

No. 18-8892

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS HERNANDEZ MACHIN, 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. 6-17) 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) does not, however, depend solely on the classification of his underlying offenses as crimes of violence under Section 924(c)(3)(B). This Court recently denied a petition for a writ of certiorari raising the same claim in similar circumstances. See Rolon v. United

States, 139 S. Ct. 1545 (2019) (No. 18-7204). The petition for a writ of certiorari in this case should likewise be denied.¹

1. Following a guilty plea, 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; conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); and using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Pet. App. A5, at 1; see Pet. 3.² The district court sentenced petitioner to 211 months of imprisonment, consisting of concurrent sentences of 151 months of imprisonment on the drug trafficking and Hobbs Act conspiracy counts, and a consecutive sentence of 60 months of imprisonment on the Section 924(c) count. Pet. App. A5, at 2.

¹ The petition for a writ of certiorari in Bachiller v. United States, No. 18-8737 (filed Apr. 5, 2019), presents the same question in a similar posture.

² The indictment also charged petitioner with attempt to possess five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), 21 U.S.C. 841(b)(1)(A) (2006), and 21 U.S.C. 846; attempt to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); conspiracy to carry a firearm in furtherance of a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A) and (Q); and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A4, at 4; Indictment 2-5. The government moved to dismiss those charges pursuant to the plea agreement. Pet. App. A4, at 4; see id. at 7.

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 drug trafficking crimes (conspiracy and attempt to possess cocaine with the intent to distribute it). Indictment 1-5; see Pet. 13.

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 the charged Hobbs Act offenses qualify as

"crime[s] of violence" under Section 924(c)(3).³ Because Davis concerns only 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. Petitioner contends (Pet. 14) that the Court should "presume" that his Section 924(c) conviction was based solely on conspiracy to commit Hobbs Act robbery, and not on any other predicate offense, because a court cannot determine which underlying offenses were found to exist without engaging in "judicial fact-finding." But petitioner bears the burden on collateral review to affirmatively establish that his conviction rested on an invalid ground. See, e.g., Parke v. Raley, 506 U.S. 20, 31 (1992) (explaining that the "presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant" on collateral review). Here, petitioner pleaded guilty and admitted in his plea agreement that he possessed a firearm "in furtherance of a crime of violence and a drug trafficking crime." Plea Agreement 1 (emphasis added); see 9/10/08 Tr. 9-12, 20-24 (petitioner admitted during plea colloquy that he

³ Petitioner's Section 924(c) conviction would also 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 Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248), and Garcia v. United States, 138 S. Ct. 641 (2018) (No. 17-5704), 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 Ragland and Garcia.

possessed firearm in furtherance of drug trafficking conspiracy). He has thus admitted that he possessed a firearm in furtherance of a drug trafficking crime and, as the magistrate judge recognized, relinquished any claim to the contrary. Pet. App. A4, at 13-16; see Pet. App. A3, at 1-2 (district court adopted magistrate judge's conclusion). Petitioner also procedurally defaulted any such claim by failing to raise it on direct appeal, providing an additional reason not to consider it on collateral review. See Pet. App. A4, at 16 n.3.

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, at 1 (citing 28 U.S.C. 2253(c)(2)).

The petition for a writ of certiorari should be denied.⁴

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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⁴ The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.