

No. 17-9377

IN THE SUPREME COURT OF THE UNITED STATES

JOE JR DESILIEEN, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in denying a certificate of appealability on petitioner's claim that robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), does not qualify 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) is not reported. The order of the district court (Pet. App. A2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2018. The petition for a writ of certiorari was filed on June 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 Southern District of Florida, petitioner was convicted on one count of conspiracy to commit robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a), one count of robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a), and one count of brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Judgment 1. The district court sentenced petitioner to 194 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. Petitioner did not appeal. In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. See Pet. App. A11. The district court denied petitioner's motion and denied a certificate of appealability (COA). Id. at A2. The court of appeals denied a COA. Id. at A1.

1. During June and July 2013, petitioner and several accomplices robbed multiple PNC banks at gunpoint in south Florida. In one such incident, on July 8, petitioner, Herbert Smith, and Paul Moore robbed a PNC bank in Port St. Lucie, Florida. Inside the bank, Smith brandished a pistol while petitioner grabbed items and Moore took money from the bank's drawers. Petitioner and Smith fled in a stolen van, but Moore was temporarily trapped inside the bank and had to flee on foot. Moore was arrested shortly

afterwards, and a knapsack containing \$4930 was recovered near the bank. Presentence Investigation Report (PSR) ¶¶ 5-23.

A federal grand jury subsequently charged petitioner with conspiracy to commit robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a), multiple counts of robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a), and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A) (ii). Third Superseding Indictment (Indictment) 1-2, 3-6. One of the Hobbs Act robbery counts, Count Six, charged that petitioner and his co-defendants "did knowingly and unlawfully obstruct, delay and affect commerce * * * in that the defendants did take United States currency from a person and in the presence of a person employed by PNC Bank * * * against the will of that person, by means of actual and threatened force, violence and fear of injury to said person." Indictment 5. The Section 924(c) count charged that petitioner and his co-defendants "did knowingly possess a firearm in furtherance of a crime of violence, * * * as set forth in Count Six of this Indictment." Indictment 6.

Pursuant to a plea agreement, petitioner pleaded guilty to conspiracy to commit Hobbs Act robbery, the Hobbs Act robbery charged in Count Six, and the Section 924(c) offense charged in the indictment. Judgment 1. The district court sentenced petitioner to concurrent terms of 110 months of imprisonment on the Hobbs Act counts and a consecutive term of 84 months on the

Section 924(c) count, resulting in a total term of 194 months of imprisonment. Judgment 2. Petitioner did not appeal.

2. In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 8 (Aug. 22, 2016). He contended that his Section 924(c) conviction was unlawful on the theory that Hobbs Act robbery does not qualify as a "crime of violence" under Section 924(c)(3). Id. at 11-29. Section 924(c)(3) defines a "crime of violence" as a felony that (A) "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 (B) "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 Hobbs Act robbery does 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 similarly worded "residual clause" in 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. D. Ct. Doc. 8, at 11-29.

A magistrate judge recommended that petitioner's Section 2255 motion be denied. Pet. App. A9-A21. The magistrate judge observed that the Eleventh Circuit had previously determined that Hobbs Act robbery qualifies as a crime of violence under Section

924(c)(3)(A), irrespective of whether Section 924(c)(3)(B) might independently apply. Id. at A18-A20 (citing In re Saint Fleur, 824 F.3d 1337, 1340 (11th Cir. 2016)). The district court adopted the magistrate judge's report and recommendation, denied petitioner's Section 2255 motion, and denied a COA. Id. at A2.

3. The court of appeals also denied petitioner's request for a COA, stating that petitioner had "failed to make the requisite showing." Pet. App. A1.

ARGUMENT

Petitioner contends (Pet. 7-21) that the court of appeals erred in denying his request for a COA on his claim that his Section 924(c) conviction is invalid because conspiracy to commit robbery and robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), do not qualify as "crime[s] of violence" under Section 924(c)(3). The petition for a writ of certiorari should be denied.

1. At the outset, although petitioner argues (Pet. 14-16) that conspiracy to commit Hobbs Act robbery is not a "crime of violence" under Section 924(c)(3), this case does not present that question because the predicate offense for petitioner's Section 924(c) conviction was substantive Hobbs Act robbery -- not conspiracy to commit Hobbs Act robbery. See Indictment 6 (charging that petitioner violated Section 924(c) by brandishing a firearm in furtherance of a crime of violence "as set forth in Count Six of this Indictment"); Indictment 5 (charging petitioner in Count

Six with Hobbs Act robbery); cf. Indictment 1-2 (charging petitioner with conspiracy to commit Hobbs Act robbery in Count One).

2. Petitioner's challenge to his Section 924(c) conviction based on his crime of Hobbs Act robbery (Pet. 17-19) also does not warrant this Court's review. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence 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 requires the prisoner to show "that jurists of reason would find it debatable whether the [Section 2255 motion] states a valid claim of the denial of a constitutional right." Gonzalez v. Thaler, 565 U.S. 134, 140-141 (2012) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

The district court and the court of appeals correctly determined that petitioner is not entitled to a COA on his claim that Hobbs Act robbery does not qualify as a "crime of violence" under Section 924(c)(3). The Hobbs Act defines robbery to require the "unlawful taking or obtaining" of personal property from another "by means of actual or threatened force, or violence, or fear of injury." 18 U.S.C. 1951(b)(1). For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Garcia v. United States, cert. denied, 138 S. Ct.

641 (2018) (No. 17-5704), Hobbs Act robbery 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.” See Br. in Opp. at 7-10, Garcia, supra (No. 17-5704).^{*} Every court of appeals to consider the issue, including the court below, has so held. See id. at 8. Petitioner suggests (Pet. 18) that a defendant can commit Hobbs Act robbery by putting the victim in fear of financial or economic loss, but he cites no case reflecting a conviction on such a theory; instead, the only decision he cites addressed Hobbs Act extortion, not Hobbs Act robbery. See United States v. Local 560 of Int’l Bhd. of Teamsters, 780 F.2d 267, 281-282 (3d Cir. 1985), cert. denied, 746 U.S. 1140 (1986); cf. Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) (a crime falls outside the statutory definition only when a “realistic probability” of overbreadth exists) (citation omitted).

This Court has recently and repeatedly denied review of petitions challenging the circuits’ consensus on the application of Section 924(c)(3)(A) to Hobbs Act robbery. See, e.g., Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248); Robinson v. United States, 138 S. Ct. 1986 (2018) (No. 17-6927); Chandler

^{*} We have served petitioner with a copy of the government’s brief in opposition in Garcia.

v. United States, 138 S. Ct. 1281 (2018) (No. 17-6415); Middleton v. United States, 138 S. Ct. 1280 (2018) (No. 17-6343); Jackson v. United States, 138 S. Ct. 977 (2018) (No. 17-6247); Garcia, 138 S. Ct. 641. The same result is warranted here.

3. Because it is clear that Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A), reasonable jurists would not debate whether petitioner's Hobbs Act robbery crime provided a valid basis for petitioner's conviction under Section 924(c). Petitioner is therefore incorrect (Pet. 19-21) that the court of appeals misapplied the standard for issuing a COA. Moreover, because petitioner's Hobbs Act robbery offense qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3)(A), no reason exists to consider petitioner's argument (Pet. 7-13) that the lower courts erred in denying a COA on his claim 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). See Pet. 7-13. 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. at 1211-1212 (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.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

THOMAS E. BOOTH
Attorney

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