

No. 19-7131

IN THE SUPREME COURT OF THE UNITED STATES

ERIC HANNA, 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

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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 or 28 U.S.C. 2244(b)(3) by giving precedential weight to previously published decisions of that court denying applications for leave to file second or successive motions under 28 U.S.C. 2255.

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

3. Whether the court of appeals correctly declined to issue a certificate of appealability with respect to claims squarely foreclosed by binding circuit precedent and rejected by every court of appeals to have addressed them.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Hanna, No. 11-cr-20678 (July 11, 2012)

Hanna v. United States, No. 16-cv-22354 (June 1, 2017)

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

United States v. Ransfer, No. 12-12956 (Apr. 14, 2014)

Hanna v. United States, No. 17-13441 (July 26, 2019)

Supreme Court of the United States:

Hanna v. United States, No. 14-6197 (Oct. 14, 2014)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1) is unreported. A prior opinion of the court of appeals is reported at 749 F.3d 914. The order of the district court is not published in the Federal Supplement but is available at 2017 WL 6610902. The reports and recommendations are unreported, but are available at 2012 WL 204294, 2012 WL 279435, and 2017 WL 6610901.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2019. On October 11, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including

December 23, 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 jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; and two counts of using, carrying, or possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii) and 2. Pet. App. A1, at 1-2. The district court sentenced petitioner to 435 months of imprisonment, to be followed by five years of supervised release. Id. at 2; Pet. App. A5, at 3-4. The court of appeals affirmed, 749 F.3d 914, and this Court denied a petition for a writ of certiorari, 574 U.S. 947. In 2016, petitioner filed a motion to vacate, correct, or set aside his sentence under 28 U.S.C. 2255. Pet. App. A1, at 2. The district court denied petitioner's motion and denied his request for a certificate of appealability (COA). Id. at 4. The court of appeals likewise denied petitioner's request for a COA. Id. at 1-9.

1. Between March and June 2011, petitioner and several others conspired to commit a series of seven armed robberies in Miami-Dade County, Florida. Presentence Investigation Report (PSR) ¶ 2. Petitioner personally participated in at least two of

those robberies. Early in the morning on April 26, 2011, he and three others drove in a stolen vehicle to the Doral Ale House and robbed it at gunpoint. PSR ¶ 10. Late in the evening on June 1, 2011, he and four others robbed a Wendy's restaurant in Miami at gunpoint. PSR ¶ 15.

A federal grand jury charged petitioner with one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; and two counts of using, carrying, or possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A) (ii) and 2. Pet. App. A1, at 1-2. Following a jury trial, petitioner was convicted on all charged counts. Id. at 2. The district court sentenced petitioner to 435 months of imprisonment, to be followed by five years of supervised release. Ibid.; Pet. App. A5, at 3-4. Petitioner, along with two co-defendants, appealed, raising several evidentiary arguments not relevant here; the court of appeals affirmed with respect to petitioner, 749 F.3d 914, and this Court denied his petition for a writ of certiorari, 574 U.S. 947.

2. In 2016, petitioner filed a motion to vacate, correct, or set aside his sentence under 28 U.S.C. 2255. Pet. App. A1, at 2. Petitioner argued that his convictions under Section 924(c) should be vacated on the theory that the underlying offense -- Hobbs Act robbery -- is not a "crime[] of violence" under 18 U.S.C.

924(c)(3). Pet. App. A1, at 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 district court denied petitioner’s motion and denied his request for a COA, noting that the court of appeals had previously determined in In re Saint Fleur, 824 F.3d 1337 (11th Cir. 2016), that Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. 924(c)(3)(A). Pet. App. A1, at 3-4.

Petitioner requested a COA from the court of appeals, arguing that the jury may have convicted him on the basis of an aiding and abetting theory of liability, and that aiding and abetting Hobbs Act robbery is not a crime of violence. Pet. App. A1, at 4. The court denied petitioner’s request, explaining that its “precedent makes it clear that both substantive Hobbs Act robbery and aiding and abetting Hobbs Act robbery meet the elements clause of § 924(c)(3)(A).” Id. at 8 (citing Saint Fleur, 824 F.3d at 1341, and In re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016)).

ARGUMENT

Petitioner contends (Pet. 14-18) that the court of appeals exceeded its statutory authority under 28 U.S.C. 2244(b)(3)(C) in

In re Saint Fleur, 824 F.3d 1337 (11th Cir. 2016), and In re Colon, 826 F.3d 1301 (11th Cir. 2016), by issuing published decisions that resolved “open merits issues” while addressing applications to file second or successive motions under 28 U.S.C. 2255, and that the court’s reliance on those decisions as binding precedent violates due process. But petitioner never presented those statutory or constitutional claims to the court of appeals, which did not decide them, and this Court should deny review of the claims for that reason alone. In any event, petitioner’s contentions lack merit, and the decision below does not conflict with any decision of this Court or another court of appeals. Petitioner also contends (Pet. 18-33) that the court of appeals erred in determining that Hobbs Act robbery and aiding and abetting Hobbs Act robbery qualify as “crime[s] of violence” under 18 U.S.C. 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. Finally, petitioner contends (Pet. 34-36) that the court of appeals’ denial of a COA on the ground that petitioner’s contentions were squarely foreclosed by binding precedent was erroneous and in conflict with decisions of this Court. But a claim such as petitioner’s -- which is foreclosed by binding circuit precedent and would not succeed in any other court of appeals -- does not “deserve encouragement to proceed further” in

the form of a COA. Buck v. Davis, 137 S. Ct. 759, 773 (2017) (citation omitted).

1. Petitioner raises for the first time in the instant petition statutory and procedural due process challenges to the court of appeals' practice of affording precedential weight to published orders denying applications for leave to file second or successive motions under Section 2255. Petitioner did not raise those claims below, and the court of appeals did not address them. See Pet. App. A1; Pet. C.A. Mot. for COA. 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 decision below, 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.

In any event, petitioner's statutory and due process claims lack merit. Petitioner contends (Pet. 14-15) that the court of appeals exceeded its "limited statutory mandate under 28 U.S.C. § 2244(b)(3)" in In re Saint Fleur, supra, and In re Colon, supra, by addressing whether Hobbs Act robbery and aiding and abetting Hobbs Act robbery are crimes of violence, because those cases involved whether to authorize second or successive motions under Section 2255, not "a full blown merits analysis of a claim." On that point, petitioner explicitly incorporates the arguments set

forth in the pending petition for a writ of certiorari in Robinson v. United States, No. 19-5451 (filed Aug. 2, 2019). Those arguments are unsound for the reasons set forth in the government's brief in opposition to that petition. See Gov't Br. in Opp. at 7-9, Robinson v. United States, supra (No. 19-5451).¹ As to petitioner's procedural due process claim, petitioner reiterates (Pet. 15-18) the criticism of the court of appeals' procedures for applications for leave to file second or successive Section 2255 motions 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 Gov't Br. in Opp. at 10-13, Valdes Gonzalez v. United States, supra (No. 18-7575).²

2. Petitioner next argues (Pet. 18-33) that neither Hobbs Act robbery nor aiding and abetting Hobbs Act robbery is a crime of violence under 18 U.S.C. 924(c)(3)(A). He is incorrect, as every court of appeals to address the issue has recognized. 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

¹ We have served petitioner with a copy of the government's brief in opposition in Robinson.

² We have served petitioner with a copy of the government's brief in opposition in Valdes Gonzalez.

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), 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 Gov’t Br. in Opp. at 7-10, Garcia, supra (No. 17-5704).³ 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 writs of certiorari challenging the circuits’ consensus on the application of Section 924(c)(3)(A) to Hobbs Act robbery.⁴ Further, for the reasons stated in the government’s brief in opposition to the petition for a writ of certiorari in Richardson

³ We have served petitioner with a copy of the Government’s brief in opposition in Garcia.

⁴ 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).

v. United States, cert. granted, vacated, and remanded, 139 S. Ct. 2713 (2019), aiding and abetting Hobbs Act robbery is likewise a crime of violence, because it requires, inter alia, proof of all of the elements of Hobbs Act robbery. See Gov't Br. in Opp. at 8-9, Richardson, supra (No. 18-7036).⁵

3. Finally, petitioner contends (Pet. 34-36) that the court of appeals should not have denied his request for a COA on the ground that circuit precedent squarely foreclosed his argument that Hobbs Act robbery and aiding and abetting Hobbs Act robbery are not crimes of violence under 18 U.S.C. 924(c)(3)(A). Although "[t]he COA inquiry * * * is not coextensive with a merits analysis," Buck, 137 S. Ct. at 773, this Court has made clear that a prisoner seeking a COA must still show that jurists of reason "could conclude [that] the issues presented are adequate to deserve encouragement to proceed further," ibid. (citation omitted). As explained above, pp. 7-8, supra, and in the cross-referenced government's briefs in opposition, petitioner's arguments

⁵ We have served petitioner with a copy of the government's brief in opposition in Richardson. Petitioner's suggestion (Pet. 33) that this issue intersects with the distinct issue of whether crimes that can be committed with a mens rea of recklessness involve the "use of physical force" under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i), lacks merit. Petitioner cites no authority for the proposition that such a mens rea can satisfy the elements of Hobbs Act robbery, which are a subset of the elements for aiding and abetting Hobbs Act robbery.

regarding Hobbs Act robbery are squarely foreclosed by precedent not only in the court of appeals here but in every court to have decided these issues. The court of appeals correctly determined that these issues are thus not sufficiently debatable to merit the issuance of a COA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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