

No. 18-6172

IN THE SUPREME COURT OF THE UNITED STATES

SHERMAN EDWARD WILLIAMS, 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

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QUESTION PRESENTED

Whether armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), qualifies as a "crime of violence" within the meaning of 18 U.S.C. 924(c) (3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is not published in the Federal Reporter but is reprinted at 709 Fed. Appx. 676. Prior opinions of the court of appeals are not published in the Federal Reporter but are reprinted at 437 Fed. Appx. 792 and 579 Fed. Appx. 954.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2018. A petition for rehearing was denied on May 21, 2018 (Pet. App. B1). On August 8, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to

and including September 19, 2018, and the petition was filed on September 18, 2018. 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 Northern District of Georgia, petitioner was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). D. Ct. Doc. 66, at 1 (Dec. 18, 2009). The district court sentenced petitioner to 219 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals affirmed petitioner's conviction but vacated his sentence and remanded to the district court for resentencing. 437 Fed. Appx. at 795. The district court reimposed a sentence of 219 months of imprisonment, to be followed by five years of supervised release. D. Ct. Doc. 100, at 2-3 (Dec. 20, 2011). The court of appeals again vacated petitioner's sentence and remanded for resentencing. 11-16144 C.A. Order 1 (June 28, 2013). The district court resentenced petitioner to 192 months of imprisonment, to be followed by five years of supervised release. D. Ct. Doc. 153, at 2-3 (Feb. 20, 2014). The court of appeals affirmed. 579 Fed. Appx. at 954-955.

In 2014, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 171, at 1-47 (Oct. 20, 2014).

The district court denied petitioner's motion, D. Ct. Doc. 197, at 1-17 (Nov. 12, 2015), and denied his request for a certificate of appealability (COA), D. Ct. Doc. 205, at 2 (Dec. 7, 2015). The court of appeals granted petitioner's request for a COA and affirmed. Pet. App. A1.

1. In March 2009, petitioner and an accomplice broke into a branch of Wachovia Bank in Hiram, Georgia, using a key that petitioner had obtained while working at a company that provided cleaning services at the bank. Presentence Investigation Report (PSR) ¶¶ 9-10. After breaking into the bank, petitioner and his accomplice removed videotapes from the bank's security system and hid inside the copy room as they awaited the arrival of a bank employee. PSR ¶ 10. They carried with them two firearms, black bags, masks, gloves, food, and water. Ibid.

The next morning, when an employee opened the door to the copy room, petitioner and his accomplice pointed their firearms at the employee and instructed her to open the vault. PSR ¶¶ 11-12. Petitioner and his accomplice stole \$219,180 from the vault and fled in an SUV that belonged to petitioner. PSR ¶¶ 12-13.

2. A federal grand jury charged petitioner with armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and using, carrying, and brandishing a firearm during and in relation to a crime of violence (the armed bank robbery), in violation of 18 U.S.C. 924(c)(1)(A). Indictment 1-2. A jury found petitioner

guilty on both counts. D. Ct. Doc. 66, at 1. The district court sentenced petitioner to 219 months of imprisonment, consisting of 135 months on the armed bank robbery count and a mandatory consecutive sentence of 84 months on the Section 924(c) count. Id. at 2.

The court of appeals affirmed petitioner's convictions but vacated his sentence on the ground that the district court had failed to adequately explain its Sentencing Guidelines calculation. 437 Fed. Appx. at 795. On remand, the district court reimposed a sentence of 219 months of imprisonment. D. Ct. Doc. 100, at 2. Following a further remand from the court of appeals, the district court resentenced petitioner to 192 months of imprisonment, consisting of 108 months on the armed bank robbery count and a consecutive 84-month term on the Section 924(c) count. D. Ct. Doc. 153, at 2. The court of appeals affirmed. 579 Fed. Appx. at 954-955.

3. In 2014, petitioner filed a motion to vacate his convictions and sentence under 28 U.S.C. 2255. D. Ct. Doc. 171, at 1-47. Petitioner contended that he had received ineffective assistance of trial counsel, that the district court had improperly calculated his advisory Sentencing Guidelines range, and that the government had suppressed evidence favorable to him. Id. at 5. A magistrate judge recommended that petitioner's motion be denied, Pet. App. D1-D12, and the district court adopted that

recommendation, D. Ct. Doc. 197, at 1-17. Petitioner requested a COA, which the district court denied. D. Ct. Doc. 205, at 2.

Petitioner subsequently filed a motion to supplement his request for a COA in the district court, see D. Ct. Doc. 213, at 1-5 (May 16, 2016), and filed an application in the court of appeals seeking leave to file a second-or-successive motion under Section 2255, see 16-13519 C.A. Order 1 (July 11, 2016). In both filings, petitioner contended that his Section 924(c) conviction was invalid on the theory that armed bank robbery is not a "crime of violence" as defined in 18 U.S.C. 924(c)(3). See D. Ct. Doc. 213, at 2, 4-5; 16-13519 C.A. Order 2-6. Section 924(c)(3) 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 contended that armed bank 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 "residual clause" of 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. See D. Ct. Doc. 213, at 2-5; 16-13519 C.A. Order 2-6.

The district court denied petitioner's motion to supplement his request for a COA. D. Ct. Doc. 214, at 1-2 (May 16, 2016). The court of appeals denied petitioner's application for leave to file a second-or-successive Section 2255 motion, see 16-13519 C.A. Order 7, but granted his request for a COA to challenge the denial of his first Section 2255 motion on the theory that Section 924(c) (3) (B) is unconstitutionally vague under Johnson, see 15-15495 C.A. Order 1-3 (July 29, 2016).¹

4. The court of appeals affirmed the denial of petitioner's first Section 2255 motion. Pet. App. A1. The court explained that armed bank robbery "clearly" qualifies as a crime of violence under Section 924(c) (3) (A) because it requires the use or threatened use of physical force. Ibid. (quoting In re Hines, 824 F.3d 1334, 1337 (11th Cir. 2016)). The court further observed that it had previously determined that Section 924(c) (3) (B) is not unconstitutionally vague, see Ovalles v. United States, 861 F.3d 1257 (11th Cir. 2017), vacated and modified, 905 F.3d 1231 (11th Cir. 2018) (en banc), and it thus determined that petitioner's challenge to his Section 924(c) conviction would fail even if armed

¹ Petitioner filed two subsequent applications for leave to file second-or-successive Section 2255 motions, which the court of appeals denied. See 18-10779 C.A. Order 1-3 (Mar. 21, 2018); 16-15146 C.A. Order 1-3 (Aug. 5, 2016).

bank robbery did not qualify as a crime of violence under Section 924(c) (3) (A). Pet. App. A1.²

ARGUMENT

1. Petitioner contends (Pet. 21-30) that the court of appeals erred in determining that armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), qualifies as a "crime of violence" within the meaning of 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." Ibid. For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Lloyd v. United States, No. 18-6269 (filed Jan. 9, 2019), that contention does not warrant this Court's review.³

Petitioner's conviction for armed bank robbery required proof that he (1) took or attempted to take money from the custody or control of a bank "by force and violence, or by intimidation," 18 U.S.C. 2113(a); and (2) either committed an "assault[]" or endangered "the life of any person by the use of a dangerous weapon or device" while committing the robbery, 18 U.S.C. 2113(d); see Indictment 1; D. Ct. Doc. 57, at 1 (Oct. 7, 2009) (jury verdict);

² Petitioner subsequently filed a motion for a sentence reduction pursuant to 18 U.S.C. 3582(c)(2), which the district court denied. See Pet. App. C1-C14. The court also denied a COA. Id. at C14.

³ We have served petitioner with a copy of the government's brief in opposition in Lloyd.

10/7/09 Tr. 52 (jury instructions). Every court of appeals to consider whether the federal offenses of bank robbery or armed bank robbery qualify as crimes of violence under Section 924(c) (3) (A) and similar provisions has determined that they do. See Br. in Opp. at 8-9, Lloyd, supra (No. 18-6269) (citing cases). And this Court has recently and repeatedly denied review of petitions raising this issue, as well as related issues concerning the categorization of those crimes under similarly worded federal statutes or the Sentencing Guidelines. See id. at 7 (citing cases); see also, e.g., Johnson v. United States, No. 18-6499 (Dec. 10, 2018) (bank robbery); Faurisma v. United States, No. 18-6360 (Nov. 13, 2018) (armed bank robbery); Cadena v. United States, 139 S. Ct. 436 (2018) (No. 18-6069) (bank robbery); Patterson v. United States, 139 S. Ct. 291 (2018) (No. 18-5685) (bank robbery); Watson v. United States, 139 S. Ct. 203 (2018) (No. 18-5022) (armed bank robbery).

2. Petitioner asserts (Pet. 6-13) that the court of appeals erred in relying on its prior decision in In re Hines, 824 F.3d 1334 (11th Cir. 2016), to support the determination that armed bank robbery qualifies as a crime of violence under Section 924(c) (3) (A). See Pet. App. A1. He contends (Pet. 6-13) that because Hines arose in the context of the denial of an application for leave to file a second-or-successive motion for post-conviction relief under 28 U.S.C. 2255, see 824 F.3d at 1335, and

because the court of appeals employs streamlined procedures in the consideration of such applications, the Due Process Clause precludes the court of appeals from assigning precedential value to that decision.

The court of appeals did not address petitioner's claim, which is itself a sufficient reason for this Court to deny review. See, e.g., Zivotofsky ex. rel. 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"); Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) (noting that this Court is "a court of review, not of first view"). The claim also lacks merit. Petitioner identifies no decision of this Court or of any other circuit that would support requiring a court of appeals, as a constitutional matter, to assign less (or no) precedential weight to published opinions issued by full panels of judges where expedited procedures were used to resolve the case. And any variation in the circuits' practices when reviewing applications for leave to file second-or-successive motions under Section 2255, see Pet. 10-11, would not warrant this Court's review, given the court of appeals' "significant authority to fashion rules to govern their own procedures." Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 99 (1993); see Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993) (observing that courts of appeals may "vary considerably" in their procedural rules).

In any event, the court of appeals' reliance on Hines does not suggest that its determination that armed bank robbery qualifies as a crime of violence under Section 924(c)(3)(A) -- which is consistent with the uniform judgment of every other circuit to have considered the question -- is incorrect. Petitioner cannot demonstrate, therefore, that any error in treating Hines as precedential affected the outcome of this case.

3. Because armed bank robbery qualifies as a "crime of violence" under Section 924(c)(3)(A), no reason exists to consider petitioner's contention (Pet. 13-21) that the alternative "crime of violence" definition in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague, or to hold this case pending the Court's decision in United States v. Davis, cert. granted, No. 18-431 (Jan. 4, 2019). The question presented in Davis is whether the definition of a "crime of violence" in Section 924(c)(3)(B) is void for vagueness. Petitioner's conviction for armed bank robbery qualifies as a crime of violence irrespective of Section 924(c)(3)(B), and thus the Court's holding in Davis will 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.

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