

No. 19-5392

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IN THE SUPREME COURT OF THE UNITED STATES

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KURT J. MYRIE, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 11-15) that his conviction under 18 U.S.C. 924(c), for brandishing a firearm during and in relation to a "crime of violence," is invalid in light of United States v. Davis, 139 S. Ct. 2319 (2019), in which this Court recently concluded that the definition of a "crime of violence" in 18 U.S.C. 924(c) (3) (B) is unconstitutionally vague. 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. A federal grand jury charged petitioner with conspiracy to commit bank robbery, in violation of 18 U.S.C. 2113(a) and 371 (Count 1); armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d) (Count 2); and two counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Superseding Indictment 1-4. The first Section 924(c) count (Count 3) identified the conspiracy to commit bank robbery charged in Count 1 as the predicate crime of violence, whereas the second Section 924(c) count (Count 4) identified both the conspiracy to commit bank robbery charged in Count 1 and the armed bank robbery charged in Count 2 as the predicate crimes of violence. Id. at 3-4.

Before trial, one of petitioner's co-defendants filed a motion to dismiss Count 4, asserting that the inclusion of conspiracy to commit bank robbery as a predicate offense in both Section 924(c) counts was impermissibly duplicitous. D. Ct. Doc. 48, at 2-3 (Nov. 29, 2007). The government noted that the co-defendant's claim was more properly viewed as a claim that the two counts were multiplicitous, not that a single count was duplicitous, and argued that the district court could resolve any multiplicity problem by "consolidat[ing]" the two counts. D. Ct. Doc. 58, at 4 (Dec. 4, 2007). The district court agreed that it would instruct the jury solely on Count 4, which identified armed bank robbery and conspiracy to commit bank robbery as predicate

crimes of violence, thereby effectively eliminating Count 3 as a separate charge. 12/10/07 Tr. 15-20. Although petitioner asserts (Pet. 6) that "[d]efense counsel opposed consolidation," the only objection was raised by petitioner's co-defendant, and petitioner himself did not object to the district court's resolution of his co-defendant's claim. 12/10/07 Tr. 15-20.

Petitioner pleaded guilty to all charges. Judgment 1. During the plea colloquy, petitioner admitted that he "committed the crimes charged in the three consolidated \* \* \* counts of the indictment," and specifically admitted that the government could prove beyond a reasonable doubt that he knowingly brandished a gun during either the "conspiracy to commit bank robbery \* \* \* as charged in Count One" or the "armed bank robbery as charged in Count Two." 12/14/07 Tr. 9, 12. Petitioner further admitted that his guilty plea to the consolidated Section 924(c) count was based on his having possessed a gun with the intent to use it during a bank robbery, "brandished the gun" "in a threatening [manner]" after entering the bank, and used the gun to "order[ ] people around, in the process of committing bank robbery." Id. at 22.

The district court sentenced petitioner to 194 months of imprisonment, consisting of concurrent terms of 60 months of imprisonment on the conspiracy offense and 110 months of imprisonment on the armed bank robbery offense, followed by a consecutive term of 84 months of imprisonment on the consolidated

Section 924(c) offense. Judgment 2. The court of appeals affirmed, 351 Fed. Appx. 248, and this Court denied a petition for a writ of certiorari, 559 U.S. 1057 (No. 09-9479). Petitioner subsequently filed a motion for postconviction relief under 28 U.S.C. 2255, D. Ct. Doc. 189 (Aug. 9, 2011), which the district court denied, D. Ct. Doc. 195 (July 11, 2012).

2. In 2016, petitioner filed a second-or-successive motion for postconviction relief under Section 2255, in which he contended that armed bank robbery and conspiracy to commit bank robbery do not qualify as crimes of violence under Section 924(c). D. Ct. Doc. 216, at 3-4 (June 22, 2016) (Second 2255 Motion); see D. Ct. Doc. 246, at 5-21 (Sept. 8, 2017) (Supplemental Second 2255 Motion). 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 argued that armed bank robbery and conspiracy to commit bank robbery do not qualify as crimes of violence under Section 924(c)(3)(A), and that Section 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015), in which this Court 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 Motion 3-4; Supplemental Second 2255 Motion 5-21.

The district court denied petitioner's motion and denied his request for a certificate of appealability (COA). D. Ct. Doc. 226, at 1-4 (Jan. 4, 2017) (Order); see Pet. App. 1-2 (denying supplemental motion). The court explained that, "even assuming for the sake of argument" that Section 924(c)(3)(B) was unconstitutionally vague, petitioner's conviction on the consolidated Section 924(c) count would remain valid because the predicate offense of armed bank robbery "categorically satisfies the physical-force clause" of Section 924(c)(3)(A). Order 3; see id. 3-4 (noting that federal courts "have uniformly ruled" that bank robbery requires the use, attempted use, or threatened use of physical force, and citing cases); Pet. App. 2 (noting that, "[s]ince [petitioner] first filed his motion," the Ninth Circuit had joined the other courts of appeals in holding "that bank robbery remains a categorical 'crime of violence' under the physical force clause of § 924(c)(3)(A), regardless of [whether] § 924(c)(3)(B)" is vague) (citing United States v. Watson, 881 F.3d 782 (9th Cir.) (per curiam), cert. denied, 139 S. Ct. 203 (2018)).

The court of appeals denied a COA. Pet. App. 3. The court cited its decision in United States v. Watson, supra, which found

that bank robbery is categorically a crime of violence under Section 924(c)(3)(A), and determined that petitioner therefore could not make the "substantial showing of the denial of a constitutional right," necessary to obtain a COA. Ibid. (quoting 28 U.S.C. 2253(c)(2)).

3. The lower courts correctly determined that armed bank robbery qualifies as a crime of violence under Section 924(c)(3)(A). A conviction for armed bank robbery requires proof that the defendant (1) took or attempted to take money from the custody or control of a bank "by force and violence, or by intimidation," 18 U.S.C. 2113(a); and (2) 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). For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Lloyd v. United States, cert. denied, 139 S. Ct. 1167 (2019) (No. 18-6269), that offense 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 6-13, Lloyd, supra (No. 18-6269).<sup>1</sup> Every court of appeals to have considered the question has so held. See id. at 8-9. This Court

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<sup>1</sup> We have served petitioner with a copy of the government's brief in opposition in Lloyd.

has recently and repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on the application of Section 924(c)(3)(A) -- and similarly worded federal statutes and provisions of the Sentencing Guidelines -- to bank robbery and armed bank robbery.<sup>2</sup>

Petitioner does not dispute that armed bank robbery qualifies as a "crime of violence" under Section 924(c)(3)(A). Rather, he asserts (Pet. 8) that conspiracy to commit bank robbery was the only crime of violence he admitted in connection with his guilty plea to a Section 924(c) offense. That assertion is incorrect. As explained above, p. 3, supra, the district court specifically advised petitioner during his plea colloquy that the consolidated

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<sup>2</sup> See, e.g., Lockwood v. United States, 139 S. Ct. 2648 (2019) (No. 18-8799) (armed bank robbery); Cirino v. United States, 139 S. Ct. 2012 (2019) (No. 18-7680) (armed bank robbery); Winston v. United States, 139 S. Ct. 1637 (2019) (No. 18-8525) (armed bank robbery); Hearn v. United States, 139 S. Ct. 1620 (2019) (No. 18-7573) (armed bank robbery); Landingham v. United States, 139 S. Ct. 1620 (2019) (No. 18-7543) (armed bank robbery); Scott v. United States, 139 S. Ct. 1612 (2019) (No. 18-8536) (armed bank robbery); Lloyd, supra (No. 18-6269) (armed bank robbery); Johnson v. United States, 139 S. Ct. 647 (2018) (No. 18-6499) (bank robbery); Faurisma v. United States, 139 S. Ct. 578 (2018) (No. 18-6360) (armed bank robbery); Cadena v. United States, 139 S. Ct. 436 (2018) (No. 18-6069) (bank robbery); Patterson v. United States, 139 S. Ct. 291 (2018) (No. 18-5685) (bank robbery); Watson v. United States, 139 S. Ct. 203 (2018) (No. 18-5022) (armed bank robbery); Perry v. United States, 138 S. Ct. 1439 (2018) (No. 17-6611) (armed bank robbery); Schneider v. United States, 138 S. Ct. 638 (2018) (No. 17-5477) (bank robbery); Castillo v. United States, 138 S. Ct. 638 (2018) (No. 17-5471) (bank robbery); Stephens v. United States, 138 S. Ct. 502 (2017) (No. 17-5186) (armed bank robbery).

Section 924(c) count was predicated on both armed bank robbery and conspiracy to commit bank robbery as charged in the other two counts, to which petitioner also pleaded guilty. 12/14/07 Tr. 9, 12. Petitioner also specifically admitted that the Section 924(c) count was based on his possession of a gun with the intent to use it during a bank robbery, that he "brandished the gun" "in a threatening [manner]" after entering the bank, and that he used it to "order[ ] people around, in the process of committing bank robbery." Id. at 21-22.<sup>3</sup>

Petitioner's Section 924(c) conviction was therefore valid under Section 924(c)(3)(A) regardless of the retroactivity of Davis or whether his conspiracy offense qualified as a "crime of violence" under Section 924(c)(3)(B). 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), and

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<sup>3</sup> Petitioner's contention (Pet. 6-7) that the grand jury did not charge armed bank robbery as a predicate crime of violence underlying the charged Section 924(c) offense is incorrect. As explained above, p. 2, supra, Count 4 of the superseding indictment identified both armed bank robbery and conspiracy to commit bank robbery as predicate crimes of violence underlying the Section 924(c) offense. See Superseding Indictment 4. The district court's decision to "consolidate" that count with Count 3 merely eliminated a redundant allegation in Count 3, without substantively changing Count 4. See 12/10/07 Tr. 15-20. Petitioner did not object to that course, and he pleaded guilty to the Section 924(c) offense charged in Count 4. See pp. 2-3, supra.

no reason exists to remand this case to the court of appeals in light of that decision.

The petition for a writ of certiorari should be denied.<sup>4</sup>

Respectfully submitted.

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Solicitor General

SEPTEMBER 2019

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<sup>4</sup> The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.