

No. 17-8629

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL JEROME HENRY, 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 IN OPPOSITION

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Petitioner contends (Pet. 5-13) that the definition of a “crime of violence” in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015). He notes (Pet. 8-9) that a circuit conflict exists on whether Section 924(c)(3)(B) is constitutional and that this Court recently held in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), that the similarly worded definition of a “crime of violence” in 18 U.S.C. 16(b) is unconstitutionally vague. Petitioner’s convictions, however, do not require the application of Section 924(c)(3)(B). The petition for a writ of certiorari should therefore be denied.

Petitioner was convicted on three counts of bank robbery, in violation of 18 U.S.C. 2113(a), and three counts of using and carrying a firearm during and in relation to a “crime of violence” (the bank robberies), in violation of 18 U.S.C. 924(c)(1)(A). Pet. App. 2a-3a. 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). The court of appeals determined that petitioner’s bank robbery offenses were “crime[s] of violence” under Section 924(c)(3)(A) because the elements of the federal bank robbery statute require at least the “threatened use of physical force.” Pet. App. 6a.

That determination was correct. For the reasons stated in the government’s brief in opposition to the similar petitions for writs of certiorari filed in Castillo v. United States, cert. denied, No. 17-5471 (Jan. 8. 2018), the federal offense of bank robbery qualifies as a “crime of violence” under 18 U.S.C. 924(c)(3)(A) and similar provisions, because it “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” See Br. in Opp. at 7-9,

Castillo, supra (No. 17-5471).¹ Every court of appeals to have considered the question has so held. Br. in Opp. at 8-9, Castillo, supra (No. 17-5471). And this Court has repeatedly denied review of that issue, id. at 7 & n.3, including in Castillo, supra, and other recent cases. See, e.g., Robinson v. United States, No. 17-7689 (June 4, 2018) (armed bank robbery); Adams v. United States, No. 17-7197 (May 14, 2018) (armed bank robbery); Moultrie v. United States, 138 S. Ct. 1017 (2018) (bank robbery) Schneider v. United States, 138 S. Ct. 638 (2018) (No. 17-5477) (bank robbery).

Because bank robbery qualifies as a “crime of violence” under Section 924(c)(3)(A), no reason exists to consider petitioner’s argument (Pet. 6-12) 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 Dimaya, supra. Pet. 8-9. Dimaya held 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. But Dimaya did not address the constitutionality of a provision similar to Section 924(c)(3)(A). See id. 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).

¹ We have served petitioner with a copy of the government’s brief in opposition in Castillo.

This Court's holding in Dimaya thus does not resolve any question that will affect the outcome of this case.

The petition for a writ of certiorari should be denied.²

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JUNE 2018

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