IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

_____

No. _____

MARCOS RODGRIGUEZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

_____

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

_____

Tina Schneider
Counsel for Petitioner

44 Exchange Street
Suite 201
Portland, Maine 04101
(207) 871-7930

July 9, 2018

QUESTIONS PRESENTED

Whether the 'risk of force' clause of 18 U.S.C. §924(c)(3)(B) is void for vagueness.

Whether the granting of a request to join in motions of a co-defendant is sufficient to assert defenses raised in a pending motion by that co-defendant.

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Statutes

Petitioner, Marcos Rodriguez, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 7, 2017.

OPINION BELOW

The decision of the Second Circuit, United States v. Martinez, 862 F.3d 223 (2d Cir. 2017), appears in the Appendix hereto, at 17-57. The decision of the Second Circuit denying the Rule 40 Petition for Panel Rehearing, United States v. Rodriguez, 888 F.3d 26 (2d Cir. 2018), appears in the Appendix hereto, at 60-63. The decision of the Second Circuit denying the Rule 35 Petition for Rehearing En Banc (unreported) appears in the Appendix hereto, at 64.

JURISDICTION

The judgment of the Second Circuit was entered on July 7, 2017. After Petitioner requested new counsel, and prior counsel moved to be relieved, on November 16, 2017, the Second Circuit granted that motion and appointed counsel for the purpose of evaluating whether a Petition for Rehearing and/or Petition for Writ of Certiorari should be filed. On January 30, 2018, the Second Circuit granted a motion to extend time, and ordered that any petition for rehearing be filed by March 1, 2018. On March 1,

2018, Petitioner filed a combined Rule 35 Petition for Rehearing En Banc and Rule 40 Petition for Panel Rehearing. On April 19, 2018, while that Petition was pending, Petitioner filed a Rule 28(j) letter, attached in the Appendix hereto, informing the Second Circuit of a new pertinent and significant authority affecting the case – specifically, Sessions v. Dimaya, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018), decided by this Court two days previous. On April 24, 2018, the Second Circuit denied the Rule 40 Petition for Panel Rehearing, and on May 14, 2018, the Second Circuit denied the Rule 35 Petition for Rehearing En Banc. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

STATUTES INVOLVED

18 U.S.C. §924. Penalties
* * *
(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, possesses 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;
* * *

(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.

(Emphasis supplied).

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial in July 2011 of conspiracy to commit Hobbs Act robbery, conspiracy to distribute narcotics, and brandishing a firearm in furtherance of a crime of violence. The jury expressly found that the firearm was used in connection with the robbery conspiracy. The charges arose out of allegations that co-conspirators impersonated New York City police officers to rob drug dealers of narcotics, which they then sold.

In June 2014, before he had been sentenced, Petitioner moved for acquittal and/or a new trial, arguing a statute of limitations defense. The court denied the motion. In January 2015, after a co-defendant had succeeded in getting the gun count against him dismissed on statute of limitations grounds (before a different judge), Petitioner supplemented his Rule 33 motion, arguing that the interests of justice required ruling in his favor to parallel the ruling in the co-defendant's case. The court again denied the motion. It sentenced Petitioner to 188 months on the conspiracy counts, and to the mandatory consecutive statutory minimum seven-year

term on the firearm brandishing count, for a total term of imprisonment of 272 months.

On appeal, Petitioner argued that the court should have granted the motion for acquittal on statute of limitations grounds. The Second Circuit found that Petitioner did not timely assert his statute of limitations defense in the district court, and concluded that it was waived. Martinez, 862 F.3d at 235, Appendix at 36-37.

In his Petition for Rehearing, Petitioner argued that he did, in fact, raise a statute of limitations defense before trial. He pointed out that in June 2011, while his case was still consolidated with that of his co-defendant, he made an application to join in the co-defendant's motions. The district court granted that application. At that time, the court had pending before it a pretrial motion filed by the co-defendant requesting that the indictment be dismissed based on the statute of limitations.

The Second Circuit denied the Petition for Rehearing, finding that the statute of limitations defense asserted by the co-defendant "neither was nor purported to be applicable to Rodriguez or to the argument Rodriguez asserted on appeal." Rodriguez, 888 F.3d at 28. Appendix at 62.

After the filing of the Petition for Rehearing, but prior to its denial by the Second Circuit, this Court decided Sessions v. Dimaya, holding that the

'risk of force' clause in 18 U.S.C. §16(b) was unconstitutionally vague. Petitioner filed a Rule 28(j) letter, calling Dimaya to the attention of the Second Circuit, and asserting that it warranted rehearing to vacate Petitioner's conviction on the firearms count. Appendix at 58-59. The Second Circuit did not address the Dimaya issue in either its April 24, 2018 denial of the Petition for Panel Rehearing, or its May 14, 2018 denial of the Petition for Rehearing En Banc.

REASONS FOR GRANTING THE PETITION

This case presents important questions of federal law that have not been, but should be, settled by this Court.

A. The 'risk of force' clause of 18 U.S.C. §924(c)(3)(B) is void for vagueness (Circuit Split).

The Fifth Amendment's due process clause is violated whenever the government prosecutes under a criminal law "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Johnson v. United States, 576 U.S. ___, 135 S.Ct. 2551, 2556, 192 L.Ed.2d 569 (2015). In Sessions v. Dimaya, 584 U.S. ___, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018), this invalidated the 'risk of force' clause in 18 U.S.C. §16(b) – identically worded to its counterpart in 18 U.S.C. §924(c)(3) – as unconstitutionally vague. Both statutes combine "indeterminacy about how to measure the risk posed by a crime

with indeterminacy about how much risk it takes for the crime to qualify as a violent felony," in violation of due process. Dimaya, 584 U.S. at ___, 138 S.Ct. at 1214.

Since Dimaya, the Second Circuit has "express[ed] no view as to whether the 'risk-of-force' clause, §924(c)(3)(B), is void for vagueness…" United States v. Hill, 890 F.3d 51, 53 n.2 (2d Cir. 2018). However, another circuit has ruled that Dimaya compels the conclusion that §924(c)(3)(B) is unconstitutionally vague. United States v. Salas, 889 F.3d 681, 684-86 (10th Cir. 2018). Accord, United States v. Birdinground, 2018 WL 3187358 (D.Mont. 2018) at *4; United States v. Flores, 2018 WL 2709855 (D.Nev. 2018) at *4. The Eleventh Circuit has vacated its prior opinion, issued pre-Dimaya, holding that §924(c)(3)(B) was not void for vagueness, and has granted rehearing en banc in that case. Ovalles v. United States, 861 F.3d 1257 (11th Cir 2017), rehearing en banc granted, opinion vacated, 889 F.3d 1259 (11th Cir. 2018).

Before Dimaya, at least one circuit held that the rationale of Johnson, which invalidated the residual clause of the Armed Career Criminal Act, similarly invalidated §924(c)(3)(B). United States v. Cardena, 842 F.3d 959, 995-99 (7th Cir. 2016). However, other circuits held, pre-Dimaya, that the rationale of Johnson did not invalidate §924(c)(3)(B). E.g., United States v.

Eshetu, 863 F.3d 946, 954-55 (D.C. Cir. 2017); United States v. Jones, 854 F.3d 737, 740 (5th Cir. 2017); United States v. Prickett, 839 F.3d 697, 699-700 (8th Cir. 2016); United States v. Taylor, 814 F.3d 340, 375-79 (6th Cir. 2016).

This Court has recently GVR'd several §924(c)(3)(B) cases in light of Dimaya, which are now working their way through the judicial system. E.g., Carreon v. United States, Supreme Court No. 17-6926; Davis v. United States, No. 16-8997; Ecourse-Westbrook v. United States, No. 17-6368; Enix v. United States, No. 17-6340; Glover v. United States, No. 16-8777; Lin v. United States, No. 17-5767; McCoy v. United States, No. 17-5484; Taylor (Brannon) v. United States, No. 16-8996; United States v. Jackson, No. 17-651; United States v. Jenkins, No. 17-97; and Winters v. United States, No. 17-5495.

As one court recently noted: "Without doubt, this issue is divisive and ripe for consideration. Some prisoners may be eligible for reduced sentences or early release, but for their convictions under §924(c)(3)(B)." United States v. Hicks, 2018 WL 3207976 (E.D. Mich. 2018) at *2. Here, Petitioner received a seven-year sentence, to be served consecutively to his other sentence of imprisonment, for a §924(c)(3)(B) conviction. This Court should grant certiorari in this case to address whether this 'risk of force'

clause is void for vagueness in light of Dimaya and Johnson, or alternatively, hold this case in abeyance until this Court rules on the merits of this issue in one of the GVR'd cases.

B. The granting of a request to join in motions of a co-defendant is sufficient to assert defenses raised in a pending motion by that co-defendant.

On appeal, Petitioner argued that his conviction for using a firearm in furtherance of the robbery conspiracy in violation of 18 U.S.C. §924(c) was barred by the statute of limitations. The Second Circuit rejected that challenge, finding: "As Rodriguez did not timely assert his statute-of-limitations defense in the district court, we conclude that it has been waived." Martinez, 862 F.3d at 235, App. at 37. It reasoned that the statute of limitations becomes part of the case only if raised by the defendant "at or before trial." Id., *quoting* Musacchio v. United States, 136 S.Ct. 709, 717-18 (2016).

However, Petitioner did, in fact, raise a statute of limitations defense before trial. On June 2, 2011, while his case was still consolidated with that of co-defendant Henry Fiorentino, Petitioner made "an application to join in the motions of co-defendant Fiorentino…" The district court granted that application. At the time of that application, the district court had pending before it a pretrial motion filed by Fiorentino requesting, inter alia, that the

indictment be dismissed based upon the statute of limitations – specifically arguing that the alleged crimes did not continue after November 2004, five years prior to indictment.

Although the district court denied the pretrial motion to dismiss the indictment, this did not nullify the fact that the statute of limitations issue was raised "before trial." Musacchio, 136 S.Ct. at 717-18. And while it was raised by his co-defendant, Petitioner's application to join in the co-defendant's motions was granted while this motion was pending. Therefore, the Second Circuit's finding that "Rodriguez did not raise his present statute-of-limitations contention until long after his trial," Martinez, 862 F.3d at 235, was wrong.

In denying the Petition for Panel Rehearing, the Second Circuit held that "[a] defendant's statement that he joins all of the arguments made by his codefendants does not preserve for his benefit arguments that do not apply to him." Rodriguez, 888 F.3d at 28, App. at 62. The Second Circuit's reasoning here was flawed, because Petitioner showed, both in his brief on appeal and in the petition for rehearing, how the statute of limitations argument applied to him. As the Fifth Circuit recently held, "[a] defendant may join in the motions of her codefendants to preserve error, but only if the Government has no valid objection and the district court allows it." United

States v. Evans, ___ F.3d ___, ___, 2018 WL 2926807 at *13 (5th Cir. 2018). In this case, Petitioner moved to join in his codefendant's motion, the government interposed no objection, and the district court allowed it. Accordingly, this Court should grant this Petition and clarify that claims of error are preserved in this situation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

July 9, 2018

Respectfully submitted,

/s/ Tina Schneider

TINA SCHNEIDER
Counsel for Petitioner

APPENDIX