No. 20-551

In the Supreme Court of the United States

JACK WITT VORIS, 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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QUESTION PRESENTED

Whether petitioner was validly convicted on four counts of forcibly assaulting an officer with a deadly or dangerous weapon, in violation of 18 U.S.C. 111, and four counts of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A), where he discharged a firearm four times at a group of law-enforcement officers.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 964 F.3d 864.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2020. A petition for rehearing was denied on October 14, 2020 (Pet. App. A24). The petition for a writ of certiorari was filed on October 23, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on six counts of forcibly assaulting a federal officer with a deadly or dangerous weapon, in violation of 18 U.S.C. 111(a) and (b); six counts of discharging a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A); and one count of possessing a

firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. The district court sentenced petitioner to 1750 months of imprisonment. *Ibid.* The court of appeals reversed with respect to one assault conviction and one Section 924(c) conviction, affirmed the other convictions, and remanded for resentencing. Pet. App. A1-A23.

1. In October 2016, petitioner was wanted on several outstanding state warrants in connection with a robbery and shooting in Tucson, Arizona. Presentence Investigation Report (PSR) ¶ 3; Pet. App. A3. The U.S. Marshals Task Force learned that petitioner and his girlfriend were in a second-floor room at a motel near Phoenix International Airport. *Ibid.* Nine officers went to the motel and surrounded the room. Pet. App. A3. Two went to the parking lot behind the room; five formed a "stack" at the front door of the room; and two others waited outside the front of the room but were not part of the stack. *Ibid.*

One officer in the stack knocked on the door to the room. Pet. App. A3. Petitioner opened the door briefly before slamming it shut and locking it. *Ibid.* Petitioner later acknowledged that he knew that the group outside the room consisted of law-enforcement officers. *Ibid.* Attempting to flee, petitioner opened the back window. *Ibid.* One of the two officers in the parking lot then shouted "Police, Police, let me see your hands." *Ibid.* Petitioner responded by firing a gun at the officer, who returned fire; all shots missed. *Ibid.*

Petitioner pushed his girlfriend out the front door of the room and then relocked it. Pet. App. A3 & n.1; Gov't C.A. Br. 4. Petitioner then fired four shots toward the front of the room, where the stack of officers was positioned outside the door. Pet. App. A3-A4. Two of the

shots exited through the bottom of the door, and two hit a wall beside the door. *Id.* at A4. From inside the room, petitioner heard an officer outside yell an expletive, which caused petitioner to believe that he had shot that officer in the vest. PSR ¶ 10. In fact, no officer was hit. Pet. App. A4.

Following hours of negotiation, petitioner ultimately surrendered. Pet. App. A4.

2. A grand jury in the District of Arizona returned an indictment charging petitioner with nine counts of forcibly assaulting a federal officer with a deadly or dangerous weapon, in violation of 18 U.S.C. 111(a) and (b); nine counts of discharging a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A); and one count of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924 (a)(2). Indictment 1-7.

Following a jury trial, petitioner was convicted on six counts of forcibly assaulting a federal officer, six counts of discharging a firearm in violation of Section 924(c), and one count of possessing a firearm as a felon. Pet. App. A5. The assault and Section 924(c) convictions were based on the shot petitioner fired out the window at the officer in the parking lot and the additional shots petitioner fired at the front of the room, where the five officers were in the stack. *Ibid.* The district court sentenced petitioner to 1750 months of imprisonment. *Id.* at A6.

3. Petitioner appealed. As relevant here, petitioner argued that the five convictions for forcibly assaulting a federal officer, and the five Section 924(c) convictions, premised on the four shots petitioner fired at the officers in the stack were multiplicitous and therefore violated the Double Jeopardy Clause. Pet. App. A2, A6.

Petitioner did not, however, dispute that the shot he fired out the window provided a valid basis for one assault and one Section 924(c) conviction. Pet. 5 n.2. The court of appeals affirmed in part and reversed in part. Pet. App. A1-A23.

Because petitioner failed to raise his challenge to the assault convictions below, the court of appeals applied plain-error review. Pet. App. A6. The court concluded that, under this Court's decision in *Ladner* v. *United States*, 358 U.S. 169 (1958), the four shots petitioner fired at the front of the room could give rise to only four assault convictions because—in the court of appeal's view—*Ladner* established a rule that there may be only one assault conviction per gunshot regardless of the number of federal officers potentially affected by that shot. See Pet. App. A8. The court rejected the government's argument that the predecessor federal assault statute at issue in *Ladner*, 18 U.S.C. 254 (1940), was materially different than 18 U.S.C. 111, the officer-assault statute under which petitioner was convicted. Pet. App. A8-A9. The court therefore reversed one of the five assault convictions premised on the four shots petitioner fired at the front door, as well as the Section 924(c) conviction predicated on the conduct comprising that assault. *Id.* at A12.

The court of appeals rejected, however, petitioner's argument that the district court had plainly erred in entering judgment on the remaining four assault convictions associated with the shots fired towards the stack of officers. Pet. App. A9. Petitioner argued that those four shots could give rise to only a single conviction for assault and a single Section 924(c) conviction because the shots had been fired "in quick succession." *Id.* at A9-A10. The court explained that *Ladner* did not support

that argument, and that *Ladner* had in fact observed that the defendant might have been "properly convicted of more than one offense" if "more than one shot was fired." *Id.* at A10 (quoting *Ladner*, 358 U.S. at 178 n.6). The court also found no support for petitioner's argument in the out-of-circuit cases on which he attempted to rely because none of those cases addressed whether "multiple gunshots fired in quick succession must be construed as one assaultive act." *Ibid.* And the court observed that logic was not on petitioner's side because petitioner committed "four assaultive acts" that could have had "four (or more)" victims when he fired "his weapon four separate times toward the door." *Id.* at A11.

The court of appeals perceived some uncertainty in its precedent as to whether plain-error or de novo review should apply to petitioner's unpreserved challenge to the Section 924(c) convictions, but because the standard of review did not affect its conclusion, the court "assume[d] without deciding that de novo review applies." Pet. App. A7. And it found no merit in petitioner's contention that he had committed only a single violation of Section 924(c) in connection with the shots fired at the front of the room. *Id.* at A13-A16. The court explained that Section 924(c) provides that "any person who, during and in relation to any crime of violence . . . *uses* or carries *a firearm*" shall "if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years." *Id.* at A13 (quoting 18 U.S.C. 924(c)(1)(A)(iii)). The court rejected petitioner's assertion that he could only be convicted for one count "for the shots he fired toward the door because he only *used* his firearm once." *Ibid.* The court again determined that petitioner's reliance on out-of-circuit cases was misplaced because none

of those cases "considered whether multiple successive shots fired at multiple victims must be considered a single use of a firearm limiting the government to one [Section] 924(c) conviction." *Id.* at A13-A14 & n.5. The court further explained that "[b]ecause each discharge" of a gun "may be considered a use within the meaning of the statute," the "plain and unambiguous language of [Section] 924(c)(1)(A) compel[led] affirmance," a result that was "entirely consistent with the conclusions reached by [the court's] sister circuits." *Id.* at A16.

ARGUMENT

Petitioner renews his contentions (Pet. 4-16), raised for the first time on appeal, that his firing of four gunshots at a group of police officers was only a single assault on a federal officer in violation of 18 U.S.C. 111, and a single "use" of a firearm in violation of 18 U.S.C. 924(c). Those contentions lack merit, and the decision below does not conflict with the precedent of this Court or any other courts of appeals. This Court has repeatedly denied other petitions for a writ of certiorari challenging the imposition of multiple convictions under Section 924(c).[1] The same result is warranted here.

1. Petitioner first contends (Pet. 4-11) that, under *Ladner* v. *United States*, 358 U.S. 169 (1958), the four shots petitioner fired in the direction of five officers

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[1] See, *e.g.*, *Jordan* v. *United States*, No. 20-256 (Jan. 11, 2021); *Campbell* v. *United States*, 577 U.S. 841 (2015) (No. 14-9949); *Sessoms* v. *United States*, 571 U.S. 1023 (2013) (No. 12-8965); *Dire* v. *United States*, 568 U.S. 1145 (2013) (No. 12-6529); *Guess* v. *United States*, 568 U.S. 1093 (2013) (No. 12-6575); *Bernardez* v. *United States*, 565 U.S. 1160 (2012) (No. 11-6779); *Castro* v. *United States*, 565 U.S. 841 (2011) (No. 10-10620).

could give rise to only a single conviction for forcibly assaulting a federal officer. That contention is incorrect and does not warrant further review.

a. Under 18 U.S.C. 111, it is a crime to "forcibly assault[]" a federal officer in the performance of his or her duties. 18 U.S.C. 111(a); see 18 U.S.C. 1114. In *Ladner*, this Court considered the text and legislative history of a prior officer-assault statute, 18 U.S.C. 254 (1940), in order to determine whether Congress intended that a "single discharge of a shotgun would constitute one assault, and thus only one offense, regardless of the number of officers affected" or whether "Congress define[d] a separate offense for each federal officer." 358 U.S. at 173. Because "[n]either the wording of [Section 254] nor its legislative history point[ed] clearly to either meaning," the Court applied the rule of lenity and concluded that "the single discharge of a shotgun alleged by the petitioner * * * would constitute only a single violation of [Section] 254." *Id.* at 177-178. The Court observed, however, that it was not "impossible that petitioner was properly convicted of more than one offense, even under the principles which govern here" because the trial judge recalled that "'more than one shot was fired into the car in which the officers were riding.'" *Id.* at 178 n.6.

Petitioner was not convicted under Section 254, the now-obsolete statute under consideration in *Ladner*. Instead, he was convicted under 18 U.S.C. 111, a later, restructured version of the officer-assault statute. But even assuming *Ladner* applies equally to convictions under Section 111, the court of appeals did not err in affirming four convictions under Section 111 based on the four separate shots that petitioner fired at the stack of officers. *Ladner* held only that a single shot could not

give rise to multiple assault convictions. 358 U.S. at 178. *Ladner* did not foreclose the possibility that multiple shots could give rise to multiple assault convictions; to the contrary, the Court suggested that the *Ladner* petitioner's multiple convictions might be upheld if "more than one shot was fired." *Id.* at 178 n.6. That makes sense because, as the court of appeals explained, each discharge of a gun constitutes a separate "assaultive act." Pet. App. A10.

Petitioner argues (Pet. 13) that his four separate shots should not be viewed as four distinct acts because "they were fired in rapid succession." But petitioner himself acknowledges that that a single shot can constitute a discrete assaultive act because he concedes that the shot he fired out the back window properly gave rise to a distinct officer-assault conviction. Pet. 5 n.2. Petitioner offers no sound reason why each shot he fired at the front of the room should cease to constitute a distinct assault merely because it was quickly preceded or followed by an identical assaultive act, an approach that would appear to turn on nebulous and difficult line-drawing (*e.g.* what constitutes "rapid succession") that would defy consistent application. Pet. 13. Other courts of appeals have rejected such an unsupported and non-deterministic approach. See *United States* v. *Hopkins*, 310 F.3d 145, 151-152 (4th Cir. 2002) (affirming two assault convictions for multiple shots fired at officers during high-speed car chase), cert. denied, 537 U.S. 1238 (2003); *Cameron* v. *United States*, 320 F.2d 16, 18 (5th Cir. 1963) (multiple shots fired in quick succession at two officers constituted two "separate and distinct" assaults).

b. Petitioner errs in suggesting (Pet. 7-11) that the court of appeals' decision conflicts with other courts' interpretation of Section 111. As the Ninth Circuit recognized, none of the cases petitioner cites indicates that "multiple shots fired in quick succession must be construed as one assaultive act." Pet. App. A10. Rather, petitioner attempts to rely on a number of cases in which courts have *affirmed* multiple assault convictions, arguing that the defendant in each case committed multiple "distinguishable acts of assault." Pet. 6 (quoting *United States* v. *Rivera Ramos*, 856 F.2d 420, 422 (1st Cir. 1988), cert. denied, 493 U.S. 837 (1989). According to petitioner, the cited decisions conflict with the decision below because in each one the court upheld multiple convictions only because the defendant had committed a number of "distinct" acts. Pet. 7 (quoting *United States* v. *Segien*, 114 F.3d 1014, 1022 (10th Cir. 1997), cert. denied, 523 U.S. 1024 (1998). But that is precisely what the court found in this case; petitioner could be convicted for multiple counts of officer assault because he "committed four assaultive acts by firing his weapon four separate times." Pet. App. A11.

Moreover, two of the cases petitioner cites (Pet. 8-10) upheld multiple assault convictions based on circumstances similar to those here, undermining petitioner's own contention that acts that occur close together in time cannot qualify as distinct assaults. In *Thorne* v. *United States*, 406 F.2d 995 (1969), the Eighth Circuit upheld two assault convictions where the defendant fired multiple gunshots at FBI agents as "part of one affray" that lasted "2 or 3 minutes and maybe less." *Id.* at 998-999. And in *United States* v. *Duran*, 96 F.3d 1495 (1996), which petitioner acknowledges (Pet. 10) supports the decision below, the D.C. Circuit upheld four

assault convictions where the defendant fired a "barrage" of gunshots in the direction of Secret Service agents. 96 F.3d 1499, 1509-1510.

c. In any event, this case would be a poor vehicle to address whether multiple gunshots can give rise to multiple assault convictions because petitioner failed to raise the issue in the district court. Pet. App. A6. As a result, the court of appeals reviewed petitioner's claim only for plain error, *ibid.*, and the same stringent standard would apply before this Court. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). As the court of appeals recognized, petitioner cannot satisfy that standard. Pet. App. A9-A10.

2. Petitioner also contends that this Court should grant review because the Ninth Circuit's determination that petitioner "use[d]" his firearm four times for purposes of 18 U.S.C. 924(c) "is inconsistent with §924(c)'s purpose." Pet. 11. That contention likewise lacks merit.

a. Section 924(c)(1) prohibits, *inter alia*, "us[ing] * * * a firearm" "during and in relation to any crime of violence." Where a defendant violates Section 924(c) by "discharg[ing]" "the firearm," that defendant is subject to a statutory minimum ten-year sentence in addition to any punishment for the underlying crime of violence. 18 U.S.C. 924(c)(1)(A)(iii). In *Bailey* v. *United States*, 516 U.S. 137 (1995), this Court held that, in order for a defendant's actions to satisfy the "use" prong of Section 924(c)(1), the defendant must "actively employ[]" the weapon. *Id.* at 147. The Court observed that active employment includes "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm." *Id.* at 148.

The court of appeals correctly recognized that, under Section 924(c)'s "plain and unambiguous" language, petitioner could be convicted of four counts of "us[ing]" a firearm "during and in relation to any crime of violence" based on his four separate discharges of a gun in connection with four separate forcible assaults on federal officers. Pet. App. A15 (citation and emphasis omitted). That straightforward interpretation of the term "uses" is reinforced by both the statute's and this Court's explicit identification of a "discharge[]" as one potential "use[]." 18 U.S.C. 924(c)(1); *Bailey*, 516 U.S. at 148. Petitioner suggests (Pet. 15) that by making "each 'use' of a firearm * * * subject to a mandatory consecutive sentence," Congress indicated an intent to make a "second conviction" dependent on a "second choice to use, carry, or possess a gun." But even if that were an available construction of the text, petitioner's conduct *does* reflect a second (as well as a third, and fourth) choice to use a gun because he chose to fire his weapon four times.

Petitioner's reliance (Pet. 16) on the rule of lenity is equally misplaced. The rule of lenity may be applied only if, after considering all of the traditional tools of statutory construction, "there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United States* v. *Castleman*, 572 U.S. 157, 173 (2014) (quoting *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010)); see *Shular* v. *United States*, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring). Section 924(c)'s text admits of no such "grievous ambiguity or uncertainty" about whether a defendant may be convicted for each separate discharge of a firearm in connection with a separate crime of violence. 18 U.S.C. 924(c)(1)(A).

b. Petitioner is also mistaken in contending (Pet. 11) that the court of appeals' decision is "at odds" with the decisions of other circuits. As the court of appeals explained (Pet. App. A13) and petitioner acknowledges (Pet. 12), "[n]one" of the cases he cites holds that the government may obtain only a single conviction under Section 924(c) where the defendant has fired multiple shots that are multiple individual crimes of violence.

Instead, petitioner asserts (Pet. 11-12) some uncertainty in the circuits regarding whether every Section 924(c) conviction must be supported by a "unique and independent use, carry, or possession" of a firearm. *United States* v. *Rentz*, 777 F.3d 1105, 1108-1111, 1115 (10th Cir. 2015) (en banc) (Gorsuch, J.). Some courts of appeals have held that a defendant can face multiple convictions under Section 924(c) so long as each Section 924(c) conviction relates to a separate predicate offense. See *United States* v. *Hodge*, 870 F.3d 184, 196 (3d Cir. 2017); *United States* v. *Sandstrom*, 594 F.3d 634, 655-656 (8th Cir.), cert. denied, 562 U.S. 878, and 562 U.S. 881 (2010); *United States* v. *Khan*, 461 F.3d 477, 493-494 (4th Cir. 2006). Other courts of appeals have held (Pet. 11-12) that only one Section 924(c) conviction is proper where the criminal conduct involved only a single incident of using, carrying, or possessing a firearm, even if that single incident has given rise to multiple distinct predicate offenses. See *United States* v. *Jackson*, 918 F.3d 467, 492 (6th Cir. 2019); *Rentz*, 777 F.3d at 1108-1111 (10th Cir.); *United States* v. *Cureton*, 739 F.3d 1032, 1043 (7th Cir. 2014); *United States* v. *Phipps*, 319 F.3d 177, 189 (5th Cir. 2003); *United States* v. *Finley*, 245 F.3d 199, 206-208 (2d Cir. 2001), cert. denied, 534 U.S. 1144 (2002). This case, however, does not implicate any disagreement.

The court of appeals resolved this case on the hypothesis that each separate conviction under Section 924(c) required *both* a separate crime of violence *and* a separate use. See Pet. App. A14. And it correctly observed that petitioner "used his gun four separate times when he fired four shots toward the door—he pulled the trigger four times, in four slightly different directions, resulting in four separate discharges, and there were at least four potential victims." *Id.* at A15. Thus, as the court itself emphasized, the result here is "entirely consistent with the conclusions reached by [the court's] sister circuits." *Id.* at A16.

Petitioner cites decisions analyzing whether a defendant may face multiple Section 924(c) convictions where he has been convicted of more than one violent felony based on the exact same conduct, but they are inapposite. For example, he attempts to rely on *United States* v. *Wilson*, 160 F.3d 732 (D.C. Cir. 1998), cert. denied, 528 U.S. 828 (1999), a case in which the defendant murdered a jailhouse informant by "shooting him repeatedly" before he could testify in court. *Id.* at 736. Based on that murder, the defendant was convicted of violating both 18 U.S.C. 1512(a)(1)(A) (1994), which punishes a killing that is intended to prevent testimony, and 18 U.S.C. 1513(a)(1)(B) (1994), which punishes a killing that is intended to retaliate for the victim's past assistance to law enforcement. *Wilson*, 160 F.3d at 748 n.20. The D.C. Circuit observed that, under its precedent, a defendant may not face multiple Section 924(c) convictions based on a single predicate offense, and it extended that precedent to the defendant's situation because—while he was convicted of two predicate offenses—there was no "distinct conduct" underlying

those two offenses. *Id.* at 749[2]; see *United States* v. *Wallace*, 447 F.3d 184, 189 (2d Cir.) (defendant could not face two Section 924(c) convictions where the underlying offenses were both predicated on the same "relevant conduct"), cert. denied, 549 U.S. 1011 (2006). That reasoning is not implicated in this case because each of defendant's assault convictions was predicated on distinct conduct, as each was based on a separate shot fired at the officers.

Finally, petitioner cites (Pet. 13) *United States* v. *Hopkins*, *supra*, where the government charged a defendant with two counts of officer assault under Section 111 and one count of discharging a weapon under Section 924(c) after he fired multiple shots at two officers during a high-speed car chase. 310 F.3d at 148-149. But the government's decision to charge only a single violation of Section 924(c) in that case does not constrain the government's ability to charge petitioner with multiple counts of discharging his firearm in connection with a violent felony where the "plain and unambiguous" language of Section 924(c) permits such charges. Pet. App. A16.

c. Even if the question of whether petitioner was properly subject to multiple convictions under Section 924(c) otherwise warranted certiorari, petitioner did not adequately preserve this argument. Petitioner acknowledged before the court of appeals that he "did

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[2] *Wilson* also referred to the shooting of the witness as "one use (albeit a repeated use)" of a firearm, even though the defendant in that case fired multiple shots. 160 F.3d at 749. But in *Wilson* it was "undisputed" that the defendant had "used his firearm only one time," *ibid.*, so the court had no occasion to consider whether or when distinct discharges of a gun might constitute distinct uses of a firearm.

not raise this precise issue below," but argued that Ninth Circuit precedent nonetheless allowed de novo review. Pet. C.A. Br. 26-27. Consistent with the plain text of Federal Rule of Criminal Procedure 52(b), however, the government advocated plain-error review. Gov't C.A. Br. 14. The court of appeals assumed without deciding that de novo review applied because the relevant standard did not affect its resolution of the appeal. Pet. App. A7. Dispute over the applicable standard review would make this case an unsuitable vehicle for review, particularly because petitioner cannot establish plain error here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2021