No. 18-7036

IN THE SUPREME COURT OF THE UNITED STATES

FRANK RICHARDSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether aiding and abetting robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3).

2. Whether petitioner, who was originally sentenced in 2013, is entitled to resentencing under a provision of the First Step Act of 2018, Pub. L. No. 115-391, Tit. IV, § 403, 132 Stat. 5221, that applies only "if a sentence for the offense has not been imposed as of" December 21, 2018. § 403(b), 132 Stat. 5222.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14)[1] is reported at 906 F.3d 417. A prior opinion of the court of appeals is reported at 793 F.3d 612.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15) was entered on October 11, 2018. The petition for a writ of certiorari

[1] The appendix to the petition for a writ of certiorari is not paginated. This brief refers to the pages in the appendix in consecutive order.

was filed on December 10, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on five counts of robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); five counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2006); and one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g). 10-cr-20397 Judgment 1-2; 11-cr-20444 Judgment 1. The district court sentenced petitioner to 1494 months of imprisonment, to be followed by three years of supervised release. Pet. App. 3; 10-cr-20397 Judgment 4-5; 11-cr-20444 Judgment 2-3. The court of appeals affirmed. 793 F.3d at 617-634. This Court granted a petition for writ of certiorari, vacated the judgment, and remanded the case for further consideration in light of Johnson v. United States, 135 S. Ct. 2551 (2015). 136 S. Ct. 1157. After the court of appeals issued an order vacating petitioner's sentence and remanding the case to the district court, the district court held a resentencing hearing and reinstated petitioner's original sentence. Pet. App. 3; 10-cr-20397 Judgment 3-4; 11-cr-20444 Judgment 2-3. The court of appeals affirmed. Pet. App. 1-14.

1. In 2010, petitioner led the armed robbery of five Radio Shack and T-Mobile stores in and around Detroit, Michigan. 793

F.3d at 618-620. At least one robber used a gun during each robbery. Ibid.; Pet. App. 2. Although petitioner himself did not enter the stores during the commission of the robberies, he planned the robberies, provided the robbers with firearms and other supplies, and served as a lookout while his co-conspirators were in the stores. 793 F.3d at 618-620.

A grand jury in the Eastern District of Michigan issued two indictments that collectively charged petitioner with five counts of robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a) and 2; five counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g). 10-cr-20397 First Superseding Indictment (Indictment) 1-10; 11-cr-20444 Indictment 1-3; 793 F.3d at 617-618; see Pet. App. 3. The Hobbs Act robbery counts of the indictments alleged that petitioner and his co-defendants, "while aiding and abetting each other," did "unlawfully take" property "from the presence" of employees of the stores they robbed "against their will and by means of actual and threatened force, violence and fear of injury," specifically, by "robb[ing] the employees at gun point." 10-cr-20397 Indictment 2, 4, 6-7; 11-cr-20444 Indictment 2. The indictments specified that the crime of violence underlying each Section 924(c) count was "interference with commerce by robbery as

alleged in" one of the Hobbs Act robbery counts. 10-cr-20397 Indictment 2, 5, 7, 9; 11-cr-20444 Indictment 2.

The district court consolidated the cases for trial. 793 F.3d at 618. The court informed the jury that petitioner had been charged with aiding and abetting Hobbs Act robbery, 6/28/13 Trial Tr. (Tr.) 1837, and instructed the jury that it could find petitioner guilty of Hobbs Act robbery as an aider and abettor only if the government's proof established (1) "that the crime of [Hobbs Act robbery] was committed," (2) "that [petitioner] helped to commit the crime or encouraged someone else to commit the crime," and (3) "that [petitioner] intended to help commit or encourage the crime," Tr. 1839. The court further instructed the jury that "robbery affecting interstate commerce as charged in" the five Hobbs Act robbery counts "is a crime of violence" for purposes of the Section 924(c) counts. Tr. 1842-1843. The jury found petitioner guilty on all counts and additionally found that a firearm was brandished in connection with the commission of each Section 924(c) offense. 793 F.3d at 618; 10-cr-20397 D. Ct. Doc. 171, at 1-7 (June 28, 2013).

The district court sentenced petitioner to 1494 months of imprisonment, consisting of concurrent sentences of 210 months of imprisonment for each Hobbs Act robbery count, a concurrent sentence of 120 months of imprisonment for possessing a firearm as a felon, a consecutive sentence of 84 months for one Section 924(c)

count, and consecutive sentences of 300 months for each of the other four Section 924(c) counts. 10-cr-20397 Judgment 3-4; 11-cr-20444 Judgment 2; 793 F.3d at 618.

2. The court of appeals affirmed. 793 F.3d at 617-634. This Court granted a petition for writ of certiorari, vacated the judgment, and remanded the case for further consideration in light of Johnson, which held that the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. 136 S. Ct. 1157; see Johnson, 135 S. Ct. at 2557. The court of appeals, in turn, issued an order vacating petitioner's sentence and remanding the case to the district court "for reconsideration of [petitioner's] sentence in light of Johnson." Pet. App. 3 (citation omitted).

On remand, petitioner contended that his Section 924(c) convictions are invalid on the theory that Section 924(c)(3)(B), which is one of two alternative definitions of "crime of violence" in Section 924(c), is unconstitutionally vague. 10-cr-20397 D. Ct. Doc. 264, at 3-4 (May 24, 2017). Section 924(c)(3) defines a "crime of violence" as a felony that (A) "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 (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," 18 U.S.C. 924(c)(3)(B). In September

2017, following a resentencing hearing, the district court reinstated petitioner's original 1494-month term of imprisonment. Pet. App. 3, 11.

3. The court of appeals again affirmed. Pet. App. 1-14. As relevant here, the court determined that aiding and abetting Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A). Id. at 9-10. Noting that it had previously held that "the principal offense of Hobbs Act robbery" is a crime of violence under Section 924(c)(3)(A), the court found that, for purposes of that subsection, "it makes no difference whether [petitioner] was an aider and abettor or a principal." Ibid. "Because an aider and abettor is responsible for the acts of the principal as a matter of law," the court explained, "an aider and abettor of a Hobbs Act robbery * * * necessarily commits a crime that 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another.'" Id. at 10 (quoting In re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016)). Because Section 924(c)(3)(A) thus provided a basis for upholding petitioner's Section 924(c) convictions, the court declined to decide whether Section 924(c)(3)(B) is unconstitutionally vague. Id. at 7-9.

ARGUMENT

Petitioner contends (Pet. 5-15) that the court of appeals erred in determining that aiding and abetting robbery in violation

of the Hobbs Act, 18 U.S.C. 1951(a), qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3)(A). This Court has previously denied petitions for writs of certiorari raising that issue. See Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248); Harris v. United States, 138 S. Ct. 355 (2017) (No. 16-9196). The same result is warranted here.

Petitioner has also filed a supplemental brief contending (Supp. Br. 1-6) that he is entitled to a resentencing under a provision of the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, Tit. IV, § 403, 132 Stat. 5221, that limits the applicability of certain enhanced minimum penalties under Section 924(c). This Court does not normally review claims in the first instance, and petitioner's claim here lacks merit. The relevant First Step Act amendment applies only "if a sentence for the offense has not been imposed as of" December 21, 2018, § 403(b), 132 Stat. 5222, and petitioner's sentence was imposed years before that.

1. The Hobbs Act defines robbery to require the "taking or obtaining" of personal property from another "by means of actual or threatened force, or violence, or fear of injury." 18 U.S.C. 1951(b)(1). For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari filed in Garcia v. United States, 138 S. Ct. 641 (2018) (No. 17-5704), Hobbs Act robbery categorically qualifies as a crime of violence under 18

U.S.C. 924(c)(3)(A) because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," ibid.; see Br. in Opp. at 7-10, Garcia, supra (No. 17-5704).[2] And every court of appeals to consider the issue has so held. Br. in Opp. at 8, Garcia, supra (No. 17-5704); see Pet. App. 9 (citing United States v. Gooch, 850 F.3d 285, 292 (6th Cir.), cert. denied, 137 S. Ct. 2230 (2017)).

Petitioner does not appear to dispute that the substantive offense of Hobbs Act robbery qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3)(A). And to the extent that the crime of violence underlying his Section 924(c) convictions is "aiding and abetting Hobbs Act robbery" (Pet. ii, 6) (emphasis omitted), aiding and abetting Hobbs Act robbery is itself a crime of violence under Section 924(c)(3)(A). As the district court instructed the jury, even under an aiding-and-abetting theory, the government still had to prove that either petitioner or his confederates committed each element of the underlying offense of Hobbs Act robbery and that petitioner was "punishable as a principal" for that offense because he took active and intentional steps to facilitate the crime. 18 U.S.C. 2(a); see Rosemond v. United States, 572 U.S. 65, 70-71, 74-75 & n.6 (2014); Tr. 1839 (jury instructions). The elements of

[2] We have served petitioner with a copy of the brief in opposition in Garcia.

the aiding-and-abetting offense are thus a superset of the elements of the substantive crime. See Pet. App. 10. If Hobbs Act robbery satisfies Section 924(c)(3)(A), then aiding and abetting that offense does as well. See also id. at 9 ("Aiding and abetting is simply an alternate theory of liability; it is 'not a distinct substantive crime.'") (citation omitted). And Section 924(c)(3)(A) contains no requirement that the "physical force" element of a crime of violence be an act that the defendant himself committed.

As petitioner acknowledges (Pet. 6), every court of appeals to consider the issue has determined that aiding and abetting Hobbs Act robbery is a crime of violence under 18 U.S.C. 924(c)(3)(A). See Pet. App. 10-11; United States v. Grissom, No. 17-2940, 2019 WL 625547, at *3 (7th Cir. Feb. 14, 2019); United States v. García-Ortiz, 904 F.3d 102, 109 (1st Cir. 2018), cert. denied, 139 S. Ct. 1208 (2019); In re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016); cf. United States v. Deiter, 890 F.3d 1203, 1215-1216 (10th Cir. 2018) (citing Colon's analysis in determining that aiding and abetting federal bank robbery is a violent felony under 18 U.S.C. 924(e)(2)(B)(i)), cert. denied, 139 S. Ct. 647. The Court has recently denied petitions for writs of certiorari raising similar questions, see Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248); Harris v. United States, 138 S. Ct. 355 (2017) (No. 16-9196), and should do the same here.

2. Petitioner recognizes (Pet. 10) that the categorical approach applied by the court below to determine whether an offense is a crime of violence under Section 924(c)(3)(A) accords with the approach of most courts of appeals. Petitioner contends (Pet. 10-15), however, that this Court should grant a writ of certiorari to resolve an asserted "split" between those decisions and United States v. Robinson, 844 F.3d 137 (3d Cir. 2016), cert. denied, 138 S. Ct. 215 (2017).

This Court has recently and repeatedly denied review in several cases similarly asserting such a methodological disagreement, and it should do the same here. See Sowell v. United States, 139 S. Ct. 1324 (2019); (No. 18-6913); Robinson v. United States, 139 S. Ct. 1168 (2019) (No. 18-6292); Griffith v. United States, 138 S. Ct. 1165 (2018) (No. 17-6855); Thomas v. United States, 138 S. Ct. 646 (2018) (No. 17-6025); Galati v. United States, 138 S. Ct. 636 (2018) (No. 17-5229); Robinson v. United States, 138 S. Ct. 215 (2017) (No. 17-5139). Indeed, petitioner himself states that some "subsequent panels of the Third Circuit have declined to follow Robinson" in similar contexts. Pet. 11; see, e.g., United States v. Johnson, 899 F.3d 191, 203 (3d Cir.) (employing the categorical approach to determine whether federal bank robbery is a crime of violence under Section 924(c)(1)(A)), cert. denied, 139 S. Ct. 647. And any intracircuit conflict would not warrant this Court's review. See Wisniewski v. United States,

353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

In any event, the court below would have reached the same result in petitioner's case if it had applied the Third Circuit's approach in Robinson (which petitioner does not even affirmatively argue is correct). In Robinson, the Third Circuit stated that, "[w]hen the predicate offense, Hobbs Act robbery, and the § 924(c) offense are contemporaneous and tried to the same jury," the "jury's determination of the facts of the charged offenses unmistakably shed light on whether the predicate offense was committed with 'the use, attempted use, or threatened use of physical force against the person or property of another,'" such that a "categorical approach" that looks to the statutory definition of the underlying crime "is not necessary." 844 F.3d at 141. Based on that reasoning, the Third Circuit concluded that when the offenses of Hobbs Act robbery and brandishing a gun under Section 924(c) "have been tried together and the jury has reached a guilty verdict on both offenses, the Hobbs Act robbery qualifies as a crime of violence under" Section 924(c)(3)(A). Id. at 139. Because the same jury considered petitioner's contemporaneous Hobbs Act robbery and Section 924(c) offenses and found him guilty as charged, the Hobbs Act robbery offenses are crimes of violence under the Third Circuit's reasoning in Robinson.

3. Because Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A), this case does not present any question (Pet. 5) of whether the alternative definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. See Pet. App. 8-9 (declining to decide petitioner's argument concerning Section 924(c)(3)(B)). For that reason, this Court should not hold this petition for a writ of certiorari pending the Court's decision in United States v. Davis, No. 18-431 (argued Apr. 17, 2019), in which the Court will decide whether the subsection-specific definition of crime of violence in Section 924(c)(3)(B) is unconstitutionally vague. See Pet. i, Davis, supra (No. 18-431). This Court's resolution of that question will not affect the correctness of the lower courts' determination in this case that Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A), and no "reasonable probability" exists that this Court's reasoning in Davis regarding Section 924(c)(3)(B) would cause the lower courts to reconsider the "ultimate outcome" of their decisions denying petitioner's claim for relief, Lawrence ex rel. Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam).

4. Finally, petitioner has filed a supplemental brief contending (Supp. Br. 1-7) that he is entitled to be resentenced because of the First Step Act, which was enacted on December 21, 2018, after the petition for a writ of certiorari was filed. That

contention, which this Court would necessarily be the first to address, lacks merit.[3]

At the time of petitioner's 2013 sentencing and 2017 resentencing, Section 924(c) provided for enhanced minimum penalties for defendants convicted of multiple violations in a single proceeding. See 18 U.S.C. 924(c)(1)(C)(i) (2012); Deal v. United States, 508 U.S. 129, 132-137 (1993). In Section 403(a) of the First Step Act, Congress limited the applicability of the enhanced minimum penalties to violations of Section 924(c) that "occur[] after a prior conviction under [Section 924(c)] has become final." § 403(a), 132 Stat. 5221. But in Section 403(b), titled "Applicability to Pending Cases," Congress provided that "the amendments made by [Section 403] shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222 (capitalization altered; emphasis added).

[3] This Court ordinarily requires a motion for leave to amend a petition when the petitioner seeks to add a new question presented to a case. See Stephen M. Shapiro et al., Supreme Court Practice § 6.27, at 472-473 (10th ed. 2013). The supplemental brief here is appropriately treated as a motion for leave to amend, and that motion may be granted. For the reasons set forth in this brief, the petition for a writ of certiorari should nevertheless be denied.

Here, petitioner's original sentence was imposed in 2013, long before the First Step Act was passed, and petitioner has been serving that sentence since that time. See 18 U.S.C. 3553(a) (sentencing court "shall impose a sentence" after considering various factors); 18 U.S.C. 3584(a) and (b) (multiple terms of imprisonment may be "imposed on a defendant" concurrently or consecutively, and the choice of how to "impose" them involves consideration of the Section 3553(a) factors); Fed. R. Crim. P. 32(b)(1) ("The court must impose sentence without unnecessary delay."). The First Step Act is thus plainly inapplicable to petitioner.

Petitioner's contention (Supp. Br. 4) that the First Step Act applies to all criminal cases "pending on direct review or not yet final" is incompatible with the language of the statute. Congress instructed that the relevant provisions of the First Step Act apply only to pending cases where "a sentence * * * has not been imposed." First Step Act § 403(b), 132 Stat. 5222. Petitioner's position is also inconsistent with the "ordinary practice" in federal sentencing "to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." Dorsey v. United States, 567 U.S. 260, 280 (2012). That practice is codified in the saving statute, 1 U.S.C. 109, which specifies that the repeal of any statute will not have the effect "to release or extinguish any penalty, forfeiture, or

liability incurred under such statute" unless the repealing act so provides.

The cases that petitioner relies upon (Supp. Br. 4-6) do not support his atextual reading of Section 403(b). Petitioner invokes Griffith v. Kentucky, 479 U.S. 314 (1987), in which this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." Id. at 328. But that principle applies to "a newly declared constitutional rule," id. at 322, not to a statutory amendment. Petitioner's reliance on Hamm v. City of Rock Hill, 379 U.S. 306 (1964) -- which involved the enactment of a materially different statute (the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241) that gave the petitioners in that case a right to engage in the conduct for which they had previously been prosecuted (participating in sit-in demonstrations at racially segregated lunch counters), and did not specify the date of its applicability -- is likewise misplaced, Hamm, 379 U.S. at 307, 311, 314. And because the First Step Act is unambiguously inapplicable here, no sound basis exists for granting the petition, vacating the judgment below, and remanding "for resentencing" (Supp. Br. 6). See Stutson v. United States, 516 U.S. 193, 196 (1996) (per curiam) (explaining that this Court will not grant, vacate, and remand in light of an intervening development absent

"a reasonable probability" that the court of appeals will reach a different conclusion on remand).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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