NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

CURTIS SOLOMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI FROM THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT

Pursuant to Supreme Court Rules 13.5, 22, and 30.3, Curtis Solomon respectfully requests a ninety-day extension of time from April 8, 2019 to and including July 8, 2019, within which to file a petition for a writ of certiorari from the judgment of the United States Court of Appeals for the Eleventh Circuit. *See* S.Ct. R. 13.5. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

In 2009, Mr. Solomon was charged with and found guilty after a jury trial of multiple counts of Hobbs Act robbery, carrying a firearm during a "crime of violence" (each of the Hobbs Act robberies), conspiracy to commit Hobbs Act robbery, and conspiracy to use and carry a firearm during a "crime of violence" (the conspiracy to commit Hobbs Act robbery), all in violation of 18 U.S.C. §§ 1951(a), 924(c), and 924(o) respectively. The district court sentenced him to a total of 4,641 months in prison. Mr. Solomon appealed his convictions and consecutive § 924(c) sentences, but both were affirmed. He also filed an initial motion to vacate pursuant to 28 U.S.C. § 2255, which was denied.

After this Court issued its decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), Mr. Solomon sought authorization from the Eleventh Circuit to file a successive § 2255 motion challenging all of his § 924(c) convictions, which the Eleventh Circuit granted in part. Specifically, the appellate court granted Mr. Solomon permission to challenge his conviction and sentence on a single § 924(c) count -- Count 2 – the one based on his conviction for conspiracy to commit Hobbs Act Robbery. It denied him permission to challenge the § 924(c) counts based upon substantive Hobbs Act robbery, given adverse circuit precedent holding that the substantive offense was a "crime of violence" within § 924(c)(3)(A). At the time, the Eleventh Circuit had not decided whether *Johnson* rendered the residual clause in § 924(c)(3)(B) unconstitutionally vague.

However, after the authorization of Mr. Solomon's successor § 2255 challenge to his Count 2 conviction, the Eleventh Circuit ruled in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017) (*Ovalles I*) that "*Johnson* does not apply to, or invalidate, the risk-of-force clause in § 924(c)(3)(B)." *Id.* at 1265. Based upon *Ovalles I*, the district court denied Mr. Solomon's §

2255 motion, but granted him a certificate of appealability to seek further review on whether *Johnson* applies to § 924(c)(3)(B).

After Mr. Solomon appealed to the Eleventh Circuit, this Court held in *Sessions v. Dimaya*, 138 S.Ct. 1204 (April 17, 2018), that a "straightforward application" of *Johnson* rendered the identically-worded residual clause in 18 U.S.C. § 16(b) unconstitutionally vague. *Id.* at 1213. In light of *Dimaya*, the Eleventh Circuit vacated the panel opinion in *Ovalles*, 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 would occur if the categorical approach were maintained, the majority simply abandoned the categorical approach with regard to that provision, and 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, 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 Mr. Solomon's case. *United States v. Solomon*, 911 F.3d 1356 (11th Cir. 2019) (copy attached). 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' 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 below 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 court below 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)). "'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 Solomon'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.

Notably, several circuits have sharply disagreed with the Eleventh Circuit in *Ovalles II*, and the Court has granted certiorari in *United States v. Davis*, 138 S.Ct. l1979 (U.S. May 14, 2018) (No. 18-431) to resolve the circuit conflict. Since the predicate for the § 924(c) conviction here is the same predicate at issue in *Davis* – a conspiracy to violate the Hobbs Act, which the government has conceded does not independently qualify as a "crime of violence" within § 924(c)(3)(A) – resolution of Mr. Solomon's case will depend upon how the Court resolves *Davis*. Nonetheless, *Davis* is a direct appeal case. And therefore, it may not resolve all of the questions that are necessary to determine its impact for cases on collateral review.

Plainly, if the Court agrees with the Respondent that the residual clause in § 924(c)(3)(B) is unconstitutionally vague in light of *Johnson* and *Dimaya*, that would definitively abrogate

Ovalles II, and resolution of Mr. Solomon's case should be straightforward: relief should be granted under *Welch v. United States*, 136 S.Ct. 1257 (2016). However, *if* the Court jettisons the categorical approach as the Eleventh Circuit did in *Ovalles II*, and adopts a "circumstance-specific" approach to § 924(c)(3)(B) as the government has urged in *Davis* because that provision is unconstitutionally vague under the categorical approach, the Court will need to determine whether a § 2255 motion like Mr. Solomon's which challenges a 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) for all second or successor motions.

If Mr. Solomon must file his petition for certiorari by the current April 8th due date, he will be forced to hypothesize various ways *Davis* may be resolved, and address all of the possibilities. That would be inefficient, wasteful, and unnecessarily complicated, particularly if the Court thereafter declares § 924(c)(3)(B) unconstitutionally vague. It would make more sense at this juncture to extend Mr. Solomon's due date for seeking certiorari, so that counsel may consider the Court's actual reasoning in *Davis*, and address the impact of that – rather than alternative, hypothetical rulings – upon cases like this, in a second or successive posture on collateral review.

Davis will be argued April 17th, and a decision is expected by the end of the term in June. To allow counsel sufficient time to consider the Court's reasoning in *Davis* before filing certiorari in this case, the undersigned respectfully requests that the Court extend the due date for Mr. Solomon's petition for writ of certiorari by ninety days, from April 8 to July 8, 2019.

Neither the government nor Mr. Solomon would be prejudiced by such an extension.

Respectfully submitted,

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