No. 20-551

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 States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The government's arguments for why this Court should pass on this petition cannot overcome the compelling reasons for review. It notes this Court has declined to resolve questions concerning the imposition of multiple convictions under § 924(c) and implies Voris did not preserve the questions presented. Despite there being a split amongst the circuits on both questions—one of which it concedes—it hypothesizes that the Ninth Circuit's opinion is "entirely consistent" with other decisions of its sister circuits and this Court. And it suggests there is "dispute" as to the applicable standard of review. None of these arguments are true barriers to this Court's review.

The circuit split as to both questions is real and "consequential." *United States v. Rentz*, 777 F.3d 1105, 1107 (10th Cir. 2015) (en banc) (Gorsuch, J.) Each separate § 111 conviction, applied below, served as a predicate offense for Voris' § 924(c) convictions, and each separate § 924(c) conviction carried mandatory consecutive prison terms, resulting in a 1,750-month sentence. Absent intervention from this Court, the Ninth Circuit's tortured reading of § 111 and, correspondingly, § 924(c), will lead to continued confusion, disproportionate outcomes, and unnecessarily severe sentences in the future.

The petition should be granted.

ARGUMENT

1. The government argues that Voris "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," and contends such an approach "would appear to turn on nebulous or difficult line-drawing . . . that would defy consistent application." BIO 8. Aside from being wholly consistent with *Ladner v. United States*, 358 U.S. 169 (1958), and the reasoning adopted by the majority of courts of appeals that have evaluated this issue, Voris' position is logically sound and straightforward in application.

Voris correctly acknowledges that a single shot *can* constitute a discrete assaultive act, depending on the circumstances. The government says this acknowledgment is proof that Voris' position is inconsistent, but his concession that the shot he fired out the back window supported a separate assault conviction only serves to illustrate *how* multiple § 111 convictions can be appropriate. BIO 8. Unlike the shots Voris fired towards the front door, the shot fired out the back window supported its own § 111 conviction because it was a distinguishable event. Voris' actions and intent in firing out the back window were different from his actions and intent in shooting the volley towards the front door. *See United States v. Thomas*, 669 F.3d 421, 426 (4th Cir. 2012) (evaluating whether defendant's "actions and intent" constitute distinct successive criminal episodes). The first shot was fired towards Officer Garcia, while the remaining four shots were fired

towards the officers in the stack. The first shot and the remaining four shots were separated in time and location, whereas no intervening events occurred between the remaining four shots themselves. After Voris fired the first round, the officers in the parking lot returned fire and Voris retreated. After a brief but significant lapse in time, Voris fired the remaining four shots through the front door. The two events also had separate motivations: Voris shot through the back window "to make the[officers] back away" so he could flee, but shot towards the front door with the hopes that different officers would return fire and kill him. PSR ¶ 10-11.

Analyzing whether an assault is separate and distinct, though perhaps fact-intensive, is not "nebulous or difficult to conduct." BIO 8. It is not unlike other fact-intensive questions that federal courts routinely evaluate. While there are reasons to distinguish between Voris firing his weapon once out the back window and subsequently firing it four times towards the front door, there is no basis to distinguish amongst the four shots themselves. Pet. at 5. Other courts of appeals that have adopted a "course of conduct" or "successive offenses approach" in evaluating whether multiple § 111 convictions can be sustained have similarly had no difficulty distinguishing between separate assaultive acts. *Cf. United States v. Alexander*, 471 F.2d 923, 933-34 (D.C. 1972) (multiple § 111 convictions appropriate only where "distinct, successive assaults have been committed"). Multiple § 111 convictions are proper if the assaults were "separated in . . . time [or]

location," *United States v. Seigen*, 114 F.3d 1014, 1022 (10th Cir. 1997), were directed at different officers, *see United States v. Hodges*, 436 F.2d 676, 678 (10th Cir. 1971), resulted in separate blows or injuries, *see Thomas*, 669 F.3d at 423, or were otherwise meaningfully distinguishable.

Ladner did not hold, as the government implies, that each discharge of a firearm necessarily constitutes a separate assault. BIO 7-8. It merely left open the possibility that separate shots *may* result in separate convictions. *See Ladner*, 358 U.S. at 178 n.6 ("In view of the trial judge's recollection that 'more than one shot was fired into the car in which the officers were riding' we cannot say that it is impossible that petitioner was properly convicted of more than once offense, even under the principles which govern here."). No court has interpreted *Ladner* as automatically permitting a separate § 111 charge for every shot fired.

Nor are the opinions in *United States v. Hopkins*, 310 F.3d 145, 151-52 (4th Cir. 2002) and *Cameron v. United States*, 320 F.2d 16, 18 (5th Cir. 1963) inconsistent with Voris' position. *See* BIO 8. *Hopkins* and *Cameron* emphasized the separate nature of each assault; multiple convictions were not affirmed merely because "multiple shots" had been fired. In *Hopkins*, the Fourth Circuit affirmed two convictions for multiple shots fired at officers during a high-speed car chase. 310 F.3d at 151-52. However, it did not base its opinion on the mere fact that more than one shot had been fired. It affirmed because the evidence showed the defendant had engaged in two separate assaults: first, by

"waiv[ing] his gun at the officers at several points during the chase" and, second, by "sho[oting] at them on at least two occasions, both as he drove and as he was stopped in Montgomery County." *Id.* In *Cameron*, the Fifth Circuit emphasized the separate nature of the assaults, noting that the district court found "the [five] shots came from different directions . . . somewhat apart from each other, showing that two men were doing the shooting at each officer," and that "the defendants were shooting at each one of the officers individually in an attempt to kill and murder each of those officers." 320 F.2d at 18. *Hopkins* and *Cameron* support—rather than cut against—Voris' claim that assaults must be separate and distinct to support multiple § 111 convictions.

All the cases Voris relies upon support his position that "multiple shots fired in quick succession must be construed as one assaultive act" *unless* the evidence provides a basis for distinguishing between multiple shots. BIO 9. Though the government correctly notes that those cases involved varying factual circumstances and different procedural postures, they each relied on the separate and distinct nature of the assaults in affirming multiple convictions. *See United States v. Rivera Ramos*, 856 F.2d 420, 423 (1st Cir. 1988) (affirming multiple § 111 convictions because court was satisfied that "defendant assaulted each of the three agents separately at different times, and not just all three together"); *Thomas*, 669 F.3d at 426 (citing three intervening events, which provided "sound support" for conclusion that Thomas' assaults

were "distinct successive criminal episodes"). Furthermore, in *Smith v. United States*, 418 F.2d 1120 (D.C. Cir. 1969), the court reversed the imposition of consecutive sentences for assault with intent to kill and assault with a dangerous weapon because it was not clear that the "actions and intent of defendant constitute[d] distinct successive criminal episodes, rather than two phases of a single assault." *Id.* at 1121. Indeed, prior to the Ninth Circuit's opinion in *Voris*, no court of appeals that has addressed this issue had affirmed multiple assault convictions without there having been some basis to distinguish between assaultive acts. In doing so, the Ninth Circuit created a rift in how courts interpret *Ladner*.

Voris' argument is not that "acts that occur close together in time *cannot* qualify as distinct assaults," as the government contends. BIO 9 (emphasis added). Rather, he argues that his act of firing four shots towards the front door did not result in distinct assaults because there was no factual predicate for distinguishing among them. It is the number of distinct assaultive acts that must guide the analysis, not the number of shots fired.

Next, the government asserts *Thorne v. United States*, 406 F.2d 995 (8th Cir. 1969) cuts against Voris' arguments because the Eighth Circuit upheld two assault convictions where the defendant fired multiple gunshots at federal agents as "part of one affray" that lasted "2 or 3 minutes and maybe less." BIO 9, *quoting Thorne*, 406 F.2d at 998. But the government ignores the basis for that decision. The Eighth Circuit

conducted a detailed factual analysis and took great pains to distinguish the assaultive acts upon each of the agents. *Thorne*, 406 F.2d at 998-99. Because the court was satisfied that "the separate character of the assault upon Calhoon, particularly after Cassidy was shot and seriously wounded, [wa]s adequately provided by Calhoon's testimony," it affirmed the separate assault convictions. *Id.* at 999. In *Voris*, unlike *Thorne*, there was no such basis for distinguishing between assaults.

United States v. Duran, 96 F.3d 1495 (D.C. Cir. 1996) does not support the government's opposition either because the D.C. Circuit was not asked to consider the issue presented here. BIO 9. There, the defendant only argued that there was insufficient evidence that he was "aware" that Secret Service agents would be present on the grounds of the White House when he fired a barrage of bullets "as he ran along the fence" of the North Lawn. 96 F.3d at 1509-10. Thus, while *Duran* may appear to support the government's position at first glance, its reasoning is wholly inapposite and cannot support the Ninth Circuit's erroneous holding that "Voris committed four assaultive acts by firing his weapon four separate times toward the door." Pet. App. A-11.

The government closes by contending this case is a "poor vehicle" to address when multiple gunshots can give rise to multiple assault convictions because Voris "failed to raise the issue in the district court" and is thus limited to plain error review. BIO 10. But the Ninth Circuit's decision was not dependent on plain

error review because it found "no error, "let alone plain[] err[or]." *See* Pet. App. A-12. This Court can simply answer the narrow question of whether *Ladner* requires that each § 111 conviction be supported by a separate and distinct assault, and then remand the case back to the Ninth Circuit for plain error review.

2. The government concedes the courts of appeals are divided "regarding whether each Section 924(c) conviction must be supported by a 'unique and independent use, carry, or possession' of a firearm," but contends this case "does not implicate any disagreement" because the Ninth Circuit concluded Voris "used his gun four separate times when he fired four shots toward the door." BIO 12-13. However, this case implicates a disagreement as to *what* exactly suffices to constitute a separate use of a firearm sufficient to support a second or successive § 924(c)(1)(A) charge. *See Rentz*, 777 F.3d at 1115.

All of the other courts of appeals that have concluded each § 924(c) conviction requires a separate use of a firearm have construed the statute as requiring each use be "unique and independent" and brought on by a separate and distinct *choice*. *See United States v. Vichitvongsa*, 819 F.3d 260, 270 (6th Cir. 2016); *Rentz*, 777 F.3d at 1115 (each § 924(c) conviction requires "unique and independent" use, carry, or possession); *United States v. Cureton*, 739 F.3d 1032, 1043 (7th Cir. 2014) (only one "use" of a firearm along with simultaneously committed predicate offenses where there was "only one choice to use a gun in committing a crime"); *United States v. Phipps*, 319 F.3d 177, 187 (5th Cir.

2003) ("Defendants chose to use a single firearm a single time, suggesting that they should only face a single count of violating § 924(c)(1)"); *United States v. Finley*, 245 F.3d 199, 207 (2d Cir. 2001) (concluding defendant could only receive one § 924(c) conviction because he only "chose to 'possess' the firearm once, albeit in continuing fashion"); *United States v. Wilson*, 160 F.3d 732, 749 (D.C. Cir. 1998) (suggesting multiple § 924(c) charges only permissible where evidence shows "distinct uses of the firearm," for example, "first to intimidate and then to kill"). Yet, the Ninth Circuit found a separate "use" with each pull of the trigger without analyzing whether each discharge amounted to a unique and independent use of a firearm or deciding whether each § 924(c) conviction requires a separate choice. Pet. App. A-16.

Even among the circuits that agree each § 924(c) conviction requires a unique and independent use, carry, or possession, there is disagreement as to when "one use, carry, or possession ends and other begins." *Rentz*, 777 F.3d at 1115 (comparing *Finley*, 245 F.3d at 206-08, which suggests a single possession existed over a continuous period of time, with *Phipps*, 319 F.3d at 188 n.11, which suggests this might count as two acts of possession); *see also Phipps*, 319 F.3d at 188 n.11 (noting skepticism regarding *Finley*'s holding that § 924(c)(1) does not authorize multiple convictions based on "continuous" possession of firearm during "simultaneous" predicate offenses consisting of "virtually" identical conduct). In other words, not only are the courts of appeals split as to *whether* every § 924(c)

conviction must be supported by a separate "use, carry, or possession" of a firearm, they are also split as to *what* constitutes a separate "use, carry, or possession" of a firearm, and how to determine *when* one "use, carry, or possession" ends and another begins. Because this case precisely implicates all of these questions, it is the perfect vehicle for resolving the conceptual mess that is § 924(c)(1)(A).

Bailey v. United States, 516 U.S. 137 (1995) does not "reinforce[]" the Ninth Circuit's conclusion that Voris' four "discharges" of his firearm were sufficient to sustain four separate § 924(c) convictions. BIO 11. *Bailey* merely established that "firing" a firearm constitutes a "use" for purposes of § 924(c), but did not answer the precise question presented here—what suffices to constitute a separate "use" of a firearm for purposes of sustaining multiple § 924(c) convictions? *Bailey*, 516 U.S. at 148 ("the question we face today" is "what evidence is required to permit a jury to find that a firearm had been used at all").

Nor is Voris alone to "suggest 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.'" BIO 11, *quoting* Pet. 15 (emphasis added). Multiple courts of appeals have similarly interpreted § 924(c) as requiring defendants to make more than one choice to possess or use a firearm to sustain more than one § 924(c) conviction. *Vichitvongsa*, 819 F.3d at 270; *Rentz*, 777 F.3d at 1111-12; *Cureton*, 739 F.3d at 1043; *Phipps*, 319 F.3d at 187;

Finley, 245 F.3d at 207; *Wilson*, 160 F.3d at 750 (Congress' intent to "penalize the choice of using or carrying a gun in committing a crime" limited the number of § 924(c) counts that could be charged).

The government suggests that this Court should decline review because Voris chose to "use" a firearm four separate times with each successive squeeze of the trigger. BIO 11. But that is a contested statement and is the kind of fact-intensive question that should be left to the lower courts to sort out *after* this Court has resolved the question presented here. That the government is satisfied that Voris' conduct reflects a second (as well as a third, and fourth) choice to use a gun does not undermine the clear circuit split over what is required to sustain separate § 924(c) convictions. BIO 11.

The government also proposes that because this Court has passed on other challenges to the imposition of multiple convictions under § 924(c) before, it should do so again. *See* BIO 6 n.1. Those cases did not present the precise question posed here. They dealt only with the broader question of whether each § 924(c) conviction requires a separate use, carry, or possession of a firearm, and did not ask the Court to clarify what exactly suffices to constitute a separate use of a firearm for purposes of § 924(c)(1)(A). As the courts of appeals continue to try to grapple with these challenging questions, the § 924(c) quandary only grows deeper, and there is no sign it will resolve on its own. *Compare United States v. Jackson*, 918 F.3d 467, 494 (6th Cir. 2019), *with United States v. Jordan*, 952 F.3d 160,

170-71 (4th Cir. 2020). These questions are ripe for this Court's review.

Finally, Voris sufficiently preserved this argument for review by this Court. BIO 14-15. The Ninth Circuit implicitly acknowledged this in reviewing his claim de novo. Pet. App. A-7. Furthermore, because the Ninth Circuit resolved this issue by finding "no error" under de novo review, there is no need for this Court to address the standard of review when resolving this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 12th day of March, 2021.

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