

No. 17-6926

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IN THE SUPREME COURT OF THE UNITED STATES

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LAVADA CARREON, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 3-5) that the lower courts erred in denying a certificate of appealability on her claim that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015). She notes (Pet. 3) that a circuit conflict exists over whether Section 924(c)(3)(B) is constitutional and that this Court has granted review in Sessions v. Dimaya, No. 15-1498 (reargued Oct. 2, 2017), to decide whether the similarly worded definition of a "crime of violence" in 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's definition of the term "aggravated felony," 8 U.S.C. 1101(a)(43), is

unconstitutionally vague. The petition for a writ of certiorari should be held pending the decision in Dimaya and then disposed of as appropriate in light of that decision.

Petitioner was convicted of kidnapping, in violation of 18 U.S.C. 1201(a)(1) and 2, and of using a firearm during and in relation to a "crime of violence" (namely, the kidnapping), in violation of 18 U.S.C. 924(c)(1)(A) and 2. Judgment 1. Section 924(c) defines a "crime of violence" as a felony that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or, "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)(B).

The Fifth Circuit has not identified which subparagraph of the "crime of violence" definition in Section 924(c)(3) applies to kidnapping. See United States v. Phipps, 319 F.3d 177, 183 (2003) (holding that kidnapping is a "crime[] of violence" under "18 U.S.C. § 924(c)(3)"). The district court in this case likewise did not specify whether its conclusion that "kidnapping is a crime of violence" rested on Section 924(c)(3)(B). See Pet. App. A5 (citing Phipps, 319 F.3d at 183). Other courts of appeals, however, have determined that kidnapping qualifies as a crime of violence, if at all, under Section 924(c)(3)(B). See, e.g., United

States v. Jenkins, 849 F.3d 390, 393-394 (7th Cir. 2017), petition for cert. pending, No. 17-97 (filed July 19, 2017); United States v. Green, 521 F.3d 929, 932-933 (8th Cir. 2008). Because the validity of Section 924(c)(3)(B) is closely related to the issue currently before this Court in Dimaya, supra, the petition should be held pending the decision in Dimaya and then disposed of as appropriate in light of that decision.\*

Respectfully submitted.

NOEL J. FRANCISCO  
Solicitor General

JANUARY 2018

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\* The government waives any further response to the petition unless this Court requests otherwise.