

IN THE SUPREME COURT OF THE UNITED STATES

CURTIS SOLOMON, 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

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QUESTION PRESENTED

Whether petitioner's conviction for conspiracy to use or carry a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(o), should be set aside on collateral review under 28 U.S.C. 2255 because the conviction rests on the definition of a "crime of violence" in 18 U.S.C. 924(c) (3) (B) that this Court held to be constitutionally vague in United States v. Davis, 139 S. Ct. 2319 (2019).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Solomon, No. 08-cr-60090 (July 15, 2009)

Solomon v. United States, No. 12-cv-62312 (Dec. 30, 2013)
(denying motion under 28 U.S.C. 2255)

Solomon v. United States, No. 12-cv-62358 (Feb. 4, 2014)

Solomon v. United States, No. 12-cv-62312 (Jan. 21, 2016)
(denying motion to alter or amend judgment)

Solomon v. United States, No. 16-cv-61410 (Aug. 29, 2017)

United States Court of Appeals (11th Cir.):

United States v. Lewis, No. 09-13660 (July 12, 2011)

Solomon v. United States, No. 14-10376 (May 12, 2014)

In re Solomon, No. 16-13456 (July 8, 2016)

In re Solomon, No. 16-14671 (July 29, 2016)

Solomon v. United States, No. 16-11162 (Aug. 22, 2016)

In re Solomon, No. 16-17193 (Dec. 21, 2016)

Solomon v. United States, No. 17-14830 (Jan. 8, 2019)

Supreme Court of the United States:

Lewis v. United States, No. 11-6928 (Nov. 28, 2011)

Solomon v. United States, No. 11-6939 (Nov. 28, 2011)

Chance v. United States, No. 11-6965 (Nov. 28, 2011)

Solomon v. United States, No. 14-7143 (Jan. 12, 2015)

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No. 18-9210

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-5) is reported at 911 F.3d 1356. The order of the district court (Pet. App. A7, at 1-2) is unreported. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 433 Fed. Appx. 844.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2019. On April 4, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 7, 2019. The petition for a writ of certiorari was filed on

May 7, 2019. 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 Southern District of Florida, petitioner was convicted on one count of conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); one count of conspiracy to use or carry a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(o); 16 counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and 16 counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1). Pet. App. A3, at 1-2.¹ The district court sentenced petitioner to 4641 months of imprisonment, to be followed by five years of supervised release. Id. at 3-4. The court of appeals affirmed, 433 Fed. Appx. 844, and this Court denied a petition for a writ of certiorari, 565 U.S. 1069.

In 2012, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. See 12-cv-62312 D. Ct. Doc. 1, at 1-7 (Nov. 26, 2012). The district court denied petitioner's motion and declined to grant a certificate of appealability (COA). 12-cv-62312 D. Ct. Doc. 21, at 1-2 (Dec. 30, 2013). The court of appeals likewise declined to grant a COA, 14-10376 C.A. Order 1 (May 12,

¹ All citations in this brief to Section 924 are to the version codified at 18 U.S.C. 924 (2006).

2014), and this Court denied a petition for a writ of certiorari, 135 S. Ct. 986.

In 2016, the court of appeals authorized petitioner to file a second-or-successive motion under Section 2255, and petitioner filed such a motion. Pet. App. A4, at 1-11; see Pet. App. A5, at 1-25. The district court denied petitioner's Section 2255 motion but granted a COA. Pet. App. A7, at 1-2. The court of appeals affirmed. Pet. App. A1, at 1-6.

1. Between December 2007 and March 2008, petitioner and several accomplices committed a string of armed robberies of restaurants in southern Florida. See Presentence Investigation Report ¶¶ 5-40. Petitioner and his accomplices held restaurant employees and customers at gunpoint and stole a variety of items, including cash, credit cards, and cell phones. Ibid.

A federal grand jury charged petitioner with one count of conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); one count of conspiracy to use or carry a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(o); 16 counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); one count of attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and 17 counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). Second Superseding Indictment 1-18. The case proceeded to trial, and a jury found petitioner guilty on all counts except the attempted Hobbs Act robbery count

and a related Section 924(c) count. Jury Verdict 1-16. The predicate crimes of violence for each of the Section 924(c) counts on which petitioner was convicted were Hobbs Act robberies. Pet. App. A1, at 2; see Second Superseding Indictment 3-18. The predicate crime of violence for petitioner's Section 924(o) offense was conspiracy to commit Hobbs Act robbery. Pet. App. A1, at 2; see Second Superseding Indictment 2.

The district court sentenced petitioner to 4641 months of imprisonment, to be followed by five years of supervised release. Pet. App. A3, at 3-4. That sentence consisted of concurrent terms of 57 months of imprisonment on the Section 924(o) count, the Hobbs Act conspiracy count, and each of the Hobbs Act robbery counts; a consecutive term of 84 months of imprisonment on petitioner's first Section 924(c) conviction; and consecutive terms of 300 months of imprisonment on each of the remaining Section 924(c) counts. Id. at 3.² The court of appeals affirmed, 433 Fed. Appx. 844, and this Court denied a petition for a writ of certiorari, 565 U.S. 1069.

2. In 2012, petitioner filed a pro se motion to vacate his sentence under 28 U.S.C. 2255. See 12-cv-62312 D. Ct. Doc. 1, at 1-7. Petitioner contended that his trial counsel was ineffective in not hiring an expert witness and in not making certain arguments

² The judgment suggests that, for the first Section 924(c) count, the district court imposed an enhanced penalty under 18 U.S.C. 924(c)(1)(A)(ii) based on the court's finding that petitioner brandished the firearm. Pet. App. A-3, at 1-2. Petitioner has not contended that any error in applying such an enhancement provides a ground for collateral relief.

in support of a motion to suppress evidence. Id. at 4; see 12-cv-62312 D. Ct. Doc. 8, at 4-10 (Dec. 14, 2012). The district court denied petitioner's motion and declined to grant a COA. 12-cv-62312 D. Ct. Doc. 21, at 1-2.³ The court of appeals likewise denied petitioner's request for a COA. 14-10376 C.A. Order 1. This Court denied a petition for a writ of certiorari. 135 S. Ct. 986.

In 2016, the district court denied petitioner's motions under Rules 59(e) and 60(b) of the Rules of Civil Procedure, which sought relief from the court's earlier judgment denying his Section 2255 motion. 12-cv-62312 D. Ct. Doc. 34, at 1-3 (Jan. 21, 2016). The court again declined to issue a COA, as did the court of appeals. See ibid.; 16-11162 C.A. Order 1 (Aug. 22, 2016).

3. In June 2016, petitioner sought leave to file a second-or-successive motion for postconviction relief under Section 2255. See Pet. App. A5, at 1-25. As relevant here, petitioner contended that his convictions under Section 924(c) were invalid, on the theory that Hobbs Act robbery (the predicate offense underlying each of those convictions) was not a "crime of violence" as defined in 18 U.S.C. 924(c)(3). Id. at 12-24. 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

³ In 2013, the district court also struck (as duplicative) a substantially similar Section 2255 motion that petitioner had filed several days after his first Section 2255 motion. See 12-cv-62358 D. Ct. Doc. 11, at 1 (Nov. 25, 2013).

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 Hobbs Act robbery did not qualify as a crime of violence under Section 924(c)(3)(A) and that Section 924(c)(3)(B) was unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015), which held that similar language in 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 unconstitutionally vague. Pet. App. A5, at 12-23.

The court of appeals granted petitioner's request in part and denied it in part. Pet. App. A4, at 11. The court reasoned that petitioner had made the necessary *prima facie* showing that his claim relied on a new retroactive rule with respect to his conviction for conspiracy to use or carry a firearm during and in relation to a crime of violence, in violation of Section 924(o). Id. at 8; see 28 U.S.C. 2255(h)(2). The court observed that the predicate crime of violence for that count was conspiracy to commit Hobbs Act robbery, which would qualify as a crime of violence, if at all, only under Section 924(c)(3)(B), not Section 924(c)(3)(A). Pet. App. A4, at 7. The court noted that it had previously authorized the filing of second-or-successive motions challenging Section 924(c) convictions that were predicated on conspiracy to commit Hobbs Act robbery, on the theory that Section 924(c)(3)(B)

was arguably unconstitutional in light of Johnson. Id. at 7-8. By contrast, the court determined that petitioner had not made the necessary *prima facie* showing with respect to his Section 924(c) convictions, for which the predicate crime of violence was Hobbs Act robbery. Id. at 6-7. The court explained that its precedent established "that Hobbs Act robbery is a crime of violence under [Section] 924(c)(3)(A)'s use-of-force clause," so the constitutionality of Section 924(c)(3)(B) was irrelevant to those counts. Id. at 7. The court therefore authorized petitioner to file a second-or-successive motion for postconviction relief limited to his conviction under Section 924(o). See id. at 8, 11.

4. The district court denied petitioner's second-or-successive Section 2255 motion. Pet. App. A7, at 1-2. A magistrate judge determined that petitioner's constitutional challenge to his Section 924(o) conviction was foreclosed by then-existing Eleventh Circuit precedent, which had established that Johnson did not invalidate the "crime of violence" definition in Section 924(c)(3)(B). Pet. App. A6, at 7-8. The magistrate judge therefore recommended that petitioner's motion be denied. Id. at 11. The district court adopted that recommendation but granted a COA. Pet. App. A7, at 1-2.

The court of appeals affirmed. Pet. App. A1, at 1-5. It observed that, after the district court had issued its order denying petitioner's motion, the en banc court of appeals had held that Section 924(c)(3)(B) should be construed to require a jury to

determine whether a defendant's actual criminal conduct involved a substantial risk of force, which would avoid the constitutional vagueness problems that this Court had identified in other statutes in Johnson, supra, and Sessions v. Dimaya, 138 S. Ct. 1204 (2018). Pet. App. A1, at 4 (citing Ovalles v. United States, 905 F.3d 1231, 1251-1252 (11th Cir. 2018) (en banc), cert. denied, 139 S. Ct. 2716, abrogated by United States v. Davis, 139 S. Ct. 2319 (2019)). The court then reasoned that, in light of its precedent, petitioner could not identify "a new rule of constitutional law, made retroactive to cases on collateral review," that would entitle him to collaterally attack his Section 924(o) conviction in a second-or-successive Section 2255 motion. Id. at 5 (citation omitted); see 22 U.S.C. 2255(h) (2) .

ARGUMENT

Petitioner contends (Pet. 11-14) that his conviction for conspiracy to use or carry a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(o), is invalid because the predicate offense underlying that conviction (conspiracy to commit Hobbs Act robbery) could qualify as a "crime of violence" only under 18 U.S.C. 924(c) (3) (B), which petitioner argues is unconstitutionally vague. After petitioner filed his petition for a writ of certiorari, this Court held in United States v. Davis, 139 S. Ct. 2319 (2019), that Section 924(c) (3) (B)'s definition of a "crime of violence" is unconstitutionally vague. See id. at 2336.

The government agrees that, in light of this Court's decision in Davis, petitioner's conviction under Section 924(o) is invalid. Accordingly, the appropriate course is to grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration in light of Davis. On remand, the court of appeals may consider in the first instance whether petitioner qualifies for postconviction relief on a second-or-successive motion under 28 U.S.C. 2255 in light of the many other concurrent and consecutive terms of imprisonment he received on other counts.

CONCLUSION

The petition for a writ of certiorari should be granted, the court of appeals' judgment should be vacated, and the case should be remanded for further consideration in light of United States v. Davis, 139 S. Ct. 2319 (2019).

Respectfully submitted.

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