

No. 20-5672

IN THE SUPREME COURT OF THE UNITED STATES

DAVID KAREEM TURPIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 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) .

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D.N.C.):

United States v. Turpin, No. 17-cr-157 (Aug. 22, 2018)

United States Court of Appeals (4th Cir.):

United States v. Turpin, No. 18-4074 (May 17, 2018)

United States v. Turpin, No. 18-4640 (Apr. 7, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 800 Fed. Appx. 194. The order of the district court (Pet. App. 13a-15a) is not published in the Federal Supplement but is available at 2018 WL 9814966.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2020. On March 19, 2020, this Court extended the deadline to file a petition for a writ of certiorari to 150 days from the date of the lower court judgment. The petition for a writ of certiorari

was filed on September 4, 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 Eastern District of North Carolina, petitioner was convicted on one count of robbery in violation of the Hobbs Act, 18 U.S.C. 1951, and one count 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. 6a. The court sentenced petitioner to 240 months of imprisonment, to be followed by five years of supervised release. Id. at 7a-8a. The court of appeals affirmed. Id. at 1a-5a.

1. On July 18, 2016, petitioner entered a Food Lion supermarket in Raleigh, North Carolina, and asked to speak with the manager. Presentence Investigation Report (PSR) ¶ 13. When the manager approached, petitioner pulled out a handgun, held it against the manager's chest, and ordered the manager to "open the safe." Ibid. When the manager explained that he was unable to open the safe, petitioner said "[d]on't make me shoot you" and "began counting down" from five. Ibid. As petitioner counted, another employee opened the safe. Ibid. Petitioner stole about \$4343 and fled. Ibid.

On July 25, 2016, petitioner entered a Family Dollar store in Raleigh and approached the cashier, ostensibly for the purpose of buying a can of soda. PSR ¶ 14. When the cashier opened the cash

register, petitioner pointed a handgun at her and said, "Gimmie everything out of your drawer." Ibid. Petitioner took \$204 from the cash register and left the store. Ibid.

On July 27, 2016, petitioner entered a Walmart in Raleigh dressed in work clothes and a yellow reflective vest. PSR ¶ 7. Petitioner asked a manager if he could speak with her in the office about some work he was doing at the store. Ibid. As the manager and petitioner entered the office, petitioner grabbed the manager, put his hand over her mouth, and pointed a gun at her. Ibid. Petitioner then led the manager to the store's safe and ordered her to open it. Ibid. The manager complied, and petitioner stole about \$30,899. Ibid.

Police tracked petitioner to a Days Inn in Raleigh, where they arrested him and recovered some of the money stolen from the Walmart. PSR ¶ 9. Petitioner confessed to the robberies of the Walmart, Food Lion, and Family Dollar store. Ibid.

2. A federal grand jury in the Eastern District of North Carolina indicted petitioner on three counts of robbery in violation of the Hobbs Act, 18 U.S.C. 1951, and two counts of brandishing a firearm during and in relation to a crime of violence (Hobbs Act robbery), in violation of 18 U.S.C. 924(c)(1)(A)(ii). Pet. App. 80a-83a.

Before trial, petitioner filed a motion to dismiss the Section 924(c) counts on the theory that Hobbs Act robbery does not qualify as a "crime of violence" under Section 924(c)(3). C.A. App. 21-35.

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). Petitioner argued that Hobbs Act robbery does not require proof of the elements required by Section 924(c) (3) (A), and that Section 924(c) (3) (B) is unconstitutionally vague in light of Johnson v. United States, 576 U.S. 591 (2015), which held that the "residual clause" of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2) (B) (ii), is void for vagueness, 576 U.S. at 597. See C.A. App. 21-35.

The district court denied petitioner's motion. Pet. App. 13a-15a. The court determined that Hobbs Act robbery qualifies as a crime of violence under Section 924(c) (3) (A) because the offense requires proof that the defendant used or threatened to use physical force against the person or property of another. Id. at 14a (citing cases). The court therefore found that it did not need to decide whether the alternative definition of a "crime of violence" in Section 924(c) (3) (B) was unconstitutionally vague. Ibid.

Following the denial of his motion to dismiss, petitioner pleaded guilty to the Hobbs Act robbery count and the Section 924(c) count that related to the Walmart robbery. Pet. App. 62a-77a; see

Plea Agreement 4-6. In his plea agreement, petitioner explicitly waived his right to challenge his convictions on appeal. Pet. App. 70a; see Plea Agreement 1-2. The government agreed to dismiss the remaining counts in the indictment. Pet. App. 77a; see Plea Agreement 7. The district court accepted petitioner's guilty plea and sentenced him to 240 months of imprisonment, consisting of 156 months of imprisonment on the Hobbs Act robbery count and a consecutive sentence of 84 months of imprisonment on the Section 924(c) count. Pet. App. 6a-7a.

3. The court of appeals affirmed. Pet. App. 1a-5a. While petitioner's case was pending on appeal, this Court held in United States v. Davis, 139 S. Ct. 2319 (2019), that the "crime of violence" definition in Section 924(c)(3)(B) is unconstitutionally vague. Id. at 2336. Petitioner's appeal argued, as relevant here, that Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A). Pet. C.A. Br. 18-23. Petitioner acknowledged, however, that circuit precedent foreclosed that argument. Id. at 18 n.1 (citing United States v. Mathis, 932 F.3d 242 (4th Cir.), cert. denied, 140 S. Ct. 639 and 140 S. Ct. 640 (2019)). The court agreed that petitioner's claim was "squarely foreclosed" and summarily denied relief. Pet. App. 4a.

ARGUMENT

Petitioner renews his contention (Pet. 5-12) that Hobbs Act robbery is not a "crime of violence" under 18 U.S.C. 924(c)(3)(A). That contention lacks merit. Every court of appeals that has

considered the issue has determined that Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A), and this Court has repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on that issue. In any event, this case would be an unsuitable vehicle for considering the question presented because petitioner waived any challenge to his Section 924(c) conviction as a condition of his guilty plea. The petition for a writ of certiorari should be denied.

1. 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 explained on pages 6 to 12 of the government's brief in opposition to the petition for a writ of certiorari in Steward v. United States, No. 19-8043 (May 21, 2020), cert. denied, 2020 WL 3492695 (June 29, 2020), 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).*

Petitioner contends (Pet. 6-10) that Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A) because Hobbs Act robbery does not require a defendant to use or

* We have served petitioner with a copy of the government's brief in opposition in Steward, which is also available from this Court's online docket at <https://www.supremecourt.gov/docket/docketfiles/html/public/19-8043.html>.

threaten to use “violent force,” and can be committed by threats to harm “intangible property.” Pet. 9 (emphasis omitted). Those contentions lack merit for the reasons explained at pages 8 to 12 of the government’s brief in opposition in Steward, supra (No. 19-8043). Every court of appeals to have considered the question, including the court below, has recognized that Section 924(c) (3) (A) encompasses Hobbs Act robbery. See id. at 7; see also, e.g., United States v. Melgar-Cabrera, 892 F.3d 1053, 1060-1066 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018).

Petitioner’s reliance (Pet. 7-8) on United States v. Torres-Miguel, 701 F.3d 165 (4th Cir. 2012), is misplaced. The Fourth Circuit concluded in Torres-Miguel that a state statute prohibiting “threat[s] to commit a crime which will result in death or great bodily injury” did not categorically require the “threatened use of physical force” because the offense could be committed by threatening indirect harm, such as “by threatening to poison another.” Id. at 168 (citations and emphasis omitted). As the Fourth Circuit has subsequently recognized, however, the holding in Torres-Miguel was abrogated by this Court’s decision in United States v. Castleman, 572 U.S. 157 (2014). See United States v. Covington, 880 F.3d 129, 134 (4th Cir.), cert. denied, 138 S. Ct. 2588 (2018). In any event, any intracircuit conflict would not warrant this Court’s review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

This Court has consistently declined to review petitions for a writ of certiorari contending that Hobbs Act robbery is not a crime of violence under Section 924(c)(3)(A). See Br. in Opp. at 7-8 n.1, Steward, supra (No. 19-8043), including in Steward and subsequent cases. See, e.g., Becker v. United States, No. 19-8459 (June 22, 2020); Terry v. United States, No. 19-1282 (June 15, 2020); Hamilton v. United States, 140 S. Ct. 2754 (2020) (No. 19-8188). The Court should follow the same course here.

2. Even if the question presented warranted this Court's review, this case would be an unsuitable vehicle for considering it. As noted above, petitioner entered into a plea agreement in which he waived his right to challenge his Section 924(c) conviction on appeal. Pet. App. 70a; see Plea Agreement 1-2. This Court has recognized that a defendant may validly waive his right to appeal as part of a plea agreement so long as his waiver is knowing and voluntary. See, e.g., Garza v. Idaho, 139 S. Ct. 738, 744-745 (2019). Although the government did not invoke petitioner's waiver in the court of appeals, that does not preclude this Court from considering petitioner's waiver as a reason to deny review. See Day v. McDonough, 547 U.S. 198, 211 (2006) (explaining that the Court may consider a threshold procedural bar not pressed by the government where "nothing in the record suggests that the [government] 'strategically' withheld the defense or chose to relinquish it"); cf. United States v. New York Tel. Co., 434 U.S. 159, 166 n.8 (1977) ("[A] prevailing party may defend a judgment

on any ground which the law and the record permit that would not expand the relief it has been granted.").

Considering petitioner's appeal waiver would be particularly appropriate here. Petitioner filed a pretrial motion to dismiss the Section 924(c) counts in his indictment on the theory that Hobbs Act robbery does not qualify as a crime of violence. C.A. App. 21-35. After that motion was denied, petitioner effectively abandoned his challenge to the classification of Hobbs Act robbery as a crime of violence by unconditionally pleading guilty to a Section 924(c) offense and explicitly waiving his right to challenge that conviction on appeal in exchange for the government dismissing the counts charging two additional robberies (and another Section 924(c) violation) against petitioner. Pet. App. 70a, 73a-75a; see Plea Agreement 1-2, 4-6. When petitioner nonetheless attempted to resurrect his Section 924(c) challenge on appeal, he acknowledged that his argument was foreclosed on the merits, see Pet. C.A. Br. 18 n.1, obviating the need for the government to rely on petitioner's appeal waiver as a reason to deny relief. See Pet. App. 4a (accepting petitioner's concession that his claim was "squarely foreclosed" by circuit precedent); Gov't C.A. Br. 12, 19-20 (describing petitioner's concession). Under these circumstances, petitioner cannot demonstrate any unfairness in holding him to his plea bargain.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2020