IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2018

CASE NO: _____

Eleventh Circuit Court of Appeals No. _____

(FLSD No. _____)

JULIO ROLON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

Whether in its supervisory jurisdiction over the Courts of the United States, and based upon this Court's clear precedent and the facts of record, this Court should grant this petition, where Petitioner in his early 40's was ***sentenced to mandatory life in prison for a reverse sting Hobbs Act robbery case that had no actual drugs***, and there are multiple conflicts with this Court's rulings because:

First, whether this is the perfect case to entertain the continuing validity *vel non*, of *Almendarez Torres v. United States*, 523 U.S. 244 (1998), in light of the reasoning of *Apprendi v, New Jersey*, 530 U.S. 466 (2000), *Alleyne United States*, 133 S.Ct. 2151 (2013), *Johnson II v. United States, supra*, and *Sessions v. Dimaya, supra?*

Second, whether Rolon presented meritorious issues under *Johnson II*, and meritorious allegations of ineffective assistance of counsel in his original 2255 motion; further the district court ***summarily denied*** all of the meritorious claims raised, failing to address even one of them, all of which violates Rolon's Constitutional guarantees of fairness and due process as mandated by *Buck v. Davis*?

Third, whether the Eleventh Circuit affirmed the summary denial of the 2255 motion on all issues raised, including a request for relief under Fed.R.Civ.P.60(b), in direct conflict in direct conflict with *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), wherein this Court held that the residual clause of 18 U.S.C. 16(b) was unconstitutionally vague; turn, *Johnson II (Johnson v. United States,* 135 S.Ct. 1551 (2015), renders the residual clause of 924(c) void for vagueness, all in direct conflict with *Buck v. Davis?*

Fifth whether conspiracy to commit a Hobbs Act robbery, attempt to commit Hobbs Act robbery, and conspiracy to possess a firearm, qualify as crimes of violence, in light of *Johnson II, Sessions v. Dimaya*, and *Mathis v. United States,* 136 S.Ct. 2243, 2251 (2016)?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2018

Julio Rolon, Petitioner,

vs.

The United States of America,
Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals Eleventh Circuit

PARTIES TO THE PROCEEDING

The United States of America, Julio Rolon, and Rodolfo Ortiz were the parties in the United States District Court for the Southern District of Florida and in the Eleventh Circuit Court of Appeals. Following a jury both defendants were enhanced-sentenced to consecutive mandatory life terms in prison. The motion to vacate that is the subject of this petition was filed by Julio Rolon, who through his *pro bono* counsel, respectfully petitions for a writ of certiorari to review the final order of the Eleventh Circuit Court of Appeals entered on August 25, 2018, denying a certificate of appealability.

OPINION BELOW

The final order of the United States Court of Appeals, Eleventh Circuit was entered on August 25, 2018. A copy is in the Appendix to this petition at p1. A petition for reconsideration or rehearing was timely filed and was denied by order of September 25, 2018. A copy of that order is in the Appendix at p 2. The amended judgment of the United States District Court, Southern District of Florida, convicting & sentencing Mr. Rolon was rendered on June 14, 2012. A copy is in the Appendix at pp 3-9.

JURISDICTION

The final order of the Eleventh Circuit Court of Appeals was entered on August 25, 2018. The order denying the petition for rehearing or reconsideration was denied on September 25, 2018. This petition is timely filed pursuant to Rule 13.1 of the Supreme Court Rules. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 and Rules 10.1(a) and (c) and Rule 13 of the Supreme Court Rules. The jurisdiction of the Eleventh Circuit Court of Appeals was invoked under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS

Fifth Amendment

Capital Crimes; double jeopardy; self-incrimination; due process; just compensation for property

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 the 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 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.

Sixth Amendment

Rights of Accused in Criminal Prosecutions

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 wherin the crime shall have 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 and Relevant Facts
Procedural History

This case has a long and complex procedural history. The record shows that in 2012 Rolon was sentenced (following remand for resentencing) to consecutive enhanced mandatory terms of life in prison following a jury trial on charges of conspiracy to distribute cocaine and interfering with commerce by threat of violence (Hobbs Act robbery), all of which arose from a reverse sting operation in the Southern District of Florida. Of course in reality there were no drugs and there was no stash-house. The crime and its details all were created in the imagination of an undercover agent. Nonetheless Rolon was sentenced to prison for a mandatory life term under 18 U.S.C. § 3553(c). At sentencing United States District Judge Alan S. Gold determined that Rolon was an Armed Career Offender.

On direct appeal to the Eleventh Circuit all convictions and sentences were affirmed with the exception of the sentence for one counts. *United States v. Rolon*, 445 F.App'x 314 (11th Cir. 2011). The Eleventh Circuit remanded for resentencing on that count. At resentencing the concurrent life sentences were again imposed with consecutive life sentences, and one small modification was made to the sentence for the count that was the subject of the reversal.

Rolon took a second direct appeal following resentencing. Again the Eleventh Circuit affirmed on all issues. *United States v. Rolon*, 511 F.App'x 883 (11th Cir. 2013), *cert. denied*, 134 S.Ct. 122 (2013).

Judge Gold has retired. The district judge currently assigned to this case is the Honorable Joan Lenard. It is noteworthy, that when Rolon timely filed a 2255 motion after the second appeal (from resentencing on remand), that motion was assigned to another district judge, the Honorable Marcia Cooke.

No prior convictions were alleged in the indictment, yet during Rolon's first and second direct appeals the government supported an enhanced maximum sentence for prior convictions. Twice, Judge Gold found that Rolon had three qualifying convictions and imposed several life sentences. Rolon is in his 40's.

On appeal Rolon not only relied on *Apprendi v New Jersey*, 530 S.Ct. 466 (2000), but also on *Alleyne v. United States*, 133 S.Ct. 2151 (2013), the case that overruled *Harris v. United States,* 536 U.S. 545 (2002), because mandatory minimum sentencing is an "element" that must be submitted to the jury. Rolon argued that under *Apprendi* and *Alleyne*, the government was required to allege prior felony convictions in the indictment; and to in-

clude drug quantities and other specifics of prior convictions, before they could subject him to enhanced penalties such as an Armed Career Criminal sentence under 21 U.S.C. § 851.

In twice affirming Rolon's mandatory life sentences the Eleventh Circuit ruled that it was bound by *Almendarez Torres v. United States,* 523 U.S. 224 (1998). *See, U.S. v. Rolon* (2011), and *U.S. v. Rolon (* 2013). In the second appeal, a ruling was stayed until *Alleyne* was decided, and one week later, the 2013 opinion was entered. The issues all are preserved.

On March 13, 2018, Judge Cooke entered orders denying all pending motions in Rolon's *pro se* 2255 matter, including his renewed motion for an indicative ruling that the Court would grant relief on *Johnson* grounds if jurisdiction were remanded from the Eleventh Circuit. In his *pro se* appeal to the Eleventh Circuit from the summary denial of his motion to vacate (from which this petition arises), Rolon argued that he was entitled to sentencing relief because ***he does not have at least two violent felonies, in combination with a serious drug offense***, to qualify him as an armed career criminal absent the ACCA's residual clause.

On April 10, 2018, Rolon filed a motion in the district court pursuant to F.R.Civ.P. 60(b) for rehearing and reconsideration, as well as a notice of

supplemental authority citing *Sessions v. Dimaya, 138 S.Ct. 1204 (2018).* Rolon argued that the district court reversibly erred and abused its discretion in denying relief without specifically addressing the merits of any claim raised in the 2255 motion, and in failing to rule on the Rule 60(b) motion. He also argued that the statutory jurisdiction of a court of appeals to grant or deny a certificate of appealabilty under 28 U.S.C. § 2255 is not coextensive with a merits analysis. That motion was just denied, December 20, 2018.

REASONS FOR GRANTING THE WRIT

Reason 1

This Court should grant certiorari to consider whether to overrule Almendarez-Torres, in light of more recent precedential decisions in Apprendi, Alleyne, Johnson II, and Dimaya.

Sentencing enhancements under 21 U.S.C. §851, 18 USC §924(e) (1), and other similar enhancements should be charged by indictment and proved beyond a reasonable doubt. Sections 851 and 924(e)(1) both define separate offenses. The indictment in the present case did not allege prior convictions. It charged only violations of 21 U.S.C. §846, 18 U.S.C. §§ 1951(a); 924(c)(1)(A); 924(o), and 922(g)(1), subjecting Julio Rolon to a

guidelines sentence. For the gun charge a maximum of 10 years; for drugs, depending upon the amount and because there were no drugs nor was an amount specified, the sentence surely should not and would not have been several consecutive life terms. Those sentences imposed on Julio Rolon, violate his Fifth and Sixth Amendment rights. Julio Rolon respectfully asks this Court to take this opportunity to rule once and for all, that *Almendez-Torres v. United States,* 523 U.S. 224 (1998), was wrongly decided.

In *Apprendi v. New Jersey*, 530 U.S. 446 (2000), this Court announced the general principle that facts that increase the maximum sentence must be treated as elements of the offense, and proved to the jury beyond a reasonable doubt. 530 U.S. at 490. This Court extended this principle to require that in federal cases, enhancing-facts be alleged in the indictment. *See United States v. Cotton*, 535 U.S. 625 (2002); and *Alleyne v. United States*, 133 S.Ct. 2151 (2013).

This Court noted that the general principle conflicted with the specific holding in *Almendarez-Torres* that a prior conviction need not be treated as an element of the offense; and found it "arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply" to prior convictions as well. *Apprendi*, 530 U.S. at 489.

Because *Apprendi* did not involve a prior conviction, this Court found that it was unnecessary to revisit *Almendarez-Torres.* *Id*. at 490. Instead the holding was framed to avoid expressly overruling it. *Id*. at 489.

Although *Apprendi* did not overrule *Almendarez-Torres*, it appears that a majority of this Court believe that it was wrongly decided. *See Shepard v. United States*, 125 S.Ct. 1254, 1264 (2005) (Thomas, J., concurring); and *Apprendi*, 530 U.S. 520-21 (Thomas, J., concurring) (criticizing *Almendarez-Torres* and stating that he had "succumbed" to error in joining it); *Monge v. California*, 524 U.S. 721, 741 (1998) (Scalia, J., joined by Souter and Ginsburg, T.J., dissenting) (*Almendarez-Torres*' holding was a "grave constitutional error affecting the most fundamental of rights;" *Jones v. United States*, 526 U.S. 227, 252 (1999) (Stevens, J., Concurring) (agreeing with Justice Scalia that contrary to *Almendarez-Torres*' holding "…it is unconstitutional for a legislature to remove from the jury the assessment that increases the prescribed range of penalties.").

Thus when presented with "an appropriate case," the Court "should consider *Almendarez-Torres*' continuing viability." *Shepard*, 125 S.Ct. 1264 (Thomas, J., concurring). *Shepard* dealt with enhancements under 924(c), the statute at issue here. In his concurrence, Justice Thomas stated

that in violation of *Apprendi*, Section 924(e) permits the judge to make a finding that raises a defendant's sentence beyond the sentence that lawfully could have been imposed by reference to facts found by the jury or admitted by the defendant. *Shepard*, 125 S.Ct. 1263 (Thomas, J., Concurring) (citing *United States v. Booker*, 125 S.Ct. 738, 775(2005) (Thomas, J., Dissenting in part). *See also, Descamps v. United States*, 133 S.Ct. 2276 (2013) (same) (Thomas, J., concurring); *Apprendi*, 530 U.S. at 490; *Harris v. United States*, 536 U.S. 545 575-82 (2002).

In light of *Apprendi, Shepard, Descamps, Alleyne*, and other similar rulings in which the Justices have clearly stated their views, this is the time and the appropriate case for the Court to take up the issue.

Julio Rolon received a mandatory life sentence, a consecutive enhanced Armed Career Criminal Life Sentence, and several enhanced convictions based on the sentencing court's findings of prior convictions that were neither alleged in the indictment nor proved beyond a reasonable doubt. This sentence is even more shocking and appalling because the entire case was based on a non-existent crime: no drugs, no stash-house, every detail conjured up by the government to convince Rolon to participate in its fictitious crime.

The consecutive life sentences imposed on Julio Rolon in a case in which there was no violence, and there were no actual drugs, clearly illustrate why *Almendarez-Torres* is cast into doubt. The rights guaranteed by the Fifth and Sixth Amendments have been subjugated in favor of truncated sentencing procedures. "There is no good reason to allow such a state of affairs to persist." *Rangel-Reyes v. United States*, 126 S.Ct. 2873, 2875 (2006) (Thomas, J., Dissenting from denial of Certiorari). The question of the continued validity of *Almendarez-Torres* may be resolved in this forum. *Id*. (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). No other court or branch of government may decide that *Almendarez-Torres* was wrongly decided. Under the Constitution of the United States, it is ultimately this Court's responsibility "…to say what the Law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This Court should determine that the time is nigh to overrule *Almendarez-Torres,* and grant certiorari.

Right now in *Stokeling v. United States* (oral argument heard October 9, 2018) this Court is reviewing whether robbery under Florida law is a crime of violence. Deciding whether to overrule *Almendarez-Torres* is a

question of exceptional importance at the present time, to bring uniformity in all decisions and to enforce the due process rights guaranteed to all defendants in the federal criminal justice system.

Reason 2, Part I

Sessions v. Dimaya and Johnson II Fully Support Relief From Mandatory Life in Prison for Julio Rolon

Sessions v. Dimaya holds that the residual clause of 18 U.S.C. § 16(b) is unconstitutionally vague. In turn, *Johnson II*, rendered the residual clause of §924(c) void for vagueness as well. *Johnson II* expressly overruled the "ordinary case" approach to whether a felony qualifies as a "crime of violence. In *Johnson II*, this Court held that the analytical framework required by the ACCA's residual clause "… both ***denies fair notice to defendants and invites arbitrary enforcement by judges***." 135 S.Ct. 2557 (emphasis added).

The framework involved two parts. First, courts applied a "categorical approach," analyzing a prior felony by looking not at the conduct underlying the conviction but instead looking to the "ordinary case" of that offense. *Id*. Second, courts asked "whether that abstraction presents a

serious potential risk of physical injury. *Id* (internal citation omitted). Thus, the the framework had "become too indeterminate to apply." 135 S.Ct. at 2573 (Thomas, J., concurring). The categorical approach provided little guidance as to how to distill the "ordinary case" of a particular crime, and the "serious potential risk" standard amplified that uncertainty by providing little guidance regarding whether a judge-made abstraction of a crime was sufficiently risky to qualify. 135 S.Ct. at 2557. "By combining 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 the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." 135 S.Ct. at 2558.

In *Welch v. United States*, 136 S.Ct. 1257 (2016), this Court again emphasized the categorical approach to the holding in *Johnson II,* affirming that the case "…cast no doubt on the many laws that "require gauging riskiness of conduct in which an individual defendant engages on a particular occasion," but noted that the residual clause failed because its approach "required courts to assess the hypothetical risk posed by an abstract genetic version of the offense." 136 S.Ct. at 1262.

Reason2, Part 2

Section 924(c)'s Residual Clause Requires the "Ordinary Case Approach"

The statutory phrase at issue here is essentially the same, if not more vague than the ACCA's residual clause. "[V]iolent felony as used in the ACCA is defined as any felony that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or ***otherwise involves conduct that presents a serious risk of physical injury to another." 18 U.S.C. §924(c)(2)(B)*** (emphasis added). *Johnson II* invalidated the bolded portion of that definition, known as the "residual clause."

Section 924(c)(3) defines "crime of violence" as 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.*** 18 U.S.C. §924(c)(3) (emphasis added). Section (A) of this definition is known as the "force clause," and (the highlighted) Section (B) is known as the "residual clause."

The clauses are not identical, but the differences do not impact the constitutional analysis. Section 924(c)'s residual clause suffers from the exact same double indeterminacy that made the ACCA's residual clause constitutionally infirm. The risk at issue in the ACCA is a risk of physical injury, whereas the risk at issue in Section 924(c) is a risk that physical force will be used against person or property. The distinction makes no difference to the due process issue identified in *Johnson II*. This is because *Johnson II* did not turn on the type of risk involved, but rather on how courts are directed to assess and qualify that risk.

The analytical framework is the same under ACCA and Section 924(c). The United States Courts of Appeals have long applied the same categorical approach to 924(c)'s residual clause. *See, United States v. Fuertes,* 805 F.3d 485, 497-99 (4th Cir. 2015); *United States v. Butler*, 496 Fed.Appx. 159 (3d Cir. 2012); *United States v. Sarafin*, 562 F.3d 1105, 1107-08 (10th Cir. 2009); *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006); and *United States .v Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995).

Both statutes require the court to first imagine the "ordinary case" presented by a particular offense and then decide if it qualifies as a crime of violence by assessing the potential risk presented by that abstract ordinary

case. For this reason, 924(c)'s residual clause is destined to the same fate as that met by ACCA's and Section 16(b)'s similarly worded clause. *See, United States v. Herr*, No. 16-10038, 2016 WL 6090714, at *2-*3 (D.Mass. Oct. 8, 2016).

Courts repeatedly have noted the similarities between the residual clauses in ACCA and in 924(c), or more frequently its identical twin found at 18 U.S.C. 16(b). *See e.g. United States v. Ayala,* 601 F.3d 256, 267 (4th Cir. 2010) (relying on ACCA cases to interpret the definition of a crime of violence under Section 924(c)(3)(B)); and *Roberts v. Holder*, 745 F.3d 928, 930-31 (8th Cir. 2014) (using both ACCA and Section 16(b) cases to define the same "ordinary case" analysis).

In similar cases the government has conceded that the phrases at issue pose the same problems. After noting that the definitions of "crime of violence" are identical in §§ 924(c) and 16(b), the Solicitor General agreed that 16(b) refers to the risk that force will be used rather than that injury will occur, but that it was equally susceptible to petitioner's central objection to the residual clause. Like the ACCA, § 16(b) requires a court to identify the ordinary case of the commission of the offense and to make a common sense

judgment about the risk of confrontation and other violent encounters. *Johnson II*, Sup.Ct. Docket No. 13-1720, Suppl. Br. Respondent U.S. at 22-23, 2015 WL 12849 64 at *22-23.

The government was correct. The same defect plagues both clauses. Accordingly this Court should hold the government to its concession and find § 924(c)'s residual clause void for vagueness in light of *Johnson II* and *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018); or remand to the Eleventh Circuit with instructions to remand to the district court to rule on the merits of the *Johnson II* issue raised by Mr. Rolon.

Dimaya held that the question was "whether a similarly worded clause in a statute's definition of "crime of violence" suffers from the same constitutional defect. [AND] Adhering to our analysis in *Johnson*, we hold that it does." Id, pages 1-19.

Reason 2, Part 3

Several Circuits Have Held that Johnson II Voids §16(b)'s Identical Language

A finding that *Johnson II* voids §924(c)'s residual clause for vagueness is bolstered by recent decisions in several federal circuits invalidating the clause's identical twin found at 18 U.S.C. §16(b). *Baptiste v. Attorney General* (No. 14-4476) 2016 WL 6595943, at *16 (3d Cir. 2016) ("because the two inquiries under the residual clause that the Supreme Court found to be indeterminable … are materially the same as the inquiries under §16(b) is unconstitutionally vague."); *Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016) (agreeing with the Sixth, Seventh, and Ninth Circuits in concluding that §16(b) is void in light of *Johnson II*: *Shuti v. Lynch*, 828 F.3d 440, 446 (6th Cir. 2016) (*Johnson II* is equally applicable to §16(b)). ; *United States v. Vivas-Ceja*, 808 F.3d 719, 721-23 (7th Cir. 2015) ("Because §16(b) requires the identical indeterminate two-step approach, it too is unconstitutionally vague."); *see also United States v. Davis*, 2018 U.S. App. Lexis 25486 (5th Cir. Sept. 7, 2018) (The Supreme Court granted certiorari vacated and remanded; defendant's convictions and sentences for knowingly using, carrying a firearm to aid and abet conspiracy to interfere with commerce by robbery must be must be vacated because 924(c)'s residual clause is uncon-

stitutionally vague; *United States v. Sanchez-Olivarez*, 2018 U.S. App. Lexis 26960 (No. 15-20637) (5th Cir. Sept. 20, 2018) (the Supreme Court granted certiorari, vacated and remanded for further consideration in light of *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). In *Dimaya*, 138 S.Ct. at 1210, 1223, this Court held that the residual clause of 16(b) is unconstitutionally vague.); *Patel v. Sessions*, 2018 U.S.App. Lexis 26080 (No. 17-60496) (5th Cir. Sept. 14, 2018).

Prior to *Shuti*,two judges in a Sixth Circuit panel declined to extend to 9242(c)'s residual clause the Ninth and Seventh Circuits' 16(b) analysis holding that Section 924(c)(3)(B) is not unconstitutionally vague. *United States v. Taylor*, 814 F.3d 375-79 (6th Cir. 2016). *Taylor* has since been significantly undercut by the Sixth Circuit's decision in *Shuti* which explicitly acknowledges that the *Taylor* panel did not have benefit of this Court's decision in *Welch*, holding that *Johnson II* was a substantive rule, retroactive on collateral review. 828 F3d at 450.

Section 16(b) applies to Title 18 statutes that lack their own definition of a "crime of violence" and, like ACCA, applies the "substantial risk"

framework to the "ordinary case," as opposed to the facts underlying the offense. See *Leocal v. Ashcroft*, 543 U.S. 1, 6 (2004); *United States v. Fish*, 758 F.3d 1, 9-10 (1st Cir. 2014) (applying the "ordinary case" analysis to construe §16(b)).

In *Dimaya v. Lynch,* 803 F.3d 1110, 1120 (9th Cir. 2015), the Ninth Circuit correctly concluded that "As with ACCA, §16(b) requires the court to (1) measure the risk by an indeterminate standard of a 'judiciary imagined ordinary case,' not by real-world facts of statutory elements and (2) determine by vague and uncertain standards when risk is sufficiently substantial." 803 F.3d at 1120. Section 16(b) was thus doomed for the same reasons as the ACCA's residual clause. *Id*. Similarly the Seventh Circuit in *Vivas-Ceja* held that §16(b) is materially indistinguishable from the ACCA residual clause rejecting the government's arguments that Section 16(b) is different because it had not produced a shifting and irreconcilable body of case law," 808 F .3d 720, 723. As such it too is unconstitutionally vague according to the reasoning of *Johnson II. Ibid*. The Third, Sixth and Tenth Circuits have since joined this reasoning in *Baptiste, Golicov and Shuti, supra*.

In the wake of the Ninth Circuit's decision in *Dimaya,* several districts within the Ninth Circuit have extended the ruling to hold the 924(c) residual clause to be unconstitutionally vague. *United States v. Bundy* (No. 16 -051), 2016 WL 3361490 (D. Ore. June 10 2015); *United States v. Baires-Reyes,* (no. 15-0122, 2016 WL 316390549 (N.D. Cal. June 7, 2016); *United States v. Lattanaphon*, 159 F.Supp. 3d 1157 (E.D.Cal. 2016); *United States v. Bell,* 158 F.Supp. 3d 906 (N.D. Cal. 2016); *United States v .Smith*, (No. 11-58), 2016 WL 2091661 (D.Nev. May 18, 2016).

Reason 2, Part 4

Rolon's §Section 924(c) conviction should be vacated because his convictions for conspiracy to commit Hobbs Act robbery, attempt to commit Hobbs Act robbery, and conspiracy to possess a firearm no longer qualify as crimes of violence.

Petitioner Julio Rolon shoulders the initial burden of showing by a prepreponderance of the evidence that he is entitled to relief. *David v. United States*, 134 F.3d 470, 474 (1st Cir. 1998). At this posture of the proceedings Rolon's burden is no longer to prove "whether or not he was sentenced under the residual clause." *In re: Chance*, 831 F.3d 1335, 1339 (11th Cir. 2016) (citation and internal quote omitted). Rather if the Court cannot ascertain from the record whether the conviction was under the

statute's residual clause, it may analyze the conviction *de novo,* with benefit of recent case law. Therefore Rolon need only show that §924(c) may no longer authorize his sentence as the statute stands after *Johnson II*. *Chance, supra,* at 1341.

The Eleventh Circuit erred in failing to grant review and thereupon vacating and remanding Rolon's 924(c) sentence. *Buck v. Davis*, 137 S.Ct. 759 (2017).

Reason 3

Conspiracy to Commit Hobbs Act Robbery, Attempt to Commit Hobbs Act Robbery, and Conspiracy to Possess a Firearm do not Qualify as Crimes of Violence in Light of Johnson II, Dimaya, and Mathis v. United States, 136 S.Ct. 2243 (2016)

Conspiracy to commit a Hobbs Act robbery, attempt to commit Hobbs Act robbery, and conspiracy to possess a firearm may no longer be considered to be crimes of violence. Recently the Sixth Circuit in *United States v. Camp*, (No. 17-1879) (Sept. 7, 2018), vacated Camp's sentence and remanded for resentencing. The facts showed that Camp pleaded guilty to Hobbs Act robbery and to using a firearm during a crime of violence, in violation of 18 U.S.C. §924(c), and being a felon in possession of a firearm

in violation of §922(g)(1). Camp argued on appeal that Hobbs Act robbery is not a crime of violence and therefore cannot serve as a predicate for a §924(c) conviction or for career offender classification.

The Sixth Circuit had to determine whether Hobbs Act robbery is a crime of violence under the Career Offender Guidelines. Because Hobbs Act robbery criminalizes conduct that extends beyond both generic robbery and guidelines extortion, the court held that it is not a crime of violence under the enumerated offense clause . *See also, United States v. O'Connor,* (No. 16-3300) (10th Cir. Oct. 30, 2017)) (Hobbs Act robbery did not qualify as a crime of violence under U.S. Sentencing Guidelines §4B1.2, which is noteworthy because it incorporated this Court's reasoning in *Mathis v. United States*, 136 S.Ct. 2243 (2016).

Reason 4

On August 3, 2018, the D.C. Circuit, Per Curiam in United States v. Eshetu, No. 15-3020, granted a rehearing and remanded to the district court to vacate the defendants' firearm convictions, where defendants were convicted for Hobbs Act Robbery and a Firearm Offense During a Crime of Violence.

In *Eshetu,* the D.C. Circuit rejected defendants' arguments and affirmed their convictions. After *Sessions v. Dimaya,* the defendants sought a rehearing arguing that *Dimaya* required *vacatur* of their 924(c) convictions, and the Court agreed.

The D.C. Circuit explained that under the residual clause that *Dimaya* struck down, "[t]he term 'crime of violence' means" an "offense that is a felony and 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, citing 18 U.S.C. §16(b). Therefore under the residual clause at issue the term "crime of violence" means an offense that is a felony and 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. 18 U.S.C. 924(c)(3)(B). The two statutes are "materially identical. The Court cited the Government's Brief, page 12,

Sessions v. Dimaya, S.C.t No. 15-1498 (Nov. 14, 2016); *see Dimaya*, 139 S.Ct. at 1241 (Roberts, C.J. dissenting) (Section 16 is replicated in Section 924(c)). The D.C. Circuit found no basis for a different result than the one in *Dimaya*. *Accord United States v. Salas*, 889 F.3d 681, 684-86 (10th Cir. 2018) (invalidating section 924(c)(3)(B) and explaining why its similarity with Section 16(b) is dispositive). Clearly §924(c)(3)(B) is void for vagueness; and *Dimaya* required the Eleventh Circuit and the district court to "abjure" their earlier analyses of Rolon's case to the contrary.

In *Eshetu*, the D.C. Circuit wrote that the government conceded that the panel should grant rehearing in order to address the impact of *Dimaya*, although it suggested a case-specific approach considering the defendants' conduct rather than the ordinary case of the crime. After citing and distinguishing other intervening cases, the D.C. Circuit ruled that rehearing was granted for the purpose of vacating the defendants' 924(c) convictions in light of *Dimaya*. The cause was remanded to the district court for further proceedings consistent with the opinion. The identical result should obtain in the present case, except the Hobbs Act robbery convictions also should be vacated.

Reason 5

In accordance with Buck v. Davis, 137 S.Ct. 759 (2017), Rolon has demonstrated not only meritorious issues under Johnson II; but also the issues in his original 2255 motion regarding ineffective counsel; and additionally that the district court abused its discretion by summarily denying all relief sought in the 2255 motion without addressing the merits of the claims raised, and in failing to rule on the motion for relief pursuant to Federal Rule of Civil Procedure 60(b).

Julio Rolon is entitled to full review regarding his *Johnson II* claim that Section 924(c) is void for vagueness under the *Sessions v. Dimaya*. He respectfully prays that this Honorable Court will rule that similarly to *Buck v. Davis*, 580 U.S. ___ (Feb. 22, 2018) his ineffective assistance of counsel claim also has merit under *Martinez v. Ryan*, 566 U.S. 1, 14 (2012), which holds that "The underlying … claim is a substantial one, which is to say that … the claim has some merit." *Buck*, at page 9, *Martinez*, 566 U.S. at 14.

The district court abused its discretion in not ruling on the merits of the motion for relief under Rule 60(b). Similarly to *Buck, supra*, Rolon sought to appeal the denial of his Rule 60(b) motion. Rolon filed an application for a COA, and Buck, was required to make "a substantial showing of denial of a constitutional right." 28 U.S.C. 2253(c)(2). It appears that the federal courts of appeals disagree over whether a COA is

needed to appeal the denial of a Rule 60(b) motion. See *Gonzalez v. Crosby*, 545 U.S. 524, 535 and n.7 (2005). This Court should take notice that when the district court denied the 2255 motion on August 31, 2015, it failed to give any explanation, reasons, or opinion on the merits of any of the issues presented, in clear violation of *Buck, supra*.

Buck held that "the COA inquiry, we have emphasized, is not coextensive with a merits analysis." At the COA stage the only question is whether the applicant has shown that "jurists of reasons could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." 537 U.S. at 327. The threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims. *Miller-El v. Cockrell*, 537 U.S. 322 at 322, 336 (2003). When a court of appeals sidesteps the COA process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, in essence, ***it is deciding an appeal without jurisdiction***. 537 U.S. at 336-37.

In the present case the district court abused its discretion in denying Rolon's 60(b) motion without any opinion, explanation, reason, or conclusion in clear violation of the due process guarantees. *Buck* was about this this type of denial, and thus a reversal is required.

Furthermore pursuant to *Buck*, Rolon's 60(b) motion should have allowed for reopening his case. *Johnson II* announced a "new rule" that, *Teague v. Lane*, 489 U.S. 288 (1989) applies retroactively to cases such as this one. See, *Welch v. United States*, 136 S.Ct. 1257 (2016). Hence this petition should be granted for any or all of the reasons stated.

Conclusion

In accordance with the foregoing arguments, authorities, and clear precedents, as well as the facts of record, Petitioner Rolon respectfully prays that this Honorable Court will grant its most gracious Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, and at long last, will overrule *Almendarez-Torres*, and thereupon will find that the inhumane consecutive enhanced mandatory life sentences imposed in this case be vacated and the cause remanded with instructions to resentence Julio Rolon consistent with this Court's cases, cited above, that prohibit enhanced sentences, mandatory life sentences, and consecutive life sentences on the record presented.

Very respectfully submitted,

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