No.

IN THE SUPREME COURT OF THE UNITED STATES

JAIRO HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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An unconstitutional statute is not an offense against the laws of the United States. This court, beginning with *Marbury v. Madison*, 1 Cranch 178, 180, 5 U.S. 137 (1803), has repeatedly held that an unconstitutional statute is void; see also *Ex parte Siebold*, 100 U.S. 371, 376-377 (1880) [an unconstitutional statute is void and "cannot be a legal cause of imprisonment"]. More recently the Court has said that subject-matter jurisdiction—a court's power to adjudicate a case—"can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002).

THE QUESTION PRESENTED

Can a defendant, by failing to directly appeal his sentence, procedurally default his claim that the court had no jurisdiction to imprison him pursuant to a statute that a subsequent decision of the Supreme Court held was unconstitutional?

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IN THE UNITED STATES SUPREME COURT

JAIRO HERNANDEZ,

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PETITION FOR WRIT OF CERTIORARI

Jairo Hernandez petitions this court for a writ of certiorari to the Court of Appeals for the Ninth Circuit, which affirmed the district court's conclusion that he waived his claim to vacate or set aside his sentence, filed pursuant to 28 U.S.C. § 2255, which claim asserted that under this court's decision in *United States v. Davis*, 588 U.S. ___, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019) the district court in his case had no power to impose a 10-year mandatory minimum sentence for committing a "crime of violence" when the facts alleged in the count of the indictment at issue and admitted by petitioner did not constitute a "crime of violence."

THE OPINION BELOW

The memorandum decision of the Court of Appeals denying relief appears at App. 1, and is unreported. The order denying rehearing appears at App. 3, and is unreported.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 2255 to adjudicate a motion to vacate or set aside petitioner's sentence on the grounds that the sentence was imposed in violation of the Constitution.[1]

The Court of Appeals had jurisdiction pursuant to 28 U. S. C. § 2255(d) as an appeal from an order entered on petitioner's § 2255 motion, and pursuant to 28 U.S.C. § 1291 as an appeal from a final decision of the district court, and 18 U.S.C. § 3742(a) as an appeal to review a sentence.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1) as a petition to review a decision by a court of appeals.

The United States Court of Appeals decided the case on January 6, 2022. App. 1. A timely petition for rehearing was denied February 17, 2022. Appendix p. A-3. This petition is filed within 90 days of that denial, and is timely pursuant to Rule 13.1 of this Court.

THE STATUTORY PROVISION INVOLVED

Title 18 § 924(c)(1) (A) provides for a mandatory 10-year enhancement to a sentence for a "crime of violence" if the defendant discharged a firearm in furtherance of the crime.

Title 18, § 924(c)(3) defines "crime of violence" in the alternative, first by referring to the elements of the relevant predicate offense and second by referring to the risk the offense poses. These alternative clauses are sometimes called the "elements clause" and the "residual clause." The statute provides, in pertinent part:

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[1] The Court of Appeals granted petitioner permission to file a second or successive § 2255 motion in Ninth Circuit Docket No. 19-72299.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

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

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

United States v. Davis, *supra*, 139 S.Ct. 2319, 2336 held the "residual clause" in subdivision (3)(B)is unconstitutionally vague. Petitioner asserts that none of his offenses meet the "elements" definition, so he was necessarily sentenced under the unconstitutional statute, making his sentence illegal.

STATEMENT OF THE CASE

The record shows that on July 22, 2016 Petitioner Jairo Hernandez pled guilty to five offenses, pursuant to a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), 2-ER-151,[2] with an agreed sentence of 300-360 months in prison. 2 ER-161. The five counts alleged in the Superseding Indictment are:

Count 1: Racketeering Conspiracy, in violation of 18 U.S.C. § 1962(d) [3-ER-216-223];

Count 2: Conspiracy to commit murder in aid of Racketeering, in violation of 18 U.S.C. § 1959(a)(5) [3-ER-223-225];

Count 3: Conspiracy to commit assault with a dangerous weapon in aid of racketeering activity, in violation of 18 U.S.C. § 1959(a)(6) [3-ER-225-226];

[2] Reference is to the Excerpts of Record filed in the Court of Appeals.

Count 6: Using and Carrying a firearm on or about August 30, 2011, During and in Relation to a Crime of Violence and Possessing a Firearm in Furtherance of a Crime of Violence against Victim 1, in violation of 18 U.S.C. § 924 (c)(1)(A) & 2.

Relative to the issues on appeal, Count 6 alleged more specifically that Petitioner Jairo Hernandez and his co-defendant Carlos Vasquez "did use, carry and discharge a firearm at Victim-1 during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, namely, the racketeering conspiracy charged in Count One, the conspiracy to commit murder in aid of racketeering charged in Count Two, the conspiracy to commit assault with a dangerous weapon in aid of racketeering charged in Count Three, and the murder in aid of racketeering of Victim-1 charged in Count Five, and did possess, brandish, and discharge a firearm in furtherance of the offenses charged in Counts One, Two, Three, and Five[3] of this Superseding Indictment," in violation of 18 U.S.C. § 924(c)(1)(A) and (2). [[3-ER-227-228];

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[3] Count 5 of the Superseding Indictment, use of a firearm causing murder (18 U.S.C. § 1959(a)(1) and (2)), was not a count of conviction.

That count alleged that Defendant Hernandez and Co-Defendant Carlos Vasquez, "for the purpose of gaining entrance to, and increasing and maintaining position in, the 19th Street Sureños, an enterprise engaged in racketeering . . . together with others known and unknown, unlawfully, knowingly, and intentionally did murder Victim-1, in violation of California Penal Code Sections 187, 188, 189, and 31." [3-ER-227.]

Count 7: Use of a Firearm Causing Murder of Victim 1 on or about August 30, 2011, in violation of 18 U.S.C. §924(j)(1) and 2 [3-ER-228].

On December 19, 2017, the District Court sentenced petitioner to 324 months in prison. The total term included a mandatory term of 120 months for Count 6, consecutive to the other terms imposed [2-ER-103; 2-ER-141], as required by 18 U.S.C. § 924(c)(1)(A)(iii); see also U.S.S.G. § 5G1.2(a) [providing that when a statute requires a consecutive sentence, the term shall be determined by the statute]. No appeal was filed.

On June 24, 2019 the Supreme Court decided *United States v. Davis*, *supra* 588 U.S. ___ , 139 S.Ct. 2319, 204 L.Ed.2d 757, which held that the definition of "crime of violence" in the "residual clause" of 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague.

On September 3, 2019, petitioner, who had previously filed an unsuccessful motion pursuant to 28 U.S.C. § 2255 to vacate his sentence, filed a *pro se* application in the Ninth Circuit Court of Appeals (Case No. 19-72299) for permission to file a second or successive 28 U.S.C. § 2255 motion, asserting that after the *Davis* decision none of the predicate offenses to which he pled guilty meet the definition of "crime of violence" under either the residual clause or the alternative "elements clause" of § 924(c)(3). The court granted his application.

Following additional briefing, the district court denied petitioner's motion. The court concluded, "Mr. Hernandez procedurally defaulted on his *Davis* argument, and he cannot rely on either cause and prejudice or actual innocence as a means to overcome the procedural default." 1-ER-11.

Petitioner appealed. The Court of Appeals affirmed the district court's decision. The appellate court cited this Court's decision in *United States v. Cotton*, *supra* 535 U.S. 625, 630-631: "The objection that the indictment does not charge a crime against the United States goes only to the merits of the case," which meant, said the memorandum decision, that petitioner's claim "is subject to the usual procedural default rule." App. 2.

REASONS FOR GRANTING THE PETITION

In *United States v. Cotton* the superseding indictment did not allege the quantity of drugs involved in the offense, but the sentencing judge made a finding of drug quantity that substantially increased the defendants' sentences. While the appeal was pending, this court decided *Apprendi v. New Jersey*, 530 U. S. 466, 476 (2000), which held that other than the fact of a prior conviction, any fact that increases the penalty for a crime must be charged in the indictment and submitted to a jury and proved beyond a reasonable doubt. The defendants had not raised the issue in the district court, but the Court of Appeals vacated the sentences, saying a court is without jurisdiction to impose a sentence for an offense not charged in the indictment. On certiorari this Court noted that there was language in an old case, *Ex parte Bain,* 121 U. S. 1 (1887), tending to support such a conclusion, but today the concept of "jurisdiction" means "the courts' statutory or constitutional power to adjudicate the case." A mere "defect" in the indictment does not deprive a court of its power to adjudicate a case. *Cotton* at 630. The Court overruled the *Bain* decision. *Id*. at 631.

1.
The Memorandum Decision Conflicts With Relevant Decisions of This Court.

But this Court has consistently held that courts have no power to adjudicate an "offense" prohibited by an unconstitutional statute. "An unconstitutional act is not law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442 (I886). "An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Ex parte Siebold*, *supra* 100 U.S. 371, 376-377.

This Court was aware of this principle when it decided *Cotton*, and it was aware that only Congress can confer jurisdiction on the courts. When "jurisdiction" is correctly defined as the court's power to hear a case, the power to adjudicate a case cannot be conferred on a court by invoking the doctrine of waiver: "This latter concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." *Cotton* at 630, citing *Louisville & Nashville R. Co. v. Mottley*, 211 U. S. 149, 152 (1908) [reversing judgment based on Supreme Court's *sua sponte* finding that the court below was without jurisdiction of the cause]; see also *Class v. United States*, 138 S.Ct. 798, 803-804 (2018) ["a plea of guilty to a charge does not waive a claim that — judged on its face — the charge is one which the State may not constitutionally prosecute"].

Petitioner's claim here is based on the Court's ruling in *Davis*, which did not address a "defect" in the indictment, but rather which held that the very same statute which imposed a 10-year mandatory minimum sentence on petitioner in the case at bar is unconstitutionally vague. The very first sentence in the *Davis* opinion echoes this Court's consistent view of the power of an unconstitutional statute to deprive a person of his liberty: "In our constitutional order, a vague law is no law at all." *Davis*, *supra*, 139 S.Ct. at 2323.

Petitioner is not saying there is a "defect" in the indictment; that is something which could be cured simply by filing a new non-defective indictment. He is saying that he admits the facts alleged in the indictment, but those facts do not describe a crime. The court has no power—no jurisdiction—to sentence him to prison pursuant to what the Court in *Davis* described as "no law at all."

The memorandum decision of the Court of Appeals decided an important federal question in a way that conflicts with this Court's decisions in *Davis*, *Cotton*, *Siebold,* and *Norton*. That is good reason to grant review. See Supreme Court Rule 10(c).

2.
The Memorandum Decision Conflicts With Decisions of the Courts of Appeals on the Same Important Matter.

The memorandum decision is also in conflict with the decision of the Ninth Circuit in *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) where the court stated that an appeal waiver will not apply if the sentence is illegal, and a sentence is illegal if it violates the Constitution. It also conflicts with *United States v. Cortez*, 973 F.2d 764, 766-767 (9th Cir. 1992), where the court held that a plea of guilty does not waive a

claim that the charge is one which the government constitutionally may not prosecute; despite defendant's admission of guilt, "the issue of whether the government had the power to bring the charge at all still remains"].

The panel decision also conflicts with the authoritative decisions of other Court of Appeals that have addressed the issue. See, e.g., *McCoy v. United States*, 266 F.3d 1245, 1249 (11th Cir. 2001) ["Because parties cannot by acquiescence or agreement confer jurisdiction on a federal court, a jurisdictional defect cannot be waived or procedurally defaulted — instead, a judgment tainted by a jurisdictional defect must be reversed"]; *United States v. St. Hubert*, 883 F.3d 1319, 1326 (11th Cir. 2018) [a district court is without jurisdiction to accept a guilty plea to a "non-offense"].

In *St. Hubert* the Eleventh Circuit interpreted the statement in *Cotton* that indictment defects do not affect the jurisdiction of the court should be limited only to the omission of elements from the indictment. *United States v. St. Hubert*, *supra* 909 F.3d at 342, citing *United States v. Peter*, 310 F.3d 709, 713-714 (11th Cir. 2002). The court in *St. Hubert* also concluded that the more recent case of *Class v. United States*, *supra* 138 S.Ct. 798 supports a finding that a claim that the facts alleged in the indictment and admitted by the defendant do not constitute a crime at all cannot be waived, "because that kind of claim challenges the district court's power to act." *St. Hubert*, 909 F.3d at 343-344, citing *Class* at 805.

This distinction between defects in the indictment and the court's lack of power to act was explained in *United States v. Moore*, 954 F.3d 1322, 1333 (11th Cir. 2020): "The absence of an element of an offense in an indictment is not tantamount to failing to charge a criminal offense

against the United States. However, if the charged conduct itself is not criminal, then an offense against the United States has not been pled and the district court lacks subject matter jurisdiction."

3.
Other Courts Of Appeals Decisions Create Confusion.

One might think that with *Bibler* and *Cortez* as binding Ninth Circuit precedent, especially in view of this Court's ruling in *United States v. Davis* that the residual clause is unconstitutionally vague, and "a vague law is no law at all," that case decisions in the Ninth Circuit would be harmonious. The case at bar illustrates that they are not. And there is evidence that inconsistent decisions are only likely to multiply.

United States v. Goodall, 15 F.4th 987, 995 (9th Cir. 2021), cert. denied April 25, 2022, Supreme Court No. 21-7486[4] (cited at App. 2), for example, only adds to the confusion. In *Goodall* the Ninth Circuit held that although an appeal waiver in a plea agreement does not apply if the sentence is illegal, such an "illegal sentence exception" does not authorize a post-*Davis* challenge to an illegal *conviction* under § 924(c)(3). The court did not explain how an illegal conviction can nevertheless result in a legal sentence, nor did the court acknowledge what should have been binding circuit precedent in *United States v. Barron*, 172 F.3d 1153 (9th Cir. 1999) (en banc), where after the defendant was sentenced a Supreme Court decision held that the law did not forbid the use of a gun in the sense the defendant had used it. The *Barron* decision stated that the basis for

[4] The Petition for Certiorari in *Goodall* presented the question: Did the Ninth Circuit err in dismissing the appeal when Mr. Goodall's plea agreement contains a count of conviction and resulting sentence that is no longer a crime, and an illegal sentence is a jurisdictional defect that is not waivable?

seeking federal habeas corpus is that the defendant is confined under a void conviction and therefore under a sentence not authorized by law, *id*. at 1158, and if the conviction was not authorized by law, "neither was the sentence." *Id*. at 1159.

Several unpublished Ninth Circuit cases quickly followed *Goodall*, affirming the defendants' convictions. See *United States v. Alvarez*, n. 1, 2022 U.S. App. LEXIS 10410, 2022 WL 1135377 (9th Cir. Apr. 18, 2022); *United States v. Rojo*, 2020 U.S. App. LEXIS 7953, 2022 WL 861039 (9th Cir. Mar. 23, 2022); *United States v. Juarez*, 2022 U.S. App. LEXIS 7915, 2022 WL 861032 (9th Cir. Mar. 23, 2022); *United States v. Goldstein*, 2022 U.S. App. LEXIS 7929, 2022 WL 861040 (9th Cir. Mar. 23, 2022); *United States v. Figueroa*, 2022 U.S. App. LEXIS 7931, 2002 WL 861035 (9th Cir. Mar. 23, 2022); *United States v. Espinoza-Gonzalez*, 2022 U.S. App. LEXIS 7507, 2022 WL 848038 (9th Cir. Mar. 22, 2022); *United States v. Beckett*, 2022 U.S. App. LEXIS 109, 2022 WL 34136 (9th Cir. Jan. 4, 2022).

Using still different reasoning, the Seventh Circuit in *United States v. Grzegorczyk,* 997 F.3d 743, 746 (7th Cir. 2021) [presently pending on a petition for certiorari under Supreme Court Docket No. 21-2967] held that an appeal waiver in a plea agreement foreclosed a post-*Davis* constitutional challenge to the defendant's § 924(c)(3) sentence. The court said the defendant admitted "conduct" that was a crime under the "elements" clause when he admitted he possessed a firearm "in furtherance of a crime of violence," notwithstanding his claim that after *Davis* his crime—murder for hire— was *not* a crime of violence, and even though the court did not address whether murder for hire was in fact a crime of violence. *Id*. at 747. In reaching this conclusion, the Seventh Circuit seemed to say that if a claim implicates statutory interpretation

(including a claim that a statute is unconstitutional), it raises only an issue of statutory construction. *Id*. at 748 ["He has not challenged the Government's power to criminalize his admitted conduct"].

In its brief responding to the Petition for Certiorari in *Grzegorczyk* the Government states it has reevaluated its position and has determined that the defendant's underlying crime does not qualify as a crime of violence and that his section 924(c) conviction is therefore invalid and should be vacated. Brief for the United States, p. 9-11.

There is no consistency in the decisions. The circuit split over how to read the statement in *Cotton* that "[t]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case," 535 U.S. at 631, is creating confusion and unfair results, and requires the intervention of this Court. Does the statement mean, as the Eleventh Circuit suggests, that a claim that a defendant's admitted conduct is not a crime at all cannot be waived or forfeited because it challenges the district court's power to act? Or does it mean a defendant cannot challenge his conviction if when he pled he said his conduct constituted a crime of violence, even if it is not a crime of violence, as the *Grzegorczyk* decision seems to say?

Does it mean that waiver or procedural default prohibits a challenge to an illegal conviction under an unconstitutional statute, but not to a challenge to an illegal sentence, as the court in *Goodall* ruled?

Can a defendant effectively grant subject-matter jurisdiction to a district court by waiving his right to appeal from a conviction under an unconstitutional statute—which this Court in *Davis* characterized as "no law at all"—or is Congress the only entity that can grant jurisdiction to the courts? See *McCoy v. United States*, *supra* 266 F.3d 1245, 1249

["parties cannot by acquiescence or agreement confer jurisdiction on a federal court"].

The issue affects scores of defendants. Unless the contradictions are resolved by this Court, whether a defendant who received a 10-year mandatory minimum sentence can seek relief under the constitutional rule announced in *United States v. Davis* will continue to depend upon where the defendant was sentenced—or in the Ninth Circuit, depend upon which appellate panel of judges draws his case on appeal.

CONCLUSION

Congress has granted district courts jurisdiction over "all offenses against the laws of the United States," 18 U.S.C. § 3231, and has authorized district courts to sentence a defendant if he "has been found guilty of an offense described in any Federal statute." 18 U.S.C. § 3551.

A statute that is unconstitutional has the same force and effect as if it had never been enacted. This Court has consistently held that a conviction under a statute that is repugnant to the Constitution is void and "cannot be a legal cause of imprisonment." *E.g., Ex parte Siebold*, *supra* 100 U.S. 371, 376-377.

The Court of Appeals says, in effect, "Yes it can," if the defendant did not appeal the issue when sentence was imposed. See Rule 4(b)(1)(A), F.R.App.P. [Notice of appeal must be filed within 14 days of entry of judgment].

This Court has ruled that the absence of jurisdiction—the power to adjudicate a case—"can never be forfeited or waived." *United States v. Cotton*, supra 535 U.S. 625, 630.

The Court of Appeals, citing the same *Cotton* case, says, in effect, "Yes it can," because, according to the court, the objection that the

indictment does not charge a crime against the United States "goes only to the merits of the case."

The latter quote from the *Cotton* case was clearly intended to apply when an element of the crime was left out of the indictment, something which can be easily cured by amendment.

Or was it? How can different courts interpret the same Supreme Court decision to reach such different results?

Whether a defendant can waive the court's lack of jurisdiction to confine him is an important question of constitutional law. The answer will affect whether a significant number of defendants must serve substantial terms of imprisonment.

Supreme Court Rule 10 gives examples of the kinds of reasons the Court considers in determining whether to grant certiorari, which include the fact that the decision in the case under consideration is in conflict with a decision of other federal courts. Here the decision in our case is in conflict with multiple other decisions.

This conflict justifies granting the petition to maintain harmony in the law. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) [granting certiorari where Ninth Circuit decision found child pornography statute invalid on its face whereas four other circuits sustained it].

Respectfully submitted,

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Appendix

Memorandum Decision of the Court of Appeals Affirming District Court Judgment

January 6, 2022

NOT FOR PUBLICATION

FILED

JAN 6 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAIRO HERNANDEZ, AKA Joker, Defendant-Appellant.	No. 20-17328 D.C. No. 3:14-cr-00120-EMC-6 MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Argued and Submitted December 8, 2021
San Francisco, California

Before: GRABER and COLLINS, Circuit Judges, and CHOE-GROVES,** Judge.

Jairo Hernandez appeals from the district court's judgment denying his 28 U.S.C. § 2255 habeas motion. We have jurisdiction under 28 U.S.C. § 1291. Reviewing de novo, *see United States v. Zuno-Arce*, 339 F.3d 886, 888 (9th Cir. 2003), we affirm.

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

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

The district court permissibly concluded that Hernandez procedurally defaulted the challenge to his sentence under 18 U.S.C. § 924(c) by failing to raise that challenge on direct appeal. *See Bousley v. United States*, 523 U.S. 614, 621 (1998). Contrary to Hernandez's contention, his claim that his sentence is invalid in light of *United States v. Davis*, 139 S. Ct. 2319 (2019), goes to the merits of his conviction and sentence rather than to the court's subject matter jurisdiction. *See United States v. Cotton*, 535 U.S. 625, 630–31 (2002) ("[T]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case." (citation omitted)); *cf. United States v. Goodall*, 15 F.4th 987, 994–97 (9th Cir. 2021) (holding that the appeal waiver contained in defendant's plea agreement barred his claim that his § 924(c) sentence was invalid in light of *Davis*). Accordingly, the claim is subject to the usual procedural default rule. *See United States v. Ratigan*, 351 F.3d 957, 962–63 (9th Cir. 2003). Hernandez does not challenge the district court's conclusion that he failed to demonstrate the necessary cause and prejudice or actual innocence to excuse his procedural default. *See Bousley*, 523 U.S. at 622.

AFFIRMED.

Appendix

Order
of the Court of Appeals
Denying Rehearing

February 17, 2022

FILED

FEB 17 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAIRO HERNANDEZ, AKA Joker, Defendant-Appellant.	No. 20-17328 D.C. No. 3:14-cr-00120-EMC-6 Northern District of California, San Francisco ORDER

Before: GRABER and COLLINS, Circuit Judges, and CHOE-GROVES,* Judge.

The panel has voted to deny the petition for rehearing and rehearing en banc (Docket Entry No. 44). The panel voted unanimously to deny the petition for panel rehearing. Judge Collins voted to deny the petition for rehearing en banc, and Judges Graber and Choe-Groves so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. See FED. R. APP. P. 35.

The petition for rehearing and rehearing en banc is denied.

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