No. 17-5484

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN GENE MCCOY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

KENNETH A. BLANCO
Acting Assistant Attorney General

JAMES I. PEARCE
Attorney

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

QUESTION PRESENTED

Whether voluntary manslaughter, in violation of 18 U.S.C. 1112(a), is a "crime of violence" under 18 U.S.C. 924(c)(1)(A).

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-5484

BRIAN GENE MCCOY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is not published in the Federal Reporter. The order of the district court (Pet. App. B1-B3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2017. A petition for rehearing was denied on May 5, 2017 (Pet. App. D1). The petition for a writ of certiorari was filed on August 1, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted of voluntary manslaughter, in violation of 18 U.S.C 1112 (2000), and using or carrying a firearm during and in relation to a "crime of violence," in violation of 18 U.S.C. 924(c)(1)(A). The district court sentenced petitioner to 216 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. 496 F.3d 853. Petitioner subsequently filed a motion for postconviction relief under 28 U.S.C. 2255, in which he argued that his conviction and sentence under Section 924(c) should be vacated. The district court denied petitioner's motion and denied his request for a certificate of appealability (COA). Pet. App. B1-B3. The court of appeals also denied a COA. Id. at A1.

1. Petitioner lived with his wife, Hanni, in Hanni's mother's house on the Fort Berthold Indian Reservation in North Dakota. 496 F.3d at 855. Hanni's sister and her sister's husband, Wayne, lived in the same house. Ibid. Petitioner's brother, Brent, lived in a nearby motor home. Ibid.

On October 17, 2005, Hanni discovered that petitioner and Brent were consuming alcohol with an underage girl in Brent's home and that Brent appeared to be in bed with the girl. 496 F.3d at 855; Presentence Investigation Report (PSR) ¶ 4. Hanni informed

her brother-in-law, Wayne, who knocked on the door of Brent's motor home, yelling to petitioner and Brent that they should not be with the girl. 496 F.3d at 855. Petitioner, holding a firearm, exited Brent's motor home and confronted Wayne. Ibid. After a verbal altercation, petitioner shot Wayne three times. Ibid. Petitioner subsequently told police officers that he had shot Wayne and that he hoped Wayne died. Ibid. Wayne died as a result of the gunshot wounds. Ibid.

A federal grand jury charged petitioner with second-degree murder in Indian country, in violation of 18 U.S.C. 1111 (2000); and using or carrying a firearm during and in relation to a crime of violence (namely, the murder), in violation of 18 U.S.C. 924(c)(1)(A). Indictment 1-2. The jury acquitted petitioner of second-degree murder, but convicted him on the lesser-included offense of voluntary manslaughter, in violation of 18 U.S.C. 1112(a), and on the Section 924(c) offense. Verdict 1. The district court sentenced petitioner to 216 months of imprisonment (96 months on the voluntary manslaughter offense and a consecutive sentence of 120 months on the Section 924(c) offense), to be followed by five years of supervised release. Judgment 2-3.

2. In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, 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. 135 S. Ct. at 2257. The ACCA's residual

clause defines a "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).

In 2016, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, in which he argued that voluntary manslaughter is not a "crime of violence" under Section 924(c) and thus his conviction and sentence on the Section 924(c) count should be vacated. See D. Ct. Doc. 67, at 1-2 (June 21, 2016). Section 924(c) 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). Petitioner argued that Johnson's holding with respect to the ACCA's residual clause "equally invalidates" Section 924(c)(3)(B), and that his Section 924(c) conviction rested "solely" on Section 924(c)(3)(B). D. Ct. Doc. 67, at 1.

The district court denied petitioner's motion. Pet. App. B1-B3. The court stated that petitioner's motion was "not actually based upon the new rule announced in Johnson"; instead, petitioner was "attempt[ing] to create a second new rule by extending Johnson to convictions under Section 924(c)(3)(B)." Id. at B2. The court additionally observed that the Eighth Circuit had "rejected the

argument that Section 924(c)(3)(B) is unconstitutionally vague under Johnson." Ibid. (citing United States v. Prickett, 830 F.3d 760 (8th Cir.) (per curiam), modified on reh'g, 839 F.3d 697 (8th Cir. 2016) (per curiam), petition for cert. pending, No. 16-7373 (filed Dec. 28, 2016)). The district court also denied a COA, holding that petitioner had failed to show that the motion raised a debatable constitutional question or was otherwise deserving of further proceedings. Id. at B3 (citing, e.g., Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)).

3. Petitioner filed an application for a COA in the court of appeals, which the court summarily denied. Pet. App. A1.

ARGUMENT

Petitioner contends (Pet. 4-8) 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. 8-10) that a circuit conflict exists over whether Section 924(c)(3)(B) is constitutional and that this Court has granted review in Sessions v. Dimaya, No. 15-1498 (reargued Oct. 2, 2017), to decide whether the similarly worded definition of a "crime of violence" in 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's definition of the term "aggravated felony," 8 U.S.C. 1101(a)(43), is unconstitutionally vague. Petitioner therefore suggests that the Court should hold

his petition for a writ of certiorari pending the decision in Dimaya.

Contrary to petitioner's suggestion, his petition should be denied, because the resolution of Dimaya will have no effect on the validity of his Section 924(c) conviction. Petitioner's predicate offense for the Section 924(c) conviction has "as an element the use, attempted use, or threatened use of physical force against the person or property of another," and thus it independently qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3)(A). His conviction is therefore lawful irrespective of the outcome of Dimaya or the constitutionality of Section 924(c)(3)(B).

Contrary to petitioner's suggestion that the matter is unclear (Pet. 3), the record establishes that his Section 924(c) conviction was based on the predicate crime of voluntary manslaughter, in violation of 18 U.S.C. 1112(a), not involuntary manslaughter. Voluntary manslaughter and involuntary manslaughter carry different punishments, see 18 U.S.C. 1112(b) (15-year statutory maximum for voluntary manslaughter and 8-year statutory maximum for involuntary manslaughter), so the "statutory alternatives" are elements and courts may use the modified categorical approach -- including consulting "the record of [the] prior conviction" -- to determine which alternative applied to petitioner. Mathis v. United States, 136 S. Ct. 2243, 2256 (2016).

Here, the jury instructions and guilty verdict show that petitioner was convicted of voluntary manslaughter. See Final Instructions, at 5 (identifying "[v]oluntary [m]anslaughter" as a lesser included offense of second-degree murder); Verdict 1 (finding petitioner guilty of the "lesser included offense of voluntary manslaughter"). The jury's verdict on the additional Section 924(c) count therefore logically rests on that predicate offense.

Voluntary manslaughter, in violation of 18 U.S.C. 1112(a), requires the "unlawful killing of a human being without malice * * * [u]pon a sudden quarrel or heat of passion." The offense requires proof "of the physical act of unlawfully killing another" and that the defendant acted with "either a general intent to kill, intent to do serious bodily injury, or with depraved heart recklessness." United States v. Barrett, 797 F.3d 1207, 1222 (10th Cir. 2015) (quoting United States v. Serawop, 410 F.3d 656, 666 (10th Cir. 2005)), cert. denied, 137 S. Ct. 36 (2016).

The crime of voluntary manslaughter thus necessarily involves the "use of physical force against the person * * * of another," within the meaning of Section 924(c)(3)(A). A physical act that kills someone qualifies as the sort of "violent force * * * capable of causing physical pain or injury to another person," Johnson v. United States, 559 U.S. 133, 140 (2010), that this Court has held constitutes "physical force" for purposes of a provision like this one. Ibid. (construing 18 U.S.C. 924(e)(2)(B)(i)); see

United States v. Castleman, 134 S. Ct. 1405, 1416-1417 (2014) (Scalia, J., concurring in part and concurring in judgment) (finding it "impossible to cause bodily injury without using force 'capable of' producing that result").

The mens rea element of the offense is likewise consistent with the "use of force." In Voisine v. United States, 136 S. Ct. 2272, 2276, 2277 (2016), this Court held that a Maine offense requiring a similar mental state to petitioner's crime -- "'intentionally, knowingly or recklessly caus[ing] bodily injury or offensive physical contact to another person'" -- qualifies as an offense that "'has, as an element, the use or attempted use of physical force'" under 18 U.S.C. 921(a)(33)(A). Although Voisine's holding did not directly encompass Section 924(c)(3)(A), see 136 S. Ct. at 2280 n.4 (reserving question whether 18 U.S.C. 16(a)'s definition of "crime of violence" includes "reckless behavior"), the Court's reasoning turned on the meaning of the word "use," which is employed in a similar way in the definition of "crime of violence" in Section 924(c)(3)(A). Moreover, even if recklessly causing injury did not always qualify as the use of force for purposes of Section 924(c)(3)(B), the conduct necessary to constitute voluntary manslaughter -- which requires, at minimum, depraved heart recklessness -- still would.

Because petitioner's predicate offense qualifies as a "crime of violence" under Section 924(c)(3)(A), no reason exists to

consider whether it would also qualify under Section 924(c)(3)(B) or to hold this petition for Dimaya. For the same reason, petitioner cannot "show[ ] that reasonable jurists could debate" whether his conviction under Section 924(c) is constitutional, as he must to obtain a COA on post-conviction review. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

KENNETH A. BLANCO
Acting Assistant Attorney General

JAMES I. PEARCE
Attorney

NOVEMBER 2017