No. 20-1233

In the Supreme Court of the United States

JOHNNY GATEWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner showed cause to excuse his procedural default of his claim on a collateral attack on his sentence under 28 U.S.C. 2255.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 979 F.3d 391. The order of the district court (Pet. App. 15a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2020. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on March 2, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on two counts of kidnapping, in violation of 18 U.S.C. 1201 (1994) and 3559 (1994), and one count of Hobbs Act robbery, in violation of 18 U.S.C. 1951. Judgment 1. He was sentenced to life imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed, 230 F.3d 186, and this Court denied certiorari, 534 U.S. 1107 (No. 01-7283). In 2016, petitioner collaterally attacked his sentence under 28 U.S.C. 2255. Pet. App. 3a. The district court denied the motion. *Id.* at 5a. The court of appeals affirmed. *Id.* at 1a-14a.

1. In February 1995, petitioner kidnapped two women from the parking lot of a Memphis, Tennessee, restaurant. 230 F.3d at 188. He forced them at gunpoint to drive to Arkansas, where he robbed the victims before they escaped. *Ibid.* Two nights later, petitioner also robbed a Memphis hotel at gunpoint. *Ibid.*

A federal grand jury in the Western District of Tennessee indicted petitioner on two counts of kidnapping, in violation of 18 U.S.C. 1201, and one count of Hobbs Act robbery, in violation of 18 U.S.C. 1951. Pet. App. 2a; Indictment 1-3. Before trial, the government filed an information and notice setting forth its intent to seek mandatory life sentences under 18 U.S.C. 3559(c) (1994). 230 F.3d at 188. Section 3559(c) requires (as relevant here) a mandatory life sentence for a defendant whose current federal offense is a "serious violent felony" and who has at least two prior convictions in federal or state court for "serious violent felonies." 18 U.S.C. 3559(c)(1)(A)(i); see *Torres* v. *Lynch*, 136 S. Ct. 1619,

1631-1632 (2016). The statute defines a "serious violent felony" to include:

> (i) a Federal or State offense, by whatever designation and wherever committed, consisting of * * * robbery (as described in [18 U.S.C.] 2111, 2113, or 2118); * * * or attempt, conspiracy, or solicitation to commit any of the above offenses; and
>
> (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.

18 U.S.C. 3559(c)(2)(F). The government invoked Section 3559(c) based on four of petitioner's prior Arkansas state convictions: (1) a 1966 conviction for robbery; (2) a 1966 conviction for assault with the intent to commit robbery; (3) a 1971 conviction for armed robbery; and (4) a 1976 conviction for aggravated robbery. 230 F.3d at 188.

Petitioner proceeded to trial, and the jury found him guilty on all counts. Pet. App. 2a. At sentencing, the district court determined that petitioner's prior Arkansas convictions qualified as "serious violent felonies" under Section 3559(c). *Ibid.* In doing so, the court rejected petitioner's contention that his prior convictions were "[n]onqualifying felonies" under Section 3559(c)(3)(A)(i), which provides that a robbery conviction does not qualify as a "serious violent felony" if the defendant establishes, by clear and convincing evidence, that "no firearm or other dangerous weapon" or threat thereof "was used in the offense" and that "the offense did not result

in death or serious bodily injury." 230 F.3d at 188-189 (citations omitted). The court accordingly sentenced petitioner in 1997 to concurrent terms of life imprisonment on each count. Pet. App. 2a; Judgment 2.

The court of appeals, sitting en banc, affirmed. 230 F.3d at 193. Petitioner contended, among other things, that his sentence was unconstitutional because Section 3559(c)(3)(A) "improperly places a heightened burden of proof on defendants to show that previous robbery convictions are 'nonqualifying felonies.'" 184 F.3d 550, 552. A panel of the court agreed with petitioner, *id.* at 554-556, but the en banc court vacated the panel opinion and explained that the statute's "requirement that the defendant shoulder the burden of proving an affirmative defense at sentencing is constitutional," 230 F.3d at 190.

In 2003, petitioner filed a motion under 18 U.S.C. 3742, claiming that the district court erred in applying Section 3559(c). See 03-cv-2748 D. Ct. Doc. 3 (Oct. 30, 2003). Specifically, petitioner contended that his 1971 Arkansas robbery conviction did not categorically qualify as a "serious violent felony" under Section 3559(c). *Id.* at 2. The district court construed petitioner's motion as a motion to vacate his sentence under 28 U.S.C. 2255, and denied it. 03-cv-2748 D. Ct. Doc. 3, at 2, 5. The court explained that "[b]ecause [petitioner's] 1971 conviction was for *armed* robbery, there is no possibility that it can be established that it was not a qualifying serious violent felony" and that petitioner would still have at least two qualifying predicate convictions in any event. *Id.* at 4.

2. In 2016, petitioner collaterally attacked his sentence under Section 2255, arguing that his Arkansas

robbery convictions could no longer be considered "serious violent felonies" under Section 3559(c) in light of this Court's opinion in *Johnson* v. *United States*, 576 U.S. 591, 597 (2015).* In *Johnson*, the Court invalidated on vagueness grounds the "residual clause" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), which defines a sentence-enhancing "violent felony" to include any crime punishable by a term of imprisonment exceeding one year that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii); see *Johnson*, 576 U.S. at 604-606; see also *Welch* v. *United States*, 136 S. Ct. 1257, 1265 (2016) (holding that *Johnson* announced a new rule with retroactive effect on collateral review). Petitioner contended that *Johnson* should also apply to Section 3559(c)'s risk-of-force clause—*i.e.*, to its definition of a "serious violent felony" as an offense "that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense." 18 U.S.C. 3559(c)(2)(F)(ii); see Pet. App. 19a.

The district court rejected petitioner's collateral attack as untimely. Pet. App. 20a-21a. Under 28 U.S.C. 2255(f)(3), a Section 2255 collateral attack is timely if it is filed within one year of the date on which "the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme

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* Petitioner sought authorization from the court of appeals to pursue that claim in a second or successive motion to vacate his sentence under Section 2255. See 16-6074 C.A. Doc. 1 (July 1, 2016). The court of appeals stated that authorization was unnecessary because petitioner's motion under Section 3742 would not be classified as an initial Section 2255 motion. 16-6074 C.A. Doc. 7-2 (Jan. 19, 2017).

Court and made retroactively applicable to cases on collateral review." Although petitioner's motion was filed within a year of this Court's decision in *Johnson*, the district court determined that *Johnson* "does not provide [petitioner] with grounds for relief from his sentence," because "*Johnson* was limited to sentences entered pursuant to the residual clause under the ACCA," and therefore "does not apply to [petitioner's] sentence under § 3559." Pet. App. 20a. "Whether § 3559(c)'s residual clause is unconstitutionally vague," the court explained, "is an open question that has not been answered by the Sixth Circuit or the Supreme Court." *Ibid.*

The district court noted that after the government filed its response to petitioner's motion, this Court found unconstitutionally vague the residual clause of 18 U.S.C. 924(c)(3)(B), which defines the term "crime of violence" as including an offense "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." See Pet. App. 19a, 21a; *United States* v. *Davis*, 139 S. Ct. 2319, 2336 (2019). But the district court stated that this Court "has yet to apply *Johnson* to § 3559(c)'s residual clause." Pet. App. 21a. The court therefore concluded that, "[b]ecause the new rule in *Johnson* does not apply to [petitioner], his § 2255 Motion does not qualify for the one-year filing period provided by § 2255(f)(3)." *Ibid.*

3. On appeal, the government conceded that petitioner's Section 2255 motion was rendered timely by this Court's decision in *Davis*, which issued while his motion was pending and which invalidated statutory language that "is nearly identical to the residual clause of [Section 3559(c)]." Pet. App. 4a. The government

maintained, however, that petitioner procedurally defaulted his claim by failing to raise it on direct review. *Id.* at 5a. The government further contended that petitioner's claim failed on the merits in any event "because his state-law convictions qualify as serious violent felonies under both the enumerated-offenses clause of § 3559(c)(2)(F)(i) and the elements clause of § 3559(c)(2)(F)(ii)," neither of which were affected by *Davis*. *Id.* at 6a. The court of appeals affirmed, determining that petitioner had procedurally defaulted his claim. *Id.* at 1a-14a.

Petitioner "acknowledge[d] that he did not raise his present vagueness claim on direct review" and that he was therefore required to "'show (1) *cause* for not raising the claim on appeal and (2) *prejudice* from the error alleged in the claim.'" Pet. App. 6a-7a (citation omitted). Petitioner claimed that he had "cause" for his default "because, before the Supreme Court decided *Johnson*, his vagueness claim was 'so novel that its legal basis [was] not reasonably available to counsel.'" *Id.* at 7a (quoting *Reed* v. *Ross*, 468 U.S. 1, 16 (1984)) (brackets in original). The court of appeals acknowledged that a claim might be "novel" enough to create "cause" for a procedural default if, at the time of the default, "petitioner's counsel * * * had 'no reasonable basis upon which to formulate' the question now raised." *Ibid.* (quoting *Gibbs* v. *United States*, 655 F.3d 473, 476 (6th Cir. 2011), cert. denied, 566 U.S. 941 (2012), in turn quoting *Reed*, 468 U.S. at 14). But the court of appeals explained that "an 'issue can hardly be novel' if, at the time of default, other defense counsel ha[d] raised the claim." *Ibid.* (quoting *Cvijetinovic* v. *Eberlin*, 617 F.3d 833, 837 (6th Cir. 2010), cert. denied, 562 U.S. 1238 (2011)) (brackets in original). And petitioner did "not

deny that, before he was sentenced in 1997, others had raised the same vagueness challenge to the ACCA that he now makes to the federal three-strikes statute." *Id.* at 7a-8a (citing cases). The court accordingly found that "[t]he tools to raise [petitioner's] present argument thus certainly existed at the time of his default." *Id.* at 8a.

The court of appeals rejected petitioner's contention that he had shown "cause" for his default because "at the time of his sentencing [his claim] 'was foreclosed by "a near-unanimous body of lower court authority."'" Pet. App. 8a (quoting Pet. C.A. Reply Br. 5). The court of appeals noted that this Court's decision in *Reed* v. *Ross* "did suggest that this species of 'novelty,' later described by the Court as 'futility,' could excuse procedural default." *Ibid.* (quoting *Reed*, 468 U.S. at 16, and citing *Bousley* v. *United States*, 523 U.S. 614, 622-623 (1998)). But the court of appeals explained that this Court's subsequent cases had "limited the breadth" of that language in *Reed*. *Ibid.* (quoting *Wheeler* v. *United States*, 329 Fed. Appx. 632, 635 (6th Cir. 2009), cert. denied, 558 U.S. 1135 (2010)). The court of appeals observed that *Smith* v. *Murray*, 477 U.S. 527 (1986), established that "'perceived futility alone cannot constitute cause' for procedural default," Pet. App. 9a (quoting *Smith*, 477 U.S. at 535), and that *Bousley* v. *United States* similarly stated that "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time," *ibid.* (quoting *Bousley*, 523 U.S. at 623).

The court of appeals explained that it had "interpreted these decisions to mean that 'futility cannot be cause,' at least where the source of the 'perceived futility' is adverse state or lower court precedent," and

noted that "[o]ther circuits have reached the same conclusion." Pet. App. 9a & n.2 (quoting *Cvijetinovic*, 617 F.3d at 839-840, and citing cases from the First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits). It therefore determined that petitioner "cannot establish cause by showing that his vagueness claim cut against the current of federal circuit precedent at the time of his direct appeal." *Id.* at 10a. The court made clear that a prior case in which it had determined that a habeas petitioner did show "cause for failing to raise his *Johnson* claim on direct appeal" was inapposite because the direct-review proceedings there occurred at a time when Supreme Court precedent "decisively foreclosed" the argument that "would later prevail in *Johnson*." *Id.* at 10a-11a (quoting *Raines* v. *United States*, 898 F.3d 680, 687 (6th Cir. 2018) (per curiam), and *Cvijetinovic*, 617 F.3d at 839 n.7). The court explained that, under *Reed*, "'actual futility,' caused by the Supreme Court's ruling on an issue, can constitute cause" only where, "at the time of default, the claim ha[s] been expressly foreclosed by a precedent of the Supreme Court that the Court later 'explicitly overrule[s].'" *Id.* at 11a (quoting *Reed*, 468 U.S. at 17) (second set of brackets in original).

The court of appeals noted that in *James* v. *United States*, 550 U.S. 192, 210 n.6 (2007), this Court stated that ACCA's residual clause was not unconstitutionally vague, and later reaffirmed that conclusion in *Sykes* v. *United States*, 564 U.S. 1, 15 (2011). Pet. App. 12a. It therefore reasoned that "from 2007, when *James* was decided, until 2015, when *Johnson* overruled *James* and *Sykes*, there was no reasonable basis for arguing that the ACCA's residual clause was unconstitutionally vague." *Ibid.* But it found that period of "actual futility" to be inapplicable to petitioner's claim because his

direct appeal concluded in 2002. *Id.* at 12a-13a. Petitioner "therefore had a reasonable basis for raising a vagueness challenge to the residual clause of the three-strikes statute, § 3559(c)(2)(F)(ii)," but failed to do so. *Id.* at 13a.

The court of appeals stated that it was "part[ing] ways with the Seventh and Tenth Circuits, which have concluded that, under *Reed*, *Johnson*'s overruling of *James* and *Sykes* creates cause even for petitioners whose convictions became final before *James* was decided." Pet. App. 13a (citing *Cross* v. *United States*, 892 F.3d 288, 295-296 (7th Cir. 2018), and *United States* v. *Snyder*, 871 F.3d 1122, 1127 (10th Cir. 2017), cert. denied, 138 S. Ct. 1696 (2018)). But the court observed that the Tenth Circuit "did not offer a justification for this conclusion" and that the Seventh Circuit's brief explanation was not "persuasive." *Ibid.* And because the court determined that petitioner "ha[d] not shown cause for the procedural default of his vagueness claim," it did not also consider whether petitioner's claim fails on the merits. *Id.* at 14a; see *id.* at 19a-20a.

ARGUMENT

Petitioner contends (Pet. 24-31) that the court of appeals erred in finding that he failed to show cause for the procedural default of his vagueness challenge to Section 3559(c)'s risk-of-force clause. The court's decision is correct, and the question presented does not implicate any circuit conflict warranting this Court's review. This case would also be a poor vehicle to address the question presented, because petitioner would not be entitled to relief even if this Court agreed that he had shown cause for his procedural default, and because review of the question presented would be complicated by threshold questions about how this Court's ACCA-

related precedents apply to Section 3559(c). The petition for a writ of certiorari should be denied.

1. Petitioner does not dispute that he procedurally defaulted his vagueness claim by failing to raise it on direct review. See Pet. App. 6a. Nor does he dispute that to pursue that claim on collateral review, petitioner must therefore demonstrate "cause" for his failure to raise the claim and "actual prejudice" resulting from the constitutional error. See *ibid.*; *Bousley* v. *United States*, 523 U.S. 614, 622 (1998). As the court of appeals determined, petitioner's claim fails at the outset because he cannot show "cause" for his default.

a. This Court has explained that "cause" may exist where a claim "is so novel that its legal basis is not reasonably available to counsel." *Reed* v. *Ross*, 468 U.S. 1, 16 (1984). "The question is not whether subsequent legal developments have made counsel's task [in raising a particular claim] easier, but whether at the time of the default the claim was 'available' at all." *Smith* v. *Murray*, 477 U.S. 527, 537 (1986). To answer that question, this Court has considered whether, at the time of the default, other litigants were raising similar claims; if such claims were repeatedly raised, then "it simply is not open to argument that the legal basis of the claim petitioner now presses on federal habeas was unavailable to counsel at the time." *Ibid.*; see *Bousley*, 523 U.S. at 622-623 (rejecting a novelty-based "cause" argument in part because the "Federal Reporters were replete with cases" considering the purportedly "novel" claim "at the time" petitioner should have raised it).

As the court of appeals observed, that analysis is fatal to petitioner's claim of "cause" here. Petitioner does not dispute that "before he was sentenced in 1997, others had raised the same vagueness challenge to the

ACCA that he now makes to the federal three-strikes statute." Pet. App. 7a-8a; see, *e.g.*, *United States* v. *Veasey*, 73 F.3d 363, 1995 WL 758439, at *2 (6th Cir. 1995) (Tbl.) (per curiam); *United States* v. *Presley*, 52 F.3d 64, 68 (4th Cir.), cert. denied, 516 U.S. 891 (1995); *United States* v. *Powell*, 967 F.2d 595, 1992 WL 127038, at *3 (9th Cir.) (Tbl.), cert. denied, 506 U.S. 960 (1992); *United States* v. *Argo*, 925 F.2d 1133, 1134-1135 (9th Cir. 1991); *United States* v. *Sorenson*, 914 F.2d 173, 175 (9th Cir. 1990), cert. denied, 498 U.S. 1099 (1991). Nor does petitioner contend that any precedent of this Court foreclosed such a claim at the time he should have raised it. "The tools to raise [petitioner's] present argument thus certainly existed at the time of his default," Pet. App. 8a, and he therefore cannot demonstrate "cause" based on a showing that his claim was "so novel that its legal basis [wa]s not reasonably available to counsel," *Reed*, 468 U.S. at 16.

b. Petitioner errs in contending (Pet. 24-28) that, notwithstanding that other defendants were at the time raising the claim that he forfeited, he can nevertheless show "cause" for his procedural default under this Court's decision in *Reed*.

In *Reed*, this Court stated that it had previously identified, for purposes of retroactivity analysis, "three situations in which a 'new' constitutional rule, representing 'a clear break with the past' might emerge from this Court": "First, a decision of this Court may explicitly overrule one of our precedents"; "[s]econd, a decision may overtur[n] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved"; and finally, a decision may "disapprov[e] a practice this Court arguably has sanctioned in

prior cases." 468 U.S. at 17 (quoting *United States* v. *Johnson*, 457 U.S. 537, 549, 551 (1982)) (internal quotation marks omitted; second and third sets of brackets in original). *Reed* suggested that when a new decision of this Court "falling into one of the first two categories is given retroactive application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a * * * court to adopt the position that this Court has ultimately adopted," and the "failure of a defendant's attorney to have pressed such a claim * * * is sufficiently excusable to satisfy the cause requirement." *Ibid.*

Relying on that language, petitioner contends (Pet. 25-28) that he can show "cause" because his case fits into one of *Reed*'s first two categories. As an initial matter, *Reed*'s three categories were derived from this Court's decision in *United States* v. *Johnson*, which determined that a new constitutional rule does not apply retroactively, even to cases on direct review, if the new rule represented a "clear break with the past." 457 U.S. at 549 (citation omitted). But after *Reed*, this Court overruled that aspect of *United States* v. *Johnson* in *Griffith* v. *Kentucky*, 479 U.S. 314, 325-326 (1987), and does not appear to have relied on *United States* v. *Johnson*'s "clear break" categories since then. And even if *Reed*'s categories premised on *United States* v. *Johnson* retain significance after the later decision in *Griffith*, *Reed* itself concerned only "the third category," which petitioner does not invoke here. *Reed*, 468 U.S. at 18. Instead, the most relevant aspect of *Reed*—its explanation that a petitioner may show "cause" when "a constitutional claim is so novel that its legal basis is not reasonably available to counsel"—cuts against petitioner here, as it is undisputed that defendants raised similar

claims before the time of petitioner's sentencing. *Id.* at 16; see p. 12, *supra*.

Moreover, even putting all of that aside, petitioner cannot show "cause" under either of *Reed*'s first two categories. Petitioner first contends that he can show cause under *Reed*'s second category, because *Johnson* v. *United States*, 576 U.S. 591 (2015), "overturn[ed] 'a longstanding and widespread practice to which this Court ha[d] not spoken, but which a near-unanimous body of lower court authority ha[d] expressly approved,'" at least as of "the time of [petitioner's] sentencing." Pet. 25 (quoting *Reed*, 468 U.S. at 17). Petitioner's attempt to invoke *Reed*'s second category is foreclosed by *Smith* and *Bousley*, which made clear that "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" *Bousley*, 523 U.S. at 623 (citation omitted); see *Smith*, 477 U.S. at 535 ("perceived futility alone cannot constitute cause") (citation omitted); Pet. App. 8a-10a. That is precisely what petitioner argues here—that his claim would have been unavailing in 1997, because lower-court authority had approved residual-clause sentencing at that time.

Petitioner next contends that he can show cause under *Reed*'s first category, which applies when "'a decision of this Court * * * explicitly overrule[s] one of [its] precedents." Pet. 26 (quoting *Reed*, 468 U.S. at 17) (asterisks and first set of brackets in original). But as the court of appeals explained—and common sense dictates—*Reed* contemplated a situation in which "*at the time of default*, the claim had been expressly foreclosed by a precedent of the Supreme Court that the Court later 'explicitly overrule[s].'" Pet. App. 11a

(quoting *Reed*, 468 U.S. at 17) (emphasis added; brackets in original). No precedent of this Court foreclosed petitioner's vagueness challenge at the time of his default or throughout his direct appeal, as petitioner concedes. See Pet. 27. Petitioner nonetheless contends that *Johnson* generally "represented a clear break" with past practice and that, as a result, any defendant can show "cause" for failing to raise a vagueness challenge at any time before 2015. Pet. 27-28. But *Reed* does not support that position. Instead, *Reed* focuses "not simply [on] whether a Supreme Court decision marks a 'clear break with the past,' but [on] whether, at the time of the default, the petitioner's 'attorney ha[d] a 'reasonable basis' upon which to develop [the] legal theory' at issue." Pet. App. 13a-14a (citation omitted; third and fourth sets of brackets in original). And as discussed above, petitioner's vagueness challenge was "reasonably available to counsel" at the time of his default, *Reed*, 468 U.S. at 16, when "the Federal Reporters were replete with cases involving challenges to" the legal regime at issue. *Bousley*, 523 U.S. at 622; see Pet. App. 8a.

c. The policy arguments that petitioner invokes (Pet. 28-31) to support his position are unsound. Petitioner contends that the court of appeals' approach will lead to "'pointless' and 'wasteful' litigation" that consumes judicial resources. Pet. 29 (citation omitted). But petitioner cannot point to a flood of wasteful litigation in the circuits that have interpreted *Reed* consistently with the decision below. See Pet. App. 9a-10a n.2.

Petitioner also contends (Pet. 30) that declining to excuse procedural default in this context would be "fundamentally unfair to criminal defendants." But "[n]o procedural principle is more familiar to this Court than

that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Puckett* v. *United States*, 556 U.S. 129, 134 (2009) (citation omitted). And it is well established that "even when the law is against a contention, a litigant must make the argument to preserve it for later consideration." *United States* v. *Smith*, 241 F.3d 546, 548 (7th Cir.), cert. denied, 534 U.S. 918 (2001).

The enforcement of procedural-default rules is critical to ensuring that collateral review remains "an extraordinary remedy" that "'will not be allowed to do service for an appeal.'" *Bousley*, 523 U.S. at 621 (quoting *Reed* v. *Farley*, 512 U.S. 339, 354 (1994)). Failure to do so "would invite criminal defendants to bypass the preferred procedural avenue of trial and direct appeal in favor of collateral review," which would then "serve as an all-purposive receptacle for claims which in hindsight appear more promising than they did at the time of trial." *United States* v. *Sanders*, 247 F.3d 139, 145-146 (4th Cir.), cert. denied, 534 U.S. 1032 (2001). The decision below accords with the importance of the finality of criminal judgments. See, *e.g.*, *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977).

2. The decision below does not implicate a split of authority warranting this Court's review.

a. As the court of appeals observed, numerous circuits have determined, consistent with this Court's opinions in *Smith* and *Bousley*, that "'futility cannot be cause,' at least where the source of the 'perceived futility' is adverse state or lower court precedent." Pet. App. 9a (quoting *Cvijetinovic* v. *Eberlin*, 617 F.3d 833, 839-840 (6th Cir. 2010), cert. denied, 562 U.S. 1238 (2011)); see *Simpson* v. *Matesanz*, 175 F.3d 200, 211

(1st Cir. 1999), cert. denied, 528 U.S. 1082 (2000); *Sanders*, 247 F.3d at 145-146 (4th Cir.); *Smith*, 241 F.3d at 548 (7th Cir.); *United States* v. *Moss*, 252 F.3d 993, 1002 (8th Cir. 2001), cert. denied, 534 U.S. 1097 (2002); *United States* v. *Daniels*, 254 F.3d 1180, 1191 (10th Cir. 2001) (en banc); *McCoy* v. *United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), cert. denied, 536 U.S. 906 (2002). Petitioner contends (Pet. 16-18) that decisions from the Third, Seventh, and Ninth Circuits have applied a contrary rule, but he overstates the extent of any conflict.

Petitioner points (Pet. 17-18) to *English* v. *United States*, 42 F.3d 473 (1994), in which the Ninth Circuit discerned no procedural default by Section 2255 movants who had failed to raise their claim at trial, on direct appeal, or in petitions for writs of certiorari, even though this Court issued a decision supporting the claim while their direct appeals were pending. *Id.* at 474. The Ninth Circuit's primary rationale was that "[a]t least as of 1989 (when the petitioners' convictions became final), we adhered to the rule * * * that § 2255 relief 'cannot be denied solely on the ground that relief should have been sought by appeal to prisoners alleging constitutional deprivations.'" *Id.* at 479 (citation omitted). And the court of appeals took the view that the existence of "'a solid wall of circuit authority'" against the claim meant that the defendants "did not default on their claims" at all. *Id.* at 477, 479 (citation and internal quotation marks omitted). The court stated that there was "thus no need * * * to show cause and prejudice." *Id.* at 477. *English* therefore did not address the question presented here—namely, what would constitute "cause" in a case where a claim has undisputedly been defaulted.

Petitioner also cites (Pet. 17) *United States* v. *Doe*, 810 F.3d 132 (2015), a case in which the Third Circuit considered multiple legal issues related to a movant's Section 2255 motions and ultimately remanded for further proceedings in the district court. "To make sure that [its] remand is not a waste of time," *id.* at 142, the court briefly addressed whether the movant had procedurally defaulted his current claim "by not raising it on appeal when its legal basis did not exist," *id.* at 153. The Third Circuit stated that "the claim is not defaulted" based on sparse reasoning that did not clearly distinguish between whether "cause" existed for the default, and whether a default occurred in the first place. *Id.* at 153-154 (citing, *inter alia*, *English*, 42 F.3d at 479, for the proposition that "failure to object in the face of a 'solid wall of circuit authority' contrary to [the] movant's position did not work a default"). The court also concluded that the government had not raised the issue of procedural default below and had therefore "waived" the defense. *Id.* at 154. Thus *Doe*, like *English*, did not squarely address the question presented here.

Finally, petitioner relies (Pet. 16-17) on *Cross* v. *United States*, 892 F.3d 288 (7th Cir. 2018), in which Section 2255 movants relied on *Johnson* to contend that they had been improperly sentenced as career offenders under the residual clause of Section 4B1.2 of the Sentencing Guidelines. *Id.* at 292-293. Although the petitioners had not objected to the constitutionality of the Guidelines' residual clause at trial or on appeal, the Seventh Circuit concluded that they "could not reasonably have challenged the guidelines residual clause" at the time because "'no one'" could "'reasonably have anticipated *Johnson*,'" and that they could therefore show

"cause" for their procedural defaults. *Id.* at 295 (citation omitted). In reaching that conclusion, the court first emphasized that *Johnson* expressly overruled prior precedent and therefore satisfied *Reed*'s first category. *Ibid.* It then stated that the "second and third scenarios identified by *Reed* present even more compelling grounds to excuse [the defendants'] procedural defaults," taking the view that "*Johnson* abrogated a substantive body of circuit precedent upholding the residual clause against vagueness challenges," or that this Court "had implicitly 'sanctioned' the residual clause by interpreting it as if it were determinate" prior to *Johnson*. *Id.* at 296 (citation omitted).

Although *Cross* does more directly address the "cause"-related question presented here than *English* or *Doe*, it declined to consider this Court's instructions that "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" *Bousley*, 523 U.S. at 623 (citation omitted). As a result, *Cross* offers no rebuttal to the logic of the decision below. *Cross* also disregarded the Seventh Circuit's own prior decision in *United States* v. *Smith*, which explained that the fact "that a legal argument would have been unpersuasive to a given court does not constitute 'cause' for failing to present that argument." 241 F.3d at 548 (citing *Bousley*, 523 U.S. at 622-624, and *Engle* v. *Isaac*, 456 U.S. 107, 130 n.35 (1982)). *Smith*, like the court below, considered whether "[o]ther defendants had been making" the claim that the petitioner had procedurally defaulted; finding that they had, the Seventh Circuit in *Smith* found no "cause" for the default. *Ibid.* *Cross*, by contrast, did not consider that point, implicitly acknowledging that other defendants had raised similar challenges

but not explaining how that might bear on petitioners' attempts to show "cause." See 892 F.3d at 296.

Cross thereby created intra-circuit tension—or outright division—that the Seventh Circuit has thus far declined to resolve. See 17-2282 C.A. Doc. 44 (Aug. 31, 2018) (denying petition for rehearing en banc). But it "is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). And to the extent that it suggests a circuit conflict, that conflict is shallow, underdeveloped, and does not warrant this Court's review in this case.

b. Petitioner also contends (Pet. 21) that the circuits are "split over whether *Johnson* provides cause to excuse procedural default" under *Reed*'s first category "for petitioners raising a residual-clause challenge who were sentenced prior to *James*." While petitioner does identify some division of authority, it likewise does not warrant this Court's review.

As noted above, the Seventh Circuit in *Cross* concluded that movants could show "cause" for the procedural default of *Johnson*-based claims in part because *Johnson* expressly overruled prior precedent and therefore, in the Seventh Circuit's view, satisfied *Reed*'s first category. *Cross,* 892 F.3d at 295. The Seventh Circuit "acknowledge[d] that the cases overruled by *Johnson* were not decided until 2007 and 2011—after the [movants'] sentencing—and thus could not themselves have influenced [the movants'] failure to object at trial." *Id.* at 295-296. "Nonetheless," the court stated, "when the Supreme Court reverses course, the change generally indicates an abrupt shift in law." *Id.* at 296. The court therefore stated that it "join[ed] the Tenth Circuit in excusing, under *Reed*'s first category, the petitioners'

failure to challenge the residual clause prior to *Johnson*." *Ibid.* (citing *United States* v. *Snyder*, 871 F.3d 1122, 1125, 1127 (10th Cir. 2017), cert. denied, 138 S. Ct. 1696 (2018)). In *Snyder*, the Tenth Circuit had concluded "cause" existed for procedural default because *Johnson* had overruled prior precedent, even though the defendant's sentence in *Snyder* was affirmed before the Supreme Court decision (*James* v. *United States*, 550 U.S. 192 (2007)) that *Johnson* later overruled. *Snyder*, 871 F.3d at 1127. The Tenth Circuit did not, however, explain that conclusion, other than to assert that "no one * * * could reasonably have anticipated *Johnson*." *Ibid.* (citation omitted).

In the decision below, the court of appeals explained that "*Reed*'s discussion of cases where the Supreme Court 'explicitly overrule[s] one of [its] own precedents' * * * must be read as taking for granted that, at the time of default, the precedent that would later be overturned was the law of the land." Pet. App. 14a (quoting *Reed*, 468 U.S. at 17) (brackets in original). That is because "when, at the time of default, the Supreme Court had not yet foreclosed an argument, the argument was not '[b]y definition' futile, because at that time state courts, lower federal courts, and the Supreme Court itself still remained free to adopt it." *Ibid.* (brackets in original).

That shallow and recent disagreement does not warrant this Court's review. The Sixth, Seventh, and Tenth Circuits are the only circuits to have squarely confronted the question presented and, as the court of appeals noted, the Tenth Circuit "did not offer a justification" for its conclusion. Pet. App. 13a. The question is also of diminishing significance, as it affects only defendants whose convictions became final before *James*

and who remain incarcerated based on statutes potentially called into question by *Johnson*.

3. In any event, this case would not be a suitable vehicle to address the question presented, for two reasons. First, petitioner would not be entitled to relief even if this Court decided the question presented in his favor. And second, review of the question presented would be complicated by threshold questions about how this Court's ACCA-related precedents apply to Section 3559(c).

a. Petitioner's Section 2255 motion is premised on the contention that he should not have been subject to the three-strikes provisions of 18 U.S.C. 3559(c). See Pet. App. 3a. His legal theory is that Section 3559(c)(2)(F)(ii)'s risk-of-force clause is unconstitutionally vague, and that his three prior Arkansas robbery convictions therefore do not qualify as "serious violent felonies" that could trigger the application of Section 3559(c). Even if he had preserved that claim or shown cause for his default, however, petitioner's Section 2255 motion would fail, because his Arkansas robbery convictions qualify as "serious violent felonies" under multiple other subsections of Section 3559(c).

In addition to its risk-of-force clause, Section 3559(c) also contains an "enumerated offenses" clause that defines "serious violent felony" to include "robbery (as described in [18 U.S.C.] 2111, 2113, or 2118)." 18 U.S.C. 3559(c)(2)(F)(i). "Congress could hardly have been clearer in the text of the statute that § 3559(c)'s enumerated clause should be understood broadly," and "[t]hat is nowhere truer than for robbery." *United States* v. *Johnson*, 915 F.3d 223, 229 (4th Cir.), cert. denied, 140 S. Ct. 268 (2019). The federal robbery statutes listed in Section 3559(c)'s enumerated-offenses clause

make it a crime to take or attempt to take something of value "from the person or presence of another," "by force and violence," or "by intimidation." 18 U.S.C. 2111, 2113(a), 2118(a).

The Arkansas robbery statutes under which petitioner was convicted criminalized the "felonious and violent taking of any goods, money or other valuable thing from the person of another by force or intimidation." Ark. Stat. Ann. § 41-3601 (1964); see also *id.* § 41-2102(1) (1975) ("A person commits aggravated robbery if he commits robbery" and is "armed with a deadly weapon" or "inflicts or attempts to inflict death or serious physical injury upon another person"); *id.* § 41-2103(1) (1975) ("A person commits robbery if with the purpose of committing a theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another."); see also Gov't C.A. Br. 22. "Because these state statutory elements parallel those required to establish robbery under 18 U.S.C. §§ 2111, 2113(a), and 2118(a), there can be no question that" petitioner's Arkansas robbery convictions "by definition qualify as serious violent felonies under § 3559(c)(2)(F)(i)." *United States* v. *Snype*, 441 F.3d 119, 144 (2d Cir.), cert. denied, 549 U.S. 923 (2006). Indeed, other courts have determined that Arkansas robbery and aggravated robbery qualify as generic robbery offenses under the enumerated-offenses clause of the Guidelines' definition of "crime of violence." See, *e.g.*, *United States* v. *Smith*, 928 F.3d 714, 717 (8th Cir. 2019).

Section 3559(c) also contains an "elements" clause, which defines a "serious violent felony" to include an offense "punishable by a maximum term of imprisonment

of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 3559(c)(2)(F)(ii). Each of petitioner's Arkansas robbery convictions was punishable by a maximum term of imprisonment of ten years or more; he in fact received sentences well above ten years for two of them. See Gov't C.A. Br. 27. And the Arkansas robbery statutes under which petitioner was convicted also had "as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 3559(c)(2)(F)(ii). See pp. 23-24, *supra*; *Parker* v. *State*, 529 S.W.2d 860, 863 (Ark. 1975) ("[T]he mere snatching of money or goods from the hand of another is not robbery, unless some injury is done to the person or there be some struggle for possession of the property prior to the actual taking or some force used in order to take it"); *Smith*, 928 F.3d at 716-717 (finding that Arkansas robbery qualifies as a predicate under the elements clause of the Guidelines' definition of "crime of violence"); see generally *Stokeling* v. *United States*, 139 S.Ct. 544, 549-555 (2019). Indeed, although it did not reach the question here, the court below has determined that robbery statutes similar to the Arkansas statutes under which petitioner was convicted fall within the ACCA's elements clause. *E.g.*, *Chaney* v. *United States*, 917 F.3d 895, 897 (6th Cir.), cert. denied, 140 S. Ct. 265 (2019); *United States* v. *Patterson*, 853 F.3d 298, 302 (6th Cir.), cert. denied, 138 S. Ct. 273 (2017); *United States* v. *Mitchell*, 743 F.3d 1054, 1059 (6th Cir.), cert. denied, 574 U.S. 861 (2014).

Thus even if petitioner showed cause to excuse the procedural default of his vagueness claim, he would not prevail on the merits because each of his three predicate

robbery convictions qualifies as a "serious violent felony" under Section 3559(c)'s enumerated-offenses clause or its elements clause. For the same reason, petitioner would be unable to show "prejudice" resulting from his procedural default, making his claimed showing of "cause," even if it were correct, insufficient on its own to overcome his default.

b. Review of the question presented would also be complicated by the fact that the key case law on which petitioner relies to establish "cause" for his default—*Johnson*, *James*, and lower court cases—do not address Section 3559(c)'s risk-of-force clause, which is the statutory provision actually at issue here. Instead, they address the ACCA's residual clause. Although the government agrees that this Court's later decision in *United States* v. *Davis*, 139 S. Ct. 2319 (2019), considered (and invalidated) "essentially the same language" as the risk-of-force clause in Section 3559(c)(2)(F)(ii), the ACCA residual clause at issue in *Johnson* differs from the provision at issue in *Davis* and Section 3559(c)'s risk-of-force clause. Pet. App. 5a (quoting Gov't C.A. Br. 11-12); compare 18 U.S.C. 924(e)(2)(B)(ii) (an offense that "involves conduct that presents a serious potential risk of physical injury to another"), with 18 U.S.C. 3559(c)(2)(F)(ii) (an offense "that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense").

The differences between Section 3559(c)(2)(F)(ii) and the ACCA's residual clause complicate the application of *Reed* here. For example, petitioner purports to show "cause" because *Johnson* overturned "a long-standing and widespread practice * * * which a near-

unanimous body of lower court authority ha[d] expressly approved," and because *Johnson* "explicitly overrule[d]" prior precedent. Pet. 25-26 (quoting *Reed*, 468 U.S. at 17). But petitioner does not point to any "near-unanimous" body of lower court authority that "expressly approved" of Section 3559(c)'s risk-of force clause. Nor did *Johnson* "explicitly overrule[]" a precedent of this Court upholding Section 3559(c)'s risk-of-force clause. Pet. 26 (citation omitted); see, *e.g.*, Pet. App. 20a (district court concluding that the "new rule in *Johnson* was limited to sentences entered pursuant to the residual clause under the ACCA," and that "[w]hether § 3559(c)'s residual clause is unconstitutionally vague is an open question that has not been answered by the Sixth Circuit or the Supreme Court").

This Court's consideration of the issues described above—such as the significance of *Bousley*, and the propriety of applying *Reed*'s first category to find "cause" for a defendant whose default occurred before any decision of this Court foreclosed his claim—could thus be obscured by the need to also consider the extent to which the ACCA decisions in *Johnson*, *James*, and the lower courts governed vagueness challenges to Section 3559(c)'s risk-of-force clause. The court below was able to assume some of those issues away in deciding against petitioner, see Pet. App. 13a n.3, but their presence would complicate this Court's review of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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