NO. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

NEIL DUSSARD, PETITIONER

vs.

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 WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Supreme Court should correct the Second Circuit's split from other Circuit Courts in addressing the recurring question of the validity of a pleaded-to 18 U.S.C. § 924(c) conviction after United States v. Davis, ___ U.S. ___, 139 S. Ct. 2319 (2019). The Second Circuit erred by applying the plain error standard of United States v. Dominguez Benitez, 542 U.S. 74, 124 S. Ct. 2333 (2004), applicable to Rule 11 colloquy errors. Instead, the court should have asked whether there was legally sufficient proof of a constitutionally valid predicate to support the § 924(c) charge, and absent such proof, vacated Mr. Dussard's unconstitutional conviction.

LIST OF PARTIES

1. Petitioner – Defendant Neil Dussard

2. Respondent – Plaintiff United States of America

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PETITION FOR WRIT OF CERTIORARI

Petitioner Neil Dussard prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The controlling opinion from the United States Court of Appeals for the Second Circuit, United States v. Dussard, 967 F.3d 149 (2d Cir. 2020), is attached at Tab A.

STATEMENT OF THE CASE

The United States Court of Appeals for the Second Circuit affirmed Mr. Dussard's conviction by plea to an 18 U.S.C. § 924(c) offense despite it being based on an unconstitutional predicate crime after United States v. Davis, ___ U.S. ___, 139 S. Ct. 2319 (2019). In doing so, it departed from the approach consistently and correctly employed by the courts in the other federal Circuits. The proper approach, where a § 924(c) conviction is based on an unconstitutional predicate crime, is to determine if there was legally sufficient proof of a valid predicate. Absent that, the § 924(c) conviction cannot stand.

The Second Circuit's variance from this established approach was based on a misapplication of the plain error standard under United States v. Dominguez Benitez, 542 U.S.74, 124 S. Ct. 2333 (2004). Dominguez Benitez applies to Rule 11 colloquy errors related to the knowing and voluntary waiver of a defendant's trial rights. The error here was not a Rule 11 error. The Rule 11 colloquy was perfect. Rather, the error was that Mr. Dussard's § 924(c) count of conviction was, post-judgment, rendered substantively unconstitutional. What he had plead to was no longer, constitutionally, a crime. Under these circumstances, Mr. Dussard's unconstitutional conviction could only survive if there was legally sufficient proof of a valid constitutional predicate.

The Second Circuit's misapplication of Dominguez Benitez, and its departure from the correct approach consistently followed in the other Circuits, is an important question of federal law which must be addressed.

As set forth in the Second Circuit's opinion, Mr. Dussard and others were indicted on multiple counts arising from attempting to commit an armed robbery of an individual they believed to be a narcotics dealer. In reality, it was a reverse sting operation, and Mr Dussard was arrested at the scene. Count One charged Mr. Dussard with conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951. Count Two charged him with conspiracy to distribute narcotics in violation of 21 U.S.C. § 841(b)(1)(A). Count Three charged him with violating 18 U.S.C. § 924(c) by using, possessing and carrying a firearm during and in relation to both the robbery conspiracy charged in Count One and the narcotics conspiracy charged in Count Two.

In entering into a plea agreement with Mr. Dussard, the government agreed to have Mr. Dussard plead guilty to Count One, and to the Count Three § 924(c) charge based solely on the crime of violence charged in Count One. As part of the plea agreement, the government committed to dismissing the drug count. At the July 25, 2017 plea colloquy, the district court followed the plea agreement, describing the charges as the Count One Hobbs Act robbery conspiracy and the § 924(c) charge based on the Count One crime of violence. The factual basis allocution was limited to Mr. Dussard stating:

> On approximately August 2016 to September 8, 2016, I conspired with individuals who possessed firearms in order to steal narcotics at gun point from people we believed were drug dealers transporting narcotics. At the time I committed the offense I knew what I was doing was wrong.

There was no allocution as to Mr. Dussard dealing narcotics, or what he intended to do with the stolen narcotics. Nowhere did Mr. Dussard ever admit or otherwise allocute to either conspiracy to distribute cocaine or conspiring to possess with intent to distribute cocaine. There was no

mention of Mr. Dussard's or co-conspirators' alleged drug dealing. There was no mention of what Mr. Dussard or his co-conspirators intended to do with the stolen narcotics. Distribution or intent to distribute are essential elements of a narcotics conspiracy charge.

Mr. Dussard took a direct appeal to the Second Circuit of his conviction and sentence. While Mr. Dussard's appeal was pending, this Court issued its opinion in Davis, which was followed by the Second Circuit in United States v. Barrett, 937 F.3d 126 (2d Cir. 2019). Under Davis, a Hobbs Act robbery conspiracy is not a crime of violence for purposes of § 924(c), because the residual clause definition of crime of violence was unconstitutionally vague, and such a conspiracy did not qualify as a crime of violence under the elements clause. Accordingly, the Second Circuit in Mr. Dussard's case recognized that his § 924(c) conviction was based on an unconstitutional predicate. 967 F.3d at 156.

In determining whether Mr. Dussard's § 924(c) conviction could nevertheless survive, the Second Circuit applied the plain error analysis used in Dominguez Benitez for Rule 11 colloquy errors. The court found that there was error, and that the error as of the date of appellate consideration was plain. But it held, applying Dominguez Benitez, that Mr. Dussard's substantial rights were not affected because Mr. Dussard could not show a reasonable probability that, but for the error, he would not have pleaded guilty. Consequently, the court affirmed Mr. Dussard's conviction. 967 F.3d at 156-58.

Mr. Dussard filed a timely Petition for Rehearing and Petition for Rehearing En Banc, which was denied on September 8, 2020.

Jurisdiction in the United States District Court over the federal criminal charges against Mr. Dussard existed pursuant to 18 U.S.C. § 3231, which grants exclusive jurisdiction to the federal courts over offenses against the laws of the United States, which include Mr. Dussard's

counts of conviction. Appellate jurisdiction in the United States Court of Appeals for the Second Circuit existed pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, providing for jurisdiction over direct criminal appeals from the federal district courts. Because this Petition for Writ of Certiorari is filed within 90 days of the Second Circuit's denial of Mr. Dussard's timely Petition for Rehearing and Rehearing En Banc on September 8, 2020, it is timely.

REASONS FOR GRANTING THE WRIT

1. The Second Circuit's decision creates a Circuit Court split on how to address a pleaded-to conviction under 18 U.S.C. § 924(c) subsequently rendered unconstitutional by *Davis*, and this Court should affirm the other Circuits' consistent approach that a § 924(c) conviction based on an unconstitutional predicate can only survive if there was legally sufficient proof of a valid alternative predicate.

Mr. Dussard's case falls squarely within a finite but important category of cases where conclusive guidance from this Court is needed. The category consists of cases where a defendant's conviction under 18 U.S.C. § 924(c) is, post-judgment, rendered substantively unconstitutional because the predicate crime no longer constitutionally qualifies as a valid predicate. In Mr. Dussard's case, his conviction under § 924(c) was, post-judgment, constitutionally invalidated because this Court in Davis held that the residual clause definition of crime of violence under § 924(c) was unconstitutionally vague, and Mr. Dussard's predicate crime of conspiracy to commit Hobbs Act robbery only qualified as a crime of violence under the residual clause. Without conclusive guidance from this Court, the Circuits will remain divided on how to address this frequently recurring category of cases, with very disparate outcomes for similarly situated defendants. This disparate treatment is grossly unfair, and needs to be rectified.

The consistent and correct approach of the federal courts to this category of cases has been to ask whether there was legally sufficient proof of another valid predicate. If there was legally sufficient proof of another valid predicate crime, then there is no plain error, because a

defendant's substantial rights have not been violated as the defendant has not been prejudiced. On the other hand, if there was not legally sufficient proof of a valid predicate, then the error must be corrected. Otherwise, the defendant stands convicted of an unconstitutional and unsupported offense.

The Eleventh Circuit's decision in Brown v. United States, 942 F.3d 1069 (11th Cir. 2019)(per curiam), is a good illustration of the prevailing approach, granting relief to a defendant identically situated to Mr. Dussard. In Brown, the defendant was indicted on one count of Hobbs Act robbery conspiracy, two counts of drug trafficking crimes, and two § 924 crimes, including Count Five charging him with carrying and possessing a firearm "during and in relation to a crime of violence and a drug trafficking crime." Id. at 1070. The defendant entered into a plea agreement to plead guilty to just Counts One and Five. As with Mr. Dussard, the plea agreement characterized the 924(c) Count Five plea as using and carrying a firearm "during and in relation to a crime of violence" as set forth in Count One, the Hobbs Act robbery conspiracy count. Dropped was any mention of the alternative drug trafficking crime predicate. Further, under the plea agreement the government agreed to dismiss the predicate drug counts. Id. at 1071. During the plea colloquy, the court described the Count Five charge as using "a firearm during the commission of a crime of violence," which the defendant indicated he understood. Id. There was no mention of a drug trafficking crime as a predicate for the charge of conviction.

On these facts – effectively identical to Mr. Dussard's – the Eleventh Circuit reached the commonsense and correct conclusion that the defendant's plea was solely to a § 924(c) conviction predicated on a crime of violence, and reversal was required. Noting that although the indictment charged the § 924(c) count based on both predicates, the court reasoned as follows:

> Nevertheless, Brown did not plead guilty to Count 5 as charged in the indictment. Nor did the district court adjudge Brown guilty of Count 5 as charged in the indictment. Rather, as the plea agreement memorializes, Brown agreed to plead guilty to Count 1 and to Count 5 – but as predicated solely upon the "crime of violence" set forth in Count 1. In particular, the plea agreement states that Brown agreed to plead guilty to knowingly using and carrying a firearm "in relation to a *crime of violence*, that is a violation of Title 18, United States Code, Section 1951(a), as set forth in Count 1[.]" (emphasis added). Notably absent from the plea agreement is any mention of "drug trafficking crimes."
>
> That was no mistake. The government was free to seek a conviction of Brown on any charge it desired, provided it could support that charge beyond a reasonable doubt. And it is clear from the events that occurred on this record, that Brown agreed to plead guilty to, and the government agreed to seek conviction by plea on, the § 924(c) charge as it related to only what the government then believed to be the "crime of violence" specified in Count 1 – conspiracy to commit Hobbs Act robbery.
>
> Not only does the plea agreement's language express this agreement, but during the plea colloquy, the trial court confirmed with Brown that he was pleading guilty to "use of a firearm during the commission of a crime of violence[.]" The government's subsequent recitation of the elements of Count 5 also illustrates the parties' and the trial court's understanding of which charge Brown actually pled guilty to: "[T]he defendant can be found guilty only if ... [t]he defendant committed the crime of violence charged in Count 1 of the indictment" and "knowingly used, carried and possessed [] a firearm ... in furtherance of the Count 1 crime of violence." Brown pled guilty to that crime, and the trial court "adjudged [Brown] guilty of Count 5, use of a firearm during a commission of a crime of violence." Nowhere does the plea colloquy suggest that Brown actually pled guilty to or the court actually adjudged him guilty of a use or possession of a firearm in furtherance of a drug-trafficking offense, despite the language of the indictment.

Id. at 1073.

Because the defendant in Brown plead and allocuted solely to the now-unconstitutional predicate crime of violence, his § 924(c) conviction could not be resuscitated through the substitution of a valid predicate. The court did not ask – as the Second Circuit did in Dussard – whether the defendant would have plead guilty to the valid predicate anyway. That is not the relevant inquiry where there is no legally sufficient proof of the alternative valid predicate.

Rather, because the § 924(c) charge was predicated solely on an unconstitutional predicate, the conviction was invalid and needed to be vacated. Id. at 1076.

Other court decisions have been consistent with Brown and support Mr. Dussard's position. See United States v. Duhart, 803 Fed. Appx. 267 (11th Cir. 2020)(on facts materially indistinguishable from Brown and Mr. Dussard's, "it is plain" that defendant's § 924(c) conviction pursuant to plea "was predicated only on a crime of violence", and because this was based on defunct residual clause, conviction must be vacated); United States v. Smith, 2019 WL 4675369, *4 (E. D. Va.)(where plea agreement limited defendant's § 924(c) predicate to the "crime of violence" of Hobbs Act robbery conspiracy, rejecting government's attempt to broaden the plea based on the alternative indictment and statement of facts, and vacating convictions); United States v. Brown, 415 F. Supp.3d 901, 905 (N.D. Cal. 2019)(rejecting government's argument that unconstitutional § 924(c) conviction could be upheld based on narcotics conspiracy predicate where defendant "did not admit anywhere in the plea agreement or in his plea colloquy that he intended to distribute or possess with intent to distribute the cocaine", and vacating conviction).

To the same effect is United States v. Branch, 2020 WL 6498968 (N.D. Cal. 2020), where, again on facts identical to Mr. Dussard's, relief was granted. The defendant in Branch was charged with a § 924(c) count based both on a predicate crime of violence and a predicate crime of drug trafficking, but his plea allocution was limited to the predicate crime of conspiracy to commit Hobbs Act robbery. With that predicate invalidated post-judgment by Davis, the government tried to save the § 924(c) conviction by the alternative drug trafficking predicate. The court would have none of that.

> To substitute a different predicate offense than the crime of violence to which Branch admitted when pleading guilty to [the § 924(c) count], and which the

> government promised not to prosecute, would violate principles of due process, double jeopardy, enforceability of plea agreements, and fundamental fairness.

Id. at *4; see also Serrano v. United States, 2020 WL 5653478, *9 (M.D. Tenn.)(rejecting government's attempt to convert § 924(c) plea to a valid predicate where predicate defendant plead to was clear and was unconstitutional after Davis).

Prior to the decision in Dussard, this was also the approach followed by the Second Circuit. A good example is United States v. Smith, 813 Fed. Appx. 662 (2d Cir. 2020)(summary order). In Smith, the defendant plead in part to a § 924(c) count of using a firearm in connection with a crime of violence, conspiracy to commit assault. After Davis, this was not a valid predicate. But the defendant in his allocution admitted to actual assault, which had formed the basis for a dismissed count and was a valid predicate. The Second Circuit affirmed the defendant's conviction, observing that a § 924(c) conviction may be predicated on an offense that the defendant was not convicted of – or even charged with – if there is "'legally sufficient proof of the underlying offense.'" Id. (quoting Johnson v. United States, 779 F.3d 125, 129-30 (2d Cir. 2015)). See also United States v. Biba, 788 Fed. Appx. 70, 71-72 (2d Cir. 2019)(summary order)(rejecting government's argument that defendant's § 924(c) count of conviction pursuant to plea could be based on a non-pleaded-to predicate crime where defendant "did not allocute to the elements" of the predicate crime during his guilty plea); Camacho v. United States, 2019 WL 3838395, *2 (S.D.N.Y.)(cannot save unconstitutional § 924(c) count by substituting valid drug trafficking predicate where "adequate factual basis" was not established in colloquy); Clayton v. United States, 456 F.Supp.3d 575, 579 (S.D.N.Y.)(same).

The Second Circuit's decision in the instant case is a radical and improper departure from the precedent of the other Circuits and its own prior precedent. In Mr. Dussard's case, as the Second Circuit held, his § 924(c) conviction was based on a constitutionally invalid predicate

crime. Under the approach utilized in the above caselaw, the inquiry then should have been whether there was a valid predicate to support the conviction. Because Mr. Dussard did not allocute to facts legally sufficient to support the alternative drug trafficking predicate, the only proper conclusion reachable under the above caselaw would be overturning his conviction. By affirming Mr. Dussard's § 924(c) conviction, Mr. Dussard stands convicted of a constitutionally invalid crime.

The Second Circuit deviated from this straightforward and proper analysis through misapplication of the plain error standard from United States v. Dominguez Benitez, 542 U.S.74, 124 S. Ct. 2333 (2004). Under Dominguez Benitez, to show that an unobjected-to error impacted substantial rights, the defendant must show a reasonable probability that the error affected the outcome of the proceeding, which in the context of a plea requires the defendant to show a reasonable probability that, but for the error, he would not have pleaded guilty. 542 U.S. at 83. But as the Supreme Court expressly recognized in Dominguez Benitez, this articulation of the standard was limited to alleged Rule 11 colloquy errors. It framed the question before it as "whether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred." Id. at 80; see also id. at 83 (holding limited to defendant seeking reversal "on the ground that the district court committed plain error under Rule 11"). The Court went out of its way to note that "the violation claimed was of Rule 11, not of due process." Id. at 83.

The Supreme Court upheld this formulation of the plain error standard for Rule 11 errors in part because of the Rule 52(b) policy to encourage timely objections, id. at 82, and the particular importance of the finality of a guilty plea. Id. at 83. The whole context of an

unpreserved Rule 11 colloquy challenge supports requiring the defendant to show a reasonable probability that he would not have plead if properly advised. A Rule 11 error typically consists of failure to advise the defendant of certain consequences, and Dominguez Benitez appropriately asks whether there is a reasonable probability that the defendant would have done anything different if correctly advised.

The error in this case was not a Rule 11 colloquy error. The Rule 11 colloquy was perfect. The error is that Mr. Dussard's § 924(c) conviction rests on a predicate crime that no longer constitutionally supports the conviction. With regard to the purposes served by the Dominguez Benitez plain error standard, this was not an objection Mr. Dussard could have been expected to raise at his plea, as the basis was not known. Further, the finality of his plea is appropriately being challenged not based on an omission during Mr. Dussard's plea colloquy, but rather based on the government's decision to base his conviction on a predicate offense now undercut by the Supreme Court. None of the reasons for the standard articulated in Dominguez Benitez can be fairly found to apply to Mr. Dussard. At the time he entered his plea, he believed the § 924(c) conviction to be constitutional. Now, post-judgment, it is not. How can he be subjected to a standard requiring him to object at a juncture when he had no basis to object?

As implicitly recognized by the multiple cases cited above, the proper plain error question cannot be whether Mr. Dussard would have plead to the § 924(c) count anyway even with knowledge of the error. That is effectively nonsensical, as he would not have been allowed by the district court to plead to an unconstitutional predicate. Rather, the proper question is whether there was legally sufficient proof of an alternative valid predicate. Without this, Mr. Dussard's substantial rights are impaired because he stands convicted of something that is no longer constitutionally a crime.

Unlike the Rule 11 error inquiry in Dominguez Benitez and United States v. Vonn, 535 U.S. 55, 122 S. Ct. 1043 (2002), this inquiry does not look at the "whole record." Legally sufficient proof does not lie in an indictment, government proffer, or PSR, all of which the Second Circuit in Dussard relied upon to find no plain error. 967 F.3d at 156-57. In a plea, it lies in the defendant's admissions during the allocution. See Smith, 813 Fed. Appx. at 665; In re Navarro, 931 F.3d 1298, 1302 (11th Cir. 2018)(§ 924(c) conviction upheld based on admissions in defendant's plea colloquy).

Mr. Dussard asks this Court to grant certiorari and correct the Second Circuit's improper application of Dominguez Benitez to this category of cases. There are a vast number of post-judgment Davis challenges to § 924(c) convictions, including challenges pursuant to 28 U.S.C. § 2255 of old convictions. The nature of a § 924(c) conviction, with its required consecutive mandatory minimums, often means substantial additional jail time for a defendant. The Second Circuit's divergence from the common approach will create fundamentally unfair outcomes for defendants, and result in unwarranted disparities between similarly situated defendants. See, e.g., Oliver v. United States, ___ F.Supp.3d ___, 2020 WL 3637632 (M.D. Tenn.)(vacating defendant's 300-month sentence and ordering immediate release for §§ 924(c) and 924(j) murder charge because conviction pursuant to plea was unconstitutional after Davis). The Court's controlling intervention is needed.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED at Middlebury, Vermont, this 4th day of December, 2020.

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