No. 19-7569

IN THE SUPREME COURT OF THE UNITED STATES

STANLEY NOEL AMES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether bank robbery, in violation of 18 U.S.C. 2113(a), and armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), are "crime[s] of violence" under 18 U.S.C. 924(c)(3)(A).

2. Whether Dean v. United States, 137 S. Ct. 1170 (2017), announced a substantive rule that applies retroactively on collateral review.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Or.):

Knutson v. United States, No. 00-cv-6049 (Mar. 1, 2000)

United States v. Knutson, No. 98-cr-60019 (Mar. 17, 2000)

United States v. Dawson, No. 03-cr-410 (Nov. 4, 2005)

United States v. Dawson, No. 04-cr-10 (Nov. 4, 2005)

United States v. Dawson, No. 05-cr-73 (Nov. 4, 2005)

Knutson v. United States, No. 02-cv-6287 (Mar. 13, 2006)

United States v. Rich, No. 08-cr-60126 (Sept. 16, 2009)

United States v. Wilcoxson, No. 10-cr-487 (Aug. 21, 2012)

United States v. Ames, No. 10-cr-487 (Aug. 22, 2012)

McGowan v. United States, No. 12-cv-397 (Sept. 16, 2014)

Knutson v. United States, No. 6:16-cv-1249 (Aug. 22, 2017)

Ames v. United States, No. 16-cv-1246 (Feb. 15, 2018)

Wilcoxson v. United States, No. 16-cv-1269 (Feb. 15, 2018)

Dawson v. United States, No. 16-cv-1284 (Feb. 27, 2018)

Dawson v. United States, No. 16-cv-1285 (Feb. 27, 2018)

Dawson v. United States, No. 16-cv-1287 (Feb. 27, 2018)

McGowan v. United States, No. 17-cv-406 (Apr. 24, 2018)

Rich v. United States, No. 16-cv-1271 (May 23, 2018)

Knutson v. United States, No. 16-cv-2415 (July 18, 2018)

United States Court of Appeals (9th Cir.):

United States v. Knutson, No. 00-30196 (May 24, 2001)

Knutson v. United States, No. 01-35962 (Mar. 15, 2002)

Knutson v. United States, No. 06-35315 (July 25, 2006)

United States v. Dawson, Nos. 05-30559, 05-30560, 05-30573 (consolidated) (Nov. 15, 2006)

United States v. McGowan, No. 14-35893 (Apr. 16, 2015)

McGowan v. United States, No. 16-72134 (Mar. 13, 2017)

Knutson v. United States, No. 16-72112 (Mar. 14, 2017)

United States v. McGowan, No. 18-35402 (July 31, 2019)

United States v. Ames, No. 18-35134 (Oct. 21, 2019)

United States v. Wilcoxson, No. 18-35135 (Oct. 21, 2019)

United States v. Dawson, Nos. 18-35179, 18-35180, 18-35181 (consolidated) (Oct. 21, 2019)

United States v. Knutson, No. 18-35618 (Nov. 20, 2019)

United States v. Rich, No. 18-35451 (Nov. 22, 2019)

Supreme Court of the United States:

Knutson v. United States, No. 01-6565 (Nov. 13, 2001)

Knutson v. United States, No. 06-7849 (Jan. 8, 2007)

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1-2, 16-17, 31-32, 46, 52) are not published in the Federal Reporter. Three of the opinions are reprinted at 782 Fed. Appx. 606 (Ames), 780 Fed. Appx. 548 (Wilcoxson), and 780 Fed. Appx. 549 (Dawson).[1]

JURISDICTION

The judgments of the court of appeals with respect to petitioners Ames, Wilcoxson, and Dawson were entered on October

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[1] Pursuant to this Court's Rule 12.4, petitioners Ames, Wilcoxson, Dawson, Knutson, and Rich have filed a single petition for a writ of certiorari challenging separate judgments from the same court of appeals presenting closely related questions. See Pet. ii.

21, 2019. The judgment of the court of the appeals with respect to petitioner Knutson was entered on November 20, 2019. The judgment of the court of appeals with respect to petitioner Rich was entered on November 22, 2019. The petition for a writ of certiorari was filed on January 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in the United States District Court for the District of Oregon, petitioners Ames, Wilcoxson, and Dawson were convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); additional crimes specific to each petitioner; and using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). Ames C.A. E.R. 90 (Ames Excerpts); Wilcoxson C.A. E.R. 88 (Wilcoxson Excerpts); Dawson C.A. E.R. 134-135, 140 (Dawson Excerpts). Following a jury trial in the United States District Court for the District of Oregon, petitioner Knutson was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and additional offenses. Knutson Judgment 1. Following a guilty plea in the United States District Court for the District of Oregon, petitioner Rich was convicted of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). Rich C.A. E.R. 64 (Rich Excerpts).

Petitioner Ames was sentenced to 220 months of imprisonment, to be followed by five years of supervised release. Ames Excerpts 92-93. Petitioner Wilcoxon was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Wilcoxson Excerpts 90-91. Petitioner Dawson was sentenced to 262 months of imprisonment, to be followed by five years of supervised release. Dawson Excerpts 130-131, 136-137, 141-142. Petitioner Knutson was sentenced to 475 months of imprisonment, to be followed by six years of supervised release. Knutson Judgment 2-3. Petitioner Rich was sentenced to 312 months of imprisonment, to be followed by five years of supervised release. Rich Excerpts at 65-66. Ames, Wilcoxson, and Rich did not appeal. The court of appeals affirmed as to Dawson and Knutson, and this Court denied Knutson's petition for a writ of certiorari. 207 Fed. Appx. 778 (Dawson); 9 Fed. Appx. 706, cert. denied, 534 U.S. 1029 (Knutson). In 2002, Knutson filed an unsuccessful motion for collateral relief under 28 U.S.C. 2255. See 98-cr-60019 D. Ct. Doc. 318, at 11 (Mar. 13, 2006).

In 2016, petitioners filed separate motions for postconviction relief under 28 U.S.C. 2255. The district court denied petitioners' motions but granted their requests for certificates of appealability (COAs). Pet. App. 3-15 (Ames), 18-30 (Wilcoxson), 33-45 (Dawson), 47-51 (Rich), 53-62 (Knutson). The court of appeals subsequently affirmed in each case. Id. at 1-2 (Ames), 16-17 (Wilcoxson), 31-32 (Dawson), 46 (Rich), 52 (Knutson).

1. Ames and Wilcoxson

a. In 2010, Ames and Wilcoxson robbed two branches of U.S. Bank in Portland, Oregon. Ames Presentence Investigation Report (PSR) ¶¶ 18, 26. During each robbery, Ames and Wilcoxson entered the bank wearing hooded sweatshirts and Guy Fawkes masks, brandished semiautomatic pistols, and fired their guns into the banks' ceilings in order to terrify bank employees and customers into submission. Ames PSR ¶¶ 15, 18-20, 26-27, 52. During one robbery, Ames confronted the bank's manager at gunpoint, forcing her to unlock a secure area. Ames PSR ¶¶ 20. During the other robbery, Ames pointed his gun at a customer who was cowering on the floor and said, "Let me in or I will shoot this fucker," while Wilcoxson ordered a group of bank employees to run out of the bank and threatened to shoot them if they did not comply. Ames PSR ¶¶ 28, 30. Ames and Wilcoxson stole approximately $23,000 during the robberies. After robbing each bank, Ames and Wilcoxson fled in getaway cars driven by Ames's girlfriend. Ames PSR ¶¶ 16, 22, 31, 105.

Police eventually identified Ames and Wilcoxson as suspects and arrested them. Ames PSR ¶¶ 34-38, 41. A search of Ames's house revealed Guy Fawkes masks, handguns, bulletproof vests, fake license plates, and other evidence linking them to the robberies. Ames PSR ¶¶ 39-40. A search of Wilcoxson's house revealed additional evidence, including an AR-15 assault rifle, three pistols, and a bulletproof vest. Ames PSR ¶ 42. Wilcoxson and Ames's girlfriend

confessed to their roles in the robberies and implicated Ames. Ames PSR ¶¶ 44-53.

A federal grand jury charged Ames and Wilcoxson with conspiracies to commit armed bank robbery, in violation of 18 U.S.C. 371; two counts of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); and two counts of using or carrying a firearm during and in relation to a crime of violence (specifically, the armed bank robberies), in violation of 18 U.S.C. 924(c)(1)(A). Ames Excerpts 135-141. The grand jury additionally charged Ames with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), and possessing body armor following conviction for a crime of violence, in violation of 18 U.S.C. 931(a)(2). Id. at 141-142.

Ames and Wilcoxson each pleaded guilty to the conspiracy count, the armed bank robbery counts, and one of the Section 924(c) counts. Ames Excerpts 131; Wilcoxson Excerpts 95. In their plea agreements, Ames and Wilcoxson waived their right to challenge their convictions or sentences on collateral review, except in circumstances involving claims of ineffective assistance of counsel, newly discovered evidence, or a sentencing range reduction by the Sentencing Commission. Ames Excerpts 133; Wilcoxson Excerpts 96-97. In exchange for the guilty pleas, the government agreed to dismiss the remaining counts of the indictment. Ames Excerpts 131; Wilcoxson Excerpts 95.

The district court accepted Ames's and Wilcoxson's guilty pleas. Ames Excerpts 90; Wilcoxson Excerpts 88. The court sentenced Ames to 220 months of imprisonment, consisting of concurrent sentences of 100 months of imprisonment on the armed bank robbery counts, a concurrent sentence of 60 months of imprisonment on the conspiracy count, and a mandatory consecutive statutory-minimum sentence of 120 months of imprisonment on the Section 924(c) count. Ames Excerpts 92. The court sentenced Wilcoxson to 180 months of imprisonment, consisting of concurrent terms of 60 months of imprisonment on the armed bank robbery and conspiracy counts and a mandatory consecutive statutory-minimum sentence of 120 months of imprisonment on the Section 924(c) count. Wilcoxson Excerpts 90. Neither Ames nor Wilcoxson appealed.

b. In 2016, Ames and Wilcoxson filed motions for postconviction relief under 28 U.S.C. 2255, in which they contended that their Section 924(c) convictions should be vacated on the theory that armed bank robbery is not a "crime of violence." Ames Excerpts 66-79; Wilcoxson Excerpts 66-79. Section 924(c) 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). Ames and Wilcoxson argued that armed bank robbery does not require proof of

the elements required by Section 924(c)(3)(A), and that Section 924(c)(3)(B) was 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. Ames Excerpts 66-79; Wilcoxson Excerpts 66-79.

Alternatively, Ames and Wilcoxson each contended that, even if their Section 924(c) convictions were valid, their sentences should be vacated under Dean v. United States, 137 S. Ct. 1170 (2017). Ames Excerpts 80-83; Wilcoxson Excerpts 80-83. In Dean, this Court held that sentencing courts may consider the mandatory minimum on a Section 924(c) count when imposing a sentence for the underlying offense (e.g., the underlying crime of violence). 137 S. Ct. at 1176-1177. Ames and Wilcoxson each contended that, at the time of his sentencing, circuit precedent had improperly foreclosed district courts from considering a mandatory consecutive sentence under Section 924(c) in determining the appropriate sentence for the predicate offense, and that each was therefore entitled to a remand for resentencing in light of Dean. Ames Excerpts 80-81 (citing United States v. Working, 287 F.3d 801, 805-807 (9th Cir. 2002)); Wilcoxson Excerpts 80-81 (same).

In response, the government explained that Ames's and Wilcoxson's claims were barred by the provisions of their plea agreements waiving their right to challenge their convictions or sentences on collateral review. Ames Excerpts 55-56; Wilcoxson

Excerpts 55-56. The government further argued that Ames's and Wilcoxson's claims lacked merit in any event, because armed bank robbery categorically qualifies as a crime of violence under Section 924(c)(3)(A), see Ames Excerpts 57-61; Wilcoxson Excerpts 57-60, and because this Court's decision in Dean does not apply retroactively on collateral review, see Ames Excerpts 61-63; Wilcoxson Excerpts 61-63.

The district court denied Ames's and Wilcoxson's motions. Pet. App. 3-15 (Ames), 18-30 (Wilcoxson). The court observed that circuit precedent had recognized federal armed bank robbery to be a "crime of violence" under Section 924(c)(3)(A). Id. at 12-14, 26-29. Accordingly, the court determined that Ames's and Wilcoxson's Section 924(c) convictions were valid irrespective of whether the alternative "crime of violence" definition in Section 924(c)(3)(B) was unconstitutionally vague. Ibid. The court further determined that the rule announced in Dean did not apply retroactively on collateral review. Id. at 8-11, 23-26. The court granted COAs authorizing Ames and Wilcoxson to appeal the court's denial of their Section 2255 motions. Id. at 14, 29.

c. The court of appeals affirmed in materially identical orders. Pet. App. 1-2 (Ames), 16-17 (Wilcoxson). The court observed that Ames's and Wilcoxson's claims were foreclosed by circuit precedent recognizing that federal bank robbery offenses qualify as crimes of violence under Section 924(c)(3)(A), see id. at 1-2 (citing United States v. Watson, 881 F.3d 782, 784 (9th

Cir.) (per curiam), cert. denied, 139 S. Ct. 203 (2018)); id. at 16-17 (same), and that Dean announced a procedural rule that does not apply retroactively on collateral review, see id. at 2 (citing Garcia v. United States, 923 F.3d 1242, 1245-1246 (9th Cir. 2019)); id. at 17 (same).

2. Dawson

a. In July 2003, petitioner Dawson robbed four banks in and around Sacramento, California. Dawson Presentence Investigation Report (PSR) ¶¶ 12-15. During the first robbery, Dawson handed a bank employee a note stating that he had a gun and demanding money. Dawson PSR ¶ 12. During the next two robberies, Dawson made the same demand orally. Dawson PSR ¶¶ 13-14. During the fourth robbery, Dawson displayed a handgun and ordered a teller to give him all of the teller's money. Dawson PSR ¶ 15. Dawson stole about $24,000 in the course of those robberies. Dawson PSR ¶¶ 12-15.

In August 2003, Dawson robbed a branch of Washington Mutual Bank in Portland, Oregon. Dawson PSR ¶ 16. In that robbery, Dawson handed a note to a bank teller stating that he had a gun and demanding that she give him money. Ibid. The teller handed Dawson a stack of bills containing $570 and (unbeknownst to Dawson) an exploding dye pack, which Dawson took with him as he left the bank. Ibid.

Shortly thereafter, police located Dawson in the parking lot of a motel and attempted to arrest him. Dawson PSR ¶¶ 17-18.

After initially evading the police, Dawson was captured. Dawson PSR ¶¶ 18, 21. The police determined that Dawson was staying at the motel and searched his room, discovering bills and a semiautomatic handgun that were covered in red dye. Dawson PSR ¶¶ 19-20. Dawson admitted to robbing the bank in Portland and the four banks in the Sacramento area, and stated that he had the semiautomatic handgun with him during the Portland robbery. Dawson PSR ¶¶ 24, 28.

In December 2003, while Dawson was in pretrial custody in the District of Oregon, he complained of chest pains and was transported to a hospital. Dawson PSR ¶ 29. At the hospital, Dawson managed to steal a set of metal eating utensils, including a knife. Ibid. When a police officer removed Dawson's restraints to allow him to change his clothes, Dawson brandished the knife, held it to the officer's neck, and threatened to hurt her unless she let him go. Ibid. Dawson then stole the officer's cell phone and radio and fled the hospital. Ibid. Police located Dawson about 20 minutes later and arrested him. Ibid.

The U.S. Attorney for the Eastern District of California filed an information charging Dawson with armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and three counts of bank robbery, in violation of 18 U.S.C. 2113(a), arising out of the robberies he committed in the Sacramento area. Dawson Excerpts 184-186. Separately, a federal grand jury in the District of Oregon charged Dawson with bank robbery, in violation of 18 U.S.C.

2113(a), and using or carrying a firearm in furtherance of a crime of violence (specifically, the bank robbery), in violation of 18 U.S.C. 924(c)(1)(A), based on the Washington Mutual Bank robbery in Portland. Dawson Excerpts 187. Additionally, the U.S. Attorney for the District of Oregon filed an information charging Dawson with escape from custody, in violation of 18 U.S.C. 751(a). Id. at 183.

Dawson agreed to waive indictment for the charges set forth in the informations, to consolidate all charges in the District of Oregon, and to plead guilty. Dawson Excerpts 169-177, 180-182. In exchange, the government agreed not to charge Dawson with additional violations of Section 924(c) arising out of the bank robberies and armed bank robbery he committed in California. Id. at 181. The district court accepted Dawson's guilty plea and sentenced him to 202 months of imprisonment on the bank robbery and armed bank robbery counts, and 60 months of imprisonment on the escape count, all to run concurrently. Id. at 130, 136, 141. The district court also imposed a mandatory consecutive statutory-minimum sentence of 60 months of imprisonment on the Section 924(c) count. Id. at 141. The court of appeals affirmed. 207 Fed. Appx. 778.

b. In 2016, Dawson filed a motion for postconviction relief under Section 2255. See Dawson Excerpts 105-128. Dawson argued that his Section 924(c) conviction should be vacated on the theory that bank robbery is not a "crime of violence," asserting that it

does not require proof of an element described in Section 924(c)(3)(A) and because Section 924(c)(3)(B) is unconstitutionally vague. Id. at 108-109. Alternatively, Dawson contended that, even if his Section 924(c) conviction were valid, his sentence based on that conviction should be vacated under Dean. Id. at 119-122. In response, the government maintained that Dawson's claims lacked merit because bank robbery categorically qualifies as a crime of violence under Section 924(c)(3)(A), see id. at 99-104, and because Dean does not apply retroactively on collateral review, see id. at 98-99.

The district court denied Dawson's motion. Pet. App. 33-45. The court observed that, under circuit precedent, federal bank robbery qualifies as a "crime of violence" under Section 924(c)(3)(A). Id. at 37-41. The court therefore determined that Dawson's Section 924(c) conviction was valid irrespective of whether the alternative "crime of violence" definition in Section 924(c)(3)(B) was unconstitutionally vague. Ibid. The court further determined that Dean does not apply retroactively on collateral review. Id. at 41-44. The court granted a COA authorizing Dawson to appeal the court's denial of his Section 2255 motion. Id. at 45.

c. The court of appeals affirmed. Pet. App. 31-32. The court observed that Dawson's claims were foreclosed by circuit precedent recognizing that federal bank robbery offenses qualify as crimes of violence under Section 924(c)(3)(A), see id. at 32

(citing Watson, 881 F.3d at 784), and that Dean announced a procedural rule that does not apply retroactively on collateral review, see ibid. (citing Garcia, 923 F.3d at 1245-1246).

3. Knutson

a. In December 1997, petitioner Knutson robbed a branch of Wells Fargo Bank in Eugene, Oregon. Knutson PSR ¶ 11. Knutson entered the bank wearing a hooded camouflage coat, a dark hat, and a black face covering. Knutson PSR ¶ 12. As he approached the teller counter, Knutson pulled back his coat, revealing a short-barreled rifle tucked into his waistband. Knutson PSR ¶¶ 12, 14. Knutson ordered two bank tellers to give him the money in their teller drawers. Knutson PSR ¶ 13. Knutson stole $10,687 from the tellers and fled. Knutson PSR ¶¶ 13-14.

About a month later, police attempted to stop Knutson's van after observing him make an illegal lane change. Knutson PSR ¶¶ 15-16. Knutson refused to stop and led police on a high-speed chase. Knutson PSR ¶¶ 16-19. The officers eventually cornered Knutson in the parking lot of an apartment complex, at which point he jumped out of the van and pointed a rifle at a pursuing officer. Knutson PSR ¶ 19. The officer retreated to safety, and Knutson fled on foot. Knutson PSR ¶¶ 20-21. A search of the van revealed a short-barreled shotgun, a four-inch dagger, and several glass flasks containing chemical residue. Knutson PSR ¶ 22.

Police tracked Knutson to a trailer home in Eugene. Knutson PSR ¶ 23. Knutson refused to come out and engaged the police in

an eight-hour standoff, during which he threatened to shoot himself. Knutson PSR ¶ 24. Knutson eventually came out of the trailer, but then bolted back towards the front door and attempted to grab a short-barreled rifle that he had hidden inside the doorway. Knutson PSR ¶¶ 25-26. The officers wrestled Knutson to the ground and arrested him. Knutson PSR ¶ 25.

A search of the trailer revealed a makeshift methamphetamine laboratory, including a bottle of finished methamphetamine, byproducts of methamphetamine production, and an extensive collection of drug paraphernalia and methamphetamine precursors. Knutson PSR ¶¶ 27-31. Police also found ammunition for a shotgun and rifle. Knutson PSR ¶ 29. Knutson eventually admitted that he had robbed the bank; that, during the robbery, he carried a loaded gun (the same gun later found at his trailer); and that he kept that gun and the one found in his van in order to protect his methamphetamine laboratory. Knutson PSR ¶¶ 36-39.

A federal grand jury in the District of Oregon charged Knutson with armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); using or carrying a firearm during and in relation to a crime of violence (specifically, the armed bank robbery), in violation of 18 U.S.C. 924(c); possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1); possessing methamphetamine with the intent to distribute, in violation of 21 U.S.C. 841(a)(1); and using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). Knutson Superseding

Indictment 1-4; Pet. App. 54 n.1. A jury found Knutson guilty on all counts. Knutson Judgment 1.

The district court sentenced Knutson to 475 months of imprisonment, consisting of concurrent sentences of 115 months on the armed bank robbery, drug trafficking, and felon-in-possession counts. Knutson Judgment 2. The district court also imposed mandatory consecutive statutory-minimum sentences of 120 months of imprisonment on the Section 924(c) count that was based on the armed bank robbery, and 240 months of imprisonment on the Section 924(c) count that was based on the drug trafficking offense. Ibid. The court of appeals affirmed, 9 Fed. Appx. 706, and this Court denied a petition for a writ of certiorari, 534 U.S. 1029.

b. In 2002, Knutson filed (and twice amended) a motion for postconviction relief under Section 2255 in which he challenged his convictions and sentence on numerous grounds, including alleged ineffective assistance of counsel, prosecutorial misconduct, and judicial bias. See 98-cr-60019 D. Ct. Doc. 318, at 2-6. The district court denied Knutson's motion, id. at 7-11, and denied Knutson's request for a COA, 98-cr-60019 D. Ct. Doc. 321, at 1 (Apr. 10, 2006). The court of appeals likewise denied a COA. See 06-35315 C.A. Doc. 4 (July 25, 2006). This Court denied a petition for a writ of certiorari. 549 U.S. 1141.

In 2016, Knutson obtained authorization from the court of appeals to file a second-or-successive motion for postconviction relief under Section 2255 challenging his Section 924(c)

conviction. Pet. App. 58-60; 98-cr-60019 D. Ct. Doc. 336, at 1-13 (June 27, 2016). Knutson argued that the conviction should be vacated on the theory that armed bank robbery is not a "crime of violence," asserting that it does not require proof of an element described in Section 924(c)(3)(A) and that Section 924(c)(3)(B) is unconstitutionally vague. 98-cr-60019 D. Ct. Doc. 336, at 4-12; see 98-cr-60019 D. Ct. Doc. 335, at 3-16 (Aug. 22, 2017).[2] In district court, Knutson added an alternative argument that, even if his Section 924(c) conviction were valid, his sentence should be vacated under Dean. Pet. App. 58-62; 98-cr-60019 D. Ct. Doc. 335, at 16-19.

In response, the government contended that Knutson's Section 924(c) conviction was valid because armed bank robbery categorically qualifies as a crime of violence under Section 924(c)(3)(A). See 98-cr-60019 D. Ct. Doc. 343, at 7-14 (Oct. 6, 2017). The government also contended that the district court lacked jurisdiction to consider Knutson's sentencing argument under Dean because Knutson had not obtained authorization from the court of appeals for that claim, and that, even if the court had jurisdiction, the claim was not cognizable on a second-or-successive motion under Section 2255. Id. at 14-15. The government

[2] Although Knutson's argument would lead to vacatur only of the Section 924(c) count for which armed bank robbery was the underlying crime of violence, under the version of the statute that governed his offense, it would also entitle him to resentencing on the Section 924(c) count predicated on drug trafficking. See 18 U.S.C. 924(c)(1)(C)(i) (1994).

further maintained that, even if Knutson's Dean claim were cognizable, it lacked merit because Dean does not apply retroactively on collateral review. Id. at 15-18.

The district court denied Knutson's motion. Pet. App. 53-62. The court observed that, under circuit precedent, federal armed bank robbery qualifies as a "crime of violence" under Section 924(c)(3)(A). Id. at 56-58. The court therefore determined that Knutson's Section 924(c) conviction was valid irrespective of whether the alternative "crime of violence" definition in Section 924(c)(3)(B) was unconstitutionally vague. Ibid. Because the jurisdictional question was "close," the court "assume[d] without deciding" that it had jurisdiction to hear a claim that the court of appeals had not authorized. Id. at 60. The court then determined that Knutson's Dean claim did not satisfy the statutory requirements for a second-or-successive motion because it did not rely on "a new rule of constitutional law." Ibid. (quoting 28 U.S.C. 2255(h)(2)); see id. at 60-62. The court granted a COA authorizing Knutson to appeal the court's denial of his Section 2255 motion. Id. at 62.

c. The court of appeals affirmed. Pet. App. 52. The court observed that Knutson's challenge to his Section 924(c) conviction was foreclosed by circuit precedent recognizing that federal bank robbery offenses qualify as crimes of violence under Section 924(c)(3)(A). Ibid. (citing Watson, 881 F.3d 782). The court did not address Knutson's Dean claim.

4. Rich

a. In September 2008, Rich robbed a branch of Wells Fargo Bank in Eugene, Oregon. Rich PSR ¶ 14. Rich entered the bank, put a backpack on the teller counter, and announced, "This is a robbery." Rich PSR ¶ 15. He then brandished a silver handgun and ordered a bank teller to fill the bag with money. Ibid. The teller placed $2310 in the bag. Ibid. Rich grabbed the backpack and left the bank. Ibid. Rich then traveled to Seattle, where he was arrested. Rich PSR ¶ 18.

In the course of its investigation into the Wells Fargo robbery, law enforcement determined that Rich was responsible for several other bank robberies in Oregon. Rich PSR ¶¶ 18, 26-28. Investigators also determined that Rich had prior federal convictions for armed bank robbery, using or carrying a firearm during a crime of violence, and possessing contraband in prison, and that he was on federal supervised release at the time he committed the Wells Fargo robbery. Rich PSR ¶¶ 4, 35-36.

A federal grand jury in the District of Oregon charged Rich with armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). Rich Excerpts 91-92. The U.S. Attorney for the District of Oregon also filed an information charging Rich with using or carrying a firearm during and in relation to a crime of violence (the armed bank robbery), in violation 18 U.S.C. 924(c)(1)(A). Rich Excerpts 90. Rich agreed to waive indictment and to plead guilty to the Section 924(c) offense. Id. at 85. In his plea

agreement, Rich waived his right to challenge his conviction or sentence on collateral review, except in circumstances involving claims of ineffective assistance of counsel, newly discovered evidence, or a sentencing range reduction by the Sentencing Commission. Id. at 87. In exchange, the government agreed to dismiss the pending armed bank robbery charge and not to charge Rich with offenses related to the other bank robberies he had committed. Id. at 86.

The district court accepted Rich's guilty plea and sentenced him to 312 months of imprisonment for the Section 924(c) offense. Rich Excerpts 64-65. Rich did not appeal.

b. In 2016, Rich filed a motion for postconviction relief under Section 2255. Rich Excerpts 44-59, 60-63. Rich argued that his Section 924(c) conviction should be vacated on the theory that armed bank robbery is not a "crime of violence," asserting that it does not require proof of an element described in Section 924(c)(3)(A) and that Section 924(c)(3)(B) is unconstitutionally vague. Id. at 46-59. In response, the government contended that Rich's claim lacked merit because bank robbery categorically qualifies as a crime of violence under Section 924(c)(3)(A). Id. at 33-34.

The district court denied Rich's motion. Pet. App. 47-51. The court observed that, under circuit precedent, federal armed bank robbery qualifies as a "crime of violence" under Section 924(c)(3)(A). Id. at 49-51. The court therefore determined that

Rich's Section 924(c) conviction was valid irrespective of whether the alternative "crime of violence" definition in Section 924(c)(3)(B) was unconstitutionally vague. Ibid. The court granted a COA authorizing Rich to appeal the court's denial of his Section 2255 motion. Id. at 51.

c. The court of appeals affirmed. Pet. App. 46. The court determined that Rich's claim was foreclosed by circuit precedent recognizing that federal bank robbery offenses qualify as crimes of violence under Section 924(c)(3)(A). Ibid. (citing Watson, 881 F.3d 782).

ARGUMENT

Petitioners contend (Pet. 8-17) that bank robbery and armed bank robbery are not "crime[s] of violence" under 18 U.S.C. 924(c)(3)(A). Petitioners further contend (Pet. 17-20) that Dean v. United States, 137 S. Ct. 1170 (2017), announced a substantive rule that applies retroactively on collateral review. Those contentions lack merit and have been rejected by every court of appeals that has considered them. The petition for a writ of certiorari should be denied.

1. A conviction for bank robbery requires proof that the defendant 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). A conviction for armed bank robbery additionally requires proof that the defendant either committed an "assault[ ]" or endangered "the life of any person" through "the use of a

dangerous weapon or device" in 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 Johnson v. United States, No. 19-7079 (Apr. 24, 2020), bank robbery and armed bank robbery qualify as crimes of violence under Section 924(c) because those offenses 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). See Br. in Opp. at 7-25, Johnson, supra (No. 19-7079).[3]

Specifically, petitioners' contentions (Pet. 8-16) that bank robbery and armed bank robbery do not qualify as crimes of violence under Section 924(c)(3)(A) because those offenses can be completed by taking property from a bank "by intimidation," 18 U.S.C. 2113(a), and because federal bank robbery does not require a specific intent to steal, see Carter v. United States, 530 U.S. 255, 268 (2000), lack merit for the reasons explained at pages 9-20 of the government's brief in opposition in Johnson, supra (No. 19-7079). Every court of appeals with criminal jurisdiction, including the court below, has recognized that Section 924(c)(3)(A) and similarly worded provisions encompass federal bank-robbery offenses. See id. at 7-8 (citing decisions that apply such provisions to bank robbery offenses, or to armed bank robbery

[3] We have served petitioners with a copy of the government's brief in opposition in Johnson, which is also available from the Court's online docket at https://www.supremecourt.gov/docket/docketfiles/html/public/19-7079.html.

offenses for reasons that apply equally to bank robbery). This Court has recently and repeatedly denied petitions for writs of certiorari challenging the circuits' consensus on that issue, see id. at 7-8 & n.1, and the same result is warranted here.[4]

2. Petitioners alternatively contend (Pet. 17-20) that Dean announced a new rule of law that is retroactive on collateral review. That contention likewise lacks merit and does not warrant review.

a. Section 924(c) requires a mandatory consecutive sentence of at least five years of imprisonment for a defendant who uses or carries a firearm during and in relation to a predicate crime of violence or drug trafficking crime. 18 U.S.C. 924(c)(1)(A)(i). In Dean, this Court determined that, where a defendant is convicted of both the predicate offense and a violation of Section 924(c), a sentencing court may properly consider the fact of the mandatory consecutive sentence under Section 924(c) "when calculating an appropriate sentence for the predicate offense." 137 S. Ct. at 1178; see id. at 1176.

[4] This Court has granted review in Borden v. United States, No. 19-5410 (Mar. 2, 2020), to consider whether the "use * * * of physical force" under 18 U.S.C. 924(e)(2)(B)(i) includes reckless conduct. See Pet. 8 n.3 (observing that this Court previously granted certiorari on the same question in United States v. Walker, cert. dismissed, 140 S. Ct. 953 (2020) (No. 19-373)). Regardless of how this Court resolves the question presented in Borden, that decision will not affect the judgments in this case. See Br. in Opp. at 19 n.3, Johnson, supra (No. 19-7079).

As petitioners acknowledge (Pet. 7), every court of appeals that has considered the question has agreed with the decisions below that Dean does not apply retroactively. Worman v. Entzel, 953 F.3d 1004, 1009-1011 (7th Cir. 2020); Harper v. United States, 792 Fed. Appx. 385, 393-394 (6th Cir. 2019), petition for cert. pending, No. 19-7780 (filed Feb. 20, 2020); Habeck v. United States, 741 Fed. Appx. 953, 954 (4th Cir. 2018) (per curiam), cert. denied, 139 S. Ct. 1364 (2019); In re Dockery, 869 F.3d 356, 356 (5th Cir. 2017) (per curiam); see Pet. App. 2 (citing Garcia v. United States, 923 F.3d 1242, 1245-1246 (9th Cir. 2019)); id. at 17 (same); id. at 32 (same).

"A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Whorton v. Bockting, 549 U.S. 406, 416 (2007) (citation, internal quotation marks, and brackets omitted). As the courts of appeals have uniformly recognized, this Court's decision in Dean does not fall into either category.

First, because Dean relates to "the manner of determining" the defendant's sentence, Schriro v. Summerlin, 542 U.S. 348, 353 (2004), it is a procedural rule, not a substantive one. Dean addresses "the proper and available scope of discretion district judges can exercise in sentencing defendants," meaning that it "regulates sentencing procedure." Worman, 953 F.3d at 1010.

Petitioners nevertheless contend (Pet. 18-19) that Dean announced a substantive rule because it "articulated a substantive (and mandatory) rule that all sentences * * * are governed by the 'parsimony principle' from 18 U.S.C. 3553(a)." Petitioners misinterpret Dean. As the Seventh Circuit has explained, "[b]y its terms, Dean is only about the proper and available scope of discretion district judges can exercise in sentencing defendants." Worman, 953 F.3d at 1010; see Dean, 137 S. Ct. at 1176, 1178. Because it affects only "the range of permissible methods" a court may use in determining the appropriate sentence, Dean announced a procedural rule. Worman, 953 F.3d at 1010 (quoting Welch v. United States, 136 S. Ct. 1257, 1264-1265 (2016)).

Petitioners' reliance (Pet. 18) on Montgomery v. Louisiana, 136 S. Ct. 718 (2016), in arguing otherwise is misplaced. In Montgomery, this Court determined that Miller v. Alabama, 567 U.S. 460 (2012), which barred mandatory sentences of life without parole for homicides committed by juveniles, announced a substantive rule that applies retroactively because it precluded a particular punishment for "a class of defendants because of their status -- that is, juvenile offenders whose crimes reflect the transient immaturity of youth." 136 S. Ct. at 734 (citation and internal quotation marks omitted).[5] Unlike the decision in Miller, this

[5] This Court has granted review in Jones v. Mississippi, No. 18-1259 (Mar. 9, 2020), to consider whether a sentencing court must make a specific finding of permanent incorrigibility before sentencing a juvenile offender to a discretionary sentence of life with parole. That issue is not presented here.

Court's decision in Dean did not "place certain * * * punishments altogether beyond the [government's] power to impose." Montgomery, 136 S. Ct. at 729. To the contrary, "Dean's rule is permissive, not mandatory." Garcia, 923 F.3d at 1245. Because a sentencing court remains free to disregard the Section 924(c) sentence in deciding on the sentences for the underlying crimes, or to consider it and still impose the same punishment that it would have otherwise imposed, petitioners' "sentence[s] may still be accurate" despite a Dean error, meaning that the rule Dean announced is procedural. Montgomery, 136 S. Ct. at 730.

Second, Dean did not announce a watershed rule of criminal procedure, and petitioners do not argue otherwise. "In order to qualify as watershed," a new rule "must be necessary to prevent an impermissibly large risk of an inaccurate conviction" and "must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Whorton, 549 U.S. at 418 (citations and internal quotation marks omitted). That category of cases is "extremely narrow." Id. at 417 (citation omitted). Indeed, the test is so "demanding," that "this Court has yet to announce a new rule of criminal procedure capable of meeting it." Ramos v. Louisiana, 140 S. Ct. 1390, 1407 (2020). Particularly against that backdrop, a rule "governing what a judge

may consider at sentencing" cannot be classified as a watershed rule. Worman, 953 F.3d at 1011; see Garcia, 923 F.3d at 1246.[6]

3. In any event, this petition -- which combines claims raised by several petitioners who are differently situated -- is an unsuitable vehicle for considering the questions presented. Indeed, the complexity of considering claims of five differently situated petitioners most of whose Section 924(c) convictions were based on armed bank robbery, rather than basic bank robbery, in a single case is alone a reason to deny review.

Petitioners Ames, Wilcoxson, and Rich entered into plea agreements in which they waived their right to challenge their convictions or sentences on collateral review, except in narrow circumstances that are not present here. See Ames Excerpts 133; Wilcoxson Excerpts 96-97; Rich Excerpts 87. Although the lower courts did not address the waivers in light of controlling precedent foreclosing their claims on the merits, those waivers would preclude relief. This Court has repeatedly recognized that a defendant may validly waive constitutional and statutory rights as part of a plea agreement so long as his waiver is knowing and voluntary. See Garza v. Idaho, 139 S. Ct. 738, 744-745 (2019) (waiver of right

[6] This Court recently granted a petition for a writ of certiorari in Edwards v. Vannoy, No. 19-5807 (May 4, 2020), to consider whether the unanimous jury requirement in Ramos, 140 S. Ct. 1390, is retroactive. No sound basis exists to hold this petition pending the disposition of Edwards. In light of the evident differences between the rule in Dean and the rule in Ramos, even a holding that Ramos is retroactive would not affect the courts of appeals' unanimous recognition that Dean is not.

to appeal); Ricketts v. Adamson, 483 U.S. 1, 9-10 (1987) (waiver of right to raise double jeopardy defense); Town of Newton v. Rumery, 480 U.S. 386, 389, 398 (1987) (waiver of right to file constitutional tort action). Ames, Wilcoxson, and Rich identify no reason why this Court should consider postconviction claims despite the knowing and voluntary waiver of such claims as a condition of their plea agreements.[7]

Furthermore, petitioners Rich and Knutson lack any cognizable claim under Dean, and thus their cases do not implicate the second question presented. Rich was convicted of a Section 924(c) offense alone, so his case does not involve a sentence for a predicate offense. Accordingly, he acknowledges (Pet. 3 n.1) that his case does not present the Dean question. Knutson's case is also unsuitable for resolving the merits of the Dean claim because he raised that claim in a second-or-successive motion under Section 2255. As the district court recognized, Pet. App. 60-62, Knutson's claim is therefore foreclosed by 28 U.S.C. 2255(h)(2), which limits

[7] The government invoked Ames's and Wilcoxson's waivers below. See Ames Excerpts 55-56; 18-35134 Gov't C.A. Br. 5-7; Wilcoxson Excerpts 55-56; 18-35135 Gov't C.A. Br. 5-7. Although the government did not invoke Rich's waiver, that fact does not preclude this Court from considering the issue as to that petitioner. See Day v. McDonough, 547 U.S. 198, 211 (2006) (court may consider a threshold procedural bar not pressed by the government where "nothing in the record suggests that the [government] 'strategically' withheld the defense or chose to relinquish it"); cf. United States v. New York Tel. Co., 434 U.S. 159, 166 n.8 (1977) ("[A] prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted.").

second-or-successive relief to new rules "of constitutional law" that have been made retroactive. 28 U.S.C. 2255(h)(2) (emphasis added); see Garcia, 923 F.3d at 1244 ("Dean's rule derives from statutory interpretation, not the Constitution."). Perhaps for that reason, the court of appeals did not address his Dean claim at all. See Pet. App. 52.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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