NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

MICHAEL SUAREZ,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a defendant may be enhanced under 18 U.S.C. § 924(c) where he entered a plea of guilty to an offense that no longer qualifies as a predicate offense and the government expressly chose not to prosecute him for an offense that might have qualified had he been convicted of that offense?.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

Michael Suarez v. United States, No. 16-22544-Civ-Lenard (October 9, 2018)

United States Court of Appeals (11th Cir.):

United States v. Michael Suarez, No. 18-15101 (October 9, 2020)

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Michael Suarez respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-15101 in that court on October 9, 2020, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on October 9, 2020. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

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

U.S. Const., amend V.

STATEMENT OF THE CASE

Mr. Suarez was charged in a second superseding indictment with conspiracy to commit hostage taking in violation of 18 U.S.C. §1203(b)(2)**;** substantive hostage taking in violation of 18 U.S.C. §1203**;** kidnapping in violation of 18 U.S.C. §1201(a)(1) and (2)**;** carjacking resulting in serious bodily injury in violation of 18 U.S.C. §2119(2) and 1365**;** using a firearm during and in relation to a "crime of violence" in violation of 18 U.S.C. §924(c)(1)(A)(ii). (D.Ct. No. 12-20152-CR DE 50)(reference to the docket of the underlying criminal action will hereinafter be referred to as "CR DE").

Mr. Suarez pled guilty to count 1 (hostage taking conspiracy) and count 5 (18 U.S.C. §924(c)) of the second superseding indictment, and the other charges were dismissed. (CR DE 169, 177, 422). Mr. Suarez's plea agreement indicated that the predicate offense for the §924(c) charge in count 5 was the hostage taking conspiracy conviction in count 1. (CR DE 177). The plea agreement referenced and explained only count 1 and count 5, stating:

> The defendant agrees to plead guilty to Count 1 and Count 5 of the Second Superseding Indictment (hereinafter "the indictment"). **Count 1** charges that between in or around February 2012, the exact date being unknown and continuing through on or about February 21, 2012, the defendant and his co-defendants did knowingly and willfully conspire to seize and detain and threaten to kill, to injure, or to continue to detain a person in order to compel a third person to do an act as an explicit and implicit condition for the release of the person detained, in violation of Title 18, United States Code, Section 1203(a). **Count 5** charges that on or about February 20, 2012, the defendant and his co-defendants did knowingly possess a firearm in furtherance of a crime of violence in violation of Title

18, United States code, Section 924(c)(1)(A).
(CR DE 177:1 ¶1) (emphasis in original).

Thus, in the plea agreement, the government thoroughly explained the hostage taking conspiracy charge that it was relying on in conjunction with its description of count 5. The plea agreement's description of count 5 did not mention or reference any of the other charges in relation to count 5, and specifically described count 5 only as a charge for "knowingly possess[ing] a firearm in furtherance of a crime of violence." *Id*. Notably, the government left out of this description any reference or mention of any other charge that had been in the indictment. In the subsequent paragraph, the plea agreement mentioned generically that it had agreed to dismiss the "remaining charges," keeping only counts 1 and 5. (DE CR 177:1 ¶2).

Based on counts 1 and 5, Mr. Suarez received a sentence of 444 months imprisonment. (CR DE 223, 422). The sentence was apportioned with 360 months on count 1 and 84 months consecutive on count 5. *Id*.

The judgment listed the convictions as "Conspiracy to Commit Hostage Taking" (count 1) and "Possession of a Firearm in Furtherance of a Crime of Violence" (count 5). (CR DE 223). Mr. Suarez did not file a direct appeal.

On June 26, 2015, the Supreme Court declared the residual clause of the Armed Career Criminal Act, 18 U.S.C. §924(e) unconstitutionally vague in *Johnson v. United States*, 135 S.Ct. 2551 (2015). Within a year of that decision, Mr. Suarez brought a first §2255 motion on June 24, 2016. (CV DE 1). Mr. Suarez argued that

in light of *Johnson*, the residual clause in § 924(c) was unconstitutionally vague, and the hostage taking conspiracy was not otherwise a "crime of violence" under §924(c)'s elements' clause. (CV DE 1). As such, Mr. Suarez argued he was actually innocent of Count 5, the § 924(c) count. He asked the court to vacate count 5 and conduct a resentencing. (CV DE 1).

The government opposed, arguing that *Johnson* did not apply to invalidate the residual clause of §924(c). It further argued that the claim was procedurally defaulted and that it failed on the merits because the offense was also based on the dismissed charge of carjacking which was a "crime of violence" under the elements' clause. (CV DE 15).

The case was stayed after *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), pending the *en banc* reconsideration of issues in *Ovalles v. United States*, 889 F.3d 1259 (11th Cir. 2018). (CV DE 23, 25).

On October 9, 2018, this Court issued *Ovalles v. United States*, 905 F.3d 1300 (October 9, 2018). The same day, the district court issued an order vacating the referral order, and upon review of the record the court denied Mr. Suarez's §2255 motion and also denied a COA. (DE CV 27). It found pursuant to *Ovalles*, 905 F.3d 1300 and *In re Smith*, 829 F.3d at 1280 (11th Cir. 2019), that the §924(c) conviction could be upheld on the dismissed charge of carjacking which it found categorically qualified as a crime of violence under §924(c)'s elements' clause. *Id*.

Mr. Suarez filed a timely appeal. (CV DE 29). This court construed the

notice of appeal as a motion for COA. (11th Cir. No. 18-15101, Jan. 2, 2019). Subsequently, the case was stayed pending the resolution of *Davis*, 139 S.Ct. 2319. After *Davis* issued, this Court reopened the case and again construed the notice of appeal as a COA. (11th Cir. No. 18-15101, Sept. 6, 2019).

The government filed an opposition, relying heavily on *In re Navarro*, 931 F.3d 1298 (11th Cir. 2019), arguing that the §924(c) conviction could be sustained under the elements' clause based on the dismissed carjacking charge, and thus a COA was not required by *Davis*. (11th Cir. No. 18-15101, Gov't Response Sept. 17, 2019). Mr. Suarez filed a Reply arguing that the government's reliance on *In re Navarro* was misplaced. In his pleadings, Suarez argued that the sole operative predicate was the conspiracy to commit hostage taking pursuant to *In re Gomez*, 830 F.3d at 1227 (11th Cir. 2019) and *Brown v. United States*, 942 F.3d 1069 (11th Cir. 2019). He further argued that the hostage taking conspiracy could not support the §924(c) charge in light of *Davis*. Suarez further argued that he was actually innocent of the §924(c) conviction, and thus, his claim was jurisdictional, non-waivable, and non- defaultable. He argued alternatively, that he could prove cause and prejudice.

On November 22, 2019, this Eleventh Circuit granted a certificate of appealability ("COA") on the following issue:

> Whether the district court erred in denying Mr. Suarez's §2255 motion to vacate based on its conclusion that his §924(c) conviction rested on a valid predicate notwithstanding *United States v. Davis*, 139 S.Ct. 2319 (2019). *See Brown v. United States*, No. 17-13933, __ F.3d __, 2019 WL 5883708 (11th Cir. Nov. 12, 2019); *In re Navarro*, 931 F.3d

1298 (11th Cir. 2019).

On appeal, the Eleventh Circuit affirmed the denial of Mr. Suarez's 28 U.S.C. § 2255 motion. Specifically, the Eleventh Circuit held that count one of the indictment, conspiracy to commit kidnapping, no longer qualified as a predicate offense for purposes of 924(c). However, the Eleventh Circuit held that the 924(c) was nevertheless supported by the offense of carjacking even though Mr. Suarez did not enter a plea of guilty to carjacking.

REASON FOR GRANTING THE WRIT

The Eleventh Circuit's reliance on an offense to which Mr. Suarez did not plead guilty, was not convicted of, and the government expressly chose not to prosecute in order to support a consecutive mandatory sentence violates Mr. Suarez's Due Process rights and the established law of this Court.

Mr. Suarez entered a plea of guilty to counts one and five of the indictment. Count one charged conspiracy to kidnap and count five charged the use of a firearm during the commission of an offense. The plea agreement was the culmination of a plea negotiation between the government and Mr. Suarez. The government was not forced into entering into the agreement. The government could have rejected any plea negotiation and Mr. Suarez would have either entered an open plea to all the charges or gone to trial on all the charges. In addition, the government could have negotiated to have Mr. Suarez enter a plea of guilty to the charge of carjacking and the 924(c) offense. None of that occurred.

Mr. Suarez admitted his guilt and was convicted of conspiracy to commit kidnapping. The government then voluntarily dismissed the other charges including the charge of carjacking. The government now relies on the charge that it agreed to dismiss to deny relief to Mr. Suarez. The action of the Eleventh Circuit denying Mr. Suarez relief based on that dismissed charge violates Mr. Suarez' Due Process rights.

This Court has held that enhancing a sentence under 924(c) based on an improper underlying offense violates due process. *Johnson v. United States,* 135 S. Ct. 2551, 2562 (2015). That is essentially what occurred here. Mr. Suarez entered

a plea of guilty to an offense that previously qualified as a predicate offense for 924(c) under the residual clause. That offense no longer qualifies. *See id.* The government and the court of appeals cannot merely substitute in an offense that the government expressly chose not to prosecute and dismissed.

A. Pursuant to *Davis*' Categorical Approach, Conspiracy to Commit Hostage Taking is the Operative Predicate.

The *Davis* case ultimately vindicated Mr. Suarez's §2255 claims when it declared the residual clause of 18 U.S.C. §924(c)(3)(B) unconstitutionally vague. *United States v. Davis*, 139 S.Ct. 2319 (2019). The *Davis* court found §924(c)(3)(B) materially indistinguishable from 18 U.S.C. §924(e)(2)(B)(ii) struck down in *Johnson*, 135 S. Ct. 2551 (2015). *Davis* made clear that the categorical approach applied to §924(c) claims. *Davis* at 2327; *see also Mathis v. United States,* 136 S.Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013); *Shepard v. United States*, 544 U.S. 13, 21-23 (2005).

In *Davis*, this Court rejected the government's " 'new 'case specific method' that would look to the 'defendant's actual conduct' in the predicate offense,'" (*Id.* at 2327), and found that "what was true of §16(b) seem[ed] . . . at least as true of §924(c)(3)(B): . . . [§924(c)'s] statutory text commands the categorical approach." (Id. at 2328). Conspicuously absent from the Court's 30-year history of applying the categorical approach is any suggestion that a conviction to a single count of a statute actually results in a conviction for multiple, alternative versions of the offense. Rather,

pursuant to *Davis*' categorical approach and the §924(c) statute, the single count of §924(c) evidenced in the judgment is one conviction supported by one operative predicate which is the "least serious" of the crimes charged in the indictment – in this case conspiracy to commit hostage taking.

The *In re Gomez* case, 830 F.3d 1225, makes clear that each "crime of violence" predicate results in a different §924(c) offense. *Id*. at 1227; *see also* Eleventh Circuit Pattern Jury Instruction 35.5 (lists "crime of violence" predicate as an element of the §924(c) conviction). In *In re Gomez*, this Court explained that the indictment was "duplicitous" because it "list[ed] multiple potential predicate offenses in a single §924(c) count." 830 F.3d at 1227. And the jury there returned a "general verdict" without specifying which predicate formed the basis of the §924(c) conviction. *Id*. Thus, the Court explained that it "can't know what, if anything, the jury found with regard to Gomez's connection to a gun and these [predicate] crimes." *Id*.

The Court continued that "[t]his lack of specificity has added significance [under *Alleyne v. United States*, 570 U.S. 99 (2013)] because §924(c) increases the mandatory minimum based on a finding that the defendant used or carried a firearm." *Gomez*, 830 F.3d at 1227; *see Schad v. Arizona*, 501 U.S. 624, 662-63 (1991) (plurality opinion) ("no person may be punished criminally save upon proof of some *specific illegal conduct.").* "*Alleyne* held that because these findings 'increase the mandatory minimum sentence,' they are 'elements and must be submitted to the jury and found beyond a reasonable doubt.'" *Gomez,* 830 F.3d at 1227 (quoting *Alleyne*,

570 U.S. at 108). And "[a]n indictment that lists multiple predicates in a single §924(c) count allows for a defendant's mandatory minimum to be increased without the unanimity *Alleyne* required." *Id*. Thus, while courts might theoretically be able to review the record and "guess which predicate the jury relied on," "*Alleyne* expressly prohibits this type of 'judicial factfinding' when it comes to increasing a defendant's mandatory minimum sentence." *Id*. at 1228. As a result, the *In re Gomez* court used the least serious predicate to analyze the §924(c) conviction.

That reasoning applies no less in a guilty-plea case like this. First, as in *In re Gomez*, the indictment here was duplicitous: it charged multiple §924(c) offenses in a single §924(c) count—one based on conspiracy to commit hostage taking, substantive hostage taking, kidnapping, and carjacking. (CR DE 50:5). Indeed, the plain language of §924(c) contemplates only a single predicate "crime of violence or drug trafficking crime." 18 U.S.C. §924(c)(1)(A). By charging four predicate "crimes of violence" in the same §924(c) count, the indictment improperly charged four separate §924(c) crimes at once.

Moreover, as in *In re Gomez*, there is no way to know which predicate formed the basis of the §924(c) conviction. Mr. Suarez's judgment confirms that the §924(c) conviction is for using a firearm in connection with a singular "crime of violence," but the judgment does not specify what the predicate "crime of violence" is. (CR DE 223:1). As explained in *Gomez*, *Alleyne* prohibits increasing Mr. Suarez's mandatory minimum through retroactive judicial fact-finding, just as it would in the context of

a case that went to trial. Just as in *In re Gomez*, it would run afoul of the Sixth Amendment for this Court to now make a judicial finding about which predicate formed the basis of Mr. Suarez's § 924(c) offense. The result is that the Court must use the least serious predicate offense — the hostage taking conspiracy — to analyze the § 924(c) offense.

The least-culpable-offense approach is required not only by the reasoning of *In re Gomez*, but also by the reasoning of *Shepard*, 544 U.S. 13. Where a defendant pled guilty to a statute that is divisible into alternative elements constituting distinct offenses, *Shepard* authorizes courts to consider a limited set of documents that will "necessarily" and "conclusive[ly]" identify the defendant's offense of conviction. *Id*. at 16, 21, 24–26. Given that "demand for certainty," *id*. at 21, when *Shepard* documents do not establish the crime for which the defendant was "necessarily" convicted, the court must use the least serious one. *See Johnson v. United States*, 559 U.S. 133, 137 (2010).

That logic applies here. Again, the indictment charged Mr. Suarez with four distinct §924(c) offenses in a single count. (CR DE 50:5). That situation is analogous to a statute of conviction that is divisible into multiple offenses. And here, the judgment does not specify the singular §924(c) crime-of-violence predicate for which Mr. Suarez was adjudicated guilty. (CR DE 435:7-8, 29-30). The judgment reflects that he was convicted for only one § 924(c) offense, but it does not tell us which one. (CR DE 223:1). The plea agreement indicates that the sole predicate is

the hostage taking conspiracy charge. The result is that the Court must use the hostage taking conspiracy as the operative § 924(c) predicate.

That result is further supported by *Stromberg v. California*, 283 U.S. 359 (1931) and its progeny, which holds that "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." *Zant v. Stephens*, 462 U.S. 862, 881 (1983). "In such circumstances, it is impossible to determine on which basis the jury reached its verdict, so deficiency in only one basis requires the entire verdict to be set aside." *Parker v. Sec'y for Dep't of Corrs.*, 331 F.3d 764, 777 (11th Cir. 2003); *see also United States v. Chapman*, 666 F.3d 220, 227-28 (4th Cir. 2012) ("[W]hen a defendant pleads guilty to a formal charge in the indictment which alleges conjunctively the disjunctive components of a statute, the rule is that the defendant admits to the least serious of the disjunctive statutory conduct.").

That logic applies here if the court considers the convictions that were dismissed by Mr. Suarez's plea. Taking the dismissed convictions into consideration, theoretically, the §924(c) conviction could have been based on the conspiracy to commit hostage taking (an invalid ground) or the carjacking charge (a valid ground, at least under current circuit precedent). Although not claiming a stand-alone duplicity claim, Mr. Suarez's citation to the *Stromberg* principle establishes why the court cannot simply shift over to an alternate predicate to uphold

the §924(c) conviction for purposes of Mr. Suarez's §2255 motion. The "crime of violence" predicate is an element of the §924(c) conviction, and such elements cannot be exchanged for a substitute set of facts. If it is unclear, the element must be based on the least serious offense.

Moreover, the plea agreement in Mr. Suarez's case, like the plea agreement in the *Brown* case, 942 F.3d 1069, indicated that the §924(c) conviction was based on the hostage taking conspiracy predicate only. Specifically, the plea agreement referenced and explained count 1 and count 5 together. And in its description of count 5, the plea agreement narrowed the §924(c) charge, stating only that it was a charge for "knowingly possess[ing] a firearm in furtherance of a crime of violence." Thus, in the plea agreement, the government thoroughly explained the hostage taking conspiracy charge that it was relying on in conjunction with its description of count 5. Notably the plea agreement only explained count 1 in relation to count 5, and it left out reference to any other dismissed charges in relation to count 5. (DE CR 177:1 ¶1). Although the court read the indictment earlier in the plea colloquy, it did not do so when establishing the terms of the plea agreement, and there was no court statement beyond acceptance of the pleas to counts 1 and 5 designating which predicate was the "crime of violence" underlying the §924(c) conviction. (CR DE 435:7-8, 29-30). In light of the above, *Brown* establishes that count 1, the conspiracy to commit hostage taking, was the sole predicate for count 5, the §924(c) offense of "knowingly possess[ing] a firearm in furtherance of a crime of violence."

In sum, to avoid crediting a duplicitous indictment, contradicting the reasoning of *In re Gomez*, *Brown*, and violating the rules of *Alleyne*, *Shepard*, and *Stromberg*, the Court should use the least culpable predicate— hostage taking conspiracy —to analyze the §924(c) offense. Not only is that conclusion dictated by this binding precedent, but it also reflects the parties' intent as indicated in the plea, since Mr. Suarez pled guilty only to hostage taking conspiracy, and not to carjacking.

Finally, that result is not contrary to *In re Navarro*, 931 F.3d 1298 (11th Cir. 2019). *In re Navarro* denied a successive application in a multiple-predicate case because it found that the predicates were inextricably intertwined and that, "there was no uncertainty" as to which of the predicates charged in the indictment formed the basis of the §924(c) conviction. *Id*. at 1303 n.4.

In Mr. Suarez's case, there was only reference to count 1 in relation to count 5 in the plea agreement that described what Mr. Suarez was pleading to. There was nothing that would have indicated that the underlying predicate was anything other than count 1's conspiracy to commit hostage taking. Accordingly, the plea agreement as well as the principles set out in *Gomez, Brown, Alleyne, Shepard, and Stromberg* support that the only underlying predicate was the hostage taking conspiracy for the adjudicated singular §924(c) conviction as evidenced in the judgment. (CR DE 177:1; CR DE 435:7-8, 29-30).

Consequently, this case is distinguishable from *In re Navarro* which does not control. The facts here are much closer to those in *In re Gomez and Brown.*

Moreover, the holding of *In re Navarro* should be limited to its facts, as it appears to disregard *In re Gomez*'s core reasoning about duplicitous indictments and *Alleyne*. To the extent *In re Navarro* cannot be reconciled with the reasoning of *In re Gomez,* the earlier decision of *Gomez* must control the later decision in *Navarro* under the prior panel precedent rule. *Walker v. Mortham*, 158 F.3d 1177, 1188–89 (11th Cir. 1998).

The court should also find that the *Navarro* case does not control because it is a published panel decision adjudicating a successive § 2255 application ("SOS" application) based on a *pro se* application and truncated proceedings that do not allow for fair and full briefing of the issues. Although Mr. Suarez recognizes that this Court has found such SOS application decisions binding precedent on all subsequent panels of this Court, including those reviewing first §2255 motions and direct appeals (*see St. Hubert*, 909 F.3d at 346), Mr. Suarez submits that such SOS orders violate Petitioner's procedural due process rights—both under the framework established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and under this Court's issue-preclusion precedents, and he preserves this issue for further appellate review. See *Valdes Gonzalez v. United States* (U.S. No. 18-7575) (cert filed January 18, 2019, pending redistribution for conference).

In light of the above, the court must find that Mr. Suarez's §924(c) conviction in count 5 rests on nothing more than the least serious predicate crime alleged in support of the §924(c) conviction – conspiracy to commit hostage taking.

B. Conspiracy to Commit Hostage Taking is Not a Crime of Violence for Purposes of §924(c)'s Elements' Clause.

Conspiracy to commit hostage taking does not qualify as a crime of violence for purposes of §924(c) because it does not have as an element the use, attempted use, or threatened use of physical force against a person or property of another. Mr. Suarez's hostage taking conspiracy, like other federal conspiracies, is merely an "agree[ment] with someone else to do something that would be another Federal crime if it was actually carried out." 11th Cir. Pattern Jury Instruction 13.1 (2010); *see also Brown*, 942 F.3d at 1075 ("The elements of conspiracy center on a defendant's agreement to commit a crime and do not require the government to prove the elements of the underlying substantive crime itself."). Since the conspiracy offense may be committed by agreement alone and does not require actual or threatened force, conspiracy to commit hostage taking does not qualify under the §924(c)(3)(A) elements clause. *See Brown*, 942 F.3d at 1075 ("Neither an agreement to commit a crime nor a defendant's knowledge of the conspiratorial goal necessitates the existence of a threat or attempt to use force. The same goes for the final element – a defendant's voluntary participation that furthers the goal of committing Hobbs Act robbery – because a defendant's voluntary participation may manifest itself in any one of countless non-violent ways. So like our sister Circuits, we conclude that conspiracy to commit Hobbs Act robbery does not qualify as a 'crime of violence,' as defined by §924(c)(3)(A)."); *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010)

(defendant's prior conviction for non-overt act criminal conspiracy was not "crime of violence"). Indeed, even the substantive crime of hostage taking does not qualify as a predicate under §924(c)'s elements' clause. *United States v. Carrion-Caliz*, 944 F.2d 220, 225 (5th Cir. 1991) (substantive hostage taking offense does not require use or threatened use of physical force or violence); *Rodriguez-Rios v. United States*, 2019 WL 7833963, *1 (D. Arizona 2019) (conspiracy to commit hostage taking and hostage taking under 18 U.S.C. §1203 are not crimes of violence for purposes of §924(c)); *cf*., *Gillis v. United States*, 938 F.3d 1181 (11th Cir. Sept. 13, 2019) (federal kidnapping does not require use, threatened use, or attempted use of physical force).

Since the elements of the hostage taking conspiracy can be met without physical force or threats of physical force, it simply does not meet the requirements of the elements clause of §924(c)(3), which requires that the predicate offense has as an element the use, attempted use, or threatened use of physical force against the person or property of another. *Cf., Brown,* 942 F.3d at 1075; *Whitson*, 597 F.3d 1218 (11th Cir. 2010) (a non-overt act conspiracy was not a "crime of violence" for purposes of the career offender guideline, and could not even meet the more expansive residual clause, because there is "no violence or aggression in the act of agreement.").

The government conceded this point below as it did not argue that hostage taking conspiracy was a viable elements' clause predicate, but instead argued only that the other *dismissed* charges, especially carjacking, were viable predicates which met §924(c)'s elements' clause requirements. (CV DE 15:7, 19-30). Because, as

explained above, the conspiracy to commit hostage taking offense is the sole operative offense, and because it is overbroad vis-à-vis the elements' clause, Mr. Suarez's §924(c) conviction cannot be sustained after *Davis*. Therefore, Mr. Suarez was illegally convicted of a non-offense in his §924(c) count, and that conviction and its sentence should be vacated and dismissed.

C. Mr. Suarez is Actually Innocent of the §924(c) Conviction, And Thus, His Claims Are Jurisdictional and Non-waivable, and His Claims Are Not Subject to Procedural Default; Alternatively, Mr. Suarez Can Prove Cause and Prejudice.

Because not all the essential elements of the §924(c) charge have been established, Mr. Suarez is actually innocent of the §924(c) crime. The conviction is invalid, and Mr. Suarez stands wrongfully convicted of the §924(c) offense because he is actually innocent of that crime. When a defendant is actually innocent, he cannot waive or procedurally default his claims because they are jurisdictional. *United States v. Peter*, 310 F.3d 709, 713-14 (11th Cir. 2003) (where indictment charged a non-offense, it did not confer jurisdiction upon the district court over defendant's case); *United States v. St. Hubert*, 909 F.3d 335, 343 (11th Cir. 2018) (citing to *Peter* and *Class*), *reh'g en banc denied*, 918 F.3d 1174 (11th Cir. 2019); *see also Harris v. United States*, 149 F.3d 1304, 1308-09 (11th Cir. 1998) ("[J]urisdictional defects . . . cannot be procedurally defaulted. As federal courts, we are courts of limited jurisdiction, deriving our power solely from Article III of the constitution and from the legislative

acts of Congress. We therefore cannot derive power to act from the actions of the parties before us. Consequently, the parties are incapable of conferring upon us a jurisdictional foundation we otherwise lack simply by waiver or procedural default . . . .[B]ecause jurisdictional claims may not be defaulted, a defendant need not show 'cause' to justify his failure to raise such a claim" on direct appeal; a judgment tainted by a jurisdictional defect must be reversed on collateral review.).

Mr. Suarez's claims are also not subject to procedural default because he can show cause and prejudice. Before Mr. Suarez's sentencing, the Supreme Court affirmed the constitutionality of the residual clause. *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009). Once the Supreme reversed itself in *Johnson*, 135 S.Ct. 2551 (2015), Mr. Suarez brought a timely claim within one year of the *Johnson* decision. Mr. Suarez has continued to press his claims through all the legal twists and turns, and his claims were ultimately vindicated by *Davis*. Moreover, since Mr. Suarez is actually innocent of the §924(c) offense, there is prejudice. Not all the elements of the §924(c) offense were established, therefore, Mr. Suarez sustained a conviction for an act that was not criminal. Because the conviction was not valid, the consecutive sentence imposed for the §924(c) conviction was invalid as well. When a conviction and punishment issue for an act that is not criminal, "There can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and

'present(s) exceptional circumstances' that justify collateral relief under §2255." *See* *Davis v. United States*, 417 U.S. 333, 341-346 (1974).

CONCLUSION

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

Respectfully submitted,

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