UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re David Roland Hinkson,)

Applicant.) (re: 1:04-cr-00127-RCT)

(re: 1:12-cv-000196-RCT)

MEMORANDUM OF FACT AND LAW IN SUPPORT OF APPLICATION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE BY A FEDERAL PRISON AND PURSUANT 28 U.S.C. Section 2255 AND 28 U.S.C. Section 2244.

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NOW COMES the Applicant, David Roland Hinkson, Pro se and pursuant to 28 U.S.C. Section 2255 (h)(2), 28 U.S.C. Section 2244 (a), Sessions v Dimaya, 138 S. Ct 1204 (2018), Haines v Kerner, 404 U.S. 519 (1972), and any and all other applicable legal authority, hereby submits his memorandum of fact and law in support of his application for leave to file a second section 2255 motion in the district court, and would state and argue as follows.

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STATEMENT OF FACTS

The Applicant (Hereinafter "Hinkson") would incorporate herein the statement of the case as outlined in the Application For Leave To File A Second Motion To Vacate Sentence under 28 U.S.C. Section 2255.

Hinkson, was convicted in the United States District Court for the District of Idaho in case no. 3:02-cr-142-RCT for, inter alia, willful failure to file tax return, willful failure to collect federal tax, misbranded drug, adulterated device, structuring transactions to avoid reporting requirements and aiding and abetting.

Hinkson was then charged and convicted in the United States District Court for the District of Idaho in case no. 1:04-cr-127-RCT for three counts of solicitation to commit a crime of violence (i.e., murder for hire).

The sentencing court imposed a term of imprisonment as follows: three 10-year consecutive sentences for each solicitation count for an aggregate sentence of 30 years. The sentencing court also imposed a consecutive sentence of 10-years for case no. 02-cr-142, and an additional three 1-year sentences (for committing the solicitation counts while on pretrial release) for a total term of imprisonment for 43-years or 516 months imprisonment.

Because Hinkson's solicitation counts were considered

to be "crimes of violence" [t]his significantly influenced the

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sentencing court to impose consecutive terms of imprisonment on each count even though Hinkson was a business man with no criminal history.

After the Supreme Court's recent decision in Sessions v Dimaya, 138 S. Ct. 1204 (2018), it is clear that Hinkson's convictions for solicitation to commit a crime of violence under 18 U.S.C. Section 373 are not crimes of violence,. and therefore, Hinkson should be entitled to stand before a judge for resentencing without being looked upon as having committed crimes of violence, and further, to have a fair and impartial court to consider the applicable factors in imposing sentence, including those articulated in 18 U.S.C. Section 3553.

QUESTION PRESENTED

WHETHER HINKSON HAS MADE A PRIMA FACIE SHOWING PERMITTING THIS COURT TO GRANT HIM AUTHORIZATION TO FILE A SECOND SECTION 2255 MOTION IN THE DISTRICT COURT IN LIGHT OF SESSIONS V DIMAYA, 138 S. CT. 1204 (2018) AND WELCH V UNITED STATES,

136 S. CT. 1257 (2016).

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ARGUMENT AND AUTHORITIES

In Johnson v United States, 135 S. Ct. 2551 (2015) the Supreme Court held that the "residual clause" contained in Title 18 U.S.C. Section 924 (e)(2)(ii), known as the Armed Career Criminal Act ("ACCA"), is unconstitutionally vague and void "in all its applications." at 2555. The ACCA defined a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year...that---
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

The underlined portion of the Act is know as the

"residual clause." 18 U.S.C. Section 924 (e)(B)(ii).

The Supreme Court in Johnson explained that the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," and therefore, "increasing a defendant's sentence under the clause denies due process of law." 135 S. Ct. 2557.

Applying Johnson, the Ninth Circuit Court of Appeals

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held that the "residual clause" contained in the Federal Criminal Code's definition of "crime of violence" is also unconstitutionally vague. See Dimaya v Lynch, 803 F.3d 1110, 1120 (9th Cir. 2015).

More specifically, 18 U.S.C. Section 16 articulates:

The term "crime of violence" means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and 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.

Section 16 (b) is known as the Act's "residual clause."

The Ninth Circuit held that if the ACCA's definition of "violent felony," as contained in Section 924 (e)(2)(B)(ii), is unconstitutionally vague, then so too is the Federal Criminal Code's definition of "crime of violence," as contained in 18 U.S.C. Section 16 (b). Dimaya, supra.

The Government, however, claimed that the Supreme Court's Johnson decision only applied to the ACCA, and thus, was not applicable to other unconstitutionally vague criminal statutes such as 18 U.S.C. Section 16 (b). But the Supreme Court disagreed with the Government and, applying its precedents as it should, affirmed the Ninth Circuit's Dimaya decision. See Sessions v Dimaya, 138 S. Ct. 1204 (2018) (affirming the Ninth Circuit's Dimaya v Lynch decision and holding that the residual clause of the Federal Criminal Code's definition of

"crime of violence" was impermissibly vague in violation of due process).

In the case at bar, Hinkson was convicted in 2004 of three counts of solicitation to commit a crime of violence (i.e., murder) in violation of 18 U.S.C. Section 373. At the time of his conviction, sentencing, direct appeal and available post-conviction, sentencing, direct appeal and available post-conviction remedy (28 U.S.C. Section), the Ninth Circuit had held that solicitation to commit murder was a crime of violence. See United States v Cox, 74 F.3d 189 (9th Cir. 1996)(finding that the district court properly considered defendant's prior conviction for solicitation of murder as a crime of violence for sentencing purposes, and affirming the district court's judgment). See also United States v Raymundo, 628 F.3d 1169 (9th Cir. 2011)(holding that solicitation of murder is a crime of violence.

18 U.S.C. Section 373 articulates:

(a) whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against the property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands,

induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.

Here, Hinkson was charged in an Eleven Count Superseding Indictment with alleged solicitation and threat offenses. The Jury, however, disbelieved many of the allegations and evidence presented by the government at trial. The jury acquitted Hinkson on several counts and hung on others. It ultimately found Hinkson guilty on counts seven, eight and nine. In these counts, the government's only witness was Elven Joe Swisher, an alleged decorated Korean war veteran who, according to federal prosecutors and Swisher, was solicited by Hinkson because Hinkson had investigated Swisher's war experience and learned that Swisher had fought in active combat in the Korean war, was awarded many medals of honor including a purple heart, and had killed many people. 1

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1. After Hinkson's jury trial, the government prosecuted Elven Joe Swisher for defrauding the government. Specifically, it was exposed that Swisher had [not] served in combat in the Korean War, had not earned [any] medals of honor including the purple heart he wore on his lapel at Hinkson's jury trial while he testified, and had [never] killed anyone. See United States v. Swisher, No. CR-07-182-BLW, U.S. District Court, District of Idaho & Montana.

At Hinkson's sentencing, the court applied the 2002 United States Sentencing Guidelines ("U.S.S.G.") Manual Section 2A1.5 "Conspiracy or Solicitation to commit Murder." Under Section 2A1.5, Hinkson's starting base offense level ("BOL") was 28. Four (4) levels were added under Section 2A1.5 (b)(1) (offer or receipt of anything or pecuniary value). Three (3) levels were added under Section 3A1.2 (official victim. Three (3) levels were added under Section 2J1.7 (commission of offense while on release), for a total offense level of 38.

However, and while the alleged scheme as outlined in the indictment reveals that this case is [a] unit of prosecution, 2 the Probation Officer, as set forth in the Presentence Investigation Report ("PSR"), treated the three Section 373 offenses as separate units of prosecution and added three (3) additional levels under Section 3D1.4 (determining the combined offense level). 3 Thus, the final base offense level

was calculated at 41, criminal history category I, and a guideline sentencing range of 324-405 months.

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2. See United States v Charles, 626 Fed. Appx. 691, No. 13-50233, 2015 U.S. App. Lexis 16875 (9th Cir. Sept. 23, 2015)(holding that to determine whether counts are multiplicitious, a court looks to how the indictment defines the scheme and examines how many executions of the scheme are alleged, a factually intensive inquiry).

3. See United States v Gordon, 2017 U.S. App. Lexis 22249, No. 16-1896 (1st Cir. Nov. 7, 2017)(holding that indictment was multiplicitious where murder for hire was a single plot.

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Based on this Court's precedents and how the indictment defined the scheme in this case, Hinkson should have been prosecuted under a single unit of prosecution, not three.

Moreover, U.S.S.G. Section 5G1.2 articulates:

(a) Except as provided in subsection (e), the sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to

be imposed: and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by the statute and imposed independently.

In the instant case, Hinkson was convicted under 18 U.S.C. Section 373. The statute outlines that a person convicted "shall be imprisoned for not more than twenty years." The statute does not state that the sentences imposed under the statute shall be run consecutive. Yet the sentencing court ran the sentences consecutive, no doubt, because under Ninth Circuit precedent at the time, convictions for solicitation to commit murder were held to be crimes of violence, and conspiracy and solicitation are treated the same under the Guidelines. See U.S.S.G. Section 2A1.5 ("Conspiracy or Solicitation to Commit Murder").

Recently, in United States v McCollun, 2018 U.S. App. Lexis 6953, No. 17-4296 (4th Cir. 2018) the court held that under the categorical approach conspiracy to commit murder is not a crime of violence.

Like conspiracy, solicitation to commit murder can

only be a crime of violence under the residual clause of 18 U.S.C. Section 16 (b). Pursuant to the Supreme Court's recent decision in Sessions v Dimaya, 138 S. Ct. 1204 (2018), Section 16 (b) is unconstitutionally vague and void. Therefore, Hinkson's convictions under 18 U.S.C. Section 373 are not crimes of violence and he should be entitled to resentencing without the offenses for which he was convicted being labeled "crimes of violence."

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Standard for obtaining permission to file a second Section 2255 Motion in District Court

A federal prisoner may not file a second or successive petition unless he or she makes a prima facie showing to the Court of Appeals that the petition is based on (1) a new rule, (2) of constitutional law, (3) made retroactive to cases on collateral review by the Supreme Court, (4) that was previously unavailable. Ezell v United States, 778 F. 3d 762 (9th Cir. 2014) citing Tyler v Cain, 533 U.S. 656, 662 (2001). 28 U.S.C. Section 2255 (h)(2).

A prima facie showing in the United States Court of Appeals for the Ninth Circuit is a sufficient showing of possible merit to warrant a fuller exploration by the district court. Cox v Powers, 525 Fed. Appx. 541, No 11-56954,

(9th Cir. 2013).

Hinkson would submit that the Supreme Court's

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decision in Sessions v Dimaya, 138 S. Ct 1204 (2018) is a new rule of constitutional law that, pursuant to the Supreme Court's decision and standard articulated in Welch v United States, 136 S. Ct. 1257 (2016, is retroactively applicable to collateral review no less than the Supreme Court's decision in Johnson v United States, 135 S. Ct. 2551 (2015. Therefore the filing of a second Section 2255 motion in the district court.

CONCLUSION

For the foregoing reasons, Hinkson respectfully moves the Court for authorization to file a second motion to vacate sentence under 28 U.S.C. Section 2255 in the district court.

Respectfully submitted

David Roland Hinkson, Pro se

Reg. No. 08795-023

USP McCreary

P.O. Box 3000

Pine Knot, KY 42635

1. United States District Court, District of Idaho.

2. Date of judgment of conviction: June 13, 2005

3. 30 Years (10, 10, 10 consecutive).

4. Nature of offense (all counts): 18 U.S.C. Section 373 (Solicitation to commit a "crime of violence," i.e., murder-for-hire).

5. What was your plea? (a) Not guilty X

6. Jury Trial: Yes

7 Yes testified at trial: Yes

8. Did you appeal? Yes.

9. (a) Court Ninth Circuit Court of Appeals (Case No. 05-30303)

(b) Appeal Granted but reversed En Banc (Change of Standard - Voilated ex-post facto)

(c) Date of result: May 30, 2008; En Banc Decision November 5, 2009

10. Yes filed previous petitions.

(a)(1) Name of court: Sentencing Court, District of Idaho, No. 1:12-cv-196-RCT

(2) Nature of proceeding: 28 U.S.C. Section 2255.

(3) Grounds raised: Newly Discovered Evidence; Judicial Bias; ;Brady Violation; Jury Misconduct; Government Misconduct; And Prosecutorial Misconduct.

(4). No evidentiary hearing.

5. Result: Petition Denied

Date of result: August 28, 2012

(b) Name of Court: U.S. District Court, E.D. California, No. 1:13-cv-1571-AWI-JLT

Nature of Proceeding: 28 U.S.C. Section 2241

(3) Grounds raised: Hinkson presented several arguement relating to
his actual innocence of the offenses of conviction (i.e.,
solicitation to commit a "crime of violence, three counts,
under 18 U.S.C. Section 373, murder-for-hire).

(4) No evidenctiary Hearing.

(5) Result: Petition Denied

From

To: Clerk of Court
U.S. Court of Appeals
Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

RE: Pro Se Filing of 28 U.S.C. Secton 2244 Application
(re: 1:04-cr-00127-RCT, U.S. District Court, Idaho)

Dear Sir or Ma'am:

I am the pro se applicatn in the instant case. Enclosed for filing iwth the Court please find my (1) Application for Authorization to File a Second Section 2255 Motion in the District Court Pursuant to 28 U.S.C. Section 2244 and 28 U.S.C. Section 2255 (h)(2), (2) Memorandum of Fact and Law in Support dof Application; and (3) Attachments A-E.

Please note that Attachment-B is missing because I do not have a copy of the prior Section 2255 ruling. However, my family is sending the prior Section 2255 ruling to this Court immediately to be added to the application (Attachment-B to the Memorandum of Fact and Law).

If anything else is necessary, please let me know and I will promptly act. Thank you.

Sincerely

David R. Hinkson Pro se

Amended 2241

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

SOUTHERN DIVISION AT LONDON

DAVID ROLAND HINKSON,

PLAINTIFF-PETITIONER,

VS.) No. 6:18-CV-104-DLB

C. GOMEZ, ACTING WARDEN,

DEFENDANT(S)-RESPONDENT.

PETITIONER'S MOTION TO BRING NEW SUPREME COURT PRECEDENT TO THE ATTENTION OF THE COURT IN SUPPORT OF REQUESTED 28 USC SECTION 2241 RELIEF

NOW COMES the Petitioner, David Roland Hinkson, pro se and pursuant to Fed. R. Civ. P. 7 (b), Haines v Kerner, 404 U.S. 519 (1972), and any and all other applicable legal authority, hereby brings to the court's attention and requests that the Court consider a new rule by the Supreme Court invalidating 18 U.S.C. Section 16 (b) as articulated in Sessions v Dimaya, 138 S. Ct. 1204 (2018) as it relates to the Petitioner's "crime of violence" claim set forth in his habeas corpus petition under 28 U.S.C. Section 2241, and for the following reasons:

1. Hinkson was convicted of three counts of solicitation to commit a crime of violence (murder for hire) in violation of 18 U.S.C. 373.

2. At the time of his sentencing, direct appeal, and previous post conviction proceedings, the Ninth Circuit, where Hinkson was convicted, had held that solicitation to commit murder was a crime of violence. See United States v Cox, 74 F.3d 189 (9th Cir. 1996) and United States v Raymundo, 628 F. 3d 1169 (9th Cir. 2011).

3. The Federal Criminal Code's definition of "crime of violence" is articulated in 18 U.S.C. Section 16 as follows:

> "The term crime of violence" means--
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and 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."

4. Conspiracy and solicitation to commit murder are treated the same under the United States Sentencing Guidelines

(U.S.S.G.) Section 2A1.5.

5. In United States v McCollum, 2018 U.S. App. Lexis 6953, No. 17-4296 (4th Cir. 2018) the court held that, after Johnson v United States, 135 S. Ct. 2551 (2015) and Mathis v United States, 136, Ct. 2243 (2016), conspiracy to commit

murder is not a crime of violence.

6. Solicitation to commit murder can be a crime of violence only under the residual clause of 18 U.S.C. Section 16 (b).

7. In Sessions v Dimaya, 138 S. Ct. 1204 (2018) the Supreme Court held that the residual clause contained in Section 16 (b) is unconstitutionally vague and void.

8. In his Section 2241 petition, Hinkson raises the claims (1) that his three convictions for solicitation to commit murder should have only been one unit of prosecution, not three, and therefore he should have received a single sentence; (2) that his solicitation convictions are not "crimes of violence," and (3) that his sentences should have run concurrently.

9. The Supreme Court's recent decision in Sessions v Dimaya, supra, pertains directly to Hinkson's three solicitation offenses and compels the relief he seeks in his Section 2241 petition.

10. For these reasons, Hinkson brings Sessions v Dimaya, 138 S. Ct. 1204 (2018) to the attention of the Court, and asks that the Court consider this case in reference to his claims raised in his Section 2241 petition.

WHEREFORE Hinkson respectfully moves the Court to take judicial notice of Sessions v Dimaya, 138 S. Ct. 1204 (2018) and its relevance to his offenses and Section 2241 claims.

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Respectfully submitted

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USP McCreary
P.O. Box 3000
Pine Knot, KY 42635

CERTIFICATE OF SERVICE

I David R. Hinkson, herby certify under 28 USC Section 1746 that I served a true and correct copy of the instant motion, via

the institutional legal mail system and first-class postage prepaid, on this _____day of June, 2018, to : Mr. C. Gomez, Acting Warden, USP McCreary, P.O. Box 3000, Pine Knot, KY 42635.

_____

David R. Hinkson, Pro Se