

No. 21-5461

IN THE SUPREME COURT OF THE UNITED STATES

TYRONE FELDER, 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

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-5461

TYRONE FELDER, 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

Petitioner contends (Pet. 13-19) that the court of appeals erred in rejecting his challenge to one of his convictions under 18 U.S.C. 924(c), which he asserted was invalid on the theory that robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), does not qualify as a "crime of violence" within the meaning of 18 U.S.C. 924(c) (3) (A). The court of appeals correctly rejected that contention, and it does not warrant further review.

1. 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), cert. denied, 141 S. Ct. 167 (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 contends (Pet. 15-19) 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 threaten to use "violent" force and may be accomplished by threats to harm "intangible" property. 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). 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-

¹ The government has served petitioner with a copy of the government's brief in opposition in Steward, which is also available from this Court's online docket.

Cabrera, 892 F.3d 1053, 1060-1066 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018).

Petitioner attempts to bolster his challenge by asserting (Pet. 19) that the district court instructed the jury in his case that he could be found "guilty of Hobbs Act robbery if he caused the victim to fear economic loss to [intangible] assets." That is not an accurate description of the jury instructions. While the jury was instructed that the "personal property" that petitioner must have "obtained" through the robbery could include "tangible and intangible things of value," the instructions did not state that the element of robbery requiring the use of "actual or threatened force, violence, or fear of injury" could be accomplished by threatening harm to intangible property. C.A. App. 1001. Instead, the court instructed the jury to give the words "force, violence, or fear * * * their common and ordinary meaning, and understand them as you normally would," and the court provided examples that involved the use of physical force against "person[s]." Ibid.²

² Petitioner additionally contends (Pet. 20-24) that the court of appeals erred by refusing to vacate his convictions based on the introduction at trial of certain historical cell-site location data, which petitioner asserted was obtained in violation of the Fourth Amendment per Carpenter v. United States, 138 S. Ct. 2206 (2018). The court determined (Pet. App. 32-36) that the Fourth Amendment's exclusionary rule did not support suppressing that evidence "on the facts of this case," id. at 36, because at the time the evidence was obtained -- before Carpenter -- it "was procured by complying with existing federal law," id. at 33. That determination was correct, see Davis v. United States, 564 U.S.

2. This Court has repeatedly and recently 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, and in other cases. See, e.g., Moore v. United States, No. 21-5066 (Oct. 4, 2021); Lavert v. United States, No. 21-5057 (Oct. 4, 2021); Copes v. United States, No. 21-5028 (Oct. 4, 2021); Council v. United States, No. 21-5013 (Oct. 4, 2021); Fields v. United States, 141 S. Ct. 2828 (2021) (No. 20-7413); Thomas v. United States, 141 S. Ct. 2827 (2021) (No. 20-7382); Walker v. United States, 141 S. Ct. 2823 (2021) (No. 20-7183); Usher v. United States, 141 S. Ct. 1399 (2021) (No. 20-6272); 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.

This Court has granted review in United States v. Taylor, No. 20-145 (oral argument scheduled for Dec. 7, 2021), to determine whether attempted Hobbs Act robbery qualifies as a "crime of violence" under Section 924(c)(3)(A). It would not, however, be appropriate to hold the petition here pending the outcome of Taylor because petitioner would not benefit from a decision in favor of the respondent in Taylor. Even if this Court were to conclude

229, 241 (2011), and petitioner does not identify any decision of another court of appeals suggesting that the good-faith exception to the exclusionary rule would not apply to historical cell-site information that was obtained without a warrant before Carpenter.

that attempted Hobbs Act robbery is not a crime of violence under Section 924(c)(3)(A), the Fourth Circuit in Taylor 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. for Resp. at 10-33, United States v. Taylor, No. 20-1459 (Oct. 22, 2021). Accordingly, no reasonable prospect exists that this Court's decision in Taylor will affect the outcome of this case.³

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General

OCTOBER 2021

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