No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the residual clause in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)?

If a conduct-based approach applies, whether a conspiracy to commit Hobbs Act robbery charge based on a stash-house robbery sting qualifies as a crime of violence?

PARTIES TO THE PROCEEDING

Petitioner is Danny Herrera, who was the Petitioner-Appellant in the court below. Respondent is the United States of America, which was the Respondent-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Danny Herrera respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS & ORDERS BELOW

The unpublished opinion of the Eleventh Circuit panel, *Herrera v. United States*, 752 Fed. App'x 944 (11th Cir. 2019), is included in the appendix to this petition. Pet. App'x A. Mr. Herrera did not file a petition for rehearing. The appendix also includes the district court's Amended Final Judgment and Order, *Herrera v. United States*, No. 16-cv-60929, Dkt. 9 (June 1, 2016), denying Mr. Herrera's 28 U.S.C. § 2255 motion. Pet. App'x B.

JURISDICTIONAL STATEMENT

The Eleventh Circuit affirmed the district court's denial of Mr. Herrera's 28 U.S.C. § 2255 motion on January 10, 2019. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1), which permits this Court to review judgments from the courts of appeal in civil cases. On March 26, 2019, this Court extended Mr. Herrera's time to file this petition until May 10, 2019.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

18 U.S.C. § 924(c)(3) provides that:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that 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.

28 U.S.C. § 2255(a) provides that:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

INTRODUCTION

This case hinges on the question of whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, in light of this Court's decision striking down a nearly identical statute in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018). This Court recently granted cert on this very question in *United States v. Davis*, No. 18-431. Mr. Herrera respectfully requests that this Court hold his petition pending the issuance of the *Davis* decision and then dispose of his case in light that decision.[1]

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[1] The Solicitor General has requested this approach on similar petitions that raise the question to be decided by this Court in *Davis*. *See, e.g.*, *Mann v. United States*, No. 18-7166, *Memorandum for the United States* at 1-2 (Feb. 21, 2019); *United States v. Lewis*, No. 18-989, *Petition for Writ of Certiorari* at 6 (Jan. 29, 2019).

STATEMENT OF THE CASE

On January 16, 2015, pursuant to a written plea agreement and factual proffer, Mr. Herrera pled guilty to two criminal charges. The first was for conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(b)(1) & (b)(3). The second charge was for carrying a firearm in relation to a crime of violence, premised on the first charge, in violation of 18 U.S.C. § 924(c)(1). On June 30, 2015, the district court accepted Mr. Herrera's plea on both counts and sentenced him to 41 months' imprisonment for the first count and 60 months' imprisonment for the second count, to be served consecutively.

On April 19, 2016, Mr. Herrera filed a motion in the district court to vacate his conviction on the second charge pursuant to 28 U.S.C. § 2255, arguing that he was wrongly convicted under 18 U.S.C. § 924(c)(1) because the definition of a "crime of violence" found in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. Mr. Herrera relied on this Court's reasoning when it struck down 18 U.S.C. § 924(e)(2) in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court denied Mr. Herrera's motion and denied a certificate of appealability.[2]

On appeal, the Eleventh Circuit granted a certificate of appealability on one question—whether the district court erred in concluding that Mr. Herrera's

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[2] The district court initially denied Mr. Herrera's petition on May 11, 2016. Mr. Herrera, proceeding *pro se*, thereafter filed a motion for rehearing, which the district court construed as a reply brief in support of his initial motion to vacate his sentence. The district court issued an amended order on June 1, 2016, in light of the reply brief.

conviction under 18 U.S.C. § 924(c) was unaffected by this Court's ruling in *Johnson v. United States*, 135 S. Ct. 2251 (2015).[3] The same day it granted a certificate of appealability, the Eleventh Circuit appointed the undersigned counsel pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. On May 1, 2018, the Eleventh Circuit stayed Mr. Herrera's case pending its decision in *Ovalles v. United States*, which it issued on October 4. 2018. 905 F.3d 1231 (11th Cir. 2018) (*en banc*). In *Ovalles*, the Eleventh Circuit held that the language of 18 U.S.C. § 924(c)(3) did not mandate the categorical approach and determined that the statute was not unconstitutionally vague when using a conduct-based approach. *Id.* at 1251-52.

On January 10, 2019, following briefing by the parties, the Eleventh Circuit issued an order affirming the district court's denial of Mr. Herrera's motion to vacate his sentence. The Eleventh Circuit first rejected the government's argument that Mr. Herrera had waived his right to challenge his conviction based on an appeal waiver in his plea agreement. The court held that "[t]he plain language of Herrera's sentence-appeal waiver did not include his right to collaterally attack his conviction and sentence using 28 U.S.C. § 2255." Pet. App'x A at 2.

The Eleventh Circuit next considered Mr. Herrera's argument that his sentence had been imposed in violation of the constitution because 18 U.S.C. § 924(c)(3) is unconstitutionally vague. The court held that "under *Ovalles*' conduct-

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[3] The Eleventh Circuit had jurisdiction over Mr. Herrera's appeal pursuant to 28 U.S.C. § 2253(a).

based approach, Herrera committed a crime of violence" and affirmed the district court's denial of Mr. Herrera's petition. Pet. App'x A at 5.

REASONS FOR GRANTING THE PETITION

I. This Court should hold Mr. Herrera's petition pending its decision in *Davis*, No. 18-431, argued on April 17, 2019.

The Eleventh Circuit's decision in this case rested solely on its holding in *Ovalles*, 905 F.3d at 1231, that 18 U.S.C. § 924(c)(3) is not unconstitutionally vague when a court applies a conduct-based approach, rather than the categorical approach. This issue has created a rift among the Circuit Courts of Appeals—a rift that this Court will soon close with its decision in *United States v. Davis*, No. 18-431. This Court's decision in *Davis* will control the outcome of Mr. Herrera's petition. He therefore respectfully requests that this Court hold its evaluation of his petition until *Davis* has been decided and then dispose of it in light of the *Davis* decision.

II. Conspiracy to commit Hobbs Act robbery based on a sting operation would not constitute a crime of violence under any alternative approach under consideration in *Davis*.

18 U.S.C. § 924(c)(3) is unconstitutionally vague because its language requires the use of the categorical approach—the same approach that could not pass constitutional muster in *Johnson*, 135 S. Ct. at 2563, and *Dimaya*, 138 S. Ct. at 1223. However, even if this Court should determine in *Davis* that 18 U.S.C. § 924(c)(3) allows for a different analysis to determine whether a crime qualifies as a crime of violence, Mr. Herrera's sentence was still imposed in violation of the

constitution. Mr. Herrera's convictions stem from a sting operation in which an undercover government agent procured Mr. Herrera's agreement to rob a fake stash house. Pet. App'x C at 1. Based on this agreement, Mr. Herrera pled guilty to conspiracy to commit Hobbs Act robbery. He also pled guilty to violating 18 U.S.C. § 924(c)(3) for carrying a firearm in relation to that conspiracy. Even if § 924(c)(3) can be applied constitutionally under some circumstances following this Court's decision in Davis, Mr. Herrera's § 924(c)(3) conviction remains unconstitutional for several reasons.

First, his conviction resulted from the district court's application of the categorical approach, which was the analysis required at the time. *United States v. McGuire*, 706 F.3d 1333, 1336-37 (11th Cir. 2013), *overruled by Ovalles*, 905 F.3d at 1234, (interpreting § 924(c)(3) as requiring categorical approach). Regardless of whether a narrowing construction can be applied to § 924(c)(3), the categorical approach is plainly unconstitutional under *Johnson* and *Dimaya*. As a result, the residual clause of § 924(c)(3) was applied unconstitutionally to convict Mr. Herrera of carrying a firearm in relation to a crime of violence. He is therefore entitled to relief under 28 U.S.C. § 2255, even if this Court applies a saving construction to § 924(c)(3).

Second, conspiracy to commit a fake stash-house robbery does not constitute a crime of violence under § 924(c)(3) using any of the alternative approaches available. Under the always-a-risk approach put forth by Justice Gorsuch in his concurrence in *Dimaya*, a court would ask "whether the defendant's crime of

conviction *always*" involves a risk of physical force. 138 S. Ct. at 1233 (Gorsuch, J., concurring). Conspiracy to commit Hobbs Act robbery—Mr. Herrera's crime of conviction—has no overt act requirement. *See, e.g.*, *United States v. Jett*, 908 F.3d 252, 265 (7th Cir. 2018) (holding that "a Hobbs Act conspiracy does not have an overt-act requirement"); *United States v. Pistone*, 177 F.3d 957, 960 (11th Cir. 1999) (same); *cf. Whitfield v. United States*, 543 U.S. 209, 213 (2005) (holding that conspiracy to commit money laundering under 18 U.S.C. § 1956(h) does not require overt act); *United States v. Shabani*, 513 U.S. 10, 17 (1994) (holding that conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 does not require overt act). Rather, a Hobbs Act conspiracy is complete as soon as the defendant agrees to commit some future conduct that would violate 18 U.S.C. § 1951(a). Because the crime simply requires an agreement as to future conduct, it carries no "substantial risk that physical force" may be used against person or property during the course of the offense *in every case*. Indeed, the crime would almost always carry no risk of violence at all. As a matter of law, then, conspiracy to commit Hobbs Act robbery would not qualify as a crime of violence under § 924(c)(3) using the always-a-risk approach.

Similarly, under a conduct-based approach such as that adopted by the Eleventh Circuit in *Ovalles*, 905 F.3d at 1234, a conspiracy to rob a fake stash house does not carry a substantial risk of violence, either. In the sting operation that led to Mr. Herrera's conviction, the stash house, the drugs to be stolen, and the potential victims of the planned robbery were all fabricated by the undercover

government agent. It therefore was not possible for the conspiracy to ever lead to violence, whether against person or property. Indeed, the government conceded at oral argument in *Davis* that using a conduct-based approach, cases where a defendant conspires with an undercover agent to rob a non-existent stash house "are going to ***at the very least*** be jury questions," if not questions of law for the judge to simply determine that the conduct does not amount to a crime of violence. Transcript of Oral Argument, *United States v. Davis*, No. 18-431 (Apr. 17, 2019) at 65-66 (emphasis added); *see also* Brief for FAMM as Amicus Curiae in Support of Respondents, *United States v. Davis*, No. 18-431 (Mar. 21, 2019) at 27-32. Because Mr. Herrera's conspiracy charge is based on a sting operation with a fake stash house, his crime of conviction did not present any risk—let alone a substantial risk—of the use of force against person or property, and his conviction under § 924(c)(3) was imposed in violation of the constitution.

CONCLUSION

This Court should hold Mr. Herrera's petition for a writ of certiorari pending the decision in *Davis* and then dispose of his case in light of that decision.

Respectfully submitted, this 9th day of May, 2019.

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