No. 20-_____

IN THE
Supreme Court of the United States

RICO BLACKWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

W. MATTHEW DODGE
Counsel of Record
FEDERAL DEFENDER PROGRAM, INC.
101 Marietta Street, NW
Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Matthew_Dodge@FD.org

QUESTIONS PRESENTED

Mr. Blackwell is serving a long federal prison sentence for the paired crimes of conspiracy to commit bank robbery and use of a firearm during and relation to a crime of violence in violation of 18 U.S.C. § 924(c). After this Court's opinion in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), in which it struck down § 924(c)'s residual clause, we know that Mr. Blackwell's conspiracy crime is no longer a crime of violence and, consequently, the § 924(c) violation is no longer a crime. The government disputes none of this. All agree, then, that Mr. Blackwell stands convicted and sentenced—to a term of 84 months in prison consecutive to the penalty for the conspiracy crime alone—for a non-crime.

Yet the district court denied Mr. Blackwell's post-*Davis* 28 U.S.C. § 2255 motion anyway. It did so based not upon the merits, but instead upon two procedural questions—procedural default and a collateral-attack waiver in the plea agreement—questions we now present to this Court:

1. At least four circuit courts have held that a post-conviction challenge to a conviction or sentence based upon one of this Court's trio of residual-clause holdings—*Johnson*, *Dimaya*, and *Davis*—cannot be procedurally defaulted. The Eleventh Circuit recently became the first to say otherwise. With this circuit split in place, we ask the Court answer this question: Whether a defendant can ever show cause and prejudice to avoid the procedural default bar on a meritorious *Davis* challenge to a § 924(c) conviction?

2. The district court enforced the long-ago collateral-attack waiver and a single judge of the Eleventh Circuit denied Mr. Blackwell a certificate of appealability. Here, too, there is a circuit split, for at least one circuit has held that a *Davis*-based § 2255 claim is exempted from a general waiver, and at least one has not. We ask this Court to decide this query: Whether the collateral-attack waiver in the plea agreement bars Mr. Blackwell's *Davis* challenge to his § 924(c) conviction in spite of the fact that he is actually innocent and that the sentence—which exceeds the statutory maximum—is a miscarriage of justice?

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rico Blackwell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION & ORDERS BELOW

The unpublished, one-page order of the Eleventh Circuit denying Mr. Blackwell's application for a certificate of appealability is included in the appendix below. Pet. App. 1. The district court's order denying Mr. Blackwell's motion for a certificate of appealability is also included here, Pet. App. 2, as is the district court's original order denying the 28 U.S.C. § 2255 motion. Pet. App. 4.

JURISDICTION

The Eleventh Circuit filed an order denying Mr. Blackwell's application for a certificate of appealability on December 9, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1), which permits review of civil cases in the courts of appeals. The 150-day deadline (per the Court's general order of March 19, 2020) would have landed on Saturday, May 8, 2021, but instead falls on the next business day: Monday, May 10, 2021. Under Supreme Court Rules 13(3) and 13.1, then, Mr. Blackwell has filed this petition on time.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(1)(A) states in part:

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

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

18 U.S.C. § 924(c)(3)(A), (B), the definition of "crime of violence," provides:

[T]he term "crime of violence" means an offense that is a felony and—(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or

property of another may be used in the course of committing the offense.

18 U.S.C. § 371, titled "Conspiracy to commit offense or to defraud United States," provides in part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

.

INTRODUCTION

The government conceded below that "[Mr.] Blackwell's § 924(c) conviction based on a conspiracy predicate would be no longer viable after *Davis*." That is, the government admits that Mr. Blackwell is not guilty of a firearm crime at all. Because he completed the portion of the sentence arising from the conspiracy crime, he is now well into an 84-month consecutive prison sentence for conduct that *does not violate federal law*. No one—neither the government nor the district court nor even the Eleventh Circuit judge who denied our motion for a COA—says otherwise.

Instead, the lower courts blocked Mr. Blackwell at the courthouse door by wielding the twin defenses of procedural default and the collateral-attack waiver. In other parts of the country, Mr. Blackwell would have succeeded in his § 2255 motion and would have been released from prison by now. Yet through this fluke of geography, he is not.

The Eleventh Circuit treats a *Davis* error like any other generic legal error. The court recently held in *Granda* v. *United States* that a defendant who failed to predict the sudden change in federal law that is the *Johnson-Dimaya-Davis* earthquake, has defaulted even a winning *Davis* claim. Yet the panel is an outlier. No fewer than four circuit courts have held that a *Davis* claim, because it is an extraordinary revolution in federal law, necessarily establishes cause and prejudice and, therefore, is exempt from the generic procedural-default sanction.

The courts below compounded the mistake. It now implies, in the face of its own precedent and at least one

other circuit court, that a defendant's long-ago generic appeal waiver must also bar a winning *Davis* claim. The court says that a defendant can bargain away his right not to go to prison for an act that everyone, including the government and the district court, agrees is a non-crime. If the outcome here—the harsh consecutive § 924(c) sentence for a non-crime—is not a "miscarriage of justice" worthy of an exception to generic waiver, then what is?

The Court should grant the petition for a writ of certiorari for several reasons:

First, the questions here are both the source of fractured conflicts in the lower courts. At least four circuits have held that a *Davis* claim establishes both cause and prejudice and, therefore, any procedural default must be excused. But the Eleventh Circuit says otherwise. On the collateral-attack waiver question, too, we have at least one circuit on both sides of the divide, with the Eleventh Circuit somewhere in the middle. These entrenched conflicts will continue, and likely widen, until this Court resolves the questions presented.

Second, this question is one of national importance that arises frequently in the lower courts. Many defendants, all over the country, have pursued § 2255 relief in the wake of *Davis*. And the stakes for each is high: the § 924(c) crime leads to a vast increase in a defendant's term of imprisonment (a consecutive term of five, seven, or ten years in prison for a first such violation). This Court has chosen to resolve questions related to many corners of the § 924(c) statute in more than a dozen cases in the last 30 years. It is important that a statute, especially this punitive statute, apply uniformly throughout the country.

On both questions we raise here, uniformity has proved elusive.

Third, this case is a strong vehicle for the Court to answer the question presented. The facts are undisputed, there are no jurisdictional hurdles for the Court to navigate, and both the district court and the Eleventh Circuit resolved Mr. Blackwell's appeal based solely upon the procedural questions presented here.

The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

In March 2013, Mr. Blackwell pled guilty to two federal crimes: conspiracy to commit bank robbery in violation of 18 U.S.C. § 371, and use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). The crime of violence defined in the § 924(c) count was the conspiracy to commit bank robbery. Mr. Blackwell signed a plea agreement with a generic appeal waiver provision, in which he waived the right to file a future collateral attack against his conviction and sentence. The district court later sentenced Mr. Blackwell to serve a total term of 138 months in prison, which included 54 months on the conspiracy count and a consecutive term of 84 months on the § 924(c) count. Mr. Blackwell did not appeal his conviction or sentence.

Mr. Blackwell later filed, on June 21, 2018, a motion to vacate his conviction and sentence under 28 U.S.C. § 2255. In light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), he challenged the § 924(c) conviction because that statute's residual clause, he argued, was void for vagueness and the underlying crime of violence—the § 371 conspiracy—was a crime of violence no more. Mr. Blackwell later recast his claim under *United States v. Davis*, once this Court struck down the § 924(c) residual clause.

The district court denied Mr. Blackwell's § 2255 motion. Although it agreed that his § 924(c) conviction was based solely on the verboten residual clause, that the *Davis* rule was retroactive, and that he filed the motion on time, the Court held both that he procedurally defaulted the claim and that the collateral-attack waiver, too, blocked his path. The district court also denied Mr. Blackwell a certificate of

appealability, and a single judge of the Eleventh Circuit later did the same, with little explanation:

> To merit a certificate of appealability, an appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. See 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Rico Blackwell's motion for a certificate of appealability is DENIED because he failed to make the requisite showing.

This petition for writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

In *Davis*, this Court held that the § 924(c)(3)(B) residual clause is void for vagueness, 139 S. Ct. 2319, 2336 (2019). The parties agree that Mr. Blackwell's § 924(c) conviction is based entirely upon the residual clause, that the *Davis* rule is retroactive to defendants like him who file a timely § 2255 motion, and that he has a winning claim on the merits. Yet the Eleventh Circuit blocked Mr. Blackwell from the relief demanded by *Davis* by erecting a pair of procedural obstacles. In doing so, the Eleventh Circuit has vastly undermined *Davis* and left Mr. Blackwell, and all other post-conviction claimants like him, out in the cold, serving long prison sentences for acts that are not crimes. If he were convicted in many other parts of the country, Mr. Blackwell would earn *Davis* relief, but not here. This Court should resolve these circuit splits—one on each procedural question—here and now.

1. Both procedural questions are the source of fractured conflicts in the lower courts. The conflicts will continue, and likely widen, until this Court resolves the questions presented.

A. Procedural default.

In the lower courts, we conceded that Mr. Blackwell did not raise the § 924(c) residual clause claim in a long-ago direct appeal. But we argued that his procedural default must be excused because, through the *Davis* claim, we showed both "cause" and "prejudice" under this Court's rubric in *Reed v. Ross*, 468 U.S. 1, 17 (1984). In *Reed*, this Court held that a claimant "will almost certainly have [had] . . . no reasonable basis" to raise a novel claim when the claim is based on a "constitutional principle that had

not been previously recognized but which is held to have retroactive application." The *Johnson*, *Dimaya*, and now *Davis* constitutional rules are quintessential examples of *Reed's* cause analysis.

We fit neatly into the cause inquiry because *Davis*, like *Johnson* and *Dimaya* before it, fit neatly within this box. These opinions explicitly overruled the Court's precedents; overturned a longstanding and widespread practice "which a near-unanimous body of lower court authority ha[d] expressly approved;" and disapproved a practice that the Court "arguably ha[d] sanctioned in prior cases." We have also proved prejudice with ease—with the *Davis* error in place, we know that Mr. Blackwell is serving an 84-month prison sentence for a crime he did not commit.

Yet the district court disagreed. It concluded that Mr. Blackwell's failure to file a direct appeal on this question many years ago, long before *Johnson* and *Davis*, is a procedural bar to his § 2255 motion. The Eleventh Circuit later, in *Granda v. United States*, adopted this very view. It rejected a *Davis*-based claim just like Mr. Blackwell's: "Granda cannot establish cause, actual prejudice, or actual innocence. Thus, he cannot collaterally attack his conviction on a vagueness theory."[1] Why not? Because the residual-clause challenge, even to the ACCA's residual clause, was not novel enough and, beyond that, the stone wall erected against ACCA challenges was not erected against § 924(c) challenges:

> Granda's best argument that his defaulted vagueness claim was not available on direct appeal

---

[1] 990 F.3d 1272, 1286 (11th Cir. 2021).

> is that at the time of that appeal, *James v. United States*, 550 U.S. 192, 210 n.6 (2007) had directly rejected the argument that the ACCA's residual clause was unconstitutionally vague. . . . However, *James* did not consider the § 924(c) residual clause at all. In fact, *James* indicated that at least three Justices were interested in entertaining vagueness challenges to the ACCA's residual clause, and perhaps to similar statutes. . . .
>
> To be sure, few courts, if any, had addressed a vagueness challenge to the § 924(c) residual clause before the conclusion of Granda's direct appeal. Still, as a general matter, due process vagueness challenges to criminal statutes were commonplace. Thus, for example, litigants had for years before Granda's appeal argued (without success) that various other provisions of § 924(c) were unconstitutionally vague.[2]

The panel found no cause and, later in the opinion, no prejudice either. Yet the *Granda* panel was not even unanimous; Judge Adalberto Jordan concurred in the judgment, but elected not to join the procedural-default holding.[3] The Eleventh Circuit is suddenly alone among the circuit courts.

At least four circuits—the First, Fifth, Seventh, and Tenth Circuits—have expressly held that a residual-clause

---

[2] 990 F.3d at 1287.

[3] *Id.* at 1296.

claim of this genre (*Johnson, Dimaya*, or *Davis*) cannot be procedurally defaulted.

In *Lassend v. United States*, the First Circuit held, in the context of the Armed Career Criminal Act and *Johnson* that "*Reed* stated that, where the Supreme Court 'explicitly overrule[s] one of [its own] precedents, . . . the failure of a defendant's attorney to have pressed such a claim . . . is sufficiently excusable to satisfy the cause requirement.' That is what happened here. Lassend's argument was not 'available at all' until the Supreme Court 'explicitly overrule[d] *Sykes* and *James*.'"[4]

In *Cross v. United States*, the Seventh Circuit agreed, and held that

> *Johnson* represented the type of abrupt shift with which *Reed* was concerned. Until *Johnson*, the Supreme Court had been engaged in a painful effort to make sense of the residual clause. In *James*, it took the position that the validity of the residual clause was so clear that it could summarily reject Justice Scalia's contrary view in a footnote. . . . Eight years later, the Court made a U-turn and tossed out the ACCA residual clause as unconstitutionally vague. We join the Tenth Circuit in excusing . . . the petitioners' failure to challenge the residual clause prior to *Johnson*.
>
> The second and third scenarios identified by Reed present even more compelling grounds to excuse [the] procedural defaults. *Johnson* abrogated a

[4] 898 F.3d 115, 122-23 (1st Cir. 2018).

> substantial body of circuit court precedent upholding the residual clause against vagueness challenges. . . . [N]o court ever came close to striking down the residual clause before 1992 or even suggested that it would entertain such a challenge. Finally, the Supreme Court had implicitly "sanctioned" the residual clause by interpreting it as if it were determinate. Thus, the parties' inability to anticipate *Johnson* excuses their procedural default.[5]

In *United States v. Snyder*, the Tenth Circuit observed that "no one—the government, the judge, or the [defendant]—could reasonably have anticipated *Johnson*."[6] That court, too, held that a defendant challenging his ACCA sentence post-*Johnson* must not be barred by the procedural default doctrine.

Finally, we have the related question of actual innocence. In *United States v. Reece*, the Fifth Circuit held:

> The government contends that Reece's petition is procedurally barred because he did not raise a constitutional challenge to § 924(c)(3)(B) in . . . his direct appeals. . . . Here, however, the cause and prejudice standard does not apply. As *Davis* reaffirmed, 'a vague law is no law at all'. . . . If

---

[5] 892 F.3d 288, 296 (7th Cir. 2018).

[6] 871 F.3d 1122, 1127 (10th Cir. 2017).

> Reece's convictions were based on . . . § 924(c)(3)(B), then he would be actually innocent of those charges.[7]

The widening gap shows that the question requires resolution by this Court. There is much at stake here. In the end, Mr. Blackwell's § 924(c) conviction is unlawful after *Davis* because his predicate offense—the § 371 conspiracy—does not qualify as a crime of violence and he is now serving an additional seven years in prison for a phantom crime.

In the end, the Eleventh Circuit's procedural default rule is doubly dangerous, for it undermines both *Reed* and *Davis*. The too-strict interpretation of the *Reed* factors misreads the dramatic shift in this Court's own views on residual clauses of all varieties, including § 924(c)'s. The rule ignores the recent history entirely. Plus, if the Eleventh Circuit's flag here remains standing, then none of this Court's constitutional rules will ever make it through

---

[7] 938 F.3d 630, 634 & n.3, 636-637 (5th Cir. 2019). This Court has never expressly held that a claim of actual innocence based on a new statutory interpretation—rather than such a claim based on new evidence—can overcome § 2255's statute of limitations, but it has come close. Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 469 (2018) ("*Bousley [v. United States*, 523 U.S. 614 (1998)] . . . recognized that legal innocence, if the defendant's conduct did not fall within the scope of the relevant criminal statute, would constitute cause for procedural default.") The Tenth Circuit has noted that this is an open question there, too. *United States v. Bowen*, 936 F.3d 1091, 1097 n.2 (10th Cir. 2019).

the cause-and-prejudice gauntlet. *Reed* would be empty, toothless words.

The Eleventh Circuit's procedural rule here likely obstructs all *Davis* claimants from relief. No one made these claims before *Johnson* (any residual-clause claim was the height of frivolousness) so if the Eleventh Circuit's rule stands, every *Davis*-based § 2255 motion will be blocked at the courthouse door.

B. The collateral-attack waiver.

Waivers of post-conviction relief—even when broadly worded—are "construe[d] narrowly, and against the government."[8] While courts often describe a plea agreement as an ordinary contract, the institutional and constitutional interests involved raise the stakes and require more careful review. This Court, too, recognizes certain rights that cannot be waived in a plea agreement: "[A]ll jurisdictions appear to treat at least some claims as unwaiveable."[9] A *Davis* claim is just such a right.

The district court was wrong to enforce the collateral-attack waiver where Mr. Blackwell pled guilty to a non-crime and a sentence that we now know is beyond the statutory maximum. In general, a court will enforce a waiver by its terms when a defendant enters into the

---

[8] *United States v. Palmer*, 456 F.3d 484, 488 (5th Cir. 2006).

[9] *Garza v. Idaho*, 139 S. Ct. 738, 745 (2019).

agreement knowingly and voluntarily.[10] And, yes, at the guilty plea hearing, Mr. Blackwell voluntarily agreed to the written collateral-attack waiver. But these bland truisms miss the point here. Even such a knowing waiver must be excused in rare circumstances. To name one such exception, a defendant cannot knowingly waive a future right to challenge a conviction and sentence that is beyond the statutory maximum.

In *United States v. Bushert*, a panel of the Eleventh Circuit implied exactly that:

> [T]here are certain fundamental and immutable legal landmarks within which the district court must operate regardless of the existence of sentence appeal waivers. As the *Marin* court wrote, "a defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute" . . . It is both axiomatic and jurisdictional that a court of the United States may not impose a penalty for a crime beyond that which is authorized by statute.[11]

Later Eleventh Circuit panels presumed that this *Bushert* exception is alive and well and, indeed, it ought to be.[12]

---

[10] *United States v. Bascomb*, 451 F.3d 1292, 1294 (11th Cir. 2006).

[11] 997 F.2d at 1350 n.18.

[12] *United States v. Northcutt*, 554 Fed. Appx. 875, 877-878 (11th Cir. 2014) (unpublished) (although an appeal waiver required dismissal of most claims, it did not block the

That exception is mandatory, and surely must include sentences, like § 924(c) sentences, that exceed the otherwise-applicable statutory maximum. Courts agree that an illegal § 924(c) sentence is above the statutory maximum.[13] This is why the single judge's denial of Mr. Blackwell's COA was inexplicable (although he may have punted on the waiver issue if he decided that Mr. Blackwell must lose on the procedural default question). In the end, the Eleventh Circuit has not yet issued a published opinion on the waiver question we present here.

Yet the other appeals courts are split on this question, too. The Ninth Circuit, in *United States v. Torres*, batted away the defense: "If [the defendant] was sentenced under the residual clause of § 924 (c)(3), his sentence would be illegal pursuant to *Davis* and his plea agreement waiver of collateral attack would be inoperative."[14] The Fifth Circuit

---

defendant's challenge to his ACCA sentence, which the panel went on to evaluate because an ACCA error would mean the sentence exceeded the statutory maximum); *United States v. Hale*, 618 Fed. Appx. 521, 523 (11th Cir. 2015) (unpublished) ("Here, though, the waiver included an explicit exception for a sentence that 'exceeds the maximum permitted by statute.' Such an exception may be mandatory. *See United States v. Bushert*.")

[13] *See United States v. Rosales-Acosta*, 679 Fed. Appx. 860, 861 (11th Cir. 2017) (unpublished) (choosing not to enforce appeal waiver in a § 924(c) challenge, where exception permitted appeal of a sentence above the statutory maximum).

[14] 828 F.3d 1113, 1125 (9th Cir. 2016).

recently held that a broadly worded waiver of appeal rights did not waive the right to challenge a § 924(c) conviction under *Davis* on direct appeal.[15] Yet a panel of the *very same circuit* had already enforced a generic waiver to deny a § 2255 claim based on *Johnson*.[16] Finally, the Seventh Circuit, too, has rejected a *Davis*-based post-conviction claim: "Express collateral-attack waivers in [the defendants'] plea agreements are valid and bar their challenges to their convictions and sentences."[17] We have, then, a circuit split.

All of this remains muddled in the district courts, too. Many judges, including those within the Eleventh Circuit, have rejected the government's collateral-attack-waiver defense in similar *Davis*-based § 2255 motions.[18] One such

---

[15] *United States v. Picazo-Lucas*, 821 Fed. Appx. 335, 338 (5th Cir. 2020) (unpublished) (choosing not to enforce appeal waiver).

[16] *United States v. Burns*, 770 Fed. Appx. 187, 190-91 (5th Cir. 2019).

[17] *Oliver v. United States*, 951 F.3d 841, 843-48 (7th Cir. 2020).

[18] *United States v. Bibiano-Vasquez*, No. 4:12-CR-9-MLB-2, Doc. 412 at 3-4 (N.D. Ga. May 18, 2020); *United States v. Lewis*, 2020 WL 2797519, at *5 (E.D.N.Y. May 22, 2020) (refusing to enforce collateral-attack waiver to bar *Davis* challenge and noting that the question is open in the Second Circuit); *United States v. McMillen*, 2019 WL 4602237, at *3 (S.D. Cal. 2019) ("A plea agreement waiver will not apply if a defendant's sentence is "illegal," which

court penned an order that perfectly expresses Mr. Blackwell's argument here:

> For sure, a knowing and voluntary waiver of the right to appeal or collaterally attack a sentence is enforceable. . . . A petitioner, however, cannot waive the right to challenge a conviction and sentence above the statutory maximum. *United States v. Bushert* . . . Petitioner is serving time under a statutory provision the Supreme Court found unconstitutional. Petitioner thus could not waive his right to bring a *Davis* challenge to his conviction and sentence on this charge.[19]

The law permits Mr. Blackwell to challenge the § 924(c) convictions in spite of the collateral-attack waiver. Jurists in Mr. Blackwell's own federal courthouse cannot agree on this legal principle. Without a firm answer from this Court, the topic surely will continue to divide courts elsewhere.

2. These § 924(c)-related questions are of national importance and arise frequently in the lower courts all over the country.

It is important that a statute, especially the hyper-punitive § 924(c) statute, apply uniformly across the

---

includes a sentence that "violates the Constitution."); *Thompson v. United States*, 2020 WL 1905817, at *3 (N.D. Tex. Apr. 17, 2020) (relying on the miscarriage of justice exception to waiver to grant relief).

[19] *Bibiano-Vasquez*, No. 4:12-CR-9-MLB-2, Doc. 412 at 3-4 (N.D. Ga. May 18, 2020).

country. This is equally true in the context of post-conviction motions. On both procedural questions, uniformity has proved elusive; they warrant review and resolution in this Court.

The question of who may gain *Davis* relief (and who may not) is one of high stakes. A § 924(c) conviction is serious business. The crime induces a sharp, mandatory increase in a defendant's term of imprisonment (a consecutive term of five, seven, or ten years in prison for a first such violation). Mr. Blackwell himself is a good example of the harsh nature of this topic: the outcome here will make the difference between freedom and incarceration. He completed the shorter prison sentence on the conspiracy count (54 months) long ago, and is well into the consecutive 84-month sentence on the firearm count. If the district court had granted him relief in this § 2255 motion, he likely would have been freed by now.

But this question is much larger than any one man. Section 924(c)-related questions recur in every district and circuit all over the nation. Over the last five years, for example, the federal government convicted 12,007 offenders of at least one count of § 924(c), and acquired an average sentence of 138 months in prison.[20] The § 924(c) prosecutions are distributed all over the map. During the last fiscal year, for example, the top five districts account for only 25 percent of the national total. In short, the harsh

---

[20] *Quick Facts — 18 U.S.C. § 924(c) Firearms Offenses (FY 2015-2019)*, U.S. Sentencing Comm'n, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY19.pdf (last visited May 9, 2021).

crime is prosecuted everywhere, and cries out for uniformity.

As the Court well knows, it has chosen to resolve § 924(c)-related questions in plenty of cases, including *Davis*, of course, but many others, including in *Deal v. United States*, 508 U.S. 129 (1993) (mandatory 20-year sentences could be imposed on second or subsequent § 924(c) counts, even though only single judgment was entered on all counts); *Smith v. United States*, 508 U.S. 223 (1993) (holding that exchange of gun for narcotics counts as § 924(c) violation); *Bailey v. United States*, 516 U.S. 137 (1995) (holding § 924(c) conviction based on "use" of firearm during and in relation to drug trafficking offense requires evidence that defendant actively employed firearm); *Muscarello v. United States*, 524 U.S. 125 (1998) (phrase "carries a firearm" in § 924(c) includes conveying firearms in vehicle); *Watson v. United States*, 552 U.S. 74 (2007) (holding that person does not "use" a firearm under § 924(c) when he receives it in trade for drugs); *Dean v. United States*, 556 U.S. 568 (2009) (holding that sentencing enhancement for § 924(c) defendant's discharge of firearm required no separate proof of intent); *Abbott v. United States*, 562 U.S. 8 (2010) (holding that consecutive § 924(c) sentence applies despite higher minimum sentences for other counts of conviction); *United States v. O'Brien*, 560 U.S. 218 (2010) (holding fact that firearm was a machinegun was an element of the offense to be proved to the jury beyond a reasonable doubt, rather than a sentencing factor); *Alleyne v. United States*, 570 U.S. 99 (2013) (holding that "brandishing" fact in § 924(c) crime is element of the offense and must be proved to a jury); *Rosemond v. United States*, 572 U.S. 65 (2014) (holding that to aid and abet § 924(c) offense, defendant must know

beforehand that one of his confederates will carry a gun); and *Dean v. United States*, 137 S. Ct. 1170 (2017) (holding that a court may consider mandatory minimum for § 924(c) count when sentencing on predicate count). By granting the petition in these cases, and others, this Court has already recognized many times that a § 924(c) question is inherently one of national importance.

Back to the procedural questions here. The harm from the Eleventh Circuit's mistakes on these topics will grow unless the Court grants certiorari to clarify the law. District courts within the Eleventh Circuit already "lead the pack in imposing sentences under these enhancement statutes," including both the ACCA and § 924(c).[21] The Sentencing Commission's data showed that in 2016, for example, only the Fourth Circuit surpassed the Eleventh Circuit in handing down sentences under § 924(c).[22] For that reason, "[i]t is critically important that [the Eleventh Circuit] of all circuits get this right."[23] But it did not.

3. This case is an excellent vehicle for the Court to answer the questions presented.

The facts here are undisputed. Mr. Blackwell's § 924(c) conviction is based solely upon the now-defunct residual clause, he made an otherwise winning *Davis* claim in his timely § 924(c) claim, and no one says differently. The

---

[21] *United States v. St. Hubert*, 918 F.3d 1174, 1212 (11th Cir. 2019) (en banc) (Jill Pryor, J., dissenting).

[22] *Id.* at 1213 n.2.

[23] *Id.*

parties briefed the procedural default and collateral-attack waiver questions in the district court and that court denied the motion exclusively on those procedural topics. And we raised these same objections in the motion for a COA before the Eleventh Circuit. There exist no jurisdictional hurdles for this Court to navigate.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

W. MATTHEW DODGE
Counsel of Record
FEDERAL DEFENDER PROGRAM
101 Marietta Street, NW
Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Matthew_Dodge@FD.org

May 10, 2021