ORIGINAL

No: 20-6051



**In the**
**Supreme Court of the United States**

JONATHAN ORTIZ TORRES,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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FOR THE FIRST CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Should a writ of certiorari should be granted to determine if trial counsel renders ineffective assistance when he fails to advise his client that the government could request a sentence above that recommended in a plea agreement thus rendering the plea involuntary.

Should a writ of certiorari be granted to determine if a plea is constitutionally valid when the same is entered to an offense the defendant did not commit.

Should a writ of certiorari should be granted to determine if counsel renders ineffective assistance by permitting Ortiz-Torres to plead guilty to a Title 18 U.S.C. § 924(c)(1)(a) and Title 18 U.S.C. § 924(j) simultaneously on the same charged offense.

Should a writ of certiorari be granted to determine if a conviction for a Title 18 U.S.C. § 924(j) must be vacated in light of this court's decision in *Sessions v. Dimaya*, 2018 U.S. Lexis 2497 (2018).

## PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the Unite States Court of Appeals for the First Circuit and the United States District Court for the District Court Puerto Rico.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes**

No:

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# PETITION FOR WRIT OF CERTIORARI

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Jonathan Ortiz Torres, the Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled cause.

## OPINION BELOW

The opinion of the Court of Appeals for the First Circuit, whose judgment is herein sought to be reviewed, is unpublished *United States v. Ortiz-Torres,* 19-1915 (1st Cir. July 8, 2020) is reprinted in the separate Appendix A to this Petition.

The order of the District Court denying the Title 28 U.S.C. § 2255 was entered on May 13, 2019, and is reprinted in the separate Appendix B to this Petition.

## STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on July 8, 2020. The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law....

*Id.* Fifth Amendment U.S. Constitution

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously

> ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

*Id.* Sixth Amendment U.S. Constitution

Title 28 U.S.C. § 2255 provides in pertinent part:

> 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.
>
> * * * * *
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

*Id.* Title 28 U.S.C. § 2255.

Title 18 U.S.C. § 924(c)(3)(B) provides in relevant part:

(a)

> (1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929 [18 USCS § 929], whoever—
>
> > (A) knowingly makes any false statement or representation with respect to the information required by this chapter [18 USCS §§ 921 et seq.] to be kept in the records of a person licensed under this chapter [18 USCS §§ 921 et seq.] or in applying for any license or exemption or relief from disability under the provisions of this chapter [18 USCS §§ 921 et seq.];

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922 [18 USCS § 922];

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l) [18 USCS § 922(1)]; or

(D) willfully violates any other provision of this chapter [18 USCS §§ 921 et seq.], shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 [18 USCS § 922] shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter [18 USCS §§ 921 et seq.] to be kept in the records of a person licensed under this chapter [18 USCS §§ 921 et seq.], or

(B) violates subsection (m) of section 922 [18 USCS § 922],
shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) [18 USCS § 922(q)] shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) [18 USCS § 922(q)] shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 [18 USCS § 922] shall be fined not more than $1,000, imprisoned for not more than 1 year, or both.

(6)

(A)

(i) A juvenile who violates section 922(x) [18 USCS § 922(x)] shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.
(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and
(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) [18 USCS § 922(x)] or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x) [18 USCS § 922(x)]—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 [18 USCS § 931] shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or

receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(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; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, 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.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.].

(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.

Title 18 USCS § 924.

## STATEMENT OF THE CASE

On May 27, 2014, Ortiz-Torres pled guilty according to a plea agreement to Count Two of the Superseding Indictment which charged him with possessing, brandishing, discharging, using, and carrying firearms during and concerning a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A) and (j). (Cr.Dkt. 606) The plea agreement included a proposed advisory guideline calculation, whereby

the parties agreed the base offense level was 43. (Cr.Dkt. 607) After applying a three-level reduction for acceptance of responsibility, the parties stipulated a total offense level of 40. Although the parties did not stipulate a Criminal History Category ("CHC"), the plea agreement indicated a CHC of I would yield an advisory guideline range of 292-365 months. (Cr.Dkt. 607). The Presentence Report's ("PSR's") advisory guideline calculation mirrored that of the plea agreement. (Cr.Dkt. 639, pp. 9-10). Given a total offense level of 40 and a CHC of I, the PSR calculated Ortiz-Torres' advisory guideline range to be 292-365 months. On October 14, 2015, the district court held Ortiz-Torres' sentencing hearing. (Cr.Dkt. 660). The government explained that the proper sentence given these circumstances would be a minimum of 500 months. *Id.* at 41-42. Counsel for Ortiz-Torres reiterated that Co-Defendant Santana-Espinet was the mastermind of the plan with a criminal record and received a 380-month sentence, noting the court needed to consider disparities at sentencing. *Id.* at 44. The court's advisory guideline range of 292-365 mirrored that of both the plea agreement and the PSR. *Id.* at 51. The court explained it must consider the § 3553(a) factors to determine a sentence that is sufficient but not greater than necessary. *Id.* After recognizing Ortiz-Torres' prompt acceptance of responsibility, the court explained a life sentence was not warranted. *Id.* at 56. A sentence of at least 500 months was warranted. *Id.* Consequently, the court determined a 560-month sentence was

sufficient but not greater than necessary. *Id.* at 57. Ortiz-Torres appealed, however, after considering the arguments raised (whether the government breached the plea agreement and whether the sentence imposed was reasonable, neither issue raised in the 2255), a panel of this court affirmed the sentence and conviction. *United States v. Ortiz-Torres*, 873 F.3d 346 (1st Cir. 2017). A Writ of Certiorari was not sought. On his 2255, Ortiz-Torres alleged that 1) his plea was involuntary since counsel had rendered ineffective assistance by not explaining that the government could request a sentence above the recommended range, 2) that counsel was ineffective because he failed to clarify that Ortiz-Torres was sentenced to an offense for which he did not plead guilty to, 3) that counsel was ineffective when he allowed Ortiz-Torres to plead guilty to a § 924(c)(1)(A) and § 924(j) offense simultaneously, 4) that his conviction for the § 924(j) must be vacated in light of *Sessions v. Dimaya*, 2018 U.S. Lexis 2497 (2018), and 5) that his conviction for § 924(c)(1)(A) and (j) must be vacated in light of *United States v. Davis*, 139 S. Ct. 2319 (2019). (Cv.Dkt. 1). After three requested extensions, the government's response was filed. (Cv.Dkt. 8). Without allowing a reply from Ortiz-Torres, the District Court denied the § 2255 and the COA. (Cv.Dkt. 9, 10). Ortiz-Torres proceeded on reconsideration, arguing that Rule 5, of Title 28 U.S.C. § 2255, directed a reply, however, once again after the government response and without a

reply, the Court denied the Rule 59 as well. (Cv.Dkt. 12, 16-17). A certificate of appealability was also denied.

## REASONS FOR GRANTING THE WRIT

### THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND THE DISTRICT COURT HAVE DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

**Rule 10**
**CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**

> (1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a)When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
> >
> > (b)When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

*Id.* Supreme Court Rule 10.1(a), (c)

## QUESTIONS PRESENTED

**1. A writ of certiorari should be granted to determine if trial counsel renders ineffective assistance when he fails to advise his client that the government could request a sentence above that recommended in a plea agreement thus rendering the plea involuntary**

During plea negotiations, Ortiz-Torres and the government entered into a Rule 11(c)(1)(A) agreement to avoid a trial. (Doc. 607). The agreement stipulated that Ortiz-Torres sentencing recommendation, based on his criminal history score, would be calculated at 292-365 months incarceration. (Doc. 607 at 4). Notwithstanding the language on the agreement, that the government reserves the right to argue for a sentence above the suggested range, Ortiz-Torres was assured that the sentence would be determined within the 292-365 range. (See Appendix A). Not only was Ortiz-Torres mislead into pleading guilty based on the terms of the agreement, but he also waived all his constitutional claims as well. (*Id.*). Although the plea agreement threats were made to Ortiz-Torres, the agreement did not cover assurances made to Ortiz-Torres by counsel. (Doc. 607 at 4, 12, and Exhibit A, Title 28 U.S.C. § 2255). Ortiz-Torres was misled into entering into the plea agreement, thus rendering the plea involuntary. "The Fourteenth Amendment Due Process Clause requires that a plea of guilty be knowingly and voluntarily entered because it involves a waiver of a number of the defendant's constitutional rights." *Gady v. Linahan*, 780 F.2d 935, 943 (11th Cir. 1986), (citation and footnote omitted). A plea of guilt "cannot support a judgment of guilt unless it was

voluntary in a constitutional sense." *Henderson v. Morgan,* 426 U.S. 637, 644-45 (1976). Above from the obvious involuntariness of a coerced plea, the Supreme Court has identified two other ways that a defendant's guilty plea may be involuntary in a constitutional sense:

> "A plea may be involuntary either because the accused does not understand the nature of the constitutional protections he is waiving, see, e.g. *Johnson v. Zerbst,* 58 S.Ct. 1019, 1023, or because he has such an incomplete understanding of the charges that his plea cannot stand as an intelligent admission of guilt without adequate notice of the nature of the charge against him, or proof that he in fact understood the charges, the guilty plea cannot be voluntary in the latter sense. Smith v. O'Grady, 312 U.S. 329 (1941)."

*Id. Henderson*, 426 U.S. at 645, n.13.

Ineffective assistance claims which site erroneous advice by counsel encouraging the Defendant to plead guilty or not plead guilty to the Prosecution's charges necessarily implicate the principle that guilty pleas must be voluntarily and intelligently made. *See North Carolina v. Alfred*, 400 U.S. 25 (1970). This Court addressed this issue in *Hill v. Lockhart*, 474 U.S. 52 (1985) in which it formulated a merger in the *Strickland* test for ineffective assistance and the traditional requirements for a valid guilty plea. *See also See also Libretti v. United States*, 516 U.S. 29 (1995); *United States v. Broce*, 488 U.S. 563 (1989) ("[a] failure by Counsel to provide advice may form the basis of a claim of ineffectiveness of counsel, but absent such a claim it cannot serve as the predicate for setting aside such a plea"); *Santos v. Kolb*, 880 F.2d 941 (7th Cir. 1989) in which the Seventh

Circuit explained that where an ineffective assistance claim concerns the Defendant's guilty plea, "the key to whether Defense Counsel has failed to provide effective assistance is whether his shortcomings resulted in an involuntary or unintelligent plea." In the instant case, counsel's failure to explicitly advise his client of the repercussions of the government's option to request a sentence above the agreed range was the equivalent of a plea that Ortiz-Torres would not have accepted. (*Id.*). In sum, counsel's failure to advise Ortiz-Torres of all the "critical options" the government may exercise if he pleads guilty, has not only caused his counsel to render ineffective assistance violating Ortiz-Torres Sixth Amendment right to the effective assistance of counsel but has also caused his Due Process rights to be violated as well, rendering his plea of guilt not knowingly and voluntarily provided. In essence, the plea agreement that was supposed to "assist" Ortiz-Torres, served no purpose whatsoever. As Ortis-Torres presented in the affidavit, had counsel properly explained the implications of the government's options, Ortiz-Torres would not have pleaded guilty and would have proceeded to trial.

**2. Should a writ of certiorari be granted to determine if a plea is constitutionally valid when the same is entered to an offense the defendant did not commit.**

As a result of the plea agreement, Ortiz-Torres was led to believe that his sentence would be based on a violation of Title 18 U.S.C. § 924(c)(1)(A) for a Title 18 U.S.C. § 1951(a) violation. (Doc. 607 at 2). During the change of plea hearing, the following colloquy occurred:

> Change of Plea Hearing - [1] Jonathan Ortíz-Torres possess, brandish, discharge, use and carry firearms as defined in 18 U.S. Code, Section 921; specifically one 9mm caliber Smith and Wesson pistol, Serial No. VYK454; as well as one .45 Smith and Wesson pistol Serial No. TBT1631, during and in relation to a crime of violence for which you may be prosecuted in the court of the United States, specifically interference of commerce by robbery in violation of 18 U.S. Code, Section 1951, which was the count -- the Count 1 of the superseding indictment which is incorporated by reference; and in the course of that crime you unlawfully killed Felix Rodriguez-Gómez and Kenneth Omar Betancourt with malice aforethought through the use of a firearm, which is the murder as defined in 18 U.S. Code, Section 111 -- no -- 1111 by knowingly, willfully, deliberately, maliciously and with premeditation shooting the Department of Natural Resources -- Commonwealth Department Rangers Felix Rodriguez-Gómez and Kenneth Omar Betancourt with a firearm thus causing their death in violation of ***18 U.S. Code, Section 2, 924(c);*** and -- and that is -- well, Count 2 of the superseding indictment, in essence.
>
> Do you understand that this is the offense to which you will be entering a guilty plea?

*Id.* (Doc. 610 at 20).

The plea was accepted for a violation of Title 18 U.S.C. § 924 (c), as per the plea agreement. This was Ortiz-Torres' understanding. (Exhibit A). However, at the time of sentencing, the government requested the court impose and did impose,

a sentence for a violation of ***18 U.S.C. § 924(j)***, an offense for which Ortiz-Torres did n to plead guilty to, nor an offense that the court had not entered judgment on during the change of plea. In essence, the court has sentenced Ortiz-Torres to an offense he did not plead guilty to, thus rendering his plea involuntary.

**a. Ortiz-Torres plea to 18 U.S.C. § 924(j) was Involuntary.**

"The Due Process Clause requires that a plea of guilty be knowingly and voluntarily entered because it involves a waiver of a number of the defendant's constitutional rights." *Gaddy*, 780 F.2d at 943. A plea of guilt "cannot support a judgment of guilt unless it was voluntary in a constitutional sense." *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976). As the Supreme Court has instructed, *the voluntariness requirement is not satisfied unless the defendant receives real notice of the true nature of the charged crime.*

> "The defendant receives real notice of the nature of the charges when he has been informed of both the nature of the charges to which he is pleading guilty represents, in essence, an admission as to *each and every element of the offense."*

*Id.* at 780 F.2d at 943-44 (citation omitted)[1]

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[1] *See also Frazer v. United States*, 18 F.3d 778 (9th Cir. 1994); *Stano v. Dugger*, 921 F.2d 125, 1142 (11th Cir. 1991) (en banc), ["that prior to entering a guilty plea, a defendant must receive information on the "nature of the offense and the elements of the crime."] *Id.* "At the very least, due process requires that the defendant, prior to tendering a plea of guilt, receives a description of the "elements of the charged offense..." *Id.* at 945 (citation omitted).

Ortiz-Torres due process rights are violated and counsel provides ineffective assistance when she allows the court to sentence Ortiz-Torres to an offense he had not provided a guilty plea to. As the Supreme Court affirmed the decision of the United States Court of Appeals for the Second Circuit when it determined that Henderson's plea could not have been voluntary thus violating his "due process of law, since the defendant, did not receive adequate notice of the offense." *Id. Henderson* at 108. As in *Henderson*, Ortiz-Torres was never advised by his counsel, by the Government, or by the Court, that he would be sentenced to Title 18 U.S.C. § 924(j) offense. The court accepted a plea for an 18 U.S.C. § 924(c) offense. Failing to advise Ortiz-Torres of the "critical elements" or the correct offense to which he is pleading in an offense, cannot be held to "harmless error" review. *Id. Henderson* at 117. The choice to plead guilty must be the defendant's, it is he who must be informed of the consequences, [elements] of his plea that he waives when he pleads, *Boykin v. Ala.*, 395 U.S. 238 (1969), and it is on his admission ["waiving the "critical elements"] that his conviction will rest. *Id.* . *Henderson,* at 118.

**3. Should a writ of certiorari should be granted to determine if counsel renders ineffective assistance by permitting Ortiz-Torres to plead guilty to a Title 18 U.S.C. § 924(c)(1)(a) and Title 18 U.S.C. § 924(j) simultaneously on the same charged offense.**

In this case, the facts are straight-forward. Ortiz-Torres was sentenced under a violation of Title 18 U.S.C. § 924(c), the lesser-included offense of Title 18 U.S.C.

§ 924(j). Counsel at all times during the change of plea and before sentencing had the obligation to advise the court that the court could not impose a sentence on *both* offenses as charged in the same indictment. Ortiz-Torres was convicted and sentenced, charging violations of 19 U.S.C. §§ 924(c) and 924(j) respectively, arose from the same predicate facts. Those circumstances place the charges squarely within the Supreme Court's holding in *Rutledge v. United States*, 517 U.S. 292, 307 (1996), setting forth the "traditional rule" that "whenever a defendant is tried for greater and lesser offenses in the same proceeding, . . . neither legislatures nor courts have found it necessary to impose multiple convictions." *See also United States v. Parkes*, 497 F.3d 220, 234(2nd Cir. 2007) (remand for resentencing in Hobbs Act/murder case because "18 U.S.C. § 924(c) is a lesser included offense of 18 U.S.C. § 924(j)(1) [and] the district court erred by imposing sentences on both.") In *United States v. Catalan-Roman*, 585 F.3d 453, 472 (1st Cir. 2009), following the government's "sensible concession, the First Circuit ratified its holding in *United States v. Jimenez-Torres*, 435 F.3d 3, 10 (1st Cir. 2006), that a § 924(c)(1) offense would be a lesser-included offense of a § 924(j)(1) offense when premised on the same predicate facts. Counsel at all times had the obligation to advise the court that Ortiz-Torres could not have been sentenced to both offenses as entered in this case. The plea agreement referenced both offenses, a clear violation of the Court's reasoning in *Catalan-Roman.*

**4. Should a writ of certiorari be granted to determine if a conviction for a Title 18 U.S.C. § 924(j) must be vacated in light of this court's decision in *Sessions v. Dimaya*, 2018 U.S. Lexis 2497 (2018).**

As presented herein, on May 27, 2014, Ortiz-Torres pled guilty according to a plea agreement to Count Two of the Superseding Indictment, which charged him with possessing, brandishing, discharging, using and carrying firearms during and in relation to a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A) and (j). (Doc. 607). The charge was premised on a violation of Title 18 U.S.C. § 1951 resulting in murder in violation of Title 18 U.S.C. § 1111. (Doc. 215). On April 17, 2018, the Supreme Court's decision in *Dimaya*, determined that the definition of "crime of violence" in Title 18 U.S.C. § 16 was unconstitutionally vague striking down the statute in its entirety. Congress uses the identical phrase "crime of violence" similarly elsewhere in Title 18 U.S.C. § 924(c). The Courts have long required Courts to interpret Title 18 U.S.C. § 924(c) utilizing the categorical approach. *See United States v. Benally*, 843 F.3d 350, 352 (9th Cir. 2016).

Congress' language in Title 18 U.S.C. § 924(c) only penalizes those who possess a firearm in furtherance of *some crimes*. The Courts' approach to deciding *which crimes* mean that the predicate to a § 924(c) conviction must always be "a crime of violence" regardless of how the particular defendant might commit the crime and regardless of whether a firearm is possessed in furtherance of that crime. A crime cannot be categorically considered a "crime of violence" if the statute of

conviction punishes any conduct not encompassed by the statutory definition of a crime of violence. (*See Benally*, 843 F.3d at 352).

In *Dimaya*, the Supreme Court held:

> Section 16(b) has the same two features that conspired to make the ACCA's residual clause unconstitutionally vague. It too requires a Court to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk. The result is that Section 16(b) produces, just as the ACCA's residual clause did, more unpredictability and arbitrariness than the due process clause tolerates.

*Id. Dimaya,* at 11.

Ortiz-Torres cannot imagine how § 924 textually identical to § 16(b) and also applied by using the categorical approach could be salvaged.

**a. Section 924(c)(3)(B) is unconstitutionally vague**

Section 924(c)(3) defines the term "crime of violence" as either a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or 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." In *Dimaya*, the Supreme Court held that 18 U.S.C. § 16(b)'s definition of a "crime of violence" is unconstitutionally vague in light of its reasoning in *Johnson*, which invalidated the similarly worded residual definition of a "violent felony" in the Armed Career Criminal Act (ACCA); see also *Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016) (ruling

that § 16(b) "must be deemed unconstitutionally vague in light of Johnson"). The *Dimaya* Court explained that the same two features rendered the clauses unconstitutionally vague: they "'require[] a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents' some not-well-specified-yet-sufficiently-large degree of risk." *Dimaya*, at 1216, (quoting *Johnson*, 135 S. Ct. at 2557). The Court also rejected several reasons for distinguishing § 16(b) from the ACCA, namely that § 16(b) requires a risk that force is used in the course of committing the offense, focuses on the use of physical force rather than physical injury, does not contain a confusing list of enumerated crimes, and does not share the ACCA's history of interpretive failures. *Id.* at 1239. Ortiz-Torres argues that § 924(c)(3)(B)'s definition of a "crime of violence," which is identical to § 16(b)'s,2is likewise unconstitutionally vague. Indeed, other courts have previously noted the similarity between the two provisions and consequently held that "cases interpreting [§ 16(b)] inform [their] analysis" when interpreting § 924(c)(3)(B). *United States v. Serafin*, 562 F.3d 1105, 1108 & n.4 (10th Cir. 2009). Other circuits interpret § 16(b) and § 924(c)(3)(B) similarly, as well. *See In re Hubbard*, 825 F.3d 225, 230 n.3 (4th Cir. 2016) ("[T]he language of § 16(b) is identical to that in § 924(c)(3)(B), and we have previously treated precedent respecting one as controlling analysis of the other."). The Seventh Circuit has faced the same

scenario that we face now: it ruled that § 16(b) was unconstitutionally vague in *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015), and then addressed the constitutionality of § 924(c)(3)(B) in *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016). In *Cardena*, the Seventh Circuit ruled that § 924(c)(3)'s residual clause was "the same residual clause contained in [§ 16(b)]" and accordingly held that "§ 924(c)(3)(B) is also unconstitutionally vague." *Cardena*, 842 F.3d at 996. Other circuits have upheld § 924(c)(3)(B)'s constitutionality, but they were not faced, as Ortiz-Torres is here, with binding authority holding § 16(b) unconstitutional. *See United States v. Garcia*, 857 F.3d 708, 711 (5th Cir. 2017); *United States v. Eshetu*, 863 F.3d 946, 955 (D.C. Cir. 2017); *Ovalles v. United States*, 861 F.3d 1257, 1265 (11th Cir. 2017); *United States v. Prickett*, 839 F.3d 697, 699 (8th Cir. 2016); *United States v. Hill*, 832 F.3d 135, 150 (2d Cir. 2016); *United States v. Taylor*, 814 F.3d 340, 379 (6th Cir. 2016). For the most part, the grounds for those decisions apply equally to § 16(b) and mirror the distinctions between the ACCA's residual clause and § 16(b) that were rejected in *Dimaya*. In *Dimaya*, this Court rejected several reasons urged by the government for distinguishing § 16(b) from ACCA including that a risk that force is used in the course of committing the offense; that is focused on the use of physical force rather than a physical injury; that it does not contain a confusing list of enumerated crimes; and that it does not

share ACCA's history of interpretive failures. *Id.* at *12-16.[2] As Judge Talwani explained in *United States v. Herr*, No. 16-CR-10038-IT, 2016 WL 6090714, at *1 (D. Mass. Oct. 18, 2016) where she found the residual clause under § 924(c)(3)(B) unconstitutional in a murder for hire case, "[b]oth the ACCA and 18 U.S.C. § 924(c)(3)(B) thus direct judges to combine the indeterminacy inherent to the categorical approach with the indeterminacy inherent to standards such as 'substantial risk,' and thereby employ a doubly indeterminate analysis that the Supreme Court has specifically addressed and foreclosed. Thus the analytical framework the court must use to determine whether a crime is a crime of violence under 18 U.S.C. § 924(c)(3)(B)'s residual clause is the one *Johnson II* disallows." *See also United States v. Armour*, 840 F.3d 904, 908 (7th Cir. 2016) (assuming that Johnson applies to § 924(c)(3)(B)). The First Circuit has not yet addressed this question. *See United States v. Taylor*, 848 F.3d 476, 491 (1st Cir. 2017) (declining to resolve whether the § 924(c)(3) residual clause is unconstitutionally vague).

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[2] In litigating *Johnson*, the Government, through the Solicitor General, agreed that the phrases at issue in *Johnson* and here poses the same problem. Upon recognizing that the definitions of a "crime of violence" in both § 924(c)(3)(B) and § 16(b) are identical, the Solicitor General stated: Although Section 16 refers to the risk that force will be used rather than that injury will occur, it is equally susceptible to petitioner's central objection to the residual clause: Like the ACCA, Section 16 requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters. *Johnson v. United States*, S. Ct. No. 13-7120, Supplemental Brief of Respondent United States at 22-23 (available 2015 WL 1284964, at *22-23 (2015)).

Given the decision in *Dimaya,* this Court too must find that § 924(c)(3)(B)'s residual clause to categorize a predicate conviction as a "crime of violence" also violate due process as other Circuits have found. *See Cardena*, 842 F.3d 959 (striking down § 924(c)(3)'s residual clause as it was the same as § 16(b) which the Circuit previously struck down in *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2014)); *United States v. Salas*, 2018 WL 2074547 __ F.3d ___(10th Cir. 2018) (April 17, 2018) (finding § 924(c)(3)'s residual clause unconstitutionally vague).

**b. Ortiz-Torres' claim could not be waived.**

In anticipation that the government will argue a procedural waiver, Ortiz-Torres addresses the claim head-on. The First Circuit has routinely found that *Johnson* claims are not barred by procedural default for similar reasons as such default can be overcome by cause and prejudice. See, e.g., *United States v. Franco*, No. 11-10228, 2018 U.S. Dist. LEXIS 33169 (D. Mass. Mar. 1, 2018); *Cruz v. United States*, No. 09-10104-RWZ, 2017 U.S. Dist. LEXIS 19553 (D. Mass. Jan. 26, 2017); *United States v. Webb*, 217 F. Supp. 3d 381, CRIMINAL ACTION NO. 06-10251-WGY, 2016 U.S. Dist. LEXIS 155558, 2016 WL 6647929, at *4 (D. Mass. Nov. 9, 2016), the "novelty of a constitutional question" can satisfy the cause prong. *Id.* at 15-16. A defendant has cause for procedural default where the Supreme Court "explicitly" overruled a precedent. *Id.* at 17. The error in this case which constitutes the conviction of Ortiz-Torres on an unconstitutional statute

affected his "substantial rights" and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." See *United States v. Olano*, 507 U.S. 725, 732 (1993) (internal quotation marks omitted).

## CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and order the Court of Appeals for the First Circuit and the District Court to address the matters of the issues filed herein.

Done this 1, day of October 2020.

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