No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RUDY ESPUDO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

QUESTION PRESENTED

Whether a conviction under 18 U.S.C. § 924(c) for using a firearm to further a crime of violence or drug-trafficking crime may rest on more than one underlying offense.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

Federal Cases

Other

IN THE SUPREME COURT OF THE UNITED STATES

RUDY ESPUDO,
Petitioner,

- v. -

UNITED STATES OF AMERICA,
Respondent.

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

Petitioner Rudy Espudo respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on April 15, 2019.

OPINION BELOW

The Court of Appeals denied Mr. Espudo's petition for a writ of habeas corpus under 28 U.S.C. § 2255 in a memorandum disposition. *See United States v. Espudo*, __ F. App'x __ (9th Cir. April 15, 2019) (attached here as Appendix A). In this petition, Mr. Espudo argued that he was eligible for relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), because the crime underlying his firearm conviction (conspiracy to commit racketeering acts) could only satisfy the "residual clause" of 18 U.S.C. § 924(c)(3)(B). But the Ninth Circuit disagreed, holding that his §924(c) conviction *also* rested his conviction for conspiracy to distribute controlled substances, which did not implicate the "residual clause."

JURISDICTION

On April 15, 2019, the Court of Appeals affirmed the denial of Mr. Espudo's petition for a writ of habeas corpus. *See* Pet. App. 1a. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The pertinent statute, 18 U.S.C. § 924(c)(1)(A), provides that a person shall be subject to an additional mandatory term of imprisonment for brandishing a firearm "during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device)."

STATEMENT OF FACTS

Mr. Espudo was a senior member of the "Mexican Mafia," a gang known for distributing drugs with the help of various dealers from other gangs. As part of their arrangement, the dealers would sell drugs and then give a portion of the proceeds back to the Mexican Mafia. These proceeds became known as "tax payments."

But sometimes, a dealer would short the Mexican Mafia on its tax payment. On one occasion when this happened, Mr. Espudo directed two other members of the Mexican Mafia to recoup the missing funds. These two associates brandished a shotgun at the rogue dealer and retrieved the tax payment.

In 2012, federal prosecutors charged dozens of members of the Mexican Mafia with various racketeering and drug-related offenses, as well as multiple counts of 18 U.S.C. § 924(c). Section 924(c)(1)(A) provides various mandatory minimum penalties for carrying, brandishing, or discharging a firearm in furtherance of a "crime of violence or drug trafficking crime."

For the offense described above, prosecutors charged Mr. Espudo with aiding and abetting the brandishing of a firearm in relation to a "crime of violence *and* a drug trafficking crime." The indictment listed two predicate offenses underlying this § 924(c) count: 1) a conspiracy to conduct enterprise affairs through a pattern of racketeering activity, in violation of 18 U.S.C § 1962(d) (the "RICO conspiracy" count); *and* 2) a conspiracy to distribute methamphetamine and cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(vii), 841(b)(1)(B)(ii), and 846 (the "drug conspiracy" count). The allegations in the RICO conspiracy count included traditional "crimes of violence" such as murder, kidnapping, robbery, and extortion. Mr. Espudo pleaded guilty to the RICO conspiracy, drug conspiracy, and § 924(c) counts without the benefit of a plea agreement.

At the change of plea hearing, the court clerk confirmed that the charges related to "a robbery which [Mr. Espudo] directed" even though he "wasn't actually present" at the time. Specifically, the factual basis for the § 924(c) count admitted that Mr. Espudo "directed various associates to rob a drug dealer that had failed to pay tax money to you on behalf of the enterprise, which included the brandishing of a shotgun." The district court then stated twice that the § 924(c) count related to

both a "crime of violence" *and* a "drug trafficking crime." Mr. Espudo did not appeal his conviction or sentence.

The underlying predicate offense of Mr. Espudo's § 924(c) did not become relevant until the constitutionality of various "residual clauses" came into question. On June 26, 2015, this Court struck down the "residual clause" of the Armed Career Criminal Act ("ACCA") as void for vagueness. *See Johnson v. United States*, 135 S. Ct. 2551 (2015). Within one year of *Johnson*, Mr. Espudo timely filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 seeking relief under *Johnson*.

In this Motion, Mr. Espudo noted that, like the ACCA residual clause, the definition of a "crime of violence" in § 924(c)(3)(B) employs language that is void for vagueness. He pointed out that this Court had recently held that the identical language appearing in 18 U.S.C. § 16(b) was unconstitutionally vague under *Johnson*. *See Dimaya v. Lynch*, 803 F.3d 1110, 1115 (9th Cir. 2015). And because RICO conspiracy did not otherwise qualify as a "crime of violence" under § 924(c)'s alternative definition (as an offense that contained an element of the use, attempted use, or threatened use of force), Mr. Espudo argued that the district court should grant his motion to correct the sentence under 28 U.S.C. § 2255.

The district court denied the § 2255 petition. Although it found Mr. Espudo's arguments "compelling," the court determined that "Espudo agreed that the brandishing a firearm not only related to the robbery but also to the drug trafficking offense." While the district court acknowledged that "there were

inconsistencies in asserting the underlying bases of the § 924(c) charge," it held that "when the plea colloquy is read in context, and when considered with the related court documents, it is plain that Espudo's § 924(c) conviction rested on *both* the RICO conspiracy and the drug-trafficking offenses" (emphasis added). And because *Johnson* only provided relief to those convicted of a "crime of violence," the district court denied his § 2255 petition.

Nevertheless, the district court found that "reasonable jurists could find the Court's assessment of Defendant's claims debatable" and granted Mr. Espudo a certificate of appealability. In his appeal to the Ninth Circuit, Mr. Espudo again argued that the plain language of the statute and the model jury instructions show that a § 924(c) conviction may rest on *either* a crime of violence *or* a drug trafficking crime but not both. To hold to the contrary, he pointed out, would create an impermissibly duplicitous indictment by charging two separate crimes in the same count. And because the factual basis repeatedly confirmed that the count was based on conspiracy to commit a "robbery," which only satisfied the residual clause of the "crime of violence" definition, Mr. Espudo argued that his conviction implicated *Johnson* and rendered him eligible for relief.

Relying on Mr. Espudo's admissions in the plea colloquy, the Ninth Circuit nevertheless agreed with the district court that the § 924(c) count was based on "*both* a crime of violence *and* a drug trafficking crime." *United States v. Espudo*, __ F. App'x __, 2019 WL 1601781 (9th Cir. April 15, 2019). The Ninth Circuit attempted to distinguish its holding from other circuits that had held similar counts

to be duplicitous, explaining that the RICO conspiracy and the drug conspiracy were "inextricably intertwined" and that Mr. Espudo's offense happened on "only one occasion." *Id.* at *2. Because his § 924(c) conviction partially relied on a drug trafficking crime, the Ninth Circuit held that it did not implicate *Johnson* and affirmed the district court's denial of his § 2255 petition. *See id.* This petition for a writ of certiorari follows.

SUMMARY OF THE ARGUMENT

Over the past 30 years, a little-noticed but significant circuit split has been brewing over how many § 924(c) counts a prosecutor may charge in a given indictment. When a defendant uses a firearm in furtherance of two separate federal crimes, the Third, Fourth, Sixth, Eighth, and Eleventh Circuits hold that a prosecutor may always bring two § 924(c) charges—one for each crime. But the Second, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits hold that a prosecutor may only bring two § 924(c) charges when the two separate federal crimes *did not arise out of the same incident or act.* Because each § 924(c) count carries a five-year mandatory consecutive sentence, this means that § 924(c) defendants in five circuits may literally be spending twice as much time in prison as defendants in six other circuits.

Mr. Espudo's case presents the best possible vehicle to resolve this inconsistent enforcement of one of the most frequently-charged federal criminal statutes. Not only did he present and receive a ruling on this issue at every stage of litigation, it is the only hurdle standing between him and the relief he seeks. What's

more, to resolve this question, the Court need only look at the plain language of § 924(c), which confirms that a § 924(c) count may rest on a crime of violence *or* a drug-trafficking crime but not both. For these reasons, the Court should grant Mr. Espudo's petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I.

The Courts of Appeals Are Divided on Whether a § 924(c) Conviction May Rest on More Than One Underlying Crime.

"Duplicity is the joining in a single count of two or more distinct and separate offenses." *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976). *See also* 1 C. Wright, *Federal Practice and Procedure*, § 142 at 469 (1982). Courts have held that a single count charging more than one offense may pose several dangers. Beyond the obvious concerns of notice to the defendant, a jury returning a verdict on a single count with multiple crimes may convict the defendant without unanimously agreeing on the same offense. *See United States v. Schlei*, 122 F.3d 944 (11th Cir. 1997). A defendant convicted of a duplicitous count may also have difficulty bringing a later double jeopardy defense. *See id.* And a court may have trouble determining whether evidence relating to one offense but not another is admissible. *See id.* For these and other reasons, courts and scholars have long held that "[o]ne offence only may be stated in a single indictment or count; if more than one offence is charged, the indictment is bad for duplicity." Joseph Henry Beale, A Treatise on Criminal Pleading and Practice 103-04 (1899).

But the courts of appeals do not agree on whether a single § 924(c) count that rests on *two separate underlying crimes* creates an improperly-duplicitous indictment. The Eleventh Circuit has held that it does. In *In re Gomez*, for instance, the defendant's single § 924(c) charge rested on no fewer than four separate crimes charged in four separate counts, "presumably offering each as a possible predicate for the § 924(c) charge." 830 F.3d 1225, 1226-27 (11th Cir. 2016). Explaining that each of these were "separate and distinct offenses," *Gomez* then reasoned that "a § 924(c) crime based on any one of these separate companion convictions would likewise be a separate offense." *Id.* at 1227.

But *Gomez* explained that this scenario "demonstrates the dangers that may lurk in indictments that list multiple potential predicate offenses in a single § 924(c) count." *Id.* For instance, "half of the jury may have believed that Gomez used the gun at some point during his Hobbs Act conspiracy, and the other half that he did so only during the drug trafficking offense." *Id.* at 1228. But because § 924(c) "'increase[s] the mandatory minimum sentence,'" its factual findings are "'elements'" that "'must be submitted to the jury and found beyond a reasonable doubt.'" *Id.* at 1227 (quoting *Alleyne v. United States*, 570 U.S. 99, 115 (2013)). And while the court could "make a guess based on the PSI or other documents from Gomez's trial or sentencing," *Alleyne* "expressly prohibits this type of 'judicial factfinding' when it comes to increasing a defendant's mandatory minimum sentence.'" *Id.* at 1228. And because the jury may have found that Gomez's § 924(c)

conviction only rested on a crime that fell under the residual clause, the Eleventh Circuit granted his application. *Id.*

Here, the Ninth Circuit did the opposite. Mr. Espudo argued that because his § 924(c) charge may have rested on a RICO conspiracy to commit robbery (and the factual basis suggests that it in fact did), it implicated the unconstitutional residual clause of § 924(c)(3)(B). *United States v. Espudo*, __ F. App'x __, 2019 WL 1601781, at *2 (9th Cir. Apr. 15, 2019). But the Ninth Circuit held that because the factual basis referenced both robbery *and* drug distribution, Mr. Espudo's § 924(c) conviction "was therefore based on both a crime of violence *and* a drug-trafficking crime." *Id.* (emphasis added). So even though the § 924(c) count rested on two "separate and distinct offenses," the Ninth Circuit (unlike the Eleventh Circuit) held that this created no duplicity problem.

The Ninth Circuit attempted to distinguish Mr. Espudo's case from *Gomez* by claiming that Mr. Espudo's firearm offense occurred "on only one occasion." *Id.* But other courts of appeals have held that a defendant may be charged with two § 924(c) counts for a single incident on one occasion that involved two predicate crimes. For instance, in *United States v. Nabors*, the defendant shot a federal agent who broke into his apartment, where he kept a large quantity of drugs. 901 F.2d 1351, 1353 (6th Cir. 1990). Prosecutors charged the defendant with one § 924(c) count for a crime of violence (shooting the agent) and a second § 924(c) count for a drug-trafficking crime (possession of cocaine with intent to distribute). *See id.* The defendant argued that § 924(c) did not allow "one use of firearms to support two

separate convictions and sentences." *Id.* at 1357. But the Sixth Circuit disagreed, explaining that the two § 924(c) counts "do not each require the same proof of facts; the two predicate offenses are distinct and require proof of facts not required by the other predicate." *Id.* at 1358.

At least three other courts of appeals have agreed with the Sixth and Eleventh Circuits. In *United States v. Casiano*, the Third Circuit held that "crimes occurring as part of the same underlying occurrence may constitute separate predicate offenses if properly charged as separate crimes"; thus, each separate crime "may be a separate predicate for a § 924(c)(1) conviction." 113 F.3d 420, 426 (3d Cir. 1997) (citations omitted). *See also United States v. Luskin*, 926 F.2d 372 (4th Cir. 1991) (rejecting the defendant's argument that "one cannot receive consecutive section 924(c) sentences for one episode of criminal behavior"); *United States v. Sandstrom*, 594 F.3d 634, 658 (8th Cir. 2010) (holding that "§ 924(c)(1) permits multiple convictions for the single use of a firearm based on multiple predicate offenses").

But at least five courts of appeals have sided with the Ninth Circuit. The Seventh Circuit provided a key example of this in *United States v. Cureton*, where the defendant "used the gun in connection with two different predicate offenses," but "both convictions are based on the exact same conduct." 739 F.3d 1032, 1035 (7th Cir. 2014). The court held that "[b]ecause there is only a single use of a single gun, and the predicate offenses were committed simultaneously without any

differentiation in conduct, only one § 924(c)(1) conviction can stand." *Id. See also United States v. Wilson*, 160 F.3d 732, 749 (D.C. Cir. 1998) (holding that "[b]ecause there was only one use of the firearm," one of the § 924(c) counts that rested on a separate predicate must be vacated); *United States v. Phipps*, 319 F.3d 177, 183 (5th Cir. 2003) (holding that § 924(c) "does not authorize multiple convictions for a single use of a single firearm based on multiple predicate offenses"); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987) (holding that a defendant who used a firearm in furtherance of both robbery and murder could only be convicted of one § 924(c) count); *United States v. Finley*, 245 F.3d 199, 207 (2d Cir. 2001) ("The statute does not clearly manifest an intention to punish a defendant twice for continuous possession of a firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct.").

What these cases show is that a deep and intractable circuit split exists between courts that believe two separate crimes arising out of a single incident may support two § 924(c) counts and courts that believe they may only support one § 924(c) count. Because this circuit split has existed for at least 30 years and shows no sign of abating, it is ripe for resolution.

II.

This Issue Has Critical Consequences for Prosecutors, Defendants, and the Entire Criminal Justice System.

As these cases demonstrate, this issue carries critical consequences for not only criminal defendants, but also prosecutors, judges, and the entire criminal justice system. Prior to 2018, defendants faced a mandatory minimum consecutive

sentence of 25 years for every additional count of § 924(c) charged in an indictment. *See* 18 U.S.C. § 924(c) (2006). So if a person aided and abetted another to use a gun to rob a drug dealer (as Mr. Espudo did), the Third, Fourth, Sixth, Eighth, and Eleventh Circuits would permit prosecutors to charge him with two § 924(c) counts—one for robbery and one for drug trafficking, resulting in a mandatory minimum sentence of 30 years in prison. But if this same person were prosecuted in the Second, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits, prosecutors could only charge him with a single § 924(c) count, leaving him with a mandatory minimum of five years. In other words, the question presented here—whether a firearms offense committed in furtherance of two separate predicate offenses may sustain one or two § 924(c) counts—affected whether people would *literally* spend additional decades in prison.

The First Step Act of 2018 ameliorated one of the harsher consequences of § 924(c) by limiting 25-year sentences to violations that occur "after a prior [§ 924(c)] conviction" has "become final." 18 U.S.C. § 924(c)(1)(C). But even with this amendment, every additional § 924(c) count in an indictment will add another five-year consecutive term of imprisonment on to the end of a person's sentence. So now a person prosecuted for Mr. Espudo's conduct in the Second, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits circuits will face five years, while the same person prosecuted in the Third, Fourth, Sixth, Eighth, and Eleventh Circuits will face ten years. This still doubles the mandatory minimum sentence. And cumulatively, it creates a disparity of hundreds (if not thousands) of years in prison, turning the

length of one's sentence on one of the most common federal criminal statutes into a matter of geographic happenstance.

Such inconsistency affects defendants, judges, prosecutors, and the Bureau of Prisons alike. Defendants convicted of § 924(c) in six circuits can expect to spend half the time in prison that defendants in five other circuits do. Prosecutors in six circuits must consider whether two separate predicate offenses related to a single incident when deciding whether to draft an indictment containing one § 924(c) count or two. Judges in those circuits must decide whether to agree or disagree with the prosecutors' assessment of that question. And for every person convicted of ten years for two § 924(c) counts, rather than five years for one § 924(c) count, the Bureau of Prisons will spend an additional $180,000 on their incarceration costs.[1] Over the past 30 years, this has resulted in thousands of hours of wasted time and millions of dollars in additional penal resources. Resolution of this important question is long overdue.

III.

Mr. Espudo's Case Squarely Presents This Issue.

At every stage of his habeas case, Mr. Espudo has argued that his § 924(c) conviction cannot rest on two separate predicate crimes (RICO conspiracy and drug conspiracy) without creating a duplicitous indictment. And at every stage of this

---

[1] *See* "Annual Determination of Average Cost of Incarceration," Federal Register, April 30, 2018, *available at*: https://www.federalregister.gov/documents/2018/04/30/2018-09062/annual-determination-of-average-cost-of-incarceration (stating that the average cost of incarceration for federal inmates in 2017 was $36, 299.25).

case, a lower court judge has disagreed, holding that his § 924(c) conviction rested on both a crime of violence *and* a drug-trafficking crime. *See United States v. Espudo*, __ F. App'x __, 2019 WL 1601781, at *1 (9th Cir. Apr. 15, 2019). The issue is therefore perfectly preserved and squarely presented for this Court's review.

Furthermore, nothing besides this holding stands between Mr. Espudo and the relief he seeks. On June 24, 2019, this Court held that the § 924(c) residual clause is void for vagueness. *United States v. Davis*, __ S. Ct. __, 2019 WL 2570623 (Jun. 24, 2019). Because RICO conspiracy may be committed without the actual use, attempted use, or threatened use of physical, it does not satisfy any other "crime of violence" definition in § 924(c) except the residual clause. And as lower courts have consistently held, a § 924(c) conviction cannot stand where it "'may have rested'" on an unconstitutional ground. *United States v. Cappas*, 29 F.3d 1187, 1193 (7th Cir. 1994) (quoting *Griffin v. United States*, 502 U.S. 46, 55 (1991)). Accordingly, Mr. Espudo's case provides a perfect vehicle to resolve this circuit split.

IV.

The Plain Language of the Statute Resolves This Question.

The resolution of this question carries mixed results for defendants like Mr. Espudo. On one hand, Mr. Espudo was denied relief because the courts below held that his § 924(c) count rested on *both* the RICO conspiracy and the drug-trafficking offenses"—i.e., that it related to both a "crime of violence" *and* a "drug trafficking crime." On the other hand, a finding to the contrary would open the door for prosecutors to charge defendants like Mr. Espudo with an additional § 924(c)

count and impose an extra five-year mandatory minimum sentence. Given these variables, different defendants may disagree on the best interpretation of the statute.

Nevertheless, an examination of the plain language of the statute provides the clearest path forward. Section 924(c) provides that a person shall be subject to an additional mandatory term of imprisonment for brandishing a firearm "during and in relation to any crime of violence *or* drug trafficking crime (including a crime of violence *or* drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device)." 18 U.S.C. § 924(c)(1)(A) (emphases added). Congress' repeated use of the word "or" shows that a term of imprisonment cannot rest on a crime of violence *and* a drug-trafficking crime, contrary to what the Ninth Circuit held here. So at a minimum, the Court should grant certiorari to clarify that two predicate offenses characterized as a "crime of violence" and a "drug-trafficking crime" cannot both underlie a single § 924(c) charge. Resolving this question alone would provide significant guidance to lower courts and avoid the bulk of pitfalls that stem from a duplicitous count.

CONCLUSION

Because five courts of appeal hold that two separate crimes committed in a single incident can sustain two separate § 924(c) counts and six courts of appeal hold they cannot, the Court should grant Mr. Espudo's petition for a writ of certiorari.

Respectfully submitted,

Date: July 1, 2019

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

APPENDIX

NOT FOR PUBLICATION

FILED

APR 15 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RUDY ESPUDO, Defendant-Appellant.	No. 17-55643 D.C. Nos. 3:16-cv-01433-GPC 3:12-cr-00236-GPC-1 MEMORANDUM*
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MIGUEL GRADO, AKA Kathy, AKA Kieto, Defendant-Appellant.	No. 17-55644 D.C. Nos. 3:16-cv-00738-GPC 3:12-cr-00236-GPC-4 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, District Judge, Presiding

Argued and Submitted March 6, 2019
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: KLEINFELD, GILMAN,** and NGUYEN, Circuit Judges.

Rudy Espudo and Miguel Grado appeal from the district court's denial of their motions to vacate, set aside, or correct their sentences under 28 U.S.C. § 2255. The defendants each pleaded guilty to, among other things, one count of violating 18 U.S.C. § 924(c) for brandishing a firearm (as to Espudo) and discharging a firearm (as to Grado) in relation to a crime of violence (a conspiracy under RICO, the Racketeer Influenced and Corrupt Organizations Act) and a drug-trafficking crime (a conspiracy to distribute controlled substances).

In their § 2255 motions, the defendants asked that the court vacate and correct their sentences under § 924(c)(1). Specifically, they argued that they were sentenced pursuant to the residual clause in § 924(c)(3)'s definition of a "crime of violence," which they claimed to be unconstitutionally vague in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court denied their motions, holding that because the defendants' § 924(c) convictions were predicated on both a crime of violence *and* a drug-trafficking crime, they would have necessarily been subject to the mandatory enhanced sentence under § 924(c) notwithstanding *Johnson*.

** The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

I. Plea Colloquies

As the district court explained, if the defendants' § 924(c) convictions were predicated on both a RICO conspiracy and a conspiracy to distribute controlled substances, then they are not eligible for *Johnson* relief. The defendants, however, contend that their § 924(c) convictions rested solely on acts involving a crime of violence and that neither defendant admitted to facts supporting a conviction of brandishing or discharging a firearm in relation to a drug-trafficking crime during their plea colloquies.

Their argument is contradicted by the record. During Espudo's plea colloquy, he admitted that (1) he entered into an agreement to participate in the activities of the Mexican Mafia, a gang that controls drug distribution within certain penal institutions; (2) he was a senior member of the Mafia and oversaw its collection of tax money from other gangs; (3) he agreed to distribute either 500 grams or more of a mixture containing methamphetamine, or 50 grams of actual methamphetamine, and a portion of the proceeds were provided to him in the form of tax payments; (4) on November 16, 2011, he directed his associates to rob a drug dealer who failed to pay tax money on behalf of the Mafia; and (5) although he was not present for the robbery, it was foreseeable that one of his associates brandishing a shotgun at the drug dealer. Espudo's § 924(c) conviction was therefore based on both a crime of violence and a drug-trafficking crime.

In similar fashion, Grado admitted during his plea colloquy that (1) he was a member of the Diablos Gang, which operated under the umbrella of the Mexican Mafia, and that he acted as a "shot-caller" who oversaw the collection of tax money; (2) he collected tax payments by intimidation, force, or threat of force from various drug dealers who operated within the Diablos Gang's territory; (3) he sold approximately 13.8 grams of methamphetamine, and distributed, possessed with the intent to distribute, or conspired with other gang members to distribute methamphetamine or cocaine; (4) he demanded a meeting with a local drug dealer after that dealer shorted Grado's coconspirator on the amount of methamphetamine to be delivered; and (5) even though the drug dealer ultimately provided Grado's coconspirator with the shorted methamphetamine, Grado went to the dealer's residence and either shot him or aided and abetted his coconspirator in shooting him. Grado's § 924(c) conviction was therefore similarly based on both a crime of violence and a drug-trafficking crime.

II. Claim of Duplicitous Counts

The defendants also contend on appeal that a § 924(c) conviction cannot be predicated on both a crime of violence and a drug-trafficking crime because it would create an impermissibly duplicitous indictment. They rely on *In re Gomez*, 830 F.3d 1225, 1227 (11th Cir. 2016), in which the Eleventh Circuit held that the defendant had made a prima facie showing for purposes of 28 U.S.C.

§ 2244(b)(3)(C), that his conviction, based on a single count, might have implicated § 924(c)'s residual clause and *Johnson*. In *Gomez*, the defendant was charged in a single count of violating § 924(c), referencing two drug-trafficking offenses and an attempted Hobbs Act robbery on the same day, as well as an ongoing conspiracy to commit Hobbs Act robbery spanning two weeks as potential predicates. Because the defendant might have "carried and possessed" the firearm during any of these separate underlying offenses (and not others), the Eleventh Circuit was left guessing as to which predicate the jury relied on for the § 924(c) conviction.

But *Gomez* is inapposite. In the present case, the defendants were each charged with violating § 924(c) for brandishing or discharging a firearm on only one occasion. The defendants just happened to commit two separate predicate offenses while brandishing or discharging that firearm—a RICO conspiracy that was inextricably intertwined with a conspiracy to distribute controlled substances.

Nor is this a situation in which the defendants were charged with multiple § 924(c) offenses for "using the same firearm *one* time to simultaneously further *two* different conspiracies." *See United States v. Vichitvongsa*, 819 F.3d 260, 266 (6th Cir. 2016) (emphases in original) (holding that the defendant who used a firearm while simultaneously committing two predicate offenses could not be convicted on two § 924(c) counts). Here, the defendants were each charged with

only one count of violating § 924(c). The defendants' § 924(c) convictions were therefore legally permissible.

III. Other Issues

Because the defendants' § 924(c) convictions were based in part on drug-trafficking crimes, they are not entitled to *Johnson* relief. We thus have no need to decide whether the residual clause in § 924(c)(3)'s definition of a crime of violence is unconstitutionally vague. Nor do we address whether the defendants' *Johnson* argument is procedurally defaulted for failing to raise the issue on direct appeal or is waived by their guilty pleas.

AFFIRMED.