No. 20-8286

IN THE SUPREME COURT OF THE UNITED STATES

KEMON DOMINIQUE THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to vacatur of his guilty plea to brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii), based on subsequent case law under which his admitted conduct still satisfies the elements of the offense.

2. Whether petitioner is entitled to relief on his claim, raised for the first time in this Court, challenging the factual basis for his unconditional guilty plea to brandishing a firearm in furtherance of a crime of violence -- specifically, a robbery offense under the Hobbs Act, in violation of 18 U.S.C. 1951(a) -- based on his contention that his conduct did not satisfy the Hobbs Act's interstate-commerce element.

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

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Thompson, No. 17-cr-20895 (June 14, 2018)

United States Court of Appeals (11th Cir.):

United States v. Thompson, No. 18-12754 (Jan. 5, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1) is not published in the Federal Reporter but is reprinted at 839 Fed. Appx. 421.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2021. The petition for a writ of certiorari was filed on June 4, 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 Southern District of Florida, petitioner was convicted on one count of brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Judgment 1. He was sentenced to 96 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed petitioner's conviction, but vacated his sentence and remanded for resentencing. Pet. App. A1, at 1-6.

1. On October 27, 2017, at 2:40 a.m., petitioner and two accomplices -- Rashard Stepherson and Vidyapati El -- approached two foreign tourists (W.H. and I.V.W.) who had traveled on vacation to Miami and were patronizing Miami Beach businesses. D. Ct. Doc. 43, at 1 (Mar. 21, 2018). Petitioner, Stepherson, and El followed W.H. and I.V.W. into a building, where El grabbed W.H. by the throat. Ibid. Stepherson then displayed a loaded firearm and placed it under W.H.'s chin. Ibid. El rifled through W.H.'s pockets and stole his watch, cell phones, and $300 in cash. Id. at 2. Stepherson then pointed the firearm at I.V.W.'s chest and collected his phone, watch, and credit cards. Ibid. As these robberies occurred, petitioner blocked the door so W.H. and I.V.W. could not leave the building. Id. at 1.

Petitioner, Stepherson, and El were charged with one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C.

1951(a); two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; and one count of brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Indictment 1-3.

Section 924(c) makes it a crime to "use[] or carr[y]" a firearm "during and in relation to," or to "possess[]" a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). The statute contains its own definition of the term "crime of violence," which has two subparagraphs, (A) and (B), that provide alternative and independent definitions. Section 924(c)(3)(A) -- which courts often refer to as containing the "elements" clause -- specifies that the term "crime of violence" includes any "offense that is a felony" and "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). Section 924(c)(3)(B) -- which courts often refer to as containing the "residual" clause -- specifies that the term "crime of violence" also includes any "offense that is a felony and * * * 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 entered an agreement to plead guilty to the Section 924(c)(1)(A)(ii) count, D. Ct. Doc. 42, at 1 (Mar. 21, 2018), which

alleged that petitioner had aided and abetted the brandishing of a firearm in furtherance of a "crime of violence" -- specifically, Hobbs Act robbery, Indictment 1-3. 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). Petitioner also signed a proffer admitting the facts described above. D. Ct. Doc. 43, at 1-2. In exchange, the government agreed to dismiss the three remaining counts. D. Ct. Doc. 42, at 1.

At the change-of-plea hearing, the government recited the elements of the Section 924(c) offense: (1) "[petitioner] committed the crime of violence charged in Counts 2 and 3 [Hobbs Act robbery]"; (2) "[petitioner] knowingly used, carried, or possessed a firearm"; and (3) "[petitioner] used the firearm in relation to or carried the firearm in relation to or possessed the firearm in relation to the violent crime." D. Ct. Doc. 127, at 12-13 (Aug. 13, 2018). The government further explained that it had charged petitioner under an aiding-and-abetting theory because petitioner had "prevented the victims from leaving as they were held at gun point." Id. at 16.

Petitioner admitted that the facts in his proffer were true, D. Ct. Doc. 127, at 19, and entered a guilty plea to the charge, id. at 43. The magistrate judge found that petitioner had

knowingly and voluntarily entered his plea. Id. at 44. At the start of petitioner's sentencing hearing, the district court reviewed the magistrate judge's findings and accepted petitioner's guilty plea. D. Ct. Doc. 129, at 2 (Aug. 14, 2018).

At the sentencing hearing, petitioner objected for the first time that Hobbs Act robbery did not qualify as a "crime of violence" for purposes of a conviction under 18 U.S.C. 924(c). D. Ct. Doc. 129, at 5-6. He acknowledged, however, that the Eleventh Circuit had recognized that Hobbs Act robbery qualifies as a "crime of violence" under Section 924(c)(3)(A). See ibid. The district court overruled petitioner's objection, id. at 6, and sentenced him to 96 months of imprisonment, id. at 9.

2. Petitioner appealed his conviction and sentence. During the pendency of his appeal, this Court decided United States v. Davis, 139 S. Ct. 2319 (2019), which invalidated the definition of "crime of violence" in Section 924(c)(3)(B) on vagueness grounds. Petitioner filed a supplemental brief arguing for the first time that his guilty plea was involuntary, invoking Davis to argue that he did not understand the essential elements of the Section 924(c) charge. See Pet. C.A. Supp. Br. 5-7. He further argued that the asserted error was "structural" and that his conviction should be vacated without any showing that an error prejudiced him. Id. at 7-10.

In an unpublished per curiam decision, the court of appeals affirmed petitioner's conviction and vacated his sentence. Pet. App. A1, at 1-6. The court observed that "[w]hile the Supreme Court invalidated 18 U.S.C. § 924(c)(3)'s residual clause in Davis for being unconstitutionally vague, it left intact [Section] 924(c)(3)'s elements clause." Id. at 3. The court further observed that, "[u]nder [Eleventh Circuit] precedent, Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)'s elements clause." Ibid. (citing In re Fleur, 824 F.3d 1337, 1340-1341 (11th Cir. 2016) (per curiam)). And because "[petitioner's] conviction for brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), was predicated upon two Hobbs Act robbery offenses," the court "affirm[ed] [his] conviction." Id. at 3-4. The court did, however, vacate petitioner's sentence and remand for resentencing, based on its conclusion that the district court plainly erred in calculating petitioner's Guidelines range. Id. at 4-6.

On remand, the district resentenced petitioner to 84 months of imprisonment, to be followed by three years of supervised release. See D. Ct. Doc. 160, at 2-3 (July 6, 2021). Petitioner did not appeal the revised judgment.

ARGUMENT

Petitioner renews his contention (Pet. 11-19) that the invalidation of Section 924(c)(3)(B) in United States v. Davis, 139 S. Ct. 2319 (2019), vitiated the knowing and voluntary nature of his plea. He further contends (Pet. 19-25) that his conduct -- the armed robbery of two foreign tourists visiting the United States -- does not satisfy the interstate-commerce element of Hobbs Act robbery, which served as the predicate offense for his Section 924(c) conviction. Finally, he argues (Pet. 25-30) that Hobbs Act robbery is not a "crime of violence" under the definition in Section 924(c)(3)(A). The court of appeals correctly denied relief on petitioner's first and third claims, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioner's second claim, which he raises for the first time in this Court, also lacks merit. The petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. 11-19) that his plea was not made knowingly and voluntarily because he entered it before this Court's decision in Davis, which invalidated the "crime of violence" definition in 18 U.S.C. 924(c)(3)(B). That contention lacks merit.

This Court's decision in Davis did not invalidate the statute's separate, independent definition of "crime of violence" in Section 924(c)(3)(A), on which petitioner's conviction rested.

At the time petitioner entered his plea, as now, Eleventh Circuit case law confirmed that his predicate offenses -- Hobbs Act robberies, in violation of 18 U.S.C. 1951(a) -- qualify categorically as "crime[s] of violence" under Section 924(c)(3)(A)'s definition. See In re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016); In re Fleur, 824 F.3d 1337, 1340-1341 (11th Cir. 2016). The indictment accordingly made clear that Section 924(c)(3)(A), not Section 924(c)(3)(B), was the basis for classifying the Hobbs Act robbery as a "crime of violence" for purposes of the charge to which petitioner pleaded guilty. See Indictment 2-3 (setting out in Count 4, to which petitioner pleaded guilty, that he used a firearm in connection with a "crime of violence * * * as charged in Counts 2 and 3," which in turn specifically indicated that he had committed "robbery" "by means of actual and threatened force, violence, and fear of injury"). And when the district court accepted the plea, petitioner's counsel acknowledged the binding Eleventh Circuit precedent regarding Section 924(c)(3)(A), and indicated awareness that prevailing on a Section 924(c) challenge would necessarily require prevailing on arguments encompassing both Section 924(c)(3)(B) and Section 924(c)(3)(A). See D. Ct. Doc. 129, at 5-6 (preserving arguments "with respect to Hobbs Act robbery being a crime of violence under 924(c)" "both as to 924(c)'s residual clause * * * and as to

924(c)'s element clause"). At no point did petitioner voice concern or confusion about his guilty plea.

This record accordingly refutes petitioner's claim that Davis, which left Section 924(c)(3)(A) "intact," Pet. App. A1, at 3, vitiates the knowing and voluntary nature of his plea. Likewise misplaced is petitioner's contention (Pet. 16-19) that he was not properly informed of the nature of the charges against him before pleading guilty, as required by Federal Rule of Criminal Procedure 11(b)(1)(G). Because petitioner did not object to a Rule 11 error in the district court, he cannot obtain relief on appeal unless he demonstrates plain error. See Fed. R. Crim. P. 52(b); United States v. Vonn, 535 U.S. 55, 59 (2002). And he cannot show "'error,' (2) that is 'plain,' * * * (3) that 'affect[s] substantial rights,'" and that "(4) * * * 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" Johnson v. United States, 520 U.S. 461, 466-467 (1997) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)) (brackets in original).

As a threshold matter, because the magistrate judge identified the elements of the charge to which petitioner was pleading guilty and confirmed that petitioner had reviewed the charge and discussed it with his attorney (D. Ct. Doc. 127, at 5-7, 12-14, 17-19), the judge did not commit error, let alone plain error, under Rule 11. Rule 11 does not require the district court

to advise the defendant about potential legal claims or the possible outcome of litigation that might bear on his proceeding. Cf. Brady v. United States, 397 U.S. 742, 749-758 (1970) (rejecting claim that subsequent invalidation of portion of statute of conviction rendered plea not knowing and voluntary). Petitioner has also not shown that any error had any effect on his substantial rights. "[A] defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea." United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004). Here, the record goes so far as to demonstrate that petitioner knew of the possibility of challenging Section 924(c)(3)(B)'s validity, see Vonn, 535 U.S. at 75, but chose to plead guilty anyway. At sentencing, petitioner's counsel observed that one of petitioner's co-defendants (Stepherson) had asserted that the definition was unconstitutionally vague and stated that petitioner sought to "preserve the same issue." D. Ct. Doc. 129, at 5. After lodging this objection, petitioner did not then seek to withdraw his guilty plea or express any confusion about its terms at any point before the district court entered its judgment. See id. at 2 (defense counsel reporting "[n]o[]" issue with petitioner's guilty plea).

Petitioner contends (Pet. 14-15) that the asserted defect in his plea colloquy reflects a "structural error" that mandates

automatic reversal without any inquiry into whether he suffered prejudice. This Court has made clear, however that "discrete defects in the criminal process -- such as the omission of a single element from jury instructions or the omission of a required warning from a Rule 11 plea colloquy -- are not structural because they do not 'necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" Greer v. United States, 141 S. Ct. 2090, 2100 (2021) (quoting Neder v. United States, 527 U.S. 1, 9 (1999)). Any error in the recounting of the elements here was accordingly not structural.

2. Petitioner separately contends (Pet. 19-25) that the conduct for which he was convicted does not satisfy the interstate-commerce element of Hobbs Act robbery. That contention likewise lacks merit.

The Hobbs Act applies to any robbery that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. 1951(a). The Act separately defines "commerce" to mean "commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, or Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through

any place outside such State; and all other commerce over which the United States has jurisdiction." 18 U.S.C. 1951(b)(3).

Petitioner asserts (Pet. 19-25) that robbing foreign tourists of their cash and personal effects does not satisfy Section 1951's interstate-commerce element. Petitioner acknowledges, however, that he did not raise that claim to either the district court or the court of appeals. See Pet. 9 n.19. As a consequence, this Court should not consider the claim because, as this Court has repeatedly emphasized, 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 omitted).

Furthermore, by pleading guilty and admitting all the elements of the charges against him, petitioner "admitt[ed] guilt of a substantive crime." United States v. Broce, 488 U.S. 563, 570 (1989); see McCarthy v. United States, 394 U.S. 459, 466 (1969) (plea "is an admission of all the elements of a formal criminal charge"). Petitioner accordingly waived all non-jurisdictional defects in his proceedings, including any challenge to the sufficiency of the evidence supporting a particular offense element. See United States v. Ternus, 598 F.3d 1251, 1254 (11th Cir. 2010).

Petitioner errs in asserting (Pet. 24) that his challenge to the sufficiency of his factual proffer implicates "the jurisdiction of the federal court" and cannot be waived or forfeited. Even a claim that a criminal statute is unconstitutional does not implicate a court's subject-matter jurisdiction over the case. See United States v. Williams, 341 U.S. 58, 66-69 (1951). And in United States v. Cotton, 535 U.S. 625 (2002), this Court held that the omission from an indictment of drug quantity, which was necessary to increase the statutory maximum for the charged offense under 21 U.S.C. 841(b)(1)(A), was a nonjurisdictional defect that "goes only to the merits of the case." Cotton, 535 U.S. at 629-631 (citation omitted). Petitioner's contention that his factual proffer was insufficient to articulate an essential element of Hobbs Act robbery (i.e., an obstruction, delay, or effect on interstate commerce, 18 U.S.C. 1951(a)) is similarly nonjurisdictional because it "do[es] not deprive a court of its power to adjudicate a case." Cotton, 535 U.S. at 630; see also Morrison v. National Austl. Bank Ltd., 561 U.S. 247, 254 (2010) ("[T]o ask what conduct [a statute] reaches is to ask what conduct [it] prohibits, which is a merits question."); United States v. Grimon, 923 F.3d 1302, 1306 (11th Cir.) ("[I]nterstate commerce jurisdictional elements * * * are not 'jurisdictional' in the sense of bearing on whether or not the district court has subject matter jurisdiction or authority to

adjudicate the case.") (emphasis omitted), cert. denied, 140 S. Ct. 536 (2019).

Finally, even if petitioner's claim were properly presented in this Court, petitioner could not show error, let alone plain error, on that forfeited issue. He and his accomplices robbed two foreign tourists at gunpoint of their cash, cell phones, foreign credit cards, and watches. D. Ct. Doc. 43, at 1-2. At the time, the victims were actively patronizing Miami Beach businesses, id. at 1, and thus engaged in foreign commerce. Petitioner's depletion of the foreign tourists' money and personal effects constitutes "an[] obstruction, delay, or other effect on commerce, even if small," for purposes of the Hobbs Act. Taylor v. United States, 136 S. Ct. 2074, 2079 (2016); see United States v. Smith, 967 F.3d 1196, 1207 (11th Cir. 2020) ("Robberies or extortions perpetrated upon individuals are prosecutable under the Hobbs Act when * * * the crime depletes the assets of an individual who is directly engaged in interstate commerce.") (citation omitted), cert. denied, No. 20-7404 (Apr. 19, 2021).

3. Finally, petitioner contends (Pet. 25-30) that Hobbs Act robbery is not a crime of violence under Section 924(c)(3)(A). The court of appeals correctly rejected that argument. See Pet. App. A1, at 3-4.

A conviction for 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)(A) 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 Gov't Br. in Opp. at 6-12, Steward, supra (No. 19-8043).*

Petitioner contends that Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A) on the theory that Hobbs Act robbery does not require a defendant to use or

* We have served petitioner with a copy of the government's brief in opposition in Steward, which is also available on this Court's online docket. This Court has granted review in United States v. Taylor, No. 20-1459 (July 2, 2021), to determine whether attempted Hobbs Act robbery qualified as a "crime of violence" under Section 924(c)(3)(A). The Court need not hold petitioner's petition pending the Court's decision in Taylor because petitioner would not benefit from a decision in favor of the respondent in Taylor. Even if this Court were to agree with the Fourth Circuit that attempted Hobbs Act robbery is not a crime of violence under Section 924(c)(3)(A), the Fourth Circuit reaffirmed that completed Hobbs Act robbery qualifies as a "crime of violence," see United States v. Taylor, 979 F.3d 203, 207-208 (2020), and the respondent in Taylor does not argue otherwise, see Br. in Opp. at 11-17, United States v. Taylor, No. 20-1459 (May 21, 2021). Accordingly, no reasonable prospect exists that this Court's decision in Taylor will affect the outcome of this case, and it would not be appropriate to hold this petition pending the disposition of Taylor.

threaten to use "physical force" and may be accomplished by threats to harm "intangible assets." Pet. 27 (citations and emphasis omitted). Those contentions lack merit for the reasons explained at pages 8 to 12 of the government's brief in opposition in Steward, supra (No. 19-8043). And every court of appeals to have considered the issue, including the court below, has recognized that Section 924(c)(3)(A) encompasses Hobbs Act robbery. See id. at 7; see also, e.g., United States v. Walker, 990 F.3d 316, 325-326 (3d Cir. 2021), petition for cert. pending, No. 21-102 (filed July 22, 2021); United States v. Melgar-Cabrera, 892 F.3d 1053, 1060-1066 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018); Pet. 29-30 & n.89 (acknowledging the circuit courts' consensus).

This Court has consistently declined to review petitions for a writ of certiorari asserting 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., Fields v. United States, No. 20-7413 (June 21, 2021); Thomas v. United States, No. 20-7382 (June 21, 2021); Walker v. United States, No. 20-7183 (June 21, 2021); Usher v. United States, 141 S. Ct. 1399 (2021) (No. 20-6272); 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 warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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