No. 19-5010

IN THE SUPREME COURT OF THE UNITED STATES

ANDREW NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DANIEL J. KANE
Attorney

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

QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected petitioner's challenge to the district court's denial of his sixth request to continue his trial on the ground that he had failed to show prejudice.

2. Whether the court of appeals correctly rejected petitioner's claim that robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), does not qualify as a "crime of violence" under 18 U.S.C. 924(c)(3).

3. Whether petitioner is entitled to a remand for resentencing under Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, where petitioner failed to seek such relief in the court of appeals and the court of appeals has since denied relief in similar circumstances on the ground that Section 403 does not apply to defendants like petitioner.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Nelson, No. 16-cr-20119 (May 18, 2017)

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

United States v. Nelson, No. 17-12375 (Feb. 7, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is available at 761 Fed. Appx. 917.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2019. A petition for rehearing was denied on March 26, 2019 (Pet. App. 12). The petition for a writ of certiorari was filed on June 24, 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 Southern District of Florida, petitioner was convicted on one count of conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); six counts of robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); and six 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). Pet. App. 13. The court sentenced petitioner to 1662 months of imprisonment, to be followed by five years of supervised release. Id. at 15-16. The court of appeals affirmed. Id. at 1-11.

1. During a one-month period between April and May 2015, petitioner and his confederates committed a string of robberies of Family Dollar stores in the Miami area. Presentence Investigation Report ¶¶ 5-28. During several of those robberies, petitioner personally brandished a firearm and used it to threaten store clerks and managers in order to demand money from them. See ibid. A federal grand jury charged petitioner with conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), six counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2, and six 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) and 2. Second Superseding Indictment 1-3, 5-11.

Section 924(c) makes it a crime to use or carry a firearm during and in relation to, or to possess a firearm in furtherance

of, "any crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). Enhanced penalties apply if the firearm is brandished or discharged. 18 U.S.C. 924(c)(1)(A)(ii)-(iii). A "crime of violence" is defined as a felony 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). The crimes of violence underlying petitioner's Section 924(c) charges were the six substantive Hobbs Act robbery offenses charged in the indictment. See Second Superseding Indictment 3, 5-7, 9-11.

2. Petitioner moved to dismiss the Section 924(c) counts, arguing that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague and that Hobbs Act robbery does not qualify as "crime of violence" under the definition in 18 U.S.C. 924(c)(3)(A). D. Ct. Doc. 67 (May 27, 2016). Petitioner additionally argued that he had been charged with aiding and abetting Hobbs Act robbery, which does not constitute a crime of violence under Section 924(c)(3)(A). D. Ct. Doc. 197 (Oct. 31, 2016). The district court rejected petitioner's arguments on the ground that, under Eleventh Circuit precedent, Hobbs Act robbery qualifies as a "crime of violence" under Section 924(c)(3)(A). D. Ct. Doc. 103, at 6 (July 19, 2016); D. Ct. Doc. 207 (Nov. 8, 2016). The district court accordingly declined to

consider whether Section 924(c)(3)(B) was unconstitutionally vague. D. Ct. Doc. 103, at 6.

The district court granted the parties several continuances of the trial, primarily to accommodate petitioner's requests for additional time to review the government's discovery, including incriminating phone calls that petitioner had made from jail. Between April 6, 2016, and September 9, 2016, the district court granted four continuances of the trial requested by petitioner, and one continuance requested by the government. See Gov't C.A. Br. 4-7.

On November 29, 2016, less than one week before petitioner's scheduled trial date, petitioner filed a motion to replace his counsel and to continue the trial for an additional 60 days in order for substitute counsel to prepare. See Gov't C.A. Br. 7. The district court appointed new counsel for petitioner, and continued the trial for a sixth time until January 23, 2017, a continuance of 50 additional days. Ibid. On January 12, 2017, petitioner filed an unopposed motion seeking a seventh continuance of the trial date, asserting that 45 additional days were necessary in order for his substitute counsel to prepare for trial. D. Ct. Doc. 268, at 2. The court denied the request, noting that the trial had been continued on numerous occasions and finding that it "ha[d] allowed sufficient time to prepare for trial." D. Ct. Doc. 269, at 1 (Jan. 13, 2017); see D. Ct. Doc. 272, at 1 (Jan. 18, 2017) (denying motion for reconsideration).

The jury found petitioner guilty on all charges. Pet. App. 13. The district court sentenced petitioner to 1662 months of imprisonment, which included a consecutive term of 84 months of imprisonment on the first Section 924(c) offense and an additional consecutive term of 300 months of imprisonment on the additional Section 924(c) offenses. Id. at 15.

3. The court of appeals affirmed in an unpublished order. Pet. App. 1-11.

The court of appeals rejected petitioner's challenge to his Section 924(c) convictions. Pet. App. 2-6. The court observed that it had previously determined that Section 924(c)(3)(B) is not unconstitutionally vague, id. at 4 (citing Ovalles v. United States, 905 F.3d 1231, 1252-1253 (11th Cir. 2018) (en banc)). And the court added that "the constitutionality of [Section 924(c)(3)(B)] does not control the outcome of this appeal because [the court] also conclude[d] that [petitioner's] Hobbs Act robbery convictions qualify as crimes of violence under [Section 924(c)(3)(A).]" Id. at 4 n.1.

The court of appeals also found that the district court did not abuse its discretion in denying petitioner's sixth motion to continue his trial date. Pet. App. 6-8. The court of appeals found that petitioner had "fail[ed] to establish specific substantial prejudice" from the denial of the continuance because he did "not point to any relevant, non-cumulative evidence that he

would have presented if the court had granted the continuance." Id. at 7.

ARGUMENT

Petitioner contends (Pet. 8-9) that the court of appeals erred by requiring him to demonstrate prejudice from the district court's denial of his sixth motion for a continuance. That fact-bound claim does not warrant this Court's review. Petitioner further contends (Pet. 9-10) that this Court should remand this case to the Eleventh Circuit in light of United States v. Davis, 139 S. Ct. 2319 (2019), in which this Court held that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. But the predicate crimes of violence for petitioner's Section 924(c) convictions -- Hobbs Act robberies -- qualified as crimes of violence under Section 924(c)(3)(A), and Davis thus does not affect the result below. Finally, petitioner contends (Pet. 10-11) for the first time in this Court that he is entitled to resentencing under Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. But petitioner forfeited that claim by failing to raise it in the court of appeals, which has since denied relief in similar circumstances on the ground that Section 403 does not apply to defendants, like petitioner, who were sentenced before enactment of the First Step Act. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly rejected petitioner's challenge to the district court's discretionary decision to deny

a seventh continuance of his trial, because he failed to establish any prejudice from that decision. Petitioner's renewed fact-bound challenge does not warrant this Court's review.

The courts of appeals unanimously agree that a defendant seeking a new trial based on the denial of a continuance must show actual prejudice resulting from the denial.[1] Petitioner did not argue otherwise in the court of appeals, instead arguing that he had demonstrated "specific, substantial prejudice arising from the denied continuance" because his attorney had "insufficient time to listen to the hundreds of hours of jail phone calls that were recorded and provided in discovery" and therefore could not "determine whether exculpatory evidence was buried in the unreviewed mass of calls." Pet. C.A. Br. 34-35 (citing United States v. Verderame, 51 F.3d 249, 251 (11th Cir.), cert. denied 516 U.S. 954 (1995)); see Pet. C.A. Reply Br. 9-10.

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[1] See United States v. Porter, 907 F.3d 374, 383 (5th Cir. 2018); United States v. Jeri, 869 F.3d 1247, 1257 (11th Cir.), cert. denied, 138 S. Ct. 529 (2017); United States v. Jirak, 728 F.3d 806, 815 (8th Cir. 2013), cert. denied, 572 U.S. 1102 (2014); United States v. Eiland, 738 F.3d 338, 355-356 (D.C. Cir. 2013); United States v. Pursley, 577 F.3d 1204, 1227-1229 (10th Cir. 2009), cert. denied, 558 U.S. 1130 (2010); United States v. Crowder, 588 F.3d 929, 936-937 (7th Cir. 2009); United States v. Rodriguez-Marrero, 390 F.3d 1, 22-24 (1st Cir. 2004), cert. denied, 544 U.S. 912 (2005); United States v. Garner, 507 F.3d 399, 408 (6th Cir. 2007); United States v. Williams, 445 F.3d 724, 739 (4th Cir.), cert. denied, 549 U.S. 933 (2006); United States v. Irizarry, 341 F.3d 273, 305-306 (3d Cir. 2003), cert. denied, 540 U.S. 1140 (2004); United States v. Zamora-Hernandez, 222 F.3d 1046, 1049 (9th Cir. 2000), cert. denied, 531 U.S. 1200 (2001); United States v. Weinberg, 852 F.2d 681, 687 (2d Cir. 1988).

The court of appeals correctly determined that petitioner's speculative assertion, which lacked any particularized theory of prejudice, did not establish reversible error. See Pet. App. 8 ("The possibility that [petitioner's] counsel may have found additional evidence if the district court had granted a continuance, however, does not establish prejudice."). Petitioner cites (Pet. 8) United States v. Williams, 576 F.3d 385 (7th Cir. 2009), in which the Seventh Circuit stated that a defendant need not "produce actual new evidence to show prejudice." Id. at 391. But as that court later explained, notwithstanding Williams, a defendant cannot establish prejudice based on "vague and conclusory statements about his abstract need for more time to review the evidence." United States v. Crowder, 588 F.3d 929, 937 (7th Cir. 2009).

Petitioner contends (Pet. 8-9) that requiring a defendant to identify specific evidence he would have presented at trial had the district court granted a continuance imposes too great a demand on appellate counsel, who lacks the resources to undertake the necessary investigation. As an initial matter, it is not clear that the court of appeals categorically required defendants to identify specific pieces of evidence, as opposed to alternative theories the defense would have pursued. See Pet. App. 6 ("If the defendant fails to proffer evidence or theories that would have been presented had he been granted a continuance, he has not shown specific substantial prejudice.") (emphasis added) (citing United

States v. Gibbs, 594 F.2d 125, 127 (5th Cir.) (per curiam), cert. denied, 444 U.S. 854 (1979)). Petitioner provides no support for a rule that would require automatic reversal without any concrete suggestion of how a continuance would have affected a trial's outcome. See Fed. R. Crim. P. 52.

Moreover, this case would be an unsuitable vehicle for reviewing the question presented because a decision in petitioner's favor would not be outcome-determinative. The court of appeals reviews the denial of a continuance for abuse of discretion, Pet. App. 6, and under the circumstances, the district court was well within its discretion to deny a seventh continuance. Petitioner's trial counsel had seven weeks to prepare and did not start from square one, but instead had the benefit of petitioner's prior counsel's months of experience with the case, including with the jailhouse recordings that formed the basis for the request for an additional continuance. See C.A. App. 54 (district court explaining it was "confident that prior counsel has cooperated in the transition"). By the time substitute counsel was appointed, the government had identified the specific calls on which it might rely, and the district court had authorized funding for petitioner's original counsel to obtain transcripts of certain calls for which the government had not already produced transcripts. See Gov't C.A. Br. 5-6. Under these circumstances, there is no basis for concluding that the district court abused its discretion. See United States v. Valladares, 544 F.3d 1257,

1264 (11th Cir. 2008) (rejecting challenge to denial of a continuance where "defense counsel had more than a month to prepare" and "the government had identified all of the documents it intended to use").

2. Contrary to petitioner's contention (Pet. 9-10), this Court should not remand this case to the court of appeals in light of this Court's decision in Davis, which concerned Section 924(c)(3)(B).

Petitioner was convicted of using or carrying a firearm during and in relation to Hobbs Act robberies. Hobbs Act robbery requires the "unlawful taking or obtaining of personal property" from another "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 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 in Garcia v. United States, cert. denied, 138 S. Ct. 641 (2018) (No. 17-5704), Hobbs Act robbery qualifies as a crime of violence under Section 924(c) because it "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). See Br. in Opp. at 7-10, Garcia, supra (No. 17-5704).[2] Every court of appeals to consider the issue has so held. See id. at 8. And this Court has recently and repeatedly denied petitions for a writ

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

of certiorari challenging the circuits' consensus on the application of Section 924(c)(3)(A) to Hobbs Act robbery.[3]

Petitioner nevertheless contends (Pet. 9-10) that the jury might have found him guilty of the Hobbs Act robbery offenses on a theory of co-conspirator liability under Pinkerton v. United States, 328 U.S. 640 (1946), and that conspiracy to commit Hobbs Act robbery is not a crime of violence under Section 924(c)(3)(A). Petitioner misunderstands the rule of Pinkerton, under which a defendant can be held liable for a substantive crime committed by a co-conspirator in furtherance of the conspiracy, so long as the crime was reasonably foreseeable. See id. at 647-648. As the indictment reflects, the predicate offenses for petitioner's Section 924(c) conviction were therefore convictions for substantive Hobbs Act robbery -- not conspiracy to commit Hobbs Act robbery. See Second Superseding Indictment at 2-3, 5-11. Accordingly, whether or not those convictions were based on Pinkerton liability, they were not convictions for a conspiracy offense that would fall outside the scope of Section 924(c)(3)(A).

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[3] See, e.g., Rojas v. United States, 139 S. Ct. 1324 (2019) (No. 18-6914); Myrthil v. United States, 139 S. Ct. 1164 (2019) (No. 18-6009); Harmon v. United States, 139 S. Ct. 939 (2019) (No. 18-5965); Foster v. United States, 139 S. Ct. 789 (2019) (No. 18-5655); Desilien v. United States, 139 S. Ct. 413 (2018) (No. 17-9377); Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248); Robinson v. United States, 138 S. Ct. 1986 (2018) (No. 17-6927); Chandler v. United States, 138 S. Ct. 1281 (2018) (No. 17-6415); Middleton v. United States, 138 S. Ct. 1280 (2018) (No. 17-6343); Jackson v. United States, 138 S. Ct. 977 (2018) (No. 17-6247); Garcia v. United States, 138 S. Ct. 641 (2018) (No. 17-5704).

Because petitioner's Hobbs Act robbery convictions qualified as "crime[s] of violence" under Section 924(c)(3)(A), and because Davis concerned only the definition of a "crime of violence" in Section 924(c)(3)(B), this Court's decision in that case did not affect the validity of petitioner's convictions under Section 924(c). No reason exists, therefore, to remand this case to the court of appeals in light of this Court's decision in Davis.

3. Petitioner separately contends (Pet. 10-11) that he is entitled to a resentencing under the First Step Act. At the time of petitioner's May 2017 sentencing, Section 924(c) provided for enhanced minimum penalties for defendants convicted of multiple violations of that provision 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. 5221-5222.

Petitioner is not eligible to benefit from that amendment. Section 403(b) of the First Step Act, titled "Applicability to Pending Cases," provides 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 (emphasis added; capitalization altered). Petitioner's

sentence was imposed in May 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.

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 contention 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).[4] But a similar disposition would not be 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 Eleventh Circuit, 48 days before the court of appeals ultimately entered its judgment. See Pet. App. 1. Although the principal briefs in the case had already

[4] 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 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.

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. Durham, 795 F.3d 1329, 1331 (11th Cir. 2015) (en banc) (holding that parties may file supplemental briefs in the court of appeals based on intervening decisions of this Court that overrule prior precedent). 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" 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 denied relief in similar circumstances on the ground that Section 403 does not apply to defendants, like petitioner, sentenced before enactment of the First Step Act. See United States v. Garcia, No. 17-13992, 2019 U.S. App. LEXIS 20376, at *2 (11th Cir. July 9, 2019) (unpublished). Although that decision is unpublished, it is correct and accords with decisions of other courts. See United States v. Wiseman, 932 F.3d 411, 417 (6th Cir. 2019) (reaching the same conclusion with respect to the identical applicability provision in Section 401 of the First Step Act); United States v. Pierson, 925 F.3d 913, 927-928 (7th Cir. 2019) (same).

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.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DANIEL J. KANE
Attorney

SEPTEMBER 2019