

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2021

BOBBY JOHN KOBITO

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the trial court erred in finding that the defendant's possession of a silencer was intended to promote a federal crime of terrorism, pursuant to U.S.S.G. § 3A1.4(a) ?

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered in his case on April 21, 2021.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, for which review is sought, is *United States v. Kobito*, 994 F.3d 696 (4th Cir. 2021) (Appendix A). The court's mandate was issued May 13, 2021 (Appendix B). The district court judgment sought to be reversed is *United States v. Kobito*, No. 1:19-CR-00025-NCT-1 (M.D.N.C. July 29, 2019) (Appendix C).

JURISDICTIONAL GROUNDS

Judgment was rendered in the United States Court of Appeals for the Fourth Circuit on April 21, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FACTUAL BACKGROUND AND STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

On January 29, 2019, a grand jury issued a one-count indictment, charging Defendant/Petitioner Bobby John Kobito with possession of an unregistered firearm, specifically a silencer, in violation of 26 U.S.C. §§ 5861(d) and 5871. On March 22, 2019, Mr. Kobito pleaded guilty to the original charge, pursuant to a written plea agreement.

A presentence report (PSR) was prepared. According to the PSR, Mr. Kobito's offense base level was 18, pursuant to U.S.S.G. § 2K2.1(a)(5). Mr. Kobito's base offense level was increased by four levels pursuant to U.S.S.G. § 2K2.1(b)(6)(B), for possessing the firearm with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense (felony terroristic threats). The PSR also applied the enhancement found in U.S.S.G. § 3A1.4(a), because the offense was a felony that involved or was intended to promote a federal crime of terrorism. Three levels were deducted for acceptance of responsibility, pursuant to U.S.S.G. §§ 3E1.1(a) and (b), resulting in a total offense level of 31. Mr. Kobito's criminal history score was zero, however because of the application of

U.S.S.G. § 3A1.4(a), his criminal history category increased from I to VI. Based on a total offense level of 31, and criminal history category of VI, the resulting advisory guideline range was 188 - 235 months, with a statutory maximum sentence of 120 months. The PSR recommended a downward variance to a sentence of 36 months, followed by 2 years of supervised release.

Mr. Kobito objected to the application of U.S.S.G. § 3A1.4 and to the four-level increase in his offense level for possession of a firearm in connection with another felony offense pursuant to U.S.S.G. § 2K2.1(b)(6)(B).

On August 16, 2019, Mr. Kobito appeared before the Honorable N. Carlton Tilley, Jr. for sentencing. After hearing the arguments of counsel, the court denied Mr. Kobito's objections. The court varied downward from Mr. Kobito's advisory guideline range, and Mr. Kobito was sentenced to 60 months' imprisonment, 3 years of supervised release, and a \$100.00 special assessment.

Judgment was formally entered July 29, 2019, and the Petitioner filed a timely notice of appeal on August 1, 2019. The Fourth Circuit affirmed Petitioner's conviction in a published opinion on April 21, 2021.

II. FACTUAL BACKGROUND

Mr. Kobito came to the attention of authorities on January

12, 2018, when he visited the Islamic Association of Raleigh and inquired about a video circulating on social media purportedly depicting a Raleigh area Imam citing a hadith that referenced killing people of the Jewish faith. Mr. Kobito was friendly and non-confrontational during the visit and appeared to accept the explanation he was given of the social media video. However, Mr. Kobito's visit to the mosque attracted the attention of an off-duty Raleigh Police Department officer who was conducting surveillance of the mosque. The officer peered into Mr. Kobito's vehicle and observed binoculars and shooting targets. Authorities were concerned that Mr. Kobito's posed a threat to the mosque, so they began an investigation. During the investigation, authorities learned that Mr. Kobito, who was identified as a member of the American Resistance Movement, had been previously investigated regarding a nuclear bomb threat. Mr. Kobito was interviewed regarding the possible threat, and subsequent to the interview, the investigation was closed.

Authorities reviewed Mr. Kobito's Facebook account and observed that some of his postings contained anti-government and pro-militia ideology. After reviewing the Facebook account, an FBI Confidential Human Source ("CHS") was tasked with communicating with Mr. Kobito to determine if he was planning to

commit a criminal act related to his visit to the mosque. Shortly after making contact with the CHS, Mr. Kobito suggested that the two meet in person. The meeting, which was audio recorded, took place on February 16, 2018.

During the meeting, Mr. Kobito told the CHS he had done "hardcore recon" at the mosque. Mr. Kobito stated each state's fusion center, which he thought were part of the National Security Administration, were "spying on everybody and everything you do." Mr. Kobito then described his desire to shoot into the Terry Sanford Federal Building in Raleigh, which is where he believed the NSA was located. Mr. Kobito spoke to the CHS about the building in Raleigh, and the three positions he had determined could be used to fire into the building, depending on which floor to be targeted. He discussed with the CHS the various measures he would take to foil any investigation into such a shooting.

During this same meeting, Mr. Kobito stated the following:

"I've been doing this, like I said for about ten years now, hardcore about the last six. I've got my (inaudible) that I've sniperized so it's ten round fed magazine. And freaking, they call it a solvent trap adapter, this company makes. And it's patented, it's completely legal to own. It freaking has the threads for, ahh, an oil filter. Poor man's silencer...Where do you buy your silencer? I go down to a fucking auto store...And the shit works. Um, I used it, I snuck it one time at the range. Because I wanted to verify the

other can that I created...It takes a 7.62 x (inaudible) round to where it's not much louder than a .22."

United States v. Kobito, 994 F.3d. 696, 699 (4th Cir. 2021).

Following this meeting, Mr. Kobito e-mailed the CHS a photograph of the Terry Sanford Federal Building and a document entitled, "Patriots Against Tyrants," which described Mr. Kobito's grievances against the United States Government.

Approximately three weeks later, Mr. Kobito met the CHS at a gun range in Burlington, North Carolina. During this meeting, Mr. Kobito identified the FBI, ATF, and DHS buildings as potential targets.

The following day, Mr. Kobito texted the CHS and stated that he could not personally do the actions they discussed, due to his age and health ailments. For the plan to have a higher probability of success, he suggested the CHS use a friend who is healthier to carry out the plan, and he stated he was still willing to help with planning and training.

The CHS met with Mr. Kobito on July 10, 2018, which was audio recorded. During this meeting, Mr. Kobito stated he still had every intention of doing what they previously talked about. When the CHS expressed concern about the gun shots making too much noise, Mr. Kobito responded, "Where I bought most parts from

the guy, that I put on it you know. It just clamps on like a bayonet would, you know? So instead of that, he got what he calls a uh, calls it muzzle-trap or something trap. And it clamps on just like the bayonet or the muzzle brake." *Kobito*, 994 F.3d. at 699. The CHS then asked, "So it's like a silencer?" Mr. Kobito responded, "No. It's frickin, just a little clamp thing you screw on a frickin oil filter...So, I've got two STPs. Went down to my local, uh, was it NAPA or frickin AutoZone? I can't remember which. Frickin that's where I bought my silencers for \$8 a piece. Frickin drilled a hole, and it . . . takes that big ass round and drops it below a .22. And that is no shit. So, for me, noise isn't a factor utilizing that particular gun." *Kobito*, 994 F.3d. at 699.

On September 30, 2018, the CHS contacted Mr. Kobito, stating, "Still worried about noise though. Do you still have the thing we talked about?" *Kobito*, 994 F.3d. at 699. Mr. Kobito responded, "I haven't changed my thoughts in any way! I still believe in what needs to be done!" *Id.* CHS asked, "Do you still have the device we talked about to help with noise? Mr. Kobito responded, "Yes." *Id.* After the CHS attempted to set up a meeting with Mr. Kobito to test out the silencer, Mr. Kobito stated, "Getting bad vibes man. Told you how it was made & works!"

Let's part ways for now. I wish you the best of luck in all you do! In Liberty, Bob." *Id.* Mr. Kobito did not respond to further attempts by the CHS to contact him.

On October 25, 2018, a search warrant was executed at Mr. Kobito's residence and two suspected silencers, made from oil filters, were discovered. ATF Special Agent Paul Johnson examined the devices and determined that they qualified as silencers. The Bureau of Alcohol, Tobacco, Firearms and Explosives confirmed Mr. Kobito had not obtained the required registration for a homemade silencer.

III. FOURTH CIRCUIT OPINION

The Fourth Circuit affirmed Defendant's sentence in *United States v. Kobito*, 994 F.3d 696 (4th Cir. 2021). Mr. Kobito raised two issues in his appeal to the Fourth Circuit: (1) The district court erred in applying the "terrorism" enhancement under U.S.S.G. § 3A1.4 for committing a felony intended to promote terrorism, and (2) the district court erred in applying section 2K2.1(b) (6) (B) for possessing a firearm with the intent that it be used in connection with another felony, specifically "Felony Terroristic Threats."

The Fourth Circuit reviewed for plain error Mr. Kobito's contention, raised for the first time, that the district court did not have jurisdiction because the government did not prove that the Terry Sanford Building was "within the special maritime jurisdiction of the United States," as required by 18 U.S.C. § 1363. The court found that the district court did not plainly err in assuming that the Terry Sanford Federal Building was under federal jurisdiction. The court also found that the government was not obligated to prove this because the enhancement does not require that the defendant be convicted of a federal crime of terrorism.

The court held that "the enhancement applies whenever a defendant's offense of conviction or relevant conduct was "intended to promote" a federal crime of terrorism even if it didn't "involve" such a crime. The court went on to discuss the definition of "intended to promote" and found that the district court's findings that Mr. Kobito intended to promote the destruction of federal property when he named the Terry Sanford Federal Building as a target were not clearly erroneous.

With respect to the 4-level enhancement pursuant to U.S.S.G. § 2K2.1(b)(6)(B), the Fourth Circuit determined that because Mr.

Kobito's advisory guideline range would exceed the statutory maximum of 120 months, regardless of whether the enhancement was applied, there was no impact on the guidelines range therefore any error was harmless.

REASONS FOR GRANTING THE WRIT

The United States Sentencing Guidelines Section 3A1.4 was wrongly applied to Mr. Kobito's base offense level. U.S.S.G. § 3A1.4 states:

- (a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.
- (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

U.S.S.G. § 3A1.4.

For purposes of the enhancement, the phrase "federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5). U.S.S.G. § 3A1.4 cmt. n.1. According to § 2332(g)(5), "federal crime of terrorism" is defined as an offense that:

- (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and
- (B) is a violation of [certain enumerated statutes].

The "terrorism enhancement" in U.S.S.G. § 3A1.4 applies only if both parts of the definition are satisfied. "Congress wanted to impose a harsher punishment on any individual who committed an offense that involved or intended to promote one of the enumerated terrorist acts, and intended, through that offense, to influence

the conduct of others." *United States v. Tankersley*, 537 F.3d 1100, 1113 (9th Cir. 2008)

(emphasis added); see also *United States v. Parr*, 545 F.3d 491, 504 (7th Cir. 2008) ("The definition [of 'federal crime of terrorism'] is stated in the conjunctive, so both requirements must be met.").

Even assuming arguendo that Mr. Kobito's conduct was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," he did not satisfy the second requirement.¹ The Government contended that the qualifying predicate offense found in 18 U.S.C. § 2332b(g)(5) was 18 U.S.C. § 1363, attempt/conspiracy to injure or destroy property within the special maritime and territorial jurisdiction of the United States. Yet, neither attempt nor conspiracy can be proven under these facts.

A. Mr. Kobito Could Not Have Been Convicted of Conspiracy to Violate 18 U.S.C. § 1363.

The Government cited 18 U.S.C. § 1363 to support the terrorism enhancement. The statute states:

Whoever, within the special maritime and territorial

¹ The district court, after hearing argument from both sides, overruled Mr. Kobito's objections, stating, "I think it is pretty obvious from what took place and what was said, that there was an intent to influence or affect the conduct of the government, to retaliate against the government, and it was in a way which would be to destroy property within the territorial jurisdiction of the United States under 18 U.S.C. § 2332(g)(5), as well as a couple of those other statutes I think as well come in there."

jurisdiction of the United States, willfully and maliciously destroys or injures any structure, conveyance, or other real or personal property, or attempts or conspires to do such an act, shall be fined under this title or imprisoned not more than five years, or both, and if the building be a dwelling, or the life of any person be placed in jeopardy, shall be fined under this title or imprisoned not more than twenty years, or both.

"In order to be convicted of conspiracy, the prosecution must prove the following:

- 1) an unlawful agreement between two or more people to commit a [federal] crime;
- 2) that the defendant 'knowingly and willfully participated in that conspiratorial endeavor'; and
- 3) an overt act committed in furtherance of the conspiracy,"

United States v. Vinson, 852 F.3d 333, 352 (4th Cir. 2017), cert. denied, 137 S. Ct. 164 (2016), quoting *United States v. Tucker*, 376 F.3d 236 238 (4th Cir. 2004)

Here, Mr. Kabuto was initially contacted on Facebook by a confidential source (CHS) who was working in that capacity for the FBI. Throughout the entire investigation, the only people involved in the discussions regarding the purported plan to shoot into the Terry Sanford Building were Mr. Kobito and the CHS, a government agent. "One who acts as a government agent and enters into a purported conspiracy in the secret role of an informer cannot be a coconspirator." *United States v. Chase*, 372 F.2d 453, 459 (4th Cir.), cert. denied, 387 U.S. 913 (1967); see *United States v.*

Hayes, 775 F.2d 1279 (4th Cir.1979) and *United States v. Strickland*, 245 F.3d 368, 386 (4th Cir. 2001 ("It is well settled, of course, that government agents participating in "sting" operations are not part of the conspiracy."))

There is no evidence in the record of anyone else participating in discussions, agreeing to assist, or in any other way participating in this endeavor. Based on the evidence before the district court, the Government could not have met its burden of proof and convicted Mr. Kobito of conspiracy to injure or destroy property within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. § 1363.

B. Mr. Kobito Could Not Have Been Convicted of Attempt to Violate 18 U.S.C. § 1363.

"An attempt to commit a crime, which is recognized as a crime distinct from the crime intended by the attempt, punishes conduct that puts in motion events that would, from the defendant's point of view, result in the commission of a crime but for some intervening circumstance." *United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003) To prove attempt, the Government must prove that (1) the defendant had the requisite intent to commit a crime; (2) the defendant undertook a direct act in a course of conduct planned to culminate in his commission of the crime; (3) the act

was substantial, in that it was strongly corroborative of the defendant's criminal purpose; and (4) the act fell short of the commission of the intended crime due to intervening circumstances." *Id.* A substantial step is defined as a "direct act in a course of conduct planned to culminate in commission of a crime that is strongly corroborative of the defendant's criminal purpose." *United States v. Engle*, 676 F.3d 405, 423 (4th Cir. 2012) (citing *United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003)). A substantial step "is more than mere preparation but less ... than completion of the crime." *United States v. Neal*, 78 F.3d 901, 906 (4th Cir. 1996)

At their first meeting, Mr. Kabuto engaged in a lot of hyperbolic talk, telling the CHS that he believed that each state's "fusion center," which he believed was part of the National Security Administration (NSA) was "spying on everybody and everything that you do." He also said that he believed that the NSA was located in the federal building in Raleigh, North Carolina, and he described his desire to shoot into the federal building, where he thought the fusion center was located. At the time he told this to the CHS, he had some knowledge of the building, but did not know on which floor the NSA was located. He expressed no definite plan as to how and when he would do this. He discussed

ways to avoid detection and described to the CHS a weapon that he had "sniperized," calling it a "poor man's silencer." He engaged in a lot of talk but discussed very little in the way of action. At no time during this conversation did Mr. Kobito tell the CHS that he had made an actual plan. They did not discuss and decide on a day and time to carry out these actions. After the meeting, Mr. Kobito emailed a photo of the building he obtained online from Google Maps and a document describing his grievances against the US Government. There is no evidence that at that time there was any discussion of concrete plans to shoot into the building.

A few weeks later, Mr. Kobito met the CHS at a gun range and again discussed his grievances and desire to shoot into the building. The next day, Mr. Kobito informed the CHS that because of his age and physical ailments, he could not personally do the things they discussed, but he was willing to help with planning. No plans were made during that conversation for Mr. Kobito to help or train anyone.

Subsequent discussions between the CHS and Mr. Kobito involved questions about his willingness to participate and the purported silencer. Mr. Kobito reiterated his interest, but again, no plans were made. Soon after the last conversation, Mr. Kobito terminated all communication, telling the CHS "Getting bad

vibes, man. Told you how it was made & works! Let's part ways for now. I wish you the best of luck in all you do! In Liberty, Bob." *Kobito*, 994 F.3d. 696, 699.

In *United States v. Pratt*, the court provided a list of acts from the Model Penal Code, which could possibly corroborate a defendant's criminal purpose.

- (a) lying in wait, searching for or following the contemplated victim of the crime;
- (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
- (c) reconnoitering the place contemplated for the commission of the crime;
- (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
- (e) possession of materials to be employed in the commission of a crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
- (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
- (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

351 F.3d 131, 135-6 (4th Cir. 2003), quoting Model Penal Code § 5.01(2). With respect to § 5.01(2)(b), although Mr. Kobito had

some information about the Terry Sanford Building, and a Google map image, that is a far cry from reconnoitering the building. In fact, there is no evidence that he made any affirmative efforts to find out exactly where the NSA was located within the building. He did not have a schematic of the interior of the building and there was no evidence that he ever entered the building to determine the layout.

With respect to § 5.01(2)(b), there is no evidence that Mr. Kobito made any further plans to actually shoot inside the building. In fact, he told the CHS that he did not believe he was capable of doing the act due to age and physical health. Although he offered to help with planning, there is no evidence that he offered to give anyone the silencers that he described to the CHS to actually use to shoot inside the building.

These facts describe a situation where Mr. Kobito engaged in "mere preparation," but not an attempt to violate 18 U.S.C. § 1363.

"Mere preparation for the commission of a crime, however, does not constitute an attempt to commit a crime. But if preparation comes so near to the accomplishment of the crime that it becomes probable that the crime will be committed absent an outside intervening circumstance, the preparation may become an attempt. Thus the line between mere preparation and a substantial act done toward the commission of a crime is inherently fact-intensive, and it is not always a clear one."

Pratt, 351 F.3d at 136. "To determine whether conduct is

preparation or an attempt, a court must assess how probable it would have been that the crime would have been committed – at least as perceived by the defendant – had intervening circumstances not occurred." *Id.*

The record shows that Mr. Kobito did not intend to go through with shooting into the building. He never came close to accomplishing the crime. He did a lot of talking but took no meaningful steps towards action. No date, time, or plan to travel to Raleigh was discussed. Mr. Kobito never informed the CHS that he in fact determined where the NSA was located in the building. Although he was found in possession of the homemade silencers, prior to the search, he expressly informed the CHS that he was not going to carry out the action he described.

Mr. Kobito's decision not to actively participate, and then shortly thereafter, terminating contact with the CHS was evidence that he did not intend to carry out the actions he previously described to the CHS. No substantial action was taken on the part of Mr. Kobito to carry out the act, therefore attempt could not have been proven.

Because the Government could prove neither the conspiracy nor the attempt elements of 18 U.S.C. § 1363, attempt/conspiracy to injure or destroy property within the special maritime and

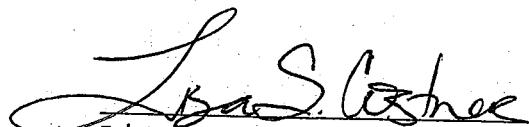
territorial jurisdiction of the United States, U.S.S.G. § 3A1.4
was wrongly applied.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Court grant his petition for writ of certiorari, vacate the Fourth Circuit's opinion, and remand his case with instructions to vacate his sentence and remand for resentencing.

This the 14th day of September 2021.

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Federal Public Defender


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