

No. 17-7592

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL CHANEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH 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 carjacking is not a "crime of violence" under 18 U.S.C. 924(c).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 3) is unreported. The order of the district court (Pet. App. 2) is not published in the Federal Supplement. A prior opinion of the court of appeals is reprinted at 421 Fed. Appx. 394.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 2017. The petition for a writ of certiorari was filed on January 25, 2018. 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 Southern District of Mississippi, petitioner was convicted of carjacking, in violation of 18 U.S.C. 2119, and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). Pet. App. 1, at 1. The district court sentenced petitioner to 139 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed, 421 Fed. Appx. 394, and this Court denied certiorari, 565 U.S. 892. In 2016, petitioner filed a motion for post-conviction relief under 28 U.S.C. 2255, in which he argued that his conviction and sentence under Section 924(c) should be vacated. The district court dismissed petitioner's motion, Pet. App. 2, at 5, and denied his request for a certificate of appealability (COA), D. Ct. Doc. 62. The court of appeals likewise denied a COA. Pet. App. 3, at 1-2.

1. On July 24, 2009, petitioner and an accomplice approached an individual standing beside a Dodge Charger. Presentence Investigation Report (PSR) ¶¶ 5, 7, 20. Petitioner's accomplice pointed a firearm at the victim, and petitioner urged his confederate to shoot. PSR ¶ 21. Petitioner's accomplice then ordered the victim to empty his pockets and take off his pants. PSR ¶ 22. Petitioner took the victim's car keys and pants and drove away in the Dodge Charger. Ibid.

A federal grand jury charged petitioner with carjacking, in violation of 18 U.S.C. 2119, and using, carrying, and brandishing a firearm during and in relation to a crime of violence (i.e., the carjacking), in violation of 18 U.S.C. 924(c)(1). Indictment 1-2. Petitioner pleaded guilty to both counts. Pet. App. 1, at 1. The district court sentenced petitioner to 139 months of imprisonment, including 55 months for the carjacking offense and a consecutive sentence of 84 months for the firearm offense, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed, 421 Fed. Appx. 394, rejecting petitioner's arguments challenging his sentence, id. at 395. This Court denied certiorari. 565 U.S. 892.

2. In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. 135 S. Ct. at 2557. The ACCA's residual clause 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).

In 2016, petitioner filed a motion for post-conviction relief under 28 U.S.C. 2255, in which he argued that, in light of Johnson, carjacking does not qualify as a "crime of violence" under Section 924(c) and thus his conviction and sentence under that statute should be vacated. See D. Ct. Doc. 52, at 4; see also D. Ct. Doc.

58, at 1. Section 924(c) defines a “crime of violence” as a felony that (1) “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 (2) “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 argued that Section 924(c)(3)(B) suffers from the same constitutional infirmities that led this Court to invalidate the ACCA’s residual clause in Johnson. See D. Ct. Doc. 58, at 10. He further argued that carjacking does not qualify as a “crime of violence” under Section 924(c)(3)(A). Id. at 10-12.

3. The district court dismissed petitioner’s motion. Pet. App. 2, at 1-5. Relying on Fifth Circuit precedent, the district court reasoned that “Johnson does not invalidate [the residual clause found in] § 924(c)(3)(B).” Id. at 3 (quoting United States v. Davis, 677 Fed. Appx. 933, 936 (2017) (per curiam), vacated and remanded, No. 16-8997 (May 14, 2018)) (brackets in original). Accordingly, the court found that, because this Court’s holding in Johnson is inapplicable to petitioner’s claim, petitioner’s motion for post-conviction relief was not timely under the applicable one-year statute of limitations in 28 U.S.C. 2255(f)(3). Pet. App. 2, at 3.

In addition, the district court described as “dubious” petitioner’s further argument that carjacking does not constitute a crime of violence under the elements clause in Section 924(c)(3)(A). Pet. App. 2, at 4. The court noted that multiple other circuit courts have rejected petitioner’s argument. Ibid. (citing United States v. Evans, 848 F.3d 242, 246 (4th Cir.), cert. denied, 137 S. Ct. 2253 (2017); In re Smith, 829 F.3d 1276, 1280 (11th Cir. 2016)). The district court stated, however, that it was not necessary to address the merits of petitioner’s argument under Section 924(c)(3)(A) because of its findings that petitioner’s Section 2255 motion was untimely and that the residual clause in Section 924(c)(3)(B) remains valid. Ibid. The court also denied a COA, finding that petitioner had failed to make a substantial showing of the denial of a constitutional right. See D. Ct. Doc. 62.

4. Petitioner filed an application for a COA in the court of appeals, arguing that his conviction for brandishing a firearm during a crime of violence, pursuant to 18 U.S.C. 924(c)(1), should be vacated in light of Johnson. Pet. App. 3, at 1. The court denied petitioner’s motion, explaining that he “ha[d] not made the required showing” for a COA. Id. at 2.

ARGUMENT

Petitioner contends (Pet. 9-20) that the court of appeals erred in denying a COA on his claim that his conviction and

sentence for brandishing a firearm in relation to a crime of violence, in violation of 18 U.S.C. 924(c), should be vacated in light of this Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015). Petitioner argues (Pet. 17-20) that this Court should grant certiorari to determine whether the definition of a "crime of violence" contained in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague in light of Johnson, and that, if Section 924(c)(3)(B) is invalid, then his conviction and sentence must be vacated because carjacking does not alternatively constitute a crime of violence under Section 924(c)(3)(A).

Petitioner's claims do not merit review. Every court of appeals to have considered the question has held that carjacking under 18 U.S.C. 2119 is a "crime of violence" under Section 924(c)(3)(A). This Court has repeatedly denied review of that issue, as well as of a related issue arising under the federal bank robbery statute, which has the same operative language as the carjacking statute.¹ The court of appeals did not, therefore, err in concluding that petitioner failed to make the substantial showing necessary to obtain a COA, and the applicability of Section 924(c)(3)(A) obviates any need to consider petitioner's claim

¹ See, e.g., Johnson v. United States, 138 S. Ct. 61 (No. 16-8415) (carjacking); Evans v. United States, 137 S. Ct. 2253 (No. 16-9114) (same); In re Fields, 137 S. Ct. 1326 (2017) (No. 16-294) (same); see also, e.g., Bruce v. United States, 137 S. Ct. 1580 (2017) (No. 16-7084) (bank robbery); Fox v. United States, 137 S. Ct. 1224 (2017) (No. 16-6989) (same); Wingate v. United States, 136 S. Ct. 1364 (2016) (No. 15-5979) (same).

regarding Section 924(c)(3)(B). The petition for a writ of certiorari should be denied.

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). The court of appeals correctly declined to issue a COA on petitioner's claim that carjacking in violation of 18 U.S.C. 2119 is not a crime of violence under Section 924(c)(3).

A person commits carjacking if, "with the intent to cause death or serious bodily harm," he "takes a motor vehicle * * * from the person or presence of another by force and violence or by intimidation." 18 U.S.C. 2119. Petitioner's carjacking offense categorically qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3)(A) because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Every court of appeals that has considered the question has held that federal carjacking qualifies as a "crime of violence" under Section 924(c)(3)(A). See United States v. Gutierrez, 876 F.3d 1254, 1256-1257 (9th Cir. 2017) (per curiam), cert. denied, No. 17-8169 (Apr. 23, 2018); United States v. Jones, 854 F.3d 737, 740 (5th Cir.), cert. denied, 138 S. Ct 242 (2017); United States v. Evans, 848 F.3d 242, 244 (4th Cir.), cert. denied, 137 S. Ct. 2253 (2017); In re Smith, 829 F.3d 1276, 1280-1281 (11th Cir. 2016); United States v. Mohammed, 27 F.3d 815, 819 (2d Cir.), cert. denied, 513 U.S. 975 (1994). Those courts have uniformly recognized that "[t]he act of taking a motor vehicle 'by force and violence' requires the use of violent physical force, and the act of taking a motor vehicle 'by intimidation' requires the threatened use of such force." Evans, 848 F.3d at 247 (citation omitted); see ibid. ("We are not aware of any case in which a court has interpreted the term 'intimidation' in the carjacking statute as meaning anything other than a threat of violent force."); cf. Holloway v. United States, 526 U.S. 1, 12 (1999) (holding that Section 2119 requires "pro[of] beyond a reasonable doubt that the defendant would have at least attempted to seriously harm or kill the driver if that action had been necessary to complete the taking of the car").

The same is true under the federal bank robbery statute, which requires the use of "force and violence, or * * * intimidation."

18 U.S.C. 2113(a); see Jones, 854 F.3d at 740-741 (noting similarities between carjacking and bank robbery statutes); Evans, 848 F.3d at 246-247 (same). The victim of a bank robbery “can reasonably believe that a robber’s demands for money to which he is not entitled will be met with violent force.” United States v. Armour, 840 F.3d 904, 909 (7th Cir. 2016). Every court of appeals to have considered the issue has therefore concluded that bank robbery, like carjacking, “inherently contains a threat of violent physical force” and thus qualifies as a “crime of violence” under Section 924(c)(3)(A). Ibid.; see, e.g., 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); United States v. McNeal, 818 F.3d 141, 153 (4th Cir.), cert. denied, 137 S. Ct. 164 (2016); 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); cf. 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.”).

Petitioner contends (Pet. 19-20) that the term “intimidation” in Section 2119 does not require a threat of “physical force” as this Court has defined that term in Curtis Johnson v. United

States, 559 U.S. 133 (2010). See id. at 140 (holding that “physical force” in Section 924(c) means “violent force -- that is, force capable of causing physical pain or injury to another person”). He argues (Pet. 20) that carjacking by intimidation is “no different” than carjacking by “exerting ‘intellectual force or emotional force.’” Petitioner’s argument lacks merit, because no court has interpreted “the term ‘intimidation’ in the carjacking statute as meaning anything other than a threat of violent force.” Evans, 848 F.3d at 247. Carjacking by “intimidation” therefore falls within Section 924(c)(3)(A)’s definition of a “crime of violence” as a crime that “has as an element the * * * threatened use of physical force against the person or property of another.” 18 U.S.C. 924(c)(3)(A).

2. Because no reasonable debate exists about whether federal carjacking is a “crime of violence” under Section 924(c)(3)(A), the court of appeals correctly denied petitioner’s request for a COA on his claim challenging his conviction under Section 924(c). No reason exists, therefore, to consider petitioner’s argument (Pet. 9-18) that the alternative “crime of violence” definition in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. Nor does any reason exist to remand this case to the court of appeals for further consideration in light of this Court’s recent decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018). See Pet. 11. Dimaya held the definition of a “crime of violence”

in 18 U.S.C. 16(b) as incorporated into the Immigration and Nationality Act -- the language of which is nearly identical to Section 924(c)(3)(B) -- to be unconstitutionally vague. See 138 S. Ct. at 1223. But Dimaya does not address the constitutionality of a provision similar to Section 924(c)(3)(A). See id. 1211 (noting that 18 U.S.C. 16(a), which is nearly identical to Section 924(c)(3)(A), was not at issue in Dimaya). This Court's holding in Dimaya thus does not resolve any question that will affect the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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