No. _____

In The
Supreme Court of the United States

JACK WITT VORIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In *United States v. Ladner*, this Court applied the rule of lenity to hold that a defendant who wounded two officers with a single gunshot could only be guilty of one assault under 18 U.S.C. § 111. The questions presented are:

1. Whether firing multiple gunshots in a single assaultive act can be construed as multiple, distinct offenses under 18 U.S.C. § 111 as the Ninth Circuit held, or whether the number of offenses depends upon the actual number of distinguishable assaultive acts as the First, Fourth, Sixth, Eighth, Tenth, and D.C. Circuits have held.

2. Whether the Ninth Circuit's definition of a firearm "use" under 18 U.S.C. § 924(c)(1)(A) is proper, or whether the definition of "use" as applied in the Second, Sixth, Seventh, and D.C. Circuits is proper.

PARTIES TO THE PROCEEDING AND RELATED CASES

The parties to this case are listed in the caption on the cover of this petition. The related cases are as follows:

- *United States of America v. Jack Witt Voris*, No. 4:16-cr-02267-JGZ-DTF-1, U.S. District Court for the District of Arizona. Judgment entered Oct. 11, 2018.
- *United States of America v. Jack Witt Voris*, No. 18-10410, U.S. Court of Appeals for the Ninth Circuit. Judgment entered July 7, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jack Witt Voris respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit decision at issue in this petition is reported as *United States v. Voris*, 964 F.3d 864 (9th Cir. 2020). The published opinion is included in the appendix at A-1. On October 14, 2020, the Ninth Circuit denied Voris' petitions for panel rehearing and rehearing en banc. That order is included in the appendix at A-24.

STATEMENT OF JURISDICTION

Voris was convicted of federal crimes in the U.S. District Court for the District of Arizona and timely appealed to the Ninth Circuit. The Ninth Circuit entered its judgment on July 7, 2020. (A-1.) The Ninth Circuit denied a timely petition for panel rehearing and rehearing en banc on October 14, 2020. (A-24.) This petition is timely filed under Rule 13.1. This Court thus has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS OF LAW INVOLVED

The full text of both 18 U.S.C. §§ 111 and 924(c) are reproduced in the appendix at A-25.

STATEMENT OF THE CASE

The Ninth Circuit's interpretation of *United States v. Ladner*, 358 U.S. 169 (1958) as permitting separate 18 U.S.C. § 111 convictions for each gunshot fired during an assaultive act upon federal officers—regardless of whether those shots were meaningfully distinguishable—is incorrect and directly conflicts with the holdings of other circuits on this issue for which national uniformity is necessary. Rule 10(a). Relatedly, the Ninth Circuit's determination that Voris' conduct in firing four near-simultaneous shots amounted to four separate "uses" of a firearm therefore supporting four separate convictions under 18 U.S.C. § 924(c)(1)(A) defies this Court's statutory interpretation principles. By interpreting § 924(c)—a statute widely recognized as ambiguous—as clearly permitting separate convictions for each indistinguishable shot fired under the facts of this case, the Ninth Circuit ignored the rule of lenity as mandated by this Court in *Bell v. United States*, 349 U.S. 81 (1955). In so doing, the Ninth Circuit's opinion conflicts with the decisions of other courts of appeals that have addressed the same issue, thus creating a clear circuit split which must be resolved by this Court. Rule 10(a).

STATEMENT OF FACTS

On October 28, 2016, nine members of the U.S. Marshals Fugitive Task Force responded to a motel near the Tucson International Airport to arrest Voris on outstanding warrants. *See Voris*, 964 F.3d at 867. Two officers positioned themselves downstairs in the parking lot, while five other officers set up as a "stack" near the front door of Voris' second-floor motel room. Two remaining officers were located in the hallway outside the motel room but were not part of the stack formation. *Id.*

The team of officers in the stack approached Voris' room and knocked on the door. *Id.* Upon learning of the police presence, Voris tried to escape out the back window. Officer Garcia, who was downstairs in the parking lot, shouted at Voris to show his hands. Voris reached out the window and fired a single shot towards Garcia. Garcia and another officer returned fire and Voris retreated back inside. Shortly thereafter, Voris' girlfriend came stumbling out of the room, which prompted the stack of officers to retreat from the doorway area. Voris then fired four more shots towards the bottom of the door. *Id.* at 867-68.

Voris fired a total of five rounds during the incident—one through the back window, followed by a four-round volley towards the stack of officers in the front walkway area. The four rounds were fired in quick succession without any pauses of delays, and no officers were injured. Voris eventually surrendered without further incident. *Id.* at 868.

Voris was charged with nine counts of aggravated assault against a federal officer, in violation of 18 U.S.C. § 111(a)(1) & (b), and nine counts of using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c).[1] The indictment named each of the nine officers involved as a separate victim. A jury subsequently found Voris guilty of six § 111 offenses and six § 924(c) offenses—one § 111 and one § 924(c) conviction were based on the single shot Voris fired towards Garcia, and the remaining five counts of each were based on the four shots toward the five officers in the stack formation. The district court ultimately sentenced Voris to 1,750 months' imprisonment and he appealed. The Ninth Circuit vacated one § 111 and one § 924(c) conviction, but left the remaining convictions intact. *See Voris*, 964 F.3d at 867. Voris now seeks certiorari from this Court to clarify a circuit split on the law as it applies to the correct unit of prosecution to apply in § 111 and § 924(c) cases.

REASONS FOR GRANTING REVIEW

1. This Court should grant review to resolve a conflict amongst the courts of appeals on a matter of practical nationwide importance

Ladner establishes that multiple gunshots may support multiple convictions under some circumstances.

[1] Voris was also charged with and convicted of one count of possession of a firearm by a prohibited person, however, he did not challenge that conviction on appeal.

Ladner, 358 U.S. at n. 6. But the Ninth Circuit misread *Ladner* to conclude that the four shots Voris fired towards the front door of the motel room constituted four separate assaults under § 111.[2] However, that conduct constitutes a single assault because there is no reasonable basis for turning that unitary transaction into four multiple, distinct offenses. Because those shots were fired virtually simultaneously, were not directed towards any officer in particular, and did not result in any injuries, they amounted to a single assault under *Ladner*. The courts of appeals are divided on the question presented and will remain so absent this Court's review. By holding that Voris could be convicted of four separate counts of assault—one for each shot fired towards the front door—the Ninth Circuit erroneously allowed multiple punishments for a single criminal offense. *Cf. Bell*, 349 U.S. at 84. And much like "an interpretation that there are as many assaults committed as there are officers affected would produce incongruous results," *Ladner*, 358 U.S. at 177, so too does the Ninth Circuit's interpretation of § 111 as permitting separate convictions for every shot fired, regardless of whether there is a reasonable basis for distinguishing between them.

This Court has specified that the allowable unit of prosecution under § 111 is the number of distinct assaults, not the number of officers involved. *Ladner*, 358 U.S. at 173-78; *see also United States v. Theriault*, 531

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[2] Voris does not dispute that the shot fired out the window towards Garcia constituted a separate assault for § 111 and § 924(c) purposes. *Voris*, 964 F.3d at 868.

F.2d 281, 285 (5th Cir.) (it is "well settled" that assaults arising out of single act can result in just one § 111 conviction), *cert. denied*, 429 U.S. 898 (1976). In interpreting the predecessor statute to § 111, this Court applied the rule of lenity to find that it could not "find that Congress intended a single act of assault affecting two officers constitutes two offenses under the statute," and concluded that a defendant who wounded two officers with a single gunshot could only be guilty on one assault. *Ladner*, 358 U.S. at 176. Though the Ninth Circuit correctly concluded that § 111's unit of prosecution is the number of assaults, not the number of officers, it applied *Ladner*'s holding too narrowly. *Voris*, 964 F.3d at 869-70. *Ladner* did not hold, as the Ninth Circuit implied, that each individual gunshot constitutes a separate assault, no matter the circumstances. Instead, *Ladner* more broadly established that § 111's unit of prosecution is the number of distinct assaults.

By contrast, other courts of appeals have "consistently applied *Ladner* to determine if a course of conduct warrants multiple assault charges," *United States v. Thomas*, 669 F.3d 421, 425 (4th Cir. 2012), looking to the "number of distinguishable acts of assault." *United States v. Rivera Ramos*, 856 F.2d 420, 422 (1st Cir. 1988); *see also Theriault*, 531 F.2d at 281; *United States v. Shumpert Hood*, 210 F.3d 660, 663 (6th Cir. 2000); *United States v. Wesley*, 798 F.2d 1155, 1156-57 (8th Cir. 1986); *United States v. Segien*, 114 F.3d 1014, 1022 (10th Cir. 1997), *abrogation on other grounds recognized by United States v. Hathaway*, 318 F.3d 1001, 1006 (10th Cir. 2003). The Tenth Circuit has applied

Ladner to hold that, in order to sustain multiple § 111 convictions, "[t]he evidence must show 'the actions and intent of [the] defendant constitute distinct successive criminal episodes, rather than two phases of a single assault.'" *Segien*, 114 F.3d at 1022, *quoting Smith v. United States*, 418 F.2d 1120, 1121 (D.C. Cir. 1969) ("The fact that a criminal episode of assault involves several blows or wounds, and different methods of administration, does not convert it into a case of multiple crimes for purposes of sentencing.").

Other circuits have affirmed multiple § 111 convictions only where it was clear that the defendant's "course of conduct" could be divided into "separate" and "distinct" assaults. *Thomas*, 669 F.3d at 426 ("Courts look to a variety of factors to determine if a series of acts constitutes more than mere phases of a single assault and so can support multiple assault charges."); *Segien*, 114 F.3d at 1022 (affirming two § 111 convictions because they were based on "two different events, separated in both time and location."); *Rivera Ramos*, 856 F.2d at 423 (affirming three § 111 convictions because evidence showed "defendant assaulted each of the three agents separately at different times, and not just all three together."); *Government of Virgin Islands v. Dowling*, 633 F.2d 660, 666-67 (3d Cir. 1980) (affirming three assault convictions because there were "at least three separate bursts of gunfire . . . at different times as well as some firing from the bush after [the suspects'] vehicle had been abandoned"); *United States v. Hopkins*, 310 F.3d 145, 148, 152 (4th Cir. 2002) (affirming two § 111 convictions where defendant waived

his gun several times during a chase and shot at officers "on at least two occasions" by firing once "as he drove" and then later firing several more shots after crashing into a school bus); *United States v. Hodges*, 436 F.2d 676, 678 (10th Cir.), *cert. denied*, 403 U.S. 908 (1971) (defendant gave each of five officers individual attention, forcibly assaulting each one in succession, thus violating § 111 five times). In all of these cases, the courts stressed that separate assault convictions were permissible because there was a clear basis for distinguishing between the underlying conduct and that constituted the assaults.

In *Thomas*, the Fourth Circuit concluded that the defendant had committed multiple acts of assault by "verbally threatening Officer Richards and punching her in the face." 669 F.3d at 426. The Fourth Circuit found significant that there were three "intervening acts between the verbal threat and the physical assault." *Id.* (considering whether there were different events, separated in time and location, or whether assailant gave each officer "individual attention, and in succession"). The Fourth Circuit also emphasized that the defendant's acts were in response to separate "factual circumstances." Similarly, in *Rivera Ramos*, the First Circuit affirmed three § 111 convictions because the defendant separately threatened "each of the three agents . . . at gunpoint, not all three together." 856 F.2d at 421 ("It is manifest . . . that the government's case against the defendant included evidence that the threats at gunpoint were not just delivered to all three agents collectively at once but were made to different

agents at different moments, with special emphasis and individualized words, and by pointing the pistol close to the head of each, at different times.").

In the handful of cases where courts of appeals have affirmed separate § 111 convictions based on a defendant's conduct in firing multiple shots at multiple officers, the opinions have stressed the separate nature of the assaults. But none of those cases involved a defendant charged with separate § 111 counts for each individual shot fired. For example, in *Cameron v. United States*, there was evidence that Cameron and his co-defendant (Ladner) committed "two separate and distinct assaults and batteries . . . upon two officers separately." 320 F.2d 16, 17-18 (5th Cir. 1963) (relying on district court's finding that "defendants were shooting at each one of the officers individually in an attempt to kill and murder each one of those officers").

Similarly, in *Thorne v. United States*, the Eighth Circuit affirmed two assault convictions where the defendant fired more than one shot at two officers. 406 F.2d 995, 999 (8th Cir. 1969). However, in *Thorne*, the defendant paid separate attention to each officer and actually injured one of them. The defendant drew his gun and pointed it at both officers, "waiving it back and forth," and when the officers tried to disarm him, he shot one of them in the arm. *Id.* The scuffle progressed from there, and after they all "went down to the floor," the defendant fired four more shots. The defendant then held the gun to one of the officer's neck before he was eventually disarmed. In affirming two separate § 111 convictions, the Eighth Circuit emphasized "the

separate character" of the assault upon the officer who was shot versus the subsequent assault on the second officer, which occurred "after [the first officer] was shot and seriously wounded." *Id.*

United States v. Duran, 96 F.3d 1495 (D.C. Cir. 1996) appears to be the only case that arguably lends some, albeit slight, support for the Ninth Circuit's conclusion in *Voris* that "[a]s long as there were four assaultive acts and at least four potential victims, there were four assaults" for § 111 purposes. *Voris*, 964 F.3d at 871. In *Duran*, despite there being no meaningful difference between the "barrage" of nine bullets fired towards four officers, the D.C. Circuit concluded the evidence supported four § 111 convictions. *Duran*, 96 F.3d at 1509-11. However, the defendant in *Duran* did not argue that each § 111 conviction had to be supported by a distinct assault. Thus, the specific issue presented to the Ninth Circuit in *Voris* was not addressed in *Duran*.

Voris' act of firing four shots towards the front door of the motel room was a single criminal occurrence that cannot be reasonably divided into several successive and separate assaults. One officer testified that the shots "c[a]me out really quickly" and that he did not "remember any pauses or delays" between firing. Another officer testified that he could not recall how many shots were fired but that it did not "matter to [him] how many shots were coming out," suggesting he did not feel separately threatened by each individual shot. Moreover, the individual shots were not directed at any officer individually, nor did they result in injuries. *See*

Thomas, 669 F.3d at 426. Thus, there was no real separation in time and space, and there is no meaningful basis for distinguishing between the four shots fired at the door. At most, they were merely separate *phases* of a single continuous assaultive act, and so could only support a single assault charge. *Id*. By concluding otherwise, the Ninth Circuit misapplied *Ladner*, departed from its sister circuits, and approved of a punishment that is completely "disproportionate to the act of assault" that Voris committed. *Ladner*, 358 U.S. at 177.

2. The Ninth Circuit's broad interpretation of "use" of a firearm under 18 U.S.C. § 924(c)(1)(A) conflicts with the decisions of other courts of appeals, which have held that each § 924(c) conviction requires proof of a unique and independent use, carry, or possession, and ignores the rule of lenity

The Ninth Circuit further held in *Voris* that each individual discharge of a firearm constitutes a separate "use" of a firearm under 18 U.S.C. § 924(c)(1)(A). *Voris*, 964 F.3d at 873. The Ninth Circuit's opinion on this issue is inconsistent with § 924(c)'s purpose and is at odds with the conclusions reached by other circuits that have addressed the same issue.

The courts of appeals have long struggled to decipher § 924(c). *See United States v. Rentz*, 777 F.3d 1105, 1106-07 (10th Cir. 2015) (en banc); *United States v. Finley*, 245 F.3d 199, 206 (2d Cir. 2001) (discussing "wildly divergent interpretations" of § 924(c)(1)).

However, most circuits have concluded that multiple § 924(c) convictions require proof of a separate use, carry, or possession of a firearm, regardless of whether that "use" resulted in more than one predicate crime. *See Rentz*, 777 F.3d 1105 (concluding each § 924(c)(1)(A) conviction requires its own "unique and independent use, carry, or possession" of a firearm, but declining to determine what exactly suffices to constitute a unique and independent use under facts of case); *United States v. Jackson*, 918 F.3d 467, 490, 493 (6th Cir. 2019); *United States v. Wilson*, 160 F.3d 734 (D.C. Cir. 1998) (only one § 924(c) enhancement permissible where there was one "use (albeit a repeated use) of a firearm"); *Finley*, 245 F.3d at 207; *United States v. Cureton*, 739 F.3d 1032, 1043 (7th Cir. 2014); *but see United States v. Sandstrom*, 594 F.3d 634 (8th Cir. 2010).

None of these cases considered directly whether "multiple successive shots fired at multiple victims must be considered a single use of a firearm limiting the government to one § 924(c) conviction." *Voris*, 964 F.3d at 872. However, all of these cases support the conclusion that "the multiple successive shots" that Voris fired towards the officers in the stack only constituted a single use of a firearm. *Id.* In concluding that it "makes no difference" to the § 924(c) analysis "that the shots were quickly fired," 964 F.3d at 873, the Ninth Circuit erred. Clarification from this Court is necessary to rectify confusion in the law amongst the sister circuits.

In *Wilson*, the defendant murdered the victim "by shooting him repeatedly" and was convicted of two § 924(c) counts. 160 F.3d at 735. On appeal, Wilson argued he could not be convicted of two § 924(c) counts because he only "used" a firearm once to commit the underlying offenses. *Id.* at 748-49. The D.C. Circuit agreed, noting that "[w]hile there may be circumstances in which such offenses could support more than one § 924(c) charge—as where, for example, the evidence shows distinct uses of the firearm, first to intimidate and then to kill—in the instant case there is no such distinction in time or place." *Id.* Thus, the D.C. Circuit held that in order to sustain multiple § 924(c) convictions, there must be evidence of "distinct conduct giving rise to multiple crimes." *Id*. at 749.

In *United States v. Wallace*, the Second Circuit concluded that the act of "fir[ing] several shots" into an adjacent car was a single "use" of a firearm under § 924(c). 447 F.3d 184, 186, 188 (2d Cir. 2006). The Court held that because the underlying offenses were committed with a "single use of a firearm," the defendant could be convicted of only one § 924(c)(1) offense. *Id.* at 188-89; *cf. Hopkins*, 310 F.3d at 148 (charging only one count of § 924(c) where defendant fired multiple times at two officers).

Voris' offenses were virtually simultaneous and consisted of the same conduct. *See Finley*, 245 F.3d at 207. The shots he fired towards the officers in the stack were not meaningfully distinguishable—they were fired in rapid succession and were aimed in the same direction. As in *Wilson*, there was no "distinction in

time or place" between those shots, nor did they give rise to four separate and distinct crimes. *Finley*, 245 F.3d at 207. Thus, whatever crimes Voris committed by shooting through the motel room door, "there was only one use (albeit a repeated use) of a firearm." *Wilson*, 160 F.3d at 749. Because the four shots fired towards the door were not "unique and independent" uses of the firearm, the evidence was insufficient to support four successive § 924(c) convictions.

The Ninth Circuit also ignored this Court's precedent on the rule of lenity in resolving the § 924(c) issue. *See Bell*, 349 U.S. at 84 ("if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses"); *see also Rentz*, 777 F.3d at 1126 ("Section 924(c) is sufficiently ambiguous as to its unit of prosecution to warrant rule-of-lenity application."). Where ambiguity or doubt exists about congressional intent regarding the unit of prosecution, courts apply the rule of lenity and resolve doubt "against turning a single transaction into multiple offenses." *Finley*, 245 F.3d at 207.

There is still a "widely-shared view" that § 924(c)'s text and legislative history are ambiguous. *Id.*; *United States v. Phillips*, 319 F.3d 177, 186 (5th Cir. 2003) (discussing difficulties in interpreting § 924(c)(1) and citing cases to illustrate the "not infrequent need to resolve ambiguities in favor of criminal defendants via the rule of lenity"); *see also United States v. Diaz*, 592 F.3d 467, 473-74 (3d Cir. 2010) (noting § 924(c)'s "meager" legislative history). As a result, courts of appeals

have frequently turned to the rule of lenity to conclude that the "best interpretation of the statute is the one that authorizes only one § 924(c)(1) conviction" in cases where, as in *Voris*, it is unclear whether a "use" of a firearm can be meaningfully divided into separate uses. *Cureton*, 739 F.3d at 1044-45; *cf. Phillips*, 319 F.3d at 186-88; *Finley*, 245 F.3d at 207 (section § 924(c) does not clearly manifest Congress' intention to punish defendant twice for continuous possession of firearm in furtherance of simultaneous predicate offenses consisting of virtually same conduct).

The fact that Congress decided that each "use" of a firearm is subject to a mandatory consecutive sentence strongly supports the conclusion of many courts of appeals that Congress intended a second conviction to require a defendant to make a second choice to use, carry, or possess a gun to further a crime—"say, by firing a gun at different people on different occasions." *Rentz*, 777 F.3d at 1111; *see also United States v. Vichitvongsa*, 819 F.3d 260, 270 (6th Cir. 2016) ("Whether a criminal episode contains more than one unique and independent use, carry, or possession depends at least in part on whether the defendant made more than one choice to use, carry, or possess a firearm."); *Cureton*, 739 F.3d at 1045; *Phillips*, 319 F.3d at 187. The severity of the punishment associated with each separate conviction also suggests that Congress saw additional charges "less as some sort of discretionary pleading choice or a nearly foregone conclusion in every case and more a highly unusual act, one wholly

different from and more reprehensible than an initial violation." *Rentz*, 777 F.3d at 1112.

Lenity is required in situations where separate "uses" of a firearm are identical to the underlying conduct that serves as the predicate offenses—in this case, Voris' act of firing towards several federal officers. *See Finley*, 245 F.3d at 207. Lenity is also particularly important because of the harsh sentencing disparity between finding one versus multiple uses of a firearm. *See* § 924(c)(1)(D) (requiring all § 924(c) sentences to be served consecutively "with any other term of imprisonment imposed on the person"); *cf. Bell*, 349 U.S. at 84. For Voris, the difference in interpretations is, quite literally, the different between spending the rest of his life behind bars and a chance at eventual freedom.

This case is the ideal vehicle with which to resolve the issues presented. The questions were squarely raised below, and the Ninth Circuit's answer forms the sole basis for its judgment. No better vehicle will emerge.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted this 23rd day of October, 2020.

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