

IN THE SUPREME COURT OF THE UNITED STATES

RANDALL GRAY WEBB, 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

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

ROBERT A. PARKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), qualifies as a "crime of violence" under 18 U.S.C. 924 (c) (3) (A) .

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Webb, No. 14-cr-23 (Sept. 2, 2014)

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

United States v. Bernal, No. 14-4662 (Apr. 2, 2015)

In re Bernal, No. 19-409 (Nov. 6, 2019)

United States v. Bernal, No. 16-7195 (Dec. 16, 2019)

United States v. Webb, No. 20-6084 (July 23, 2020)

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-6200

RANDALL GRAY WEBB, 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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A3) is not published in the Federal Reporter but is reprinted at 813 Fed. Appx. 885. The order of the district court (Pet. App. B6-B7) is not published in the Federal Supplement but is available at 2020 WL 33010.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2020. The petition for a writ of certiorari was filed on October 22, 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 North Carolina, petitioner was convicted on two 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 2. Judgment 1. The district court sentenced petitioner to 384 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. Petitioner did not appeal. In 2016, petitioner filed a collateral attack under 28 U.S.C. 2255. D. Ct. Doc. 78 (Oct. 18, 2016) (Amended 2255 Motion). The district court denied that motion and denied petitioner's request for a certificate of appealability (COA). Pet. App. B6-B7. The court of appeals likewise denied a COA. Pet. App. A2-A3.

1. In 2013, petitioner and his wife, Dalia Bernal, committed a string of armed robberies of convenience stores and one food truck in Winston-Salem, North Carolina. See Factual Basis 1-10. During each robbery, petitioner approached employees wearing a ski mask, brandished a hunting knife or gun, and demanded money. Id. at 1-8. The employees complied with petitioner's demands in each case, handing over a total of about \$9300. Ibid. In two of the robberies, petitioner also forced employees to hand over their engagement and wedding rings, which he pawned. Id. at 3, 7, 9. Petitioner explicitly threatened to hurt or kill employees or their families if they did not comply with his demands. During one robbery, petitioner threatened to "come back and kill" the store's

owner if he later learned that the owner had not given him "all the hundreds." Id. at 4. During another robbery, petitioner grabbed an employee's two-year-old daughter by the arm and threatened to kidnap her if the employee did not "give him money." Id. at 6. Bernal assisted petitioner during the robbery spree by conducting surveillance and acting as a getaway driver. Id. at 9-10.

Police ultimately linked petitioner and Bernal to the robberies and arrested them. Factual Basis 9. Petitioner and Bernal each agreed to waive their Miranda rights and confessed. Id. at 9-10. A subsequent search of petitioner's house and truck revealed the gun, hunting knife, and ski mask that petitioner had used during the robberies. Id. at 10.

2. A federal grand jury in the Middle District of North Carolina charged petitioner with eight counts of robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a) and 2, and two 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 2. Indictment 1-9. Each of the Section 924(c) counts identified Hobbs Act robbery as the underlying crime of violence. Indictment 3-4.

Petitioner pleaded guilty to the two Section 924(c) counts. Plea Agreement 1-2. As a condition of his plea agreement, petitioner waived his right to appeal his convictions or sentence "on any ground," and further waived his right to challenge his convictions or sentence on collateral review except on the grounds

of ineffective assistance of counsel, prosecutorial misconduct, punishment that exceeded the applicable statutory maximum, or consideration of "unconstitutional factor[s]" at sentencing "such as race, religion, national origin or gender." Id. at 5-6. In exchange, the government agreed to dismiss the remaining counts of the indictment. Id. at 4.

The district court accepted petitioner's guilty plea and sentenced him to the statutory minimum 384 months of imprisonment, consisting of 84 months of imprisonment for the first Section 924(c) offense and a consecutive term of 300 months of imprisonment for the second Section 924(c) offense. Judgment 2; see 18 U.S.C. 924(c) (1) (A) (ii) and (c) (1) (C) (i) (2012). Petitioner did not appeal.

3. In 2016, petitioner collaterally attacked his Section 924(c) convictions under 28 U.S.C. 2255, arguing that they should be vacated on the theory that Hobbs Act robbery is not a crime of violence. Amended 2255 Motion 4. 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 asserted that Hobbs Act robbery does not qualify as a crime of violence under either provision, relying primarily on this Court's

decision in 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 596. See Amended 2255 Motion 4.

A magistrate judge recommended that petitioner’s motion for postconviction relief be denied. Pet. App. B1-B5. While petitioner’s motion was pending, 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. Shortly thereafter, however, the court of appeals recognized in United States v. Mathis, 932 F.3d 242 (4th Cir.), cert. denied, 140 S. Ct. 639 and 140 S. Ct. 640 (2019), that Hobbs Act robbery qualifies as a crime of violence under the alternative definition in Section 924(c)(3)(A), because it categorically requires the use, attempted use, or threatened use of physical force. Id. at 265-266. The magistrate judge accordingly determined that petitioner’s challenge to the classification of Hobbs Act robbery as a crime of violence was foreclosed by precedent. Pet. App. B4-B5.

The district court adopted the magistrate judge’s recommendation and denied petitioner’s Section 2255 motion. Pet. App. B6. The court also denied petitioner’s request for a COA. Id. at B7.

4. The court of appeals likewise denied a COA, Pet. App. A2-A3, finding that petitioner had not made the “substantial

showing of the denial of a constitutional right" necessary to obtain a COA. Id. at A3 (quoting 28 U.S.C. 2253(c) (2)).

ARGUMENT

Petitioner contends (Pet. 6-7) that Hobbs Act robbery does not qualify as a "crime of violence" under 18 U.S.C. 924(c) (3) (A), and that the court of appeals erred in denying a COA on that claim. Those contentions lack 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) convictions as a condition of his guilty plea. The petition for a writ of certiorari should be denied.

1. The lower courts correctly denied relief in this case. 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 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) (3) 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

The court of appeals did not err in determining that petitioner had failed to make the "substantial showing of the denial of a constitutional right" necessary to obtain a COA. Pet. App. A3 (quoting 28 U.S.C. 2253(c)(2)). 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 Br. in Opp. at 7, Steward, supra (No. 19-8043) (citing cases); see also, e.g., United States v. Mathis, 932 F.3d 242, 265-266 (4th Cir.), cert. denied, 140 S. Ct. 639, and 140 S. Ct. 640 (2019); United States v. Melgar-Cabrera, 892 F.3d 1053, 1060-1066 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018). 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, 141 S. Ct. 167 (2020), and in subsequent cases. See, e.g., Becker v. United States, 141 S. Ct. 145 (2020) (No. 19-8459); Terry v. United States, 141 S. Ct. 114 (2020) (No. 19-1282); Hamilton v. United States, 140 S. Ct. 2754 (2020) (No. 19-8188). The same course is appropriate here.

¹ 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.

2. Petitioner observes (Pet. 6) that two district courts in other circuits have previously declined to treat Hobbs Act robbery as a crime of violence under Section 924(c)(3)(A), and he argues that the court of appeals was therefore required to grant a COA on the ground that reasonable jurists could debate the merits of his claim. See, e.g., Slack v. McDaniel, 529 U.S. 473, 484 (2000) (explaining that, to satisfy the COA standard, a defendant must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong"). Petitioner is incorrect. Both decisions on which he relies were abrogated.

In Haynes v. United States, No. 16-cv-4106, 2017 WL 368408 (C.D. Ill. Jan. 25, 2017), the district court initially concluded that Hobbs Act robbery is not a crime of violence. See id. at *6-*8. But the court reconsidered that decision less than one month later when the Seventh Circuit held that Hobbs Act robbery is a crime of violence under Section 924(c)(3)(A). See Haynes v. United States, 237 F. Supp. 3d 816, 827 (C.D. Ill. 2017) (citing United States v. Anglin, 846 F.3d 954, 964-965 (7th Cir.), vacated on other grounds, 138 S. Ct. 126 (2017)); see also United States v. Rivera, 847 F.3d 847, 848-849 (7th Cir.) ("Hobbs Act robbery indeed qualifies as a 'crime of violence' under § 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.'") (citation omitted), cert. denied, 137 S. Ct. 2228 (2017).

In United States v. Chea, No. 98-cr-20005, 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019), the district court similarly concluded that Hobbs Act robbery does not categorically qualify as a crime of violence. Id. at *7-*13. But the Ninth Circuit has since abrogated that decision in United States v. Dominguez, 954 F.3d 1251 (2020), rejecting the same arguments on which the district court in Chea relied and “reaffirm[ing] that Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)(3)(A).” Id. at 1261.

3. Even if the question presented warranted further review, this case would be an unsuitable vehicle for considering it. As explained, petitioner entered into a plea agreement in which he waived his right to challenge his Section 924(c) conviction on appeal and postconviction review, subject to limited exceptions that are not applicable here. Plea Agreement 5-6. 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, e.g., 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, 398 (1987) (waiver of right to file constitutional tort action). Although the lower courts summarily denied petitioner’s collateral attack and request for a COA based on binding precedent that foreclosed his claim on the merits -- without requesting a response from the government -- that disposition does not foreclose

the government from relying on petitioner's waiver in this Court. See, e.g., 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 secured substantial benefits by pleading guilty and waiving his right to challenge his convictions and sentence on appeal or postconviction review, including dismissal of the eight counts of Hobbs Act robbery that had been charged in the indictment. Plea Agreement 4; see Indictment 1-9. Under these circumstances, petitioner cannot demonstrate any unfairness in holding him to his bargain.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

ROBERT A. PARKER
Attorney

JANUARY 2021