

No. 18-9244

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IN THE SUPREME COURT OF THE UNITED STATES

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DANNY HERRERA, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 5-8) that this case presents the same issue as United States v. Davis, No. 18-431 (June 24, 2019), in which this Court recently held that the definition of a “crime of violence” in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. 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.<sup>1</sup>

1. In 2014, a federal grand jury charged petitioner with conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951; 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 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 (2); and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g) (1) and (2). Indictment 1-4. The Section 924(c) count identified the predicate “crime of violence” as the Hobbs Act robbery conspiracy, and identified the predicate “drug trafficking crime[s]” as conspiracy and attempt to possess cocaine with the intent to distribute it. Id. at 4.

Petitioner pleaded guilty to conspiracy to commit Hobbs Act robbery and the Section 924(c) offense. Pet. App. B1; see Judgment 1. In his plea agreement, petitioner acknowledged that his Section

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<sup>1</sup> The petitions for a writ of certiorari in Martin v. United States, No. 18-9185 (filed May 6, 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.

924(c) offense involved "knowingly using and carrying a firearm during and in relation to a crime of violence and a drug trafficking crime." Plea Agreement 1 (emphasis added). Petitioner further acknowledged in the factual proffer supporting his plea that he and his co-conspirators had carried guns as part of a conspiracy to steal 15 kilograms of cocaine during an armed robbery. Pet. App. C1-C6. The district court's judgment reflects that petitioner's Section 924(c) conviction was for the "[u]se of a firearm during the commission of a crime of violence or "drug trafficking crime." Judgment 1. Petitioner does not dispute that it was unnecessary for him to have pled guilty to, or otherwise been convicted of, the drug trafficking crimes charged in the indictment in order for those drug trafficking crimes to provide the basis for his Section 924(c) conviction. See Pet. App. B2.

The district court sentenced petitioner to 101 months of imprisonment, consisting of 41 months of imprisonment on the Hobbs Act conspiracy count and a consecutive term of 60 months of imprisonment on the Section 924(c) count. Judgment 2.

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 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). See Judgment 1; Plea Agreement 1; Indictment 3-4.

Petitioner does not dispute that his underlying drug offenses qualify as "drug trafficking crimes" 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), the Court's decision in that case did not affect the validity of petitioner's conviction under Section 924(c). No reason exists, therefore, to remand this case to the court of appeals in light of Davis.

The petition for a writ of certiorari should be denied.<sup>2</sup>

Respectfully submitted.

NOEL J. FRANCISCO  
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JULY 2019

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