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.
Nos. 2:16-CV-236 & 2:16-CV-181
Hon. Joseph S. Van Bokkelen, *Judge*.

BRIEF AND APPENDIX FOR THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 17-3306 & 17-3307

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

BRIEF FOR THE UNITED STATES

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 18 U.S.C. § 3231 over the motions of Petitioners Dedrick Bufkin and Diamond Toney under 28 U.S.C. § 2255 to vacate and set aside their convictions and sentences. R. 71, 74; *Harris v. Warden*, 425 F.3d 386, 388 (7th Cir. 2005).[1]

On September 15, 2017, the district court entered a joint opinion and order vacating both defendants' convictions. R. 85 (App. 1-4). Final judgments

[1] Citations to the district court record in the underlying criminal case (Northern District of Indiana Docket No. 2:13-CR-54) are designated as "R." Citations to the appendix are "App."

on both petitioners' Section 2255 motions were initially entered on September 15, 2017. R. 86, 87. Amended final judgments correcting a clerical error (an omitted statutory citation) were entered on September 18, 2017. R. 89, 90 (App. 5-6).

On November 3, 2017, the United States timely filed notices of appeal. R. 110, 111; see also Fed. R. App. P. 4(a)(1)(B)(i). No motions were filed affecting the time for filing a notice of appeal. This Court has jurisdiction over these appeals pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253(a).

STATEMENT OF ISSUE

Is the definition of the term "crime of violence" in 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague?

STATEMENT OF THE CASE

I. Procedural History

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. App. 1-4. 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 district court vacated the convictions, concluding that, in light of *United States v. Jenkins*, 849 F.3d 390, 393-394 (7th Cir. 2017), *petition for cert. filed* (U.S. July

19, 2017) (No. 17-97), kidnapping is not a crime of violence, so petitioners were actually innocent of the sole offense to which they pled guilty. App. 3-4.

II. Offense Conduct

In March 2013, Toney created a dating website profile ("Spooky300"), intending to lure men she met to discreet locations, where she would rob them with the help of her boyfriend Bufkin. R. 47, at 8; R. 60, at 3; R. 61, ¶¶ 6, 12. Through the website, Toney began communicating with an Illinois man, KB. R. 61, ¶¶ 6-7. After chatting online for about three days, Toney asked KB to meet her at a Merrillville, Indiana, intersection at 10:00 p.m. on March 20, 2013. R. 60, at 4; R. 61, ¶¶ 6-8.

When KB arrived, he saw Toney walking alone. R. 60, at 4; R. 61, ¶ 9. He pulled over and opened the passenger door. *Ibid.* Bufkin appeared at the driver's door, pointed a handgun at KB's head, and ordered him out of the car. *Ibid.* Toney produced duct tape and taped KB's legs, arms, and mouth. *Ibid.* The pair stole KB's cell phone and wallet and ordered him into the trunk of his car. *Ibid.* Toney and Bufkin drove around Merrillville for about four hours plotting other potential robberies. R. 61, ¶¶ 9-10. Eventually, they took KB out of the trunk, told him where his keys were, and fled. R. 61, ¶ 10.

KB removed his restraints and called the police. R. 61, ¶ 10. Through investigation, the police connected the Spooky300 online profile to Toney. R. 61, ¶¶ 10-11. Officers interviewed Toney and Bufkin, who each confessed to

robbing and kidnapping KB. R. 60, at 5; R. 61, ¶ 11. Toney admitted she came up with the plan and asked Bufkin to assist. R. 47, at 9; R. 61, ¶ 12.

III. Guilty Pleas and Sentencing

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

In June 2013, Bufkin agreed to plead guilty to the Section 924(c) count pursuant to a plea agreement. R. 24, ¶ 7(a). As part of the agreement, the government agreed to dismiss the kidnapping count and to consider filing a motion under U.S.S.G. § 5K1.1 based on Bufkin's cooperation against Toney. R. 24, ¶¶ 7(c)-(e).

In August, Toney similarly pled guilty to Count 2 with an agreement to dismiss the kidnapping count. R. 32, ¶¶ 7(a), 7(d). Her agreement did not contain a 5K provision. The district court ultimately sentenced Bufkin to 60 months' imprisonment (plus 2 years' supervised release) and Toney to 84 months' imprisonment (plus 3 years' supervised release). R. 56, 69.

IV. Motions to Vacate Convictions

In 2016, Toney and Bufkin filed identical motions under 28 U.S.C. § 2255 to vacate their Section 924(c) convictions in light of *Johnson v. United States*,

135 S. Ct. 2551 (2015). R. 71, 74. They argued that kidnapping could qualify as a Section 924(c) "crime of violence" only 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. They argued they had thus been unconstitutionally convicted of a non-existent federal offense and asked the district court to vacate their convictions and sentences. R. 71, at 1-2, 17; R. 74, at 1-2, 17.

The district court granted both defendants' motions. App. 1-4. It concluded that kidnapping does not qualify as a "crime of violence" under 18 U.S.C. § 924(c) in light of this Court's decision in *Jenkins*, 849 F.3d at 393-394. App. 3-4. The court entered separate civil judgments vacating each defendant's Section 924(c) conviction. App. 5-6.

SUMMARY OF THE ARGUMENT

18 U.S.C. § 924(c)(3)(B) is constitutional. Admittedly, the provision, like the residual clause in the Armed Career Criminal Act ("ACCA") ruled unconstitutional in *Johnson*, requires a court to assess the risk posed by the ordinary case of a particular offense. But there the similarity ends. The risk analysis under Section 924(c)(3)(B) materially differs from the open-ended risk assessment necessitated by ACCA's unconstitutional residual clause. Section 924(c)(3)(B) is expressly limited to risks that occur "in the course of committing

the offense," while ACCA's residual clause included risks that could arise after the offense's completion. Likewise, Section 924(c)(3)(B) focuses on a sharply defined category of risk—the use of physical force against persons or property in the course of committing an offense involving firearms—whereas ACCA's residual clause included any crime that entailed a present or future risk of injury. Moreover, *Johnson* found ACCA's accompanying list of exemplar offenses with vastly different risk levels exacerbated the text's imprecision, but Section 924(c)(3)(B) contains no such list.

Recognizing this Court's contrary authority in *Jenkins*, the United States respectfully maintains that Section 924(c)(3)(B) is constitutional. If the residual clause remains in force, kidnapping qualifies as a crime of violence under that clause. The district court therefore erred in setting aside Toney and Bufkin's convictions for using a firearm in furtherance of KB's kidnapping.

ARGUMENT

I. 18 U.S.C. § 924(c)(3)(B) Is Constitutional

A. Standard of review

This Court reviews a district court's decision to grant a Section 2255 motion de novo. *McCleese v. United States*, 75 F.3d 1174, 1177 (7th Cir. 1996). Toney and Bufkin forfeited their constitutional vagueness challenges to their Section 924(c) convictions by not raising them earlier. Although the United States responded to the defendants' Section 2255 motion in the district court on

the merits, that motion raised a constitutional argument that should have been made pre-trial in the form of a motion to dismiss Count 2 of the indictment. This "argument not only *could* have been presented by pretrial motion but also *had* to be so presented under Fed. R. Crim. P. 12(b)(3)(B)(v), which provides that 'failure to state an offense' is the sort of contention that 'must' be raised before trial." *United States v. Wheeler*, 857 F.3d 742, 744 (7th Cir. 2017), *cert. denied,* 2018 WL 311462 (Jan. 8, 2018) (emphasis in original). Since the defendants failed to timely raise their Section 924(c) constitutional challenges, this Court should consider the merits of defendants' claim only through the lens of plain error. *See United States v. Fox*, 650 Fed. App. 734, 736-738 (11th Cir. 2016), *cert. denied,* 137 S. Ct. 1224 (2017) (reviewing for plain error and rejecting post-conviction *Johnson* challenge to constitutionality of Section 924(c)); *United States v. Campbell*, 775 F.3d 664, 668 (5th Cir. 2014) (applying plain error review to post-trial challenge to Section 924(c)).

B. Analysis

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 use or carry 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" (the "residual clause"). 18 U.S.C. § 924(c)(3).

This Court has held that, in light of *Johnson*, Section 924(c)'s residual clause is unconstitutionally vague. *See United States v. Cardena,* 842 F.3d 959, 996 (7th Cir. 2016), *cert. denied*, 138 S. Ct. 247 (2017) (defense petition); *Jenkins*, 849 F.3d at 394. Recognizing this adverse precedent, but seeking to preserve its argument for further review, the United States respectfully maintains that § 924(c)'s residual clause is constitutional and was unaffected by *Johnson*. That position is consistent with the decisions of every circuit, other than this one, to have decided the issue. *See United States v. Eshetu*, 863 F.3d 946, 953-955 (D.C. Cir. 2017); *Ovalles v. United States*, 861 F.3d 1257, 1267 (11th Cir. 2017) ("*Cardena* does not convince us."); *United States v. Davis*, 677 Fed. App. 933, 936-937 (5th Cir. 2017) (per curiam), *petition for cert. filed* (U.S. Apr. 14, 2017) (No. 16-8777); *United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016) (per curiam), *petition for cert. filed* (U.S. Dec. 28, 2016) (No. 16-7373); *United States v. Hill*, 832 F.3d 135, 145-149 (2d Cir. 2016); *United States v. Taylor*, 814 F.3d 340, 375-379 (6th Cir. 2016), *petition for cert. filed* (U.S. Oct. 6, 2016) (No. 16-6392); *see also United States v. Ponzo*, 853 F.3d 558, 585-586 (1st Cir. 2017), *petition for cert. filed* (U.S. Oct. 27, 2017) (No. 17-624) (rejecting vagueness challenge under plain error review); *United States v.*

Graham, 824 F.3d 421, 424 n.1 (4th Cir. 2016) (en banc), *petition for cert. filed* (U.S. Sept. 26, 2016) (No. 16-6308) (same).

Johnson held that "[t]wo features of the [ACCA's] residual clause conspire to make it unconstitutionally vague." 135 S. Ct. at 2557. First, ACCA's residual clause required judges not only to assess risk of violence in an ordinary case, but also to "imagine how the idealized ordinary case of the crime subsequently plays out"—that is, whether the ordinary offender "might engage in violence *after*" completing the offense. *Id.* at 2557-2558 (emphasis in original). The ACCA residual clause's consideration of post-offense conduct was the fundamental source of its "indetermina[te]," "wide-ranging inquiry." *Id.* at 2557; *see also id.* at 2559 (noting that "remote" physical injury could qualify under the ACCA, but that the clause does not indicate "how remote is too remote"); *cf. Paroline v. United States*, 134 S. Ct. 1710, 1717 (2014) ("The full extent of [a] victim's suffering is hard to grasp.").

In contrast to ACCA, which asked whether the crime entailed "conduct that presents a serious potential risk of physical injury to another," a remote or attenuated potential use of force or injury is not enough to satisfy Section 924(c)(3)(B). Like 18 U.S.C. § 16(b) (the constitutionality of which is under consideration in *Sessions v. Dimaya*, 137 S. Ct. 31 (2016)), the residual clause in Section 924(c)(3)(B) asks whether risk arises "in the course of committing the offense." Section 924(c)(3)(B) therefore excludes risk arising after the

offense is completed, which was significant to the Supreme Court in *Johnson*. The statute's plain text also clarifies that the substantial risk that physical force will be used in committing the offense must stem from the nature of the acts that constitute the offense ("in the course of committing the offense").

In short, unlike ACCA's residual clause, the residual clause in Section 924(c)(3) does not require courts to go "beyond evaluating the chances that the physical acts that make up the crime will injure someone" and to evaluate the risk for injury "*after*" completion of the offense, *Johnson*, 135 S. Ct. at 2557 (emphasis omitted). This textual limitation both temporally and functionally restricts the scope of the risk analysis. *Eshetu*, 863 F.3d at 954-955; *Ovalles*, 861 F.3d at 1266; *Davis*, 677 Fed. App. at 936; *Prickett*, 839 F.3d at 699; *Taylor*, 814 F.3d at 377.

Second, ACCA covered any offense posing a serious potential risk that "physical *injury*" will occur. 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). By contrast, Congress limited Section 924(c)(3)(B) to a more concrete type of risk. Specifically, the latter statute requires that "physical force" against person or property may be "used" in the course of committing the offense. The use of physical force against the person or property of another is a much more specific and focused requirement than ACCA's risk-of-injury requirement. *Eshetu*, 863 F.3d at 954; *Ovalles*, 861 F.3d at 1266; *Davis*, 677 Fed. App. at 936; *Prickett*, 839 F.3d at 699; *Hill*, 832 F.3d at 148; *Taylor*, 814 F.3d at 376-377.

Indeed, in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Supreme Court contrasted 18 U.S.C. § 16(b) with the then-existing version of U.S.S.G. § 4B1.2(a)(2), which was identical to ACCA's residual clause. 543 U.S. at 10 n.7. The Supreme Court observed that, unlike U.S.S.G. § 4B1.2(a)(2), "[Section] 16(b) plainly does not encompass all offenses which create a 'substantial risk that" that injury will result from a person's conduct. The 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct." *Ibid.* Thus, the Supreme Court "plainly" expressed the view that Section 16(b), and, by extension, Section 924(c)(3)(B), is materially narrower than Section 4B1.2(a)(2) and, thus, ACCA's residual clause. *See Taylor*, 814 F.3d at 376 (finding language of Section 924(c)(3)(B) "distinctly narrower" than in ACCA).

In other words, Section 924(c)(3)(B) describes a more concrete and targeted range of conduct than did ACCA. Although a court still must determine the most likely ways in which a person would commit the offense, it need not speculate about a chain of causation that could possibly result in a victim's injury. It must determine only whether there exists a substantial risk that statutorily defined conduct—kidnapping someone, for example—would entail the use of physical force against property or another person.

Moreover, according to the Supreme Court in *Johnson*, ACCA's residual clause "le[ft] uncertainty about how much risk it takes for a crime to qualify as a violent felony," both because of the difficulty of "apply[ing] an imprecise

'serious potential risk' standard to ... a judge-imagined abstraction," and because "the residual clause forces courts to interpret 'serious potential risk' in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives." 135 S. Ct. at 2558. This problem does not plague Section 924(c)(3)(B). Congress did not include a confusing list of exemplar crimes in Section 924(c)(3)(B), and so freed courts from having to reconcile the different risks entailed in the listed offenses. *Eshetu*, 863 F.3d at 954; *Ovalles*, 861 F.3d at 1266; *Prickett*, 839 F.3d at 699-700; *Hill*, 832 F.3d at 146-147; *Taylor*, 814 F.3d at 377. Section 924(c)(3)(B) does not require courts to determine any substantive similarities between a set of enumerated offenses and then compare those similarities to unenumerated offenses. *See Johnson*, 135 S. Ct. at 2561 (observing that "'[t]he phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so.'" (emphasis in original)); *see also ibid.* (rejecting the dissent's argument that striking down the ACCA's residual clause would affect statutes like those cited by the government in its brief, almost none of which "link[] a phrase such as 'substantial risk' to a confusing list of examples.").

This Court's opinion in *United States v. Vivas-Ceja*, 808 F.3d 719, 723 (7th Cir. 2015), finding the residual clause in Section 16(b) unconstitutional, does not require a contrary result, nor would a consistent decision in *Dimaya*.

The residual clauses in Section 16(b) and Section 924(c)(3)(B) are similar insofar as they both define a crime of violence as any offense "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." But there are important distinctions between the statutes that confine the scope of Section 924(c)(3)(B) and make it not impermissibly vague.

Many statutes that incorporate 18 U.S.C. § 16(b)'s definition of crime of violence, including 8 U.S.C. § 1101(a)(43)(F), do so for the purpose of identifying predicate convictions that trigger heightened or further punishment, whether in the form of a recidivist enhancement or for purposes of deportation. *See Vivas-Ceja*, 808 F.3d at 720. In this way, Section 16(b)'s crime of violence definition functions similarly to the definition of crime of violence in the ACCA. The same is not true of Section 924(c)(3)(B). Unlike ACCA and Section 16(b), Section 924(c) does not identify predicate convictions for the purpose of analyzing punishment (or deportation) based on past conduct. Rather, a "crime of violence" under Section 924(c), if perpetrated with a sufficient nexus to a firearm, is a new and separate criminal offense. This distinction is important, for purposes of vagueness analysis, because only a narrow band of offenses can serve as predicate crimes of violence in this context.

Notably, the predicate crime of violence must be one prosecutable in a court of the United States. 18 U.S.C. § 924(c)(1)(A). The predicate crime of

violence also must be of the type where a firearm could be "used" or "carried"—that is, actively employed—not only in conjunction with the offense, but "during and in relation to" it. 18 U.S.C. § 924(c)(1). The statutory requirement of a direct connection between the federal crime of violence and the firearm's usage limits the list of predicate offenses to ones that could be committed with a sufficient nexus to a firearm. These limitations are not present in Section 16(b), which applies equally to all prior federal and state crimes that, by their nature, pose a substantial risk that physical force will be used during the offense, including but not limited to those crimes with a direct connection to firearm usage or the type of force associated with the active employment of a firearm.

In short, the very nature of a Section 924(c) offense limits application of the statute's crime of violence definition in a manner not considered by this Court in *Vivas-Ceja*. The unique circumstances under which Section 924(c) applies cabin its residual clause. In context, the necessity of a direct connection between the firearm and the predicate offense provides sufficient notice to individuals that their conduct is criminal and precludes a finding of vagueness.

Finally, assuming that Section 924(c)'s residual clause is constitutional, kidnapping qualifies as a crime of violence. *United States v. Green*, 521 F.3d 929, 932-933 (8th Cir. 2008). The district court thus erred in concluding that using a firearm in furtherance of a kidnapping was a non-existent offense. It should not have set aside the defendants' Section 924(c) convictions.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgments of the district court and reinstate the Section 924(c) convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 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/ Lorene B. Nelson
Lorene B. Nelson
Legal Assistant

RULE 30(d) CERTIFICATION

All materials required by Circuit Rule 30(a) and (b) included in the Appendix

/s/ DAVID E. HOLLAR
DAVID E. HOLLAR
Assistant United States Attorney

APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA v. DIAMOND TONEY and DEDRICK BUFKIN	Case No.: 2:13-CR-54 JVB

OPINION AND ORDER

Following Diamond Toney's and Dedrick Bufkin's guilty pleas to brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c), the Court sentenced them to imprisonment. According to the indictment, the predicate offense for the convictions—the crime of violence—was kidnapping as set out in 18 U.S.C. § 1201(a)(1). Following the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), both defendants moved to vacate their convictions pursuant to 28 U.S.C. § 2255(a). While they filed their petitions separately, they are identical. Therefore, the petitions can be addressed in a single order.

Both sides agree that the petitions are timely, but disagree whether kidnapping is in fact a crime of violence. And although both defendants had plea agreements with the government waiving their rights to contest their convictions collaterally as they're doing now,[1] the

[1] Both plea agreements contain the following waivers:

> . . . I expressly waive my right to appeal or to contest my conviction and my sentence or the manner in which my conviction or my sentence was determined or imposed, to any Court on any ground, including any claim of ineffective assistance of counsel unless the claimed ineffective assistance of counsel relates directly to this waiver or its negotiation, including any appeal under Title 18, United States Code, Section 3742 or any post-conviction proceeding, including but not limited to, a proceeding under Title 28, United States Code, Section 2255.

(Bufkin Plea Agreement, DE 24 at 4; Toney Plea Agreement, DE 32 at 4.)

government's response is silent on this issue. It's not clear whether this silence is by design so as to constitute the government's own waiver or an oversight so as to constitute a forfeiture. The Court will not second-guess the government, which knows its cases from the outset and knows them best. Whatever the reason, the plea agreement waiver question is not before the Court and the outcome of the § 2255 petition rests on the merits of the parties' arguments about whether kidnapping is a crime of violence as defined in § 924(c)(3).[2] As the Seventh Circuit Court of Appeals recently held in the context of a direct appeal, but which equally applies here, it is not. *See United States v. Jenkins*, 849 F.3d 390 (7th Cir. 2017).

As charged in this case, to establish guilt the government had to prove that each defendant brandished a firearm (or aided and abetted such brandishing) during and in relation to a crime of violence. (*See* Indict., Count 2, DE 15 at 2); 18 U.S.C. § 924 (c)(1)(A)(ii). Subsection 924(c)(3) defines a crime of violence as—

> an offense that is a felony and—
>
> > (A) has as element the use, attempted use, or threatened use of physical force against the person or property of another,[3] or
> >
> > (B) 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.[4]

Id.

As related to this case, the purported crime of violence was kidnapping. (Indict., Count 2, DE 15 at 2).

[2] Both defendants were also charged with the offenses of kidnapping in Count 1 of the indictment, but the government moved at each defendant's sentencing for that count to be dismissed.
[3] Subsection (A) is commonly called the "force clause."
[4] Subsection (B) is commonly called the "residual clause."

While the petitions to vacate the convictions were pending, the Court of Appeals for the Seventh Circuit issued an opinion in *United States v. Jenkins*, 849 F.3d 390. Defendants supplemented their briefs with a notice of this opinion to which the government has not responded.

Jenkins held that "[b]ecause the Residual Clause, § 924(c)(3)(B), is unconstitutionally vague and kidnapping under § 1201(a) does not have, as an element, the use, threatened use, or attempted use of physical force" defendant Jenkins's conviction had to be reversed. In that case, the government presented arguments that are repeated in the instant case but the Court of Appeals rejected them all. The government's error was to rely on pre-*Johnson* cases, *see Jenkins*, 849 F.3d at 394, and to conflate the "force clause" with the "residual clause," *id.* at 393.

None of the pre-*Johnson* cases cited by the government in *Jenkins* (nor any of such cases cited by the government here) "found that kidnapping had physical force as an element, and one even expressly stated that it does not." *Jenkins*, 849 F.3d at 394 (referring to *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1130 (9th Cir. 2012) ("The federal kidnapping statute has no force requirement . . . ."). Rather, while kidnapping generally invokes the images of great danger and violence, kidnapping can be "accomplished without physical force" as well. *Id.* at 393. After all, a person commits a kidnapping offense when he "unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person" and willfully transports him "in interstate or foreign commerce." 18 U.S.C. § 1201(a).

Both the first element of the offense—unlawfully seizing, confining, inveigling, decoying, kidnaping, abducting, or carrying away—and the second one—holding for ransom or reward or otherwise—can be accomplished without force, even if that is not the usual scenario

for kidnappings. That is to say, one cannot escape the charge of kidnapping if he can restrain himself from use of force and sets out to abduct another "civilly":

> For example, a perpetrator could lure his victim into a room and lock the victim inside against his or her will. This would satisfy the holding element of kidnapping under § 1201(a) without using, threatening to use, or attempting to use physical force.

Jenkins, 849 F.3d 390 at 393. While the government argues that kidnapping presents a constant danger of escalation, which could result in force being used even when none was planned, the force is simply not an element of the crime of kidnapping.

As for the residual clause of the definition of the crime of violence, that is, § 924(c)(3)(B), the Court of Appeals found it unconstitutionally vague. *See Jenkins*, 849 F.3d at 394 (citing *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016).

For these reasons, and because the government waived or forfeited any argument about the defendants being foreclosed from bringing § 2255 petitions in this Court, the Court grants both petitions and vacates § 924(c) convictions for both Defendant Diamond Toney and Defendant Dedrick Bufkin.

SO ORDERED on September 15, 2017.

s/ Joseph S. Van Bokkelen
JOSEPH S. VAN BOKKELEN
UNITED STATES DISTRICT JUDGE

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Indiana

DIAMOND TONEY

Plaintiff(s)

v.

Civil Action No. 2:16-cv-181
ARISING OUT OF 2:13-cr-54

UNITED STATES OF AMERICA

Defendant(s)

AMENDED JUDGMENT IN A CIVIL ACTION

The court has ordered that (*check one):*

☐ the plaintiffs _____ recover from the defendant _____ the amount of _____ $_____, plus post-judgment interest at the rate of _____ %.

☐ the plaintiff recover nothing, the action is dismissed on the merits, and the defendant _____ recover costs from the plaintiff _____.

X Other: The Petitioner's Motion to Vacate under 28 U.S.C. § 2255 is GRANTED and VACATES § 924(c) conviction.

This action was (*check one):*

☐ tried to a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

X decided by Judge Joseph S. Van Bokkelen

DATE: 9/18/2017

ROBERT TRGOVICH, CLERK OF COURT
by /s/Jason Schrader
Signature of Clerk or Deputy Clerk

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Indiana

DEDRICK BUFKIN

Plaintiff(s)

v.

Civil Action No. 2:16-cv-236
ARISING OUT OF 2:13-cr-54

UNITED STATES OF AMERICA

Defendant(s)

AMENDED JUDGMENT IN A CIVIL ACTION

The court has ordered that (*check one):*

☐ the plaintiffs _____ recover from the defendant _____ the amount of _____ $_____, plus post-judgment interest at the rate of _____ %.

☐ the plaintiff recover nothing, the action is dismissed on the merits, and the defendant _____ recover costs from the plaintiff _____.

X Other: The Petitioner's Motion to Vacate under 28 U.S.C. § 2255 is GRANTED and VACATES § 924(c) conviction.

This action was (*check one):*

☐ tried to a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

X decided by Judge Joseph S. Van Bokkelen

DATE: 9/18/2017

ROBERT TRGOVICH, CLERK OF COURT
by /s/Jason Schrader
Signature of Clerk or Deputy Clerk