NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

JASON ROSADO,

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

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QUESTION PRESENTED FOR REVIEW

Whether, in light of this Court's most recent decision, in *United States v. Davis*, 139 S. Ct. 2319 (2019), which abrogated the Eleventh Circuit Court of Appeal's *en banc* decision in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (*en banc*), the Order issued in this case by the Eleventh Circuit denying the movant's request for a Certificate of Appealability, in reliance upon the now-abrogated *Ovalles* opinion, should be vacated?

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

Jason Rosado respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-15027 in that court on February 21, 2019, in which the Eleventh Circuit denied movant's request for a Certificate of Appealability.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, in which the Eleventh Circuit denied movant's request for a Certificate of Appealability, is contained in the Appendix (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 was entered on February 21, 2019. This petition is timely filed pursuant to SUP. CT. R. 13.1. On April 25, 2019, pursuant to SUP. CT. R. 13.5, movant requested and received a 60-day extension of time in which to file this petition. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

28 U.S.C. § 2255(a)

Subsection (a) of section 2255 of Title 28, United States Code states:

> **(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.

28 U.S.C. § 2253(c)

Subsection (c) of Section 2253 of Title 28, United States Code states:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (B) the final order in a proceeding under Section 2255. . ..
> >
> > (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
> >
> > (3) A certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

18 U.S.C. § 924(c)(1)(A)

Subsection (c)(1)(A) of section 924 of Title 18, United States Code states:

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 . . . 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 . . . [be subject to increased mandatory minimum penalties to be served consecutive to the punishment provided for such crime of violence or drug trafficking crime].

18 U.S.C. § 924(c)(3)

Subsection (c)(3) of section 924 of Title 18, United States Code states:

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.

18 U.S.C. § 1203(a)

Subsection (a) of section 1203 of Title 18, United States Code states:

Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

STATEMENT OF THE CASE

A federal grand jury indicted Mr. Rosado for, in relevant part, conspiracy to commit hostage taking, in violation of 18 U.S.C. § 1203(a) (Count 1), and 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)(3)(B) 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 on two issues:

> 1. Whether Conspiracy to Commit Hostage Taking, in violation of 18 U.S.C. §1203(a), categorically qualifies as a "crime of violence" under § 924(c)'s elements clause?

2. Whether *Johnson* has rendered § 924(c)'s residual clause unconstitutionally vague?

In an order issued by one judge of the 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 offense 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 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. *Jason Rosado v. United States*, No. 18-15027 (11th Cir. Feb. 21, 2019) (order denying motion for a certificate of appealability).

The court did not address the second issue raised by Mr. Rosado—whether conspiracy to commit hostage taking, in violation of 18 U.S.C. § 1203(a), categorically qualifies as a "crime of violence" under § 924(c)'s elements clause—because the issue was moot in light of *Ovalles*.

REASON FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT COURT OF APPEALS' DECISION BELOW, DENYING MOVANT A CERTIFICATE OF APPEALABILITY, RESTS SOLELY ON AN OPINION THAT HAS NOW BEEN ABROGATED BY THIS COURT'S DECISION IN *UNITED STATES V. DAVIS*, 139 S. CT. 2319 (2019) AND, THEREFORE, IS BASED ON AN UNCONSTITUTIONAL APPLICATION OF 18 U.S.C. § 924(C)(3).

In *United States v. Davis*, 139 S. Ct. 2319 (2019), this Court held that 18 U.S.C. § 924(c)(3)(B) was void for vagueness because, like the residual clause in the Armed Career Criminal Act ("ACCA") at issue in *Johnson v. United States*, 135 S. Ct. 2551 (2015), it required a "categorical approach" in which courts must imagine an "ordinary case" and apply it against an uncertain level of risk. *Id.* at 2336. *Davis* abrogated the Eleventh Circuit Court of Appeals *en banc* decision in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (*en banc*), *cert. denied.* No. 18-8393, 2019 WL 1172307 (U.S. June 17, 2019).

A. The Eleventh Circuit's Judgment is Based on Reasoning Which has Squarely Been Rejected by This Court in *Davis*.

In *Ovalles*, the Eleventh Circuit found that § 924(c)'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 1234.

In 2017, a three-judge panel of the Eleventh Circuit Court of Appeals affirmed the district court's denial of Irma Ovalles' 28 U.S.C. § 2255 motion to vacate her 18 U.S.C. § 924(c) conviction and sentence for using and carrying a firearm during a crime of violence, namely, attempted carjacking. *Ovalles v. United States*, 861 F.3d

1257, 1267-69 (11th Cir. 2017) (*Ovalles I*). The panel opinion held that Ovalles' attempted carjacking conviction qualified as a crime of violence under both 18 U.S.C. § 924(c)(3)(B)'s residual clause and 18 U.S.C. § 924(c)(3)(A)'s elements clause. *Id.*

After this Court issued its decision in *Sessions v. Dimaya,* 138 S. Ct. 1204 (2018), the Eleventh Circuit vacated the panel opinion and took the case *en banc*. The court *en banc* then held that: (1) 18 U.S.C. § 924(c)(3)(B)'s residual clause was not unconstitutionally vague; (2) the court determines whether a predicate offense qualifies under the residual clause by using a conduct-based approach; and (3) given the admitted conduct, Ovalles' attempted carjacking conviction qualified under 18 U.S.C. § 924(c)(3)(B)'s residual clause. *Ovalles v. United States,* 905 F.3d 1231, 1233-35, 1244-54 (11th Cir. October 4, 2018) (*Ovalles II*). The *en banc* Court remanded the appeal to the original panel for further proceedings. The panel reinstated its original opinion and added additional analysis. *Ovalles v. United States,* 905 F.3d 1300 (11th Cir. October 9, 2018) (*Ovalles III*).

For purposes of this petition, Mr. Rosado will refer to the *en banc Ovalles* decision as simply *Ovalles*—not *Ovalles II*.

The Eleventh Circuit has applied *Ovalles* in numerous cases which resulted in the denial of relief to defendants who otherwise deserved to have their convictions under § 924(c)'s residual clause vacated and their sentences substantially reduced. *Solomon v. United States,* 911 F.3d 1356, 1360 (11th Cir. 2019) ("Relying on *Ovalles II*, this Court has since held that a federal prisoner's proposed vagueness challenge

to § 924(c)(3)(B)'s residual clause under *Johnson* and *Dimaya* could not satisfy the statutory requirement of § 2255(h)."); *In Re Garrett,* 908 F.3d 686 (11th Cir. 2019) (Denying movant relief based on *Ovalles*); *United States v. St. Hubert,* 909 F.3d 335, 345 (11th Cir. 2019) ("We follow *Ovalles II* and conclude that St. Hubert's constitutional challenge to § 924(c)(3)(B) lacks merit."); *Chance v. United States,* 769 Fed. Appx. 893 (11th Cir. 2019); *Exposito v. United States,* 762 Fed. Appx. 936 (11th Cir. 2019); *United States v. Lewis,* 762 Fed. Appx. 786 (11th Cir. 2019); *McKnight v. United States,* 753 Fed. Appx. 873 (11th Cir. 2019); *Herrera v. United States,* 760 Fed Appx. (11th Cir. 2019).

The Eleventh Circuit's judgment in this case, based solely on *Ovalles*, cannot stand and must be vacated. In the aftermath of this Court's decision in *Davis* and the abrogation of *Ovalles,* Mr. Rosado is entitled to relief—a certificate of appealability (COA) challenging the district court's denial of his § 2255 motion. At a minimum, Mr. Rosado is entitled to a reexamination of his request for a COA in light of this Court's *Davis* decision.

B. Mr. Rosado Can Meet His Burden for the Issuance of a COA as to the Issue the Eleventh Circuit Failed to Reach–Whether Conspiracy to Commit Hostage Taking, in Violation of 18 U.S.C. § 1203(a), Categorically Qualifies as a "Crime of Violence" under § 924(c)'s Elements Clause.

Mr. Rosado requested a COA on two issues—whether § 924(c)(3)'s residual clause was unconstitutional and, if not, whether conspiracy to commit hostage taking, in violation of 18 U.S.C. § 1203(a), categorically qualifies as a "crime of violence" under § 924(c)(3)'s "use-of-force" clause? The Eleventh Circuit Court of

Appeals has never squarely ruled on the second issue. In an unpublished order, issued by a three-judge panel, granting movant a COA, the Eleventh Circuit found, "This Court has not yet determined the legal issue of whether a hostage taking conviction under § 1203 may qualify as a companion crime of violence under the § 924(c)(3)(A) use-of-force clause without regard to the § 924(c)(3)(B) residual clause." *In Re Hernandez,* No. 16-13280-J (11th Cir. June 30, 2016) (order granting certificate of appealability). The movant, Hernandez, was also convicted of conspiracy to commit hostage taking, but the Eleventh Circuit did not address whether the conspiracy conviction was a crime of violence when it assumed, without deciding, that *Johnson*'s rule about the ACCA residual clause applied to the § 924(c)(3)(B) residual clause. The COA in *In Re Hernandez* was granted before the Eleventh Circuit's *en banc* decision in *Ovalles* was issued. Based on the grant of a COA, Hernandez filed a motion to vacate his conviction and sentence in the district court. *Hernandez v. United States,* No. 16-Cv-22657-PCH (S.D. Fla., filed June 26, 2016). The district court granted Hernandez's petition and vacated his § 924(c) conviction agreeing with Hernandez that hostage taking did not qualify as a crime of violence under § 924(c)(3)(A)'s use-of-force clause and that § 924(c)(3)(B)'s residual clause was void for vagueness based on an application of *Johnson. Hernandez v. United States,* No. 16-Cv-22657-PCH, 2016 WL 8078311 *3 (S.D. Fla. Sept. 27, 2016). The district court later withdrew its Order and denied Hernandez relief in light of the Eleventh Circuit's decision in *Ovalles. Hernandez v. United States,* No. 16-Cv-22657-PCH (S.D. Fla. Sept. 27, 2017) (order denying 28 U.S.C. § 2255 motion

to vacate conviction and sentence). Hernandez obtained a COA from the Eleventh Circuit to brief the issue of whether a conviction for hostage taking qualified as a crime of violence under § 924(c)(3)(B)'s residual clause. *Hernandez v. United States,* No. 18-10334-C (11th Cir., filed Jan. 27, 2018). His initial brief was filed July 1, 2019, after this Court's *Davis* decision was issued. Therefore, the issue of whether a conviction for hostage taking is a crime of violence is currently pending in the Eleventh Circuit and will finally be definitively decided.

In this case, the Eleventh Circuit did not reach the issue and denied Mr. Rosado a COA based on *Ovalles*, implying that the court assumed *conspiracy* to commit hostage taking—the crime Mr. Rosado pled guilty to and which was used as the predicate for the § 924(c) conviction—was a crime of violence under the *residual clause.*

There is no doubt, the Eleventh Circuit would have granted Mr. Rosado a COA if the *Davis* decision had already been issued by this Court. The district court's decision would clearly have been wrong because it relied upon *Ovalles.* The other issue raised by Mr. Rosado was whether conspiracy to commit hostage taking was a crime of violence under § 924(c)(3)'s use-of-force clause. By granting the movant, in *In Re Hernandez,* a COA, the Eleventh Circuit has acknowledged that "reasonable jurists can disagree" about whether hostage taking is a crime of violence. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603 (2000) ("[T]he applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or

that the issues presented were adequate to deserve encouragement to proceed further." (internal quotation marks omitted). *See also Henry v. Dep't of Corrections*, 197 F.3d 1361, 1364 (11th Cir. 1999).

Given the important nature of this issue, Mr. Rosado respectfully seeks this Court's review. The Court should therefore grant the petition and remand this case back to the Eleventh Circuit in light of the *Davis* decision.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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