



Office of the Attorney General  
Washington, D. C. 20530

February 3, 2017

The Honorable Paul Ryan  
Speaker  
U.S. House of Representatives  
Washington, DC 20515

Re: *United States v. Robert Cardena et al.*, 842 F.3d 959 (7th Cir. 2016)

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I write to call your attention to the above-referenced decision of the United States Court of Appeals for the Seventh Circuit. A copy of the decision is enclosed.

This case concerns the constitutionality of 18 U.S.C. 924(c)(3)(B). The defendants in this criminal prosecution were members of an organization that kidnapped, robbed, and murdered drug dealers. A jury convicted the defendants of numerous federal offenses, including violations of 18 U.S.C. 924(c). That statute provides that a person who uses or carries a firearm during and in relation to a “crime of violence” or a “drug trafficking crime” is subject to a mandatory consecutive sentence of at least five years in prison. 18 U.S.C. 924(c)(1)(A). The statute defines a “crime of violence” as a felony that (1) “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 (2) “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 Section 924(c) convictions in this case relate to the defendants’ use of firearms while committing kidnappings in violation of Illinois law. See 842 F.3d at 996. The defendants challenged those convictions on the ground that their predicate kidnapping offenses did not qualify as crimes of violence under Section 924(c)(3)(B) because that section is unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* invalidated the “residual clause” in the Armed Career Criminal Act of 1984 (ACCA), which defined a “violent felony” to include a prior felony 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). The defendants argued that Section 924(c)(3)(B)’s definition of a “crime of violence” suffers from the same constitutional infirmities as the ACCA’s residual clause. See 842 F.3d at 995-996.

The Court of Appeals concluded that Section 924(c)(3)(B) is unconstitutionally vague. 842 F.3d at 996. The Court noted that it had previously held that an identically worded definition of “crime of violence” in 18 U.S.C. 16(b) is unconstitutionally vague under *Johnson*, see *United States v. Vivas-Ceja*, 808 F.3d 719, 721 (7th Cir. 2015), and held that Section 924(c)(3)(B) is likewise invalid, see 842 F.3d at 996. But the Court nonetheless affirmed the

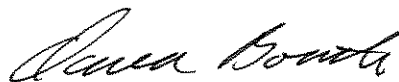
defendants' Section 924(c) convictions. Reviewing for plain error, the Court concluded that Illinois' kidnapping statute is divisible and that the government established at trial that the defendants committed a type of kidnapping that would qualify as a crime of violence under Section 924(c)(3)(A). 842 F.3d at 996-999.

The Department has defended the constitutionality of Section 924(c)(3)(B) following *Johnson*, and will continue to do so. See, e.g., *United States v. Prickett*, 839 F.3d 697, 698 (8th Cir. 2016) (holding that Section 924(c)(3)(B) is not unconstitutionally vague), petition for cert. pending, No. 16-7373 (filed Jan. 3, 2017); *United States v. Hill*, 832 F.3d 135, 146 (2d Cir. 2016) (same); *United States v. Taylor*, 814 F.3d 340, 379 (6th Cir. 2016) (same), petition for cert. pending, No. 16-6392 (filed Oct. 6, 2016). The Supreme Court has also granted the government's petition for a writ of certiorari in *Boente v. Dimaya*, No. 15-1498 (argued Jan. 17, 2017), in which the Department is defending the constitutionality of the identically worded definition of "crime of violence" in Section 16(b).

This case does not, however, present a suitable candidate for Supreme Court review. The Court of Appeals affirmed the defendants' convictions under Section 924(c) on the alternative ground that their prior kidnapping offenses qualified as crimes of violence under Section 924(c)(3)(A), the constitutionality of which is not disputed. Review of the Court's ruling that Section 924(c)(3)(B) is unconstitutionally vague would not, therefore, affect the Court's judgment. Moreover, the Seventh Circuit's rules permit reconsideration of the panel's constitutional holding by another panel, see 7th Cir. R. 40(e), or by the en banc court in an appropriate case, see *United States v. Corner*, 598 F.3d 411, 414 (7th Cir. 2010) (en banc).

A petition for a writ of certiorari would be due on February 16, 2017. Please let me know if we can be of further assistance in this matter.

Sincerely,



Dana J. Boente  
Acting Attorney General