No. 20-7213

IN THE SUPREME COURT OF THE UNITED STATES

NATHAN RAY DENT ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-7213

NATHAN RAY DENT ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (Pet. 9-16) that their convictions for brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A), are invalid because the government failed to specify a qualifying crime of violence. Petitioners further contend (Pet. 16-26) that armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), does not qualify as a "crime of violence" within the meaning of 18 U.S.C. 924(c)(3)(A). No further review is warranted on either issue.

1. Petitioners contend (Pet. 11-12) that it is unclear whether their convictions for brandishing a firearm during and in

relation to a crime of violence under Section 924(c)(1)(A) were based on the predicate offense of (1) conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), or (2) armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). Petitioners are incorrect. Each petitioner pleaded guilty pursuant to a plea agreement that specified "bank robbery" as the predicate offense for the Section 924(c) conviction. See Pet. App. 38a (Dent); id. at 68a (Morales); see also Pet. 4-5. Armed bank robbery qualifies as a crime of violence under Section 924(c)(3)(A), see pp. 4-5, infra, even though conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence following this Court's decision in United States v. Davis, 139 S. Ct. 2319 (2019), see, e.g., United States v. Barrett, 937 F.3d 126, 129-130 (2d Cir. 2019) (concluding that conspiracy to commit Hobbs Act robbery is not a crime of violence after Davis).

Moreover, each petitioner pleaded guilty to armed bank robbery in addition to the Section 924(c) offense, and each petitioner specifically admitted that he personally employed a firearm in the course of the bank robbery. See Pet. App. 39a (Dent); id. at 69a (Morales). Those admissions show that, even if petitioners' plea agreements were ambiguous about the predicate offense for their Section 924(c) convictions, any such ambiguity had no effect on the outcome of petitioners' cases.

Petitioners argue (Pet. 12-14) that the "categorical approach and modified categorical approach" prohibit reliance on

petitioners' convictions for armed bank robbery as the predicate crimes of violence for their convictions under Section 924(c)(1)(A). Petitioners are incorrect. The categorical and modified categorical approaches are used to determine whether a defendant's prior offense qualifies as a crime of violence. The categorical approach is used if the prior crime involved a violation of an "'indivisible'" statute -- i.e., one that "sets out a single * * * set of elements to define a single crime," Mathis v. United States, 136 S. Ct. 2243, 2248 (2016), whereas the modified categorical approach is used if the prior crime involved a violation of a "divisible" statute -- i.e., a statute that defines multiple crimes with distinct elements, see id. at 2249 (citation omitted). Neither approach applies in the different circumstances at issue in the first question presented here, which pertains not to whether an offense is a crime of violence, but instead whether, if so, it was relied upon. Here, the armed bank robbery offense was part of the charges, specified in the plea agreements, and a valid predicate "crime of violence."

Petitioners also argue (Pet. 14-16) that the court of appeals' denials of their requested certificates of appealability conflict with the Fourth Circuit's decision in United States v. Runyon, 983 F.3d 716 (2020), amended, No. 17-5, 2021 WL 1513409 (Feb. 12, 2021), and the Fifth Circuit's decision in United States v. Jones, 935 F.3d 266, 272-274 (2019) (per curiam). That is incorrect. In Runyon, the Fourth Circuit determined that both of the defendant's

charged predicate offenses categorically qualified as crimes of violence under Section 924(c)(3)(A), so the court had no need to determine which offense the jury had relied on as the predicate for the Section 924(c) conviction. See 2021 WL 1513409, at *4-*6. And in Jones, the court of appeals made a specific finding that the "record evidence demonstrates a reasonable probability that the jury would not have convicted Appellants of the § 924 offenses if the invalid crime of violence predicate were not included on the verdict form." 935 F.3d at 274. Here, by contrast, the court of appeals correctly made a different determination, which accords with petitioners' charges and pleas.

2. A conviction for armed bank robbery requires proof that the defendant (1) 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); and (2) 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 explained 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), armed bank robbery qualifies as a crime of violence under Section 924(c) because it "has as an element the use, attempted use, or threatened use of physical force

against the person or property of another," 18 U.S.C. 924(c)(3)(A). See Br. in Opp. at 7-25, Johnson, supra (No. 19-7079).[1]

Petitioners contend (Pet. 22-33) that armed bank robbery does not qualify as a crime of violence under Section 924(c)(3)(A), asserting that federal bank robbery does not require the use, attempted use, or threatened use of violent force, see Pet. 18-20; that federal bank robbery is not a specific-intent crime, see Pet. 19 (citing, inter alia, Carter v. United States, 530 U.S. 255, 268 (2000)); that federal armed bank robbery may be committed using an inoperable or fake gun, see Pet. 20-21; and that the bank-robbery statute includes nonviolent intimidation and extortion as indivisible means of committing the offense, see Pet. 21-22. Those contentions lack merit for the reasons explained at pages 9 to 25 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 and armed bank robbery. See Br. in Opp. at 7-8, Johnson, supra (No. 19-7079). This Court has repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on that issue, see id. at 8-9 & n.1, and the same result is warranted here.

[1] We have served petitioners with a copy of the government's brief in opposition in Johnson, which is also available on this Court's online docket.

The petition for a writ of certiorari should be denied.[2]

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

APRIL 2021

[2] The government waives any further response to the petition unless this Court requests otherwise.