No. _____

IN THE
Supreme Court of the United States

EWIN OSCAR MARTINEZ,
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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QUESTIONS PRESENTED

Ewin Oscar Martinez was convicted in 2000 of using and carrying a firearm during a "crime of violence" in violation of 18 U.S.C. § 924(c), based upon two federal-criminal-law predicates: (1) hostage-taking, under § 924(c)'s "residual clause," which was later invalidated in *United States* v. *Davis*, 139 S.Ct. 2319 (2019), and (2) carjacking, under the still-valid "elements clause." In a habeas petition filed after *Davis* invalidated § 924(c)'s residual clause, he argued among other things that he was actually innocent of § 924(c) because he was actually innocent of the sole remaining valid predicate "crime of violence" (carjacking); that is because he did not take the vehicle in question in the presence of another and did not use force, violence, or intimidation to take it, as required by the carjacking statute, 18 U.S.C. § 2119.

The questions presented are:

> 1.a. Whether a person violates the federal carjacking statute, 18 U.S.C. § 2119, by taking a motor vehicle *not* in the presence of its owner and *without* any force, violence, or intimidation, and then subsequently uses force, violence, or intimidation against the vehicle's owner in connection with a different crime.
>
> 1.b. Whether a habeas petitioner may assert he is actually innocent, thereby avoiding a procedural default, of a § 924(c) conviction on the grounds that he is actually innocent of any

valid elements-clause predicate and that the remaining predicate is a residual-clause crime rendered invalid by *Davis*.

2.a. Whether cause exists to excuse a habeas petitioner's procedural default where he was convicted under a federal criminal statute containing a residual clause that this Court later invalidated as unconstitutional.

2.b. Whether, when a prisoner was convicted of using and carrying a firearm during a "crime of violence" under § 924(c) based upon two predicates – one under the valid "elements clause" and the second under the later-invalidated "residual clause" – and the two predicate offenses are intertwined, it necessarily follows that a habeas petition challenging the § 924(c) conviction fails for want of prejudice and/or for harmlessness, as the court below held, or whether habeas relief remains available.

PARTIES TO THE PROCEEDING

Ewin Oscar Martinez, petitioner on review, was the petitioner-appellant below.

Respondent United States of America was the respondent-appellee below.

RELATED PROCEEDINGS

Martinez v. *United States*, No. 01-8607 (U.S. Apr. 1, 2002).; *United States* v. *Ferreira,* No. 00-14723 (11th Cir. Dec. 11, 2001) (reported at 275 F. 3d 1020); *United States* v. *Martinez*, No. 00-cr-00001-JAL (S.D. Fl. Sept. 22, 2000).

In re Martinez, No. 19-12817 (11th Cir. Aug. 16, 2019); *United States* v. *Martinez*, No. 18-12284 (11th Cir. Jan. 28, 2019); *Martinez* v. *United States*, No. 14-6978 (U.S. Dec. 8, 2014); *Martinez* v. *United States*, No. 13-15597 (11th Cir. June 2, 2014); *Martinez* v. *United States,* No. 07-15895-H (11th Cir. Mar. 18, 2008); *Martinez* v. *United States,* No. 07-10844 (U.S. Jun. 9, 2008); *Martinez* v. *United States,* No. 07-15895 (11th Cir. Feb. 15, 2008); *Martinez* v. *United States,* No. 07-9383 (U.S. Apr. 14, 2008); *Martinez* v. *United States,* No. 06-15919, (11th Cir. Dec. 7, 2007); *Martinez* v. *United States*, No. 07-6130, (U.S. Oct. 9, 2007); *United States* v. *Martinez*, No. 06-11630 (11th Cir. Apr. 10,

2007); *Martinez* v. *United States,* No. 06-07311 (U.S. Dec. 4, 2006); *Martinez* v. *United States,* No. 06-11345 (11th Cir. Jun. 27, 2006); *Martinez* v. *United States*, No. 02-cv-23561 (S.D. Fl. Feb. 1, 2006).

Martinez v. *United States*, No. 20-10598 (11th Cir. Apr. 21, 2021) (reported at 853 Fed. App'x. 416) (Reh'g denied June 24, 2021); *Martinez* v. *United States,* No. 19-23455-CIV-LENARD, (S.D. Fl. Jan. 27, 2020).

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING iii
RELATED PROCEEDINGS iii
TABLE OF CONTENTS v
TABLE OF APPENDICES vii
TABLE OF AUTHORITIES viii
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
I. Residual-Clause Jurisprudence 2
II. Procedural-Default Jurisprudence 5
III. Procedural History 7
REASONS FOR GRANTING THE PETITION 11
I. THE COURT SHOULD GRANT THE FIRST QUESTION PRESENTED 11
II. THE COURT SHOULD GRANT THE SECOND QUESTION PRESENTED 19
A. The Circuits Have Divided Over The Appropriate "Cause" Standard. 19

1. The Circuits Are Split On Whether Near-Unanimous Circuit Precedent Foreclosing Relief Is "Cause" 19

2. The Circuits Are Also Split On Whether *Johnson* And *Davis* Represent A Clear Break 23

B. The Eleventh Circuit's "Prejudice" And "Harmlessness" Analyses Depart From This Court's Decisions And The Rule In Other Circuits 24

C. No Vehicle Problems Prevent Review Of The Second Question Presented 27

CONCLUSION 29

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED APRIL 21, 2021 ..... 1a

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED JANUARY 27, 2020..... 11a

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED AUGUST 16, 2019..... 45a

APPENDIX D — ORDER DENYING REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 24, 2021 ..... 52a

APPENDIX E — STATUTORY PROVISIONS INVOLVED 54a

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. *Ives*,
950 F.3d 1184 (9th Cir. 2020) 16

Allen v. *Ives*,
976 F.3d 863 (9th Cir. 2020) 16

Bailey v. *United States*,
516 U.S. 137 (1995) 6, 7

Beeman v. *United States*,
871 F.3d 1215 (11th Cir. 2017) 9

Begay v. *United States*,
553 U.S. 137 (2008) 20-21

Bousley v. *United States*,
523 U.S. 614 (1998) ..... *passim*

Brown v. *Caraway*,
719 F.3d 583 (7th Cir. 2013) 17

Cross v. *United States*,
892 F.3d 288 (7th Cir. 2018) 4, 20, 23

Damon v. *United States*,
732 F.3d 1 (1st Cir. 2013) 17, 18

Dretke v. *Haley*,
541 U.S. 386 (2004) 5

Engle v. *Isaac*,
456 U.S. 107 (1982) 7

English v. *United States*,
42 F.3d 473 (9th Cir. 1994) 21

Gatewood v. *United States*,
979 F.3d 391 (6th Cir. 2020).....21, 22, 24

Gomez v. *United States*,
490 U.S. 858 (1989).....21

Hill v. *Masters*,
836 F.3d 591 (6th Cir. 2016).....16-17

Holloway v. *United States*,
526 U.S. 1 (1999).....12

In re Bradford,
660 F.3d 226 (5th Cir. 2011).....17, 18

In re Smith,
829 F.3d 1276 (11th Cir. 2016).....14

James v. *United States*,
550 U.S. 192 (2007).....3, 4

Johnson v. *United States*,
576 U.S. 591 (2015).....*passim*

Leocal v. *Ashcroft*,
543 U.S. 1 (2004).....3

Lester v. *Flournoy*,
909 F.3d 708 (4th Cir. 2018).....16, 17

Massaro v. *United States*,
538 U.S. 500 (2003).....5

McCarthan v. *Dir. of Goodwill Indus.-Suncoast, Inc.*,
851 F.3d 1076 (11th Cir. 2017).....18

McCoy v. *United States*,
266 F.3d 1245 (11th Cir. 2001).....22, 23

Murray v. *Carrier*,
477 U.S. 478 (1986) 5

Okereke v. *United States*,
307 F.3d 117 (3d Cir. 2002) 17

Poindexter v. *Nash*,
333 F.3d 372 (2d Cir. 2003) 17

Prost v. *Anderson*,
636 F.3d 578 (10th Cir. 2011) 18

Reed v. *Ross*,
468 U.S. 14 (1984) ..... *passim*

Sessions v. *Dimaya*,
138 S. Ct. 1204 (2018) 4

Smith v. *Murray*,
477 U.S. 527 (1986) 21, 22, 24

Stinson v. *United States*,
508 U.S. 36 (1993) 3

Stokeling v. *United States*,
139 S. Ct. 544 (2019) 25

Sun Bear v. *United States*,
644 F.3d 700 (8th Cir. 2011) 17

Taylor v. *United States*,
495 U.S. 575 (1990) 2, 3, 19

Teague v. *Lane*,
489 U.S. 288 (1989) 4

United States v. *Applewhaite*,
195 F.3d 679 (3d Cir. 1999) 12, 13

United States v. *Childs*,
403 F.3d 970 (8th Cir. 2005) 3

United States v. *Davis*,
139 S. Ct. 2319 (2019) 2

United States v. *Davis*,
16 F.3d 212 (7th Cir. 1994) 3

United States v. *Doe*,
810 F.3d 132 (3d Cir. 2015) 20

United States v. *Eldridge*,
2 F.4th 27 (2d Cir. 2021) 26

United States v. *Felder*,
993 F.3d 57 (2d Cir. 2021) 13

United States v. *Ferreira*,
275 F.3d 1020 (11th Cir. 2001) 8, 14

United States v. *Frady*,
456 U.S. 152 (1982) 5

United States v. *Garcia*,
811 Fed. App'x 472 (10th Cir. 2020) 24

United States v. *Geozos*,
870 F.3d 890 (9th Cir. 2017) 25, 27

United States v. *Granda*,
990 F.3d 1272 (11th Cir. 2021) ..... *passim*

United States v. *Heyward*,
3 F.4th 75 (2d Cir. 2021) 25, 27

United States v. *Johnson*,
457 U.S. 537 (1982) 6

United States v. *Jones*,
935 F.3d 266 (5th Cir. 2019) 27

United States v. *Marcus*,
560 U.S. 258 (2010) 26

United States v. *Maybeck*,
23 F.3d 888 (4th Cir. 1994) 16

United States v. *McClaren*,
13 F.4th 386 (5th Cir. 2021) 27

United States v. *Moss*,
252 F.3d 993 (8th Cir. 2001) 22

United States v. *Peralta-Romero*,
83. Fed. App'x 872 (9th Cir. 2003) 21

United States v. *Petruk*,
781 F.3d 438 (8th Cir. 2015) 12, 13

United States v. *Presley*,
52 F.3d 64 (4th Cir. 1995) 3

United States v. *Redrick*,
841 F.3d 478 (D.C. Cir. 2016) 24

United States v. *Snyder*,
871 F.3d 1122 (10th Cir. 2017) 23

United States v. *Sorenson*,
914 F.2d 173 (9th Cir. 1990) 3

Welch v. *United States*,
578 U.S. 120 (2016) 4

Wheeler v. *United States*,
329 Fed. App'x 632 (6th Cir. 2009) 24

Statutes and Other Authorities

18 U.S.C. § 16 4

18 U.S.C. § 924 27

18 U.S.C. § 924(c) ..... *passim*

18 U.S.C. § 924(c)(3) 2
18 U.S.C. § 924(c)(3)(A) 9, 10
18 U.S.C. § 924(e) 2, 3, 4
18 U.S.C. § 924(o) 26
18 U.S.C. § 1203(a) 7
18 U.S.C. § 2119 ..... *passim*
28 U.S.C. § 2244(a) 5
28 U.S.C. § 2244(b)(2)(A) 27
28 U.S.C. § 2244(b)(3) 5
28 U.S.C. § 2255 ..... 16, 27
28 U.S.C. § 2255(a) 5
28 U.S.C. § 2255(f) 5
28 U.S.C. § 2255(h) 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 853 Fed. App'x 416. App. 1a-10a. The judgment of the District Court is unreported. *Id.* at 11a-44a.

JURISDICTION

The Eleventh Circuit issued its opinion on April 21, 2021. That court denied rehearing on June 24, 2021. *Id*. at 52a-53a. By general order dated July 19, 2021, this Court extended the deadline for petitions for writs of certiorari seeking review of judgments or orders issued before July 19, 2021, to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. This petition is timely, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are produced in the appendix to this petition. App. 54a-56a.

STATEMENT OF THE CASE

I. Residual-Clause Jurisprudence

Certain federal criminal statutes impose heightened sanctions where the defendant committed prior violent or drug-related crimes. For example, 18 U.S.C. § 924(c)—the statute at issue in this case—"authorizes heightened criminal penalties for using or carrying a firearm 'during and in relation to,' or possessing a firearm 'in furtherance of,' any federal 'crime of violence or drug trafficking crime.'" *United States* v. *Davis*, 139 S.Ct. 2319, 2324 (2019). Similarly, the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), imposes a minimum of fifteen years in prison on those who commit a federal firearm offense and were previously convicted of three "violent felon[ies]" or "serious drug offense[s]."

Section 924(c), like ACCA, defines the category of qualifying "violent" predicate offenses in subparts—"the first known as the elements clause, and the second the residual clause." *Davis*, 139 S.Ct. at 2324. A "crime of violence," § 924(c) states, is a "felony" that either "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (the "*elements clause*") or "(B) that by its nature, involves a substantial risk that physical force against the person or property of anther may be used in the course of committing the offense" (the "*residual clause*"). 18 U.S.C. § 924(c)(3).

In *Taylor* v. *United States*, 495 U.S. 575 (1990), while addressing ACCA's elements clause, this Court

stated that a crime which did not have as one of its elements the use or attempted use of force might still qualify as a "violent" offense under ACCA's residual clause. *Id.* at 600 n.9 ("The Government remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement. . . under § 924(e)(2)(B)(ii).").

For nearly two decades following *Taylor*, circuit courts routinely upheld convictions under the residual clauses in § 924(c) and ACCA. *See United States* v. *Davis*, 16 F.3d 212, 215 (7th Cir. 1994) (describing the "line of cases" holding that attempted burglary offenses are crimes of violence under § 924(e)(2)(B)(ii)). No circuit found either residual clause unconstitutionally vague. *United States* v. *Childs*, 403 F.3d 970, 972 (8th Cir. 2005) ("We agree with every other circuit that has considered this argument and hold that [the constitutional vagueness challenge] has no merit."); *United States* v. *Presley*, 52 F.3d 64, 68 (4th Cir. 1995); *United States* v. *Sorenson*, 914 F.2d 173, 175 (9th Cir. 1990). In addition, this Court interpreted and applied criminal statutes containing catch-all residual clauses without hinting at the existence of a constitutional defect. *See, e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 10-11 (2004); *Stinson* v. *United States*, 508 U.S. 36, 38 (1993).

This Court squarely confronted the constitutionality of a residual clause for the first time in *James* v. *United States*, 550 U.S. 192 (2007). *James* held that attempted burglary under Florida law was a "violent felony" under the residual clause of § 924(e) ("involves

conduct that presents a serious potential risk of physical injury to another"). *Id.* at 201-02. Justice Scalia dissented, stating that the residual clause—at least when applied "case by case in its pristine abstraction," as in the Court's opinion—"violates, in my view, the constitutional prohibition against vague criminal laws." *Id.* at 229-30.

Eight years later, this Court reversed course and adopted Justice Scalia's approach from *James*. Thus, in *Johnson* v. *United States*, 576 U.S. 591 (2015), Justice Scalia wrote for the Court that the residual clause in Section 924(e) violates "the Constitution's prohibition of vague criminal laws." *Id.* at 593. In addition to overruling *James*, *Johnson* "upset[] a host of decisions from every court of appeals in the country." *Cross* v. *United States*, 892 F.3d 288, 292 (7th Cir. 2018).

In *Welch* v. *United States*, 578 U.S. 120 (2016), this Court confirmed that *Johnson* announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review under *Teague* v. *Lane*, 489 U.S. 288 (1989).

This Court later followed *Johnson* to invalidate residual clauses in two additional criminal statutes. In 2018, *Sessions* v. *Dimaya* invalidated the residual clause in 18 U.S.C. § 16, as incorporated into the Immigration and Nationality Act. 138 S.Ct. 1204 (2018). And, in 2019, *Davis* invalidated the residual clause in § 924(c), the statute at issue in this case.

II. Procedural-Default Jurisprudence

Under 28 U.S.C. § 2255(a), a federal prisoner may petition to "vacate, set aside or correct" a sentence "imposed in violation of the Constitution or the laws of the United States." Prisoners must generally petition for review within one year of conviction. § 2255(f).

A court of appeals may authorize a second or successive petition, §§ 2244(a), (b)(3), upon certifying that the petition contains "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h). The federal prisoner must make a request to file such a successive petition within one year from "the date on which the [new] right asserted was initially recognized" by this Court. § 2255(f)(3).

Petitioners who file an authorized, timely petition based on a new constitutional right with retroactive application often did not assert the right on direct appeal (because the original proceedings concluded before this Court recognized the right). In that situation, the general rule is that the petitioner must "show[] cause and prejudice." *Massaro* v. *United States*, 538 U.S. 500, 504 (2003) (first citing *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982); then citing *Bousley* v. *United States*, 523 U.S. 614, 621-622 (1998)). Alternatively, a petitioner can overcome procedural default by demonstrating he is "actually innocent." *Dretke* v. *Haley*, 541 U.S. 386, 388 (2004); *see also Murray* v. *Carrier*, 477 U.S. 478, 496 (1986) ("[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction

of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.").

As for cause to excuse procedural default, in *Reed* v. *Ross*, this Court held that "where a constitutional claim is so novel that its legal basis [was] not reasonably available" on direct appeal, and the "procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests," a petitioner "has cause for . . . failure to raise the claim." 468 U.S. 14, 16 (1984).

Reed identified three circumstances in which a new constitutional rule may "represent[] 'a clear break with the past'" such that there would have been "no reasonable basis" to assert the newly announced right. *Id.* at 17 (quoting *United States* v. *Johnson*, 457 U.S. 537, 551, (1982), *abrogated on other grounds by Griffith* v. *Kentucky*, 479 U.S. 314 (1987)). Such circumstances exist when this Court (i) explicitly overrules a prior decision, (ii) "overtur[ns] 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," or (iii) "disapproves a practice this Court arguably sanctioned in prior cases." *Id.* at 17 (quoting *Johnson*, 457 U.S. at 551).

Subsequently, in *Bousley*, 523 U.S. 614, this Court held that *Bailey* v. *United States*, 516 U.S. 137 (1995)—which held that "use" of a firearm in violation of Section 924(c) requires more than mere possession—*was* "reasonably available" to counsel during

petitioner's appeal, even though in-circuit precedent had foreclosed the argument at the time. *Id.* at 623. *Bousley* clarified that "futility" alone does not constitute "cause" under *Reed* "if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" *Id.* (quoting *Engle* v. *Isaac*, 456 U.S. 107, 130 n.35 (1982)).

III. Procedural History

A. On February 3, 2000, a federal grand jury returned a superseding indictment charging petitioner Ewin Martinez with one count of hostage-taking in violation of 18 U.S.C. § 1203(a), one count of carjacking in violation of 18 U.S.C. § 2119, two counts of conspiracy (one for each substantive count), and one count of "using and carrying a firearm during crimes of violence" in violation of 18 U.S.C. § 924(c). *United States* v. *Martinez*, No. 00-cr-00001-JAL, ECF No. 25 (S.D. Fla. Feb. 03, 2000).

At trial, the evidence showed Martinez and his co-defendants (i) took the keys to a Lincoln Navigator from a garage (where one co-defendant worked as a valet), (ii) subsequently abducted members of the family that owned the Lincoln Navigator by forcing them *from* another vehicle into the Lincoln Navigator, and driving them in the Navigator to a house approximately fifteen minutes away, and (iii) held them for ransom for approximately four days. *See* App. 12a-13a.

A jury convicted Martinez on all five counts in a general verdict. For the § 924(c) conviction, the verdict referred to the Superseding Indictment, which referenced both substantive counts (hostage-taking and carjacking) but did not specify which count constituted the predicate "crime of violence." *Martinez*, No. 00-cr-00001-JAL, ECF No. 131 (June 2, 2000); *see also* App. 6a ("The district court instructed the jury that it could convict under § 924(c) if he used a firearm in connection with *either* the hostage taking or the carjacking."). The district court sentenced Martinez to life imprisonment. *Martinez*, No. 00-cr-00001-JAL, ECF No. 203 (Sept. 25, 2000).

B. On direct appeal, Martinez argued, *inter alia*, that the evidence could not support the carjacking conviction because the Lincoln Navigator was not "taken 'from the person or presence' of the victims" or "by 'force and violence or by intimidation,'" as the statute requires. Martinez Br., Case No. 00-14723-H, 2001 WL 34106941, at *32 (11th Cir. Mar. 30, 2001) (quoting 18 U.S.C. § 2119). The Eleventh Circuit affirmed, addressing that argument in a footnote without analysis, on the basis that it (and several other arguments) had "no merit." *United States* v. *Ferreira*, 275 F.3d 1020, 1022 n.1 (11th Cir. 2001). Martinez later sought post-conviction relief, which was denied.

C. After *Davis*, on August 16, 2019, the Eleventh Circuit granted Martinez's application for an order authorizing a second or successive habeas petition. App. 45a-51a. Noting "there is no binding precedent from the Supreme Court or this Court . . . to indicate

that hostage taking . . . categorically qualifies as a crime of violence under the elements clause of § 924(c)(3)(A)," the Eleventh Circuit ruled that Martinez made a "*prima facie* showing that . . . his § 924(c) conviction may be unconstitutional under *Davis*, as he was potentially sentenced under the now-invalid residual clause[.]" *Id.* at 51a.

On January 27, 2020, the district court denied Martinez's petition. *Id.* at 11a-44a. At the outset, the court rejected the Government's argument that Martinez's *Davis* claim was procedurally defaulted, as the argument was "not available" in 2000. *Id.* at 15a-16a. On the merits, the district court held first that circuit law required Martinez to show that his § 924(c) conviction "more likely than not" relied on the invalidated residual clause. *Id.* at 16a-18a (applying standard applicable to *Johnson* claims in the Eleventh Circuit under *Beeman* v. *United States*, 871 F.3d 1215 (11th Cir. 2017)). Applying that standard, the district court denied relief; given that carjacking was a "crime of violence" under the elements clause, *id.* at 21a, the court reasoned, it was "at least as likely" that the jury convicted Martinez "of possessing a firearm in furtherance of the predicate carjacking offense" as of possessing a firearm in furtherance of hostage taking. *Id.* at 23a-24a.

D. The Eleventh Circuit granted Martinez a certificate of appealability, *Martinez* v. *United States*, No. 20-10598-D (11th Cir. Apr. 27, 2020), and then affirmed. App. 1a-10a. Following Eleventh Circuit precedent, the court first held that Martinez had no

"cause" to excuse his default, because *Davis*'s "new constitutional rule of retroactive application" was not a "'sufficiently clear break with the past.'" *Id.* at 5a (quoting *United States* v. *Granda*, 990 F.3d 1272, 1286 (11th Cir. 2021)). Instead, the Eleventh Circuit ruled, Martinez already "had the building blocks of a due process vagueness challenge to the 924(c) residual clause before [this Court's] decision in *Davis*." *Id.* at 6a.

The Eleventh Circuit also held Martinez could not show "prejudice." The court reasoned that Martinez had to show "a 'substantial likelihood' that the jury relied *only* on the invalid predicate" in order to show "prejudice." *Id.* (quoting *Granda*, 990 F.3d at 1286). Martinez could not satisfy that standard, the court explained, because the predicate "crime of violence" for his § 924(c) conviction might have been carjacking, which satisfies the still-valid "elements clause" in § 924(c)(3)(A). *Id.* at 6a-7a. And, notwithstanding Martinez's claim that he was actually innocent of federal carjacking as a matter of undisputed fact, the Eleventh Circuit asserted it was "not at liberty to question" that conviction, citing the law-of-the-case doctrine, and explaining the convictions were intertwined. *Id.* at 7a.

The court carried this reasoning through to deny Martinez's alternate argument that he was "actually innocent" of violating § 924(c) – thus excusing his default. Thus, although Martinez argued he was actually innocent of the sole federal crime that could constitutionally support his § 924(c) conviction following

Davis—namely, federal carjacking—the court brushed the argument aside while again citing the law-of-the-case doctrine. *Id.* at 8a, n.1

Finally, the court also held, citing the purported validity of the carjacking conviction and the fact it was "inextricably intertwined" with the hostage-taking conviction, that any error would be harmless anyway, meaning the petition failed on the merits. *Id.* at *4.

On June 24, 2021, the Eleventh Circuit denied Martinez's timely petition for rehearing.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE FIRST QUESTION PRESENTED

The decision below recognized that (1) actual innocence under § 924(c) would excuse Martinez's default; (2) after *Davis*, the hostage-taking conviction was no longer a valid predicate under § 924(c); and (3) as for the count of carjacking, the only potentially valid § 924(c) predicate after *Davis* in this case, Martinez had obtained the keys to the car in issue outside the presence of the owners, and *before* any force was used. Nonetheless, reasoning that it was not at liberty to question the carjacking conviction itself, the court below denied Martinez's claim that he was actually innocent under § 924(c). That ruling conflicts with statutory text as well as the decisions of this Court and other Circuits.

A. To begin, the decision below, in holding based on its prior ruling (in Martinez's own case) that carjacking does not necessitate force or violence be used in connection with the taking of a car or that it be taken from the presence of another, conflicts with the plain statutory text and the rule in other Circuits.

The federal carjacking statute, 18 U.S.C. § 2119, requires the following elements: (i) "tak[ing] a motor vehicle," (ii) "from the person or presence of another," (iii) "by force and violence or by intimidation," (iv) "with the intent to cause death or serious bodily harm." App. 54a.

In line with the plain statutory text, at least two Circuits, the Third and Eighth, hold that "there is no carjacking within the meaning of 18 U.S.C. § 2119" *unless* "the threatened or actual force is employed *in furtherance* of the taking of the car." *United States* v. *Applewhaite*, 195 F.3d 679, 686 (3rd Cir. 1999) (citing *Holloway* v. *United States*, 526 U.S. 1 (1999) (emphasis added)). The Eighth, moreover, requires – also in line with the plain text – that the car be taken "from the person or in the presence of another," unlike the Eleventh. *United States* v. *Petruk*, 781 F.3d 438, 442 (8th Cir. 2015).

Applewhaite concerned defendants who "knocked [a person] unconscious by three blows from behind" and then, after the person was unconscious, used the victim's car to "kidnap" him; the Third Circuit held that on such facts a defendant does *not* commit carjacking under 18 U.S.C. § 2119. The Court explained:

"Although the defendants clearly intended to seriously harm or kill Eddie Romero, neither their evil intent, nor the force they employed in furtherance of it, had any nexus to the subsequent taking of his van. The force was employed in an attempt to harm Eddie Romero. It was not used to take his van." *Id.* at 685. *Cf. United States* v. *Felder*, 993 F.3d 57, 67 (2d Cir. 2021) (distinguishing *Applewhaite* on the basis that the "problem" with the carjacking conviction in that case was the "lack of a nexus between the defendant's violence and his taking of the victim's van" whereas "here, the two stolen cabs were plainly carjacked by means of force and violence or intimidation[,] [s]pecifically, Felder demanded each cab at the point of his gun").

Petruk, 781 F.3d 438, is to like effect. There, the Eighth Circuit vacated a carjacking conviction on the ground that, although the defendant had both "taken" a truck and assaulted its owner, he did not do so at the same "time." *Id.* at 443-44. In that case, contrary to the statutory text, the actual "tak[ing]" of the vehicle was not from a "person" or in the "presence of another," *and* was not accomplished by means of "force and violence or by intimidation." *Id.* at 443 (quoting 18 U.S.C. § 2119). Again, on such facts, a federal-carjacking conviction could not stand.

By contrast, in the case below, the Eleventh Circuit recognized that Martinez and his co-defendants "forced [a] woman and her children into the family's Lincoln Navigator" *after* obtaining "the keys" to the Navigator, explaining Martinez and his co-defendants

"obtained the keys to that car earlier in the day," without any use of violence or force, and not in the presence of another. App. 2a; see also *Ferreira*, 275 F.3d at 1022-23 & n.1 (direct appeal). The Eleventh Circuit nonetheless rejected the assertion that Martinez was actually innocent of carjacking – and thus, as carjacking is the only possible valid § 924(c) predicate in this case following *Davis*, of violating § 924(c). This ruling plainly conflicts with the text of the carjacking statute and the decisions of the Sixth and Eighth Circuit.

Indeed, on the facts that the Circuit itself recited below, Martinez plainly did not "take[]" the Navigator "by force and violence or by intimidation." § 2119. He took "a woman and her children" by such means – *i.e.*, hostage-taking – but to "take[]" the car itself, he and his co-defendants used the key they had taken, without force, earlier that day. Ferreira, one of the co-defendants, "was the parking lot attendant at the [victims'] condominium complex and had provided the keys to the [victims'] Lincoln Navigator." *Ferreira*, 275 F.3d at 1023.

B. The first question presented is squarely implicated in this case, and there is no obstacle to addressing it. Given the elements of the carjacking statute, the Eleventh Circuit has held that carjacking satisfies the "elements clause" of § 924(c)'s "crime of violence" definition, meaning it remains a valid predicate for conviction following *Davis*. *E.g.*, *In re Smith*, 829 F.3d 1276, 1280 (11th Cir. 2016) ("[A]n element requiring that one take or attempt to take by force and violence

or by intimidation, which is what the federal carjacking statute does, satisfies the force clause of § 924(c).”). The court below proceeded on that basis in Martinez’s case, and also proceeded on the basis that hostage-taking did *not* satisfy the elements clause – and thus could not support a § 924(c) conviction. *See, e.g.*, App. 6a-8a, 51a. This means, given *Davis*, that Martinez can be guilty of violating § 924(c) *only if* he is guilty of violating the federal carjacking statute.

Thus, the court’s error on the carjacking claim necessarily infected its entire analysis of Martinez’s challenge to his § 924(c) conviction. The court indeed found that Martinez could not overcome his procedural default based on a claim of actual innocence under § 924(c) because the carjacking conviction was valid. *Id.* at 7a-8a & n.1. And, in the alternative, it ruled that any error was harmless because the hostage-taking conviction, which concededly could not support the § 924(c) conviction after *Davis*, was inextricably intertwined with that unquestioned carjacking conviction, which could. *Id.* 9a. Recognition that Martinez is actually innocent of carjacking thus defeats the reasoning of the court of appeals in its entirety.

C. The Eleventh Circuit’s refusal to consider Martinez’s actual-innocence claim regarding § 924(c) on the basis that it declined to consider his actual-innocence claim regarding his predicate crime of violence (carjacking) – in reliance on the ‘law of the case’ – also implicates another split among the Circuits.

The Circuits are deeply divided over the proper standard to apply in adjudicating actual-innocence challenges that are based on changes in the law. *Allen* v. *Ives*, 976 F.3d 863, 868 (9th Cir. 2020) (Fletcher, J., concurring in the denial of rehearing en banc) ("[T]here is a circuit split. . . . [T]he Supreme Court should grant certiorari . . . to resolve the circuit split."); *id.* at 869 (Nelson, J., dissenting from the denial of rehearing en banc) (noting a "four-way circuit split" and stating this issue "warrants Supreme Court review"). This split subsumes the issue of whether and how habeas petitioners may assert they are actually innocent of a conviction under a statute containing an invalidated residual clause like that in § 924(c).

The Ninth Circuit correctly holds that a habeas petitioner states "an actual innocence claim where the petitioner contend[s] that a prior conviction d[oes] not qualify as a predicate offense" based on new case law. *Allen* v. *Ives*, 950 F.3d 1184, 1189 (9th Cir. 2020) (citing *United States* v. *Maybeck*, 23 F.3d 888, 890–91 (4th Cir. 1994)). This type of claim is not procedurally barred where the actual innocence argument "was foreclosed by existing precedent at the time of his direct appeal and § 2255 motion." *Id.* at 1190.

Similarly, the Fourth, Sixth, and Seventh Circuits have allowed actual-innocence challenges where the application of a no-longer-valid predicate offense for an enhancement is an "error sufficiently grave to be [] a fundamental defect." *Lester* v. *Flournoy*, 909 F.3d 708, 712 (4th Cir. 2018) (citation omitted); *see also Hill*

v. *Masters*, 836 F.3d 591, 600 (6th Cir. 2016); *Brown* v. *Caraway*, 719 F.3d 583, 588 (7th Cir. 2013).

In those Circuits, petitioners must make an equitable showing that the enhancement resulted in a significant sentence disparity. *Lester*, 909 F.3d at 716 ("Where, as here, an erroneous career offender designation raises a defendant's mandatory prison term from a maximum of 12 ½ years to a minimum of almost 22, the resulting sentence is fundamentally defective."); *Hill*, 836 F.3d at 600 ("To require that Hill serve an enhanced sentence as a career offender, bearing the stigma of a 'repeat violent offender' and all its accompanying disadvantages, is a miscarriage of justice where he lacks the predicate felonies to justify such a characterization."); *Brown*, 719 F.3d at 585 (noting career offender enhancement "resulted in a substantially higher Guidelines range").

Meanwhile, adopting an unjustifiably stringent approach, the First, Second, Third, Fifth, and Eighth Circuits *bar* actual-innocence challenges to sentencing enhancements, even after a material change in law. These Circuits base their holdings on a misreading of this Court's decision in *Bousley* v. *United States*, 523 U.S. 614, 623 (1998), which states "'actual innocence' means factual innocence, not mere legal insufficiency." *See Damon* v. *United States*, 732 F.3d 1, 6 (1st Cir. 2013); *Poindexter* v. *Nash*, 333 F.3d 372, 382 (2d Cir. 2003)*; Okereke* v. *United States*, 307 F.3d 117, 120–21 (3d Cir. 2002); *In re Bradford*, 660 F.3d 226, 230 (5th Cir. 2011) (per curiam); *Sun Bear* v. *United States*, 644 F.3d 700, 705–06 (8th Cir. 2011) (en banc).

These Circuits interpret *Bousley* to mean that a change regarding the possible predicate offenses is a legal, not a factual, innocence argument, because the defendant is still concededly guilty of the underlying offenses. *See, e.g.*, *Damon*, 732 F.3d at 6 ("Because Damon contests only the categorization of his prior conviction as a crime of violence, he has not pleaded 'actual innocence' as defined in *Bousley*."); *In re Bradford*, 660 F.3d at 230 ("[A] claim of actual innocence of a career offender enhancement is not a claim of actual innocence of the crime of conviction.").

Even more stringent are the Tenth and Eleventh Circuits, which hold that petitioners cannot raise actual-innocence challenge to a sentencing enhancement that was not raised, or raised in a different context, even if the actual-innocence challenge was foreclosed by existing case law at the time. *Prost* v. *Anderson*, 636 F.3d 578, 583 (10th Cir. 2011) (Gorsuch, J.); *McCarthan* v. *Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1089 (11th Cir. 2017). The Eleventh Circuit's decision below adds that any actual innocence challenge is barred on habeas review if the petitioner argued actual innocence of a predicate offence on direct appeal. *See* App. 7a-8a.

The result is that in the Ninth Circuit Martinez's actual-innocence challenge would not be procedurally barred. Martinez could also proceed in the Fourth, Sixth, and Seventh Circuits, albeit for different reasons. But Martinez's actual-innocence challenge was barred in the Eleventh Circuit, as it would be in the First, Third, Fifth, Eighth, and Tenth Circuits.

II. THE COURT SHOULD GRANT THE SECOND QUESTION PRESENTED

Martinez was convicted and sentenced in 2000, and his direct appeal affirmed in 2001 – many years before this Court first invalidated a residual clause, and during a time when the Circuits consistently upheld such convictions in line with *Taylor*. Nevertheless, the court below held that Martinez's *Davis* claim was defaulted because the "building blocks of a due process vagueness challenge to the § 924(c) residual clause" existed during his criminal proceedings and direct appeal, some 15 and 19 years, respectively, before *Johnson* and *Davis*. App. 6a. And it then ruled that, regardless, the habeas petition failed for lack of prejudice and harmlessness, because the valid and invalid convictions were supposedly "inextricably intertwined." *Id.* at 9a. These rulings were not just wrong, but also implicate divisions among the Circuits.

A. The Circuits Have Divided Over The Appropriate "Cause" Standard.

1. The Circuits Are Split On Whether Near-Unanimous Circuit Precedent Foreclosing Relief Is "Cause."

To begin, this case implicates a clear division among the courts of appeals as to whether, given this Court's decisions in *Reed* and *Bousley*, there is cause excusing a procedural default on a habeas petition if, at the time of the direct appeal, a near-unanimous view among the circuits rejected the right that is later

recognized by the Supreme Court and collaterally advanced by the petitioner.

On one side of the split, the Third, Seventh, and Ninth Circuits hold that there is indeed "cause" if near-unanimous circuit precedent forecloses the right later recognized by this Court.

In *Cross*, the Seventh Circuit held that petitioners sentenced in 1992 and 2000, respectively, demonstrated "cause" to excuse procedural default of their *Johnson* claims under all three scenarios identified in *Reed*. 892 F.3d at 296. The court emphasized the "compelling" fact that, at the time of the petitioners' trial and direct appeal, "a substantial body of circuit court precedent [had] uph[eld] the residual clause against vagueness challenges." *Id.* (citing circuit cases). "[N]o court ever came close to striking down the residual clause before 1992 or even suggested that it would entertain such a challenge." *Id.* Thus, the procedural default was excused. And the Seventh Circuit rejected the Government's argument that *Reed* "is no longer good law": "[t]he Supreme Court has since relied on *Reed*." *Id.* at 295.

In *United States* v. *Doe*, 810 F.3d 132 (3d Cir. 2015), the Third Circuit found cause to excuse a procedural default by a petitioner sentenced as a "career offender" under the then-mandatory Sentencing Guidelines on the basis of two convictions for simple assault. The petitioner argued these were not "crimes of violence" under the Guidelines. The Circuit explained its "precedent foreclosed that argument when he made it," but that circuit had "reversed [itself]" "in light of" *Begay* v.

United States, 553 U.S. 137 (2008), and then "Doe's argument became plausible." *Id.* at 138.

Similarly, in *English* v. *United States*, 42 F.3d 473, 479 (9th Cir. 1994), *as amended* (Nov. 21, 1994), the Ninth Circuit found cause excusing a procedural default where "a solid wall of circuit authority" precluded his claim until this Court's decision in *Gomez* v. *United States*, 490 U.S. 858 (1989). Subsequent decisions of the Ninth Circuit have relied on *English*'s analysis. *See, e.g.*, *United States* v. *Peralta-Romero*, 83. Fed. App'x 872, 874 (9th Cir. 2003) (table opinion) (finding no procedural default and citing *English*).

On the other side of the divide, the Sixth, Eighth, and Eleventh Circuits deem near-unanimous circuit precedent precluding a claim to be *insufficient* to constitute cause to excuse procedural default – including in the Eleventh Circuit's decision in *Granda*, on which the court below relied in denying Martinez relief.

In *Gatewood* v. *United States*, 979 F.3d 391 (6th Cir. 2020), a habeas petitioner claimed the residual clause of the federal three-strikes law was unconstitutionally vague. The Sixth Circuit rejected the petitioner's argument that his default was excused because "at the time of his sentencing" his claim "was foreclosed by 'a near-unanimous body of lower court authority.'" *Id.* at 395 (quoting *Reed*, 468 U.S. at 17). Citing precedent from the Sixth and other Circuits, the court stated that *Bousley* had limited *Reed*, and that "ha[s] interpreted" *Bousley* and *Smith* v. *Murray*, 477 U.S. 527 (1986) "to mean that futility cannot be

cause, at least where the source of the perceived futility is adverse state or lower court precedent." *Id.* at 396 (quotation marks omitted). In *Smith*, this Court held that procedural default barred consideration of an argument that had been "deliberately abandoned" by counsel on direct appeal. 477 U.S. at 534. The Sixth Circuit concluded from the holdings of *Bousley* and *Smith* that "[e]ven the alignment of the circuits against a particular legal argument does not equate to cause for procedurally defaulting it[.]" *Gatewood*, 979 F.3d at 396 (quotation marks omitted).

Similarly, in *United States* v. *Moss*, the Eighth Circuit held "[p]rocedural default . . . cannot be overcome because the issue was settled in the lower courts." 252 F.3d 993, 1002 (8th Cir. 2001). Per the Eighth Circuit, "[t]he Supreme Court [in *Bousley*] rejected the argument that default can be excused when existing lower court precedent would have rendered a claim unsuccessful." *Id.* In that case – concerning a collateral attack on a sentence based on *Apprendi* – the court found no cause excusing the default even though "[t]he circuits . . . unanimously rejected the notion that drug quantity is an element of the offense" before *Apprendi*. *Id.* at 1002.

And in *McCoy* v. *United States*, 266 F.3d 1245 (11th Cir. 2001), the Eleventh Circuit explained that even where "reasonable defendants and lawyers could well have concluded it would be futile to raise" an *Apprendi* claim because "every circuit which had addressed the issue had rejected" it, "perceived futility

does not constitute cause to excuse a procedural default." *Id.* at 1258-59 (citing *Bousley*). The Eleventh Circuit explained that "[u]nless and until the Supreme Court overrules its decisions that futility cannot be cause, laments about those decisions forcing defense counsel to file 'kitchen sink' briefs in order to avoid procedural bars are beside the point." *Id.* at 1259 (citation omitted).

2. The Circuits Are Also Split On Whether *Johnson* And *Davis* Represent A Clear Break.

In line with their divergent views on applying this Court's "cause" precedents more generally when a near-unanimity of the Courts of Appeals have rejected a right, the Circuits have also divided on the specific application of this Court's precedents to habeas petitioners raising the residual-clause-based challenges.

On one side of the divide, the Seventh and Tenth Circuits hold that residual-clause claims were not "reasonably available" to criminal defendants before this Court's 2015 decision *Johnson* (*i.e.*, when Martinez's conviction, sentence, and appeal concluded). The Seventh Circuit so held in *Cross*, 892 F.3d at 296, discussed *supra.*

In *United States* v. *Snyder*, 871 F.3d 1122 (10th Cir. 2017), the Tenth Circuit held the procedural default rule did not bar merits adjudication of a *Johnson* claim asserted by a petitioner whose original criminal proceedings and direct appeal concluded in 2005.

"'[N]o one—the government, the judge, or the [defendant]—could reasonably have anticipated *Johnson*,'" the Tenth Circuit reasoned, and so "the *Johnson* claim was not reasonably available to [petitioner] at the time of his direct appeal," thus "establish[ing] cause." *Id.* at 1127 (quoting *United States* v. *Redrick*, 841 F.3d 478, 480 (D.C. Cir. 2016)). *See also United States* v. *Garcia*, 811 Fed. App'x 472, 475 (10th Cir. 2020).

The Sixth and Eleventh Circuits have concluded the opposite, holding that *Johnson* and its progeny are not sufficiently "novel" to excuse procedural defaults, notwithstanding the substantial and uniform body of caselaw that had foreclosed such claims. *Gatewood*, 979 F.3d at 397 ("In so holding, we part ways with the Seventh and Tenth Circuits."); App. 5a-6a; *see also Granda*, 990 F.3d at 1286-88. These Circuits reason that this Court "limited the breadth of *Reed*'s holding" in *Bousley* and *Smith*, 477 U.S. 527. *Gatewood*, 979 F.3d at 395 (quoting *Wheeler* v. *United States*, 329 Fed. App'x 632, 635 (6th Cir. 2009)).

B. The Eleventh Circuit's "Prejudice" And "Harmlessness" Analyses Depart From This Court's Decisions And The Rule In Other Circuits.

The Circuits are also split as to whether prejudice exists excusing procedural default (and whether any error is harmless) where, as is true for many habeas petitioners convicted under residual clauses invalidated in *Johnson* and *Davis*, (a) the Government charged the defendant of violating more than one

predicate crime, one of which is now permissible and the other not permissible, and (b) the predicate "crime of violence" for the residual-clause conviction is not specifically identified in the original proceeding.

As the Ninth Circuit explains, because "[n]othing in the law requires a court to specify which clause of [the statute]—residual or elements clause—it relied upon in imposing a sentence," the question whether a collateral challenge to a general verdict "relies on the rule announced in [*Johnson*] such that [petitioner] may bring that claim in a second or successive 2255 motion" "has cropped up somewhat frequently." *United States* v. *Geozos*, 870 F.3d 890, 894 & n.4 (9th Cir. 2017), *abrogated on other grounds by Stokeling* v. *United States*, 139 S.Ct. 544 (2019); *see also United States* v. *Heyward*, 3 F.4th 75, 85 & n.9 (2d Cir. 2021) ("But as the verdict sheet only asked the jury to determine whether Heyward possessed or used a firearm during *either* of these conspiracies, we are left with a distinct uncertainty as to the propriety of his conviction. . . . These ambiguities in the jury instructions and verdict sheet exist largely because of *Davis* and its progeny[.]").

This has led to another Circuit split—and to the disparate treatment of federal prisoners depending upon where they file their petition. In the Eleventh Circuit, petitioners must show "'a substantial likelihood' that the jury relied *only* on the invalid predicate." App. 6a (quoting *Granda*, 990 F.3d at 1280-21). Further complicating matters, the Eleventh Circuit has frequently made such a showing impossible by

deeming multiple predicates to be "inextricably intertwined" for purposes of showing prejudice and/or a lack of harmlessness. *See id.* at 8a-9a ("[T]he inextricability of the alternative predicate crimes convinces us that the error Martinez complains about—instructing the jury on a constitutionally-invalid predicate as one of two potential alternative predicates—was harmless."); *Granda*, 990 F.3d at 1280–81 ("Among the shortcomings that defeat [Granda's] claim is a fundamental one that cuts across both the procedural and merits inquiries: all of the § 924(o) predicates are inextricably intertwined, arising out of the same cocaine robbery scheme . . . thus, Granda cannot show actual prejudice or actual innocence to excuse his procedural default. Moreover, the overlapping factual relationship between the alternative predicate offenses renders any error in the jury instructions harmless.").

By contrast, in the Second Circuit, harmless-error review asks whether there is "'a reasonable probability that the error affected the outcome of the trial,'" which in the context of challenges to convictions based on both valid and invalid predicate offenses, "means the erroneous jury instruction was 'harmless beyond a reasonable doubt.'" *United States* v. *Eldridge*, 2 F.4th 27, 38-39 & n. 16 (2d Cir. 2021) (first quoting *United States* v. *Marcus*, 560 U.S. 258, 262 (2010); second citation omitted). And in one recent decision, the Second Circuit vacated a § 924(c) conviction after *rejecting* the Government's assertion that the invalid and valid predicate convictions were so "inextricably intertwined" as to support the conviction—precisely

the opposite of the argument accepted below. *Heyward*, 3 F.4th at 82.

Similarly, in the Fifth Circuit, the inclusion of an invalid predicate as a possible basis for a § 924(c) conviction is *not* "harmless" when the "record evidence demonstrates a reasonable probability that the jury would not have convicted Appellants of the § 924 offenses if the invalid crime of violence predicate were not included on the verdict form." *United States* v. *Jones*, 935 F.3d 266, 274 (5th Cir. 2019); *see also United States* v. *McClaren*, 13 F.4th 386, 414 (5th Cir. 2021) (vacating multiple "firearms" offenses under § 924 because the court "[could not] determine whether the jury relied on the RICO or drug-trafficking predicate, and because a RICO conspiracy is not a crime of violence, the basis for conviction may have been improper").

In the Ninth Circuit, too, the court has held that "when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in" *Johnson*. *Geozos*, 870 F.3d at 896 (quoting 28 U.S.C. § 2244(b)(2)(A)).

C. No Vehicle Problems Prevent Review Of The Second Question Presented.

There are no obstacles to addressing the second question presented. The court below rejected the habeas petition on the basis of a procedural default, finding that the building blocks for the *Davis* challenge

existed in 2000 (at the time of conviction) – *i.e.*, 19 years before *Davis* – and further found that there was no prejudice (and any error was harmless) because the two predicates (the carjacking count and the hostage-taking count) were inextricably intertwined, so that it was irrelevant that only one of the two predicates remained valid after *Davis*.

The second question presented implicates clear divides among the courts of appeals as to how best to reconcile *Reed* and *Bousley*, and whether, when a valid predicate offense may be "intertwined" with an invalid one, that fact necessarily defeats review of a conviction under a statute the Court has recognized to be unconstitutional. The result, which flies in the face of this Court's rulings regarding the constitutionality of vague residual clauses, is intolerably disparate treatment of federal prisoners, some of whom can have their unconstitutional convictions set aside and others, on the same facts, cannot – all depending upon where they are imprisoned.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 22, 2021

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED APRIL 21, 2021

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

April 21, 2021, Decided

No. 20-10598
Non-Argument Calendar

EWIN OSCAR MARTINEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before GRANT, LAGOA, and BRASHER, Circuit Judges.

Opinion

PER CURIAM:

Ewin Oscar Martinez appeals the district court's denial of his successive 28 U.S.C. § 2255 motion to vacate. We granted a certificate of appealability on one issue: whether in light of *United States v. Davis*, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019), the district court erred in

refusing to vacate his 18 U.S.C. § 924(c) conviction and refusing to conduct a de novo resentencing. We affirm.

I.

In December 1999, Martinez and two other men abducted a woman and her two sons. The three men hid behind a car in a parking garage as they awaited the woman's arrival; Martinez had a pistol and a stun gun. As he waited, Martinez placed his pistol on top of the wheel of the car they were hiding behind. The men eventually saw the woman drive into the garage in her Porsche; once she got out of the car, they shocked her with the stun gun and struck her repeatedly in her face. One of her children attempted to run away but was shot in his head and neck with the stun gun. When the woman screamed and struggled, the men covered her face and threatened to kill her. The men forced the woman and her children into the family's Lincoln Navigator; they had obtained the keys to that car earlier in the day. Martinez then grabbed his pistol, got into the driver's seat, and drove the family's car out of the garage. He took the woman and her sons to a nearby house, where they were held for five days. Government agents eventually rescued the family.

Martinez was charged with committing five crimes: (1) conspiracy to commit hostage taking in violation of 18 U.S.C. § 1203(a), (2) hostage taking in violation of 18 U.S.C. § 1203(a), (3) conspiracy to commit carjacking in violation of 18 U.S.C. §§ 2119 and 371, (4) carjacking in violation of 18 U.S.C. §§ 2119(2) and 2, and (5) using and carrying a firearm during crimes of violence—the

18 U.S.C. §§ 1203(a) and 2119(2) crimes—in violation of 18 U.S.C. § 924(c). Section 924(c)(3) defines a "crime of violence" as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or that "by its nature" involves a substantial risk that physical force may be used. 18 U.S.C. § 924(c)(3)(A)—(B). The former is referred to as the "elements clause," the latter the "residual clause."

A jury found Martinez guilty on all five counts and the district court sentenced him to a total term of life imprisonment. This Circuit affirmed his convictions and sentences on direct appeal. Martinez filed a motion to vacate his sentence under 28 U.S.C. § 2255, but that motion was denied. He then filed a series of successive § 2255 motions which were dismissed for not being authorized.

In 2019, the Supreme Court held in *United States v. Davis* that § 924(c)'s "residual clause," like the residual clause in the Armed Career Criminal Act, is unconstitutionally vague. *See* 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019). So after *Davis*, a conviction can only qualify as a "crime of violence" to serve as a predicate offense for a § 924(c) conviction if it meets the criteria of the "elements clause."

After receiving permission from this Court, Martinez filed a successive § 2255 motion based on *Davis*. He argued that his § 924(c) conviction was invalid because one of his crimes—hostage taking—only qualified as a "crime of

violence" under the now-invalid residual clause. He also argued that the Hostage Taking Act is unconstitutionally vague and requested a new sentencing hearing as to all counts.

The district court denied his motion. It first found that procedural default did not preclude his successive § 2255 petition because his *Davis* claim was not available to him on direct appeal. But it rejected that claim on the merits. The court explained that Martinez did not establish that it was "more likely than not" that he was convicted under § 924(c) for possessing a firearm in furtherance of *only* the hostage-taking offense. Instead, it was "at least as likely" that the jury convicted him under § 924(c) for possessing a firearm in furtherance of the *carjacking offense*—which categorically qualifies as a "crime of violence" under the still-valid elements clause. And because Martinez was not entitled to relief, there was no need for a resentencing hearing. The court also held that it did not have jurisdiction to consider his constitutional argument because it was outside the scope of this Circuit's permission to file a successive § 2255 motion.

Martinez then filed a motion with this Court seeking a certificate of appealability. We granted it on one issue: whether in light of *Davis* the district court erred in refusing to vacate his § 924(c) conviction and resentence him. This appeal followed.

II.

When reviewing a district court's denial of a § 2255 motion, we review questions of law de novo and factual

findings for clear error. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004).

III.

To start, we have jurisdiction to consider Martinez's *Davis* claim. We authorized his successive § 2255 petition because *Davis* established a new, retroactive rule of constitutional law that was previously unavailable. *See* 28 U.S.C. § 2255(h). And we granted a certificate of appealability on the issue of whether the district court erred in denying Martinez's challenge to his § 924(c) conviction in light of *Davis. See id.* § 2253(c)(1)(B).

But a prisoner procedurally defaults a § 2255 claim if he fails to raise that claim on direct appeal. *Bousley v. United States*, 523 U.S. 614, 622, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). He can overcome this procedural bar only by establishing cause and actual prejudice or actual innocence. *Id.* Martinez did not argue in the trial court or on direct appeal that his § 924(c) conviction was invalid because the § 924(c) residual clause was unconstitutionally vague. He therefore procedurally defaulted this claim and cannot succeed on collateral review unless he can show cause to excuse his default and actual prejudice, or that he is actually innocent of the § 924(c) crime. *United States v. Granda*, 990 F.3d 1272, 1286 (11th Cir. 2021).

In *United States v. Granda* , we held that although *Davis* announced a new constitutional rule of retroactive application, it was not a "sufficiently clear break with the past" such that an attorney would not reasonably

have had the tools necessary to present the claim before that decision. *Id.* (quotation omitted). In other words, a defendant had the building blocks of a due process vagueness challenge to the § 924(c) residual clause even before the Supreme Court's decision in *Davis*. *Id.* at 1287-88.

We also determined in *Granda* that a petitioner cannot overcome procedural default unless he can show "actual prejudice." *Id.* at 1288. He must show "a substantial likelihood" that the jury relied *only* on the invalid predicate to convict under § 924(c). *Id.* If the absence of the invalid predicate would not likely have changed the jury's decision to convict, then the petitioner did not suffer actual prejudice. *Id.*

Martinez cannot make this actual prejudice showing. The district court instructed the jury that it could convict under § 924(c) if he used a firearm in connection with *either* the hostage taking or the carjacking. The jury found beyond a reasonable doubt that Martinez committed the carjacking, which is a qualifying predicate under § 924(c)'s still-valid elements clause. *See In re Smith*, 829 F.3d 1276, 1280-81 (11th Cir. 2016). Though the general jury verdict did not specify which predicate offense Martinez's § 924(c) conviction was based on, the record shows that the two crimes were factually bound up. Martinez committed the carjacking in order to put the family inside the car and hold them hostage. And he carried a firearm when he hid in the parking garage and when he drove the family's car away. So Martinez cannot show that the jury relied solely on the hostage-taking offense to convict under

§ 924(c); it is just as likely that the jury relied on the carjacking conviction to find that he possessed a firearm in furtherance of a crime of violence. *Granda*, 990 F.3d at 1289-91.

Martinez contends that a jury could not have found that he used the firearm in furtherance of the carjacking offense because he took the keys to the car from the valet stand without a struggle. But the carjacking conviction required the jury to find that Martinez took the vehicle by *force* and *violence*. *See* 18 U.S.C. § 2119. And we are not at liberty to question that conviction. *See United States v. Jordan*, 429 F.3d 1032, 1035 (11th Cir. 2005) ("The law of the case doctrine bars relitigation of issues that were decided, either explicitly or by necessary implication, in an earlier appeal of the same case."). So because the jury necessarily found that Martinez took the vehicle by force and violence, and because the record shows that Martinez carried a firearm while waiting in the parking garage and while driving the car away after violently forcing its owner inside, it is at least possible that the jury concluded he possessed a firearm in furtherance of the carjacking. *Granda*, 990 F.3d at 1289-91.

Because Martinez cannot establish both cause and prejudice, his only way around procedural default is by establishing actual innocence. The actual innocence exception is "exceedingly narrow"; it concerns factual innocence, not legal innocence. *Id.* at 1292 (quotation omitted). To demonstrate actual innocence of his § 924(c) offense, Martinez must show that no reasonable juror could have concluded that he possessed a firearm in

furtherance of the carjacking.[1] *Id.* Martinez cannot make this showing; because the carjacking and hostage taking were part of the same scheme, a reasonable juror could have concluded that he used the firearm in furtherance of both crimes. So because Martinez cannot show cause and prejudice or actual innocence, he cannot overcome the procedural default of his *Davis* claim.

IV.

Even were we to assume that Martinez's *Davis* claim was not barred on procedural default grounds, the inextricability of the alternative predicate crimes convinces us that the error Martinez complains about—instructing the jury on a constitutionally-invalid predicate as one of two potential alternative predicates—was

1. Martinez argues that there was insufficient evidence to convict him of the carjacking itself, contending that this shows he is "actually innocent" of the § 924(c) conviction. But we already considered and rejected this argument when he challenged his conviction on direct appeal. *See United States v. Ferreira*, 275 F.3d 1020, 1022 n.1 (11th Cir. 2001). And the "law of the case" doctrine bars relitigation of issues that were decided in an earlier appeal of the same case. *Jordan*, 429 F.3d at 1035. Martinez argues that controlling authority has since made a contrary decision of the law applicable to the issue of whether he is actually innocent of the carjacking and that the previous decision was clearly erroneous and would work a manifest injustice—two exceptions to the "law of the case" doctrine. But none of the cases he points to changed the existing law as to what constitutes a carjacking offense, and our decision in his earlier appeal was not clearly erroneous. Moreover, this issue was not included in the certificate of appealability; that means we lack jurisdiction to consider it absent "exceptional" circumstances which are not present here. *Mays v. United States*, 817 F.3d 728, 733 (11th Cir. 2016).

harmless. *Granda*, 990 F.3d at 1292. On collateral review, the harmless error standard requires that relief is only proper if the court has "grave doubt" about whether the error had "substantial and injurious effect or influence in determining the jury's verdict." *Id.* (quoting *Davis v. Ayala*, 576 U.S. 257, 267-68, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015)). Put differently, we can only order relief if the error "resulted in actual prejudice." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

The available record does not provoke grave doubt about whether Martinez's § 924(c) conviction rested on an invalid ground. As we already explained, the hostage taking was inextricably intertwined with the carjacking. If the jury found that Martinez possessed a firearm in furtherance of the hostage taking, it would be reasonable for it to also conclude that he possessed the firearm in furtherance of the carjacking—a crime it found him guilty of beyond a reasonable doubt. And because we cannot say that the inclusion of the invalid predicate had a "substantial influence" in determining the jury's verdict, any error in instructing the jury on the potentially invalid predicate was harmless. *Granda*, 990 F.3d at 1293.

V.

Martinez argues that the Hostage Taking Act violates the Tenth Amendment of the U.S. Constitution. The district court determined that it lacked jurisdiction to consider this argument because it went beyond the scope of this Circuit's order authorizing Martinez's

successive § 2255 motion. We agree with that decision. Martinez's application for leave to file a successive § 2255 motion did not assert that the Hostage Taking Act was unconstitutionally vague, so this Circuit did not determine that the issue satisfied the requirements of § 2244(b) and § 2255(h) when granting his application. And because he never asked, the district court never had subject matter jurisdiction over this claim. *United States v. Pearson*, 940 F.3d 1210, 1216-17 (11th Cir. 2019).

Martinez also contends that he should get a full resentencing. But because the arguments in his successive § 2255 petition all fail, he is not entitled to a new sentencing hearing. *See* 28 U.S.C. § 2255(b). And to the extent Martinez contends that he is entitled to a de novo sentencing hearing in light of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), that argument falls outside the scope of his certificate of appealability. *Mays v. United States*, 817 F.3d 728, 733 (11th Cir. 2016).

* * *

We therefore **AFFIRM** the district court's denial of Martinez's successive § 2255 motion to vacate.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED JANUARY 27, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-23455-CIV-LENARD;
(Criminal Case No. 00-00001-Cr-Lenard)

EWIN OSCAR MARTINEZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

January 27, 2020, Decided
January 27, 2020, Entered on Docket

ORDER DENYING AMENDED MOTION TO VACATE CONVICTIONS AND SENTENCES PURSUANT TO 28 U.S.C. § 2255 (D.E. 16), DENYING CERTIFICATE OF APPEALABILITY, AND CLOSING CASE

THIS CAUSE is before the Court on Movant Ewin Oscar Martinez's Amended Motion to Vacate Convictions and Sentences Pursuant to 28 U.S.C. § 2255, ("Motion," D.E. 16), and Memorandum of Law in Support of

Appendix B

Amended Motion to Vacate Pursuant to 28 U.S.C. § 2255, ("Memorandum," D.E. 17), filed on October 21, 2019. The Government filed a Response on December 19, 2019, ("Response," D.E. 23), to which Movant filed a Reply on January 14, 2020, ("Reply," D.E. 28). Upon review of the Motion, Memorandum, Response, Reply, and the record in the civil and criminal cases, the Court finds as follows.

I. Background

a. Criminal Proceedings[1]

On December 13, 1999, after six months of planning surveillance, Movant and his co-defendants abducted Christine Aragao and her two sons, nine-year-old Alceau, Jr. ("Junior") and one-year-old Alexander ("Baby Alex"). The abduction occurred in the parking garage of the Oceania Tower Condominium in Sunny Isles, Florida, where the Aragaos lived. When Mrs. Aragao screamed and struggled, Movant beat her severely in her face. She was also repeatedly shocked with a stun gun; as a result, she lost consciousness and dropped Baby Alex, causing him injury. Junior was also shocked with the stun gun and was burned as a result. The Aragaos were then forced into one of the family's cars, a Lincoln Navigator to which the

1. Unless otherwise indicated, the facts contained in this section are taken from the Eleventh Circuit's opinion on direct appeal, *United States v. Ferreira,* 275 F.3d 1020, 1023 (11th Cir. 2001), and this Court's Order denying Movant's first 2255 Motion, *Martinez v. United States,* Case No. 02-23561-Civ-Lenard, Final Judgment (D.E. 63) at 2-3, 2006 U.S. Dist. LEXIS 107888 (S.D. Fla. Jan. 27, 2006).

attackers had previously obtained the keys, and driven to a house approximately fifteen minutes away.

At the house, the Aragaos were strapped to lawn chairs, gagged, and placed in separate closets where they were kept for four and one-half days. During this time, Movant required Mrs. Aragao to contact her husband regarding their release and prepared a letter in which he demanded a ransom and threatened to kill Mrs. Aragao and her sons. At night, Junior was forced to sleep in his underwear in a bed with Movant.

Ultimately, government agents rescued the Aragaos and arrested Movant and his co-defendants. Movant confessed to waiting in the parking garage, punching Mrs. Aragao in the face to subdue her, binding and gagging her, binding and gagging Junior, and taking the victims to a house that had been rented for the abduction. At trial, however, Movant testified that he abducted Mrs. Aragao and her sons in order to protect the Aragao family from the Brazilian mafia.

The Government presented evidence that Movant carried a silver-colored pistol into the parking garage and placed it on the wheel of the car he was hiding behind. (Trial Tr., Cr-D.E. 229-1 at 74:18-20, 75:3-4.) After forcing the Aragaos into the Lincoln Navigator, Movant retrieved the firearm from the wheel he had placed it on, got into the Navigator's drivers' seat, and drove away. (*Id.* at 78:22-24.) Junior testified that he saw two silver guns at the house the Aragaos were being held captive in. (*Id.* at 11:5-8.) FBI Agent Scott Hahn testified that after rescuing the

Aragaos, the FBI recovered two guns from that house. (Trial Tr., Cr-D.E. 224-1 at 55:24-57:11.)

On February 3, 2000, a Grand Jury sitting in the Southern District of Florida returned a Superseding Indictment charging Movant with the following offenses:

- *Count One:* Conspiracy to commit hostage taking, 18 U.S.C. § 1203(a);
- *Count Two:* Hostage taking, 18 U.S.C. § 1203(a);
- *Count Three:* Conspiracy to commit carjacking, 18 U.S.C. §§ 2119(2) & 371;
- *Count Four:* Carjacking, 18 U.S.C. § 2119(2); and
- *Count Five:* Using and carrying a firearm during crimes of violence, 18 U.S.C. § 924(c), and specifically "violations of Title 18 United States Code, Sections 1203(a) and 2119(2), as set forth in Counts Two and Four" of the Superseding Indictment.[2]

United States v. Martinez, Case No. 00-00001-Cr-Lenard, Superseding Indictment (Cr-D.E. 25). The case proceeded to trial where a jury found Movant guilty of Counts One through Five of the Superseding Indictment. (Jury Verdict, Cr-D.E. 131.)

2. The Superseding Indictment also contained a Count Six which charged Movant with possession of child pornography, (Cr-D.E. 25 at 5-6), but the Government ultimately dismissed that Count with leave of the Court, (Cr-D.E. 201).

On September 22, 2000, the Court entered Judgment sentencing Movant to a total term of life imprisonment, consisting of terms of life imprisonment as to Counts One and Two, respectively, sixty months' imprisonment as to Count Three, and 300 months' imprisonment as to Count Four, all to run concurrently, plus a term of sixty months' imprisonment as to Count Five, to run consecutively with the sentences imposed as to Counts One through Four. (Judgment, Cr-D.E. 203 at 3.) Movant appealed, and the Eleventh Circuit affirmed his convictions and sentences in a published opinion. *United States v. Ferreira,* 275 F.3d 1020 (11th Cir. 2001). Mandate issued July 5, 2002. (Cr-D.E. 259.)

b. Prior Civil Proceedings

On December 13, 2002, Movant filed his first Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, (Cr-D.E. 263), which was assigned Case No. 02-23561-Civ-Lenard, (hereafter, "*Martinez I*"). In his First 2255 Motion, Movant asserted fourteen claims of ineffective assistance of trial counsel, six claims of ineffective assistance of appellate counsel, and a claim under *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). (*See Martinez I,* Report and Recommendation (D.E. 40) at 1-3.) On February 1, 2006, the Court denied Movant's First 2255 Motion on the merits. (*Martinez I,* Final Judgment (D.E. 63).) Movant petitioned the Eleventh Circuit Court of Appeals for a Certificate of Appealability, but the Eleventh Circuit denied the petition and dismissed the appeal. (*Martinez I,* Dismissal Order (D.E. 73).)

Appendix B

On March 21, 2007, Movant filed a Motion under Rule 60(b) seeking to vacate the Court's judgment in *Martinez I,* but the Clerk never filed that motion on the docket. (*See Martinez I,* D.E. 74.) On April 12, 2007, the Court construed the Rule 60(b) motion as a second or successive 2255 Motion and dismissed it for Movant's failure to seek an order from the Eleventh Circuit pursuant to 28 U.S.C. § 2244 authorizing the filing of a second or successive 2255 Motion. (*Id.* (citing, *e.g., Farris v. United States,* 333 F.3d 1211, 1216 (11th Cir. 2003)).)

On May 21, 2007, Movant filed a purported Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 in the United States District Court for the Central District of California, Case No. CV 07-3324-SVW(RC), which was subsequently transferred to this Court and assigned Case Number 07-21582-Civ-Lenard, (hereafter, "*Martinez II*"). On June 25, 2007, the Court construed the Petition as a second or successive 2255 Motion and dismissed it as unauthorized. (*Martinez II,* D.E. 8.)

On August 27, 2007, Movant filed a second purported Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 in the United States District Court for the Central District of California, Case No. CV-07-5584-SVW(RC), which was subsequently transferred to this Court and assigned Case Number 07-22741-Civ-Lenard, (hereafter, "*Martinez III*"). On October 17, 2007, the Court construed the Petition as a second or successive 2255 Motion and dismissed it as unauthorized. (*Martinez III,* D.E. 2.)

Appendix B

On November 30, 2007, Movant filed another Motion under Rule 60(b) seeking to vacate the Court's judgment in *Martinez I.* (*Martinez I,* D.E. 76.) On December 3, 2007, the Court construed the Rule 60(b) motion as a second or successive 2255 Motion and dismissed it as unauthorized. (*Id.* (citing, *e.g., Farris,* 333 F.3d at 1216).) Movant moved the Eleventh Circuit for a Certificate of Appealability, which the Eleventh Circuit denied on March 18, 2008. (*Martinez I,* D.E. 88.) Movant petitioned the United States Supreme Court for a writ of certiorari, which the Supreme Court denied on June 20, 2008. (*Martinez* I, D.E. 89.)

On July 2, 2013, Movant filed a Petition for Writ of Audita Querela which was assigned Case Number 13-23701-Civ-Lenard, (hereafter, "*Martinez IV*"). On November 26, 2013, the Court construed the Petition as a second or successive 2255 Motion and dismissed it as unauthorized. (*Martinez IV,* D.E. 7.) Movant moved the Eleventh Circuit for a Certificate of Appealability, which the Eleventh Circuit denied on June 2, 2014. (*Martinez IV,* D.E. 17.) Movant filed a Motion for Reconsideration which the Eleventh Circuit denied on July 18, 2014. (*Martinez IV,* D.E. 18.) Movant petitioned the Supreme Court for a Writ of Certiorari, which the Supreme Court denied on December 9, 2014. (*Martinez IV,* D.E. 19.)

On May 15, 2018, Movant filed a Motion to Reopen *Martinez I* pursuant to Federal Rule of Civil Procedure 60(b)(4) on the grounds that the Court's Judgment in the criminal case is void. (*Martinez I,* D.E. 92.) Therein, he attacked his convictions for conspiracy to commit carjacking, carjacking, and use of a firearm during a crime

of violence. (*Id.* at 2.) On May 18, 2018, the Court construed the Rule 60(b)(4) motion as a second or successive 2255 Motion and dismissed it as unauthorized. (*Martinez I,* D.E. 94 (citing *Gonzalez v. Crosby,* 545 U.S. 524, 532, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005); *United States v. Holt,* 417 F.3d 1172, 1175 (11th Cir. 2005)).)

On May 17, 2018, Movant filed in *Martinez I* a "Motion Requesting this Court to Place an Order Over the Government to Concede the Fact that there is Not Any Reasonable Conceivable State of Facts that Could Provide a Rational Basis to Sustain that an Offense of 'Conspiracy to Commit Car[j]acking,' 'Carjacking,' and 'Use of a Firearm During a Crime of Violence,' has Occurred in this Case as a Matter of Law." (*Martinez I,* D.E. 93.) On May 18, 2018, the Court construed that motion as a second or successive 2255 Motion and dismissed it for Movant's failure to seek an order from the Eleventh Circuit pursuant to 28 U.S.C. § 2244 authorizing the filing of a second or successive 2255 Motion. (*Martinez I,* D.E. 95 (citing *Gonzalez,* 545 U.S. at 532; *Holt,* 417 F.3d at 1175).)

c. *United States v. Davis* and the instant Motion

As previously discussed, Movant was adjudicated guilty in Count Five of using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c), with the predicate "crimes of violence" being the hostage taking offense charged in Count Two and the carjacking offense charged in Count Four. (Superseding Indictment, Cr-D.E. 25.) As used in Section 924(c), "crime of violence" means:

> an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Subsection (A) is commonly referred to as the "elements" (or "force" or "use-of-force") clause, while subsection (B) is commonly referred to as the "residual" clause. *See Solomon v. United States,* 911 F.3d 1356, 1358 (11th Cir. 2019).

In *United States v. Davis,* the Supreme Court held that Section 924(c)(3)(B)'s residual clause is unconstitutionally vague. __U.S. __, 139 S. Ct. 2319, 2336, 204 L. Ed. 2d 757 (2019).

On or about July 26, 2019, Movant applied to the Eleventh Circuit Court of Appeals for leave to file a second or successive 2255 Motion, asserting that the Supreme Court's decision in *Davis* invalidated his conviction in Count Five for using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). (*See* D.E. 1 at 8.) On August 16, 2019, the Eleventh Circuit granted Movant's application, finding that Movant had made "a *prima facie* showing that his claim satisfies the statutory criteria of [18 U.S.C.] § 2255(h)(2) on the basis

that his § 924(c) conviction may be unconstitutional under *Davis,* as he potentially was sentenced under the now-invalid residual clause of § 924(c)(3)(B)." (*Id.* at 7 (citing *In re Cannon,* 931 F.3d 1236, 1240-43 (11th Cir. 2019); 28 U.S.C. § 2255(h)(2)).) Specifically, it observed that "there is no binding precedent from the Supreme Court or this Court at this time to indicate that hostage taking, one of the potential predicate offenses, categorically qualifies as a crime of violence under the elements clause of § 924(c)(3)(A)." (*Id.)*

On August 22, 2019, the Court entered an Order appointing Attorney Martin Feigenbaum to represent Movant in these proceedings.[3] (D.E. 6.) On October 21, 2019, Movant, through counsel, filed the instant Amended Section 2255 Motion. (D.E. 16.)

III. Legal Standard

Pursuant to 28 U.S.C. § 2255, a prisoner in federal custody may move the court which imposed the sentence to vacate, set aside, or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess

3. The Court originally appointed attorney Alvin E. Entin to represent Movant in these proceedings. However, Mr. Entin represented Movant during his direct appeal, and Movant, in his First 2255 Motion, asserted several claims of ineffective assistance of appellate counsel. *See Martinez I,* D.E. 40 at 1-3. To avoid any actual or potential conflict, the Court vacated its Order appointing Mr. Entin as counsel in these proceedings, (D.E. 5), and appointed Mr. Feigenbaum instead, (D.E. 6).

of the maximum authorized by law, or is otherwise subject to collateral attack. *See United States v. Jordan,* 915 F.2d 622, 625 (11th Cir. 1990) . However, "[a] second or successive motion must be certified . . . by a panel of the appropriate court of appeals to contain" either:

> **(1)** newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> **(2)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C).

The Court of Appeals' determination is limited. *See Jordan v. Sec'y, Dep't of Corr.,* 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that the court of appeals' determination that an applicant has made a prima facie showing that the statutory criteria have been met is simply a threshold determination). If the Court of Appeals' authorizes the applicant to file a second or successive 2255 Motion, "'[t]he district court is to decide the [§ 2255(h)] issue[s] fresh, or in the legal vernacular, *de novo.*'" *In re*

Moss, 703 F.3d 1301, 1303 (11th Cir. 2013) (quoting *Jordan,* 485 F.3d at 1358). Only if the district court concludes that the applicant has established the statutory requirements for filing a second or successive motion will it "proceed to consider the merits of the motion, along with any defenses and arguments the respondent may raise." *Id.* If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and 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).

IV. Discussion

Movant asserts three grounds for relief. **First**, he argues that the Supreme Court's decision in *Davis* invalidates his Section 924(c) conviction in Count Five. (Mot. at 5-6.) Specifically, he argues that the Court must presume that the 924(c) conviction was predicated solely on the underlying hostage taking offense (rather than the carjacking offense), and hostage taking is not a "crime of violence" under Section 924(c)'s elements clause. (*Id.* at 6.) **Second**, he argues that he is entitled to a resentencing as to all counts under the "Resentencing Package Rule." (*Id.* at 7.) In this regard, he argues that developments in the law since his Sentencing Hearing may entitle him to lighter sentences for his other convictions. (*Id.)* **Third**, he argues that the Court should vacate his convictions in Counts One and Two because the Hostage Taking Act is "a vague and overbroad implementation of the Necessary and Proper Clause of Article I, Section 8, and therefore, in conflict with the Tenth Amendment." (*Id.* at 9.) Although

this claim is beyond the scope of Movant's application to the Eleventh Circuit for leave to file a second or successive 2255 Motion and the Eleventh Circuit's Order granting the application, he argues that the Eleventh Circuit's Order does not appear to bar him from raising additional grounds under Section 2255. (*Id.)*

The Government argues that Movant's *Davis* claim is procedurally defaulted because he failed to raise it on direct appeal. (Resp. at 11-19.) It further argues that the claim fails on the merits because carjacking was listed as a predicate offense for Movant's 924(c) conviction, and carjacking constitutes a crime of violence under Section 924(c)'s elements clause. (*Id.* at 19-20.) It further argues that although Count Five also listed the underlying hostage taking offense as a predicate for the 924(c) offense, the carjacking offense was "inextricably intertwined" with the hostage taking offense, and therefore Movant cannot show that the jury based his 924(c) conviction solely on hostage taking. (*Id.* at 20-24.) The Government further argues that even if the 924(c) conviction rests solely on the hostage taking predicate, Movant is still not entitled to relief because hostage taking qualifies as a crime of violence under 924(c)'s elements clause. (*Id.* at 24-31.) The Government further argues that Movant's challenge to the constitutionality of the Hostage Taking Act is beyond the purview of the Eleventh Circuit's authorization to file a second or successive 2255 Motion and, therefore, this Court does not have jurisdiction to consider it. (*Id.* at 31-33.) Finally, the Government argues that because Movant's claims fail, he is not entitled to a resentencing hearing and/or the application of the "resentencing

package doctrine." (*Id.* at 33 n.17.) And even if the Court finds that Movant is entitled to relief as to Count Five, the Court would not need to resentence Movant because he received a life sentence *plus* 60 months on the 924(c) conviction; therefore, the Court could simply vacate the 60-month sentence imposed as to Count Five. (*Id.)*

In his Reply, Movant argues that his *Davis* claim is not procedurally defaulted. (Reply at 1-2.) He argues that he can show cause for failing to previously raise the issue and prejudice resulting from the error. (*Id.* at 2-5.) He maintains that hostage taking is not a crime of violence under Section 924(c)'s elements clause, (*id.* at 5-7), the carjacking conviction cannot be used as a predicate for his 924(c) conviction because it is not the "least culpable conduct" charged in Count Five, (*id.* at 7-9), and a hearing is warranted so Movant can establish that the jury used the hostage-taking conviction (rather than the carjacking conviction) as the predicate to his 924(c) conviction, (*id.* at 9-10).

Pursuant to 28 U.S.C. § 2255(b), "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." "A petitioner is entitled to an evidentiary hearing if he 'alleges facts that, if true, would entitle him to relief.'" *Winthrop-Redin v. United States,* 767 F.3d 1210, 1216 (11th Cir. 2014) (quoting *Aron v. United States,* 291 F.3d 708, 715 (11th Cir. 2002)). "However, a district court

need not hold a hearing if the allegations are 'patently frivolous,' 'based upon unsupported generalizations,' or 'affirmatively contradicted by the record.'" *Id.* (quoting *Holmes v. United States,* 876 F.2d 1545, 1553 (11th Cir. 1989)). For the reasons explained in the remainder of this Order, the Court finds that the files and records of the case conclusively show that Movant is entitled to no relief; therefore, he is not entitled to an evidentiary hearing.

As a threshold matter, the Court must determine *de novo* whether Movant has carried his burden under 28 U.S.C. § 2255(h) of showing that he is entitled to file a second or successive 2255 Motion. *See In re Moss,* 703 F.3d at 1303 (quoting *Jordan,* 485 F.3d at 1358). As relevant here, the Court must determine whether Movant's Motion contains a claim involving "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2).

In his Motion and Memorandum, Movant asserts that the Supreme Court's decision in *Davis* invalidates his Section 924(c) conviction in Count Five. (*See* Mot. at 5-6; Memo. at 1-3.) As previously stated, in *Davis* the Supreme Court held that Section 924(c)(3)(B)'s residual clause is unconstitutionally vague. 139 S. Ct. at 2336. The Eleventh Circuit has held that (1) *Davis* announced a new substantive rule of constitutional law, and (2) the rule in *Davis* was made retroactive to cases on collateral review by the Supreme Court. *In re Hammoud,* 931 F.3d 1032, 1038-39 (11th Cir. 2019). Specifically,

> [B]y striking down § 924(c)(3)(B)'s residual clause, *Davis* altered the range of conduct and the class of persons that the § 924(c) statute can punish in the same manner that *Johnson[v. United States,* ___ U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)] affected the ACCA [Armed Career Criminal Act]. In other words, *Davis* announced a new substantive rule, and *Welch [v. United States,* 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016)] tells us that a new rule such as the one announced in *Davis* applies retroactively to criminal cases that became final before the new substantive rule was announced. Consequently, for purposes of § 2255(h)(2), we conclude that, taken together, the Supreme Court's holdings in *Davis* and *Welch* "necessarily dictate" that *Davis* has been "made" retroactively applicable to criminal cases that became final before *Davis* was announced.

Id. Because Movant's Motion contains a claim involving a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable, the Court finds that Movant is entitled to file a second or successive 2255 Motion challenging his Section 924(c) conviction under *Davis.*

The Government argues that this claim is procedurally defaulted due to Movant's failure to raise it on direct appeal. (*See* Resp. at 11-19.) "Generally speaking, an available challenge to a criminal conviction or sentence must be advanced on direct appeal or else it will be

considered procedurally barred in a § 2255 proceeding." *Mills v. United States,* 36 F.3d 1052, 1055 (11th Cir. 1994) (citing *Greene v. United States,* 880 F.2d 1299, 1305 (11th Cir. 1989)). "A ground of error is usually 'available' on direct appeal when its merits can be reviewed without further factual development." *Id.* (citations omitted). "When a defendant fails to pursue an available claim on direct appeal, it will not be considered in a motion for § 2255 relief unless he can establish cause for the default and actual prejudice resulting from the alleged error." *Id.* (citing *Cross v. United States,* 893 F.2d 1287, 1289 (11th Cir. 1990)). "Alternatively, under the fundamental miscarriage of justice exception, 'in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.'" *Id.* (quoting *Murray v. Carrier,* 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)).

The Government argues that Movant failed to present this claim on direct appeal, (Resp. at 11-12); he cannot show cause for such failure because the claim is not novel, (*id.* at 13-14); he cannot show prejudice because (a) his ultimate sentence of life imprisonment does not exceed the aggregate statutory maximum sentences for the other counts of conviction, (*id.* at 15 (citing *United States v. Hester,* 287 F.3d 1355, 1357 (11th Cir. 2002); *United States v. Smith,* 240 F.3d 927, 930 (11th Cir. 2001)), and (b) both predicate offenses underlying his 924(c) conviction are crimes of violence under Section 924(c)(3)(A)'s elements clause, (*id.* at 15-16); and, for the same reason, he cannot

establish actual innocence of the 924(c) charge, (*id.* at 16-19).

The Court rejects the Government's argument and finds that Ground One is not procedurally defaulted because it was not available to Movant during his direct appeal in 2000. The Court adopts Judge Reid's analysis on the issue:

> Respondent's procedural default argument is foreclosed by *Hammoud,* 931 F.3d at 1039. In *Hammoud,* the Eleventh Circuit reviewed and granted an application to file a successive § 2255 motion. To receive such authorization, the application must contain a claim involving "a new rule of constitutional law, made retroactive on collateral review by the Supreme Court, that was **previously unavailable**." *Id.* at 1035 (quoting 28 U.S.C. § 2255(h)(2)) (emphasis added).
>
> In *Hammoud,* the Eleventh Circuit held that the applicant's *Davis* claim met the requirements of 28 U.S.C. § 2255(h)(2) and granted his application to file a successive § 2255 motion. *See id.* at 1040. This necessarily means that the applicant's *Davis* claim was in fact **previously unavailable** before June 24, 2019. Accordingly, Movant is not attempting to assert a previously available claim he did not assert on direct appeal. *See Lynn,* 365 F.3d at 1232 (citing *Mills,* 36 F.3d at 1055).

Appendix B

Thomas v. United States, CASE NO. 19-23378-CV-SCOLA (16-20870-CR-SCOLA), 2019 U.S. Dist. LEXIS 211056, 2019 WL 7484696, at *3 (S.D. Fla. Dec. 5, 2019), *report and recommendation adopted* 2020 U.S. Dist. LEXIS 1263, 2020 WL 59750 (S.D. Fla. Jan. 6, 2020). *See also Vilar v. United States,* 16-CV-5283, 2020 U.S. Dist. LEXIS 4074, 2020 WL 85505, at *2 (S.D.N.Y. Jan. 3, 2020) ("In the absence of any indication that *Davis* (or its predecessors *Sessions v. Dimaya,* 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018), or *Johnson v. United States,* 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)) was even close to anybody's radar screen in 1997 or 1998, I will assume that the claim here is so novel that it was not reasonably available to counsel at the time."). Because Movant's *Davis* claim was not available to him on direct appeal, the Court finds it is not procedurally barred in this 2255 proceeding. *See Thomas,* 2019 U.S. Dist. LEXIS 211056, 2019 WL 7484696, at *3. The Court will therefore proceed to the merits of the claim.

Pursuant to 18 U.S.C. § 924(c), any person who possesses a firearm in furtherance of "any crime of violence or drug trafficking crime . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . be sentenced to a term of imprisonment of not less than 5 years[.]" 18 U.S.C. § 924(c)(1)(A)(i).

> 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.

18 U.S.C. § 924(c)(3). Subsection (A) is commonly referred to as the "elements" (or "force" or "use-of-force") clause, while subsection (B) is commonly referred to as the "residual" clause. *See Solomon,* 911 F.3d at 1358. As previously stated, in *Davis,* the Supreme Court held that Section 924(c)(3)(B)'s residual clause is unconstitutionally vague. 139 S. Ct. at 2336.

The Eleventh Circuit has not yet decided the legal standard that applies to a *Davis* claim raised in a Section 2255 motion. However, in *Beeman v. United States,* 871 F.3d 1215, 1222 (11th Cir. 2017), the Eleventh Circuit decided the legal standard that applies in the analogous context of a 2255 movant seeking to vacate a sentence enhancement under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), on the ground that the ACCA's residual clause is unconstitutionally vague. Briefly, an individual adjudicated guilty of being a felon in possession of a firearm under 18 U.S.C. § 922(g) is subject to a maximum sentence of ten years' imprisonment. 18 U.S.C. § 924(a)(2). However, if the defendant has three

prior convictions for a "violent felony or a serious drug offense," the ACCA enhances the sentence to a mandatory minimum fifteen years' imprisonment. 18 U.S.C. § 924(e)(1). The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. § 924(e)(2)(B). Subsection (i) is referred to as the "elements clause"; subsection (ii)'s first nine words are referred to as the "enumerated crimes clause"; and subsection (ii)'s final thirteen words are referred to as the "residual clause." *See In re Rogers,* 825 F.3d 1335, 1338 (11th Cir. 2016).

In *Johnson v. United States,* the United States Supreme Court held that the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. 2551, 2563, 192 L. Ed. 2d 569 (2015). In *Welch v. United States,* the Supreme Court held that *Johnson* announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review. 136 S. Ct. 1257, 1268, 194 L. Ed. 2d 387 (2016).

Appendix B

In *Beeman,* the Eleventh Circuit held that to prove a *Johnson* claim, a Section 2255 "movant must show that — more likely than not — it was use of the residual clause that led to the sentencing court's enhancement of [the movant's] sentence." 871 F.3d at 1222; *see also United States v. Pickett,* 916 F.3d 960, 964 (11th Cir. 2019) ("To overcome *Beeman,* Pickett needs to show that it is more likely than not that the district court *only relied on* the residual clause."). "Whether the residual clause was the basis for the [sentence] is a question of 'historical fact.'" *Pickett,* 916 F.3d at 963 (quoting *Beeman,* 871 F.3d at 1224 n.5). "To determine this 'historical fact' we look first to the record, and then, if the record proves underdeterminative, we can look to the case law at the time of sentencing." *Id.* "The movant can succeed in the face of some uncertainty, but must show more than just equipoise — the motion fails '[i]f it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement.'" *Id.* (quoting *Beeman,* 871 F.3d at 1222).

Given the obvious similarities between a *Davis* claim and a *Johnson* claim—indeed, the holding in *Davis* was dictated in large part by the holding in *Johnson, see Davis,* 139 S. Ct. at 2325-27—the Court concludes that the *Beeman* standard applies to *Davis* claims. *See United States v. McIntosh,* Cases No. 4:99cr66-RH/GRJ, 2019 U.S. Dist. LEXIS 163510, 2019 WL 4561459, at *2 (N.D. Fla. Aug. 29, 2019) (applying *Beeman* to *Davis* claim in 2255 proceeding); *United States v. Cooper,* Cases No. 4:99cr37-RH-CAS, 4:16cv458-RH-CAS, 2019 U.S. Dist. LEXIS 141917, 2019 WL 3948098, at *1 (N.D. Fla. Aug. 20, 2019) (same).

Thus, the Court finds that to prove a *Davis* claim, the movant must show that it is more likely than not that he was adjudicated guilty of using or carrying a firearm during, or possessing a firearm in furtherance of, a "crime of violence" under 18 U.S.C. § 924(c)(3)(B)'s "residual clause." If it is just as likely that the movant was adjudicated guilty of using or carrying a firearm during, or possessing a firearm in furtherance of, a "crime of violence" under Section 924(c)(3)(A)'s "elements clause," the motion fails. *See Cooper,* 2019 U.S. Dist. LEXIS 141917, 2019 WL 3948098, at *1 (finding that a criminal defendant "may obtain relief from a 924(c) conviction [under *Davis*] if—but only if—the residual clause was essential to the conviction. A defendant whose conviction was or, had there been no residual clause, would have been imposed based on the element clause is not entitled to relief.") (citing *Beeman,* 871 F.3d 1215).

In *Davis,* the Supreme Court stated that in determining whether a particular offense qualifies as a "crime of violence" under Section 924(c)(3)(A)'s elements clause, courts must apply the "categorical approach." 139 S. Ct. at 2326. "In applying the categorical approach, we look only to the elements of the predicate offense statute and do not look at the particular facts of the defendant's offense conduct." *United States v. St. Hubert,* 909 F.3d 335, 348 (11th Cir. 2018) (citing *United States v. Keelan,* 786 F.3d 865, 870-71 (11th Cir. 2015)), *abrogated on other grounds by Davis,* 139 S. Ct. 2319, 204 L. Ed. 2d 757. "In doing so, 'we must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts' qualify as crimes of violence." *Id.* (quoting *Moncrieffe,* 569 U.S. at

190-91). If the crime, in general, "plausibly covers any non-violent conduct," then it is not a crime of violence under Section 924(c)(3)(A)'s elements clause. *United States v. McGuire,* 706 F.3d 1333, 1337 (11th Cir. 2013); *see also United States v. Gillis,* 938 F.3d 1181, 1198-99 (11th Cir. 2019) (concluding that "*McGuire's* categorical approach ruling—that the text of § 924(c)(3)(A)'s elements clause requires use of the categorical approach in analyzing whether a felony offense qualifies as a crime of violence—was "necessary to [the] result," and therefore part of the holding, in that case").

Here, Count Five of the Superseding Indictment charged Movant with using and carrying a firearm during and in relation to two crimes of violence—hostage taking and carjacking. (Cr-D.E. 25 at 5.) Specifically, Count Five of the Superseding Indictment charged Movant with

> knowingly us[ing] and carry[ing] firearms, to wit, a Davis Industries Pistol, model number P-380, serial number 8P404186 and a Raven Arms 25 caliber pistol, model number P-25, serial number 126128, during and in relation to crimes of violence which are felonies prosecutable in a court of the United States, that is, violations of Title 18 United States Code, Sections 1203(a) and 2119(2), as set forth in Count Two and Four of this [superseding] indictment and incorporated herein by reference, all in violation of Title 18, United States Code, Sections 924(c) and 2.

(*Id.)* It is unclear from the verdict form whether the conviction in Count Five was predicated on the hostage taking or carjacking offense (or both).[4] (*See* Cr-D.E. 131.)

It is undisputed that under binding Eleventh Circuit precedent, carjacking is categorically a crime of violence under Section 924(c)(3)(A)'s "elements" clause. *See In re Smith,* 829 F.3d at 1280 ("Even assuming that *Johnson* invalidated § 924(c)'s residual clause, that conclusion would not assist [the movant] because the elements of the underlying conviction on which his § 924(c) conviction was based—carjacking, in violation of 18 U.S.C. § 2119—meet the requirements that the force clause in § 924(c)(3)(A) sets out for a qualifying underlying offense."). In *Smith,* the Eleventh Circuit relied on its prior decision in *United States v. Moore,* which held that "[t]he term *'crime of violence'* as Congress defined it in 18 U.S.C § 924(c)(3) *clearly includes carjacking.* 'Tak[ing] or attempt[ing] to take by force and violence or by intimidation,' 18 U.S.C. § 2119, encompasses 'the use, attempted use, or threatened use of physical force. . . .' 18 U.S.C. § 924(c)(3)(A)." 43 F.3d 568, 572-73 (11th Cir. 1994).

> Stated another way, an element requiring that one take or attempt to take by force and violence or by intimidation, which is what the federal carjacking statute does, satisfies the force clause of § 924(c), which requires

4. Movant has never argued that his conviction for Count Five should be vacated as an impermissible duplicitous indictment, and he has therefore waived the argument. *See United States v. Seher,* 562 F.3d 1344, 1359 (11th Cir. 2009).

> the use, attempted use, or threatened use of physical force. In short, our precedent holds that carjacking in violation of § 2119 satisfies § 924(c)'s force clause, and that ends the discussion.

Smith, 829 F.3d at 1280-81. *See also Ovalles v. United States,* 905 F.3d 1300, 1303-04 (11th Cir. 2018) (observing that in *Smith* and *Moore* the Eleventh Circuit "held that a § 2119 carjacking offense meets the requirements of § 924(c)(3)(A)'s elements clause"), *abrogated on other grounds by Davis,* 139 S. Ct. 2319, 204 L. Ed. 2d 757.[5]

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5. It is undisputed that the holding in *Smith* is binding on this Court. *See Rosado v. United States,* CASE NO. 16-23503-CIV-LENARD/WHITE, 2018 U.S. Dist. LEXIS 173015, 2018 WL 9537832, at *4 (S.D. Fla. Oct. 5, 2018); *Morton v. United States,* CASE NO. 2:16-CV-8114-SLB, 2017 U.S. Dist. LEXIS 9501, 2017 WL 345551, at *3 (N.D. Ala. Jan. 24, 2017). Although *Smith* was decided in the context of an application to file a second or successive Section 2255 Motion, it is axiomatic that this Court is bound by the holdings of prior cases rendered by Eleventh Circuit Court of Appeals. *In re Hubbard,* 803 F.3d 1298, 1309 (11th Cir. 2015) (citing *Generali v. D'Amico,* 766 F.2d 485, 489 (11th Cir. 1985)). This "rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions." *In re Lambrix,* 776 F.3d 789, 794 (11th Cir. 2015). The holding of a case is "comprised both of the result of the case and 'those portions of the opinion necessary to that result by which we are bound.'" *United States v. Kaley,* 579 F.3d 1246, 1249 n.10 (11th Cir. 2009) (quoting *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 66-67, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996)). The Eleventh Circuit's conclusion that Smith's carjacking conviction qualified as a "crime of violence" was necessary to the result in that case, as his application for leave to file a second or successive Section

Appendix B

The Eleventh Circuit has not yet decided whether hostage taking categorically qualifies as a crime of violence under Section 924(c)(3)(A)'s elements clause.[6] Movant argues that because hostage taking may be accomplished by deception, it does not categorically qualify as a crime of violence under Section 924(c)(3)(A). (Memo. at 3 (citing *United States v. Gillis,* 938 F.3d 1181, 1210 (11th Cir. 2019) (holding that because federal kidnapping statute may be violated by deception it does not categorically qualify as a crime of violence under 18 U.S.C. § 373(a)'s elements clause)).)

Movant argues that because it cannot be determined from the verdict form whether his Section 924(c) conviction was predicated on hostage taking or carjacking, the Court should presume it was predicated on hostage taking. (Mot. at 6.) Specifically, he argues that a district court "must presume that the conviction rested upon nothing more than the *least* of the acts criminalized," (*id.* (quoting *Moncrieffe v. Holder,* 569 U.S. 184, 190-91, 133 S. Ct. 1678, 185 L. Ed. 2d 727 (2013)), and in this case hostage taking is the "least of the acts criminalized" because "carjacking has been held to be a crime of violence whereas hostage taking has not[,]" (*id.).*

2255 motion was denied on that basis. *Smith,* 829 F.3d at 1280-81. As such, *Smith* holds that carjacking is a "crime of violence" for purposes of Section 924(c), and that holding is binding precedent unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by the Eleventh Circuit Court of Appeals sitting *en banc. United States v. Archer,* 531 F.3d 1347, 1352 (11th Cir. 2008).

6. The issue is currently before the Eleventh Circuit in *Hernandez v. United States,* Case No. 18-10334-C.

Movant's argument is flawed. The categorical approach is applied to the *predicate* offense, not the Section 924(c) charge itself. *See St. Hubert,* 909 F.3d at 348 ("In applying the categorical approach, we look only to the *elements of the predicate offense statute* and do not look at the particular facts of the defendant's offense conduct."), *abrogated on other grounds by Davis,* 139 S. Ct. 2319, 204 L. Ed. 2d 757. Stated differently, courts apply the categorical approach to determine "the least culpable conduct criminalized by a statute," *United States v. Vail-Bailon,* 868 F.3d 1293, 1306 (11th Cir. 2017)—here, carjacking under 18 U.S.C. § 2119 and hostage taking under 18 U.S.C. § 1203—not the least culpable conduct charged in a 924(c) count containing multiple predicate offenses.

Even assuming *arguendo* that hostage taking does not categorically qualify as a crime of violence under Section 924(c)(3)(A)'s elements clause, the Court finds that Movant is not entitled to relief because he has not argued—much less established—that it is more likely than not that he was adjudicated guilty in Count Five of possessing a firearm in furtherance of *only* the hostage taking offense. Indeed, Movant does not dispute that the evidence at trial established that he possessed a firearm during the carjacking offense. Specifically, FBI agent Eliasib Ortiz, Jr. testified that one of Movant's co-defendants admitted that Movant carried a silver-colored pistol into the parking garage and placed it on the wheel of a car they were hiding behind. (Trial Tr., Cr-D.E. 229-1 at 74:18-20, 75:3-4.) After placing the Aragaos in the Lincoln Navigator, Movant retrieved the firearm from the wheel he had placed it on,

got into the Navigator's drivers' seat, and drove away. (*Id.* at 78:22-24.) This constitutes constructive possession of a firearm during the carjacking offense. *See United States v. Perez,* 661 F.3d 568, 576 (11th Cir. 2011) ("As long as the Government proves, through either direct or circumstantial evidence that the defendant (1) was aware or knew of the firearm's presence and (2) had the ability and intent to later exercise dominion and control over that firearm, the defendant's constructive possession of that firearm is shown.") (citing *United States v. Winchester,* 916 F.2d 601, 603-04 (11th Cir. 1990) (holding that a firearm found behind the defendant's couch when the defendant was not home was sufficient for a conviction of possessing a firearm under 18 U.S.C. § 922(g))).

Because it is at least as likely that the jury convicted Movant in Count Five of possessing a firearm in furtherance of the predicate carjacking offense—which categorically qualifies as a "crime of violence" under Section 924(c)(3)(A)'s elements clause, *Smith,* 829 F.3d at 1280—Movant has not shown that it is more likely than not that the jury convicted him solely under the residual clause. Consequently, Movant is not entitled to 2255 relief under *Davis* and *Beeman.*[7]

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7. Even if Movant could establish that it is more likely than not the jury convicted him in Count Five of possessing a firearm in furtherance of *only* the hostage taking offense, and that hostage taking does not qualify as a crime of violence under Section 924(c)(3)(A)'s elements clause, the Court would simply vacate his consecutive 60-month sentence for that Count and leave the remainder of the Judgment intact, including the terms of life imprisonment as to Counts One and Two, respectively,

Finally, the Court declines to address Movant's argument that the Hostage Taking Act is unconstitutionally vague. First, the argument is beyond the scope of Movant's application for leave to file a successive 2255 Motion, (*see* D.E. 1 at 8-12), and the Eleventh Circuit's Order granting Movant's application to file a successive 2255 Motion (*see id.* at 2-6). Pursuant to 28 U.S.C. § 2255(h):

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> > **(1)** newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> >
> > **(2)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

In turn, Section 2244 provides, in relevant part:

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sixty months' imprisonment as to Count Three, and 300 months' imprisonment as to Count Four. (*See* Judgment, Cr-D.E. 203 at 3.) The Court would further find that Movant is not entitled to a full resentencing hearing under the "resentencing package doctrine."

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > **(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > **(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C).

Appendix B

In this case, Movant's application for leave to file a successive 2255 motion did *not* assert that the Hostage Taking Act is unconstitutionally vague, (*see* D.E. 1 at 8-12), and the Eleventh Circuit therefore *could not* (and did not) determine that that issue satisfied the requirements of Sections 2244(b) and 2255(h). As such, this Court is without jurisdiction to consider that issue. *See Farris v. United States,* 333 F.3d 1211, 1216 (11th Cir. 2003).

Alternatively, the Court finds that the claim is procedurally barred or defaulted. A prisoner is procedurally barred from raising claims in a 2255 Motion that were raised and rejected on direct appeal. *United States v. Nyhuis,* 211 F.3d 1340, 1343 (11th Cir. 2000). "'[O]nce a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255.'" *Id.* (quoting *United States v. Natelli,* 553 F.2d 5, 7 (2d Cir. 1977)). "[N]ew evidence, by itself, is not a ground for relief in a motion to vacate unless that new evidence establishes an error of constitutional proportions or a 'fundamental defect which inherently results in a complete miscarriage of justice.'" *Stoufflet v. United States,* 757 F.3d 1236, 1240 (11th Cir. 2014) (quoting *Hill v. United States,* 368 U.S. 424, 428, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962)). "And only a limited set of intervening changes of law warrant setting aside a ruling in the defendant's direct appeal because not all intervening changes in law have retroactive effect after a judgment of conviction has become final." *Id.* (citing, e.g., *Teague v. Lane,* 489 U.S. 288, 310-11, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)).

Appendix B

"Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding.'" *Lynn v. United States,* 365 F.3d 1225, 1234 (11th Cir. 2004); *see also McKay v. United States,* 657 F.3d 1190, 1196 (11th Cir. 2011). "The exceptions are: (1) for cause and prejudice, or (2) for a miscarriage of justice, or actual innocence." *McKay,* 657 F.3d at 1196 (citing *Lynn,* 365 F.3d at 1234).

Here, Movant argued on direct appeal that the Hostage Taking Act is unconstitutional. *See Ferreira,* 275 F.3d at 1025. Specifically, he argued that: (1) the Hostage Taking Act violates [his] Fifth Amendment right to equal protection by discriminating impermissibly on the basis of alienage[,]" *id.;* and (2) "Congress lacked the authority under any of its constitutionally enumerated powers to enact the Hostage Taking Act," *id.* at 1027. The Eleventh Circuit rejected both arguments, holding that: (1) "the Hostage Taking Act is rationally related to a legitimate government interest[,]" *id.;* and (2) "the Hostage Taking Convention is well within the boundaries of the Constitution's treaty power, and . . . Congress had authority under the Necessary and Proper Clause to enact the Hostage Taking Act[,]" *id.* at 1028 (internal quotation marks and citation omitted).

In his 2255 Motion, Movant argues that "the Hostage Taking Act cannot pass constitutional muster, it being a vague and overbroad implementation of the Necessary and Proper Clause of Article I, Section 8, in conflict with the Tenth Amendment." (Memo. at 9.) To the extent this issue

was raised and rejected on direct appeal, it is procedurally barred because Movant has presented no new evidence or intervening change in controlling law with retroactive application. *Nyhuis,* 211 F.3d at 1343; *Stoufflet,* 757 F.3d at 1240. To the extent that Movant did not raise this issue on direct appeal, it is procedurally defaulted because it was available to him on direct appeal, and he has not argued or established that an exception to the procedural default rule applies. *McKay,* 657 F.3d at 1196; *Lynn,* 365 F.3d at 1234.

IV. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Movant Ewin Oscar Martinez's Amended Motion to Vacate Convictions and Sentences Pursuant to 28 U.S.C. § 2255 (D.E. 16) is **DENIED**;

2. A Certificate of Appealability **SHALL NOT ISSUE**;

3. All pending motions are **DENIED AS MOOT**; and

4. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida this 27th day of January, 2020.

/s/ Joan A. Lenard
JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED AUGUST 16, 2019

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 19-12817-E

IN RE: EWIN OSCAR MARTINEZ,

Petitioner.

Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence, 28 U.S.C. § 2255(h)

Before: TJOFLAT, MARTIN, and JILL PRYOR Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Ewin Oscar Martinez has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear

> and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection". *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

As a brief factual background, in 2000, a federal grand jury returned a superseding indictment charging Martinez with one count of conspiracy to commit hostage taking, in violation of 18 U.S.C. § 1203(a) (Count One); one count of hostage taking, in violation of § 1203(a) (Count Two); one count of conspiracy to commit carjacking, in violation of 18 U.S.C. § 371 (Count Three); one count of carjacking, in violation of 18 U.S.C. §§ 2119(2) and 2 (Count Four); one count of using or carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c) and 2 (Count Five); and one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) (Count Six). Notably, the indictment alleged that the

§ 924(c) count related to both the hostage-taking offense in Count Two and the carjacking offense in Count Four. The jury returned a general verdict finding Martinez guilty of Counts One through Five.[1] Martinez was sentenced to life plus 60 years, which consisted of life sentences on Counts One and Two, concurrent 60 and 300-month sentences on Counts Three and Four, and a consecutive 60-month sentence on Count Five.

In his present application, Martinez seeks to raise one claim relying on a new rule of constitutional law set forth in *United States v. Davis,* 139 S. Ct. 2319 (2019), in which the Supreme Court invalidated § 924(c) as unconstitutionally vague. He also cites *Johnson v. United States,* 135 S. Ct. 2551 (2015),[2] *Welch v. United States,* 136 S. Ct. 1257 (2016), *Holloway v. United States*, 526 U.S. 1 (1999), and a number of appellate decisions, in setting forth his claim. He argues that he is actually innocent of his § 924(c) conviction, as he and his codefendants did not use firearms during the commission of the kidnapping, but instead gave firearms to the kidnapping victims to help gain their confidence. Moreover, he argues that he is actually innocent of his carjacking convictions, as the vehicle that he and his codefendants stole was unoccupied when they took it and they did not use any force in taking the vehicle. He asserts that he has made a *prima facie* showing under §§ 2244(b)(3)(C) and 2255(h) because *Davis* provides a new

1. The government agreed to dismiss Count Six.

2. Martinez's reliance on *Johnson* to support his § 924(c) challenge is misplaced, as that case involved the Armed Career Criminal Act. Thus, Martinez's current claim is best interpreted as a *Davis* claim.

rule of constitutional law that was previously unavailable and which is retroactively applicable on collateral review.

On June 24, 2019, the Supreme Court in *Davis* extended its holdings in *Johnson* and *Sessions v. Dimaya,* 138 S. Ct. 1204 (2018), to § 924(c) and held that § 924(c)(3)(B)'s residual clause, like the residual clauses in the Armed Career Criminal Act and 18 U.S.C. § 16(b), is unconstitutionally vague. *Davis,* 139 S. Ct. at 2324-25, 2336. The Court resolved a circuit split on the issue, rejecting the position that § 924(c)(3)(B)'s residual clause could remain constitutional if read to encompass a case-specific, conduct-based approach, rather than a categorical approach. *Id.* at 2325 & n.2, 2332-33. The Court in *Davis* emphasized that there was no "material difference" between the language or scope of § 924(c)(3)(B) and the residual clauses struck down in *Johnson* and *Dimaya,* and, therefore, concluded that § 924(c)(3)(C) was unconstitutional for the same reasons. *Id.* at 2326, 2336.

In *In re Hammoud,* we recently resolved several preliminary issues with respect to successive applications involving proposed *Davis* claims. No. 19-12458, manuscript op. at 4 (11th Cir. July 23, 2019). First, we held that *Davis,* like *Johnson,* announced a new rule of constitutional law within the meaning of § 2255(h)(2), as the rule announced in *Davis* was both "substantive"—in that it "restricted for the first time the class of persons § 924(c) could punish and, thus, the government's ability to impose punishments on defendants under that statute"—and was "new" —in that it extended *Johnson* and *Dimaya* to a new statutory context and that its result was not necessarily "dictated by precedent" *Id.* at 6-7. Second, we held that, even

though the Supreme Court in *Davis* did not expressly discuss retroactivity, the retroactivity of *Davis*'s rule was "necessarily dictated" by the holdings of multiple cases, namely, the Court's holding in *Welch,* 136 S. Ct. at 1264-65, 1268, that *Johnson's* substantially identical constitutional rule applied retroactively to cases on collateral review. *Id.* at 7-8 (quoting *Tyler v. Cain,* 533 U.S. 656, 662-64, 666 (2001)).

Here, Martinez has made a *prima facie* showing that he is entitled to relief under *Davis. See* 28 U.S.C. §§ 2244(b)(3)(C), 2255(h)(2). Martinez's indictment charged that he used or carried a firearm in furtherance of multiple predicate offenses, namely, the hostage-taking charge in Count Two and the carjacking charge in Count Four.

In *In re Gomez,* we granted a *Johnson*-based successive application, holding that the applicant had made a *prima facie* showing that his § 924(c) conviction might implicate § 924(c)(3)(B)'s residual clause and *Johnson* where (1) the § 924(c) count in the indictment had referenced multiple potential predicate offenses, and the jury had returned a general guilty verdict; (2) our precedent at the time had not yet indicated whether two of the potential predicate offenses—conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery—otherwise qualified under § 924(c)(3)(A)'s elements clause; and (3) it was unclear which crime or crimes had served as the predicate offense for the § 924(c) conviction. 830 F.3d 1225, 1227-28 (11th Cir. 2016); *but see United States v. St. Hubert,* 909 F.3d 335, 351-52 (11th Cir. 2018) (holding, after *Gomez,* that attempted Hobbs Act robbery categorically qualifies as

a crime of violence under § 924(c)(3)(A)), *cert. denied,* 139 S. Ct. 1394 (2019).

More recently, in *In re Cannon,* we addressed a similar *Davis*-based successive application challenging § 924(c)-related counts tied to multiple potential predicate offenses. No. 19-12533, manuscript op. at 2-3, 6-10 (11th Cir. July 25, 2019). As to two § 924(c) counts, which were tied only to drug-trafficking, substantive Hobbs Act robbery, and carjacking predicate offenses, we concluded that Cannon had not made a *prima facie* showing that he was entitled to relief under *Davis,* as all were qualifying predicates without resort to § 924(c)(3)(B)'s invalidated residual clause. *Id.* at 8-9. However, as to a separate § 924(o) firearm-conspiracy count, which was tied to two carjackings, four drug-trafficking crimes, and one count of conspiracy to commit Hobbs Act robbery, we noted that we had not yet decided whether Hobbs Act conspiracy categorically qualified under § 924(c)(3)(A)'s elements clause, and the jury had returned a general guilty verdict. *Id.* at 9-10. Because the limited record available was "somewhat unclear" about which crime or crimes served as the predicate offense for the § 924(o) count, we concluded that Cannon had made the requisite *prima facie* showing that his § 924(o) conviction might implicate § 924(c)(3)(B)'s residual clause and *Davis. Id.* at 10. Accordingly, we granted his application in part as to the § 924(o) count, but denied the application as to his two § 924(c) counts. *Id.* at 13. We emphasized that our authorization was a "threshold determination" that was "narrowly circumscribed," and that the district court must still determine *de novo* whether Cannon's *Davis* challenge to his § 924(o) conviction met the requirements

of § 2255(h)(2). *Id.* at 12 (citation omitted). If the court finds that those requirements have been met, the court should then "proceed to consider the merits," along with any defenses and arguments the government might raise. *Id.* at 13.

Similar to *Gomez* and *Cannon,* Martinez's § 924(c) charges referenced multiple, distinct predicate offenses and the jury returned a general guilty verdict. *See Cannon,* No. 19-12533, manuscript op. at 9-10; *Gomez,* 830 F.3d at 1226-28. Further, there is no binding precedent from the Supreme Court or this Court at this time to indicate that hostage taking, one of the potential predicate offenses, categorically qualifies as a crime of violence under the elements clause of § 924(c)(3)(A). Accordingly, Martinez has made a *prima facie* showing that his claim satisfies the statutory criteria of § 2255(h)(2) on the basis that his § 924(c) conviction may be unconstitutional under *Davis,* as he potentially was sentenced under the now-invalid residual clause of § 924(c)(3)(B). *See Cannon,* No. 19-12533, manuscript op. at 9-10, 13; 28 U.S.C. § 2255(h)(2). As for Martinez's arguments that he is actually innocent of his carjacking and § 924(c) convictions, these arguments are irrelevant to his *Davis* claim because *Davis* involved the invalidation of a statute as unconstitutionally vague. Moreover, Martinez's reliance on *Welch, Holloway,* and the various appellate decisions he cites is misplaced, as none of these opinions provide new rules of constitutional law made retroactive to cases on collateral review by the Supreme Court. *See* 28 U.S.C. § 2255(h)(2).

Thus, Martinez's application is GRANTED.

APPENDIX D — ORDER DENYING REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 24, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-10598-BB

EWIN OSCAR MARTINEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: GRANT, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested

that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

APPENDIX E — STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. § 2119 provides in pertinent part:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

> **(1)** be fined under this title or imprisoned not more than 15 years, or both[.]

* * * * *

2. 18 U.S.C. § 924(c) 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;

Appendix E

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(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.

* * * * *

3. 28 U.S.C. § 2255 provides in pertinent part:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * *

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final; [or]

* * * * *

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;

* * * * *

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

* * * * *

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.