

No. 17-5732

IN THE SUPREME COURT OF THE UNITED STATES

RUSSELL HAMPTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner argues (Pet. 19-27) that the definition of a “crime of violence” in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015). This Court has granted review in Sessions v. Dimaya, No. 15-1498 (reargued Oct. 2, 2017), to decide whether the similarly worded definition of a “crime of violence” in 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act’s definition of the term “aggravated felony,” 8 U.S.C. 1101(a)(43), is unconstitutionally vague. Although petitioner’s constitutional claim would ordinarily warrant holding his petition for a writ of certiorari pending the decision in Dimaya, that course is not

appropriate here because the decision below is interlocutory. The petition should accordingly be denied.

1. Petitioner was convicted of conspiring to engage in a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d); and possessing a firearm in furtherance of a "crime of violence" (namely, the RICO conspiracy), in violation of 18 U.S.C. 924(c)(1)(A). Pet. App. 3. 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).

The court of appeals concluded that because the RICO predicate offenses at issue (attempted murders) qualified as crimes of violence under Section 924(c)(3)(A), a conspiracy to commit those offenses likewise qualified as a crime of violence under Section 924(c)(3)(A). Pet. App. 7-8. The court relied on United States v. Elder, 88 F.3d 127 (2d Cir. 1996), in which the court held that a conspiracy to commit a violent offense "is itself a crime of violence" for purposes of Section 924(c). Id. at 129; see Pet. App. 8. Elder, however, held that such conspiracies presumptively qualify as crimes of violence under Section 924(c)(3)(B), not

Section 924(c)(3)(A). See 88 F.3d at 129 (addressing conspiracy to commit Hobbs Act robbery). The Second Circuit has also relied on Section 924(c)(3)(B), or the similar language in Section 16(b), to classify other conspiracies as crimes of violence, including RICO conspiracies. See, e.g., United States v. Doe, 49 F.3d 859, 866 (1995) (holding that RICO conspiracy qualifies as a crime of violence under Section 16(b) because it “creates the substantial risk that physical force against the person or property of another may be used in the offense”); United States v. Patino, 962 F.3d 263, 267 (same for conspiracy to commit kidnapping under Section 924(c)(3)(B)), cert. denied, 506 U.S. 927 (1992). Other courts of appeals have likewise classified conspiracies as crimes of violence under Section 924(c)(3)(B). See, e.g., United States v. Eshetu, 863 F.3d 946, 955-956 (D.C. Cir. 2017) (citing cases related to Hobbs Act conspiracy).

Because the validity of Section 924(c)(3)(B) is closely related to the issue currently before this Court in Dimaya, supra, and the court of appeals’ unpublished summary order in this case may have incorrectly relied on Section 924(c)(3)(A) rather than Section 924(c)(3)(B) in holding that petitioner’s conspiracy offense is a crime of violence, the usual course would be to hold the petition pending the decision in Dimaya and then dispose of it as appropriate in light of that decision.

2. Holding the petition for Dimaya is not warranted here, however, because the court of appeals' decision is interlocutory. The court vacated petitioner's sentence due to a Sentencing Guidelines calculation error and remanded to the district court for resentencing. Pet. App. 9-11. The district court recently resentenced petitioner and issued an amended judgment, from which petitioner has appealed. D. Ct. Doc. 1360 (Nov. 3, 2017); D. Ct. Doc. 1362 (Nov. 8, 2017). The interlocutory posture of the decision from which petitioner seeks review by itself "furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam). After the court of appeals resolves petitioner's pending appeal from the district court's amended judgment, petitioner will have an opportunity to raise the claims pressed here, in addition to any claims arising from the disposition of his second appeal, in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting Court's "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). No justification exists in this case to depart from this Court's usual practice of declining to review interlocutory petitions.

The petition for a writ of certiorari should be denied.*

Respectfully submitted.

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* The government waives any further response to the petition unless this Court requests otherwise.