U.S.C. § 1201.

In instances like this, "federal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser included

offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense." *Rutledge*, 517 U.S. at 306; *see also, e.g., United States v. Sepúlveda-Hernández*, 752 F.3d 22, 28 (1st Cir. 2014) (collecting cases); *United States v. Skipper*, 74 F.3d 608, 611-12 (5th Cir. 1996); *United States v. Thomas*, 274 F.3d 655, 672-73 (2d Cir. 2001); *United States v. Peterson*, 622 F.3d 196, 205-07 (3d Cir. 2010). This authority stems from Congress' decision that courts of appeals "may affirm, modify, vacate, set aside or reverse any judgment … and direct the entry of such appropriate judgment … as may be just under the circumstances." 28 U.S.C. § 2106.

Once an appellate court has determined that the evidence fails to support a greater offense, it can remand for resentencing on a lesser offense once it considers whether the "evidence is sufficient to sustain each and every element of a different offense; [ ] whether that different offense is a lesser included offense of the offense of conviction; and [ ] whether any injustice or unfair prejudice will inure to the defendant by directing entry of a conviction for the lesser included offense." *Sepulveda-Hernandez*, 752 F.3d at 29. There is no prejudice here since the defendants have had "fair adjudication of guilt on all elements of the" kidnapping and have admitted all legal and factual elements of the offense. *Austin v. United States*, 382 F.2d 129, 142-43 (D.C. Cir.

1967); *cf. United States v. Smith*, 13 F.3d 380, 383 (10th Cir. 1993) (defendant is not prejudiced just because he is convicted of lesser-included offense).

Rather, it would be prejudicial to the justice system if defendants were allowed to kidnap an individual at gunpoint, admit to that offense, and yet walk away without a conviction simply because recent Supreme Court precedent interacts to technically exclude kidnapping from the scope of § 924(c)(3). This Court should therefore remand so that the district court can enter judgment on the kidnapping count.

2. Alternatively, this Court should reinstate the kidnapping count and allow the case to proceed accordingly.

If this Court concludes that the defendants' § 924(c) convictions are unconstitutional but declines to enter judgment on the kidnapping charge, the proper remedy still is not to vacate the convictions and close the case, as the district court seems to have done. Rather, this Court should vacate the guilty pleas and direct the district court to reinstate the kidnapping counts.

A. This Court should reinstate because there was a mutual mistake in relation to the plea agreement.

In interpreting plea agreements, courts apply ordinary contract principles, subject to the constraints of equity and due process. *United States v. Williams*, 198 F.3d 988, 993 (7th Cir. 1999). Voiding or rescinding a contract is the proper remedy where "a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a

material effect on the agreed exchange of performances." Restatement (Second) of Contracts § 152(1).

18 U.S.C. § 3296 provides for just that result. It directs that the district court "shall … reinstate[ ]" any counts of an indictment or information dismissed pursuant to a plea agreement if:

> (1) the counts sought to be reinstated were originally filed within the applicable limitations period;
>
> (2) the counts were dismissed pursuant to a plea agreement approved by the District Court under which the defendant pled guilty to other charges;
>
> (3) the guilty plea was subsequently vacated on motion of the defendant; and
>
> (4) the United States moves to reinstate the dismissed counts within 60 days of the date on which the order vacating the plea becomes final.

18 U.S.C. § 3296(a).

All of those conditions are met here. First, Toney and Bufkin were indicted less than a month after they kidnapped the victim. Second, the kidnapping charges were dismissed as a condition of the defendants' guilty pleas to § 924(c) counts. Third, the convictions based on the defendants' pleas admitting guilt on the § 924(c) count have been vacated based on the defendants' § 2255 motions. Fourth, the order vacating the plea has been appealed and has not yet become final.

Reinstating the kidnapping counts is consistent with this Court's well-established precedent. This Court has repeatedly made clear that, upon a showing that a defendant has pled guilty to an infirm count of conviction, the remedy is not outright acquittal, but instead withdrawal of the guilty plea, after which "the government could proceed … on the other counts." *United States v. Angelos*, 763 F.2d 859, 862 (7th Cir. 1985); see also *United States v. Barnett*, 415 F.3d 690, 693 (7th Cir. 2005).

For example, in *United States v. Anderson*, 514 F.2d 583 (7th Cir. 1975), a defendant stole $35 by pointing a gun at a bank teller. The defendant was originally charged with bank robbery with a dangerous weapon, but that charge was dismissed based on the defendant's plea to an information charging a lesser-included offense. *Id.* at 585. When the parties discovered that the agreed upon sentence exceeded the lesser included offense's statutory maximum penalty, the defendant was granted § 2255 relief, but the government was permitted to recharge the greater offense. *Id.* at 585, 587-589. The government "conditionally relinquished" its right to prosecute on the greater offense only while the defendant "remained convicted" of the lesser one. *Id.* at 587. "When the [lesser] conviction was vacated the condition precedent to the government's agreement not to prosecute no longer existed." *Id.*

The remedy applies regardless of whether in a given situation it tends to benefit the government or the defendant. For example, in *United States v. Bradley*, 381 F.3d 641, 643 (7th Cir. 2004), the defendant initially pled guilty to both a drug count and a § 924(c) count. When this Court found that no factual basis existed for the § 924(c) count, it found that the appropriate remedy was not to vacate the § 924(c) conviction while leaving the remaining count intact, but instead to vacate the entire plea agreement and revert the case to the pre-plea stage. *Id.* at 648. Because "[b]oth parties were mistaken as to the nature of the § 924(c) charge … the entire agreement is invalidated." *Id.* Having found that mutual mistake, the Court had to "discard the entire agreement" and direct the parties to "begin their bargaining all over again." *Id.* quoting *United States v. Barnes*, 83 F.3d 934, 941 (7th Cir. 1996).

The remedy makes sense, as it reverts all parties back to the point where a mistake was made. Here all parties reasonably believed it was a federal crime to use a firearm to kidnap someone. The government never would have agreed to dismiss a perfectly valid charge (kidnapping) to which the defendants had confessed that expressly covered their extraordinary criminal conduct had it known the alternative charge (§ 924(c)) might be constitutionally infirm.

The remedy question arose several times in other federal appeals courts in the wake of *Bailey v. United States*, 516 U.S. 137 (1995), a decision that

narrowed the scope of § 924(c) and revealed that many defendants had pled guilty to or been convicted based on conduct that did not state a § 924(c) offense. Courts found that "when the district court, pursuant to a motion filed by a defendant, vacates that defendant's plea-bargain sentence pursuant to 28 U.S.C. § 2255," the government "may reinstitute counts it dismissed pursuant to a plea agreement" under the contract law doctrine of frustration of purpose. *United States v. Bunner*, 134 F.3d 1000, 1002, 1004-1005 (10th Cir. 1998). The purpose of a plea agreement is frustrated when it turns out that the acts admitted do not constitute a federal crime because at the heart of any plea agreement is the promise "that the defendant will substantially serve the sentence imposed on the basis of conduct that the defendant has admitted." *United States v. Green*, 139 F.3d 1002, 1004 (4th Cir. 1998). Because the entire purpose of the contract is frustrated by the discovery that the admitted conduct was not a federal crime, the remedy is to return the parties "to the positions they occupied before Defendant entered his guilty plea." *Bunner*, 134 F.3d at 1005; see also *United States v. Podde*, 105 F.3d 813, 817 (2d Cir. 1997) ("[I]t is well-settled that double jeopardy does not apply to the original counts in an indictment when a defendant has withdrawn or successfully challenged his plea of guilty to lesser charges."); *Green*, 139 F.3d at 1005 ("the change in the law and the successful § 2255 motion frustrated the purpose of the plea

agreement and permitted the government to reinstate previously dismissed charges"); *but see United States v. Sandoval-Lopez*, 122 F.3d 797, 802 (9th Cir. 1997) (Reinhardt, J.) (disagreeing with other courts and concluding that appropriate remedy is outright dismissal of all charges). That result is proper even if the effect of the plea agreement withdrawal is the potential the defendant could receive a substantially longer sentence on the new charge. *United States v. Moulder*, 141 F.3d 568, 570-572 (5th Cir. 1998); see also *Alabama v. Smith*, 490 U.S. 794, 798-803 (1989) (defendant who withdraws plea can receive higher sentence on reinstated charges).

This Court did not face a directly analogous case in the *Bailey* context. Nonetheless, it did endorse the "package" concept in dealing with the fallout from *Bailey*. For example, in *United States v. Smith*, 103 F.3d 531, 532 (7th Cir. 1996), a defendant was convicted at trial of an underlying drug charge and a § 924(c) charge. He received a 16-month sentence on the drug charge and a 60-month sentence on the § 924(c) charge. *Id.* He succeeded in having the § 924(c) charge vacated in light of *Bailey*, but argued that he was not challenging his 16-month sentence on the drug charges, which should simply stand. *Id.* at 532-533. This Court rejected that argument, finding that vacatur of the § 924(c) conviction "radically changes the sentencing package." *Id.* at 534. It consequently upheld resentencing on the drug counts. *Id.* at 535.

Taking the lead from these cases, this Court should direct the district court to reinstate the kidnapping count (Count 1) and revert Toney and Bufkin's case to its pre-plea stage.

B. Alternatively, the Court should permit reinstatement under the plain terms of the plea agreement.

Even were the Court to conclude that reinstatement of prior pending charges is not the appropriate remedy in all § 924(c) cases affected by *Johnson* and *Dimaya*, it should still find that reinstatement of the kidnapping count is appropriate here under the plain terms of the defendants' plea agreements. Both plea agreements contain express provisions waiving collateral attacks on their conviction or sentence. (R. 32, ¶ 7(e); R. 24, ¶ 7(f)). Defendants stated they understood those terms as well as the paragraphs discussing what would happen if they violated the agreement. (R. 32 ¶ 9; R. 24 ¶ 9). Despite promising not to do so, the defendants contested their convictions through a post-conviction proceeding under 28 U.S.C. § 2255. That violates the plea agreement. See *United States v. Worthen*, 842 F.3d 552, 555 (7th Cir. 2016) (finding that defendant's *Johnson* challenge on appeal to validity of § 924(c) conviction violated plea agreement); *United States v. Carson*, 855 F.3d 828 (7th Cir.), *cert. denied*, 138 S. Ct. 268 (2017). Upon such a breach, the government may elect either specific performance of the plea agreement (*i.e.*, enforcement of the promise not to appeal) or rescission of the plea agreement and any

benefits that flowed to the defendant. *United States v. Hare*, 269 F.3d 859, 862-863 (7th Cir. 2001).

Here the United States forewent the remedy of specific performance, permitting the defendants, at their free choice and election, to breach their plea agreements and argue on the merits that their admitted misconduct no longer constitutes a crime. At the same time, it does seek to enforce the remedy of rescission, as it is in the interest of justice. Both defendants confessed to the police and admitted under oath that they lured an unsuspecting man across state lines. They held him at gunpoint. They duct taped his mouth, arms, and legs. They ordered him into the trunk of his own car and drove him around, still bound, for hours.

Absent reinstatement of the kidnapping charge, the net effect of affirming the district court's order vacating the § 924(c) charge is to remove the defendants' criminal convictions and preclude their just punishment. Such an approach permitting defendants to make promises in plea agreements and later breach those promises would render plea agreements "meaningless." *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987); see also *Worthen*, 842 F.3d at 555 (noting the many benefits defendants receive from enforcement of plea agreements). In exchange for their admissions of guilt, the defendants received 60 (Bufkin) and 84 (Toney) month sentences, far below the guideline range for

kidnapping crimes. See U.S.S.G. § 2A4.1(a)(3) & U.S.S.G. § 5A (Table) (providing for an offense level of 34 for kidnapping with a dangerous weapon, corresponding to a guideline range of at least 151-188 months). It would produce an unjustified windfall to allow the defendants to keep these benefits and walk away without at least the potential of receiving felony convictions for their admitted misdeeds.

CONCLUSION

For the foregoing reasons, the Court should affirm defendants' § 924(c) convictions. Alternatively, it should remand for resentencing and entry of judgment on the kidnapping count (Count 1), or remand with instructions to the district court to vacate the guilty pleas and proceed to trial on Count 1.

Respectfully submitted,

THOMAS L. KIRSCH II
United States Attorney

DAVID E. HOLLAR
Assistant United States Attorney
Chief, Appellate Division

By: */s/ Nathaniel L. Whalen*
Nathaniel L. Whalen
Assistant United States Attorney
United States Attorney's Office
Northern District of Indiana
5400 Federal Plaza, Suite 1500
Hammond, IN 46320
(219) 937-5500

RULE 32 CERTIFICATION

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 7,515 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Word word processing program, with thirteen point Century Schoolbook font.

/s/ Nathaniel L. Whalen
Nathaniel L. Whalen
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Jessica Taulbee
Jessica Taulbee
Legal Assistant