NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

CURTIS SOLOMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
Brenda G. Bryn
Assistant Federal Public Defender
Counsel of Record
One East Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), this Court held the "crime of violence" definition in 18 U.S.C. § 16(b) void for vagueness for the same reasons it held 18 U.S.C. § 924(e)(2)(B)(ii) void for vagueness in *Johnson v. United States*, 135 S.Ct. 2551 (2015). This was a "straightforward application" of *Johnson*, the Court explained, since – just like the ACCA's residual clause – § 16(b)'s residual clause required the court to identify a crime's "ordinary case" in order to measure the crime's risk under the categorical approach, and also employed an "ill-defined risk threshold," which together conspired to make § 16(b) unconstitutionally vague and void just like § 924(e)(2)(B)(ii). 138 S.Ct. 1215-16, 1223 (citing *Johnson*, 135 S.Ct. at 2557).

In *United States v. Davis*, 138 S.Ct. 1979 (U.S. May 14, 2018) (No. 18-431), the Court will resolve whether the "crime of violence" definition 18 U.S.C. § 924(c)(3)(B), a provision worded identically to § 16(b), is unconstitutionally vague for the above reasons, or whether the Court can avoid declaring that provision unconstitutionally vague by reinterpreting § 924(c)(3)(B) to permit a "conduct-based" approach instead of the categorical approach. However, since *Davis* is a direct appeal case, it will not likely resolve the following questions which will be crucial for cases on collateral review:

1. If *Davis* holds § 924(c)(3)(B) is unconstitutionally vague, is that ruling retroactively applicable to cases on collateral review?

2. If *Davis* reinterprets § 924(c)(3)(B) to require a "conduct-based" approach because the statute is unconstitutionally vague under the categorical approach, does a second or successive § 2255 petition challenging a conviction under the unconstitutional categorical approach "contain . . . a new rule of constitutional law" as required by § 2255(h)(2)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Curtis Solomon ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion affirming Petitioner's convictions and sentence, *Solomon v. United States*, 911 F.3d 1356 (11th Cir. Jan. 8, 2019), is included in the Appendix at A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming the denial of Petitioner's motion to vacate his convictions and sentence pursuant to 18 U.S.C. §

924(c), was entered on January 8, 2019. On April 4, Justice Thomas extended the time to file this petition until June 7, 2019. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 16. Crime of violence defined

The term "crime of violence" means –

> **(a)** an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> **(b)** any other 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. 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;
> >
> > **(ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; . . .
>
> **(c)(1)(C)** In the case of a second or subsequent conviction under this subsection, the person shall –
>
> > **(i)** be sentenced to a term of imprisonment of not less than 25 years; and
> >
> > (ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(c)(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. . . .

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, and fined under this title or both . . .

18 U.S.C. § 1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his family or anyone in his company at the time of the taking or obtaining.

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence.

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . .

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . .

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain – . . .

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in 2255. . . .

(b)(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

STATEMENT OF THE CASE

On April 29, 2009, after a jury trial, Curtis Solomon ("Petitioner") was found guilty of (1) conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951(a) (Count l); (2) conspiracy to use and carry a firearm during and in relation to a "crime of violence" under 18 U.S.C. §§ 924(c)(l)(A) and 924(o); (3) substantive Hobbs Act Robbery under 18 U.S.C. §§ 1951(a) and 2 (Counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 25, 27, 29, 31, 33, 35); and (4) carrying a firearm during and in relation to a "crime of violence" under 18 U.S.C. §§ 924(c)(l) and 2 (Counts 6, 8, 10, 12, 14, 16, 18, 20, 22, 26, 28, 30, 32, 34, 36). The alleged "crime of violence" for Count 2 was the Hobbs Act conspiracy in Count 1; the alleged "crimes of violence" for the other § 924(c) counts were the substantive Hobbs Act robberies.

On July 13, 2009, Petitioner was sentenced to 4,641 months in prison as follows: 57 months for Counts 1, 2, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 25, 27, 29, 31, 33, and 35, to be served concurrently; 84 months for Count 4, to be served consecutively, followed by 300 months as to each of Counts 6, 8, 10, 12, 14, 16, 18, 20, 22, 26, 28, 30, 32, 34, and 36, to be served consecutively as to all other counts.

On July 12, 2011, the Eleventh Circuit affirmed Petitioner's convictions and sentences, *United States v. Lewis, et al.*, 433 F. App'x 844, 845 (11th Cir. 2011), and on November 28, 2011, this Court denied certiorari. *Solomon v. United States*, 565 U.S. 1069 (2011).

On November 26, 2012, Petitioner filed an initial *pro se* § 2255 motion to vacate, which was denied on December 30, 2013. *Solomon v. United States*, No.12-6231 2-Civ-Middlebrooks/White (S.D. Fla. 2013). He appealed this denial, but was not successful.

On June 26, 2015, this Court decided *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). In *Johnson*, the Court found the "residual clause" of the Armed Career Criminal

Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), to be void for vagueness and a violation of the Constitution's guarantee of due process. *Johnson*, 135 S. Ct. at 2563. On April 18, 2016, the Court held in *Welch v. United States*, 136 S. Ct. 1257 (2016) that the substantive decision in *Johnson* is retroactively applicable to cases on collateral review. *Id.* at 1265.

On June 24, 2016, Petitioner, now represented by counsel, filed a second § 2255 Motion seeking to have his multiple § 924(c) convictions and sentences vacated in light of *Johnson* and *Welch*. In that successive motion, he argued that all of his § 924(c) convictions should be vacated, since Hobbs Act robbery was not categorically a "crime of violence" under § 924(c)(3)(A), and § 924(c)(3)(B) was unconstitutionally vague after *Johnson*.

On July 8, 2016, the Eleventh Circuit partially granted Petitioner leave to file his successive § 2255 Motion. Specifically, the appellate court granted him permission to challenge his "conviction and sentence under § 924(c) on Count 2 based on his conviction for conspiracy to commit Hobbs Act Robbery." The court assumed for purpose of its order that it "should extrapolate from the *Johnson* holding" that "§ 924(c)(3)(B) is also unconstitutional." *In re: Curtis Solomon*, Order at 6 (11th Cir. July 8, 2016) (No. 16-13456). However, the court explained, that assumption only impacted Count 2, the § 924(c) conspiracy count predicated upon Hobbs Act conspiracy. It did not impact the other § 924(c) counts which were predicated upon substantive Hobbs Act robberies, which qualified as "crimes of violence" under the court's recent decision in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016). *Id.* at 6-7. Accordingly, the court explained, it was only granting the portion of Petitioner's application seeking to challenge his Count 2 conviction, because he had made a *prima facie* showing under 28 U.S.C. § 2255(h), that "this particular § 924(c) conviction falls within *Johnson*." *Id.* at 7-9. The Petitioner was "not granted permission to challenge any convictions other than the conviction on Count 2." *Id.*

at 11. Ultimately, the court noted, the district court would have to determine for itself upon *de novo* review whether the § 2255(h) requirements were met. *Id.* at 9-10.

Once the successive § 2255 motion was authorized "in part," the magistrate judge entertained briefing. However, once the Eleventh Circuit panel in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017) (*Ovalles I*) held that "*Johnson* does not apply to, or invalidate, the risk-of-force clause in § 924(c)(3)(B)," *id.* at 1265, the magistrate judge recommended that Petitioner's motion be denied "under binding precedent," and that a certificate of appealability be denied as well since *Ovalles I* "foreclose[d]" the possibility of success on appeal. Nonetheless, the magistrate did recognize that a conspiracy to commit a Hobbs Act robbery would not alternatively qualify as a "crime of violence" within the elements clause in § 924(c)(3)(A), since it "does not have as an element the use, attempted use, or threatened use of physical force against the property of another."

After both parties filed objections to the report and recommendation, the district court entered an order adopting the Report in part, but still denying Petitioner's motion. Specifically, the district court adopted the portion of the Report that recommended denying Petitioner's motion under *Ovalles I*'s holding that § 924(c)(3)(B) was not unconstitutionally vague. However, the district court did not adopt the Report's analysis of whether a conviction for conspiracy to commit Hobbs Act robbery is a crime of violence, finding that question unnecessary to resolve Petitioner's motion. The district court also did not adopt the magistrate's recommendation to deny a certificate of appealability. The district court specifically granted Petitioner a certificate of appealability on whether *Johnson* applies to § 924(c)(3)(B).

Accordingly, on January 5, 2018, Petitioner filed a brief with the Eleventh Circuit asking the appellate court to hold his case pending this Court's decision in *Sessions v. Dimaya*, No. 15-

1498. Several months later, in *Sessions v. Dimaya*, 138 S.Ct. 1204 (April 17, 2018), this Court held that a "straightforward application" of *Johnson* rendered the identically-worded residual clause in 18 U.S.C. § 16(b) unconstitutionally vague, *id.* at 1213, because "§16(b) has the same '[t]wo features] that 'conspire[d] to make [ACCA's residual clause unconstitutionally vague," *id.* at 1216, namely, "both an ordinary-case requirements and an ill-defined risk threshold"). *Id.* at 1223. Implicitly rejecting much of the Eleventh Circuit's reasoning in *Ovalles I*, the Court held that "none of the minor linguistic disparities in the statutes makes any real difference." *Id.*

As the Chief Justice noted, the holding in *Dimaya* necessarily "call[ed] into question" convictions under the identically-worded §924(c)(3)(B). 138 S.Ct. at 1241 (Roberts, C.J., dissenting). And for that reason, soon after *Dimaya*, the Eleventh Circuit vacated *Ovalles I*, and granted rehearing en banc, 889 F.3d 1259 (11th Cir. May 15, 2018), to determine whether §924(c)(3)(B) was now unconstitutionally vague in light of *Dimaya*, or whether that conclusion could be avoided by overruling *United States v. McGuire*, 706 F.3d 1333, 1336-67 (11th Cir. 2013), to the extent *McGuire* mandated use of the categorical approach for determining whether a prior offense was a "crime of violence" under §924(c)(3)(B).

In light of *Dimaya*, the Eleventh Circuit vacated the panel opinion in *Ovalles I*, and reheard that case en banc. In a sharply divided decision on rehearing en banc, all members of the Eleventh Circuit recognized that §924(c)(3)(B) was unconstitutionally vague under the categorical approach. *Ovalles v. United States*, 905 F.3d 1231, 1233 (11th Cir. Oct. 4, 2018) (en banc) (*Ovalles II*) (holding that in the wake of *Johnso*n and *Dimaya*, "all here seem to agree that if § 924(c)(3)'s residual clause is interpreted to require determination of the crime-of-violence issue using . . . 'the categorical approach,' the clause is doomed."); *id.* at 1239-40 ("it seems clear that if we are required to apply the categorical approach in interpreting § 924(c)(3)'s

residual clause . . . then the provision is done for."); *id.* at 1244 (recognizing the "near-certain death" that would result to § 924(c)(3)(B), if the categorical approach were retained); *id.* at 1251 n. 9 (responding to the dissent's criticism of rewriting the statute by stating that the court had "saved it from the trash heap," and arguing that the dissent's insistence on retaining the categorical approach "guarantees its invalidation").

To save § 924(c)(3)(B) from the "trash heap" which the majority conceded would occur if the categorical approach were maintained, the majority simply abandoned the categorical approach with regard to that particular provision, and instead adopted instead a "conduct-based approach that accounts for the actual, real-world facts of the crime's commission." *Id*. at 1253. The majority justified its decision to "jettison" the categorical approach for § 924(c)(3)(B), by the canon of "constitutional doubt," *id.* at 1234, otherwise known as "constitutional avoidance." According to the *Ovalles II* dissenters, however, in relying upon that canon to save §924(c)(3)(B) from being void for vagueness after *Dimaya*, the *Ovalles II* majority had ignored this Court's contrary precedents in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) and *Dimaya*, which dictated that the plain text of § 924(c)(3)'s residual clause requires application of the categorical approach. *See id*. at 1277-99 (Jill Pryor, J., joined by Wilson, Martin, and Jordan, JJ., dissenting).

After the en banc decision in *Ovalles II* issued, the Eleventh Circuit issued a published decision affirming the denial of § 2255 relief in Petitioner's case. *Solomon v. United States*, 911 F.3d 1356 (11th Cir. 2019). The court noted that in *In re Garrett*, 908 F.3d 686 (11th Cir. 2018), a prior 3-judge panel had found at the authorization stage of a second or successive § 2255 motion, that given *Ovalles II*'s rejection of a vagueness challenge to § 924(c)(3)(B) under *Johnson* and *Dimaya*, "neither *Johnson* nor *Dimaya* supplies any 'rule of constitutional law' – 'new' or old, 'retroactive' or nonretroactive, 'previously unavailable' or otherwise – that can

support a vagueness-based challenge to the residual clause of section 924(c)." *Solomon*, 911 F.3d at 1360 (citing *Garrett*, 908 F.3d at 689). Moreover, the court noted, the *Garrett* panel had "added that, even though Garrett was sentenced prior to *Ovalles II*, during a time when this Court interpreted § 924(c) to require a categorical approach, construing his claim to challenge the use of the categorical approach would 'make no difference' because the substitution of one statutory interpretation for another did not amount to a new rule of constitutional law." *Solomon*, *id*. (citing *Garrett*, *id.*).

Irrespective of whether a court of appeals has authorized a successive § 2255 motion because it found that the movant had made "a *prima facie* showing that he satisfied § 2255(h)'s criteria," the Eleventh Circuit explained, that does not "conclusively resolve" whether the movant has met the requirements of 28 U.S.C. § 2255(h). *Solomon*, 911 F.3d at 1360-61 (citing *Randolph v. United States*, 904 F.3d 962, 964 (11th Cir. 2018)). In *Randolp*h, the court below noted, a prior panel had held that "'the district court has jurisdiction to determine for itself if the motion relies on 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" 911 F.3d at 1360-61 (citing *Randolph*, 904 F.3d at 964 as "quoting 28 U.S.C. § 2255(h)(2)"). "'If the motion meets those requirements, the district court has jurisdiction to decide whether any relief is due under the motion; if the motion does not meet the 2255(h) requirements, the court lacks jurisdiction to decide whether the motion has any merit.'" 911 F.3d at 1361 (citing *Randolph*, *id*.).

The district court had no jurisdiction to decide Petitioner's motion here, the Eleventh Circuit found, since

> [a]s this Court explained in *Garrett*, given *Ovalles II*'s holding that § 924(c)(3)(B)'s residual clause is not unconstitutionally vague, a *Johnson*- or *Dimaya*-based vagueness challenge to § 924(c)'s residual clause cannot satisfy § 2255(h)(2)'s "new rule of constitutional law" requirement. [*Garrett*, 908 F.3d at

> 689]. Likewise, any challenge Solomon might raise to the district court's use of the categorical approach and its application of § 924(c)(3)(B)'s residual clause in this case would not satisfy § 2255(h) either, as such a claim would be statutory in nature. *Id.* *Ovalles II* and *Garrett* foreclose even the most generous reading of Solomon's challenges, both constitutional and statutory, to his § 924(c) conviction in Count 2. *See United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018) ("[L]aw established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions is binding on *all* subsequent panels of this Court, including those reviewing direct appeals and collateral attacks . . .").

911 F.3d at 1361.

REASONS FOR GRANTING THE WRIT

I. *Davis* will be dispositive of whether Petitioner was unconstitutionally convicted of Count 2 under § 924(c)(3)(B).

In *United States v. Davis*, 138 S.Ct. l1979 (U.S. May 14, 2018) (No. 18-431), this Court will resolve whether *Johnson* and *Dimaya* have rendered the residual clause in § 924(c)(3)(B) unconstitutionally vague. There is no dispute between the parties in *Davis* that § 924(c)(3)(B) is unconstitutionally vague under the ordinary case/categorical approach, or that the Respondents in *Davis* were convicted under that approach. Nonetheless, the government has asked the Court to apply the doctrine of constitutional avoidance, and hold, as the en banc Eleventh Circuit did in *Ovalles II*, that a vagueness finding can be avoided by jettisoning the categorical approach, and adopting a "conduct-based" approach to § 924(c)(3)(B) in its stead. At the *Davis* oral argument, counsel for the government took the position that any error in convicting the Respondents under the unconstitutional categorical approach "could be found harmless," but that if the Court did not agree, the case could be sent "back to the court of appeals and possibly there could be a retrial." Transcript of Oral Argument, *United States v. Davis*, 2019 WL 1672439, at *7 (U.S. Apr. 17, 2019) (No. 18-431).

Notably, the predicate for Petitioner's Count 2 conviction here is the same predicate as that at issue in *Davis*: a conspiracy to commit a Hobbs Act robbery. And indeed, the government has conceded in *Davis* that such a predicate does *not* independently qualify as a "crime of violence" within the elements clause of § 924(c)(3)(A). *See* Gov't Br., *United States v. Davis*, 2019 WL 629976, at *50 (U.S. Feb. 12, 2019) (No. 18-431) ("A Hobbs Act conspiracy . . . does not 'have as an element the use, attempted use, or threatened use of physical force against the person or property of another,' so as to qualify as a 'crime of violence' under 18 U.S.C. § 924(c)(3)(A).").[1] Since there is no dispute that conspiracy to commit a Hobbs Act robbery is *not* a "crime of violence" under § 924(c)(3)(A)'s elements clause, Petitioner could only have been convicted under § 924(c)(3)(B)'s residual clause. And therefore, whether the Court agrees with the Respondents in *Davis* that § 924(c)(3)(B) is void for vagueness, or it avoids that conclusion by jettisoning the categorical approach and adopting a conduct-based approach in its stead – *Davis* should confirm that Petitioner was unconstitutionally convicted of the Count 2 offense under the now-clearly-unconstitutional ordinary case, categorical approach to § 924(c)(3)(B).

Nonetheless, since *Davis* is a direct appeal case, it will not likely answer the crucial question for successor § 2255 petitions challenging § 924(c) convictions after *Johnson*: whether such a petition "contain[s] . . . a new rule of constitutional law, . . . that was previously unavailable," as required by 28 U.S.C. § 2255(h)(2). That question is directly presented here.

[1] The government has made the same concession multiple times before the courts of appeals as well. *See United States v. Simms*, 914 F.3d 229, 233 (4th Cir. 2019) (en banc) (noting government's concession); *United States v. Lewis*, 907 F.3d 891, 895 (5th Cir. 2018) (same); *United States v. Douglas*, 907 F.3d 1, 6 n.7 (1st Cir. 2018) (quoting government's explicit assertion that "'[T]he Department of Justice's position is that a conspiracy offense does not have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another.'"), *petition for cert. filed*, (U.S. Jan. 9, 2019) (No. 18-7331); *United States v. Eshetu*, 898 F.3d 36, 38 n.2 (D.C. Cir. 2018) (*per curiam*) (noting government's concession that only the residual clause in § 924(c)(3)(B) is at issue), *reh'g en banc denied* (Feb. 19, 2019).

II. If the Court declares the residual clause in § 924(c)(3)(B) unconstitutionally vague in *Davis*, it should either summarily reverse this case under *Welch*, or use this case to "make" *Davis* retroactive to cases on collateral review.

If the Court holds in *Davis* that invalidating § 924(c)(3)(B) as unconstitutionally vague is no more than a "straightforward" application of *Dimaya*, which in turn was a "straightforward" application of *Johnson*, *see Dimaya*, 138 S.Ct. 1215-16, 1223 (citing *Johnson*, 135 S.Ct. at 2557), resolution of this case would also be "straightforward." Such a ruling would definitively abrogate *Ovalles II*, which would in turn abrogate the decision below which was predicated upon *Ovalles II*. Should that occur, there would be no question that the "new rule of constitutional law" applied in *Davis* was that set forth in *Johnson*. And indeed, since the Court "made" the new rule of *Johnson* retroactively applicable to cases on collateral review in *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016), there would be nothing further to decide under § 2255(h)(2) for defendants in a second or successive posture like Petitioner challenging § 924(c) convictions predicated upon a conspiracy to violate the Hobbs Act. The Court should, in that circumstance, summarily reverse this case under *Welch*.

It is *only* if the Court finds § 924(c)(3)(B) unconstitutionally vague for reasons different than those in *Johnson* and *Dimaya*, that the Court would need to determine if *Davis* then sets forth a "new rule," and whether that "new rule" is retroactive to cases on collateral review. While the "new rule" question might require further briefing, the retroactivity question would be easily answered by *Welch*. Indeed, any arguably "new" vagueness rule *Davis* might announce would be substantive, and retroactive, for the same reasons *Johnson* was held retroactive in *Welch*. *See id*. at 1264-65 (*Johnson* announced a substantive rule with retroactive effect, because it "alters the range of conduct or the class of persons that the law punishes;" citing *Schiro v. Summerlin*, 542 U.S. 348, 353 (2004)).

The instant case would be an ideal vehicle to follow *Davis*, and quickly resolve these issues – as the Court did in *Welch* following *Johnson* – since there would be only be 1 year to file collateral proceedings if, in fact, the Court were to hold that the right confirmed by *Davis* is "new." *See* 28 U.S.C. § 2255(f)(3). Briefing could be expedited and the case argued at the beginning of the new term, and a decision could issue well in advance of the running of the 1-year statute of limitations. Defendants who did not challenge their § 924(c) convictions within a year of *Johnson* could file timely petitions within a year of *Davis*. Defendants with collateral proceedings still in the pipeline could supplement those proceedings to address the impact of *Davis*. And if the Court were to "make" *Davis* retroactive by its decision in this case, that would allow defendants in a successive posture who did not previously file or were previously denied authorization under *Ovalles II*, to timely file within 1-year of *Davis*. Notably, while the Eleventh Circuit has refused to authorize any successive § 2255 motions after *Ovalles II*, *see In re Garrett*, 908 F.3d 686, 688-89 (11th Cir. Nov. 2, 2018), it has acknowledged that defendants in a successive posture who were previously denied authorization can refile if "controlling authority has since made a contrary decision of law applicable to [the] issue." *In re Baptiste*, 828 F.3d 1337, 1341 (11th Cir. 2016). That would be the case here if *Davis* abrogates *Ovalles II*.

III. If the Court adopts a conduct-based approach in *Davis*, the Court should hold in this case that a petition challenging a conviction under the concededly-unconstitutional categorical approach "contains a new rule of constitutional law" sufficient for 28 U.S.C. § 2255(h)(2).

If the Court in *Davis* jettisons the categorical approach as the Eleventh Circuit did in *Ovalles II*, and adopts a "conduct-based" approach to § 924(c)(3)(B) because that provision is unconstitutionally vague under the categorical approach, the Court will need to determine whether Petitioner's successive § 2255 motion challenging his conviction under the now-admittedly unconstitutional categorical approach to § 924(c)(3)(B), "contains . . . a new rule of

constitutional law" as required by 28 U.S.C. § 2255(h). And it should hold that it does because the *Ovalles II* majority ***only*** adopted a new interpretation of § 924(c)(3)(B) because that provision was unconstitutional under the ordinary case/categorical approach which had applied under binding Supreme Court and Circuit precedent until that time. A claim challenging a prior conviction under an approach which is now-concededly-unconstitutional under *Johnson* easily "contain[s][2] . . . a new rule of constitutional law."

For the Eleventh Circuit to have suggested otherwise – that such a challenge to the conviction would be purely "statutory in nature," *Solomon*, 911 F.3d at 1361 – is inconsistent with this Court's precedents recognizing that the Due Process Clause does not permit a court to uphold a conviction on a different theory from that which the defendant was charged and tried, *see Cole v. Arkansas*, 333 U.S. 196, 202 (1948); *Rabe v. Washington*, 405 U.S. 313, 315 (1972), particularly where the Court adopts a narrowing construction of a statute to avoid unconstitutionality. *See Ashton v. Kentucky*, 384 U.S. 195, 198 (1966); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 155 (1969). And indeed, notice and *ex post facto* principles would preclude the Eleventh Circuit from punishing Petitioner post-*Davis* for pre-ruling conduct that did not violate § 924(c) at the time of commission. *See Bouie v. City of Columbia*, 378 U.S. 347, 350, 353-54 (1964); *Marks v. United States*, 430 U.S. 188, 195-97 (1977).

Since the Fifth Amendment indictment clause would likewise preclude the district court from retrying Petitioner after *Davis* on a different "crime of violence" theory than that presented

[2] The decision below confused the gateway requirement in § 2255(h) of what a motion must "contain," with the more onerous requirement in § 2244(b)(2) – relevant only to § 2254 petitions – of what a "claim" "requires." *Compare Solomon*, 911 F.3d at 1360 *with Raines v. United States*, 898 F.3d 580, 692-93 (6th Cir. 2018) (Cole, C.J., concurring) (citation omitted); *In re Bradford*, 830 F.3d 1273, 1276, n.1 (11th Cir. 2017) (§ 2255(h) "does not incorporate § 2244(b)(2)").

in the grand jury's indictment, *see Stirone v. United States*, 361 U.S. 212, 217 (1960), Petitioner's Count 2 conviction should be vacated and he should be resentenced.

CONCLUSION

If the Court rules in *Davis* that § 924(c)(3)(B) is unconstitutionally vague, the Court should either summarily reverse this case under *Welch*, or use this case as a vehicle to "make" *Davis* retroactively applicable to cases on collateral review. If, however, the Court adopts a conduct-based approach due to the fact that *Johnson* and *Dimaya* have rendered § 924(c)(3)(B) unconstitutionally vague under the categorical approach, it should use this case as a vehicle to determine whether a petition challenging a § 924(c)(3)(B) conviction under the categorical approach "contains . . . a new rule of constitutional law" sufficient for 28 U.S.C. § 2255(h)(2).

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Brenda G. Bryn*
Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
May 7, 2019