

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ARMSTRONG, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

ANN O'CONNELL ADAMS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether this Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand the case for further consideration in light of United States v. Taylor, 142 S. Ct. 2015 (2022).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

United States v. Armstrong, No. 6:19-cr-00224 (Apr. 14, 2021)

United States Court of Appeals (11th Cir.):

Armstrong v. United States, No. 21-11252 (Dec. 15, 2021)

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-7933

JOHN ARMSTRONG, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not published in the Federal Reporter but is available at 2021 WL 5919822.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2021. On March 1, 2022, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including April 14, 2022. The petition for a writ of certiorari was filed on March 15, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and (b); two counts of bank robbery, in violation of 18 U.S.C. 2113(a); two counts of using, carrying, and brandishing a firearm during and in relation to a bank robbery, in violation of 18 U.S.C. 924(c) (1) (A) (ii); one count of attempted bank robbery, in violation of 18 U.S.C. 2113(a); and one count of using, carrying, and brandishing a firearm during and in relation to an attempted bank robbery, in violation of 18 U.S.C. 924(c) (1) (A) (ii). Judgment 1. The district court sentenced petitioner to a total of 420 months of imprisonment to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. A1-A5.

1. On June 14, 2019, petitioner ran into a 7-Eleven Store wearing all black and a mask. Plea Agreement 23. He pointed a gun at two employees and demanded money from the employee behind the counter. Ibid. When that employee froze, petitioner jumped over the counter and struck the employee in the head with his gun, lacerating the employee's left eye. Ibid. The other employee emptied the cash registers and gave petitioner about \$350. Ibid.

On July 31, 2019, petitioner robbed a Bank OZK in Punta Gorda, Florida. Plea Agreement 25. He hid behind bushes outside of the

bank with a gun and wearing a mask, jumped out and grabbed a teller who was arriving at work, and forced his way into the bank. Ibid. He ordered two tellers into the bank's vault and demanded that they fill his bags with money. Ibid. Petitioner left the bank with about \$151,000. Ibid.

On September 25, 2019, petitioner and two co-defendants, Tanya Legg and Daniel Zirk, attempted to rob a PNC Bank in Davenport, Florida. Plea Agreement 27. Petitioner and Zirk hid in bushes outside the bank, forced their way inside as tellers arrived at work, held the tellers at gunpoint, and ordered them to get money out of the safe. Id. at 27, 29. The robbery was foiled when the bank's alarm went off while petitioner and Zirk were inside. Id. at 29.

On September 26, 2019, petitioner, Legg, and Zirk robbed a BB&T Bank in Altamonte Springs, Florida. Plea Agreement 27-28. Petitioner and Zirk used the same tactic of hiding in bushes and forcing their way into the bank by holding the tellers at gunpoint as they arrived for work. Ibid. They stole about \$22,000 from the bank during the robbery. Ibid.

2. A federal grand jury in the Middle District of Florida charged petitioner with Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and (b) (Count 1); using, carrying, and brandishing a firearm during and in relation to Hobbs Act robbery, in violation of 18 U.S.C. 924(c)(1)(A)(ii) (Count 2); two counts of bank

robbery, in violation of 18 U.S.C. 2113(a) (Counts 3 and 11); two counts of using, carrying, and brandishing a firearm during and in relation to a bank robbery, in violation of 18 U.S.C. 924(c)(1)(A)(ii) (Counts 4 and 12); attempted bank robbery, in violation of 18 U.S.C. 2113(a) (Count 9); using, carrying, and brandishing a firearm during and in relation to an attempted bank robbery, in violation of 18 U.S.C. 924(c)(1)(A)(ii) (Count 10); possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (Count 13); and possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count 15). Second Superseding Indictment 1-4, 7-11.

Petitioner pleaded guilty to each of the robbery counts (Counts 1, 3, 9, and 11) and three of the Section 924(c) counts (Counts 4, 10, and 12). Judgment 1. The government agreed to dismiss the Section 924(c) count predicated on Hobbs Act robbery, the felon-in-possession count, and the cocaine-trafficking count. Plea Agreement 5.

Before sentencing, petitioner objected to the imposition of the statutorily required consecutive sentence for each of the Section 924(c) offenses, asserting that the predicate crimes of bank robbery and attempted bank robbery were not "crime[s] of violence" under the statute's definitional provision, see 18 U.S.C. 924(c)(3), and that Section 924(c) is unconstitutionally vague. D. Ct. Doc. 210, at 4-5 (Mar. 23, 2021); D. Ct. Doc. 243,

at 10 (May 31, 2021). The district court overruled petitioner's objection. D. Ct. Doc. 243, at 11. The court sentenced petitioner to 168 months of imprisonment on the robbery counts and a consecutive 84-month sentence on each Section 924(c) count, for a total of 420 months, to be followed by five years of supervised release. Judgment 3-4.

3. The court of appeals affirmed. Pet. App. A1-A5. The court rejected petitioner's argument that 18 U.S.C. 924(c)(3)(A)'s definition of "crime of violence" is unconstitutionally vague in light of the Supreme Court's decision in United States v. Davis, 139 S. Ct. 2319, 2336 (2019), which invalidated the alternative "crime of violence" definition in Section 924(c)(3)(B). Pet. App. A4. The court of appeals then observed that it had previously held that bank robbery under Section 2113(a) is categorically a crime of under Section 924(c)(3)(A), which remains valid even after Davis's invalidation of Section 924(c)(3)(B) as unconstitutionally vague. Id. at A4-A5 (citing In re Sams, 830 F.3d 1234, 1239 (11th Cir. 2016)). And the court further observed that it had previously found attempted bank robbery and aiding and abetting bank robbery to qualify as crimes of violence under Section 924(c)(3)(A). Ibid. (citing Steiner v. United States, 940 F.3d 1282, 1293 (11th Cir. 2019) (per curiam) (aiding and abetting), cert. denied, 141 S. Ct. 320 (2020); United States v. St. Hubert, 909 F.3d 335, 351-352 (11th Cir. 2018) (attempt), cert. denied, 139 S. Ct. 1394 (2019)).

ARGUMENT

Petitioner contends (Pet. 2, 10) that his convictions under 18 U.S.C. 924(c) are infirm because Section 924(c)(3)(A) is unconstitutionally vague and because bank robbery and attempted bank robbery are not predicate "crime[s] of violence" under 18 U.S.C. 924(c)(3). He also contends (Pet. 2, 10) that the sentences for his Section 924(c) offenses should run concurrently with each other. Plenary review of the petition is unwarranted. However, because one of petitioner's Section 924(c) offenses is predicated on attempted bank robbery, the Court should grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration in light of United States v. Taylor, 142 S. Ct. 2015 (2022).

1. Under Section 924(c)(3), a federal felony qualifies as a predicate "crime of violence" if it satisfies either of two definitions: (A) the offense "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (the elements clause); or (B) the offense "by its nature, involves a substantial risk that physical force * * * may be used" (the residual clause). 18 U.S.C. 924(c)(3). This Court invalidated Section 924(c)(3)(B) as unconstitutionally vague in United States v. Davis, 139 S. Ct. 2319 (2019). And in Taylor, this Court held that attempted Hobbs Act robbery is not a "crime of violence" under Section 924(c)(3)(A), because it does not have

as an element the use, attempted use, or threatened use of physical force. 142 S. Ct. at 2025-2026.

The predicate “crime of violence” in this case is attempted bank robbery under 18 U.S.C. 2113(a), rather than attempted Hobbs Act robbery. The decision below, however, rests on the premise that “attempting to commit a crime of violence” in itself “qualifies as a crime of violence for purposes of § 924(c)(3)(A)’s use-of-force-clause.” Pet. App. A4. And in other cases involving Section 924(c) convictions predicated on attempted bank robbery under Section 2113(a), this Court has granted petitions for a writ of certiorari, vacated the court of appeals’ judgments, and remanded for further consideration in light of Taylor. See, e.g., Cooper v. United States, No. 21-6278 (June 27, 2022). To give the court of appeals the opportunity in the first instance to consider any potential effect of the Court’s decision Taylor to petitioner’s case, the same result is appropriate here.

2. No other issue raised in the petition warrants further review by this Court or the court of appeals.

Petitioner’s questions presented (see Pet. 2) ask whether Hobbs Act robbery is a “crime of violence” under 18 U.S.C. 924(c)(3)(A), but he was not convicted of a Section 924(c) offense predicated on Hobbs Act robbery. See Judgment 1; Plea Agreement 5 (agreeing to dismiss Count 2 as part of the plea agreement).

That crime's classification as a crime of violence therefore has no effect on this case.

Petitioner further contends (Pet. 10) that Section 924(c)(3)(A) is unconstitutionally vague. This Court's decision in Davis, however, which found Section 924(c)(3)(B) unconstitutionally vague, left Section 924(c)(3)(A) intact. See Taylor, 142 S. Ct. at 2019. Petitioner identifies no decision of any court that has found Section 924(c)(3)(A) unconstitutionally vague.

Finally, petitioner suggests (Pet. 2, 10) that the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, requires that the sentences for his Section 924(c) convictions run concurrently. That is incorrect. Before the First Step Act, Section 924(c) enhanced the length of the mandatory consecutive sentences of five, seven, or ten years of imprisonment that it requires by default for each Section 924(c) conviction to 25 years of imprisonment for a "second or subsequent conviction" under that Section. 18 U.S.C. 924(c)(1)(C) (Supp. IV 1998). The First Step Act amended that provision so that it no longer applied to "second or subsequent conviction[s]" for additional Section 924(c) offenses (beyond the first) entered "in [a] single proceeding," Deal v. United States, 508 U.S. 129, 131-134 (1993) (citation omitted). See § 403(a), 132 Stat. 5221-5222 (replacing reference to "second or subsequent conviction" with "a violation of this subsection that occurs after

a prior conviction under this subsection has become final"). But the First Step Act did not alter the requirement to impose mandatory consecutive sentences of the default length for each Section 924(c) conviction in a single proceeding.

Following the First Step Act, a mandatory 25-year sentence is not triggered by a second or subsequent Section 924(c) conviction unless the defendant has a previous Section 924(c) conviction that had already become final at the time of his offense. See 18 U.S.C. 924(c) (1) (C) (i). The First Step Act did not, however, otherwise eliminate mandatory consecutive sentences for each Section 924(c) offense. See 18 U.S.C. 924(c) (1) (D) (ii) ("Notwithstanding any other provision of law[,], * * * no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person[.]"). The district court therefore properly imposed a consecutive seven-year sentence for each Section 924(c) offense. See 18 U.S.C. 924(c) (1) (A) (ii) (mandatory sentence of seven years if firearm is brandished); 18 U.S.C. 924(c) (1) (D) (ii) (mandatory consecutive sentence).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for further

consideration in light of United States v. Taylor, 142 S. Ct. 2015
(2022).

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

ANN O'CONNELL ADAMS
Attorney

AUGUST 2022