No. _____

IN THE
Supreme Court of the United States

_____

DEANTE BLACKMAN,
***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

_____

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QUESTION PRESENTED FOR REVIEW

1. Whether cause exists to excuse a habeas petitioner's procedural default when near-unanimous circuit precedent foreclosed the petitioner's claim or when this Court explicitly overrules one of its precedents.

2. Whether the offense of aiding and abetting another who attempted to murder a witness is a "crime of violence" under 18 U.S.C. § 924(c)'s force clause.

LIST OF PARTIES

Petitioner, Deante Blackman, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Deante Blackman respectfully petitions this Court for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of a certificate of appealability on the issues of whether his sentence for violation of 18 U.S.C. § 924(c), based on his substantive conviction for aiding and abetting another who attempted to murder a witness, in violation of 18 U.S.C. §§ 1512(a)(1)(C), 1111, is unconstitutional in light of this Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *United Stated v. Davis*, 139 S. Ct. 2319 (2019), as well as whether that claim was procedurally defaulted when at the time of his sentencing the claim was foreclosed by circuit and this Court's precedent.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of a certificate of appealability for Mr. Blackman's in Appeal No. 21-11301 is included in the Appendix at A. The district court's order denying Mr. Blackman's § 2255 motion is included in the Appendix at B. Mr. Blackman's plea agreement is included in the Appendix at C.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Blackman's criminal case pursuant to 18 U.S.C. § 3231 and jurisdiction over his civil case proceeding pursuant to 28 U.S.C. § 2255. The district court denied Mr. Blackman's § 2255 motion on February 18, 2021. Mr. Blackman subsequently filed a notice of appeal on April 19, 2021. The Eleventh Circuit denied a certificate of appealability on August 11, 2021. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. This petition is timely pursuant to Supreme Court Rule 13.1.

RELEVANT STATUTORY PROVISIONS

A. 18 U.S.C. § 924(c)

As amended by the First Step Act of 2018, 18 U.S.C. § 924 provides, in pertinent part:

(c)(1)(A) 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.

[. . .]

(3) For purposes of this subsection the 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.

[. . .]

B. 18 U.S.C. § 1512

Entitled "Tampering with a witness, victim, or an informant," 18 U.S.C. § 1512 provides:

(a)(1) Whoever kills or attempts to kill another person, with intent to--

> **(A)** prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to--

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to--

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is--

> **(A)** in the case of a killing, the punishment provided in sections 1111 and 1112;
>
> **(B)** in the case of--
>
> > **(i)** an attempt to murder; or
> >
> > **(ii)** the use or attempted use of physical force against any person;
>
> imprisonment for not more than 30 years; and
>
> **(C)** in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.

C. 18 U.S.C. § 1111.

Entitled "Murder," 18 U.S.C. § 1111 provides, in relevant part:

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

[. . .]

BACKGROUND

A. Residual Clause Jurisprudence

Sentences imposed under the residual clauses of federal criminal statutes were routinely upheld by appeals courts for many years. *See, e.g., United States v. Veasey,* 73 F.3d 363 (6th Cir. 1995) (per curiam) (table opinion) ("This constitutional argument has been rejected by every Circuit that has considered it."); *see also United States v. Presley,* 52 F.3d 64, 68 (4th Cir. 1995); *United States v. Childs,* 403 F.3d 970, 972 (8th Cir. 2005); *United States v. Sorenson,* 914 F.2d 173, 175 (9th Cir. 1990).

Over that period, this Court repeatedly interpreted statutes and guidelines containing residual clauses without comment about their constitutionality. *See, e.g., Leocal v. Ashcroft,* 543 U.S. 1, 10 (2004); *Stinson v. United States,* 508 U.S. 36, 38 (1993). In *James v. United States,* 550 U.S. 192 (2007), the Court for the first time explicitly addressed—and ultimately rejected—a challenge to the residual clause of a criminal statute. There, the habeas petitioner argued that his prior conviction under Florida's attempted burglary statute did not qualify as a "violent felony" under the Armed Career Criminal Act. *See id.* at 196.

According to the petitioner, "attempted burglary" did not fall under the residual clause "unless *all* cases" of attempted burglary under Florida law present "a risk of physical injury to others." *Id.* at 207. This Court disagreed. So long as "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another," the Court explained, the offense fell within the residual clause. *Id.* at 208.

In dissent, Justice Scalia argued that the Armed Career Criminal Act's residual clause was unconstitutional because it required courts to apply "vague language" with "highly unpredictable" results. *Id.* at 230 (Scalia, J., dissenting). The majority rejected that argument, citing other federal and state criminal statutes that employ "[s]imilar formulations," and concluding that the residual clause "is not so indefinite as to prevent an ordinary person from understanding what conduct it prohibits." *Id.* at 210 n.6. The Court noted, moreover, that neither the petitioner nor amici in support of petitioner had challenged the residual clause on vagueness grounds. *See id.*

Over the next decade, this Court addressed several challenges to the Armed Career Criminal Act's residual clause. In *Begay v. United*

States, 553 U.S. 137 (2008), the Court held that driving under the influence did not qualify as a violent felony under the residual clause of the Armed Career Criminal Act. *See id.* at 148. In *Chambers v. United* States, 555 U.S. 122 (2009), the Court held that a felony failure to report to incarceration did not qualify as a violent felony under the residual clause. *See id.* at 130. And in *Sykes v. United States,* 564 U.S. 1 (2011), the Court held that a state statute making it a crime for a driver to flee from police *was* a violent felony under the residual clause. *See id.* at 4. Justice Scalia again dissented, arguing that the Court should "admit that ACCA's residual provision is a drafting failure and declare it void for vagueness." *Id.* at 28 (Scalia, J., dissenting).

In *Johnson v. United States,* 135 S. Ct. 2551 (2015), this Court adopted Justice Scalia's position. The Court acknowledged that its "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy." *Id.* at 598. "All in all," the Court explained, *"James, Chambers,* and *Sykes* failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition." *Id.* at 600. The Court

concluded that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Id.* at 602.

In *Welch v. United States,* 136 S. Ct. 1257 (2016), the Court held that *Johnson* announced a substantive constitutional rule that applies retroactively to cases on collateral review, permitting criminal defendants to seek habeas review of their sentences under *Johnson*. *Id.* at 1268. Following *Welch,* this Court has applied *Johnson's* reasoning to other statutes, including a residual clause incorporated into the Immigration and Nationality Act, *see Sessions v. Dimaya,* 138 S. Ct. 1204 (2018), and the residual clause governing the use of a firearm during crimes of violence or drug trafficking crimes, *see United States v. Davis,* 139 S. Ct. 2319 (2019). The Court has struck down those residual clauses, too, as unconstitutionally vague. *See Dimaya,* 138 S. Ct. at 1223; *Davis,* 139 S. Ct. at 2336.

This Term, the Court will determine whether 18 U.S.C. § 924(c)(3)(A)'s definition of "crime of violence" excludes attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a). *See United States v. Taylor*, 141 S. Ct. 2882 (2021) (cert. granted).

B. Procedural Default and the Cause-and-Prejudice Standard

A federal prisoner may challenge the legality of a sentence or conviction in federal court under the federal habeas statute, 28 U.S.C. § 2255. A state prisoner may do the same under 28 U.S.C. § 2254. Petitioners must normally file a habeas petition within one year of conviction. *See id.* § 2255(f)(1). But if this Court recognizes a new right "made retroactively applicable to cases on collateral review," the petitioner may file a petition within one year from the date on which the Court first recognizes the new right. *Id.* § 2255(f)(3); *see id.* § 2244(d)(1).

If a new right is retroactive, and a habeas petition is timely, the petitioner must often meet yet another requirement to obtain relief. If the petitioner procedurally defaulted the claim at issue—by failing to raise it at the appropriate stage of the criminal proceedings in state or federal court—the federal habeas court "will not entertain" that claim "absent a showing of cause and prejudice." *Dretke v. Haley,* 541 U.S. 386, 388 (2004). This "cause and prejudice" standard "is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's

important interest in the finality of judgments." *Massaro v. United States*, 538 U.S. 500, 504 (2003).

In *Reed v. Ross,* this Court held that "the cause requirement may be satisfied under certain circumstances" when "a constitutional claim is so novel that its legal basis is not reasonably available to counsel" and the "procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests." 468 U.S. 1, 14, 16 (1984). As relevant here, *Reed* identified two such circumstances. First, there is cause to excuse procedural default when a decision of this Court "explicitly overrule[s] one of [its] precedents." *Id.* at 17. Second, there is cause to excuse procedural default when a decision of this Court overturns "a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority expressly approved." *Id.* (internal quotation marks omitted). In those circumstances, "[c]ounsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns" that justify enforcing the procedural bar. *Id.* at 15.

STATEMENT OF THE CASE

On November 30, 2006, Mr. Blackman, pursuant to a written plea agreement, pleaded guilty to the following offenses: aiding and abetting another who attempted to murder a witness, in violation of 18 U.S.C. §§ 1512(a)(1)(C), 1512(a)(3)(B)(i), 1111, and 2 (count one); aiding and abetting another who carried a firearm which was discharged during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(A)(iii), and 2 (count three); conspiracy to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B)(ii) (count four); possession with intent to distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1(B)(iii), and 18 U.S.C. § 2. Mr. Blackman's offense as to count one—aiding and abetting another who attempted to kill another person with the intent to "prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings"—was charged under 18 U.S.C.

§§ 1512(a)(1)(C), 1512(a)(3)(B)(i), 1111, and 2. Pet. App. 1c–4c. The plea agreement provided that the elements of this offense were:

> First: That the Defendant or person he aided and abetted attempted to killed [sic] Joseph Alexander, as charged; and,
>
> Second: That the Defendant or a person he aided and abetted attempted to kill Joseph Alexander knowingly and willfully with the intent to prevent the communication by Joseph Alexander to a law enforcement officer or a judge of the United States of information relating to the commission or possible commission of a Federal offense.

Pet. App. at 3c. It was the crime of violence of count one the formed the predicate offense for Mr. Blackman's § 924(c) offense of count three.

On February 27, 2007, Mr. Blackman was sentenced to 188 months' imprisonment as to counts one, four, and six, to be served concurrently with each other, and to a consecutive term of 120 months' imprisonment as to count three. Mr. Blackman did not appeal his sentence.

Following this Court's decision in *Johnson*, Mr. Blackman filed a motion pursuant to 28 U.S.C. § 2255, challenging his § 924(c) conviction by alleging that his predicate offense could only apply under that statute's residual clause. That motion was summarily denied as

untimely, and Mr. Blackman appealed. Following this Court's decision in *Davis*, the appeals court remanded the case. Mr. Blackman moved to amend his § 2255 motion to include a *Davis* claim, which the district court granted. In his amended § 2255 motion, Mr. Blackman asserted that his aiding and abetting another who attempted to murder a witness was not a "crime of violence" under § 924(c)'s force clause.

The district court denied relief, finding that Mr. Blackman had procedurally defaulted his claim and it could not be excused. The district court further held that his predicate conviction for aiding and abetting another who attempted to murder a witness qualified under § 924(c)'s elements clause. Pet. App. at 1b. The district court also denied a certificate of appealability. Pet. App. at 17b–18b. Mr. Blackman appealed that order.

The appeals court denied a certificate of appealability, finding that binding circuit precedent required that his claim was procedurally barred based on his failure to raise a vagueness challenge to his § 924(c) conviction at sentencing or on direct appeal. *See* Pet. App. at 5a (citing *Granda v. United States*, 990 F.3d 1272, 1287–88 (11th Cir. 2021)).

REASONS FOR GRANTING THE WRIT

A. The circuits are divided over whether near-unanimous circuit precedent and/or this Court's precedent is cause to excuse procedural default.

The procedural default rule is a judge-made doctrine intended to *conserve* judicial resources. *See Massaro,* 538 U.S. at 504. It "promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow." *Reed,* 468 U.S. at 10–11. "This Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights" in habeas proceedings. *Id.* at 15.

When defense counsel makes a "tactical decision to forgo a procedural opportunity" in a criminal proceeding, the procedural default rule prohibits the defendant from "pursu[ing] an alternative strategy" in a federal habeas court. *Id.* at 14; *see Smith v. Murray*, 477 U.S. 527, 534 (1986). If a "counsel has no reasonable basis upon which to formulate a constitutional question," however, the procedural default rule does not apply. *Reed,* 468 U.S. at 14–15. Otherwise, if "novelty of a

constitutional question does not give rise to cause for counsel's failure to raise it, [the Court] might actually disrupt [criminal] proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition." *Id.* at 15–16.

This Court thus recognized in *Reed* that "[c]ounsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference" to a "procedural bar." *Id.* at 15. And it reaffirmed that conclusion in *Bousley v. United States,* stating that "a claim that is so novel that its legal basis is not reasonably available to counsel may constitute cause for a procedural default." 523 U.S. 614, 622 (1998) (internal quotation marks omitted). In *Reed,* the Court explained two circumstances where that novelty test is met-where near-unanimous circuit precedent forecloses a claim, and where this Court overturns prior precedent, indicating a clear break with the past. *See* 468 U.S. at 17.

Both of those exceptions to the procedural default rule make good sense: When nearly every circuit court has rejected a claim, a

defendant's failure to raise it in a criminal proceeding is not gamesmanship; it is an efficient use of the court's resources. Requiring defense counsel "to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law" does not promote "the efficiency of the . . . criminal justice system." *Id.* at 15-16. It does the opposite-encouraging "pointless" and "wasteful" litigation. *English v. United States*, 42 F.3d 473, 479 (9th Cir. 1994), as amended (Nov. 21, 1994). Similarly, when a decision of this Court overturns longstanding precedent-including its own precedent-in an area of law that was previously settled, it demonstrates that an argument was not reasonably available to counsel. *See Cross v. United States*, 892 F.3d 288, 295–96 (7th Cir. 2018). In those circumstances too, the federal courts should not foreclose a petitioner from raising a claim on habeas review.

The approach adopted by the court below, however, is not only a waste of judicial resources. It is also fundamentally unfair to criminal defendants. At the time Mr. Blackman was sentenced, uniform circuit precedent foreclosed his residual-clause claim. And it took this Court

years of internal debate—including in *James, Sykes,* and finally *Johnson—to* determine that the residual clause of the Armed Career Criminal Act was unconstitutionally vague. *See Johnson,* 576 U.S. at 597. The Court explicitly recognized that it was "this Court's *repeated attempts* and *repeated failures* to craft a principled and objective standard of the residual clause" that confirmed "its hopeless indeterminacy." *Id.* at 598 (emphases added).

Reed states that there is cause to excuse procedural default when "a near-unanimous body of lower court authority has expressly approved" of a "longstanding and widespread practice" that the Court later holds is unconstitutional. 468 U.S. at 17. (internal quotation marks omitted). The Third, Seventh, and Ninth Circuits continue to apply *Reed,* finding cause to excuse procedural default in those circumstances, whereas the Sixth, Eighth, and Eleventh Circuits disagree, concluding that under *Bousley,* circuit precedent foreclosing a claim cannot excuse procedural default.

Further*, Reed* states that there is cause to excuse procedural default when this Court overturns its own precedent, indicating "a clear break with the past." 468 U.S. at 17 (internal quotation marks omitted).

The Seventh and Tenth Circuits hold that under *Reed,* this Court's decision in *Johnson* was a clear break from the past, providing cause to excuse procedural default. *See Cross,* 892 F.3d at 296 (7th Cir.); *Snyder,* 871 F.3d at 1127 (10th Cir.).

Three circuits—the Third, Seventh, and Ninth—hold that under *Reed,* defendants like Mr. Blackman need not present on direct review an argument foreclosed by near-unanimous circuit precedent to later raise that argument on habeas review.

In *Cross,* the Seventh Circuit considered *Johnson* challenges brought by two habeas petitioners to their residual-clause sentences. *See* 892 F.3d at 291. As in this case, the petitioners had not raised a residual clause challenge on direct review and had thus defaulted that claim. *See id.* 291, 294. The Seventh Circuit held that under *Reed,* the petitioners could show cause to excuse their procedural default. *Id.* at 296.

The Third Circuit has reached the same conclusion. In *United States v. Doe,* the petitioner filed a Section 2255 petition seeking relief under *Begay,* which had interpreted the phrase "violent felony" in the Armed Career Criminal Act to require "purposeful, violent, and

aggressive conduct." 810 F.3d 132, 139 (3d Cir. 2015). The petitioner had not raised a *Begay* claim on direct review, and circuit precedent had foreclosed such a claim at that time. *See id.* at 140. In those circumstances, the Third Circuit found cause to excuse the petitioner's procedural default, explaining that the "failure to object in the face of a 'solid wall of circuit authority' contrary to" the petitioner's "position did not work a default." *Id.* at 153 (quoting *English,* 42 F.3d at 479). The court concluded that under *Reed,* "[w]hen the legal basis for a claim was not reasonably available to counsel, there is 'cause' for a procedural default." *Id.* (internal quotation marks and citation omitted).

Likewise, the Ninth Circuit has held that a petitioner does not procedurally default when he fails to raise a "futile" claim foreclosed by "a solid wall of circuit authority." *English,* 42 F.3d at 479 (internal quotation marks omitted). There, the petitioner had failed to object at trial to a voir dire procedure later held unconstitutional in *Gomez v. United States,* 490 U.S. 858 (1989). The Ninth Circuit concluded that "it would be pointless (and indeed wasteful) to require a defendant to raise such a futile objection in the district court," and that the defendant

accordingly "did not forfeit a *Gomez* claim merely by failing to raise an objection in the trial court." *English,* 42 F.3d at 479.

In contrast, the Sixth, Eighth, and Eleventh Circuits hold that near-uniform circuit precedent foreclosing an argument is *not* sufficient cause to overcome procedural default. In the proceedings below, Mr. Blackman sought to vacate his sentence under *Johnson* and *Davis*. Mr. Blackman did not raise that challenge on direct review. Citing circuit precedent, the Eleventh Circuit rejected that argument. *See* Pet. App. at 5a (citing *Granda v. United States*, 990 F.3d 1272, 1287–88 (11th Cir. 2021) (holding that defendant could not establish cause for defaulting his *Johnson/Davis* claim because, at the time of his 2009 direct appeal, such a claim was reasonably available to him as he did not lack the "building blocks of a due process vagueness challenge to the § 924(c) residual clause.").

An earlier Eleventh Circuit opinion addresses this same issue. In *McCoy,* the petitioner alleged that his drug conviction was unconstitutional under *Apprendi v. New Jersey,* 530 U.S. 466 (2000). The petitioner had not raised that claim on direct review, and a divided Eleventh Circuit panel found no cause to excuse the default. The panel

majority acknowledged that "reasonable defendants and lawyers could well have concluded it would be futile to raise the issue" given that "every circuit which had addressed the issue had rejected" it. 266 F.3d at 1258. Nevertheless, the panel majority held that "perceived futility does not constitute cause to excuse a procedural default." Id. at 1259 (citing *Bousley*, 523 U.S. at 623, and *Smith*, 477 U.S. at 535).

The third member of the panel concurred in the judgment, concluding that the defendant's claim failed on the merits. In a separate opinion, however, the concurrence criticized the majority's reading of *Bousley,* stating that "the majority's reasoning leads to the improbable conclusion that the rejection of a claim by every circuit in the country can never be considered relevant to whether the claim is or is not reasonably available." *Id.* at 1273 (Barkett, J., concurring in the judgment). The concurrence would have read *Reed* and *Bousley* to hold that "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time," but that a petitioner *could* show cause based on "the nationwide rejection, by every court, of the claim at issue." *Id.* As the concurrence put it, to "penalize a petitioner for failing to make a claim on appeal that had

been explicitly rejected by every circuit in the country would be patently unfair." *Id.* at 1274.

The Sixth Circuit has interpreted *Bousley* and *Smith* "to mean that futility cannot be cause" to excuse procedural default "where the source of the perceived futility is adverse state or lower court precedent." *Gatewood v. United States*, 979 F.3d 391, 396 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2798 (2021) (internal quotation marks omitted). The *Gatewood* court expressly rejected the Seventh Circuit's position in *Cross, see id.* at 396 n.2, stating that "[e]ven the alignment of the circuits against a particular legal argument does not equate to cause for procedurally defaulting it." *Id.* (internal quotation marks omitted). According to the Sixth Circuit, a petitioner "cannot establish cause by showing that his vagueness claim cut against the current of federal circuit precedent at the time of his direct appeal." *Id.* The court ruled that a habeas petitioner has cause to overcome procedural default *only* when "the Supreme Court has decisively foreclosed an argument." *Id.* (internal quotation marks omitted).

The Eighth Circuit has joined the Sixth and the Eleventh. In *Moss,* the petitioner sought to raise an *Apprendi* claim for the first time

on habeas review. 252 F.3d 993, 1001 (8th Cir. 2001). A divided panel of the Eighth Circuit acknowledged that the circuit courts had "unanimously rejected" such claims prior to this Court's decision in *Apprendi*. *Id.* at 1002. But the Eighth Circuit nonetheless held, citing *Bousley,* that procedural default "cannot be overcome because the issue was settled in the lower courts." *Id.* at 1002. Judge Arnold dissented and would have held that under *Reed,* " 'cause' arises where a new constitutional rule overturns 'a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.'" *Id.* at 1005 (Arnold, J., dissenting) (quoting *Reed,* 468 U.S. at 16).

Reed's approach to procedural default is eminently sensical. It is the law of this land. And the Court should enforce it in this case. Given this clear split, the Court should grant certiorari to resolve the unsettled application of *Reed* and find that Mr. Blackman has met his burden to show cause.

B. Aiding and Abetting Another Who Attempted to Murder a Witness is Not a "Crime of Violence" Under § 924(c)'s Force Clause

Mr. Blackman's conviction for aiding and abetting attempted murder of a witness is a textbook example of how one might explain § 924(c)'s void-for-vagueness residual clause to a layman, as it is more likely to "involve[ ] a substantial risk" of physical force and does not have as an element "the use, attempted use, or threated use of physical force." Turning to the statutory provisions cited in the plea agreement, Mr. Blackman was charged under 18 U.S.C. § 1512, which provides:

> (a)(1) Whoever kills or attempts to kill another person, with intent to—[. . .]
>
> > (C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;
>
> shall be punished as provided in paragraph (3)."

Paragraph (3), specifically subjection (b)(i), provides "(B) in the case of—(i) an attempt to murder" the punishment shall be "imprisonment for not more than 30 years." Notably, subsection (b)(ii) of paragraph 3 has a clause that addresses "the use or attempted use of physical force

against any person." As Mr. Blackman was not charged under that subjection, the only applicable provision is "an attempt to murder." As set forth below, such a crime does not have an element of force, so it cannot be a "crime of violence."

First, Mr. Blackman was convicted for *aiding and abetting* another who attempted to murder a witness, rather than the actual commission of attempted murder. Although an individual convicted of aiding and abetting an offense is punishable, and as equally culpable, as a principal, this conviction does not require proof of the same elements required for conviction of substantive attempted murder. *See Rosemond v. United States*, 134 S. Ct. 1240, 1246 (2014) ("As almost every court of appeals has held, a defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense.") (quotation marks and citations omitted); *see also United States v. Broadwell*, 870 F.2d 594, 608 (11th Cir. 1989) ("The aiding and abetting statute allows the jury to find a person guilty of a substantive crime even though that person did not commit all acts constituting elements of the crime."); *United States v. Sosa*, 777 F.3d 1279, 1293 (11th Cir. 2015) ("A defendant can be properly convicted of

aiding and abetting even when he has not personally committed all the acts constituting the elements of the substantive crime aided.") (quotation marks and citations omitted); *United States v. Arias-Izquierdo*, 449 F.3d 1168, 1176 (11th Cir. 2006) ("The government was not required to prove that Arias-Izquierdo participated in each element of the substantive offense in order to hold him liable as an aider and abettor."); *But see In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) ("Colon's conviction for aiding and abetting a Hobbs Act robbery qualifies as a "crime of violence" under the § 924(c)(3)(A) use-of-force clause, without regard to the § 924(c)(3)(B) residual clause.").

Clearly, although an aider and abettor of attempted murder is legally responsible for all acts of the principal, he does not have to commit, threaten to commit, or attempt to commit (or even aid and abet in the commission of) all elements of the attempted murder of a witness. Thus, even assuming arguendo that an element of substantive attempted murder of a witness required physical force, an aider and abettor of that attempted murder would not have to aid and abet in the commission of that element to be convicted. *See Boston v. United States*, 939 F.3d 1266, 1273–74 (11th Cir. 2019) (Jill Pryor, J., concurring)

("The problem I see with the reasoning in *Colon* is that it takes a legal fiction—that one who aids and abets a robbery by, say, driving a getaway car, is deemed to have committed the robbery itself—and transforms it into a reality—that a getaway car driver actually committed a crime involving the element of force."); *In re Colon*, 826 F.3d at 1306–07 (Martin, J. dissenting) ("It seems plausible that a defendant could aid and abet a robbery without ever using, threatening, or attempting any force at all. For example, the aider and abettor's contribution to a crime could be as minimal as lending the principal some equipment, sharing some encouraging words, or driving the principal somewhere. And even if Mr. Colon's contribution in his case involved force, this use of force was not necessarily an *element* of the crime, as is required to meet the 'elements clause' definition.").[1]

[1] *In re Colon* is problematic for another troubling reason. As Justice Sotomayor recently pointed out, the Eleventh Circuit's procedures for issuing published opinions in untested—and often uncounseled—habeas petitions "make out a troubling tableau indeed." *St. Hubert v. United States*, 140 S. Ct. 1727, 1728 (2020) (Sotomayor, J., statement respecting denial of certiorari). These outlier procedures "raise a question whether the Eleventh Circuit's process is consistent with due process." *Id.* It is not, as well as rightly criticized—by its own judges—as representing "the worst of three worlds in this Circuit." *In re Williams*, 898 F.3d 1098, 1104 (11th Cir. 2018) (Wilson, J., specially concurring).

Further, whether attempted Hobbs Act robbery is a crime of violence under § 924(c)'s elements clause is before the Court this Term. *See Taylor*, 141 S.Ct. 2882. Like attempted Hobbs Act robbery, aiding and abetting another who attempted to murder a witness may be committed without engaging in "the use, attempted use, or threatened use of physical force against the person or property of another," this Court's reasoning in *Taylor* could be applied as to Mr. Blackman's offense.

In any event, the underlying statute does not require the use of force. Under 18 U.S.C. § 1111, murder is defined as "the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a). The statute continues:

> Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree.

Id.

Recently, the Eleventh Circuit held that second-degree murder under § 1111(a) qualifies under § 924(c)'s elements clause. *See Thompson v. United States*, 924 F.3d 1153, 1158 (11th Cir. 2019) ("At a minimum, federal second-degree murder has as an element the killing of a human being with malice aforethought. Because § 1111(a), by its plain terms, criminalizes the actual killing of another person, the level of force used must necessarily be capable of causing physical pain or injury.") (citation omitted). However, the *Thompson* Court's reasoning is flawed.

Under the plain meaning of § 1111, second-degree murder is an indivisible offense that only has two elements: (1) unlawful killing of a human being; (2) with malice afterthought. "To kill with 'malice aforethought' means an intent to take the life of another person either deliberately or intentionally, or to willfully act with callous and wanton disregard for human life." *United States v. Sharma*, 394 F. App'x 591, 596–97 (11th Cir. 2010). By the statute's plain language, second-degree murder may be committed without the use, attempted use, or threated use of force because second-degree murder includes "any other murder." In addition to a victim's death and federal jurisdiction, the statute

provides for only one element for second-degree murder: malice aforethought. Indeed, the jury instruction states:

> The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt: (1) the victim, [victim's name] was killed; (2) the Defendant caused the death of the victim with malice aforethought; and (3) the killing occurred within the [special maritime] [territorial] jurisdiction of the United States.

11th Cir. Pattern Jury Instructions, Offense Instruction 45.3 (2003). These are the only "elements," that the jury must find "unanimously and beyond a reasonable doubt." *See Descamps v. United States*, 570 U.S. 254, 272 (2013). Therefore, the statute does not contain "alternative elements" but rather it has only one element—malice aforethought.

A person could intentionally end the life of another deliberately but without force. For example, a caretaker could withhold food or medicine from his patient in order to cause his death. Applying the malice aforethought definition of "callous and wanton disregard for human life," it is easy to imagine other intentional inaction that could cause a death. A doctor could "grossly deviate from an appropriate standard of care" by failing to take proper hygienic actions and spread a deadly disease. If the doctor did so with "callous and wanton disregard

for human life," his failure to engage in sanitary measures would rise to the level of second-degree murder. Such inaction would occur with malice aforethought and yet not involve any force. Additionally, second-degree murder could occur during the commission of a felony not specified for first-degree murder but without the use, attempted use, or threatened use of force. An example would be mail fraud, if a person involved in the mail fraud died from a reaction to the chemicals in the mailing envelopes. Factually, this would not be a first-degree murder or an intentional poisoning, but instead, a death with malice aforethought and committed during the commission of a nonenumerated felony. The only elemental requirement, that of malice aforethought, would be satisfied by the commission of the predicate felony of mail fraud. *See United States v. Tham*, 118 F.3d 1501, 1508 (11th Cir. 1997) (adopting the common law first-degree felony murder rule and concluding "by virtue of the federal felony murder rule, the defendant need only have intended to commit the underlying felony; no other mens rea is required."). Courts must also employ the "least culpable act rule," under which they "must presume that the conviction 'rested upon nothing

more than the least of the acts' criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

Notably, death can be committed without the use of force. The causation of bodily injury does not necessarily entail violent force. "[A] crime may result in death or serious injury without involving the use of physical force." *See United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012). In fact, *Torres-Miguel* specifically cited to the example of poison as an offense that may result in death without the use of force. *Id.* at 168–69 (citing *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010)). "Not to recognize the distinction between a use of force and a result of injury is not to recognize the 'logical fallacy . . . that simply because all conduct involving a risk of the use of physical force also involves a risk of injury then the converse must also be true.'" *Id.* at 169 (quoting *Dalton v. Ashcroft*, 257 F.3d 200, 207 (2d Cir. 2001)). And other courts have recognized that any offense that can be committed by poison does not have physical force as an element. *See United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006); *Perez-Munoz v. Keisler*, 507 F.3d 357, 364 (5th Cir. 2007).

While some courts have attempted to distinguish *Torres-Miguel* in light of the reasoning in *United States v. Castleman*, 572 U.S. 157 (2014), *Castleman* did not undo the logic or holding of *Torres-Miguel*. In *Castleman*, this Court held that a prior Tennessee domestic violence offense that had an element of physical injury qualified as a misdemeanor crime of domestic violence for purposes of 18 U.S.C. § 922(g)(9) under the force clause of 18 U.S.C. § 921(a)(33)(A)(ii). 572 U.S. at 167–68. However, the force clause of § 921(a)(33)(A)(ii) is critically different from that applicable here and in *Torres-Miguel*. Indeed, the *Castleman* Court, in great length, explained that it was applying a definition of "physical force" to § 921(a)(33)(A)(ii) that was starkly different from that of the ACCA force clause which, like the § 924(c)(3) force clause, requires violent physical force. 572 U.S. at 162–71. Unlike the definition of "physical force" at issue here (and in *Torres-Miguel*), the *Castleman* Court applied the common law definition of "physical force" that encompassed "even the slightest offense touching"—i.e., de minimis force. *Id.* at 163. In this context, the Court held that physical injury necessarily requires de minimis force. *Id.* at 167–68; *see also United States v. Perez-Vargas*, 414 F.3d 1282, 1287

(10th Cir. 2005) (statute requiring causation of bodily injury "does not necessarily include the use or threatened use of 'physical force' under" the elements clause); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 195 (2d Cir. 2003) (agreeing "that there is a difference between the causation of an injury and an injury's causation by the 'use of physical force'") (quotation marks omitted).

This Court in *Castleman* explicitly refused to evaluate the validity of the logic rejecting *Torres-Miguel*. The *Castleman* Court wrote that "[w]hether or not the causation of bodily injury necessarily entails violent force [is] a question we do not reach." 572 U.S. at 167; *see also United States v. McNeal*, 818 F.3d 141, 156 n.10 (4th Cir. 2016) (noting that the Supreme Court in *Castleman* "expressly reserved the question of whether causation of bodily injury 'necessarily entails violent force.'"). That, of course, is the question any decision abrogating *Torres-Miguel* must answer. Because *Castleman* failed to reach the question *Torres-Miguel* answered, *Torres-Miguel* retains its vitality.

Thus, although murder results in death, it does not require the use of physical force. Under the reasoning in *Torres-Miguel*, a violation of 18 U.S.C. § 1111 cannot qualify as a "crime of violence." And it is

even further attenuated when one is charged with aiding and abetting another who attempts to commit that offense. Without an underlying "crime of violence" to support Mr. Blackman's § 924(c) conviction, the conviction must be vacated. Accordingly, this Court should grant this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

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