

No. 18-9211

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IN THE SUPREME COURT OF THE UNITED STATES

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LEON ESCOURSE-WESTBROOK, 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 ELEVENTH CIRCUIT

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BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner was entitled to a certificate of appealability on his claim that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Escouse-Westbrook, No. 1:13-cr-20524 (Mar. 7, 2014)

Escouse-Westbrook v. United States, No. 1:16-cv-22538 (Feb. 28, 2017)

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

United States v. Westbrook, No. 13-15767 (Sept. 24, 2014)  
(appeal of co-defendant)

Escouse-Westbrook v. United States, No. 17-12040-F (July 18, 2017)

Escouse-Westbrook v. United States, No. 17-12040-F (Jan. 7, 2019)

Supreme Court of the United States:

Escouse-Westbrook v. United States, No. 17-6368 (May 14, 2018)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1, at 1) is unreported. The order of the district court (Pet. App. A2, at 1-7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2019. On March 27, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including May 7, 2019, and the petition was filed on that date. 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 Southern District of Florida, petitioner was convicted of conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Pet. App. A4, at 1. The district court sentenced petitioner to 114 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. Petitioner did not appeal his convictions or sentence.

In 2016, petitioner filed a motion to vacate his sentence on the Section 924(c) count under 28 U.S.C. 2255. D. Ct. Doc. 101 (June 24, 2016) (2255 Mot.). The district court denied that motion, Pet. App. A2, at 7, and denied petitioner's request for a certificate of appealability (COA), ibid. The court of appeals likewise denied a COA. See 7/18/17 Order 1. This Court granted a petition for a writ of certiorari, vacated the court of appeals' judgment, and remanded for further consideration in light of Sessions v. Dimaya, 138 S. Ct. 1204 (2018). 138 S. Ct. 1983. On remand, the court of appeals again denied a COA. Pet. App. A1, at 1.

1. In 2013, petitioner and two co-conspirators, Alex Westbrook and Eddie Lee Thomas, robbed a McDonald's restaurant in Miami, Florida. Plea Tr. 11. The robbers agreed that petitioner and Westbrook would enter the restaurant while Thomas waited in a

getaway car. Ibid. One of the robbers threw a rock at the window of the restaurant, causing it to shatter. Ibid. Petitioner and Westbrook, who were wearing ski masks, then entered the restaurant through the broken window. Ibid. They brandished a firearm and ordered all of the employees and customers to get on the ground. Ibid. The robbers stole cell phones, a laptop computer, and about \$1900 in cash before fleeing in Thomas's car. Id. at 11-12.

Shortly thereafter, a police officer stopped the getaway car for speeding. Plea Tr. 12. Thomas was driving the car, and petitioner and Westbrook were passengers. Ibid. A search of the car revealed the cell phones, laptop computer, and cash stolen during the robbery, as well as black ski masks and a loaded .38 caliber revolver. Ibid.

2. 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 Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and one count of brandishing a firearm during and in relation to a crime of violence and possessing that firearm in furtherance of a crime of violence -- namely, the conspiracy to commit Hobbs Act robbery -- in violation of 18 U.S.C. 924(c) (1) (A) (ii). Indictment 1-3. Petitioner pleaded guilty to the Hobbs Act conspiracy count and the Section 924(c) count, and the government agreed to dismiss the Hobbs Act robbery count. Pet. App. A4, at 1; see Plea Tr. 16.

The district court sentenced petitioner to 114 months of imprisonment, consisting of 30 months of imprisonment on the Hobbs Act conspiracy count and a consecutive term of 84 months of imprisonment on the Section 924(c) count. Pet. App. A4, at 2. Petitioner did not appeal his convictions or sentence. See Pet. 6.

3. In 2016, petitioner filed a motion to vacate his sentence on the Section 924(c) count pursuant to 28 U.S.C. 2255. See 2255 Mot. 3-19. Petitioner contended that his Section 924(c) conviction was invalid, on the ground that conspiracy to commit Hobbs Act robbery was not a "crime of violence" as defined in 18 U.S.C. 924(c) (3). 2255 Mot. 10-19. 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 contended (2255 Mot. 10-19) that conspiracy to commit 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 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. 135 S. Ct. at 2563.

A magistrate judge recommended that petitioner's motion be granted, see Pet. App. A3, at 3-12, but the district court disagreed with that recommendation and denied the motion, see Pet. App. A2, at 1-7. The court reasoned that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under Section 924(c) (3) (A) because the offense does not require the use, attempted use, or threatened use of physical force. Id. at 5-6. The court concluded, however, that the alternative crime-of-violence definition in Section 924(c) (3) (B) was not unconstitutionally vague and that conspiracy to commit Hobbs Act robbery qualified as a crime of violence under that provision. Id. at 6-7. The court denied a COA. Id. at 7.

The court of appeals likewise denied a COA, stating that petitioner had "failed to make a substantial showing of the denial of a constitutional right." 7/18/17 Order 1 (citing 28 U.S.C. 2253(c) (2)).

4. In 2017, petitioner filed a petition for a writ of certiorari. While that petition was pending, this Court held that the definition of a "crime of violence" in 18 U.S.C. 16(b) is unconstitutionally vague. See Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018). The language of Section 16(b) is nearly identical to Section 924(c) (3) (B)'s. Accordingly, on May 14, 2018, this Court granted the petition for a writ of certiorari, vacated the court of appeals' judgment, and remanded for reconsideration in light of Dimaya. 138 S. Ct. 1983.

Several months later, the en banc court of appeals held that the definition of a "crime of violence" in Section 924(c)(3)(B) was not unconstitutionally vague. See Ovalles v. United States, 905 F.3d 1231, 1252 (11th Cir. 2018), abrogated by United States v. Davis, 139 S. Ct. 2319 (2019). The court therefore reasoned that petitioner could not make a substantial showing of the denial of a constitutional right and again denied a COA. Pet. App. A1, at 1.

#### ARGUMENT

Petitioner contends (Pet. 9-17) that the court of appeals erred in denying his request for a COA on his claim that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. After petitioner filed his petition, this Court held in United States v. Davis, 139 S. Ct. 2319 (2019), that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. See Davis, 139 S. Ct. at 2336. The government agrees that, in light of Davis, petitioner can make the "substantial showing of the denial of a constitutional right" necessary to obtain a COA. 28 U.S.C. 2253(c)(2). 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.

## 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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