

No. 17-6855

IN THE SUPREME COURT OF THE UNITED STATES

ANDREW N. GRIFFITH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying a certificate of appealability on petitioner's claim that bank robbery, in violation of 18 U.S.C. 2113(a), is not a "crime of violence" under 18 U.S.C. 924(c) (3) .

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is not published in the Federal Reporter but is available at 2017 WL 4857461. The opinion of the district court (Pet. App. 2a-5a) is not published in the Federal Supplement but is available at 2017 WL 1078155.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2017. On October 12, 2017, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including

November 21, 2017, and the petition was filed on November 16, 2017. 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 Middle District of Pennsylvania, petitioner was convicted of attempted bank robbery, in violation of 18 U.S.C. 2113(a), and possessing, brandishing, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i), (ii), and (iii). Judgment 1. Petitioner was sentenced to a total of 153 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. Petitioner did not appeal his convictions or sentence. In 2016, petitioner moved for post-conviction relief under 28 U.S.C. 2255, arguing 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. 2a-7a. The court of appeals likewise denied a COA. Id. at 1a.

1. Petitioner plotted with four other people to rob banks in York, Pennsylvania. See Presentence Investigation Report (PSR) ¶¶ 4-11. On December 5, 2007, petitioner and his four fellow conspirators drove to Northwest Savings Bank. One of the conspirators entered, posing as a potential new customer, in order to case the bank for the robbery. PSR ¶ 4. When the conspirator returned to the car to report her findings, petitioner and the

others, wearing masks, exited the car and began approaching the bank. The bank manager became suspicious, locked the doors, and called the police. The conspirators fled before the police arrived. Ibid.

Later the same day, the group drove to Citizens Bank, another bank in York. PSR ¶ 5. Petitioner requested to drive the getaway car. PSR ¶¶ 5, 8, 10. The other four other conspirators entered the bank, where one pointed a firearm at a bank teller and demanded cash, announcing that he would shoot her if she did not comply. PSR ¶ 5. After the conspirator began counting backwards from five, the teller handed him \$1343. PSR ¶¶ 5, 12. As the group exited, another conspirator discharged a round from his firearm into the bank's ceiling. PSR ¶ 5. Petitioner then drove the group away from the scene. Ibid.

2. A federal grand jury charged petitioner with one count of possessing, using, carrying, brandishing, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i), (ii), and (iii), and 2; one count of conspiracy to possess, carry, use, brandish, and discharge a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(o); one count of bank robbery, in violation of 18 U.S.C. 2113(a) and 2; and one count of attempted bank robbery, in violation of 18 U.S.C. 2113(a) and 2. Indictment 1-5.

Petitioner pleaded guilty to the Section 924(c) count and to the attempted-bank-robbery count. Plea Agreement 1-3.¹ The district court sentenced petitioner to 33 months of imprisonment on the attempted-bank-robbery count, and to a consecutive term of 120 months on the Section 924(c) count, for a total term of 153 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. Petitioner did not appeal his convictions or his sentence.

3. In 2016, petitioner filed a motion for post-conviction 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 that his conviction and sentence on the Section 924(c) count should be vacated. See D. Ct. Doc. 347 (May 17, 2016). 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 asserted that bank robbery could qualify as a "crime of violence" only under Section 924(c) (3) (B), and that

¹ Petitioner admitted at his guilty-plea hearing that, although he had not personally possessed, brandished, and discharged the firearm, he was guilty of aiding and abetting that offense. See Plea Tr. 12-14; cf. 18 U.S.C. 2(a).

Section 924(c)(3)(B) is unconstitutional under Johnson v. United States, 135 S. Ct. 2551 (2015). See D. Ct. Doc. 347, at 4-11. In Johnson, this Court held that the “residual clause” of the Armed Career Criminal Act of 1984 (ACCA), which defines a “violent felony” to include 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 district court denied petitioner’s motion. Pet. App. 2a-6a. Applying circuit precedent, the court looked to the facts underlying petitioner’s bank-robbery conviction and concluded that the admitted use of a firearm in the offense constituted “the use, attempted use, or threatened use of physical force” necessary to establish that the bank robbery qualified as a crime of violence under Section 924(c)(3)(A). Id. at 5a (citing United States v. Galati, 844 F.3d 152, 154-155 (3d Cir. 2016), cert. denied, No. 17-5229 (Jan. 8, 2018)). The court accordingly found it unnecessary to consider petitioner’s arguments concerning the constitutionality of Section 924(c)(3)(B). The court also denied a COA, determining that an appeal would be “frivolous and not taken in good faith.” Id. at 7a.

4. Petitioner filed an application for a COA in the court of appeals. See Pet. C.A. COA Appl. 2. Finding that petitioner had failed to make a substantial showing of the denial of a

constitutional right, the court of appeals summarily denied petitioner's application. Pet. App. 1a (citing 28 U.S.C. 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

ARGUMENT

Petitioner contends (Pet. 7-14) that his conviction under 18 U.S.C. 924(c) should be vacated because bank robbery, in violation of 18 U.S.C. 2113(a), is not a "crime of violence." That contention lacks merit. Bank robbery involves "the use, attempted use, or threatened use of physical force against the person or property of another" and therefore qualifies as a crime of violence under 18 U.S.C. 924(c)(3)(A), as every circuit to have considered the issue has concluded. Petitioner argues that the court of appeals erred by failing to use the categorical approach employed by other circuits in analyzing whether his bank robbery conviction qualified as a crime of violence under 18 U.S.C. 924(c)(3)(A). But petitioner's methodological criticism makes no difference because the same result would obtain in this case under any approach. This Court has repeatedly and recently denied petitions for writs of certiorari seeking review of the question whether bank robbery qualifies as a "crime of violence" under Section 924(c).² The same result is warranted here.

² See, e.g., Castillo v. United States, No. 17-5471 (Jan. 8, 2018); Hardy v. United States, No. 17-5442 (Jan. 8, 2018); Stephens v. United States, 138 S. Ct. 502 (2017) (No. 17-5186); Anderson v. United States, 138 S. Ct. 504 (2017) (No. 17-5753); Williams v. United States, 138 S. Ct. 272 (2017) (No. 17-5551);

1. A federal prisoner seeking to appeal the denial of a motion for post-conviction relief under Section 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, the prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 & n.4 (1983)); see Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) (same). Applying that standard, the court of appeals correctly denied a COA on petitioner's claim that bank robbery is not a crime of violence under Section 924(c)(3).

a. Section 924(c)(3) defines a "crime of violence" as including a felony "offense" 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). This Court has held that identical language in another statute requires a categorical approach under which courts "look to the elements and the nature of the offense of conviction, rather than to the

Johnson v. United States, 138 S. Ct. 61 (2017) (No. 16-8415); 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).

particular facts relating to [a defendant's] crime," to determine whether the offense fits that definition. Leocal v. Ashcroft, 543 U.S. 1, 7 (2004) (interpreting 18 U.S.C. 16(a)).

The predicate offense underlying petitioner's Section 924(c) conviction is bank robbery, in violation of 18 U.S.C. 2113(a).³ See Indictment 3 (identifying "bank robbery" as predicate crime of violence for Section 924(c) count). A violation of Section 2113(a) requires proof that the defendant 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).

An offense committed "by force and violence" necessarily involves the "use * * * of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A). And 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

³ As discussed, in addition to pleading guilty to the Section 924(c) charge, petitioner also pleaded guilty to one count of attempted bank robbery. See Indictment 5 (alleging that petitioner and his co-conspirators "attempted to enter Northwest Savings Bank * * * for the purpose of taking cash from the bank tellers by force, violence, or intimidation"); Plea Agreement 2, 23 (admitting petitioner's guilt to that charge).

of violent physical force.”); United States v. McBride, 826 F.3d 293, 296 (6th Cir. 2016), cert. denied, 137 S. Ct. 830 (2017); United States v. McNeal, 818 F.3d 141, 154 (4th Cir.), cert. denied, 137 S. Ct. 164 (2016); United States v. Selfa, 918 F.2d 749, 751 (9th Cir.), cert. denied, 498 U.S. 986 (1990); United States v. Ferreira, 821 F.2d 1, 6 n.8 (1st Cir. 1987).

Consistent with that uniform understanding of the elements of the offense, every court of appeals to have addressed the issue has concluded that federal bank robbery 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.) (citing Armour, 840 F.3d at 909), cert. denied, 138 S. Ct. 272 (2017); United States v. Jones, 854 F.3d 737, 740 & n.2 (5th Cir.), cert. denied, 138 S. Ct. 242 (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.").

b. Petitioner asserts (Pet. 7-14) that the court of appeals erred in not addressing whether federal bank robbery categorically qualifies as a crime of violence under Section 924(c). But petitioner's methodological criticism of the court of appeals' resolution of his claim provides no sound basis for this Court's review. Although the court of appeals disclaimed reliance on a categorical approach to the application of Section 924(c)(3)(A) in United States v. Robinson, 844 F.3d 137, 141-143 (3d Cir. 2016), cert. denied, 138 S. Ct. 215 (2017), and it relied on Robinson here, any focus on the particular (noncategorical) facts of petitioner's own bank-robbery crime did not affect the result. Cf. California v. Rooney, 483 U.S. 307, 311 (1987) (per curiam) ("This Court reviews judgments, not statements in opinions.") (citation and internal quotation marks omitted). As explained above (see pp. 8-9, supra), federal bank robbery categorically qualifies as a crime of violence under Section 924(c)(3)(A), and petitioner has identified no decision holding otherwise. Thus, although petitioner asserts that the court of appeals' method of analysis differed from that employed by other courts under Section 924(c)(3)(A), petitioner cannot show that any other circuit would reach a different result in these circumstances. This Court has recently denied certiorari in several cases presenting similar

methodological challenges, and the same course is warranted here. See Galati v. United States, No. 17-5229 (Jan. 8, 2018); Thomas v. United States, No. 17-6025 (Jan. 8, 2018); Robinson v. United States, 138 S. Ct. 215 (2017) (No. 17-5139).

2. Petitioner notes (Pet. 7) that this Court held in Johnson v. United States, 135 S. Ct. 2551 (2015), that the residual clause of the ACCA is unconstitutionally vague, and observes 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 “crime of violence” in 18 U.S.C. 16(b) is similarly unconstitutional. The pendency of Dimaya has no effect on this petition, because petitioner does not seek this Court’s review of any constitutional question. See Pet. 8 (stating that “Johnson’s application to Section 924(c) is not the subject of this petition”). Moreover, as explained, federal 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 Dimaya is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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