No. 18-9793

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY DALE GOULD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly denied a certificate of appealability on petitioner's claim that armed robbery of a credit union, in violation of 18 U.S.C. 2113(a) and (d), does not qualify as a "crime of violence" under 18 U.S.C. 924(c)(3).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

Gould v. United States, No. 16-cv-129 (Aug. 8, 2017)

United States Court of Appeals (5th Cir.):

United States v. Gould, No. 17-10993 (Mar. 25, 2019)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 77a-78a) is unreported. The order of the district court (Pet. App. 51a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2019. The petition for a writ of certiorari was filed on June 24, 2019 (Monday). 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 Northern District of Texas, petitioner was convicted of armed robbery of a credit union, 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)(ii). Pet. App. 1a. The district court sentenced petitioner to 357 months of imprisonment, to be followed by five years of supervised release. Id. at 2a-3a. Petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied petitioner's motion and denied a certificate of appealability (COA). Pet. App. 51a-53a. The court of appeals likewise declined to issue a COA. Id. at 77a-78a.

1. Between July 1999 and September 2002, petitioner committed a string of robberies of banks and credit unions in the North Texas area. Presentence Investigation Report (PSR) ¶¶ 9-32. In almost all of the robberies, petitioner was armed and brandished firearms. Ibid. In each case, petitioner forced employees to open safes or vaults and, before leaving with stolen cash, he tied the employees' hands behind their backs with plastic ties. PSR ¶¶ 10-11, 14, 19-21, 25-26, 30-32. In two of the robberies, petitioner stole an employee's car to make his escape. PSR ¶¶ 22-23, 28.

A federal grand jury charged petitioner with four counts of armed robbery of a bank or credit union, in violation of 18 U.S.C.

2113(a) and (d); four counts of brandishing a firearm during and in relation to a crime of violence (each corresponding to one of the bank and credit union robberies), in violation of 18 U.S.C. 924(c)(1)(A)(ii); and one count of possession of firearms as a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1-11.

In Count 3, which was one of the Section 2113 robbery charges, the indictment alleged that petitioner "unlawfully and knowingly by force and violence, and by intimidation did take from the person or presence of another, that is, an employee of the WESTEX Federal Credit Union * * * $37,949.00 * * * and in committing and in attempting to commit said credit union robbery did assault a person, and put in jeopardy the life of a person * * * by the use of a dangerous weapon, to wit, a firearm, while engaged in taking the money." Indictment 4. In Count 4, which was one of the Section 924(c) offenses, the indictment charged petitioner with brandishing a firearm in furtherance of the armed credit-union robbery charged in Count 3. Indictment 5.

Petitioner pleaded guilty to Counts 3 and 4 pursuant to a plea agreement. PSR ¶ 2. In his "factual resume," petitioner admitted that he took, "by force and violence and by intimidation," $37,949 from an employee of the WESTEX Federal Credit Union Association; that he brandished a firearm during the robbery; and that in committing the armed robbery, he "assault[ed]" the employee and "put in jeopardy" the employee's life "by the use of a

dangerous weapon." Factual Resume 2. In January 2004, the district court sentenced petitioner to 357 months of imprisonment, which included a consecutive 300-month term on the Section 924(c) count. Pet. App. 2a.

2. In June 2016, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, arguing for the first time that the credit-union robbery offense underlying his Section 924(c) conviction did not constitute a "crime of violence" under Section 924(c)(3). See Pet. App. 9a-18a, 36a-45a. 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 argued that armed robbery of a credit union does not qualify as a crime of violence under Section 924(c)(3)(A) because the offense may be committed by "non-violent and non-forceful" intimidation, Pet. App. 41a-45a, 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, 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness, Pet. App. 37a-41a. The government opposed petitioner's motion on the grounds that the motion was untimely

because petitioner's challenge to the classification of armed credit-union robbery as a "crime of violence" under Section 924(c)(3) should have been brought within one year of the date on which his conviction became final, see 28 U.S.C. 2255(f)(1), and that in any event, petitioner's claim lacked merit.

The district court denied petitioner's motion. Pet. App. 51a-53a. The court determined that Johnson did not invalidate Section 924(c)(3)(B) and therefore that petitioner's claim lacked merit. Id. at 52a. For the same reason, the court was "of the opinion" that the claim was "otherwise time-barred." Ibid. The court denied petitioner a COA. Id. at 52a-53a.

3. The court of appeals also denied petitioner's request for a COA. Pet. App. 77a-78a. Although the court stated that petitioner had shown that "reasonable jurists would debate the correctness of the district court's determination that his § 2255 motion was not timely filed," the court of appeals determined that petitioner had 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 the denial of a constitutional right." Id. at 78a (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

ARGUMENT

Petitioner contends (Pet. 6-9) that the court of appeals erred in denying a COA on his claim that armed robbery of a credit union, in violation of 18 U.S.C. 2113(a) and (d), does not qualify as a

"crime of violence" within the meaning of 18 U.S.C. 924(c)(3)(A) (2000). The court of appeals correctly denied a COA, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is unwarranted.

1. The court of appeals correctly determined that petitioner has not stated a valid claim of the denial of a constitutional right. The federal offense of armed credit-union robbery is 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."

To determine whether an offense constitutes a "crime of violence" under Section 924(c)(3)(A) and similar statutes, courts generally apply a "categorical approach." See, e.g., Mathis v. United States, 136 S. Ct. 2243, 2248 (2016). Under that approach, a court "focus[es] solely" on "the elements of the crime of conviction," not "the particular facts of the case." Ibid. If, however, the statute of conviction lists multiple alternative elements, it is "divisible" into different offenses. Id. at 2249 (citation omitted). In order to determine whether a criminal statute is divisible, a court may "look[ ] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of." Ibid. A statute is

not divisible if it merely lists "various factual means of committing a single element." Ibid.

Here, the underlying offense for petitioner's conviction under Section 924(c) was armed robbery of a credit union, in violation of 18 U.S.C. 2113(a) and (d). Section 2113(a) has two separate paragraphs. The first paragraph prohibits taking or attempting to take from another, "by force and violence, or by intimidation," any property "in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association." 18 U.S.C. 2113(a). The second paragraph prohibits "enter[ing] or attempt[ing] to enter any bank, credit union, or any savings and loan association" with intent to commit in such bank, credit union, or savings and loan association any felony affecting that institution and in violation of a federal statute, or any larceny. Ibid. Section 2113(d) provides for an enhanced penalty when a defendant committed or attempted to commit an "assault[ ]" or endangered "the life of any person by the use of a dangerous weapon or device" while committing the offense defined in subsection (a). 18 U.S.C. 2113(d).

Petitioner suggests (Pet. 7-8), for the first time this litigation, that credit-union robbery cannot qualify as a crime of violence under Section 924(c)(3)(A) because the two paragraphs in Section 2113(a) are indivisible, and the second paragraph can be accomplished without force. As an initial matter, this Court should not consider petitioner's claim because, as this Court has

repeatedly emphasized, it is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), whose "traditional rule * * * precludes a grant of certiorari" on a question that "was not pressed or passed upon below," United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). See 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").

In any event, petitioner's claim lacks merit. Petitioner's conviction for armed credit-union robbery required proof (or admissions) that he 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). Petitioner's conviction under Section 2113(a) and (d) thus necessarily required a threat of the use of violent, physical force. See United States v. Maldonado-Palma, 839 F.3d 1244, 1250 (10th Cir. 2016), cert. denied, 137 S. Ct. 1214 (2017).

Moreover, even irrespective of petitioner's conviction for armed credit-union robbery, this Court's decision in Mathis suggests that Section 2113(a) defines, at a minimum, two different crimes against banks, as set forth in the separate paragraphs of that subsection. Section 2113(a)'s "text makes clear" that it "can be violated in two distinct ways: (1) bank robbery, which involves taking or attempting to take from a bank by force [and violence], intimidation, or extortion; and (2) bank burglary,

which simply involves entry or attempted entry into a bank with the intent to commit a crime therein." United States v. Almeida, 710 F.3d 437, 440 (1st Cir. 2013); see United States v. Loniello, 610 F.3d 488, 491-496 (7th Cir. 2010) (holding that the two paragraphs define distinct offenses), cert. denied, 563 U.S. 929 (2011). Petitioner was charged with, and pleaded guilty to, violating Section 2113(a) "by force and violence," not to the bank-burglary offense defined in Section 2113(a)'s second paragraph. Cf. Mathis, 136 S. Ct. at 2257 ("[A]n indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime.").

Petitioner identifies no court of appeals that has concluded that the separate paragraphs of Section 2113(a) are indivisible. To the contrary, the courts of appeals that have considered the issue have unanimously found that the statute is divisible. See United States v. Moore, 916 F.3d 231, 238 (2d Cir. 2019); United States v. Rinker, 746 Fed. Appx. 769, 772 & n.21 (10th Cir. 2018) (citing cases); see also United States v. Wilson, 880 F.3d 80, 84 n.3 (3d Cir.) (noting that the district court determined that Section 2113(a) was divisible "because it contained two paragraphs, each containing a separate version of the crime"), cert. denied, 138 S. Ct. 2586 (2018).

2. Contrary to petitioner's contention (Pet. 8), this Court's decision in United States v. Davis, 139 S. Ct. 2319 (2019),

does not show any "error in the district court's classification of federal bank robbery as a 'crime of violence.'" Because petitioner's conviction for armed credit-union robbery qualified as a "crime of violence" under Section 924(c)(3)(A), and because Davis concerned only the definition of a "crime of violence" in Section 924(c)(3)(B), this Court's decision in that case did not affect the validity of petitioner's conviction under Section 924(c). No reason exists, therefore, to remand this case to the court of appeals in light of this Court's decision in Davis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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