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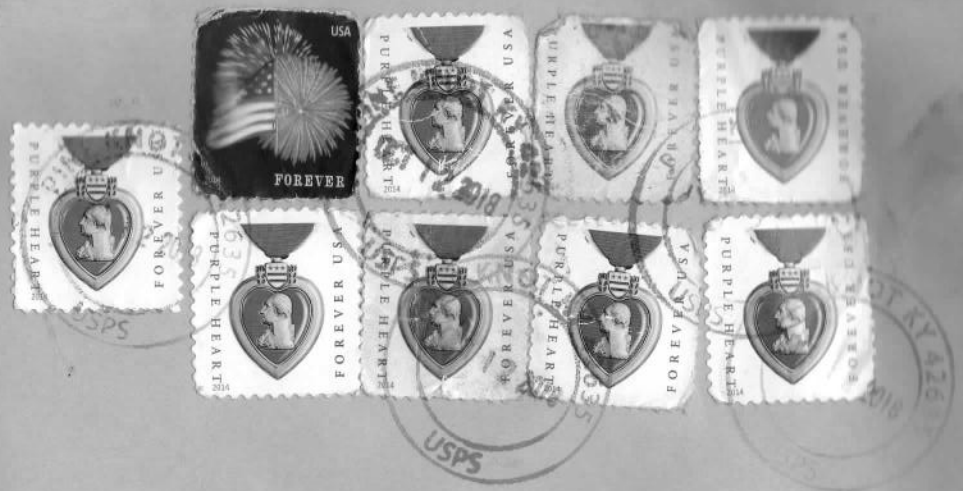

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12/24

SUPREME COURT OF THE UNITED STATES

David Roland Hinkson,	)	
	)	
Petitioner,	)	
	)	
	)	No.
	)	
vs.	)	(re: USA v Hinkson, No. 1:04CR127RCT)
	)	
	)	
	)	
United States of America,	)	
	)	
Respondent.	)	

PRO SE FEDERAL PRISONER'S PETITION FOR WRIT OF HABEAS CORPUS

PURSUANT TO 28 U.S.C.S. § 2241(a)

COMES NOW the Petitioner, David Roland Hinkson, pro se and pursuant to Article I, § 9, cl. 2 of the U.S. Constitution, 28 U.S.C.S. § 2241, Felker v Turpin, 518 U.S. 651 (1996), Haines v Kerner, 404 U.S. 519 (1972), Harris v Nelson, 394 U.S. 286 (1969), United States v Morgan, 346 U.S. 502 (1954), Ex Parte Hull, 312 U.S. 546 (1941), and any and all other applicable legal authority, hereby moves the Court for a Petition for Writ of Habeas Corpus, and in support thereof, would state and argue as follows.

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REASON(S) FOR NOT FILING THE PETITION IN THE DISTRICT COURT

(See 28 U.S.C. § 2242 & S. Ct. Rule 20)

28 U.S.C. § 2244(b)(3)(E) states: The grant or denial of authorization by a court of appeals is not appealable or subject to a petition for rehearing or a petition for writ of certiorari.

Thus, under Ground One, Hinkson has no other available remedy. A habeas corpus petition under 28 U.S.C. § 2241 is the only other available remedy. Under § 2241, a Justice of this Court, or the whole Court, has jurisdiction to review Hinkson's constitutional claim, and in the interest of justice, it should, particularly where he was arbitrarily denied authorization by the court of appeals to file a second motion to vacate sentence under 28 U.S.C. § 2255 after this Court's decisions in Sessions v Dimaya, 138 S. Ct. 1204 (2018) and Welch v United States, 136 S. Ct. 1257 (2016), but where he qualified for authorization under 28 U.S.C. § 2255(h)(2).

Under Ground Two, there is no other court in the nation, other than this Court, with the authority to overrule the Ninth Circuit's decision in United States v Hinkson, 585 F.3d 1247 (9th Cir. 2009), in which Hinkson would assert is violative of the ex post facto clause [Art. I, § 9, cl. 3] of the United States Constitution, as applied to his case. The Ninth Circuit's 6 to 5 en banc decision results in a miscarriage of justice and a fundamental defect in the criminal proceedings, and in the interest of justice, this Court should review that decision.

QUESTION(S) PRESENTED FOR REVIEW

I. Whether Hinkson is entitled to habeas corpus relief under 28 U.S.C. § 2241 where he "asserted" a valid claim of a new rule of constitutional law [Sessions v Dimaya, 138 S. Ct. 1204 (2018)], retroactively applicable by the Supreme Court [Welch v United States, 136 S. Ct. 1257 (2016)] on collateral review, but was arbitrarily denied authorization to file a second motion to vacate sentence under 28 U.S.C. § 2255 by the court of appeals, and where the denial of authorization by the court of appeals is not appealable or subject to a petition for rehearing or a petition for writ of certiorari [28 U.S.C. § 2244(b)(3)(E)], and thus, Hinkson has no other available remedy to challenge his sentence under Dimaya and Welch even though he is entitled to relief.

II. Whether Hinkson is entitled to habeas corpus relief under 28 U.S.C. § 2241 where his panel victory and reversal of his convictions on direct appeal was arbitrarily reversed by the split (6 to 5) en banc court of appeals after it changed its legal standard while Hinkson was on direct appeal, and applied the new legal standard to Hinkson's case in a manner that resulted in a harsher outcome, and thus, violated the ex post facto clause [Art. I, § 9, cl. 3] of the Constitution of the United States.

PARTIES TO LITIGATION

The Parties to this litigation are listed on the cover page of the instant petition for writ of habeas corpus under 28 U.S.C. § 2241.

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OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Ninth Circuit in Hinkson's direct criminal appeal is contained in Appendix-A, and cited as United States v Hinkson, 526 F.3d 1262 (9th Cir. 2008)(reversed and remanded).

2. The opinion of the En Banc decision of the Ninth Circuit is contained in Appendix-B, and cited as United States v Hinkson, 585 F.3d 1247 (9th Cir. 2009)(Judgment affirmed).

3. The opinion of the denial of Hinkson's motion to vacate sentence under 28 U.S.C. § 2255 is contained in Appendix-C.

4. The opinion of the denial of Hinkson's petition for writ of habeas corpus under 28 U.S.C. § 2241 is contained in Appendix-D.

5. The opinion of the denial of Hinkson's petition for authorization to file a second motion to vacate sentence under 28 U.S.C. § 2255 is contained in Appendix-E.

JURISDICTION

This Court has jurisdiction over the instant petition for writ of habeas corpus pursuant to Article I, § 9, cl. 2 of the United States Constitution, and 28 U.S.C. § 2241 and 28 U.S.C. § 2106. See also Harris v Nelson, 394 U.S. 286 (1969), and United States v Morgan, 346 U.S. 502 (1954).

Specifically, Art. I, § 9, cl. 2 of the United States Constitution articulates:

> The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Further, 28 U.S.C. § 2241 articulates:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any Justice thereof, the district courts and any Circuit Judge within their respective jurisdictions...
> (c) The writ of habeas corpus shall not extend to a prisoner unless (1) he is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or...(3) he is in custody in violation of the Constitution or laws or treaties of the United States; or...

Hinkson is serving a federal term of imprisonment for 43 years, and his sentence is violative of the Constitution and

laws of the United States.

In Harris v Nelson, 394 U.S. 286 (1969) the Court held that the All Writs Act, 28 U.S.C. § 1651, extends to habeas corpus proceedings and authorizes courts to fashion appropriate modes of procedure by analogy to existing rules or otherwise in conformity with judicial usage. The Court further held that the provision of the United States Constitution relating to the suspension of the writ of habeas corpus, Art. I, § 9, cl. 2, recognizes the pre-eminent role of the writ, the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. at 291.

In United States v Morgan, 346 U.S. 502 (1954) the Court held that in behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief. at 505 citing Darr v Buford, 339 U.S. 200, 203-204 (1950)(holding the "the writ of habeas corpus commands general recognition as the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his Constitutional rights. To make this protection effective for unlettered prisoners without friends or funds, federal courts have long disregarded legalistic requirements in examining applications for the writ, and judged the papers by the simple statutory test of whether facts are alleged that entitle the applicant to relief."). See also Haines v Kerner, 404 U.S. 519 (1972)(holding pro se petitions to less stringent standards than those drafted by lawyers), and Erickson v Pardus, 551 U.S. 89, 94 (2007)(same).

Further, in Trevino v Thaler, 133 S. Ct. 1911 (2013) the Court held that a petitioner may obtain habeas corpus review of a procedurally defaulted claim by showing cause and prejudice from a violation of federal law. Ineffective assistance of appellate counsel on direct appellate review could amount to "cause" excusing a defendant's failure to raise, and thus procedurally defaulting, a constitutional claim. Id.

Here, Hinkson asserts that his appellate counsel was constitutionally ineffective in violation of the Sixth Amendment and under the two-prong standard articulated by this Court in Strickland v Washington, 466 U.S. 668 (1984) in failing to raise claim two (i.e., the ex post facto clause violation claim) in his petition for writ of certiorari from the denial of the direct criminal appeal. See also English v United States, 42 F.3d 473, 477 (9th Cir. 1994)(holding that the petitioners did not commit any procedural default because their claim was constitutionally based and their failure to raise the claim on direct review did not constitute a deliberate bypass).

Thus, this Court has jurisdiction over the instant petition for writ of habeas corpus. See also 28 U.S.C. § 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. I, § 9, cl. 3, U.S. CONST: No Bill of Attainder or ex post facto law shall be passed.

AMEND V, U.S. CONST: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; 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, nor shall private property be taken for public use, without just compensation.

AMEND XIV, U.S. CONST: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 18 U.S.C. § 16: 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.

18 U.S.C. § 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.

Title 28 U.S.C. § 2255:

A federal prisoner may move to vacate his sentence under § 2255 if the sentence was imposed in violation of, inter alia, the Constitution or federal law. § 2255(a). A § 2255 motion

must be filed within one year of, inter alia, "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." § 2255(f)(3). "A second or successive motion must be certified as provided in [28 U.S.C. § 2244] by a panel of the appropriate court of appeals to contain...a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h)(2).

Title 28 U.S.C. § 2244:

Under § 2244, there are five procedures: (1) the prisoner must first apply for authroization in the court of appeals, 28 U.S.C. § 2244(b)(3)(A); (2) a three-judge panel of the court of appeals must decide the application, 28 U.S.C. § 2244(b)(3)(B); (3) the court of appeals may authorize the filing of a successive motion only if it determines that the prisoner has made "a prima facie showing that the application satisfies the requirements of this subsection," 28 U.S.C. § 2244(b)(3)(C); (4) the court of appeals must grant or deny the application within thirty days, 28 U.S.C. § 2244(b)(3)(D); and (5) the grant or denial of auhtorization by a court of appeals is not appealable or subject to a petition for rehearing or a petition for writ of certiorari, 28 U.S.C. § 2244(b)(3)(E).

STATEMENT OF THE CASE

Hinkson was the owner and operated of WaterOz, a successful water bottling company located in Grangeville, Idaho. In 2002, Hinkson was charged and convicted of several business related offenses including willful failure to file tax returns, willful failure to collect federal taxes, misbranded drug, adulterated device, structuring transactions to avoid reporting requirements, and aiding and abetting. United States v Hinkson, No. 3:02-cr-142-RCT[1] (D. Idaho).

Hinkson was then charged and convicted in the United States District Court for the District of Idaho for three counts of solicitation to commit a crime of violence (i.e., murder for hire) in violation of 18 U.S.C. § 373. United States v Hinkson, No. 1:04-cr-127-RCT (D. Idaho). The sentencing from both trials were consolidated.

Specifically, on April 25th and June 3, 2005, a sentencing hearing was conducted before Judge Tallman in both the tax and solicitation cases. At the hearing, the court sentenced Hinkson on the non-violent tax offenses to a total term of 10-years imprisonment. The court then imposed three 10-year consecutive sentences for each solicitation count

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1. Judge Richard C. Tallman is a Ninth Circuit Court of Appeals Judge who was assigned to preside over Hinkson's criminal jury trials in the District of Idaho.

and three 1-year consecutive sentences for incurring the solicitation offenses while on pretrial release. The court then ran the 10-year tax related sentence consecutive to the 33-year sentence in the solicitation case for an aggregate term of imprisonment for 43-years. Hinkson timely appealed.

On direct appeal, the Ninth Circuit applied its abuse of discretion standard and reversed the district court's denial of Hinkson's Fed. R. Crim. P. 33 motion for new trial. See United States v Hinkson, 526 F.3d 1262 (9th Cir. 2008)(reversed and remanded). However, the case was then taken en banc. The Ninth Circuit changed its abuse of discretion standard (now called the "Hinkson standard"), applied the new standard to Hinkson's case, and reversed the panel decision and affirmed Judge Tallman's denial of Hinkson's motion for new trial. See United States v Hinkson, 585 F.3d 1247 (9th Cir. 2009)(Judgment affirmed). This Court denied certiorari; However, counsel for Hinkson did not raise the issue presented here (i.e., violation of the Ex Post Facto Clause of Art. I, § 9, cl. 3). Hinkson v United States, No. 10-869 (Cert. Denied April, 2011).

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2. The tax related offenses were non-crimes of violence and thus ran concurrently. However, at the time of sentencing in 2005 the solicitation offenses were "crimes of violence" under Ninth Circuit precedent, and therefore, ran consecutively to each other and to the tax offense sentences.

At trial Hinkson was represented by attorney Wesley Hoyt. However, after the trial, Hoyt moved to withdraw from the case claiming a conflict of interest. See (1:04-cr-127, DE#242). The district court allowed Hoyt to withdraw and ordered that attorney Hoyt should have no further involvment in future proceedings relating to this case. See (id. DE#249). Nevertheless, attorney Hoyt continued to receive $2,500 weekly from Hinkson's family for approximately twelve (12) years, and essentially sabotaged Hinkson's post-conviction remedies in proceedings under 28 U.S.C. § 2255 (No. 1:12-cv-196-RCT), and 28 U.S.C. § 2241 (No. 1:13-cv-01571-JLT, E.D. Cal.).[3]

Hinkson has now been incarcerated in the Federal Bureau of Prisons ("FBOP") since 2005. In 2017 he was transferred to United States Penitentiary ("USP") McCreary in Pine Knot, Kentucky (i.e., the Sixth Circuit). Here, Hinkson filed a petition under 28 U.S.C. § 2241 arguing, inter alia, that his three convictions and/or sentences under 18 U.S.C. § 373 should merge because the indictment alleged a single plot, not three. Hinkson v C. Gomez, Warden, No. 6:18-cv-00104-DLB (E.D. KY). However, the district court denied the habeas petition and Hinkson is currently on appeal, No. 18-5833 (6th Cir. 2018)(arguing whether the district court erred in denying his petition).

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3. While attorney Hoyt compelled Hinkson to file his § 2255 and § 2241 petitions in a pro se capacity, attorney Hoyt was the individual who completed the petitions, and in doing so, failed to raise claims that should have been raised in those proceedings.

Additionally, on April 17, 2018, this Court decided Sessions v Dimaya, 138 S. Ct. 1204 (2018)(holding that the residual clause of 18 U.S.C. § 16(b) is unconstitutionally vague). Hinkson then filed a petition under 28 U.S.C. § 2244 in the Ninth Circuit Court of Appeals seeking authorization to file a second § 2255 motion in the district court arguing that the solicitation offenses are not "crimes of violence," and therefore, he should be entitled to resentencing. See Hinkson v United States, No. 18-71748 (9th Cir. Aug. 27, 2018). However, on August 27, 2018, the Ninth Circuit denied Hinkson authorization to file a second § 2255 motion merely asserting that the sentencing court had authority to run the solicitation counts consecutively without any regard for this Court's Dimaya decision, and the Ninth Circuit precedents that held the murder for hire offenses were crimes of violence at the time of Hinkson's conviction and sentence.[4] Nevertheless, there is no appeal or rehearing available from the denial of a petition under Title 28 U.S.C. § 2244. Moreover, § 2241 is not available to Hinkson in the Sixth Circuit for such an issue because Dimaya is a new rule of constitutional law, not a statutory interpretation by this Court, that would allow Hinkson to file a § 2241 petition

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4. The murder for hire offenses were previously held to be "crimes of violence" by the Ninth Circuit. See [infra]. But with this Court's invalidation of § 16(b)'s residual clause, Dimaya has overruled Ninth Circuit precedent.

in the jurisdiction of incarceration. See Hill v Masters, 836 F.3d 591 (6th Cir. 2016)(outlining the Sixth Circuit's standard for prisoners filing a § 2241 petition).

Thus, Hinkson has no other available remedy to bring the constitutions claims he raises here, before the federal judiciary. Furthermore, this case may very well present a miscarriage of justice and/or fundamental defect in the proceedings that should not go unheard by this Court.

GROUND ONE

Whether Hinkson is entitled to habeas corpus relief under 28 U.S.C. § 2241 where he "asserted" a valid claim of a new rule of constitutional law [Sessions v Dimaya, 138 S. Ct. 1204 (2018)], retroactively applicable by the Supreme Court [Welch v United States, 136 S. Ct. 1257 (2016)] on collateral review, but was arbitrarily denied authorization to file a second motion to vacate sentence under 28 U.S.C. § 2255 by the court of apeals, and where the denial of authorization by the court of appeals is not appealable or subject to a petition for rehearing or a petition for writ of certiorari [28 U.S.C. § 2244(b)(3)(E)],and thus, Hinkson has no other available remedy to challenge his sentence under Dimaya and Welch even though he is entitled to relief.

REASONS FOR GRANTING THIS PETITION

[1]

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. § 924(e)(2)(B)(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 known as the "residual clause." 18 U.S.C. § 924(e)(2)(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. at 2557.

Applying Johnson, the Ninth Circuit Court of Appeals

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. § 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 § 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. § 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. § 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 2005 of three counts of solicitation to commit a crime of violence (i.e., murder) in violation of 18 U.S.C. § 373. At the time of his conviction, sentencing, direct appeal and available post-conviction remedy (28 U.S.C. §§ 2255 & 2241), 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. § 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.[5]

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5. 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 active 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 Guideline ("U.S.S.G.") Manual § 2A1.5 "Conspiracy or Solicitation to Commit Murder." Under § 2A1.5, Hinkson's starting base offense level ("BOL") was 28. Four (4) levels were added under § 2A1.5(b)(1)(offer or receipt of anything or pecuniary value). Three (3) levels were added under § 3A1.2 (official victim). Three (3) levels were added under § 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,[6] the Probation Officer, as set forth in the Presentence Investigation Report ("PSR"), treated the three § 373 offenses as separate units of prosecution and added three (3) additional levels under § 3D1.4 (determining the combined offense level).[7] 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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6. 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 multiplicitous, a court looks to how the indictment defines the scheme and examines how many executions of the scheme are alleged, a factually intensive inquiry).

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

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. § 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 that statute and imposed independently.

In the instant case, Hinkson was convicted under 18 U.S.C. § 373. The statute outlines that a person so 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, because under the 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. § 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. § 16(b). But pursuant to this Court's decision in Sessions v Dimaya, 138 S. Ct. 1204 (April 17, 2018), § 16(b) is unconstitutionally vague and void. Therefore, Hinkson's three convictions under 18 U.S.C. § 373 are not crimes of violence and he should have the same right as every other criminal defendant- to a fair and impartial sentencing hearing based on accurate information.

But as stated above, the Ninth Circuit has denied Hinkson authorization to file a second § 2255 motion in the district court. And based on this Court's Dimaya decision, it appears that this decision by the Ninth Circuit is arbitrary and capricious, with no recourse for Hinkson. Moreover, habeas corpus under § 2241 in the jurisdiction of incarceration is also not available to Hinkson. See Hill v Masters, 836 F.3d 591 (6th Cir. 2016) (articulating § 2241 standard for sentencing claims).

Therefore, a petition for writ of habeas corpus in this Court is the only recourse available to Hinkson, and in the interest of justice, this Court should hear the petition because, among other things, this case presents a miscarriage of justice, and at the very least, a fundamental defect in the criminal proceedings that the great writ of habeas corpus under Article I, § 9, cl. 2 of the United States Constitution, and Title 28 U.S.C. § 2241 were created to correct.

Wherefore, Hinkson would respectfully move the Court

to vacate the Ninth Circuit's August 27, 2018, order denying him authorization to file a second motion to vacate sentence under 28 U.S.C. § 2255(h)(2) and direct the Court of Appeals to grant Hinkson authorization to file a second § 2255 motion in the district court because he unequivocally meets the statutory requirements for permission by the Court of Appeals to file the second § 2255 motion after this Court's recent decisions in Sessions v Dimaya, 138 S. Ct. 1204 (2018) and Welch v United States, 136 S. Ct. 1257 (2016). See 28 U.S.C. § 2244(b)(3)(C) and 28 U.S.C. § 2255(h)(2).[8]

Hence, Hinkson's application for authorization to file a second motion to vacate sentence relied on this Court's Dimaya and Welch decisions, i.e., a new retroactive rule of constitutional law by the Supreme Court.

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8. The Congressional Statutes articulate that an applicant show only that his application for authorization to file a second § 2255 motion relies on a new rule of constitutional law made retroactive by the Supreme Court.

GROUND TWO

Whether Hinkson is entitled habeas corpus relief under 28 U.S.C. § 2241 where his panel victory and reversal of his convictions on direct appeal was arbitrarily reversed by the split (6 to 5) en banc court of appeals after it changed its legal standard while Hinkson was on direct appeal, and applied the new legal standard to Hinkson's case in a manner that resulted in a harsher outcome, and thus, violated the ex post facto clause [Art. I, § 9, cl. 3] of the Constitution of the United States.

REASONS FOR GRANTING THIS PETITION

[2]

As noted above, the government's key witness in Hinkson's case was Elven Joe Swisher. See United States v Hinkson, 526 F.3d 1262 (9th Cir. 2008). During Hinkson's jury trial, while wearing a Purple Heart on his lapel, and waiving a forged DD-214 form in front of the jury, Swisher testified that he had told Hinkson that he was a Korean War combat vateran and that Hinkson, impressed by Swisher's military exploits, solicited him to kill three federal officials. Id. at 1265. Furthermore, the government maintained in its opening statement to the jury that Swisher was a Korean War combat veteran, and it also maintained throughout the trial that Hinkson's understanding of Swisher's military exploits showed that he was serious in his alleged solicitations of Swisher. Id. But at the time of appeal, the government conceded that Swisher neither served in combat nor earned any personal military commendations, and that Swisher presented a forged military document (i.e., a DD-214 form) in court, in front of the jury while testifying, and repeatedly lied under oath at trial about his military record. Id.

Thus, Hinkson appealed the district court's denial of his new trial motion under Fed. R. Crim. P. 33 arguing, inter alia, that he is entitled to a new trial based upon his discovery after trial of evidence that conclusively establishes Swisher's fabrications. 526 F.3d at 1265.

On July 30, 2007, the government indicted Swisher for

knowingly wearing military decorations to which he was not entitled, including the Purple Heart, in violation of 18 U.S.C. § 704(a); for willfully and knowingly making false representations about his military service in order to obtain benefits to which he was not entitled, in violation of 18 U.S.C. § 1001(a)(2) and 1001(a)(3), and for presenting false testimony and a "forged form DD-214" in order to obtain benefits to which he was not enitled, in violation of 18 U.S.C. §§ 641 and 642. See id. at 1276-77. On April 11, 2008, Swisher was convicted on all three counts of the indictment. Id. at 1277.

The Ninth Circuit reviewed the district court's denial of Hinkson's motion for a new trial based upon newly discovered evidence for abuse of discretion. Id. at 1277 citing United States v Sarno, 73 F.3d 1470, 1507 (9th Cir. 1995). Under Ninth Circuit law, at the time of Hinkson's alleged offenses and throughout his criminal proceedings and initial direct appeal, a district court abuses its discretion when it "makes an error of law," when it "rests its decision on clearly erroneous findings of fact," or when the Appellate Court "is left with a definite and firm conviction that the district court committed a clear error of judgment." Id. at 1277 quoting Delay v Gordon, 475 F.3d 1039, 1043 (9th Cir. 2007)(internal quotation marks omitted).

Under Ninth Circuit precedent at the time of Hinkson's direct criminal appeal, a 2-1 panel of the court held that the district court abused its discretion in denying Hinkson's motion for a new trial. Id. Thus, the court reversed the district court's denial of Hinkson's motion for a new trial and remanded to the

district court to allow it to vacate his conviction and sentence on the conspiracy counts. Id.

Hinkson's appeal or case was then ordered to be reheard en banc pursuant to Circuit Rule 35-3. See United States v Hinkson, 547 F.3d 993 (9th Cir. 2008). On rehearing en banc, the Ninth Circuit voted 6-5 to reverse the panel decision and affirm Judge Tallman's denial of Hinkson's Rule 33 motion. See United States v Hinkson, 585 F.3d 1247 (9th Cir. 2009). In doing so, the Ninth Circuit changed its abuse of discretion standard from that articulated in Delay v Gordon, Supra, 475 F.3d 1039 (9th Cir. 2007), to a newly articulated "Hinkson standard," holding:

> The U.S. Court of Appeals for the Ninth Circuit adopts a two-prong test to determine objectively whether a district court has abused its discretion in denying a motion for a new trial. A district court abuses its discretion when it makes an error of law. Thus, the first step of the abuse of discretion test is to determine de novo whether the trial court identified the correct legal rule to apply to the relief requested. If the trial court failed to do so, the appellate court must conclude it abused its discretion. If the trial court identified the correct legal rule, the appellate court moves to the second step of the abuse of discretion test. The second step of the abuse of discretion test is to determine whether the trial court's application

> of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record. If any of these three apply, only then are we able to have a definite and firm conviction that the district court reached a conclusion that was a mistake or was not among its permissible options, and thus that it abused its discretion by making a clearly erroneous finding of fact. See United States v Hinkson, 585 F.3d 1247 (9th Cir. 2009)(the "Hinkson standard").

More specifically, the en banc court found that this Court's precedents as stated in United States v U.S. Gypsum Co., 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948), and United States v Yellow Cab Co., 338 U.S. 338, 70 S. Ct. 177, 94 L. Ed. 150 (1949)(both articulating "clearly erroneous" standard), "contrast" with each other. See Hinkson, Surpa, 585 F.3d at 1259-61. Thus, the court concluded that "In sum, this analysis leads us to conclude that, by way of the Anderson case [Anderson v City of Bessemer City, N.C., 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985][9] we can create an objective abuse of discretion test that brings the Yellow Cab Co. and U.S. Gypsum Co. line of cases together." Id. at 1261.

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9. In Anderson this Court held that the appeals court had erred in concluding the trial court findings were clearly erroneous, but...

In sum, the Ninth Circuit changed its abuse of discretion standard during Hinkson's direct criminal appeal, applied the the new abuse of discretion standard to Hinkson's case, called it the "Hinkson standard," reversed the Panel's decision that originally applied the law in effect at the time of Hinkson's offense, trial and appeal process, and affirmed the trial judge's denial of Hinkson's motion for new trial. And while a court may of course make a change in the law at any time, it seems unfair and unjust that it would apply a new legal standard that results in a harsher outcome for an accused, to an accused's case after the case has already came this far in the proceedings.

More specifically, Article I, § 9, cl. 3 of the United States Constitution states:

> No Bill or Attainder or Ex Post Facto Law shall be passed.

Here, because the Ninth Circuit Court of Appeals had established its legal standard for judging a trial court's determination, among other things, of the [evidence] presented in a motion for new trial under Fed. R. Crim. P. 33 relating to a criminal jury trial long before Hinkson's criminal proceedings and, until the point of change, throughout his criminal proceedings, it would seem that Hinkson had a right to rely on those legal principles and standards throughout his criminal proceedings. Moreover, in this case, the change in the court's legal standards worked adversly and resulted in a harsher

outcome when applied to the instant case. Therefore, applying the new legal standard to the case at bar, appears to be blatently violative of the Ex Post Facto Clause of the United States Constitution, and the Due Process Clauses of the Fifth & Fourteenth Amendments, as well.Furthermore, the "Hinkson standard" has not been applied fairly and equally by the Ninth Circuit suggesting that it may have been applied unjustly in the case at bar. See e.g., United States v Jackson, 637 Fed. Appx. 353 (9th Cir. 2016) (ruling against the Hinkson standard and reversing the district court, but dissenting Judge Bea states that he would apply the Hinkson standard and affirm).

Thus, Hinskon's conviction and sentence are violative of the United States Constitutional and laws of the United States. [T]his, the Supreme Court of the United States is the only Court in the Nation that has the power and authority to resolve this issue. As such, Hinkson respectfully move a Justice of this Court, or in the alternative, the full Court, to issue its writ of habeas corpus, reverse the en banc Ninth Circuit decision of United States v Hinkson, 585 F.3d 1247 (9th Cir. 2009), direct the Ninth Circuit to reinstate the original Panel decision of United States v Hinkson, 526 F.3d 1262 (9th Cir. 2008), and grant any other relief in which he may be entitled or deemed just and proper by the Court.

CONCLUSION

For the foregoing reasons, Hinkson respectfully moves the Court to issue its writ of habeas corpus and grant the relief requested herein, and any other relief that this Honorable Court may deem just and proper, all premises considered.

Respectfully submitted

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APPENDIX A

A. United States v Hinkson, 526 F.3d 1262 (9th Cir. 2008)

APPENDIX B

B. United States v Hinkson, 585 F.3d 1247 (9th Cir. 2009)(en banc).

APPENDIX C

C. Opinion on denial of 28 USC § 2255 motion (re: David R. Hinkson).

APPENDIX D

D. Opinion on Denial of 28 USC § 2241 petition (re: David R. Hinkson).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

DAVID ROLAND HINKSON,

CASE NO: **1:13-CV-01571-AWI-JLT**

V.

PAUL COPENHAVER,

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 6/4/14

Marianne Matherly
Clerk of Court

ENTERED: **June 4, 2014**

by: /s/ J. Hellings
Deputy Clerk

6-3-2014

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAVID ROLAND HINKSON, Petitioner, v. WARDEN PAUL COPENHAVER, Respondent.	Case No.: 1:13-cv-01571-AWI-JLT ORDER ADOPTING FINDINGS AND RECOMMENDATIONS (Doc. 5) ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS (Doc. 1) ORDER DENYING ALL PENDING MOTIONS (Docs. 20, 21, & 22) ORDER DIRECTING CLERK OF COURT TO ENTER JUDGMENT AND CLOSE CASE ORDER DECLINING TO ISSUE CERTIFICATE OF APPEALABILITY

Petitioner is a federal prisoner proceeding in propria persona with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. On October 21, 2013, the Magistrate Judge assigned to the case issued Findings and Recommendations to dismiss the petition for lack of habeas jurisdiction. (Doc. 5). This Findings and Recommendations was served upon all parties and contained notice that any objections were to be filed within twenty-one days from the date of service of that order. On

December 31, 2013, after receiving an extension of time, Petitioner filed objections to the Magistrate Judge's Findings and Recommendations. (Doc. 9). On December 31, 2013, Petitioner also filed a motion for leave to file a second supplement to the petition. (Doc. 10). That proposed supplement was lodged with the Court. (Doc. 11).

In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), this Court has conducted a *de novo* review of the case. Having carefully reviewed the entire file, including Petitioner's objections and supplements, the Court concludes that the Magistrate Judge's Findings and Recommendations is supported by the record and proper analysis. As the facts and procedural history are well known to the parties and addressed in the Findings and Recommendations and the parties' briefs, they will not be repeated here. Petitioner's basic objection is addressed below.

As explained in more detail by the Magistrate Judge, 28 U.S.C. § 2255 provides that a federal prisoner attacking his sentence "may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). In general, Section 2255 "provides the exclusive procedural mechanism by which a federal prisoner may test the legality of detention." Harrison v. Ollison, 519 F.3d 952, 955 (9th Cir. 2008); Lorentsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000). A federal court cannot consider a petition for habeas relief pursuant to Section 2241 unless it appears that the petitioner's remedy under Section 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e); Harrison, 519 F.3d at 956. A federal prisoner may avail himself of "Section 2255's escape hatch" only when he "(1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim." Harrison, 519 F.3d at 960; Ivy v. Pontesso, 328 F.3d 1057, 1060 (9th Cir. 2003).

The Court must agree with the Magistrate Judge that, despite Plaintiff's arguments to the contrary, Petitioner has had a procedural shot at presenting his claims. The petition and objections focus on Witness Swisher's credibility. Witness Swisher's credibility is attacked based on false testimony surrounding his military career, awards, and duties. This is not the first time Witness Swisher's credibility has been called into question. There is a lengthy history to Petitioner's criminal

case. The issue of Witness Swisher's credibility concerning Witness Swisher's own military service and how it may have influenced a guilty verdict has been debated and resolved numerous times by numerous courts. See U.S. v. Hinkson, 526 F.3d 1262 (9th Cir. 2008) (direct appeal); U.S. v. Hinkson, 585 F.3d 1247 (9th Cir. 2009) (appeal en banc); Hinkson v. U.S., 2012 WL 3776023 (D.Idaho Aug 28, 2012) (section 2255 petition).

When reviewing this issue it appears neither the trial court nor the Ninth Circuit had the additional detail that Witness Swisher was eventually convicted of perjury regarding his false military service statements. However, the impact of the false testimony on Petitioner's guilty verdict was greatly discussed by the Ninth Circuit. The United States District Court for the District of Idaho was made aware of Witness Swisher's perjury conviction in Petitioner's Section 2255 petition.

Witness Swisher's perjured testimony concerned Witness Swisher's background in the military. Witness Swisher has not been convicted of perjury for his testimony or contradicted by formal records on the issue of whether Petitioner solicited Witness Swisher to murder three federal officials. The Court has reviewed Petitioner's Section 2255 petition. It cites to evidence showing inconsistencies about Witness Swisher's military service and the fact Witness Swisher has now been convicted of perjury regarding his military service claims. Because the issues raised in the petition have been raised and addressed in Petitioner's appeals and Section 2255 petition, the Court cannot find relief is available pursuant to Section 2241. Thus, the objections provide no grounds for questioning the Magistrate Judge's analysis.

Moreover, the Court declines to issue a certificate of appealability. A successive petition under 28 U.S.C. § 2255 that is disguised as a § 2241 petition requires a certificate of appealability. Harrison v. Ollison, 519 F.3d 952, 958 (9th Cir. 2008); Porter v. Adams, 244 F.3d 1006, 1007 (9th Cir. 2001). The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(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—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(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) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

If a court denied a petitioner's petition, the court may only issue a certificate of appealability when a petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must establish 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'." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (*quoting* Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

In the present case, the Court finds that Petitioner has not made the required substantial showing of the denial of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists would not find the Court's determination that Petitioner is not entitled to federal

habeas corpus relief debatable, wrong, or deserving of encouragement to proceed further. Thus, the Court DECLINES to issue a certificate of appealability.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations, filed October 21, 2013 (Doc. 5), is ADOPTED IN FULL;
2. The petition for writ of habeas corpus (Doc. 1), is DISMISSED;
3. All pending motions (Docs. 20, 21, and 22), are DENIED;
4. The Clerk of Court is DIRECTED to ENTER JUDGMENT and close the file; and,
5. The Court DECLINES to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: June 3, 2014

MIME-Version:1.0 From:caed_cmecf_helpdesk@caed.uscourts.gov To:CourtMail@localhost.localdomain Message-Id: Subject:Activity in Case 1:13-cv-01571-AWI-JLT (HC) Hinkson v. Copenhaver Order Adopting Findings and Recommendations Content-Type: text/html

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U.S. District Court

Eastern District of California – Live System

Notice of Electronic Filing

The following transaction was entered on 6/4/2014 at 11:45 AM PDT and filed on 6/4/2014

Case Name: (HC) Hinkson v. Copenhaver
Case Number: 1:13-cv-01571-AWI-JLT
Filer:
WARNING: CASE CLOSED on 06/04/2014
Document Number: 25
Docket Text:
ORDER ADOPTING FINDINGS and RECOMMENDATIONS [5] ORDER DISMISSING Petition for Writ of Habeas Corpus [1]; ORDER DENYING All Pending Motions [20], [21], [22]; ORDER DIRECTING Clerk of Court to Enter Judgment and Close Case; ORDER DECLINING TO ISSUE CERTIFICATE OF APPEALABILITY, signed by District Judge Anthony W. Ishii on 6/3/14. (CASE CLOSED)(Hellings, J)

1:13-cv-01571-AWI-JLT Notice has been electronically mailed to:

Bureau of Prisons Regional Counsel wxrolegalinfo@bop.gov

Litigation Coordinator atw/attorney~@bop.gov

Audrey Benison Hemesath audrey.hemesath@usdoj.gov, jeanette.glenn@usdoj.gov, usacae.ecfsaccrm@usdoj.gov

1:13-cv-01571-AWI-JLT Electronically filed documents must be served conventionally by the filer to:

David Roland Hinkson
08795-023
ATWATER U.S. PENITENTIARY
Inmate Mail/Parcels
P.O. BOX 019001
ATWATER, CA 95301-0910

The following document(s) are associated with this transaction:

APPENDIX E

E. Opinion of Ninth Circuit on denial of Application for Authorization to file a second § 2255 motion dated Aug. 27, 2018 (re: David R. Hinkson).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 27 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DAVID R. HINKSON, Applicant, v. UNITED STATES OF AMERICA, Respondent.	No. 18-71748 ORDER

Before: FARRIS, HAWKINS, and BYBEE, Circuit Judges.

The application for authorization to file a second or successive 28 U.S.C. § 2255 motion contends that the district court imposed consecutive sentences on the applicant's convictions for solicitation to commit murder under 18 U.S.C. § 373 because it believed those convictions qualified as crimes of violence. The applicant contends that he is entitled to resentencing because solicitation to commit murder no longer qualifies as a crime of violence in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). We need not determine whether solicitation to commit murder remains a crime of violence after *Dimaya* or whether *Dimaya* is retroactively applicable under the reasoning set forth in *Welch v. United States*, 136 S. Ct. 1257 (2016). The decision to run sentences concurrent or consecutive is within the district court's discretion and governed by 18 U.S.C. § 3584(a), which does not contain language implicated by *Dimaya*. The application is, therefore,

denied. The applicant has not made a prima facie showing under 28 U.S.C. § 2255(h) of:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.
>
> Any pending motions are denied as moot.
>
> No further filings will be entertained in this case.
>
> **DENIED.**