No. 19-5312

IN THE
Supreme Court of the United States

KENNETH H. BURKE JR.,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

REPLY TO THE UNITED STATES' MEMORANDUM IN OPPOSITION

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TABLE OF CONTENTS

Table of Authorities iii

Reply Arguments 1

Conclusion 4

TABLE OF AUTHORITIES

Cases

Alleyne v. United States, 133 S. Ct. 2151 (2013) 3

In re Gomez, 830 F.3d 1225 (11th Cir. 2016) 3

Johnson v. United States, 135 S. Ct. 2551 (2015) 1

Johnson v. United States, 559 U.S. 133 (2010) 3

Ovalles v. United States, 905 F.3d 1231 (2018) 1

Reed v. Ross, 468 U.S. 1 (1984) 4

United States v. Bowen, 936 F.3d 1091 (10th Cir. 2019) 3

United States v. Davis, 139 S. Ct. 2319 (2019) 1, 2, 3, 4

United States v. Snyder, 871 F.3d 1122 (10th Cir. 2017) 4

Statutes

18 U.S.C. § 924(c) 1, 2, 3

18 U.S.C. § 924(c)(1) 3

18 U.S.C. § 924(c)(3)(A) 3

18 U.S.C. § 924(c)(3)(B) 3

28 U.S.C. § 2255 1

REPLY ARGUMENTS

Mr. Burke's was convicted of brandishing and discharging a firearm during a "crime of violence," in violation of 18 U.S.C. § 924(c). The "crime[s] of violence" supporting the conviction were conspiracy to commits Hobbs Act robbery and attempt to commit Hobbs Act robbery. Mr. Burke moved to vacate his sentence based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), arguing his conviction was presumably based on the conspiracy count, and without the use of § 924(c)'s unconstitutionally vague residual clause, conspiracy to commit Hobbs Act robbery could not qualify as a "crime of violence." *See* Pet. at 6 n.1. The Eleventh Circuit originally granted Mr. Burke relief, but soon after, the court vacated its original decision and affirmed the denial of Mr. Burke's § 2255 motion. The Eleventh Circuit vacated its decision because it failed to realize that, at that time, its precedent foreclosed Mr. Burke's claim. *See Ovalles v. United States*, 905 F.3d 1231 (2018) (en banc), *overruled by United States v. Davis*, 139 S. Ct. 2319 (2019). Judge Rosenbaum concurred in the judgment, believing the Eleventh Circuit could alternatively affirm because attempted Hobbs Act robbery qualified as a "crime of violence" under § 924(c)'s use-of-force clause. *See* Pet. at 6 n.1. But the two other members of Mr. Burke's panel did not join Judge Rosenbaum's opinion. Instead, the majority affirmed based solely on its then-existing precedent that § 924(c)'s residual clause is not unconstitutionally vague.

Since the Eleventh Circuit's decision affirming the denial of Mr. Burke's § 2255 motion, this Court held in *Davis* that § 924(c)'s residual clause is unconstitutionally

vague. In doing so, this Court abrogated the precedent the Eleventh Circuit relied on to deny Mr. Burke relief.

In the government's response to Mr. Burke's petition, it does not agree that the Eleventh Circuit should look at Mr. Burke's case anew given that the basis it relied on has been upset. Rather, the government responds that this Court should simply adopt Judge Rosenbaum's concurring opinion as its own. Gov. Mem. at 5–7. The majority of the judges on Mr. Burke's panel below, however, did not adopt that reasoning. Indeed, given that the Eleventh Circuit originally granted Mr. Burke relief, it is highly likely that but for the Eleventh Circuit's then-binding precedent, the Eleventh Circuit would have granted Mr. Burke relief.[1]

The government also objects to Mr. Burke's argument that the Court must presume his conviction is based on his conspiracy offense. Gov. Mem. at 7–8. According to the government, Mr. Burke has waived any duplicity claim by not raising it before trial. *Id.* But the government misconstrues Mr. Burke's argument. Mr. Burke is not raising a freestanding duplicity claim. He merely argues that as a result of the duplicity in his case, this Court cannot assume his conviction rests on anything other than the conspiracy offense because doing so would require to the Court to find facts that increase his mandatory minimum sentence, in

[1] It is also worth noting that the government incorrectly argues that Mr. Burke "does not dispute that attempted Hobbs Act robbery qualifies as a crime of violence" under § 924(c)'s use-of-force clause. Gov. Mem. at 5. However, Mr. Burke did, and does, dispute that attempted Hobbs Act robbery is a "crime of violence." *See* Pet. at 6 n.1 ("Mr. Burke maintains that attempted Hobbs Act robbery does not qualify as a "crime of violence.").

violation of *Alleyne v. United States*, 133 S. Ct. 2151 (2013). *See In re Gomez*, 830 F.3d 1225, 1227–28 (11th Cir. 2016). In addition to *Alleyne*, the least-culpable-act rule also requires this Court to presume Mr. Burke's conviction is based on his conspiracy offense. *See Johnson v. United States*, 559 U.S. 133, 137 (2010).

As a final matter, the government argues that Mr. Burke procedurally defaulted on his claim. Gov. Memo. at 8. Aside from the fact that the Eleventh Circuit never passed on this question, the government's argument fails because Mr. Burke is actually innocent of his offense and can establish cause and prejudice to excuse the default. First, because conspiracy to commit Hobbs Act robbery is not a "crime of violence," Mr. Burke is actually innocent of his § 924(c) offense. The Tenth Circuit recently considered a similar issue in light of *Davis* and came to the same conclusion. *United States v. Bowen*, 936 F.3d 1091, 1108 (10th Cir. 2019) ("We conclude that Bowen's witness retaliation convictions do not qualify as crimes of violence under 18 U.S.C. § 924(c)(3)(A), and § 924(c)(3)(B) is void for vagueness, so Bowen is actually innocent of § 924(c)(1)."). Additionally, Mr. Burke can also satisfy the cause-and-prejudice exception to the procedural-default rule because the rule announced in *Johnson* was not reasonably available to Mr. Burke at the time of his direct appeal, and without the residual clause, Mr. Burke's § 924(c) conviction cannot stand. *See United States v. Snyder*, 871 F.3d 1122, 1127 (10th Cir. 2017) (discussing and applying *Reed v. Ross*, 468 U.S. 1 (1984)). Thus, despite the government's argument, the procedural-default rule does not preclude consideration of Mr. Burke's claim.

CONCLUSION

Thus, given that this Court has abrogated the precedent the Eleventh Circuit relied on to deny Mr. Burke relief and that Mr. Burke will likely receive relief if this Court remands his case for further consideration in light of *Davis*, Mr. Burke respectfully requests that this Court grant this petition, vacate the Eleventh Circuit's judgment, and remand this case for further proceedings.

Respectfully submitted,

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