

No. 17-7248

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL SHANE RAGLAND, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying a certificate of appealability on petitioner's claim that robbery and attempted robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), do not qualify as "crimes of violence" under 18 U.S.C. 924(c)(3).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1, at 1) is not published in the Federal Reporter but is available at 2017 WL 6811897. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 434 Fed. Appx. 863. The opinion of the district court (Pet. App. A2, at 1-7) is not published in the Federal Supplement but is available at 2017 WL 1831673.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2017. The petition for a writ of certiorari was filed on

December 26, 2017. 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 Southern District of Florida, petitioner was convicted of conspiracy to commit robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a); two counts of attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); one count of carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i); seven counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and seven counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Am. Judgment 1. The district court sentenced petitioner to 2352 months of imprisonment, to be followed by three years of supervised release. Id. at 3-4. The court of appeals affirmed. 434 Fed. Appx. 863. In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied petitioner's motion and denied his request for a certificate of appealability (COA). Pet. App. A2, at 1-7. The court of appeals likewise denied a COA. Pet. App. A1, at 1.

1. In 2007 and 2008, petitioner and several accomplices committed a string of armed robberies of gas stations and convenience stores, and attempted armed robberies of two other businesses, in southern Florida. Presentence Investigation Report (PSR) ¶¶ 4-34, 39. Petitioner entered each business and pointed

firearms at employees during the robberies. Ibid. A federal grand jury charged petitioner with conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); two counts of attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); one count of carrying a firearm during and in relation to a crime of violence (one of the attempted Hobbs Act robberies), in violation of 18 U.S.C. 924(c)(1)(A)(i); nine counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and nine counts of brandishing a firearm during and in relation to crimes of violence (the Hobbs Act robberies), in violation of 18 U.S.C. 924(c)(1)(A)(ii). Superseding Indictment 1-14.

The government subsequently dismissed one of the Hobbs Act robbery counts and one of the Section 924(c) counts, and a jury acquitted petitioner on another Hobbs Act robbery count and a related Section 924(c) count. Am. Judgment 2. The jury found petitioner guilty on each of the remaining counts. Id. at 1. The district court sentenced petitioner to 2352 months of imprisonment, including concurrent 168-month terms on the Hobbs Act robbery, attempted Hobbs Act robbery, and Hobbs Act conspiracy counts; a statutory minimum consecutive term of 84 months on one of the Section 924(c) counts; and statutory minimum consecutive terms of 300 months on each of the remaining Section 924(c) counts. Id. at 3. The court of appeals affirmed. 434 Fed. Appx. 863.

2. In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. See 16-cv-14251 D. Ct. Doc. 1 (June 24,

2016) (2255 Mot.). Petitioner contended that his Section 924(c) convictions were unlawful on the theory that the "predicate offense of Hobbs Act [r]obbery does not qualify as a 'crime of violence'" under Section 924(c)(3). Id. at 15. That paragraph defines a "crime of violence" as a felony that either "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), or, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B). Petitioner argued that Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A) and that Section 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the "residual clause" of the definition of a "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness. 2255 Mot. 15-28.

A magistrate judge issued a report recommending that petitioner's motion be denied. Pet. App. A3, at 1-37. The magistrate judge noted that Eleventh Circuit precedent foreclosed petitioner's claim that Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A). Id. at 28-32 (citing In re Saint Fleur, 824 F.3d 1337 (11th Cir. 2016)). The magistrate judge further determined that attempted Hobbs Act robbery qualifies as an "attempted use * * * of physical force" under

Section 924(c)(3)(A), reasoning that “the attempt version of the offense” requires “the intent to use physical force” to rob a victim and “the taking of a substantial step toward committing the robbery.” Pet. App. A3, at 34-35.

The district court adopted the magistrate judge’s report and recommendation and denied petitioner’s motion. Pet. App. A2, at 1-7. The court stated that it “agree[d]” with the magistrate judge’s determination that Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A), id. at 4, but it did not specifically discuss attempted Hobbs Act robbery. The court also declined to issue a COA. Id. at 7.

4. The court of appeals summarily denied petitioner’s request for a COA. Pet. App. A1, at 1.

ARGUMENT

Petitioner contends (Pet. 9-21) that the court of appeals erred in denying a COA on his claim that robbery and attempted robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a), do not qualify as “crime[s] of violence” within the meaning of 18 U.S.C. 924(c)(3). The decision below is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The Hobbs Act defines robbery to require the “taking or obtaining” of personal property from another “by means of actual or threatened force, or violence, or fear of injury.” 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 filed in Garcia v. United States, cert. denied, No. 17-5704 (Jan. 8, 2018), Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. 924(c) (3) (A) because it “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” Ibid.; see Br. in Opp. at 7-10, Garcia, supra (No. 17-5704).^{*} Every court of appeals to consider the issue, including the Eleventh Circuit, has so held. Br. in Opp. at 8, Garcia, supra (No. 17-5704). And this Court has repeatedly denied review of that issue, see id. at 5 & n.1, including in Garcia, supra, and more recent cases. See, e.g., Chandler v. United States, cert. denied, No. 17-6415 (Mar. 19, 2018); Middleton v. United States, cert. denied, No. 17-6343 (Mar. 19, 2018); Jackson v. United States, cert. denied, No. 17-6247 (Feb. 20, 2018).

2. Petitioner asserts (Pet. 15-16) that the court of appeals erred in denying his request for a COA because, unlike completed Hobbs Act robbery, reasonable jurists may debate whether attempted Hobbs Act robbery is a “crime of violence” under Section 924(c) (3) (A). This Court recently denied review of that claim in the context of a petition for a writ of certiorari filed by one of petitioner’s co-defendants. See James v. United States, cert. denied, No. 17-6295 (Mar. 19, 2018). The same result is appropriate here.

^{*} We have served petitioner with a copy of the government’s brief in opposition in Garcia.

Numerous courts of appeals have held that an attempt to commit a crime that requires the use, attempted use, or threatened use of physical force is itself a “crime of violence” under Section 924(c)(3)(A) and similarly worded provisions. See Arellano Hernandez v. Lynch, 831 F.3d 1127, 1132 (9th Cir. 2016) (“The ‘attempt’ portion of Arellano Hernandez’s conviction does not alter our determination that the conviction is a crime of violence. We have ‘generally found attempts to commit crimes of violence, enumerated or not, to be themselves crimes of violence.’”) (citation omitted), cert. denied, 137 S. Ct. 2180 (2017); see also, e.g., United States v. Armour, 840 F.3d 904, 907-909 (7th Cir. 2016) (holding that attempted federal bank robbery is a “crime of violence” under Section 924(c)(3)(A)); United States v. McGuire, 706 F.3d 1333, 1337 (11th Cir.) (O’Connor, J.) (same for offense of attempting to “set[] fire to, damage[], destroy[] . . . or wreck[]” an aircraft with people on board) (brackets in original), cert. denied, 569 U.S. 912 (2013); cf. United States v. Alexander, 809 F.3d 1029, 1033 (8th Cir. 2016) (holding that attempted second-degree assault under Missouri law is a “violent felony” under the ACCA’s elements clause, 18 U.S.C. 924(e)(2)(B)(i)), cert. denied, 137 S. Ct. 1608 (2017).

As the Seventh Circuit has explained, “[a]n attempt conviction requires proof of intent to carry out all elements of the crime, including, for violent offenses, threats or use of violence,” as well as a “substantial step toward completion of the

crime.” Armour, 840 F.3d at 910 n.3. Although petitioner is correct (Pet. 16) that not every act constituting an attempt to commit Hobbs Act robbery must itself be violent, a person who takes a substantial step toward committing such an inherently violent offense is properly understood to have at least attempted or threatened the use of violent force within the meaning of Section 924(c) (3) (A) .

Petitioner identifies no conflict in the circuits on whether attempted Hobbs Act robbery is a crime of violence under Section 924(c) (3) (A) . Instead, he cites (Pet. 15, 18-20) a published order from the court below granting authorization to file a second or successive Section 2255 motion concerning whether attempted Hobbs Act robbery qualifies as a crime of violence under Section 924(c), see In re Gomez, 830 F.3d 1225, 1228 (11th Cir. 2016), and unpublished orders from that court granting COAs to review whether Hobbs Act robbery or attempted Hobbs Act robbery qualify as crimes of violence. None of those orders holds that attempted Hobbs Act robbery (or completed Hobbs Act robbery) is not a crime of violence under Section 924(c) (3) (A) . And in any event, an intracircuit conflict on that question would not merit this Court’s review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) (“It is primarily the task of a Court of Appeals to reconcile its internal difficulties.”).

Even if the question of whether attempted Hobbs Act robbery qualifies as a “crime of violence” under Section 924(c) (3) (A)

merited review, however, this case would not be an appropriate vehicle for addressing it. Only one of petitioner's Section 924(c) convictions is based on attempted Hobbs Act robbery, for which petitioner received a consecutive sentence of 300 months of imprisonment. See Superseding Indictment 9-10; Am. Judgment 3 (Count 16). Vacating that sentence would reduce petitioner's overall sentence from 2352 months (196 years) to 2052 months (171 years), which would still result in petitioner being imprisoned for life. Because a decision in petitioner's favor would have no practical effect on his term of incarceration, no reason exists to review his claim in the context of this case.

3. Petitioner separately asserts (Pet. 16-18) that the court of appeals should have granted a COA to consider whether aiding and abetting a Hobbs Act robbery is a "crime of violence" under 18 U.S.C. 924(c)(3)(A). In his Section 2255 motion, petitioner argued only that the substantive offense of Hobbs Act robbery does not categorically qualify as a crime of violence under Section 924(c)(3)(A). See 2255 Mot. 15-28. Petitioner first contended that he was convicted on an aiding-and-abetting theory in his motion for a COA in the court of appeals. Pet. C.A. COA Mot. 19-21. Because petitioner did not make that argument in the district court, appellate review would be limited to plain error. See United States v. Frady, 456 U.S. 152, 167 n.15 (1982) (noting that the plain-error standard limits appellate review of claims

that were not "brought to the attention of the district court" in post-conviction proceedings under Section 2255).

Petitioner cannot demonstrate error, plain or otherwise. The counts of the superseding indictment charging petitioner and his co-defendants with Hobbs Act robbery and attempted Hobbs Act robbery alleged that the defendants "did unlawfully take and obtain" property "from the person and presence" of employees of the businesses they robbed "by means of actual and threatened force, violence and fear of injury, immediate and future, to [the] employees." Superseding Indictment 2-14. Although those counts cited the aiding-and-abetting provision, 18 U.S.C. 2, that does not suggest any possibility that the offenses were not "crime[s] of violence" under Section 924(c)(3)(A). Even under an aiding-and-abetting theory, the government would still have had to prove that either petitioner or his confederates committed each of the elements of the underlying offense of Hobbs Act robbery and that petitioner was "punishable as a principal" for that offense because he took active and intentional steps to facilitate the crime. 18 U.S.C. 2(a); see Rosemond v. United States, 134 S. Ct. 1240, 1245, 1247 & n.6 (2014). The elements of the aiding-and-abetting offense are thus a superset of the elements of the substantive crime. If Hobbs Act robbery satisfies Section 924(c)(3)(B), then aiding and abetting that offense does as well.

In any event, the court of appeals correctly denied a COA to review petitioner's argument for plain error because he cannot

show that jurists of reason could debate whether the alleged error was “clear or obvious” under current law. Puckett v. United States, 556 U.S. 129, 135 (2009). Petitioner’s claim is foreclosed by circuit precedent. See In re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016) (“Because an aider and abettor is responsible for the acts of the principal as a matter of law, an aider and abettor of a Hobbs Act robbery necessarily commits all the elements of a principal Hobbs Act robbery.”). And petitioner identifies no disagreement among other courts of appeals on that issue. Cf. United States v. Tibbs, 685 Fed. Appx. 456, 465 (6th Cir.) (finding no plain error in classifying aiding and abetting Hobbs Act robbery as a crime of violence under Section 924(c)), cert. denied, 138 S. Ct. 209 (2017). This Court has previously denied petitions for writs of certiorari raising similar claims. See, e.g., Stephens v. United States, 138 S. Ct. 502 (2017) (No. 17-5186); Harris v. United States, 138 S. Ct. 355 (2017) (No. 16-9196). The same result is warranted here.

4. Petitioner contends (Pet. 18-20) that his claim is reasonably debatable for purposes of issuing a COA because the Eleventh Circuit first concluded that Hobbs Act robbery qualifies as a “crime of violence” under Section 924(c)(3)(A) in the context of denying an application to file a second-or-successive motion under Section 2255, see In re Saint Fleur, 824 F.3d 1337, 1340 (2016), and one of the judges who joined the unanimous decision in that case has since stated that she “may have been mistaken” in

doing so. Pet. 19 (citing Order, In re Garcia, No. 16-14187 (11th Cir. Jul. 27, 2016) (Martin, J., concurring)); see Pet. 20 (citing Order, Davenport v. United States, No. 16-15939 (11th Cir. Mar. 28, 2017) (Martin, J.) (granting COA to review whether Hobbs Act robbery is a crime of violence)). That contention is incorrect.

To obtain a COA, a defendant must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), and show that "jurists of reason" could debate whether his claim was properly denied or "deserve[s] encouragement to proceed further," Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). Given the uniform view of the courts of appeals that Hobbs Act robbery is properly classified as a crime of violence under Section 924(c)(3)(A), and binding Eleventh Circuit precedent agreeing with that determination, an expression of doubt by a single judge does not establish the "substantial showing" of a constitutional violation necessary to obtain a COA. 28 U.S.C. 2253(c)(2); see Tompkins v. Secretary, 557 F.3d 1257, 1261 (11th Cir.) ("[I]f a habeas petitioner's contention is foreclosed by a binding decision -- one from the Supreme Court or this Court that is on point -- the attempted appeal does not present a substantial question, because reasonable jurists will follow controlling law.") (citation and internal quotation marks omitted), cert. denied, 555 U.S. 1161 (2009).

5. Because the district court correctly determined that petitioner's Hobbs Act robbery and attempted Hobbs Act robbery

convictions qualify as “crime[s] of violence” under 18 U.S.C. 924(c) (3) (A), no reason exists to consider petitioner’s alternative argument (Pet. 9-13) that the court of appeals erred in denying a COA on his claim that 18 U.S.C. 924(c) (3) (B) is unconstitutionally vague. Nor does any reason exist to hold this petition for the decision in Sessions v. Dimaya, No. 15-1498 (reargued Oct. 2, 2017). Dimaya concerns the constitutionality of 18 U.S.C. 16(b), the language of which is similar to Section 924(c) (3) (B). But Dimaya presents no issue concerning a provision similar to Section 924(c) (3) (A), and thus the Court’s holding in Dimaya will not resolve any question that will affect the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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