

No. 19-7067

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL BAIRD JORDAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), is a "crime of violence" under 18 U.S.C. 924(c) (3) (A).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Or.):

United States v. Jordan, No. 06-cr-450 (Nov. 15, 2007)

Jordan v. United States, No. 10-cv-70017 (Mar. 11, 2011)

United States Court of Appeals (9th Cir.):

United States v. Jordan, No. 07-30464 (Dec. 12, 2008)

United States v. Jordan, No. 08-30126 (Dec. 10, 2009)

United States v. Jordan, No. 11-35300 (Mar. 5, 2012)

United States v. Jordan, No. 15-35555 (Dec. 4, 2015)

In re Jordan, No. 18-72654 (Dec. 19, 2018)

United States v. Jordan, No. 19-35577 (Sept. 16, 2019)

Supreme Court of the United States:

Jordan v. United States, No. 09-5831 (Oct. 5, 2009)

Jordan v. United States, No. 09-9915 (May 3, 2010)

Jordan v. United States, No. 12-5401 (Oct. 1, 2012)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is not published in the Federal Reporter. The opinion and order of the district court (Pet. App. 2-9) is not published in the Federal Supplement but is available at 2019 WL 2616180.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2019. The petition for a writ of certiorari was filed on December 13, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Oregon, petitioner was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii); and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g). Judgment 1-2. The district court sentenced petitioner to life imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed, 303 Fed. Appx. 439, and this Court denied a petition for a writ of certiorari, 558 U.S. 920. In 2010, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 112 (July 12, 2010) (First 2255 Motion). The district court denied that motion and denied a certificate of appealability (COA). D. Ct. Doc. 134, at 4-14 (Mar. 11, 2011). The court of appeals likewise denied a COA, 11-35300 C.A. Order (Mar. 5, 2012), and this Court denied a petition for a writ of certiorari, 568 U.S. 933. In 2017, petitioner filed an authorized second-or-successive Section 2255 motion. D. Ct. Doc. 149, at 7-20 (May 17, 2017) (Second 2255 Motion). The district court denied that motion and denied a COA. Pet. App. 2-9. The court of appeals likewise denied a COA. Id. at 1.

1. a. Petitioner is a serial bank robber. Between 1964 and 1966, petitioner committed numerous armed bank robberies in California, culminating in the armed robbery of a Bank of America

branch in Anaheim during which petitioner took a bank employee hostage and fired a shot into the ceiling. Presentence Investigation Report (PSR) ¶ 35. Petitioner was convicted of federal armed bank robbery in connection with that offense and was sentenced to 25 years of imprisonment. Ibid. Petitioner was released on parole in 1972 and was discharged from parole in 1977. Ibid. In 1978 and 1979, petitioner robbed two more Bank of America branches in California. PSR ¶ 36. Petitioner was again convicted of federal armed bank robbery and was sentenced to ten years of imprisonment. Ibid.

In 1985, while on federal parole, petitioner robbed the same Bank of America branch he had robbed in 1979. PSR ¶ 37. During the 1985 robbery, petitioner shot a security guard in the chest and took an elderly man hostage. Ibid. Petitioner was convicted of numerous California state offenses in connection with that crime (including armed robbery, attempted murder, and assault with a firearm resulting in great bodily injury) and was sentenced to 24 years and eight months of imprisonment. Ibid. In 1999, the State returned petitioner to federal custody to finish serving his sentence for the 1978 and 1979 bank robberies. Ibid.; see PSR ¶ 36. Petitioner was released on parole in 2003 and was discharged from parole in 2004. PSR ¶ 36.

b. In 2006, petitioner robbed a Bank of America branch in Lake Oswego, Oregon. PSR ¶ 7. Petitioner entered the bank wearing a long black coat and motorcycle helmet, brandished a revolver,

and ordered all of the employees and customers to go to the back of the bank. Ibid. Petitioner then pointed the revolver at the bank manager and ordered her to open the door to the teller area. PSR ¶ 8. The manager complied, and petitioner stole more than \$7000 from the teller stations. PSR ¶¶ 8, 14.

When petitioner was finished collecting the money, he ran out of the bank and carjacked a 17-year-old boy who was driving nearby. PSR ¶ 9. Petitioner pointed the revolver in the boy's face and forced him to drive to a nearby intersection. PSR ¶¶ 9-10. After arriving at the intersection, petitioner forced the boy to get out of the car. PSR ¶ 10. Petitioner then drove the car to a nearby church where he abandoned the vehicle, got into his own car, and fled. Ibid.

Unbeknownst to petitioner, the cash he had stolen from the bank contained two tracking devices. PSR ¶¶ 8, 11. Police used those devices to locate petitioner's car and attempted to stop him. PSR ¶ 11. Petitioner led police on a high-speed chase before he was cornered in a parking lot and arrested. Ibid. A search of petitioner's car revealed the money stolen from the bank and three loaded guns, including a .38 caliber revolver inside a motorcycle helmet on the front passenger's seat, a stolen .223 caliber rifle, and a .45 caliber pistol on the floor near the driver's seat. PSR ¶ 12.

2. A federal grand jury in the District of Oregon charged petitioner with armed bank robbery, in violation of 18 U.S.C.

2113(a) and (d); using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A); and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. A jury found petitioner guilty on all counts. Judgment 1.

In its presentence report, the Probation Office determined that, in light of petitioner's offense conduct and criminal history, his advisory Sentencing Guidelines range was 444 months to life imprisonment. PSR ¶¶ 33, 60-61. The Probation Office explained that petitioner could face mandatory life sentences on the armed bank robbery and Section 924(c) counts under 18 U.S.C. 3559(c), which applies to defendants convicted of certain violent offenses (including bank robbery under Section 2113 and firearm possession under Section 924(c)) who have at least two prior convictions for such offenses. 18 U.S.C. 3559(c)(1) and (2)(F)(i); see PSR ¶¶ 57-58. The Probation Office further explained that petitioner's felon-in-possession conviction required a sentence of between 15 years and life imprisonment under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), which applies to defendants convicted of certain firearm offenses who have at least three prior convictions for "violent felon[ies]" committed on different occasions. See PSR ¶¶ 58-59.

The district court determined that, in light of petitioner's criminal history, he qualified for life sentences on each count. See Pet. App. 3-4. The court sentenced petitioner to concurrent

terms of life imprisonment on the armed bank robbery and felon-in-possession counts and a consecutive term of life imprisonment on the Section 924(c) count. Judgment 2. The court of appeals affirmed, 303 Fed. Appx. 439, and this Court denied a petition for a writ of certiorari, 558 U.S. 920.¹

In 2010, petitioner filed a motion to vacate his sentence under Section 2255, in which he challenged his convictions on several grounds, including alleged ineffective assistance of counsel. See First 2255 Motion 2-4 (listing issues). The district court denied that motion and denied a COA. D. Ct. Doc. 134, at 4-14. The court of appeals likewise denied a COA, 11-35300 C.A. Order, and this Court denied a petition for a writ of certiorari, 568 U.S. 933.²

3. In 2017, petitioner filed an authorized second-or-successive Section 2255 motion in which he argued that armed bank robbery does not qualify as a "crime of violence" under Section 924(c) or as a "violent felony" under the ACCA. Second 2255 Motion. 7-10, 12-20; see D. Ct. Doc. 172, at 3-18 (Apr. 15, 2019)

¹ In a separate proceeding, the court of appeals dismissed petitioner's pro se appeal from a district court order denying his request for a new trial. See 08-30126 C.A. Order (Aug. 6, 2009). This Court denied a petition for a writ of certiorari seeking review of that dismissal. See 559 U.S. 1113.

² Three years later, petitioner filed a pro se motion for reconsideration of the denial of his request for postconviction relief, which the district court denied. See D. Ct. Doc. 141, at 2 (Mar. 9, 2015). The court of appeals declined to review that decision. See 15-35555 C.A. Order (Dec. 4, 2015).

(Supplement to Second 2255 Motion). Section 924(c) defines a "crime of violence" as a felony offense 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 ACCA similarly defines a "violent felony" to include a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i) (elements clause), or "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii) (residual clause). Petitioner argued that armed bank robbery does not require proof of the elements required by Section 924(c)(3)(A) or the ACCA's elements clause, and that Section 924(c)(3)(B) and the ACCA's residual clause are unconstitutionally vague in light of Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (which invalidated the definition of a "crime of violence" in 18 U.S.C. 16(b)), and Johnson v. United States, 135 S. Ct. 2551 (2015) (which invalidated the residual clause). See Supplement to Second 2255 Motion 3-18; Second 2255 Motion 7-10, 12-20.

The district court denied petitioner's motion. Pet. App. 2-9. The court recognized that, while petitioner's motion was pending, this Court had held that the definition of a "crime of

violence” in Section 924(c)(3)(B) is unconstitutionally vague. Id. at 7 (citing United States v. Davis, 139 S. Ct. 2319 (2019)). The district court observed, however, that the Ninth Circuit had held that federal armed bank robbery qualifies as a “crime of violence” under the alternative definition in Section 924(c)(3)(A), ibid. (citing United States v. Watson, 881 F.3d 782 (9th Cir.) (per curiam), cert. denied, 139 S. Ct. 203 (2018)), and determined that the same reasoning supported treating armed bank robbery as a “violent felony” under the ACCA’s elements clause, id. at 8. The district court also denied petitioner’s request for a COA. Id. at 8-9.

4. The court of appeals likewise denied petitioner’s request for a COA. Pet. App. 1. The court determined that, in light of Watson, petitioner could not make a “substantial showing of the denial of a constitutional right,” as required to obtain a COA. Ibid. (quoting 28 U.S.C. 2253(c)(2)).

ARGUMENT

Petitioner contends (Pet. 9-22) that the court of appeals erred in denying his request for a COA on his claim that armed bank robbery is not a “crime of violence” under 18 U.S.C. 924(c)(3)(A). That contention lacks merit. A conviction for armed bank robbery requires proof that the defendant (1) took or attempted to take money from the custody or control of a bank “by force and violence, or by intimidation,” 18 U.S.C. 2113(a); and (2) either committed an “assault[]” or endangered “the life of

any person" through "the use of a dangerous weapon or device" in committing the robbery, 18 U.S.C. 2113(d). For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Johnson v. United States, No. 19-7079 (Apr. 24, 2020), armed bank 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 7-25, Johnson, supra (No. 19-7079).³ Every court of appeals with criminal jurisdiction, including the court below, has so held, see id. at 7-8, 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) and similarly worded provisions to bank robbery and armed bank robbery, see id. at 7-8 & n.1. The same result is warranted here.

1. Petitioner's contentions (Pet. 9-22) that armed bank robbery does not qualify as a crime of violence under Section 924(c)(3)(A) because it can be completed by taking property from a bank "by intimidation," 18 U.S.C. 2113(a), and because federal bank robbery does not require a specific intent to steal, see Carter v. United States, 530 U.S. 255, 268 (2000), are meritless

³ We have served petitioner with a copy of the government's brief in opposition in Johnson.

for the reasons explained at pages 9-20 of the government's brief in opposition in Johnson, supra (No. 19-7079).⁴

Contrary to petitioner's contention (Pet. 22-23), the fact that a district court judge granted a COA on whether unarmed bank robbery qualifies as a crime of violence under Section 924(c)(3)(A), see Pet. 23 (citing United States v. Dawson, 300 F. Supp. 3d 1207, 1210-1212 (D. Or. 2018)), does not show that the court of appeals erred in denying a COA on whether armed bank robbery qualifies. In any event, the court of appeals subsequently determined in Dawson that bank robbery is a crime of violence and that the defendant's contrary argument was "foreclosed" by precedent. United States v. Dawson, 780 Fed. Appx. 549, 550 (9th Cir. 2019), petition for cert. pending, No. 19-7569 (filed Jan. 17, 2020). Petitioner identifies no authority that would require the court of appeals to continue to grant COAs on that issue simply to apply its settled law and affirm the denial of relief on the merits.

2. Even if the question presented warranted this Court's review, this case would be an unsuitable vehicle for considering

⁴ This Court has granted review in Borden v. United States, No. 19-5410 (Mar. 2, 2020) to consider whether the "use * * * of physical force" under 18 U.S.C. 924(e)(2)(B)(i) includes reckless conduct. See Pet. 11 n.3 (observing that this Court previously granted certiorari on the same question in United States v. Walker, cert. dismissed, 140 S. Ct. 953 (2020) (No. 19-373)). But regardless of how this Court resolves the question presented in Borden, that decision will not affect the judgment in this case. See Br. in Opp. at 19 n.3, Johnson, supra (No. 19-7079).

it because a decision in petitioner's favor would have no practical effect on his sentence. See Supervisors v. Stanley, 105 U.S. 305, 311 (1882) (explaining that this Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties).

Petitioner's life sentence for his Section 924(c) conviction was imposed consecutively to two concurrent life sentences for his armed bank robbery and felon-in-possession convictions. Judgment 2. Petitioner's life sentence for armed bank robbery was imposed under 18 U.S.C. 3559(c), which provides that a defendant who commits a "serious violent felony" and has at least two prior convictions for "serious violent felonies" shall be sentenced to life imprisonment. 18 U.S.C. 3559(c)(1)(A)(i). The statute defines a "serious violent felony" to include a conviction for "robbery (as described in section * * * 2113)." 18 U.S.C. 3559(c)(2)(F)(i). Petitioner does not dispute that he has two prior federal convictions for armed bank robbery (in addition to California state convictions for armed robbery, attempted murder, and assault with a firearm resulting in great bodily injury), and that he therefore qualifies for a mandatory life sentence under Section 3559(c) irrespective of whether his Section 924(c) conviction -- the only conviction or sentence that the petition challenges -- is valid. Petitioner will therefore be subject to a lifetime term of imprisonment regardless of the Court's disposition of the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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