No.

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR MINAYA, PETITIONER,

v.

UNITED STATES.

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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Questions Presented

1. In considering error under *Yates v. United States*, 354 U.S. 298 (1957) should a court consider evidence of the defendant's actual innocence of the charged offenses?
2. Did the Court of Appeals correctly apply the decision of the Court in *Yates v. United States*, 354 U.S. 298 (1957), in sustaining two of petitioner's convictions for violations of 18 U.S.C. § 924(c)?

Related Proceedings

1. *Oscar Minaya v. United States*, No. 19-5308
2. *United States v. Rodriguez et al.*, No. 14-882 (L), 14-1129 (Con.), 14-1891 (Con.), 14-1892 (Con.); 14-4042 (Con.) (2d Cir.)
3. *United States v. Minaya et al.*, 11 Cr. 755 (S.D.N.Y.)

TABLE OF CONTENTS

Opinions Below and Jurisdiction……....1

Relevant Constitutional and Statutory Provisions…….….1

Statement of Facts……...1

Argument…….3

I. The Second Circuit Disregarded Evidence of Minaya's Actual Innocence of the Section 924(c) Counts and so Misapplied Yates…...……6

II. The Second Circuit Misapplied Yates to the Overlapping Bases of the Kidnapping and Hobbs Act Robbery Charges…...……..8

Conclusion…….10

TABLE OF AUTHORITIES

Cases:

Pinkerton v. United States, 328 U.S. 640 (1946)..……..……6

United States v. Davis, 588 U.S. ____ (2019)…….……...1, 4

United States v. Jones, 935 F.3d 266 (5th Cir. 2019)…….……9

United States v. Marcus, 560 U.S. 258 (2010)……...……6

Yates v. United States, 354 U.S. 298 (1957)…….7, 9, 11

Statutes & Constitutional Provisions:

18 U.S.C. § 924…….……*passim*

18 U.S.C. § 3742……4

28 U.S.C. § 1254…….2

28 U.S.C. § 1291……4

28 U.S.C. § 3231……..……...2

U.S. Const., Amend. V ……..……2

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner Oscar Minaya respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit denying in part and granting in part his motion to vacate counts of conviction following remand from the Court.

Citations of Opinions and Orders

United States v. Rodriguez, No. 14-882, 761 Fed. Appx. 53 (2d Cir. Feb. 5, 2019) (summary opinion).

United States v. Rodriguez, No. 14-822 (2d Cir. April 22, 2019) (decision on motion for rehearing and rehearing *en banc*).

Oscar Minaya v. United States, No. 19-5308 (Nov. 4, 2019) (Mem.)

United States v. Minaya, No. 14-1891 (2d Cir. Jan. 22, 2021) (decision on motion to dismiss Section 924(c) counts on remand).

Opinion Below and Jurisdiction

Following remand from the Court in *Oscar Minaya v. United States*, 19-5308 (Nov. 4, 2019) for further consideration in light of the Court's decision in *United States v. Davis*, 588 U.S. ____ (2019), a Panel of the Second Circuit granted in part and denied in part Petitioner's motion to

vacate three of his four convictions for violating Section 924(c) in a summary order. *See United States v. Minaya*, No. 14-1891 (2d Cir. Jan. 22, 2021); Appendix ("A.") A.1-A.10. Petitioner filed this petition for certiorari on April 19, 2021, within 90 days of the decision of which review is sought. This petition is accordingly timely under Supreme Court. Rule 13.1.

This Court has jurisdiction over final orders of the United States Court of Appeals for the Second Circuit under 28 U.S.C. § 1254(1).

Relevant Constitutional and Statutory Provisions

18 U.S.C. § 924(c)(3)(A) provides that "For purposes of this subsection the term "crime of violence" means an offense that "is a felony and . . . has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law[.]" (U.S. Const. Amend. V).

Statement of Facts

Jurisdiction was vested in the district court by 18 U.S.C. § 3231.

Petitioner was charged, along with eight other individuals, with conspiracy to commit Hobbs Act robbery (Count One), conspiracy to

commit kidnapping (Count Two), one count of the use of a firearm in furtherance of the conspiracies to commit Hobbs Act robbery and to commit kidnapping (Count Three), several substantive Hobbs Act robbery charges (Counts Four, Ten, Thirteen) two substantive kidnapping charges (Counts Five, Eleven), two counts of use of a firearm in connection with either a substantive robbery or a substantive kidnapping offense (Counts Six, Twelve), one count of use of a firearm in connection with a substantive robbery (Court Fourteen). Petitioner was also charged with narcotics conspiracy (Count Fifteen).

Following a three-week trial in the United States District Court for the Southern District of New York, Petitioner was convicted on all counts, including convictions on the four Section 924(c) counts. Petitioner was sentenced to an aggregate sentence of 92 years of incarceration and 5 years of post-release supervision. Significantly for the present petition, Petitioner was convicted of four (4) counts of violating 18 U.S.C. § 924(c) for the use of a firearm in connection with a "crime of violence".

Petitioner filed a timely notice of appeal of his conviction and sentence. Jurisdiction was had of his appeal in the Second Circuit pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. His appeal was denied in all respects. Petitioner filed a petition for certiorari before the Court which was

granted on November 4, 2019, remanding the case to the Second Circuit for further consideration in light of *United States v. Davis*, 588 U.S._____ (2019).

On Remand Before the Second Circuit

On remand, the Second Circuit directed the parties to file motions on the question of how the Court's decision in *United States v. Davis*, 588 U.S. ____ (2019) affected the Petitioner's conviction and sentence.

In their motions, Petitioner and Respondent agreed that Petitioner's conviction under Count Three, charging a Section 924(c) violation in furtherance of a Hobbs Act conspiracy or a kidnapping conspiracy, must be vacated because conspiracy cannot be considered a "crime of violence" after *Davis*. Petitioner and Respondent further agreed that Count Fourteen, charging a Section 924(c) violation in furtherance of a Hobbs Act robbery, should not be vacated, because Hobbs Act robbery remained a crime of violence after *Davis*. The parties concentrated their arguments on Counts Six and Twelve, which charged Petitioner with Section 924(c) violations in connection with substantive Hobbs Act or substantive kidnapping counts arising from series of incidents in December 2010 and May 2011 respectively. Petitioner argued that kidnapping is not a crime of violence, and accordingly could not support a Section 924(c) conviction. Because the

jury had not returned special verdicts as to these counts, Petitioner argued it was impossible to tell whether the jury had convicted him based on the use of a firearm in connection with the kidnapping or the Hobbs Act robbery and that accordingly Counts Six and Twelve had to be vacated. While conceding that substantive kidnapping was not a "crime of violence," the government argued that because the Hobbs Act and kidnapping counts arose out of the same two events, they were inextricably intertwined such that it was impossible for the jury to have concluded that a firearm was used in one charge but not the other.

The Second Circuit granted the motion to dismiss Count Three on consent, assuming without deciding that conspiracy to kidnap was not a crime of violence after *Davis*. A.4. The Second Circuit assumed without deciding that substantive kidnapping was not a crime of violence after *Davis*. *Id.* The Second Circuit further assumed that because the jury could not have properly predicated Petitioner's convictions on Counts Three and Six on a crime that was not a "crime of violence," it was error for the district court to instruct the jury that it could. *Id.* Notwithstanding the above, the Second Circuit found that there was "no possibility"[1] that the jury relied

[1] While the Second Circuit purported to be applying a "harmless error" standard, and not a "plain error" standard of review, A.6, its use of the "no reasonable possibility" standard and citation to *United States v. Marcus*, 560 U.S. 258, 262 (2010) seems to indicate that

solely on the invalid kidnapping predicate for the Section 924(c) convictions under Counts Six and Twelve because the kidnapping and Hobbs Act robbery counts arose out of the "same incidents" which occurred on December 21, 2010 and May 15, 2011 respectively. A.6-7.

Argument

I. The Second Circuit Disregarded Evidence of Minaya's Actual Innocence of the Section 924(c) Counts and so Misapplied *Yates*

The fact that the same facts implicate two different criminal statutes does not support the conclusion that a firearm used in connection with one charged offense must necessarily have been used in connection with the other. The term "incident," as used by the Second Circuit, compresses two complex and lengthy series of events involving multiple locations and people and, critically for this analysis, the use of force (or threat thereof) both with and without a firearm.[2] Moreover, in this case, as Petitioner argued before the Second Circuit, there was considerable evidence of Petitioner's actual innocence of the Section 924(c) charges in Counts Six and Twelve

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"plain error" review may have in fact been used. For the purposes of this petition, however, Petitioner is taking at face value the statement by the Second Circuit that the same result would have been reached even if the "harmless error" had been used.

[2] Under *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946), a conspirator may be convicted of a substantive offense that other conspirators commit during and in furtherance of a conspiracy. However, the government did not ask for and no instruction was given concerning a *Pinkerton* theory of liability for any offense charged.

that the Second Circuit should have considered before concluding that it was "impossible" that the jury had relied on the invalid kidnapping counts in convicting Petitioner on these Section 924(c) counts. *Yates v. United States*, 354 U.S. 298, 312 (1957).

To begin with, both "incidents" were complex multi-stage affairs. The December 2010 incident (Counts Four, Five, and Six) involved at least five people, locations in Queens and Manhattan, and the violent beating of the victim. The May 2011 incident (Counts Ten, Eleven and Twelve) involved at least four people, a meeting in Manhattan before the victim was taken off the street in Queens and driven between several parking garages before being beaten, robbed of $400 from his person, and dropped back on the street.

As argued before the Second Circuit, it was undisputed that Petitioner was not physically present for large stretches of both series of events. Moreover, there was substantial evidence that Petitioner was not aware of the presence of a firearm during either series of events and, further, evidence that he discouraged his co-conspirators from bringing or using firearms. In connection with the May 2011 incident, a cooperating witness testified that Petitioner had not been present during the time that use of a firearm was discussed in the planning. It was uncontested that Minaya was not present at

any point during which a firearm was displayed, used or discussed in connection with the May 2011 events.

Likewise, with regards to the December 2010 events, Minaya was never present during the time that the gun was displayed. Moreover, evidence concerning which of the co-conspirators knew about the gun being present was at least ambiguous, with one cooperator testifying that the gun was in a sock during the time it was used to beat the victim and, further, that he could not be sure that there was even a gun present.

In sum, while the evidence was sufficient, if barely, to sustain the government's burden of proof as to the Section 924(c) counts, the relative paucity of the evidence that would support the government's theory that Petitioner aided and abetted co-conspirators' use of firearms during the December 2010 events and the May 2011 events should have weighed in his favor in the *Yates* analysis. By simply conflating the valid Hobbs Act robbery count and the invalid kidnapping count, and not considering the evidence offered by the government to prove each count, the Second Circuit skipped a critical step in the analysis. The decision below should be vacated.

II. The Second Circuit Misapplied *Yates* to the Overlapping Bases of the Kidnapping and Hobbs Act Robbery Charges

In addition, the Second Circuit misconstrued the significance of the closely related acts that the government offered to prove both the Hobbs Act

and the kidnapping offenses charged in connection with December 2010 incident and the May 2011 incident. As other courts have concluded, including this Court in *Yates* itself, the presence of such shared acts *increases* the likelihood of *Yates* error, rather than *decreasing* it.

As the Fifth Circuit observed in *United States v. Jones*, 935 F.3d 266, 273 (5th Cir. 2019), the fact that crimes are overlapping does not satisfy the *Yates* analysis unless the crimes charged *completely* overlap:

> The government contends that the verdict form instead establishes that the RICO conspiracy and the controlled-substance conspiracy were necessarily connected, pointing to the jury's additional findings on Count 1 that Appellants conspired to distribute and possess drugs in furtherance of the RICO conspiracy. This does not change our analysis. The fact that Appellants' drug-related conduct furthered the RICO conspiracy does not establish the converse: that all of Appellants' RICO conduct furthered the controlled-substance conspiracy as well. A reasonable probability remains that the jury relied upon RICO conduct separate from the drug conspiracy—such as assaults and murders for the purpose of maintaining the gang's territory or reputation—to convict Appellants of the challenged § 924 offenses.

In this case, it is beyond peradventure that Hobbs Act robbery and kidnapping have different elements and are not overlapping offenses. The mere fact that a person was convicted of a Hobbs Act robbery is no guarantee that the person would be convicted of kidnapping on the same facts. After all, kidnaping and Hobbs Act robbery are predicated on different elements: kidnaping on the seizure, inveigling, or other less than voluntary

movement of a person, 18 U.S.C § 1201; Hobbs Act robbery on the interference with commerce, or an article or commodity in commerce, 18 U.S.C. § 1951. And while the government is clearly free to charge different offenses arising from the same conduct, when it does so in the context of a Section 924(c) offense without asking for a special verdict, it assumes the risk of a general verdict that cannot be "unwound".

As this Court noted in *Yates* itself when offenses are based on closely overlapping facts, but have different elements, the overlap makes *Yates* error more likely, not less:

> The character of *most of the overt acts* alleged associates them as readily with 'organizing' [the offense barred by the statute of limitations] as with 'advocacy.' [the offense that could be lawfully charged] In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases 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, 354 U.S. 298, 312 (1957) (emphasis added). In sum, this Court has already recognized that, contrary to the Second Circuit, overlapping proof in a *Yates* analysis increases the likelihood of error, not the opposite.

Conclusion

For these reasons, the Court should grant the petition for certiorari.

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April 19, 2021

Respectfully submitted:

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