

IN THE SUPREME COURT OF THE UNITED STATES

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JOHN PRICKETT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the definition of the term "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).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 839 F.3d 697. A prior opinion of the court of appeals is reported at 830 F.3d 760. The opinion of the district court (Pet. App. B1-B4) is not published in the Federal Supplement but is available at 2015 WL 5884904.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2016. The petition for a writ of certiorari was filed on December 28, 2016. 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 Western District of Arkansas, petitioner was convicted of assault with intent to commit murder, in violation of 18 U.S.C. 113(a)(1); and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii). The district court sentenced petitioner to 97 months of imprisonment on Count 1 and a mandatory consecutive term of 120 months of imprisonment on Count 2, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. A1-A3.

1. In September 2014, petitioner and his wife, Tommie Prickett, were camping in Buffalo River National Park in Arkansas. Presentence Investigation Report (PSR) ¶¶ 10, 17. During an argument, petitioner shot Tommie multiple times at close range. PSR ¶¶ 27-28. Tommie survived but sustained life-threatening injuries that required multiple surgeries. PSR ¶ 16. Petitioner initially lied to investigators about the shooting but ultimately confessed. PSR ¶¶ 17-25.

2. In November 2014, a federal grand jury indicted petitioner on one count of assault with intent to commit murder, in violation of 18 U.S.C. 113(a)(1) (Count 1); and one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii) (Count 2).

Indictment 1. Petitioner pleaded guilty to both counts. See Plea Agreement 1; see also Pet. App. A2.

Shortly before his sentencing, petitioner moved to dismiss Count 2 and withdraw his plea as to that count on the ground that his underlying offense -- assault with intent to commit murder -- did not qualify as a "crime of violence" for purposes of Section 924(c). See D. Ct. Doc. 34, at 4-14 (Oct. 5, 2015) (Mot. to Dismiss). Section 924(c) defines a "crime of violence" as a felony that (1) "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 (2) "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 assault with intent to commit murder does not have the elements required by Section 924(c)(3)(A). See Mot. to Dismiss 4-9. He further argued that his offense could not qualify as a "crime of violence" under Section 924(c)(3)(B) because that provision is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015). Mot. to Dismiss 10-14. Johnson held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. See 135 S. Ct. at 2556-2558. Petitioner argued that Section 924(c)(3)(B) suffers

from the same constitutional infirmities as the ACCA's residual clause. See Mot. to Dismiss 10-14.

The government responded that assault with intent to commit murder, as that offense is defined in 18 U.S.C. 113(a)(1), qualifies as a "crime of violence" under Section 924(c)(3)(A). D. Ct. Doc. 35, at 1-2 (Oct. 6, 2015). With respect to petitioner's Johnson claim, the government argued that, although the ACCA's residual clause and Section 924(c)(3)(B) both require application of the categorical approach, critical differences in text, structure, scope, and judicial application distinguish the two provisions. Id. at 2-10.

The district court denied petitioner's motion but adopted a rationale different from that advanced by the government. Pet. App. B1-B4. The court concluded that, whereas the ACCA requires courts to "utilize the categorical approach," Section 924(c)(3)(B) "looks to the evidence in [the particular] case, i.e., the underlying offense conduct." Id. at B3. Because petitioner's offense conduct involved the use of physical force, the court determined that his offense qualified as a "crime of violence" under Section 924(c)(3)(B). Id. at B4.

The district court sentenced petitioner to 97 months of imprisonment on Count 1 and a consecutive term of 120 months of imprisonment on Count 2. Judgment 2.

3. The court of appeals affirmed. Pet. App. A1-A3. The court's initial opinion concluded that, unlike the categorical approach mandated by the ACCA's residual clause, Section 924(c)(3)(B) "operates on 'real-world facts.'" 830 F.3d at 761 (quoting Johnson, 135 S. Ct. at 2557). The court thus held that "Section 924(c)(3)(B) is the very type of statute that the Johnson Court explained would not be unconstitutionally vague under its holding." Ibid. (citing Johnson, 135 S. Ct. at 2561).

The government petitioned for panel rehearing on the ground that the court of appeals had erroneously determined that the categorical approach does not apply to Section 924(c). Gov't C.A. Pet. for Reh'g 1-2, 5-7. The government argued, however, that the court's judgment was nonetheless correct because Section 924(c)(3)(B) is distinguishable from the ACCA's residual clause on other grounds. Id. at 8-13. In the alternative, the government argued that assault with intent to commit murder qualifies as a "crime of violence" under Section 924(c)(3)(A), and thus any error in applying Section 924(c)(3)(B) was harmless. Id. at 14-15.

The court of appeals granted the government's petition for panel rehearing, vacated its opinion, and issued a revised opinion rejecting petitioner's Johnson claim substantially on the grounds urged by the government. Pet. App. A1-A3. The court explained that "several factors distinguish the ACCA residual clause from [Section] 924(c)(3)(B)," including Section 924(c)(3)(B)'s

"distinctly narrower" language; the fact that Section 924(c)(3)(B) is not "linked to a confusing set of examples"; the absence of a comparable history of judicial confusion related to the interpretation and application of Section 924(c)(3)(B); and the fact that Johnson itself cautioned against extending its holding beyond the "particular set of circumstances" of the ACCA's residual clause. Id. at A2-A3 (citations omitted). The court thus "join[ed] the Second and Sixth Circuits in upholding [Section] 924(c)(3)(B) against a vagueness challenge." Id. at A2; see United States v. Hill, 832 F.3d 135, 145-150 (2d Cir. 2016); United States v. Taylor, 814 F.3d 340, 375-379 (6th Cir. 2016), petition for cert. pending, No. 16-6392 (filed Oct. 6, 2016).

Having concluded that federal assault with intent to murder qualifies as a "crime of violence" under Section 924(c)(3)(B), the court of appeals did not reach the government's alternative argument under Section 924(c)(3)(A).

#### ARGUMENT

Petitioner contends (Pet. 7-18) that certiorari is warranted to resolve a circuit conflict concerning whether the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. No reason exists to address that issue in this case. The circuit conflict petitioner identifies is not entrenched and may resolve itself, particularly in light of this Court's forthcoming decision in Sessions v. Dimaya, No. 15-1498

(argued Jan. 17, 2017). And this case would be an especially poor vehicle in which to consider the constitutionality of Section 924(c)(3)(B) because petitioner's crime (assault with intent to commit murder) also qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3)(A). A decision in petitioner's favor would not, therefore, affect the validity of his conviction under Section 924(c). Neither plenary review nor a hold for Dimaya is warranted and the petition should be denied.

1. In Johnson v. United States, 135 S. Ct. 2551 (2015), this Court held that the ACCA's residual clause, which defines the term "violent felony" to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. 135 S. Ct. at 2556-2558. The Court explained that "[t]wo features" of the ACCA's residual clause "conspire[d]" to make it vague, including "uncertainty about how to estimate the risk posed by a crime" and "uncertainty about how much risk it takes for a crime to qualify as a violent felony." Id. at 2557-2558. Those features, in turn, depended on a number of factors unique to the ACCA's residual clause, including the "imprecise 'serious potential risk' standard," the linkage between the residual clause and the ACCA's "confusing list of examples," and, "[c]ritically," the requirement that judges "imagine how the

idealized ordinary case of [a] crime subsequently plays out.” Id. at 2557-2558, 2561.

In the wake of Johnson, four courts of appeals have addressed whether Section 924(c)(3)(B) is unconstitutional. Three of those courts, including the court below, have concluded that Section 924(c)(3)(B) does not share the same features that rendered the ACCA’s residual clause unconstitutional and have thus affirmed the statute’s validity. See Pet. App. A2-A3; United States v. Hill, 832 F.3d 135, 146-149 (2d Cir. 2016); United States v. Taylor, 814 F.3d 340, 375-379 (6th Cir. 2016), petition for cert. pending, No. 16-6392 (filed Oct. 6, 2016). The Seventh Circuit reached a different conclusion in United States v. Cardena, 842 F.3d 959 (2016), holding that Section 924(c)(3)(B) is unconstitutional in light of Johnson but determining that the error in that case was harmless because the defendants’ underlying offense (kidnapping) qualified as a “crime of violence” under 18 U.S.C. 924(c)(3)(A). Cardena, 842 F.3d at 996-999.<sup>1</sup>

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<sup>1</sup> Petitioner contends (Pet. 8) that the Eleventh Circuit’s decision in In re Pinder, 824 F.3d 977 (2016), is consistent with the holding in Cardena. As petitioner acknowledges, however, Pinder involved a prisoner’s application to file a second or successive motion for post-conviction relief under 28 U.S.C. 2255(h). The Eleventh Circuit granted the application under 28 U.S.C. 2255(h)(2), which requires only that the prisoner make a “prima facie” showing that his claim implicates a new, retroactively applicable rule of constitutional law. See Pinder, 824 F.3d at 978. The court of appeals found that standard satisfied because Section 924(c)(3)(B)’s constitutionality is “unsettled” following Johnson. Id. at 979. The court noted,

2. Contrary to petitioner's argument (Pet. 7), the circuit conflict concerning the constitutionality of Section 924(c)(3)(B) does not warrant review at this time. Only four courts of appeals have considered the question following Johnson, and only one (the Seventh Circuit) has determined that Section 924(c)(3)(B) is unconstitutional. The Seventh Circuit ultimately affirmed the defendants' convictions in Cardena under Section 924(c)(3)(A), however, and neither the government nor the defendants sought further review of that aspect of the court's decision.

The Seventh Circuit has noted that en banc review is "appropriate" when "th[e] circuit stands alone" on an issue and "can eliminate [a circuit] conflict by overruling a decision that lacks support elsewhere." United States v. Corner, 598 F.3d 411, 414 (2010) (en banc). The Seventh Circuit also permits panels of that court to overrule prior panel decisions without the need for en banc review if the decision is circulated to all active judges before publication and a majority does not request en banc consideration of the issue. 7th Cir. R. 40(e). If other circuits follow the lead of the Second, Sixth, and Eighth Circuits and affirm the constitutionality of Section 924(c)(3)(B), it is reasonably probable that the Seventh Circuit will reconsider its

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however, that its preliminary decision to grant the application was not a decision on the merits and would not "bind[]" the district court or another panel of the court of appeals to find that Section 924(c)(3)(B) is unconstitutional. Ibid.

decision in Cardena and resolve the circuit conflict without this Court's intervention.

Declining to address the conflict between Cardena and the court of appeals' decision in this case would be especially prudent in light of this Court's forthcoming decision in Dimaya, which concerns the constitutionality of 18 U.S.C. 16(b). See Pet. 8-9 (noting circuit conflict concerning Section 16(b)). The wording of Section 16(b) is identical to that in Section 924(c)(3)(B). If the Court's opinion in Dimaya affirms the constitutionality of Section 16(b), it would likely resolve any doubt concerning the constitutionality of Section 924(c)(3)(B).

If the Court were to hold in Dimaya that Section 16(b) is unconstitutional, however, it would not necessarily require the same result for Section 924(c)(3)(B). As explained in the government's brief in Dimaya, Section 924(c) "requires a specified nexus to the use, carrying, or possession of a firearm," which may "serve to narrow the scope of the statute and eliminate vagueness concerns" that could arise under other statutes. Gov't Br. at 53 n.11, Dimaya, supra (No. 15-1498). A ruling adverse to the government in Dimaya would require the courts of appeals to resolve that issue and others, including the threshold question of whether the categorical approach applies to Section 924(c) at all.

The most appropriate course is to allow the courts of appeals to decide those issues in light of whatever guidance the

forthcoming decision in Dimaya provides. Granting review before the courts of appeals have had an opportunity to do so would require this Court to resolve difficult questions of statutory interpretation without the benefit of lower court opinions considering those questions in light of this Court's most recent pronouncements on related issues and without knowing whether the emerging circuit conflict concerning Section 924(c)(3)(B) will persist. See, e.g., Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (declining to review claim "without the benefit of thorough lower court opinions to guide our analysis of the merits"). The better course is to deny review in this case and await further development in the courts of appeals, after which this Court would be better positioned to determine whether the issue merits certiorari review.<sup>2</sup>

3. Even if this Court were inclined to grant review to consider the constitutionality of Section 924(c)(3)(B), this case would not be an appropriate vehicle for doing so. As in Cardena,

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<sup>2</sup> Denying review in this case would not leave petitioner without a remedy if the Court were to hold in a future case that Section 924(c)(3)(B) is unconstitutional. In that event (and assuming petitioner's Section 924(c) conviction were not valid on other grounds, see pp. 12-13, infra), petitioner would be entitled to seek post-conviction relief under 28 U.S.C. 2255 on the ground that he was convicted of an offense that is not prohibited by Section 924(c). See Bousley v. United States, 523 U.S. 614, 621 (1998) (holding that Bailey v. United States, 516 U.S. 137 (1995), which narrowed the scope of another provision of Section 924(c), applied retroactively on collateral review).

any error in applying Section 924(c)(3)(B) was harmless because petitioner's underlying offense of assault with intent to commit murder qualifies as a "crime of violence" under the alternative definition in Section 924(c)(3)(A).

Petitioner pleaded guilty to a violation of 18 U.S.C. 113(a)(1), which criminalizes "[a]ssault with intent to commit murder" on federal land and in other areas subject to federal jurisdiction. The Eighth Circuit has construed the term "assault" to require proof of "an[] intentional and voluntary attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the attempt is made in fear of immediate bodily harm." United States v. LeCompte, 108 F.3d 948, 952 (1997). Under Section 113(a)(1), the attempt or threat to do bodily harm must be accompanied by an intent to commit murder, thus limiting the statute to particularly serious forms of assault. See, e.g., United States v. Perez, 43 F.3d 1131, 1137-1138 & n.10 (7th Cir. 1994) (noting the "unanimous view" of the circuits that have considered the question that Section 113(a) "requires a specific intent to commit murder").

As explained, Section 924(c)(3)(A) requires that an 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). "[P]hysical force" means "force capable

of causing physical pain or injury.” Johnson v. United States, 559 U.S. 133, 140 (2010) (construing similar provision in the ACCA) (citation and internal quotation marks omitted). The Eighth Circuit has repeatedly held that “physical force,” so defined, is an element of assault offenses that require an attempt or threat to cause bodily harm. See, e.g., United States v. Headbird, 832 F.3d 844, 846-847 (2016) (Minnesota second-degree assault); United States v. Lindsey, 827 F.3d 733, 739-740 (same), cert. denied, 137 S. Ct. 413 (2016); United States v. Schaffer, 818 F.3d 796, 798 (Minnesota domestic assault), cert. denied, 137 S. Ct. 410 (2016). The same is certainly true where the intent of the assault is to kill the victim.<sup>3</sup>

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<sup>3</sup> Petitioner contended below that assault with intent to commit murder does not categorically qualify under Section 924(c)(3)(A) because the offense could be committed through indirect means such as “poisoning.” Pet. C.A. Br. 21. That argument is foreclosed by this Court’s decision in United States v. Castleman, 134 S. Ct. 1405 (2014), which held that the term “use \* \* \* of physical force” in 18 U.S.C. 921(a)(33)(A) includes both the direct and indirect causation of physical harm. 134 S. Ct. at 1414-1415; see ibid. (noting that poisoning involves the use of “physical force”). The Eighth Circuit has relied on Castleman in rejecting proposed distinctions between the direct and indirect use of force under provisions similar to Section 924(c)(3)(A). See, e.g., Headbird, 832 F.3d at 847; Lindsey, 827 F.3d at 739-740; Schaffer, 818 F.3d at 798; United States v. Rice, 813 F.3d 704, 705-706, cert. denied, 137 S. Ct. 59 (2016).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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