

No. 18-9808

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IN THE SUPREME COURT OF THE UNITED STATES

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MANUEL REYES, 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. 11-15) that this case presents the same issue as United States v. Davis, 139 S. Ct. 2319 (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. See Davis, 139 S. Ct. at 2336. Petitioner further contends (Pet. 11-15) 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) (2006) 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.<sup>1</sup>

1. Following a guilty plea, petitioner was convicted on one count of conspiracy to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846; one count of conspiracy to use or 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); and one count of 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). Pet. App. A3, at 1; see Pet. App. A2, at 1-2, 5-6. The district court sentenced petitioner to 322 months of imprisonment, consisting of concurrent sentences of 262 months of imprisonment on the drug trafficking conspiracy count and 240 months of imprisonment on the Section 924(o) count, and a consecutive sentence of 60 months of imprisonment on the Section 924(c) count, to be followed by five years of supervised release. Pet. App. A3, at 2-3.

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

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<sup>1</sup> The petitions for writs of certiorari in Herrera v. United States, No. 18-9244 (filed May 9, 2019), 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 similar issues.

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 offenses classified as crimes of violence (conspiracy and attempt to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951 et seq.), as well as on offenses classified as drug trafficking crimes (conspiracy and attempt to possess cocaine with the intent to distribute it). Pet. App. A2, at 1-4, 6.

Petitioner does not dispute that his underlying drug offenses qualify as "drug trafficking crime[s]" under 18 U.S.C. 924(c)(2). Accordingly, his Section 924(c) conviction would be valid regardless of whether his Hobbs Act offenses qualify as "crime[s] of violence" under 18 U.S.C. 924(c)(3)(B).<sup>2</sup> Because Davis concerns

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<sup>2</sup> Petitioner's Section 924(c) conviction also would be valid based on his attempted Hobbs Act robbery offense. For the reasons stated in the government's briefs in opposition to the

only the definition of a "crime of violence" in Section 924(c)(3)(B), this Court's decision in that case does not affect the validity of petitioner's conviction under Section 924(c).<sup>3</sup>

2. Petitioner contends (Pet. 15) 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. Specifically, petitioner asserts that by "enumerat[ing] four separate predicate offenses," the Section 924(c) count in the indictment "charged four separate and distinct crimes," and it would have been improper for him to "ple[a]d guilty to multiple \* \* \* crimes in a single count of conviction." Ibid. (emphasis omitted). To the extent that petitioner seeks to raise a duplicity challenge to his indictment, he relinquished that claim by entering an unconditional guilty plea. See Pet. App. A6, at 7

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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). See Pet. App. A5, at 24-25 (magistrate judge reached same conclusion, citing Eleventh Circuit precedent). We have served petitioner with copies of the briefs in opposition in both Ragland and Garcia.

<sup>3</sup> Petitioner does not appear to challenge his conviction under Section 924(o). See Pet. 12, 14 (referring only to petitioner's conviction under section 924(c)). In any event, Davis does not affect petitioner's Section 924(o) conviction, which was predicated on his conspiracy to use and carry a firearm during and in relation to crimes of violence and drug trafficking crimes. Pet. App. A2, at 1-6.

n.2 (district court "note[d] that [petitioner] has never argued -- in his criminal case or in this 2255 action -- that [the Section 924(c) count] is duplicitous," and that he "waived the argument by pleading guilty"); see also, e.g., United States v. Broce, 488 U.S. 563, 570-571 (1989) (holding that unconditional plea relinquished multiplicity challenge to indictment); United States v. Lampazianie, 251 F.3d 519, 525-526 & n.19 (5th Cir. 2001) (same for duplicity challenge, citing cases); cf. Fed. R. Crim. P. 12(b)(3)(B)(i) (requiring defendants to challenge before trial "a defect in the indictment or information, including \* \* \* joining two or more offenses in the same count (duplicity)"). 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 Bousley v. United States, 523 U.S. 614, 621 (1998).

In any event, 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." Pet. App. A5, at 3 (emphasis added; citation

omitted); see id. at 4-5 (explaining that petitioner admitted during plea colloquy that he 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 district court recognized, relinquished any claim to the contrary. Pet. App. A6, at 7; see In re Navarro, No. 19-12612-E, 2019 WL 3424965, at \*3-\*4 (11th Cir. July 30, 2019) (denying leave to file second-or-successive motion for postconviction relief based on defendant's claim that Hobbs Act conspiracy predicate "no longer qualifie[d] as a crime of violence in light of Davis," where defendant's Section 924(c) count also named drug trafficking as a predicate and factual proffer in plea agreement established both offenses).

3. 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 make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), as he must to obtain a certificate of appealability on collateral review, see Gonzalez v. Thaler, 565 U.S. 134, 140-141 (2012).

The petition for a writ of certiorari should be denied.<sup>4</sup>

Respectfully submitted.

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Solicitor General

AUGUST 2019

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