No. 19-8004

IN THE SUPREME COURT OF THE UNITED STATES

LAMARCUS HARVEY, 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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QUESTION PRESENTED

Whether attempted bank robbery, in violation of 18 U.S.C. 2113(a), is a "crime of violence" under 18 U.S.C. 924(c)(3)(A).

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Cherry, No. 17-cr-298 (July 12, 2018)

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

United States v. Harvey, No. 18-13108 (Jan. 23, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, at 1-4) is not published in the Federal Reporter but is reprinted at 791 Fed. Appx. 171. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2020. The petition for a writ of certiorari was filed on March 11, 2020. 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 Middle District of Florida, petitioner was convicted on one count of attempted bank robbery, in violation of 18 U.S.C. 2113(a) and 2, and one count of carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) and 2. Judgment 1. The district court sentenced petitioner to 102 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A, at 1-4.

1. Between November 17 and December 7, 2017, petitioner and three co-defendants -- Tariq Malik Cherry, Coryell Demond Robinson, and Walter Lee Jones -- were observed casing several banks in and around Orlando, Florida. Presentence Investigation Report (PSR) ¶¶ 11-23.

After Cherry became a suspect in a separate October 2017 bank robbery in Oviedo, Florida, agents began conducting surveillance on him, and obtained a tracker for a silver BMW that Cherry had purchased with cash on November 10, 2017. PSR ¶ 12 n.1. On November 21, Cherry and Robinson drove the silver BMW from petitioner's residence to a Taco Bell parking lot located across the street from the Iberia Bank in Apopka, Florida. PSR ¶ 12; Plea Agreement 23. Cherry and Robinson remained parked facing the Iberia Bank for approximately 15 minutes. PSR ¶ 12. They then drove to a different Taco Bell in Apopka, located across from a

Seacoast Bank, where they remained parked for another hour. Ibid. Several days earlier, Robinson had been observed casing that same Seacoast Bank by entering the bank and standing behind a pillar -- in what a bank employee understood as an attempt to remain out of view of the bank's surveillance camera -- and asking an employee when the bank closed. PSR ¶ 11.

On November 27, 2017, petitioner, Cherry, Robinson, and a fourth man traveled to Kissimmee, Florida in Cherry's BMW. Plea Agreement 24. The men parked in the respective parking lots of seven different banks, remaining in each one for several minutes before departing. Ibid. The following day, Cherry and Robinson again drove Cherry's BMW to Kissimmee and parked in the lot of a TD Bank branch for approximately 15 minutes. Ibid.

By early December 2017, petitioner and his co-defendants had narrowed their focus to the Iberia Bank in Apopka. On December 4, 2017, all four co-defendants -- including petitioner -- were observed driving to a cellular-phone store located next to the Iberia Bank, from which they could observe the bank. PSR ¶ 16. The men remained parked there for about 20 minutes. Ibid. The next day, Cherry and Robison again drove the BMW to the Taco Bell parking lot across from the Iberia Bank and parked for a short period of time. PSR ¶ 18. They then drove to petitioner's residence, got out of the BMW, and got into a beige Jaguar. Ibid. With petitioner driving the Jaguar, the three men then returned to the Taco Bell, and remained parked for approximately 45 minutes.

Ibid. On the morning of December 6, Cherry, Robinson, and Jones again departed petitioner's residence in the BMW, traveled to Apopka, and parked in the Taco Bell parking lot. PSR ¶ 21. After returning to petitioner's residence, all four co-defendants -- including petitioner -- then drove in the Jaguar back to Apopka, passed the Iberia Bank, and after entering a housing division behind the bank, passed the bank a second time. PSR ¶ 22.

On the same days that petitioner and his co-defendants were casing the Iberia Bank, some of them committed a string of robberies of auto shops in the Orlando area. PSR ¶ 15. Around 12:30 a.m. on December 4, 2017, Cherry's BMW was observed driving to an auto store in Orlando and circling the store a few times. Ibid. The car then stopped and two men got out, jumped the fence surrounding the store, smashed the glass, and entered the shop, but no vehicles were stolen. Ibid. Early the next morning, again around 12:30 a.m., Cherry's BMW entered the parking lot of a different auto shop. PSR ¶ 17. Three men got out, but after they were confronted by a night watchman, they fled back to the car and departed the area. Ibid. Finally, around midnight on December 6, Cherry's BMW departed from petitioner's residence and traveled to a third auto shop in Orlando. PSR ¶ 19. The BMW remained in the area until 3:39 a.m. PSR ¶¶ 19-20. Two vehicles were stolen from the auto shop early that morning: a white Toyota Yaris and a red Toyota RAV4. PSR ¶ 20.

After the automobile theft, petitioner and his co-defendants attempted to rob the Iberia Bank on December 7, 2017. PSR ¶¶ 22-25.

Around 7:20 a.m. that morning, petitioner and his co-defendants were again observed parked across the street from the bank, where they remained for an hour. PSR ¶ 23. After briefly returning to petitioner's residence, the men departed wearing different clothing. Ibid. They then drove to a separate apartment complex in Orlando, where they recovered Cherry's BMW, the white Toyota Yaris, and the red Toyota RAV4 that had been stolen from the Orlando auto shop the previous morning. PSR ¶ 24. After driving down Highway 408 as a caravan, the group stopped underneath an overpass and abandoned the BMW, getting into the other two vehicles. Ibid. A short while later, they left the red Toyota RAV4 by a different overpass, and all departed together in the white Toyota Yaris. PSR ¶ 25.

Petitioner and his co-defendants drove to Apopka and parked for several minutes in the cellular-phone store parking lot next to the Iberia Bank. Plea Agreement 29. Shortly after 11 am, the men approached the front of the bank. Ibid. Jones, disguised in fake dreadlocks and makeup to cover his tattoos, exited the Yaris and approached the bank. PSR ¶ 25. He attempted to open the door, but found it was locked. Ibid. As Jones returned to the Yaris, officers with the Orange County Sheriff's Office stopped the vehicle and arrested its occupants, including petitioner, who was driving. Ibid. As Jones was apprehended, a loaded FN Herstal

Belgium firearm fell out of his waistband. PSR ¶ 26. Three additional firearms were also recovered from the Yaris: a loaded .45 caliber Colt 1911 firearm, a loaded nine-millimeter SCCY Industries firearm and ammunition, and a .40 caliber Smith and Wesson firearm (which had been reported stolen in 2012) and ammunition. Ibid.

Following petitioner's arrest, a search warrant was executed at his residence, and police recovered two more firearms (including one that had been reported stolen), several rounds of ammunition, a firearm magazine, and over 500 grams of marijuana. PSR ¶ 27.

2. A federal grand jury in the Middle District of Florida charged petitioner with conspiracy to commit bank robbery, in violation of 18 U.S.C. 2113(a) and 371; attempted bank robbery, in violation of 18 U.S.C. 2113(a) and 2; and using or carrying a firearm during and in relation to a crime of violence (the attempted bank robbery), in violation of 18 U.S.C. 924(c)(1)(A) and 2. Indictment 1-7. Petitioner pleaded guilty to the attempted bank robbery and Section 924(c) counts. Plea Agreement 1; see 4/17/18 Tr. 10-13, 22-23.

On the same day that petitioner pleaded guilty, this Court decided Sessions v. Dimaya, 138 S. Ct. 1204 (2018), which invalidated the definition of a "crime of violence" in 18 U.S.C. 16(b). Petitioner thereafter filed a motion to dismiss his Section 924(c) count, on the theory that attempted bank robbery does not qualify as a "crime of violence" under the separate definition in

Section 924(c). D. Ct. Doc. 131, at 2-7 (May 22, 2018) (Motion to Dismiss). Section 924(c) 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 that, "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 argued that Section 924(c)(3)(B) was unconstitutionally vague in light of Dimaya and Johnson v. United States, 135 S. Ct. 2551 (2015), which had invalidated the definition of a "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii). See Motion to Dismiss 2-4. Petitioner separately argued that bank robbery does not qualify as a crime of violence under Section 924(c)(3)(A), on the theory that it can be committed without the use, attempted use, or threatened use of physical force. Id. at 5-7.

The district court denied petitioner's motion to dismiss. Pet. C.A. App. 20-22. The court observed that petitioner's arguments were foreclosed by "controlling Eleventh Circuit precedent" finding that federal bank robbery necessarily requires "the use, attempted use, or threatened use of physical force," and therefore "qualifies as a 'crime of violence'" under Section 924(c)(3)(A). Id. at 21 (citing United States v. Moore, 43 F.3d

568, 572-573 (11th Cir. 1994), cert. denied, 516 U.S. 879, and In re Hines, 824 F.3d 1334, 1337 (11th Cir. 2016)).

The district court sentenced petitioner to 102 months of imprisonment, consisting of 42 months of imprisonment on the attempted bank robbery count and a consecutive term of 60 months of imprisonment on the Section 924(c) count. Judgment 2.

3. The court of appeals affirmed. Pet. App. A, at 1-4. Petitioner argued on appeal that neither bank robbery nor attempted bank robbery is a crime of violence under Section 924(c)(3)(A). The court of appeals explained, however, that it had "previously held that a substantive violation of § 2113(a) is a 'crime of violence' because a 'taking by force and violence entails the use of physical force' and 'a taking by intimidation involves the threat to use such force.'" Pet. App. A, at 2 (quoting In re Sams, 830 F.3d 1234, 1239 (11th Cir. 2016)). The court further explained that "when a substantive federal offense qualifies as a crime of violence under the elements clause of § 924(c), an attempt to commit that offense is itself a crime of violence." Id. at 2-3.

ARGUMENT

Petitioner contends (Pet. 7-15) that bank robbery and attempted bank robbery are not "crime[s] of violence" under 18 U.S.C. 924(c)(3)(A). Those contentions lack merit, and this Court has consistently declined to review them. The petition for a writ of certiorari should be denied.

1. A conviction for bank robbery requires proof that the defendant 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). For the reasons explained 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), 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 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. 9-11, and that federal bank robbery does not require proof of knowing or intentional conduct, Pet. 9. Those contentions lack merit for the reasons explained at pages 9 to 20 in the government's brief in opposition in Johnson, supra (No. 19-7079). Every court of appeals with criminal jurisdiction, including the court below, has recognized that Section 924(c)(3)(A) or similarly worded provisions encompass federal bank robbery. See

[1] We have served petitioner with a copy of the government's brief in opposition in Johnson, which is also available from the Court's online docket. Although Johnson involves an armed bank robbery, the government's brief in opposition explains why simple bank robbery, in violation of 18 U.S.C. 2113(a), qualifies as a crime of violence.

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. Petitioner asserts (Pet. 15-20) that the circuits' uniform determination that federal bank robbery qualifies as a crime of violence under Section 924(c)(3)(A) and similar provisions is inconsistent with decisions of two of those circuits concluding that certain state-law offenses do not qualify as "violent felon[ies]" under the ACCA. That contention lacks merit. Even assuming that any intracircuit disagreement existed, it would not warrant this Court's review, see Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam), and in any event petitioner has identified no conflict.

The ACCA defines a "violent felony" to include an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). Petitioner cites cases from the Fourth and Ninth Circuits concluding that a state assault offense that encompasses rude or offensive touching such as spitting, United States v. Jones, 914 F.3d 893, 902-903 (4th Cir. 2019) (South Carolina assault on a law enforcement officer), and a state-law robbery offense that encompasses purse snatching, United States v. Shelby, 939 F.3d 975, 979 (9th Cir. 2019) (Oregon first-degree robbery), do not fall within that ACCA definition. See Stokeling v. United States, 139 S. Ct. 544, 554-555 (2019) (explaining that statutes

that include "[m]ere 'snatching of property'" or "offensive touching" do not categorically require the use or threat of physical force against another person) (citations omitted). As both circuits have recognized, however, federal bank robbery qualifies as a crime of violence because -- unlike the state offenses addressed in Shelby and Jones -- bank robbery "even [in] its least violent form requires at least an implicit threat to use the type of violent physical force necessary" to qualify under the ACCA and similar provisions. United States v. Watson, 881 F.3d 782, 785 (9th Cir.) (per curiam) (citation and internal quotation marks omitted), cert. denied, 139 S. Ct. 203 (2018); see United States v. McNeal, 818 F.3d 141, 154 (4th Cir.), cert. denied, 137 S. Ct. 164 (2016) (same).

3. Petitioner additionally argues (Pet. 11-15) that an attempt to commit bank robbery does not qualify as a crime of violence under Section 924(c)(3)(A). That argument likewise lacks merit.

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); 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 robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a)), 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]ttempted murder in the second degree is a crime 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).

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.

To the extent that petitioner suggests (Pet. 11) that the circuits' uniform determinations that attempted robbery offenses qualify as crimes of violence under Section 924(c)(3)(A) are inconsistent with United States v. Simms, 914 F.3d 229 (en banc), cert. denied, 140 S. Ct. 304 (2019), in which the Fourth Circuit held that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence, see id. at 233-234, that suggestion is misplaced. The two offenses are distinct. "[A] conspiracy is not

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[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).

an attempt," Hyde v. United States, 225 U.S. 347, 387 (1912) (Holmes, J., dissenting), but is instead "an agreement to commit an unlawful act," Iannelli v. United States, 420 U.S. 770, 777 (1975). Many federal conspiracy offenses do not require proof of any overt act, see United States v. Shabani, 513 U.S. 10, 13-14 (1994), and those that do typically require only that at least one of the conspirators engage in conduct tending to "effect the object of the conspiracy," Braverman v. United States, 317 U.S. 49, 53 (1942) -- even if that conduct would be insufficient to constitute a substantial step. See, e.g., Hyde, 225 U.S. at 388 (Holmes, J., dissenting) (noting that "if an overt act is required, it does not matter how remote the act may be from accomplishing the purpose," whereas attempt requires "dangerous proximity to success"); United States v. Nelson, 66 F.3d 1036, 1044 (9th Cir. 1995) ("[T]he overt act * * * need not have as immediate a connection to the intended crime as the 'substantial step' required for an attempt.") (citation omitted). Petitioner pleaded guilty to an attempt to commit bank robbery, not conspiracy to commit bank robbery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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