No. 19-5312

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH H. BURKE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 6-9) that this case presents the same issue as United States v. Davis, 139 S. Ct. 2319 (2019), in which this Court recently held that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. The validity of petitioner's conviction under Section 924(c) does not, however, turn on the classification of his underlying offenses as crimes of violence under Section 924(c)(3)(B). The petition for a writ of certiorari should therefore be denied.

1. Following a jury trial, petitioner was convicted of conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); attempted Hobbs Act robbery, in violation of

18 U.S.C. 1951(a); using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A); and possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Judgment 1. The Section 924(c) count identified the charged offenses of attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery as predicate "crime[s] of violence." Indictment 2. The district court instructed the jury -- without objection from petitioner -- that it could find petitioner guilty on the Section 924(c) count if it found that he "committed either or both" of those predicate offenses and that he carried a firearm during and in relation to "the commission of one or both of th[o]se offenses." 11-cr-181 D. Ct. Doc. 79, at 14 (Dec. 2, 2011) (Jury Instructions); see Pet. App. B2.

The district court sentenced petitioner to 355 months of imprisonment, consisting of concurrent terms of 235 months of imprisonment on the Hobbs Act conspiracy, attempted Hobbs Act robbery, and possession-of-ammunition counts, and a consecutive term of 120 months of imprisonment on the Section 924(c) count. Judgment 2. The court of appeals affirmed, 521 Fed. Appx. 720, and this Court denied a petition for a writ of certiorari, 571 U.S. 1184.

Petitioner subsequently filed a motion for postconviction relief under 28 U.S.C. 2255, in which he alleged ineffective

assistance of counsel on various grounds. 15-cv-119 D. Ct. Doc. 1, at 4-18 (Jan. 21, 2015). The district court denied petitioner's motion and denied a certificate of appealability (COA). 15-cv-119 D. Ct. Doc. 16, at 5-16 (June 30, 2015). The court of appeals likewise denied a COA, 15-13111 C.A. Order (Oct. 13, 2015), and this Court denied a petition for a writ of certiorari, 136 S. Ct. 2542.

2. In 2016, petitioner filed an authorized second-or-successive motion for postconviction relief under Section 2255, in which he contended that his Section 924(c) conviction should be vacated because it did not rely on a valid "crime of violence." 16-cv-1641 D. Ct. Doc. 1, at 4, 9 (June 18, 2016) (Second 2255 Mot.). Section 924(c)(3) defines a "'crime of violence'" as a felony offense 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 asserted, without explanation, that his Section 924(c) conviction was imposed "under [Section] 924(c)(3)(B)." Second 2255 Mot. 4. And he argued that Section 924(c)(3)(B) is unconstitutionally vague in light of this Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the "residual clause" of the Armed Career

Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness, 135 S. Ct. at 2557. See Second 2255 Mot. 4. The district court denied petitioner's motion and denied a COA. Pet. App. A1-A2.

The court of appeals granted a COA. 16-16198 C.A. Order (Feb. 22, 2017). The court then initially issued a decision reversing the district court's order and remanding for reconsideration in light of the court of appeals' intervening decision in Ovalles v. United States, 905 F.3d 1231 (11th Cir. 2018) (en banc), in which the court had held that Section 924(c)(3)(B) is not unconstitutionally vague because it should be interpreted to require a jury to determine "whether a defendant's actual conduct 'by its nature involves a substantial risk' of physical force." Pet. App. B2 (brackets and citation omitted); see Ovalles, 905 F.3d at 1253. Eight days later, however, the court of appeals sua sponte vacated its initial decision and issued a new opinion affirming the district court's judgment. Pet. App. C1-C2. The court of appeals cited circuit precedent holding that a constitutional challenge to a Section 924(c) conviction based on Johnson was not cognizable on a second-or-successive Section 2255 motion because Johnson had not addressed the constitutionality of Section 924(c)(3)(B). Id. at C2 (citing In re Garrett, 908 F.3d 686 (11th Cir. 2018)); see 28 U.S.C. 2255(h). Judge Rosenbaum filed a concurring opinion in which she stated that, even if

Johnson had called into question the constitutionality of Section 924(c)(3)(B), it would not "affect [petitioner's] conviction" because one of his Section 924(c) predicate offenses -- attempted Hobbs Act robbery -- "qualifie[d] as a 'crime of violence' under [Section] 924(c)(3)(A)[], * * * without consideration of [Section] 924(c)(3)(B)[.]" Pet. App. C2.

3. The petition for a writ of certiorari should be denied because this Court's decision in Davis does not affect the validity of petitioner's Section 924(c) conviction. That conviction was predicated on two separate predicate offenses: attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery. Petitioner does not dispute (Pet. 6-9) that attempted Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A). Accordingly, petitioner's Section 924(c) conviction remains valid notwithstanding Davis's determination that the alternative definition of a "crime of violence" in Section 924(c)(3)(B) is unconstitutionally vague.

a. Hobbs Act robbery requires the "unlawful taking or obtaining of personal property" from another "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. 1951(b)(1). For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Garcia v. United States, 138 S. Ct. 641 (2018) (No. 17-5704), Hobbs Act robbery qualifies

as a crime of violence under Section 924(c) because it "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). See Br. in Opp. at 7-10, Garcia, supra (No. 17-5704).[1] Every court of appeals to consider the issue has so held. See id. at 8. And this Court has recently and repeatedly denied petitions for writs of certiorari challenging the circuits' consensus on the application of Section 924(c)(3)(A) to Hobbs Act robbery.[2]

Because Hobbs Act robbery categorically qualifies as a crime of violence under Section 924(c)(3)(A), attempted Hobbs Act robbery likewise qualifies under that provision. As explained in the government's brief in opposition to the petition for a writ of certiorari in Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248), every court of appeals to consider the question has held that an attempt to commit a crime that requires the use, attempted use, or threatened use of physical force is itself a

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[1] We have served petitioner with a copy of the government's brief in opposition in Garcia.

[2] See, e.g., Greer v. United States, 139 S. Ct. 2667 (2019) (No. 18-8292); Rojas v. United States, 139 S. Ct. 1324 (2019) (No. 18-6914); Foster v. United States, 139 S. Ct. 789 (2019) (No. 18-5655); Desilien v. United States, 139 S. Ct. 413 (2018) (No. 17-9377); Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248); Robinson v. United States, 138 S. Ct. 1986 (2018) (No. 17-6927); Chandler v. United States, 138 S. Ct. 1281 (2018) (No. 17-6415); Middleton v. United States, 138 S. Ct. 1280 (2018) (No. 17-6343); Jackson v. United States, 138 S. Ct. 977 (2018) (No. 17-6247); Garcia, 138 S. Ct. 641.

"crime of violence" under Section 924(c)(3)(A) and similarly worded provisions. See Br. in Opp. at 6-8, Ragland, supra (No. 17-7248).[3] This Court has repeatedly denied review of petitions for writs of certiorari raising the question whether attempts to commit Hobbs Act robbery or other violent offenses qualify as crimes of violence under Section 924(c)(3)(A).[4]

b. Petitioner contends (Pet. 6 n.1) that the Court should "presume[]" that his Section 924(c) conviction was based solely on conspiracy to commit Hobbs Act robbery, and not on attempted Hobbs Act robbery, because including both predicate offenses in a single Section 924(c) count was "duplicitous." But petitioner relinquished any duplicity claim by failing to raise it before

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[3] We have served petitioner with a copy of the government's brief in opposition in Ragland.

[4] See, e.g., Ovalles v. United States, 139 S. Ct. 2716 (2019) (No. 18-8393) (attempted carjacking); Sosa v. United States, 139 S. Ct. 1581 (2019) (No. 18-8333) (attempted murder in aid of racketeering); Myrthil v. United States, 139 S. Ct. 1164 (2019) (No. 18-6009) (attempted Hobbs Act robbery); St. Hubert v. United States, 139 S. Ct. 246 (2018) (No. 18-5269) (same); Corker v. United States, 139 S. Ct. 196 (2018) (No. 17-9582) (same); Beavers v. United States, 139 S. Ct. 56 (2018) (No. 17-8059) (same); Berry v. United States, 138 S. Ct. 2665 (2018) (No. 17-8987) (attempted carjacking); Chance v. United States, 138 S. Ct. 2642 (2018) (No. 17-8880) (attempted Hobbs Act robbery); Ragland, 138 S. Ct. 1987 (same); Sampson v. United States, 138 S. Ct. 1583 (2018) (No. 17-8183) (same); Robbio v. United States, 138 S. Ct. 1583 (2018) (No. 17-8182) (same); James v. United States, 138 S. Ct. 1280 (2018) (No. 17-6295) (same); Galvan v. United States, 138 S. Ct. 691 (2018) (No. 17-6711) (attempted carjacking); Wheeler v. United States, 138 S. Ct. 640 (2018) (No. 17-5660) (attempted Hobbs Act robbery).

trial. See Fed. R. Crim. P. 12(b)(3)(B)(i) (requiring defendants to challenge "a defect in the indictment or information" before trial, "including * * * joining two or more offenses in the same count (duplicity)"). Petitioner also procedurally defaulted any such claim by failing to raise it on direct appeal, providing an additional reason not to consider it on collateral review. See Bousley v. United States, 523 U.S. 614, 621 (1998).

In any event, petitioner bears the burden on collateral review to affirmatively establish that his conviction rested on an invalid ground. See, e.g., Parke v. Raley, 506 U.S. 20, 31 (1992) (explaining that the "presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant" on collateral review). Here, the jury determined beyond a reasonable doubt that petitioner committed both attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery as part of the same course of conduct (the robbery of a convenience store). Indictment 1-2; see Judgment 1. Petitioner identifies no likelihood that the jury found -- or logically could have found -- that he used or carried a gun during one predicate offense but not the other.

4. Under these circumstances, no reason exists to remand this case to the court of appeals in light of the Court's decision in Davis. See Pet. 6-7. Davis concerns only the definition of a "crime of violence" in Section 924(c)(3)(B), not the alternative

definition in Section 924(c)(3)(A), and thus does not affect the validity of petitioner's conviction under Section 924(c).

The petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

SEPTEMBER 2019

[5] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.