

No. 19-6195

IN THE SUPREME COURT OF THE UNITED STATES

ALEJANDRO MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 7-9) that this Court should grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration in light of United States v. Davis, 139 S. Ct. 2319 (2019), in which this Court held that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. Davis, 139 S. Ct. at 2336. Petitioner further contends (Pet. 7) that the court of appeals erred in denying his request for a certificate of appealability on that issue. Petitioner's conviction under

Section 924(c), however, does not turn on the classification of his offenses as crimes of violence under Section 924(c) (3) (B), nor would a decision vacating his Section 924(c) conviction have a practical effect on his overall sentence. The petition for a writ of certiorari should be denied.

1. Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of conspiracy against civil rights, in violation of 18 U.S.C. 241 (Count I); one count of aiding and abetting interference with federally protected activities, in violation of 18 U.S.C. 2 and 245(b) (2) (B) (Count II); and one count of aiding and abetting the use or discharge of a firearm during a crime of violence causing death, in violation of 18 U.S.C. 2 and 924(j) (1) and 18 U.S.C. 924(c) (1) (A) (iii) (Supp. IV 1998) (Count III). Judgment 1. The charges stemmed from petitioner's involvement in a Latino street gang. See Second Superseding Indictment 1-2. Count I concerned petitioner's participation in a conspiracy to violate the federally protected housing rights of African Americans through violence and threats of violence, id. at 4-12, while Count II concerned petitioner's participation in the shooting death of an African-American man because of his race and because he was enjoying a public facility, id. at 13. Count III identified both Count I and Count II as predicate "crimes of

violence" for petitioner's Section 924(c) offense. Id. at 14-15. The district court sentenced petitioner to life imprisonment, consisting of concurrent sentences of life imprisonment on Counts I and Count II, and a consecutive sentence of life imprisonment on Count III. Judgment 1.

Section 924(c) makes it a crime to use or carry a firearm during and in relation to, or to possess a firearm in furtherance of, "any crime of violence." 18 U.S.C. 924(c)(1)(A) (Supp. IV 1998). The statute defines a "'crime of violence'" 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," 18 U.S.C. 924(c)(3)(A), or, "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," 18 U.S.C. 924(c)(3)(B).

Petitioner does not dispute that his Count II offense under 18 U.S.C. 245(b)(2)(B) -- which criminalizes actions taken "by force or threat of force" to willfully intimidate or interfere with any person's enjoyment of a public facility because of his race -- qualifies as a "crime of violence" under Section 924(c)(3)(A). Accordingly, his Section 924(c) conviction is valid regardless of whether his civil rights conspiracy conviction qualified as a "crime of violence" under Section 924(c)(3)(B).

Because Davis concerns only the definition of a "crime of violence" in Section 924(c)(3)(B), this Court's decision in that case does not affect the validity of petitioner's conviction under Section 924(c).

2. Petitioner contends (Pet. 4-5, 7-8) that the court of appeals' decision upholding his conviction on direct appeal "specifically found" that his Section 924(c) conviction rested solely on his civil rights conspiracy conviction, and such a finding is the law of the case. That is incorrect.

Petitioner relies (Pet. 4) on the court of appeals' statement, in summarizing the case's procedural history, that "[t]he jury also found [petitioner and his co-defendants] guilty of violating 18 U.S.C. §§ 924(c)(1)(A)(iii), (j)(1) and 2(a) by using firearms to kill Kenneth Kurry Wilson while carrying out the charged conspiracy." 788 F.3d 956, 962. That statement encompasses both the conspiracy in violation of Section 241 (Count I) and the shooting of Wilson in violation of Section 245(b)(2)(B) (Count II). And in any event, the court of appeals' description could not have altered the bases for petitioner's Section 924(c) conviction -- an issue petitioner and his co-defendants did not raise, and the court of appeals accordingly did not consider. See 788 F.3d at 962-963.

3. Moreover, even if petitioner's Section 924(c) conviction were vacated, it would have no practical effect on his sentence. Petitioner's consecutive life sentence under Section 924(c) was in addition to two concurrent life sentences for his other convictions. Those other convictions and life sentences would remain valid even if petitioner's Section 924(c) conviction were invalidated.

4. Under these circumstances, no reason exists to remand this case to the court of appeals in light of this Court's decision in Davis. Nor can petitioner make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), as he must to obtain a certificate of appealability on collateral review, see Gonzalez v. Thaler, 565 U.S. 134, 140-141 (2012).

The petition for a writ of certiorari should be denied.*

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

DECEMBER 2019

* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.