No. 19-5267

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ST. HUBERT, 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

ANDREW W. LAING
Attorney

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

QUESTIONS PRESENTED

1. Whether a three-judge panel of the court of appeals violated petitioner's rights under the Due Process Clause of the Fifth Amendment by giving precedential weight to a previously published decision of that court denying an application for leave to file a second or successive motion under 28 U.S.C. 2255.

2. Whether attempted robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), is a "crime of violence" under 18 U.S.C. 924(c)(3)(A).

3. Whether petitioner, who was sentenced in February 2016, is entitled to be resentenced under Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, which 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 (S.D. Fla.):

United States v. St. Hubert, No. 15-cr-20621 (Feb. 18, 2016)

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

United States v. St. Hubert, No. 16-10874 (Nov. 15, 2018)

Supreme Court of the United States:

St. Hubert v. United States, No. 18-5269 (Oct. 1, 2018)

St. Hubert v. United States, No. 18-8025 (Mar. 25, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-5267

MICHAEL ST. HUBERT, 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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-16) is reported at 909 F.3d 335. The order of the court of appeals denying rehearing en banc (Pet. App. A2, at 1-29) is reported at 918 F.3d 1174. A prior opinion of the court of appeals (Pet. App. A8, at 1-15) is reported at 883 F.3d 1319.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 2018. The court of appeals sua sponte issued an order declining to rehear the case en banc on March 19, 2019 (Pet. App. A-2). On May 31, 2019, Justice Thomas extended the time within

which to file a petition for a writ of certiorari to and including July 18, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. A4, at 1. The district court sentenced petitioner to 384 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals affirmed but held the mandate. Pet. App. A8, at 1-15. This Court denied a petition for a writ of certiorari. 139 S. Ct. 246. After supplemental briefing from the parties, the court of appeals substituted a new opinion affirming petitioner's convictions and sentence. Pet. App. A1, at 1-16. This Court again denied a petition for a writ of certiorari. 139 S. Ct. 1394. The court of appeals considered sua sponte whether to rehear petitioner's case en banc, and denied rehearing. Pet. App. A2, at 1-29.

1. Between December 2014 and January 2015, petitioner committed or attempted to commit six armed robberies in southern Florida. Presentence Investigation Report (PSR) ¶¶ 6-12. Two robberies are relevant here. First, on January 21, 2015, petitioner entered an AutoZone store in Hollywood, Florida, where

he brandished a gun, directed three store employees to put money in a bag, and threatened to shoot them if they did not comply. PSR ¶ 10. Petitioner escaped with $2300. Ibid. Second, on January 27, 2015, petitioner entered an AutoZone store in Miami, Florida, where he held a gun to an employee's head and ordered a second employee to open the store's safe. PSR ¶¶ 6, 12. The second employee saw a police car outside and ran to it to ask for help; petitioner fled and was later arrested at his home. PSR ¶ 12.

2. A federal grand jury charged petitioner with five counts of robbery and one count of attempted robbery, all in violation of the Hobbs Act, 18 U.S.C. 1951(b)(1) and (b)(3); six counts of using a firearm during and in relation to a crime of violence (the Hobbs Act robberies and the attempted Hobbs Act robbery), in violation of 18 U.S.C. 924(c)(1)(A); and one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A3, at 1-8. Petitioner pleaded guilty to the two Section 924(c) offenses corresponding to the January 21 robbery and the January 27 attempted robbery. PSR ¶ 1; see Pet. App. A3, at 5, 7.

The district court sentenced petitioner to 384 months of imprisonment, including a mandatory 25-year consecutive term of imprisonment in connection with his second Section 924(c) conviction, to be followed by five years of supervised release. Pet. App. A4, at 2-3; see 18 U.S.C. 924(c)(1)(C)(i) (2012).

3. Petitioner appealed. He argued, as relevant here, that his convictions under Section 924(c) should be vacated because the predicate offenses -- Hobbs Act robbery and attempted Hobbs Act robbery -- were not "crime[s] of violence" under 18 U.S.C. 924(c)(3). Pet. C.A. Br. 2. Section 924(c)(3) 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). The court of appeals rejected petitioner's arguments and determined that both Hobbs Act robbery and attempted Hobbs Act robbery are crimes of violence under Section 924(c)(3)(A).

a. The court of appeals issued its first opinion affirming petitioner's convictions and sentence in February 2018. Pet. App. A8, at 1-15. The court held the mandate for several months, see Pet. 10, while petitioner filed a petition for a writ of certiorari raising the second question presented by the instant petition. See No. 18-5269 (filed July 13, 2018). This Court denied that petition. 139 S. Ct. 246. After the court of appeals concluded in Ovalles v. United States, 905 F.3d 1231 (11th Cir. 2018) (en banc), that 18 U.S.C. 924(c)(3)(B) was not unconstitutionally vague, the court requested supplemental briefing from the parties

to this case on whether petitioner's predicate offenses constitute crimes of violence, see Pet. 10-11.

b. In November 2018, the court of appeals vacated its initial opinion in light of Ovalles and this Court's opinion in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), and replaced it with a new opinion (Pet. App. A1, at 1-16) affirming petitioner's convictions and sentence, see Pet. 12. With respect to Hobbs Act robbery, the court of appeals observed that it had already determined in a prior published decision, in which it had denied a prisoner leave to file a second or successive collateral attack under 28 U.S.C. 2255, that Hobbs Act robbery is a crime of violence under Section 924(c)(3)(A), and the court concluded that it was bound by that precedent. Pet. App. A1, at 10 (citing In re Saint Fleur, 824 F.3d 1337, 1340-1341 (11th Cir. 2016), and In re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016)). With respect to attempted Hobbs Act robbery, the court explained that attempt liability "requires the defendant to have the specific intent to commit each element of the completed federal offense," and "because the taking of property from a person against his will in the forcible manner required by [the Hobbs Act] necessarily includes the use, attempted use, or threatened use of physical force, then by extension the attempted taking of such property from a person in the same forcible manner must also include at least the 'attempted use' of force" under Section 924(c)(3)(A). Id. at 14-15.

Petitioner filed a second petition for a writ of certiorari, see Pet. 10, raising the second and third questions presented by the instant petition. See No. 18-8025 (filed Feb. 13, 2019). This Court denied that petition. 139 S. Ct. 1394.

4. The court of appeals sua sponte considered whether to rehear petitioner's case en banc, and it declined to do so. See Pet. App. A2, at 1-29. Judge Tjoflat, joined by four other judges, concurred in the denial of rehearing en banc, stating that the court's precedent in Saint Fleur is sound; that it is consistent with the decisions of every other court of appeals to address whether Hobbs Act robbery is a crime of violence; that the court publishes only a very small percentage of its orders denying permission to file second or successive collateral attacks under 28 U.S.C. 2255; and that in any case in which a panel of the court affords precedential weight to a published order denying permission to file a second or successive Section 2255 motion, both that decision and the earlier published order can be reviewed by the court en banc -- just as the court had considered (but declined) to review petitioner's own case en banc. Id. at 1-8.

Judge William Pryor also concurred in the denial of rehearing en banc, Pet. App. A2, at 8-13, stating that the process for reviewing whether to permit the filing of a second or successive collateral attack under Section 2255 is adequate for the court to "decide the discrete legal issue whether a particular offense is

or is not a crime of violence, an inquiry with which [the court] has plenty of experience," id. at 12. Judge Jordan also concurred in the denial of rehearing en banc, rejecting the dissenting judges' suggestion that published orders denying permission to file a second or successive Section 2255 motion are not entitled to precedential weight, but stating that he hoped the court would sparingly publish such orders in the future. Id. at 13-17.

Judge Wilson, joined by in part by three other judges, dissented from the denial of rehearing en banc. Pet. App. A2, at 17-20. He disagreed with the application of the crime of violence definition in Section 924(c)(3)(A), and he took the view that published orders denying permission to file second or successive collateral attacks under Section 2255 should not be precedential. Ibid. Judge Martin, joined by one other judge, dissented from the denial of rehearing en banc, taking the view that consideration of the merits of a prisoner's Section 2255 petition is not appropriate in the context of determining whether to authorize a second or successive collateral attack. Id. at 20-27. Finally, Judge Jill Pryor, joined by Judges Wilson and Martin, dissented from the denial of rehearing en banc, taking the view that published orders denying permission to file second or successive collateral attacks under Section 2255 should not be binding on all subsequent panels, and that an attempt to commit an offense that qualifies as a crime of violence under 18 U.S.C. 924(c)(3)(A) does not itself

necessarily constitute a crime of violence. Pet. App. A2, at 27-29.

ARGUMENT

Petitioner contends (Pet. 16-21) that the court of appeals "denied [him] Due Process" by concluding that it was bound by its prior published orders rejecting similar challenges to convictions under Section 924(c)(3), because those prior decisions arose in the context of adjudicating applications for leave to file second or successive collateral attacks under 28 U.S.C. 2255.[1] But petitioner never presented his constitutional claim to the court of appeals, which did not decide that claim, and this Court should deny review of the claim for that reason alone. In any event, petitioner's due process claim lacks merit, and the decision below does not conflict with any decision of this Court or another court of appeals. In addition, this case would be a poor vehicle for considering petitioner's first question presented because the court of appeals independently discussed whether, and correctly determined that, Hobbs Act robbery is a crime of violence under Section 924(c)(3)(A).

Petitioner's arguments with respect to the second and third questions presented by the petition were raised in one or both of his prior petitions for a writ of certiorari, which this Court

[1] A similar question is presented in Williams v. United States, No. 18-6172 (filed Sept. 18, 2018), and Valdes Gonzalez v. United States, No. 18-7575 (filed Jan. 18, 2019).

denied. 139 S. Ct. 246 (No. 18-5269); 139 S. Ct. 1394 (No. 18-8025). The same result is warranted here. Petitioner contends (Pet. 22-31) that the court of appeals erred in determining that attempted Hobbs Act robbery qualifies as a "crime of violence" under Section 924(c)(3)(A), but the decision below is correct and does not conflict with any decision of this Court or another court of appeals. Petitioner also argues (Pet. 31-40) that Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, entitles him to be resentenced, even though he was sentenced in February 2016 and the statute provides that Section 403 applies only "if a sentence for the offense has not been imposed as of" December 21, 2018. § 403(b), 132 Stat. 5222. The court below and every other court of appeals to consider the question has held that Section 403 of the First Step Act does not apply to a defendant like petitioner who was sentenced before the statute was enacted.

1. Petitioner raises for the first time in the instant petition a procedural due process challenge to the court of appeals' decision affording precedential weight to published orders denying applications for leave to file second or successive motions under Section 2255. Because petitioner did not raise that claim below, the court of appeals has never addressed it, including in the court's opinions regarding its sua sponte denial of rehearing en banc. See Pet. App. A1, at 1-16; Pet. App. A2, at

1-29.[2] This Court is one "of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and ordinarily does not address issues that were not passed upon in the court of appeals, ibid.

That general rule should apply with special force here, as a challenge to the procedures employed by the court of appeals should be addressed by that court in the first instance. Some members of the court below expressed concerns over the court's practice of publishing and giving precedential weight to certain orders issued by three-judge panels on applications for leave to file second or successive Section 2255 motions. See Pet. App. A2, at 1-29. Yet, in the course of those opinions, no member of the court addressed the possible application of the Due Process Clause. See ibid. Given the court of appeals' active internal deliberation about the proper treatment of published orders on applications for leave to file second or successive Section 2255 motions, that court should decide in the first instance whether or to what extent due process principles should affect the court's approach.

In any event, petitioner's due process claim lacks merit. Petitioner contends (Pet. 16-21) that the court of appeals violated his right to procedural due process by treating In re Saint Fleur,

---

[2] Judge Jill Pryor, dissenting from the denial of rehearing en banc, referred in passing to what she saw as "[t]he [significant] institutional (and, possibly, constitutional) problems with treating published panel orders as binding on all subsequent panels." Pet. App. A2, at 27.

824 F.3d 1337 (11th Cir. 2016), as binding precedent in his case. Petitioner's objection to Saint Fleur stems from his criticism of the court's streamlined procedures for applications for leave to file second or successive Section 2255 motions. On that point, petitioner explicitly incorporates the arguments set forth in the pending petition for a writ of certiorari in Valdes Gonzalez v. United States, No. 18-7575 (filed Jan. 18, 2019). Those arguments are unsound for the reasons set forth in the government's brief in opposition to that petition. See Br. in Opp. at 10-13, Valdes Gonzalez, supra (No. 18-7575) (May 6, 2019).[3]

Finally, further review of petitioner's due process claim is not warranted because the underlying substantive issue to which the challenged precedent related -- whether Hobbs Act robbery is a crime of violence under 18 U.S.C. 924(c)(3)(A) -- was the subject of extended discussion in the decision below, see Pet. App. A1, at 9-10, which reached the correct result. 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, No. 17-5704 (Nov. 13, 2017), cert. denied,

[3] We have served petitioner with a copy of the government's brief in opposition in Valdes Gonzalez.

138 S. Ct. 641 (2018), 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).[4] Every court of appeals to consider the issue has so held. See id. at 8.[5] And this Court has recently and repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on the application of Section 924(c)(3)(A) to Hobbs Act robbery.[6]

2. For the reasons stated on pages 6-9 of the government's brief in opposition to the petition for a writ of certiorari in

---

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

[5] Contrary to petitioner's suggestion (Pet. 17-19), the Eleventh Circuit's pattern jury instructions do not bolster his claim here. Petitioner pleaded guilty, p. 3, supra, and therefore was not convicted based on the language in the pattern jury instructions to which he objects.

[6] See, e.g., Nelson v. United States, No. 19-5010 (Nov. 4, 2019); 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).

Ragland v. United States, No. 17-7248 (Apr. 4, 2018), cert. denied 138 S. Ct. 1987 (2018), attempted Hobbs Act robbery also 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." 18 U.S.C. 924(c)(3)(A).[7] Every court of appeals to have considered the issue has so held. Br. in Opp. at 7-8, Ragland, supra (No. 17-7248). This Court has repeatedly denied review of that issue, including in the prior petition for a writ of certiorari in this very case. See 139 S. Ct. 246 (No. 18-5269); see also, e.g., Ragland, 138 S. Ct. 1987 (2018); James v. United States, 138 S. Ct. 1280 (2018). The same result is appropriate here.

Contrary to petitioner's suggestion (Pet. 26-27), the decision below does not conflict with the Seventh Circuit's decision in United States v. D.D.B., 903 F.3d 684 (2018). The decision in that case turned on an unusual feature of Indiana law under which conviction for attempted robbery did not require proof of the defendant's intent to commit every element of the completed crime. See id. at 690; see ibid. (noting that Indiana's law differs in this regard from "most criminal attempt statutes"). By contrast, conviction of attempted Hobbs Act robbery "requires the defendant to have the specific intent to commit each element of

[7] We have served petitioner with a copy of the government's brief in opposition in Ragland.

the completed federal offense," including the use of force. Pet. App. A1, at 14-15.

3. Finally, petitioner's argument for resentencing under the First Step Act lacks merit, and this Court should again decline to review it. See 139 S. Ct. 246 (No. 18-5269). At the time of petitioner's February 2016 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 prospectively 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 February 2016, well before the First Step Act was enacted on December 21, 2018. See Pet. App. A4, at 1-3; 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 sentence. Contrary to petitioner's suggestion (Pet. 31-39), "the fact that Congress used the 'clarification' label in § 403's heading does not clearly indicate Congress's intent" -- notwithstanding the express statutory text -- to permit resentencing for defendants like petitioner who were sentenced before the First Step Act took effect but whose cases were pending on direct appeal in December 2018. United States v. Hunt, No. 19-1075, 2019 WL 5700734, at *2 (10th Cir. Nov. 5, 2019) (explaining that "the First Step Act's amendments to § 924(c) were substantive, rather than clarifying").

As petitioner observes (Pet. 33-34), 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).[8] But the Court has denied petitions in a similar

[8] 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) (Apr. 5, 2019); Br. in Opp. at 12-16, Richardson, supra (No. 18-7036) (May 15, 2019). The two provisions have the same wording.

posture to this one. See Nelson v. United States, No. 19-5010 (Nov. 4, 2019); Pizarro v. United States, 140 S. Ct. 211 (2019) (No. 18-9789); Sanchez v. United States, 140 S. Ct. 147 (2019) (No. 18-9070). A similar disposition is warranted here, because a remand has no reasonable prospect of changing the outcome.

The court of appeals has denied relief to defendants in circumstances similar to petitioner's, 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, 778 Fed. Appx. 779, 783 (11th Cir. 2019). Although that decision is unpublished, it is correct and accords with decisions of other courts. 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") (citation omitted); United States v. Wiseman, 932 F.3d 411, 417 (6th Cir. 2019) (determining that 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 § 401(c) 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."), petition for cert. pending, No. 19-566 (filed Oct. 28, 2019); 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.").

Because petitioner's First Step Act claim is 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

ANDREW W. LAING
Attorney

DECEMBER 2019