

No. _____

In the
Supreme Court of the United States

Timothy Dale Gould,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Is 18 U.S.C. § 2113(a) is divisible for purposes of categorical analysis?

PARTIES TO THE PROCEEDING

Petitioner is Timothy Dale Gould, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Dale Gould seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's order denying a certificate of appealability was unpublished. Pet. App. 77a–78a. The Appendix also contains copies of the district court's original judgment of conviction (Pet. App. 1a–5a) and the district court's order denying and dismissing Gould's motion while also denying a certificate of appealability. Pet. App. 51a–53a.

JURISDICTION

The Fifth Circuit denied a certificate of appealability on March 25, 2019. Pet. App. 77a–78a. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

Section 924(c) of Title 18 provides in part:

(c)(1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in

addition to the punishment provided for such crime of violence or drug trafficking crime—

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years;

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) 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.

Section 2113 of Title 18 provides in part:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association, and in violation of any statute of the United states, or any larceny—

Shall be fined under this title or imprisoned not more than twenty years, or both.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

STATEMENT OF THE CASE

A. Conviction and Sentence

Timothy Dale Gould pled guilty to one count of armed credit union robbery in violation of 18 U.S.C. § 2113(a) and (d) and one count of using and carrying a firearm in furtherance of a “crime of violence” in violation of 18 U.S.C. § 924(c). The district court sentenced him to an aggregate term of 357 months: 57 months for the robbery and a consecutive term of 300 months for the gun crime. He did not appeal his sentence.

B. District Court Proceedings Pursuant to 28 U.S.C. § 2255

After the Court issued its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Gould wrote to the district court requesting appointment of counsel. Pet. App. 6a. The district court appointed the Federal Public Defender’s office. Pet. App. 8a. Mr. Gould’s motion challenging his § 924(c) conviction and sentence was filed on June 22, 2016—less than one year after *Johnson* was decided. Pet. App. 9a–18a. Mr. Gould argued that his § 924(c) conviction could not survive scrutiny after *Johnson*, because credit union robbery could no longer count as a crime of violence. Pet. App. 15a. The Government responded that the motion was untimely, “conclusory,” procedurally barred, and meritless. Pet. App. 19a–35a. Mr. Gould responded to each argument in a Reply, Pet. App. 36a–50a, but the district court agreed with the Government. Pet. App. 51a–53a. The court specifically held that

Johnson did not apply to § 924(c), and therefore Mr. Gould’s claim was meritless and untimely. Pet. App. 52a. Petitioner filed a timely notice of appeal. Pet. App. 54a.

C. Motion for Certificate of Appealability

Petitioner then sought a certificate of appealability. Pet. App. 55a–57a. In his brief supporting that motion, Gould argued (1) the Court’s decision in *Sessions v. Dimaya*, _____ U.S. _____, 138 S.Ct. 1204 (2018), and the Fifth Circuit’s subsequent ruling in *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018), *cert. granted*, _____ U.S. _____, 139 S.Ct. 782 (18-431), could cause reasonable jurists to conclude that § 924(c)(3)(B) is unconstitutionally vague; (2) reasonable jurists could disagree with the district court’s conclusion that Gould’s motion was untimely; and (3) it is debatable whether a § 2113 “robbery” satisfies the elements clause of 18 U.S.C. § 924(c)(3)(A). Pet. App. 70a–75a.

The court of appeals denied the certificate in a two-page, unreported order. Pet. App. 77a–78a. It concluded that “[a]lthough Gould has shown that reasonable jurists would debate the correctness of the district court’s conclusion that his § 2255 motion was not timely filed, he has not shown that reasonable jurists would debate the correctness of the district court’s conclusion that his § 2255 motion did not state a valid claim of a denial of a constitutional right.” Pet. App. 78a.

REASONS FOR GRANTING THIS PETITION

- I. **In light of today’s decision in *United States v. Davis*, No. 18-431 (June 24, 2019), Petitioner’s conviction under 18 U.S.C. § 924(c) cannot be predicated on the unconstitutional language of 18 U.S.C. § 924(c)(3)(B). Petitioner’s conviction thus depends on whether 18 U.S.C. § 2113(a) is divisible for purposes of determining whether it is a crime of violence under 18 U.S.C. § 924(c)(3)(A).**

Section 2255 of Title 28 permits prisoners to seek relief from a conviction or sentence imposed in violation of the law or constitution of the United States. *See* 28 U.S.C. §2255. While most such motions must be brought within a year of a conviction becoming final, the period of limitations is reset when a right is “initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” 28 U.S.C. § 2255(f)(3). They are entitled to appellate review when such motions are denied, but they must first obtain a certificate of appealability. *See* 28 U.S.C. §2253. A certificate should be granted when “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in [any] procedural ruling” dismissing a §2255 action on procedural grounds. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

Section 924(c)(1)(A)(ii) of Title 18 of the United States Code makes it a crime to brandish a firearm in connection with a “crime of violence.” The term “crime of violence” is defined as any felony that:

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) 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.

18 U.S.C. §924(c)(3). Today, however, the Court struck down 18 U.S.C. § 924(c)(3)(B) as unconstitutional. *United States v. Davis*, No. 18-431 (June 24, 2019).

Petitioner was convicted of brandishing a firearm in connection a “robbery” under 18 U.S.C. §2113(a) and (d). The court below has held that violations of the first paragraph of 18 U.S.C. §2113(a) have force as an element and, hence, qualify as “crimes of violence.” *See United States v. Brewer*, 848 F.3d 711 (5th Cir. 2017). Violations of the second paragraph, however, plainly do not satisfy this definition. Nothing about the mere entry of a bank with felonious intent necessarily involves the use, threatened use, or attempted use of force against another. Nor can it be considered “robbery,” in the generic sense, which requires, at the very least, an effort to obtain property. Indeed, the court below has held that the second paragraph of

§ 2113(a) does not qualify as a “crime of violence” under the similar language of U.S.S.G. §4B1.2. *See United States v. Dentler*, 492 F.3d 306, 313 (5th Cir. 2009).

The question thus becomes whether § 2113(a) may be subdivided into its first and second paragraphs when determining whether it qualifies for a criminal history enhancement. *See Mathis v. United States*, ___U.S.____, 136 S.Ct. 2243 (2016). Chiefly, the parties in *Davis* disputed whether the portion of the definition of “crime of violence” found in 18 U.S.C. § 924(c)(3)(B) should be evaluated based on the defendant’s conduct or based on the elements of the offense statute he or she violated. After *Davis*, an offense constitutes a “crime of violence” under 18 U.S.C. §924(c)(3) only if all instances of the offense involves a substantial risk that force will be used against the person or property of another. *See Dimaya*, ___U.S.____, 138 S.Ct. 1204 (2018) (Gorsuch, J., concurring) (suggesting, in connection with 18 U.S.C. §16(b), which is identically worded to 18 U.S.C. §924(c)(3)(B), that “[w]e might also have to consider an interpretation that would have courts ask not whether the alien’s crime of conviction ordinarily involves a risk of physical force, or whether the defendant’s particular crime involved such a risk, but whether the defendant’s crime of conviction always does so.”).

Davis reveals clear error in the district court’s classification of federal bank robbery as a “crime of violence.” This Court “regularly hold(s) cases that involve the same issue as a case on which certiorari has been granted and plenary review is

being conducted in order that (if appropriate) they may be ‘GVR’d’ when the case is decided.” *Lawrence v. Chater*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting). Ultimately, GVR is appropriate if the decision “reveal(s) a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation...” *Lawrence*, 516 U.S. at 167.

Conclusion

Petitioner respectfully prays that this Honorable Court grant *certiorari*, and reverse the judgment below, and/or vacate the judgment and remand for reconsideration in light of *Davis*.

Respectfully submitted this 24th day of June, 2019.

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