

IN THE SUPREME COURT OF THE UNITED STATES

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EDWARD NATHAN WING, 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 TENTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether forcible assault upon a federal officer with a deadly or dangerous weapon, in violation of 18 U.S.C. 111(a) and (b), qualifies as a "crime of violence" under 18 U.S.C. 924(c) (3).
2. Whether petitioner's motion for postconviction relief under 28 U.S.C. 2255 was timely.

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No. 18-5147

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OPINIONS BELOW

The order and judgment of the court of appeals (Pet. App. A1-A10) is not published in the Federal Reporter but is reprinted at 730 Fed. Appx. 592. The order of the district court (Pet. App. B1-B16) is not reported in the Federal Supplement but is available at 2016 WL 6803695.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2018. The petition for a writ of certiorari was filed on July 3, 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 District of Colorado, petitioner was convicted of forcibly assaulting a federal officer with a deadly or dangerous weapon, in violation of 18 U.S.C. 111(a) and (b), 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). C.A. ROA 36. The district court sentenced petitioner to 147 months of imprisonment, to be followed by five years of supervised release. Id. at 37-38. Petitioner did not appeal, but later filed a motion to vacate his sentence under 28 U.S.C. 2255. Id. at 55-63. The district court denied petitioner's motion. Pet. App. B1-B16. The court of appeals affirmed in an unpublished order. Id. at A1-A10.

1. On May 18, 2006, officers of the federal Bureau of Indian Affairs responded to a report that petitioner was shooting a firearm toward a road near his home on the Ute Mountain Indian Reservation. ROA 24. Upon arriving at the scene, the officers observed petitioner standing near his house shooting an SKS semiautomatic assault rifle that was equipped with a scope and a bayonet. Ibid. As the officers began to approach petitioner, he started shooting directly at them. Ibid. The officers took cover behind their vehicles. Ibid. Petitioner shot the side of one of the vehicles and fired several rounds "directly over [the] head" of an officer. Ibid. Petitioner surrendered only after his father arrived and convinced him to end the attack. Ibid.

A federal grand jury charged petitioner with four counts of forcible assault upon a federal officer with a deadly or dangerous weapon, in violation of 18 U.S.C. 111(a) and (b); four counts of assault with intent to commit murder in Indian country, in violation of 18 U.S.C. 1151 and 1153(a); and eight counts of use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). ROA 9-13. Pursuant to a written plea agreement, petitioner pleaded guilty to one count of forcibly assaulting a federal officer with a deadly or dangerous weapon, in violation of 18 U.S.C. 111(a) and (b), and one count of using, carrying, brandishing, and discharging a firearm during and in relation to a crime of violence (namely, the assault), in violation of 18 U.S.C. 924(c)(1)(A)(iii). ROA 21-22. The government agreed to dismiss the remaining counts in the indictment. Id. at 22.

The district court sentenced petitioner to 147 months of imprisonment, consisting of 27 months on the assault count and a statutory minimum consecutive sentence of 120 months on the Section 924(c) count, to be followed by five years of supervised release. ROA 37-38. Petitioner did not appeal.

2. In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. ROA 55-63. Petitioner contended that his Section 924(c) conviction was invalid, on the theory that forcible assault upon a federal officer with a deadly or dangerous weapon is not a "crime of violence" as defined in 18 U.S.C. 924(c)(3).

ROA 56. Section 924(c)(3) defines a "crime of violence" as a felony that "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 his assault offense did 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 "residual clause" of the definition of a "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness. ROA 56-63.

The government opposed petitioner's motion. The government argued that the motion was untimely because petitioner's challenge to the classification of his offense as a crime of violence should have been brought within a year of the date on which his conviction became final, as required by 28 U.S.C. 2255(f)(1). ROA 66, 67-72. Addressing the potential applicability of 28 U.S.C. 2255(f)(3), which allows for filing within a year of "the date on which the right asserted was initially recognized" by a retroactive decision of this Court, the government explained that although petitioner's motion had been filed within one year of this Court's decision in Johnson, that decision addressed only the ACCA's residual clause, not Section 924(c)(3)(B). ROA 66. The government

separately contended that, in any event, forcible assault upon a federal officer with a deadly or dangerous weapon qualifies as a crime of violence under Section 924(c)(3)(A), the constitutionality of which petitioner did not challenge. Id. at 65-80.

The district court denied petitioner's motion. Pet. App. B1-B16. The court explained that the offense of forcibly assaulting a federal officer with a deadly or dangerous weapon requires proof that the defendant "use[d] a deadly or dangerous weapon," 18 U.S.C. 111(b), to "forcibly assault[], resist[], oppose[], impede[], intimidate[], or interfere[] with" a federal officer "engaged in or on account of the performance of official duties," 18 U.S.C. 111(a)(1). Pet. App. B13. The court determined that a violation of those provisions necessarily requires at least the threatened use of "physical force" within the meaning of Section 924(c)(3)(A). Id. at B12-B15. And the court observed that every court of appeals to have considered the question had likewise determined that forcibly assaulting a federal officer with a deadly or dangerous weapon requires the use or threatened use of physical force. Id. at B14-B15.

In light of its determination that petitioner's assault offense qualified as a crime of violence under Section 924(c)(2)(A), the district court did not "reach any conclusions" about whether his motion was timely or whether the alternative "crime of violence" definition in Section 924(c)(3)(B) was

unconstitutionally vague. Pet. App. B15. The court granted a certificate of appealability. ROA 109-110.

3. The court of appeals affirmed in an unpublished order. Pet. App. A1-A10.

First, the court of appeals determined that petitioner's motion was untimely because he did not file it within a year of his conviction becoming final, as required under Section 2255(f)(1). Pet. App. A5-A8. The court reasoned that petitioner could not rely on Johnson to restart the limitations period under Section 2255(f)(3) because that decision was "specifically limited \* \* \* to the [ACCA's] residual clause" and "did not recognize a new right relative to [Section] 924(c)(3)(B)." Id. at A6, A8; see id. at A7 ("Johnson does not compel the conclusion that § 924(c)(3)(B) is unconstitutionally vague.").

Second, and alternatively, the court of appeals determined that even if timely, petitioner's claim would "fail[] on the merits" regardless of whether Section 924(c)(3)(B) is unconstitutional, because forcible assault upon a federal officer with a deadly or dangerous weapon qualifies as a crime of violence under Section 924(c)(3)(A). Pet. App. A8-A9. The court observed that it had previously held that a violation of Section 111(a) and (b) "categorically entails the actual or threatened use of violent physical force" under the Sentencing Guidelines' career-offender provision, which also "define[s] 'crime of violence' to include a felony offense involving the actual or threatened use of physical

force." Id. at A9 (citing United States v. Kendall, 876 F.3d 1264, 1270-1271 (10th Cir. 2017), cert. denied, 138 S. Ct. 1582 (2018)).

#### ARGUMENT

Petitioner contends (Pet. 10-13) that forcible assault upon a federal officer with a deadly or dangerous weapon, in violation of 18 U.S.C. 111(a) and (b), does not qualify as a "crime of violence" within the meaning of 18 U.S.C. 924(c)(3). That contention does not warrant review. The court of appeals correctly determined that forcibly assaulting a federal officer with a deadly or dangerous weapon qualifies as a crime of violence under 18 U.S.C. 924(c)(3)(A) because it requires the use or threatened use of physical force. Every court of appeals to have considered the question has reached the same conclusion. That basis for upholding the judgment obviates any need for this Court to consider, in the context of this case, petitioner's assertions that the alternative definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague (Pet. 6-7, 10), or that the court of appeals erred in determining that his motion for postconviction relief was untimely (Pet. 7-10), which lack merit in any event. The petition for a writ of certiorari should be denied.

1. Forcibly assaulting a federal officer with a deadly or dangerous weapon, in violation of 18 U.S.C. 111(a) and (b), requires proof that the defendant "use[d] a deadly or dangerous weapon" to "forcibly assault[], resist[], oppose[], impede[],

intimidate[], or interfere[] with" a federal officer engaged in his official duties. 18 U.S.C. 111(a), (b). Every court of appeals to have considered the question has classified that offense as a "crime of violence" under Section 924(c)(3)(A) or analogous provisions. See, e.g., United States v. Taylor, 848 F.3d 476, 491-495 (1st Cir.) (Section 924(c)(3)(A)), cert. denied, 137 S. Ct. 2255 (2017); United States v. Rafidi, 829 F.3d 437, 444-446 (6th Cir. 2016) (same), cert. denied, 137 S. Ct. 2147 (2017); United States v. Juvenile Female, 566 F.3d 943, 947-948 (9th Cir. 2009) (18 U.S.C. 16(a)), cert. denied, 558 U.S. 1134 (2010); United States v. Kendall, 876 F.3d 1264, 1270-1271 (10th Cir. 2017) (Sentencing Guidelines § 4B1.2(a)(1) (2016)), cert. denied, 138 S. Ct. 1582 (2018); United States v. Hernandez-Hernandez, 817 F.3d 207, 216-217 (5th Cir. 2016) (Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) & comment. (n.1(B)(iii)) (2015)); United States v. Green, 543 Fed. Appx. 266, 271-272 (3d Cir. 2013) (Sentencing Guidelines § 4B1.2(a)(1) (2014)).

The courts in those cases have correctly determined that a violation of Section 111(a) and (b) necessarily requires at least the threatened use of "force capable of causing physical pain or injury," Johnson v. United States, 559 U.S. 133, 140 (2010) (Curtis Johnson) (interpreting the phrase "physical force" in 18 U.S.C. 924(e)(2)(B)(i)), and thus satisfies the "physical force" requirement in Section 924(c)(3)(A) and similar provisions. See, e.g., Taylor, 848 F.3d at 494 ("A defendant who acts 'forcibly'

using a deadly or dangerous weapon under § 111(b) must have used force by making physical contact with the federal employee, or at least threatened the employee, with an object that, as used, is capable of causing great bodily harm."); Rafidi, 829 F.3d at 446 (noting that, "even if the defendant did not come into physical contact with the officers at all," the requirement that he forcibly used a deadly or dangerous weapon would necessarily establish "a threat or display of physical aggression" sufficient "to inspire fear of pain, bodily harm, or death") (citation omitted). Indeed, in Curtis Johnson, supra, this Court noted that "'assault and battery with a dangerous weapon'" is among the prototypically "'violent'" offenses "'characterized by extreme physical force.'" 559 U.S. at 140-141 (quoting Black's Law Dictionary 1188 (9th ed. 2009)).

The court of appeals did not, therefore, err in determining that forcibly assaulting a federal officer with a deadly or dangerous weapon is a crime of violence under Section 924(c)(3)(A). Further review of that determination is unwarranted.

2. Petitioner notes (Pet. 6-7) that this Court has invalidated the definition of a "crime of violence" in 18 U.S.C. 16(b), the language of which is materially similar to Section 924(c)(3)(B). See Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018). Following Dimaya, the courts of appeals have disagreed about whether Section 924(c)(3)(B) -- which, unlike Section 16(b), applies solely to the classification of the defendant's current

offense conduct, rather than a prior conviction -- is unconstitutionally vague. Compare, e.g., United States v. Davis, 903 F.3d 483, 485-486 (5th Cir. 2018) (per curiam) (holding that Section 924(c)(3)(B) is void for vagueness), petition for cert. pending, No. 18-431 (filed Oct. 3, 2018); United States v. Eshetu, 898 F.3d 36, 37-38 (D.C. Cir. 2018) (per curiam) (same); United States v. Salas, 889 F.3d 681, 684-686 (10th Cir. 2018) (same), petition for cert. pending, No. 18-428 (filed Oct. 3, 2018), with United States v. Douglas, No. 18-1129, 2018 WL 4941132, at \*5-\*12 (1st Cir. Oct. 12, 2018) (holding that Section 924(c)(3)(B) is not unconstitutionally vague); Ovalles v. United States, No. 17-10172, 2018 WL 4830079, at \*1-\*2 (11th Cir. Oct. 4, 2018) (en banc) (same); United States v. Barrett, 903 F.3d 166, 178-184 (2d Cir. 2018) (same). The United States has filed petitions for writs of certiorari in Davis and Salas, supra, seeking review of that issue.

Because petitioner's predicate offense qualifies as a crime of violence under Section 924(c)(3)(A), however, no reason exists to consider the constitutionality of the alternative definition of a "crime of violence" in Section 924(c)(3)(B) in the context of this case. Nor is it necessary for this Court to consider petitioner's contention (Pet. 7-10) that the court of appeals erred in determining that his motion for postconviction relief was not timely. That determination was correct, see Pet. App. A5-A8, but as the court explained, "[e]ven if" it were not, the applicability

of Section 924(c) (3) (A) would preclude petitioner from obtaining relief. Id. at A8-A9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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