

No. 17-7678

IN THE SUPREME COURT OF THE UNITED STATES

JASON DENNIS MCGUIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH 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 attempting to "set[] fire to, damage[], destroy[], disable[], or wreck[] any aircraft," in violation of 18 U.S.C. 32(a), 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 denying petitioner a certificate of appealability (Pet. App. 1-2) is unreported.¹ The order of the court of appeals order denying reconsideration (Pet. App. 7) is unreported. The order of the district court (Pet. App. 3-6) denying petitioner's motion under 28 U.S.C. 2255 and denying him a certificate of appealability is unreported. An earlier opinion of the court of appeals is reported at 706 F.3d 1333.

¹ The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the pages as if they were consecutively paginated.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2017. Pet. App. 1-2. A petition for rehearing was denied on October 5, 2017. Pet. App. 7. The petition for a writ of certiorari was filed on January 3, 2018. 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 Middle District of Florida, petitioner was convicted of attempting to damage, destroy, disable, or wreck an aircraft in the special aircraft jurisdiction of the United States, in violation of 18 U.S.C. 32(a)(1) and (8), and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). Pet. App. 3-4. Following a guilty plea, petitioner was also convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 3-4. The district court sentenced petitioner to 150 months of imprisonment, to be followed by three years of supervised release. Id. at 4. The court of appeals affirmed, 706 F.3d 1333, 1335 (11th Cir. 2013) (O'Connor, J., by designation), and this Court denied certiorari, 569 U.S. 912 (No. 12-9032). 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. 3-6. The court of appeals likewise denied a COA. Id. at 1-2.

1. Petitioner, inebriated and distraught, took a loaded .38-caliber revolver out to the driveway of his home. 706 F.3d at 1335. After attempting unsuccessfully to reach friends by telephone to vent his distress and say that he was contemplating suicide, petitioner fired several rounds from the revolver: one into a tree, and several down an empty street. Ibid. Neighbors called the police. Ibid. Petitioner, meanwhile, went back inside the house. Ibid.

Petitioner returned outside after the police arrived. 706 F.3d at 1335. There he encountered officers on the ground and a police helicopter in the air, shining its spotlight in his direction. Ibid. Petitioner raised his arm and fired one round into the sky. Ibid. One witness testified that he saw petitioner fire directly into the spotlight and at the helicopter; another witness testified that petitioner raised his arm to an 80-degree angle and fired; and others testified that petitioner fired in the general direction of the helicopter, but could not say whether he had fired directly at it. Ibid.

A grand jury charged petitioner with attempting to damage, destroy, disable, or wreck an aircraft in the special aircraft

jurisdiction of the United States, in violation of 18 U.S.C. 32(a)(1) and (8); using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence (the alleged violation of Section 32(a)), in violation of 18 U.S.C. 924(c)(1)(A); and possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). See Pet. App. 3-4; Gov't C.A. Br. 1 (11th Cir. No. 11-12052). Petitioner pleaded guilty to the felon-in-possession count and proceeded to trial on the other two charges. Pet. App. 4.

Petitioner's defense at trial was that he had not willfully shot at the police helicopter but merely fired a shot "'randomly,' without meaning to hit the helicopter or even knowing it was there." 706 F.3d at 1335. The jury found petitioner guilty of willfully attempting to damage, destroy, disable, or wreck an aircraft, as charged in the indictment. Ibid. The jury also found that petitioner had used or possessed a firearm in connection with that offense, which the district court determined to be a crime of violence for purposes of Section 924(c). Ibid.

The district court sentenced petitioner to 150 months of imprisonment, to be followed by three years of supervised release. Pet. App. 4.

2. The court of appeals affirmed. 706 F.3d 1333. The court first concluded that the evidence at trial was sufficient to

support petitioner's conviction under 18 U.S.C. 32(a). 706 F.3d at 1336. The court then concluded that attempting to set fire to, damage, destroy, disable, or wreck an aircraft, in violation of 18 U.S.C. 32(a), is categorically a crime of violence within the meaning of 18 U.S.C. 924(c). 706 F.3d at 1336-1338.² Section 924(c) defines "crime of violence" as an 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," 18 U.S.C. 924(c) (3) (B).

The court of appeals began its analysis by noting that the predicate offense for petitioner's Section 924(c) conviction -- violation of 18 U.S.C. 32(a) (1) and (8) -- "requires attempting to

² As relevant here, 18 U.S.C. 32 provides that:

(a) Whoever willfully --

(1) sets fire to, damages, destroys, disables, or wrecks any aircraft in the special aircraft jurisdiction of the United States;

* * * or

(8) attempts or conspires to do [so];

shall be fined under this title or imprisoned not more than twenty years or both.

damage or disable an aircraft in the 'special aircraft jurisdiction of the United States.'" 706 F.3d at 1337 (quoting 18 U.S.C. 32(a)(1)). The court observed that the "special aircraft jurisdiction of the United States" is defined as an "aircraft in flight," ibid. (quoting 49 U.S.C. 46501(2)), which is further "defined as encompassing the time 'from the moment all external doors are closed following boarding through the moment when one external door is opened to allow passengers to leave,'" ibid. (quoting 49 U.S.C. 46501(1)(A)). The court accordingly explained that petitioner's predicate offense necessarily involved "attempting to damage or disable an aircraft that was either flying or else ready to take off or arriving at a destination with people on board." Ibid.

"In that context," the court of appeals determined, "most of the separately stated versions of the [predicate] offense can be readily recognized as crimes of violence." 706 F.3d at 1337. The court explained that "[a]ttempting to 'set[] fire to, damage[], destroy[] . . . or wreck[]' an aircraft with people on board is unmistakably violent." Ibid. (brackets in original). "At a minimum," the court explained, "each of these actions has 'as an element, the use, attempted use, or threatened use of physical force against the . . . property of another.'" Ibid. (quoting 18 U.S.C. 924(c)(3)(A)).

The court of appeals also rejected petitioner's argument that "the sole remaining version of the offense -- 'disabl[ing] an aircraft' -- * * * does not necessarily involve the use of force or a serious risk that force will be involved." 706 F.3d at 1337 (brackets in original). The court explained that "attempting to disable an aircraft while people are on board is itself an act of force in the meaningful sense." Ibid. The court also concluded, in the alternative, that such conduct "by its nature, involves a substantial risk that [the perpetrator] will use force against a victim in completing the crime." Id. at 1338 (quoting Leocal v. Ashcroft, 543 U.S. 1, 10 (2004)).

3. 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. In June 2016, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, in which he argued that, in light of Johnson, his Section 924(c) conviction and sentence for using a firearm during and in relation to attempting to damage, destroy, disable, or wreck an aircraft should be vacated. See D. Ct. Doc. 1, at 5, 11-13 (June 24, 2016). 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, and that his

Section 924(c) conviction rested on Section 924(c) (3) (B). D. Ct. Doc. 10, at 2 (Jan. 3, 2017). Petitioner also asserted that his motion was timely under 28 U.S.C. 2255(f) (3) because Johnson announced a new rule that was “[made] retroactively applicable by the Supreme Court in Welch v. United States, [136 S. Ct. 1257, 1265] (2016).” D. Ct. Doc. 1, at 11; see also D. Ct. Doc. 10, at 4-5.

The district court denied petitioner’s motion. Pet. App. 3-6. The court explained that “Johnson affords [p]etitioner no collateral relief” because it “did not address the statute under which [p]etitioner was convicted” and because “[n]either the Supreme Court nor the Eleventh Circuit * * * ‘has extended Johnson’s § 924(e) residual clause ruling to conclude that * * * § 924(c) (3) (B) * * * is unconstitutionally vague.’” Id. at 5 (quoting United States v. Langston, 662 Fed. Appx. 787, 794 (11th Cir. 2016) (per curiam), cert. denied, 137 S. Ct. 1583 (2017)). The district court further determined that, because petitioner’s motion was filed more than one year after petitioner’s conviction became final in 2013 and relied upon a rule that was not yet recognized by the Supreme Court, the motion was untimely. Ibid. See 28 U.S.C. 2255(f). The court also denied a COA, finding that petitioner had failed to demonstrate that reasonable jurists would find “debatable or wrong” the court’s assessment of petitioner’s

claim or the court's procedural ruling. Pet. App. 6 (citing, e.g., Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

4. Petitioner filed an application for a COA in the court of appeals, in which he argued that his "[Section] 2255 motion was timely in light of a right that was newly recognized in Johnson and that is retroactively applicable to cases on collateral review." Pet. App. 2. The court of appeals denied petitioner's application. Id. at 1-2. The court explained that "Johnson's holding does not apply to or invalidate the risk-of-force clause of the definition of the phrase 'crime of violence' in § 924(c)." Id. at 2 (citing Ovalles v. United States, 861 F.3d 1257, 1265-1267 (11th Cir. 2017)). Accordingly, the court of appeals agreed with the district court that "[petitioner's] § 2255 motion was untimely." Ibid.

ARGUMENT

Petitioner contends (Pet. 10-22) that the courts below erred in denying a COA on his claim that attempting to damage, destroy, disable, or wreck an aircraft in flight, in violation of 18 U.S.C. 32(a)(1) and (8), does not qualify as a "crime of violence" within the meaning of 18 U.S.C. 924(c)(3)(B). But petitioner cannot show that jurists of reason would debate whether attempting to damage, destroy, disable, or wreck an aircraft in flight qualifies as a

"crime of violence" under Section 924(c)(3). 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).

Applying that standard, the court of appeals correctly declined to issue a COA on petitioner's claim that attempting to damage, destroy, disable, or wreck an aircraft in flight in violation of 18 U.S.C. 32(a)(1) and (8) is not a crime of violence under Section 924(c)(3). Petitioner's 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." As the court of appeals explained in petitioner's direct appeal, his offense necessarily involved "attempting to damage or disable

an aircraft that was either flying or else ready to take off or arriving at a destination with people on board." 706 F.3d at 1337 (discussing statutory definitions of "special aircraft jurisdiction of the United States" and "aircraft in flight"). Attempting to set fire to, damage, destroy, or wreck an aircraft with people on board "is unmistakably violent." Ibid. "At a minimum, each of these actions has 'as an element, the use, attempted use, or threatened use of physical force against the . . . property of another.'" Ibid. (quoting 18 U.S.C. 924(c) (3) (A)).

The same is true of "attempting to disable an aircraft while people are on board," which "is itself an act of force in the meaningful sense." 706 F.3d at 1337. "It involves an 'active crime' done 'intentionally' against the property of another, with extreme and manifest indifference to the owner of that property and the wellbeing of the passengers." Ibid. (quoting Leocal v. Ashcroft, 543 U.S. 1, 7, 9 (2004)). As the court of appeals explained:

It makes little difference that the physical act, in isolation from the crime, can be done with a minimum of force; we would not say that laying spikes across a roadway is a non-violent crime because laying something upon the ground is not a forceful act. It still involves an intentional act against another's property that is calculated to cause damage and that is exacerbated by indifference to others' wellbeing. Likewise, the fact that deflating an airplane's tire or rewiring its onboard systems are minimally forceful acts does not mean that such acts of sabotage against a loaded plane

are not crimes that involve the use of force against that plane or its passengers.

Id. at 1338; see United States v. Castleman, 134 S. Ct. 1405, 1415 (2014) (concluding that indirect use of force is “use of physical force” under 18 U.S.C. 921(a)(33)(A)). Petitioner does not identify any court of appeals that has disagreed with the Eleventh Circuit’s determination that attempting to damage, destroy, disable, or wreck an aircraft in flight categorically qualifies as a “crime of violence” under 18 U.S.C. 924(c)(3)(A).

2. Because attempting to damage, destroy, disable, or wreck an aircraft in flight qualifies as a “crime of violence” under Section 924(c)(3)(A), no reason exists to consider petitioner’s argument (Pet. 10-22) that the court of appeals erred in denying a COA on his claim 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, No. 15-1498 (Apr. 17, 2018). See Pet. 21. Dimaya held the definition of a “crime of violence” in 18 U.S.C. 16(b) -- the language of which is nearly identical to Section 924(c)(3)(B) -- to be unconstitutionally vague. Slip op. 24-25. But Dimaya does not address the constitutionality of a provision similar to Section 924(c)(3)(A). See id. at 2 (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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