

IN THE SUPREME COURT OF THE UNITED STATES

THAMUD ELDRIDGE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. 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).
2. Whether the court of appeals committed reversible error in applying the factors from Barker v. Wingo, 407 U.S. 514 (1972), to reject petitioner's Speedy Trial Clause claim on the particular facts of this case.

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No. 21-6389

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 2 F.4th 27. The order of the court of appeals (Pet. App. A11-A17) is not published in the Federal Reporter but is reprinted at 860 Fed. Appx. 773. The judgment of the district court (Pet. App. A18-A23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2021. A petition for rehearing was denied on August 26, 2021 (Pet. App. A24). The petition for a writ of certiorari was filed on

November 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted of racketeering, in violation of 18 U.S.C. 1962(c) and 1963(a); conspiring to commit racketeering, in violation of 18 U.S.C. 1962(d) and 1963(a); conspiring to distribute controlled substances and to possess controlled substances with the intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D), 846, and 851; possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i); kidnapping in aid of racketeering, in violation of 18 U.S.C. 1959(a); conspiring and attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and possessing and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Pet. App. A18. The district court sentenced petitioner to 600 months of imprisonment, to be followed by four years of supervised release. Id. at A19-A20. The court of appeals affirmed. Id. at A1-A17.

1. Petitioner is a former member of the Bloods street gang in Buffalo, New York. Presentence Investigation Report (PSR) ¶¶ 7-8, 10. From 2003 to 2005, petitioner and his co-defendants participated in a drug-dealing enterprise and robbed drug dealers.

PSR ¶ 13; Pet. App. A2. In March 2004, petitioner and a co-defendant attempted to rob a "significant marijuana dealer" by entering an apartment, ordering the apartment's occupants -- including a person in a wheelchair -- to the floor at gunpoint, and then binding them with duct tape. PSR ¶ 16. Police identified petitioner's DNA from a cigar he left behind at the scene. Ibid. In February 2005, petitioner and his co-defendants kidnapped a drug dealer at gunpoint and drove him to an abandoned building. PSR ¶ 17. Fearing death, the drug dealer arranged for an associate to deliver two kilograms of cocaine, which petitioner and his co-defendants split, along with \$30,000. PSR ¶¶ 18-21. In April 2005, petitioner and a co-defendant robbed a marijuana dealer and fatally shot him in the back. PSR ¶¶ 26-34. Days later, petitioner killed a cocaine dealer whom he believed to be an FBI informant. PSR ¶¶ 35-46.

For those and other acts in support of a criminal enterprise, a federal grand jury in the Western District of New York charged petitioner with one count of racketeering, in violation of 18 U.S.C. 1962(c) and 1963(a); one count of conspiring to commit racketeering, in violation of 18 U.S.C. 1962(d) and 1963(a); one count of conspiring to distribute controlled substances and to possess controlled substances with the intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D), 846, and 851; two counts of possessing a firearm in furtherance of a drug-trafficking

crime, in violation of 18 U.S.C. 924(c)(1)(A)(i); one count of kidnapping in aid of racketeering, in violation of 18 U.S.C. 1959(a); three counts of conspiring and attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); one count of possessing and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii); two counts of murder in aid of racketeering, in violation of 18 U.S.C. 1959(a); two counts of using a firearm to commit murder during a crime of violence, in violation of 18 U.S.C. 924(j)(1); and one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Superseding Indictment 5-28.

2. Petitioner and his co-defendants were arraigned in September 2009. Pet. App. A34. During the next four years, they filed numerous pretrial motions, including motions seeking to bifurcate non-dispositive and dispositive motions, turn over discovery and related materials, institute a protective order, dismiss the indictment, suppress statements, exclude gunshot residue evidence, sever their trials, extend the time to file post-hearing briefing, and extend the time to file objections. Id. at A36-A49. Some motions were resolved by a magistrate judge, and petitioner, as well as the government, each appealed some of the magistrate judge's decisions to the district court. See, e.g., D. Ct. Doc. 125 (Oct. 21, 2011); D. Ct. Doc. 231 (July 22, 2013); D. Ct. Doc. 317 (July 3, 2014). In October 2013, the government

objected to petitioner's motion to return the case to the magistrate judge, D. Ct. Doc. 244 (Oct. 17, 2013); D. Ct. Doc. 246 (Oct. 25, 2013), on the ground that the case had been pending for four years and that further delay would be unfair to the defendants, D. Ct. Doc. 257, at 3 (Jan. 23, 2014).

In June 2014, the government filed a motion to schedule a trial date, explaining that "it is incumbent upon the government to make diligent efforts to advance this case to trial as expeditiously as possible." D. Ct. Doc. 309, at 4 (June 19, 2014). The district court scheduled trial for January 2015. 09-cr-329 Docket entry (July 8, 2014). But days before the trial, petitioner moved to postpone it. D. Ct. Doc. 401 (Dec. 31, 2014); 09-cr-329 Docket entry (Jan. 7, 2015). Over the government's objection, D. Ct. Doc. 402 (Dec. 31, 2014), the court granted the motion and rescheduled trial for May 2015, 09-cr-329 Docket entry (Jan. 7, 2015); D. Ct. Doc. 439, at 1 (Jan. 14, 2015). The district court subsequently rescheduled the trial once more, again at petitioner's request and over the government's objection, for January 2016. 09-cr-329 Docket entry (May 22, 2015). At no time did petitioner "expressly invoke his speedy trial rights before the district court." Pet. App. A13.

The trial began in January 2016 and concluded in late February. Pet. App. A70-A78. The jury found petitioner guilty on the counts that charged racketeering, racketeering conspiracy,

drug-trafficking conspiracy, kidnapping in aid of racketeering, and possessing a firearm in furtherance of a crime of violence, as well as one of the counts of conspiring or attempting to commit Hobbs Act robbery and one of the counts of possessing a firearm in furtherance of a drug-trafficking crime. Id. at A18. The jury acquitted petitioner on one count of murder in aid of racketeering and failed to reach a unanimous verdict on the remaining counts. Id. at A4; see PSR ¶ 2. The district court sentenced petitioner to 600 months of imprisonment, consisting of concurrent terms of 240 months of imprisonment on the racketeering, racketeering conspiracy, kidnapping in aid of racketeering, and Hobbs Act robbery counts; a concurrent term of 120 months of imprisonment on the drug-trafficking conspiracy count; a consecutive term of 60 months of imprisonment on the Section 924(c) count that charged possession of a firearm in furtherance of a drug-trafficking crime; and a consecutive term of 300 months of imprisonment on the Section 924(c) count that charged possession of a firearm in furtherance of a crime of violence. Pet. App. A19.

3. The court of appeals affirmed, addressing some of petitioner's claims in a published opinion (Pet. App. A1-A10) and others in an unpublished summary order (id. at A11-A17).

a. In its published opinion, the court of appeals rejected petitioner's claim, raised for the first time on appeal, that his Section 924(c) conviction for possessing a firearm in furtherance

of a crime of violence was invalid because none of the predicate offenses on which that count was based -- conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, and kidnapping in aid of racketeering -- qualified as a "crime of violence." Pet. App. A5. The court acknowledged that, under this Court's intervening decision in United States v. Davis, 139 S. Ct. 2319 (2019) and the Second Circuit's decision in United States v. Barrett, 937 F.3d 126 (2019), conspiracy to commit Hobbs Act robbery did not qualify as a crime of violence. Pet. App. A5. The court also noted that, following those decisions, both parties "take the position that kidnapping in aid of racketeering is no longer a crime of violence under those precedents." Ibid.

The court of appeals determined, however, that petitioner had not satisfied his burden of demonstrating plain error in light of Second Circuit precedent establishing that attempted Hobbs Act robbery is a crime of violence. Pet. App. A5-A6 (citing United States v. McCoy, 995 F.3d 32, 55 (2d Cir. 2021), petitions for cert. pending, No. 21-447 (filed Sept. 15, 2021), and No. 21-6490 (filed Nov. 24, 2021)). Although the jury did not specify which alternative predicate offense it relied on in finding petitioner guilty under Section 924(c), the court found that petitioner could not show that he was prejudiced, given the "strong evidence" that he possessed a gun in furtherance of an attempted Hobbs Act robbery. Id. at A7.

b. In its unpublished summary order, the court of appeals rejected petitioner's claim, raised for the first time on appeal, "that the approximately six-year interval" between his indictment and the start of his trial violated his speedy trial rights under the Sixth Amendment. Pet. App. A13; see id. at A13-A14. After considering the speedy-trial factors set forth in Barker v. Wingo, 407 U.S. 514 (1972) -- the length of the delay, the reason for the delay, assertion of the right by the defendant, and prejudice to the defendant -- the court found that the six-year delay between petitioner's arraignment and trial did not violate his speedy trial rights. Pet. App. A13-A14.

As to the first Barker factor, the government conceded that the length of the delay was presumptively prejudicial. See Pet. App. A13. But the court of appeals found that the other three Barker factors all weighed against finding a speedy-trial violation. Id. at A13-A14. The court observed that "[a] significant portion, if not a substantial majority, of the delay was attributable to" petitioner and his co-defendants, and that petitioner never expressly invoked his speedy trial right. Id. at A13. And the court explained that petitioner had not suffered prejudice from the delay, because he was serving an unrelated sentence for approximately half of his pre-trial incarceration, never argued he suffered anxiety as a result of the delay, and in fact benefited from the delay when an important government witness

died prior to trial. Id. at A14. The court found no prejudice from his original attorney's removal during the six-year period, noting that the attorney was ineligible to practice and was removed for reasons unrelated to the delay. Ibid.

ARGUMENT

Petitioner contends (Pet. 7-15) that attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), is not a "crime of violence" under 18 U.S.C. 924(c) (3). On July 2, 2021, this Court granted the petition for a writ of certiorari in United States v. Taylor, No. 20-1459, to consider that issue (argued Dec. 7, 2021). 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 separate contention (Pet. 15-26) that the court of appeals erred in denying his Speedy Trial Clause claim in its unpublished summary order does not warrant certiorari. Pet. App. A13-A14. Petitioner acknowledges (Pet. 15) that the court correctly identified the governing factors set forth in Barker v. Wingo, 407 U.S. 514 (1972), and that "misapplication of a properly stated rule of law will rarely warrant certiorari." See Sup. Ct. R. 10. Petitioner suggests (Pet. 15) that the "unique nature of the speedy trial right" supports review here, but that contention lacks merit. Application of the Barker factors to case-specific

facts "ordinarily would not prompt this Court's review," Vermont v. Brillon, 556 U.S. 81, 91 (2009), and the court of appeals properly applied those factors to reject petitioner's Speedy Trial Clause claim in the particular circumstances of this case.

Although the government and the court both recognized that the length of the pretrial delay (the first Barker factor) was presumptively prejudicial, Pet. App. A13, the court correctly determined that the other Barker factors all weigh against petitioner, id. at A14. The delay was largely, if not entirely, attributable to the flurry of pretrial motions filed by petitioner and his co-defendant, Pet. App. A13; petitioner's attempt (Pet. 17-22) to blame the government for part of the delay overlooks that even when the government sought extensions, defense motions were still pending, Pet. App. A14. The government, moreover, repeatedly sought to bring the case to trial, but petitioner requested further postponements. See p. 5, supra. And contrary to petitioner's suggestion (Pet. 20-21), the replacement of his counsel was not attributable to the government, but instead to his attorney's ineligibility to practice law. Pet. App. A14.

The court of appeals also correctly found that petitioner never expressly invoked his speedy trial right (the third Barker factor). Pet. App. A13. Petitioner does not disagree. Cf. Pet. 22-23 (noting that petitioner filed a motion for bail release). Finally, the court correctly determined that petitioner was not

meaningfully prejudiced by the delay (the fourth Barker factor). Pet. App. A14. The court observed that petitioner was serving an unrelated sentence for three years and three months after his indictment in this case and never argued that he suffered "any particular anxiety" as a result of the delay. Ibid. Indeed, as the court explained, petitioner actually benefited from the delay because a government witness died prior to trial, "leaving the prosecution unable to directly connect" petitioner with one of the charged offenses. Ibid.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in United States v. Taylor, No. 20-1459, as to petitioner's claim that attempted Hobbs Act robbery is not a crime of violence under 18 U.S.C. 924(c)(3). The petition should be denied as to petitioner's Speedy Trial Clause claim.

Respectfully submitted.

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