

No. 19-7113

IN THE SUPREME COURT OF THE UNITED STATES

RAYNARD GRAY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether armed bank robbery and attempted armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), are "crime[s] of violence" under 18 U.S.C. 924(c)(3)(A).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Tex.)

United States v. Gray, No. 15-cr-60 (Apr. 5, 2018)

United States Court of Appeals (5th Cir.):

United States v. Pervis, No. 17-20689 (Aug. 30, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 937 F.3d 546.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2019. On November 19, 2019, Justice Alito granted an extension of the time within which to file a petition for a writ of certiorari to and including December 28, 2019, and the petition was filed on December 20, 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 Texas, petitioner was convicted on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and 2; one count of attempted armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and 2; and two counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A) (ii) and (iii), and 2. Pet. App. 20a. The district court sentenced petitioner to 510 months of imprisonment, to be followed by five years of supervised release. Id. at 21a-22a. The court of appeals affirmed. Id. at 1a-19a.

1. Petitioner organized and orchestrated the attempted armed robbery of the Shared Resources Credit Union in Pasadena, Texas on July 26, 2014, and the successful armed robbery of the same credit union on July 28, 2014. Presentence Investigation Report (PSR) ¶¶ 8-9, 42.

On July 26, 2014, four men approached the credit union driving a dark-colored truck. PSR ¶ 8. One man, wearing a white mask, exited the truck and attempted to enter the credit union, but the door was locked. Ibid. A credit union employee reported that the man was holding a black handgun in his right hand. Ibid.

Two days later, on July 28, three armed men -- Keith McGee, Howard Glaze, and Sonny Pervis -- drove to the credit union in a dark-colored Ford truck. PSR ¶¶ 9, 20. Petitioner and an

accomplice, Leroy Richardson, acted as lookouts at a nearby gas station. PSR ¶¶ 22. Another man, Christopher Braziel, was stationed in a nearby neighborhood in a second getaway vehicle. Ibid. During the robbery, petitioner maintained contact with Pervis (who was inside the credit union) and Braziel in a three-way cell phone conversation. PSR ¶¶ 22, 31.

McGee, Glaze, and Pervis entered the credit union with handguns, and McGee ordered the employees at gunpoint to gather in the lobby and lay face down on the floor. PSR ¶¶ 15, 20, 22. Pervis jumped over the teller counter, pointed a handgun at the teller on duty, and ordered her to open the teller drawers. PSR ¶¶ 16, 39. Pervis tapped the teller on the shoulder with his handgun, and the teller reported fearing for her life. PSR ¶ 16. Glaze then joined Pervis behind the counter, grabbing the teller's keys and demanding that she open the other teller drawers. PSR ¶¶ 16, 39. The robbers stole a total of \$22,250. PSR ¶ 14.

While the robbery was in progress, petitioner observed a customer approach the credit union. PSR ¶ 22. Petitioner contacted McGee, Glaze, and Pervis using his cell phone and instructed them to "hurry up." Ibid. As the robbers exited the credit union, McGee pointed his gun at the approaching customer, causing the customer to lie on the ground. Ibid. McGee, Glaze, and Pervis then fled in the truck, rendezvoused with Braziel at the getaway vehicle, and entered the nearby freeway in Braziel's vehicle. Ibid. Police officers attempted to stop the vehicle,

resulting in a high-speed chase that ended when the robbers abandoned the vehicle and fled on foot. PSR ¶¶ 10, 22, 31.

A subsequent investigation revealed that petitioner had organized and directed the robbery and attempted robbery, including by selecting the target, recruiting participants, and supplying some of the robbers with disguises and guns. PSR ¶¶ 21, 35, 40, 42.

2. A federal grand jury in the Southern District of Texas charged petitioner with one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and 2; one count of attempted armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and 2; and two counts of using or carrying a firearm during and in relation to a crime of violence (the armed bank robbery and attempted armed bank robbery), in violation of 18 U.S.C. 924(c) (1) (A) (ii) and (iii), and 2. C.A. ROA 342-345. A jury found petitioner guilty on all counts. Id. at 1878-1879.

The district court sentenced petitioner to 510 months of imprisonment, consisting of concurrent terms of 150 months of imprisonment on the armed bank robbery and attempted armed bank robbery counts and consecutive terms of 60 months and 300 months of imprisonment on the Section 924(c) counts. Pet. App. 21a; see 18 U.S.C. 924(c) (1) (A) and (C) (2012) (requiring a minimum consecutive sentence of 60 months for a first Section 924(c) offense and 300 months for a second Section 924(c) offense).

3. The court of appeals affirmed. Pet. App. 1a-19a. Petitioner argued for the first time on appeal that bank robbery does not qualify as a “crime of violence” under Section 924(c). Pet. C.A. Br. 22-23. He acknowledged that he had not preserved that claim in the district court, and that the court of appeals’ review of his claim was therefore limited to plain error. Id. at 17. Petitioner also acknowledged that his claim was “foreclosed” by United States v. Brewer, 848 F.3d 711 (5th Cir. 2017), in which the court of appeals recognized that bank robbery qualified as a “crime of violence” under a provision of the Sentencing Guidelines with a definition of that term similar to the one in Section 924(c)(3)(A). Id. at 23; see Sentencing Guidelines § 4B1.2(i)(1). The court agreed that Brewer had determined that “robbery under § 2113(a) constitutes a crime of violence,” and the court observed that it had subsequently “applied [Brewer’s] holding to § 924(c)(3)(A) in numerous unpublished decisions.” Pet. App. 9a. The court therefore determined that federal bank robbery “is a crime of violence under 18 U.S.C. § 924(c)(3)(A).” Ibid.

ARGUMENT

Petitioner contends (Pet. 8-10; Pet. Supp. Br. 2-3) that armed bank robbery and attempted armed bank robbery are not “crime[s] of violence” under 18 U.S.C. 924(c)(3)(A). That contention lacks merit. In any event, this case would be a poor vehicle for considering that question because petitioner did not preserve his

arguments in the district court. The petition for a writ of certiorari should be denied.

1. A conviction for armed bank robbery requires proof that the defendant (1) took or attempted to take money from the custody or control of a bank "by force and violence, or by intimidation," 18 U.S.C. 2113(a); and (2) either committed an "assault[]" or endangered "the life of any person" through "the use of a dangerous weapon or device" in committing the robbery, 18 U.S.C. 2113(d). For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Johnson v. United States, No. 19-7079 (Apr. 24, 2020), armed bank 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 7-25, Johnson, supra (No. 19-7079).¹

In particular, petitioner contends that armed bank robbery does not qualify as a crime of violence under Section 924(c) (3) (A) on the theory that robbery "by * * * intimidation" does not require a threat of violent force, Pet. 8, and that federal bank robbery does not require a specific intent to intimidate a victim, Pet. 8-10. Those arguments lack merit for the reasons explained at pages 9 to 20 of the government's brief in opposition in Johnson, supra (No. 19-7079). Every court of appeals with criminal

¹ We have served petitioner with a copy of the government's brief in opposition in Johnson. That brief is also available on this Court's electronic docket.

jurisdiction, including the court below, has recognized that Section 924(c)(3)(A) and similarly worded provisions encompass federal bank robbery and armed bank robbery. See id. at 7-8. This Court has recently and repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on that issue, see id. at 7-8 & n.1, and the same result is warranted here.

2. In any event, this case would be a poor vehicle for considering the question presented. As petitioner acknowledged before the court of appeals, he did not raise his statutory challenge to his Section 924(c) conviction before the district court, so his claim is reviewable only for plain error. Pet. C.A. Br. 17; see Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 731-732 (1993). To establish reversible plain error, a defendant must demonstrate that (1) there was error; (2) the error is plain or obvious; (3) the error affected substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 507 U.S. at 732-736; see, e.g., Puckett v. United States, 556 U.S. 129, 135 (2009).

As stated above, every court of appeals with criminal jurisdiction, including the court below, has recognized that Section 924(c)(3)(A) and similarly worded provisions encompass federal bank robbery and armed bank robbery. See Br. in Opp. at 7-8, Johnson, supra (No. 19-7079). At a minimum, therefore, petitioner cannot demonstrate that the lower courts' application

of Section 924(c)(3)(A) here was erroneous, much less a "clear or obvious" error. Puckett, 556 U.S. at 135.

3. Petitioner's supplemental brief cites (at 2-3) two unpublished district court decisions involving Section 924(c) charges based on attempts to commit robbery (in violation of the Hobbs Act, 18 U.S.C. 1951(a)), and he claims that the rationales of those decisions "extend" to show that federal bank robbery under 18 U.S.C. 2113(a) is not a crime of violence. That contention lacks merit.

In the first place, petitioner did not press any argument regarding attempted armed bank robbery before the court of appeals. This Court's "traditional rule" "precludes a grant of certiorari" where "the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted); see also Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). And any review would necessarily be for plain error. See Fed. R. Crim. P. 52(b).

In any event, because bank robbery qualifies as a crime of violence under Section 924(c)(3)(A), attempted bank robbery likewise qualifies. To be convicted of a federal attempt offense, a defendant must (1) have the intent to commit each element of the substantive crime, and (2) take a "substantial step" toward its commission. United States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007) (citation omitted); see United States v. Barlow, 568 F.3d

215, 219 (5th Cir. 2009); United States v. Armour, 840 F.3d 904, 909 n.3 (7th Cir. 2016). That standard requires conduct that goes beyond “[m]ere preparation” and that “strongly corroborates the firmness of [the] defendant’s criminal attempt.” Barlow, 568 F.3d at 219 (citations omitted); see Swift & Co. v. United States, 196 U.S. 375, 402 (1905) (“The distinction between mere preparation and attempt is well known in the criminal law.”).

Every court of appeals to consider the question has recognized that an attempt to commit a crime of violence (like bank robbery) is itself a “crime of violence” under Section 924(c)(3)(A) and similarly worded provisions because the offense requires the use, attempted use, or threatened use of physical force. See United States v. Dominguez, 954 F.3d 1251, 1261-1262 (9th Cir. 2020) (reasoning that, “when a substantive offense would be a crime of violence under 18 U.S.C. § 942(c)(3)(A), an attempt to commit that offense is also a crime of violence,” and recognizing that “[t]here is no circuit court decision to the contrary”).² This Court has

² See, e.g., Armour, 840 F.3d at 907-909 (holding that attempted bank robbery is a crime of violence under Section 924(c)(3)(A)); United States v. Ingram, 947 F.3d 1021, 1025-1026 (7th Cir. 2020) (same for attempted Hobbs Act robbery), petition for cert. pending, No. 19-8756 (filed June 15, 2020); United States v. St. Hubert, 909 F.3d 335, 351-353 (11th Cir. 2018) (same), cert. denied, 139 S. Ct. 1394 (2019) and 140 S. Ct. 1727 (2020); Ovalles v. United States, 905 F.3d 1300, 1304-1307 (11th Cir. 2018) (per curiam) (same for attempted carjacking), cert. denied, 139 S. Ct. 2716 (2019); United States v. McGuire, 706 F.3d 1333, 1337-1338 (11th Cir.) (O’Connor, J.) (same for attempted destruction of occupied aircraft), cert. denied, 569 U.S. 912 (2013); cf. United States v. Scott, 681 Fed. Appx. 89, 95 (2d Cir. 2017) (holding that “[a]tttempted murder in the second degree is a crime

repeatedly denied petitions for a writ of certiorari challenging the circuit courts' consensus that attempts to commit bank robbery or other federal robbery offenses qualify as crimes of violence under Section 924(c)(3)(A).³ The same result is warranted here.

unmistakably involving 'an attempted use . . . of physical force' within § 924(c)(3)(A)'), cert. denied, 138 S. Ct. 642, and 138 S. Ct. 643 (2018).

³ See, e.g., Bolden v. United States, 140 S. Ct. 1551 (2020) (No. 19-6878) (attempted bank robbery); Burke v. United States, 140 S. Ct. 452 (2019) (No. 19-5312) (attempted Hobbs Act robbery); Barriera-Vera v. United States, 140 S. Ct. 263 (2019) (No. 19-5063) (attempted bank robbery); Gray v. United States, 140 S. Ct. 63 (2019) (No. 18-9319) (attempted Hobbs Act robbery); Ovalles v. United States, 139 S. Ct. 2716 (2019) (No. 18-8393) (attempted carjacking); Myrthil v. United States, 139 S. Ct. 1164 (2019) (No. 18-6009) (attempted Hobbs Act robbery); St. Hubert v. United States, 139 S. Ct. 246 (2018) (No. 18-5269) (same); Corker v. United States, 139 S. Ct. 196 (2018) (No. 17-9582) (same); Beavers v. United States, 139 S. Ct. 56 (2018) (No. 17-8059) (same); Berry v. United States, 138 S. Ct. 2665 (2018) (No. 17-8987) (attempted carjacking); Chance v. United States, 138 S. Ct. 2642 (2018) (No. 17-8880) (attempted Hobbs Act robbery); Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248) (same); Sampson v. United States, 138 S. Ct. 1583 (2018) (No. 17-8183) (same); Robbio v. United States, 138 S. Ct. 1583 (2018) (No. 17-8182) (same); James v. United States, 138 S. Ct. 1280 (2018) (No. 17-6295) (same); Griffith v. United States, 138 S. Ct. 1165 (2018) (No. 17-6855) (attempted bank robbery); Galvan v. United States, 138 S. Ct. 691 (2018) (No. 17-6711) (attempted carjacking); Wheeler v. United States, 138 S. Ct. 640 (2018) (No. 17-5660) (attempted Hobbs Act robbery).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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