

No. 21-6748

IN THE SUPREME COURT OF THE UNITED STATES

JOSE LUIS WONG, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 9-38) that he is entitled to collaterally undo his conviction for carrying or possessing a firearm in connection with a crime of violence or a drug-trafficking crime, in violation of 18 U.S.C. 924(c), based on a claim that the conviction might rest on the predicate offense of either attempted Hobbs Act robbery or conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), both of which petitioner contends are invalid predicates. This Court is currently considering, in United States v. Taylor, No. 20-1459 (argued Dec. 7, 2021), whether attempted Hobbs Act robbery is a valid predicate "crime of violence" under 18 U.S.C. 924(c)(3).

Because petitioner would not be entitled to relief regardless of the outcome in Taylor, however, the petition for a writ of certiorari need not be held pending Taylor and should instead be denied.

1. Petitioner conspired with others to steal drugs from a fictional stash house in a sting operation organized by law enforcement. See Pet. App. A3, at 2-4. Police arrested petitioner on the day of the planned robbery -- after petitioner convened with the other planned participants at an arranged meeting spot -- and retrieved a shortened rifle, two silencers, and a magazine clip of ammunition from petitioner's vehicle. Ibid.

A federal grand jury charged petitioner with conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); conspiring to possess with intent to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. 846, 841(a)(1), and (b)(1)(A)(ii); attempted possession with intent to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. 846, 841(a)(1) and (b)(1)(A)(ii); carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a crime of violence or a drug-trafficking crime (the Hobbs Act and drug-trafficking crimes charged in the preceding counts), in violation of 18 U.S.C. 924(c)(1)(A); possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1); and possessing a firearm with an

obliterated serial number, in violation of 18 U.S.C. 922(k) and 924(a)(1)(B). Indictment 1-5; see Pet. App. A3, at 4-5.

At trial, the district court instructed the jury that it could find petitioner guilty of violating Section 924(c) if it found that petitioner "committed a drug trafficking offense or crime of violence," and that during the commission of that crime, petitioner "knowingly carried a firearm in relation to" or "possessed the firearm in furtherance of that drug trafficking crime or crime of violence." Pet. App. A3, at 5 (quoting jury instructions). The jury found petitioner guilty on all counts, and the district court sentenced him to 600 months of imprisonment. 386 Fed. Appx. 927, 933. The court of appeals affirmed. Id. at 946.

After the district court denied a motion by petitioner to correct, set aside, or vacate his sentence under 28 U.S.C. 2255, the court of appeals authorized petitioner to file a second or successive Section 2255 motion challenging his Section 924(c) conviction in light of this Court's decision in United States v. Davis, 139 S. Ct. 2319 (2019). See Pet. App. A3, at 6. In Davis, this Court held that the definition of "crime of violence" in Section 924(c)(3)(B) is unconstitutionally vague. See 139 S. Ct. at 2336. Petitioner argued that after Davis, conspiracy to commit Hobbs Act robbery no longer qualified as a "crime of violence" under Section 924(c)(3) and that his Section 924(c)(3) conviction was accordingly invalid. See Pet. App. A3, at 6-9.

The district court denied the motion. Pet. App. A3, at 6-10. Applying Granda v. United States, 990 F.3d 1272 (11th Cir. 2021), petition for cert. pending, No. 21-6171 (filed Nov. 1, 2021), the court observed that petitioner had procedurally defaulted his claim and found that he had not demonstrated either cause and prejudice or actual innocence, as required to excuse that default. See Pet. App. A3, at 6-8. The court explained that petitioner could not show cause for failing to raise his claim at trial or on direct appeal, because a vagueness challenge to Section 924(c) (3) (B) was not so novel that its legal basis was not reasonably available to his counsel. Id. at 7. And the court additionally found that petitioner also could not show prejudice because his conviction necessarily rested on a verdict reflecting a jury finding that his firearm conduct was connected to "drug trafficking crime[s]" -- namely, conspiring to possess cocaine with the intent to distribute and attempting to possess cocaine with the intent to distribute -- that undisputedly remained valid predicate offenses. Id. at 7-8.

The district court observed that the four predicates charged in the indictment and sent to the jury -- conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, conspiring to possess cocaine with the intent to distribute, and attempting to possess cocaine with the intent to distribute -- were "inextricably intertwined" and "rested on the same operative facts and the same set of events." Pet. App. A3, at 7-8. And it

accordingly recognized that the jury had found beyond a reasonable doubt that petitioner "conspired and attempted to rob the stash house in order to possess and distribute the cocaine it held," and could not have concluded that petitioner possessed or carried a firearm in connection with conspiring to commit Hobbs Act robbery but not in connection with conspiring and attempting to possess cocaine. Id. at 7 (citation omitted); see id. at 7-8.

The district court further explained that, for those same reasons, petitioner could not show that he was actually innocent of violating Section 924(c). Pet. App. A3, at 8. And the court also determined that petitioner's claim failed on the merits because any error in instructing the jury on both valid and invalid theories of guilt was harmless. Id. at 8-9.

The district court and the court of appeals denied petitioner's requests for a certificate of appealability. Pet. App. A3, at 9-10; id. A1, at 1.

2. Petitioner contends (Pet. 12-38) that this Court should review the denial of a certificate of appealability by the court of appeals, the determination by the district court that petitioner could not show cause to overcome procedural default, and the determination by the district court that any error in instructing the jury on both valid and invalid theories of guilt was harmless. He alternatively requests (Pet. 7, 38) that this Court hold his petition pending the Court's decision in Taylor and the Court's

resolution of the petition for a writ of certiorari in Granda v. United States, No. 21-6171 (filed Nov. 1, 2021).

For the same reasons identified on pages 14 to 29 of the government's brief in opposition in Granda, supra (No. 21-6171) (Granda Opp.), the petition for a writ of certiorari should be denied.¹ Petitioner does not and cannot dispute that two of the predicates charged in the indictment and sent to the jury -- conspiring and attempting to possess cocaine with the intent to distribute -- qualify as "drug trafficking crime[s]" under Section 924(c)(2), and are therefore valid predicates under Section 924(c). And as the district court correctly recognized, the jury found beyond a reasonable doubt that petitioner's firearm conduct was in connection with those drug-trafficking crimes, as no reasonable probability exists that a jury on these facts determined that petitioner attempted or conspired to steal but did not attempt to possess the drugs that were the object of the planned theft. See Pet. App. A3, at 7-8.

Petitioner accordingly cannot demonstrate cause and prejudice to overcome the procedural default of his current claims, nor can he show that the claimed errors would not have been found harmless if raised on direct review. See Granda Opp. at 23-29. And because petitioner's claim fails regardless of whether attempted Hobbs Act

¹ We have served petitioner with a copy of the government's brief in opposition in Granda.

robbery is a valid predicate under Section 924(c), the petition need not be held pending the Court's decision in Taylor.²

Respectfully submitted.

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² The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.