No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JULIAN MONDRAGON-HERNANDEZ,
JOSE LUIS HERNANDEZ
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

When a jury verdict allows for alternative elements of conviction, may courts review the evidence and make factual findings to uphold the conviction and mandatory minimum sentences?

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

Petitioners Julian Mondragon-Hernandez and Jose Luis Hernandez respectfully pray 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 September 2, 2020.

OPINION BELOW

The Court of Appeals denied Mr. Mondragon's and Mr. Hernandez's petitions for a writ of habeas corpus under 28 U.S.C. § 2255 in a consolidated memorandum disposition. *See United States v. Hernandez,* 819 F. App'x 548, 549 (9th Cir. 2020) (attached here as Appendix A).

JURISDICTION

On September 2, 2020, the Court of Appeals affirmed the denial of Mr. Mondragon's and Mr. Hernandez's petitions for a writ of habeas corpus. *See* Appendix A. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 924(c)(1)(A) of Title 18 provides that a person shall be subject to a mandatory term of imprisonment for using or carrying 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)."

Section § 924(c)(3)(B) of Title 18 defines a "crime of violence," in part, as an offense 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."

STATEMENT OF FACTS

On April 13, 2011, a grand jury indicted Mr. Mondragon, Mr. Hernandez, and two other defendants with four criminal counts: 1) conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846; 2) conspiracy to affect commerce by robbery and extortion, in violation of 18 U.S.C. § 1951(a); 3) possession of a firearm in furtherance of a crime of violence and drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(i) and aiding and abetting in violation of 18 U.S.C. § 2; and 4) unlawful noncitizen in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2).

The case went to trial, and the jury convicted Mr. Mondragon and Mr. Hernandez on all four counts. But at trial, the court instructed the jury that, to find them guilty of the § 924(c) firearm offense, it must find that they "possessed a

firearm in furtherance of the conspiracy to possess with intent to distribute cocaine, ***or*** the conspiracy to affect commerce by robbery and extortion." (emphasis added). Consistent with this instruction, the verdict form stated that the jury found Mr. Mondragon and Mr. Hernandez guilty of "possession of a firearm in furtherance of a crime of violence ***or*** a drug trafficking offense." (emphasis added). At sentencing, the court then imposed a sentence of five years' custody for the § 924(c) violation, to run consecutively to the sentences on the other three counts.

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. Mondragon and Mr. Hernandez 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. Mondragon and Mr. Hernandez 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. They pointed out that the Ninth Circuit 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 conspiracy to commit Hobbs Act robbery 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), they argued that the district court should grant their motions to correct the sentence under 28 U.S.C. § 2255.

The Government disagreed. It did not dispute that a conspiracy to commit Hobbs Act robbery does not, by its elements, include the use, attempted use, or threatened use of force. Instead, it claimed that, unlike the residual clause in ACCA or 18 U.S.C. § 16(b), the residual clause of § 924(c)(3)(B) was not void for vagueness. The district court denied their § 2255 petitions, agreeing with the Government that *Johnson* did not render § 924(c)(3)(B) void for vagueness.

Mr. Mondragon and Mr. Hernandez appealed the district court's denial to the Ninth Circuit. On appeal, the Government again argued that *Johnson* did not render the § 924(c) residual clause void for vagueness. But for the first time, it argued in the alternative that even if the § 924(c) residual clause *were* void for vagueness, the evidence at trial showed that their § 924(c) convictions alternatively rested on the drug conspiracy count. The Government did so even though it admitted that it had forfeited this argument below.

In response, Mr. Mondragon and Mr. Hernandez argued that the appellate court could not consider this argument for the first time on appeal. And even if it could, they maintained, it was impossible to know whether the jury had convicted them of the § 924(c) firearm offense in furtherance of a drug-trafficking offense or a crime of violence. They also pointed out that this case involved the robbery of a "stash house" in which the defendants believed they would have to overcome armed guards to obtain a quantity of drugs. Only *after* the robbery was complete did the defendants then plan to distribute the drugs. Because the defendants could have distributed the drugs without possessing firearms—but could *not* have overcome

armed guards without firearms—they explained that it was more likely the jury found they had used firearms in furtherance of the crime of violence, rather than the drug-trafficking offense.

While the denial of their habeas petition was on appeal, this Court issued its decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), striking down the § 924(c) residual clause as void for vagueness. The Ninth Circuit then ordered the parties to submit supplemental briefing on *Davis*.

In this supplemental briefing, the Government relied solely on its new theory that the evidence at trial showed their firearms convictions rested on the drug conspiracy count. Mr. Mondragon and Mr. Hernandez again pointed out that, not only had the Government forfeited this issue below, but the Court's holding in *Alleyne v. United States*, 570 U.S. 99, 116 (2013), forbids courts from engaging in the type of judicial fact-finding that the government's theory would require.

Nevertheless, the Ninth Circuit "excuse[d]" the Government's admitted forfeiture and denied their appeals. *Hernandez*, 819 F. App'x at 549. It determined that "[a]s the trial record makes clear," Mr. Mondragon's and Mr. Hernandez's firearms conviction were "independently supported by the drug trafficking conspiracy offense." *Id.* Because their convictions did not implicate the § 924(c) residual clause, the Ninth Circuit affirmed the district court's denial of their § 2255 petitions. *See id.* This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I.

In Violation of *Alleyne* and the Sixth Amendment, Courts of Appeals Are Taking Inconsistent Approaches to the Role of Fact Finder to Uphold § 924(c) Mandatory-Minimum Sentences.

In *Alleyne v. United States*, this Court confirmed its prior holding in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), that "[a]ny fact that, by law, increases the penalty for a crime" qualifies as an "'element' that must be submitted to the jury and found beyond a reasonable doubt." 570 U.S. 99, 103 (2013). In *Alleyne*, the jury had convicted a defendant of using or carrying a firearm under 18 U.S.C. § 924(c), an offense carrying a five-year mandatory minimum. *See id.* at 104. But the jury did not specify whether the defendant had "brandished" the firearm, which would trigger a seven-year mandatory minimum. *See id.* At sentencing, the district court determined that brandishing was a "sentencing factor" that courts could "find by a preponderance of evidence without running afoul of the Constitution" and the Sixth Amendment right to a jury trial. *Id.* This Court ultimately disagreed, overruling its prior precedent to hold that any fact that increases a mandatory minimum such as § 924(c) is an "element" that must be submitted to the jury and found beyond a reasonable doubt. *Id.* at 116.

Relying on *Alleyne*, the Eleventh Circuit subsequently held that even appellate courts cannot usurp a jury's fact-finding role by looking to the trial record to uphold a firearm-based mandatory minimum. In *In re Gomez*, a defendant seeking *Johnson* relief had been charged with using a firearm in furtherance of two

drug trafficking offenses, an attempted Hobbs Act robbery, and a conspiracy to commit Hobbs Act robbery. 830 F.3d 1225, 1227 (11th Cir. 2016). The court recognized that the jury could have rested the firearms conviction on the conspiracy to commit Hobbs Act robbery, which no longer qualified as a "crime of violence" after *Johnson*. *See id.* But because "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," *Gomez* concluded that "we can only guess which predicate the jury relied on." *Id.* at 1228. And while "we can make a guess" based on documents from the defendant's trial or sentencing, the Eleventh Circuit held that *Alleyne* "expressly prohibits this type of 'judicial factfinding' when it comes to increasing a defendant's mandatory minimum sentence." *Id.*

Multiple district courts have adopted this holding. In *United States v. Berry*, 2020 WL 591569, at *3 (W. D. Va. Feb. 6, 2020), the government conceded that "the jury instructions allowed for a [firearms] conviction on either conspiracy or attempted Hobbs Act robbery, and the jury verdict was a general verdict which [did] not specify which was the basis for the conviction." The court overturned the conviction, explaining that "as the United States has conceded, there is no means of establishing whether the conviction was for attempt—which could qualify as a crime of violence—as opposed to conspiracy—which does not qualify as a crime of violence." *Id.* (quotations omitted). Similarly, the District of Montana vacated a firearms conviction because "[t]he jury did not find all the elements" of a crime of

violence predicate. *United States v. Lettiere*, 2018 WL 3429927, at *5 (D. Mont. July 16, 2018).

Unlike *Gomez*, the Fifth Circuit has gone further in examining the trial record, acknowledging that the courts of appeals have reached "disparate conclusions" on this issue. *United States v. Jones*, 935 F.3d 266, 272 (5th Cir. 2019). In *Jones*, where the firearms conviction rested on either a RICO conspiracy or a controlled-substance conspiracy predicate, the Fifth Circuit looked to the evidence presented at trial but found that the RICO conspiracy "encompassed conduct beyond the controlled-substance conspiracy," such as assaults and murder. *Id.* at 273. Because a "reasonable probability" existed that the jury would not have convicted the defendants if "the invalid crime of violence predicate were not included on the verdict form," the Fifth Circuit vacated the § 924(c) count. *Id.* at 273–74.

Other courts of appeals have more blatantly encroached on the jury's fact-finding role. For instance, in *United States v. Ventura*, the government charged, and the trial court instructed, that the firearm offense could rest on "either of two predicate offenses: federal arson (as a crime of violence) or conspiracy to distribute marijuana (as a drug crime)." 742 F. App'x 575, 578 (2d Cir. 2018). The Second Circuit concluded on the basis of the trial record that the conviction could stand. *See id.* In *United States v. Cardena*, the Seventh Circuit relied heavily on trial testimony to conclude that the defendants' firearms charges rested on an offense that remained a crime of violence even after *Johnson*. 842 F.3d 959, 999 (7th Cir.

2016). And in other Eleventh Circuit cases, the court has distinguished *Gomez* and examined the evidence at trial to uphold the firearm conviction. *See, e.g.*, *United States v. Nesbitt*, 809 F. App'x 705, 710 (11th Cir. 2020).

Here, the Ninth Circuit followed the courts of appeals that have strayed from *Alleyne*'s prohibition on judicial fact-finding. The jury's general verdict form at Mr. Mondragon and Mr. Hernandez's trial found only that they were "Guilty" of "possession of a firearm in furtherance of a crime of violence or a drug trafficking offense." Yet the Ninth Circuit concluded that "[a]s the trial record makes clear," their § 924(c) convictions were "independently supported by the drug trafficking conspiracy offense." *United States v. Hernandez*, 819 F. App'x 548, 549 (9th Cir. 2020). In other words, the Ninth Circuit stepped into the jury's shoes to evaluate the evidence and find Mr. Mondragon and Mr. Hernandez guilty of a firearms offense. Because this improper practice "allows for a defendant's mandatory minimum to be increased without the unanimity *Alleyne* required," *Gomez*, 830 F.3d at 1227, it violated their Sixth Amendment right to a jury trial.

Despite this Court's clear mandate in *Alleyne* that any fact increasing a firearm mandatory minimum is an "element" a jury must find beyond a reasonable doubt, multiple courts continue to violate this constitutional prerogative. Because this split of authority persists and shows no sign of abating, the Court should grant Mr. Mondragon's and Mr. Hernandez's petitions and use their cases to resolve this question.

II.

This Issue Has Important Sixth Amendment Consequences.

This Court did not arrive at its holding in *Alleyne* lightly. To do so, it had to overturn its prior decision in *Harris v. United States,* 536 U.S. 545 (2002), which held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. But when faced with the inconsistencies between *Harris* and *Apprendi*, even the weighty considerations of *stare decisis* could not overcome the "original meaning of the Sixth Amendment" that "[*a*]*ny* fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S. at 103 (emphasis added).

In reaching this decision, Justice Thomas explained that at common law, criminal penalties were "sanction-specific," which "left judges with little sentencing discretion." *Id.* at 108. Rather, once a jury determined the facts of the offense, the judge was "meant simply to impose the prescribed sentence." *Id.* (citing Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany 1700–1900*, p. 36 (A. Schioppa ed. 1987)) (quotations and alterations omitted). This "historical practice" applies equally to mandatory minimums and statutory maximums by "allow[ing] those who violated the law to know, *ex ante,* the contours of the penalty that the legislature affixed to the crime" and "comport[ing] with the obvious truth that the floor of a mandatory range is as relevant to wrongdoers as the ceiling." *Id.* at 112–13. Not only does it

"enable[] the defendant to predict the legally applicable penalty from the face of the indictment," it also "preserves the historic role of the jury as an intermediary between the State and criminal defendants" and "guard[s] against a spirit of oppression and tyranny on the part of rulers." *Id.* at 113–14 (quotations omitted).

But here, Mr. Mondragon and Mr. Hernandez were stripped of their Sixth Amendment right to have a jury determine the facts on which their firearms mandatory minimums rested. After *Johnson* and *Davis* made clear that their firearms offenses could *not* rest on the robbery conspiracy, the Ninth Circuit did not vacate their conviction or remand for a new trial. Instead, it stepped into the jury's fact-finding shoes, examined the evidence, and came to the conclusion that their firearms convictions were "independently supported by the drug trafficking conspiracy offense." *Hernandez*, 819 F. App'x at 549. And it did so despite the Government's concession that it had forfeited this issue below. Because the Ninth Circuit's adoption of this fact-finding role contradicts *Alleyne* and the Sixth Amendment right to have a jury adjudicate guilt beyond a reasonable doubt, it presents an important issue this Court should resolve.

III.

This Case Provides an Ideal Vehicle to Resolve the Issue.

Mr. Mondragon's and Mr. Hernandez's case squarely presents the issue of whether multiple courts of appeals are improperly taking on a fact-finding role designated exclusively for the jury. As soon as the Government raised its theory for the first time on appeal, they contended that this violated *Alleyne* and the Sixth

Amendment and pointed to courts of appeals that had declined to take on such a role. Yet despite bringing this constitutional issue to the court's attention, the Ninth Circuit assumed the role of fact-finder and used it to uphold their firearms convictions. The issue is therefore perfectly preserved and squarely presented for this Court's review.

Furthermore, nothing besides this holding stands between Mr. Mondragon and Mr. Hernandez and the relief they seek. Neither the Ninth Circuit nor the Government dispute that their firearm offenses cannot rest on the robbery conspiracy, which could only fall under the unconstitutional residual clause of § 924(c)(3)(B). So if the Court agrees that the Ninth Circuit improperly assumed a fact-finding role to uphold their firearm offenses, they are unquestionably eligible for relief. Accordingly, Mr. Mondragon and Mr. Hernandez's case provides an ideal vehicle to resolve this circuit split.

CONCLUSION

Because courts are taking inconsistent approaches to § 924(c) and violating *Alleyne* and the Sixth Amendment by taking on the jury's fact-finding role, the Court should grant Mr. Mondragon and Mr. Hernandez's petition for a writ of certiorari.

Respectfully submitted,

Date: November 24, 2020

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APPENDIX A

NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE LUIS HERNANDEZ, Defendant-Appellant.	No. 16-56675 D.C. Nos. 3:16-cv-01452-H 3:10-cr-03173-H-3 MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JULIAN MONDRAGON-HERNANDEZ, AKA David Rojas, Defendant-Appellant.	No. 17-55385 D.C. Nos. 3:16-cv-01537-H 3:10-cr-03173-H-1

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Submitted August 14, 2020**
Pasadena, California

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: WARDLAW and CLIFTON, Circuit Judges, and CHOE-GROVES,*** Judge.

Jose Luis Hernandez and Julian Mondragon-Hernandez (collectively, the "Defendants") were convicted by jury trial of conspiracy to commit Hobbs Act robbery, conspiracy to possess cocaine with intent to distribute, and firearms offenses under 18 U.S.C. § 924(c). Defendants now appeal the denials of their 28 U.S.C. § 2255 motions to vacate, set aside or correct their convictions arising under § 924(c), for which they were each sentenced to a 60-month term of imprisonment. We have jurisdiction under 28 U.S.C. § 2253(a), and we affirm.

1. The jury was instructed that to convict on the firearms charge under § 924(c) it had to find beyond a reasonable doubt that Defendants possessed a firearm in furtherance of the drug conspiracy *or* the conspiracy to commit Hobbs Act Robbery. The jury verdict form for the § 924(c) conviction did not specify which predicate offense the jury relied upon. In light of the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), which held that § 924(c)(3)(B) is unconstitutionally vague, the parties now agree that the instruction was erroneous because conspiracy to commit Hobbs Act robbery no longer qualifies as a crime of violence and thus is not a predicate offense for the § 924(c) conviction.

*** The Honorable Jennifer Choe-Groves, Judge for the United States Court of International Trade, sitting by designation.

2. We need not reach the question of whether the Government waived its argument that this error was harmless because we would nonetheless excuse it. All three *Rodriguez* factors—"(1) the length and complexity of the record, (2) whether the harmlessness of an error is certain or debatable, and (3) the futility and costliness of reversal and further litigation"—weigh in favor of excusing any possible waiver by the Government. *United States v. Rodriguez*, 880 F.3d 1151, 1164 (9th Cir. 2018). For the first factor, the record in this case, which spans just over a year, is not sufficiently lengthy or complex so as to "render the harmlessness inquiry a burdensome one." *Id.* As for the second and third, the record demonstrates that the instructional error was harmless, so reversal would lead only to costly, and ultimately futile, further litigation.

3. Because the error did not have a "substantial and injurious effect or influence in determining the jury's verdict," it was harmless. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal citation omitted); *Pulido v. Chrones*, 629 F.3d 1007, 1012 (9th Cir. 2010). Defendants' argument that *Stromberg v. California*, 283 U.S. 359 (1931), mandates reversal is foreclosed because "drawing a distinction between alternative-theory [*Stromberg*] error and the instructional errors in *Neder*, *Roy*, *Pope*, and *Rose* would be patently illogical." *Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008).

As the trial record makes clear, Defendants' § 924(c) convictions are independently supported by the drug trafficking conspiracy offense, and Defendants committed two different predicate offenses while possessing a firearm—a Hobbs Act conspiracy that was inextricably intertwined with a conspiracy to possess cocaine with intent to distribute.

AFFIRMED.