

No. 17-8629

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL JEROME HENRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Sixth Circuit

PETITIONER'S REPLY MEMORANDUM

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5 July 2018

PETITIONER'S REPLY MEMORANDUM

- A. The federal offense of bank robbery does not necessarily qualify as a “crime of violence” and, thus, Petitioner’s convictions can be sustained only if they qualify as crimes of violence under 18 U.S.C. § 924(c)(3)(B), a provision containing language this Court has declared unconstitutional.**

This Court has declared language identical to that used in 18 U.S.C. § 924(c)(3)(B) as unconstitutionally vague and, thus, void. See *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569, 577 (2015). A circuit split exists as to whether that particular provision is also void as a result of this Court’s decision in *Johnson*. Petitioner has established that, under the logic of *Johnson* and the circuit decisions favoring voiding § 924(c)(3)(B), his convictions under § 924 for using and carrying a firearm during and in relation to a crime of violence must be vacated.

Respondent’s position is that § 924(c)(3)(B) is not needed to convict Petitioner because this conduct qualifies as a crime of violence under § 924(c)(3)(A). In support, Respondent points to circuit court decisions, including that of the U.S. Court of Appeals for the Sixth Circuit in Petitioner’s case. But the fact that “[e]very court of appeals to have considered the question” of whether bank robbery, 18 U.S.C. § 2113(a), is a crime of violence under the force or use-of-force clause has held that it does not preclude relief. The fact that this Court denied review of several cases involving that question does not mean this Court agrees that bank robbery necessarily is, in all cases, a crime of violence involving an element of use, attempted, use or threatened use of physical force. That issue remains an important open question that should be resolved for the benefit of the government, defense bar and circuit and district courts. See Sup. Ct. R. 10(c).

If anything, then, Respondent’s argument begs the Court to grant certiorari to resolve whether § 2113(a) is necessarily a crime of violence under § 924(c)(3)(A) and, if not in all cases, whether § 924(c)(3)(A) is void for unconstitutional vagueness.

B. While the *Dimaya* decision does not address the constitutionality of § 924(c)(3)(A) or even § 924(c)(3)(B) in particular, the decision demonstrates the likelihood that the Court will find § 924(c)(3)(B) unconstitutional.

In *Sessions v. Dimaya*, No. 15-1498, 548 U.S. ____ (2018), the Court held that language found in 18 U.S.C. § 16(b) and nearly identical to that in § 924(c)(3)(B) was unconstitutionally vague for the reasons identified in *Johnson*. *Id.* at slip opinion at 11 (“In sum, § 16(b) has the same ‘[t]wo features’ that ‘conspire[d] to make [ACCA’s residual clause unconstitutionally vague.’”). Petitioner recognizes that *Dimaya* did not address § 924(c)(3)(A)’s use-of-force clause. But assuming the Court finds either that question does not need to be resolved or finds that bank robbery is not necessarily a crime of violence as a result of the use-of-force clause, the *Dimaya* decision appears to signal the Court’s view that § 924(c)(3)(B) is, indeed, unconstitutional. See *Dimaya*, No. 15-1498, 548 U.S. at Slip Opinion at 15 (noting the similarities between § 16(b) and § 924(c)(3)(B) and asserting that the *Dimaya* majority “holding calls into question convictions under” § 924(c)(1)) (Roberts, C.J., dissenting).

CONCLUSION

Petitioner asks the Court to reject Respondent’s arguments and grant his petition and grant full briefing in this important matter to address and resolve the circuit split as to whether the Court’s decisions in *Johnson* and *Dimaya*, along with the similarities between the residual clauses of the § 924(e), § 16(b) and § 924(c)(3)(B), mean the definition of “crime of violence” in § 924(c)(3)(B) is unconstitutionally vague.

Respectfully submitted,

ROBINSON & BRANDT, P.S.C.

Dated: 5 July 2018

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing reply memorandum was served by U.S. Priority Mail on the date I reported below upon Assistant U.S. Attorney Kenneth Ray Chadwell, Jr., U.S. Attorney's Office, 11 W. Fort Street, Suite 2001, Detroit, MI 48226 and by email to the Office of the Solicitor General by email to SupremeCtBriefs@USDOJ.gov and by U.S. Priority Mail to Solicitor General's Office, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001.

Dated: 5 July 2018

by: /s/ Jeffrey M. Brandt
Jeffrey M. Brandt