

No. 17-97

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTWON D. JENKINS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the definition of the term “crime of violence” in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague.

TABLE OF CONTENTS

	Page
Opinion below.....	1
Jurisdiction.....	1
Statutory provisions involved.....	1
Statement	2
Reasons for granting the petition	5
Conclusion	8
Appendix A — Court of appeals opinion (Feb. 24, 2017).....	1a
Appendix B — Court of appeals order denying rehearing (Apr. 20, 2017).....	11a
Appendix C — District court amended judgment (Sept. 18, 2015).....	13a
Appendix D — Statutory provisions.....	18a

TABLE OF AUTHORITIES

Cases:

<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015).....	4, 5, 7
<i>Ovalles v. United States</i> , No. 17-10172, 2017 WL 2829371 (11th Cir. June 30, 2017)	5
<i>United States v. Cardena</i> , 842 F.3d 959 (7th Cir. 2016).....	4, 5
<i>United States v. Hill</i> , 832 F.3d 135 (2d Cir. 2016)	5
<i>United States v. Jenkins</i> , 772 F.3d 1092 (7th Cir. 2014).....	2
<i>United States v. Prickett</i> , 839 F.3d 697 (8th Cir. 2016), petition for cert. pending, No. 16-7373 (filed Dec. 28, 2016)	5
<i>United States v. Taylor</i> , 814 F.3d 340 (6th Cir. 2016), petition for cert. pending, No. 16-6392 (filed Oct. 6, 2016)	5
<i>United States v. Vivas-Ceja</i> , 808 F.3d 719 (7th Cir. 2015)	4, 5

IV

Statutes:	Page
Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).....	4
Immigration and Nationality Act, 8 U.S.C. 1101 <i>et seq.</i>	5
18 U.S.C. 16(b)	4, 5, 6, 7, 18a
18 U.S.C. 924(c).....	2, 3, 4, 5, 7
18 U.S.C. 924(c)(3)	3
18 U.S.C. 924(c)(3)(A).....	3, 6, 18a
18 U.S.C. 924(c)(3)(B).....	3, 4, 5, 6, 7, 18a
18 U.S.C. 1201(a)	2, 3
18 U.S.C. 1201(a)(1).....	4

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 849 F.3d 390.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 2017. A petition for rehearing was denied on April 20, 2017 (App., *infra*, 11a-12a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 18a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Illinois, respondent was convicted of kidnapping, in violation of 18 U.S.C. 1201(a); and using or carrying a firearm to commit a crime of violence, in violation of 18 U.S.C. 924(c). App., *infra*, 13a. The court sentenced respondent to 188 months of imprisonment on the kidnapping count and to a consecutive term of 120 months of imprisonment on the firearm count, to be followed by five years of supervised release. *Id.* at 14a-15a. The court of appeals reversed respondent's Section 924(c) conviction. *Id.* at 1a-10a.

1. In July 2012, respondent kidnapped Amir Hunt in East St. Louis, Illinois. *United States v. Jenkins*, 772 F.3d 1092, 1094 (7th Cir. 2014). Respondent believed that Hunt had stolen money and an Xbox video gaming console from respondent's home. *Ibid.* Respondent and others lured Hunt to another residence, where they sought to coerce a confession from Hunt by beating him severely and threatening to kill or further harm him. *Ibid.* Hunt told respondent that he had not stolen the property. *Ibid.*

Respondent and others put Hunt in a truck and drove him over the border to Missouri. *Jenkins*, 772 F.3d at 1094. Respondent twice stopped the vehicle and threatened to kill Hunt if he failed to return the stolen items. *Ibid.* At the second stop, respondent ordered Hunt out of the truck and instructed him to lie on his stomach so that he could be shot. *Ibid.* Hunt escaped into the woods. *Ibid.* A Missouri state trooper later found Hunt "severely injured" by the side of a road. *Ibid.* Later that day, the allegedly stolen property was found at respondent's home. *Ibid.*

2. A federal grand jury in the Southern District of Illinois returned an indictment charging respondent with one count of kidnapping, in violation of 18 U.S.C. 1201(a) (Count 1); and one count of using a firearm to commit a crime of violence, in violation of 18 U.S.C. 924(c) (Count 2). Indictment 1-2. The indictment alleged that the crime of violence for purposes of the Section 924(c) offense was the kidnapping offense charged in Count 1. *Id.* at 2. The jury found respondent guilty on both counts. App., *infra*, 13a. The district court sentenced respondent to 188 months of imprisonment for the kidnapping offense and to a consecutive term of 120 months of imprisonment for the firearm offense, to be followed by five years of supervised release. *Id.* at 14a-15a.

3. As relevant here, respondent argued for the first time on appeal that his federal kidnapping conviction did not qualify as a crime of violence under 18 U.S.C. 924(c)(3). Resp. C.A. Supp. Br. 11-19. Section 924(c)(3) 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 court of appeals held that kidnapping under Section 1201(a) did not qualify as a crime of violence under Section 924(c)(3). App., *infra*, 3a.

First, the court of appeals considered whether federal kidnapping qualified as a crime of violence under Section 924(c)(3)(A). App., *infra*, 5a-7a. The federal kidnapping statute makes it a crime to unlawfully “seize[], confine[], inveigle[], decoy[], kidnap[], abduct[],

or carr[y] away” a person, and to “hold[]” that person “for ransom or reward or otherwise,” if the defendant or the victim moves in interstate commerce. 18 U.S.C. 1201(a)(1). The government argued that the statute’s “holding element” requires at least “a threat of physical force.” Gov’t C.A. Resp. to Mot. to Submit Supp. Br. 7. The court of appeals disagreed because “[h]olding can be accomplished without physical force.” App., *infra*, 6a.

The court of appeals further held that federal kidnapping could not qualify as a crime of violence under Section 924(c)(3)(B) because that provision is unconstitutionally vague. App., *infra*, 8a. In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness. See 135 S. Ct. at 2556-2558.¹ In *United States v. Vivas-Ceja*, 808 F.3d 719 (2015), the Seventh Circuit extended *Johnson*’s vagueness holding to the definition of a “crime of violence” contained in 18 U.S.C. 16(b). See 808 F.3d at 721-723. And in *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016), the court relied on *Vivas-Ceja* to conclude that the similarly worded definition of “crime of violence” contained in 18 U.S.C. 924(c)(3)(B) is also unconstitutionally vague. See 842 F.3d at 996. The court of appeals applied *Cardena*’s holding in this case. App., *infra*, 8a.

Finally, the court of appeals held that respondent was entitled to reversal of his Section 924(c) conviction under the applicable plain-error standard of review. App., *infra*, 8a-9a. The court found that the error was

¹ The ACCA’s residual clause defines the term “violent felony” to include an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. 924(e)(2)(B)(ii).

“plain at the time of this review.” *Id.* at 8a. The court further explained that, because respondent had received an additional 120-month sentence for his conviction under Section 924(c), the error affected his substantial rights and warranted discretionary judicial relief. *Id.* at 9a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that the definition of the term “crime of violence” contained in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. The court’s decision was based on the “extension” of its prior holding that the similarly worded definition of “crime of violence” contained in 18 U.S.C. 16(b) is unconstitutionally vague. App., *infra*, 8a (citing *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015)); see *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016).² The question presented in this case is related to the issue currently before this Court in *Sessions v. Dimaya*, No. 15-1498 (restored to the calendar for reargument on June 26, 2017). *Dimaya* presents the question whether the definition of “crime of violence” contained in Section 16(b), as incorporated into the provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*,

² Since this Court issued its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Seventh Circuit is the only court of appeals to hold that Section 924(c)(3)(B) is unconstitutionally vague. Four courts of appeals have held that *Johnson* did not render Section 924(c)(3)(B) unconstitutional. See *Ovalles v. United States*, No. 17-10172, 2017 WL 2829371, at *8 (11th Cir. June 30, 2017); *United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016) (per curiam), petition for cert. pending, No. 16-7373 (filed Dec. 28, 2016); *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. pending, No. 16-6392 (filed Oct. 6, 2016).

governing an alien’s removal from the United States, is unconstitutionally vague. The petition in this case should be held pending this Court’s decision in *Dimaya* and then disposed of as appropriate in light of that decision.³

Unlike in this case, the dispute in *Dimaya* involves an alien’s removability from the United States, not the validity of a criminal conviction. The government has argued in part that, because removal of an alien is a civil proceeding, the statutes that govern removability are subject to a lesser standard of definiteness than is applied in the criminal context. See Gov’t Br. at 13-25, *Dimaya*, *supra* (No. 15-1498). If the Court rejects *Dimaya*’s vagueness challenge on that ground, its decision may not resolve the question whether 18 U.S.C.

³ The government has urged the Court to deny petitions for writs of certiorari in *Prickett v. United States*, No. 16-7373 (filed Dec. 28, 2016), and *Taylor v. United States*, No. 16-6392 (filed Oct. 6, 2016), which likewise present the question whether Section 924(c)(3)(B) is unconstitutionally vague. In both cases, the government has argued that any error in applying Section 924(c)(3)(B) was harmless. See Br. in Opp. at 11-13, *Prickett*, *supra* (No. 16-7373) (arguing that the predicate offense of assault with intent to commit murder would qualify as a “crime of violence” under 18 U.S.C. 924(c)(3)(A)); Br. in Opp. at 26-29, *Taylor*, *supra* (No. 16-6392) (arguing that any error in classifying kidnapping as a “crime of violence” under Section 924(c)(3)(B) would not affect petitioner’s death sentences on three other counts). The government further argued in *Prickett* that the circuit conflict over whether Section 924(c)(3)(B) is constitutional did not warrant plenary review because the Seventh Circuit could reconsider its decision in *Cardena* in an appropriate case, particularly after this Court issues its decision in *Dimaya*. See Br. in Opp. at 9-11, *Prickett*, *supra* (No. 16-7373). Although the filings in *Prickett* were distributed for the conference on May 11, 2017, this Court has not acted on the petition. The filings in *Taylor* will likely be distributed for the conference on September 25, 2017.

16(b) or 924(c)(3)(B) is unconstitutionally vague in the context of a criminal prosecution.

The government in *Dimaya* has also argued, however, that Section 16(b) is not unconstitutionally vague under the standard that applies to criminal laws. See Gov't Br. at 28-52, *Dimaya*, *supra* (No. 15-1498). The government has explained, in particular, how Section 16(b) is drafted more precisely than the statutory provision that was held to be unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015). See Gov't Br. at 29-31, *Dimaya*, *supra* (No. 15-1498). If the Court in *Dimaya* concludes on that basis that Section 16(b) is not unconstitutionally vague, that holding would likely supersede the court of appeals' decision in this case.

Finally, even if the Court holds that Section 16(b) is unconstitutional as applied in *Dimaya*, Section 924(c) might be distinguished on the ground that conviction under that statute requires a specified nexus to the use, carrying, or possession of a firearm. See Gov't Br. at 53 n.11, *Dimaya*, *supra* (No. 15-1498). This Court's decision in *Dimaya* may shed light on the significance of that distinction. The petition should therefore be held pending the decision in that case and then disposed of as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Sessions v. Dimaya*, No. 15-1498, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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SEPTEMBER 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14-2898

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTWON JENKINS, DEFENDANT, APPELLANT

Argued: May 18, 2015

Decided: Feb. 24, 2017

Appeal from the United States District Court for the
Southern District of Illinois.

No. 3:12-CR-30239-DRH-1—David R. Herndon, *Judge*

Before KANNE and SYKES, *Circuit Judges*, and
ELLIS, *District Judge*.^{*}

ELLIS, *District Judge*. Defendant-Appellant, Antwon Jenkins, was arrested and charged with Kidnaping, 18 U.S.C. § 1201(a), and Using or Carrying a Firearm to Commit a Federal Crime of Violence, 18 U.S.C. § 924(c)(1)(A)(ii).¹ Following his arrest, Jenkins agreed to cooperate with the Government's inves-

^{*} The Honorable Sara L. Ellis, of the United States District Court for the Northern District of Illinois, sitting by designation.

¹ While not explicitly addressed by either party, Jenkins' appeal relates only to evidence admitted in support of the firearm count, Count II of the indictment. We limit our analysis accordingly.

tigation of these crimes and give a proffer interview. Prior to the interview, the Government and Jenkins entered into a proffer agreement, the terms of which prohibited the Government from making direct use of any statements or information Jenkins provided during the interview in its case-in-chief, but permitted the Government to derivatively use such information. During the interview, Jenkins told the Government where he hid the gun he used during the kidnapping. The Government used this information to recover the gun and then introduced both physical evidence of the gun, as well as the testimony of the agents who found the gun (collectively, the “gun evidence”), during its case-in-chief. A jury convicted Jenkins on all counts and he received a sentenced of 308 months in prison—188 months for kidnapping and 120 months for using a firearm to commit a federal crime of violence, to run consecutively. On appeal, Jenkins argues that the Government breached the proffer agreement by directly using the information he provided during the proffer interview against him during its case-in-chief.

After Jenkins filed his appeal and the parties argued the case before this panel, but before we decided the appeal, the Supreme Court issued its opinion in *Johnson v. United States*, --- U.S. ----, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), which held the residual clause of the Armed Career Criminals Act (“ACCA”), 18 U.S.C. § 924(e), to be unconstitutionally vague. Jenkins then filed a supplemental appellate brief challenging his conviction under 18 U.S.C. § 924(c) for using a weapon during a “crime of violence,” in this case kidnapping under 18 U.S.C. 1201(a), arguing that in light of the ruling in *Johnson*, kidnapping is no longer a “crime of violence” as defined under § 924(c), and therefore his

conviction under § 924(c) must be overturned as a matter of law. The Government argues that the ruling in *Johnson* should not be extended to the Residual Clause of § 924(c), and even if it were, kidnapping would still be a crime of violence under the Force Clause, § 924(c)(3)(A), which *Johnson* did not implicate. Because 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, we reverse Jenkins' conviction under § 924(c). Because Jenkins' conviction under § 924(c) is the only issue on appeal, we need not reach the original appellate issue of whether the Government breached the proffer agreement.

I. ANALYSIS

A jury convicted Jenkins of using or possessing a weapon during the commission of a crime of violence, namely, kidnapping, under 18 U.S.C. § 924(c). Section 924(c)(3) defines a crime of violence as:

[A] felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, 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.

18 U.S.C. § 924(c)(3)(A), (B). Subsection A is commonly referred to as the “Force Clause” and Subsection B is referred to as the “Residual Clause.”

Jenkins now challenges his conviction under § 924(c), arguing that in light of *Johnson*, the Residual Clause is unconstitutionally vague and that the Force Clause does not apply to kidnapping because kidnapping under § 1201(a) does not include the use of physical force as an element. The Government responds that kidnapping is a crime of violence under the Force Clause and, in the alternative, under the Residual Clause and that we should not extend *Johnson* to § 924(c)(3)(B). Additionally, the Government argues that we should not even consider the vagueness challenge to § 924(c)(3)(B) because Jenkins has not brought it as an as applied challenge.

The parties agree that because Jenkins did not raise his challenge to § 924(c) in the district court, the proper standard of review is plain error. To reverse a trial court ruling for plain error, there must be “(1) an error or defect (2) that is clear or obvious (3) affecting the defendant’s substantial rights (4) and seriously impugning the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Jenkins*, 772 F.3d 1092, 1097 (7th Cir. 2014) (quoting *United States v. Goodwin*, 717 F.3d 511, 518 (7th Cir. 2013), *cert. denied*, --- U.S. ---, 134 S. Ct. 334, 187 L. Ed. 2d 234 (2013)). An error is plain if it is plain at the time the appellate court reviews the error, regardless of whether it was settled or unsettled at the time the district court ruled. *Henderson v. United States*, --- U.S. ---, 133 S. Ct. 1121, 1130-31, 185 L. Ed. 2d 85 (2013).

A. Force Clause

There is no question as to the constitutionality of the Force Clause; Jenkins simply argues that it does not apply to kidnapping. The Force Clause defines a crime of violence as any felony that “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). In determining whether a crime fits this definition, a court may only look at the elements of the offense, not the underlying facts of conviction. *United States v. Yang*, 799 F.3d 750, 752 (7th Cir. 2015) (interpreting the functionally identical force clause of the Armed Career Criminal Act). Therefore, in evaluating whether kidnapping under § 1201(a) is a crime of violence under § 924(c)(3)(A), the kidnapping statute must have as an element the use, attempted use, or threatened use of physical force; it is irrelevant whether a defendant actually used force in the commission of the crime. *Id.*

Section 1201(a) punishes for kidnapping:

[w]hoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . when the person is willfully transported in interstate or foreign commerce . . .

18 U.S.C. § 1201(a).

The Government does not argue that the first element—unlawfully seizing, confining, inveigling, decoying, kidnapping, abducting, or carrying away—requires the use of force and rests its argument on the second element, “hold[ing] for ransom or reward or otherwise.” *Id.* The Government argues that be-

cause the holding must be unlawful, it necessarily requires at a minimum the threat of physical force. This is incorrect. Holding can be accomplished without physical force. 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. See *United States v. Swanson*, 55 Fed. App'x 761, 762 (7th Cir. 2003) (“[O]ur sister circuits have held that the similar crimes of false imprisonment and kidnapping by deception . . . do not have physical force as an element[.]” (citing *United States v. Zamora*, 222 F.3d 756, 764-65 (10th Cir. 2000); *United States v. Williams*, 110 F.3d 50, 52-53 (9th Cir. 1997); *United States v. Kaplansky*, 42 F.3d 320, 324 (6th Cir. 1994) (en banc))).

The Government argues that even in cases where no force is actually used there is an ever-present risk that the situation will devolve to the point that the perpetrator will need to use force. But this argument conflates the Force Clause and the Residual Clause. The Force Clause only defines crimes of violence by the elements of those crimes, not by any inherent risk associated with the crime. While kidnapping very well may carry such inherent risks, one properly analyzes that argument only under the Residual Clause, rather than the Force Clause.

We are aware of this Court's recent decision in *United States v. Cureton*, 845 F.3d 323, 326 (7th Cir. 2017), in which we found, applying the plain error standard, that it is a debatable question whether the ransom demand statute, 18 U.S.C. § 875(a), “has as an element the . . . threatened use of physical force

against the person . . . of another.” The *Cureton* Court determined that because the law is not settled on that issue and further, because the defendant failed to carry his burden to demonstrate that his conviction under the statute affected his substantial rights, he could not prevail under the plain error standard.² *Id.* at 326-27. We find *Cureton* distinguishable because without the conviction on Count II, Jenkins’ sentencing guidelines range would be 151 to 188 months on Count I. R. 246. He received a sentence of 308 months, which was 120 months longer than the top end of the sentencing guidelines range for Count I. R. 261. Unlike the defendant in *Cureton*, Jenkins has clearly demonstrated harm from this error.

Finally, the Government attempts to bolster its argument by citing to pre-*Johnson* cases that held kidnapping to be a crime of violence. However, none of these cases found that kidnapping had physical force as an element, and one even expressly stated that it does not. See *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1130 (9th Cir. 2012) (“The federal kidnapping statute has no force requirement. . . .”). Therefore, we find that kidnapping is not a crime of violence under the Force Clause.

² The *Cureton* Court found that reversing the defendant’s conviction for the ransom demand would not affect the sentencing guidelines range for the remaining offenses and the district court would be well within its discretion to impose the same sentence on remand even without that conviction; therefore, the defendant failed to demonstrate that any error was harmful. *Id.* at 327.

B. Residual Clause

Jenkins also argues that in light of the Supreme Court's decision in *Johnson*, 135 S. Ct. 2551, and our subsequent extension of *Johnson*'s holding in *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015), the Residual Clause of § 924(c)(3)(B) is unconstitutionally vague and therefore we should vacate his § 924(c) conviction. After the parties submitted their supplemental briefs, we decided this very issue in *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016), holding that § 924(c)(3)(B) is unconstitutionally vague. Therefore, kidnapping under 18 U.S.C. § 1201(a) is not a crime of violence as defined in § 924(c).

C. Plain Error Analysis

Because § 1201(a) does not satisfy the Force Clause and the Residual Clause is unconstitutionally vague, we must determine if this error satisfies the plain error standard for reversing the conviction on the basis of an argument the defendant did not previously raise before the district court.

First we must determine if there was an error and if that error is clear and obvious. *Jenkins*, 772 F.3d at 1097. In light of the Supreme Court ruling in *Johnson* and our subsequent extension of *Johnson* to § 924(c)(3)(B) in *Cardena*, the unconstitutionality of § 924(c)(3)(B) is plain. Additionally, kidnapping as defined in 18 U.S.C. § 1201(a) does not require the use of force as an element, therefore Jenkins' conviction under § 924(c) cannot be sustained under the Force Clause either. Thus, Jenkins' conviction under § 924(c) was in error and that error is plain at the time of this review.

Next, we must determine whether this error affected Jenkins' substantive rights and seriously impugned the fairness of the judicial proceedings. *Id.* An error affects a defendant's substantive rights if it resulted in the defendant receiving a longer sentence than he otherwise would have without the error. *See id.* at 1098-99 (sentencing a defendant to a longer prison term based on an improperly calculated sentencing guideline range affected defendant's substantive rights). Here, Jenkins received a sentence of 120 months in prison for his § 924(c) conviction, to run consecutively to his 188 month sentence for kidnapping. Therefore, this erroneous conviction directly resulted in the district court increasing Jenkins' sentence by 120 months. *See, e.g., United States v. Armour*, 840 F.3d 904, 910 (7th Cir. 2016) (plain error standard satisfied where defendant was given a consecutive seven-year mandatory minimum sentence for brandishing where there was no jury verdict finding him guilty of brandishing). There is no set of alternative facts that the government could have presented that would have resulted in a valid conviction under § 924(c) for using or carrying a firearm during the commission of a federal kidnapping offense because, as discussed above, kidnapping is not a crime of violence under § 924(c)(3). And a 120-month prison sentence for a nonexistent crime undermines the fairness of the judicial proceedings and cannot stand. Therefore, Jenkins has satisfied the high burden for reversal under the plain error standard and we reverse his conviction under § 924(c)(1)(A)(ii).

II. CONCLUSION

For the foregoing reasons, we REVERSE Jenkins' conviction for Using or Carrying a Firearm to Commit a Federal Crime of Violence, 18 U.S.C. § 924(c)(1)(A)(ii), and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 14-2898

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTWON JENKINS, DEFENDANT, APPELLANT

Apr. 20, 2017

Appeal from the United States District Court for the
Southern District of Illinois.
No. 3:12-CR-30239-DRH-1—David R. Herndon, *Judge*

ORDER

Michael S. Kanne, *Circuit Judge*

Diane S. Sykes, *Circuit Judge*

Sara L. Ellis, *District Judge**

On consideration of the petition for rehearing filed
in the above-entitled cause, all of the judges on the
original panel have voted to deny a rehearing. It is,

* Of the United States District Court for the Northern District of
Illinois, sitting by designation.

12a

therefore, ORDERED that the aforesaid petition for rehearing is DENIED.

APPENDIX C

AO 245C (Rev. 09/11) Amended Judgment in a Criminal Case
Sheet 1

(NOTE: Identify Changes with Asterisks (*))

UNITED STATES DISTRICT COURT

Southern District of Illinois

UNITED STATES OF AMERICA

V.

Antoine Jenkins

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 3:12-cr-30239-DRH

USM Number: 09778-025

Neal Connors

Defendant's Attorney

Date of Original Judgment: August 22, 2014

(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

- ☒ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Cp
- Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Resitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☒ was found guilty on count(s) 1 & 2 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18§1201(a)(1) and 2	Kidnapping	July 17, 2012	1
18§824(c)(1)(ii)	Using or carrying a firearm to commit a federal crime of violence	July 17, 2012	2

The defendant is sentenced as provided in pages 2 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 18, 2015

Date of Imposition of Judgment

Signature of Judge

David R. Herndon, U.S. District Judge

Name and Title of Judge

Date

DEFENDANT: Antoine Jenkins
CASE NUMBER: 3:12-cr-30239-DRH

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of
308 TOTAL months: 188 months on Count 1 of the Indictment and 120 months on Count 2 of the Indictment, all terms to be served consecutively.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

DEFENDANT: Antoine Jenkins
CASE NUMBER: 3:12-cr-30239-DRH

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:
5 years on each count, all terms to run concurrent.

(***)MANDATORY CONDITIONS

The following conditions are authorized pursuant to 18 U.S.C. § 3583(d):

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court, not to exceed 52 tests in one year.

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.

(***)ADMINISTRATIVE CONDITIONS

The following administrative conditions are imposed, consistent with 18 USC § 3583(d) and § 3553, as necessary for the defendant while on supervision as essential for the probation officer to successfully supervise the defendant and to provide defendant with the structure and monitoring needed to meet the objectives of supervision. The Court notes that the probation officer's explanations for the conditions will help provide the defendant with an understanding of each of the conditions, the defendant has acknowledged an understanding of the conditions and counsel has stated defendant does not object to any of these conditions.

- 1) The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
- 2) The defendant shall not knowingly possess a firearm, ammunition, or destructive device. The defendant shall not knowingly possess a dangerous weapon unless approved by the Court.
- 3) The defendant shall not leave the judicial district of his designated residence (that which he has reported to his probation officer as his place of abode) without the permission of the Court or the probation officer.
- 4) The defendant shall report to the probation officer in a manner and frequency directed by the Court or probation officer.
- 5) The defendant shall respond to all non-incriminating inquiries of the probation officer and follow the instructions of the probation officer.
- 6) The defendant shall notify the probation officer at least ten days prior to, or within 72 hours after, any change in place of residence or place of employment.
- 7) The defendant shall not knowingly meet, communicate, or otherwise interact with a person whom the defendant knows to be engaged, or planning to be engaged, in criminal activity.
The defendant shall permit a probation officer to visit the defendant, between the hours of 6:00 a.m. and 10:00 p.m. unless
- 8) otherwise ordered by the Court upon a showing of good cause, at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.
- 9) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

Judgment — Page 4 of 5DEFENDANT: Antoine Jenkins
CASE NUMBER: 3:12-cr-30239-DRH**CRIMINAL MONETARY PENALTIES**

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200	\$	\$ 38,053.50

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Mercy Hospital of St. Louis P.O. Box 504856 St. Louis, MO 63150		\$34,743.25	
United Revenue Corp. 204 Billings, Ste. 120 Arlington, TX 76010		\$390.00	
Mercy Clinic East Comm. P.O. Box 504655 St. Louis, MO 63105		\$1,763.00	
Neurosurgical Specialists of West County, Inc. 621 South Ballas Rd., Ste. 297A St. Louis, MO 63140		\$280.00	
Meramac Ambulance District 3279 Highway 100 Villa Ridge, MO 63089		\$877.25	
		<u>\$38,053.50</u>	

☐ Restitution amount ordered pursuant to plea agreement _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☒ the interest requirement is waived for ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Antoine Jenkins
CASE NUMBER: 3:12-cr-30239-DRH

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

- A ☐ Lump sum payment of \$ _____ due immediately, balance due
☐ not later _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
 Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be paid in equal monthly installments of \$50 or ten percent of his net monthly income, whichever is greater. The defendant shall pay any financial penalty that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☒ Joint and Several
 Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and corresponding payee, if appropriate.
 Quavondris Graves, 12-30239-002 and Jevon Jenkins 12-30239-003 - \$38,053.50

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
 Taurus PT, 02 AF, 9mm Parabellum semi-automatic pistol, serial number TJJ69745 and all ammunition

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX D

1. 18 U.S.C. 16 provides:

Crime of violence defined

The term “crime of violence” means—

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and 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.

2. 18 U.S.C. 924(c)(3) provides:

Penalties

(c)(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and—

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, 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.