No. 18-9244

In the
Supreme Court of the United States

Danny Herrera,
Petitioner,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

In its opposition to Mr. Herrera's petition for a writ of certiorari, the Government argues that the petition should be denied because Mr. Herrera's 18 U.S.C. § 924(c) conviction "involved 'knowingly using and carrying a firearm during and in relation to a crime of violence *and* a drug trafficking crime.'" Opp. at 3-4. (quoting Plea Agreement at 1) (emphasis in original). The Government's argument ignores the record in this case. Mr. Herrera pled guilty to a § 924(c) offense predicated solely on conspiracy to commit Hobbs Act robbery and not on a drug trafficking crime. Thus, the only issue presented by this petition is the constitutionality of § 924(c)(3)(B)—an issue that this Court conclusively resolved in Mr. Herrera's favor with its decision *United States v. Davis*, No. 18-431 (June 24, 2019). This Court should therefore grant Mr. Herrera's petition for a writ of certiorari, vacate the Eleventh Circuit's order denying his habeas petition, and remand this case for further consideration in light of *Davis*.

I. Mr. Herrera Was Not Convicted of Using a Firearm in Connection With a Drug Trafficking Crime.

The Government's recitation of the facts regarding Mr. Herrera's § 924(c) conviction notably omits any mention of his plea hearing. The Government skips from Mr. Herrera's plea agreement and factual proffer to the district court's judgment. Opp. at 4. Of course, the judgment does not support the Government's argument, as it merely recites the statutory description of the offense: "Use of a firearm during the commission of a crime of violence or drug trafficking crime."

App. D at 1. The judgment does not indicate that Mr. Herrera was convicted of use of a firearm during ***both*** a crime of violence ***and*** a drug trafficking crime.[1] Moreover, the transcript of Mr. Herrera's plea hearing shows that the district court elicited a knowing and voluntary guilty plea of a § 924(c) conviction based solely on conspiracy to commit Hobbs Act robbery—not on a drug trafficking offense.

The Government is correct that Mr. Herrera's plea agreement lists two predicate offenses, including drug trafficking. But a plea agreement by itself is not sufficient to show a valid conviction. For a guilty plea to become effective, a district court must accept the plea and find that it has a factual basis. To do so, the district court must follow the requirements of Federal Rule of Criminal Procedure 11, including informing the defendant of "the nature of each charge to which the defendant is pleading" before accepting a guilty plea. Fed. R. Crim. Proc. 11(b)(1)(G). A failure to inform the defendant of the nature of the charge is fatal to a guilty plea. *E.g.*, *United States v. Telemaque*, 244 F.3d 1247 (11th Cir. 2001) (vacating conviction where district court did not refer to the elements of a crime during plea hearing): *United States v. Portillo-Cano*, 192 F.3d 1246, 1252 (9th Cir.

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[1] The Government also states that "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," citing to the district court's denial of Mr. Herrera's habeas petition. Opp. at 4. This is beside the point. While the Government need not have secured a conviction for the underlying drug trafficking crime itself, the Government certainly must have secured a conviction for the § 924(c) violation based on that drug trafficking crime. The Government did not do so here. Instead, Mr. Herrera was convicted only of a § 924(c) violation based on conspiracy to commit Hobbs Act robbery.

1999), *as amended* (Dec. 6, 1999) (vacating conviction where district court did not inform defendant of nature of the charge at plea hearing); *United States v. Bernal*, 861 F.2d 434, 438 (5th Cir. 1988) (same); *see also McCarthy v. United States*, 394 U.S. 459, 465 (1969) (holding that a district court's failure to inform the defendant of the nature of the charge entitles a defendant to "plead anew").[2]

At Mr. Herrera's plea colloquy, the district court described the § 924(c) charge as "using a firearm in furtherance of a crime of violence," meaning conspiracy to commit Hobbs Act robbery. Transcript of Plea Colloquy, Case No. 14-cr- 60277, Dkt. 120 at 5. Toward the end of the hearing, the court again confirmed that Mr. Herrera wanted to plead guilty and that he conceded he "did knowingly, during and in relation to ***a crime of violence***, carry a firearm and possess a firearm in

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[2] Mr. Herrera's case is procedurally distinct from *Telemaque*, *Portillo-Cano*, and *Bernal*. Here, the Government charged Mr. Herrera with one count of violating § 924(c)(1) based on two predicate offenses, even though those two predicate offenses represented distinct violations. *In re Gomez*, 830 F.3d 1225, 1227 (11th Cir. 2016) ("[A] § 924(c) crime based on any one of these separate companion convictions would likewise be a separate offense."). At the plea hearing, the district court elicited a knowing and voluntary guilty plea for the § 924(c) charge, but it did so with reference to only the first of the two predicate offenses. The district court did not purport to convict Mr. Herrera of a § 924(c) violation based on the second predicate offense. In *Telemaque*, *Portillo-Cano*, and *Bernal*, the district courts similarly failed to inform the defendant of the nature of the charge, but they then purported to convict the defendant of those charges. The effect of the district courts' Rule 11 errors in *Telemaque*, *Portillo-Cano*, and *Bernal* was a vacatur of the conviction, whereas in Mr. Herrera's case, the effect of the district court's error (i.e., forgetting to mention a charge entirely) was that Mr. Herrera was never convicted of the omitted charge. Regardless of these procedural differences, *Telemaque*, *Portillo-Cano*, and *Bernal* still help illustrate why Mr. Herrera's plea hearing could not have resulted in a § 924(c) conviction based on a drug trafficking offense.

furtherance of ***a crime of violence, that is Count 1*** [conspiracy to commit Hobbs Act robbery]." *Id.* at 55 (emphasis added).

In describing the elements of Count 5 to Mr. Herrera, the district court stated: "[T]he government would have had to have proven that you committed the crime of violence charged in Count 1, that you used or possessed a firearm, and that you used the firearm ***in furtherance of a crime of violence***." *Id.* at 72 (emphasis added). Based on this description, the court then asked Mr. Herrera whether he understood the elements of the § 924(c) charge, and he responded that he did. *Id.* In concluding that there was a factual basis for Mr. Herrera's plea, the district court found that "the facts which the government is prepared to prove are sufficient to constitute the crimes of conspiracy to commit Hobbs Act robbery and ***use of a firearm during a crime of violence***." *Id.* at 74-75 (emphasis added).

The district court never described the elements of a § 924(c)(1) charge predicated on a drug trafficking offense. Indeed, the district court never even mentioned drug trafficking as a predicate offense. The district court's statements show that Mr. Herrera never pleaded guilty to, and was never convicted of, a § 924(c)(1) violation based on a drug trafficking offense. Contrary to the Government's assertion in its opposition brief, Mr. Herrera's conviction was predicated solely on conspiracy to commit Hobbs Act robbery.

II. The Eleventh Circuit Determined That Mr. Herrera's Conviction Was Not Predicated on a Drug Trafficking Crime.

The Government's failure to mention Mr. Herrera's plea hearing in its opposition brief is surprising given that the parties collectively devoted 16 pages of their briefing in the Eleventh Circuit to this very issue. The Government argued that the Eleventh Circuit need not consider Mr. Herrera's argument regarding § 924(c)(3)(B) because his § 924(c) conviction was also based on a predicate offense that qualified as a crime of violence under § 924(c)(3)(A). Pet. App'x F at 11-18. Mr. Herrera argued that his § 924(c) conviction rested solely on conspiracy to commit Hobbs Act robbery, which qualifies as a crime of violence under § 924(c)(3)(B). Pet. App'x E at 19-21; Pet. App'x G at 6-11.

The Eleventh Circuit agreed with Mr. Herrera. Its order stated that "Danny Herrera pleaded guilty to possession of a firearm during a crime of violence or drug-trafficking crime under 18 U.S.C. § 924(c), ***which was premised on conspiracy to commit Hobbs Act robbery*** under 18 U.S.C. § 1951." Pet. App'x A at 1-2. After disposing of a procedural argument regarding Mr. Herrera's appeal waiver, the Eleventh Circuit then considered the constitutionality of § 924(c)(3)(B). In this section of its opinion, the Eleventh Circuit noted that Mr. Herrera "concedes that conspiracy to commit Hobbs Act robbery is a crime of violence under § 924(c)(3)(B)." *Id.* at 4-5. Despite the Government's argument, the Eleventh Circuit never discussed Mr. Herrera's conviction as one based on a drug trafficking crime.

The Government's opposition brief asks this Court to disregard the Eleventh Circuit's decision that Mr. Herrera's conviction was based solely on the predicate offense of conspiracy to commit Hobbs Act robbery. It would be inappropriate to deny Mr. Herrera's petition based on an argument that the Government lost in the court below, particularly where the Government has not filed a cross-petition. Given the procedural posture of this case, the Eleventh Circuit—not this Court—is in the best position to reconsider the Government's predicate-offense argument, if the Government wishes to attempt to raise that issue again. The appropriate course for this Court is to grant Mr. Herrera's petition for a writ of certiorari, reverse the order below, and remand this case for further consideration.

III. This Court Has Granted, Reversed, and Remanded Petitions That Present the Same Facts as Mr. Herrera's Petition.

In its opposition, the Government cites four cases that it claims "present the same question in a similar posture" to support its argument that Mr. Herrera's petition should be denied. Opp. to Cert. at 1-2, 2 n.1 (citing *Rolon v. United States*, No. 18-7204; *Martin v. United States*, No. 18-9185; *Machin v. United States*, No. 18-8892; *Bachiller v. United States*, No. 18-8737). But each of those four cases is distinct from Mr. Herrera's in two key ways: (1) the petitioners all sought review of a circuit court's denial of a certificate of appealability, and (2) the petitioners' § 924(c) convictions all rested on multiple predicate offenses, including drug charges that qualify as crimes of violence under § 924(c)(3)(A).

By contrast, Mr. Herrera's § 924(c) conviction rested solely on the predicate offense of conspiracy to commit Hobbs Act robbery. Likely based on this distinction, the Eleventh Circuit recognized that Mr. Herrera's habeas petition was more meritorious than those presented in *Rolon*, *Martin*, *Machin*, and *Bachiller* when it granted him a certificate of appealability on the question of § 924(c)(3)(B)'s constitutionality. Mr. Herrera's petition for a writ of certiorari concerns the Eleventh Circuit's merits decision on that question. Thus, the Government's reliance on *Rolon*, *Martin*, *Machin*, and *Bachiller* is misplaced.

To best determine how to dispose of Mr. Herrera's petition, this Court should instead look to the order list it issued on June 28, 2019—the first order list following the *Davis* decision. There, this Court disposed of five petitions that raised the enforceability of § 924(c)(3)(B). Order List, 588 U.S. ___ (June 28, 2019) at 2-3. Each petition was granted, the orders below were vacated, and the cases were remanded for reconsideration in light of *Davis*. *Rodriguez v. United States*, No. 18-5234; *Jefferson v. United States*, No. 18-5306; *Barrett v. United States*, No. 18-6985; *Mann v. United States*, No. 18-7166; *Douglas v. United States*, No. 18-7331. Four of those petitions—*Rodriguez*, *Barrett*, *Mann*, and *Douglas*—are practically identical to Mr. Herrera's. They each involved § 924(c)(1) convictions based solely on the predicate crime of conspiracy to commit Hobbs Act robbery, the same predicate offense for Mr. Herrera's conviction. *Jefferson* was similar, as it involved a § 924(c)(1) conviction based on a RICO conspiracy. All five petitions sought review of a merits decision, rather than the denial of a certificate of appealability. These five

petitions are much more aligned with Mr. Herrera's petition (both procedurally and substantively) than those petitions cited by the Government. Accordingly, this Court should dispose of Mr. Herrera's petition in the same way as it did the analogous petitions in its June 28 Order List.

CONCLUSION

This Court should grant Mr. Herrera's petition for a writ of certiorari, reverse the Eleventh Circuit's decision, and then remand this case for further consideration in light of this Court's opinion in *Davis*.

Respectfully submitted, this 26th day of July, 2019.

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