

No. 18-9064

IN THE SUPREME COURT OF THE UNITED STATES

ADONIJAH LINDSAY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly denied a certificate of appealability on petitioner's claim that robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), does not qualify as a "crime of violence" under 18 U.S.C. 924(c) (3).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.N.J.):

United States v. Lindsay, No. 07-cr-01032 (Feb. 16, 2011)

Lindsay v. United States, No. 16-cv-3281 (Oct. 16, 2018)

United States Court of Appeals (3d Cir.):

United States v. Lindsay, No. 11-1374 (July 13, 2012)

Lindsay v. United States, No. 17-1580 (July 7, 2017)

Lindsay v. United States, No. 18-3433 (Feb. 22, 2019)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A2) is unreported.¹ The order of the district court (Pet. App. B1-B2) is unreported. A prior order of the court of appeals is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2019. The petition for a writ of certiorari was filed on April

¹ The appendix to the petition for a writ of certiorari identifies "Appendix A" and "Appendix B," but it is not consecutively paginated. This brief refers to each appendix as if it were consecutively paginated.

26, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of New Jersey, petitioner was convicted of robbery in violation of the Hobbs Act, 18 U.S.C. 1951, and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii) and 2. Am. Judgment 1. The district court sentenced petitioner to 205 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals summarily affirmed in an unreported order. See 11-1374 Order (July 13, 2012). Petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied petitioner's motion and denied a certificate of appealability (COA). 2016 WL 6469297. The district court denied petitioner's subsequent motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), 2017 WL 396541, and the court of appeals denied a COA, see 17-1580 Order (July 7, 2017). Petitioner then filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). The district court denied the motion, Pet. App. B1-B2, and denied petitioner's motion for a COA, 16-cv-3281 D. Ct. Doc. 27 (October 16, 2018). The court of appeals likewise declined to issue a COA. Pet. App. A1-A2.

1. In January 2006, petitioner and three others committed a string of armed robberies of fast food restaurants, grocery

stores, and delicatessens. Presentence Investigation Report (PSR) ¶¶ 11-31, 34-35. During almost all of the robberies, the robbers ordered employees and customers at gunpoint either to the ground or to back rooms or restrooms, and in some instances, the robbers threatened to kill the victims if they did not follow the robbers' instructions. PSR ¶¶ 14, 16-19, 21, 24-27.

A federal grand jury charged petitioner with conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), six counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2, and six counts of brandishing a firearm during and in relation to a crime of violence (one count for each Hobbs Act robbery), in violation of 18 U.S.C. 924(c)(1)(A)(ii) and 2. Indictment 1-14. Petitioner pleaded guilty to one count of Hobbs Act robbery and one count of brandishing a firearm during and in relation to that robbery. PSR ¶ 3. The district court sentenced petitioner to 205 months of imprisonment, which included a consecutive term of 84 months of imprisonment on the Section 924(c) offense. Judgment 2. The court of appeals summarily affirmed in an unpublished order. See 11-1374 Order (July 13, 2012).

2. In May 2016, petitioner filed a motion under 28 U.S.C. 2241 challenging his conviction and sentence, which the district court denied on the ground that it raised claims that must be asserted in a motion under 28 U.S.C. 2255. See 2016 WL 3457157, at *1-*2. The court also determined that, even if the motion were construed as a Section 2255 motion, it was untimely because it was

filed more than one year after petitioner's convictions had become final. Id. at *3. The court dismissed the motion without prejudice, granting petitioner leave to file a response within 30 days "with any basis he may have for equitable tolling" of the one-year limitations period. Id. at *4; see 28 U.S.C. 2255(f)(3).

In July 2016, petitioner submitted a response to the district court's dismissal order, claiming for the first time that the Hobbs Act robbery offense underlying his Section 924(c) conviction did not constitute a "crime of violence" under Section 924(c)(3). See 16-cv-3281 D. Ct. Doc. 4 (July 25, 2016). 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). Petitioner argued that Section 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the "residual clause" of the definition of a "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness. Petitioner also argued that he was "actually innocent" of the Section 924(c) charge, and that the one-year limitations period in 28 U.S.C. 2255(f)(3) should run from the date that Johnson was decided. 16-cv-3281 D. Ct. Doc. 4.

The district court determined that petitioner's claim invoking Johnson was time barred because petitioner had filed it more than one year after this Court issued that decision. See 2016 WL 6469297, at *3-*5. The court also noted that, even if petitioner's claim were not time barred and even if the reasoning of Johnson applied to Section 924(c)(3)(B), petitioner's claim would still lack merit because his Hobbs Act robbery conviction qualified as a crime of violence under the alternative definition in 18 U.S.C. 924(c)(3)(A). 2016 WL 6469297, at *5. The court denied petitioner a COA. Id. at *6.

Petitioner subsequently moved for reconsideration pursuant to Federal Rule of Civil Procedure 59(e). The district court denied that motion, reiterating that petitioner's "actual innocence" claim failed because his Section 924(c) conviction "remain[ed] entirely proper under the elements clause [in Section 924(c)(3)(A)] given his guilty plea to Hobbs Act robbery." 2017 WL 396541, at *4.

Petitioner sought a COA from the court of appeals, which likewise denied him one. 17-1580 Order (July 7, 2017). The court of appeals agreed with the district court that petitioner's motion was untimely; that equitable tolling was unwarranted; and that petitioner's "actual innocence argument [was] insufficient under McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013), to serve as a gateway through which he may pass to overcome the statute of limitation." 17-1580 Order, at 2.

3. In June 2018, petitioner filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b), claiming that this Court's decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), presented an intervening change in the law that was sufficient to reset the statute of limitations on his challenge to his Section 924(c) conviction based on Johnson, or else to render him "actually innocent" of his Section 924(c) conviction. 16-cv-3281 D. Ct. Doc. 20 (June 25, 2018). The district court dismissed the motion without prejudice, Pet. App. B, finding that the motion, "although styled as a Rule 60(b) motion," was in fact a second or successive motion under 28 U.S.C. 2255, which had been improperly filed without leave of the court of appeals. 2018 WL 3370635, at *3; see 28 U.S.C. 2255(h). The court also reiterated that petitioner's actual innocence claim was "not improved" by Dimaya because Hobbs Act robbery categorically qualified as a crime of violence under Section 924(c)(3)(A) irrespective of whether Johnson had affected the constitutionality of Section 924(c)(3)(B). 2018 WL 3370635, at *3.

In October 2018, petitioner filed an application for a COA "or reconsideration" of the district court's previous order, two years earlier, denying a COA. 16-cv-3281 D. Ct. Doc. 25 (Oct. 10, 2018) (capitalization and emphasis omitted). The court first found that petitioner's motion for reconsideration was "grossly untimely." 16-cv-3281 D. Ct. Doc. 26, at 5-6 (Oct. 16, 2018). The court then explained that, even construing petitioner's motion

as a new request for a COA, it failed to meet the requirements for a COA for the reasons stated in the court's previous orders. See id. at 7 ("[T]he argument underpinning [p]etitioner's new requests for a certificate of appealability -- that he is actually innocent of violating § 924(c) -- has been repeatedly rejected both by this Court and by the Court of Appeals in denying [p]etitioner a certificate of appealability."). In particular, the court again emphasized that "even if the residual clause of § 924(c) has been indirectly invalidated by Johnson or Dimaya, Hobbs Act robbery is categorically a crime of violence under the elements clause of § 924(c)." Ibid.

4. The court of appeals denied petitioner's request for a COA. Pet. App. A1-A2. The court of appeals first noted that the district court had found that petitioner's Hobbs Act robbery conviction qualified as a crime of violence under Section 924(c)(3)(A). Id. at A1. The court of appeals additionally stated that, unlike the prior convictions at issue in Johnson and Dimaya, petitioner's case "does not require the use of a categorical analysis where the convictions [for Hobbs Act robbery and brandishing a firearm during and in relation to that offense] are contemporaneous, and thus nothing in Dimaya calls into question the District Court's original § 2255 determination." Id. at A1-A2; see United States v. Robinson, 844 F.3d 137 (3d Cir. 2016), cert. denied, 138 S. Ct. 215 (2017).

ARGUMENT

Petitioner contends (Pet. i, 6) that his Section 924(c) conviction is invalid because the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. This Court recently addressed that issue in United States v. Davis, 139 S. Ct. 2319 (2019), but the validity of petitioner's conviction under Section 924(c) does not depend on the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B). As a result, Davis did not affect petitioner's case. The petition should accordingly be denied.

Petitioner was convicted of using or carrying a firearm during and in relation to a Hobbs Act robbery. Hobbs Act robbery requires the "unlawful taking or obtaining of personal property" from another "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. 1951(b)(1). For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Garcia v. United States, cert. denied, 138 S. Ct. 641 (2018) (No. 17-5704), Hobbs Act robbery qualifies as a crime of violence under Section 924(c) because it "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). See Br. in Opp. at 7-10, Garcia, supra (No. 17-5704).² Every court of

² We have served petitioner with a copy of the government's brief in opposition in Garcia.

appeals to consider the issue has so held. See id. at 8. And this Court has recently and repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on the application of Section 924(c)(3)(A) to Hobbs Act robbery.³ The court of appeals thus correctly denied a certificate of appealability on petitioner's challenge to his conviction under Section 924(c).⁴

Because Davis concerned only the definition of a "crime of violence" in Section 924(c)(3)(B), this Court's decision in that case did not affect the validity of petitioner's conviction under Section 924(c). No reason exists, therefore, to remand this case to the court of appeals in light of this Court's decision in Davis.

³ See, e.g., Rojas v. United States, 139 S. Ct. 1324 (2019) (No. 18-6914); Myrthil v. United States, 139 S. Ct. 1164 (2019) (No. 18-6009); Harmon v. United States, 139 S. Ct. 939 (2019) (No. 18-5965); Foster v. United States, 139 S. Ct. 789 (2019) (No. 18-5655); Desilien v. United States, 139 S. Ct. 413 (2018) (No. 17-9377); Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248); Robinson v. United States, 138 S. Ct. 1986 (2018) (No. 17-6927); Chandler v. United States, 138 S. Ct. 1281 (2018) (No. 17-6415); Middleton v. United States, 138 S. Ct. 1280 (2018) (No. 17-6343); Jackson v. United States, 138 S. Ct. 977 (2018) (No. 17-6247); Garcia v. United States, supra (No. 17-5704).

⁴ Petitioner contends (Pet. 6) that the court of appeals should have "analyzed" whether his Hobbs Act robbery conviction qualifies as a crime of violence under Section 924(c) by "using a categorical approach." But as the government's brief in opposition in Garcia explains, Hobbs Act robbery satisfies Section 924(c)(3)(A) under such an approach, and no court of appeals has held otherwise. See Br. in Opp. at 7-10, Garcia, supra (No. 17-5704). The court of appeals' view that a categorical approach would not apply to review of petitioner's Section 924(c) conviction thus provides no basis for certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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