

No. 22-6968

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IN THE SUPREME COURT OF THE UNITED STATES **ORIGINAL**

\_\_\_\_\_\*\_\_\_\_\_  
THOMAS MARMOLEJOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

\_\_\_\_\_\*\_\_\_\_\_  
On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Second Circuit

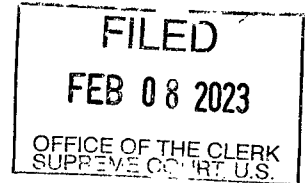
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PETITION FOR WRIT OF CERTIORARI

\_\_\_\_\_\*\_\_\_\_\_  
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### QUESTION PRESENTED FOR REVIEW

Can a section 924(c) and 924(j) charge that alleges multiple predicates stand when one or more of the predicates no longer qualifies as a crime of violence, and the district court instructed the jury that the predicates constituted crimes of violence that can serve as predicates for violations of § 924(c) and § 924(j), and there is no way of knowing whether the guilty verdict was based on the legal error?

## RELATED PROCEEDINGS

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

United States v. Marmolejas, No. 99-cr-1048 (Sept. 19, 2002)

United States v. Marmolejos, No. 05-cv-10693 (Jan. 15, 2021)

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

United States v. Marmolejas, No. 02-1577 (Oct. 27, 2004)

Marmolejos v. United States, No. 21-426 (Nov. 10, 2022)

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PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The summary order decision of the court of appeals denying Mr. Marmolejos' 28 U.S.C. §2255 motion to vacate his convictions for firearms under 18 U.S.C. §§924(c) and (j) is available at 2022 U.S. App. LEXIS 31222. Appendix ("App.") 1a-5a. The decision from the district court denying the §2255 motion is available at 2021 U.S. Dist. LEXIS 8374. App. 7a-18a.

JURISDICTION

The summary order decision of the court of appeals was entered on November 10, 2022. Rehearing was denied on December 19, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 and this petition is timely filed.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Amendment V to the Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### 18 U.S.C. § 924(c)

(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possess a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substance Act (21 U.S.C. 801 et seq.), the Controlled Substance Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(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.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

## STATEMENT OF CASE

Title 18, United States Code, section 924(c)(1)(A) makes it a crime to use or carry a firearm during and in relation to a predicate offense--either a "drug trafficking crime" as defined in §924(c)(2), or a "crime of violence" as defined in §924(c)(3). 18 U.S.C. §924(c)(1)(A). The same is required for conviction under §924(j) (requiring that the death be caused "in the course of a violation of subsection (c)"). In *United States v. Davis*, 139 S. Ct. 2319 (2019), this Court held that §924(c)(3)(B)'s residual clause (definition of crime of violence) is void for vagueness, in violation of the Fifth Amendment's Due Process. *Id.* at 2336. Thus, §924(c)(3)(A)'s "element clause" is the only remaining valid definition of a crime of violence for purposes of the firearms statute. As a result, conspiracy to commit robbery and extortion, conspiracy to commit murder-for-hire, and murder-for-hire are not valid predicates for §924(c) and §924(j). Therefore, in order to convict a defendant for violation of any of these statutes, the Due Process Clause of the Fifth Amendment requires the jury to find beyond a reasonable doubt that the firearm-related conduct was committed during and in relation to a qualifying predicate ("crime of violence" or "drug trafficking crime"). Where disjunctive theories of culpability are submitted to the jury, one valid and the other invalid, and the jury returns a general verdict, the verdict must be set aside if it is "impossible to tell which ground the jury selected." *Yates v. United States*, 354 U.S. 298, 312 (1957); *Griffen v. United States*, 502 U.S. 46, 56-59 (1991).

In November 2001, Superseding Indictment S3 99-Cr-1048 (DC) (the "Indictment") was filed against Mr. Marmolejos and others in 10 counts, eight of which charged Mr. Marmolejos. Count One charged Mr. Marmolejos with conspiracy to commit robbery and extortion, in violation of 18 U.S.C. §1951; Count Two charged conspiracy to commit murder-for-hire, in violation of 18 U.S.C. §1958; Count Three charged substantive murder-for-hire, in violation of 18 U.S.C. §1958; Count Four charged conspiracy to distribute and possess with intent to distribute one kilogram and more of heroin, in violation of 21 U.S.C. §846; Count Five charged murder while engaged in a major drug conspiracy, in violation of 21 U.S.C. §848(e)(1)(A); Count Six charged using and carrying firearms during and in relation to the crimes of violence and drug trafficking charged in Counts One through Five, in violation of 18 U.S.C. §§924(c) and 2; Count Seven charged using a firearm to commit a murder during and in relation to the crimes of violence and drug trafficking charged in Counts One through Five, in violation of 18 U.S.C. §§924(j) and 2; Count Eight charged possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. §§922(k) and 2.

Mr. Marmolejos pled not guilty, and his trial began on January 14, 2002. At trial, with respect to Count Six the jury was instructed that in order to find Mr. Marmolejos guilty of violating §924(c) the jurors first had to find that he committed a predicate offense, either a "crime of violence" or "drug trafficking crime." Specifically the court instructed:

Count Six charges both defendants with knowingly using and carrying firearms during and in relation to the crimes charged in Counts one through five. That is, Count Six charges that . . . Thomas Marmolejos used and carried firearms during and in relation to the conspiracy to commit robbery and extortion charged in Count One, the conspiracy to commit murder-for-hire . . . charged in Count Two, the murder-for-hire . . . charged in Count Three, the narcotics conspiracy charged in Count Four, . . .

The first element the government must prove beyond a reasonable doubt is that the defendant you are considering committed a crime of violence or drug trafficking crime . . .

I instruct you that counts one through three and five are crimes of violence, and that count four is a drug trafficking crime . . .

App. 19a-21a, Jury Charge for Count Six, §924(c).

On February 1, 2002, the jury returned a guilty verdict against Mr. Marmolejos on all eight counts. In July 2002, the district court vacated the guilty verdict on Count Five--murder while engaged in a major drug conspiracy--because the jury's guilty verdict on that count was inconsistent with its finding with respect to Count Four that the government had failed to prove that Mr. Marmolejos reasonably could have foreseen that the conspiracy involved at least one kilogram of heroin. The jury's general verdict, with respect to Count Six, read as follows:

Using and Carrying a Firearm During and In  
Relation to a Crime of Violence and/or a  
Narcotic Trafficking Crime  
GUILTY X NOT GUILTY \_\_\_\_\_

App. 22a-24a, Special Verdict Form. The form did not ask, and the jury did not indicate, which underlying offenses--conspiracy to commit robbery and extortion, conspiracy to commit murder-for-hire, murder-for-hire, or the narcotics conspiracy--predicated

the Count Six charge, although it described Count Six as charging using and carrying a firearm during and in relation to a crime of violence "and/or" a narcotics trafficking crime. Making it impossible to determine which crime or crimes served as the predicate offense(s) for Mr. Marmolejos' §924(c) conviction.

On September 19, 2002, the district court sentenced Mr. Marmolejos to a term of life imprisonment on Counts Two, Three,<sup>1</sup> and Seven (§924(j)), a concurrent term of 20 years on Counts One and Four, and a concurrent term of 10 years on Count Eight, plus a mandatory consecutive 10 years on Count Six (§924(c)). On October 27, 2004, the Second Circuit affirmed the judgment by summary order. *United States v. Marmolejas*, 112 F. App'x 779 (2d Cir. 2004).

In 2005, Mr. Marmolejos moved, pursuant to 28 U.S.C. §2255, to vacate, set aside, or correct his sentence, arguing ineffective assistance of counsel in connection with trial and sentencing. On September 15, 2006, the district court denied the motion. Mr. Marmolejos subsequently filed additional challenges to his conviction and sentence, all of which were denied.

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The life sentences on the murder-for-hire counts, Two and Three, exceeds the maximum authorized by the jury's verdict. 18 U.S.C. §1958(a) provides a maximum penalty of 10 years; "if personal injury results" increases the maximum to 20 years; and a sentence of death or life "if death results." This Court has held that any fact that increases statutory maximum must be found by jury. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013)(same regarding any fact triggering statutory minimum sentence). Because Mr. Marmolejos' jury was not instructed to find, and did not find, that "death resulted" from the commission of the murder-for-hire offenses, its verdict convicted him of only a base §1958 offenses and permitted sentences of only 10 years.

In June 2020, the Second Circuit granted Mr. Marmolejos leave to file a second or successive petition under §2255. In that petition Mr. Marmolejos argued that, in light of this Court decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), his conviction and sentence on Counts Six and Seven should be vacated because the "residual clause" of §924(c) has been declared unconstitutionally vague and because all his predicate offenses, with the exception of the narcotics conspiracy offense in Count Four, no longer qualify as crimes of violence under the "elements clause" of section 924(c), and the trial record does not provide sufficient factual basis to conclude that Mr. Marmolejos firearms convictions were based on the narcotics predicate, and thus, the jury may have relied on the invalid predicates for those convictions. On January 15, 2021, the district court denied Mr. Marmolejos' successive §2255 motion. App. 7a-18a. On November 10, 2022, the Second Circuit affirmed the district court order. App. 1a-5a. On December 19, 2022, the Second Circuit denied the petition for rehearing. App. 6a.

#### REASONS FOR GRANTING THE WRIT

Mr. Marmolejos' convictions under 18 U.S.C. §§924(c) and 924(j) are unconstitutional and cannot stand in light of this Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). The indictment alleges that there are three offenses underlying §924(c) and §924(j) counts: "crimes of violence," conspiracy to commit robbery and extortion, Count One; conspiracy to commit murder-for-hire, Count Two; and murder-for-hire, Count Three. The district court instructed the jury that the predicate

offenses charged in Counts One, Two, and Three constituted crimes of violence. That instruction was plain error.

In light of *Davis*, the definition of "crime of violence" in section 924(c)(3)(B) is void for vagueness in violation of the Fifth Amendment's Due Process. *Davis*, 139 S. Ct. at 2336. As a result, an offense is now a crime of violence only if it falls within the force clause, i.e., if it has "as an element the use, attempted use, or threatened use of physical force." 18 U.S.C. §924(c)(3)(A). Mr. Marmolejos' predicate offenses, conspiracy to commit robbery and extortion charged in Count One, conspiracy to commit murder-for-hire charged in Count Two, and murder-for-hire charged in Count Three do not categorically require the use, attempted use, or threatened use of physical force and do not qualify as crimes of violence under the element clause of §924(c)(3)(A). Because the jury returned a general verdict on the §924 charges, the erroneous inclusion of the invalid predicates affected Mr. Marmolejos' substantial rights, and requires the §924 convictions be vacated. Therefore, if, as here, multiple grounds for conviction are submitted to a jury and one or more rest on "a mistake concerning the law," and if it is impossible to determine which ground the jury selected, the conviction must be vacated. *Griffen v. United States*, 502 U.S. 46, 56-59 (1991); *United States v. Salmonese*, 352 F.3d 608, 624 (2d Cir. 2003).

Mr. Marmolejos respectfully urges that all aspects of the lower court's decision are erroneous and at a variance with this Court decisions as explained in the argument. This Court should exercise its supervisor powers over the lower courts and issue the writ.

## ARGUMENT

I. MR. MARMOLEJOS' CONVICTION OF COUNTS SIX AND SEVEN CANNOT STAND BECAUSE THE JURY WAS ERRONEOUSLY CHARGED THAT THE "CRIME OF VIOLENCE" ELEMENT WAS MET IF MR. MARMOLEJOS USED AND CARRIED FIREARMS DURING AND IN RELATION TO THE CONSPIRACY TO COMMIT ROBBERY AND EXTORTION CHARGED IN COUNT ONE, CONSPIRACY TO COMMIT MURDER FOR HIRE CHARGED IN COUNT TWO, AND MURDER FOR HIRE CHARGED IN COUNT THREE

A. The Conspiracy to Commit Robbery and Extortion, Conspiracy to Commit Murder-for-Hire, and Murder-for-Hire Are No Longer Valid "Crimes of Violence"

Count One of the indictment charged Mr. Marmolejos with conspiracy to commit robbery and extortion; Count Two charged conspiracy to commit murder-for-hire; Count Three charged murder-for-hire; and Count Four charged a narcotics conspiracy. Counts Six and Seven charged Mr. Marmolejos with §924 violations committed during and in relation to a "crime of violence" or "drug trafficking crime" as alleged in Counts One, Two, Three, and Four. The district court instructed the jury with respect to Count Six and Seven that conspiracy to commit robbery and extortion, Count One; conspiracy to commit murder-for-hire, Count Two; and murder-for-hire, Count Three are crimes of violence.

As discussed below, it was error for the district court to charge the jury with respect to Counts Six and Seven that Counts One, Two, and Three are crimes of violence for purposes of §924(c) and §924(j).

### 1. Davis' Invalidation of §924(c)(3)(B)'s Residual Clause

Section 924(c) provides for a series of graduated, mandatory consecutive sentences for using and carrying a firearm during and in relation to a "crime of violence" or "drug trafficking crime." 18 U.S.C. §924(c)(1)(A). The term "crime of violence," in turn,

is defined as a felony offense that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," §924(c)(3)(A) or "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." §924(c)(3)(B). Subpart (A), in this Court's parlance, is the "elements clause"; (B) is the "residual clause." *Davis*, 139 S. Ct. at 2324.

Section 924(j)(1) in turn is violated when a person, "in the course of a violation of subsection (c), causes the death of a person through use of a firearm . . . if the killing is a murder (as defined in section 1111)." A violation of §924(c) is therefore a prerequisite for violating §924(j).

In *Davis*, 139 S. Ct. 2319 (2019), this Court invalidated and voided for vagueness §924(c)(3)(B)'s residual clause. *Id.* at 2336. In its opinion, this Court noted that it had already invalidated two statutes "that bear more than a passing resemblance" to §924(c)'s residual clause. *Davis*, 139 S. Ct. at 2325. First, in *Johnson v. United States*, 135 S. Ct. 2552 (2015), this Court struck down a similarly-worded clause of the Armed Career Criminal Act (ACCA), as unconstitutionally vague.

Next, in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210 (2018), this Court held unconstitutional a similar clause in 18 U.S.C. §16's definition of a crime of violence.

Following these decisions, and affirming that, "[i]n our constitutional order, a vague law is no law at all," this Court ruled that §924(c)(3)(B)'s residual clause is unconstitutionally

vague. *Davis*, 139 S. Ct. at 2324. In the Court's words, the clause "provides no reliable way to determine which offenses qualify as crimes of violence." *Id.* As part of its ruling, this Court also rejected the government's argument that it could avoid invalidating this clause by abandoning this Court's long-standing "categorical" approach and examining the facts of an underlying predicate offense to determine if it is "violent." See *id.* at 2327. Instead, this Court affirmed that courts should continue to use the categorical approach to decide if an offense qualifies as a crime of violence for purposes of §924(c). See *id.* at 2328-36.

**2. The Conspiracy to Commit Robbery and Extortion, Conspiracy to Commit Murder-for-Hire, and Murder-for-Hire Are Not Valid "Crimes of Violence" Under 18 U.S.C. §924(c)(3)(A)'s Element Clause**

Because the residual clause at "§924(c)(3)(B) is unconstitutionally vague," *Davis*, 139 S. Ct. at 2336, for an offense to qualify as a "crime of violence" it must fit §924(c)'s element clause, meaning it must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another. 18 U.S.C. §924(c)(3)(A). A conspiracy can never fall within §924(c)(3)(A)'s "element clause" because a "conspiracy's elements are met as soon as the participants have made an agreement." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1219 (2018). In light of this Court decision in *Davis*, the Second Circuit has subsequently held that conspiracy to commit robbery and extortion and conspiracy to commit murder-for-hire are no longer valid "crimes of violence" predicates for §924. See *United States v. Barrett*, 937 F.3d 126, 127-28 (2d Cir.

2019); **United States v. Pastore**, 36 F.4th 423, 428-29 (2d Cir. 2022). Further, the government concedes that Mr. Marmolejos' substantive murder-for-hire conviction cannot serve as a valid §924 predicate because the jury was not asked to find that the offense resulted in personal injury or death. See Brief for the United States, No. 21-426 at 32.; see also, e.g., Brief for United States in **Grzegorzczuk v. United States**, No. 21-5967, 142 S. Ct. 2589, 213 L.Ed.2d 1128 (2022)(Government conceding that, after Davis, a federal murder-for-hire conviction was not a crime of violence under §924(c)). The Solicitor General in that case explained that the murder-for-hire, 18 U.S.C. §1958(a):

require[s] only that a defendant travel in, or use a facility of, interstate commerce with the requisite criminal intent; it does not require that a defendant actually enter into a murder-for-hire agreement, that he carry out or otherwise attempt to accomplish his criminal intent, or that the contemplated murder be attempted or accomplished by another person ...

Travel in interstate commerce or use of a facility of interstate commerce with the requisite criminal intent need not, as a categorical matter, involve the use, attempted use, or threatened use of physical force under Section 924(c)(3)(A).

Brief of United States at 9, **Grzegorzczuk**, No. 21-5967, 142 S. Ct. 2580, 213 L.Ed.2d 1128.

Mr. Marmolejos' predicate offenses, conspiracy to commit robbery and extortion, conspiracy to commit murder-for-hire, and murder-for-hire fell under §924(c)(3)'s residual clause, which is now void vagueness, and §924(c)(3)(A)'s element clause. Thus, Mr. Marmolejos' §924 convictions and sentences violate due process of law.

**B. Counts Six and Seven Must Be Vacated Because We Cannot Know if the Verdict Was Based on the Legal Error**

Reversal of Mr. Marmolejos' conviction of Counts Six and Seven are required because there is no way of knowing whether the guilty verdict was based on the legal error. *Griffen v. United States*, 502 U.S. 46, 56-59 (1991); *United States v. Salmonese*, 352 F.3d 608, 624 (2d Cir. 2003).

The jury was instructed that Mr. Marmolejos could be convicted of Counts Six and Seven: if he used and carried a firearm during and in relation to the crimes charged in Count One-conspiracy to commit robbery and extortion; Count Two-conspiracy to commit murder-for-hire; Count Three-murder-for-hire; Count Four-narcotics conspiracy; and Count Five-murder while engaged in a drug conspiracy.<sup>2</sup> "crime of violence or drug trafficking crime." The district court further told the jury, "I instruct you that counts one through three and five are crimes of violence, and that count four is a drug trafficking crime." App. 19a-21a.

There is no error in the instruction that the narcotics conspiracy charged in Count Four, is a drug trafficking crime that may serve as a predicate for prosecutions under §924(c) and §924(j). But it was plain error to instruct the jury that it could use the conspiracy to commit robbery and extortion; conspiracy to commit murder-for-hire; and murder-for-hire as "crimes of violence," and therefore as predicates for violations

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<sup>2</sup> The district court vacated Count Five on inconsistency grounds. See *United States v. Gomez*, 210 F.Supp.2d 465,479 (S.D.N.Y. 2002).

of §924(c) and §924(j), absent findings necessary to render the predicates as crimes of violence within the meaning of §924(c)(3)(A)'s element clause.

The verdict form did not require the jury to indicate whether its finding of guilty on Counts Six and Seven were based on the conspiracy to commit robbery and extortion predicate, the conspiracy to commit murder-for-hire predicate, the murder-for-hire predicate, the drug trafficking predicate, or all. App. at 24a.

Because the jury instructions and verdict form allowed the jury to convict based on this legal error, and because the verdict form does not indicate whether the legal error was in fact the basis for the convictions, the convictions must be vacated.

**1. A Jury Verdict Must Be Reversed if it May Have Been Based on Legal Error and There Is No Way of Knowing the Basis the Jury Selected**

A conviction must be vacated if it potentially rest on a legally erroneous basis. In *Yates v. United States*, 354 U.S. 298 (1957), this Court considered a general guilty verdict for a twin-object conspiracy. One of the objects was unsupportable. *Id.* at 304-11. This Court held that the general verdict must be set aside if it "is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Id.* at 312.

*Yates'* holding was narrowed by this Court decision in *Griffen* to apply only in situations where there is legal error in one of the bases of conviction. *Griffen*, 502 U.S. at 56. Under

Griffen, a conviction must be affirmed on a sufficiency challenge if there is sufficient evidence "with respect to any one of the acts charged," but it must still be reversed if one of the grounds submitted to the jury was "a mistake concerning the law" and it is impossible to determine which ground the jury selected. Id. at 56-58.

That is precisely what happened in Mr. Marmolejos' case.

## 2. The Jury's Verdict on Counts Six and Seven

The district court instructed the jury that the conspiracy to commit robbery and extortion charged in Count One, the conspiracy to commit murder-for-hire charged in Count Two, and the murder-for-hire charged in Count Three, are "crimes of violence" for purposes of Counts Six and Seven. The district court therefore told the jury that it could find Mr. Marmolejos guilty of Counts Six and Seven if he used and carried the firearm during and in relation to either the conspiracy to commit robbery and extortion charged in Count One, the conspiracy to commit murder-for-hire charged in Count Two, the murder-for-hire charged in Count Three, or the narcotics conspiracy charged in Count Four. App. 19a-21a.

Three of the alternative options for conviction erroneously assumed for the jury that the conspiracy to commit robbery and extortion, the conspiracy to commit murder-for-hire, and the murder-for-hire were crimes of violence for purposes of §924(c) and §924(j).

The verdict form did not require the jury to indicate whether it based its conviction of Counts Six and Seven on the

conspiracy to commit robbery and extortion charged in Count One, the conspiracy to commit murder-for-hire charged in Count Two, the murder-for-hire charged in Count Three, the drug conspiracy charged in Count Four, or all. The verdict form makes it impossible to tell which of the four predicates the jury relied upon.

Such uncertainty gives rise to the possibility that the jury could have predicated its guilty verdict on the section 924(c) and 924(j) charges by relying on any one one of the invalid crimes of violence, but not the narcotic conspiracy.

Without being able to determine whether the judgment of conviction was based on the legal error--the district court's instruction to treat the conspiracy to commit robbery and extortion charged in Count One, the conspiracy to commit murder-for-hire charged in Count Two, and the murder-for-hire charged in Count Three as crimes of violence as a matter of law--the convictions on Counts Six (§924(c)) and Seven (§924(j)) must be vacated. *Yates*, 354 U.S. at 312; *Griffen*, 502 U.S. at 56-57.

**C. Mr. Marmolejos Was Harmed By The Erroneous Crime of Violence Instruction**

Although the narcotics conspiracy charged in Count Four does qualify as a predicate for purposes of §924(c) and §924(j), the jury did not return a special verdict unanimously tying that charge to the §924(c) and §924(j) convictions. The government never argued that the narcotics conspiracy was the foundation of the §924 charges and never alleged that Mr. Marmolejos was a drug dealer, a money launderer, or otherwise a regular member of any narcotics organization. Neither the evidence, trial record nor

the law permit a finding that the jury predicated the §924 charges upon the narcotics offense. It is impossible to conclude that the inclusion of the invalid predicates was harmless and did not affect Mr. Marmolejos' substantial rights.

As demonstrated at trial, Mr. Marmolejos' various convictions stem from being part of a murder-for-hire team, hired by the Reyes heroin organization solely to murder two persons, Johan Pena-Perez ("Profesor") and Nilton Duran ("Barbita"). Juan ("Junior") Matos Reyes wanted the two men killed because they had turned against the organization by robbing one of its own apartments and taking one or two kilograms of heroin, between \$30,000 and \$100,000 in cash, a beeper that the organization's drug customers used to contact the organization and place heroin orders, and for ruining his drug trafficking operation causing the Reyes heroin organization to disband. App. 25a-37a, Trial Transcript-Testimony of Robinson Reyes.

Prior to the disbandment of the Reyes heroin organization Mr. Marmolejos was not a member or participant of the organization and was not involved in the organization drug trafficking operation. It is just as clear that Mr. Marmolejos did not have knowledge of the organization's heroin distribution operations--the amounts, the drugs, the nature of the drugs, and type of drugs. Junior Reyes' chief operatives in the organization were Andres Peralta, Robinson Reyes, Diego Mojica, Johan Pena-Perez, and Nilton Duran. Id. at 25a-28a. No other connection between Reyes' drug operation and Mr. Marmolejos was ever alleged, much less proved.

The Court of Appeals panel, in affirming the district court's order, erroneously determined that Mr. Marmolejos' acceptance of compensation for the murder established his involvement in the narcotics conspiracy which overlaps with the evidence of his involvement in the Hobbs Act conspiracy, the conspiracy to commit murder-for-hire, and the murder-for-hire. Therefore, the evidence supporting those convictions was inextricably intertwined with the evidence supporting the narcotics conspiracy. But the record does not admit of such a finding. The only evidence presented by the government with respect to the compensation for the murder was the testimony of Robinson Reyes, a member of the Reyes heroin organization, who testified about the money. As this testimony indicates, there was in fact no acceptance of compensation for the murder by Mr. Marmolejos. App. 38a-40a. And, as noted by the panel, "Other than Marmolejos' acceptance of compensation for the murder, there was no evidence of his further contact with the narcotics conspiracy." App. at 4a. Thus, there is no evidence of Mr. Marmolejos' involvement in the narcotics conspiracy to establish support for purposes of §924 convictions. Therefore, evidence supporting those convictions was not inextricably intertwined with the evidence supporting the narcotics conspiracy conviction.

It is undisputed that Mr. Marmolejos had no previous association with the Reyes heroin organization nor was he involved in the organization's drug trafficking operation. Mr. Marmolejos' first contact with the Reyes organization was on May 25, 1998, when the team he was part of was hired for the specific

purpose to commit a murder-for-hire, weeks after the robbery and the disbandment of the Reyes heroin organization. App. at 37a

In charging the jury with the law it was to apply in reaching its verdict on the §924 charges, the district court specifically instructed the jury that: "As is made clear from the indictment, Count Six concerns 9-millimeter and 10-millimeter firearms that were allegedly used and carried on or about May 26, 1998 in the Southern District of New York." App. at 20. The district court's instruction evidence that the firearms were used and carried during and in relation to the May 26, 1998 murder, further demonstrating that Mr. Marmolejos' section 924(c) and 924(j) convictions rested on the murder-for-hire offenses. Nothing in the jury instructions suggest that the firearms were used and carried during and in relation to the narcotics conspiracy.

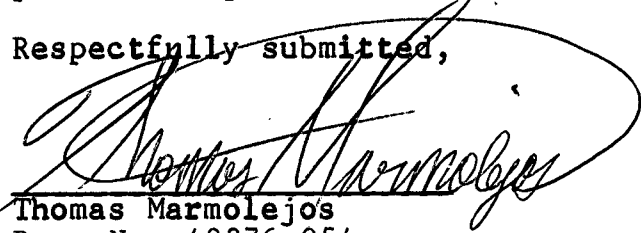
Given the instructions and the evidence that was developed at trial, the jury likely concluded that Mr. Marmolejos used and carried a firearm during and in relation to the murder-for-hire offenses, but not the narcotics conspiracy. As there is no evidence of Mr. Marmolejos in the records of any sort of wrongdoing other than being involved in a murder-for-hire. It is doubtful that the jury would have convicted Mr. Marmolejos of the §924(c) and §924(j) counts if it had only been instructed on the narcotics predicate. At minimum, it is impossible to say that the legally erroneous inclusion of the conspiracy to commit robbery and extortion, the conspiracy to commit murder-for-hire, and the murder-for-hire as §924(c) and §924(j) predicates was harmless

beyond a reasonable doubt. That in turn requires that Count Six and Seven be vacated. See *Griffen*, 502 U.S. at 56-59; *Salmonese*, 352 F.3d at 264.

#### CONCLUSION

A writ of certiorari should be granted and this Court should review and reverse the decision below, and the case remanded for further proceeding in light of the position expressed herein.

Respectfully submitted,



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