No. 20-6038

IN THE SUPREME COURT OF THE UNITED STATES

DARIUS COTY WHITAKER, 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 petitioner is entitled to relief on his claim that attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), is a "crime of violence" under 18 U.S.C. 924(c)(3)(A), where petitioner did not raise that argument in the district court and waived his right to appeal as a condition of his plea agreement.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Whitaker, No. 17-cr-24 (Feb. 12, 2019)

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

United States v. Whitaker, No. 19-4129 (May 15, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted at 804 Fed. Appx. 209.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2020. A petition for rehearing was denied on August 31, 2020. The petition for a writ of certiorari was filed on September 25, 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 brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii), and one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii). Judgment 1. The district court sentenced petitioner to 204 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-3.

1. On September 6, 2016, petitioner attempted to rob a Dollar Tree store in Rocky Mount, North Carolina. C.A. App. 90. Petitioner had identified an employee whom he believed was responsible for taking the store's daily receipts to the bank. Ibid. He accosted the employee in the parking lot, brandished a handgun, and ordered the employee to hand over the money. Ibid.; see Presentence Investigation Report (PSR) ¶ 9. The employee stated that she did not have any money, at which point petitioner grabbed her purse and started rifling through it. Ibid. After finding no money, petitioner fled on foot. Ibid.

Later that day, petitioner attempted to rob a Marathon gas station in Battleboro, North Carolina. C.A. App. 90. Petitioner entered the gas station, jumped over the counter, and pointed a .38 caliber revolver at a clerk's head. PSR ¶ 10. As petitioner

attempted to open the cash register, the clerk tried to grab the revolver. Ibid.; see C.A. App. 90. During the ensuing struggle, petitioner punched the clerk several times and fired his gun into the floor. Ibid. Eventually, the clerk bit petitioner, causing him to drop the gun. PSR ¶ 10. Petitioner managed to steal the clerk's cell phone and credit card before fleeing. Ibid.; see C.A. App. 91.

On September 13, 2016, petitioner robbed a Family Dollar store in Rocky Mount. C.A. App. 91. Petitioner brandished a firearm and ordered a clerk to give him the money in the cash register. Ibid.; see PSR ¶ 14. The store manager eventually opened the cash register at gunpoint. Ibid. Petitioner stole $481 and left. Ibid.

On September 15, 2016, petitioner carried out a similar robbery of a Lucky Dollar Sweepstakes store in Enfield, North Carolina. C.A. App. 91. Petitioner brandished a firearm and ordered a clerk to hand over money in the register and from under the counter. Ibid.; see PSR ¶ 15. Petitioner stole $2000 and fled. Ibid.

Petitioner was arrested and, after waiving his Miranda rights, admitted that he committed each of the robberies using two guns that he had previously stolen. C.A. App. 91-92. Police recovered the .38 caliber revolver used during the Marathon gas station robbery but never found the other gun. Ibid. One of petitioner's

relatives identified petitioner as the person depicted in a surveillance photo from one of the robberies. Id. at 92.

2. A federal grand jury in the Eastern District of North Carolina charged petitioner with two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); two counts of attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); three counts 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); and one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii). Indictment 1-6.

Petitioner pleaded guilty to the Section 924(c) discharge offense (related to the attempted robbery of the Marathon gas station) and one of the Section 924(c) brandishing offenses (related to the attempted robbery of the Dollar Tree store). Plea Agreement 1; see C.A. App. 89-90. As a condition of his plea agreement, petitioner waived his right to challenge his convictions on appeal and additionally waived his right to challenge any sentence that was within the advisory Sentencing Guidelines range. Plea Agreement 1-2; see C.A. App. 87-89. Petitioner also acknowledged having committed each of the robberies and attempted robberies and agreed to pay restitution to the Family Dollar and Lucky Dollar Sweepstakes stores. Plea Agreement 1; see C.A. App. 91-92. In exchange, the government agreed to dismiss the remaining counts of

the indictment. Plea Agreement 7; see C.A. App. 86. The district court accepted petitioner's guilty plea. C.A. App. 92-93.

In its presentence report, the Probation Office determined that the advisory guidelines sentence was the same as the statutory minimum sentence for petitioner's two Section 924(c) offenses: 204 months of imprisonment, consisting of 84 months of imprisonment for the brandishing offense and a consecutive term of 120 months of imprisonment for the discharge offense. PSR ¶¶ 43-46. The district court adopted that calculation without objection from petitioner, C.A. App. 100-101, and sentenced petitioner to 204 months of imprisonment, id. at 111-112.

3. The court of appeals affirmed. Pet. App. 1-3.

Pursuant to Anders v. California, 386 U.S. 738 (1967), petitioner's counsel filed a brief stating that, in light of petitioner's appeal waiver and circuit precedent, no nonfrivolous grounds existed on which petitioner could appeal. Pet. C.A. Br. 8-9. Counsel identified a potential argument that Hobbs Act robbery does not qualify as a "crime of violence" under 18 U.S.C. 924(c) because it does not categorically require 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 Pet. C.A. Br. 10-13. Petitioner's counsel acknowledged, however, that the Fourth Circuit had rejected that argument in United States v. Mathis, 932 F.3d 242, cert. denied, 140 S. Ct. 639 and 140 S. Ct. 640 (2019), and that the claim was barred by petitioner's

"knowing[] and voluntar[y]" waiver of his right to appeal in any event. Pet. C.A. Br. 8-9.

The court of appeals accepted counsel's Anders brief and affirmed the district court's judgment without requesting a response from the government. Pet. App. 1-3. The court observed that petitioner's Section 924(c) convictions were predicated on attempted Hobbs Act robbery, not completed Hobbs Act robbery. Id. at 2. The court further observed that petitioner "never argued" in the district court that attempted Hobbs Act robbery was not a crime of violence under Section 924(c), and that appellate review was therefore limited to review for plain error. Ibid. The court of appeals determined that petitioner could not establish reversible plain error because he could not show that any hypothetical error in treating attempted Hobbs Act robbery as a crime of violence was "clear under current law." Id. at 3 (citation omitted).

ARGUMENT

Petitioner contends (Pet. 4-5) that attempted Hobbs Act robbery does not qualify as a "crime of violence" for purposes of 18 U.S.C. 924(c). After petitioner filed his petition for a writ of certiorari, the Fourth Circuit held in United States v. Taylor, 979 F.3d 203 (2020), that attempted Hobbs Act robbery does not categorically qualify as a crime of violence under Section 924(c). That holding conflicts with decisions from other courts of appeals, and the government is considering whether to file a petition for

a writ of certiorari seeking review of that decision. But even if the question presented warranted review, this case would not be an appropriate one in which to consider it. As petitioner's counsel acknowledged below, petitioner knowingly and voluntarily waived his right to challenge his convictions and sentence as a condition of his plea agreement, in which the government agreed to dismiss additional serious charges. Whether or not attempted Hobbs Act robbery qualifies as a crime of violence, petitioner is unlikely to benefit from the relief he seeks. 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 stated in 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), 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 6-12, Steward, supra (No. 19-8043).[1] Every court of appeals to have considered the question, including the court

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

below, has recognized that Section 924(c)(3)(A) encompasses Hobbs Act robbery. See id. at 7; see also United States v. Mathis, 932 F.3d 242, 265-266 (4th Cir.), cert. denied, 140 S. Ct. 639 and 140 S. Ct. 640 (2019). This Court has recently and repeatedly denied petitions for writs of certiorari challenging the circuits' consensus on that issue, see Br. in Opp. at 7-8 n.1, Steward, supra (No. 19-8043), including in Steward, No. 19-8043 (June 29, 2020), and in subsequent cases.[2]

Most courts of appeals to have considered the question have also determined that, because completed Hobbs Act robbery categorically qualifies as a crime of violence under Section 924(c)(3)(A), attempted Hobbs Act robbery likewise qualifies. See, e.g., United States v. Dominguez, 954 F.3d 1251, 1261-1262 (9th Cir. 2020); United States v. Ingram, 947 F.3d 1021, 1025-1026 (7th Cir. 2020), cert. denied, 141 S. Ct. 323 (2020); United States v. St. Hubert, 909 F.3d 335, 351-353 (11th Cir. 2018), cert. denied, 139 S. Ct. 1394 (2019), and 140 S. Ct. 1727 (2020). The courts of appeals have similarly recognized that attempts to commit other crimes that require the use, attempted use, or threatened use of physical force are themselves crimes of violence under Section 924(c)(3)(A) and similarly worded provisions. See, e.g., Ovalles v. United States, 905 F.3d 1300, 1304-1307 (11th Cir. 2018) (per curiam) (attempted carjacking), cert. denied, 139 S. Ct. 2716

[2] 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).

(2019); United States v. Armour, 840 F.3d 904, 907-909 (7th Cir. 2016) (attempted bank robbery); United States v. McGuire, 706 F.3d 1333, 1337-1338 (11th Cir.) (O'Connor, J.) (attempted destruction of occupied aircraft), cert. denied, 569 U.S. 912 (2013).

The Fourth Circuit is the only court of appeals to have departed from that uniform understanding of attempt offenses. In Taylor, supra, the court held that attempted Hobbs Act robbery "does not invariably require the use, attempted use, or threatened use of physical force" within the meaning of 18 U.S.C. 924(c)(3)(A), on the theory that it is possible to commit the offense by "attempt[ing] to threaten to use physical force" and that such conduct falls outside the scope of Section 924(c)(3)(A). 979 F.3d at 208 (emphasis omitted). The court acknowledged that its decision was in conflict with decisions of other courts of appeals, ibid., and that its reasoning could logically render Section 924(c)(3)(A) inapplicable to other robbery offenses, such as attempted bank robbery and attempted carjacking, that have long been viewed as quintessential crimes of violence, ibid. The government is considering whether to file a petition for a writ of certiorari in Taylor.

2. Regardless of the outcome of any potential further proceedings in Taylor, however, further review of petitioner's case is not warranted. The court of appeals affirmed petitioner's convictions and sentence before it issued its decision in Taylor. Pet. App. 1-3. The court's reasoning -- that any error in treating

attempted Hobbs Act robbery as a crime of violence under Section 924(c)(3)(A) was not reversible plain error because it was not clear or obvious, id. at 2-3 -- would likely be different following Taylor. See Henderson v. United States, 568 U.S. 266, 269 (2013) (holding that clarity of error under plain-error standard is assessed based on the law at "the time of appellate review"). But "this Court reviews judgments, not opinions," Chevron U. S. A. Inc. v. NRDC, 467 U.S. 837, 842 (1984), and no reason exists to question the court of appeals' bottom-line determination that petitioner is not entitled to relief.

As noted, petitioner generally waived his right to challenge his convictions or sentence on appeal as a condition of his plea agreement. Plea Agreement 1-2; see C.A. App. 87. Petitioner's counsel filed an appeal brief pursuant to Anders v. California, 386 U.S. 738 (1967), in which she acknowledged that petitioner's appeal waiver was "knowing[] and voluntar[y]" and that, accordingly, any challenge to his Section 924(c) convictions was barred by the terms of his plea agreement. Pet. C.A. Br. 8-9. Petitioner did not file a response to that brief despite having been advised of his right to do so. See Pet. App. 2. The court of appeals accepted counsel's Anders brief and affirmed the district court's judgment without requesting a response from the government. Id. at 2-3. After the court of appeals issued its decision, petitioner filed a pro se petition for rehearing in which he argued that attempted Hobbs Act robbery is not a crime of

violence. Pet. C.A. Pet. for Rhr'g 1-2. The court of appeals denied rehearing, again without requesting a response from the government. C.A. Doc. 42 (Aug. 31, 2020).

This Court has repeatedly recognized that a defendant may validly waive constitutional and statutory rights as part of a plea agreement so long as his waiver is knowing and voluntary. See Garza v. Idaho, 139 S. Ct. 738, 744-745 (2019) (waiver of right to appeal); Ricketts v. Adamson, 483 U.S. 1, 9-10 (1987) (waiver of right to raise double jeopardy defense); Town of Newton v. Rumery, 480 U.S. 386, 389-390, 398 (1987) (waiver of right to file constitutional tort action). Petitioner knowingly and voluntarily waived his right to appeal in this case and obtained substantial benefits as a result, including the dismissal of other serious charges. See Plea Agreement 1-2, 7. That waiver bars relief on petitioner's challenge to his Section 924(c) convictions.

Although the Fourth Circuit may not enforce an appeal waiver if a defendant can show a miscarriage of justice, such as actual innocence, see United States v. Adams, 814 F.3d 178, 182 (4th Cir. 2016), no such miscarriage occurred here given the lack of any dispute that petitioner in fact committed both the robberies and attempted robberies described above. Indeed, for the same reason, petitioner is unlikely to benefit from the relief that he now seeks. Petitioner was charged with eight offenses, including two counts of completed Hobbs Act robbery, two counts of attempted Hobbs Act robbery, and four associated Section 924(c) counts (three

involving brandishing a firearm and one involving discharging a firearm). Indictment 1-6. Although petitioner pleaded guilty to the two Section 924(c) counts arising out of the attempted robberies, he acknowledged having committed all of the armed robberies with which he was charged and agreed to pay restitution to the victims of the completed robberies. Plea Agreement 1; see C.A. App. 91-92. Petitioner made similar admissions to the police following his arrest. C.A. App. 91-92.

Accordingly, if petitioner's Section 924(c) convictions were vacated on the ground that attempted Hobbs Act robbery is not a crime of violence, he would face two additional Section 924(c) counts predicated on completed Hobbs Act robberies. The Fourth Circuit (like every other court of appeals to have considered the question) has determined that completed Hobbs Act robbery is a crime of violence under Section 924(c), see Mathis, 932 F.3d at 265-266, and petitioner does not contend otherwise. Petitioner would also face four counts of Hobbs Act robbery or attempted Hobbs Act robbery. Petitioner has not suggested that he could reasonably contest his guilt with respect to those offenses.

The Sentencing Guidelines offense level for each of petitioner's four robbery offenses would be at least 20, Sentencing Guidelines § 2B3.1(a), increased by four levels to reflect his multiple counts, id. § 3D1.4, and his criminal history category is II, PSR ¶ 20 -- yielding an advisory range of at least 57 to 71 months of imprisonment for those offenses. See Sentencing

Guidelines Ch. 5, Pt. A. When added to the 84-month mandatory minimum consecutive sentences required for each of petitioner's remaining Section 924(c) offenses, see 18 U.S.C. 924(c)(1)(A)(ii); Sentencing Guidelines § 2K2.4(b), his recommended sentencing range would be at least 225 to 239 months of imprisonment. Under those circumstances, it is unlikely that appellate relief would result in a sentence lower than his existing 204-month sentence.

If, however, this Court believes that some further judicial consideration of petitioner's claim may be warranted, it could choose to grant the petition, vacate the judgment below, and remand for further proceedings in the Fourth Circuit itself in light of Taylor, supra. But this case -- which, among other things, is in a plain-error posture -- is not a suitable vehicle for plenary review of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2021