No. 20-6743

IN THE SUPREME COURT OF THE UNITED STATES

NEIL DUSSARD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

JENNY C. ELLICKSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, on plain-error review, petitioner's conviction under 18 U.S.C. 924(c)(1)(A) should be vacated in light of United States v. Davis, 139 S. Ct. 2139 (2019).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y):

United States v. Dussard, No. 16-cr-673 (Mar. 15, 2018)

United States Court of Appeals (2d Cir.):

United States v. Dussard, No. 18-804 (July 23, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 967 F.3d 149.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2020. A petition for rehearing was denied on September 8, 2020 (Pet. App. B). The petition for a writ of certiorari was filed on December 4, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] Appendix A to the petition for a writ of certiorari is not sequentially paginated. This brief treats it as if it were, beginning with page 1 following the cover page.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951, and one count of "[p]ossession of [a] firearm in furtherance of narcotics conspiracy," in violation of 18 U.S.C. 924(c)(1)(A)(i). Judgment 1; see Pet. App. A1. The district court sentenced petitioner to 84 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A7.

1. In August and September 2016, petitioner and others conspired to rob an alleged drug trafficker and steal 12 kilograms of cocaine from him. Presentence Investigation Report (PSR) ¶¶ 16-30; Pet. App. A1-A2. At a meeting that petitioner, a co-conspirator, and two confidential sources attended two days before the planned robbery, petitioner's co-conspirator explained that he had buyers lined up to purchase the cocaine that they were planning to steal. PSR ¶¶ 23-24. The co-conspirator further stated that he would need a week to sell the cocaine and receive payments that he could pass along to the other participants in the robbery. PSR ¶ 24. During the meeting, petitioner and his co-conspirator discussed bringing silencers for firearms to the robbery. PSR ¶ 23.

On the night of the planned robbery, petitioner told the two confidential sources that he and a co-conspirator had firearms "on deck" for the robbery. PSR ¶ 30. When one of the confidential sources warned that the intended victim had a gun, petitioner's co-conspirator responded that he was not concerned because he and the other co-conspirators would shoot first. Ibid. Shortly thereafter, law-enforcement agents arrested petitioner and four co-conspirators as they drove in two cars to the site of the planned robbery. PSR ¶¶ 31-35. When the agents searched the cars, they discovered zip ties, a knife, a small axe, pepper spray, and two pistols. PSR ¶¶ 33, 35. In addition, at the time of the arrests, one of petitioner's co-conspirators had a Glock pistol with an extended magazine tucked into his waistband. PSR ¶ 34.

2. A federal grand jury returned an indictment that charged petitioner on multiple counts. Pet. App. A2; Indictment 1-4. Count One charged petitioner with conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951, and alleged in relevant part that petitioner "conspired to commit the armed robbery of an individual believed to be a narcotics dealer." Indictment 1-2; see Pet. App. A2. Count Two charged petitioner with conspiring to distribute and to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 841(b)(1)(A) (2012) and 21 U.S.C. 846. Indictment 2-3; see Pet. App. A2. Count Three charged in relevant part that petitioner, "during and in relation

to a crime of violence * * * , namely, the robbery conspiracy charged in Count One of this Indictment, and during and in relation to a drug trafficking crime * * * , namely, the narcotics conspiracy charged in Count Two of this Indictment," knowingly "use[d] and carr[ied] a firearm, and, in furtherance of such crime, did possess a firearm, and did aid and abet the use, carrying, and possession of a firearm," in violation of 18 U.S.C. 924(c)(1)(A)(i) and 2. Pet. App. A2 (quoting Indictment 3) (emphasis omitted).

Petitioner entered into a written plea agreement with the government, in which he agreed to plead guilty to "Counts One and Three of the Indictment." C.A. App. 23; see id. at 31; Pet. App. A2. The written agreement stated that Count One charged petitioner with "conspiracy to commit Hobbs Act robbery," in violation of 18 U.S.C. 1951, and that Count Three charged petitioner with "using and carrying a firearm during and in relation to a crime of violence, to wit, the Hobbs Act robbery charged in Count One," in violation of 18 U.S.C. 924(c)(1)(A)(i). Pet. App. A2 (quoting C.A. App. 23) (emphasis omitted).

In the written plea agreement, the government agreed that, "[i]n consideration of [petitioner's] plea to the above offense," the United States Attorney's Office for the Southern District of New York would not "further prosecute[]" petitioner for his "participation in a conspiracy to commit Hobbs Act robbery * * * as charged in Count One of the Indictment" and for "using and

carrying a firearm during and in relation to the above-referenced Hobbs Act robbery conspiracy, as charged in Count Three of the Indictment." C.A. App. 23-24; see Pet. App. A2. The government further agreed that, "at the time of sentencing," it would "move to dismiss any open Counts" against petitioner. Pet. App. A2 (quoting C.A. App. 24). In addition, the parties agreed that,

> should the conviction following [petitioner's] plea of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against [petitioner].

Ibid. (quoting C.A. App. 28).

At petitioner's plea hearing, the district court confirmed that petitioner understood and had signed the written plea agreement and that petitioner "wished to plead guilty to Count One and Count Three of the indictment." Pet. App. A2-A3 (quoting C.A. App. 33) (brackets omitted). The court stated that Count One of the indictment charged petitioner with "conspiracy to commit * * * a Hobbs Act robbery" and that Count Three charged petitioner with "using and carrying a firearm during and in relation to a crime of violence, to wit, that Hobbs Act robbery." Id. at A3 (quoting C.A. App. 36) (emphases omitted). When the court asked petitioner what he had done that made him "guilty of those two offenses," petitioner responded that he had "'conspired with individuals who possessed firearms in order to steal narcotics at gun point from

people we believed were drug dealers transporting narcotics.'" Ibid. (quoting C.A. App. 42). The court determined that petitioner's guilty plea was knowing and voluntary, and the court accepted petitioner's plea, finding that petitioner had acknowledged that he was "guilty as charged in Count One and Count Three of this indictment" and that petitioner's guilty plea was "supported by facts containing each of the essential elements of those offenses." Ibid. (quoting C.A. App. 43) (emphasis omitted).

3. Before sentencing, the Probation Office prepared a presentence report that described petitioner's offense conduct. PSR ¶¶ 15-36; see Pet. App. A3. The report stated that petitioner and his co-conspirators had planned to rob someone they believed to be a drug dealer and had discussed their understanding that the targeted victim would be carrying 12 kilograms of cocaine. Pet. App. A3; see PSR ¶¶ 23-24, 30. The report further stated that, during one preparatory conversation in which petitioner had participated, one of the co-conspirators had stated that "he had buyers lined up to purchase the cocaine" and "would need a week to sell the cocaine and receive payment that could be passed on to" other participants in the robbery. PSR ¶ 24; see Pet. App. A3. Petitioner did not object to those statements in the presentence report, see Addendum to PSR 1-2; C.A. App. 46, and the district court accepted those factual recitations at sentencing, C.A. App. 58. The court also accepted the Probation Office's determination

that petitioner's advisory Guidelines range was 41 to 51 months of imprisonment, to be followed by a statutory consecutive term of imprisonment with a minimum of 60 months on Count Three. Ibid.; PSR ¶ 99; see Pet. App. A3.

At the sentencing hearing, petitioner's counsel informed the district court that petitioner was "extremely remorseful for his participation in this crime" and had instructed counsel "to reach out to the government and inform them of his intent to accept responsibility for his conduct and spare the government any additional resources in the prosecution of his case." Pet. App. A3 (quoting C.A. App. 53). Petitioner's counsel argued that petitioner had little criminal history and had yielded to "temptation" when he was offered an opportunity to obtain "15 to 20 kilos of cocaine" that petitioner and his co-conspirators could have sold for $30,000 to $40,000 per kilogram. C.A. App. 55; see Pet. App. A3. When petitioner addressed the court directly, he "accept[ed] full responsibility" for his role in the conspiracy and explained that he had made "a really bad decision" when he was "in a vulnerable state." Pet. App. A3 (quoting C.A. App. 57) (brackets in original).

The district court sentenced petitioner to 24 months of imprisonment on Count One, to be followed by the statutory-minimum term of 60 months of imprisonment on Count Three. Pet. App. A3; C.A. App. 58. Following that pronouncement, the court granted the

government's motion to dismiss Count Two of the indictment. C.A. App. 60; see id. at 7-8; Pet. App. A3.

The district court entered written judgment later that day. The written judgment stated that petitioner had pleaded guilty to Counts One and Three of the indictment and described petitioner's conviction on Count Three as a conviction for "[p]ossession of firearm in furtherance of narcotics conspiracy." Judgment 1. Petitioner did not seek any correction of the written judgment. Pet. App. A3.

4. Petitioner appealed the judgment. Pet. App. A3.

a. Petitioner's appellate attorney filed a brief under Anders v. California, 386 U.S. 738 (1967), and moved to withdraw as counsel. Pet. App. A3. Petitioner's counsel informed the court of appeals that petitioner's case presented "no nonfrivolous issues for appeal except one that '[i]t would not be in [petitioner's] interest to pursue.'" Ibid. (brackets in original; citation omitted). Specifically, counsel stated that petitioner "does have a non-frivolous basis to challenge his plea to the Count Three gun charge, because the predicate crime he plead[ed] to of conspiracy to commit Hobbs Act robbery is not a 'crime of violence' for purposes of 18 U.S.C. § 924(c)(3)." Id. at A3-A4 (citation omitted). Counsel observed, however, that if petitioner succeeded in withdrawing his guilty plea on Count Three, "he 'would run an unacceptable risk of adverse consequences,' because '[a]

successful challenge has no reasonable prospect of getting [petitioner] a better sentence, and carries a significant risk of re-exposing petitioner[] to a mandatory minimum 15 years of imprisonment.'" Id. at A4 (citation omitted). Counsel explained that the government's agreement to dismiss Count Two had given petitioner a "substantial benefit" because petitioner faced a statutory minimum sentence of ten years of imprisonment on that charge. Ibid. (citation omitted). And counsel explained that because that term of imprisonment and Count Three's mandatory five-year term of imprisonment would have run consecutively, petitioner faced a statutory minimum sentence of 15 years of imprisonment -- more than twice his current 84-month sentence -- if convicted on both Counts Two and Three. Ibid.

While counsel's Anders motion was pending, this Court held in United States v. Davis, 139 S. Ct. 2319, 2336 (2019), that 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. See Pet. App. A4. Following that decision, petitioner's counsel successfully moved to withdraw his Anders motion. Ibid. Thereafter, petitioner filed his opening brief on appeal, arguing that his conviction on Count Three should be vacated on the ground that it is unconstitutional under Davis. Ibid.

Two months later, petitioner filed a supplemental brief in which he requested that the court of appeals issue a preliminary ruling on whether the government would be permitted to prosecute

him on Counts Two and Three if the court of appeals vacated his current conviction on Count Three. Pet. App. A4. Petitioner explained that a preliminary ruling on that question was "vitally important" to him because he would "fac[e] a mandatory minimum sentence of 180 months" if the court determined that the government could "reindict or otherwise reinstate the charges" in Counts Two and Three. Pet. C.A. Supp. Br. 1; see Pet. App. A4. Petitioner stated that if the court determined that the government could prosecute him on Counts Two and Three should his current conviction be vacated, then petitioner "would not pursue an appeal." Pet. C.A. Supp. Br. 2; see id. at 1; Pet. App. A4; Pet. C.A. Reply Br. 12-14.

In a May 2020 order, the court of appeals "declined to grant [petitioner's] request for an advisory opinion as to the government's power to reindict [petitioner] on Counts Two and Three." Pet. App. A4; see C.A. Doc. 117, at 2 (May 20, 2020). The court gave petitioner three weeks to decide whether he wished to withdraw his appeal. Ibid. In response to that order, petitioner informed the court that he had decided to proceed with the appeal. Pet. App. A4; see C.A. Doc. 119 (June 9, 2020).

b. The court of appeals affirmed. Pet. App. A1-A7. The court began by noting petitioner's acknowledgment that because he had "made no challenge to his Count Three conviction in the district court," he could prevail on appeal only by showing an

entitlement to relief on plain-error review. Id. at A4. The court stated that petitioner's challenge to his conviction on Count Three satisfied the first two requirements of the plain-error standard because this Court's decision in Davis "'precludes' a conclusion 'that [a] Hobbs Act robbery conspiracy crime qualifies as a § 924(c) crime of violence.'" Id. at A5 (brackets in original; citation omitted); see Gov't C.A. Br. 10 ("In light of Davis, it was error to predicate [petitioner's] Section 924(c) conviction on a conspiracy to commit Hobbs Act robbery."). Based on the "circumstances of this case," Pet. App. A1, however, the court of appeals found that petitioner had failed to satisfy the third requirement of plain-error review because he had "not met his burden of showing that his plea of guilty on Count Three adversely affected his substantial rights, given the record as a whole," id. at A5; see id. at A5-A7.

The court of appeals explained that if petitioner were convicted on all counts, he "would have been sentenced to a minimum of 15 years' imprisonment." Pet. App. A6. The court observed that the "Plea Agreement as drafted avoided that exposure" because the government agreed to dismiss Count Two, which carried a statutory-minimum ten-year sentence, and that the record indicated that petitioner "would have had little genuine hope of being acquitted of the Count Two drug trafficking conspiracy after a trial." Ibid. The court described some of the government's

evidence on Count Two, see id. at A5-A6, and additionally noted that during his plea colloquy, petitioner had specifically admitted that "he knowingly participated in a conspiracy 'to steal narcotics at gun point from people [he and his co-conspirators] believed were drug dealers transporting narcotics.'" Id. at A6 (citation omitted). The court also noted that petitioner had not disputed the presentence report's description of his meetings with co-conspirators, during which the co-conspirators discussed stealing and selling large quantities of drugs. Ibid.

In light of the record evidence of petitioner's guilt with respect to Count Two, the court of appeals determined that Count Two "provided an ample predicate for a conviction under § 924(c)(1)(A)(i) on the basis of firearm possession during and in relation to a drug trafficking crime." Pet. App. A6. The court observed that Section 924(c)(1)(A)(i) "does not require the defendant to be convicted of (or even charged with) the predicate crime, so long as there is legally sufficient proof that the predicate crime was, in fact, committed." Ibid. (citation and emphasis omitted). Thus, while the plea agreement allowed petitioner to avoid a 15-year statutory-minimum sentence, it "could also have achieved the same result by making a simple reference to the Count Two narcotics conspiracy as a predicate drug trafficking crime" for purposes of Count Three. Ibid. The court further determined that "nothing about [petitioner's] plea

or the plea hearing itself provides any basis for an argument that he was willing to plead guilty to Count Three only if it was tied to the charge of Hobbs Act conspiracy and that he would not have pleaded guilty to Count Three if the Plea Agreement had referred instead to the drug trafficking predicate," which was also charged as a basis for Count Three in the indictment. Ibid.; see id. at A7 (noting petitioner's "demonstrated willingness to plead guilty to Count Three in order to gain dismissal of Count Two"). The court therefore determined that petitioner had not shown that the Davis error in his Section 924(c) conviction affected his substantial rights, and it affirmed the judgment. Ibid.

ARGUMENT

Petitioner contends (Pet. 4-11) that his Section 924(c) conviction should be vacated on plain-error review in light of this Court's decision in United States v. Davis, 139 S. Ct. 2319 (2019). As petitioner explained below, however, "he would not pursue an appeal" to challenge that conviction if, on remand, the government could reinstate the other charges that were dismissed pursuant to the parties' plea agreement. Pet. C.A. Br. 2. Although the court of appeals refused petitioner's request for an "advisory opinion" on the reinstatement question, Pet. App. A4, it is clear that on remand, the government could reinstate the dismissed charges. In that event, petitioner would "fac[e] a mandatory minimum sentence of 180 months," Pet. C.A. Supp. Br. 1,

a term that is more than double his current 84-month sentence, and he would have "little genuine hope of being acquitted" on the reinstated charges, Pet. App. A6. Because an ostensibly favorable decision by this Court would not benefit petitioner -- and instead might affirmatively harm him -- this case presents an unsuitable vehicle for reviewing any recent and narrow tension between the decision below and the decisions of the Eleventh Circuit on which petitioner relies. The petition for a writ of certiorari should be denied.

1. Because petitioner did not preserve a challenge to his Section 924(c) conviction in the district court, his challenge to the conviction is subject to review only for plain error. See Pet. App. A1, A4. To prevail on plain-error review, petitioner must show (1) an "error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Marcus, 560 U.S. 258, 252 (2010) (citation omitted).

In the decision below, the court of appeals determined that petitioner satisfied the first two requirements of the plain-error standard to the extent that petitioner's Section 924(c) conviction was premised on a conspiracy to commit Hobbs Act robbery, because this Court's decision in United States v. Davis, supra,

"'precludes' a conclusion 'that [a] Hobbs Act robbery conspiracy crime qualifies as a § 924(c) crime of violence.'" Pet. App. A5 (quoting United States v. Barrett, 937 F.3d 126, 127 (2d Cir. 2019)) (brackets in original). The court of appeals concluded, however, that petitioner had failed to satisfy the third requirement of the plain-error standard because he had "not shown any reasonable probability that he would not have pleaded guilty to Count Three * * * based on the permissible drug-trafficking-crime predicate alleged in Count Three." Id. at A7.

Petitioner asserts (Pet. 5-7) that the decision below conflicts with the decisions in Brown v. United States, 942 F.3d 1069 (11th Cir. 2019) (per curiam), and United States v. Duhart, 803 Fed. Appx. 267 (11th Cir. 2020). In those cases, the Eleventh Circuit determined that defendants who had filed motions under 28 U.S.C. 2255 to vacate their Section 924(c) convictions were entitled to relief because those convictions were predicated solely on conspiracies to commit Hobbs Act robbery. See Brown, 942 F.3d at 1075-1076; Duhart, 803 Fed. Appx. at 269-270. Because both Brown and Duhart addressed Section 2255 motions, the Eleventh Circuit's opinions in those cases did not discuss the potential application of the plain-error standard; they thus do not directly conflict with the decision below. See Brown, 942 F.3d at 1070-1076; Duhart, 803 Fed. Appx. at 268-271. And to the extent that the results in Brown and Duhart suggest that the Eleventh Circuit

might disagree with the decision below and conclude that an individual in petitioner's circumstances satisfies the third requirement of the plain-error standard, any disagreement between the circuits would not warrant this Court's review at this time, given that it is both recent and shallow.

As petitioner observes (Pet. 8), the Second Circuit's decision in this case is also in some tension with that court's prior decision in United States v. Biba, 788 Fed. Appx. 70 (2d Cir. 2019). Like petitioner, the defendant in Biba argued on direct appeal that his Section 924(c) conviction was invalid because it was premised solely on a conspiracy to commit Hobbs Act robbery. Id. at 71. Because the court agreed that the defendant "only allocuted to a Hobbs Act robbery conspiracy as it relates to the § 924(c) count," the court concluded that the defendant's Section 924(c) conviction "must be vacated under Davis." Id. at 72. The court reached that conclusion without any further discussion of prejudice and without evaluating whether the defendant would have pleaded guilty to the Section 924(c) offense based on the valid predicate of attempted robbery. See ibid. That analytical approach is consistent with the Eleventh Circuit's decisions in Brown and Duhart.

The court of appeals' decision in Biba is thus in tension with its decision in petitioner's case. But Biba and the decision below have coexisted for less than a year, and in a future case,

the Second Circuit may "reconcile its internal difficulties" and adopt a uniform approach. Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). In the meantime, any intra-circuit conflict between Biba and the decision below does not warrant this Court's review. See ibid.; see also Joseph v. United States, 574 U.S. 1038, 1040 (2014) (statement of Kagan, J., respecting the denial of certiorari) ("[W]e usually allow the courts of appeals to clean up intra-circuit divisions on their own, in part because their doing so may eliminate any conflict with other courts of appeals.").

2. In any event, this case would be an unsuitable vehicle for reviewing any tension within the Second Circuit, or between the Second and Eleventh Circuits, because petitioner would not benefit from a decision in his favor on the question presented. Indeed, as petitioner has previously acknowledged, he could face a much longer term of imprisonment.

a. The indictment in this case charged petitioner with conspiring to commit Hobbs Act robbery (Count One), conspiring to distribute and to possess with intent to distribute five kilograms or more of cocaine (Count Two), and a Section 924(c) violation predicated on both the Hobbs Act conspiracy and the drug-trafficking conspiracy (Count Three). Indictment 1-3; see also Pet. App. A2. "If convicted on all counts," petitioner "would have been sentenced to a minimum of 15 years' imprisonment,"

consisting of a minimum 10-year term on Count Two and a consecutive minimum 5-year term on Count Three. Pet. App. A6; see id. at A5; 18 U.S.C. 924(c)(1)(A)(i) (2006); 21 U.S.C. 841(b)(1)(A) (2012).

Petitioner "avoided that exposure" by entering into a written plea agreement with the government. Pet. App. A6. Pursuant to that agreement, petitioner agreed to plead guilty to the Hobbs Act conspiracy charged in Count One and to the associated Section 924(c) violation charged in Count Three. Id. at A2; see C.A. App. 23. In exchange, the government agreed that it would not further prosecute petitioner for his participation in those offenses and "w[ould] move to dismiss any open Counts" against him. Pet. App. A2; see C.A. App. 23-24. As a result of that agreement and petitioner's ensuing guilty plea, the government moved to dismiss the drug-trafficking conspiracy charge in Count Two, which carried a minimum term of ten years of imprisonment, and the district court granted that motion. See Pet. App. A4; C.A. App. 60. Petitioner was accordingly convicted only of Hobbs Act conspiracy, which carries no statutory minimum term of imprisonment, and the associated Section 924(c) offense, which carries a consecutive minimum 5-year term. See Pet. App. A3, A6. Petitioner's current 84-month sentence is less than half of the statutory minimum 180-month term that he would have faced if convicted of the drug-trafficking conspiracy charged in Count Two and the associated Section 924(c) offense charged in Count Three.

As petitioner has previously recognized, he could face the full 180-month term if he were "'successful' in challenging the constitutionality of his Count Three conviction," but the government were "permitted to seek reindictment" on the drug-trafficking conspiracy charged in Count Two and the associated Section 924(c) violation charged in Count Three. Pet. C.A. Supp. Br. 1. Petitioner accordingly informed the court of appeals that "he would withdraw his appeal" if that court determined that the government could reinstate its prosecution against him on Counts Two and Three. Ibid. Petitioner further stated that it was "vitally important" to him that the court of appeals resolve that question at the outset to allow him to "gauge the risk of his constitutional challenge" and to give him "the option of withdrawing his appeal." Id. at 1-2; see Pet. C.A. Reply Br. 14.

Petitioner's concern about a renewed prosecution is well-founded. As the court of appeals explained, given the evidence against him, petitioner "would have had little genuine hope of being acquitted of the Count Two drug trafficking conspiracy after a trial." Pet. App. A6. For example, the record indicates that "one or more confidential sources" attended "[t]he coconspirator meetings planning the robbery of drug dealers believed to be transporting narcotics." Ibid.; see PSR ¶¶ 16-25, 28, 30-31. In addition, "some telephone conversations were recorded; some meetings were surveilled by law enforcement; and pistols were

seized when the coconspirators," including petitioner, "were arrested as they advanced on the site of the planned robbery." Pet. App. A6; see PSR ¶¶ 15-22, 26-27, 32-25. As the court found, that evidence would not only expose petitioner to conviction on the drug charge in Count Two of the indictment, but also would "provide[] an ample predicate for a conviction under § 924(c)(1)(A)(i) on the basis of firearm possession during and in relation to a drug trafficking crime." Pet. App. A6. In light of that overwhelming evidence, petitioner understandably informed the court below that "he would not pursue an appeal" if he "knew that remand would allow for reindictment." Pet. C.A. Supp. Br. 2.

b. The court of appeals correctly "declined to grant [petitioner's] request for an advisory opinion as to the government's power to reindict [petitioner] on Counts Two and Three." Pet. App. A4; see Gov't C.A. Br. 14-16 (explaining why issuing such an opinion would be impermissible). Thereafter, petitioner decided to proceed with his appeal and, later, with the petition for a writ of certiorari. See Pet. App. A4. To the extent that petitioner did so because he believes that the government could not permissibly prosecute him on Counts Two and Three on remand, however, that is incorrect.

If petitioner were to secure the vacatur of his current Section 924(c) conviction, the plea agreement would explicitly permit the government to prosecute petitioner for the drug-

trafficking conspiracy charged in Count Two and the associated Section 924(c) offense charged in Count Three. The plea agreement specifically states that, "should the conviction following the defendant's plea of guilty pursuant to this Agreement be vacated for any reason," the government may "commence[] or reinstate[]" any prosecution against the defendant that was not time-barred when the parties signed the plea agreement. Pet. App. A2 (quoting C.A. App. 28) (emphasis omitted); see United States v. Podde, 105 F.3d 813, 821 (2d Cir. 1997) (recognizing that a plea agreement may permissibly include "a waiver of the statute of limitations covering those situations in which the defendant withdraws or challenges his or her guilty plea after the limitations period on the original charges has expired"); 105 F.3d at 817 (recognizing that "double jeopardy does not apply to the original counts in an indictment when a defendant has withdrawn or successfully challenged his plea of guilty to lesser charges").

In the court of appeals, petitioner argued that, if he were to prevail in his challenge to his Section 924(c) conviction, the plea agreement would not permit the government to reinstate any charges against him because he would "still remain[] convicted on Count One." Pet. C.A. Supp. Br. 5. According to petitioner, the plea agreement's statement that the government may reinstate any prosecution upon vacatur of "the conviction," Pet. App. A2 (quoting C.A. App. 28) (emphasis omitted), indicates that both counts of

conviction must be vacated in order for the government to reinstate the dismissed charges. See Pet. C.A. Supp. Br. 5-13; Pet. C.A. Reply Br. 15-18. For reasons the government explained below, however, the plea agreement's reference to "the conviction" necessarily refers to the two-count "conviction" that would result from the agreement, such that the vacatur of petitioner's conviction on Count Three would permit prosecution on Counts Two and Three even if petitioner's conviction on Count One remained in place. See Gov't C.A. Br. 18-20; see also C.A. App. 27 (other provisions of plea agreement that use "conviction," rather than "convictions," to describe petitioner's convictions on both counts); C.A. App. 38, 41 (district court used the same terminology during the plea hearing); C.A. App. 60 (district court used the same terminology during the sentencing hearing).

No other interpretation would make sense. As the government further explained below, "[p]ermitting [petitioner] to challenge" Count Three "while preventing the Government from reinstating the outstanding charges, would plainly frustrate the central purpose of the Plea Agreement" -- "dismissal of certain counts in exchange for [petitioner's] plea of guilty to two counts of conviction: Hobbs Act conspiracy and Section 924(c)." Gov't C.A. Br. 18. The reinstatement provision was plainly directed at the proceedings that might follow any appellate disturbance of the two-count "conviction" upon which the parties agreed.

Accordingly, if petitioner were "'successful' in challenging the constitutionality of his Count Three conviction," and the Government exercised its right to reinstate the charges against him on Counts Two and Three, "then [petitioner] would be 'rewarded' by facing a mandatory minimum sentence of 180 months if reindicted on Counts Two and Three." Pet. C.A. Supp. Br. 1. Petitioner's case thus presents an unsuitable vehicle for considering the question presented, because petitioner cannot show that he is likely to benefit from a favorable decision by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

JENNY C. ELLICKSON
Attorney

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