No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE LUIS RAMIREZ-DORANTES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

QUESTION PRESENTED

Whether a count charging the use of a firearm to further a "crime of violence" under 18 U.S.C. § 924(c) that rests on multiple underlying offenses is duplicitous.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Ramirez-Dorantes*, 21-55988 (denial of request for a certificate of appealability, issued December 16, 2022);

- *United States v. Ramirez-Dorantes*, 10-CR-1793-JAH-2, 16-CV-1632-JAH, S.D. Ca. (district court's denial of habeas petition, issued September 7, 2021);

- *United States v. Ramirez-Dorantes*, 10-CR-1793-JAH-2 (judgment and commitment after guilty plea, December 20, 2013).

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Petitioner Jose Luis Ramirez-Dorantes respectfully prays that this Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on December 16, 2022.

INTRODUCTION

Over the past 30 years, a little-noticed but significant circuit split has been brewing over how prosecutors may charge the crime of using or carrying a firearm in furtherance of a drug trafficking offense or a crime of violence under 18 U.S.C. § 924(c)—specifically, whether such a charge may rest on more than one underlying crime. For instance, when a defendant uses a firearm in furtherance of two or more separate federal crimes, the Third, Fourth, Sixth, Eighth, and Eleventh Circuits hold that a prosecutor may bring multiple § 924(c) charges—one for each underlying crime. But the Second, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits hold that a

prosecutor may bring just one § 924(c) charge when separate underlying federal crimes arise out of the same incident or act.

Mr. Ramirez-Dorantes's case presents a strong vehicle to resolve this inconsistent enforcement of one of the most frequently-charged federal offenses. Not only did he raise this issue at every stage of litigation, it is the only hurdle standing between him and the relief he seeks. What's more, to resolve this question, the Court need only look at the plain language of § 924(c), which confirms that a § 924(c) count may only rest on a single underlying offense. For these reasons, the Court should grant Mr. Ramirez-Dorantes's petition for a writ of certiorari.

OPINION BELOW

The Court of Appeals denied Mr. Ramirez-Dorantes's motion for a certificate of appealability of the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2255 in a dispositive order. *See United States v. Ramirez-Dorantes,* Case No. 21-55988 (9th Cir. Dec. 16, 2022) (attached here as Appendix A).

JURISDICTION

On December 16, 2022, the Court of Appeals denied Mr. Ramirez-Dorantes's motion for a certificate of appealability. *See* Pet. App. 1a. The Court has jurisdiction under 28 U.S.C. § 1254(a).

RELEVANT STATUTORY PROVISION

The pertinent statute, 18 U.S.C. § 924(c)(1)(A), provides that a person shall be subject to an additional mandatory term of imprisonment for brandishing and discharging a firearm "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)."

STATEMENT OF FACTS

Mr. Ramirez-Dorantes worked for a Mexican smuggling organization that brought drugs and migrants across the border. One night in the summer of 2009, one of the leaders of this group (a "dangerous psychopath," according to the leader's girlfriend) hatched a plan to cross the U.S./Mexico border to steal night vision goggles from a Border Patrol agent. As the prosecutor admitted, this plan was "driven by" the leader, and Mr. Ramirez-Dorantes "probably had no decision-making authority" in it.[1]

In fact, Mr. Ramirez-Dorantes did not find out about this plan until he and three other co-conspirators arrived at the border. When Mr. Ramirez-Dorantes finally learned about the plan, he told the group it was a bad idea. Nevertheless, the leader sent three men across the border to rob the agent of his goggles, while he and Mr. Ramirez-Dorantes remained on the Mexican side of the border.

The plan went horribly wrong. As the three men tried to take the night vision goggles, the agent resisted. A struggle ensued, and the agent was shot multiple times. Mr. Ramirez-Dorantes and one of the robbers were later apprehended and extradited to face prosecution, while the leader escaped and remains at large in Mexico.

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[1] *See* Presentence Report, 10-CR-01793, Dkt. 230, at 11.

In 2010, a jury returned a superseding indictment charging Mr. Ramirez-Dorantes with the following counts:

Count 1: conspiracy to commit robbery and kidnapping, in violation of 18 U.S.C. § 371;

Count 2: aiding and abetting robbery, in violation of 18 U.S.C. § 2112 and 18 U.S.C. § 2;

Count 3: aiding and abetting kidnapping of a federal officer, in violation of 18 U.S.C. § 1201(a)(5) and 18 U.S.C. § 2;

Count 4: aiding and abetting murder of a federal officer, in violation of 18 U.S.C. § 1114 and 18 U.S.C. § 2; and

Count 5: aiding and abetting brandishing and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2.

Faced with murder charges, Mr. Ramirez-Dorantes elected to plead guilty to Counts 1 and 5 (conspiracy and discharging a firearm in furtherance of a crime of violence). The plea agreement stated that the elements of the § 924(c) charge in Count 5 were that:

1. *At least one* of the crimes of violence in Count 5 of the Superseding Indictment was committed; and

2. Defendant knowingly used, carried, brandished, or discharged a firearm during and in relation to *that* crime.

(emphases added). Count 5, in turn, listed the potential "crimes of violence" as being those charged in Counts 2, 3, and 4 of the Superseding Indictment, namely:

(a) robbery of personal property of the United States (18 U.S.C. § 2112);

(b) unlawful confinement of a federal officer resulting in death (18 U.S.C. 1201(a)(5));

(c) murder of a federal officer committed in perpetration of a robbery (18 U.S.C. § 1114).

In other words, the elements of the § 924(c) count that Mr. Ramirez-Dorantes pleaded guilty to were that he aided and abetted the discharge of a firearm in relation to "at least one of" the following crimes—robbery, unlawful confinement, or felony murder.

At sentencing, his co-defendant explained that Mr. Ramirez-Dorantes never encouraged or supported the plan, nor did he provide any kind of help to commit this crime. Although Mr. Ramirez-Dorantes's attorney requested a sentence of 180 months, the district court sentenced him to 60 months on the conspiracy and 600 months on the § 924(c) firearms charge. This combined sentence of 55 years virtually assured that Mr. Ramirez-Dorantes would die in prison for a crime he never encouraged or supported.

The underlying predicate offense of Mr. Ramirez-Dorantes's § 924(c) did not become relevant until the constitutionality of various "residual clauses" came into question. On June 26, 2015, this Court struck down the "residual clause" of the Armed Career Criminal Act ("ACCA") as void for vagueness. *See Johnson v. United States*, 135 S. Ct. 2551 (2015). Within one year of *Johnson*, Mr. Ramirez-Dorantes timely filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 seeking relief under *Johnson*.

Relying on the categorical approach, Mr. Ramirez-Dorantes argued that none of the three crimes charged as underlying predicates for his § 924(c) conviction could satisfy the alternative definition of a crime of violence under the "elements clause"

because they did not require 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). As to the robbery predicate, Mr. Ramirez-Dorantes specifically contended that the force necessary to satisfy § 2112 could be *de minimis* force or unintentional force—either one of which would render it a categorical mismatch to the elements clause. And even if one of the three predicates *could* satisfy the elements clause, he argued, his plea agreement did not admit *which* predicate the § 924(c) rested on—thus, so long as one of them fell short of the elements clause, his § 924(c) conviction and sentence were unconstitutional.

In its response brief, the government argued that robbery under § 2112 satisfied the elements clause. The government never disagreed that unlawful confinement and felony murder were *not* crimes of violence. But the government claimed that Mr. Ramirez-Dorantes's § 924(c) conviction and sentence could stand so long as *any* of the three predicates (unlawful confinement, robbery, or felony murder) satisfied the elements clause.

After briefing concluded, the district court took no action on Mr. Ramirez-Dorantes's case for five years. Finally, it denied his § 2255 petition. *See* Pet. App. 9–11a. In its denial the court agreed that the plea agreement only required Mr. Ramirez-Dorantes to admit that "*at least one* of the crimes of violence in count five of the superseding indictment was committed." Pet. App. 10a (emphases added). But the court then inexplicably concluded that his § 924(c) conviction was "based upon *all three offenses*, including robbery." Pet. App. 11a (emphasis added). And

because the district court believed that robbery alone satisfied the "crime of violence" definition, it did not consider whether the other crimes alleged in Count 5 were crimes of violence or whether his plea necessarily rested on those other crimes. The district court then denied Mr. Ramirez-Dorantes a certificate of appealability,

Mr. Ramirez-Dorantes made a timely request to the Ninth Circuit for a certificate of appealability. In this motion, he again argued that robbery under 18 U.S.C. § 2112 was not categorically a crime of violence. But even if it were, he argued, his written plea agreement had not admitted that the § 924(c) count rested on *all three* of the predicate offenses (robbery, unlawful confinement, and felony murder), as the district court concluded. Nor could it, as such a conclusion would render Count 5 impermissibly duplicitous. And because the plea never admitted *which* predicate Count 5 rested on, and neither the government nor the court had ever claimed that unlawful confinement and felony murder were crimes of violence, Mr. Ramirez-Dorantes argued that his sentence for Count 5 was unlawful.

On December 16, 2022, the Ninth Circuit denied Mr. Ramirez-Dorantes's request for a certificate of appealability, stating only that he had not made a substantial showing of the denial of a constitutional right. *See* Attachment A. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I.

The Courts of Appeals Are Divided on Whether a § 924(c) Conviction May Rest on More Than One Underlying Crime.

"Duplicity is the joining in a single count of two or more distinct and separate offenses." *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976). *See also* 1 C. Wright, *Federal Practice and Procedure*, § 142 at 469 (1982). Courts have held that a single count charging more than one offense may pose several dangers. Beyond the obvious concerns of notice to the defendant, a jury returning a verdict on a single count with multiple crimes may convict the defendant without unanimously agreeing on the same offense. *See United States v. Schlei*, 122 F.3d 944 (11th Cir. 1997). A defendant convicted of a duplicitous count may also have difficulty bringing a later double jeopardy defense. *See Id.* And a court may have trouble determining whether evidence relating to one offense but not another is admissible. *See Id.* For these and other reasons, courts and scholars have believed for over a century that "[o]ne offence only may be stated in a single indictment or count; if more than one offence is charged, the indictment is bad for duplicity." Joseph Henry Beale, A Treatise on Criminal Pleading and Practice 103-04 (1899).

But the courts of appeals do not agree on whether a single § 924(c) count that rests on *two separate underlying crimes* creates an improperly-duplicitous indictment. The Eleventh Circuit has held that it does. In *In re Gomez*, for instance, the defendant's single § 924(c) charge rested on no fewer than four separate crimes charged in four separate counts, "presumably offering each as a possible predicate

for the § 924(c) charge." 830 F.3d 1225, 1226–27 (11th Cir. 2016). Explaining that each of these were "separate and distinct offenses," *Gomez* then reasoned that "a § 924(c) crime based on any one of these separate companion convictions would likewise be a separate offense." *Id.* at 1227.

But *Gomez* explained that this scenario "demonstrates the dangers that may lurk in indictments that list multiple potential predicate offenses in a single § 924(c) count." *Id.* For instance, "half of the jury may have believed that Gomez used the gun at some point during his Hobbs Act conspiracy, and the other half that he did so only during the drug trafficking offense." *Id.* at 1228. But because § 924(c) "'increase[s] the mandatory minimum sentence,'" its factual findings are "'elements'" that "'must be submitted to the jury and found beyond a reasonable doubt.'" *Id.* at 1227 (quoting *Alleyne v. United States*, 570 U.S. 99, 115 (2013)). While the court could "make a guess based on the PSI or other documents from Gomez's trial or sentencing," *Alleyne* "expressly prohibits this type of 'judicial factfinding' when it comes to increasing a defendant's mandatory minimum sentence.'" *Id.* at 1228. And because the jury may have found that Gomez's § 924(c) conviction only rested on a crime that fell under the residual clause, the Eleventh Circuit granted his application. *Id.*

At least four other courts of appeals agree with the Eleventh Circuit. For instance, in *United States v. Nabors*, the defendant shot a federal agent who broke into his apartment, where he kept a large quantity of drugs. 901 F.2d 1351, 1353 (6th Cir. 1990). Prosecutors charged the defendant with one § 924(c) count for a

crime of violence (shooting the agent) and a second § 924(c) count for a drug-trafficking crime (possession of cocaine with intent to distribute). *See id.* The defendant argued that § 924(c) did not allow "one use of firearms to support two separate convictions and sentences." *Id.* at 1357. But the Sixth Circuit disagreed, explaining that the two § 924(c) counts "do not each require the same proof of facts; the two predicate offenses are distinct and require proof of facts not required by the other predicate." *Id.* at 1358. Similarly, in *United States v. Casiano*, the Third Circuit held that "crimes occurring as part of the same underlying occurrence may constitute separate predicate offenses if properly charged as separate crimes"; thus, each separate crime "may be a separate predicate for a § 924(c)(1) conviction." 113 F.3d 420, 426 (3d Cir. 1997) (citations omitted). *See also United States v. Luskin*, 926 F.2d 372 (4th Cir. 1991) (rejecting the defendant's argument that "one cannot receive consecutive section 924(c) sentences for one episode of criminal behavior"); *United States v. Sandstrom*, 594 F.3d 634, 658 (8th Cir. 2010) (holding that "§ 924(c)(1) permits multiple convictions for the single use of a firearm based on multiple predicate offenses").

Here, however, the Ninth Circuit affirmed the opposite. Mr. Ramirez-Dorantes argued that because his § 924(c) charge may have rested on the crime of unlawful confinement or felony murder, this implicated the unconstitutional residual clause of § 924(c)(3)(B). But the district court concluded that his § 924(c) conviction was "based upon *all three offenses*, including robbery." Pet. App. 11a (emphasis added). The Ninth Circuit agreed. So even though the § 924(c) count

rested on "two or more distinct and separate offenses." *UCO Oil Co.*, 546 F.2d at 835, the Ninth Circuit, unlike the five circuits above, holds that this creates no duplicity problem. *See, e.g., United States v. Gobert*, 943 F.3d 878, 880 n.2 (9th Cir. 2019) (noting that it was "lawful" for both Counts One and Two to serve as predicates for a § 924(c) conviction so long as one of them qualifies as a crime of violence).

At least five courts of appeals have sided with the Ninth Circuit. The Seventh Circuit provided a key example of this in *United States v. Cureton*, where the defendant "used the gun in connection with two different predicate offenses," but "both convictions are based on the exact same conduct." 739 F.3d 1032, 1035 (7th Cir. 2014). The court held that "[b]ecause there is only a single use of a single gun, and the predicate offenses were committed simultaneously without any differentiation in conduct, only one § 924(c)(1) conviction can stand." *Id. See also United States v. Wilson*, 160 F.3d 732, 749 (D.C. Cir. 1998) (holding that "[b]ecause there was only one use of the firearm," one of the § 924(c) counts that rested on a separate predicate must be vacated); *United States v. Phipps*, 319 F.3d 177, 183 (5th Cir. 2003) (holding that § 924(c) "does not authorize multiple convictions for a single use of a single firearm based on multiple predicate offenses"); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987) (holding that a defendant who used a firearm in furtherance of both robbery and murder could only be convicted of one § 924(c) count); *United States v. Finley*, 245 F.3d 199, 207 (2d Cir. 2001) ("The statute does not clearly manifest an intention to punish a

defendant twice for continuous possession of a firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct.").

These cases show that a deep and intractable circuit split exists between courts that believe two separate crimes arising out of a single incident may support two § 924(c) counts and courts that believe they may only support one § 924(c) count. Because this circuit split has existed for at least 30 years and shows no sign of abating, it is ripe for resolution.

II.

This Issue Has Critical Consequences.

As these cases demonstrate, this issue carries critical consequences for not only criminal defendants, but also prosecutors, judges, and the entire criminal justice system. Defendants face a mandatory minimum consecutive sentence of five years for every additional count of § 924(c) charged in an indictment. *See* 18 U.S.C. § 924(c). So if a person uses a gun to commit three crimes, the Third, Fourth, Sixth, Eighth, and Eleventh Circuits would permit prosecutors to charge him with multiple § 924(c) counts, resulting in a mandatory minimum sentence of fifteen years in prison. But if this same person were prosecuted in the Second, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits, prosecutors could only charge him with a single § 924(c) count, leaving him with a mandatory minimum of five years. Cumulatively, this creates a disparity of hundreds (if not thousands) of years in prison, turning the length of one's sentence on one of the most common federal

criminal statutes into a matter of geographic happenstance. Resolution of this important question is thus long overdue.

III.

Mr. Ramirez-Dorantes's Case Squarely Presents This Issue.

At every stage of his habeas case, Mr. Ramirez-Dorantes has argued that his § 924(c) conviction cannot rest on more than one predicate crime without creating a duplicitous indictment. And at every stage of this case, a court has disagreed, holding that his § 924(c) conviction was "based upon *all three offenses*, including robbery." Pet. App. 11a (emphasis added). This issue is therefore perfectly preserved and squarely presented for this Court's review.

Furthermore, nothing besides this holding stands between Mr. Ramirez-Dorantes and the relief he seeks. Neither the government nor the district court nor the Ninth Circuit has ever argued or held that Mr. Ramirez-Dorantes's other predicates (unlawful confinement and felony murder) qualify as crimes of violence. And the written plea agreement did not specify which predicate offense the § 924(c) count rested on, stating only that "[a]t *least one*" of the crimes of violence in Count 5 of the Superseding Indictment was committed. Accordingly, Mr. Ramirez-Dorantes's case provides an ideal vehicle to resolve this circuit split.

IV.

The Plain Language of the Statute Resolves This Question.

The resolution of this question carries mixed results for defendants like Mr. Ramirez-Dorantes. Because each § 924(c) count carries a five-year mandatory

consecutive sentence, adopting the position of the Third, Fourth, Sixth, Eighth, and Eleventh Circuits would mean that defendants in the Second, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits could literally spend twice as much time (or more) in prison than they currently do. And for every person convicted of an extra five years for an another § 924(c) count, the Bureau of Prisons will spend an additional $180,000 on their incarceration costs.[2] Over the past 30 years, this has resulted in thousands of hours of wasted time and millions of dollars in additional penal resources.

On the other hand, Mr. Ramirez-Dorantes was denied relief because the courts below held that his § 924(c) count was "based upon all three offenses, including robbery." Pet. App. 11a. This permits juries to convict a defendant even though they might disagree on the facts surrounding the underlying crime of violence. As *In re Gomez*, pointed out, "half of the jury may have believed that [the defendant] used the gun at some point during his Hobbs Act conspiracy, and the other half that he did so only during the drug trafficking offense." 830 F.3d 1225, 1228 (11th Cir. 2016). And while a court could "make a guess based on the PSI or other documents from [the defendant's] trial or sentencing" as to which underlying crime of violence the jury relied on, this Court's decision in *Alleyne*, 570 U.S. at 115, "expressly prohibits this type of 'judicial factfinding' when it comes to increasing a

[2] *See* "Annual Determination of Average Cost of Incarceration," Federal Register, April 30, 2018, *available at*: https://www.federalregister.gov/documents/2018/04/30/2018-09062/annual-determination-of-average-cost-of-incarceration (stating that the average cost of incarceration for federal inmates in 2017 was $36, 299.25).

defendant's mandatory minimum sentence.'" *Id.* Given these competing risks, different defendants may disagree on the best interpretation of the statute.

Nevertheless, an examination of the plain language of the statute provides the clearest path forward. Section 924(c) provides that:

> 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*, possesses a firearm, shall, in addition to the punishment provided for such *crime* of violence or drug trafficking *crime* … be sentenced to a term of imprisonment of not less than 5 years[.]

18 U.S.C. § 924(c)(1)(A) (emphases added). Congress' seven-time use of the word "crime" in its singular form shows that the legislature did not contemplate that a § 924(c) charge may rest on multiple underlying offenses. Thus, the Court should grant certiorari to clarify that the plain language of the statute prevents prosecutors from resting a § 924(c) charge on more than one offense. Resolving this question alone would provide significant guidance to lower courts and avoid the bulk of pitfalls that stem from a duplicitous count.

CONCLUSION

Because five courts of appeal hold that two separate crimes committed in a single incident can sustain two separate § 924(c) counts and six courts of appeal

hold they cannot, the Court should grant Mr. Ramirez-Dorantes's petition for a writ of certiorari to resolve this inter-circuit conflict.

Respectfully submitted,

Date: March 16, 2023

s/ Kara Hartzler

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner