No. 18-7022

IN THE SUPREME COURT OF THE UNITED STATES

RYAN LEE ZATER, PETITIONER

v.

KENNY ATKINSON, WARDEN

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Under 28 U.S.C. 2255, a federal prisoner has the opportunity to collaterally attack his sentence once on any ground cognizable on collateral review, with "second or successive" attacks limited to certain claims that show factual innocence or that rely on constitutional-law decisions made retroactive by this Court. 28 U.S.C. 2255(h). Under 28 U.S.C. 2255(e), an "application for a writ of habeas corpus [under 28 U.S.C. 2241] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255 "shall not be entertained * * * unless it * * * appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." The United States has filed

a petition for a writ of certiorari in United States v. Wheeler, No. 18-420 (filed Oct. 3, 2018), seeking this Court's resolution of a circuit conflict regarding whether the portion of Section 2255(e) beginning with "unless," known as the saving clause, allows a defendant who has been denied Section 2255 relief to later file a habeas petition that challenges his conviction or sentence based on an intervening change in the judicial interpretation of a statute. See id. at I. Petitioner seeks review of a similar question, but the circumstances of his case would not lead to relief under any circuit's interpretation of the saving clause. The petition for a writ of certiorari should therefore be denied and need not be held pending the disposition of the petition in Wheeler.

1. In June and July of 2000, petitioner and his co-conspirators robbed two banks while armed and aborted a planned robbery of a third bank. 00-626 Superseding Indictment 2. A federal grand jury in the District of South Carolina charged petitioner with conspiracy to commit armed bank robbery, in violation of 18 U.S.C. 371 (Count 1); armed bank robbery, in violation 18 U.S.C. 2113(a) and (d) (Counts 2 and 4); brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (Count 3); discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2000) (Count 6); and conspiracy to use and carry a firearm during and in relation to a crime of violence, in

violation of 18 U.S.C. 924(o) (Count 7). 00-626 Superseding Indictment 1-6. Petitioner pleaded guilty to conspiracy to commit armed robbery (Count 1), brandishing a firearm during one of the robberies (Count 3), and discharging a firearm during the other robbery (Count 6). 00-626 Judgment 1. He was sentenced to consecutive sentences of five years of imprisonment for the conspiracy conviction, seven years of imprisonment for the first Section 924(c) conviction, and 25 years of imprisonment for the second Section 924(c) conviction, for a total sentence of 37 years of imprisonment, to be followed by five years of supervised release. 00-626 Judgment 2-3. The Fourth Circuit affirmed on direct appeal. 25 Fed. Appx. 112. Petitioner subsequently filed a motion to vacate, correct, or set aside his sentence under 28 U.S.C. 2255 (2000), which the district court denied, and the court of appeals denied a certificate of appealability. 63 Fed. Appx. 732.

2. Following denial of his initial Section 2255 motion, petitioner twice sought authorization from the court of appeals to file a second or successive motion for relief under Section 2255. Petitioner's argument in both requests was based on a constitutional challenge to his convictions under Section 924(c). That provision imposes criminal liability on a person who uses or carries a firearm "during and in relation to any crime of violence." 18 U.S.C. 924(c)(1)(A). The term "crime of violence" is defined as a felony that:

> (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) and (B). Petitioner contended that Section 924(c)(3)(B) is unconstitutionally vague in light of this Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), which invalidated the similarly worded "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), and that his Section 924(c) convictions were therefore invalid. The court of appeals denied both of petitioner's requests for authorization to file second or successive Section 2255 motions, explaining that petitioner's brandishing and discharging of a firearm had occurred during or in relation to "the offense of armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d) (2012), [which] constitutes a 'crime of violence'" under the force clause of Section 924(c)(3)(A) (2012). 16-776 C.A. Order 1-2 (June 7, 2016) (citing United States v. McNeal, 818 F.3d 141, 151-157 (4th Cir.), cert. denied, 137 S. Ct. 164 (2016)); see 16-9529 C.A. Order (July 8, 2016).

Petitioner subsequently filed a habeas petition under 28 U.S.C. 2241 in the United States District Court for the Southern District of Florida, the district in which he was confined. He again raised the claim that his Section 924(c) convictions were invalid on the theory that 18 U.S.C. 924(c)(3)(B) is

unconstitutionally vague. Pet. App. 9-10.[1] The district court dismissed the habeas petition, determining that it was foreclosed by 28 U.S.C. 2255(e). Pet. App. 5-6; see id. at 7-13. The court of appeals affirmed. Id. at 1-4.

3. Petitioner renews his contention (Pet. 13-18) that Section 924(c)(3)(B) is unconstitutionally vague and that his Section 924(c) convictions are therefore invalid. He further contends (Pet. 6-13) that the saving clause of 28 U.S.C. 2255(e) permits him to raise that claim in a habeas petition under 28 U.S.C. 2241. As noted above, the United States has filed a petition for a writ of certiorari in Wheeler, supra (No. 18-420), asking this Court to resolve a circuit conflict regarding whether the saving clause allows a defendant who has been denied Section 2255 relief to challenge his conviction or sentence based on an intervening decision of statutory interpretation. The Court need not hold the petition in this case pending Wheeler, however, because petitioner would not be entitled to relief even in the courts of appeals that have given the saving clause the most prisoner-favorable interpretation.

Even circuits that construe the saving clause to permit relief based on an intervening decision of statutory interpretation generally have required a prisoner to show (1) that the prisoner's

[1] The appendix to the petition for a writ of certiorari is not consistently numbered. This brief treats the appendix as if it were consecutively paginated, with the first page as page 1.

claim was foreclosed by (erroneous) precedent at the time of the prisoner's first motion under Section 2255; and (2) that an intervening decision of statutory interpretation, made retroactive on collateral review, has since established that the prisoner is in custody for an act that the law does not make criminal, has been sentenced in excess of an applicable maximum under a statute or under a mandatory Sentencing Guidelines regime, or has received an erroneous statutory minimum sentence. See, e.g., Hill v. Masters, 836 F.3d 591, 594-600 (6th Cir. 2016); Brown v. Rios, 696 F.3d 638, 640-641 (7th Cir. 2012).

Petitioner's habeas petition does not rely on an intervening decision of statutory interpretation and instead raises a claim of constitutional error. The petition asserts that this Court's constitutional rulings in Johnson, supra, and Sessions v. Dimaya, 138 S. Ct. 1204 (2018), which invalidated similarly worded clauses in the ACCA and 18 U.S.C. 16(b), respectively, establish that Section 924(c)(3)(B) is also unconstitutionally vague and that his convictions for violating Section 924(c) are therefore invalid. A federal prisoner attacking his conviction on constitutional grounds after the denial of a first Section 2255 motion, however, must satisfy the gatekeeping provisions of 28 U.S.C. 2255(h), which limits constitutional challenges in second or successive Section 2255 motions to those relying on "a new rule of constitutional law" that this Court has "made retroactive to cases on collateral review." 28 U.S.C. 2255(h)(2). No court of appeals has construed

the saving clause to permit a federal prisoner who is raising a constitutional claim in a habeas petition to bypass those gatekeeping limitations.

Even if the saving clause permitted constitutional claims otherwise foreclosed by Section 2255(h), petitioner's constitutional claim lacks merit. Petitioner contends that his Section 924(c) convictions are invalid on the theory that those convictions were predicated on his conviction for conspiracy to commit armed robbery; a conspiracy offense can qualify as a crime of violence only under Section 924(c)(3)(B); and 924(c)(3)(B) is unconstitutionally vague. But petitioner's Section 924(c) convictions were not based on conspiracy to commit armed robbery. Rather, petitioner pleaded guilty to brandishing and discharging firearms during and in relation to two substantive violations of the armed bank robbery statute, 18 U.S.C. 2113(a) and (d). As the court of appeals correctly held, a conviction for armed bank robbery qualifies as a "crime of violence" under the elements clause of Section 924(c)(3)(A) because the offense has as an element the use, attempted use, or threated use of force. See McNeal, 818 F.3d at 151-157. Every court of appeals to consider whether the federal offenses of bank robbery or armed bank robbery qualify as crimes of violence under Section 924(c)(3)(A) and similar provisions has determined that they do. See, e.g., United States v. McCranie, 889 F.3d 677, 679-681 (10th Cir.), petition for cert. pending, No. 18-6257 (filed Oct. 1, 2018); United States

v. Ellison, 866 F.3d 32, 35-39 (1st Cir. 2017); United States v. Williams, 864 F.3d 826, 830 (7th Cir.), cert. denied, 138 S. Ct. 272 (2017); United States v. Jones, 854 F.3d 737, 740 & n.2 (5th Cir.), cert. denied, 138 S. Ct. 242 (2017); Holder v. United States, 836 F.3d 891, 892 (8th Cir. 2016) (per curiam); In re Sams, 830 F.3d 1234, 1239 (11th Cir. 2016); Johnson v. United States, 779 F.3d 125, 128-129 (2d Cir.), cert. denied, 136 S. Ct. 209 (2015); United States v. Wright, 215 F.3d 1020, 1028 (9th Cir.), cert. denied, 531 U.S. 969 (2000); Royal v. Tombone, 141 F.3d 596, 602 (5th Cir. 1998); see generally United States v. McNeal, 818 F.3d 141, 153 (4th Cir.) ("Our sister circuits have uniformly ruled that other federal crimes involving takings 'by force and violence, or by intimidation,' have as an element the use, attempted use, or threatened use of physical force."), cert. denied, 137 S. Ct. 164 (2016).

Petitioner's Section 924(c) convictions would thus remain even if he were correct that Section 924(c)(3)(B) is unconstitutionally vague.[2] The petition should therefore be

[2] This Court has granted certiorari to determine whether the residual clause in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. See United States v. Davis, cert. granted, No. 18-431 (Jan. 4, 2019). The petition here need not be held pending the Court's decision in Davis, however, because as just described, the petition lacks merit even on the assumption that Section 924(c)(B) is invalid.

denied.[3]

Respectfully submitted.

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FEBRUARY 2019

[3] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.