

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JASON ROSADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**APPLICATION FOR A 60-DAY EXTENSION OF TIME 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**

Petitioner, Jason Rosado, respectfully requests a 60-day extension of time, up to and including July 19, 2019, within which to file a petition for a writ of certiorari from the decision of the United States Court of Appeals for the Eleventh Circuit. Mr. Rosado has not previously sought an extension of time from this Court.

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

Mr. Rosado sought a Certificate of Appealability from the Eleventh Circuit Court of Appeals, but the request was denied in case number 18-15027-H. Mr. Rosado sought to appeal the denial of his motion to set aside or vacate his sentence filed pursuant to 28 U.S.C. § 2255. A copy of the Court of Appeals' decision is attached as Exhibit A. Unless extended, the time within which Mr. Rosado must file a Petition for a Writ of Certiorari will expire on May 22, 2019. *See* S.Ct. R. 13.5.

A federal grand jury indicted Mr. Rosado for, in relevant part, (1) conspiracy to commit hostage taking, in violation of 18 U.S.C. § 1203(a)(Count 1), and (2) possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(Count 5) which was tied to Count 1. Mr. Rosado pled guilty to Counts 1 and 5 and was sentenced to a total of 444 months imprisonment. Mr. Rosado filed a motion pursuant to 28 U.S.C. § 2255 arguing that this Court's opinion in *Johnson v. United States*, 135 S. Ct. 2551 (2015) rendered the residual clause in § 924(c) unconstitutional and his conviction for conspiring to commit hostage taking could only fall under the residual clause, thereby rendering his conviction for violating § 924(c) unconstitutional. Instead of analyzing whether conspiracy to commit hostage taking was a crime of violence under either § 924(c)'s residual clause or under its so-called "use of force" clause, the magistrate judge found that Count 4 of the indictment, alleging Mr. Rosado committed carjacking, even though it was dismissed as part of Mr. Rosado's plea agreement, could be used as the predicate

offense for the § 924(c) conviction. Mr. Rosado objected, but his objections were overruled by the district court which also denied Mr. Rosado a certificate of appealability.

Mr. Rosado sought a certificate of appealability in the Eleventh Circuit Court of Appeals. In an order issued by one judge of Eleventh Circuit, the court agreed with Mr. Rosado that the § 924(c) charge in Count 5 was tied to the conspiracy to commit hostage taking in Count 1. The court, however, relying upon its recent decision in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018)(*en banc*), found that § 924(c)'s residual clause is not unconstitutionally vague as long as courts applied a conduct-based approach that accounts for the actual facts of the companion offense's commission. The court further found that other recent Eleventh Circuit Court of Appeals decisions held that the conduct-based approach was "a rule of statutory interpretation, not a rule of constitutional law." *United States v. Hubert*, 909 F.3d 335, 344-45 (11th Cir. 2018).

Several circuits have disagreed with the Eleventh Circuit's decision in *Ovalles*, and this Court has granted certiorari in *United States v. Davis*, 139 S. Ct. 782 (U.S. Jan. 4, 2019) to resolve the circuit conflict. Since the predicate for the § 924(c) conviction in this case is similar to the predicate at issue in *Davis*, a conspiracy to commit hostage taking verses a conspiracy to violate the Hobbs, Act, resolution of Mr. Rosado's case will depend on how the Court resolves *Davis*.

If the Court disagrees with the government and finds that § 924(c)(3)(B)'s residual clause is unconstitutionally vague in light of *Johnson* and *Dimaya*, *Ovalles*

would be abrogated. If, however, the Court determines that the conduct-based approach, as applied in *Ovalles*, is correct the Court will need to determine whether a § 2255 motion like Mr. Rosado'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 successive motions.

If Mr. Rosado is required to file his petition for a writ of certiorari by the current May 22nd due date, he will be forced to hypothesize various ways *Davis* might be resolved and address all of the possibilities. That would be inefficient, wasteful, and unnecessarily complicated. Therefore, Mr. Rosado requests this Court extend Mr. Rosado's due date for seeking certiorari so that counsel can consider this Court's reasoning in *Davis*.

Undersigned counsel also has the following other matters pending in the Eleventh Circuit Court of Appeals: Emergency jurisdictional question letter brief and an initial brief in Case No. 19-10606, *United States v. Nevia Abraham*; and initial briefs in Case No. 19-10163, *United States v. Surmondrea McGregor* and in Case No. 18-15339-A, *United States v. Etevaldo de Souza*. The undersigned is also working on a Petition for a Writ of Certiorari in *United States v. Henry Vazquez Valois* to be filed in this Court.

Undersigned counsel believes that additional time will be important for the effective representation of Mr. Rosado. No party will be prejudiced by the granting of a 60-day extension.

Accordingly, Petitioner respectfully requests that an order be entered extending the time to file a Petition for Writ of Certiorari by sixty days, up to and including July 19, 2019.

Respectfully submitted,

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