No. 22-5503

IN THE SUPREME COURT OF THE UNITED STATES

JOSE VARGAS-SOTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner showed cause to excuse his procedural default of his claim on a collateral attack on his sentence under 28 U.S.C. 2255.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 35 F.4th 979. The opinion of the district court (Pet. App. 44a-53a) is reported at 452 F. Supp. 3d 491.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2022. The petition for a writ of certiorari was filed on August 31, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of unlawfully reentering the United States following removal, in violation of 8 U.S.C. 1326(a) and (b)(2). Judgment 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Judgment 2. The court of appeals affirmed, Pet. App. 57a-63a, and this Court denied certiorari, 568 U.S. 1204. Petitioner subsequently filed unsuccessful motions under 28 U.S.C. 2255 to vacate his sentence. 14-cv-442 D. Ct. Doc. 4 (July 29, 2014); 13-cv-880 D. Ct. Doc. 11 (Mar. 27, 2014). In 2018, the court of appeals authorized petitioner to file an additional Section 2255 motion. Pet. App. 54a. The district court denied the motion, id. at 44a-53a, and the court of appeals affirmed, id. at 1a-43a.

1. Petitioner is a native and citizen of Mexico. C.A. ROA 363. In 2001, he was convicted of driving while intoxicated, in violation of Texas law, and ordered removed to Mexico. Presentence Investigation Report (PSR) ¶ 14. In 2003, petitioner was found in the United States and ordered removed to Mexico for a second time. PSR ¶ 15.

Later that same year, petitioner reentered the United States. PSR ¶ 16. In December 2013, he was driving a Ford Thunderbird in Grand Prairie, Texas, when he struck a pickup truck from the rear and caused the truck to roll over, seriously injuring the driver

and killing a passenger. PSR ¶ 40. Petitioner sped away from the collision with no headlights on, traveling between 80 to 100 miles per hour while trying to evade police. Ibid. When the officers caught up to petitioner, they detected a strong odor of alcohol and noticed "a white powdery substance, believed to be cocaine, in both of his nostrils." Ibid. Petitioner was convicted of manslaughter, in violation of Tex. Penal Code Ann. § 19.04(a), for "recklessly caus[ing] the death of an individual." Ibid.; see PSR ¶ 40. He was also convicted of intoxication assault, failure to stop and render aid after a collision, and evading arrest using a motor vehicle, all in violation of Texas law. PSR ¶¶ 41-44.

In 2007, following his release on parole, petitioner was convicted of possessing cocaine, in violation of Texas law. PSR ¶ 17. The following year, he was convicted of unlawfully reentering the United States following removal, in violation of 8 U.S.C. 1326(a). PSR ¶ 19. Immigration officials subsequently removed him to Mexico again. PSR ¶ 20; C.A. ROA 173. In 2010, petitioner was again found in the United States and convicted of driving while intoxicated, in violation of Texas law. PSR ¶ 21.

2. In 2011, a federal grand jury in the Northern District of Texas indicted petitioner on one count of unlawfully reentering the United States following removal, in violation of 8 U.S.C. 1326(a) and (b)(2). Indictment 1-2. Petitioner pleaded guilty. C.A. ROA 191.

The default maximum term of imprisonment for unlawfully reentering the United States following removal is two years. 8 U.S.C. 1326(a). If, however, the defendant's removal followed a conviction for a "felony," the maximum term of imprisonment is 10 years. 8 U.S.C. 1326(b)(1). And if the defendant's removal followed a conviction for an "aggravated felony," the maximum term of imprisonment is 20 years. 8 U.S.C. 1326(b)(2). An "aggravated felony" is defined to include, among other things, "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F) (footnote omitted). Section 16 of Title 18, in turn, defines "crime of violence" as "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or "(b) any other offense that is a felony and 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. 16.

In pleading guilty, petitioner acknowledged that he was subject to a maximum term of imprisonment of 20 years. C.A. ROA 172, 327-328. The Probation Office likewise determined that the "maximum term of imprisonment that may be imposed is 20 years" under Section 1326(b)(2), the aggravated-felony provision. PSR ¶ 79. The district court sentenced petitioner to 180 months of

imprisonment, to be followed by three years of supervised release. C.A. ROA 356; Judgment 2.

On appeal, petitioner argued for the first time that he was not subject to an increased maximum term of imprisonment under Section 1326(b)(2). 11-10835 Pet. C.A. Br. 8-16. Specifically, petitioner contended that his prior conviction for Texas manslaughter did not qualify as a conviction for a "crime of violence" under either Section 16(a) or Section 16(b). Id. at 11-14. Petitioner did not challenge Section 16(b) as unconstitutionally vague. Pet. App. 4a; Pet. 9.

Applying plain-error review, the court of appeals affirmed. Pet. App. 57a-63a. The court found it unnecessary to resolve whether Texas manslaughter qualified as a "crime of violence" under Section 16(a) or (b). Id. at 60a. The court explained that petitioner also had a prior conviction for evading arrest using a motor vehicle and that, under circuit precedent, that offense qualified as a "crime of violence" under Section 16(b). Ibid. The court therefore determined that, "even if categorizing [petitioner's] manslaughter conviction as a crime of violence were plain error," his conviction for evading arrest using a motor vehicle was an "alternative basis" for applying Section 1326(b)(2). Id. at 62a. In February 2013, this Court denied a petition for a writ of certiorari. 568 U.S. 1204.

3. In October 2013, petitioner filed a motion under Section 2255 to vacate his sentence, alleging, among other things,

ineffective assistance of counsel. C.A. ROA 222. The district court denied the motion, 13-cv-880 D. Ct. Doc. 11, at 1-5, and the court of appeals dismissed petitioner's appeal, 14-10456 C.A. Order 1 (July 8, 2014).

In June 2014, petitioner filed a second motion under Section 2255 to vacate his sentence, challenging the calculation of his offense level under the advisory Sentencing Guidelines. C.A. ROA 230. The district court dismissed the motion because the court of appeals had not authorized petitioner to file a second Section 2255 motion. 14-cv-442 D. Ct. Doc. 4, at 1-2. The court of appeals thereafter denied petitioner's request for such authorization. 14-11082 C.A. Order 1-2 (Mar. 17, 2015).

4. In Johnson v. United States, 576 U.S. 591 (2015), this Court held that the residual clause of the Armed Career Criminal Act of 1984 (ACCA), which defines the term "violent felony" to include offenses punishable by more than one year of imprisonment that "involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague, 576 U.S. at 597. This Court subsequently held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. Welch v. United States, 578 U.S. 120, 135 (2016).

In 2016, petitioner moved for authorization to file a successive Section 2255 motion arguing that Section 16(b) is unconstitutionally vague in light of Johnson and that his prior

conviction for evading arrest using a motor vehicle therefore did not qualify as a "crime of violence." Pet. App. 55a. The court of appeals denied petitioner's motion for authorization, citing a post-Johnson decision of the en banc court rejecting a vagueness challenge to Section 16(b). Id. at 56a (citing United States v. Gonzalez-Longoria, 831 F.3d 670 (5th Cir. 2016) (en banc), vacated, 138 S. Ct. 2668 (2018)).

5. In Sessions v. Dimaya, 138 S. Ct. 1204 (2018), this Court held that the definition of crime of violence in Section 16(b) is unconstitutionally vague. Id. at 1223. The Court observed that Section 16(b) suffered from "the same two features," "combined in the same constitutionally problematic way," that had led the Court in Johnson to find the ACCA's residual clause unconstitutionally vague. Id. at 1213. In 2018, after obtaining authorization from the court of appeals, Pet. App. 54a, petitioner filed a successive Section 2255 motion, arguing that Dimaya precluded reliance on Section 16(b) and that his prior convictions for manslaughter and evading arrest using a motor vehicle therefore did not qualify as crimes of violence, C.A. ROA 35-37.

The district court denied the Section 2255 motion. Pet. App. 44a-53a. Although the court agreed with petitioner that he had shown cause for procedurally defaulting a constitutional challenge to Section 16(b) by failing to raise it on direct review, id. at 48a, the court observed that Section 16(a) "remains a viable definition of 'crime of violence'" after Dimaya, id. at 49a. And

it determined that Texas manslaughter qualifies as a "crime of violence" under Section 16(a). Id. at 52a. The court explained that, under then-prevailing circuit precedent, "a statute criminalizing recklessly causing the death of an individual * * * is one that has use of force as an element." Id. at 51a-52a (citing United States v. Reyes-Contreras, 910 F.3d 169, 183-184 (5th Cir. 2018) (en banc)). The district court therefore found that the sentencing court "did not err in relying on [petitioner's] prior conviction [for] Texas Manslaughter when imposing his enhanced sentence pursuant to § 1326(b)(2)." Id. at 52a. The district court declined to issue a certificate of appealability (COA). Id. at 53a.

Petitioner filed a motion asking the court of appeals to grant a COA on the issue of whether the "reckless causation of injury" is "a 'use' of physical force 'against' the victim." 20-10705 Pet. C.A. Mot. for COA 3 (Sept. 29, 2020). While his motion was pending, this Court in Borden v. United States, 141 S. Ct. 1817 (2021), determined that Tennessee reckless aggravated assault lacks a mens rea element sufficient to qualify it as an offense involving the "use of physical force against the person of another" for purposes of the definition of "violent felony" in the elements clause of the ACCA, 18 U.S.C. 924(e)(2)(B)(i). The court of appeals subsequently granted petitioner a COA. Pet. App. 6a.

6. The court of appeals affirmed the denial of petitioner's Section 2255 motion. Pet. App. 1a-43a.

The court of appeals determined that petitioner had procedurally defaulted his vagueness claim and could not excuse that default. Pet. App. 18a-32a. The court observed that to excuse his procedural default, petitioner "must show either (A) cause and prejudice or (B) actual innocence." Id. at 18a. The court determined that he could show neither. Ibid.

The court of appeals observed that in Reed v. Ross, 468 U.S. 1 (1984), this Court had "held that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause." Pet. App. 19a (quoting Reed, 468 U.S. at 16) (brackets omitted). The court of appeals further observed that subsequent decisions of this Court "have substantially limited that holding." Ibid. The court of appeals noted that in Smith v. Murray, 477 U.S. 1 (1986), this Court emphasized that "perceived futility alone" cannot constitute cause, and that the relevant question "is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Pet. App. 19a (citations omitted). The court of appeals also noted that in Bousley v. United States, 523 U.S. 614 (1998), this Court "reaffirmed that 'where the basis of a claim is available, and other defense counsel have perceived and litigated that claim,' the claim is not novel." Pet. App. 19a (citation omitted). The court of appeals explained that a claim therefore "is not 'novel'

where a prisoner could (or where other prisoners did in fact) raise it at time X." Id. at 20a.

The court of appeals rejected petitioner's contention that the legal basis for a vagueness challenge to Section 16(b) was so novel that it was not reasonably available to him on direct appeal. Pet. App. 20a-22a. The court acknowledged that petitioner "did not then have the benefit of Johnson and Dimaya." Id. at 20a. But the court identified "three reasons" why petitioner nevertheless "had the tools for timely raising his vagueness claim," ibid.: (1) this "Court has recognized that criminal statutes are subject to vagueness challenges since at least 1954," ibid., and "has recognized vagueness challenges to sentencing provisions since at least 1979," id. at 20a-21a; (2) other defendants were raising vagueness challenges to Section 16(b) before petitioner "ever set foot in federal court," including challenges by "the Federal Public Defender for the Western District of Texas," who "had squarely attacked [Section 16(b)] as unconstitutionally vague three years before [petitioner's] sentencing," id. at 21a; and (3) "other defendants were raising vagueness challenges to other similarly worded statutes before [petitioner's] sentencing," ibid. The court of appeals also emphasized that Justice Scalia had "argued at length that ACCA's materially identical residual clause was unconstitutionally vague" in his dissent in James v. United States, 550 U.S. 192, 214-231 (2007), and had "expanded" on "his void-for-vagueness argument" in

his dissent in Sykes v. United States, 564 U.S. 1, 28-35 (2011). Pet. App. 21a. The court found that those opinions "provided [petitioner] the tools needed to raise his vagueness claim." Ibid.

The court of appeals rejected petitioner's reliance on Reed. Pet. App. 22a-28a. The court observed that Reed had listed three categories of "novelty" and that petitioner had invoked the first two: "(1) a Supreme Court decision that overturns a Supreme Court precedent," and "(2) a Supreme Court decision that overturns a widespread lower-court practice." Id. at 25a. The court of appeals concluded, however, that the first two categories "were dicta" because this Court "has never relied" on them. Ibid. The court of appeals also explained that "Bousley and Murray squarely held that futile claims are not novel" and thus "unraveled Reed's first two categories," whose "entire premise is futility." Ibid. And the court emphasized that "[d]efense counsel 'routinely raise arguments to preserve them for further review despite binding authority to the contrary'" and that "[t]his entire enterprise would be pointless if futility constituted cause." Id. at 26a (citation omitted).

The court of appeals additionally rejected petitioner's alternative argument that his procedural default should be excused because he is actually innocent. Pet. App. 28a-32a. The court explained that "'actual innocence' means factual innocence, not mere legal insufficiency." Id. at 28a (citation omitted). And the court viewed petitioner's contention that he lacked a prior

conviction for an "aggravated felony" as a claim of legal, not factual, innocence. Id. at 29a.

Judge Davis dissented. Pet. App. 33a-43a. In his view, a vagueness challenge to Section 16(b) was not "reasonably available" to petitioner until this Court in Johnson "overruled James and decided the constitutional issue favorably to [petitioner]." Id. at 33a.

ARGUMENT

Petitioner contends (Pet. 19-23) that he showed cause for the procedural default of his vagueness challenge to Section 16(b). The court of appeals correctly rejected that contention, and the question presented does not implicate any circuit conflict warranting this Court's review. This case would also be a poor vehicle to address the question presented because this Court's review would be complicated by threshold questions about how the Court's ACCA-related precedents apply to Section 16(b). The petition for a writ of certiorari should be denied.*

1. Petitioner does not dispute that he procedurally defaulted his vagueness claim by failing to raise it on direct review. See Pet. App. 18a ("All agree that [petitioner] procedurally defaulted his void-for-vagueness claim."). Nor does petitioner challenge the court of appeals' determination that he cannot show actual innocence. Id. at 28a-32a. Petitioner

* Another pending petition for a writ of certiorari raises a similar issue. See Maxime v. United States, No. 22-5549 (filed Sept. 6, 2022).

accordingly does not dispute that to pursue his vagueness claim on collateral review, he must demonstrate "cause" for his failure to raise the claim and "actual 'prejudice'" resulting from the constitutional error. Bousley v. United States, 523 U.S. 614, 622 (1998) (citation omitted). As the court of appeals correctly determined, petitioner's claim fails at the outset because he cannot show "cause" for his default.

a. This Court has explained that "cause" may exist where a constitutional claim "is so novel that its legal basis is not reasonably available to counsel." Reed v. Ross, 468 U.S. 1, 16 (1984). The Court has emphasized, however, that the "futility" of raising a claim "cannot alone constitute cause." Engle v. Isaac, 456 U.S. 107, 130 (1982); see Bousley, 523 U.S. at 623 (reaffirming that "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time'") (citation omitted); Smith v. Murray, 477 U.S. 527, 535 (1986) (reaffirming that "perceived futility alone cannot constitute cause") (citation omitted). The existence of cause instead turns on "the novelty of [the] constitutional issue" itself. Reed, 468 U.S. at 13; see Murray, 477 U.S. at 537 (explaining that "[t]he question is not whether subsequent legal developments have made counsel's task [in raising a particular claim] easier, but whether at the time of the default the claim was 'available' at all"); Reed, 468 U.S. at 15 (focusing on "the novelty of [the] constitutional question"). "If counsel ha[d] no

reasonable basis upon which to formulate a constitutional question," Reed, 468 U.S. at 14-15, then the "issue" was "sufficiently novel" to "excuse" counsel's "failure to raise it," id. at 16; see id. at 17 (framing the relevant inquiry as "whether an attorney has a 'reasonable basis' upon which to develop a legal theory").

Here, the court of appeals correctly determined that the legal basis for a vagueness challenge to Section 16(b) was reasonably available to petitioner at the time of his sentencing and direct appeal. Pet. App. 20a-22a. As the court of appeals explained, this Court has long recognized that criminal statutes and sentencing provisions are subject to vagueness challenges under the Due Process Clause. Id. at 20a-21a. And other defendants had raised such challenges to Section 16(b) and other similarly worded statutes long before petitioner's sentencing. Id. at 22a; see, e.g., United States v. Veasey, 73 F.3d 363, 1995 WL 758439, at *2 (6th Cir. 1995) (Tbl.) (per curiam); United States v. Presley, 52 F.3d 64, 68 (4th Cir.), cert. denied, 516 U.S. 891 (1995); United States v. Powell, 967 F.2d 595, 1992 WL 127038, at *3 (9th Cir.) (Tbl.), cert. denied, 506 U.S. 960 (1992); United States v. Argo, 925 F.2d 1133, 1134-1135 (9th Cir. 1991); United States v. Sorenson, 914 F.2d 173, 175 (9th Cir. 1990), cert. denied, 498 U.S. 1099 (1991).

Indeed, "the Federal Public Defender for the Western District of Texas had squarely attacked [Section 16(b)] as

unconstitutionally vague three years" before petitioner failed to raise the issue. Pet. App. 21a; see United States v. Nevarez-Puentes, 278 Fed. Appx. 429, 430 (5th Cir.) (per curiam), cert. denied, 555 U.S. 1050 (2008). Given that "various forms of the claim [petitioner] now advances had been percolating in the lower courts for years at the time of his original appeal," "it simply is not open to argument that the legal basis of the claim * * * was unavailable to counsel at the time." Murray, 477 U.S. at 537; see Bousley, 523 U.S. at 622 (rejecting a novelty-based "cause" argument where the "Federal Reporters were replete with cases" considering the purportedly novel claim "at the time" petitioner should have raised it); Engle, 456 U.S. at 131 (rejecting a novelty-based "cause" argument where "dozens of defendants" had previously raised the purportedly novel claim).

Moreover, by the time of petitioner's sentencing and direct appeal, Justice Scalia had already "develop[ed] [the] legal theory" on which to challenge Section 16(b) on vagueness grounds. Reed, 468 U.S. at 17. In James v. United States, 550 U.S. 192 (2007), Justice Scalia, joined by Justices Stevens and Ginsburg, identified reasons why the Court's interpretation of the ACCA's similarly worded residual clause had rendered the clause incompatible with "the constitutional prohibition against vague criminal laws." Id. at 230 (Scalia, J., dissenting). In Sykes v. United States, 564 U.S. 1 (2011), Justice Scalia reiterated his view that the ACCA's residual clause was "void for vagueness,"

setting forth his reasons in greater detail. Id. at 28 (Scalia, J., dissenting); see id. at 33-35. And in Derby v. United States, 131 S. Ct. 2858 (2011), Justice Scalia yet again urged the Court to "grant certiorari" and "declare ACCA's residual provision to be unconstitutionally vague." Id. at 2860 (Scalia, J., dissenting from denial of certiorari). Thus, by the time of petitioner's sentencing and direct appeal, the legal basis for a vagueness challenge to Section 16(b) was "far from unknown," Engle, 456 U.S. at 131; Justice Scalia had already "laid the basis" for a vagueness challenge to the ACCA's residual clause and other similarly worded provisions, ibid., giving petitioner "the tools" necessary "to construct [his] constitutional claim," id. at 133.

b. Petitioner errs in contending (Pet. 19-23) that he can nevertheless show "cause" for his procedural default under this Court's decision in Reed. In Reed, this Court stated that it had previously identified, for purposes of retroactivity analysis, "three situations in which a 'new' constitutional rule, representing 'a clear break with the past,' might emerge from this Court": "First, a decision of this Court may explicitly overrule one of [the Court's] precedents"; "[s]econd, a decision may overtur[n] 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"; and third, "a decision may disapprov[e] a practice this Court arguably has sanctioned in prior cases." 468 U.S. at 17 (quoting United States v. Johnson,

457 U.S. 537, 549, 551 (1982)) (internal quotation marks omitted; third and fourth sets of brackets in original). Reed suggested that when a new decision of this Court "falling into one of the first two categories is given retroactive application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a [lower] court to adopt the position that this Court has ultimately adopted," and that the "failure of a defendant's attorney to have pressed such a claim * * * is sufficiently excusable to satisfy the cause requirement." Ibid.

Reed's three categories were derived from this Court's decision in United States v. Johnson, which determined that a new constitutional rule does not apply retroactively, even to cases on direct review, if the new rule represented a "clear break with the past." 457 U.S. at 549 (citation omitted); see id. at 551. But after Reed, this Court overruled that aspect of United States v. Johnson in Griffith v. Kentucky, 479 U.S. 314 (1987), "hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Id. at 328. The Court does not appear to have relied on United States v. Johnson's "clear break" categories since then, suggesting that any special distinction for those categories may lack continuing salience. And even if those categories retained

significance after Griffith, Reed itself concerned only "the third category," 468 U.S. at 18, which petitioner does not invoke, see Pet. App. 25a. Instead, the most relevant aspect of Reed -- its explanation that a defendant may show "cause" when "a constitutional claim is so novel that its legal basis is not reasonably available to counsel," 468 U.S. at 16 -- cuts against petitioner here, as it is undisputed that defendants raised similar claims before petitioner's default, see Pet. App. 21a.

In any event, petitioner errs in asserting (Pet. 9, 21) that he can show cause under Reed's first category. That category contemplates a situation in which, at the time of default, the constitutional claim is foreclosed by a precedent of this Court that the Court later "explicitly overrule[s]." Reed, 468 U.S. at 17. But no precedent of this Court foreclosed petitioner's vagueness challenge to Section 16(b) at the time of his default. Contrary to petitioner's suggestion (Pet. 9, 21), this Court's decision in Leocal v. Ashcroft, 543 U.S. 1 (2004), involved only a question of statutory interpretation and did not address any constitutional challenge to Section 16(b). See id. at 11 (holding that Section 16 "cannot be read to include [the challenged] conviction for [driving under the influence] causing serious bodily injury under Florida law"). And although this Court did address vagueness challenges in James, 550 U.S. at 210 n.6, and in Sykes, 564 U.S. at 15-16, it did so only with respect to the ACCA's residual clause. Accepting petitioner's vagueness argument with

respect to Section 16(b) therefore would not have required this Court to "explicitly overrule one of [its] precedents." Reed, 468 U.S. at 17.

c. Petitioner contends that the court of appeals' approach will "create 'perverse incentives for counsel on direct appeal' to raise all possible claims to avoid a waiver." Pet. 22 (citation omitted). But petitioner cannot point to a flood of wasteful litigation in the circuits that have interpreted Reed consistently with the decision below. See Pet. App. 20a, 25a-26a. In any event, "[n]o procedural principle is more familiar to this Court than that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." Puckett v. United States, 556 U.S. 129, 134 (2009) (citation omitted). And it is well established that "even when the law is against a contention, a litigant must make the argument to preserve it for later consideration." United States v. Smith, 241 F.3d 546, 548 (7th Cir.), cert. denied, 534 U.S. 918 (2001).

The enforcement of procedural-default rules is critical to ensuring that collateral review remains "an extraordinary remedy" that "'will not be allowed to do service for an appeal.'" Bousley, 523 U.S. at 621 (citation omitted). Failure to enforce such rules "would invite criminal defendants to bypass the preferred procedural avenue of trial and direct appeal in favor of collateral review," which would then "serve as an all-purposive receptacle

for claims which in hindsight appear more promising than they did at the time of trial." United States v. Sanders, 247 F.3d 139, 145-146 (4th Cir.), cert. denied, 534 U.S. 1032 (2001). The decision below accords with the importance of the finality of criminal judgments. See, e.g., Blackledge v. Allison, 431 U.S. 63, 71 (1977).

2. Petitioner contends (Pet. 13-18) that the circuits are divided over whether a claim of the sort raised in his successive Section 2255 motion is sufficiently novel to demonstrate cause to excuse a procedural default. This Court has recently and repeatedly declined to review that purported conflict. See, e.g., Granda v. United States, 142 S. Ct. 1233 (2022) (No. 21-6171); Blackwell v. United States, 142 S. Ct. 139 (2021) (No. 20-8016); Gatewood v. United States, 141 S. Ct. 2798 (2021) (No. 20-1233). The same result is appropriate here. None of the other circuits' decisions that petitioner cites (Pet. 13-18) involved a vagueness challenge to Section 16(b), or addressed whether the reasoning in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), was sufficiently novel to excuse the procedural default of a claim that Section 16(b) was unconstitutionally vague -- the issue that the court of appeals considered in its decision here.

Most of the decisions cited by petitioner, two of which were nonprecedential, involved challenges to the ACCA's residual clause. See Raines v. United States, 898 F.3d 680, 683 (6th Cir. 2018) (per curiam); Lassend v. United States, 898 F.3d 115, 118

(1st Cir. 2018), cert. denied, 139 S. Ct. 1300 (2019); United States v. Snyder, 871 F.3d 1122, 1124 (10th Cir. 2017), cert. denied, 138 S. Ct. 1696 (2018); see also Ezell v. United States, 743 Fed. Appx. 784, 785 (9th Cir. 2018) (per curiam) (nonprecedential), cert. denied, 139 S. Ct. 1601 (2019); Rose v. United States, 738 Fed. Appx. 617, 625 (11th Cir. 2018) (per curiam) (nonprecedential). Those cases involve different considerations -- principally, the effect of the ACCA residual-clause decisions in James and Sykes, and how the timing of a particular prisoner's sentencing relates to them. See, e.g., Lassend, 898 F.3d at 118; Snyder, 871 F.3d at 1127; Ezell, 743 Fed. Appx. at 785; Rose, 738 Fed. Appx. at 626. As the Sixth and Eleventh Circuits have since expressly recognized, such decisions do not resolve cause-and-prejudice issues for other statutes. See Gatewood v. United States, 979 F.3d 391 (6th Cir. 2020), cert. denied, 141 S. Ct. 2798 (2021); Granda v. United States, 990 F.3d 1272, 1287 (11th Cir. 2021) (rejecting the argument that James excuses a defendant's procedural default of a vagueness challenge to 18 U.S.C. 924(c)(3)(B), "a clause to which James did not even apply"), cert. denied, 142 S. Ct. 1233 (2022).

Other decisions cited by petitioner likewise addressed cause and prejudice in other contexts and did not involve specific consideration of cause and prejudice to excuse procedural default of a claim that Section 16(b) is unconstitutionally vague. See Jones v. United States, 39 F.4th 523, 524 (8th Cir. 2022)

(vagueness challenge to 18 U.S.C. 924(c)(B)(3)); United States v. Jackson, 32 F.4th 278, 283 (4th Cir. 2022) (same), petition for cert. pending, No. 22-5982 (filed Oct. 31, 2022); Cross v. United States, 892 F.3d 288, 291 (7th Cir. 2018) (vagueness challenge to mandatory Sentencing Guidelines); see also United States v. Werle, 35 F.4th 1195, 1199-1201 (9th Cir. 2022) (statutory claim under Rehaif v. United States, 139 S. Ct. 2191 (2019)). Some also involved sentencings that predated Justice Scalia's explication of vagueness principles in James and Sykes. See Jackson, 32 F.4th at 282; Cross, 892 F.3d at 292. Here, however, that explication "provided [petitioner] the tools needed to raise his vagueness claim." Pet. App. 21a. Finally, the Seventh Circuit's approach in Cross is in significant tension, if not outright conflict, with prior circuit precedent that, like the decision below here, included in its analysis of cause and prejudice an examination of whether "[o]ther defendants had been making" the procedurally defaulted claim. Smith, 241 F.3d at 548; see Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

3. Threshold questions about how this Court's ACCA-related precedents interacted with Section 16(b) moreover make this case an unsuitable vehicle for addressing the question presented. As noted above, the key decisions on which petitioner relies (Pet. i, 2-3, 4-5, 9, 21, 24) to establish cause for his default -- Johnson,

James, and Sykes -- do not address Section 16(b), the statutory provision at issue here. Instead, those decisions address the ACCA's residual clause.

That aspect of those cases would complicate any application of Reed in this case. For example, petitioner argues (Pet. 2-3, 21, 24) that he can show cause for his default on the theory that James and Sykes foreclosed a vagueness challenge to Section 16(b) at the time of his direct appeal and that Johnson later overruled those precedents. But James and Sykes did not address the constitutionality of Section 16(b), and Johnson did not overrule any precedent rejecting a vagueness challenge to that provision. See p. 18, supra. This Court's consideration of the issues described above -- including the propriety of applying Reed's first category to excuse a default that occurred at a time when no decision of this Court foreclosed the defendant's claim -- could thus be obscured by the need to also consider the extent to which the ACCA-related decisions in Johnson, James, and Sykes governed vagueness challenges to Section 16(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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