

No. 17-5477

IN THE SUPREME COURT OF THE UNITED STATES

COLT DAVID SCHNEIDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT 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).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is unreported. The order of the district court (Pet. App. B1-B3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2017. A petition for rehearing was denied on May 9, 2017 (Pet. App. D1). The petition for a writ of certiorari was filed on August 1, 2017. 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 North Dakota, 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) and 2. The district court sentenced petitioner to 84 months and one day of imprisonment, to be followed by three years of supervised release. Judgment 2-3. Petitioner did not appeal his convictions or sentence. In 2016, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, in which he argued that his conviction under Section 924(c) should be vacated. The district court denied petitioner's motion and denied his request for a certificate of appealability (COA). Pet. App. B1-B3. The court of appeals likewise denied petitioner's request for a COA. Id. at A1.

1. On October 18, 2012, petitioner and Johnner Ward robbed the American Bank Center in New England, North Dakota. Presentence Investigation Report (PSR) ¶ 5. Petitioner entered the bank wearing a black ski mask and brandishing a sawed-off shotgun, and he and Ward "demand[ed] that the bank teller give them money." Ibid.; see PSR ¶ 6. They stole over \$2300. PSR ¶ 5.

2. A federal grand jury 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" (namely,

the bank robbery), in violation of 18 U.S.C. 924(c)(1)(A) and 2. Indictment 1-2. A jury found petitioner guilty on both counts. Judgment 1. The district court sentenced petitioner to one day of imprisonment on the bank robbery count and to a mandatory minimum consecutive sentence of 84 months of imprisonment on the Section 924(c) count. Id. at 2. Petitioner did not appeal his convictions or sentence.

3. In 2016, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, in which he argued that bank robbery does not qualify as a "crime of violence" under Section 924(c) and thus his conviction and sentence on the Section 924(c) count should be vacated. See D. Ct. Doc. 104-1, at 1-3 (June 21, 2016). 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).

Petitioner asserted that Section 924(c)(3)(B) is unconstitutional under Johnson v. United States, 135 S. Ct. 2551 (2015). D. Ct. Doc. 104-1, 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 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 government responded that petitioner’s argument was foreclosed by United States v. Prickett, 830 F.3d 760 (per curiam), modified on reh’g, 839 F.3d 697 (per curiam), petition for cert. pending, No. 16-7373 (filed Dec. 28, 2016), in which the Eighth Circuit had rejected the contention that Section 924(c)(3)(B) is unconstitutionally vague under the reasoning of Johnson. See D. Ct. Doc. 112, at 3-4 (July 28, 2016). The government further argued that, in any event, bank robbery qualifies as a “crime of violence” under Section 924(c)(3)(A). Id. at 5-7.

The district court denied petitioner’s motion. See Pet. App. B1-B3. The court recognized that in Welch v. United States, 136 S. Ct. 1257 (2016), this Court held that Johnson announced a new, substantive rule of constitutional law concerning the ACCA’s residual clause that applies retroactively on collateral review. Pet. App. B2; see 136 S. Ct. at 1268. The district court reasoned, however, that neither Johnson nor Welch recognized a rule, retroactive or otherwise, that would invalidate Section 924(c)(3)(B). See Pet. App. B2 (stating that petitioner was “attempt[ing] to create a second new rule by extending Johnson to convictions under Section 924(c)(3)(B)”). The court also observed that, in any event, petitioner’s claim was foreclosed by the Eighth

Circuit's decision in Prickett. Ibid. The court denied petitioner's request for a COA on the ground that his claim was "not debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings." Id. at B3 (citing Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)).

4. Petitioner filed an application for a COA in the court of appeals, which the court summarily denied. Pet. App. A1.

ARGUMENT

Petitioner contends (Pet. 4-8) that a writ of certiorari is 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. For the reasons stated in the government's brief in opposition to the similar petitions for writs of certiorari filed in Castillo v. United States, No. 17-5471, the federal offense of bank robbery qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3)(A) and similar provisions, because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Ibid.; see Br. in Opp. at 7-9, Castillo, supra (No. 17-5471).^{*} Every court of appeals to have considered the question (including the Eighth Circuit) has so held. Br. in Opp. at 8-9, Castillo, supra (No. 17-5471). And this Court

^{*} We have served petitioner with a copy of the government's brief in opposition in Castillo.

has recently and repeatedly denied review in other cases raising that issue. Id. at 7 & n.3.

Because bank robbery qualifies as a “crime of violence” under Section 924(c)(3)(A), no reason exists to consider whether the offense would also qualify under Section 924(c)(3)(B). Nor does any reason exist to hold this petition for the decision in Sessions v. Dimaya, No. 15-1498 (reargued on Oct. 2, 2017). See Pet. 8-9. Dimaya concerns the constitutionality of a provision that is similar to Section 924(c)(3)(B). It presents no issue concerning a provision similar to Section 924(c)(3)(A).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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