

No. 19-6108

IN THE SUPREME COURT OF THE UNITED STATES

COREY KIDD, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-6108

COREY KIDD, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 6-15) that his conviction under 18 U.S.C. 924(c)(1)(A) is invalid because his predicate offense -- armed robbery involving controlled substances, in violation of 18 U.S.C. 2118(a) and (c)(1) -- does not qualify as a "crime of violence" under 18 U.S.C. 924(c)(3). That contention lacks merit. The petition for a writ of certiorari should be denied.

1. Following a guilty plea, petitioner was convicted of armed robbery involving controlled substances, in violation of 18 U.S.C. 2118(a) and (c)(1), and using or carrying a firearm during and in relation to a crime of violence (the armed robbery), in violation of 18 U.S.C. 924(c)(1)(A). Judgment 1. The district

court sentenced petitioner to 155 months of imprisonment, consisting of 71 months of imprisonment on the armed robbery count and a consecutive term of 84 months of imprisonment on the Section 924(c) count. Judgment 2. Petitioner did not appeal.

In 2016, petitioner filed a motion for post-conviction relief under 28 U.S.C. 2255, in which he contended that armed robbery involving controlled substances does not qualify as a crime of violence for purposes of Section 924(c). D. Ct. Doc. 162, at 6-17 (June 22, 2016) (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 robbery involving controlled substances does not qualify as a crime 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), which held that the "residual clause" of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness, 135 S. Ct. at 2557. See 2255 Motion 6-17. The district court denied petitioner's motion but granted him a certificate of appealability. D. Ct. Doc. 170, at 1-2 (May 23, 2018).

The court of appeals affirmed. Pet. App. 1a-4a. The court observed that the elements of armed robbery involving controlled substances are, in relevant respects, identical to the elements of other federal robbery offenses, including bank robbery, that the court had previously determined "categorically qualif[y]" as crimes of violence under Section 924(c) (3) (A). Id. at 3a. The court determined that armed robbery involving controlled substances likewise qualifies as a crime of violence under Section 924(c) (3) (A). For that reason, the court additionally determined that petitioner was not entitled to relief under this Court's decision in United States v. Davis, 139 S. Ct. 2319 (2019), which held that the alternative definition of a "crime of violence" in Section 924(c) (3) (B) is unconstitutionally vague. See Pet. App. 3a.

2. The court of appeals correctly determined that armed robbery involving controlled substances qualifies as a crime of violence under Section 924(c) (3) (A). A conviction for armed robbery involving controlled substances requires (among other things) proof that the defendant (1) took or attempted to take a controlled substance "from the person or presence of another by force or violence or by intimidation," 18 U.S.C. 2118(a); and (2) used "a dangerous weapon or device" to "assault[] any person, or put[] in jeopardy the life of any person" in the course of committing the offense, 18 U.S.C. 2118(c) (1). As the court of

appeals explained (Pet. App. 3a), and as petitioner acknowledges (Pet. 6-7), the elements of that offense are, for relevant purposes, indistinguishable from the elements of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (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, No. 18-6269 (Jan. 9, 2019), armed bank robbery -- and thus armed robbery involving controlled substances -- 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) (explaining the application of Section 924(c)(3)(A) to armed bank robbery).¹ Every court of appeals to have considered the question as to armed bank robbery has so held. See id. at 8-9. This Court 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.²

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

² See, e.g., Myrie v. United States, No. 19-5392 (Nov. 4, 2019) (armed bank robbery); 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

Petitioner's challenge to the determination that armed robbery involving controlled substances is a crime of violence, which is based almost exclusively on cases involving bank robbery (Pet. 7-13), likewise does not warrant this Court's review.

3. Petitioner further contends (Pet. 13-15) that his conviction for armed robbery involving controlled substances does not qualify as a crime of violence under Section 924(c)(3)(A) because he was charged with that offense under an aiding-and-abetting theory. For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Mojica v. United States, No. 19-35 (Nov. 22, 2019), aiding and abetting armed robbery qualifies as a crime of violence under Section 924(c)(3)(A). See Br. in Opp. at 8-10, Mojica, supra

(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 v. United States, 139 S. Ct. 1167 (2019) (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).

(No. 19-35).³ Every court of appeals to have considered the question has determined that aiding and abetting a crime that has the requisite element of force under Section 924(c)(3)(A) and similar provisions qualifies as a crime of violence, see id. at 9-10 (citing cases), including the court of appeals in this case, see Pet. App. 3a. This Court has previously denied review of that issue. See Br. in Opp. at 10, Mojica, supra (No. 19-35) (citing cases). The same result is appropriate here.

The petition for a writ of certiorari should be denied.⁴

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

DECEMBER 2019

³ We have also served petitioner with a copy of the government's brief in opposition in Mojica.

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