NO.

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS LEWIS AND
DERRICK YOUNG,

Petitioners,

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

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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 defendant's raising motions to vacate their sentences under 28 U.S.C. § 2255?

2. In cases with an ambiguous record as to the predicate crime of violence, can a conviction under 18 U.S.C. § 924(c) stand where one of the possible predicates—federal conspiracy under 18 U.S.C. § 371—no longer qualifies as a crime of violence?

Table of Contents

Table of Authorities

Federal Cases

Federal Statutes

U.S. Constitution

Federal Rules

Secondary Sources

Petition for Certiorari

Petitioners Thomas Lewis and Derrick Young jointly petition for a writ of certiorari to review judgments of the United States Court of Appeals for the Ninth Circuit. A joint petition is proper under Supreme Court Rule 12.4, as Petitioners each challenge an order from the same court on the same issues. In light of *United States v. Davis*, 139 S. Ct. 2319 (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), Petitioners asks this Court to grant certiorari, vacate the Ninth Circuit's denials of certificates of appealability, and remand for further proceedings.

Orders Below

The orders denying Petitioners' 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. Lewis*, No. 2:13-cr-00149-KJD-CWH, 2018 WL 3146790 (D. Nev. June 26, 2018), *appeal denied*, No. 18-16412 (9th Cir. Dec. 20, 2018), *and reconsideration denied*, No. 18-16412 (9th Cir. Feb. 27, 2019); and *United States v. Young*, 2:13-cr-00149-KJD-CWH, 2018 WL 3577227 (D. Nev. July 25, 2018), *appeal denied*, No. 18-16602 (9th Cir. Dec. 20, 2018), *and reconsideration denied*, No. 18-16602 (9th Cir. Feb. 27, 2019).

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final orders in Petitioners' cases on February 27, 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. *Lewis, et al., 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 –
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> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
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> (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.
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> 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. Petitioners jointly request 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. In cases with an ambiguous record as to the predicate crime of violence, can a conviction under 18 U.S.C. § 924(c) stand where one of the possible predicates—federal conspiracy under 18 U.S.C. § 371—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. Thus, remand is necessary as the Petitioners challenges to their respective 18 U.S.C. §924(c) convictions were

both timely filed and meritorious. Lewis and Young are each serving seven-year mandatory, consecutive prison sentences for unconstitutional § 924(c) convictions.

In ambiguous record cases, the original proceedings do not clearly establish the predicate count upon which the § 924(c) count rests. Lewis and Young were convicted of both federal conspiracy under 18 U.S.C. § 371, and federal armed bank robbery under 18 U.S.C. § 2113. But it is unclear whether their § 924(c) counts are predicated on conspiracy or armed bank robbery. 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. 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. When the record does not clearly establish which offense serves as the crime of violence, courts must presume the § 924(c) count rests on the non-qualifying offense, and the § 924(c) conviction cannot stand.

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), Petitioners respectfully request this Court grant certiorari, vacate the denials of certificates 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 record is ambiguous as to whether the conviction rests on a non-qualifying conspiracy offense.

Related Cases Pending in this Court

The conspiracy predicate issue herein is also raised in another case arising from the Ninth Circuit, in a petition for writ of certiorari to be filed today, June 26, 2019. *See Kurt Myrie v. United States*, No. 18A1226 (U.S.) (extension request).

Statement of the Cases

Petitioners are serving a combined 21 years in federal prison, 14 years of which are unconstitutional. The Petitioners' federal conspiracy convictions are not crimes of violence under 18 U.S.C. § 924(c)(3)(A)'s elements clause. Because the record is ambiguous whether each Petitioner's § 924(c) count rests on federal conspiracy, the convictions must be vacated. Petitioners jointly request certiorari to correct the Ninth Circuit's deviation from established federal law regarding predicate counts for a § 924(c) charge.

I. Mandatory, consecutive sentences for use of a firearm during federal conspiracy.

Petitioners were each convicted of federal conspiracy under 18 U.S.C. § 371, armed bank robbery under 18 U.S.C. § 2113(a) and (d), and one count of using a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c). Prior to 2015, each Petitioner received various prison terms on the non-§ 924(c) counts, and a 7-year mandatory consecutive sentence on the § 924(c) counts, as follows:

- **Thomas Lewis**: Pled guilty and sentenced to 57 months for conspiracy (Count One), armed bank robbery (Count Two), to run concurrently, and an **84-month mandatory, consecutive sentence for § 924(c) (Count Three)**, for a total of 141 months in prison. The superseding indictment, plea agreement, and plea colloquy are ambiguous as to whether the § 924(c) count rests on conspiracy (Count One) or armed bank robbery (Count Two). The Ninth Circuit affirmed the sentences on direct appeal. *United States v. Lewis*, 608 F. App'x 471 (9th Cir. 2015).

- **Derrick Young**: Pled guilty and sentenced to 37 months for armed bank robbery (Count Two), and an **84-month mandatory, consecutive sentence for § 924(c) (Count Three)**, for a total of 121 months in prison. The superseding indictment, plea agreement, and plea colloquy are ambiguous as to whether the § 924(c) count rests on federal conspiracy (Count One) or armed bank robbery (Count Two). No direct appeal taken.

The record in each case is ambiguous as to whether the § 924(c) count rests on federal conspiracy.

II. Petitioners seek 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 36.

Each Petitioner, represented by the Federal Public Defender for the District of Nevada, filed timely motions to vacate under 28 U.S.C. § 2255, in light of *Johnson*. The motions to vacate argued that: § 924(c)(3)(B)'s residual clause is void for vagueness; federal conspiracy is not a crime of violence under 18 U.S.C. § 924(c)(3)(A); and the record is ambiguous as to whether federal conspiracy is the underlying count for the § 924(c) conviction. Each Petitioner was denied relief in both the district court and the Ninth Circuit, as follows:

- **Thomas Lewis**: The district court denied Lewis's motion to vacate and denied a certificate of appealability on June 26, 2018. The Ninth Circuit denied a certificate of appealability on December 20, 2018, and declined to reconsider on February 27, 2019.

- **Derrick Young**: The district court denied Young's motion to vacate and denied a certificate of appealability on July 25, 2018. The Ninth Circuit denied a certificate of appealability on December 20, 2018, and declined to reconsider on February 27, 2019.

Each denial for post-conviction relief rests on the finding that bank robbery remains a crime of violence under § 924(c)'s elements clause. The district courts did not address the Petitioners' unrebutted arguments that conspiracy under 18 U.S.C. § 371 does not satisfy § 924(c)'s elements clause. In Petitioners' denials, the district court stated—in a footnote—the record was not ambiguous without further explanation. And in each of the Petitioners' appeal denials, the Ninth Circuit did not address whether conspiracy under 18 U.S.C. § 371 satisfies § 924(c)'s elements clause, or whether the records below are ambiguous as to the predicate § 924(c) count.

The Petitioners remain in federal custody serving their respective unconstitutional sentences. Lewis's estimated release date is July 8, 2023, and Young's estimated release date is March 2, 2022. Each Petitioner is therefore eligible for immediate release should their respective § 924(c) sentences be vacated.

Argument

I. Certiorari is necessary to resolve whether *United States v. Davis*, 139 S. Ct. 2319 (2019), retroactively invalidated 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—
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> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
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> (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*—issued after the Ninth Circuit denials in Petitioners' cases—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*, Petitioners jointly request this Court grant certiorari on the closely aligned issue of whether *Davis*'s decision applies retroactively.

II. Certiorari is necessary to ensure all circuits appropriately vacate § 924(c) convictions where the record is ambiguous as to whether the conviction rests on a non-qualifying conspiracy offense.

The predicate for each of the Petitioner's § 924(c) count is ambiguous. The Ninth Circuit failed to address this ambiguity. The record does not clearly establish that the § 924(c) predicate crime of violence was armed bank robbery, as opposed to conspiracy. Because conspiracy does not qualify as a crime of violence under § 924(c)'s elements clause, Petitioners' convictions and sentences for their § 924(c) counts are unconstitutional and must be vacated.

A. 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*.

The two Circuits to address this issue 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. filed* (U.S. Jan. 29, 2019) (No. 18-989).[1]

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 has 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); Fourth Circuit, *see United States v. Simms*, 914 F.3d 229, 233 (4th Cir. 2019) (en banc) (noting concession); Fifth Circuit, *see United States v. Lewis*, 907 F.3d 891, 894 (5th Cir. 2018) (same), *cert. denied*, No. 18-989, 2019 WL 358452 (U.S. June 28, 2019); and D.C. Circuit, *see United States v. Eshetu*, 898 F.3d 36, 38 n.2 (D.C. Cir. 2018)

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1 District courts have also found that conspiracy, 18 U.S.C. § 371, is not a crime of violence under § 924(c)'s elements clause. *See 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, 2019) (holding that conspiracy under 18 U.S.C. § 372 is not a crime of violence under §924(c)'s elements clause).

(noting concession that only the residual clause was at issue), *reh'g en banc denied* (Feb. 19, 2019).

Similarly, just this week the Ninth Circuit granted post-*Davis* relief where the defendants' § 924(c) convictions were predicated on conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO conspiracy) and conspiracy to commit murder in aid of racketeering (VICAR conspiracy). *See United States v. Cruz-Ramirez*, No. 11-10632, ---Fed. App'x----, 2019 WL 3249880 (9th Cir. July 19, 2019) (unpublished) (granting relief on direct appeal); *United States v. Carcamo*, No. 17-16825, ---Fed. App'x----, 2019 WL 3302360 (9th Cir. July 23, 2019) (unpublished) (granting relief on collateral review).

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)); 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 18 U.S.C. § 371, the government must prove: "(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 has been committed, which could be well before the objective offense ever takes place. Under general principles of conspiracy law, however, 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).

B. Certiorari is necessary to uphold this Court's precedent that ambiguity about the predicate crime of violence offense must be resolved in Petitioners' favor.

The government bears the burden to "clearly establish" the statute of conviction for a predicate crime of violence. *See, e.g.*, *United States v. Matthews*, 278 F.3d 880, 884 (9th Cir. 2002) (en banc) (remanding for resentencing without ACCA enhancement where district court did not properly find the underlying statutes of conviction); *see also Taylor v. United States*, 495 U.S. 575, 602 (1990) (recognizing that the government is the party that seeks to use a conviction for sentencing enhancement purposes). To determine the statute of conviction for a predicate offense, a district court may examine a limited number of court documents: "the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy or some comparable judicial record . . . ." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (quoting *Shepard v. United States*, 544 U.S. 13, 26 (2005)). These judicial documents are commonly called "*Shepard* documents."

Shepard documents must establish with "certainty" that the defendant's conviction rested on a predicate offense "necessarily" including the elements required to constitute a crime of violence. *Shepard*, 544 U.S. at 24-25. When there is ambiguity about which statute serves as the crime-of-violence predicate, the government has not met its burden and the conviction cannot stand. "The problem," this Court has explained, "is that what the [district] court has been

required to find is debatable." *Shepard*, 544 U.S. at 25 (alteration and internal quotation marks omitted). For example, in *Taylor*, this Court vacated a sentencing enhancement under the ACCA where the record was too "sparse" to identify the statutes under which the defendant was previously convicted. 495 U.S. at 602.

Consulting the *Shepard* documents here reveals ambiguity about whether the § 924(c) predicate crime of violence for each Petitioner was conspiracy to commit armed bank robbery or armed bank robbery. *Supra*, at 6. Because at least one of the possible underlying offenses does not qualify as a "crime of violence" under § 924(c), Petitioners' convictions and sentences for their § 924(c) counts are unconstitutional.

This Court instructs that a "general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." *Zant v. Stephens*, 462 U.S. 862, 881 (1983). This Court's decision in *Stromberg v. California*, 283 U.S. 359 (1931), set forth this constitutional rule, which is sometimes referred to as the "*Stromberg* principle." *See United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017), *abrogated on other grounds by Stokeling*, 139 S. Ct. 544.

Applying the *Stromberg* principle here, if one of the underlying convictions qualifies as a "crime of violence" but the other does not, constitutional error occurred because the conviction may rest on the unconstitutional alternative. *Hedgpeth v. Pulido*, 555 U.S. 57, 62 (2008). The government cannot meet its burden

to prove beyond a reasonable doubt that such error was harmless, i.e. that any constitutional error did not have a "substantial and injurious effect" on the conviction and sentence. *O'Neal v. McAninch*, 513 U.S. 432, 435-36 (1995).

At least one Circuit applies similar constitutional principles in the *Johnson* post-conviction context. The Eleventh Circuit, in *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016), analyzed an indictment charging numerous predicates for a § 924(c) count, including two drug trafficking offenses, Hobbs Act robbery, attempted Hobbs Act robbery, and Hobbs Act conspiracy. *Id.* at 1226-27. In granting the defendant's application for a second or successive motion under 28 U.S.C. § 2255, the Eleventh Circuit recognized that when one of the potential predicates for a § 924(c) offense no longer qualifies as a crime of violence, post-conviction relief may be warranted. Because Hobbs Act conspiracy may no longer qualify as a crime of violence post-*Johnson*, and conspiracy may have been the predicate for the § 924(c) count, the issue met the standard for filing a second or successor § 2255 motion. *In re Gomez*, 830 F.3d at 1228.

To so conclude, *Gomez* relied in part on this Court's decision in *Alleyne v. United States*, 570 U.S. 99, 112 (2013). *Alleyne* addressed whether the judge or the jury must find the defendant "brandished" a firearm for purposes of a § 924(c)(1)(A) conviction. 570 U.S. at 104. This Court concluded the jury must make such a finding: "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Id.* at 103. Because "the fact of brandishing aggravates the legally prescribed range of

allowable sentences, it constitutes an element of a separate, aggravated offense that must be found by the jury, regardless of what sentence the defendant might have received if a different range had been applicable." *Id.* at 115.

The Eleventh Circuit recognized that *Alleyne* applies when a record is unclear as to what predicate underlies a § 924(c) count. The "lack of specificity" regarding the § 924(c) predicate violated *Alleyne* "because § 924(c) 'increases [the] mandatory minimum' based on a finding that the defendant 'used or carried a firearm' (mandatory minimum of five years), 'brandished" a firearm (seven years), or 'discharged' a firearm (ten years)." *In re Gomez*, 830 F.3d at 1227. "An indictment that lists multiple predicates in a single § 924(c) count allows for a defendant's mandatory minimum to be increased without the unanimity *Alleyne* required." *In re Gomez*, 830 F.3d at 1227. The Circuit provided examples of problematic jury findings:

> For example, half of the jury may have believed that Gomez used the gun at some point during his Hobbs Act conspiracy, and the other half that he did so only during the drug trafficking offense. The way Gomez's indictment is written, we can only guess which predicate the jury relied on.

Id. at 1228.

The Eleventh Circuit also recognized that duplicity principles prohibit multiple predicates for a § 924(c) conviction because a jury may convict a defendant without unanimously agreeing on the same offense and a defendant may be prejudiced in a subsequent double jeopardy defense. *Id.* at 1227. "Gomez's indictment, which lists 'a crime of violence and a drug trafficking crime' as the

companion convictions for his § 924(c) offense, suffers from this infirmity." *Id.* "[B]ecause the jurors had multiple crimes to consider in a single count, so they could have convicted Gomez of the § 924(c) offense without reaching unanimous agreement on during which crime it was that Gomez possessed the firearm." *Id.* "Or, they could have unanimously agreed that he possessed a firearm at some point during the Hobbs Act conspiracy, but not during the drug trafficking crime." *Id.* "Either way, a general verdict of guilty does not reveal any unanimous finding by the jury that the defendant was guilty of conspiring to carry a firearm during one of the potential predicate offenses, all of [the] predicate offenses, or guilty of conspiring during some and not others." *Id.*

For the reasons explained by the Eleventh Circuit in *Gomez*, the lack of specificity as to the predicate crimes of violence underlying Petitioners' § 924(c) convictions renders these convictions infirm. Petitioners' ambiguous records lack any assurance, much less the requisite certainty the categorical analysis demands, that their § 924(c) convictions rest on a constitutional predicate. As a result, Petitioners' § 924(c) convictions violate: (1) the Due Process Clause; and (2) the United States laws and result in a fundamental miscarriage of justice. Therefore, Petitioners are entitled to a vacatur of their unlawful § 924(c) convictions under 28 U.S.C. § 2255.

For a certificate of appealability (COA) to issue, a petitioner need only demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the

issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 481 (2000)). This threshold inquiry "do[es] not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Id.* at 338. Rather, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*

Before the district courts and the Ninth Circuit, Petitioners argued § 924(c)'s residual clause was unconstitutional under *Johnson*, conspiracy under 18 U.S.C. § 371 does not satisfy § 924(c)'s elements clause, and the records were ambiguous as to whether Petitioners' § 924(c) convictions were unlawfully predicated upon conspiracy as a crime of violence. At a minimum, Petitioners made the threshold demonstration that reasonable jurists could debate the merits of the petition, warranting a certificate of appealability.

Conclusion

For the above reasons, Petitioners respectfully suggest this Court grant the petition, vacate the denials of certificates of appealability, and remand for reconsideration in light of *Davis*. In the alternative, this Court should grant plenary review to ensure all circuits appropriately vacate § 924(c) convictions where the record is ambiguous as to whether the conviction rests on a non-qualifying offense.

Respectfully submitted,
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