

No. 21-6605

IN THE SUPREME COURT OF THE UNITED STATES

JERMAINE JACKSON, 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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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).

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OPINION BELOW

The summary order of the court of appeals (Pet. App. A1-A7) is not published in the Federal Reporter but is reprinted at 854 Fed. Appx. 403.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2021. A petition for rehearing en banc was denied on July 13, 2021 (Pet. App. C1). The petition for a writ of certiorari was filed on December 10, 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 New York, petitioner was convicted of murder resulting from the use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(j)(1). Pet. App. B1. He was sentenced to 365 months of imprisonment, to be followed by five years of supervised release. Id. at B2-B3. The court of appeals dismissed his appeal. Id. at A1-A7.

1. Over eight days in December 2016, petitioner, with the assistance of an accomplice, held up two businesses at gunpoint. See Pet. App. A2-A3. On December 9, 2016, petitioner and his accomplice, wearing masks and brandishing firearms, entered a deli in Queens Village, New York, and demanded money from the cashier. Presentence Investigation Report (PSR) ¶ 2. They removed \$2000 from the cash register, stole a cell phone from a store employee and \$120 from a customer, and fled in petitioner's car. Ibid. One week later, the pair, again masked and brandishing firearms, entered a convenience store in Valley Stream, New York, and again demanded money. Id. ¶ 3. When confronted by Edwin Lopez, an unarmed store employee, petitioner shot five rounds at Lopez, striking him multiple times and killing him. Ibid. Following the confrontation, petitioner and his accomplice fled the scene without completing the robbery. Ibid.

2. A federal grand jury in the Eastern District of New York charged petitioner with two counts of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) (Counts 1 and 4); two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) (Counts 2 and 5); one count of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i) and (ii) (Count 3); one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i), (ii), and (iii) (Count 6); and one count of murder resulting from the use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(j)(1) (Count 7). Indictment 1-5.

Petitioner pleaded guilty to the Section 924(j)(1) charge in Count 7, which was premised on the murder of Edwin Lopez during the attempted robbery of the convenience store in Valley Stream, New York. Pet. App. A3. In satisfaction of its obligations under the plea agreement, the government moved to dismiss the remaining counts against petitioner, and the district court granted that request. Ibid. The plea agreement also included an appeal waiver that bound petitioner as long as the custodial sentence imposed by the district court did not exceed 365 months. Ibid. The district court imposed a sentence of 365 months of imprisonment, to be followed by five years of supervised release. Id. at B2-B3.

3. The court of appeals dismissed petitioner's appeal based on the appeal waiver in the plea agreement. Pet. App. A1-A7.

Petitioner contended on appeal that (1) the magistrate judge had erred at his plea colloquy by failing to inform him that completed Hobbs Act robbery requires the unlawful taking of property, which did not occur during the Valley Stream incident; and that (2) in the absence of a valid completed Hobbs Act robbery charge, his Section 924(j)(1) conviction must have rested on conspiracy to commit Hobbs Act robbery, which is not a valid "crime of violence." See Pet. App. A4-A5. The court of appeals reviewed those claims for plain error, because petitioner had failed to raise them in the district court, and rejected both. See id. at A4. The court found no error in the plea colloquy, observing that "the magistrate judge informed [petitioner] of each element" of the charge to which he pleaded guilty -- which was "a violation of 18 U.S.C. § 924(j)(1), not to Hobbs Act robbery" -- and "ensured that [petitioner] understood the court's explanations." Id. at A5.

The court of appeals then reasoned that "even assuming that [Federal] Rule [of Criminal Procedure] 11 requires a magistrate judge to explain every material fact that the government would need to prove to secure a conviction on the count to which a defendant pleads," petitioner could not obtain relief. Pet. App.

A5; see id. at A5-A6. The court observed that petitioner had murdered Lopez during an attempted Hobbs Act robbery, and that, under circuit precedent, "attempted Hobbs Act robbery" continues to "qualif[y] as a 'crime of violence'" even though conspiracy to commit robbery does not. Id. at A6 (citing United States v. McCoy, 995 F.3d 32, 57 (2d Cir. 2021), petitions for cert. pending, No. 21-447 (filed Sept. 15, 2021), and No. 21-6490 (filed Nov. 24, 2021)). The court also concluded that petitioner could not satisfy the remaining requirements for plain-error relief. See id. at A6-A7.

The court of appeals subsequently denied petitioner's petition for rehearing en banc. Pet. App. C1.

ARGUMENT

Petitioner contends (Pet. 8-18) 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 (argued Dec. 7, 2021), to consider that issue. Although the court of appeals in this case dismissed petitioner's appeal based on his appeal waiver, its reasons for doing so were informed by circuit precedent recognizing attempted Hobbs Act robbery as a crime of violence for purposes of Section 924(c)(3). Because the Court's decision in Taylor may therefore 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.*

Respectfully submitted.

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