No. 11-9037

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR SEASE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in rejecting petitioner's unpreserved challenges to the sufficiency of the evidence in support of his convictions of depriving individuals of their civil rights under color of law, in violation of 18 U.S.C. 242, and of conspiring to do the same, in violation of 18 U.S.C. 241.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 659 F.3d 519.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 2011. A petition for rehearing was denied on November 30, 2011. The petition for a writ of certiorari was filed on February 27, 2012. 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 Tennessee, petitioner, a former police officer, was convicted on multiple counts of a 51-count indictment. Petitioner was convicted of conspiring to violate civil rights, in violation of 18 U.S.C. 241; depriving individuals of civil rights under color of law, in violation of 18 U.S.C. 242; conspiring to possess with intent to distribute controlled substances, in violation of 21 U.S.C. 846; robbery and extortion interfering with interstate commerce, in violation of 18 U.S.C. 1951; possession with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 846; and using or carrying a firearm during and in relation to the commission of a crime of violence or drug trafficking crime, in violation of 18 U.S.C. 924(c). Pet. App. 3. He was sentenced to life imprisonment plus 255 years. Ibid. The court of appeals affirmed. Id. at 1-11.

1. Petitioner was a police officer in Memphis, Tennessee, before he was fired by the Memphis Police Department in late 2004. Pet. App. 2. His convictions stem from his role as the leader in a conspiracy to use his authority as a police officer, as well as the police power of some of his co-conspirators, to take for his own benefit drugs, large quantities of cash, and other property. Ibid.; Gov't C.A. Br. 4.

Petitioner's convictions are based on 14 separate incidents, most of which followed a basic plan of using police authority to steal drugs and money from drug dealers. Pet. App. 2. Under the plan, petitioner would typically arrange for a drug deal through a non-officer co-conspirator. Ibid. At the designated time, petitioner or a co-conspirator police officer would arrive at the scene of the drug deal, stop and search the participants, and then take anything of value found at the scene, such as the drugs and money involved in the deal. Ibid. Rather than turn in as evidence the drugs, money, and other property seized, petitioner and his co-conspirators would keep the fruits of the drug stops for themselves. Id. at 2, 7. When petitioner and his co-conspirators recovered drugs from the stops, they would either sell the drugs or use them to set up additional drug deals in which they robbed the participants. Gov't C.A. Br. 5. Petitioner and his co-conspirators often frankly revealed the criminal nature of their actions to their victims, telling them that they were being robbed rather than arrested. See, e.g., 1/23/09 Tr. 343-344, 349; 1/27/09 Tr. 836-837. To disguise his conduct from his police department superiors and other authorities, petitioner, among other things, failed to create records of the drug stops, failed to notify police dispatchers of the stops as required by police procedure, made stops outside of his precinct, failed in most instances to arrest the persons he found in possession of drugs, and failed to inform

his superiors of the quantities of drugs and money seized. Pet. App. 2, 7; 1/22/09 Tr. 246-247, 264-265.

The robberies undertaken by petitioner and his co-conspirators yielded significant quantities of drugs and money. For example, on April 10, 2004, petitioner, who was armed and in a marked police car, stopped a car because one of its occupants had previously agreed to buy one-and-a-half kilograms of cocaine from one of petitioner's co-conspirators. Petitioner took money from both men in the car, as well as a safe located in the car containing over $34,000. Petitioner then released the two men. After one of the men noticed the safe was missing and accused petitioner of stealing, petitioner pulled his gun halfway out of its holster and ordered the men to leave immediately. See Gov't C.A. Br. 12-14; 1/27/09 Tr. 838-839. On another occasion on July 21, 2005 -- after petitioner had been terminated by the police department -- one of petitioner's co-conspirators made a traffic stop of a vehicle that he knew was delivering cocaine. He took one kilogram of cocaine, $1000 in cash, a watch worth approximately $15,000, and a cell phone from the vehicle's occupant, whom he then released. Petitioner and his co-conspirators divided up the cocaine. They also successfully extorted an additional $9500 from the same individual using a false promise to return the cocaine and the watch. See Presentence Investigation Report (PSR) para. 27; 1/23/09 Tr. 484-485, 488, 490-495. In September 2005, petitioner

and his co-conspirators executed their biggest heist, arranging and then intercepting a drug transaction involving four kilograms of cocaine. After obtaining the drugs, petitioner and his co-conspirators kidnapped the two men transporting the drugs and held them hostage in an unsuccessful effort to extort a ransom or obtain more drugs. See Gov't C.A. Br. 16-19.

2. On September 16, 2008, a grand jury returned a 51-count superseding indictment charging petitioner with, as is relevant here, one count of conspiracy to violate civil rights, in violation of 18 U.S.C. 241; one count of conspiracy to possess with intent to distribute controlled substances, in violation of 21 U.S.C. 846; 12 counts of robbery and extortion interfering with interstate commerce, in violation of 18 U.S.C. 1951; 11 counts of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 846, and 18 U.S.C. 2; 12 counts of deprivation of civil rights under color of law, in violation of 18 U.S.C. 242 and 18 U.S.C. 2; and 13 counts of carrying a firearm during and in relation to the commission of a crime of violence or drug trafficking crime, in violation of 18 U.S.C. 924(c) and 18 U.S.C. 2. Gov't C.A. Br. 3. With respect to the Section 241 charge, the indictment alleged that petitioner conspired to deprive individuals of their right under the Fourth Amendment to be free from unreasonable searches and seizures, as well as of their right under the Fourteenth Amendment not to be deprived of property

without due process of law. See Second Superseding Indictment para. 5. The Section 242 charges alleged specific instances where petitioner deprived others of these rights. Id. Counts 26-35.

At the close of the government's case-in-chief, petitioner moved for a judgement of acquittal under Federal Rule of Criminal Procedure 29(a). His motion was made "in general terms without reference to the Fourth Amendment violations." Pet. App. 5. Petitioner did not renew his motion following the government's rebuttal witnesses. Ibid. Petitioner also did not object to the district court's jury instruction that a search or seizure is unreasonable under the Fourth Amendment if it lacks a legitimate law enforcement purpose, such as when money, drugs, or other personal property is seized solely for an officer's personal enrichment. See Gov't C.A. Br. 19-20, 23; 2/5/09 Tr. 1812-1814.

The jury convicted petitioner on 44 of the 51 counts. Pet. App. 1-2; Gov't C.A. Br. 3. Relevant to this petition, the jury convicted petitioner on the Section 241 conspiracy count and on 11 of the 12 Section 242 counts. Pet. App. 2.[1] The district

[1] The jury made specific findings for each of these counts. With respect to the Section 241 count, the jury found that petitioner conspired to deprive others of their rights under the Fourth Amendment and the Due Process Clause, and it also found that petitioner had kidnapped or attempted to kidnap three individuals to further the objects of the conspiracy. With respect to the Section 242 counts of conviction, the jury found that petitioner deprived others of their Fourth Amendment and Due Process Clause rights on seven of the counts. Petitioner was also found guilty of willfully violating Fourth Amendment rights only on three of the counts and of willfully violating due process rights only on one count. In addition, the jury found petitioner guilty of kidnapping

court sentenced petitioner to life imprisonment plus 255 years. Pet. App. 3.[2]

3. On appeal, petitioner argued that the evidence presented at trial was insufficient to support any of his convictions. Pet. App. 2. Specifically, petitioner contended that he had not violated the rights of anyone during the charged incidents because, regardless of his subjective motivation, he had probable cause to arrest the drug dealers and to seize their drugs and money. Ibid.; Pet. C.A. Br. 17. The court of appeals affirmed petitioner's convictions. Pet. App. 1-11.

As an initial matter, the court of appeals found that petitioner "did not preserve a sufficiency of the evidence issue for appeal." Pet. App. 5. The court held that by failing to renew his motion for a judgment of acquittal following the government's rebuttal witnesses, petitioner "waive[d] * * * the objections to the sufficiency of the evidence." Ibid. Accordingly, the court of appeals stated that petitioner's sufficiency challenges "must be rejected unless the convictions represent a manifest miscarriage of justice." Ibid. (internal quotation marks omitted).

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or attempted kidnapping on two of the counts. See Verdict Form 1-2, 7-15.

[2] The sentence of 255 years consecutive to the sentence of life imprisonment was required by petitioner's convictions on 11 counts of carrying a firearm during and in relation to the commission of a crime of violence or drug trafficking crime. See PSR para. 157; 18 U.S.C. 924(c)(1)(A)(i) and (C)(i).

Turning to the merits of petitioner's challenges, the court of appeals concluded that petitioner's convictions were supported by sufficient evidence "under any standard." Pet. App. 5. In so holding, the court rejected petitioner's argument that his conduct was constitutional under Whren v. United States, 517 U.S. 806 (1996), because petitioner had probable cause to make the stops given that he had generally arranged the drug deals with the individuals who were stopped. See Pet. App. 6-10.

The court of appeals recognized that under Whren, when an officer is engaged in "bona fide law enforcement activities," such as policing traffic laws or looking for evidence of drug activity, the officer's subjective motivation does not affect whether a search or seizure supported by the requisite degree of individualized suspicion is reasonable under the Fourth Amendment. See Pet. App. 6-7. But the court distinguished Whren, explaining that unlike the officers in that case and other cases applying the same rule, petitioner and his co-conspirators engaged in "inherently improper" conduct -- "using the appearance of law enforcement activities" to further a criminal conspiracy -- that was objectively unrelated to any legitimate law enforcement purpose. Pet. App. 7. With respect to such officers, whose conduct was "thoroughly and objectively illegal from start to finish," the court reasoned that the balancing of interests underlying the holding in Whren did not apply because imposing

liability did not require courts to engage in "post hoc analysis of officer motivations" about "snap" law-enforcement decisions. Ibid. Accordingly, the court of appeals held that "where, as here, there is clear evidence that the officers were not engaged in bona fide law enforcement activities, but instead acted with a corrupt, personal, and pecuniary interest, the officers violate the civil rights of those that are stopped, searched, or have their property seized." Id. at 10. Based on that holding, the court concluded that petitioner "deprived those that he targeted of their constitutional rights" and that, as a result, his convictions on the Sections 241 and 242 counts were supported by sufficient evidence. Ibid.

The court of appeals also held that petitioner's convictions on non-civil rights counts were supported by sufficient evidence. Pet. App. 10-11. Noting that petitioner's arguments as to these counts were "derivative" of his challenge to the Section 241 and Section 242 convictions (id. at 10), the court concluded that petitioner's asserted right to make the traffic stops at issue did not mitigate the illegality of (1) petitioner's possession of controlled substances with an intent to distribute for purposes unrelated to law enforcement; (2) his disruption of interstate commerce by robbing drug dealers; or (3) his use of a firearm

during and in relation to the commission of drug trafficking offenses. Id. at 10-11.[3]

ARGUMENT

Petitioner renews (Pet. 9-18) his contention that the evidence was insufficient to support his convictions under 18 U.S.C. 241 and 242 for depriving others of constitutional rights, and conspiring to do the same, by robbing drug dealers under the cloak of his police authority. Further review by this Court of petitioner's unpreserved sufficiency of the evidence claim is not warranted.

1. Section 242 "make[s] it criminal to act (1) 'willfully' and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States." United States v. Lanier, 520 U.S. 259, 264 (1997). The provision's "companion conspiracy statute," Section 241, criminalizes "conspiracies to prevent 'the free exercise or enjoyment of any right or privilege secured to [any person] by the Constitution or laws of the United States.'" Id. at 265 (quoting 18 U.S.C. 241). These two laws "incorporate constitutional law by reference" into the scope of conduct that they prohibit. Ibid. Individuals may be held criminally liable under Sections 241 or 242 when they violate (or conspire to violate) rights "fairly warned of," that have been "'made specific' by the time of the charged conduct." Id. at 267

[3] Petitioner does not challenge the court of appeals' affirmance of these convictions in his petition for a writ of certiorari.

(quoting Screws v. United States, 325 U.S. 91, 105 (1945)); see also United States v. Kozminski, 487 U.S. 931, 941 (1988).

2. Petitioner contends (Pet. 9) that the evidence was insufficient to support his convictions for violating, and conspiring to violate, civil rights under Sections 241 and 242 because the government failed to show that he violated anyone's right to be free from unreasonable searches and seizures or to be free from the deprivation of property without due process. Ordinarily, to prevail on a challenge to the sufficiency of the evidence, a defendant must demonstrate that, viewing the evidence in the light most favorable to the government, no rational factfinder could have found the disputed element beyond a reasonable doubt. See, e.g., Jackson v. Virginia, 443 U.S. 307, 319 (1979). In this case, the court of appeals found that petitioner did not preserve his sufficiency of the evidence objection because he failed to renew his motion for a judgment of acquittal at the close of the evidence. Pet. App. 5.

Because of that forfeiture, the court below stated that petitioner's unpreserved sufficiency challenge "must be rejected unless the convictions represent a 'manifest miscarriage of justice.'" Pet. App. 5 (quoting United States v. Damra, 621 F.3d 474, 494 (6th Cir. 2010), cert. denied 131 S. Ct. 2930 (2011)); see also United States v. Wade, 266 F.3d 574, 579 (6th Cir. 2001) (explaining that where the defendant did not preserve a sufficiency

challenge by moving for a judgment of acquittal, the court will reverse "only upon finding plain error resulting in a manifest miscarriage of justice" (internal quotation marks omitted)), cert. denied 535 U.S. 964 (2002); United States v. Rea, 621 F.3d 595, 602 (7th Cir. 2010) (describing "[m]anifest miscarriage of justice" review of a sufficiency challenge under the plain-error standard as "perhaps the most demanding standard of appellate review" under which reversal "is warranted only if the record is devoid of evidence pointing to guilt, or if the evidence [of guilt] on a key element was so tenuous that a conviction would be shocking" (internal quotation marks omitted)).[4]

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[4] The courts of appeals have consistently applied a plain-error (see Fed. R. Crim. P. 52(b)) or similarly stringent standard to forfeited sufficiency of the evidence claims. See, e.g., United States v. Delgado, 672 F.3d 320, 330-332 (5th Cir. 2012) (en banc), petition for cert. pending (filed May 22, 2012) (No. 11-10492); United States v. Cooper, 654 F.3d 1104, 1117 (10th Cir. 2011); United States v. Barrington, 648 F.3d 1178, 1192 (11th Cir. 2011), cert. denied, 132 S. Ct. 1066 (2012); United States v. Rendelman, 641 F.3d 36, 43 (4th Cir. 2011), cert. denied 132 S. Ct. 1712 (2012); United States v. Kennedy, 638 F.3d 159, 168 (3d Cir. 2011), cert. denied, 132 S. Ct. 977 (2012); United States v. Bush, 626 F.3d 527, 533 (9th Cir. 2010); United States v. Anderson, 570 F.3d 1025, 1029-1030 (8th Cir. 2009). Although some courts of appeals have indicated that plain error review has less practical impact with respect to sufficiency challenges because the last two prongs of plain-error review will be satisfied whenever the government fails to prove an essential element of the crime of conviction, see, e.g., United States v. Flyer, 633 F.3d 911, 917 (9th Cir. 2011), other courts have indicated that the requirement that an error "be plain, clear, or obvious * * * imposes a greater burden on forfeited claims." Delgado, 672 F.3d at 332; see United States v. Dinga, 609 F.3d 904, 907 (7th Cir. 2010) (indicating that the plain error standard applies an "additional hurdle" beyond the deferential standard of review for sufficiency of the evidence claims).

Petitioner does not attempt to meet the normal standard for plain-error review that it was "clear or obvious" that the record did not support his convictions under Sections 241 and 242. See United States v. Olano, 507 U.S. 725, 731 (1993). In any event, petitioner's failure to preserve his sufficiency claim, and any implications of that forfeiture for the standard of review, makes this case a poor vehicle to address the arguments his petition raises.

a. Petitioner's conviction under Section 241 was supported by jury findings that he conspired to violate both Fourth Amendment and due process rights (see note 1, supra), and either finding would have been sufficient to support conviction. Similarly, all but four of the Section 242 counts were supported by jury findings that petitioner violated both sets of rights. Ibid. Therefore, with the exception of the three Section 242 counts that were premised only on Fourth Amendment violations and the one count that was supported only by a due process violation, petitioner must show that the record does not support guilt on either theory.

i. Petitioner cites no authority from this Court, or from any lower court, holding that where an officer has probable cause to make a stop he cannot violate the Fourth Amendment by using his police authority to detain individuals and then seize their property for his own use. In the small number of cases where the question has been presented, courts have instead rejected arguments

like the one advanced by petitioner and held that criminal liability could be established under 18 U.S.C. 241 or 242 where the defendant officer effected a search or seizure for his own personal benefit and without any legitimate law enforcement interest. See Pet. App. 9-10 (discussing United States v. Parker, 165 F. Supp. 2d 431, 453-454 (W.D.N.Y. 2001), aff'd United States v. Ferby, 108 Fed. Appx. 676 (2d Cir. 2004), cert. denied, 555 U.S. 1099 (2008), and United States v. Contreras, 134 F. Supp. 2d 820, 825 (S.D. Tex. 2000)).

In contending generally that no Fourth Amendment violations were established because he had probable cause to make arrests because of his knowledge of planned drug transactions (Pet. 9-10), petitioner does not account for the nature of the searches and seizures he and his co-conspirators undertook pursuant to their conspiracy to steal money, property, and drugs. Petitioner and his co-conspirators seized and then kept drugs and personal property -- including property that had no clear connection to narcotics trafficking, such as an expensive watch (PSR para. 27; 1/23/09 Tr. 484-485) -- without any objectively valid law enforcement interest. Cf. United States v. Place, 462 U.S. 696, 709-710 (1983) (explaining that the length of time during which property is seized and whether the police "diligently pursue[d]" an investigation of the property informs whether the seizure is reasonable under the Fourth Amendment). By converting these individuals' property for

personal use without any objective basis for the seizure, petitioner and his co-conspirators "unreasonably infring[ed] possessory interests protected by the Fourth Amendment[]." United States v. Jacobsen, 466 U.S. 109, 124 (1984) (recognizing that a seizure "lawful at its inception can nevertheless violate the Fourth Amendment" because of its manner of execution). Petitioner and his co-conspirator also detained individuals solely to facilitate their robberies. In one instance, they detained two individuals for well over an hour, moved them to an abandoned parking lot, and threatened the use of force in an effort to extract a ransom and information about drugs. Gov't C.A. Br. 16-19; 1/23/09 Tr. 514-515; see also PSR para. 22 (describing a separate incident where petitioner and a co-conspirator detained three men for approximately one hour to try to force them to give up their drug contact).

In short, the conspiracy petitioner led involved conduct that was objectively unreasonable under the circumstances and patently unlawful under the Fourth Amendment. See Graham v. Connor, 490 U.S. 386, 395-396 (1989) (explaining that the reasonableness of a seizure depends in part on "how it is carried out" and that determining whether a particular seizure is "'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at

stake" (citation omitted)). In light of the deference to a jury verdict under sufficiency-of-the-evidence review, the record plainly contains evidence that supports the finding of Fourth Amendment violations.

ii. Petitioner also cannot show that no reasonable jury could have concluded that he violated the clearly established due process rights of his victims by stealing their money and property. Numerous courts of appeals have upheld 18 U.S.C. 242 convictions for willful deprivation of due process rights in cases in which state officials stole money or property under color of law. See United States v. Alonso, 740 F.2d 862, 872-873 & n.8 (11th Cir. 1984), cert. denied, 469 U.S. 1166 (1985); United States v. Albert, 595 F.2d 283, 285-286 (5th Cir.), cert. denied 444 U.S. 963 (1979); United States v. McClean, 528 F.2d 1250, 1255-1256 (2d Cir. 1976).

Without disputing that authority, petitioner argues (Pet. 10-11) that individuals have no property rights in illegal drugs or other contraband, and he therefore contends that he did not deprive any of the individuals whom he robbed of rights protected by the Due Process Clause. The robberies undertaken by petitioner and his co-conspirators, however, were not limited to taking illegal drugs. Petitioner took substantial sums of money from individuals, some of whom were not found with drugs (see page 4, supra), and he also took part in the theft of personal property, including the theft of a watch worth thousands of dollars (see ibid.). While

"[u]ndoubtedly some of th[is] property was indeed contraband, * * * there is nothing to show that the money [and other property] taken * * * in each case could properly have been * * * retained by the Police Department" because of its connection with narcotics trafficking. McClean, 528 F.2d at 1255. "In any event the victims were entitled to have the status of [their] property determined by due process." Id. at 1256.[5]

b. This Court has emphasized generally that "[t]he primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals." Hamling v. United States, 418 U.S. 87, 124 (1974); see Scales v. United States, 367 U.S. 203, 230 (1961). That approach to sufficiency claims is particularly appropriate here. Because petitioner forfeited his sufficiency of the evidence claim, and the court of appeals therefore approached this case by stating that his challenges must be rejected "unless the convictions represent a 'manifest miscarriage of justice,'" Pet. App. 5, this petition presents an undesirable vehicle to address the legal arguments petitioner raises. Even if this Court were to grant review and vacate the convictions, it would provide little practical benefit

[5] Petitioner has not argued that he did not violate due process rights by stealing property because adequate post-deprivation remedies were available under state law. See Hudson v. Palmer, 468 U.S. 517, 530-536 (1984); Parratt v. Taylor, 451 U.S. 527, 537-544 (1981); see also Vukadinovich v. Zentz, 995 F.2d 750, 755 (7th Cir. 1993) (applying Hudson to an alleged theft by an officer while the individual was in custody). That issue is accordingly not before the Court.

to petitioner. Petitioner's convictions under 18 U.S.C. 924(c) alone carry a total mandatory minimum sentence of 255 years of imprisonment, and he has not challenged those convictions in his petition for certiorari. See note 2, supra; see also Deal v. United States, 508 U.S. 129 (1993) (holding that the "second or subsequent" conviction provision of Section 924(c) is triggered when multiple convictions for violating Section 924(c) are obtained in a single proceeding).

3. Petitioner contends (Pet. 11-16) that the court of appeals' decision is inconsistent with Whren v. United States, 517 U.S. 806 (1996), Ashcroft v. Al-Kidd, 131 S. Ct. 2074 (2011), and other cases from this Court establishing that Fourth Amendment reasonableness is, with limited exceptions, based on an objective inquiry that does not turn on officer motivations.[6] The court of appeals' effort (Pet. App. 6-10) to craft a "no bona fide law enforcement purpose" exception to Whren seems misguided. But the judgment below is correct, and the decision does not squarely conflict with any decision of this Court or of any court of

[6] The Court has recognized "limited exception[s]" to this rule in the context of special-needs and administrative-search cases, as well as "Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion." Al-Kidd, 131 S. Ct. at 2080-2081 (internal quotation marks and emphasis omitted).

appeals. For the reasons previously set forth (see pp. 11-18, supra), plenary review by this Court is not warranted.[7]

a. The court of appeals correctly recognized that under Whren, the constitutional reasonableness of searches and seizures undertaken by officers engaged in law enforcement activities does not "depend[] on the actual motivations of the individual officers involved." Pet. App. 6 (quoting Whren, 517 U.S. at 813). But the court found Whren inapplicable here, reasoning that Whren "presumes that the officers are engaging in bona fide law enforcement activities," whereas here, petitioner and his co-conspirators engaged in conduct that was "thoroughly and objectively illegal from start to finish." Id. at 6, 7. The court also found this case distinguishable because of the "punitive purpose" of 18 U.S.C. 242, which the court believed "would be undermined" if it "allow[ed] a corrupt officer to hide behind the policy goals of the exclusionary rule." Id. at 8.

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[7] Petitioner's additional contention (Pet. 16-18) that the court of appeals adopted a novel rule that constitutional rights are necessarily violated for purposes of Sections 241 or 242 prosecutions so long as the government shows a police officer engaged in "inherently improper" conduct lacks merit. In concluding that the record provided sufficient evidence to support petitioner's convictions, the court of appeals did not rely on generalized evidence of illegality, but instead held that the record evidence supported the jury's conclusion that petitioner violated, and conspired to violate, individuals' Fourth Amendment rights when he engaged in stops, searches, and seizures of property that had no bona fide connection to legitimate law enforcement activities. See Pet. App. 10.

Whren did not involve a sham law enforcement operation designed to facilitate thefts of property from persons engaged in illegal activity. To the extent, however, that the court of appeals believed that Whren does not apply where police officers had probable cause to make stops but "were not engag[ed] in bona fide law enforcement activities" (Pet. App. 7), and that "subjective intent" can be consulted in a civil rights prosecution to determine whether the Fourth Amendment was violated because Whren is an exclusionary rule decision (id. at 8), its reasoning is unsound. Whren was not an exclusionary rule decision; rather, it is part of a long line of cases holding that reasonableness under the Fourth Amendment is "predominantly an objective inquiry" that does not turn on the subjective motivations of individual officers. See Al-Kidd, 131 S. Ct. at 2080 (collecting cases). "This approach recognizes that the Fourth Amendment regulates conduct rather than thoughts * * * ." Ibid. Accordingly, even where an individual officer has a "corrupt, personal, and pecuniary purpose" for his conduct (Pet. App. 8), whether any action he takes violates the Fourth Amendment still depends on whether "the circumstances, viewed objectively, justify that action." Scott v. United States, 436 U.S. 128, 138 (1978).

While the court of appeals suggested that this rule is inapplicable to civil rights prosecutions involving willful criminal conduct by police officers, Pet. App. 6-8, the specific

cause of action does not change the nature of the substantive right at issue. Because the conduct of an individual officer must be objectively unreasonable to violate the Fourth Amendment, see Brigham City v. Stuart, 547 U.S. 398, 404-405 (2006), a Section 241 or 242 charge premised on a violation of Fourth Amendment rights necessarily requires the government to show that the officer acted objectively unreasonably in the circumstances, whatever his subjective intent. The officer's intent is, of course, relevant to whether the officer "willfully" violated others' constitutional rights, which both Sections 241 and 242 charges also require. See 18 U.S.C. 241, 242. But an officer's illicit purpose for an action does not, without more, turn a search or seizure that is objectively justified under the circumstances into a Fourth Amendment violation. See Whren, 517 U.S. at 813-814.

b. Although the court of appeals' treatment of Whren was unsound, its judgment, which correctly affirmed petitioner's convictions (see pp. 13-18, supra), does not warrant this Court's review. See Black v. Cutter Labs, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions."). Petitioner's conduct violated the Fourth Amendment under an objective standard that is consistent with Whren, and the record therefore supports his convictions on that constitutional basis. Whatever petitioner's subjective motive, purpose, or plan, he participated in seizures of personal property that the police

lacked probable cause to believe was connected with crime. Those seizures for personal enrichment were objectively unreasonable.

Review is further unwarranted because, as the court of appeals indicated (Pet. App. 9-10), few reported decisions have considered how the Fourth Amendment applies to pretextual uses of law enforcement authority to further a criminal conspiracy. Petitioner cannot point to any decision in which this Court has considered how the Fourth Amendment reasonableness standard applied to conduct that was intended to further a criminal conspiracy, and he also fails to identify a direct conflict between the decision below and the decision of any other court of appeals.[8] Under those circumstances, and given the vehicle issues created by petitioner's forfeiture of his sufficiency claim, review of the Sixth Circuit opinion is not warranted.

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[8] Petitioner does cite two cases holding that the absence of probable cause is an essential element of a Fourth Amendment claim of false arrest under 42 U.S.C. 1983, and he suggests that the decision below conflicts with that rule. See Pet. 10 (citing Case v. Eslinger, 555 F.3d 1317, 1326-1327 (11th Cir. 2009), and Holmes v. Village of Hoffman Estates, 511 F.3d 673, 679-680 (7th Cir. 2007)). In fact, however, the Sixth Circuit follows precisely the same rule, see, e.g., Arnold v. Wilder, 657 F.3d 353, 363 (2011), and the court below specifically distinguished Section 1983 claims from the Sections 241 and 242 prosecutions at issue in this case, see Pet. App. 8 n.1. Even granting petitioner's contention that the court of appeals' effort to distinguish these cases is unpersuasive (Pet. 15-16), petitioner effectively seeks only intra-circuit error correction, and such a claim does not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2012