No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD HERRON,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the second circuit err by affirming petitioner's 18 U.S.C. § 924(c) convictions – either under § 924(c)(3)(b), which has been declared unconstitutional by this court, or by ignoring the trial court's aiding and abetting instruction which omitted any requirement of advance knowledge of the firearm-related conduct.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

1) *United States v. Herron*, No. Cr. 10-615 (S-6) (NGG), United States District Court for the Eastern District of New York. Judgment entered April 8, 2015.

2) *United States v. Herron*, No. 15-1089, United States Court of Appeals for the Second Circuit. Judgment entered February 14, 2019, rehearing denied June 22, 2020.

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The unpublished Summary Order of the United States Court of Appeals for the Second Circuit, *United States v. Herron*, 762 F. App'x 25 (2d Cir. 2019), was issued on February 14, 2019, and is reproduced in the Appendix at A-2. The order denying panel or en banc rehearing was issued on June 22, 2020, and is reproduced in the Appendix at A-1.

BASIS FOR JURISDICTION

Because of the COVID-19 pandemic, on March 19, 2020, this Court entered an Order directing that "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing."

The Second Circuit denied a timely petition for rehearing on June 22, 2020, and Mr. Herron's petition for certiorari is therefore due on or before November 19, 2020.

This petition is timely filed and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS CITED

The text of 18 U.S.C. § 924 is reproduced in the Appendix at A-11.

INTRODUCTION

In *United States v. Davis*, ___ U.S. ___, 139 S. Ct. 2319 (2019), this Court held that § 924(c)(3)(B)'s residual clause was unconstitutionally vague. And in *Rosemond v. United States*, 572 U.S. 65 (2014), the Court held that aiding and abetting a § 924(c) crime required advance knowledge of the firearm-related conduct.

In petitioner Ronald Herron's case, the Second Circuit affirmed several counts of conviction using a case-specific approach under § 924(c)(3)(B). After this Court declared that subsection unconstitutional, Herron sought rehearing, arguing (1) that the portion of the Second Circuit's decision which relied on § 924(c)(3)(B) could not stand and (2) all of Herron's § 924(c) convictions needed to be vacated because the jury was told that it could convict him as an aider or abettor but the jury charge on that theory was legally incorrect.

The Second Circuit denied rehearing without explanation. A-1. Petitioner now asks this Court to do what the Second Circuit clearly should have done and vacate the convictions on those counts.

STATEMENT OF THE CASE

According to the government, from the late 1990s through 2010, petitioner Ronald Herron led a violent criminal enterprise which consisted of members and associates of the Murderous Mad Dog set of the Bloods street gang, which operated in the Boerum Hill section of Brooklyn, New York ("the Enterprise"). Herron used his high-ranking position within the Bloods and his reputation for violence to maintain his control over the Enterprise. Herron's role was established, in part, by his reputation

for "beating a body" by being acquitted of the 2001 murder of Frederick Brooks. He further enhanced his reputation for ruthlessness by committing two more murders – the 2008 murder of Richard Russo and the 2009 murder of Victor Zapata.

The Enterprise's primary means of income was narcotics trafficking, and Herron controlled much of the drug trafficking in the Gowanus and Wyckoff Housing Developments. He employed members of the Enterprise to act as sellers and enforcers and supplied the Enterprise with narcotics that he purchased from various sources of supply.

Herron was charged in a superseding indictment with a pattern of racketeering activity that spanned the period of January of 1998 through October of 2010, and which involved cocaine and heroin distribution, murder, and robbery. The 21-count indictment charged: racketeering (18 U.S.C. §§ 1962(c), 1963(a)) [Count One]; racketeering conspiracy (18 U.S.C. §§ 1962(d), 1963(a)) [Count Two]; conspiracy to distribute cocaine base (21 U.S.C. §§ 846 and 841(b)(1)(A)(iii)) [Count Three]; use of firearms in furtherance of a narcotics trafficking crime (18 U.S.C. § 924(c)(1)(A)(i)) [Count Four]; murder in-aid-of racketeering (18 U.S.C. § 1959) [Counts Five and Twelve]; drug-related murder (21 U.S.C. § 848(e)(1)(A)) [Counts Six, Thirteen, and Eighteen]; unlawful use and discharge of a firearm in furtherance of a crime of violence (18 U.S.C. §§ 924(c)(1)(A)(iii) and (c)(1)(C)(i)) [Counts Seven, Fourteen, and Nineteen]; firearm-related murder (18 U.S.C. § 924(j)(1)) [Counts Eight, Fifteen, and Twenty]; Hobbs Act robbery (18 U.S.C. § 1951(a)) [Count Nine]; unlawful use and brandishing of a firearm in furtherance of a crime of violence (18 U.S.C. §§ 924(c)(1)(A)(ii) and

(c)(1)(C)(i)) [Count Ten]; conspiracy to distribute and possess with intent to distribute heroin (21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(C)) [Count Eleven]; conspiracy to commit murder in-aid-of-racketeering (18 U.S.C. § 1959) [Count Seventeen]; and, being a felon in possession of a firearm (18 U.S.C. §§ 922(g)(1), 924(a)(2)) [Count Twenty-One].

Herron was tried before Judge Nicholas G. Garaufis and a jury, in the Eastern District of New York. He was convicted on all counts in the indictment after a five-week trial and subsequently sentenced to 12 life terms plus 105 consecutive years.

Herron appealed, arguing that: (1) the district court erred by not examining whether two witnesses would have provided self-incriminating testimony before permitting them to invoke the Fifth Amendment; (2) the introduction of rap music videos into evidence ran afoul of the First Amendment and Fed. R. Evid. 403; (3) cell-site location evidence should have been suppressed; and (4) various firearms convictions were invalid because they were not "crimes of violence" under 18 U.S.C. § 924(c)(3).

By Summary Order dated February 14, 2019, the Second Circuit affirmed the district court's judgment in all respects. Relevant to this petition, the Second Circuit affirmed the convictions on counts Seven, Fourteen, and Nineteen by finding that the conduct underlying those counts qualified as crimes of violence pursuant to "the case-specific approach under § 924(c)(3)(B), the risk-of-force clause," as adopted in *United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018) (*Barrett I*). As to the conviction on Count Ten, the Second Circuit affirmed because "Hobbs Act robbery is categorically a crime of violence under § 924(c)(3)(A)." *United States v. Herron*, 762 F. App'x at 32-33;

A-8.

Subsequently, this Court decided *United States v. Davis*, ___ U.S. ___, 139 S. Ct. 2319 (2019), and held that § 924(c)(3)(B)'s residual clause was unconstitutionally vague. The Court also vacated *Barrett I* and remanded for further consideration in light of *Davis*. On remand, the Second Circuit held that, in light of *Davis*, a crime cannot be identified as a crime of violence under § 924(c) – even by a trial jury – on a case-specific basis and the decision must be made categorically. *United States v. Barrett*, 937 F.3d 126, 128 (2d Cir. 2019) (*Barrett II*) (citing *United States v. Davis*, 139 S. Ct. 2319 (2019)).

Herron filed a timely petition for a panel or en banc rehearing, arguing that the his convictions on counts Seven, Fourteen, and Nineteen must be vacated because the Panel had affirmed them based on *Barrett I*'s case-specific approach to § 924(c)(3)(B) – which was no longer valid in light of *Davis* (as explicitly held in *Barrett II*).

The Second Circuit denied Herron's petition for rehearing. A-1.

REASON FOR GRANTING THE PETITION

I. THE CONVICTIONS MUST BE VACATED BECAUSE THE RESIDUAL CLAUSE OF § 924(c)(3) IS UNCONSTITUTIONAL AND THE JURY WAS NOT INSTRUCTED THAT LIABILITY UNDER A THEORY OF AIDING OR ABETTING REQUIRES ADVANCE KNOWLEDGE OF THE FIREARM-RELATED CONDUCT

A. Counts Seven, Ten, Fourteen, and Nineteen Were Affirmed Pursuant to the Residual Clause of § 924(c)(3)(B), Which Has Been Declared Unconstitutional by this Court

Section 924(c) of Title 18 prohibits the use or carrying of a firearm in relation to, or possession of a firearm in furtherance of, a "crime of violence." 18 U.S.C. § 924(c)(1)(A). A "crime of violence" is a felony that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that 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)(A)-(B).

Subsection (A) is known as "the elements clause," and subsection (B) is referred to as "the residual clause." *United States v. Davis*, 139 S. Ct. at 2324.

In *Davis*, this Court held that § 924(c)(3)(B)'s residual clause was unconstitutionally vague, and "a vague law is no law at all." *United States v. Davis*, 139 S. Ct. at 2323, 2336. The Court then vacated *Barrett I* and remanded for further consideration in light of *Davis*. On remand, Second Circuit held that, in light of *Davis*, a crime cannot be identified as a crime of violence under § 924(c) – even by a trial jury – on a case-specific basis and the decision must be made categorically. *United States v. Barrett*, 937 F.3d at 128 (*Barrett II*).

It is clear that an appellate court must apply the law in effect at the time it renders its decision. *Henderson v. United States*, 568 U.S. 266, 271 (2013). Because § 924(c)(3)(B) was declared unconstitutionally vague while Herron's direct appeal was pending, the Second Circuit was required to apply its holding to Herron's case. Yet the Second Circuit upheld the convictions on counts Seven, Fourteen, and Nineteen under 924(c)(3)(B) (and by utilizing *Barrett I*'s now repudiated case-specific approach), and that portion of the Second Circuit's decision simply cannot stand.

B. Each of the § 924(c) Convictions (Counts Four, Seven, Ten, Fourteen, Fifteen, and Nineteen) and the Counts Which Rely on Them Must Be Vacated Because the Jury Instruction on Aiding and Abetting Was Legally Incorrect

The jury was instructed that, "under New York law *and federal law*," a person charged with aiding and abetting may be criminally liable for the conduct of another person if he solicited, requested, commanded, importuned, or intentionally aided the other person to engage in the criminal conduct, and did so with the state of mind required for the commission of the offense. A-45 (emphasis added).[1]

Count Four charged Herron with unlawful use of a firearm in connection with Count Three, and the jury was told that it could evaluate Herron's guilt on Count Four as an aider and abettor, as the court had previously explained it. A-110. Count Seven was based on the crimes charges in Counts Five and Six (the Brooks murder), and the jury was told to apply the instructions from Count One and Count Four. A-82. Count

[1] As part of the charge on Count One, the jury was instructed that it could find Herron guilty of second-degree murder under New York State law pursuant to the aiding and abetting statute. A-46.

Ten charged Herron with unlawful use of a firearm in connection with Count Nine (a robbery), and the jury was told that it could evaluate his guilt as an aider or abettor. A-99. Count Fourteen was based on the crimes charged in Counts Twelve and Thirteen (the Russo murder), where the jury was again told it could evaluate Herron's guilt as an aider or abettor. A-101. Count Fifteen was based on the conduct charged in Count Fourteen, and again the jury was told it could consider Herron's guilt as an aider or abettor. A-104. And Count Nineteen was based on crimes charged in Counts Seventeen and Eighteen (the Zapata murder), which again referenced New York's aiding and abetting statute. A-106.

But just three months prior to Herron's trial, this Court explicitly held that aiding and abetting a § 924(c) crime required advance knowledge of the firearm-related conduct. *Rosemond v. United States*, 572 U.S. 65, 67 (2014). Despite that holding, the jury here was never instructed on that additional requirement and the verdict sheet does not indicate which theory the jury relied on to convict on each count. A-112-118. Thus, the jury could have held Herron liable for offenses he did not personally commit without ever concluding he had advance knowledge a firearm would be used.[2]

C. It Is Impossible to Conclude That Any of the Convictions Are Based on Offenses Which Still Qualify as Crimes of Violence And/or Valid Theories of Liability

In *Yates v. United States*, 354 U.S. 298 (1957) (overruled on other grounds,

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[2] While Herron did not raise this issue at trial he did raise it in his petition for rehearing. But the Second Circuit, despite its own precedent, failed to even address whether relief was warranted under the plain error standard of review. *See United States v. Prado*, 815 F.3d 93 (2d Cir. 2016) (applying plain error analysis to *Rosemond* error).

Burks v. United States, 437 U.S. 1 (1978)), this Court declared that a conviction must 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." *Yates v. United States*, 534 U.S. at 311.

On Count Ten, which is predicated on a Hobbs Act robbery charged in Count Nine, the jury was told they could convict Herron as an aider and abettor or based on co-conspirator liability. A-99. And the jury was also told they could convict Herron on Count Nine as an aider abettor or based on liability as a co-conspirator. A-97-98.

On the other Counts, the Second Circuit concluded that: "The verdict sheet containing special interrogatories makes clear that the jury found that the government proved beyond a reasonable doubt that Herron 'discharged a firearm' in connection with each murder." *United States v. Herron*, 762 F. App'x at 33; A-9. But that is simply not correct. While the special interrogatories on the racketeering acts *permit* that finding, they certainly do not *mandate* it because the jury was instructed it could convict on the theory of aiding and abetting for all of the murders.

But because *Davis* eliminates conspiracy as a valid predicate for a § 924(c) conviction, a conviction based on co-conspirator liability would not be constitutional. And even if aiding and abetting a crime would still qualify the jury was not properly instructed on that theory.

CONCLUSION

For the reasons set forth in this Petition, the judgment should be vacated and the case should be remanded to the Second Circuit for further proceedings.

Dated: November 17, 2020
New York, New York

Respectfully submitted,

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