

No. 18-9325

IN THE SUPREME COURT OF THE UNITED STATES

DAVION L. JEFFERSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly determined that Hobbs Act robbery is a "crime of violence" under 18 U.S.C. 924(c)(3)(A).
2. Whether this Court should overrule its interpretation in Deal v. United States, 508 U.S. 129 (1993), of the statutory term "second or subsequent conviction" in 18 U.S.C. 924(c)(1)(C) (2012).
3. Whether petitioner, who was sentenced in June 2017, is entitled to resentencing under a provision of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, that applies only "if a sentence for the offense has not been imposed as of" December 21, 2018. § 403(b), 132 Stat. 5222.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Kan.):

United States v. Jefferson, No. 15-cr-20012 (June 21, 2017)

United States Court of Appeals (10th Cir.):

United States v. Jefferson, No. 17-3150 (Dec. 28, 2018)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 911 F.3d 1290.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 2018. A petition for rehearing was denied on February 14, 2019 (Pet. App. 29a). The petition for a writ of certiorari was filed on May 15, 2019. 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 District of Kansas, petitioner was convicted on five counts of robbery in violation of the Hobbs Act, 18 U.S.C. 1951 and 2, and two counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A) (ii). Judgment 1-2. The district court sentenced petitioner to 454 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-28a.

1. Between December 30, 2014, and January 9, 2015, petitioner and an accomplice robbed five convenience stores. Pet. App. 1a-2a; Gov't C.A. Br. 3-12. A federal grand jury charged petitioner with five counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951 and 2, and three counts of brandishing a firearm during and in relation to a crime of violence (three of the Hobbs Act robberies), in violation of 18 U.S.C. 924(c) (1) (A) (ii). Indictment 1-5.

Before trial, petitioner submitted proposed jury instructions on the Section 924(c) counts that would have required the government to prove -- and the jury to find -- that robbery is a "crime of violence" under 18 U.S.C. 924(c) (3). That provision 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). Petitioner requested that the district court instruct the jury that the government was required to prove beyond a reasonable doubt that petitioner "committed robbery by force capable of causing physical pain or injury to another person or the person's property." Pet. App. 4a (citation omitted). The court denied the request. Id. at 5a, 36a. The court instead instructed the jury that the government needed to prove that petitioner "committed the crime of robbery" as charged in the corresponding Hobbs Act robbery count of the indictment and that he "knowingly used or carried a firearm . . . during and in relation to [those] robber[ies]." Id. at 5a (brackets in original). The court further instructed the jury that "robbery is a crime of violence." Ibid. (citation omitted).

A jury acquitted petitioner on one of the Section 924(c) counts and found him guilty on the remaining counts. Judgment 1-2. The district court sentenced petitioner to concurrent terms of 70 months of imprisonment on the five Hobbs Act robbery counts. Judgment 3. Petitioner's first conviction for brandishing a firearm during and in relation to a crime of violence, in violation of Section 924(c), required a consecutive minimum sentence of 96 months of imprisonment, 18 U.S.C. 924(c)(1)(A)(ii), and the district court imposed a 96-month consecutive sentence. Judgment

3. At the time of petitioner's sentencing, his "second * * * conviction" for violating Section 924(c) required a minimum sentence of 300 months of imprisonment, 18 U.S.C. 924(c)(1)(C)(i) (2012), that would run consecutively to petitioner's other sentences, 18 U.S.C. 924(c)(1)(D)(ii). See Deal v. United States, 508 U.S. 129, 132 (1993). The court imposed a consecutive 300-month sentence for petitioner's second Section 924(c) conviction, resulting in a total sentence of 454 months of imprisonment. Judgment 3.

2. The court of appeals affirmed. Pet. App. 1a-28a. As relevant here, the court rejected petitioner's argument that the government was required to prove to the jury that robbery is a crime of violence. Id. at 5a-8a (citing United States v. Morgan, 748 F.3d 1024 (10th Cir.), cert. denied, 135 S. Ct. 298 (2014)). The court explained that, "[u]sing the categorical approach, [the court] focus[es] solely on the statute of conviction, 'while ignoring the particular facts of the case,' to decide whether it satisfies the 'crime of violence' definition" in Section 924(c)(3). Id. at 7a (quoting Mathis v. United States, 136 S. Ct. 2243, 2248 (2016)). "In other words," the court stated, "deciding whether a crime is a 'crime of violence' under § 924(c) is largely a matter of statutory interpretation, a legal task for the judge, not a factual one for the jury." Id. at 7a-8a. The court then

determined that Hobbs Act robbery is a crime of violence under 18 U.S.C. 942(c) (3) (A). Id. at 8a-14a.¹

ARGUMENT

Petitioner contends (Pet. 9-14) that the district court erred by instructing the jury that robbery is a "crime of violence" rather than submitting that element to the jury. He also asks (Pet. 14-17) the Court to overrule its prior decision in Deal v. United States, 508 U.S. 129 (1993), in light of Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, which amended the provision of Section 924(c) (1) (C) that required the district court in this case to impose a consecutive minimum sentence of 300 months of imprisonment for petitioner's second Section 924(c) conviction. § 403(a), 132 Stat. 5221-5222. In a supplemental brief, petitioner contends (Pet. Supp. Br. 1-8) that this Court should grant the petition for a writ of certiorari, vacate the judgment, and remand to the court of appeals to consider whether he is entitled to resentencing under Section 403 of the First Step Act, even though the Act provides that Section 403 applies only "if a sentence for the offense has not been imposed

¹ The court of appeals additionally found that the district court should have instructed the jury that, in order to convict him of Hobbs Act robbery, the jury needed to find that he committed the robberies using violent force, but that this error was harmless in light of the evidence. See Pet. App. 14a-20a. The petition for a writ of certiorari does not challenge the court of appeals' finding of harmless error regarding the jury instructions on petitioner's Hobbs Act robbery offenses.

as of" December 21, 2018. § 403(b), 132 Stat. 5222. Each of petitioner's claims lacks merit, and the decision below does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. As noted above, 18 U.S.C. 924(c)(3) defines a "crime of violence" to include, inter alia, a felony offense that "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). This Court has viewed similar or identical language in other statutes to require a categorical approach under which courts "look to the elements and nature of the offense of conviction, rather than to the particular facts relating to [a defendant's] crime," to determine whether the offense fits the applicable definition. Leocal v. Ashcroft, 543 U.S. 1, 7 (2004) (interpreting 18 U.S.C. 16(a)); see Nijhawan v. Holder, 557 U.S. 29, 35-36 (2009) (interpreting 18 U.S.C. 924(e)(2)(B)(i)).

Moreover, this Court's decision in United States v. Davis, 139 S. Ct. 2319 (2019), refutes petitioner's claim that the classification of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), as a "crime of violence" under 18 U.S.C. 924(c)(3)(A) is a question for the jury, rather than the judge. In Davis, this Court considered whether the categorical approach applies to the alternative "crime of violence" definition in Section 924(c)(3)(B). The Court concluded that Section 924(c)(3)(B) requires a categorical approach, and held that Section

924(c)(3)(B) is unconstitutionally vague. See 139 S. Ct. at 2336. Although Davis concerned the interpretation of Section 924(c)(3)(B), this Court observed that "everyone agrees that, in connection with the elements clause [in Section 924(c)(3)(A)], the term 'offense'" refers directly to "generic crimes." Id. at 2328 (quoting Nijhawan, 557 U.S. at 36); see also id. at 2339 (Kavanaugh, J.) ("The judge makes th[e] determination" "whether the underlying crime categorically fits within § 924(c) because of the elements of the crime."). Because the categorical approach applies to a determination whether a defendant's underlying offense is a "crime of violence" under Section 924(c)(3)(A), the judge -- not a jury -- decides the legal question whether the offense "has as an element" the requisite degree of force.

Petitioner contends (Pet. 9-10) that the district court's instruction that Hobbs Act robbery is a crime of violence amounted to a "directed verdict" on the crime-of-violence element and contravened "blackletter law that a jury must find beyond a reasonable doubt all elements of an offense." Petitioner is incorrect. While "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged," United States v. Gaudin, 515 U.S. 506, 522-523 (1995), "[i]n criminal cases, as in civil, * * * the judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions." Id. at 513 (citing Sparf & Hansen v. United

States, 156 U.S. 51, 105-106 (1895)). As multiple courts of appeals have recognized, the determination whether Hobbs Act robbery under 18 U.S.C. 1951(a) -- or any other crime -- is a "crime of violence" under Section 924(c) presents such a purely legal question. See, e.g., United States v. Harris, 676 Fed. Appx. 558, 562 (6th Cir. 2017) (per curiam); United States v. Meachum, 182 F.3d 923, 1999 WL 511431, at *1-*2 (7th Cir.) (Tbl.), cert. denied, 528 U.S. 1056 (1999); United States v. Green, 115 F.3d 1479, 1486-1487 (10th Cir. 1997), cert. denied, 522 U.S. 1053, and 523 U.S. 1024 (1998); United States v. Credit, 95 F.3d 362, 364 (5th Cir. 1996), cert. denied, 519 U.S. 1138 (1997); United States v. Amparo, 68 F.3d 1222, 1224 (9th Cir. 1995), cert. denied, 516 U.S. 1164 (1996); United States v. Moore, 38 F.3d 977, 979 (8th Cir. 1994), abrogated on other grounds by Leocal v. Ashcroft, 543 U.S. 1 (2004); United States v. Weston, 960 F.2d 212, 217 (1st Cir. 1992), abrogated on other grounds by Stinson v. United States, 508 U.S. 36 (1993).

Contrary to petitioner's suggestion (Pet. 9, 11), this Court's decision in Rosemond v. United States, 134 S. Ct. 1240 (2014), which stated that "the commission of a * * * violent * * * crime is -- no less than the use of a firearm -- an 'essential conduct element of the § 924(c) offense,'" id. at 1247 (citation omitted), provides no support for his argument here. Rosemond referred to the "commission" of the violent crime as an element of the Section 924(c) offense, ibid. (emphasis added), and

it is undisputed here that the jury, not the court, found that petitioner committed each of the Hobbs Act robberies underlying his Section 924(c) convictions.

Petitioner also contends (Pet. 11) that "several courts of appeals have recently held that § 924(c)'s crime-of-violence determination is a jury issue." But as petitioner acknowledges, the cases that he cites all involved the separate crime of violence definition in Section 924(c) (3) (B), and all were decided before this Court rejected a case-specific approach to that subsection in Davis.

2. Petitioner separately contends (Pet. 14-17) that this Court should grant review to overrule its decision in Deal v. United States, supra. Deal construed the statutory term "second or subsequent conviction" in Section 924(c) to include a defendant's second and subsequent counts of conviction under Section 924(c) even when those convictions are entered "in [a] single proceeding" along with the defendant's first Section 924(c) conviction. 508 U.S. at 131; see id. at 132-134. Petitioner accordingly does not dispute that, under Deal, his second Section 924(c) conviction in this case was a "second or subsequent conviction" that carried a consecutive 300-month minimum sentence. See 18 U.S.C. 924(c) (1) (C) (i) (2012). Petitioner argues (Pet. 15), however, that "Deal was incorrectly decided" and that Congress's recent amendment of Section 924(c) demonstrates that Justice Stevens's dissenting opinion in Deal reflects the better

interpretation of Section 924(c)'s text. That contention lacks merit.

On December 21, 2018, the First Step Act became law. In Section 403(a) of the Act, Congress deleted Section 924(c)(1)(C)'s reference to a "second or subsequent conviction" and replaced it with the phrase a "violation of this subsection that occurs after a prior conviction under this subsection has become final." § 403(a), 132 Stat. 5221-5222. But Congress did not make that amendment fully retroactive; in Section 403(b) of the First Step Act, 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).

Contrary to petitioner's contention (Pet. 15), the First Step Act did not alter the then-existing language of Section 924(c)(1)(C) that this Court interpreted in Deal. See United States v. Hunt, No. 19-1075, 2019 WL 5700734, at *2 (10th Cir. Nov. 5, 2019). The First Step Act reflects Congress's policy choice in 2018 to lessen the statutory-minimum sentences for a specified subset of defendants -- but not for a defendant like petitioner, who was sentenced before the First Step Act. The statutory amendment does not provide a basis to overrule this Court's correct construction in Deal of the different statutory

language in the predecessor version of Section 924(c) that was in effect at the time of petitioner's offense and sentencing. As the Tenth Circuit has recognized, "the fact that Congress used the 'clarification' label in § 403's heading" does not supersede the substance of the amendment or indicate that defendants who fall outside the amendment's expressly prospective scope are entitled to relief through an overruling of Deal. Ibid.

Petitioner contends (Pet. 15) that overruling Deal would be "consistent with this Court's precedent on statutory retroactivity." To the contrary, the "ordinary practice" in federal sentencing is "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 case on which petitioner relies, Schriro v. Summerlin, 542 U.S. 348 (2004) -- which held that the rule announced by this Court in Ring v. Arizona, 536 U.S. 584, 589 (2002), was procedural rather than substantive and therefore not retroactive on collateral review -- has no bearing on the question presented here.

3. Petitioner's supplemental brief contends (Pet. Supp. Br. 1-8) for the first time in this Court that he is entitled to

resentencing under the terms of the First Step Act itself.² But as discussed, petitioner is not eligible to benefit from the Act's prospective amendment to Section 924(c)(1)(C). Section 403(b) of the First Step Act provides that the amendments it made to Section 924(c) "shall apply" only "if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222. Petitioner's sentence was imposed in June 2017, well before the First Step Act was enacted on December 21, 2018. See 18 U.S.C. 3553 (2012) ("Imposition of a sentence") (emphasis omitted). Accordingly, the amendments made by Section 403 do not apply to petitioner's offense.

As petitioner observes (Pet. Supp. Br. 2-3), this Court recently granted two petitions for a writ of certiorari, vacated the respective judgments, and remanded to the courts of appeals to consider the application of the First Step Act on direct appeal, notwithstanding the government's observation that the defendants' sentences had been imposed before the enactment of the statute. See Richardson v. United States, 139 S. Ct. 2713 (2019) (No. 18-7036); Wheeler v. United States, 139 S. Ct. 2664 (2019) (No. 18-7187).³ But the Court has denied petitions in a similar

² A similar question is presented by the petitions for a writ of certiorari in Coleman v. United States, No. 19-5445 (filed July 31, 2019), and St. Hubert v. United States, No. 19-5267 (filed July 18, 2019).

³ Wheeler concerned Section 401(c) of the First Step Act, which governs the applicability of Section 401, whereas Richardson concerned Section 403(b), the same provision at issue here. See

posture to this one. See Nelson v. United States, No. 19-5010 (Nov. 4, 2019); Pizarro v. United States, No. 18-9789 (Oct. 7, 2019); Sanchez v. United States, No. 18-9070 (Oct. 7, 2019). A similar disposition is warranted here, for two reasons.

First, unlike the defendants in Richardson and Wheeler, petitioner had the opportunity to present his claim for resentencing under the First Step Act to the court of appeals, but failed to do so. The First Step Act was enacted while petitioner's appeal was still pending in the Tenth Circuit, seven days before the court of appeals ultimately entered its judgment. See Pet. App. 1a. Although the principal briefs in the case had already been filed, petitioner could have raised the issue by other means -- for example, by requesting leave to file a supplemental brief addressing the effect of the statute on his sentence. Cf. United States v. Sillas-Cembreros, 148 Fed. Appx. 684, 688-689 (10th Cir. 2005) (considering an argument made for the first time in a supplemental brief addressing a new decision of this Court), cert. denied, 547 U.S. 1022 (2006). By failing to avail himself of the opportunity to present the First Step Act issue to the court of appeals, petitioner has forfeited the argument. See Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 75-76 & n.5 (2010) (determining that the respondent forfeited an argument in the court of appeals when he "could have submitted a supplemental brief")

Br. in Opp. at 22-25, Wheeler, supra (No. 18-7187); Br. in Opp. at 12-16, Richardson, supra (No. 18-7036). The two provisions have the same wording.

addressing the issue in the period between the intervening legal development and the court of appeals' entry of judgment).

Second, the court of appeals has since determined that Section 403 does not apply to defendants, like petitioner, sentenced before enactment of the First Step Act. See Hunt, 2019 WL 5700734, at *3 ("The language of § 403 of the First Step Act plainly does not reach § 924(c)(1)(C) sentences * * * which were imposed before the Act was enacted."). Although that decision is unpublished, it is correct and accords with the decisions of every other court of appeals to have considered the issue. See United States v. Aviles, 938 F.3d 503, 510 (3d Cir. 2019) (observing that "'[i]mposing' sentences is the business of district courts" and "Congress's use of the word 'imposed' thus clearly excludes cases in which a sentencing order has been entered by a district court [before December 21, 2018] from the reach of the amendments made by the First Step Act"); United States v. Wiseman, 932 F.3d 411, 417 (6th Cir. 2019) (determining that the defendant "cannot benefit from" Section 401 of the First Step Act because "he was sentenced prior to its effective date"); United States v. Pierson, 925 F.3d 913, 928 (7th Cir. 2019) ("Sentence was 'imposed' here within the meaning of [the First Step Act] when the district court sentenced the defendant, regardless of whether he appealed a sentence that was consistent with applicable law at that time it was imposed."); United States v. Garcia, 778 Fed. Appx. 779, 783 (11th Cir. 2019)

(determining that Section 403 does not apply to defendants sentenced before enactment of the First Step Act).

Because petitioner's First Step Act claim is both forfeited and without merit, no reasonable probability exists that the court of appeals would remand this case for resentencing in light of that statute. See Greene v. Fisher, 565 U.S. 34, 41 (2011) (explaining that this Court will not grant, vacate, and remand in light of an intervening development unless, as relevant here, "a reasonable probability" exists that the court of appeals will reach a different conclusion on remand) (quoting Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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