Nos. 17-5471, 17-5472, and 17-5527

IN THE SUPREME COURT OF THE UNITED STATES

ALDO CASTILLO, PETITIONER

v.

UNITED STATES OF AMERICA

LUIS A. CASTILLO, PETITIONER

v.

UNITED STATES OF AMERICA

FERNANDO BUENDIA REYES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH 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), qualifies as a "crime of violence" within the meaning of 18 U.S.C. 924(c)(3).

IN THE SUPREME COURT OF THE UNITED STATES

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No. 17-5471

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## OPINIONS BELOW

The opinions of the court of appeals (17-5471 Pet. App. A1; 17-5472 Pet. App. A1; 17-5527 Pet. App. A1) are unreported. The orders of the district court in Nos. 17-5471 and 17-5472 (17-5471 Pet. App. B1-B4; 17-5472 Pet. App. B1-B4) are unreported. The order of the district court in No. 17-5527 (17-5527 Pet. App.

B1-B4) is not published in the Federal Supplement but is available at 2016 WL 4939534.

## JURISDICTION

The judgment of the court of appeals in No. 17-5472 was entered on February 15, 2017. The judgments of the court of appeals in Nos. 17-5471 and 17-5527 were entered on February 17, 2017. Petitions for rehearing were denied on May 4, 2017 (17-5471 Pet. App. D1; 17-5472 Pet. App. D1; 17-5527 Pet. App. D1). The petitions for writs of certiorari were filed on July 31, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following guilty pleas in the United States District Court for the District of South Dakota, petitioners were 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) and 2. The district court sentenced petitioner Aldo Castillo to 155 months of imprisonment and sentenced petitioners Luis Castillo and Buendia Reyes to 169 months of imprisonment, with each term of imprisonment to be followed by three years of supervised release. Aldo Castillo Judgment 2-3; Luis Castillo Judgment 2-3; Buendia Reyes Judgment 2-3. Petitioners did not appeal their convictions or sentences. In 2016, petitioners filed motions for postconviction relief under

28 U.S.C. 2255, in which they argued that their convictions under Section 924(c) should be vacated. The district court denied petitioners' motions and denied their requests for certificates of appealability (COAs). 17-5471 Pet. App. B1-B4; 17-5472 Pet. App. B1-B4; 17-5527 Pet. App. B1-B4. The court of appeals likewise denied petitioners' requests for COAs. 17-5471 Pet. App. A1; 17-5472 Pet. App. A1; 17-5527 Pet. App. A1.

1. Petitioners are citizens of Mexico who are unlawfully present in the United States. Presentence Investigation Report (PSR) ¶ 8.[1] On March 13, 2009, petitioners robbed the First State Bank in Warner, South Dakota. PSR ¶¶ 6, 13. Petitioners entered the bank wearing ski masks and gloves, brandished a loaded .38 caliber revolver and two BB guns, and demanded "all of the bank's money." PSR ¶ 13; see PSR ¶ 18. After stealing over $85,000 from the teller drawers and vault, petitioners bound the bank's employees with zip ties, placed the employees in the vault, and fled in a pickup truck. PSR ¶¶ 13, 17.

Police encountered petitioners' pickup truck shortly thereafter and tried to stop it. PSR ¶ 15. Petitioners led the

[1] The relevant record documents for each petitioner are substantively identical. For ease of reference, this brief cites the documents relating to petitioner Aldo Castillo (No. 17-5471), with cross-references to similar documents relating to petitioners Luis Castillo (No. 17-5472) and Buendia Reyes (No. 17-5527) where appropriate.

police on a lengthy high-speed chase that ended only after police managed to puncture the truck's tires. PSR ¶¶ 15-16. Police recovered the stolen money from the truck, along with the ski masks, gloves, and zip ties used during the robbery. PSR ¶ 17. They recovered the guns (which petitioners had thrown out of the truck during the chase) shortly thereafter. PSR ¶ 18. Petitioners admitted to having robbed the bank and admitted to having stolen the .38 caliber revolver during a similar robbery they committed in Colorado. PSR ¶¶ 16, 18.

2. A federal grand jury charged petitioners with bank robbery, in violation of 18 U.S.C. 2113(a) and (2); brandishing a firearm during and in relation to a "crime of violence" (namely, the bank robbery), in violation of 18 U.S.C. 924(c)(1)(A) and 2; and possession of a firearm by an illegal alien, in violation of 18 U.S.C. 922(g)(5) and 2. Indictment 1-2. Petitioners pleaded guilty to the bank robbery and Section 924(c) counts. Plea Agreement 2. The district court sentenced petitioner Aldo Castillo to 155 months of imprisonment, including 71 months on the bank robbery count and a mandatory minimum consecutive sentence of 84 months on the Section 924(c) count. Aldo Castillo Judgment 2. The court sentenced petitioners Luis Castillo and Buendia Reyes to 169 months of imprisonment each, including 85 months on the bank robbery count and 84 months on the Section 924(c) count. Luis

Castillo Judgment 2; Buendia Reyes Judgment 2. Petitioners did not appeal their convictions or sentences.

3. In 2016, petitioners filed motions for postconviction relief under 28 U.S.C. 2255, in which they argued that bank robbery does not qualify as a "crime of violence" under Section 924(c) and thus their convictions and sentences on the Section 924(c) count should be vacated. See 16-cv-1020 Docket entry No. 7, at 1-3 (July 11, 2016).[2] Section 924(c) 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). Petitioners asserted that bank robbery could only qualify as a "crime of violence" under Section 924(c)(3)(B), and that Section 924(c)(3)(B) is unconstitutional under Johnson v. United States, 135 S. Ct. 2551 (2015). See 16-cv-1020 Docket entry No. 7, at 1-3. In Johnson, this Court held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), which defines a "violent felony" as an offense

[2] See also 16-cv-1021 Docket entry No. 8, at 1-3 (July 11, 2016) (Luis Castillo); 16-cv-1030 Docket entry No. 6, at 1-3 (July 11, 2016) (Buendia Reyes).

that "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. 135 S. Ct. at 2557.

The district court denied petitioners' motions. See 17-5471 Pet. App. B1-B4; 17-5472 Pet. App. B1-B4; 17-5527 Pet. App. B1-B4. The court reasoned that Johnson invalidated the ACCA's residual clause, not Section 924(c)(3)(B), and that the two "provisions are not so similar" that Johnson could reasonably be construed to authorize postconviction relief for prisoners raising challenges to Section 924(c)(3)(B). 17-5471 Pet. App. B3; see 17-5472 Pet. App. B3 (same); 17-5527 Pet. App. B3 (same). The court also denied petitioners' requests for COAs on the ground that petitioners failed to "ma[ke] a substantial showing of the denial of a constitutional right." 17-5471 Pet. App. B4; see 17-5472 Pet. App. B4 (same); 17-5527 Pet. App. B4 (same).

4. Petitioners filed applications for COAs in the court of appeals, which the court summarily denied. See 17-5471 Pet. App. A1; 17-5472 Pet. App. A1; 17-5527 Pet. App. A1.

## ARGUMENT

Petitioners contend (17-5471 Pet. 4-8; 17-5472 Pet. 4-8; 17-5527 Pet. 4-8) that writs of certiorari are warranted to consider whether the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. That issue

does not warrant review in the context of this case. Every court of appeals to consider the issue, including the Eighth Circuit, has held that bank robbery under 18 U.S.C. 2113(a) satisfies the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(A) or similarly worded provisions. That alternative basis for upholding the validity of petitioners' convictions obviates any need for this Court to consider whether Section 924(c)(3)(B) is unconstitutionally vague. This Court has repeatedly denied petitions for writs of certiorari seeking review of whether bank robbery qualifies as a "crime of violence" under Section 924(c).[3] The same result is warranted here.

1. As noted above, Section 924(c)(3)(A) defines a "crime of violence" as a felony that "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). Petitioners pleaded guilty to bank robbery, which requires proof that the defendant took money from the custody or control of a bank "by force and violence, or by intimidation." 18 U.S.C. 2113(a). See, e.g., Indictment 1 (alleging that petitioners committed the robbery "by

[3] See, e.g., Williams v. United States, No. 17-5551 (Oct. 2, 2017); Bruce v. United States, 137 S. Ct. 1580 (2017) (No. 16-7084); Fox v. United States, 137 S. Ct. 1224 (2017) (No. 16-6989); McBride v. United States, 137 S. Ct. 830 (2017) (No. 16-6475); Wingate v. United States, 136 S. Ct. 1364 (2016) (No. 15-5979).

force and violence, and by intimidation"); Plea Agreement 2 (admitting guilt to that charge).

The courts of appeals that have addressed the issue have uniformly held that "intimidation" under Section 2113(a) requires at least the threatened use of violent force. See, e.g., United States v. Armour, 840 F.3d 904, 909 (7th Cir. 2016) ("A bank employee can reasonably believe that a robber's demands for money to which he is not entitled will be met with violent force * * * because bank robbery under [Section] 2113(a) inherently contains a threat of violent physical force."); United States v. McBride, 826 F.3d 293, 296 (6th Cir. 2016) (same), cert. denied, 137 S. Ct. 830 (2017); United States v. McNeal, 818 F.3d 141, 154 (4th Cir.) (same), cert. denied, 137 S. Ct. 164 (2016); United States v. Selfa, 918 F.2d 749, 751 (9th Cir.) (same), cert. denied, 498 U.S. 986 (1990); United States v. Ferreira, 821 F.2d 1, 6 n.8 (1st Cir. 1987) (same).

Consistent with that uniform understanding of the elements of the offense, every court of appeals to have addressed the issue, including the Eighth Circuit, has concluded that bank robbery under Section 2113(a) qualifies as a "crime of violence" within the meaning of Section 924(c)(3)(A) or similarly worded provisions. See United States v. Ellison, 866 F.3d 32, 35-39 (1st Cir. 2017); United States v. Williams, 864 F.3d 826, 830 (7th Cir. 2017)

(citing Armour, 840 F.3d at 909), cert. denied, No. 17-5551 (Oct. 2, 2017); United States v. Jones, 854 F.3d 737, 740 & n.2 (5th Cir. 2017), cert. denied, No. 17-5285 (Oct. 2, 2017); Holder v. United States, 836 F.3d 891, 892 (8th Cir. 2016) (per curiam); In re Sams, 830 F.3d 1234, 1239 (11th Cir. 2016); McNeal, 818 F.3d at 153; Johnson v. United States, 779 F.3d 125, 128-129 (2d Cir.), cert. denied, 136 S. Ct. 209 (2015); United States v. Wright, 215 F.3d 1020, 1028 (9th Cir.), cert. denied, 531 U.S. 969 (2000); Royal v. Tombone, 141 F.3d 596, 602 (5th Cir. 1998) (per curiam); see generally McNeal, 818 F.3d at 153 ("Our sister circuits have uniformly ruled that other federal crimes involving takings 'by force and violence, or by intimidation,' have as an element the use, attempted use, or threatened use of physical force.").

Because petitioners' predicate offense qualifies as a "crime of violence" under Section 924(c)(3)(A), no reason exists to consider whether it would also qualify under Section 924(c)(3)(B). For the same reason, petitioners cannot "show[] that reasonable jurists could debate" whether their convictions under Section 924(c) are constitutional, as they must to obtain COAs on postconviction review. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

2. Petitioners note (17-5471 Pet. 8-9; 17-5472 Pet. 8-9; 17-5527 Pet. 8-9) that this Court has granted a petition for a

writ of certiorari in Sessions v. Dimaya, No. 15-1498 (reargued Oct. 2, 2017), to consider whether the definition of a "crime of violence" in 18 U.S.C. 16(b) is unconstitutionally vague. Although Section 16(b) and Section 924(c)(3)(B) contain similar language, the Court's decision in Dimaya will not resolve any question that will affect the outcome of this case. As explained, bank robbery qualifies as a "crime of violence" under Section 924(c)(3)(A), the language of which is not at issue in Dimaya. Holding this petition for the decision in Dimaya is therefore not warranted.

## CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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