

No. 17-6117

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT JAMES EIZEMBER, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-6117

SCOTT JAMES EIZEMBER, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

Petitioner contends (Pet. 7-12) that the lower courts erred in denying a certificate of appealability on his claim 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). He notes (Pet. 9-12) that a circuit conflict exists over whether Section 924(c)(3)(B) is constitutional and that 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. The petition for a writ of certiorari should be held pending the decision in Dimaya and then disposed of as appropriate in light of that decision.

Petitioner was convicted on two counts of kidnapping, in violation of 18 U.S.C. 1201; one count of brandishing a firearm during and relation to a "crime of violence" (namely, the kidnappings), in violation of 18 U.S.C. 924(c)(1)(A); and one count of carjacking, in violation of 18 U.S.C. 2119. Pet. App. 4a; see Indictment 1-2. 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).

The district court in this case, and courts of appeals in other cases, have concluded that kidnapping may qualify as a "crime of violence" under Section 924(c)(3)(B). See Pet. App. 2a, 8a; see, e.g., United States v. Jenkins, 849 F.3d 390, 393-394 (7th Cir. 2017), petition for cert. pending, No. 17-97 (filed July 19, 2017); United States v. Green, 521 F.3d 929, 932-933 (8th Cir. 2008). Because the validity of Section 924(c)(3)(B) is closely related to the issue currently before this Court in Dimaya, supra,

the petition should be held pending the decision in Dimaya and then disposed of as appropriate in light of that decision.*

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

DECEMBER 2017

* The government waives any further response to the petition unless this Court requests otherwise. Petitioner has been sentenced to death in Oklahoma for a murder he committed before the federal offenses at issue in this case. See Eizember v. Trammell, 803 F.3d 1129 (10th Cir. 2015) (Gorsuch, J.), cert. denied, 136 S. Ct. 2468 (2016). The resolution of this case will not affect that pending state sentence.