No. ____

IN THE

Supreme Court of the United States

GERARD MANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the definition of "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) and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is unpublished but reported at __ F. App'x __, 2018 WL 5310176 and reproduced as Appendix A. App. 1a–7a. The district court's order granting Petitioner's motion to vacate is unreported but reproduced as Appendix B. App. 8a–15a.

JURISDICTION

The court of appeals issued its decision on October 26, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In relevant part, 18 U.S.C. § 924(e)(2)(B)(ii) defines "violent felony" as "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

Sections 16(b) and 924(c)(3)(B) of Title 18 of the U.S. Code both define "crime of violence" as a felony "that, 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."

STATEMENT OF THE CASE

In 2011, Petitioner pled guilty to conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). The court sentenced him to 26 months on the Hobbs Act conspiracy count, and a mandatory consecutive 84-month sentence on the § 924(c) count.

Within one year of *Johnson v. United States*, 135 S. Ct. 2551 (2015) (declaring unconstitutionally vague the residual clause definition of "violent felony" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii)), Petitioner filed a motion to vacate his § 924(c) conviction, pursuant to 28 U.S.C. § 2255. He argued that, in light of *Johnson*, he was actually innocent of his § 924(c) offense because the predicate offense of Hobbs Act conspiracy was no longer a "crime of violence." Specifically, he argued that *Johnson* rendered the residual clause definition in § 924(c)(3)(B) unconstitutionally vague, because it was materially indistinguishable from the ACCA's residual clause struck down in *Johnson*. And, he argued, Hobbs Act conspiracy did not satisfy the alternative elements clause definition in § 924(c)(3)(A), because it could be committed without the use, attempted use, or threatened use of physical force against the person or property of another.

In March 2017, the district court granted Petitioner's § 2255 motion. The court agreed with Petitioner that Hobbs Act conspiracy did not satisfy the elements clause in § 924(c)(3)(A). App. 9a, 14a. The court also agreed with Petitioner that *Johnson* invalidated the residual clause in § 924(c)(3)(B). Although that issue was

unsettled in the Eleventh Circuit, the district court found that the text of § 924(c)(3)(B) was materially indistinguishable from the ACCA's residual clause and therefore "suffer[ed] from the same defects." App. 11a–14a & n.1. Notably, the court relied in part on "multiple Circuits Courts [that] have found that the residual clause of 18 U.S.C. § 16(b), a provision that is identical to that of § 924(c)(3)(B), is unconstitutionally vague." App. 13a–14a. Because Hobbs Act conspiracy was not a "crime of violence" under § 924(c)(3)(A) or § 924(c)(3)(B), the court granted the § 2255 motion and declared Petitioner actually innocent of his § 924(c) offense. App. 14a. After the court denied its reconsideration motion, the government appealed.

During the pendency of that appeal, a panel of the Eleventh Circuit held that *Johnson* did not render § 924(c)(3)(B) unconstitutionally vague. *Ovalles v. United States*, 861 F.3d 1257, 1263–67 (11th Cir. 2017). Acknowledging that the circuits were divided on that question, it adopted the view that there were material textual differences between the ACCA's residual clause and § 924(c)(3)(B).

But not long thereafter, this Court held in *Session v. Dimaya*, 138 S. Ct. 1204 (2018) that the identical provision in § 16(b) was unconstitutionally vague based on a "straightforward application" of *Johnson*. *Id.* at 1213–16. The Court found immaterial the same distinctions that the *Ovalles* panel had relied upon. *Id.* at 1218–23. The Court applied the so-called "categorical approach," which also governed the ACCA's residual clause; but Justice Gorsuch, who cast the deciding vote, left for a future case to determine whether a conduct-based approach instead might apply to § 16(b). *See id.* at 1216–18 (plurality) (opining that § 16(b) required

a categorical approach); *id.* at 1232–33 (Gorsuch, J., concurring in part and concurring in the judgment) (assuming, without deciding, that categorical approach applied because the government did not argue otherwise).

Following *Dimaya*, the Eleventh Circuit convened en banc in *Ovalles* to again address whether § 924(c)(3)(B) was void for vagueness. 905 F.3d 1231 (11th Cir. 2018) (en banc). By a vote of 8–4, the majority concluded that it was not. Because *Dimaya* had rejected the distinctions that the panel had previously used to distinguish § 924(c)(3)(B) from the ACCA's residual clause, the issue boiled down to whether the categorical approach applied to § 924(c)(3)(B). If so, then § 924(c)(3)(B) "is doomed." *Id.* at 1233. But if a conduct-based approach applied, then § 924(c)(3)(B) would not be doomed by *Johnson* and *Dimaya*. *Id.* Applying the canon of constitutional avoidance, the court "h[e]ld that § 924(c)(3)(B) prescribes a conduct-based approach" because the statute could be so construed. *Id.* at 1234.

In light of en banc decision in *Ovalles*, the court of appeals vacated the order granting Petitioner's § 2255 motion. App. 1a–2a. After summarizing *Ovalles*' en banc holding, the court of appeals explained that the district court had erred by using the categorical approach with respect to § 924(c)(3)(B). App. 6a–7a. The court of appeals therefore vacated the district court's order and remanded for reconsideration in light of *Ovalles*, which required the court to apply a conduct-based approach to § 924(c)(3)(B). App. 7a. The court of appeals denied Petitioner's motion to hold his case pending government petitions for a writ of certiorari presenting the question whether § 924(c)(3)(B) is void for vagueness. *Id.*

REASONS FOR GRANTING THE PETITION

The question presented here is also pending in several petitions, including two filed by the government. *See United States v. Davis & Glover* (U.S. No. 18-431) (filed Oct. 3, 2018) and *United States v. Salas* (U.S. No. 18-428) (filed Oct. 3, 2018).

Those petitions have correctly explained that the circuits are divided on whether § 924(c)(3)(B) is unconstitutionally vague in light of *Johnson* and *Dimaya*. *See, e.g.*, *Davis*, Pet. 21–23. In addition to the en banc Eleventh Circuit decision in *Ovalles*, the First and Second Circuits have also held that § 924(c)(3)(B) is not unconstitutionally vague post-*Dimaya*, reasoning that § 924(c)(3)(B) may be analyzed under a fact-based (rather than categorical) approach *United States v. Douglas*, 907 F.3d 1, 4, 8–16 (1st Cir. 2018); *United States v. Barrett*, 903 F.3d 166, 178–84 (2d Cir. 2018), *cert. pet. pending* (U.S. No. 18-6985) (filed Dec. 3, 2018).

In so holding, the Second Circuit disagreed with the Tenth and D.C. Circuits, *Barrett*, 903 F.3d at 176 n.8, which have held that § 924(c)(3)(B) is unconstitutionally vague post-*Dimaya* because, like the ACCA's residual clause, it is governed by the categorical approach, *see United States v. Eshetu*, 898 F.3d 36, 37–38 (D.C. Cir. 2018); *United States v. Salas*, 889 F.3d 681, 684–86 (10th Cir. 2018). The Fifth Circuit has reached the same conclusion. *United States v. Davis*, 903 F.3d 483, 485–86 (5th Cir. 2018). And the Seventh Circuit did as well even before *Dimaya*. *See United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2015).

In addition, and as other petitions have explained, the question presented is important and recurring. *See, e.g.*, *Davis*, Pet. 23–25. For example, "[i]n 2017 alone, more than 2700 defendants were charged with a Section 924(c) violation." *Id.*

at 24. And the confusion in the lower courts is "not limited to current and future prosecutions, but extend[s] to past ones as well." *Id.* at 25. As this case illustrates, those "whose convictions long ago became final are mounting collateral attacks to their convictions and sentences." *Id.* While the government asserts that these attacks undermine the interest in finality, it overlooks that, if § 924(c)(3)(B) is indeed unconstitutionally vague, then many federal prisoners are actually innocent of § 924(c) convictions mandating significant terms of imprisonment.

Petitioner is one such prisoner. Because the predicate "crime of violence" underlying his § 924(c) conviction was for *conspiracy* to commit Hobbs Act robbery, the question presented here would be dispositive of his § 924(c) conviction. Indeed, Hobbs Act conspiracy requires nothing more than an agreement to commit the underlying crime, *see Ocasio v. United States*, 136 S. Ct. 1423, 1429–30 (2016); no overt act is required, *United States v. Pistone*, 177 F.3d 957, 959–60 (11th Cir. 1999). Thus, if § 924(c)(3)(B) is unconstitutionally vague, his § 924(c) conviction could be not sustained on the alternative ground that his predicate offense satisfied the elements clause definition in § 924(c)(3)(A). Notably, the government has conceded as much. *See, e.g.*, *Davis*, 903 F.3d at 485 ("[T]he conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force. Accordingly, the Government concedes that Defendants could only have been convicted as to [§ 924(c)] under the residual clause."). Accordingly, the question presented will determine whether Petitioner is actually innocent of a § 924(c) offense resulting in a mandatory 84-month sentence.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari. If the Court grants certiorari in another petition presenting the same question, Petitioner respectfully requests that the Court hold this petition.

Respectfully submitted,

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