IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15027-H

JASON ROSADO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Jason Rosado, a federal prisoner, seeks a certificate of appealability ("COA") to appeal the district court's denial of his authorized successive 28 U.S.C. § 2255 motion to vacate. In his motion, Rosado argued that his conviction under 18 U.S.C. § 924(c) was unlawful following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

As background, a federal grand jury indicted 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). Relevant here, the § 924(c) charge in Count 5 was tied to the charge in Count 1.

Rosado pled guilty to Counts 1 and 5. At his change-of-plea hearing, Rosado stipulated that he and his codefendants planned to steal a car, drugs, and money from the victim. Rosado and his codefendants gathered firearms, kidnapped the victim at gunpoint, and beat, cut, waterboarded,

and burned him. Several weeks later, police searched Rosado's home and found firearms that were used during the kidnapping. The district court sentenced Rosado to a total sentence of 444 months' imprisonment. Rosado did not directly appeal. However, he filed the instant § 2255 motion, which the district court denied as meritless.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

In *Johnson*, the Supreme Court struck down as unconstitutionally vague the Armed Career Criminal Act's ("ACCA") "residual clause," which defined a violent felony as a crime that "involves conduct that presents a serious potential risk of physical injury to another." 135 S. Ct. at 2555-58, 2563; 18 U.S.C. § 924(e)(2)(B)(ii). More recently, in *Sessions v. Dimaya*, the Supreme Court applied the rule in *Johnson* and struck down the residual clause in 18 U.S.C. § 16(b), which defined a "crime of violence" as a felony 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." 138 S. Ct. 1204, 1211 (2018) (quoting 18 U.S.C. § 16(b)).

Distinct from the ACCA and § 16(b), § 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a "crime of violence," which is a felony that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or "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)(A), (B). Section 924(c)(3)(A) is the "elements clause," and § 924(c)(3)(B)

is the "residual clause." *Ovalles v. United States*, 905 F.3d 1231, 1234 n.1 (11th Cir. 2018) (*en banc*). In *Ovalles*, we held that § 924(c)(3)(B)'s residual clause was not unconstitutionally vague as long as courts applied a conduct-based approach that accounts for the actual facts of the companion offense's commission. *Id.* at 4, 17-19, 27-28, 43-45.

Following *Ovalles*, this Court denied a federal prisoner's application for leave to file a second or successive § 2255 motion in *In re Garrett*, holding that his proposed vagueness challenge to § 924(c)(3)(B)'s residual clause under *Johnson* and *Dimaya*, "like *any* identical challenge by *any* federal prisoner," could not satisfy the statutory requirements of § 2255(h). 908 F.3d 686, 688-90 (11th Cir. 2018) (emphasis in original). The Court said that "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)." *Id.* at 689. In *United States v. St. Hubert*, the Court held that the conduct-based approach is "a rule of statutory interpretation, not a rule of constitutional law." 909 F.3d 335, 344-45 (11th Cir. 2018). We are bound by these holdings.

So reasonable jurists would not debate the district court's denial of Rosado's vagueness-based constitutional challenge to his § 924(c) conviction. Under *Garrett*, neither *Johnson* nor *Dimaya* supplies a rule of constitutional law that supports a vagueness challenge to § 924(c)(3)(B). Accordingly, because Rosado cannot make a "substantial showing of the denial of a *constitutional* right," his motion for a COA is DENIED. 28 U.S.C. § 2253(c)(2) (emphasis added); *see Slack*, 529 U.S. at 484.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE