

No. 18-5234

IN THE SUPREME COURT OF THE UNITED STATES

MARCOS RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 10-13) that his conviction for brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A), should be vacated because the relevant definition of a "crime of violence" in 18 U.S.C. 924(c) is unconstitutionally vague. Section 924(c)(3) 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). The jury in petitioner's case determined that the "crime of violence" underlying his Section 924(c) offense was conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a). See D. Ct. Doc. 581, at 1, 4-5 (Aug. 23, 2011). Petitioner contends that conspiracy to commit Hobbs Act robbery could qualify as a "crime of violence" only under Section 924(c)(3)(B), which he asserts is void for vagueness.

In Sessions v. Dimaya, 138 S. Ct. 1204 (2018), this Court held that the definition of a "crime of violence" in 18 U.S.C. 16(b), which contains language that is nearly identical to that in Section 924(c)(3)(B), is unconstitutionally vague. 138 S. Ct. at 1223. Three courts of appeals have since held that Section 924(c)(3)(B) is unconstitutionally vague in light of Dimaya. See United States v. Davis, No. 16-10330, 2018 WL 4268432, at *1-*3 (5th Cir. Sept. 7, 2018) (per curiam), petition for cert. pending, No. 18-431 (filed Oct. 3, 2018); United States v. Eshetu, 898 F.3d 36, 37-38 (D.C. Cir.) (per curiam), petition for reh'g en banc pending, No. 15-3020 (D.C. Cir. filed Aug. 31, 2018); United States v. Salas, 889 F.3d 681, 684-686 (10th Cir.), petition for cert.

pending, No. 18-428 (filed Oct. 3, 2018). Two other courts of appeals, including the court of appeals below, have expressly disagreed with other circuits and have determined that Section 924(c)(3)(B) is not unconstitutionally vague. See Ovalles v. United States, No. 17-10172, 2018 WL 4830079, at *1-*2 (11th Cir. Oct. 4, 2018) (en banc); United States v. Barrett, No. 14-2641, 2018 WL 4288566, at *10-*14 (2d Cir. Sept. 10, 2018).

The United States has filed petitions for writs of certiorari in Davis, supra, and Salas, supra, seeking review of their invalidation of Section 924(c)(3)(B). Davis and, to a lesser extent, Salas provide superior vehicles than this case for addressing the constitutionality of that provision. In both Davis and Salas, the courts of appeals considered the question in published opinions. See Davis, 2018 WL 4268432, at *1-*3; Salas, 889 F.3d at 684-686. By contrast, in this case, the court of appeals did not address the constitutionality of Section 924(c)(3)(B) either in its original opinion (which predated this Court's decision in Dimaya) or in its opinion denying rehearing (which addressed issues unrelated to the interpretation or application of Section 924(c)(3)(B)). See Pet. App. 17-57, 60-63. The Court accordingly should hold the petition in this case

pending the disposition of the petitions in Davis and Salas, and then dispose of the petition in this case as appropriate.*

Respectfully submitted.

NOEL J. FRANCISCO
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* The government waives any further response to the petition unless this Court requests otherwise.