

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL WAYNE NORTHCUTT, 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 (C.D. Cal.):

United States v. Northcutt, No. 95-cr-20 (Aug. 16, 1996)

United States District Court (E.D. Cal.):

United States v. Northcutt, No. 96-cr-5067 (Feb. 21, 1997)

United States v. Northcutt, No. 97-cr-5033 (Feb. 21, 1997)

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

United States v. Northcutt, No. 96-cr-439 (Jan. 27, 1997)

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

United States v. Northcutt, No. 96-50468 (Nov. 6, 1997)

United States v. Northcutt, No. 97-10080 (May 19, 1998)

United States v. Northcutt, No. 19-16182 (Apr. 13, 2020)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter. The orders of the district court (Pet. App. B1-B3, C1-C4) are not published in the Federal Supplement but are available at 2019 WL 2524412 and 2019 WL 1539169.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2020. The petition for a writ of certiorari was filed on September 4, 2020. 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 Eastern District of California, petitioner was convicted on three counts of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and one count of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1994). Pet. App. D1. The court sentenced petitioner to 391 months of imprisonment, to be followed by five years of supervised release. Id. at D2-D3. The court of appeals affirmed. 145 F.3d 1343 (Tbl.). In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. 96-cr-5067 D. Ct. Doc. 38 (June 22, 2016) (2255 Motion). The district court denied that motion, Pet. App. C1-C4, but granted a certificate of appealability (COA) in part, id. at B1-B3. The court of appeals affirmed. Id. at A1-A2.

1. On October 25, 1995, petitioner robbed a branch of Stockton Savings Bank in Turlock, California. Presentence Investigation Report (PSR) ¶ 19. After entering the bank, petitioner approached a teller and asked her about the types of accounts the bank offered. Ibid. As the teller began to describe the accounts, petitioner pulled out a gun and a canvas bag and ordered the teller to fill the bag with money. Ibid. The teller put \$5510 in the bag. Ibid. Petitioner "took his bag, turned around, and casually walked out of the bank." Ibid. Petitioner then walked to a nearby movie theater, where he carjacked a man at

gunpoint and forced him to drive a short distance. PSR ¶ 21. Petitioner eventually exited the man's car and ran away. Ibid.

On November 10, 1995, petitioner robbed a branch of First National Bank in San Bruno, California. PSR ¶ 24. Petitioner entered the bank, brandished two handguns, and shouted, "I want \$15,000 in this bag and I want you to do it in three minutes. If you don't, I'll shoot everyone, including myself." Ibid. As two bank employees attempted to comply with petitioner's demands, petitioner pointed his guns at them, yelled obscenities, and repeated his threat to shoot everyone in the bank. PSR ¶ 25. Petitioner's gun then discharged twice, shooting one of the tellers in the arm. PSR ¶ 26. Petitioner, who appeared to be surprised by the shots, ran out of the bank with about \$7608 in cash. PSR ¶¶ 24, 26.

On November 20, 1995, petitioner robbed another branch of Stockton Savings Bank in Modesto, California. PSR ¶ 22. Petitioner pointed a handgun at a teller and said, "Give me the money out of that drawer and put it in the bag, or I'll be shooting." Ibid. As the teller and another bank employee began collecting money, petitioner became "very aggravated" and told them that they had "20 seconds" to finish. PSR ¶ 23. Petitioner eventually grabbed the bag away from the tellers and fled, stealing about \$2435. PSR ¶¶ 22-23.

On December 15, 1995, petitioner robbed a branch of Wells Fargo Bank in Upland, California. PSR ¶ 66. Similar to the other

robberies, petitioner pointed a gun at a teller and demanded that she fill a bag with money. Ibid. The teller put about \$4405 into a bag and handed it to petitioner. Ibid. As petitioner was moving to another teller station, he got into a physical altercation with a customer and fell to the ground, dropping a second loaded firearm. Ibid. Petitioner left the bank with the money and fled in a getaway car. Ibid.

Police officers pursued petitioner, resulting in a high-speed chase during which petitioner drove down the sidewalk of a shopping center and nearly hit several pedestrians. PSR ¶ 66. Petitioner eventually abandoned his car and fled on foot to a nearby freeway, where he tried to carjack three motorists at gunpoint. Ibid. As police officers approached petitioner, he screamed "Kill me!" Ibid. The officers eventually persuaded petitioner to drop his gun and arrested him. Ibid. A search of petitioner and his car revealed a large quantity of ammunition, methamphetamine, and the stolen money. Ibid. Petitioner later told one of the arresting officers that he had planned to shoot the officer and that he did not care if he died. Ibid.

2. A federal grand jury in the Eastern District of California charged petitioner with two counts of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and two counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (1994), related to the Stockton Savings Bank robberies. Indictment 1-3. Separately,

the government filed an information in the Northern District of California charging petitioner with armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), based on the First National Bank robbery. See Plea Agreement 2; PSR ¶¶ 2, 6. Petitioner agreed to waive indictment for the armed bank robbery count in the Northern District of California and consolidate that count with the other charges pending in the Eastern District of California. Plea Agreement 2. He also agreed to plead guilty to all of the armed bank robbery counts and to one of the Section 924(c) counts. Ibid. Petitioner was separately convicted of armed bank robbery and violating Section 924(c) in the Central District of California in connection with the Wells Fargo robbery, for which he was sentenced to 130 months of imprisonment. See PSR ¶¶ 11, 66.

In his plea agreement related to his offenses in the Eastern and Northern Districts of California, petitioner agreed to a sentence of at least 360 months of imprisonment that would run consecutively to the 130-month sentence that he had received in the Central District of California, yielding a total aggregate sentence of 490 months of imprisonment. Plea Agreement 4; see ibid. (explaining that "the object" of the parties' agreed-upon sentencing package was to ensure "that [petitioner's] total sentence for the Central District, Eastern District and Northern District offenses shall equal 490 months"). Petitioner also expressly waived his right to "collaterally attack his plea and conviction." Ibid. In exchange, the government agreed (1) to

dismiss the Section 924(c) count related to the second Stockton Savings Bank robbery; (2) to recommend a reduction of petitioner's offense level under the Sentencing Guidelines based on his acceptance of responsibility; and (3) not to charge petitioner with yet another bank robbery that he had committed in Sacramento, California. Id. at 6.

The district court accepted petitioner's guilty plea and sentenced him to 391 months of imprisonment, consisting of concurrent sentences of 151 months of imprisonment on the armed bank robbery counts and a consecutive sentence of 240 months of imprisonment on the Section 924(c) count. Pet. App. D2. Consistent with the parties' agreed-upon sentencing package, the court specified that 360 months of his sentence would run consecutively to the 130-month sentence he had received following his separate conviction for armed bank robbery in the Central District of California. Ibid. The court of appeals affirmed. 145 F.3d 1343 (Tbl.).¹

3. In 2016, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, in which he argued that armed bank robbery does not qualify as a "crime of violence" under Section

¹ While serving his term of imprisonment, petitioner was convicted of assault and contraband offenses in connection with an incident in which he stabbed another inmate, and he was sentenced to an additional consecutive term of 125 months of imprisonment. See United States v. Northcutt, 234 Fed. Appx. 789 (9th Cir.), cert. denied, 552 U.S. 925 (2007); see also 04-cr-418 D. Ct. Doc. 241, at 1 (C.D. Cal. Apr. 27, 2006). That conviction and sentence are not at issue here.

924(c). 2255 Motion 2-8. 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 armed bank robbery does not require proof of an element listed in Section 924(c)(3)(A), and that Section 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States, 576 U.S. 591 (2015), which held that the "residual clause" of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness, 576 U.S. at 597. See 2255 Motion 2-8.

The district court denied petitioner's motion. Pet. App. C1-C4. The court observed that the Ninth Circuit and "every other circuit to have addressed th[e] issue" had held that federal armed bank robbery qualifies as a "crime of violence" under the Section 924(c)(3)(A), because the offense requires proof of the use, attempted use, or threatened use of physical force. Id. at C4 (citing, inter alia, United States v. Watson, 881 F.3d 782 (9th Cir.) (per curiam), cert. denied, 139 S. Ct. 203 (2018)). The court therefore determined that petitioner's Section 924(c) conviction was valid irrespective of whether the alternative "crime of violence" definition in Section 924(c)(3)(B) was unconstitutionally vague. Ibid.

The district court acknowledged that, at the time of its decision, a circuit conflict existed over whether Section 924(c) (3) (B) was unconstitutionally vague. Pet. App. B2-B3 (citing cases). The court therefore granted petitioner a COA on that issue. Id. at B3. The court determined, however, that "reasonable jurists would [not] disagree" with the courts of appeals' "unanimous holding" that armed bank robbery qualifies as a crime of violence under Section 924(c) (3) (A), and the district court therefore denied petitioner's request for a COA on that issue. Ibid.

4. The court of appeals affirmed. Pet. App. A1-A2. 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. But the court of appeals cited circuit precedent holding that armed bank robbery qualifies as a "crime of violence" under the alternative definition of that term in Section 924(c) (3) (A). Pet. App. A1 (citing, inter alia, Watson, 881 F.3d 782). The court declined to expand the COA to encompass that issue and summarily affirmed the denial of petitioner's motion for postconviction relief. Ibid.

ARGUMENT

Petitioner contends (Pet. 12-26) 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. Every court of appeals with criminal jurisdiction has determined that bank robbery and armed bank robbery qualify as crimes of violence under Section 924(c)(3)(A) and similar provisions, and this Court has repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on that issue. In any event, this case would be an unsuitable vehicle for considering the question presented, both because petitioner waived any postconviction challenge to his Section 924(c) conviction and because he would be unlikely to receive a lower sentence if that conviction were vacated. The petition for a writ of certiorari should be denied.

1. 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).²

Petitioner contends (Pet. 12-26) that armed bank robbery does not qualify as a crime of violence under Section 924(c) (3) (A) because robbery "by intimidation" does not require a threat of violence or proof of knowing and intentional conduct. Those contentions are meritless for the reasons explained at pages 9-20 of the government's brief in opposition in Johnson, supra (No. 19-7079). Every court of appeals with criminal jurisdiction, including the court below, has recognized that Section 924(c) (3) (A) and similarly worded provisions encompass federal bank robbery and armed bank robbery. See id. at 7-8. This Court has recently and repeatedly denied petitions for a writ of certiorari challenging that consensus, see id. at 7-8 & n.1, and the same result is warranted here.³

The lower courts accordingly did not err in determining that petitioner was not entitled to a COA on his claim that armed bank

² We have served petitioner with a copy of the government's brief in opposition in Johnson, which is also available from this Court's online docket.

³ Petitioner observes (Pet. 20) that this Court has granted review in Borden v. United States, No. 19-5410 (oral argument scheduled Nov. 3, 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); see also Pet. 20 (acknowledging that "it is unlikely that Borden * * * will be dispositive" here) (capitalization altered).

robbery is not a crime of violence. Pet. App. A1, B3. To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). That standard requires the prisoner to demonstrate "that jurists of reason would find it debatable whether" a motion for postconviction relief "states a valid claim of the denial of a constitutional right." Gonzalez v. Thaler, 565 U.S. 134, 140-141 (2012) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). The uniform rejection of petitioner's contentions by every court of appeals to consider them -- including the court below in a precedential opinion, see United States v. Watson, 881 F.3d 782 (9th Cir.) (per curiam), cert. denied, 139 S. Ct. 203 (2018) -- demonstrates that petitioner cannot make the showing necessary to obtain a COA. See Pet. App. A1, B2-B3.

2. In any event, this case would be an unsuitable vehicle for considering the question presented, for two independent reasons.

a. Petitioner entered into a plea agreement in which he waived his right to challenge his convictions on collateral review, including his conviction under Section 924(c). Plea Agreement 4. This Court has repeatedly recognized that a defendant may validly waive constitutional and statutory rights as part of a plea agreement so long as his waiver is knowing and voluntary. See Garza v. Idaho, 139 S. Ct. 738, 744-745 (2019) (waiver of right to appeal); Ricketts v. Adamson, 483 U.S. 1, 9-10 (1987) (waiver of right to raise double jeopardy defense); Town of Newton v. Rumery,

480 U.S. 386, 389-390, 398 (1987) (waiver of right to file constitutional tort action).

Although the government did not invoke petitioner's waiver in responding to his motion for postconviction relief under 28 U.S.C. 2255, that does not preclude this Court from considering petitioner's waiver as a reason to deny review. See Day v. McDonough, 547 U.S. 198, 211 (2006) (explaining that the Court may consider a threshold procedural bar not pressed by the government where "nothing in the record suggests that the [government] 'strategically' withheld the defense or chose to relinquish it"); cf. United States v. New York Tel. Co., 434 U.S. 159, 166 n.8 (1977) ("[A] prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted."). Doing so would be particularly appropriate here. Petitioner obtained substantial benefits as a result of his decision to plead guilty and to waive his right to collaterally attack his convictions, including the government's agreement not to charge him in connection with another bank robbery he had committed. Plea Agreement 6. Petitioner cannot demonstrate any unfairness in holding him to his bargain.

b. Finally, even if petitioner's argument were accepted and his Section 924(c) conviction were vacated, that likely would not result in a lower overall sentence for him. Petitioner agreed, as a condition of his plea, that the sentence in this case would be part of a package designed to achieve an overall sentence of 490

months of imprisonment for the multiple armed bank robberies that he committed in three different jurisdictions in California. Plea Agreement 4 (explaining that "[i]t is the object of this plea agreement to achieve * * * [a] total sentence for the Central District, Eastern District and Northern District offenses [that] shall equal 490 months"). Although the plea agreement did not require the district court to adopt the parties' proposed sentencing package, ibid., the court did adopt that package and imposed a sentence of 391 months of imprisonment in this case, with 360 months running consecutively to the 130-month sentence petitioner had already received in the Central District of California. Pet. App. D2.

The parties' contemplation in the plea agreement that the sentencing package would include a sentence of 240 months on the Section 924(c) offense, which was the required statutory minimum at that time, does not suggest that the district court would impose a lower overall sentence for petitioner's string of violent armed bank robberies if the Section 924(c) conviction were vacated. See Plea Agreement 4; 18 U.S.C. 924(c)(1) (1994) (requiring a mandatory 20-year consecutive sentence for a "second or subsequent conviction under this subsection"). Where a defendant is convicted of both a predicate offense and a violation of Section 924(c), a sentencing court may properly consider the fact of the mandatory consecutive sentence under Section 924(c) "when calculating an appropriate sentence for the predicate offense." Dean v. United

States, 137 S. Ct. 1170, 1178 (2017). Accordingly, if a defendant's Section 924(c) conviction is vacated, the courts of appeals have "routinely agree[d]" that the sentencing court may preserve the overall sentencing package by "increas[ing] the sentences for any remaining counts up to the limit set by the original aggregate sentence." Id. at 1176 (citing cases); see Greenlaw v. United States, 554 U.S. 237, 253 (2008) (describing "'sentencing package'" doctrine).

Particularly in light of petitioner's agreement that an aggregate term of 490 months of imprisonment was appropriate punishment for all of the armed bank robberies with which he had been charged in multiple jurisdictions -- and the government's agreement, in exchange, to forgo charging petitioner with yet another bank robbery that he had committed -- it is unlikely that the district court would be inclined to impose a lower sentence if petitioner's Section 924(c) conviction were vacated. Instead, the most likely course would be for the sentencing court to adjust the sentences on the remaining armed bank robbery counts to reach the 360-month threshold that, when run consecutively to the 130-month sentence imposed in the Central District of California, would yield the 490-month sentence to which petitioner agreed and which the court previously found to be appropriate. See 18 U.S.C. 2113(d) (authorizing a sentence of up to 25 years of imprisonment for an armed bank robbery conviction).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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