

IN THE SUPREME COURT OF THE UNITED STATES

ERICK MANNERS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction for assault with a dangerous weapon in aid of racketeering, in violation of 18 U.S.C. 1959(a), which is predicated on a violation of Mich. Comp. Laws Ann. § 750.82 (West 2004), qualifies as 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. A1-A3) is not published in the Federal Reporter but is available at 2017 WL 3613308. The order of the district court is not published in the Federal Supplement but is available at 2016 WL 4801238.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2017. A petition for rehearing was denied on November 16, 2017 (Pet. App. C1). The petition for a writ of certiorari was filed on February 12, 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 Eastern District of Michigan, petitioner was convicted of assault with a dangerous weapon in aid of racketeering, in violation of 18 U.S.C. 1959(a), and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Judgment 1. The district court sentenced petitioner to 138 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. Petitioner did not appeal his convictions or his sentence. In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 2784 (June 30, 2016) (2255 Mot.). The district court denied petitioner's motion, 2016 WL 4801238, at *1-*2, but granted his request for a certificate of appealability (COA), D. Ct. Doc. 2826, at 1-2 (Dec. 20, 2016). The court of appeals affirmed. Pet. App. A1-A3.

1. Petitioner was a member of the Highwaymen motorcycle gang in Michigan. Presentence Investigation Report (PSR) ¶¶ 18, 20. Members of the Highwaymen participated in a variety of criminal activities on behalf of the gang, including murder, armed robbery, arson, extortion, theft, and drug trafficking. PSR ¶ 20. Members also frequently used violence to protect the gang's territory, to intimidate witnesses, and to retaliate against anyone who had "wronged or was perceived to have wronged" the gang. Plea Agreement 3; see PSR ¶ 19.

In 2005, several Highwaymen members got into a confrontation with Alan Kirchoff at a bar in Taylor, Michigan. Plea Agreement 3. Petitioner and other gang members found Kirchoff at a restaurant later that day and assaulted him. Id. at 3-4. The group punched Kirchoff and broke bottles over his head until he fell to the floor. Id. at 4. Petitioner then brandished a gun over Kirchoff and said, "remember me, motherfucker?" Ibid. As Kirchoff ran away, petitioner fired two rounds into the ceiling. Ibid.

2. A federal grand jury charged petitioner and other Highwaymen members with a variety of federal offenses. Second Superseding Indictment 3-62. Petitioner pleaded guilty to two counts related to the assault on Kirchoff: one count of assault with a dangerous weapon in aid of racketeering, in violation of 18 U.S.C. 1959(a), and one count of using a firearm during and in relation to a crime of violence (the assault offense), in violation of 18 U.S.C. 924(c). Plea Agreement 1-2; see Second Superseding Indictment 21, 40-41.

Section 1959(a) makes it a federal crime to commit various offenses, including "assault[] with a dangerous weapon * * * in violation of the laws of any State," "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." 18 U.S.C. 1959(a). Petitioner admitted in his plea agreement that he assaulted Kirchoff in order to maintain or increase his position in the Highwaymen and that his offense qualified as felonious assault under Michigan law,

which makes it a crime to "assault[] another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder." Mich. Comp. Laws Ann. § 750.82 (West 2004); see Plea Agreement 2.

The district court sentenced petitioner to 138 months of imprisonment, comprised of 18 months of imprisonment on the Section 1959(a) count and a statutory minimum sentence of 120 months of imprisonment on the Section 924(c) count. Judgment 2; see 18 U.S.C. 924(c)(1)(A)(iii) (providing a minimum term of ten years of imprisonment if a firearm is discharged). Petitioner did not appeal his convictions or his sentence.

3. In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. Petitioner contended that his Section 924(c) conviction was invalid on the theory that assault with a dangerous weapon in aid of racketeering is not a "crime of violence" as defined in 18 U.S.C. 924(c)(3). 2255 Mot. 4-10. Section 924(c)(3) 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). Petitioner argued that his assault offense did not qualify as a crime of violence under Section 924(c)(3)(A) and that Section 924(c)(3)(B)

is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the “residual clause” of the definition of a “violent felony” in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness. 2255 Mot. 6, 8-10.

The district court denied petitioner’s motion. See 2016 WL 4801238, at *1-*2. The court noted that the Sixth Circuit had previously rejected the argument that Johnson invalidated Section 924(c)(3)(B). Id. at *1 (citing United States v. Taylor, 814 F.3d 340, 376-379 (6th Cir. 2016), cert. denied, No. 16-6392 (May 14, 2018)). The court also determined, in the alternative, that assault with a dangerous weapon in aid of racketeering qualifies as a “crime of violence” under Section 924(c)(3)(A), and thus that petitioner’s motion “would fail” even if Section 924(c)(3)(B) were unconstitutionally vague. Id. at *2. The court granted a COA. D. Ct. Doc. 2826, at 1-2.

4. The court of appeals affirmed. Pet. App. A1-A3. The court observed that it had “consistently held” that Section 924(c)(3)(B) “is distinguishable from and considerably narrower than the ACCA’s residual clause.” Id. at A3 (citing, inter alia, Taylor, 814 F.3d at 376-377). The court explained, relying on that precedent, that Section 924(c)(3)(B) is not unconstitutionally vague under the reasoning of Johnson. Ibid.

The court of appeals acknowledged that it had previously determined that the definition of a “crime of violence” in 18

U.S.C. 16(b), which is worded similarly to Section 924(c)(3)(B), is unconstitutionally vague under Johnson. Pet. App. A3 (citing Shuti v. Lynch, 828 F.3d 440, 449 (6th Cir. 2016), cert. denied, No. 16-991 (May 14, 2018)). The court explained, however, that petitioner's reliance on that precedent was "unavailing" because the court had explicitly determined in Shuti that the invalidation of Section 16(b) was "'wholly consistent'" with the court's "conclusion in Taylor" that Section 924(c)(3)(B) "is not unconstitutionally vague." Ibid. (quoting Shuti, 828 F.3d at 449).

ARGUMENT

Petitioner renews his contention (Pet. 6-9) that 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015). That contention does not warrant review in the context of this case. As the district court observed, irrespective of Section 924(c)(3)(B), petitioner's offense of assault with a dangerous weapon in aid of racketeering 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." Ibid.; see 2016 WL 4801238, at *2. Resolution of the question presented will therefore have no effect on the validity of petitioner's conviction under Section 924(c). The petition for a writ of certiorari should be denied.

1. To determine whether an offense constitutes a "crime of violence" under Section 924(c)(3)(A) and similar statutes, courts

generally apply a “categorical approach.” See, e.g., Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); Taylor v. United States, 495 U.S. 575, 602 (1990). Under that approach, a court “focus[es] solely” on “the elements of the crime of conviction,” not “the particular facts of the case.” Mathis, 136 S. Ct. at 2248. If, however, the statute of conviction lists multiple alternative elements, it is “divisible” into different offenses. Id. at 2249 (citation omitted). To classify a conviction under a divisible statute, a court may “look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of.” Ibid. A statute is not divisible if it merely enumerates “various factual means of committing a single element.” Ibid.

Petitioner’s predicate offense under Section 924(c) was a violation of 18 U.S.C. 1959(a), which prohibits (inter alia) “assault[] with a dangerous weapon * * * in violation of the laws of any State” in furtherance of a racketeering enterprise. A violation of that provision of Section 1959(a) requires proof that the “predicate acts constitute state law crimes.” United States v. Carrillo, 229 F.3d 177, 185 (2d Cir.), cert. denied, 531 U.S. 1026 (2000). Petitioner admitted in his plea agreement that his offense qualified as assault with a dangerous weapon under Michigan’s felonious assault statute, which makes it a crime to “assault[] another person with a gun, revolver, pistol, knife,

iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder.” Mich. Comp. Laws Ann. § 750.82 (West 2004); see Plea Agreement 2.

The Michigan Supreme Court has held that Section 750.82 requires proof the defendant committed “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” People v. Jackson, 790 N.W.2d 340, 343 n.2 (2010) (citation and emphasis omitted). As the Sixth Circuit has explained, Michigan courts have interpreted the term “assault” to require an attempted battery or an act that places the victim in fear of an immediate battery. United States v. Harris, 853 F.3d 318, 320-321 (2017) (citing cases). Michigan defines “battery” as “‘a forceful or violent touching’” involving the “‘use of physical force against another person so as to harm or embarrass’” that person. Id. at 321 (citations omitted). And it defines a “dangerous weapon” as an “‘object that is used in a way that is likely to cause serious physical injury or death.’” Ibid. (citation omitted).

Even assuming that Michigan’s felonious assault statute is not divisible, see Harris, 853 F.3d at 320, it categorically qualifies as a “crime of violence” under Section 924(c)(3)(A). The elements of the offense, taken together, require an attempt or threat to commit a battery with a dangerous weapon that necessarily creates a likelihood of physical injury. Id. at 321. No way

exists, therefore, “to commit [Michigan felonious assault] without intentionally attempting or threatening physical force against another with a dangerous weapon.” Ibid. (applying similar “physical force” requirement under the Sentencing Guidelines); see Johnson v. United States, 559 U.S. 133, 140 (2010) (defining “physical force” under a similar provision of the ACCA to require “force capable of causing physical pain or injury to another person”). And because the commission of felonious assault under Michigan law is a necessary component of petitioner’s offense of assault with a dangerous weapon in aid of racketeering, see 18 U.S.C. 1959(a), the latter offense likewise qualifies as a “crime of violence” under Section 924(c)(3)(A).

2. Because petitioner’s conviction for assault with a dangerous weapon in aid of racketeering qualifies as a “crime of violence” under Section 924(c)(3)(A), no reason exists to consider petitioner’s argument (Pet. 6-9) 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 decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018). Dimaya holds that 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) -- is unconstitutionally vague. 138 S. Ct. at 1223; see Pet. 7 (arguing that Section 924(c)(3)(B) is unconstitutionally vague under “[t]he same rationale” that renders Section 16(b)

unconstitutionally vague). But Dimaya does not address the constitutionality of a provision similar to Section 924(c)(3)(A). See 138 S. Ct. at 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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