

No. 20-7183

IN THE SUPREME COURT OF THE UNITED STATES

SHAMEKE WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner contends (Pet. 24-26) that the court of appeals erred in rejecting his claim that Rehaif v. United States, 139 S. Ct. 2191 (2019), entitled him to vacatur of his conviction under 18 U.S.C. 922(g)(1) and 924(a)(2) on plain-error review following trial and sentencing. Review of the decision below is unwarranted because the decision is interlocutory. See, e.g., American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372, 384 (1893). Although the court of appeals denied petitioner relief on that claim, see Pet. App. A59-A61, it separately remanded the case for further consideration of whether

petitioner qualifies for an enhanced sentence under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(1), and for resentencing, Pet. App. A74.

The decision's interlocutory posture "alone furnishe[s] sufficient ground for the denial of" the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327, 328 (1967) (per curiam); Virginia Military Inst. v. United States, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari); see also Stephen M. Shapiro et al., Supreme Court Practice § 4.18 & n.72, at 282-283 (10th ed. 2013) (noting that the Court routinely denies interlocutory petitions in criminal cases). If petitioner ultimately is dissatisfied with the district court's disposition on remand, and if that disposition is upheld in any subsequent appeal, petitioner will be able to raise his current claims, together with any other claims that may arise with respect to his proceeding, in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent" judgment). This case presents no occasion for this Court to depart from its usual practice of awaiting final judgment before determining whether to review a challenge to a criminal conviction.

In the alternative, the Court may wish to hold the petition for a writ of certiorari pending its decision in Greer v. United States, No. 19-8709 (oral argument scheduled for April 20, 2021), and then dispose of it as appropriate in light of that decision. In Greer, the Court will consider a similar Rehaif challenge to a defendant's conviction under 18 U.S.C. 922(g)(1) and 924(a)(2) on plain-error review following trial and sentencing. Petitioner acknowledges (Pet. 26) that the Court's decision in Greer may affect the proper disposition of his petition.

2. Petitioner separately renews his contention (Pet. 18-24) that Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A). As with petitioner's Rehaif claim, the interlocutory posture here furnishes a sufficient ground for declining to review that claim. In any event, the court of appeals correctly denied relief on the claim, and further review is unwarranted.

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)(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

Petitioner argues 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 threaten to use "violent" force and may be accomplished by threats to harm "intangible objects." Pet. 22, 23. That contention lacks 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 has recognized that Section 924(c) (3) (A) encompasses Hobbs Act robbery. See id. at 7.

Petitioner's reliance (Pet. 19-21) on United States v. Bowen, 936 F.3d 1091 (10th Cir. 2019), is misplaced. Bowen did not involve Hobbs Act robbery, but instead witness retaliation under 18 U.S.C. 1513(b) (2). See Bowen, 936 F.3d at 1102. The Tenth Circuit in that case deemed it a "realistic probability" that a defendant could be convicted of witness retaliation under Section 1513(b) (2) for conduct that did not include "the use, attempted use, or threatened use of physical force against the person or property of another" under Section 924(c) (3) (A). See id. at 1104, 1105 (citation omitted). But petitioner identifies no comparable

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.

past prosecutions for Hobbs Act robbery under Section 1951(b)(1).² And in the absence of any such realistic probability, the Tenth Circuit has concluded that Hobbs Act robbery does qualify as a crime of violence under Section 924(c)(3)(A). See United States v. Melgar-Cabrera, 892 F.3d 1053, 1060-1066, cert. denied, 139 S. Ct. 494 (2018).

This Court has recently and repeatedly denied 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 v. United States, 141 S. Ct. 167 (2020), and in subsequent cases. See, e.g., 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). The Court should follow the same course here.³

² Petitioner points (Pet. 22) to United States v. Ivanov, 175 F. Supp. 2d 367 (D. Conn. 2001), but that case involved charges of Hobbs Act extortion under Section 1951(b)(2), not Hobbs Act robbery under Section 1951(b)(1). See Br. in Opp. at 10-11, Steward, supra (No. 19-8043) (discussing distinction).

³ The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.

Respectfully submitted.

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