

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAFAEL RONDON — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

ELEVENTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RAFAEL RONDON #48834-018
(Your Name)

FEDERAL CORRECTIONAL INSTITUTION
(Address)

PO. BOX. 1032 COLEMAN, FLORIDA 33521
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether the Eleventh Circuit's 18 U.S.C. § 924(c) pattern jury instruction violates the Sixth Amendment .. because it concludes that the crucial question as to — whether the robberies alleged are "crimes of violence" for purpose - of Section § 924(c) are questions of law to be determined by the district court ?

2. Whether after the Supreme Court's decision in .. Sessions v. Dimaya, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018), Section § 924(c) is unconstitutional ?

3. Whether the Supreme Court should definitively resolve whether § 924(c)(3)(B)'s "residual clause" is unconstitutional in order to promote uniformity of .. federal law in light of Sessions v. Dimaya ?

4. Whether Sessions v. Dimaya, is retroactive for purposes of 28 U.S.C. § 2255(h) ?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 6/28/2018.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 5

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

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 offence 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.

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

After a jury trial for the Middle District of Florida Petitioner was convicted of more than two dozen charges, arising out of six bank robberies and was sentenced to - 1,794 months, consecutively pursuant to 18 U.S.C. § 924(c). On Direct Appeal, Petitioner raised 10 issues, however, the Eleventh Circuit only disposed of two issues raised. See United States v. Rondon, 372 Fed. Appx. 28 (11th Cir. 2010). Petitioner's counsel then raised an important ... federal question: **FOR APPELLATE PRESERVATION PURPOSES/ONLY**

Whether this court's 18 U.S.C. § 924(c) PATTERN JURY INSTRUCTION VIOLATES THE SIXTH AMENDMENT BECAUSE IT CONCLUDES THAT THE CRUTIAL QUESTION AS TO WHETHER THE ROBBERIES ALLEGED ARE CRIMES OF VIOLENCE FOR PURPOSES OF SECTION § 924(c) ARE QUEATIONS OF LAW TO BE DETERMINED BY THE DISTRICT COURT ?

This question went unresolved, for nearly 8 years the question was interred, because the ground was not yet ripe. That was until the Supreme Court's decision in Sessions v. Dimaya, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018). Petitioner filed a motion to recall the mandate in the - Eleventh Circuit, demonstrating with specificity why the motion to recall the mandate was not filed within one year of the denial of his direct appeal. Circuit Judge MARTIN denied Petitioner's motion to recall on 6/28/2018, this writ of certiorari is therefore timely.

REASONS FOR GRANTING THE PETITION

Movant's procedural history is attached hereto as App B. United States v. Rondon, 372 Fed. Appx. 28 (11th Cir. 2010). In accordance with Cir. R. 41-(b) and (c), a mandate once issued **shall** not be recalled except to prevent injustice; and, the clerk **shall** not accept the motion for filing unless the motion states with specificity why it was not filed sooner. The court will not grant the motion unless the movant has established good cause for the delay in filing the motion. For the reasons stated below, the mandate must be recalled in this case to prevent a grave injustice, and movant can demonstrate with specificity why the mandate was not .. filed within one year of the issuance, and establish - "good cause" for the motion to be granted by the panel TJOFLAT, PRYOR and MARTIN, Circuit Judges.

Movant's appointed Counsel from the Federal Public Defenders Office, John L. Badalamenti, raised in the direct appeal process in issue **IV: FOR APPELLATE PRESERVATION PURPOSES**, THIS COURT'S 18 U.S.C. § 924(c) PATTERN JURY INSTRUCTION VIOLATES THE SIXTH AMENDMENT BECAUSE IT CONCLUDES THAT THE CRUCIAL QUESTION AS TO WHETHER THE ROBBERIES ALLEGED ARE CRIMES OF VIOLENCE FOR PURPOSES OF SECTION 924(c) ARE A QUESTION OF LAW TO BE DETERMINED BY THE DISTRICT COURT.

See Att C

The panel, failed to resolve IV issue presented in their opinion order dated - April 2, 2010, though noted that "They have raised 10 issues on appeal, we will .. discuss two of those issues here." See n.1 372 Fed. Appx. 28 (11th Cir. 2010). Movant submits that his appointed counsel raised this constitutional issue for "preservation" purposes because the claim had not yet ripened, and ... if in the future the issue would become ripe, either in a collateral proceeding or in the United States Supreme Court on writ of certiorari, Movant would have preserved the issue. However, the claim did not ripen until the United States Supreme Court decision in Sessions v. Dimaya, 584 U.S. ___, (2018), as demonstrated below.

Specifically, Pattern Jury Instruction 35.2, as the district court so instructed the jury here, simply instructs the jury that "the defendant committed the crime of violence charged in Count[s] Two, Four, Six Eight, Ten, and Twelve, respectively, of the indictment." That is, it does not ... charge that the jury needed to find, in the first instance, that the charged robbery is indeed a "crime of violence" under section § 924 c)(1)(A) in order for it to find Movant Rondon guilty of the charged section § 924(c)(1)(A) offenses.

The Writ of Certiorari .. is warranted in this case in order to prevent a grave miscarriage of justice. Movant was sentenced to a defacto term of life imprisonment on what now is arguably a "non-existant-offense". Movant, here has exhausted all of his available legal remedies to challenge this preserved claim. In fact, the U.S. ... Court of appeals as stated above, refused to entertain the claim. Movant could not raise an ineffective assistance of counsel claim pursuant to a Sixth Amendment because his counsel moved to preserve the claim. This issue is not procedurally defaulted whereas there has been no resolution to the question presented before the distinguished panel of circuit judges; oral argument was heard in this case, however no court has ever entertained the Movant's claim.

Movant satisfies the Eleventh Circuits Local R 41-1 (b) and (c) after he filed a motion to the District Court requesting counsel to represent him in filing a second or successive § 2255, with respect to the issue presented herein. The District court denied the motion, stating .. the Eleventh Circuit dismissed his (SOS) because "his - claim was previously decided on the merits."

Movant submits the following argument in the interest of justice.

II. "CRIME OF VIOLENCE" IS AN INDIVISIBLE ELEMENT OF § 924(c) RENDERING THE ENTIRE STATUTE UNCONSTITUTIONAL AFTER THE U.S. SUPREME COURT DECISION IN SESSIONS V. DIMAYA, 584 U.S. ___, (2018)

If, 18 U.S.C. § 2113(a) & (d), can be accomplished ... without the use of physical force, then its elements are too broad to match up with the appropriate "crime of violence" term in § 924(c) under the categorical approach as explained by the Supreme Court in Mathis, 136 S. Ct. 2243, 195 L. Ed. 2d 604. This is so because the crime of violence is an indivisible element of the 924(c) offense. No jury-certainly not Petitioner's-was ever asked to unanimously decide on - whether they concluded a § 924(c) offense was warranted under the elements clause or the now-defunct residual clause, ... regardless of whatever language was included in the counts of the charging instrument.* In addition, § 924(c) is a stand-alone crime, rather than an enhancement provision that relies on a prior conviction; "it does not require a prosecution for or conviction of the other offense." See United States v. Moore, 763 F.3d 900, 908 (7th Cir. 2014). For this reason, Title 18 U.S.C. § 924(c) in its entirety is unconstitutional. The ACCA statute § 924(e) is distinguishable from § 924(c) ... because §924(e) is a "sentence enhancement" whereas § 924(c) is a stand alone offense.

* The United States Response to Defendant's argument on direct appeal conceded. "Indeed, no Circuit has held that the jury is to decide whether an offense constitutes a crime of violence .. under section 924(c)." (quoting United States v. Credit, 95 F.3d 362, 364 (5th Cir. 1996)).

In United States v. Fuertes, * the 4th Circuit - articulated the proper analysis with respect to indivisibility of a criminal statute:

When using the categorical approach to determine whether a crime is a "crime of violence" for the purposes of 18 U.S.C. § 924(c), a statute is indivisible when a jury need not agree on anything past the fact that the statute was violated. Any statutory phrase that explicitly or implicitly refers to multiple, alternative means of commission must .. still be regarded as indivisible if jurors need not agree on which method of committing the offense the defendant - used.

Petitioner's argument that 18 U.S.C. § 924(c) in its entirety is unconstitutional is rooted in Federal Law. At .. first glance, § 924(c)(1) appears to be a penalty enhancement statute. Section § 924(c) is entitled "Penalties," and its remaining subsections set forth penalties for firearm offenses. Section 924(c)(1) provides that its penalty is "in addition to the punishment" provided by the underlying crime, and a ... conviction under § 924(c)(1) requires that proof that the - defendant committed the underlying crime of violence or drug trafficking crime. United States v. Munoz-Fabela, 896 F.2d 908, 910 (5th Cir. cert denied, 498 U.S. 824, 111 S. Ct. 76, 112 L. Ed. 2d 49 ... (1990); United States v. Hunter, 887 F.2d 1001

* 805 F.3d 485 (4th Cir. 2015).

1003 (9th Cir. 1989)(per curiam), cert denied, 493 U.S. 1090 110 S. Ct. 1159, 107 L. Ed. 2d 1062 ... (1990). See also H.R. Rep. No. 495, 99th Cong., 2d Sess. 10, reprinted in 1986 U.S.C.C.A.N. 1327, 1335 (construing earlier version of § 924 (c) as requiring- "proof of the defendant's commission of the [underlying] crime"). Indeed, § 924(c) has been characterized as an enhancement statute. See Basic v. United States, 446 U.S. 398, 405, 100 S. Ct. 1747, 64 L. Ed. 2d 381 ... (1980)(characterizing earlier version of § 924(c) as an "enhancement scheme"); United States v. Henning, 906 F.2d 1392, 1399 (10th Cir. 1990) (§ 924(c) is an enhancement statute"), cert denied, 498 U.S. 1069 111 S. Ct. 789, 112 L. Ed. 2d 852 ... (1991); United States v. Sherbondy, 865 F.2d 996, 1010 n.18 (9th Cir. 1988)(§ 924(c) ... is a sentence enhancement provision). However, historically, courts reached diametrically opposite conclusions stating that "section § 924(c) creates distinct offenses rather than being merely a sentencing enhancement provision." United States v. Abru, 962 F.2d 1447, 1451 (10th Cir. 1992)(en banc)(citations omitted) (distinguishing conflicting authority and applying principles on lenity and strict construction based on distinction) See also Simson v. United States, 435 U.S. 6, 10, 98 S. Ct. 909, 55 L. Ed. 2d 163 ... (1978)("[§ 924(c) is] an offense distinct from the underlying federal felony"); United States v. Martinez, 924 F.2d 209, 211 n.2 (11th Cir.) (per curiam) (§ 924(c)(1) creates a separate offense and separate sentence),

cert denied, 502 U.S. 870, 112 S. Ct. 204, 116 L. Ed 2d. 163 ... (1991); Munoz-Fabela, 896 F.2d at 910 ("[924(c)(1)] constitutes an independent basis for criminal liability"); Hunter, 887 F.2d at 1003 ("924(c)(1) defines a separate crime rather than merely enhancing the punishment for other crimes"). This interpretation finds support in the statutory language which provides that the underlying offense need only be one for which the defendant "may be prosecuted in a court of the United States," and provides for a greater sentence for a .. "second or subsequent conviction under this subsection." ... 18 U.S.C. § 924(c)(1) (emphasis added). 971 F.2d at 1463-64. The Tenth Circuit held: "We believe that our recent characterization in Abru of § 924(c) as a 'distinct' offense rather than 'merely a sentencing enhancement provision' is a correct interpretation of the statute." 971 F.2d at 1464. Accordingly, "a conviction and sentence under § 924(c) requires the full panoply of the constitutional safeguards ordinarily granted criminal defendants." 971 F.2d at 1464. The Court agrees, .. therefore, that § 924(c) is "a 'distinct' offense rather than 'merely a sentencing enhancement provision' is a correct ... interpretation of the statute." 971 F.2d at 1464. Cf. In re: Irby, 858 F.3d 231, 234 (4th Cir. 2017)("We briefly note the categorical approach is a particularly bad fit in § 924(c) cases because § 924(c) is a firearms enhancement provision that penalizes, in broad terms, the use of a firearm during

violent crimes. While Irby poists multiple hypotheticals on how a person can commit second-degree retaliory murder without using direct force, '[o]ne is left to ask when, if ever, would someone be facing a firearms enhamcenemnt ... by pointing a laser at an airplane' or convincing a child to - jump out of a second story window." (quoting United States v. Checora, 155 F. Supp. 3d 1192, 1200 (D. Utah. 2015))).

Accordingly, Petitioner argues that 18 U.S.C. § 924(c) will not .. survive intact a facial constitutional challenge. The Eighth Circuit now ends the inquiry: "We conclude that § 924 (c)(3) is not divisible. First a judge, not a jury, decides whether an underlying offense constitutes a crime of violence under either § 924(c)(3)(A) or § 924(c)(3)(B). Second, the .. definition of crime of violence as its used in § 924(c)(1) is contained in a separate statutory section, § 924(c)(3). See McFee, 842 F.3d at 575 ("The fact that the definition of 'crime of violence' is contained in a separate section of [§ 924(c)] thus provides textual support for the conclusion that the term 'crime of violence' is intended to be an element of the crime and that the [definition of crime of violence in § 924(c)(3)] contains alternative means by which that element can be ... committed"). United States v. Boman, 873 F.3d 1035 (8th Cir. 2017)). For those not in the know, "Elements are the constituent parts of a crimes legal definition-the things the prosecution must prove to sustain a conviction." Mathis v. United States, 136 S. Ct. 2243; 195 L. Ed 2d 604 (2016).

Petitioner argues herein that this Court must apply ... the categorical approach in the § 924(c) context as now — mandated by the Court in Sessiona v. Dimaya, 584 U.S. ___, (2018). Once this court applies the categorical approach to section § 924(c), et, seq. this court must conclude the § 924(c) statute is unconstitutional in its entirety.

III. SEVERABILITY

After this court concludes § 924* unconstitutional, it must confront the question of severability. Alaska Airlines v. Brock, 480 U.S. 678, 684, 94 L. Ed. 2d 661, 107 S. Ct. 1476 (1987). "Whenever an act of congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to declare, and to maintain the act in so far as it is valid." El Paso & Northeastern R.R. v. Gutierrez, 215 U.S. 87, 96, 54 L. Ed. 106, 30 S. Ct. 21 (1909). In ... determining whether unconstitutional provisions are severable, we engage in a two-part inquiry. Board of Natural Resources v. Brown, 992 F.2d 937, 948 (9th Cir. 1993). "First, we inquire whether the Act which remains after the unconstitutional .. provisions are excised is 'fully operative,'" Id., or "functionally independent" of the rest. Alaska Airlines, 480 U.S. at 684. Second, "we then inquire whether Congress would have enacted the constitutional provisions of the Act independently of the unconstitutional provisions." Brown, 992 F.2d at 948.

*

United States v. Salas, (No. 16-2170) (10th Cir. May 4, 2018) Salas was found guilty of various arson-related offenses and he appealed from his conviction and sentence under 18 U.S.C. § 924(c)(1) for using a destructive device in furtherance of crime of violence. This Court remanded to the district court with instructions to vacate Salas's § 924(c)(1) conviction and resentence him because § 924(c)(3)(B), the provision defining a "crime of violence" for the purposes of his conviction, is unconstitutionally vague. See Sessions v. Dimaya, (No. 15-1498) (S. Ct. April 17, 2018).

The first prong of the severability inquiry cannot be .. satisfied because § 924(c)(3)(A) is not "fully operative" or "functionally independent" from § 924(c)(3)(B); because a judge not a jury, decides whether an underlying offense constitutes a "crime of violence" under either § 924(c)(3)(A) or § 924(c)(3)(B). Therefore Congress could never have enacted constitutional provisions of the Act independently from the unconstitutional provisions because the entire statute is unconstitutional on its face. "We address only the statutes residual clause where Congress ended its own list and asked us to begin writing our own. Just as Blackstone's legislature passed a revised statute clarifying that cattle covers bulls and oxen, Congress remains free at any time to add more crimes to its list. It remains free, as well to write a new residual clause that affords the fair notice lacking here." Sessions v. Dimaya, Slip Op at pg9 (Gorsuch). United States v. Batchelder, 442 U.S. 114, 123 (1979)("it is a fundamental tenet of due process that 'no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes ...' [V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute"). No jury, certainly not Petitioner's-was ever asked to unanimously decide on whether they concluded a § 924(c) offense was warranted under the elements clause, or the now defunct .. -residual clause found in (c)(3)(B), regardless whatever language was included in the counts of the charging instrument.

See Wooten v. United States, U.S. Dist. LEXIS 50969 (S.D. Fla. 2018)(quoting Alleyne v. United States, 133 S. Ct. 2151 (2013); citing In re: Gomez 830 F.3d at 1228.* "As we observed in the ACCA context, the absence of terms alluding to a crime's circumstances, or its commission, makes a fact based interpretation an uncomfortable fit. See Descamps, 570 U.S. ... at 267. If Congress had wanted judges to look into a felon's actual conduct, it presumably would have said so." Sessions v. Dimaya, Slip Op at pg14 (Kanag, J. Opinion).

Petitioner's conviction for § 924(c) in furtherance of a "crime of violence" or "drug trafficking offense" is unlawful after this court determines that 18 U.S.C. § 924(c)(3) (A) is not fully operative or functionally independent from § 924(c)(3)(B); § 924(c), et, seq. remains unconstitutional on its face. There is ostensibly a circuit split on the issue of § 924(c)(3)(B)'s constitutionality, but Dimaya has since ... abrogated the reasoning in those cases.

* A jury verdict's lack of specificity may be significant because § 924(c) "increases [the] mandatory minimum' based on a finding that the defendant 'used or carried a firearm' (mandatory minimum of five years), 'brandished' a firearm (seven years), or 'discharged' a firearm (ten years)." *Id.* (quoting Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013)). For example, Gomez's conviction could have been improper if half of a jury believed that he used a gun during a Hobbs Act conspiracy, and the other half believed that he used a firearm during a drug trafficking offense. The reason this is important is because at least one of Gomez's offenses - attempt to commit Hobbs Act robbery and conspiracy to commit Hobbs Act robbery - may not have been categorically a "crime of violence." And if one of the underlying crimes that the jury found Gomez guilty of was not a "crime of violence," under § 924(c), then his prison sentence was unlawfully enhanced.

Federal Circuit's are struggling with whether they should apply a categorical approach to § 924(c)(3)(B), and several courts are awaiting (en banc) decision in order to resolve the question of whether § 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States / Sessions v. Dimaya. See United States v. Simms, (4th Cir. No. 15-4640); Ovalles v. United States, (11th Cir. No. 1710172), both cases are pending en banc determination. However other federal courts have ruled that after the Supreme Court's decision in Sessions v. Dimaya, § 924(c)(3)(b) is void for vagueness. See United States v. Salas, 889 F.3d 681, 684-86 (10th Cir. 2018); United States v. Eshetu, (No. 15-3020)(D.C. Cir. August 3, 2018)(Justice Kavanaugh, presiding on the Eshetu panel)(en banc). The United States also conceded "that the panel should grant rehearing in order to address the impact of Dimaya." The D.C. Circuit therefore discerned no basis for a different result here from the one in Dimaya based on the reasoning in Salas (invalidating section § 924(c)(3)(B) and explaining why its textual similarity with section 16(b) is dispositive).

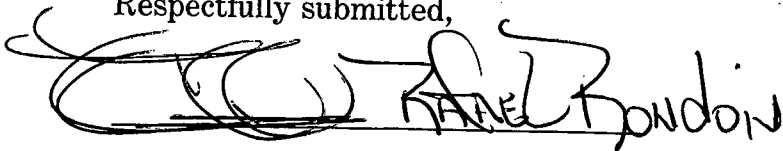
In short, section § 924(c)(3)(B) is void for vagueess. Dimaya required the D.C. Circuit to abjure their earlier analysis to the contrary and vacated Eshetu's § 924(c) convictions in light of Sessions v. Dimaya, 138 S. Ct. 1204 200 L. Ed 2d 549 (2018).

Petitioner moves the Supreme Court to resolve the questions presented for review, in addition to whether Session v. Dimaya, is retroactive to cases on collateral review pursuant to 28 U.S.C. § 2255(h). The only relief petitioner seeks here is to vacate his convictions under 18 U.S.C. § 924(c) resulting in over a 140 years of .. consecutive terms of imprisonment for a first time — convicted felon.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

 RANIEL BONDON

Date: Aug 12/2018