

No. 21-5967

IN THE SUPREME COURT OF THE UNITED STATES

ZENON GRZEGORCZYK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner is entitled to relief on his claim that knowingly using a facility of interstate commerce with intent that a murder be committed, in violation of 18 U.S.C. 1958(a), is not a crime of violence under 18 U.S.C. 924(c).

RELATED PROCEEDINGS

United States District Court (N.D. Ill.):

United States v. Grzegorzczuk, No. 12-cr-320 (Oct. 24, 2014)

United States v. Grzegorzczuk, No. 16-cv-8146 (Oct. 17, 2018)

United States Court of Appeals (7th Cir.):

United States v. Grzegorzczuk, No. 14-3460 (Sept. 1, 2015)

Grzegorzczuk v. United States, No. 18-3340 (May 13, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 997 F.3d 743. The order of the district court (Pet. App. 11a-14a) is not published in the Federal Supplement but is available at 2018 WL 10126077.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 2021. By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying

discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari was filed on October 8, 2021. 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 Northern District of Illinois, petitioner was convicted of knowingly using a facility of interstate commerce with intent that a murder be committed, in violation of 18 U.S.C. 1958(a), and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). Judgment 1. The district court sentenced petitioner to 211 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 15a-23a. The district court denied petitioner's subsequent motion for post-conviction relief under 28 U.S.C. 2255, Pet. App. 11a-14a, and also denied petitioner's request for a certificate of appealability (COA), D. Ct. Doc. 33 (Feb. 7, 2019). The court of appeals granted a COA, C.A. Doc. 12 (Aug. 27, 2019), and affirmed, Pet. App. 1a-10a.

1. In 2012, petitioner, who was seeking to procure firearms to ship to Poland, met with two undercover law enforcement agents posing as gun suppliers. Pet. App. 16a; Presentence Investigation Report (PSR) ¶¶ 14, 16. After discussing the firearms shipment

with the agents, petitioner stated that he also wanted them to kill several people whom petitioner blamed for his divorce and the loss of custody of his son. Pet. App. 16a; PSR ¶¶ 16-19. Petitioner agreed to pay the undercover agents \$5000 for each person they killed and instructed the agents to burn the victims alive to ensure that they suffered. Pet. App. 16a; PSR ¶¶ 16, 19.

Petitioner had additional meetings with the undercover agents, during which he provided the undercover agents with photographs of the six people whom he wanted the agents to kill; directed the agents to the homes of his ex-wife and two of his other intended victims; and gave the agents further instructions on how to kill the victims. Pet. App. 16a-17a; PSR ¶¶ 21-24. Petitioner also indicated that he would pay the agents another \$5000 for each additional person they needed to kill to eliminate witnesses. See Pet. App. 17a; PSR ¶¶ 22-23. During their last meeting, petitioner paid the agents \$3000 as a down payment for the murders and showed them a bag that contained \$45,000 in cash, a semiautomatic handgun, and two magazines of ammunition. Pet. App. 17a; PSR ¶ 25. Petitioner told the agents that he intended to leave for Poland in about five weeks and indicated that he wanted them to commit the murders while he was gone so that he would have an alibi. See ibid.

2. A federal grand jury in the Northern District of Illinois returned an indictment charging petitioner with three counts of

knowingly using a facility of interstate commerce with intent that a murder be committed, in violation of 18 U.S.C. 1958(a), and one count of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). Indictment 1-4. Section 924(c) defines a "crime of violence" as a felony offense 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 indictment identified the Section 1958(a) offense as the predicate crime of violence for the Section 924(c) count. Indictment 4.

Petitioner pleaded guilty, pursuant to a plea agreement, to one of the Section 1958(a) counts and the Section 924(c) count. Plea Agreement 2. In the plea agreement, petitioner agreed that his Section 1958(a) offense was "a crime of violence" under Section 924(c). Id. at 4. And, as part of the plea agreement, petitioner agreed to "waiv[e] all appellate issues that might have been available if he had exercised his right to trial," though he reserved the right to "appeal the validity of [his] plea of guilty and the sentence imposed." Id. at 13. In exchange, the government agreed to dismiss the remaining counts of the indictment. Id. at 10. The district court sentenced petitioner to 211 months of

imprisonment, consisting of 151 months of imprisonment on the Section 1958(a) count and a consecutive sentence of 60 months of imprisonment on the Section 924(c) count, to be followed by three years of supervised release. Judgment 1-3. The court of appeals affirmed petitioner's sentence. Pet. App. 15a-23a.

3. In Johnson v. United States, 576 U.S. 591 (2015), this Court held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), which defines as a "violent felony" offenses punishable by more than one year of imprisonment that "involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague, 576 U.S. at 597. This Court subsequently held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. Welch v. United States, 578 U.S. 120, 135 (2016).

In 2016, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, arguing that Section 924(c)(3)(B) is unconstitutionally vague in light of Johnson and that his Section 1958(a) conviction did not qualify as a "crime of violence" under the alternative definition in Section 924(c)(3)(A). See D. Ct. Doc. 1 (Aug. 16, 2016). The district court denied petitioner's motion. Pet. App. 11a-14a. The court viewed the "crime of violence" definition in Section 924(c)(3)(B) as unconstitutionally vague in light of Johnson, id. at 12a (citing United States v. Cardena, 842

F.3d 959, 995-996 (7th Cir. 2016), cert. denied, 138 S. Ct. 247 (2017)), but found that petitioner had "waiv[ed] his Johnson challenge" by admitting that the predicate Section 1958(a) offense was a crime of violence as part of his unconditional guilty plea to the Section 924(c) count, ibid.; see id. at 11a. The court accordingly denied petitioner's Section 2255 motion, see id. at 14a, and declined to issue a COA, D. Ct. Doc. 33.

4. The court of appeals granted a COA, C.A. Doc. 12, and affirmed the district court's denial of postconviction relief, Pet. App. 1a-10a. While the appeal was pending, this Court held in United States v. Davis, 139 S. Ct. 2319 (2019), that Section 924(c) (3) (B) is unconstitutionally vague. Id. at 2336. The court of appeals explained that petitioner's Section 924(c) conviction would remain valid so long as petitioner's Section 1958(a) offense qualified as a crime of violence under Section 924(c) (3) (A) and that it "need not decide" that merits issue because petitioner "waived [a] challenge to the legal sufficiency of the [Section] 924(c) charge by pleading guilty." Pet. App. 4a. The court observed that in previous decisions it had found that "a criminal defendant who pleads guilty to a [Section] 924(c) charge" cannot later challenge whether his conduct in fact satisfied all the elements of that crime, including the crime-of-violence element, because "'an unconditional guilty plea waives any contention that an indictment fails to state an offense.'" Id. at 5a (quoting

United States v. Wheeler, 857 F.3d 742, 745 (7th Cir. 2017), cert. denied, 138 S. Ct. 640 (2018)). And the court explained that this Court's decision in Class v. United States, 138 S. Ct. 798 (2018), which held that an unconditional guilty plea does not waive a defendant's challenge to the constitutionality of the statute of conviction, id. at 801-802, did not provide petitioner with a basis for postconviction relief, because petitioner's challenge to the classification of his predicate offense as a crime of violence under Section 924(c)(3)(A) raised "an issue of statutory construction, not a claim of constitutional immunity from prosecution," Pet. App. 8a; see id. at 6a-8a.

ARGUMENT

Petitioner contends (Pet. 11-26) that knowingly using a facility of interstate commerce with intent that a murder be committed, in violation of 18 U.S.C. 1958(a), is not a "crime of violence" under 18 U.S.C. 924(c), and that this Court should grant plenary review to decide whether he relinquished that claim by entering an unconditional plea of guilty to a Section 924(c) offense. The government agrees that petitioner's Section 1958(a) offense does not qualify as a crime of violence. And in light of that agreement, it has determined that, consistent with the government's practice in similar cases, it will forgo reliance on petitioner's unconditional guilty plea as a bar to postconviction relief. Accordingly, this Court should grant the petition for a

writ of certiorari, vacate the court of appeals' judgment, and remand for further proceedings in light of the position expressed in this brief.

1. In United States v. Davis, 139 S. Ct. 2319 (2019), this Court held that the definition of "crime of violence" in Section 924(c)(3)(B) is unconstitutionally vague. Id. at 2336. In light of Davis, an offense may qualify as a "crime of violence" under Section 924(c) only if it satisfies the alternative "crime of violence" definition in Section 924(c)(3)(A), which requires that the offense have "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).

In the court of appeals, the government argued that petitioner's Section 1958(a) offense was a "crime of violence" under Section 924(c)(3)(A) because it "ha[d] [as] an element the attempted use of physical force against another." Gov't C.A. Br. 18; see id. at 13-18. The government observed that, under Seventh Circuit precedent, attempted murder under Illinois law qualifies as a "violent felony" under ACCA's analogue to Section 924(c)(3)(A). Id. at 16-17 (citing Hill v. United States, 877 F.3d 717, 719-720 (7th Cir. 2017), cert. denied, 139 S. Ct. 352 (2018)). The government argued that knowingly using a facility of interstate commerce with intent that a murder be committed, in violation of Section 1958(a), similarly qualifies as a crime of

violence because it satisfies the elements of attempted murder identified in Hill. Id. at 17-18.

The government has reevaluated its position and has determined that a Section 1958(a) offense does not categorically require the use, attempted use, or threatened use of physical force. Section 1958(a) makes it a crime to

travel[] in * * * interstate or foreign commerce, or * * * use the mail or any facility of interstate or foreign commerce, with intent that murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value.

18 U.S.C. 1958(a). The statute "require[s] only that a defendant travel in, or use a facility of, interstate commerce with the requisite criminal intent"; it does not require "that a defendant actually enter into a murder-for-hire agreement," that he "carry out or otherwise attempt to accomplish his criminal intent," or that the contemplated murder be attempted or accomplished by another person. United States v. Dvorkin, 799 F.3d 867, 876 (7th Cir. 2015); see United States v. Preacher, 631 F.3d 1201, 1203 (11th Cir. 2011) (per curiam) (explaining that Section 1958(a) "'does not prohibit murder or attempted murder'") (quoting United States v. Delpit, 94 F.3d 1134, 1149 (8th Cir. 1996)).

Travel in interstate commerce or use of a facility of interstate commerce with the requisite criminal intent need not, as a categorical matter, involve the use, attempted use, or threatened use of physical force under Section 924(c)(3)(A).

Petitioner's own Section 1958(a) conviction rests on his use of a car to drive to a meeting with the undercover agents. See Plea Agreement 2-4; Indictment 3. Accordingly, the government agrees that his Section 1958(a) violation does not qualify as a "crime of violence" under Section 924(c)(3)(A) and that his Section 924(c) conviction is therefore invalid.

2. In the court of appeals, the government raised petitioner's unconditional guilty plea as a procedural bar that prevented the court from considering the merits of the claim that his Section 924(c) conviction was invalid. See, e.g., Gov't C.A. Br. 7-12. That position was supported by the court's precedent, which explains that a defendant relinquishes a challenge to the classification of an offense as a "crime of violence" under Section 924(c)(3)(A) when he unconditionally pleads guilty to a Section 924(c) count and admits all the elements of that offense, including the existence of a predicate crime of violence. See Pet. App. 5a-6a (citing Wheeler, 857 F.3d 742, and Davila v. United States, 843 F.3d 729 (7th Cir. 2016)). Petitioner challenges (Pet. 11-23) the court's precedent on that issue. No reason exists to consider that contention in this case.

Where, as here, the government determines that a defendant's conviction under Section 924(c) is invalid and no other grounds support the defendant's overall sentence (such as concurrent life sentences on other counts or equally serious charges that were

dismissed as consideration for a guilty plea), its usual practice is to waive any applicable procedural defenses on collateral review and agree that the defendant's Section 924(c) conviction should be vacated. Cf. Wood v. Milyard, 566 U.S. 463, 472-473 (2012) (explaining that procedural defenses may be waived). Consistent with that practice, the government has determined that it is appropriate to forgo reliance on petitioner's unconditional guilty plea and agree to vacatur of the Section 924(c) conviction. That course will allow the district court to reevaluate petitioner's sentence in light of his valid Section 1958(a) conviction and any additional convictions that may be entered on counts that were dismissed in connection with petitioner's guilty plea. See 18 U.S.C. 3296.*

* A remand to the district court will also permit correction of an unrelated error in petitioner's sentence. The maximum sentence for a violation of Section 1958(a) is generally ten years of imprisonment, but "if personal injury results" from the offense, the maximum sentence is 20 years of imprisonment. 18 U.S.C. 1958(a). Petitioner's offense did not result in personal injury or death, and therefore his maximum term of imprisonment on the Section 1958(a) count was ten years. However, the parties mistakenly stated in petitioner's plea agreement that the statutory maximum punishment on the Section 1958(a) count was 20 years of imprisonment, Plea Agreement 5, and the Probation Office repeated that error in its presentence report, PSR ¶¶ 105, 107 (determining that the maximum term of imprisonment on the Section 1958(a) count was 20 years and that petitioner's Sentencing Guidelines range for that count was 151 to 188 months of imprisonment). The court sentenced petitioner to 211 months of imprisonment, consisting of 151 months of imprisonment on the Section 1958(a) count and a consecutive sentence of 60 months of imprisonment on the Section 924(c) count. Judgment 2.

CONCLUSION

The petition for a writ of certiorari should be granted, the court of appeals' judgment vacated, and the case remanded for further proceedings in light of the position expressed in this brief.

Respectfully submitted.

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