No. 19-5246

IN THE SUPREME COURT OF THE UNITED STATES

JASON ROSADO, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 7-12) 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. Petitioner's conviction under 18 U.S.C. 924(c) does not, however, depend solely on the classification of his underlying offenses as crimes of violence under Section 924(c)(3)(B). The petition for a writ of certiorari should therefore be denied.

1. A federal grand jury charged petitioner with conspiracy to commit hostage taking, in violation of 18 U.S.C. 1203(a); hostage taking, in violation of 18 U.S.C. 1203(a); kidnapping, in

violation of 18 U.S.C. 1201(a)(1) and (2); carjacking, in violation of 18 U.S.C. 2119; and using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). Second Superseding Indictment 1-5. The Section 924(c) count identified each of the other charged offenses -- conspiracy to commit hostage taking, hostage taking, kidnapping, and carjacking -- as predicate "crime[s] of violence." Id. at 5.

Pursuant to a written plea agreement, petitioner pleaded guilty to conspiracy to commit hostage taking and to the Section 924(c) offense, and the government agreed to dismiss the other charges. Pet. App. A4, at 1; Plea Agreement 1. During the plea colloquy, the district court explained to petitioner that the Section 924(c) offense was predicated on each of the crimes charged in the indictment, and not simply on the hostage-taking conspiracy count to which petitioner had agreed to plead guilty. 11/30/12 Tr. 7. Petitioner acknowledged that he understood the charges to which he was pleading guilty, id. at 11-12, and admitted that he and his co-conspirators had carjacked the victim, kidnapped him at gunpoint, and then "tortured" him -- during which the victim "was severely beaten, burned, cut, tasered and waterboarded" -- in order to extort ransom money from the victim's family. Id. at 9; see id. at 8-12.

The district court sentenced petitioner to 444 months of imprisonment, consisting of 360 months of imprisonment on the

hostage-taking conspiracy count and a consecutive term of 84 months of imprisonment on the Section 924(c) count. Pet. App. A4, at 2. Petitioner did not appeal. See Pet. App. A2, at 2. Petitioner subsequently filed a motion for postconviction relief under 28 U.S.C. 2255, which the district court dismissed as untimely. See Pet. App. A2, at 2 n.1.

2. In 2016, petitioner filed an authorized second-or-successive motion for postconviction relief under Section 2255, in which he contended that conspiracy to commit hostage taking does not qualify as a crime of violence under Section 924(c). D. Ct. Doc. 437, at 12-19 (Oct. 5, 2016) (2255 Mot.). Section 924(c)(3) 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). Petitioner argued that conspiracy to commit hostage taking does not qualify as a crime of violence under Section 924(c)(3)(A), and that Section 924(c)(3)(B) is unconstitutionally vague in light of this Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C.

924(e)(2)(B)(ii), is void for vagueness, 135 S. Ct. at 2557. See 2255 Mot. 12-19.

A magistrate judge recommended that petitioner's Section 2255 motion be denied, Pet. App. A3, at 1-16, and the district court adopted that recommendation, Pet. App. A2, at 5-10. The district court explained that petitioner's Section 924(c) conviction was predicated on (among other crimes) carjacking, which categorically qualifies as a "crime of violence" under Section 924(c)(3)(A) because it "'requires the use, attempted use, or threatened use of physical force.'" Id. at 8 (quoting In re Smith, 829 F.3d 1276, 1280 (11th Cir. 2016)). The court observed that it had "specifically identified the carjacking offense" "as a predicate crime of violence" for the Section 924(c) offense during petitioner's plea colloquy, and that petitioner had "stipulated to the facts underlying the carjacking offense" and pleaded guilty to the Section 924(c) offense "without limitation." Id. at 6 (emphasis omitted). The court rejected petitioner's claim that listing multiple predicate offenses in a single Section 924(c) count was "impermissibl[y] duplicitous," finding that petitioner had failed to preserve that argument by raising it before the magistrate judge and, in any event, had relinquished a duplicity challenge by pleading guilty to the Section 924(c) count. Id. at 6-7.

The district court explained that, because carjacking categorically qualifies as a "crime of violence" under Section

924(c)(3)(A), petitioner's challenge to his Section 924(c) conviction "fail[ed] on the merits" irrespective of whether conspiracy to commit hostage taking qualified as a "crime of violence" under the alternative definition of that term in Section 924(c)(3)(B). Pet. App. A2, at 8-10. The court also denied petitioner's request for a certificate of appealability (COA). Id. at 10.

The court of appeals denied a COA. Pet. App. A1, at 1-3. Observing that, under then-existing Eleventh Circuit precedent, the definition of a "crime of violence" in Section 924(c)(3)(B) was not unconstitutionally vague, the court determined that petitioner could not "make a 'substantial showing of the denial of a constitutional right,'" as required for a COA. Id. at 1, 3 (quoting 28 U.S.C. 2253(c)(2) (emphasis omitted) and citing Ovalles v. United States, 905 F.3d 1231 (11th Cir. 2018) (en banc)).

3. The petition for a writ of certiorari should be denied because this Court's decision in Davis does not affect the validity of petitioner's Section 924(c)(3) conviction, which is supported by his admission that he used a firearm in committing a carjacking.

The district court correctly determined that carjacking qualifies as a crime of violence under Section 924(c)(3)(A). A person commits carjacking if, "with the intent to cause death or serious bodily harm," he "takes a motor vehicle * * * from the

person or presence of another by force and violence or by intimidation." 18 U.S.C. 2119. For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Cooper v. United States, 139 S. Ct. 411 (2018), carjacking categorically qualifies as a crime of violence under Section 924(c) because it "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). See Br. in Opp. at 6-9, Cooper, supra (No. 17-8844).[1] Every court of appeals to have considered the question has so held. See id. at 7-8. In particular, although petitioner suggests (Pet. 9-12) that the Eleventh Circuit has not definitively resolved the issue, it too has determined that "a § 2119 carjacking offense categorically qualifies [as a crime of violence] under § 924(c)(3)(A)'s elements clause." Ovalles v. United States, 905 F.3d 1300, 1304 (2018) (per curiam), cert. denied, 139 S. Ct. 2716 (2019). And this Court has recently and repeatedly denied petitions for writs of certiorari implicating that issue, as well as a related issue arising under the federal bank robbery statute, 18 U.S.C. 2113, which has operative language similar to the carjacking statute's.[2]

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[1] We have served petitioner with a copy of the government's brief in opposition in Cooper.

[2] See, e.g., Ovalles, supra (No. 18-8393); Williams v. United States, 139 S. Ct. 1619 (2019) (No. 18-7470); Foster v. United States, 139 S. Ct. 789 (2019) (No. 18-5655); Cooper, supra (No. 17-8844); Lindsey Johnson v. United States, 139 S. Ct. 70

Although petitioner asserts (Pet. 6) that the court of appeals "agreed with [him] that the § 924(c) charge" in his case "was tied to the conspiracy to commit hostage taking offense" alone, the court made no such finding. The court determined that petitioner had failed to demonstrate his entitlement to a COA because, under then-existing circuit precedent, the definition of a "crime of violence" in Section 924(c)(3)(B) was not unconstitutionally vague. Pet. App. A1, at 1-3. It did not, however, suggest that the district court had erred in denying petitioner's Section 2255 motion on the merits (or in denying a COA) for the additional reason that petitioner's Section 924(c) conviction was supported by a valid predicate offense under Section 924(c)(3)(A), and that petitioner had relinquished any argument to the contrary. See Pet. App. A2, at 5-10. Accordingly, petitioner's Section 924(c) conviction would be valid regardless of whether his hostage-taking conspiracy offense qualifies as a "crime of violence" under Section 924(c)(3)(B).

Because Davis concerned only the definition of a "crime of violence" in Section 924(c)(3)(B), this Court's decision in that

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(2018) (No. 17-8632); Henry v. United States, 139 S. Ct. 70 (2018) (No. 17-8629); Leon v. United States, 139 S. Ct. 56 (2018) (No. 17-8008); Stevens v. United States, 138 S. Ct. 2676 (2018) (No. 17-7785); Chaney v. United States, 138 S. Ct. 2675 (2018) (No. 17-7592); Dial v. United States, 138 S. Ct. 647 (2018) (No. 17-6036); Charles Johnson v. United States, 138 S. Ct. 61 (2017) (No. 16-8415); Evans v. United States, 137 S. Ct. 2253 (2017) (No. 16-9114); In re Fields, 137 S. Ct. 1326 (2017) (No. 16-293).

case does 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.[3]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

SEPTEMBER 2019

[3] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.