

NO. _____

In The
Supreme Court of the United States

DARRELL E. GILLESPIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether, after *Davis*, the invocation of *Pinkerton* theory of liability by the government, without more, obviates the government's requirement to satisfy the force/elements clause and allows the government to prosecute a §924(c) offense based upon allegations and evidence that the defendant was engaged in a *conspiracy*?

Petitioner was convicted of multiple offenses, including two violations of 18 U.S.C. § 924(c) for carrying a firearm during a crime of violence. In *United States v. Davis*, 139 S. Ct. 2319 (2019), this Court found the residual clause to be unconstitutional, leaving only the force/elements clause as a valid basis for finding a defendant guilty of the necessary predicate crime of violence.

After *Davis*, to determine whether an offense satisfied the elements clause, Courts must employ the “categorical approach.” *Simms*, 914 F.3d 229, 234 (4th. Cir. 2019). That is, courts are to consider the elements of the crime of conviction, not the facts of how it was committed. A predicate offense is considered constitutionally overbroad if its elements allow for a conviction without satisfying the elements Congress has provided to define the required predicate offense.

In the instant case, the jury was instructed by the Court, argued to by counsel, and then presented with a verdict form that erroneously instructed them that they could use “conspiracy to commit Hobbs Act Robbery” as a predicate crime of violence upon which to base a subsequent § 924(c) conviction

STATEMENT OF RELATED CASES

None.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Darrel E. Gillespie, respectfully prays that a writ of certiorari be issued to review the judgment below of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears in the Appendix to this Petition and can be found at *United States v. Gillespie*, 27 F.4th 934 (4th Cir. 2022).

JURISDICTION

On March 3, 2022, a three-judge panel for the United States Court of Appeals for the Fourth Circuit entered its published opinion in *United States of America v. Darrell E. Gillespie*, No. 21-4146, 27 F.4th 934 (4th Cir. 2022). This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES, ORDINANCE AND REGULATIONS INVOLVED

18 U.S.C. § 924(c)(1)(A): Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm ... 18 U.S.C. § 924(c)(3): (3) For purposes of this subsection the term “crime of violence” means an

offense that is a felony and-- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

STATEMENT

This case was premised on the theory that Petitioner and multiple other individuals engaged in a conspiracy to rob drug dealers with the use of firearms from approximately September of 2011 through May 21, 2012. Except for Mr. Gillespie and his co-defendant Johnson, all of the other named defendants in the various iterations of the government's Indictment entered into plea agreements with the United States and pled guilty to various charges contained therein. Gillespie and Johnson proceeded to trial and a jury trial was held beginning on January 13, 2015. After approximately two weeks of trial, the jury returned guilty verdicts against Gillespie on all counts.

From the outset of the trial, through its final presentation to the jury, the Government stressed to the jury that the defendants could be found guilty through their participation in the conspiracy to rob drug dealers. That is, the government presented its theory of the case to the court and the jury that Gillespie could be found guilty of a violation of 18 U.S.C. § 924(c)(3) through his participation in a conspiracy to commit Hobbs Act Robbery.

During its opening statement to the jury, counsel for the United States began its presentation by stating, in pertinent parts:

... When put together, the United States believes the evidence in this case will tell you about an agreement that a group of friends made, including these two defendants, to make money. It was not a complicated agreement. It was actually quite simple. Rob drug dealers of their drugs, their money, and any of their drug proceeds.

...

This agreement between Defendant Gillespie and Defendant Johnson and their friends is what forms the basis of Count 1 of the Indictment. That Count charges these defendants, from September, 2011 to on or about May 21st, 2012, in Kanawha County and McDowell County, West Virginia, and elsewhere, with conspiring to commit robberies that affected interstate commerce and the movement of articles and commodities in interstate commerce.

...

To convict the defendant of Count 1, the United States has to prove two elements beyond a reasonable doubt:

First, that two or more persons, in some way or manner, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan; that is, to commit robberies affecting interstate commerce; and, two, that Defendants Johnson and Defendant Gillespie willfully became a member of such a conspiracy.

With regard to its *Pinkerton* theory of liability, during opening statements, the government told the jury the following:

... As to Counts 4, 6, 8 and 12, the firearms counts, defendants are also charged under a theory of Pinkerton liability. Generally, Pinkerton liability means that a co-conspirator can be found guilty for substantive crimes committed by a member of the conspiracy if the substantive crime was committed while the one committing the crime was a member of the conspiracy and if the offense was committed in furtherance of the conspiracy.

The jury was not provided with any additional information during the opening statements regarding the government's *Pinkerton* liability theory of the case.

Prior to the closing arguments in the case, the district court and the parties participated in a charge conference to discuss the proposed jury instructions to be provided to the jury. During that conference, the United States advocated for the inclusion of jury instructions regarding the use of “conspiracy to commit Hobbs Act robbery” as a predicate offense for the imposition of a guilty verdict for a violation of 18 U.S.C. § 924(c) and for the inclusion of language regarding the government’s alternative theory of *Pinkerton* liability. The end result were jury instructions that allowed the jury to reach a guilty verdict on Count Six on the basis of Gillespie’s participation in the conspiracy to commit Hobbs Act robbery alleged in Count 1 of the Fifth Superseding Indictment.

During the charge conference, the government advocated the following:

... Well, Your Honor, for a 924(c) offense, you would have to have a crime of violence and that would be to commit a robbery. The *Pinkerton* liability makes them substantively liable for the acts of his co-conspirators which, in this case, would be the conspiracy to commit the armed robberies.

...

I think that there’s a misunderstanding of with [sic] a *Pinkerton* liability is, Your Honor. *Pinkerton* liability is clear that this defendant can be held accountable for a crime committed by a co-conspirator that’s committed during the course of the conspiracy after this – if the jury finds that this defendant is a member of the conspiracy, he can be held accountable for a substantive offense committed by a co-conspirator during the offense. That is what that means. So, if the jury finds that he is part of the conspiracy charged in Count 1, and that a co-conspirator committed the offense charged in Count 4¹, then they can convict him of

¹ It appears from the transcript that the parties and the Court are specifically addressing charges relating to Petitioner’s co-defendant Johnson at this juncture, however, the instructions and language were applied equally to Gillespie and the charges in Count 6 of the Indictment.

that charge. That's what that instruction is – that's why we asked for that language.²

...

... So, if the jury finds that a member of the conspiracy committed that 924(c) offense, and they find this defendant guilty of the conspiracy, then they can find him guilty of that Switchback – use of a firearm during that Switchback robbery. That's the 924(c) offense that he is charged with.

...

He is also charged with a 924(c)(1)(A) offense regarding Cabell Franklin.³ If they find that this defendant was a member of the conspiracy and that a co-conspirator committed that substantive offense involving Cabell Franklin during the conspiracy in furtherance of the conspiracy then, under *Pinkerton*, he can be found guilty of that 924(c) offense. That's what *Pinkerton* stands for. That's why it's charged that way. That's why we referenced – asked for the reference to Count 1.⁴

Following the charge conference, the Court prepared its jury instructions for the jury to consider. With regard to the elements the government was required to prove beyond a reasonable doubt to carry its burden on the § 924(c) charge contained in Count 6 of the Indictment, the Court instructed the jury thusly:

Counts Four, Six, Eight & Twelve: Use of Firearms in a Crime of Violence

In order to sustain its burden of proof for the crime of use of firearms in a crime of violence in violation of Title 18, United States Code, Section 924(c)(1)(A) as charged in Counts Four, Six, Eight and Twelve of the Indictment, the United States must prove the following essential elements beyond a reasonable doubt:

² J.A. 161-162

³ Again, it appears the parties and the court are specifically referring to charges brought against Mr. Johnson, however, again, the language and theory of liability were equally applied to Petitioner as to Count 6.

⁴ J.A. 162-163

First: That on or about the dates alleged in Count Four, Six, Eight and Twelve of the Indictment, the defendant under consideration knowingly used, carried, brandished, or discharged a firearm; and

Second: That the defendant under consideration did so during and in relation to a crime of violence for which he may be prosecuted in a court of the United States.

The offense alleged in Count One, conspiracy to commit robberies that affect interstate commerce, and the offenses alleged in Count Three, Five, Seven and Eleven, robbery affecting interstate commerce, are crimes of violence.

After defining multiple terms used in the operative statutes, the Court then returned to its instructions regarding the § 924(c) charges, and stated to the jury:

. . . Similarly, Defendant Darrell E. Gillespie is charged with use of firearms in a crime of violence in Counts Six and Twelve of the Indictment, which arise out of two different types of underlying charges, each of which may be a separate basis for the charges in Counts Six and Twelve: (1) the charges of robbery affecting interstate commerce charged in Counts Five and Eleven, respectively; and (2) the conspiracy to commit robberies charges in Count One.

Further, the Court specifically addressed the issue of relying on conspiracy as the predicate offense for the § 924(c) charges:

The second basis for the charges of use of firearms in a crime of violence contained in Counts Four, Six, Eight and Twelve of the Indictment is the underlying charge of conspiracy to commit robberies contained in Count One. Under this second basis, a member of a conspiracy who commits another crime during the existence or life of a conspiracy and commits this other crime in order to further or somehow advance the goals or objectives of the conspiracy, may be found by you to be acting as the agent of the other members of the conspiracy. The illegal actions of this person in committing this other crime may be attributed to other individuals who are then members of the conspiracy.

. . .

If you find that the Government has proven that the defendant under consideration guilty of conspiracy charged in Count One of the

Indictment, you may also find him guilty of the crimes alleged in Counts Four, Six, Eight and Twelve of the Indictment, provided you find that the essential elements of these counts, as defined in these instructions, have been established beyond a reasonable doubt.

The Court then defined the essential elements of “conspiracy” for the jury:

In order to carry its burden of proof as to this charge [Conspiracy to Commit Armed Robberies], the United States must establish each of the following essential elements beyond a reasonable doubt:

First: That the defendant entered into an agreement with one or more persons to commit one or more robberies affecting interstate commerce as charged in Count One of the Indictment;

Second: That the defendant had knowledge of that conspiracy; and

Third: That the defendant knowingly and voluntarily participated in the conspiracy.

These instructions were reiterated to the jury throughout the Government's final argument.

Following closing arguments, the jury was instructed as referenced above and provided with a jury verdict form. As the Verdict Form clearly indicates, the government pursued a theory of liability against Gillespie in Count 6 that relied on the jury finding him guilty of conspiracy to commit Hobbs Act robbery in Count 1 of the Fifth Superseding Indictment. Question 11 of the Specific Interrogatories given to the jury explicitly states: “Question 11: Regardless of your answer to Question 10 above, answer this Question 11 if you found the Defendant, Darrell E. Gillespie, guilty of the charge of Conspiracy to Commit Armed Robberies, in violation of Title 18, United States Code, Section 1951 contained in Count One of the Indictment. As

to the charge of the Use of Firearms in a Crime of Violence in violation of Title 18, United States Code, Section 924(c)(1)(A) contained in Count Six of the Indictment arising out of the acts of a co-conspirator, we the jury find the Defendant, Darrell E. Gillespie: Guilty Not Guilty". J.A. 293-294. In Question 10 of the verdict form, the following Special Interrogatory was posed to the jury: "Question 10: . . . As to the charge of Use of a Firearm in violation of Title 18, United States Code, Section 924(c)(1)(A) contained in Count Six of the Indictment arising out of the charge of Robbery Affecting Interstate Commerce in Count Five, we the jury find the Defendant, Darrell E. Gillespie: Guilty Not Guilty." J.A. 293. The jury affirmatively found the Defendant not guilty. *Id.*

Following the entry of the jury's verdict of guilty on all counts of the Fifth Superseding Indictment, Gillespie filed his Motion for New Trial and Supplemental Motion for New Trial or Judgment of Acquittal. On June 9, 2017, the district court issued a Memorandum Opinion and Order denying Gillespie's post-trial motions. Subsequently, new counsel was appointed and the case was held in abeyance as relevant cases were resolved in this Court and the Fourth Circuit Court of Appeals.

On December 16, 2019 the district court entered an Order granting Mr. Gillespie leave to file any motions respecting the viability of his convictions following the disposition of *Dimaya, Simms and Davis*. On February 3, 2020, the district court denied Gillespie's Motion for Judgment of Acquittal and to Vacate his Convictions on Counts Six and Twelve of the Fifth Superseding Indictment. While finding that Petitioner had alleged a plain error regarding Count 6 of the Indictment, the district

court concluded that Gillespie was not entitled to a vacatur of his conviction due to the invocation of the *Pinkerton* theory of liability by the government.

At sentencing, the Court invoked the stacking provisions of 18 U.S.C. § 924(c) and sentenced Gillespie to 60 months and 84 months consecutively to the sentences for his other convictions, resulting in a total sentence of 265 months. Gillespie received the longest sentence of any defendant associated with this case by orders of magnitude.

Gillespie appealed his conviction and sentence to the United States Court of Appeals for the Fourth Circuit and the case was argued on January 25, 2022. On March 8, 2022, the Court issued a published opinion affirming Mr. Gillespie's conviction and sentence holding that "the district court's contrary jury instruction was not plain error because the jury's special verdict form reveals that Gillespie was convicted under a *Pinkerton* theory of liability, which remains valid."

REASON FOR GRANTING THE PETITION

The decision of the Circuit Court of Appeals for the Fourth Circuit in this case essentially eviscerates this Court's holding in *United States v. Davis*, 139 S. Ct. 2319 (2019). In *Davis*, this Court found that the "residual" clause of § 924(c) was unconstitutionally vague and, therefore, in order to prove a predicate crime of violence to sustain a § 924(c) conviction, the government must meet the requirements of the elements clause. The Fourth Circuit's opinion in this case obviates this requirement, and also essentially reverses its own opinion in *Simms*, by allowing the

government to rely on a defendant's participation in a *conspiracy* so long as it simply invokes the *Pinkerton* theory of liability.

Darrell Gillespie was convicted of two violations of 18 U.S.C. § 924(c), which proscribes using a firearm in connection with a predicate "crime of violence." Section 924 (c)(3) defines a crime of violence as a felony offense that:

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (B) by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In *United States v. Davis*, the United States Supreme Court held that § 924(c)(3)(B) – frequently referred to as the "residual clause" – was unconstitutionally vague under the Fifth Amendment's Due Process Clause. *Davis*, at 139 S. Ct. 2319, 2336 (2019). The commission of a crime of violence and its proof beyond a reasonable doubt to a jury is an element of a § 924(c) offense. Consequently, Gillespie's § 924(c) conviction on Count 6 of the Indictment remains valid only if it rests on a predicate offense that satisfies the sole surviving prong of the definition – the "elements clause" of § 924(c)(3)(A).

Gillespie's § 924(c) conviction contained in Count 6 of the operative superseding Indictment relies upon the predicate offense contained in Count 1 of the Indictment, that is, conspiracy to commit Hobbs Act Robbery. Count 6 is built upon allegations of violations of 18 U.S.C. §§ 1951 and 2, Robbery Affecting Interstate Commerce ("Hobbs Act Robbery") as the predicate "crime of violence." Importantly, however, the Government charged and strenuously advocated for the inclusion of

instructions to the jury that Gillespie and his co-defendant Johnson could be convicted of these § 924(c) violations upon a finding that they were merely guilty of conspiracy to commit armed robberies in violation of 18 U.S.C. § 1951. Obviously, the Government charged and advocated for these instructions so that the jury could find the defendants guilty of § 924(c) violations should the evidence satisfy either the “elements” clause of § 924(c), or the “residual clause.” The district court ultimately adopted the Government’s proffered instructions and explicitly and erroneously instructed the jury that the “offense alleged in Count One, conspiracy to commit robberies that affect interstate commerce, and the offenses alleged in Counts Three, Five, Seven and Eleven, robbery affecting interstate commerce, are crimes of violence.”

After *Davis*, which struck § 924(c)(3)(B)’s residual clause, an offense qualifies as a crime of violence only if it satisfies § 924(c)(3)(A)’s elements clause. Accordingly, it must have as an element the use, attempted use, or threatened use of physical force against the person or property of another.” To determine whether an offense satisfies the elements clause, Courts must employ the “categorical approach.” *United States v. Simms*, 914 F.3d 229, 234 (4th Cir. 2019). Courts are to consider the elements of the crime of conviction, not the facts of how it was committed. A predicate offense is considered overbroad if its elements allow for a conviction without satisfying the elements Congress has provided to define the required predicate offense.

In this case, the jury was instructed by the Court, argued to by counsel for the Government, then presented with a verdict form⁵ erroneously instructing them that they could use “conspiracy” as a predicate crime of violence in order to convict the defendants of violations of § 924(c). After *Simms* and *Davis*, this is patently erroneous and requires this Court to vacate Gillespie’s conviction on Count 6 of the Indictment.

The elements of “conspiracy” do not include the use, attempted use, or threatened use of force. Rather, “conspiracy’s elements are met as soon as the participants have made an agreement.” *Sessions v. Dimaya*, 138 S. Ct. 1204, 1219 (2018). Conspiracies, which criminalize mere agreements, do not satisfy § 924(c)(3)(A)’s elements clause. Indeed, in *Simms*, the Fourth Circuit Court of Appeals explained that conspiracy to commit Hobbs Act robberies does not qualify as a crime of violence “because to convict a defendant of this offense, the Government must prove only that the defendant agreed with another to commit actions that, if realized, would violate the Hobbs Act. Such an agreement does not invariably require the actual, attempted or threatened use of physical force.” *Id.* 914 F. 3d at 233-34.

The United States, the United States District Court for the Southern District of West Virginia and the Fourth Circuit Court of Appeals have all relied upon the application of the *Pinkerton Doctrine* to uphold Gillespie’s conviction on Count 6. This

⁵ On the Verdict Form presented to the jury, Questions 9, 10 and 11 address Count 6 of the Indictment. The special interrogatories were designed to allow the jury to identify which clause of § 924(c)(3) they relied upon. In Question 10, the jury affirmatively rejected the imposition of guilt based upon an application of § 924(c)(3)(A). Instead, as they were erroneously instructed, they relied upon their previous determination that Gillespie was guilty of conspiracy to determine that met the requirements of § 924(c)(3)(B).

reliance is misplaced. As is set forth in the district court’s Memorandum Opinion and Order denying Defendant’s Motion for Judgment of Acquittal and to Vacate his Convictions on Count 6 and 12 of the Fifth Superseding Indictment, the court abandoned the categorical approach mandated by this Court and instead carefully examined the manner in which the crimes were perpetrated. On appeal, the Fourth Circuit Court of Appeals did the same. Neither approach is consistent with the categorical approach mandated by this Court.

At trial, and throughout the post-trial motion practice, the United States has maintained that Defendant’s conviction on Count 6 may be maintained and affirmed based upon its alternative theory of the *Pinkerton Doctrine*. This is incorrect. Under a theory of *Pinkerton Doctrine* liability, Defendant’s conviction suffers from the same constitutional defect, as it relies on the jury’s reliance on “conspiracy” as the predicate crime of violence, rather than proof beyond a reasonable doubt satisfying § 924(c)(3)(A)’s elements clause.

Under the *Pinkerton* theory of liability, a person may be held liable for substantive offenses that were committed by a co-conspirator when their commission is reasonably foreseeable and in furtherance of the conspiracy. *United States v. Hare*, 820 F.3d 93, 105 (4th Cir. 2016), *citing United States v. Ashley*, 606 F.3d 135, 142-43 (4th Cir. 2010). As is demonstrated in the transcript of the charge conference, the United States relied on the “conspiracy to commit Hobbs Act robbery” as the predicate crime of violence to pursue its *Pinkerton* theory of liability. As counsel for the United States stated during the conference: “Well, your Honor, for a 924(c) offense, you would

have to have a crime of violence and that would be to commit a robbery. The *Pinkerton* liability makes them substantively liable for the acts of his co-conspirators which in this case, **would be the conspiracy to commit the robberies.** The government's counsel goes on to elaborate on the government's theory of liability for this § 924(c) charge, stating: "I think that there is a misunderstanding of with a *Pinkerton* liability is, Your Honor. *Pinkerton* liability is clear that this defendant can be held accountable for a crime committed by a co-conspirator that is committed during the course of the conspiracy after this – **if the jury finds that this defendant is a member of the conspiracy, he can be held accountable for a substantive offense committed by a co-conspirator during the offense.** That is what that means. So, **if the jury finds that he is part of the conspiracy charged in Count 4, then they can convict him of that charge.** That's what that instruction is – that's why we asked for that language." (*emphasis added.*)

As the Verdict Form clearly indicates, the government pursued a *Pinkerton* theory of liability against Gillespie in Count 6, relying on the jury finding him guilty of conspiracy to commit Hobbs Act robbery in Count 1 of the Fifth Superseding Indictment. Question 11 of the Specific Interrogatories given to the jury explicitly states: **Question 11:** Regardless of your answer to Question 10 above, answer this Question 11 if you found the Defendant, Darrell E. Gillespie, guilty of the charge of Conspiracy to Commit Armed Robberies, in violation of Title 18, United States Code, Section 1951 **contained in Count One of the Indictment,** As to the charge of the Use of Firearms in a Crime of Violence in violation of Title 18, United States Code,

Section 924(c)(1)(A) contained in Count Six of the Indictment arising out of the acts of a co-conspirator, we the jury find the Defendant, Darrell E. Gillespie: ____ Guilty ____ Not Guilty" (*emphasis added.*)

Clearly, the jury was instructed erroneously that it could rely on the charge of "conspiracy" to commit Hobbs Act Robbery as the predicate offense crime of violence as the basis for its finding of guilt on Count 6. Following the Fourth Circuit's decision in this case, the holdings of both *Davis* and *Simms* may be easily circumvented if the government merely invokes a *Pinkerton* theory of liability, essentially rendered both decision dead letters.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted.

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