NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ERIC JOHNSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Does aiding and abetting armed bank robbery—which can be accomplished without the use, attempted use, or threatened use of physical force—qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A)?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States v. Eric Johnson, No. 1:12-cr-10010-2, U.S. District Court for the Western District of Arkansas. Judgment entered December 13, 2013.

Eric Johnson v. United States, No. 1:16-cv-01052, U.S. District Court for the Western District of Arkansas. Judgment entered April 30, 2018.

Eric Johnson v. United States, No. 18-2413, U.S. Court of Appeals for the Eighth Circuit. Judgment entered August 1, 2019.

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OPINION BELOW

On August 1, 2019, the court of appeals entered its opinion and judgment affirming the judgment of the district court denying Eric Johnson's motion to vacate under 28 U.S.C. § 2255. *Johnson v. United States*, 774 F. App'x 334 (8th Cir. 2019). A copy of the opinion is attached in the Appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2019. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following statutory provisions:

18 U.S.C. § 924(c)(3) provides, in relevant part:

> 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 . . . .

18 U.S.C. § 2(a) provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

STATEMENT OF THE CASE

1. Eric Johnson was named, along with three co-defendants, in a three-count second superseding indictment filed in the Western District of Arkansas on August 22, 2012. Mr. Johnson was charged in Count One with conspiracy to commit armed bank robbery in violation of 18 U.S.C. §§ 2113(a) & (d), 2, and 371; in Count Two with aiding and abetting armed bank robbery in violation of 18 U.S.C. §§ 2113(a) & (d) and 2; and in Count Three with aiding and abetting the use of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2. The § 924(c) violation charged in Count Three was predicated upon the "crime of violence" of aiding and abetting armed bank robbery as charged in Count Two.

2. On March 4, 2013, Mr. Johnson pleaded guilty to Counts Two and Three of the second superseding indictment. On December 11, 2013, Johnson was sentenced to a total of 135 months imprisonment, consisting of 51 months on Count Two and 84 months on Count Three to be served consecutively. Count One of the superseding indictment was dismissed on motion of the Government. Johnson did not appeal from the final judgment of the district court.

3. On June 9, 2016, Mr. Johnson filed a motion to vacate under 28 U.S.C. § 2255. The district court, as the sentencing court, had jurisdiction pursuant to § 2255. In this motion, Johnson challenged his § 924(c) conviction on the basis that a portion of that statute was unconstitutionally vague in light of this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). On June 13, 2016, the district court appointed the Federal Public Defender to represent Johnson with respect to his

pro se motion to vacate. On June 20, 2016, appointed counsel filed a memorandum brief in support of the motion to vacate. In this brief, it was argued that the portion of the definition of "crime of violence" found at 18 U.S.C. § 924(c)(3)(B) is similar enough to the residual clause of the Armed Career Criminal Act (the "ACCA") found at 18 U.S.C. § 924(e)(2)(B)(ii) that it was also unconstitutionally vague in light of *Johnson*. Johnson went on to argue that his § 924(c) conviction was predicated upon an offense—namely, aiding and abetting armed bank robbery—that only qualified as a "crime of violence" under the unconstitutionally vague portion of the definition, and that this conviction should accordingly be vacated.

4. On April 30, 2018, the district court entered its order adopting in part the magistrate's report and recommendation and denying Mr. Johnson's § 2255 motion. The court found that it was bound by *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016) (per curiam), to conclude that *Johnson* did not invalidate § 924(c)(3)(B) and, therefore, to deny Mr. Johnson's motion to vacate. However, the court also recognized the split among the circuits regarding the constitutionality of § 924(c)(3)(B), and further noted this Court's recent decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), in which it affirmed the holding of the Ninth Circuit Court of Appeals that 18 U.S.C. § 16(b) is unconstitutionally vague. The court accordingly granted a certificate of appealability on the issue of whether § 924(c)(3)(B) is unconstitutionally vague.

5. Mr. Johnson appealed to the Eighth Circuit Court of Appeals. The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2255(d). Johnson

argued that the "risk-of-force" portion of § 924(c)'s definition of "crime of violence" was unconstitutionally vague in light of this Court's decisions in *Johnson* and *Dimaya*. In *Dimaya*, the Court clarified that its *Johnson* decision rested only on the two factors expressly identified therein—"an ordinary-case requirement and an ill-defined risk threshold," *see Dimaya*, 135 S. Ct. at 1223—and found both of these factors to be present in 18 U.S.C. § 16(b). Johnson argued that both of these factors were also present in § 924(c)(3)(B), and that it was likewise unconstitutionally vague.[1] Johnson further argued that his § 924(c) conviction should be vacated because the predicate offense upon which it was based, aiding and abetting armed bank robbery, could only qualify as a "crime of violence" under § 924(c)(3)(B) rather than under the "force clause" of § 924(c)(3)(A). Johnson pointed out that a defendant can be convicted of aiding and abetting armed bank robbery merely by encouraging or supporting another with regard to a single element of the offense, and that it accordingly cannot be said that this offense necessarily involves as an element the use, attempted use, or threatened use of physical force.

6. In its opinion, the Eighth Circuit held that aiding and abetting armed bank robbery qualifies as a "crime of violence" under the force clause of § 924(c)(3)(A). The court noted that, because bank robbery qualifies as a crime of violence under the force clause, aiding and abetting armed bank robbery also qualifies, since an aider and abettor is treated the same as a principal when making this determination. As

[1] In *United States v. Davis*, 139 S. Ct. 2319 (2019), this Court found § 924(c)(3)(B) to be unconstitutionally vague based on the reasoning of *Johnson* and *Dimaya*.

precedent, the court cited *Kidd v. United States*, 929 F.3d 578 (8th Cir. 2019) (per curiam), *petition for cert. filed*, No. 19-6108 (Oct. 1, 2019).

The court of appeals found that Mr. Johnson's conviction and sentence under § 924(c)(1)(A) was not unconstitutional, and affirmed the judgment of the district court. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court should resolve the important question of whether an aiding and abetting offense should be analyzed separately from the underlying offense in determining whether it qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).

Mr. Johnson contends that, even assuming the offense of armed bank robbery is considered to be a "crime of violence" under the force clause of 18 U.S.C. § 924(c)(3)(A), the offense of aiding and abetting armed bank robbery should not be. The relevant portion of the federal aiding and abetting statute, 18 U.S.C. § 2(a), provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Courts of appeal have generally somewhat summarily determined that aiding and abetting a crime of violence is treated just the same as a crime of violence when applying the categorical approach required by § 924(c)(3)(A). *See, e.g.*, *United States v. Garcia-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018) ("18 U.S.C. § 2 . . . makes an aider and abettor 'punishable as a principal,' and thus no different for purposes of the categorical approach than one who commits the substantive offense.").

"As almost every court of appeals has held, '[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of

the offense." *Rosemond v. United States*, 134 S. Ct. 1240, 1246 (2014) (quoting *United States v. Sigalow*, 812 F.2d 783, 785 (2d Cir. 1987)). The language used by Congress in proscribing aiding and abetting "comprehends all assistance rendered by words, acts, encouragement, support, or presence . . . ." *Id.* (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993)). It is therefore clear that a defendant can be convicted of aiding and abetting bank robbery without any proof that the defendant himself actually committed an act directed toward taking bank property by means of actual or threatened force. As Judge Martin noted in his dissent in *In re Colon*, 826 F.3d 1301, 1306 (11th Cir. 2016) (Martin, J., dissenting), "[i]t seems plausible that a defendant could aid and abet a robbery without ever using, threatening, or attempting any force at all. For example, the aider and abettor's contribution to a crime could be as minimal as lending the principal some equipment, sharing some encouraging words, or driving the principal somewhere."

In its opinion below, the Eighth Circuit simply held that, because the offense of bank robbery is a crime of violence under § 924(c)(3)(A), the offense of aiding and abetting armed bank robbery is, too, because an aider and abettor is treated the same as a principal for purposes of making this determination. *Johnson v. United States*, 774 F. App'x 334, 335 (8th Cir. 2019). The Eighth Circuit cites its prior decision in *Kidd v. United States*, 929 F.3d 578 (8th Cir. 2019) (per curiam), *petition for cert. filed*, No. 19-6108 (Oct. 1, 2019), as precedent on this issue. In *Kidd*, the court stated that, "[b]ecause we treat an aider and abettor no differently than a principal, *see* 18 U.S.C. § 2, we hold that Kidd's underlying offense categorically qualifies as a crime

of violence under § 924(c)(3)(A)." The court cited to no authority other than the aiding and abetting statute as support for this conclusion.

The Eighth Circuit in the instant case did not even purport to address the real question at issue here, which is a simple but important one that deserves the attention of this Court: in order to be considered a predicate "crime of violence" under § 924(c)(3)(A), must an offense necessarily involve the use, attempted use, or threatened use of physical force by the defendant actually charged with violating § 924(c), or is it sufficient if physical force is used, attempted, or threatened by another? The courts that have found aiding and abetting offenses to qualify as § 924(c) predicates have tended to sidestep this question in favor of simply concluding that there is no practical difference between aiding and abetting an offense and committing the offense as a principal. For example, in finding that aiding and abetting the offense of Hobbs Act robbery qualifies as a crime of violence under the force clause of § 924(c)(3)(A), the Eleventh Circuit reasoned that, "[b]ecause an aider and abettor is responsible for the acts of the principal as a matter of law, an aider and abettor of a Hobbs Act robbery necessarily commits all the elements of a principal Hobbs Act robbery." *In re Colon*, 826 F.3d at 1305. The court reached this conclusion largely because of precedent holding that aiding and abetting under 18 U.S.C. § 2 "is not a separate federal crime, but rather an alternative charge that permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense." *Id.* (quoting *United States v. Sosa*, 777 F.3d 1279, 1292 (11th Cir. 2015)).

However, as discussed above, even if the courts that have reached this conclusion are correct that aiding and abetting is not technically a separate crime, it must be recognized that there is a meaningful distinction between committing an offense as an aider and abettor and committing it as a principal. Perhaps most significantly, a defendant may be convicted of aiding and abetting without proof that he personally committed any of the elements of the underlying offense. The Eleventh Circuit goes too far when it says that an aider and abettor "necessarily commits all the elements" of the principal offense. Instead, turning back to the language of the statute, an aider and abettor "*is punishable as* a principal." 18 U.S.C. § 2(a) (emphasis added). Although he does not in fact commit all the elements of an offense, he is subject to the same punishment as though he has. This does not mean that his personal behavior actually and automatically satisfies the elements of the principal offense.

Mr. Johnson contends that, in order for a defendant to be convicted of violating § 924(c)(3)(A), he must have committed the underlying offense in such a manner that he *himself* necessarily used, attempted to use, or threatened to use physical force against the person or property of another. If he was convicted of the underlying offense as an aider and abettor, this will not necessarily be the case; accordingly, under the categorical approach which must be applied under this Court's decision in *Davis* (*see* 139 S. Ct. at 2328), an aiding and abetting offense is not sufficient to be considered a crime of violence under § 924(c)(3)(A).

The en banc Fourth Circuit has recently determined—upon concession of the Government—that the offense of conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under the elements-based categorical approach required by § 924(c)(3)(A) because, "to convict a defendant of this offense, the Government must prove only that the defendant agreed with another to commit actions that, if realized, would violate the Hobbs Act. Such an agreement does not invariably require the actual, attempted, or threatened use of physical force." *United States v. Simms*, 914 F.3d 229, 233-34 (4th Cir. 2019) (en banc), *cert. denied*, No. 18-1338, 2019 WL 4923463 (U.S. Oct. 7, 2019). Mr. Johnson argues that aiding and abetting armed bank robbery should be viewed similarly, as a defendant may be convicted of this offense simply by encouraging another to commit the offense without actually employing or threatening to employ any physical force. Johnson urges the Court to grant review in this case to clarify this important point of law, which has significant ramifications for numerous defendants who have been convicted of aiding and abetting various underlying offenses that have been considered to be crimes of violence under § 924(c)(3)(A).

CONCLUSION

For all of the foregoing reasons, Petitioner Eric Johnson respectfully requests that this Court grant the petition for a writ of certiorari, and accept this case for review.

DATED: this 29th day of October, 2019.

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