

No. 19-5460

IN THE SUPREME COURT OF THE UNITED STATES

JOSE ORTEGA, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 6-9) that this Court should grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration in light of United States v. Davis, 139 S. Ct. 2319 (2019), in which this Court determined 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's conviction under 18 U.S.C. 924(c), however, turns on the classification of an underlying offense as a "drug trafficking crime" under 18 U.S.C. 924(c)(2), not on the classification of an underlying offense as a "crime of violence" under Section 924(c)(3)(B). Because Davis does not address the

definition of a "drug trafficking crime," and thus would not affect the outcome of this case, the petition for a writ of certiorari should be denied.

1. Following a guilty plea, petitioner was convicted on one count of conspiracy to conduct a racketeering enterprise, in violation of 18 U.S.C. 1962(d); one count of conspiracy to distribute methamphetamine and cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(vii), (b)(1)(B)(ii), and 846; and one count of possessing a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Judgment 1; see Superseding Indictment 1-80, 82. The district court sentenced petitioner to 180 months of imprisonment, consisting of concurrent sentences of 120 months of imprisonment on the racketeering and drug-distribution conspiracy counts, and a consecutive sentence of 60 months of imprisonment on the Section 924(c) count. Judgment 2. Petitioner did not appeal his convictions or sentence. Pet. App. 6.

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 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 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). The Section 924(c) count to which petitioner pleaded guilty identified as predicate "drug trafficking crimes" both the charged drug-distribution conspiracy and the charged racketeering conspiracy, insofar as the latter involved "the commission of" offenses under the Controlled Substances Act, 21 U.S.C. 841(a)(1) and 846 -- specifically, "distribution, possession with intent to distribute[,] and conspiracy to distribute controlled substances." Superseding Indictment 13, 82. The Section 924(c) count did not identify any underlying crimes of violence. Id. at 82.

2. In 2016, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, in which he contended that his racketeering conspiracy offense was not a valid Section 924(c) predicate. D. Ct. Doc. 2018, at 4-12 (Nov. 15, 2016) (Am. 2255 Mot.). Petitioner contended that racketeering conspiracy 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 Johnson v. United States, 135 S. Ct. 2551 (2015), in which this Court 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 Am. 2255 Mot. 4-9. Petitioner further argued that the racketeering conspiracy count in his case did not categorically qualify as a "drug trafficking crime" because it identified several predicate racketeering acts that were unrelated to drug distribution and that could have provided the basis for his conviction. Id. at 10-12; see Superseding Indictment 12-13 (alleging that racketeering conspiracy involved agreement to commit murder, kidnapping, robbery, extortion, drug distribution, and money laundering).

The district court denied petitioner's Section 2255 motion. Pet. App. 4-18. The court determined that petitioner's Section 924(c) conviction "rested on a drug trafficking [predicate], not on a crime of violence," and thus that petitioner was not entitled to "relief under Johnson." Id. at 9, 14. The court explained that the "plain language of the superseding indictment" identified the predicate offenses for petitioner's 924(c) conviction as "drug trafficking crimes," id. at 9-10, and that petitioner had expressly admitted as much during his plea colloquy, id. at 11-12. Specifically, the court observed that the Section 924(c) count to which petitioner pleaded guilty had identified the underlying racketeering conspiracy as an agreement to commit drug-distribution offenses "punishable under the Controlled Substances Act," and had not itself referenced other possible racketeering acts. Id. at 10. The court further observed that, "even if RICO

[c]onspiracy were not a drug-trafficking crime," petitioner's conviction was "lawful" because the other underlying offense identified in the Section 924(c) count -- conspiracy to distribute methamphetamine and cocaine -- qualified as a "drug trafficking crime." Id. at 10 n.8.

The district court rejected petitioner's alternative contention that the categorical approach precluded reliance on "the face of the indictment, plea colloquy, and other elements of the record" to establish that petitioner's underlying offenses were "drug trafficking crime[s]" rather than "crime[s] of violence." Pet. App. 16. The court explained that the categorical approach "governs the inquiry * * * of whether a particular conviction satisfies the specified elements of a sentence-enhancement provision," but does not address whether an underlying offense is charged as a drug trafficking crime or a crime of violence. Id. at 15; see ibid. (noting that petitioner "cited no case" that supported his argument).

Finally, the district court rejected petitioner's assertion that alleging two drug trafficking predicates in a single Section 924(c) count was "impermissibly duplicitous." Pet. App. 16. The court explained that petitioner relinquished any duplicity challenge by pleading guilty and that, in any event, petitioner had procedurally defaulted that claim by not raising it earlier. Id. at 17.

3. The district court granted a certificate of appealability, Pet. App. 17, and the court of appeals affirmed, id. at 1-3. The court of appeals determined that “the district court permissibly reviewed ‘the record before the sentencing court’ to determine” that the offenses underlying petitioner’s Section 924(c) conviction “related to drug trafficking, not * * * crime[s] of violence.” Id. at 2-3 (quoting United States v. Geozos, 870 F.3d 890, 896 (9th Cir. 2017)). Accordingly, the court found that neither the constitutionality of Section 924(c) (3) (B)’s “crime of violence” definition nor the potential reach of the racketeering conspiracy statute were implicated in petitioner’s case. Id. at 3.

4. Petitioner’s request for a remand in light of Davis should be denied. Davis held that the definition of a “crime of violence” in Section 924(c) (3) (B) is unconstitutionally vague. See 139 S. Ct. at 2336. As the court of appeals correctly determined, that issue is not presented in this case because petitioner’s Section 924(c) conviction is premised on his possession of a gun during and in relation to drug trafficking crimes, not crimes of violence.

Davis does not address Section 924(c) (2)’s definition of a “drug trafficking crime,” and it provides no support for petitioner’s factbound contention that his predicate racketeering conspiracy offense may have been based on non-drug offenses.

Indeed, as the district court correctly explained, the Section 924(c) count in petitioner's case specifically limited the predicate racketeering conspiracy to an agreement to distribute drugs, see Superseding Indictment 13, 82; it identified the drug-distribution conspiracy as an alternative predicate offense, id. at 82; and petitioner expressly admitted during his plea colloquy that he possessed a gun during and in relation to drug offenses, not crimes of violence, Plea Tr. 3, 7-8, 13-16. See Pet. App. 9-12. Further consideration in light of Davis's invalidation of the definition of "crime of violence" in Section 924(c)(3)(B) would therefore have no effect on the outcome.

The petition for a writ of certiorari should be denied.*

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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* The government waives any further response to the petition unless this Court requests otherwise.