No. _____

In the

Supreme Court of the United States

WILLIAM FERGUSON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

Whether a defendant's convictions for violating 18 U.S.C. § 924(c) should be vacated, where each § 924(c) charge had, as an underlying predicate, a violation of 18 U.S.C. § 242, which is not a crime of violence after *Johnson v. United States*, 576 U.S. 591 (2015) and *United States v. Davis*, 139 S. Ct. 2319 (2019).

Statement of Related Proceedings

- *United States v. William Ferguson,*
  2:04-cr-01131-GAF-7 (C.D. Cal. May 19, 2008
- *United States v. William Ferguson,*
  08-50269 (9th Cir. Apr. 29, 2010)
- *William Ferguson v. United States,*
  2:11-cv-03302-GAF (C.D. Cal. Apr. 18, 2012)
- *William Ferguson v. United States,*
  2:16-cv-09678-TJH (C.D. Cal. Jul 21, 2018)
- *United Stats v. William Ferguson*,
  18-55854 (9th Cir. Apr. 12, 2021)

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Petition for Writ of Certiorari

William Ferguson petitions for a writ of certiorari to review the memorandum decision entered by the United States Court of Appeals for the Ninth Circuit affirming the denial of Mr. Ferguson's motion under 28 U.S.C. § 2255.

Opinions Below

The Ninth Circuit's memorandum disposition affirming the denial of Mr. Ferguson's 28 U.S.C. § 2255 motion was not published. (App. 1a-5a.) The district court issued a written order denying Mr. Ferguson's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, and granting his request for a certificate of appealability. (App. 6a-9a.)

Jurisdiction

The Ninth Circuit issued its memorandum disposition affirming the denial of Mr. Ferguson's 28 U.S.C. § 2255 motion on April 12, 2021. (App. 1a-5a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved

18 U.S.C. § 242 provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death

Introduction

In 2015, this Court held that the residual clause in the Armed Career Criminal Act was void for vagueness. *Johnson v. United States*, 576 U.S. 591 (2015). Within a year of that decision, thousands of inmates filed habeas petitions claiming that their convictions and sentences, though not based on the ACCA, were infected by the same ordinary-case analysis and ill-defined risk threshold that combined in *Johnson* to "produce[] more unpredictability

and arbitrariness than the Due Process Clause tolerates." *Johnson*, 576 U.S. at 598. Among that number was William Ferguson. He argued that, after *Johnson*, his § 924(c) convictions (and the attendant 82-year consecutive sentence) should be vacated. He argued that § 242, conspiracy to deprive individuals of civil rights under color of law, was not a crime of violence after *Johnson*.

The Ninth Circuit found that his claim was procedurally defaulted; more specifically, that Mr. Ferguson was not prejudiced (for purposes of "cause and prejudice," which excuses procedural default) because each verdict was supported by an alternative predicate offense that was not affected by *Johnson*. (App. 5a.) In this, the Court erred: Mr. Ferguson has established a reasonable probability of a different result, absent *Johnson* error, because the alternative basis for the jury's verdict was legally insufficient. The government did not prove that Mr. Ferguson had sufficient intent to possess cocaine with intent to distribute, and did not prove a nexus between the firearm possession and the offense of possession with intent to distribute. Because the Ninth Circuit wrongly concluded that Mr. Ferguson's claim was procedurally defaulted, Mr. Ferguson asks the Court to grant the writ.

Statement of the Case

A. Initial Conviction and Sentencing

Mr. Ferguson was convicted, following a jury trial, of seventeen counts: (1) seven counts of deprivation of rights under color of law, and conspiracy to commit such a deprivation; (2) six counts of drug trafficking under 21 U.S.C. § 841 and 846; and (3) four counts of using or possessing a firearm during a crime of violence and drug trafficking offense, in violation of 18 U.S.C. § 924(c) (Counts 5 and 7). On May 19, 2008, the district court sentenced him to 1,224 months—30 years on each of the civil rights and drug charges, plus a mandatory consecutive 82 years on the Section 924(c) offenses.

1. The government's theory at trial

The prosecution's theory of the case—which the jury accepted in significant part—went as follows: William Ferguson was an officer with the Los Angeles Police Department. (ER 260.) Between 1999 and 2001, he was part of a conspiracy in which officers used the trappings of their law-enforcement position to rip off drug dealers, plundering whatever they could and splitting the proceeds among conspirators. (*Id.*) The co-conspirators, usually Ruben Palomares, would learn of an address believed to be connected to a drug dealer—generally from another drug dealer who wanted a rival ripped off or who wanted collection on a debt owed. The officers would assemble a team and conduct surveillance. They would go to the house in uniform, badges, and guns,

and would purport to enter the home for a legitimate law enforcement function. Once there, officers would search the house and steal whatever they found, whether it was money, firearms, jewelry, or drugs, and would share the profits amongst themselves. (*See generally* ER 260-61.)

After conducting numerous similar operations, the conspiracy came to a crashing end when one of the conspirators (not Mr. Ferguson) tried to purchase drugs to an undercover DEA agent, and was arrested. (ER 284-85.) The prosecution of Mr. Ferguson ensued.

2. **The Section 924(c) Charges**

In 2004, a group of officers, including Mr. Ferguson, were indicted and charged with conspiring to deprive individuals of civil rights (i.e., acting under color of law to violate their victims' Fourth and Fifth Amendment rights), attempting to possess drugs with intent to distribute, and using, carrying, and brandishing a firearm during commission of a crime of violence and drug trafficking offense under Section 924(c). (ER 65.) The instant § 2255 motion attacked the four convictions under 18 U.S.C. § 924(c), Counts Five, Eighteen, Twenty-Eight, and Thirty-One of the Seventh Superseding Indictment, the indictment given to the jury at trial.

a. Count Five—Cedar Street robbery

The conduct underlying Count Five involved the robbery of a house on Cedar Street. (ER 79-81.) Ruben Palomares told his co-conspirators that he

had information that there was "drugs and possibl[y] a big amount of money" inside a house on Cedar Street, in Bellflower, California. (ER 641 (RT (1/4 p.m.) 208); *see also* ER 656 (RT (1/8 a.m.) 94) (Palomares testifying that he had information that the Cedar Street address was a stash house that would have "drugs or money").) While they hoped to find cocaine, there was no specific information to that effect, "just drugs." (ER 641 (RT (1/4 p.m.) 208).) Even at that, the intel was sketchy: he was told there "*might be* drugs in this house." (*Id.*) Even so, the conspirators went to the house and, guns drawn, purported to execute a search warrant. (ER 644 (RT (1/4 p.m.) 211).) The search at Cedar Street turned up some jewelry and about $3000, but no drugs. (ER 397-99.) One conspirator testified that *if* they had found drugs, they would have given them to the drug dealer who gave them the lead, so that those individuals could sell the drugs and return the profits to the conspirators. (ER 401.)

Based on this conduct, the government charged three counts: Count Three charged that Mr. Ferguson, "while acting under color of the laws of the State of California, did willfully deprive a person of the right secured and protected by the Constitution of the United States not to be deprived of property without due process of law by one acting under color of law." That Count further charged that Petitioner had, "in commission of said offenses . . . possessed, brandished, used, attempted to use, and threatened to use a dangerous weapon, namely, a handgun," in violation of 18 U.S.C. § 242. (ER

79.) Count Four charged that Petitioner had "knowingly and intentionally attempted to possess with intent to distribute . . . a detectable amount of cocaine." (ER 80.) Count Five charged that Mr. Ferguson had "used, carried, and brandished a firearm, namely a handgun, during and in relation to a crime of violence, namely the deprivation of rights under color of law by armed robbery, in violation of 18 U.S.C. § 242, as charged in Count Three of the indictment, and during and in relation to a drug trafficking offense, namely the attempted possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 846, as charged in Count Four of the indictment." (ER 81.)

b. Count Eighteen—Pearl Street robbery

Count Eighteen repeated the pattern, but with respect to a different address. Ruben Palomares learned about a drug dealer, Freddy Staves, who lived at a house on Pearl Street. Palomares was told Mr. Staves supposedly "always had drugs in his house or always had money in his house." (ER 776 (RT (1/10 a.m.) 161); *see also* ER 699 (RT (1/08 a.m.) 171) (Palomares testimony that he was told there would be fifty kilos of cocaine or $500,000 of money).) It appears the intel was wrong: Freddy Staves testified that he never kept drugs in his own house. (ER 617-18 (RT (1/4 a.m.) 39).) As before, the co-conspirators went to the house under the pretenses of conducting a legitimate investigation and searched the house. They didn't find drugs, or a significant stash of money,

but they did steal a gun—and seriously roughed up Mr. Staves in the process. (ER 438-40.)

As above, this conduct resulted in three charges: a charged violation of 18 U.S.C. § 242 (Count Sixteen), a charged violation of 21 U.S.C. § 841 based on attempted possession with intent to distribute (Count Seventeen), and a § 924(c) count that charged, as predicate offenses, both a violation of 18 U.S.C. § 242 and a violation of 21 U.S.C. § 841 (Count Eighteen). (ER 92-95.)

c. *Count 28—Universal Tire robbery*

Count 28 relates to the only non-residential job the conspirators did, one at a retail store called Universal Tire. Ruben Palomares had received information that the shop was known to have a "lot of marijuana or cocaine." (ER 718 (RT (1/8 p.m.) 231); ER 732 (RT (1/8 p.m.) 245).) Palomares told co-conspirators that they would find "either money or drugs" at the shop. (ER 763 (RT (1/11 a.m.) 79.) A scorned ex-spouse of the owner wanted the group to go to the shop and "collect money from him or take drugs." (ER 718 (RT (1/8 p.m.) 231).) Once again, the intel was bad; conspirators did not locate any drugs or significant stash of money in the shop.

This conduct resulted in the same pattern of charges: a charged violation of 18 U.S.C. § 242 (Count Twenty-Six), a charged violation of 21 U.S.C. § 841 based on attempted possession with intent to distribute (Count Twenty-Seven),

and a § 924(c) count attached to both a violation of 18 U.S.C. § 242 and a violation of 21 U.S.C. § 841 (Count Twenty-Eight). (ER 103-05.)

d. *Count 34—Hubbard Street robbery*

The last of the Section 924(c) counts is a slight variation on the theme, in that the group actually found drugs in the house. As before, Palomares received information pointing them toward a particular house on Hubbard Street, and he and Mr. Ferguson went to the house. (ER 739-40 (RT (1/8 p.m.) 252-53).) Though Mr. Palomares testified that they were armed, (*id.*) there is no evidence that the firearm was brandished—the residents were compliant and let Palomares and Ferguson into the house. (ER 739-44 (RT (1/8 p.m.) 252-570.) The two searched the house, found fifty kilograms of cocaine in the closet, and left. (ER 447-48; ER 743-45 (RT (1/8 p.m.) 256-58.) Palomares testified that they gave the drugs to two different individuals for sale, and received a portion of the proceeds. (ER 744-47 (RT (1/8 p.m.) 257-60.)

This conduct resulted in the same pattern of charges: a charged violation of 18 U.S.C. § 242 (Count Thirty-Two), a charged violation of 21 U.S.C. § 841 based on possession with intent to distribute (Count Thirty-Three), and a § 924(c) count attached to both a violation of 18 U.S.C. § 242 and a violation of 21 U.S.C. § 841 (Count Thirty-Four). (ER 109-11.)

3. **The Jury Instructions**

Relevant to the 924(c) question, the district court instructed the jury that, in order to convict Mr. Ferguson of 18 U.S.C. § 924(c), the jury had to first find that he committed "either a crime of violence or a drug trafficking crime, or both, with all of you agreeing as to which crime or crimes the defendant committed." (ER 172.) The jury was told that 18 U.S.C. § 242 was a crime of violence. (ER 175.) It was also instructed that 21 U.S.C. § 841 was a drug trafficking crime. (ER 176.) The jury was also required to find that Mr. Ferguson "used or carried [a] handgun during and in relation to the crime." (ER 172.)

With respect to the underlying predicate offense of 18 U.S.C. § 242, the jury was instructed that a conviction required the following elements:

> FIRST: That the defendant acted under color of law
>
> SECOND: That the defendant deprived a person in the United States of a right protected or secured by the Constitution or laws of the United States . . .
>
> THIRD: That the defendant acted willfully
>
> FOURTH: . . . [T]he offense included the use, attempted use, or threatened use of a dangerous weapon (handgun) . . .

(ER 153.) As to the fourth element, the jury was instructed that a "dangerous weapon" was "any instrument capable of inflicting death or serious bodily injury, including physical pain." (ER 157.)

With respect to the underlying crime of attempted possession with intent to distribute cocaine, the jury was instructed that the government had to prove two elements:

> First, the defendant intended to possess cocaine with the intent to deliver it to another person; and
>
> Second, the defendant did something that was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step.

(ER 164.) The crime of possession with intent to distribute similarly required:

> First, the defendant knowingly possessed the narcotics specified in the indictment in a measurable or detectable amount; and
>
> Second, the defendant possessed it with the intent to deliver it to another person.

(ER 162.)

4. **Verdict and Sentencing**

The jury returned a mixed verdict, acquitting and hanging on several counts, and returning a guilty verdict with respect to seventeen counts, including four § 924(c) charges. The verdict form reflects that, with respect to

each § 924(c) count, the jury checked boxes finding that Mr. Ferguson used or carried a handgun during and in relation to a crime of violence and a drug trafficking offense. (ER 845, 858, 869, 876.)

On May 19, 2008, the Court imposed a sentence of 1,224 months—30 years on the civil rights and drug charges, and a consecutive 82 years on the 924(c) charges. (ER 113.)

5. **Appeal**

Petitioner appealed his conviction and sentence on grounds not relevant here—none challenged whether there was a valid predicate offense underlying the Section 924(c) convictions. On May 21, 2010, the Ninth Circuit affirmed Mr. Ferguson's conviction and sentence in an unpublished decision. *United States v. Ferguson*, 377 F. App'x 718 (9th Cir. 2010).

B. Section 2255 Motion

On June 23, 2016, Mr. Ferguson filed a timely motion to vacate his sentence under 28 U.S.C. § 2255. In it, he argued that his Section 924(c) convictions should be vacated because one predicate offense, deprivation of rights under color of law, no longer qualified as a crime-of-violence predicate for purposes of Section 924(c) after *Johnson*.

On June 21, 2018, the district court issued an order denying Mr. Ferguson's Section 2255 Motion, and granting a certificate of appealability. (App. 6a-9a.) On appeal, the Ninth Circuit concluded that Mr. Ferguson's

claim was barred by procedural default. Mr. Ferguson could not establish prejudice (for purposes of cause and prejudice,) because there was an alternative predicate found by the jury that supported each § 924(c) violations. Mr. Ferguson had argued that, not withstanding the jury's finding of an alternative predicate offense, he was still prejudiced because there was insufficient evidence to support the alternative predicate. The Ninth Circuit disagreed, finding ample evidence to support the drug trafficking offense predicate for the § 924(c) offenses. (App. 4a-5a.)

Argument

The Ninth Circuit was wrong to deny Mr. Ferguson's petition as procedurally defaulted. This Court should grant the writ of certiorari in his case, and should vacate the judgment below.

As a general rule, a criminal defendant cannot pursue a claim for the first time on collateral attack. And Mr. Ferguson did not challenge the constitutionality of the residual clause at trial. Therefore, to obtain relief based on errors as to which no contemporaneous objection was made, the defendant must show both "cause" excusing his default, and "actual prejudice" resulting from the error. *United States v. Frady*, 456 U.S. 152, 167 (1982). Mr. Ferguson established cause, in that, by the time of his trial, this Court had twice rejected vagueness challenges to the residual clause. *See*

Reed v. Ross, 468 U.S. 1, 15-17 (1984) (cause exists where the Supreme Court overrule one of its precedents); *see also Cross v. United States*, 892 F.3d 288, 295 (7th Cir. 2018) (finding cause for the failure to raise a *Johnson* claim in 1992; "No one—the government, the judge, or the [defendant]—could reasonably have anticipated *Johnson*.") (cleaned up).

The Ninth Circuit did not take up the cause question, ruling, instead, that he had not established prejudice. This was error.

To establish actual prejudice under the "cause and prejudice" test, a petitioner must show that there is a reasonable probability that, without the error, the result of the proceedings would have been different. *Strickler v. Greene*, 527 U.S. 263, 289 (1999). The government did not argue below that, if the residual clause were stripped from Section 924(c), Mr. Ferguson's convictions could stand under the elements clause. Instead, it argued that Mr. Ferguson could not establish prejudice because the jury's verdict had an independent basis—the verdict rested on both a crime-of-violence ground and a drug-trafficking ground. (ER 562-63.)

Under the unique facts of this case, the dual bases for the verdict do not prevent Mr. Ferguson from establishing that the result of the proceedings would have been different. Had Mr. Ferguson's verdict rested only on the drug-trafficking ground, he would have challenged that ground on appeal and there is a reasonable probability that he could have raised challenges that

would have succeed. As such, Mr. Ferguson was prejudiced by the *Johnson* error.

The independent basis depended on the jury's finding that Mr. Ferguson possessed or used (or aided and abetted, or contemplated a conspiracy involving possession or use of) a firearm in furtherance of a drug-trafficking offense. And to sustain the verdict on that basis, the jury would have had to find that the underlying drug-trafficking offense was committed and that a firearm was used or possessed in connection with that offense. The charged drug-trafficking offense for Counts Five, Eighteen, and Twenty-Eight was 21 U.S.C. § 841(a)(1), attempted possession with intent to distribute cocaine. The charged drug-trafficking offense for Count 34 was 21 U.S.C. § 841(a)(1), possession with intent to distribute. But the evidence supporting the jury's finding that that the offense of attempted possession with intent to distribute was committed was legally insufficient. And the evidence supporting a finding that Mr. Ferguson possessed or used a firearm in connection with possession of cocaine was equally lacking.

1. There is insufficient evidence of attempted possession with intent to distribute.

Three of Mr. Ferguson's § 924(c) offenses were premised on the crime of attempted possession with intent to distribute cocaine, an offense that requires the intent to commit the targeted crime. (ER 164.) That specific

intent is lacking here.

These offenses involved a cohort of police officers receiving tips about locations where there might be drugs or money. Time and again, this was the intel received. (ER 641 (RT (1/4 p.m.) 208)) (there "might be drugs in this house" and "possibl[y] a big amount of money"); (ER 780 (RT (1/11 p.m.) 217) (the tire shop was suspected of having "illegal drugs or . . . or money.")); (ER 718 (RT (1/8 p.m.) 231) ("collect money from him or take drugs"); ER 778 (RT (1/11 p.m.) 209) ("There was supposed to be there money or drugs inside the residence.").)

The looseness of the intel did not much matter to the conspirators. As Palomares put it, they "always kept it open because it could always be cocaine, marijuana, or methamphetamine. So we were going to just . . . go in there and search for whatever we found that had to do with narcotics. We were going to search for that or money." (ER 712 (RT (1/8 p.m.) 225.) Nor did the conspirators seem daunted when the intel that a particular house would have drugs turned out to be wrong. (ER 267-68 (Cedar Street); ER 275-76 (Pearl Ave.); ER 282 (Universal Tire).)[1]

[1] Those three are the addresses tied to convictions, but there were plenty of other strike outs, as described in the government's trial memorandum. (ER 261-63 (no drugs found at Colorado Street); ER 270-71 (no drugs found at Mountain Terrace Lane); ER 271 (only small amount of drugs found at Nebraska Ave); ER 272 (no drugs found at 32nd Street); ER 272 (no drugs found at East 85th Street); ER 273 (no drugs found in Ford Pickup Truck);

An attempt crime, however, requires more than an intent to violate the law; a defendant must have the specific intent to commit the target offense. *United States v. Lombera-Valdovinos*, 429 F.3d 927, 929 (9th Cir. 2005). Intent to do wrong, or to engage in some criminal behavior is insufficient—there must be intent to accomplish a specific illegal objective that is the object of the attempt. *United States v. Sneezer*, 900 F.2d 177, 180 (9th Cir. 1990).

The opinion in *United States v. Buffington*, 815 F.2d 1292 (9th Cir. 1987) is illustrative of the requirement that defendant's intent run to commission of a particular crime. There, the defendant was charged with attempted bank robbery. He was seen pulling into a strip mall, and driving slowly back and forth past a bank (and other businesses). *Id.* at 1295. He then went into a shoe store next to the bank, and stood in a window that overlooked the bank. *Id.* His two co-conspirators got out of the car and stood facing the bank. By happenstance, at that moment, the power went out and the bank locked its doors. The defendant returned to his car. *Id.* The group was later arrested, and their car contained handguns and disguises. *Id.* at 1301-02. He was convicted at trial of attempted bank robbery. On appeal, however, the Court vacated the conviction for attempted bank robbery as

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ER 280 (no drugs found at Karen Street address); ER 280 (no drugs found at Roseton Avenue); ER 283 (no drugs found at Duncan Avenue address).

premised on insufficient evidence. While the group's conduct was clearly consistent with casing an establishment in the strip mall, the government failed to prove that their intent ran to robbing the *bank*, as opposed to the shoe store or some other store in the strip mall. *Id.* at 1302. They "focused no more on Bay View [bank] than on other nearly institutions"—and as such, could not be convicted of attempted bank robbery. *Id.*

This case is akin. Here, the co-conspirators clearly intended to work their way into the house, search it, and to steal anything of value. Their intent to use their status as law enforcement officers to violate the rights of their victims was equally clear. The co-conspirators' intent to possess cocaine, however, was far more murky. The information that a particular residence would contain cocaine was equivocal. That was no matter to the cohort, who "kept it open" to stealing whatever the house would contain, whether it "be cocaine, marijuana, or methamphetamine. . . . or money." (ER 712 (RT (1/8 p.m.) 225). And in robbery after robbery, the co-conspirators acted on information saying that there would be money or drugs in a house, and found no drugs. This strongly corroborates that the co-conspirators possessed the intent to plunder anything of value, but not the specific intent to possess cocaine.

Had the civil rights violation not presented an independent basis for the Section 924(c) convictions, Mr. Ferguson would have appealed the

sufficiency of the Section 924(c) convictions based on attempted possession of cocaine with intent to distribute, and there is a reasonable probability that he would have succeeded. Mr. Ferguson was therefore prejudiced by *Johnson* error as to those three counts.

2. The government did not prove a nexus between the firearm and a drug trafficking offense for purposes of Count 34.

With respect to Count 34, the government charged a Section 924(c) offense in furtherance of the crime of possession with intent to distribute. Here, the intent to take possession of the drugs found at Hubbard Street is admittedly clear. But with this Count, the nexus between the firearm and the drug trafficking offense was never proved up.

Taking the evidence in the light most favorable to the government, the evidence showed that Mr. Palomares and Mr. Ferguson were armed when they went to the house, and that those arms were part of their show of lawful authority to enter the house. (ER 740; *see also* ER 449 ("They used the gun. They went in that house with their uniforms and their badges and their guns because that's what you wear when you're a police officer.").) There was a clear nexus, then, between the firearms and the civil rights violations; they were an essential piece of the facade.

There's no evidence, however, that the Ferguson used or possessed a firearm to further the offense of possession with intent to distribute drugs.

Once in the home, Palomares and Ferguson took possession of the drugs and took them out of the house without the use of the firearm whatsoever. (ER 741-44.) There was no evidence that the firearms facilitated that offense. And while the conspirators possessed a firearm at the time they took possession of the drugs, "mere possession of a firearm by an individual convicted of a drug crime is not sufficient for a rational trier of fact to convict under § 924(c)(1)(A)." *United States v. Rios*, 449 F.3d 1009, 1012 (9th Cir. 2006) (citation omitted). They then further distributed the drugs to two co-conspirators, but, again, that step involved no use of the firearm whatsoever. (ER 745-46.)

Thus, as to all four § 924(c) counts, the evidence was insufficient supporting the jury's finding that Mr. Ferguson possessed a firearm in furtherance of a drug trafficking offense. The Ninth Circuit was wrong to conclude otherwise. And because there was prejudice sufficient to excuse the default in this case, the Court should grant the writ.

Conclusion

For the foregoing reasons, Mr. Ferguson respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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DATED: August 27, 2021

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