

No. 17-8608

IN THE SUPREME COURT OF THE UNITED STATES

NATHANIEL PEMBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

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The petition for a writ of certiorari presents two questions: (1) whether the acquisition of historical cell-site records from a service provider pursuant to a court order issued under 18 U.S.C. 2703(d) violates the Fourth Amendment; and (2) whether conspiracy to commit robbery under the Hobbs Act, 18 U.S.C. 1951(a), is a “crime of violence” under 18 U.S.C. 924(c)(3). Pet. i. On the first question presented, the Court should either deny the petition for a writ of certiorari or hold the petition pending the decision in Carpenter v. United States, No. 16-402 (argued Nov. 29, 2017), and dispose of it as appropriate in light of that decision. On

the second question presented, the Court should grant the petition, vacate the court of appeals' judgment, and remand for further consideration in light of Sessions v. Dimaya, 138 S. Ct. 1204 (2018), of petitioner's challenge to his conviction under Section 924(c) for use of a firearm during and in relation to a conspiracy to commit Hobbs Act robbery.¹

1. Petitioner contends (Pet. 6-7) that the government violated his Fourth Amendment rights by acquiring, pursuant to a court order issued under Section 2703(d), historical cell-site records from service providers showing that a cell phone that petitioner was known to use had connected to certain cell towers at certain times. The court of appeals declined to decide whether the government had violated petitioner's Fourth Amendment rights. See Pet. App. 11a-12a & n.14. Instead, the court held that, even if the Fourth Amendment required the government to obtain a warrant for the cell-site records at issue, suppression of the records was not warranted under the good-faith exception to the exclusionary rule. Id. at 11a-12a. The court reasoned that, at the time the government sought and obtained the cell-site records in petitioner's case, neither Supreme Court nor Sixth Circuit precedent established that the government's acquisition of cell-

¹ Other petitions seeking review of the same court of appeals decision are currently pending before the Court. See Johnson v. United States, No. 17-7779 (filed Feb. 13, 2018); Briley v. United States, No. 17-8523 (filed Apr. 12, 2018).

site records was a Fourth Amendment search. See ibid. The court concluded that, in relying on the authority to obtain cell-site records pursuant to a court order under Section 2703(d), “the government had an objectively reasonable good-faith belief that no warrant was required.” Id. at 11a (citation and internal quotation marks omitted).

The court of appeals noted that it had previously held in United States v. Carpenter, 819 F.3d 880 (6th Cir. 2016), that the acquisition of cell-site records is not a Fourth Amendment search, but that this Court had granted a writ of certiorari in Carpenter to review that issue. Pet. App. 12a n.14; see Carpenter, supra (No. 16-402). The court of appeals accordingly declined to “rely on Carpenter” in resolving petitioner’s case. Pet. App. 12a n.14.

Because the court of appeals did not decide the Fourth Amendment question and instead applied the good-faith exception to the exclusionary rule, it would be appropriate to deny review of the Fourth Amendment issue in this case without waiting for the decision in Carpenter. If, however, the Court decides to hold the petition for a writ of certiorari pending the decision in Carpenter, it should dispose of the petition as appropriate in light of the decision in that case.

2. Petitioner further contends (Pet. 7-10) that this Court should grant review to determine whether conspiracy to commit Hobbs Act robbery qualifies as a “crime of violence” under 18 U.S.C.

924(c)(3). As relevant here, petitioner was convicted on two counts of using a firearm during and in relation to a “crime of violence,” in violation of 18 U.S.C. 924(c)(1)(A). Second Superseding Indictment 2, 4. One of those counts identified the underlying crime of violence as Hobbs Act robbery, while the other count identified the crime of violence as conspiracy to commit Hobbs Act robbery. Ibid. Petitioner does not challenge the classification of Hobbs Act robbery as a crime of violence. See Pet. i, 7-10.

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’s claim that conspiracy to commit Hobbs Act robbery is a crime of violence implicates Section 924(c)(3)(B). Several courts of appeals have classified conspiracy to commit Hobbs Act robbery as a “crime of violence” under Section 924(c)(3)(B). See, e.g., United States v. Eshetu, 863 F.3d 946, 955-956 (D.C. Cir. 2017) (citing cases). In Dimaya, supra, this Court held that the definition of a “crime of violence” in 18 U.S.C. 16(b), which contains language that is nearly identical to that in Section 924(c)(3)(B), is unconstitutionally

vague. 138 S. Ct. at 1223. Accordingly, the appropriate course in light of Dimaya is to grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration of petitioner's challenge to his conviction under Section 924(c) for use of a firearm during and in relation to a conspiracy to commit Hobbs Act robbery.²

Respectfully submitted.

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Solicitor General

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² The government waives any further response to the petition unless this Court requests otherwise.