

No. 17-7785

IN THE SUPREME COURT OF THE UNITED STATES

RAYFORD STEVENS, 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 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. 1-12)¹ is not published in the Federal Reporter. The order of the district court (Pet. App. 20-24) is not published in the Federal Supplement.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2017. The petition for a writ of certiorari was filed on

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.

January 22, 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 Southern District of Alabama, petitioner was convicted of conspiracy to commit carjacking, in violation of 18 U.S.C. 371; carjacking, in violation of 18 U.S.C. 2119; and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. 20. The district court sentenced petitioner to life imprisonment plus five years, to be followed by five years of supervised release. Id. at 20-21; D. Ct. Doc. 111 (Judgment). The court of appeals affirmed. 70 F.3d 1285 (Tbl.). In June 2016, petitioner filed an application for leave to file a second or successive Section 2255 motion, which the court of appeals granted. Pet. App. 13-19. Petitioner then filed a motion in the district court for post-conviction relief under Section 2255, in which he argued that his conviction and sentence under Section 924(c) should be vacated. The court dismissed petitioner's motion and denied his request for a certificate of appealability (COA). Id. at 20-24. The court of appeals likewise denied a COA. Id. at 12.

1. On December 23, 1993, Darwin Knight and petitioner sat in a truck in a food-store parking lot. Presentence Investigation Report (PSR) ¶ 6. They watched a man exit his red Camaro and walk

into the food store. Ibid. When the man returned to his car, Knight exited the truck and confronted him, armed with a weapon. Ibid. The two men exchanged words and, as the victim turned to enter his vehicle, Knight shot him several times in the arm and the back. Ibid. The victim fell to the ground while a woman, who had been sitting in the car, fled the vehicle. Ibid. Knight entered the car and drove away. Ibid. Petitioner followed Knight in the truck. Ibid. The victim later died from his injuries. Id. at ¶¶ 6-7.

A federal grand jury charged petitioner and Knight with conspiracy to commit carjacking, in violation of 18 U.S.C. 371; carjacking, in violation of 18 U.S.C. 2119; and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Indictment 1-3. A jury found the defendants guilty on all counts. D. Ct. Doc. 111 (Judgment). The district court sentenced petitioner to life imprisonment for the carjacking offense; 60 months of imprisonment for the conspiracy offense, to run concurrently; and 60 months of imprisonment for the firearm offense, to run consecutively to the other sentences, all to be followed by five years of supervised release. Ibid. The court of appeals summarily affirmed. 70 F.3d 1285 (Tb1.).

In 1997, petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. See 572 Fed. Appx. 731, 732 (11th Cir. 2014) (citing D. Ct. Doc. 139). The district court denied

his motion, and both the district court and the court of appeals denied him a COA. Ibid. (citing D. Ct. Doc. 152; Stevens v. United States, 49 Fed. Appx. 288 (11th Cir. 2002) (Tbl.)). From 2003 through 2014, petitioner made several collateral attacks on his carjacking convictions and sentences, claiming that he was “factually innocent” under 28 U.S.C. 2241. See 572 Fed. Appx. at 732-733. The district court and the court of appeals both denied him relief. Id. at 732-734.

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 an application in the court of appeals for leave to file a second or successive Section 2255 motion. See Pet. App. 1-2. 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. Id. at 2. 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).

The court of appeals granted petitioner's application to file a successive Section 2255 motion as to his Johnson-based claim. Pet. App. 17-18. The court noted that the record in petitioner's case "demonstrate[d] two possible companion crimes": carjacking, which the court had held qualifies as a crime of violence under Section 924(c) (3) (A) in In re Smith, 829 F.3d 1276, 1280 (11th Cir. 2016); and conspiracy to commit carjacking, which the court had not previously addressed. Pet. App. 17 n.1.

The district court subsequently determined that petitioner's motion should be dismissed on the merits. Pet. App. 20-24. The court found that the "Indictment confirms carjacking, not conspiracy, was relied upon when the Court sentenced [petitioner] pursuant to § 924(c)." Id. at 22. "Accordingly," the court determined, "[Section 924(c) (3) (B)] was not implicated, and even if Johnson extends to § 924(c) [petitioner] would obtain no relief." Ibid. The court also denied a COA, finding that petitioner had failed to make a substantial showing of the denial of a constitutional right. Id. at 4.

3. Petitioner filed an application for a COA in the court of appeals, arguing that carjacking does not qualify as a crime of violence under Section 924(c) (3) (A) and that Johnson invalidated

Section 924(c)(3)(B). See Pet. App. 4-5. The court denied petitioner's application. It observed that, subsequent to the district court's denial of petitioner's Section 2255 motion, it had held that Section 924(c)(3)(B) is not unconstitutionally vague in light of Johnson. Id. at 7 (citing Ovalles v. United States, 861 F.3d 1257, 1259, 1267 (11th Cir. 2017)). The court additionally explained that petitioner's claim "alternatively fail[ed]" because carjacking qualifies as a crime of violence under Section 924(c)(3)(A). Id. at 9 (citing Smith, 829 F.3d at 1280-1281). As a result, the court determined that petitioner could not "make a substantial showing of the denial of a constitutional right." Id. at 12.

ARGUMENT

Petitioner contends (Pet. 5-8) that the court of appeals erred in denying a COA on his claim that his conviction and sentence for using 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 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.² 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 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

² 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).

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. 6-7) 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. 6-8) that a defendant can commit carjacking merely by having a threatening appearance (such as being a “large, muscular man”), or by blackmailing the victim. 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. 5-6) 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. 6. 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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