NO.

IN THE SUPREME COURT OF THE UNITED STATES

KURT J. MYRIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Rene L. Valladares
Federal Public Defender
*Wendi L. Overmyer
Assistant Federal Public Defender
Office of the Federal Public Defender
411 E. Bonneville, Ste. 100
Las Vegas, Nevada 89101
(702) 388-6577
Wendi_Overmyer@fd.org
*Counsel for Petitioner

July 26, 2019

Questions Presented For Review

1. Does this Court's ruling in *United States v. Davis*, 139 S. Ct. 2319 (2019), striking as unconstitutionally vague the residual clause of 18 U.S.C. § 924(c)(3)(B), apply retroactively to defendants raising motions to vacate their § 924(c) convictions and sentences under 28 U.S.C. § 2255?

2. Can a conviction under 18 U.S.C. § 924(c) stand where the predicate offense is federal conspiracy under 18 U.S.C. § 371, which no longer qualifies as a crime of violence?

Table of Contents

Table of Authorities

Federal Cases **Page(s)**

Federal Statutes

U.S. Constitution

Secondary Sources

Petition for Certiorari

Petitioner Kurt J. Myrie petitions for a writ of certiorari to review judgments of the United States Court of Appeals for the Ninth Circuit. In light of *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), and the government's concessions that conspiracy is no longer a qualifying crime of violence under 18 U.S.C. § 924(c)(3)(A), Petitioner Myrie asks this Court to grant certiorari, vacate the Ninth Circuit's denial of a certificate of appealability, and remand for further proceedings.

Orders Below

The orders denying Petitioner Myrie's motion to vacate under 28 U.S.C. § 2255 in the U.S. District Court for the District of Nevada and the orders denying appellate relief in the Ninth Circuit Court of Appeals are attached in the Appendix: *United States v. Myrie*, No. 2:06-cr-00239-RCJ-PAL-1, 2018 WL 5839073 (D. Nev. Nov. 7, 2018); *appeal denied*, No. 18-17336 (9th Cir. Jan. 10, 2019), *and reconsideration denied*, No. 18-17336 (9th Cir. Mar. 15, 2019).

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in Petitioner Myrie's case on March 15, 2019. *See* Appendix. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely per this Court's order granting an extension of the due date until July 27, 2019. *Myrie v. United States*, No. 18A1226 (U.S. May 29, 2019).

Relevant Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 of the United States Code, Section 924(c)(3) defines "crime of violence" as:

> (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.

The federal conspiracy statute at 18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Reasons for Granting the Writ

Two grounds support a grant of certiorari, with the government conceding both grounds in other cases. Petitioner Myrie requests certiorari on both grounds to reconcile and bring accord among the federal circuits:

1. Whether *United States v. Davis*, 139 S. Ct. 2319 (2019), retroactively voided as unconstitutional the residual clause of 18 U.S.C. § 924(c)(3)(B).

2. Can a conviction under 18 U.S.C. § 924(c) stand where the predicate offense is federal conspiracy under 18 U.S.C. § 371, which no longer qualifies as a crime of violence?

This Court has long attempted to unify the "crime of violence" definition in federal criminal statutes. On June 24, 2019, this Court settled the matter as to one of these statutes—18 U.S.C. § 924(c). In *Davis*, this Court held the residual clause of 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague under the Due Process Clause. While the decision does not address retroactivity, the Solicitor General conceded *Davis*'s ruling would apply retroactively. The Ninth Circuit has since held *Davis* applies retroactively. Thus, remand is necessary as Petitioner Myrie's challenge to his 18 U.S.C. §924(c) conviction was both timely filed and meritorious. Petitioner Myrie is serving an unconstitutional mandatory consecutive seven-year prison sentence.

Myrie was convicted of both federal conspiracy under 18 U.S.C. § 371, and federal armed bank robbery under 18 U.S.C. § 2113. However, the federal conspiracy charge served as the basis for the 18 U.S.C. § 924(c) count, as found by the district court at sentencing. Neither this Court nor the Ninth Circuit have yet addressed whether federal conspiracy, 18 U.S.C. § 371, is a crime of violence under

the elements clause of § 924(c)(3)(A). The Fourth and Seventh Circuits hold, post-*Johnson*, that federal conspiracy does not satisfy the elements clause. Furthermore, the government conceded in its *United States v. Davis*, No. 18-431, briefing that conspiracy offenses do not satisfy § 924(c)(3)(A)'s elements clause.

In light of *Davis* and the government's concessions that conspiracy does not qualify as a crime of violence under 18 U.S.C. § 924(c)(3)(A), Petitioner Myrie respectfully requests this Court grant his petition, vacate the denial of certificate of appealability, and remand the cases for further proceedings, as it has already done with a number of similar petitions. *See Rodriguez v. United States*, No. 18-5234, 2019 WL 2649795, at *1 (U.S. June 28, 2019); *Jefferson v. United States*, No. 18-5306, 2019 WL 2649796, at *1 (U.S. June 28, 2019); *Barrett v. United States*, No. 18-6985, 2019 WL 2649797, at *1 (U.S. June 28, 2019); *Mann v. United States*, No. 18-7166, 2019 WL 2649802, at *1 (U.S. June 28, 2019); *Douglas v. United States*, No. 18-7331, 2019 WL 176716, at *1 (U.S. June 28, 2019); *Watkins v. United States*, No. 18-7996, 2019 WL 653249, at *1 (U.S. June 28, 2019). In the alternative, this Court should grant plenary review to ensure all circuits appropriately vacate § 924(c) convictions where the conviction rests on a non-qualifying conspiracy offense.

Related Cases Pending in this Court

The conspiracy predicate issue herein is also raised in two cases arising from the Ninth Circuit, in a joint petition for writ of certiorari to be filed today, June 26, 2019. *See Thomas Lewis and Derrick Young v. United States*, No. 18A1226 (U.S.).

Statement of the Case

Petitioner Myrie is serving a 194-month federal prison sentence, 7 years of which is unconstitutional. The federal conspiracy conviction below is not a crime of violence under 18 U.S.C. § 924(c)(3)(A)'s elements clause. Therefore, Myrie requests certiorari to correct the Ninth Circuit's deviation from the present federal law regarding predicate counts for a § 924(c) charge.

A. Mandatory, consecutive sentence for use of a firearm during federal conspiracy.

Petitioner Myrie pled guilty and was sentenced to 60 months for federal conspiracy under 18 U.S.C. § 371 (Count One), 110 months for armed bank robbery under 18 U.S.C. § 2113(a) and (d) (Count Two), and an 84-month mandatory consecutive sentence for using a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c) (Count Three).

At Myrie's plea, accepted on December 14, 2007, the § 924(c) charge (Count Three) rested on conspiracy to commit bank robbery. *Myrie*, No. 2:06-cr-00239-RCJ-PAL-1, ECF Nos. 36, 95, p.24. The superseding indictment, to which Myrie pled, stated *four times* that Count Three's § 924(c) charge rested on "conspiracy to commit bank robbery." *Id.* at ECF No. 36, p.3-4. The charge's title identified the predicate as conspiracy:

> **COUNT THREE**
> Brandishing a Firearm During, In Relation To, and
> In Furtherance of a Conspiracy to Commit Bank Robbery

Id. at ECF No. 36, p.3. The text listed only one predicate—conspiracy: "the defendants herein, did knowingly possess, carry, and brandish a firearm, to wit: a

handgun, during, in relation to, and in furtherance of a ***conspiracy*** to commit a crime of violence for which they may be prosecuted in a court of the United States, that is, ***conspiracy*** to commit bank robbery as alleged in Count One of this Indictment and such was a reasonably foreseeable consequence of the ***conspiracy***, all in violation of Title 18, United States Code, Section 924(c)." *Id.* ECF No. 36, pp.3-4 (emphases added).

The superseding indictment also included another § 924(c) charge, Count Four, alleging a second violation of 18 U.S.C. § 924(c) for brandishing a firearm "during and in relation to a crime of violence, namely, conspiracy to commit bank robbery *and* armed bank robbery as alleged in Count One *and* Count Two." *Myrie*, No. 2:06-cr-00239-RCJ-PAL-1, ECF No. 36, p. 4 (emphases added). Prior to plea, defense counsel moved to dismiss Count 4 as duplicitous. *Id.* at ECF No. 48. To avoid dismissal of Count 4, the government suggested—without providing any authority—the district court could "consolidate" Counts Three and Four. *Id.* at ECF No. 58. Defense counsel opposed consolidation, asserting that doing so would violate the Fifth Amendment's Grand Jury indictment requirement. *Id.* at ECF No. 167, pp. 15-19. Without citing any authority, the district court "consolidated" Count 4 "into" Count 3, over defense counsel's objection. *Id.* at ECF No. 167, pp. 19-20.

Myrie recognizes that, in his § 2255 motion, the parties argued whether the record below was ambiguous as to the §924(c) predicate count. It is well-settled, however, that the Fifth Amendment's indictment requirement only permits a Grand Jury to substantively amend an indictment. *See Stirone v. United States*, 361 U.S.

212, 217 (1960); U.S. Const. amend. V ("No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury. . . ."). The "consolidation" of Count 4 into Count 3—which added a new predicate allegation—therefore had no legal effect. By law, Myrie pled guilty to the originally charged Count 3, which solely charged § 924(c) as to conspiracy. *Myrie*, No. 2:06-cr-00239-RCJ-PAL-1, ECF No. 36.

At sentencing, held April 21, 2008, the district court stated that the conviction for conspiracy (Count One) qualified as the crime of violence under 18 U.S.C. § 924(c) (Count Three)—making no reference to armed bank robbery. *Myrie*, No. 2:06-cr-00239-RCJ-PAL-1, ECF No. 173, pp.4, 8. The Ninth Circuit affirmed the sentences on direct appeal. *United States v. Jordan,* 351 F. App'x 248, 251-52 (9th Cir. 2009).

B. Petitioner Myrie timely sought relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

On June 26, 2015, this Court held that imposing an enhanced sentence under the residual clause of 18 U.S.C. § 924(e), the Armed Career Criminal Act (ACCA), violates the Constitution's guarantee of due process. *Johnson*, 135 S. Ct. 2551. This Court subsequently held that *Johnson* announced a new substantive rule retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016). On April 17, 2018, this Court held the Immigration and Nationality Act's residual clause, contained in the definition of "crime of violence" at 18 U.S.C. § 16(b), to be void for vagueness and violated due process. *Dimaya*, 138 S. Ct. at 1215. The residual clause in § 16(b) is identical to the residual clause in

§ 924(c). On June 24, 2019, this Court, relying on the reasoning of *Johnson* and *Dimaya*, held the residual clause in § 924(c) unconstitutionally vague. *Davis*, 139 S. Ct. at 2325-27.

Petitioner Myrie, represented by the Federal Public Defender for the District of Nevada, filed a timely motion to vacate under 28 U.S.C. § 2255, in light of *Johnson*. The motion to vacate argued that: § 924(c)(3)(B)'s residual clause is void for vagueness; and federal conspiracy is not a crime of violence under 18 U.S.C. § 924(c)(3)(A). Both the district court and the Ninth Circuit denied relief. The district court denied Myrie's successor motion to vacate and denied a certificate of appealability on June 26, 2018. Appendix, p.1. The Ninth Circuit denied a certificate of appealability on December 20, 2018, and declined to reconsider on February 27, 2019. Appendix, pp. 3-4.

The district court did not address the Myrie's unrebutted arguments that conspiracy under 18 U.S.C. § 371 does not satisfy § 924(c)'s elements clause. Instead, the district court erroneously held that armed bank robbery underlies the § 924(c) conviction, even though at the original plea and sentencing the district court concluded that *conspiracy* was the crime of violence under Count Three's § 924(c) conviction. Appendix, pp.1-2. The Ninth Circuit summarily denied a certificate of appealability and Myrie's motion to reconsider, without addressing whether conspiracy under 18 U.S.C. § 371 satisfies § 924(c)(3)(A)'s elements clause. Appendix, pp.3-4.

Myrie remains in federal custody serving an unconstitutional sentence. To date, Myrie completed the 110-month sentence imposed for the non-§ 924(c) counts, and has served 47 months of the unconstitutional 84-month consecutive sentence imposed for the § 924(c) count. His current release date is September 20, 2020. Myrie is therefore eligible for immediate release should the § 924(c) sentence be vacated.

Argument

I. Certiorari is necessary to resolve whether *United States v. Davis*, 139 S. Ct. 2319 (2019), retroactively invalidates the residual clause at 18 U.S.C. § 924(c)(3)(B).

Section 924(c) provides for a series of graduated, mandatory, consecutive sentences for using or carrying a firearm during and in relation to a "crime of violence." 18 U.S.C. § 924(c)(3). The statute defines "crime of violence" as:

> (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.

18 U.S.C. § 924(c)(3). The first clause, § 924(c)(3)(A), is referred to as the elements clause. The second clause, § 924(c)(3)(B), is referred to as the residual clause.

In *Johnson*, this Court struck the ACCA's residual clause, at 18 U.S.C. § 924(e), as unconstitutionally vague. 135 S. Ct. at 2557. The ACCA contains

similar element and residual clauses to 18 U.S.C. § 924(c). The ACCA defines "violent felony" as:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B)(i)-(ii).

This Court also held *Johnson* retroactively applies to all defendants sentenced under the ACCA. *Welch*, 136 S. Ct. at 1265. Because striking § 924(e)'s residual clause as void for vagueness "alter[ed] the range of conduct or the class of persons that the law punishes," *Johnson* announced a substantive rule retroactively applicable to petitioners on collateral review. *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

In *Davis*, this Court struck § 924(c)(3)(B) as unconstitutionally vague. 139 S. Ct. at 2336. The government conceded in its *Davis* briefing that a rule holding § 924(c)'s residual clause void for vagueness would be retroactive. *United States v. Davis*, No. 18-431, Brief for the United States, p.52 (Feb. 12, 2019) ("A holding of this Court that Section 924(c)(3)(B) requires an ordinary-case categorical approach—and thus is unconstitutionally vague—would be a retroactive substantive rule applicable on collateral review."). Like this Court's decision in

Johnson, which "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied," *Welch*, 136 S. Ct. at 1265, *Davis*'s holding limits the range of conduct or class of persons that the law punishes under § 924(c). It follows that *Davis* is likewise retroactively applicable to all defendants sentenced under § 924(c)(3)(B).

At present, there are over 50 pending cases being litigated by the Office of the Federal Public Defender in the District of Nevada alone—either at the Ninth Circuit or in the district court—all of which seek 28 U.S.C. § 2255 relief from § 924(c) convictions and sentences under *Johnson*. Because this Court recently invalidated the § 924(c) residual clause in *Davis*, Petitioner Myrie requests this Court grant certiorari on the closely aligned issue of whether *Davis*'s decision applies retroactively.

II. Certiorari is necessary to resolve whether federal conspiracy, 18 U.S.C. § 371, qualifies as a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A).

Neither this Court nor the Ninth Circuit have directly addressed whether federal conspiracy, 18 U.S.C. § 371, may be a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) in light of *Johnson* or *Davis*. Just this week, however, the Ninth Circuit issued an unpublished decision remanding a § 2255 petition challenging a § 924(c) conviction based on RICO and VICAR conspiracy, in light of *Davis*. *United States v. Carcamo*, No. 17-16825, 2019 WL 3302360 (9th Cir. July 23, 2019) (unpublished); *see also United States v. Cruz-Ramirez*, No. 11-10632, 2019 WL 3249880 (9th Cir. July 19, 2019) (direct appeal, vacating § 924(c) convictions resting on RICO and VICAR conspiracy, in light of *Davis*). The

government, in various briefings, has conceded that conspiracy, 18 U.S.C. § 371, is not a qualifying crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A). Because conspiracy does not qualify as a crime of violence under § 924(c)(3)(A)'s elements clause, Myrie's conviction and sentence for the § 924(c) charge (Count Three) is unconstitutional and must be vacated.

The two Circuits to address conspiracy post-*Johnson*, the Fourth and Seventh Circuits, both hold that federal conspiracy under 18 U.S.C. § 371 does not satisfy the elements clause. *United States v. Gonzalez-Ruiz*, 794 F.3d 832, 836 (7th Cir. 2015) (finding post-*Johnson* that conspiracy to commit armed robbery does not satisfy the ACCA's elements clause); *United States v. Melvin*, 621 F. App'x 226, 226 (4th Cir. 2015) (unpublished) (finding post-*Johnson* that conspiracy to commit robbery with a dangerous weapon does not satisfy the ACCA's elements clause and noting government concession on issue). The Fifth Circuit has not addressed conspiracy under 18 U.S.C. § 371, but holds that conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951 does not meet the elements clause of § 924(c)(3)(A). *United States v. Lewis*, 907 F.3d 891 (5th Cir.2018), *cert. denied*, 2019 WL 358452 (Jan. 29, 2019) (No. 18-989).[1]

[1] District courts also find that conspiracy, 18 U.S.C. § 371, is not a crime of violence under § 924(c)'s elements clause. *See e.g., Royer v. United States*, 324 F. Supp. 3d 719, 736-37 (E.D. Va. 2018); *United States v. Chavez*, No. 15-CR-00285-LHK, 2018 WL 339140 (N.D. Cal. Jan. 9, 2018); *United States v. Bundy*, No. 2:16-cr-00036-GMN-PAL, 2016 WL 8730142, *18 (D. Nev. Dec. 30, 2018) (holding that conspiracy under 18 U.S.C. § 372 is not a crime of violence under §924(c)'s elements clause).

The government conceded in *Davis* that conspiracy to commit Hobbs Act robbery at 18 U.S.C. § 1951 does not satisfy the elements clause of § 924(c)(3)(A):

> . . . conspiracy need not, however, lead to the commission of the planned robbery, *see Callanan v. United States*, 364 U.S. 587, 593-594 (1961), and thus such a conspiracy does not 'ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another,' so as to qualify as a 'crime of violence' under 18 U.S.C. § 924(c)(3)(A).

United States v. Davis, No. 18-431, Brief for the United States, p.50 (Feb. 12, 2019). The government made the same concession in the First Circuit, *see United States v. Douglas*, 907 F.3d 1, 11 (1st Cir. 2018) (quoting concession), *cert. granted, judgment vacated*, No. 18-7331, 2019 WL 176716 (U.S. June 28, 2019), *and abrogated by United States v. Davis*, 139 S. Ct. 2319 (2019); the Fourth Circuit, *see United States v. Simms*, 914 F.3d 229, 233 (4th Cir. 2019) (en banc) (noting concession), *cert. petition pending* (U.S. April 24, 2019) (18-1338); the Fifth Circuit, *see United States v. Lewis*, 907 F.3d 891, 894 (5th Cir. 2018) (same), *cert. denied*, No. 18-989, 2019 WL 358452 (June 28, 2019); and the D.C. Circuit, *see United States v. Eshetu*, 898 F.3d 36, 38 n.2 (D.C. Cir. 2018) (noting concession that only the residual clause was at issue), *reh'g en banc denied* (D. C. Cir. Feb. 19, 2019).

To meet the elements clause, the offense must have "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). This means the underlying statute must require two elements: (1) violent physical force capable of causing physical pain or injury to another person, *Stokeling v. United States*, 139 S. Ct. 544,554 (2019) (citing

Johnson v. United States, 559 U.S. 133, 140 (2010) ("*Johnson 2010*")); and (2) the use of force must be intentional and not merely reckless or negligent. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

The *Davis* decision cemented the long-standing rule that to determine if an offense qualifies as a "crime of violence" under § 924(c), courts use the categorical approach. *Davis*, 139 S. Ct. at 2326-36. In applying the categorical approach, courts only examine the statutory definition of the underlying offense, not the underlying facts. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). How a defendant committed the offense "makes no difference." *Id.* at 2251. An overbroad indivisible offense is not a crime of violence. *Id.* 136 S. Ct. at 2248-49.

Conspiracy under 18 U.S.C. § 371 does not require violent force as an element. Instead, to prove a conspiracy under § 371, the government must merely show: "(1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime." *United States v. Kaplan*, 836 F.3d 1199, 1212 (9th Cir. 2016); *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000).

The crime of conspiracy under § 371 is therefore complete as soon as an overt act is committed, which could be well before the objective offense ever takes place. Under general principles of conspiracy law, an overt act need not be violent or even "be itself a crime." *Braverman v. United States*, 317 U.S. 49, 53 (1942); *see* 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.2(b), at 372-377 (3d ed. 2018).

Instead, the defendant or one of the co-conspirators must simply "do any act to effect the object of the conspiracy." 18 U.S.C. § 371.

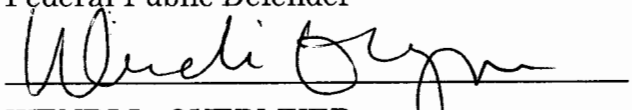
The elements clause focuses on whether "the offense" has "as an element" the use, attempted use, or threatened use of violent force. Conspiracy does not satisfy the elements clause because, to secure a conspiracy conviction, the government need not prove that *anyone*—not the defendant or anyone else involved in the conspiracy—ever used, attempted, or threatened to use force against another.

Therefore, certiorari is necessary to resolve whether federal conspiracy, 18 U.S.C. § 371, qualifies as a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A).

Conclusion

For the above reasons, Petitioner Myrie respectfully suggests this Court grant the petition, vacate the denial of a certificate of appealability, and remand for further proceedings in light of *Davis*. In the alternative, this Court should grant plenary review to ensure all circuits appropriately vacate § 924(c) convictions that rest on a non-qualifying conspiracy offense.

Respectfully submitted,
RENE VALLADARES
Federal Public Defender



WENDI L. OVERMYER
Assistant Federal Public Defender
Office of the Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Wendi_Overmyer@fd.org