No. 19-7320

IN THE SUPREME COURT OF THE UNITED STATES

JURDEN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

United States v. Hanks, No. 18-cr-28 (Nov. 30, 2018)

United States Court of Appeals (11th Cir.):

United States v. Rogers, No. 18-15152 (Nov. 7, 2019)

United States v. Hanks, No. 18-14183 (Jan. 13, 2020)

Supreme Court of the United States:

Hanks v. United States, No. 19-7732 (Mar. 30, 2020), petition for reh'g pending (filed Apr. 29, 2020).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is reprinted at 794 Fed. Appx. 828.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 2019. The petition for a writ of certiorari was filed on January 14, 2020. 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 Middle District of Florida, petitioner was convicted of bank robbery, in violation of 18 U.S.C. 2113(a) and 2, 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. Judgment 1. The district court sentenced petitioner to 141 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A4.

1. On January 18, 2018, petitioner and an accomplice, Jerad Hanks, robbed a branch of Seacoast Bank in Sanford, Florida. Presentence Investigation Report (PSR) ¶ 6. Petitioner drove himself and Hanks to the bank and waited in the parking lot while Hanks entered the bank wearing a ski mask and carrying a loaded shotgun. Ibid. Hanks pointed the shotgun at bank employees and ordered them to fill a duffel bag with money. Ibid. The employees put $2372 in the bag. Ibid. Hanks left the bank with the bag and got into petitioner's car. Ibid. Petitioner then drove away. Ibid.

Police traced petitioner's car to an apartment complex where petitioner and Hanks lived. PSR ¶ 7. Police arrested petitioner and Hanks and searched their apartment and petitioner's car. PSR ¶¶ 7-8. A search of the apartment revealed the shotgun used during the robbery, the clothing that Hanks wore during the robbery, and

the cash stolen during the robbery, which had been divided in half and placed in different rooms. PSR ¶ 8. A search of the car revealed shotgun shells and shell casings that matched the shotgun used during the robbery. PSR ¶¶ 7-8. After being advised of his Miranda rights, Hanks confessed to his participation in the robbery. PSR ¶ 7.

2. A federal grand jury in the Middle District of Florida charged petitioner with bank robbery, in violation of 18 U.S.C. 2113(a) and 2, 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. Indictment 1-2. Petitioner filed a motion to dismiss the Section 924(c) count on the ground that bank robbery does not qualify as a "crime of violence" under Section 924(c). D. Ct. Doc. 37, at 3-7 (May 14, 2018) (Motion to Dismiss). 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). Petitioner argued that bank robbery does not require proof of the elements required by Section 924(c)(3)(A), and that Section 924(c)(3)(B) was 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 definition of a "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii)). See Motion to Dismiss 3-7.

The district court denied petitioner's motion to dismiss. D. Ct. Doc. 53, at 1 (July 17, 2018). The court observed that petitioner's arguments were "inconsistent with settled law in the Eleventh Circuit," ibid., which at that time had established that Section 924(c)(3)(B) was not unconstitutionally vague and that, in any event, federal robbery offenses (like bank robbery) that require proof of "force and violence" or "intimidation" necessarily require the use, attempted use, or threatened use of physical force under Section 924(c)(3)(A). See Ovalles v. United States, 861 F.3d 1257, 1267-1269 (11th Cir. 2017) (determining that carjacking, in violation of 18 U.S.C. 2119, is a crime of violence), vacated and remanded, 905 F.3d 1231 (11th Cir. 2018) (en banc), reinstated in part, 905 F.3d 1300 (11th Cir. 2018), cert. denied, 139 S. Ct. 2716 (2019).

A jury found petitioner guilty on both counts. Judgment 1; see Verdict Form 1-2. The district court sentenced petitioner to 141 months of imprisonment, consisting of 57 months of imprisonment on the bank robbery count and a consecutive term of 84 months of imprisonment on the Section 924(c) count. Judgment 2.

3. The court of appeals affirmed. Pet. App. A1-A4. While petitioner's case was pending on appeal, this Court held in United

States v. Davis, 139 S. Ct. 2319 (2019), that the "crime of violence" definition in Section 924(c)(3)(B) is unconstitutionally vague. Id. at 2336. The court of appeals explained, however, that bank robbery qualifies as a "crime of violence" under the alternative definition of that term in Section 924(c)(3)(A), the validity of which was not affected by Davis. Pet. App. A2-A3 (citing In re Sams, 830 F.3d 1234, 1239 (11th Cir. 2016)).

ARGUMENT

Petitioner contends (Pet. 6-9) that the court of appeals erred in determining that bank robbery is a "crime of violence" under 18 U.S.C. 924(c)(3)(A). That contention lacks merit. A conviction for bank robbery requires proof that the defendant 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). 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), 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).[1] Every court

[1] We have served petitioner with a copy of the government's brief in opposition in Johnson, which is also available from the Court's online docket at https://www.supremecourt.gov/docket/docketfiles/html/public/19-7079.html. Although Johnson itself involves armed bank robbery, the government's brief in opposition explains why bank robbery alone, in violation of 18 U.S.C. 2113(a), qualifies as a crime of violence.

of appeals with criminal jurisdiction, including the court below, has recognized that Section 924(c)(3)(A), or similarly worded provisions, encompasses federal bank-robbery offenses. See id. at 7-8 (citing decisions that apply such provisions to bank robbery offenses, or to armed bank robbery offenses for reasons that apply equally to bank robbery). And this Court has recently and repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on that issue, see id. at 7-8 & n.1, including the petition filed by petitioner's co-defendant, Hanks v. United States, No. 19-7732 (Mar. 30, 2020), petition for reh'g pending (filed Apr. 29, 2020). The same result is warranted here.

1. Petitioner's contention (Pet. 5-9) that 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), is meritless for the reasons explained at pages 9-20 of the government's brief in opposition in Johnson, supra (No. 19-7079).

Petitioner suggests in particular (Pet. 7) that the Eleventh Circuit's pattern jury instructions for federal bank robbery, by instructing the jury to consider whether a reasonable person would be intimidated, necessarily show that bank robbery "does not require proof of a defendant's state of mind." That is incorrect. Although intimidation is defined "at least partly in objective terms of what a reasonable, ordinary person would find intimidating," a defendant convicted of violating Section 2113(a)

must also know that his actions would be so perceived, "which separates this offense from crimes of mere negligence." United States v. Carr, 946 F.3d 598, 606 (D.C. Cir. 2020); see United States v. Horsting, 678 Fed. Appx. 947, 950 (11th Cir. 2017) (per curiam) (determining that a conviction for bank robbery requires more than proof that the defendant merely negligently intimidated the victim). As the courts of appeals to have considered the question have uniformly recognized, a defendant who "knowingly rob[s] or attempt[s] to rob a bank" by engaging in conduct that he knows "'would create the impression in an ordinary person that resistance would be met by force'" is properly described as having committed a threatened use of physical force within the meaning of Section 924(c)(3)(A) and similar provisions. United States v. Wilson, 880 F.3d 80, 87 & n.8 (3d Cir.) (citation omitted), cert. denied, 138 S. Ct. 2586 (2018); see Br. in Opp. at 15-20, Johnson, supra (No. 19-7079). Petitioner does not identify any case, in the Eleventh Circuit or elsewhere, in which a defendant was convicted of bank robbery without proof at least that the defendant knew that his actions would be perceived to convey that resistance to his demand for money would be met with force.[2]

[2] 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. 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).

2. Petitioner further contends (Pet. 9-13) that the circuits' uniform determination that federal bank robbery qualifies as a crime of violence under Section 924(c)(3)(A) and similar provisions is inconsistent with decisions of two of those circuits concluding that certain state offenses do not qualify as "violent felon[ies]" under the ACCA. That contention lacks merit.

The ACCA defines a "violent felony" to include an 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). Petitioner relies on cases from the Fourth and Ninth Circuits concluding that a state assault offense that encompasses rude or offensive touching such as spitting, United States v. Jones, 914 F.3d 893, 902-903 (4th Cir. 2019) (South Carolina assault on a law enforcement officer), and a state-law robbery offense that encompasses purse snatching, United States v. Shelby, 939 F.3d 975, 979 (9th Cir. 2019) (Oregon first-degree robbery), do not fall within that ACCA definition. See Stokeling v. United States, 139 S. Ct. 544, 554-555 (2019) (explaining that statutes that include "[m]ere snatching of property" or "offensive touching" do not categorically require the use or threat of physical force against another person) (citations and internal quotation marks omitted).

As both circuits have recognized, however, federal bank robbery qualifies as a crime of violence because -- unlike the state offenses addressed in Shelby and Jones -- bank robbery "even

[in] its least violent form requires at least an implicit threat to use the type of violent physical force necessary" to qualify under the ACCA and similar provisions. United States v. Watson, 881 F.3d 782, 785 (9th Cir.) (per curiam) (citation and internal quotation marks omitted), cert. denied, 139 S. Ct. 203 (2018); see United States v. McNeal, 818 F.3d 141, 154 (4th Cir.), cert. denied, 137 S. Ct. 164 (2016) (same). Even assuming that any intracircuit disagreement existed, it would not warrant this Court's review, see Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam), and in any event petitioner has identified no conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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