

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN REID, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

JOHN M. PELLETTIERI
Attorney

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

QUESTION PRESENTED

Whether 18 U.S.C. 924(c)(3)(A)'s definition of "crime of violence" excludes attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Cal.):

United States v. Reid, No. 99-cr-358 (July 27, 2019)

United States District Court (N.D. Al.):

United States v. Reed, No. 18-cr-226 (Mar. 13, 2019)

United States Court of Appeals (9th Cir.):

United States v. Reid, No. 19-16799 (Dec. 11, 2020)

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-7497

KEVIN REID, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is not published in the Federal Reporter but is available at 2020 WL 8918197. The orders of the district court and the magistrate judge (Pet. App. 2-12) are unreported but are available at 2019 WL 3254087 and 2019 WL 2599975.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 2020. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the

lower court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on March 11, 2021. 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 California, petitioner was convicted on one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). 7/24/2000 Judgment 1. He was sentenced to 44 months of imprisonment, to be followed by three years of supervised release. Pet. App. 5. Petitioner filed a motion for collateral relief under 28 U.S.C. 2255, which the district court denied. Id. at 2-12. The court of appeals affirmed. Id. at 1.

1. In July 1999, petitioner and co-defendant Jonnie Lee Rogers attempted to rob a Pizza Hut restaurant in Sacramento, California. See Presentence Investigation Report (PSR) ¶¶ 6-10, 17. Rogers held one employee at gunpoint with a 12-gauge shotgun while petitioner grabbed another employee and dragged her to the back of the restaurant, directing her to open the restaurant's safe. See ibid. The employee was unable to open the safe, and the men fled. See ibid.

A federal grand jury in the Eastern District of California charged petitioner with attempting to commit Hobbs Act robbery, in

violation of 18 U.S.C. 1951, and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). See Pet. App. 4. Petitioner pleaded guilty to the Section 924(c) count and was sentenced to 44 months of imprisonment, to be followed by three years of supervised release. See id. at 4-5.

2. On October 7, 2003, petitioner was released to a halfway house in Nevada to finish the remainder of his 44-month sentence. See D. Ct. Doc. No. 54-2, at 5 (Nov. 28, 2016). One week later, petitioner signed out of the halfway house for the stated purpose of conducting a job search; when he returned, police officers were waiting for him in connection with an investigation of a crime committed earlier that day. Ibid. When he saw the officers, petitioner fled; it took approximately three weeks to apprehend him. Ibid.

Petitioner was charged with federal and state offenses related to his Nevada conduct. See D. Ct. Doc. No. 54-2, at 2, 9. He pleaded guilty to escaping from federal custody, in violation of 18 U.S.C. 751, and was sentenced to 32 months of imprisonment, to be followed by three years of supervised release. Id. at 9-10. He was also convicted of state offenses, for which his sentences included a life sentence with the possibility of parole. See Pet. App. 2-3; D. Ct. Doc. No. 56, at 13-14 (May 3, 2017).

3. In 2016, while incarcerated in Nevada, petitioner filed a motion for collateral relief under 28 U.S.C. 2255, claiming that

his Section 924(c) conviction was invalid on the theory that the underlying offense -- attempted Hobbs Act robbery -- did not qualify as a "crime of violence." See Pet. App. 4-6. 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 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 attempted Hobbs Act robbery does not qualify as a crime of violence under Section 924(c) (3) (A), and that 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 597. See Pet. App. 2.

The district court referred petitioner's motion to a magistrate judge for a report and recommendation. See Pet. App. 2. The magistrate judge concluded that although petitioner was incarcerated in state prison on different charges when he filed his Section 2255 motion, the court retained jurisdiction because petitioner remained subject to an unexpired three-year term of supervised release in this case. D. Ct. Doc. No. 56, at 13-14. But the magistrate rejected his claim on the merits, determining

that attempted Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A). Pet. App. 7-12. The district court adopted the magistrate judge's report and recommendation, and granted petitioner a certificate of appealability. Id. at 2-3.

The court of appeals stayed petitioner's appeal pending its decision in United States v. Dominguez, 954 F.3d 1251 (9th Cir. 2020), petition for cert. pending, No. 20-1000 (filed Jan. 21, 2021), which subsequently explained that "attempted Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)(3)(A)." Id. at 1262. The court then granted the government's motion for summary affirmance in this case, observing that the issue raised in this appeal was "directly controlled by" Dominguez. Pet. App. 1.

4. Since initially filing this Section 2255 motion, petitioner has been released from state custody (in November of 2017), has committed a new federal bank robbery in Alabama (in February of 2018), and is now once again in Bureau of Prisons custody serving a term of imprisonment for that bank robbery. See Bureau of Prisons, Inmate Locator, <https://www.bop.gov/inmateloc/> (last visited July 15, 2021) (inmate location information for prisoner number 11971-097); 3/13/2019 Presentence Investigation Report. Due to his repeated incarceration, petitioner has never completed the term of supervised release imposed for his Section 924(c) conviction.

ARGUMENT

Petitioner contends (Pet. 7-22) that the court of appeals erred in determining that attempted Hobbs Act robbery is a crime of violence under Section 924(c) (3) (A). On July 2, 2021, this Court granted the petition for a writ of certiorari in United States v. Taylor, No. 20-1459, to consider whether 18 U.S.C. 924(c) (3) (A)'s definition of "crime of violence" excludes attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a). Because the Court's decision in Taylor may affect the proper disposition of the petition for a writ of certiorari, the petition in this case should be held pending the decision in Taylor and then disposed of as appropriate in light of that decision.

Petitioner's specific contention (Pet. 13-22) that completed Hobbs Act robbery is not a crime of violence under Section 924(c) (3) (A) -- an issue that he argues "underpins" the question presented here -- does not itself warrant review. 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, cert. denied, 141 S. Ct. 167 (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).¹ 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 Dominguez, 954 F.3d at 1260-1261; see also, e.g., United States v. Melgar-Cabrera, 892 F.3d 1053, 1060-1066 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018).

Contrary to petitioner's suggestion (Pet. 22 n.4), nothing in this Court's decision in Borden v. United States, 141 S. Ct. 1817 (2021), which determined that Tennessee reckless aggravated assault lacks a mens rea element sufficient to meet the definition of a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), undermines the unanimous consensus that completed Hobbs Act robbery is a "crime of violence" under Section 924(c)(3)(A). See, e.g., Dominguez, 954 F.3d at 1261 (rejecting the argument that completed Hobbs Act robbery lacks the necessary mens rea to qualify as a crime of violence, because "criminal intent -- acting 'knowingly or willingly' -- is an implied and necessary element that the government must prove for a Hobbs Act conviction"). Petitioner's contrary argument is premised on the assertion (Pet. 15-20) that the courts of appeals have erred in determining that the relevantly analogous crime of bank robbery,

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 at <https://www.supremecourt.gov/docket/docketfiles/html/public/19-8043.html>.

in violation of 18 U.S.C. 2113(a), requires knowledge or intent. But as explained at pages 9-20 of the government's brief in opposition in Johnson v. United States, No. 19-7079, the courts of appeals' uniform interpretation of the bank-robbery statute is correct.²

This Court has consistently denied review of petitions for writs of certiorari asserting that completed 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., Stallworth v. United States, No. 20-6563 (Apr. 19, 2021); Turpin v. United States, No. 20-5672 (Feb. 22, 2021); 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). And even if further review of this question were appropriate, this case would not be a suitable vehicle, as it does not directly involve a Section 924(c) conviction predicated on completed Hobbs Act robbery.

² We have served petitioner with a copy of the government's brief in opposition in Johnson, which is also available from this Court's online docket at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-7079.html>.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in Taylor and then disposed of as appropriate in light of that decision.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

JOHN M. PELLETTIERI
Attorney

JULY 2021