NO: 19-5246

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

JASON ROSADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITIONER'S REPLY TO THE UNITED STATES' MEMORANDUM IN OPPOSITION

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I.

THE SOLICITOR GENERAL HAS FAILED TO ADDRESS THE TWO ISSUES RAISED BY MR. ROSADO IN HIS PETITION FOR A WRIT OF CERTIORARI

In its Memorandum in Opposition to Mr. Jason Rosado's Petition for a Writ of Certiorari, the Solicitor General fails to address the two issues raised by Mr. Rosado—whether the Eleventh Circuit Court of Appeals' denial of Mr. Rosado's request for a Certificate of Appealibility ("COA") can stand after this Court's decision in *United States v. Davis,* 588 U.S. ___, 139 S. Ct. 2319 (2019) and whether Mr. Rosado can meet his burden for the issuance of a COA where conspiracy to commit hostage taking can only be a crime of violence under the now-unconstitutionally vague residual clause in 18 U.S.C. § 924(c)(3)(B)? Instead, the Solicitor General argues that Mr. Rosado's conviction can be upheld—and, therefore, no COA should issue—because Mr. Rosado was also charged with carjacking, in violation of 18 U.S.C. § 2119, even though the carjacking charge was dismissed by the government at the time of the change of plea.

A. The Eleventh Circuit's Judgment is Based on Reasoning which has Squarely been Rejected by this Court in *Davis.*

The Solicitor General does not dispute—or even address—the fact that the single case relied upon by the Eleventh Circuit Court of Appeals when it denied the COA, *Ovalles v. United States,* 905 F.3d 1231 (11th Cir. 2018), was abrogated by this Court's *Davis* opinion. The Eleventh Circuit Court of Appeals never reached the issue of whether conspiracy to commit hostage taking was a crime of violence under

the elements clause of 18 U.S.C. § 924(c)(3)(A) or even if the district court was correct when it determined that Mr. Rosado's § 924(c) conviction could be upheld based on the fact that Mr. Rosado was also charged with—but not convicted of—carjacking. Instead, the Solicitor General jumps to its argument that Eleventh Circuit Court precedent supports the district court's finding that carjacking is a crime of violence under the elements clause and so the Eleventh Circuit Court of Appeals properly denied Mr. Rosado's request for a COA. This is simply incorrect and this Court should grant Mr. Rosado's petition.

Despite the government's protestation to the contrary, (Mem. at 7), the Eleventh Circuit Court of Appeals very explicitly stated in its Order denying the COA that Count 2, possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c), was "tied" to Count 1, conspiracy to commit hostage taking, in violation of 18 U.S.C. § 1203(a). The court did not reference the carjacking charge, which was dismissed at the time of the change of plea. *Ovalles*, the case relied upon by the appeals court, specifically held that carjacking was a crime of violence under § 924(c)'s elements clause and so the court could have relied upon that holding as an alternative holding in finding that reasonable jurists could disagree, but it did not. The Solicitor General is asking this Court to deny Mr. Rosado's petition on a ground that was never considered by the Eleventh Circuit Court of Appeals.

The facts of this case are indistinguishable from the facts in *Danny Herrera v. United States*, ___ U.S. ___, No. 18-9244 (U.S. filed May 13, 2019) in which this

Court, on October 7, 2019, granted the petition for a writ of certiorari, vacated the judgment and remanded for further consideration in light of *Davis*. In *Herrera*, a case which also came from the Eleventh Circuit Court of Appeals and decided based on *Ovalles*, the defendant pled guilty to conspiracy to commit Hobbs Act robbery and possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). This case is also similar to two other cases decided on October 7, 2019 and out of the Eleventh Circuit, *Mario Bachiller v. United States*, ___ U.S. ___, No. 18-8737 (U.S. filed April 9, 2019) and *Bobby Martin v. United States*, ___ U.S. ___, 18-9185 (U.S. filed May 8, 2019) in which this Court granted the petition for a writ of certiorari, vacated the judgment and remanded for further consideration in light of *Davis*. In those cases, the government alleged multiple predicates when it charged the defendant with violating 18 U.S.C. § 924(c) and the § 924(c) conviction was based on a general jury verdict.

Alternatively, the petition should be granted because, using the modified categorical approach, it must be presumed that Mr. Rosado's conviction under § 924(c) rested on the "least serious" of the crimes charged in the indictment—in this case, conspiracy to commit hostage taking.

B. A Guilty Plea to a Single Count of Violating 18 U.S.C. § 924(c) Necessarily Rests on One – and Only One – Predicate Crime.

1. The statutory language of 18 U.S.C. § 924(c)(1)(A) demands a single predicate offense.

"When interpreting a statute, we look first to the language." *Richardson v. United States*, 526 U.S. 813, 818 (1999). "This language is conclusive, absent a clearly expressed legislative intent to the contrary." *United States v. Rawlings*, 821

F.3d 1543, 1545 (11th Cir. 1987) (citations omitted). "[W]e must assume that Congress used the words of the statute as they are commonly and ordinarily understood." *Id.*

Title 18 U.S.C. § 924(c) makes it an offense to carry or possess a firearm "during and in relation to any crime of violence or drug trafficking offense." 18 U.S.C. § 924(c) (emphasis added). The statute identifies the predicate offenses disjunctively ("or") and uses the singular form of the words "crime" and "offense." 18 U.S.C. § 924(c). Congress could have written the statute to apply to a "crime or crimes" of violence. But it did not. It clearly and specifically identified a singular "crime" of violence (or drug trafficking "offense") to attach to each count of conviction.

Consistent with this statutory language, the Eleventh Circuit – following an apparent majority of circuits – has held that a separate § 924(c) count may be charged for each separate predicate offense the defendant committed. *See United States v. Hamilton*, 953 F.2d 1344, 1346 (11th Cir. 1992) (collecting cases). *See also In re Gomez,* 830 F.3d 1225, 1227 (11th Cir. July 25, 2016) (holding that an indictment enumerating two or more predicate crimes in a single § 924(c) count actually alleged two or more separate and independent § 924(c) offenses; "the jurors had multiple crimes to consider in a single count"). These cases confirm the longstanding understanding that the term "crime of violence" in 18 U.S.C. § 924(c)(1)(A), is to be satisfied by proof of a single predicate offense.

This interpretation is bolstered by *Davis'* holding that 18 U.S.C. § 924(c) requires the categorical approach. *Davis,* 588 at ___, 139 S. Ct. at 2329. Under that approach — which dates back to *Taylor v. United States*, 495 U.S. 575 (1990) — a defendant can be found guilty of committing a specified offense if, and only if, the elements of the defendant's crime "are the same as, or narrower than, those of the generic offense." *See Mathis v. United States*, 136 S. Ct. 2243 (2016). A statute which "list elements in the alternative, and thereby define[s] multiple crimes," is said to be "divisible." *Id.* at 2249. In such cases, the Court may apply the modified categorical approach, and examine a limited universe of documents to determine which, of the several alternative crimes, "necessarily" formed the basis of the conviction. *See Shepard v. United States*, 544 U.S. 13, 21-23 (2005); *Descamps v. United States*, 570 U.S. 254 (2013). The categorical approach applies in the case of guilty pleas as well as trials, and has been consistently applied for nearly 30-years. *See Shepard*, 544 U.S. at 15 (including plea agreement and transcript of plea colloquy among documents the court may consider in determining the nature of the offense); *Descamps*, 133 S. Ct. at 264 ("Applied in that way — which is the only way we have ever allowed — the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute."). Conspicuously absent from the Court's 30-year history of applying the categorical approach, however, is any suggestion that one element of an offense may be satisfied by multiple, alternative sets of facts.

2. Elements must be based on specifically identified facts.

"'Elements' are the 'constituent parts' of a crime's legal definition – the things the 'prosecution must prove to sustain a conviction.' At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Mathis*, 136 S. Ct. at 2449 (citations omitted). "Calling a particular kind of fact an 'element' carries certain legal consequences." *Richardson*, 526 U.S. at 817. Importantly, "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." *Id.* (citations omitted).

A related consequence of calling a particular fact an "element" is that the defendant must be in a "position to understand with some specificity" the basis of the charge against him. *Schad v. Arizona,* 501 U.S. 624, 632-33 (1991) (plurality opinion) (internal citation omitted). "[I]t is an assumption of our system of criminal justice 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' ... that no person may be punished criminally save upon proof of some specific illegal conduct." *Id.* at 633 (internal citations omitted). As Justice Souter wrote: "nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." *Id.* By definition, therefore, elements must be determined with specificity at the time of the verdict or guilty

plea. They are immutable, and cannot later be exchanged for a substitute set of facts. In a word, they are not fungible.

3. The "crime of violence" is an element which must be unanimously determined by the jury or identified at the time of the guilty plea.

The government does not dispute, of course, that the "crime of violence" is an element of 18 U.S.C. § 924(c)(1)(A). Nonetheless, the *Richardson* Court's discussion of the continuing criminal enterprise ("CCE") statute, 18 U.S.C. § 848(a), sheds light on the issues herein.

In *Richardson*, the Court determined that each "violation" in a "series of violations" was an element of CCE offense under § 848(a). *See Richardson*, 526 U.S. at 818. Although the statutory language was inconclusive, it was also "not totally neutral." *Id.* This was because "[t]he words 'violates' and 'violations' are words that have a legal ring. A 'violation' is not simply an act or conduct; it is an act or conduct that is contrary to law." *Id.* at 818-819. "To hold that each 'violation' here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant engaged in conduct that violates the law. To hold to the contrary is not." *Id.* at 819. Thus, the jurors in *Richardson* were required to agree on which three "violations" constituted the "series of violations" under the statute.

Similarly, here, 18 U.S.C. § 924(c) makes it a crime to carry, use, or possess a firearm in connection with any "crime of violence .... for which the person may be prosecuted in a court of the United States." The statute thus requires a finding that the defendant has "engaged in conduct that violates the law;" and this finding is an

element requiring unanimity. *See Richardson*, 526 U.S. at 819. Hence, a jury in a § 924(c) case must agree as to which specific "crime of violence" or "drug trafficking offense" the defendant committed with the assistance or possession of a firearm.

As a necessary corollary to the above, when a defendant pleads guilty to a single count of violating 18 U.S.C. § 924(c), he is pleading guilty to a single set of elements, including a specifically identified predicate crime. "And there's the constitutional rub." *Descamps*, 570 U.S. at 270. "The Sixth Amendment contemplates that a jury ... will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances." *Id.*, *citing*, "*e.g.*," *Richardson*, 526 U.S. at 817. "Similarly, when a defendant pleads guilty to a crime, he waives his right to a jury determination only of that offense's elements; whatever he says, or fails to say, about superfluous facts" is "irrelevant." *Decamps*, 507 U.S. at 270.

"A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense – and may have good reason not to." *Id.* For example, "during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations." *Id.* (emphasis added). That does not mean, of course, that he pled guilty to distinct, alternative crimes made up of facts that were legally "superfluous" at the time of the plea hearing. Rather, the Court in such a case will use the modified categorical approach to determine "which," of "several different crimes" necessarily "formed the basis of the

defendant's conviction." *Id.* at 263 (citing *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009)). The focus remains "on the elements, rather than the facts, of a crime." *Id.*

The government's reliance on Mr. Rosado's "admission that he used a firearm in committing a carjacking," (Mem. At 5), is misplaced. *Mathis*, 136 S.Ct. at 2248. "These are 'circumstance[s]' or 'event[s]' having no 'legal effect [or] consequence'" *Id.* "And ACCA [and, hence, the categorical approach] ... cares not a whit about them." *Mathis*, 136 S. Ct. at 2249. This is true whether or not the defendant admitted to them. *See Descamps*, 570 U.S. at 270 ("Whether Descamps did break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant") (emphasis in original).

Under the modified categorical approach, if it is unclear which of several alternative versions of an offense the defendant pled guilty to, the Court "must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized." *See Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (citing *Johnson v. United States*, 559 U.S. 133, 137 (2010)). The Court may not do what the district court did here — and substitute an alternative set of facts that may or may not have formed the basis of the charge at the time of the plea.

4. The modified categorical approach is consistent with the *Stromberg* line of cases.

In this sense, the modified categorical approach is consistent with a line of precedent stemming from *Stromberg v. California*, 283 U.S. 359 (1931), and *Yates v. United States*, 354 U.S. 298 (1957), *overruled in part on other grounds Burks v. United States*, 473 U.S. 1 (1978).

"[T]he law is well established that where an indictment charges in the conjunctive several means of violating a statute, a conviction may be obtained on proof of only one of the means, and accordingly the jury instructions may properly be framed in the disjunctive." *United States v. Simpson*, 228 F.3d 1294, 1300 (11th Cir. 2000). In such a case, the government has charged "more than was required by the statute." *See id.* But it does not follow that a defendant convicted on a general verdict is thereafter guilty of multiple, alternative versions of the crime.

Were that the case, there would have been no need for the Court to hold — as it has for nearly a century — that *vacatur* is required where it is "impossible to tell" whether a defendant was convicted based on an unconstitutional alternatively-phrased ground. *See, e.g.*, *Stromberg*, 283 U.S. at 368; *Yates*, 354 U.S. at 312. *See also Williams v. North Carolina*, 317 U.S. 287, 292 (1942) ("To say that a general verdict of guilty should be upheld even though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights.").

Importantly, while *Stromberg* and *Yates* involved convictions which might have rested on constitutionally protected conduct, in *Black v. United States*, 561 U.S. 465 (2010), the Court invoked *Yates* where the defendant might have been convicted – as in this case – of an unconstitutionally vague offense. *Black* was issued the same day as *Skilling v. United States*, 561 U.S. 358 (2010), and involved a challenge to the defendants' convictions under the unconstitutionally vague

"honest services" theory of wire fraud. The Court reaffirmed that "[u]nder the rule declared by this Court in *Yates v. United States* ... a general verdict may be set aside 'where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.'" *Black*, 501 U.S. at 470.

In none of these cases did the Court find that the defendant was really convicted on multiple, alternative grounds. Indeed, the Court has "made clear that the reasoning of *Stromberg* encompasses a situation in which the general verdict on a single-count indictment or information rested on both a constitutional and an unconstitutional ground." *See Zant v. Stephens*, 462 U.S. 862 (1983) (citing *Thomas v. Collins*, 323 U.S. 516, 528-29 (1945), and *Street v. New York*, 394 U.S. 576, 586-590 (1969)). In such a case, "the judgment ... must be affirmed as to both or as to neither." *Thomas*, 323 U.S. at 529. And, the fact that the defendant entered a guilty plea makes no difference. *See Vann*, 660 F.3d at 774 (rejecting this view).

C. There is a Split between the Eleventh and Fourth Circuits Regarding whether a Defendant's Guilty Plea to a Single Disjunctive Charge Actually Establishes Multiple Variants of the Offense.

In this Court, the Solicitor General, in its memorandum in opposition, rather than focusing on the flawed reasoning of the Eleventh Circuit, adopted the equally flawed reasoning of the district court – which denied relief because the violation of 18 U.S.C. § 924(c) to which Mr. Rosado pled guilty alleged multiple predicate crimes. *See* Pet. at 5. This reasoning, which was incorporated into Eleventh Circuit law in *In re Navarro*, 931 F.3d 1298, 1302 (11th Cir. 2019), is inconsistent with both

the plain language of § 924(c) and the categorical approach. Furthermore, it is directly contrary to the law of the Fourth Circuit.

In *In re Navarro*, the Eleventh Circuit held that a defendant's guilty plea was "predicated ***both*** on conspiracy to commit Hobbs Act robbery and drug-trafficking crimes." 931 F.3d at 1302 (emphasis added). This ruling conflicts with the law of the Fourth Circuit, which holds that: "when a defendant pleads guilty to a formal charge in the indictment which alleges conjunctively the disjunctive components of a statute, the rule is that the defendant admits to the least serious of the disjunctive statutory conduct." *United States v. Chapman*, 666 F.3d 220, 227-28 (4th Cir. 2012). The *en banc* Fourth Circuit expressly rejected the notion that a defendant admits to multiple versions of a crime when he pleads guilty to a conjunctively-phrased charge. *See United States v. Vann*, 660 F.33d 771, 774 (4th Cir. 2011) (*per curiam* for the *en banc* majority) ("That Vann's predicate charging documents properly use the conjunctive term "and," rather than the disjunctive 'or,' does not mean that Vann "necessarily" pleaded guilty to subsection (a)(2)."). "That position is untenable, ... as demonstrated by the principles generally applicable to charging documents," which allow prosecutors to charge alternative allegations in the conjunctive, and prove them disjunctively at trial. *See id. See also Valansi v. Ashcroft*, 278 F.3d 203, 215-218 (3d Cir. 2002) (finding that specific intent to defraud was not established, where element alleged that the defendant "acted with the intent to injure or defraud").

Following these principles, as recognized by the Fourth Circuit, Mr. Rosado is entitled to relief. *See Chapman*, 666 F.3d at 228 ("[T]he rule is that the defendant admits to the least serious of the disjunctive statutory conduct."). The result should be no different because he was convicted in the Eleventh.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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