No. 23-6167

IN THE SUPREME COURT OF THE UNITED STATES

IN RE DWIGHT CARTER, SR., PETITIONER

ON PETITION FOR A WRIT OF HABEAS CORPUS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant an original writ of habeas corpus based on petitioner's contention that the court of appeals erroneously denied his application for authorization to file a successive motion under 28 U.S.C. 2255 collaterally attacking his conviction under 18 U.S.C. 924(c), where the application contended that petitioner's sentence was invalid in light of United States v. Davis, 139 S. Ct. 2319 (2019), and petitioner had previously identified the same claim in an earlier application to file a successive Section 2255 motion.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Carter, No. 1:09-cr-20470 (Nov. 5, 2010)

Carter v. United States, No. 1:14-cv-20093 (Mar. 18, 2015)

Carter v. United States, No. 1:16-cv-22516 (Aug. 31, 2016)

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

United States v. Carter, No. 10-15413 (July 24, 2012)

Carter v. United States, No. 15-11743 (July 10, 2015)

In re Carter, No. 16-13115 (June 29, 2016)

In re Carter, No. 16-17761 (Feb. 13, 2017)

In re Carter, No. 19-12456 (July 26, 2019)

In re Carter, No. 20-10066 (Feb. 6, 2020)

In re Carter, No. 22-14046 (Jan. 4, 2023)

Supreme Court of the United States:

Carter v. United States, No. 12-7792 (Jan. 22, 2013)

Carter v. United States, No. 15-9591 (Oct. 3, 2016)

In re Carter, No. 18-7507 (Feb. 19, 2019)

In re Carter, No. 19-5964 (Oct. 15, 2019)

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OPINIONS BELOW

Prior opinions of the court of appeals (Pet. App. A, B, C) are unreported.

JURISDICTION

The petition for an original writ of habeas corpus was filed on November 29, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a) and 2241(a).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted in 2010 of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); possessing a firearm during and in relation to a "crime

of violence" resulting in death, in violation of 18 U.S.C. 924(c)(1)(A) and (j)(1); conspiring to distribute and to possess with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 846; possessing cocaine and cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a); and possessing a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). 09-cr-20470 Judgment (Judgment) 1-2. The district court sentenced petitioner to 80 years of imprisonment on the Hobbs Act and drug-trafficking counts, a consecutive life sentence on the robbery-related Section 924(c) count, and a consecutive sentence of 25 years of imprisonment on the drug-related Section 924(c) count, all to be followed by five years of supervised release. Id. at 3-4. The court of appeals affirmed, 484 Fed. Appx. 449 (2012), and this Court denied certiorari, 568 U.S. 1149 (2013).

In 2015, the district court denied petitioner's motion under 28 U.S.C. 2255 to vacate his convictions. 14-cv-20093 D. Ct. Doc. 31 (Mar. 18, 2015). The court of appeals denied a certificate of appealability, 15-11743 C.A. Order (July 10, 2015), and this Court denied certiorari, 580 U.S. 847 (2016). From 2016 to 2022, petitioner filed five applications for leave to file a second or successive Section 2255 motion, which the court of appeals denied or dismissed in relevant part. See, e.g., 16-13115 C.A. Order (June 29, 2016); 16-17761 C.A. Order (Feb. 13, 2017). Three of petition-

er's applications sought leave to file a successive Section 2255 motion to vacate his robbery-related Section 924(c) count based on United States v. Davis, 139 S. Ct. 2319 (2019); the court of appeals denied the first in 2019, Pet. App. B, dismissed the second in relevant part in 2020, id. at C, and dismissed the third in relevant part in 2023, id. at A.

1. On December 1, 2008, Carlos Alvarado, an armored-car driver for Dunbar Security Solutions, arrived at the Dadeland Mall in Miami-Dade County, Florida, and collected over $60,000 in cash from several of the mall's retail establishments, which he carried in a canvas Dunbar bag. 484 Fed. Appx. at 452. As Alvarado approached the mall's exit with the money, petitioner and Emmanuel Maxime rushed him with firearms in hand, yelling at Alvarado to drop the bag and get on the ground. Id. at 452-453. When Alvarado reached for his holstered weapon, petitioner fired at least eight or nine shots at Alvarado. Ibid. One of the shots hit Alvardo while he was standing and three others hit him as he lay on the floor, causing Alvarado's death about an hour later in a hospital. Id. at 453. Petitioner grabbed the canvas bag, and both he and Maxime successfully fled the scene. Ibid. Petitioner later used a portion of the robbery proceeds to purchase cocaine, which he converted into cocaine base for resale. Id. at 458.

After the robbery, witnesses identified petitioner and Maxime as the perpetrators. 484 Fed. Appx. at 453. A search incident to

petitioner's arrest led to the discovery of firearms and cocaine base. Id. at 453 n.3, 458. During a subsequent interview by investigating officers, petitioner was advised of and waived his Miranda rights and, after the officers confronted him with evidence of his crimes, petitioner "confessed to his guilt as the person who had shot and killed Alvarado"; he then led officers to locations containing evidence that corroborated his guilt. Id. at 453-454.

2. A federal grand jury in the Southern District of Florida indicted petitioner on six counts based on his robbery and drug offenses. 09-cr-20470 Superseding Indictment (Indictment). Three counts related to the robbery resulting in Alvarado's death: conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and possession a firearm during and in relation to a "crime of violence" resulting in death, in violation of 18 U.S.C. 924(c)(1)(A) and (j)(1). Indictment 1-2. The three other counts related to petitioner's drug offenses: conspiracy to distribute and possess with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 846; possession with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 841(a); and possession of a firearm during and in relation to a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A). Indictment 3-4.

Section 924(c) defines a "crime of violence" as a felony offense that either "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), or, "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," 18 U.S.C. 924(c)(3)(B). With respect to the robbery-related Section 924(c) count for possessing a firearm during and in relation to a "crime of violence" resulting in death, the indictment identified each of the two robbery-related offenses -- conspiring to commit Hobbs Act robbery (Count 1) and Hobbs Act robbery (Count 2) -- as satisfying Section 924(c)'s "crime of violence" prerequisite. Indictment 2 (identifying each Section 1951(a) offense "as set forth in Count 1 and Count 2" as "a crime of violence").

The jury found petitioner guilty on all counts. Judgment 1. With respect to the robbery-related Section 924(c) offense, the jury returned a unanimous special verdict finding that petitioner "caused the death of Carlos Alvarado through the use of a firearm" and that Alvarado's killing constituted "murder." 09-cr-20470 D. Ct. Doc. 254, at 1-2 (Aug. 2, 2010). In 2010, the district court sentenced petitioner to 80 years of imprisonment on the four Hobbs Act and drug-trafficking counts (four consecutive 20-year terms), a consecutive life sentence on the robbery-related Section 924(c) count, and a consecutive sentence of 25 years of imprison-

ment on the drug-related Section 924(c) count, all to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed, 484 Fed. Appx. 449, and this Court denied certiorari, 568 U.S. 1149.

3. In 2014, petitioner filed a motion under 28 U.S.C. 2255 to vacate his convictions based on ineffective assistance of counsel, 14-cv-20093 D. Ct. Docs. 1, 4 (Jan. 9, 2014), which the district court denied. 14-cv-20093 D. Ct. Doc. 31 (Mar. 18, 2015). The court of appeals denied a certificate of appealability, 15-11743 C.A. Order (July 10, 2015), and, in October 2016, this Court denied certiorari, 580 U.S. 847.

From 2016 to 2022, petitioner filed five applications for leave to file a second or successive Section 2255 motion in the court of appeals. Section 2255(h) allows a federal prisoner to file a second or successive Section 2255 motion only if a court of appeals panel "certifie[s] as provided in [S]ection 2244" that the motion either "contain[s]" newly discovered persuasive evidence of innocence, 28 U.S.C. 2255(h)(1), or a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. 2255(h)(2).

Petitioner's first application for leave to file a second or successive Section 2255 motion was based on Johnson v. United States, 576 U.S. 591 (2015), which held that the residual clause of the definition of "violent felony" in the Armed Career Criminal

Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii) -- which contains language similar to one of the two alternative definitions of "crime of violence" relevant to petitioner's robbery-based Section 924(c) conviction, 18 U.S.C. 924(c)(3)(B) -- is unconstitutionally vague. Johnson, 576 U.S. at 594-597; see 16-13115 C.A. Doc. 1, at 5, 10 (May 31, 2016). This Court has held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. Welch v. United States, 578 U.S. 120, 122, 130, 135 (2016).

While his application to file such a motion was pending in the court of appeals, petitioner also proceeded to file a Johnson-based Section 2255 motion in district court. 16-cv-22516 D. Ct. Doc. 1, at 4 (June 24, 2016). In 2016, the court of appeals denied as "premature" petitioner's application to file a second Section 2255 motion, reasoning that the "proposed [Section] 2255 motion [wa]s not second or successive" because the disposition of petitioner's first Section 2255 motion was "not yet final" given that his certiorari petition regarding that motion was still pending. 16-13115 C.A. Order 1-2 (June 29, 2016). Judge Martin dissented and would have granted petitioner permission to file a Johnson-based Section 2255 motion. Id. at 3. After the court of appeals denied the application, the district court dismissed petitioner's Johnson-based motion as an unauthorized second Section 2225 motion over which it lacked jurisdiction. 16-cv-22516 D. Ct. Doc. 11

(Aug. 31, 2016); see 16-cv-22516 D. Ct. Doc. 10, at 1-2 (July 1, 2016) (magistrate judge's report).

In 2017, the court of appeals denied petitioner's next application for leave to file a successive Section 2255 motion, which was also based on Johnson. 16-17761 C.A. Order (Feb. 13, 2017); see 16-17761 C.A. Doc. 1, at 5, 9, 15-17 (Dec. 29, 2016) (application). The court determined that even if Johnson's vagueness holding were to apply to (and invalidate) Section 924(c)(3)(B)'s definition of "crime of violence," petitioner would still be unable to successfully challenge his robbery-related Section 924(c) conviction. 16-17761 C.A. Order 10-18. The court reasoned that the special verdict for petitioner's robbery-based Section 924(c) conviction established that the "jury unanimously agreed that [petitioner] used the firearm during the Hobbs Act robbery charged in Count 2 to kill the security guard," id. at 18, and that that Hobbs Act robbery conviction qualified as a "crime of violence" predicate under Section 924(c)(3)(A)'s alternative definition of the term, id. at 10-16. Judge Martin again dissented. Id. at 20-29.

4. Petitioner subsequently filed three applications for leave to file a successive Section 2255 motion that were at least based in part on Davis, supra, which held that the "crime of violence" definition in Section 924(c)(3)(B) is itself unconstitutionally vague. Davis, 139 S. Ct. at 2336; see 19-12456 C.A. Doc. 1, at 7 (June 28, 2019); 20-10066 C.A. Doc. 1, at 7-16 (Jan.

6, 2020); 22-14046 C.A. Doc. 1, at 7-11 (Dec. 5, 2022). The court of appeals denied or dismissed the Davis-based request in each application. Pet. App. A, B, C.

First, in 2019, the court of appeals denied petitioner's June 2019 application, Pet. App. B, on grounds that paralleled its 2017 denial of petitioner's earlier Johnson-based application, id. at B4, B6-B8. The court determined that petitioner could not make a prima facie showing to warrant the filing of a successive Section 2255 motion based on Davis because, "as [it] explained in [its] prior order denying [petitioner's earlier] application, [1] the special jury verdict in [petitioner's] case sufficiently establishes that his [Section] 924(c) conviction in Count Three" was based on the jury's "conclu[sion] that [petitioner] used the firearm during the substantive Hobbs Act robbery charged in Count Two to kill the victim" and (2) "substantive Hobbs Act robbery qualifies as a crime of violence under [Section] 924(c)(3)(A)'s elements clause, which remains valid even after Davis." Id. at B6-B8; see id. at B1-B2. Judge Martin again dissented and would have granted petitioner leave to file a second Section 2255 motion to raise a Davis claim. Id. at B9-B13.

Second, in 2020, the court of appeals denied in part and dismissed in part petitioner's 2020 application. Pet. App. C. The court dismissed for lack of jurisdiction the portion of the application based on Davis because petitioner previously "raise[d] the

same claim for relief * * * in his June 2019 application." Id. at C2. The court observed that in In re Baptiste, 828 F.3d 1337 (11th Cir. 2016), it had interpreted 28 U.S.C. 2244(b)(1) -- which provides that "[a] claim presented in a second or successive habeas corpus application under [28 U.S.C.] 2254 that was presented in a prior application shall be dismissed," ibid. -- to deprive courts of "jurisdiction over claims that an inmate has raised in a prior application" to file a second or successive motion under Section 2255. Pet. App. C2 (citing Baptiste, 828 F.3d at 1339-1340).

Each judge on the panel authored a separate opinion concurring in the judgment. Pet. App. C3-C20. Judge Martin concurred (id. at C3-C8) based on Baptiste's interpretation of Section 2244(b)(1), but wrote separately to explain that "Baptiste wrongly prevents [the court] from correcting [prior] orders" and to express his view that petitioner "should have been allowed to present his Davis claim" in a successive Section 2255 motion. Id. at C3. Judge Jordan similarly agreed that petitioner's "current application should be denied," but stated that he would have voted to allow petitioner to file a successive Section 2255 motion if he had "been on the panel reviewing his prior application." Id. at C9. Judge Hull concurred (id. at C10-C20) to explain "more fully why th[e] Court properly denie[d]" petitioner's application and dismissed petitioner's Davis-based request for lack of jurisdiction. Id. at C10, C20.

Finally, in 2023, the court of appeals denied in part and dismissed in part petitioner's 2022 application. Pet. App. A. The court dismissed the portion of the application based on Davis, explaining that petitioner "has made [the Davis] claim twice before" and that, under Baptiste's interpretation of Section 2244(b)(1), the court "must dismiss a claim raised in a successive application that was presented in * * * a prior application to file a second or successive [Section] 2255 motion." Id. at A2, A7.

ARGUMENT

Petitioner contends (Pet. 5) that this Court should grant an original writ of habeas corpus based on his contention that the court of appeals erred in applying 28 U.S.C. 2244(b)(1) to bar his 2022 application for leave to file a motion under Section 2255. See Pet. 3 (stating that petitioner's "fifth application" is "at issue here"). Petitioner further contends (Pet. 5) that the courts of appeals are divided over whether Section 2244(b)(1)'s requirements apply in the Section 2255 context. As the government explained in its response in In re Bowe, No. 22-7871, 2024 WL 674656 (Feb. 20, 2024) -- another original habeas petition, which this Court recently denied -- the government agrees that the court of appeals here incorrectly applies Section 2244(b)(1) to Section 2255 motions and that the courts of appeals are divided on that issue. See Br. in Opp. at 10-13, Bowe, supra (filed Nov. 27,

2023).[1] But as in Bowe, petitioner fails to establish that the remedy of an original writ of habeas corpus from this Court is warranted because he cannot meet the high showing required for such extraordinary relief. See id. at 9-10, 13-17 (discussing standard for granting an original writ of habeas corpus).

Petitioner cannot show that "exceptional circumstances warrant the exercise of the Court's discretionary powers." Sup. Ct. R. 20.4(a). Even absent the court of appeals' erroneous application of Section 2244(b)(1) to this case, the court of appeals would have denied petitioner's 2022 application to file another Section 2255 motion to challenge his robbery-related conviction for violating 18 U.S.C. 924(c). That application was premised on the assertion that petitioner's Hobbs Act robbery conviction is not a proper "crime of violence" predicate in light of the Court's determination in United States v. Davis, 139 S. Ct. 2319 (2019), which held that Section 924(c)(3)(B)'s "crime of violence" definition is unconstitutionally vague. 22-14046 C.A. Doc. 1, at 7-11 (Dec. 5, 2022). As the court of appeals has recognized, "Hobbs Act robbery * * * qualifies as a 'crime of violence' under the [elements] clause in [Section] 924(c)(3)(A)." In re Fleur, 824 F.3d 1337, 1340 (11th Cir. 2016) (per curiam); see United States v. St. Hubert, 909 F.3d 335, 345 (11th Cir. 2018) (same), cert. denied,

[1] The government has served petitioner with a copy of its brief in Bowe.

139 S. Ct. 1394 (2019), abrogated in part on other grounds by United States v. Taylor, 596 U.S. 845 (2022). And because "Hobbs Act robbery qualifies as a crime of violence under [Section] 924(c)(3)(A)'s elements clause," the court has recognized that Davis's "invalidation of the residual clause in 18 U.S.C. § 924(c)(3)(B) did not impact the qualification of Hobbs Act robbery as a crime of violence." United States v. Gibbs-King, 808 Fed. Appx. 738, 741 (11th Cir. 2020) (per curiam) (unpublished).

The court of appeals has already denied two of petitioner's previous applications to file a successive Section 2255 motion based its determination that petitioner's robbery-related Section 924(c) conviction was predicated on his Hobbs Act robbery offense, which continues to be a "crime of violence" under Section 924(c)(3)(A) notwithstanding Davis or Davis's predecessor, Johnson v. United States, 576 U.S. 591 (2015). See Pet. App. B6-B8 (denying petitioner's June 2019 application based on Davis); 16-17761 C.A. Order 8-18 (Feb. 13, 2017) (denying petitioner's December 2016 application based on Johnson); see also pp. 8-9, supra (discussing those denials). Petitioner's habeas petition identifies no basis, let alone a sound basis, for a different disposition here.[2]

[2] In her statement respecting the Court's denial of an original writ of habeas corpus in Bowe, Justice Sotomayor explained that the denial of habeas relief there was appropriate, reasoning that it was "questionable" whether Bowe could satisfy the Court's

CONCLUSION

The petition for an original writ of habeas corpus should be denied.

Respectfully submitted.

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APRIL 2024

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demanding standard for consideration of an original habeas petition "because it [wa]s not clear that, absent [Section] 2244(b)(1)'s bar, the Eleventh Circuit would have certified his § 2255 motion." Bowe, 2024 WL 674656, at *2. Justice Sotomayor thus left open the possibility that "a future case where the petitioner may have meritorious § 2255 claims" might warrant a favorable exercise of the Court's original habeas jurisdiction to resolve the circuit split about Section 2244(b)(1). Ibid. But as explained above, this is not such a case because "the Eleventh Circuit would [not] have certified [petitioner's] § 2255 motion" even "absent [Section] 2244(b)(1)'s bar," ibid.