

No. 18-8737

IN THE SUPREME COURT OF THE UNITED STATES

MARIO BACHILLER, 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. 11-15) that this case presents the same issue as United States v. Davis, No. 18-431 (argued Apr. 17, 2019), in which this Court is considering whether the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague -- and that the court of appeals erred in denying his request for a certificate of appealability (COA) on that issue. Petitioner's conviction under 18 U.S.C. 924(c) (2006) does not, however, depend solely on the classification of his underlying offenses as crimes of violence under Section 924(c)(3)(B), nor would a decision vacating his Section 924(c) conviction have a practical effect on his overall sentence. This

Court recently denied a petition for a writ of certiorari raising the same claim in similar circumstances. See Rolon v. United States, No. 18-7204 (Apr. 15, 2019). The petition for a writ of certiorari in this case should likewise be denied.

1. Petitioner was convicted of conspiracy to possess five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 846; attempted possession of five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 846; conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); using and carrying a firearm during and in relation to a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. 924(c) (1) (A); and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g) (1). Pet. App. A5; see Pet. 8. The district court sentenced petitioner to life plus 84 months of imprisonment, consisting of concurrent life sentences on the two drug trafficking counts; concurrent sentences of 240 months of imprisonment on the Hobbs Act counts and 180 months on the Section 922(g) (1) count; and a sentence of 84 months of imprisonment on the Section 924(c) count, to run consecutive to the life sentences imposed on the drug trafficking counts. Judgment 2.

Section 924(c) makes it a crime to use or carry a firearm during and in relation to, or to possess a firearm in furtherance

of, "any crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). The statute defines a "crime of violence" as a felony offense 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 statute defines a "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)." 18 U.S.C. 924(c)(2). Petitioner's Section 924(c) conviction was predicated on his possession of a firearm in furtherance of crimes of violence (conspiracy and attempt to commit Hobbs Act robbery), as well as on his drug trafficking crimes (conspiracy and attempt to possess cocaine with the intent to distribute it). Pet. App. A5; see Indictment 3-4.

Petitioner does not dispute that his underlying drug offenses qualify as "drug trafficking crime[s]" under Section 924(c)(2). Accordingly, his Section 924(c) conviction would be valid regardless of whether his Hobbs Act offenses qualify as "crime[s] of violence" under Section 924(c)(3).¹ Because Davis concerns only

¹ Indeed, petitioner's Section 924(c) conviction would be valid even if it were based solely on his Hobbs Act offenses. For the reasons stated in the government's briefs in opposition to the petitions for writs of certiorari in Garcia v. United States, cert. denied, No. 17-5704 (Jan. 8, 2018), and Ragland v. United States,

the definition of a "crime of violence" in Section 924(c) (3) (B), this Court's decision in that case will not affect the validity of petitioner's conviction under Section 924(c).

2. Moreover, even if petitioner's Section 924(c) conviction were vacated, it would have no practical effect on his sentence. Petitioner received a consecutive 84-month sentence under Section 924(c) in addition to two concurrent life sentences on other convictions. Those other convictions and life sentences would remain valid even if petitioner's Section 924(c) conviction were invalidated.

3. Under these circumstances, no reason exists to consider in this case whether Section 924(c) (3) (B) is unconstitutionally vague, or to hold this petition for a writ of certiorari pending the Court's decision in Davis. Nor can petitioner establish that the court of appeals erred in determining that "reasonable jurists" would not find his constitutional claim debatable, and that a COA therefore was not warranted. Pet. App. A1 (citing 28 U.S.C. 2253(c) (2)).

The petition for a writ of certiorari should be denied.²

cert. denied, No. 17-7248 (May 14, 2018), attempted Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. 924(c) (3) (A). We have served petitioner with copies of the briefs in opposition in both Garcia and Ragland.

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

Respectfully submitted.

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