No. 20-6428

IN THE SUPREME COURT OF THE UNITED STATES

RONALD HERRON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court plainly erred in determining that petitioner's offenses of murder in aid of racketeering, murder in the course of a continuing criminal enterprise, and Hobbs Act robbery qualify as crimes of violence under 18 U.S.C. 924(c)(3).

2. Whether the district court plainly erred in instructing the jury on principles of aiding-and-abetting liability and coconspirator liability under 18 U.S.C. 924(c).

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Wilson, No. 10-cr-615 (Apr. 8, 2015)

United States Court of Appeals (2d Cir.):

United States v. Herron, No. 15-1089 (Feb. 14, 2019)

United States v. Walker, No. 17-1896 (Apr. 4, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A9) is not published in the Federal Reporter but is reprinted at 762 Fed. Appx. 25.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2019. A petition for rehearing was denied on June 22, 2020 (Pet. App. A1). The petition for a writ of certiorari was filed on November 17, 2020. 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 Eastern District of New York, petitioner was convicted on one count of racketeering, in violation of 18 U.S.C. 1962(c) and 1963(a); one count of racketeering conspiracy, in violation of 18 U.S.C. 1962(d) and 1963(a); two counts of conspiring to distribute controlled substances (heroin and cocaine base), in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(iii) (2000), 21 U.S.C. 841 (b)(1)(C) (2006), and 21 U.S.C. 846 (2006); three counts of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) (2000); one count of conspiring to commit murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5) (2006); three counts of murder in the course of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e)(1)(A) (2006); one count of using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i) (2006); 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) (2006); three counts 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) (2006); three counts of using a firearm to commit murder in the course of a crime of violence, in violation of 18 U.S.C. 924(j)(1); one count of attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) (2006); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) (2006). Judgment 2. The district

court sentenced petitioner to 12 terms of life imprisonment plus an additional 105 years of imprisonment, to be followed by five years of supervised release. Judgment 4-5. The court of appeals affirmed. Pet. App. A2-A9.

1. Petitioner is a former leader of the Murderous Mad Dog Bloods, a drug-distribution and racketeering enterprise that controlled the drug trade in and around two public housing complexes in Brooklyn, New York. Pet. App. A3. From the late 1990s until 2011, petitioner committed or ordered others to commit numerous crimes in furtherance of the drug-trafficking enterprise, including multiple murders. Id. at A3-A4; see Gov't C.A. Br. 6-17 (summarizing evidence).

Four offenses in particular are relevant here. In 2001, petitioner murdered Frederick Brooks, a rival drug dealer. Pet. App. A3. Petitioner accosted Brooks outside an apartment building in an effort to get Brooks to cede the building's drug market to petitioner. Gov't C.A. Br. 9-10. Brooks and petitioner eventually moved into the building's lobby, where petitioner brandished a gun and shot Brooks multiple times in the neck and head. Id. at 10. State law enforcement officers tracked petitioner to an apartment that he used as a drug "stash house" and arrested him. Id. at 7, 10. A search of the apartment uncovered drugs, a .38 caliber firearm, and ammunition. Ibid. Petitioner was ultimately convicted on state drug charges but was acquitted on a state murder charge after he threatened two witnesses who later refused to

testify against him. Pet. App. A3; see Gov't C.A. Br. 11. Petitioner continued to manage the enterprise while serving his state prison sentence for the drug conviction. Pet. App. A3; see Gov't C.A. Br. 8.

Upon his release from prison in 2007, petitioner learned that another drug dealer, Joseph Garcia, had been selling drugs in one of the apartment buildings that petitioner claimed as his exclusive territory. Pet. App. A4; see Gov't C.A. Br. 11. Petitioner ordered several of his subordinates to rob Garcia in order to reassert petitioner's control over the building. Pet. App. A4; see Gov't C.A. Br. 11. Petitioner's subordinates confronted Garcia in the building's lobby, brandished a gun, and stole Garcia's money and jewelry. Gov't C.A. Br. 11. Afterward, petitioner approached Garcia and told him that the robbery "wasn't personal." Ibid. Petitioner explained that he had ordered the robbery because Garcia was selling drugs without petitioner's permission, and Garcia agreed to work for petitioner in the future. Id. at 11-12.

In 2008, petitioner murdered Richard Russo. Pet. App. A4. Russo had approached some of petitioner's subordinates while they were selling drugs in the lobby of an apartment building and stated that he was not afraid of petitioner and would kill petitioner if petitioner ever confronted him. Ibid.; see Gov't C.A. Br. 13. After petitioner learned of that threat, he and one of his subordinates followed Russo into an elevator, where petitioner

pulled out a gun and shot Russo in the head. Pet. App. A4; see Gov't C.A. Br. 13-14.

In 2009, petitioner murdered Victor Zapata, a rival drug dealer. Pet. App. A4; see Gov't C.A. Br. 15-17. Zapata, who had initially worked for petitioner, got into a dispute with one of petitioner's drug sellers at an apartment building that petitioner claimed to control. Gov't C.A. Br. 15. Zapata then shot and wounded one of petitioner's top lieutenants, Jorge Mejia, who had gone to the apartment building to mediate the dispute. Pet. App. A4; see Gov't C.A. Br. 15-16. Petitioner and several of his subordinates visited Mejia in the hospital, where they recorded a video in which petitioner invoked his membership in the Murderous Mad Dog Bloods and vowed to kill Zapata. Gov't C.A. Br. 16. Petitioner eventually located Zapata in the courtyard of the apartment building and, after a foot chase, shot Zapata several times in the head and torso. Pet. App. A4; see Gov't C.A. Br. 16-17.

2. a. A federal grand jury charged petitioner with numerous offenses arising out of his leadership of the Murderous Mad Dog Bloods. See C.A. App. 310-335. As relevant here, petitioner was charged with five firearm offenses under 18 U.S.C. 924(c) and three related murder offenses under 18 U.S.C. 924(j). See C.A. App. 319, 321-322, 323, 325-326, 328-329.

Specifically, Count 4 of the indictment charged petitioner with using or carrying a firearm during and in relation to a drug

trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i), based on his possession of firearms throughout the drug-distribution conspiracy. C.A. App. 319. Count 10 charged petitioner with brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii), based on his subordinates' use of a gun during the attempted Hobbs Act robbery of Joseph Garcia, which petitioner had ordered. C.A. App. 323. Counts 7, 14, and 19 of the indictment charged petitioner with discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii). C.A. App. 321-322, 325, 328. Each of those counts identified two murder offenses -- murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1), and murder in the course of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e)(1)(A) -- as the predicate crimes of violence, relating to the murders of Frederick Brooks (Count 7), Richard Russo (Count 14), and Victor Zapata (Count 19). C.A. App. 321-322, 325, 328. Counts 8, 15, and 20 additionally charged petitioner with using a firearm to commit murder in the course of a crime of violence, in violation of 18 U.S.C. 924(j)(1), arising out of those same killings. C.A. App. 322, 325-326, 328-329.

b. During petitioner's trial, the government sought standard jury instructions related to accomplice liability, including aiding-and-abetting liability and coconspirator liability under Pinkerton v. United States, 328 U.S. 640 (1946).

See D. Ct. Doc. 527, at 8-10, 16-17 (June 12, 2014). Petitioner objected to those proposed instructions. See 6/20/14 Tr. 3673-3674, 3677. In response, the government clarified that it would not rely on an accomplice-liability theory with respect to the murders of Frederick Brooks (including Counts 7 and 8) and Victor Zapata (including Counts 19 and 20). Id. at 3677, 3683-3684. The government explained, however, that accomplice-liability principles were relevant to Count 4, which involved the use of a gun during the drug conspiracy; Count 10, which involved the use of a gun by petitioner's subordinates while they were carrying out his orders to rob Joseph Garcia; and Counts 14 and 15, which involved the murder of Richard Russo in the presence of petitioner and one of his subordinates (creating possible doubt over whether petitioner or his subordinate had pulled the trigger). Id. at 3672-3675, 3677-3685. The government further clarified that, with respect to the Russo murder, it sought only an instruction on aiding-and-abetting liability and was "not advancing a theory with respect to [that murder] through coconspirator liability" under Pinkerton. 6/24/14 Tr. 4039; see id. at 4078-4079.

The district court proposed limiting the jury's consideration of accomplice liability to only those counts for which the government had specifically stated its intention to rely on such a theory. 6/20/14 Tr. 3684. Petitioner did not object to that proposal. See ibid. (defense counsel agreeing with district court's observation that "the importance of the objection [to] the

defense is that it should be specific to certain alleged crimes and not to anything else"); see also 6/24/14 Tr. 4040 (defense counsel stating that he had "no problem" with government proposal to instruct jury on aiding-and-abetting liability but not coconspirator liability on the counts related to the Russo murder).

Accordingly, the district court informed the jury that it could find petitioner guilty on certain counts based on principles of accomplice liability, even if it did not find that he personally committed all of the acts charged. See Pet. App. A44-A46, A53-A55. As relevant here, the court instructed the jury that it could rely on aiding-and-abetting or coconspirator liability in assessing petitioner's guilt on Counts 4 and 10, id. at A78, A99, and that it could rely on aiding-and-abetting liability in assessing petitioner's guilt on Counts 14 and 15, id. at A103-A104. The court did not instruct the jury to consider accomplice liability on Counts 7, 8, 19, or 20.

c. The jury found petitioner guilty on all counts, including the Section 924(c) and Section 924(j) counts discussed above as well as counts charging racketeering, racketeering conspiracy, murder in aid of racketeering, conspiracy to commit murder in aid of racketeering, murder in the course of a continuing criminal enterprise, drug-distribution conspiracy, attempted Hobbs Act robbery, and possession of a firearm by a felon. C.A. App. 349-350. The district court sentenced petitioner to 12 terms of life imprisonment, each of which was to run concurrently with the

sentences on some counts and consecutively to others, as well as a further consecutive term of 105 years of imprisonment. Id. at 352. That sentence included life sentences on each of the Section 924(j) counts and consecutive sentences of five or 25 years of imprisonment on each of the Section 924(c) counts. Ibid.

3. The court of appeals affirmed. Pet. App. A2-A9. As relevant here, petitioner argued that his convictions on Counts 7, 10, 14, and 19 -- the Section 924(c) counts predicated on the murders of Brooks, Russo, and Zapata, and the attempted robbery of Garcia -- were invalid because those predicate offenses were not crimes of violence. Pet. C.A. Br. 63-71. 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 both murder and Hobbs Act robbery were broader than permitted under Section 924(c)(3)(A)'s elements clause, because they could be committed by the use (or, in the case of robbery, threatened use) of indirect force such as poisoning. Pet. C.A. Br. 68-70. Petitioner further argued that the alternative definition of a "crime of violence" in Section 924(c)(3)(B) was 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 595. See Pet. C.A. Br. 64-67.

Petitioner acknowledged that he had not raised those claims in the district court and that appellate review was therefore limited to plain error. Pet. C.A. Br. 70. Petitioner did not argue that any of his predicate offenses failed to qualify as crimes of violence because of the district court's instructions on accomplice liability.

The court of appeals rejected petitioner's challenge to his conviction on Count 10 as foreclosed by circuit precedent recognizing that Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A). Pet. App. A8 (citing United States v. Hill, 890 F.3d 51, 60 (2d Cir. 2018), cert. denied, 139 S. Ct. 844 (2019)). As for Counts 7, 14, and 19, the court determined that petitioner's murder offenses qualified as crimes of violence under Section 924(c)(3)(B) because "the jury found that the actions taken by [petitioner] underlying each of" those offenses "involved the actual use of physical force -- firing a gun one or more times at the person of another, leading to that person's death." Id. at A9; see id. at A8 (observing that, under then-existing circuit precedent, Section 924(c)(3)(B) was not unconstitutionally vague as long as jury's findings established "'the nature of the predicate offense and the attending risk of physical force being used in its commission'") (quoting United States v. Barrett, 903 F.3d 166, 178 (2d Cir. 2018), vacated and remanded, 139 S. Ct. 2774 (2019)).

Although the court did not decide whether petitioner's murder offenses also qualified as crimes of violence under Section 924(c)(3)(A), id. at A8, it noted that it had previously determined in unpublished opinions that New York murder -- on which petitioner's murder-in-aid-of-racketeering offenses were based -- "unmistakably" qualified as a crime of violence under Section 924(c)(3)(A) as well, id. at A9 n.5 (citation and internal quotation marks omitted).

ARGUMENT

Petitioner contends (Pet. 6-7) that the court of appeals erred in determining that the predicate offenses underlying his convictions on Counts 7, 10, 14, and 19 qualified as "crime[s] of violence." He further contends (Pet. 7-9) that his convictions on Counts 4, 7, 10, 14, 15, and 19 are invalid because the jury was incorrectly instructed on principles of accomplice liability. Neither of those claims is preserved, nor do they apply to all of the counts petitioner identifies. And petitioner cannot demonstrate reversible plain error in any event: the murder and robbery offenses on which his Section 924(c) convictions are based qualify as "crime[s] of violence" under 18 U.S.C. 924(c)(3)(A), and the district court's accomplice-liability instructions were correct and did not affect his convictions. Petitioner's case is also a poor vehicle for considering those issues because he received multiple concurrent and consecutive life sentences for separate racketeering, drug, and murder offenses that he has not

challenged. The petition for a writ of certiorari should be denied.

1. a. Petitioner contends (Pet. 6-7) that the court of appeals improperly determined that the murder offenses underlying his convictions on Counts 7, 14, and 19 were crimes of violence under Section 924(c)(3)(B). The court's reliance on that provision -- which predated this Court's decision in United States v. Davis, 139 S. Ct. 2319 (2019) -- was unsound. See id. at 2336 (holding that Section 924(c)(3)(B) is unconstitutionally vague). 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.

Davis did not affect the validity of the alternative "crime of violence" definition in Section 924(c)(3)(A). And as the court of appeals observed, petitioner's murder offenses required proof of intentionally killing, Pet. App. A8, and those offenses have therefore been treated as crimes of violence under Section 924(c)(3)(A) in other cases, id. at A9 n.5. Petitioner does not challenge the classification of intentional murder as a crime of violence under Section 924(c)(3)(A), nor could he plausibly do so -- particularly under the plain-error standard applicable here. See Pet. C.A. Br. 70 (acknowledging that petitioner did not object to classification of murder offenses as crimes of violence in the

district court and that review was therefore limited to plain error).

Counts 7, 14, and 19 each charged discharging a firearm during and in relation to two crimes of violence: murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1), and murder in the course of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e)(1)(A). C.A. App. 321-322, 325, 328. Both of those predicate offenses required proof of intentionally killing the victims. Section 848(e)(1)(A) requires proof that the defendant "intentionally kill[ed] or counsel[ed], command[ed], induce[d], procure[d], or cause[d] the intentional killing of an individual and such killing result[ed]." 21 U.S.C. 848(e)(1)(A); see Pet. App. A83-A87, A101-A102, A106-A107 (jury instructions); C.A. App. 321, 324-325, 327-328 (Indictment). Section 1959(a)(1) requires proof that the defendant committed "murder[] * * * in violation of the laws of [a] State," 18 U.S.C. 1959(a), which in this case required the jury to find that petitioner committed New York second-degree murder. Pet. App. A8; see id. at A79, A81-A82, A101, A106 (Jury Instructions); C.A. App. 321-322, 324, 327 (Indictment). That offense, in turn, requires proof that the defendant "inten[ded] to cause the death of another person" and "cause[d] the death of such person or of a third person." N.Y. Penal Law

§ 125.25(1) (McKinney 2009); see Pet. App. A41 (Jury Instructions).[1]

As the court of appeals observed, intentionally killing a person "'unmistakably'" requires the use of physical force within the meaning of Section 924(c)(3)(A). Pet. App. A9 n.5 (citing cases classifying New York second-degree murder as a crime of violence under Section 924(c)(3)(A)); cf. Johnson v. United States, 559 U.S. 133, 140 (2010) (defining "physical force" in 18 U.S.C. 924(e)(2)(B)(i) as "force capable of causing physical pain or injury to another person"). Petitioner does not argue otherwise in this Court. And his argument in the court of appeals -- that his murder offenses were not crimes of violence because they could have been committed through indirect uses of force such as

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[1] Another subsection of New York's second-degree murder statute prohibits "recklessly engag[ing] in conduct which creates a grave risk of death to a person, and thereby caus[ing] the death of another person." N.Y. Penal Law § 125.25(2) (McKinney 2020). Courts have widely determined that the intentional and reckless variants of New York second-degree murder are divisible offenses with different elements. See, e.g., United States v. Sanchez, 940 F.3d 526, 534 (11th Cir.), cert. denied, 140 S. Ct. 559 (2019); Boykin v. United States, 2020 WL 774293, at *6 (S.D.N.Y. Feb. 18, 2020); Rizzuto v. United States, 2019 WL 3219156, at *2-*3 (E.D.N.Y. July 17, 2019); cf. People v. Williams, 63 N.Y.S.3d 161, 162 (App. Div. 2017) (describing separate "elements" set forth in different subsections of the second-degree murder statute). Petitioner does not contest that the statute is divisible, nor does he contest that he was charged with and convicted of intentional murder under Section 125.25(1). See, e.g., Pet. App. A41, A79, A81-A82. Accordingly, this case does not present the question whether recklessness offenses may qualify as crimes of violence under Section 924(c)(3)(A) and similar provisions. Cf. Borden v. United States, No. 19-5410 (argued Nov. 3, 2020) (addressing that question in the context of 18 U.S.C. 924(e)(2)(B)(i)).

poisoning, Pet. C.A. Br. 68-70 -- conflicted with precedent. See United States v. Castleman, 572 U.S. 157, 170 (2014) (holding that analogous definition of "use * * * of physical force" in 18 U.S.C. 921(a)(33)(A) includes indirect applications of force by, for example, administering poison, infecting the victim with a disease, or "resort[ing] to some intangible substance" to cause harm) (citation omitted); see also United States v. Hill, 890 F.3d 51, 59-60 (2d Cir. 2018) (same under Section 924(c)(3)(A)), cert. denied, 139 S. Ct. 844 (2019).

Accordingly, the court of appeals' erroneous reliance on Section 924(c)(3)(B) in classifying petitioner's murder offenses as crimes of violence does not warrant review or vacatur. Those offenses qualify as crimes of violence under Section 924(c)(3)(A). Petitioner does not argue otherwise in his petition, nor could he plausibly do so. At the very least, petitioner cannot demonstrate that treating intentional murder as a crime of violence is the sort of "clear or obvious" error necessary to satisfy his burden under the plain-error standard. Puckett v. United States, 556 U.S. 129, 135 (2009) (citation omitted). Nor could he (or does he) suggest that treating his murders as crimes of violence "affected [his] substantial rights" or "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Marcus, 560 U.S. 258, 262 (2010) (citation omitted). He therefore cannot obtain plain-error relief.

b. Contrary to petitioner's assertion (Pet. 6-7), the court of appeals determined that the predicate offense for Count 10 -- the Hobbs Act robbery charged in Count 9 -- was a crime of violence under Section 924(c)(3)(A), not Section 924(c)(3)(B). See Pet. App. A8 (citing Hill, 890 F.3d at 60). Petitioner does not challenge that Section 924(c)(3)(A) determination in his petition for a writ of certiorari, and it is therefore not presented for review. See, e.g., Caspari v. Bohlen, 510 U.S. 383, 388 (1994) ("We have consistently declined to consider issues not raised in the petition for a writ of certiorari.").

In any event, the court of appeals' determination that petitioner's Hobbs Act robbery offense qualifies as a crime of violence under Section 924(c)(3)(A) is correct; at a bare minimum, petitioner cannot show that he is entitled to relief under the plain-error standard. 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).[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 id. at 7. And this Court has consistently declined to review petitions for writs 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, No. 19-8043 (June 29, 2020), and in subsequent cases. See, e.g., Jackson v. United States, No. 20-6466 (Mar. 1, 2021); Webb v. United States, No. 20-6200 (Mar. 1, 2021); Thomas v. United States, No. 20-6323 (Feb. 22, 2021); Usher v. United States, No. 20-6272 (Feb. 22, 2021); Turpin v. United States, No. 20-5672 (Feb. 22, 2021); 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).

In his briefs to the court of appeals and this Court, petitioner characterized Count 9 as a conviction for Hobbs Act robbery, without noting that the indictment charged attempted Hobbs Act robbery. See Pet. 3, 4, 9; Pet. C.A. Br. 69-70; but see C.A. App. 322-323 (Indictment). The court of appeals addressed petitioner's argument on its own terms, and explained that his claim failed because "Hobbs Act robbery is categorically a crime

[2] 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.

of violence." Pet. App. A8. As most courts of appeals to have considered the question have recognized, attempted Hobbs Act robbery likewise qualifies as a crime of violence under Section 924(c)(3)(A). 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.), 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 (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).[3]

[3] The Fourth Circuit is the only court of appeals to have departed from that uniform understanding of attempt offenses. See United States v. Taylor, 979 F.3d 203, 208 (4th Cir. 2020) (holding that attempted Hobbs Act robbery "does not invariably require the use, attempted use, or threatened use of physical force" within the meaning of Section 924(c)(3)(A), on the theory that it is possible to commit the offense by "attempt[ing] to threaten to use physical force") (emphasis omitted). The government is considering whether to file a petition for a writ of certiorari in Taylor.

Those decisions are not only correct, but moreover establish that even if petitioner had challenged the court of appeals' determination that his Hobbs Act robbery offense qualifies as a crime of violence under Section 924(c)(3)(A), he could not demonstrate that the court's decision was based on a "clear or obvious" error under the plain-error standard. Puckett, 556 U.S. at 135 (citation omitted); see Henderson v. United States, 568 U.S. 266, 278 (2013) (explaining that "lower court decisions that are questionable but not plainly wrong (at time of trial or at time of appeal) fall outside the * * * scope" of the plain-error rule).

2. Petitioner also contends (Pet. 7-9) that the district court improperly instructed the jury on principles of accomplice liability in connection with Counts 4, 7, 10, 14, 15, and 19. He asserts (Pet. 7-8) that the court's aiding-and-abetting instruction was erroneous because it did not specifically require the jury to find that he had advance knowledge that a gun would be used in the commission of the charged offenses. He further asserts (Pet. 9) that the coconspirator-liability instruction was legally insufficient to support a conviction under Section 924(c) "because Davis eliminates conspiracy as a valid predicate for a § 924(c) conviction." Those contentions do not warrant review.

But that issue is not presented here, both because petitioner has not challenged the classification of attempted Hobbs Act robbery as a crime of violence under Section 924(c)(3)(A) and because, as explained, petitioner cannot demonstrate that any error was clear or obvious under the plain-error standard.

a. As an initial matter, petitioner has relinquished his challenges to the jury instructions. Petitioner acknowledges (Pet. 8 n.2) that he did not raise either of his jury-instruction claims in the district court or in his initial briefs on appeal. Instead, he first raised them in a petition for rehearing after the court of appeals had issued its decision affirming his convictions. C.A. Pet. for Reh'g 6-9. The court summarily denied the petition for rehearing, Pet. App. A1, consistent with its longstanding rule that an "argument raised for [the] first time on [a] petition for rehearing is considered waived," United States v. Bouyea, 152 F.3d 192, 196 (2d Cir. 1998) (per curiam) (citation omitted), cert. denied, 528 U.S. 904 (1999).

This Court has repeatedly emphasized that it is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), whose "traditional rule * * * precludes a grant of certiorari" on a question that "was not pressed or passed upon below," United States v. Williams, 504 U.S. 36, 41 (1992) (citation and internal quotation marks omitted). See Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (declining to review claim "without the benefit of thorough lower court opinions to guide our analysis of the merits"). Petitioner identifies no reason to depart from that rule in this case.

b. In any event, petitioner's claims lack merit. As a threshold matter, the challenged accomplice-liability instructions did not apply to all of the counts petitioner identifies. As

explained (pp. 7-8, supra), the district court instructed the jury that it could rely on an aiding-and-abetting theory or a coconspirator theory in assessing petitioner's guilt on Counts 4 and 10, Pet. App. A78, A99, and that it could rely on an aiding-and-abetting theory in assessing petitioner's guilt on Counts 14 and 15, id. at A103-A104. The court did not, however, instruct the jury to consider accomplice liability on Counts 7 and 19 (the Section 924(c) counts relating to the murders of Frederick Brooks and Victor Zapata, respectively). See id. at A87-A89, A107-A108.[4]

Petitioner contends (Pet. 7-8 & n.1) that an aiding-and-abetting theory was implicit in the instructions for Counts 7 and 19 because those instructions cross-referenced earlier instructions on New York second-degree murder, which included aiding and abetting. That is incorrect: the district court instructed the jury on the elements of New York second-degree murder, and later provided general instructions on aiding-and-abetting liability, but it never suggested that every count that incorporated New York second-degree murder could be proved on an aiding-and-abetting theory. See Pet. App. A41-A42, A44-A46. Rather, as discussed extensively at the charge conference (see pp. 7-8, supra), the court limited its instructions on aiding and abetting and coconspirator liability to only those counts on which the government intended to rely on those theories.

[4] Petitioner does not challenge the jury instructions for the Section 924(j)(1) counts related to those murders (Counts 8 and 20).

To the extent that petitioner challenges the district court's aiding-and-abetting instruction as applied to Counts 4, 10, 14, and 15, that claim is unsound. Petitioner asserts (Pet. 7-8) that the aiding-and-abetting instruction was incomplete because it did not require the jury to find that petitioner had advance knowledge that a firearm would be used in the course of the offense. See Rosemond v. United States, 572 U.S. 65, 67 (2014) (holding that, to prove that a defendant aided and abetted a Section 924(c) offense, the government must prove that "the defendant knew in advance that one of his cohorts would be armed"). But the court's aiding-and-abetting instruction -- which was drawn from both New York and federal law -- required the jury to find beyond a reasonable doubt that petitioner "intend[ed] that the crime be committed" and "solicit[ed], request[ed], command[ed], induce[d], importune[d], or intentionally aid[ed] another to commit the crime." Pet. App. A45. As applied to Counts 4, 10, 14, and 15, that instruction required the jury to find that petitioner intended to commit the specific firearm crimes charged in those counts, rather than simply the underlying predicate offenses, and that he played an active role in carrying out the specific firearm crimes he intended to commit. The instructions in this case therefore differ from the ones the Court addressed in Rosemond. The defendant in that case had been convicted of aiding and abetting a violation of Section 924(c) based on instructions that required the jury to find only that he had "knowingly and actively

participated in the [predicate] drug trafficking crime" and was aware that one of his accomplices used a gun during it, even if he did not intend to commit the firearm element of the offense. 572 U.S. at 69. This Court determined that an aider and abettor must intend to commit "the entire crime" under Section 924(c) and must therefore have advance knowledge that the predicate offense would involve a firearm. Id. at 76, 77-78.

Petitioner identifies no basis on which the jury could have made the intent finding required by the instructions here without finding that he was aware that the crimes would involve firearms. At the very least, petitioner cannot demonstrate reversible plain error in light of (i) the lack of any precedent establishing that the instructions used in this case were insufficient, and (ii) the overwhelming evidence that petitioner was aware that guns would be used during the charged offenses and, in fact, used them himself. See Puckett, 556 U.S. at 135 (explaining that, in addition to being "clear or obvious" under governing law, an error "must have affected the appellant's substantial rights" in order to qualify as reversible plain error, "which in the ordinary case means [the defendant] must demonstrate that it affected the outcome of the district court proceedings") (citation and internal quotation marks omitted). The evidence established that petitioner kept a gun in the apartment where he stored his drugs and was arrested; that he used guns to murder Frederick Brooks, Richard Russo, and Victor Zapata in order to protect or expand his drug-trafficking

enterprise; and that he directed his subordinates to rob Joseph Garcia in order to frighten Garcia away from selling drugs within petitioner's purported territory. See Pet. App. A3-A4; see also Gov't C.A. Br. 6-17 (summarizing evidence). Petitioner cannot demonstrate a reasonable probability that the jury would nonetheless have found he was unaware that a gun would be used during the course of the overall drug conspiracy (Count 4), the Garcia robbery (Count 10), and the Russo murder (Counts 14 and 15), each of which he willingly participated in.

c. Petitioner further contends (Pet. 9) that the district court erred in instructing the jury that it could find him guilty on Counts 4 and 10 based on a coconspirator theory of liability under Pinkerton v. United States, 328 U.S. 640 (1946). Petitioner asserts (Pet. 9) that, by invalidating the "crime of violence" definition in Section 924(c)(3)(B), this Court's decision in Davis "eliminate[d] conspiracy as a valid predicate for a § 924(c) conviction." That assertion is mistaken in at least two respects.

First, petitioner's conviction on Count 4 is based on his use of a firearm during a drug trafficking crime, not a crime of violence. See, e.g., C.A. App. 319, 350. Section 924(c) defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act," 18 U.S.C. 924(c)(2), which includes drug-distribution conspiracies, 21 U.S.C. 846. Nothing in Davis affects the validity of that provision. See, e.g., United States v. Chapman, 851 F.3d 363, 375 (5th Cir. 2017) (explaining that

drug-distribution conspiracies "qualify as predicate offenses for the purposes of § 924(c)'s enhanced penalty without reference to the [crime of violence] definition").

Second, and in any event, petitioner's argument erroneously conflates the distinction between a conviction for conspiracy and a conviction for a substantive crime based on principles of coconspirator liability. "Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." Iannelli v. United States, 420 U.S. 770, 777 (1975). A conspiracy offense is distinct from the substantive offense that is the object of the agreement and may therefore "be punished whether or not the substantive crime ensues." Salinas v. United States, 522 U.S. 52, 65 (1997); see Pinkerton, 328 U.S. at 643 ("It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."). Accordingly, following Davis, conspiracies generally do not qualify as crimes of violence because they do not necessarily require the use, attempted use, or threatened use of physical force within the meaning of Section 924(c)(3)(A). See, e.g., United States v. Barrett, 937 F.3d 126, 129-130 (2d Cir. 2019) (concluding that conspiracy to commit Hobbs Act robbery is not a crime of violence following Davis).

Coconspirator liability under Pinkerton, in contrast, is a means of holding defendants "responsible for [a] substantive offense" committed by their coconspirators in furtherance of a

conspiracy. Pinkerton, 328 U.S. at 647 (emphasis added); see id. at 645 (explaining that whether a defendant is liable for a conspiracy and whether he is liable for "the commission of * * * substantive offenses" that occur in the course of that conspiracy are distinct questions); Nye & Nissen v. United States, 336 U.S. 613, 618 (1949) (same). Accordingly, even if the jury had determined that petitioner committed certain crimes of violence based on a Pinkerton theory, that finding would not have converted those substantive offenses into crimes that were themselves conspiracies. Every court of appeals to consider the question -- before and after Davis -- has determined that ordinary principles of accomplice liability, including coconspirator liability under Pinkerton, apply to Section 924(c) predicates. See, e.g., United States v. Henry, 984 F.3d 1343, 1355-1356 (9th Cir. 2021); United States v. Hernández-Román, 981 F.3d 138, 145 (1st Cir. 2020); United States v. Portillo, 969 F.3d 144, 166 (5th Cir. 2020), cert. denied, Nos. 20-6554, 20-6589 (Jan. 25, 2021); United States v. McGill, 815 F.3d 846, 944 (D.C. Cir. 2016) (per curiam), cert. denied, 138 S. Ct. 57-58 (2017); United States v. Fonseca-Caro, 114 F.3d 906, 907-908 (9th Cir. 1997) (per curiam), cert. denied, 522 U.S. 1097 (1998); United States v. Myers, 102 F.3d 227, 237-238 (6th Cir. 1996), cert. denied, 520 U.S. 1223 (1997); United States v. Masotto, 73 F.3d 1233, 1239-1240 (2d Cir.), cert. denied, 519 U.S. 810 (1996). And even if petitioner's claim were

debatable, it would not rise to the level of reversible plain error for reasons similar to those discussed above.

3. In any event, this case is not an appropriate vehicle for considering the questions presented because a decision in petitioner's favor would have no practical effect on his sentence. Petitioner challenges his convictions on five counts under Section 924(c) (Counts 4, 7, 10, 14, and 19), for which he received a combined consecutive sentence of 105 years of imprisonment. C.A. App. 352. He also challenges his conviction on one count under Section 924(j)(1) (Count 15), for which he received a life sentence. Ibid. But petitioner additionally received concurrent or consecutive life sentences on numerous other counts that he has not challenged and that would be unaffected if his firearm convictions were vacated, including counts of racketeering (Count 1); racketeering conspiracy (Count 2); conspiring to distribute cocaine base (Count 3); murder in aid of racketeering (Counts 5, 12, and 17); and murder in the course of a continuing criminal enterprise (Counts 6, 13, and 18).

Accordingly, a decision in petitioner's favor on the questions presented would have no effect on his overall sentence because he would remain subject to multiple life sentences on other counts. This Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties. Supervisors v. Stanley, 105 U.S. 305, 311 (1882); see The Monrosa v. Carbon Black Exp., Inc., 359

U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the [c]ourts of [a]ppeals is judicial, not simply administrative or managerial."). Petitioner's inability to obtain any practical benefit from the relief he seeks provides a further reason not to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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