

No. 18-9185

IN THE SUPREME COURT OF THE UNITED STATES

BOBBY MARTIN, 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. 8-12) that this case presents the same issue as United States v. Davis, No. 18-431 (June 24, 2019), in which this Court recently determined that the definition of a "crime of violence" in 18 U.S.C. 924(c) (3) (B) is unconstitutionally vague, and he further contends that the court of appeals erred in denying his request for a certificate of appealability (COA) on that issue. The validity of petitioner's conviction under 18 U.S.C. 924(c) does not, however, depend 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 jury trial, petitioner was convicted of conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); conspiracy to possess five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 846; attempting to possess five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 846; conspiracy to carry a firearm during and in relation to a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. 924(o); carrying a short-barreled 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 (B); possession of an unregistered firearm, in violation of 26 U.S.C. 5861(d) and 5871; and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A3, at 2-3; see Superseding Indictment 1-5. The district court sentenced petitioner to 380 months of imprisonment, consisting of concurrent sentences of 240 months of imprisonment on the Hobbs Act and firearm-conspiracy counts, 260 months of imprisonment on the drug trafficking counts, and 120 months of

¹ The petitions for a writ of certiorari in Herrera v. United States, No. 18-9244 (filed May 9, 2019), Machin v. United States, No. 18-8892 (filed Apr. 16, 2019), and Bachiller v. United States, No. 18-8737 (filed Apr. 5, 2019), present the same question in a similar posture.

imprisonment on the firearm possession counts, to be followed by a consecutive sentence of 120 months of imprisonment on the Section 924(c) count. Pet. App. A4, at 3.

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 a crime of violence (conspiracy 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). Superseding Indictment 1-4.

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 was valid regardless of whether the charged Hobbs Act offense qualifies as a "crime of

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

Although petitioner contends (Pet. 5) that "the jury's verdict did not specify" whether it found petitioner guilty of possessing the firearm in furtherance of a crime of violence or a drug trafficking crime, on the facts here, no reasonable jury could have found petitioner guilty without concluding that he possessed the firearm in connection with his drug offenses. The government proved at trial that petitioner and his co-defendants possessed the firearm in connection with their "plan[] to rob a cocaine stash house." 329 Fed. Appx. 862, 865. No reasonable jury could conclude that petitioner possessed a firearm in furtherance of the conspiracy to commit that robbery but not in furtherance of one or more of his drug crimes -- e.g., conspiracy to possess cocaine with the intent to distribute it. Indeed, petitioner's defense at trial was that he had been entrapped, not that he did not possess the firearm in furtherance of his drug trafficking offenses. Id. at 866-867.

2. Under these circumstances, no reason exists to remand this case to the court of appeals in light of this 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. A5, at 6 (citing 28 U.S.C. 2253(c)(2)).

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

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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