No. _____

IN THE

Supreme Court of the United States

JESUS RUIZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a conviction carrying a non-concurrent prison sentence for an act the law does not make criminal can ever be considered harmless.

2. Whether, on collateral review, a court may refuse to review the validity of a federal conviction under the concurrent sentence doctrine.

RELATED PROCEEDINGS

United States District Court (N.D. Ill.):

United States v. *Ruiz*, No. 1:96-cr-407-3 (Sep. 8, 1998)

Ruiz v. *United States*, No. 1:01-cv-1191 (Aug. 30, 2006)

Ruiz v. *United States*, No. 1:16-cv-2521 (May 8, 2020)

United States District Court (W.D. Wis.):

Ruiz v. *Williams*, No. 3:15-cv-372 (Jan. 16, 2018)

United States Court of Appeals (7th Cir.):

United States v. *Ruiz*, No. 98-3357 (Sep. 15, 1999)

Ruiz v. *United States*, No. 06-4024 (Jan. 29, 2007)

Ruiz v. *United States*, No. 14-2127 (Nov. 7, 2014)

Ruiz v. *United States*, No. 14-2258 (Jun. 12, 2014)

Ruiz v. *United States*, No. 16-1193 (Feb. 19, 2016)

Ruiz v. *United States*, No. 17-1928 (pending)

Ruiz v. *United States*, No. 18-1114 (Aug. 4, 2021)

Ruiz v. *Williams*, No. 18-1202 (Sep. 28, 2021)

Ruiz v. *United States*, No. 19-1697 (Apr. 22, 2019)

Ruiz v. *United States*, No. 19-1919 (May 16, 2019)

Ruiz v. *United States*, No. 20-2161 (Jul. 29, 2020)

Supreme Court of the United States:

Torres, et al. v. *United States*, No. 99-7852 (Feb. 22, 2000)

Ruiz v. *United States*, No. 06-11047 (Jun. 4, 2007)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jesus Ruiz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–30a) is reported at 990 F.3d 1025. The order of the district court (App. 31a–34a) is unreported.

JURISDICTION

The court of appeals entered judgment on March 10, 2021. App. 1a. The court of appeals denied a timely petition for rehearing, 5 F.4th 839, on August 4, 2021. App. 35a. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be … deprived of life, liberty, or property, without due process of law.

Relevant provisions of 18 U.S.C. 924(c) (1994 & Supp. II) and 28 U.S.C. 2255 are reproduced in Appendix D to this petition.

STATEMENT

Petitioner Jesus Ruiz, a federal prisoner, stands convicted of at least one offense (and up to three) for conduct that does not constitute a federal crime. The convictions each require mandatory prison terms (45 years in total) that must run consecutively to any other term of imprisonment. 18 U.S.C. 924(c) (1994 & Supp. II). After decisions of this Court suggested they were invalid, Petitioner sought to vacate the convictions under 28 U.S.C. 2255. Though the United States agrees that one conviction is invalid, both the district court and the court of appeals declined to vacate any of the convictions or their corresponding consecutive sentences. App. 18, 34. Citing the fact that Petitioner is currently serving life terms on other, unrelated convictions, both courts found that Petitioner's convictions and sentences for nonexistent offenses were harmless. *Ibid*.

Judge Diane Wood dissented because that conclusion contradicts this Court's precedent. App. 19a. On Petitioner's timely petition for rehearing, Judge Wood (joined by Judges Rovner and Hamilton) authored a dissental elaborating on three reasons she believed this Court should hear the case:

- The Seventh Circuit's decision conflicts with this Court's decisions;
- The decision carries the serious possibility of real-world consequences for Petitioner; and
- The decision has far-reaching implications for hundreds of similarly situated people.

App. 37a.

A. Legal background

Section 924(c) of the Criminal Code sets forth mandatory, consecutive penalties when a person uses a firearm during a crime of violence. Congress defined "crime of violence" to mean an offense that is a felony and—

> (A) has 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. 924(c)(3). Subsection (B), known as the residual clause, mirrors provisions found at 18 U.S.C. 16(b) and in the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(2)(B)(ii). In three decisions since 2015, the Court has determined that each residual clause is unconstitutionally vague. *United States* v. *Davis*, 139 S. Ct. 2319 (2019) (Section 924(c)(3)(B)); *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018) (Section 16(b)); *Johnson* v. *United States*, 576 U.S. 591 (2015) (ACCA). "[A] vague law is no law at all," *Davis*, 139 S. Ct. at 2323, so convictions under Section 924(c)(3)(B) violate Due Process and undermine the Constitution's separation of powers by handing responsibility for defining crimes to police, prosecutors, and judges. *Id.* at 2325.

Invalidating half of the definition of "crime of violence" led to a wave of litigation by those previously held liable under the unconstitutional definition. See *Welch* v. *United States*, 578 U.S. 120 (2016). Federal prisoners generally may challenge their final sentences only under 28 U.S.C. 2255, which directs district courts to "vacate and set aside" a criminal judgment containing a sentence that was not authorized by law

or that arose from "such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." The court "shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. 2255(b). Conviction for conduct that the law does not make criminal represents a "complete miscarriage of justice" justifying collateral relief under Section 2255. *Davis* v. *United States*, 417 U.S. 333, 346–47 (1974).

Harmless error principles apply to collateral review. See *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993). An error is harmless where it did not contribute to the conviction. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). An error is not harmless, though, if it may have a material effect on the movant's rights. Fed. R. Civ. Pro. 61.

B. Factual and procedural background

1. Petitioner Jesus Ruiz was prosecuted for criminal conduct that occurred in June 1996, when he was barely 18 years old. App. 2a, 26a. He participated with others in a series of kidnappings to collect drug debts. App. 2a. One of his associates shot a kidnapping victim, who later died as a result of the injury. App. 2a–3a. Petitioner was charged with 11 federal offenses, including conspiracy to commit racketeering, 18 U.S.C. 1962(d); conspiracy to commit kidnapping, 18 U.S.C. 1201(c); kidnapping, 18 U.S.C. 1201(a); assaulting a federal officer, 18 U.S.C. 111; four counts of violating the Hostage Act, 18 U.S.C. 1203(a); and three counts of using a firearm during and in relation to a crime of violence, 18 U.S.C. 924(c). App. 3a. He was convicted on all counts. *Id*.

The Section 924(c) counts were based on three predicate crimes of violence. Petitioner was convicted of using a firearm during a conspiracy to kidnap, 18 U.S.C. 1201(c); during a kidnapping, 18 U.S.C. 1201(a); and during an assault on a federal officer, 18 U.S.C. 111(a). App. 3a.

The court imposed seven concurrent life sentences, a 10-year concurrent sentence, and an extra 45 years (5 plus 20 plus 20) under Section 924(c) to run consecutively to the life sentences. Pet. App. 3a–4a. The life sentences were based on the district court's finding that two counts carried mandatory life sentences because they had resulted in death, see 18 U.S.C. 1201(a), 1203(a). *Ibid.* Petitioner was sentenced before *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Alleyne* v. *United States*, 570 U.S. 99 (2013), so the judge, not the jury, determined that the offenses had resulted in death, thus warranting the mandatory life sentences. App. 4a.

The judgment was affirmed on direct appeal *sub nom. United States* v. *Torres*, 191 F.3d 799 (7th Cir. 1999). Petitioner's first Section 2255 petition was denied years later. *Ruiz* v. *United States*, 447 F. Supp. 2d 921 (N.D. Ill. 2006).

2. After *Johnson* deemed the residual clause to ACCA unconstitutionally vague, Petitioner obtained permission to file a successive Section 2255 motion to challenge his Section 924(c) convictions. App. 4a–5a. He argued that each of the convictions should be vacated because the underlying crimes of violence—conspiracy to kidnap, kidnapping, and assault—had been considered crimes of violence based only on

the residual clause in Section 924(c)(3)(B). App. 5a. The government disagreed on the merits and suggested any errors were harmless. *Id.*

The district court did not reach the merits. Petitioner was sentenced to life in prison on the other counts, which were not the subject of the current Section 2255 petition. The court thus found any error was harmless. App. 33a–34a.

3. Petitioner appealed, reiterated his merits arguments, and argued that the district court had wrongly deemed his invalid convictions and sentences harmless. App. 6a. The government changed its position and agreed that one of his Section 924(c) convictions (related to conspiracy to kidnap) relied on the unconstitutional residual clause. App. 30a. But it maintained the others were still valid and, in any event, argued that any errors were harmless. App. 6a.

The court of appeals, in a split decision, affirmed without reaching the merits. "[W]e cannot say that any error underlying Ruiz's § 924(c) convictions could be considered anything other than harmless." App. 10a. In light of his life sentences, Petitioner could show neither prejudice nor collateral consequences, "let alone any consequences affecting his 'custody' for purposes of habeas relief," from his invalid conviction(s). App. 10a–11a. The court also approved of the government's analogy to the concurrent sentence doctrine. App. 13a–15a. It applied the doctrine to "properly exercise its discretion in declining to reach the merits of the conviction[s]" because the "considerations of futility, speculation, and preservation of judicial resources" rendered a resolution of Petitioner's claims "unnecessary, as our review would lead to no

practical or concrete sentencing relief" for Petitioner. App. 14a–15a, citing *Ryan* v. *United States*, 688 F.3d 845 (7th Cir. 2012).

Judge Wood dissented. Conviction and punishment for an act the law does not make criminal is an inherent miscarriage of justice. App. 20a; *Davis*, 417 U.S. at 346. Conviction for a noncrime is harmful by definition, because any defect that permits the jury to return a verdict for something the law does not make criminal is necessarily prejudicial. App. 22a. The majority had misapplied harmless-error review by focusing on the wrong topic. Instead of considering whether the constitutional error (relying on Section 924(c)(3)(B)) affected Petitioner's conviction, it considered whether the conviction affected the overall length of the sentence. App. 22a–23a. This Court has never endorsed that conception of harmless error. App. 23a; *Chapman*, 386 U.S. at 26.

Judge Wood also noted that the majority's finding that Petitioner suffered no prejudice or collateral consequences from his unlawful conviction(s) was foreclosed by this Court's precedent. App. 25a. The clear command of *Sibron* v. *New York*, 392 U.S. 40 (1968), is that criminal convictions carry collateral consequences. App. 25a. For one, it is impossible to say "at what point the number of convictions on a man's record renders his reputation irredeemable." *Id*. For another, what appears to be futile today may be significant tomorrow; a court's inability to forecast future changes to the law favors deciding the case on the merits. App. 25a–26a, 29a. Noting Petitioner's young

age at the time he committed the crimes, Judge Wood thought it not beyond plausibility to think that the rule of *Miller* v. *Alabama*, 567 U.S. 460 (2012), might one day be extended in a way to afford Petitioner relief on his life sentences. App. 26a–29a. The 45 additional years of imprisonment for noncrimes at that point would of course be significant.

Finally, Judge Wood noted the apparent misuse of the concurrent sentence doctrine in a case featuring convictions carrying consecutive sentences. App. 24a. "There is no 'consecutive-to-a-life-sentence doctrine.'" *Id.*

4. Petitioner asked the court of appeals to rehear the case en banc. Among his other arguments, he asked the court to reconsider its view on the concurrent-sentence doctrine it had adopted in *Ryan*, 688 F.3d 845. C.A. R. 67, at 15–16. A majority of judges voted to deny rehearing. App. 36a. Judge Wood, joined now by two colleagues, authored a dissental. App. 37a–45a. The court's opinion "cannot be reconciled with *Sibron* v. *New York*." App. 39a–41a. Petitioner will continue to suffer collateral consequences from his convictions. App. 42a. And the court certainly could not predict what changes in the law—including a possible extension of *Miller*—might come about in the next several decades. App. 43a–44a.

The court should not have dodged the merits on a spurious harmless-error rationale. App. 44a. "The question is ripe for decision now; Ruiz has properly presented it; and he has made a compelling showing that the firearms convictions should be vacated." *Id.* Moreover, the precedential effect of the court's opinion would cut off

"hundreds, if not thousands, of people" with flawed Section 924(c) convictions. App. 45a (citing data from the U.S. Sentencing Commission). Judge Wood therefore believed the case should be reviewed by this Court.

REASONS FOR GRANTING THE PETITION

From ancient times our legal tradition has insisted that no man be imprisoned contrary to the law of the land. *Boumediene* v. *Bush*, 553 U.S. 723, 740–45 (2008). The Constitution insists the Executive Branch obtain criminal convictions only with Due Process of law. *In re Winship*, 397 U.S. 358, 362 (1970); U.S. Const. Amend. V. And Due Process limits the grounds of conviction to those crimes defined by Legislature, "exercised within the limits [] prescribed [in the Constitution], and interpreted according to the principles of the common law." *Hurtado* v. *California*, 110 U.S. 516, 535 (1884). Conviction for anything else "inherently results in a complete miscarriage of justice" because it amounts to "conviction and punishment … for an act that the law does not make criminal." *Davis* v. *United States*, 417 U.S. 333, 346 (1974).

The Court in *United States* v. *Davis*, 139 S. Ct. 2319 (2019), held that Congress had transgressed constitutional limits of Due Process in enacting 18 U.S.C. 924(c)(3)(B). Petitioner here was convicted and sentenced to 45 years' imprisonment under Section 924(c)(3)(B). His convictions and punishment represent a miscarriage of justice that offends our most basic principles of criminal law.

The Court should grant certiorari because the court of appeals fundamentally misapplied the doctrine of harmless error to affirm Petitioner's unlawful convictions.

The Seventh Circuit's decision disregards *Sibron* v. *New York*, 392 U.S. 40 (1968), among other cases, and as a result fails to give effect to *United States* v. *Davis*, 139 S. Ct. 2319 (2019).

In addition, the decision maintains a circuit split on the validity of the concurrent sentence doctrine on collateral review. The Court's opinion in *Ray* v. *United States*, 481 U.S. 736 (1987), has led the Fourth, Eighth, and Eleventh Circuits to find that the doctrine is available to bypass merits challenges to only sentences, as opposed to convictions, under federal criminal law. The Second, Third, and Seventh Circuits, by contrast, have used the doctrine to affirm federal convictions on collateral review without reviewing the validity of those convictions. The Court should resolve the 3–3 split in the circuits.

Granting certiorari is important not only for Petitioner, who stands convicted and sentenced for noncrimes, but for the hundreds or thousands of other similarly situated federal prisoners. The Court should grant certiorari.

A. The decision below conflicts with this Court's precedent.

1. The harmless-error doctrine permits a court to affirm when an error in the trial proceedings did not affect the criminal judgment. *Chapman* v. *California*, 386 U.S. 18, 22–24 (1967). The focus is on whether the error contributed to the verdict; for example, the admission of evidence that was improper but did not affect the outcome of the trial is harmless. See *Rose* v. *Clark*, 478 U.S. 570, 576–77 (1986). The

"central purpose" of a criminal trial is to decide "the factual question of the defendant's guilt or innocence," *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986), so reviewing courts need not set aside convictions for small errors or defects that did not change the result of the trial. *Chapman*, 386 U.S. at 22.

The Court has never held that an error that *did* affect the verdict can be harmless. On the contrary: an error that results in conviction for conduct the law does not make criminal "inherently results" in a miscarriage of justice; it is not harmless. *Davis*, 417 U.S. at 346–47. The Court's "[s]ensitivity to the injustice of incarcerating an innocent individual" has led it to conclude that vindicating an innocent person's interest in vacating his wrongful conviction outweighs other societal interests in finality, comity, and conservation of scarce judicial resources. *McQuiggin* v. *Perkins*, 569 U.S. 383, 393 (2013). *Davis* (2019) applies retroactively precisely because of the "significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Welch* v. *United States*, 136 S. Ct. 1257, 1266 (2016). "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey* v. *United States*, 401 U.S. 667, 693 (1971) (opinion of Harlan, J.). The ends of justice therefore require vacating an unlawful conviction even when the sentence for the conviction runs fully concurrently with a separate, lawful sentence. *Putnam* v. *United States*, 162 U.S. 687, 714–15 (1896).

Modern federal sentences, in any event, do not run fully concurrently with each other because each count of conviction carries a special assessment. *Ray* v. *United*

States, 481 U.S. 736, 737 (1987); 18 U.S.C. 3013. And sentences imposed under Section 924(c), which mandates that a prison term imposed under that law run consecutively to "any other term of imprisonment," of course do not run concurrently. 18 U.S.C. 924(c)(1) (1994 & Supp. II). Moreover, even concurrent sentences do not obviate the consequences of multiple convictions. A second conviction "does not evaporate simply because of the concurrence of the sentence." *Ball* v. *United States*, 470 U.S. 856, 864–65 (1985). "[T]he collateral consequences of a second conviction make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence." *Rutledge* v. *United States*, 517 U.S. 292, 302–03 (1996) (rejecting argument that prisoner's other life sentences obviated need to review conviction carrying concurrent prison term).

The Court's modern doctrine stems from *Sibron* v. *New York*, in which the defendant had completely served the sentence stemming from the conviction he challenged. 392 U.S. 40, 50 (1968). The Court held the case was not moot. "[T]he obvious fact of life [is] that most criminal convictions do in fact entail adverse collateral legal consequences," so the possibility of such consequences is sufficiently substantial to justify dealing with the merits. *Id*. at 55, citing *Pollard* v. *United States*, 352 U.S. 354, 358 (1957). The Court similarly rejected the argument that multiple convictions rendered any one of them unimportant. "It is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable." *Id*. at 56. It is likewise impossible for any court to say that a prisoner has no

interest in beginning "the process of redemption with the particular case sought to be adjudicated." *Id.*

No court can "foretell what opportunities might present themselves in the future for the removal of other convictions from an individual's record." *Id.* It is "always preferable" to litigate the validity of a conviction "when it is directly and principally in dispute." *Id.* at 56–57. And it is "far better" to eliminate the source of a potential legal disability than to require the citizen to suffer the unjustified consequences of the disability for an indefinite period of time. *Id.* at 57. The person seeking to vacate his conviction thus has a substantial stake in seeking relief from the conviction separate from any continued obligation to serve the sentence. *Id.* at 58.

2. The Seventh Circuit's decision flatly contradicts *Sibron* and its progeny. Petitioner Ruiz stands convicted and imprisoned for three offenses the Constitution does not tolerate. His consecutive sentences for those separate convictions are anything but harmless. Moreover, by describing the convictions as harmless, the court of appeals abdicated the responsibility assigned to it to guard against the application of a law that exceeds the limits on government power set forth in the Constitution.

The Seventh Circuit first went wrong by expanding harmless-error review beyond anything yet recognized by this Court. An error is harmless if it "did not contribute to the verdict obtained." *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1907 (2017), citing *Chapman*, 386 U.S. at 24. The error here contributed to (and indeed was cause of) the verdict. Petitioner was convicted of a noncrime because the jury was

instructed that he could be convicted for that noncrime. App. 22a. As Judge Wood wrote below, "[u]nder the harmless-error test, a conviction for a noncrime is, by definition, harmful." *Id.*

The court of appeals then applied the concurrent-sentence doctrine to affirm Petitioner's convictions carrying consecutive prison terms. App. 13a–15a. It thus disregarded this Court's instruction that the doctrine does not apply to modern federal sentences in general (because of Section 3013), let alone Section 924(c) sentences. See *Ray*, 481 U.S. at 737. It ignored that the Court in *Rutledge* rejected an argument that a conviction whose sentence runs concurrently to multiple life sentences should go unaddressed by a court of review. 517 U.S. at 302. Petitioner's convictions for offenses the legislature could not constitutionally enact do not evaporate simply because he is serving multiple life terms on other counts of conviction. *Ball*, 470 U.S. at 864–65.

By misunderstanding harmless-error review and misconstruing the Court's decisions on the concurrent-sentence doctrine, the court of appeals contradicted *Sibron*, which establishes that each conviction in a criminal judgment carries collateral consequences. 392 U.S. at 55. Petitioner has a substantial stake in seeking relief from his Section 924(c) convictions. *Id.* at 58. The court of appeals reasoned that it could not foresee Petitioner ever being released from prison, so it could overlook his invalid convictions. App. 11a. *Sibron* holds the opposite: the fact that a court cannot foresee future legal developments affecting other convictions is the reason why it is "always preferable" to adjudicate the particular matters in dispute now. 392 U.S. at 56–57.

Petitioner is entitled to eliminate "the source of a potential legal disability" now, rather than later. *Id*. at 56. His need to do so now is especially acute in light of the restrictions on federal habeas relief, which prohibit him from ever raising his claim in any subsequent habeas petition. 28 U.S.C. 2244(a), 2255(h). The validity of his convictions are "directly and principally in dispute" here; the court of appeals was not entitled to wait for some future proceeding in which it would be "collateral to the central controversy." *Sibron*, 392 U.S. at 56–57.

Petitioner is currently 43 years old. It is impossible to determine whether the next several decades will bring about legislative or judicial amendments to the law undermining the life sentences on his other convictions. *Id*. at 56. Making retroactive the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), would do it, as would extending the rule of *Miller* v. *Alabama*, 567 U.S. 460 (2012). App. 26a–29a, 39a–44a. That no court can predict whether those (or other) events will come to pass is why both the district court and court of appeals should have considered Petitioner's claim on the merits now instead of waiting. *Sibron*, 392 U.S. at 56–57.

The collateral consequences to Petitioner's convictions are not imaginary, either. He has been ordered to pay $300 under Section 3013 for noncrimes. See *Ray*, 481 U.S. at 737. His Section 924(c) convictions may be used to impeach him in a future criminal trial. App. 42a; see Title 18, U.S. Code, chapter 87 (describing offenses occurring in federal prison). Petitioner's convictions subject him to recidivist penalties should he face similar charges in the future. 18 U.S.C. 924(c)(1)(C). That Petitioner

stands convicted of other offenses does not render his Section 924(c) convictions harmless, for it is "impossible" to say "at what point the number of convictions on a man's record renders his reputation irredeemable." *Sibron*, 392 U.S. at 56.

The court of appeals declined to follow *Sibron* because it saw no sense in undertaking the substantive work of reviewing Petitioner's convictions in light of his life sentences. App. 10a–15a. However misguided the Seventh Circuit believes *Sibron* to be, however, it is not free to disregard a precedent of this Court. *Hutto* v. *Davis*, 454 U.S. 370, 375 (1982). *Sibron* rejected the "wait-and-see" approach invented by the court of appeals when it comes to the consequences of invalid convictions. Petitioner has argued (and the government partly concedes) that he was convicted under Section 924(c)(3)(B), which is void for vagueness and thus "no law at all." *Davis*, 139 S. Ct. at 2323. "If this contention is well taken, then [Petitioner's] conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstances inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief under § 2255." *Davis*, 417 U.S. at 346–47 (cleaned up). The Court should grant certiorari and reverse the Seventh Circuit for its failure to adhere to this Court's precedent.

B. The decision below entrenches a circuit split on the concurrent sentence doctrine.

1. The Court in 1987 granted certiorari in a direct appeal of a criminal judgment to review the role of the concurrent sentence doctrine in the federal courts. *Ray*, 481 U.S. at 737. The question of the doctrine's legitimacy had been reserved by

Benton v. *Maryland*, 395 U.S. 784, 791–93 (1969), which described it as a "rule of judicial convenience" that permits courts to "avoid decision of issues which have no appreciable impact on the rights of any party"—in particular, the validity of convictions carrying concurrent sentences. But the Court in *Ray* did not reach the issue because federal sentences, which each carry separate special assessments, are not concurrent. *Id*. The Court later reinforced *Ray* by holding in another case on direct review that courts should not apply the concurrent *sentence* doctrine to avoid examining the validity of *convictions*. *Rutledge*, 517 U.S. at 301–03.

The federal courts of appeals are split on whether, and to what extent, the concurrent sentence doctrine applies on collateral review. The doctrine does not apply to Section 2255 challenges to convictions in the Fourth, Eighth, and Eleventh (and likely the Ninth) Circuits. By contrast, the Second, Third, and Seventh Circuits have used the doctrine (or a variation) to avoid determining the validity of a petitioner's convictions on collateral review.

The Fourth Circuit reads *Ray* and *Rutledge* as eliminating the concurrent sentence doctrine for federal convictions, because federal convictions do not carry concurrent sentences. *United States* v. *Charles*, 932 F.3d 153, 160 (2019). Instead, the doctrine applies only "as a species of harmless-error review where a defendant seeks to challenge the legality of a [prison] *sentence* …." *Id*. (emphasis in original). The Eighth and Eleventh Circuits agree with that reading of this Court's precedent. *Oslund* v. *United States*, 944 F.3d 743, 746 n.2 (8th Cir. 2019); *Cazy* v. *United States*,

717 F. App'x 954, 956 (11th Cir. 2017) (unpublished). The Ninth Circuit, meanwhile, has long refused to apply the doctrine at all, so it likely would not use the doctrine under Section 2255. *Cruickshank* v. *United States*, 505 F. Supp. 3d 1127, 1131 (W.D. Was. 2020), citing *United States* v. *De Bright*, 730 F.2d 1255, 1259–60 (9th Cir. 1984) (en banc) ("[T]he advantages of reviewing each conviction on its merits substantially outweigh the threatened harm from any resulting decrease in judicial efficiency.").

On the other hand, the Second Circuit continues to apply the concurrent sentence doctrine on collateral review of federal convictions. *Kassir* v. *United States*, 3 F.4th 556, 563–67 (2021). It reasons that a collateral attack under Section 2255 "presents a wholly different context in which a court may grant relief" from the direct appeals at issue in *Ray* and *Rutledge*. *Id*. at 566. In the Second Circuit's view, *Ray* "effectively abolish[ed] the doctrine for direct review of federal convictions," while leaving it available for direct review of federal sentences. *Id*. at 565. But the same distinction between conviction and sentence does not exist on collateral review, because the basis for the collateral attack is the defendant's custody, so matters that do not affect the defendant's custody are immaterial. *Id*. at 565–66. The Third Circuit is similarly unpersuaded that *Ray* or *Rutledge* has any applicability to Section 2255 proceedings. *United States* v. *Ross*, 801 F.3d 374, 381–82 (2015). Both courts built upon the foundation laid by the Seventh Circuit in *Ryan* v. *United States*, 688 F.3d 845 (2012), where that court acknowledged that *Ray*'s abrogation of the concurrent

sentence doctrine "for direct appeal," but found a distinction in Section 2255's focus on custody. *Id*. at 849.

2. The court below relied on *Ryan* to affirm the denial of Petitioner's Section 2255 motion. App. 14a–15a. Of course, Petitioner is serving *consecutive* sentences, rather than concurrent ones, but the court treated them as if they were essentially concurrent to the other life terms. Compare App. 15a, with App. 24a; see *Oslund*, 944 F.3d at 748 n.3 (considering consecutive life terms to be "functional equivalent" of concurrent life terms). The court reasoned that "the same considerations of futility, speculation, and preservation of judicial resources that underpinned our discretion in *Ryan* to not review all seven mail-fraud convictions rings true here too." App. 15a. The question of the continuing vitality of the concurrent sentence doctrine is thus squarely implicated in this case.

The Court should grant certiorari to consider the issue left unresolved by *Ray*: whether, and to what extent, the concurrent sentence doctrine permits a court to refuse to review the validity of a federal conviction, considering that there is no such thing as a fully concurrent sentence under the Criminal Code. The courts of appeals themselves will not resolve the split. On the one hand, the Ninth Circuit has held for over three decades that the doctrine is never available; on the other hand, the Seventh Circuit has refused to reconsider its adherence to the doctrine. App. 36a. Three

circuits read *Ray* and *Rutledge* faithfully to apply to all challenges to federal convictions, which do not carry concurrent sentences; three circuits distinguish that precedent on collateral review. The Court's intervention is needed to resolve the dispute.

C. The case presents an issue of national importance.

Petitioner is hardly alone in seeking relief after the Court's series of decisions invalidating the residual-clause definitions of "crime of violence" in the Criminal Code. *Johnson* has been cited in the lower courts over 14,000 times in six years; *Dimaya*, over 1,800 times in three years; and *Davis*, over 2,500 times in two years. And Petitioner is one of many federal prisoners serving life-*plus* terms of imprisonment. Each year hundreds of people are sentenced to life in federal prison, with up to 40% being sentenced to an additional term under Section 924(c). U.S. Sent'g Comm'n, *Life Sentences in the Federal System* (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf.

The Seventh Circuit's decision affects more than just those seeking to vindicate their rights under *Davis*, *Dimaya*, and *Johnson*. The court of appeals purported to limit its holding to this case by declaring it narrow. App. 18a. But its rationale, which carries the force of precedent in the Seventh Circuit, can surely be extended to other situations. See Bryan A. Garner, et al., The Law of Judicial Precedent 83 (2016). The Seventh Circuit's rationale, for example, would preclude Section 2255 review for any prisoner serving life in prison when he is accused and convicted of committing a new

crime in prison, because the new conviction would not affect his custody. App. 13a; see Title 18, U.S. Code, chapter 87. The rationale would foreclose collateral review of federal convictions for federal prisoners subject to concurrent life terms in state prison for the same conduct. See generally *Gamble* v. *United States*, 139 S. Ct. 1960 (2019) (tolerating parallel prosecutions under dual-sovereignty rule). The rationale imposes an atextual limit on the relief Congress has expressly authorized in 28 U.S.C. 2255(a).

As Judge Wood noted below, Petitioner "joins hundreds, if not thousands, of people who are now cut off from challenging their flawed section 924(c) convictions thanks to the majority's disregard of *Sibron*." App. 45a. This case presents an issue of national importance concerning the availability of collateral review to address convictions that were obtained in violation of our constitutional order. The Seventh Circuit has chosen to "permit[] the criminal process to rest at a point where it ought properly never to repose," *Mackey*, 401 U.S. at 693 (opinion of Harlan, J.), by misreading the Court's precedent on harmless error and the concurrent sentence doctrine. The Court should grant certiorari in this case and reverse the court of appeals' deeply flawed decision.

CONCLUSION

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

Respectfully submitted,

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