NO:

IN THE
SUPREME COURT OF THE UNITED STATES

EMMANUEL MAXIME,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender

SARA W. KANE*
Assistant Federal Public Defender
150 West Flagler Street, Suite 1700
Miami, Florida 33130-1555
Telephone (305) 530-7000
Email: Sara_Kane@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Whether *Johnson v. United States*, 135 S.Ct. 2551 (2015), establishes "cause" to excuse procedurally defaulted 28 U.S.C. § 2255 claims that are predicated on the unconstitutionally vague residual clause in 18 U.S.C. § 924(c)(3)(B).

INTERESTED PARTIES

Petitioner submits that there are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

Emmanuel Maxime v. United States,
No. 19-24827-Civ-Martinez (Feb. 28, 2022)

Emmanuel Maxime v. United States,
No. 16-22876-Civ-Martinez (Sept. 13, 2016)

Emmanuel Maxime v. United States,
No. 14-20265-Civ-Martinez (Apr. 10, 2015)

United States v. Dwight Carter, *et al.*,
No. 09-20470-Cr-Martinez (Nov. 4, 2010)

United States Court of Appeals (11th Cir.):

Emmanuel Maxime v. United States,
No. 22-11482 (June 7, 2022)

In re Emmanuel Maxime,
No. 19-14246 (Nov. 20, 2019)

In re Emmanuel Maxime
No. 17-15400 (Jan. 5, 2018)

Emmanuel Maxime v. United States,
No. 15-12586 (July 26, 2016)

In re Emmanuel Maxime,
No. 16-13671 (July 14, 2016)

United States v. Emmanuel Maxime,
No. 10-15345 (July 24, 2012)

United States Supreme Court:

Emmanuel Maxime v. United States,
No. 16-6737 (Jan. 9, 2017)

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OCTOBER TERM, 2022

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PETITION FOR WRIT OF CERTIORARI

Emmanuel Maxime respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 22-11482 in that court on June 7, 2022, which denied a certificate of appealability to appeal the order of the United States District Court for the Southern District of Florida, denying petitioner's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255.

OPINIONS BELOW

The decision of the court of appeals denying a certificate of appealability (App. A-1) is unpublished and unreported. The decision of the district court denying petitioner's 28 U.S.C. § 2255 motion to vacate sentence and a certificate of appealability (App. A-3) is unpublished and unreported.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on June 7, 2022. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The lower court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1291, 2253, and 2255.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(1)(A)

(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(3)

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

STATEMENT OF THE CASE[1]

In 2010, petitioner Emmanuel Maxime's jury was instructed that it could rely on one of two predicates to convict him of an 18 U.S.C. §§ 924(c) and (j)(1) offense that added a consecutive term of life imprisonment to his total sentence. (Cr. DE 267; Cr. DE 295). One of those predicates was conspiracy to commit Hobbs Act robbery, which is no longer a valid § 924(c) predicate because it was based on the residual clause that the Court found unconstitutionally vague in *United States v. Davis*, 139 S. Ct. 2319 (2019). *See Brown v. United States*, 942 F.3d 1069, 1075-76 (11th Cir. 2019) (holding that Hobbs Act conspiracy does not satisfy § 924(c)(3)(A) and therefore is not a "crime of violence" after *Davis*).

Pursuant to *Davis*, petitioner brought an authorized, successive 28 U.S.C. § 2255 motion in the district court, arguing that his §§ 924(c) and (j)(1) conviction was invalid because it was based, at least in part, on conspiracy to commit Hobbs Act robbery. (Cv. DE 15). On direct appeal, petitioner had not challenged his §§ 924(c) and (j)(1) conviction on constitutional vagueness grounds, resulting in procedural default of his claim. (Cv. DE 21). Nonetheless, petitioner argued that he had "cause" to overcome procedural default, because, at the time of his sentencing and direct

[1] Citations to the record in the district court will be referred to by the abbreviation "Cv. DE" followed by the docket entry number and the page number. Citations to the record in the underlying criminal case, *United States v. Dwight Carter*, *et al.*, No. 09-20470-Cr-Martinez, will be referred to by the abbreviation "Cr. DE" followed by the docket entry number and the page number, as applicable.

appeal, the claim that the residual clause in § 924(c)(3)(B) was unconstitutionally vague was not "reasonably available" to him, pursuant to the "cause" factors identified in *Reed v. Ross*, 468 U.S. 1 (1984). *Id.* In fact, at the time of his direct appeal, the Court had held that the comparable residual clause in § 924(e)(2)(B) was not unconstitutionally vague. *See James v. United States*, 127 S.Ct. 1586 (2007); *Sykes v. United States*, 131 S.Ct. 2267 (2011). This holding was not overturned until *Johnson v. United States*, 135 S.Ct. 2551 (2015), which was a "clear break from the past." *See Reed*, 468 U.S. at 16. And, the Court in *Davis* relied on *Johnson* to hold, for the first time, that the residual clause in § 924(c)(3)(B) was also unconstitutionally vague. 139 S. Ct. 2319, 2325-27.

The district court relied on controlling Eleventh Circuit precedent, primarily *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), *cert. denied*, 142 S.Ct. 1233 (2022), to find that petitioner could not establish "cause" to overcome procedural default, because the "tools existed" for petitioner to have challenged § 924(c)(3)(B) as unconstitutionally vague on direct appeal. *See* App. A-3.[2] The district court denied both § 2255 relief and a certificate of appealability (COA). *Id.*

Petitioner moved the Eleventh Circuit for a COA. *See* App. A-2. Petitioner argued, in relevant part, that COA should be granted because there was a circuit split

[2] The district court also found that petitioner could not prevail on the merits, because his §§ 924(c) and (j)(1) predicates—conspiracy to commit, and substantive, Hobbs Act robbery—were "inextricably intertwined," making any "potential error," harmless. *Id.*

regarding whether *Johnson* provided "cause" to overcome procedural default for § 2255 movants asserting claims predicated on the unconstitutional vagueness of a residual clause:

> The Seventh and Tenth Circuits hold that under *Reed*, the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), was a clear break from the past, providing cause to excuse procedural default. *See Cross* [*v. United States*], 892 F.3d [288,] 296 (7th Cir. [2018]); [*United States v.*] *Snyder*, 871 F.3d [1122,] 1127 (10th Cir. [2017]). *Granda*, however, disagreed, finding cause only in cases where Supreme Court precedent expressly foreclosed a petitioner from raising a residual clause challenge to § 924(c)(3)(B). *See Granda*, 990 F.3d at 1286-87.

Id.[3]

The Eleventh Circuit denied a COA solely on procedural grounds, finding, in pertinent part, that:

> reasonable jurists would not debate the district court's finding that Maxime's *Davis* claim was procedurally defaulted because he never argued in his original criminal proceedings that his § 924(c) conviction was "invalid since the [18 U.S.C.] § 924(c)(3)(B) residual clause was unconstitutionally vague." *Granda v. United States*, 990 F.3d 1272, 1285-86 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 1233 (2022). And because "the building blocks . . . [to make] a due process vagueness challenge to the § 924(c) residual clause" existed at the time of his direct

[3] Petitioner also argued that COA should be granted as to the merits of his § 2255 claim, because the record established that the jury more likely than not relied solely on the conspiracy predicate to convict him of violating §§ 924(c) & (j). *See* App. A-2. The Eleventh Circuit declined to address the merits in its order denying COA. *See* App. A-1. Thus, the merits of Maxime's claim are not the subject of the instant petition. Should the petition be granted, and should petitioner prevail, he would request that the Court remand his case to the Eleventh Circuit for reconsideration of his motion for COA on the merits.

> appeal in 2010, he lacks cause to excuse the default. *Id.* at 1286-88 (citation omitted).

See App. A-1.

To obtain a COA, the petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted).

As demonstrated below—and argued in petitioner's motion for a COA—there is a circuit split regarding whether a § 2255 movant, raising a claim predicated on the constitutional vagueness of a residual clause, can overcome procedural default in light of the Court's holding in *Johnson*. That split has only become more pronounced since COA was denied. *See Jones v. United States*, 39 F.4th 523, 525-26 (8th Cir. 2022) (holding that § 2255 movant, challenging his § 924(c) conviction in light of *Davis*, had "cause" to overcome default because his claim was "reasonably available only after" *Johnson* overturned *James*); *United States v. Vargas-Soto*, 35 F.4th 979, 993–99 (5th Cir. 2022) (holding that *Johnson* does not provide "cause" to overcome a procedurally defaulted § 2255 claim predicated on the residual clause in 18 U.S.C. § 16(b)), *petition for cert. filed* (U.S. Sept. 2, 2022) (No. 22-5503).

Since there is a circuit split on this issue, reasonable jurists *are* debating it—and COA should have been granted. *See Slack*, 529 U.S. at 484. More to the point, this petition should be granted to resolve the split as to whether *Johnson* establishes

"cause" to excuse procedurally defaulted § 2255 claims that are predicated on the unconstitutionally vague residual clause in § 924(c)(3)(B).

1. In 2010, petitioner Maxime was charged with: conspiring to commit a Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a), from November 2008 through December 1, 2008 (count 1); Hobbs Act Robbery, in violation of 18 U.S.C. §§ 1951(a) and 2, on or about December 1, 2008 (count 2); knowingly carrying and using a firearm during and in relation to, or possessing a firearm in furtherance of, the crimes of violence charged in counts 1 and 2, and "in the course of this violation caus[ing] the death of a person, through the use of a firearm," in violation of 18 U.S.C. §§ 924(c)(a)(A)(I), 924(j)(1), 1111, and 2, on or about December 1, 2008 (count 3). (Cr. DE 122).

2. Maxime's co-conspirator and co-defendant, Dwight Carter, was charged in the same indictment with counts 1, 2 and 3, as well as additional drug crimes. (Cr. DE 122). Maxime's case was severed from Carter's for trial. (Cr. DE 156). Carter was convicted on all counts (Cr. DE 254), before Maxime proceeded to trial. (Cr. DE 259).

3. At trial, petitioner's counsel conceded his guilt as to the conspiracy to commit a Hobbs Act robbery charged in count 1. (Trial Tr. Vol. II: 249). It was also uncontested that the conspiracy—the planning of the robbery—had taken place in the weeks and days leading up to the robbery, and had involved multiple conversations among the co-conspirators, "casing" the location and target of the robbery (an armored truck guard at a mall), Carter obtaining firearms for himself and for Maxime, and borrowing a "getaway" car. (Trial Tr. Vol. II: 244-45; 249-53;

363-66). Both parties also agreed that the Carter followed through with the robbery, and that, during the robbery, Carter had shot and killed the victim. (Trial Tr. Vol. II: 242, 246, 248-49; Trial Tr. Vol. V: 947; 970). The only contested aspect of the trial was petitioner's guilt as to the Hobbs Act robbery itself, in count 2, and the §§ 924(c) & (j) offense, in count 3. In its second closing argument, consistent with its earlier argument and the jury instructions, the government argued to the jury that, "just by participating in [the conspiracy in] Count I, the defendant is guilty of [the §§ 924(c) & (j) offense in] Count III." (Trial Tr. Vol. V: 1002).

4. The jury found Maxime guilty of all three counts. (Cr. DE 271). As to count 3, the jury made a special finding that, during the course of the § 924(c) violation, petitioner "caused the death of Carlos Alvarado through the use of a firearm and . . . the killing was murder." *Id*. In accordance with the law, the jury was not asked to, and did not, specify which theory of liability they adopted as to count 3, nor did they specify which predicate—count 1 or count 2—they relied on to find Maxime guilty of count 3. *Id*.

5. Petitioner was sentenced to the statutory maximum for each count: life imprisonment as to count 3, to be served consecutively to consecutive twenty-year sentences as to each count 1 and count 2. (Cr. DE 295).

6. Maxime's direct appeal was denied. *United States v. Maxime*, 484 Fed. App'x 439, 441 (11th Cir. 2012). Maxime's first motion to vacate pursuant to 28 U.S.C. § 2255 was denied, *Emmanuel Maxime v. United States*, No. 14-20265-Civ-Martinez (S.D. Fla. Apr. 10, 2015), as was COA, *Emmanuel Maxime v. United States*, No. 15-

12586 (11th Cir. July 26, 2016), and a petition for certiorari. *Emmanuel Maxime v. United States*, No. 16-6737 (U.S. Jan. 9, 2017). His second § 2255 motion was dismissed. *Emmanuel Maxime v. United States*, No. 16-22876-Civ-Martinez (S.D. Fla. Sept. 13, 2016).

7. After *Johnson v. United States*, 135 S.Ct. 2551 (2015), petitioner repeatedly sought authorization from the Eleventh Circuit to file a "second or successive" (SOS) motion to vacate his §§ 924(c) & (j) conviction. At first, authorization was denied without prejudice because the motion for COA from his first motion to vacate was still pending. *In re Emmanuel Maxime*, No. 16-13671 (11th Cir. July 14, 2016). Then authorization was denied pursuant to *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), in which the Eleventh Circuit had held that *Johnson* did not invalidate—or apply to—the residual clause of § 924(c)(3)(B). *In re Emmanuel Maxime*, No. 17-15400 (11th Cir. Jan. 5, 2018). Finally, pursuant to *United States v. Davis*, 139 S. Ct. 2319 (2019), authorization to pursue an SOS motion was granted. *In re Emmanuel Maxime*, No. 19-14246 (Nov. 20, 2019).

8. After the Eleventh Circuit's authorization was docketed in the district court, petitioner filed a § 2255 motion and memorandum raising his *Davis* claim, which the government opposed. (Cv. DE 15; Cv. DE 18; Cv. DE 21). The district court relied on controlling Eleventh Circuit precedent, primarily *Granda*, to conclude that petitioner's post-*Davis* challenge to his §§ 924(c) & (j) conviction was both barred by procedural default—because Petitioner could not demonstrate "cause"—and meritless, because the conviction remained supported by the still-valid robbery

predicate—which it concluded was "inextricably intertwined," with the invalid conspiracy predicate. *See* App. A-3. The district court therefore denied relief, and denied a COA. *Id.*[4]

9. Petitioner appealed and moved the court of appeals for a COA as to the district court's procedural and merits rulings. *See* App. A-2. The Eleventh Circuit, relying on *Granda*, denied a COA on the basis of procedural default, alone. *See* App. A-1. This petition follows.

[4] The district court did not decide whether Maxime had established "prejudice," to overcome procedural default. *See* App. A-3. Nor did the Eleventh Circuit. *See* App. A-1. however, Maxime argued before the district court, and in his motion for COA, that his consecutive life sentence, which included a 10-year minimum mandatory and was imposed as a result of an invalid §§ 924(c) & (j) conviction, which was also in excess of the maximum sentence authorized by his other counts of conviction, demonstrated prejudice sufficient to overcome procedural default. *See* App. A-2; Cv. DE 21: 20-21.

REASONS FOR GRANTING THE WRIT

The Court should resolve the circuit split regarding whether *Johnson v. United States*, 135 S.Ct. 2551 (2015), establishes "cause" to overcome procedurally defaulted 28 U.S.C. § 2255 claims predicated on the unconstitutional residual clause in 18 U.S.C. § 924(c)(3)(B).

In *Johnson v. United States*, 576 U.S. 591 (2015), the Court deemed unconstitutionally vague the so-called "residual clause" in the Armed Career Criminal Act ("ACCA"), which defines the term "violent felony" to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). In the Court's view, the process of determining what is embodied in the "ordinary case" of such an offense, and then of quantifying the "risk" posed by that ordinary case, "offer[ed] no reliable way to choose between . . . competing accounts of what 'ordinary' . . . involves." *Johnson*, 576 U.S. at 598. The Court concluded that the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by Judges," in violation of due process. *Id.* at 597.

Johnson was a marked break in the law. The Court had spent "[n]ine years . . . trying to derive meaning from" and "develop the boundaries of" the residual clause. *See id.* at 606; *Welch v. United States*, 578 U.S. 120, 124-25 (2016) (citing *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Sykes v. United States*, 564 U.S. 1 (2011)). In both *James* and *Sykes*, the Court rejected the constitutional vagueness challenge that would ultimately prevail in *Johnson*. *See James* 550 U.S. at 211 n.6, *overruled by Johnson*, 576 U.S. at 606; *Sykes*, 564 U.S. at 15-16*, overruled by Johnson*,

576 U.S. at 606. In *Welch*, the Court held that *Johnson* was a substantive change in law that applied retroactively. *Welch*, 578 U.S. at 130.

Petitioner's direct appeal was filed after *James*, but before *Johnson* and *United States v. Davis*, 139 S. Ct. 2319 (2019). *Davis*, of course, applied the new rule from *Johnson* and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)—"that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case'"—to invalidate the residual clause in § 924(c)(3)(B), as unconstitutionally vague. 139 S. Ct. 2319, 2326-27.

However, petitioner did not challenge the unconstitutional vagueness of § 924(c)(3)(B) on direct appeal, so any challenge to his §§ 924(c) & (j) conviction on that basis was procedurally defaulted. As a "general rule ... claims not raised on direct review may not be raised on collateral review unless the petitioner shows caused and prejudice." *Massaro v. United States*, 538 U.S. 500, 504 (2003) (citing *United States v. Frady*, 456 U.S. 152, 167-168 (1982); *Bousley v. United States,* 523 U.S. 614, 621-622 (1998)). "The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Masarro*, 538 U.S. at 505. "This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." *Reed v. Ross*, 468 U.S. 1, 10 (1984).

There are circumstances, however, where it is neither efficient nor fair to prohibit a petitioner from raising a new claim on collateral review. In *Reed*, the Court held that "the novelty of a constitutional issue" and the "failure to counsel to raise a constitutional issue reasonably unknown to him" may provide "cause" sufficient to overcome a procedural default. *Id*. at 10, 15. *Reed* lists "three situations in which a 'new' constitutional rule, representing 'a clear break with the past' might emerge from this Court[,]" and provide cause to overcome a procedural bar because it was, "so novel that its legal basis was not reasonably available to counsel," at the time of default:

> First, a decision of this Court may explicitly overrule one of our precedents . . . Second, 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, finally, a decision may 'disapprov[e] a practice this Court has arguably sanctioned in prior cases.'

Reed, 468 U.S. at 16-17 (quotation and citations omitted). The Court in *Reed* held that a claim that satisfies any of the above criteria *and* is based on a "constitutional principle that had not been previously recognized but which is held to have retroactive effect," "will almost certainly have [had] . . . no reasonable basis," to have been brought previously. *Id*.

A rough consensus emerged among the courts of appeals that § 2255 claims predicated on § 924(e)(2)(B)(ii)—the same residual clause that was struck down in *Johnson*—could establish "cause" to overcome procedural default, pursuant to *Reed*, because the claim was "not reasonably available" before *Johnson*. *United States v. Snyder*, 871 F.3d 1122, 1127 (10th Cir. 2017); *Lassend v. United States*, 898 F.3d 115, 122–23 (1st Cir. 2018); *Raines v. United States*, 898 F.3d 680, 687 (6th Cir. 2018);

Ezell v. United States, 743 F. App'x 784, 785 (9th Cir. 2018); *Rose v. United States*, 738 F. App'x 617, 626 (11th Cir. 2018); *United States v. Bennerman*, 785 F. App'x 958, 963 (4th Cir. 2019). *But see Gatewood v. United States*, 979 F.3d 391, 396-97 (6th Cir. 2020) (distinguishing *Johnson*-based claims that were defaulted before or after *James*, and holding that the former could not overcome default because *James* had not yet foreclosed claim).

However, that consensus has not extended to § 2255 claims predicated on the unconstitutional vagueness of non-ACCA residual clauses. For example, the district court in petitioner's case found the Eleventh Circuit's decision in *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), compelled it to hold that petitioner could not show "cause" sufficient to excuse the default (and also to deny relief on the merits), because "neither *Johnson* nor *James* considered the § 924(c) residual clause, thereby not depriving the litigants of the tools to challenge that residual clause." *See* App. A-3 at 7 (citing *Granda*, at 1287).

Thereafter, petitioner moved the Eleventh Circuit for a COA on whether he could show "cause" for any default, noting that there was a circuit split regarding whether *Johnson* provided "cause" to overcome procedural default for § 2255 movants asserting claims predicated on the unconstitutional vagueness of a residual clause:

> The Seventh and Tenth Circuits hold that under *Reed*, the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), was a clear break from the past, providing cause to excuse procedural default. *See Cross* [*v. United States*], 892 F.3d [288,] 296 (7th Cir. [2018]); *Snyder*, 871 F.3d at 1127. *Granda*, however, disagreed, finding cause only in cases where Supreme Court precedent expressly foreclosed a petitioner from raising a residual clause challenge to § 924(c)(3)(B). *See Granda*, 990 F.3d at 1286-87.

See App. A-2. Despite the circuit split, the Eleventh Circuit denied a COA, finding that:

> reasonable jurists would not debate the district court's finding that Maxime's *Davis* claim was procedurally defaulted because he never argued in his original criminal proceedings that his § 924(c) conviction was "invalid since the [18 U.S.C.] § 924(c)(3)(B) residual clause was unconstitutionally vague." *Granda v. United States*, 990 F.3d 1272, 1285-86 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 1233 (2022). And because "the building blocks . . . [to make] a due process vagueness challenge to the § 924(c) residual clause" existed at the time of his direct appeal in 2010, he lacks cause to excuse the default. *Id.* at 1286-88 (citation omitted).

See App. A-1.

A year after the Eleventh Circuit decided *Granda*—and one month after the denial of petitioner's COA—the Eighth Circuit came to the contrary conclusion, in *Jones v. United States*, 39 F.4th 523, 525-26 (8th Cir. 2022) (holding that § 2255 movant, challenging his § 924(c) conviction in light of *Davis*, had "cause" to overcome default because his claim was "reasonably available only after" *Johnson* overturned *James*). The Eighth and Eleventh Courts of Appeals have thus now come to diametrically-opposed positions as to whether *Johnson* provides "cause" for § 2255 claims regarding the residual clause in § 924(c)(3)(B) that was struck down in *Davis*.

This disagreement is not limited to § 924(c)(3)(B) claims, or to the Eighth and Eleventh Circuits. It extends to other circuits, and additional non-ACCA residual clauses, as well. *Compare Cross v. United States*, 892 F.3d 288, 296 (7th Cir. 2018) (holding that *Johnson* provides "cause" to overcome procedurally defaulted § 2255 claim predicated on the residual clause in the mandatory Sentencing Guidelines);

with United States v. Vargas-Soto, 35 F.4th 979, 993–99 (5th Cir. 2022) (holding that *Johnson* does not provide "cause" to overcome procedurally defaulted § 2225 claim predicated on the residual clause in 18 U.S.C. § 16(b)). The Court should grant the petition to resolve this latest split between the Eighth and the Eleventh Circuits—thereby also clarifying the "cause" standard for all post-*Johnson* § 2255 claims predicated on the unconstitutional vagueness of non-ACCA residual clauses.

I. There is a clear circuit split between the Eleventh Circuit Court of Appeals and the Eighth Circuit Court of Appeals regarding whether *Johnson* provides "cause" to overcome procedurally defaulted claims predicated on the unconstitutional residual clause in § 924(c)(3)(B).

In 2021, the Eleventh Circuit issued *Granda*. Like petitioner, Granda sought to invalidate a § 924 conviction on the basis that it was predicated on the unconstitutionally vague residual clause in § 924(c)(3)(B).

Granda had not raised this claim on direct appeal, resulting in procedural default. A majority of the panel found that Granda could not establish cause to overcome the default. The court first recognized that "[b]oth *Johnson* and *Davis* announced new constitutional rules," but that "to establish novelty 'sufficient to provide cause' based on a new constitutional principle, Granda must show that the new rule was 'a sufficiently clear break with the past, so that an attorney representing [him] would not reasonably have had the tools for presenting the claim.'" *Granda*, 990 F.3d at 1286 (internal citation omitted). Next, the court discussed the three circumstances from *Reed* in which novelty can establish cause. *Id*.

The court determined that the first *Reed* circumstance—"when a decision of the Supreme Court explicitly overrules one of its precedents" did not apply, despite

Johnson having explicitly overturned *James*, because, "*Davis* did not overrule any prior Supreme Court precedents holding that the § 924(c) residual clause was not unconstitutionally vague." *Id*. at 1287 (citing *Reed*, 468 U.S. at 17).

The court then rejected without discussion the second *Reed* circumstances—"when a Supreme Court decision overturns 'a longstanding and widespread practice to which [the Supreme] Court has not spoken but which a near-unanimous body of lower court authority has expressly approved.'" *Id*. (citing *Reed*, 468 U.S. at 17). However, the Eleventh Circuit had previously rejected the premise that default could be excused by the existence of a wall of adverse circuit authority. *McCoy v United States*, 266 F.3d 1245, 1258 (11th Cir. 2001). According to the Eleventh Circuit, this Court "could not have been clearer that perceived futility does not constitute cause to excuse a procedural default." *Id*. at 1259 (citing *Bousley v. United States*, 523 U.S. 614, 623 (1998), and *Smith v. Murray*, 477 U.S.527, 535 (1996)). The Court in *Granda* thus reiterated, "[t]hat an argument might have less than a high likelihood of success has little to do with whether the argument is available or not." 990 F.3d 1282, 1286 (quotation omitted). "[T]he 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." *Id*. (citing *McCoy*, 266 F.3d at 1258 (internal quotation marks and further citation omitted)). It appears therefore that *Reed*'s second "cause" category is no longer viable in the Eleventh Circuit, under the theory that *Bousley* and *Smith* invalidated that portion of *Reed*, *sub silentio*.

The court decided instead that "Granda's *Davis* claim fits most neatly into the third category," which is "when a Supreme Court decision disapproves of 'a practice [the Supreme Court] arguably has sanctioned in prior cases.'" *Id*. at 1286-87 (citing *Reed*, 468 U.S. at 17). This category asks court to determine, "whether others were recognizing and raising the same or similar claims in the period preceding or concurrent with the petitioner's failure to raise his claim." *Id*. at 1286-87 (internal citation omitted). "[H]owever, '[e]ven if others have not been raising a claim, the claim may still be unnovel if a review of the historical roots and development of the general issue involved indicate that petitioners did not 'lack the tools to construct their constitutional claim.'" *Id*. (quoting *Engle v. Isaac*, 456 U.S. 107, 133 (1982)).

According to the court, "Granda's best argument," with respect to cause under the third *Reed* category, was that *James*, "had directly rejected the argument that the ACCA's residual clause was unconstitutionally vague" at the time of Granda's direct appeal. *See Granda*, 990 F.3d at 1287. "However," the court wrote, "*James* did not consider the § 924(c) residual clause at all." *Id.* The Eleventh Circuit reasoned that the dissenting Justices in *James* signaled that they "were interested in entertaining vagueness challenges to ACCA's residual clause, and perhaps to similar statutes," and that other defendants had raised vagueness challenges to ACCA's residual clause after *James*. *See id*. "These claims did not succeed. But if *James* did not deprive litigants of the tools to challenge even the ACCA's residual clause on vagueness grounds, it surely did not deprive them of the tools to challenge the § 924(c) residual clause." *Id.*

The court further reasoned that Granda did not lack the "building blocks" to raise a due process vagueness challenge at the time. Although "few courts, if any," had addressed a vagueness challenge to § 924(c)(3)(B), "as a general matter, due process vagueness challenges to criminal statutes were commonplace." *Id*. "The tools" thus "existed" to challenge § 924(c)'s residual clause at the time of Granda's direct appeal, and he could not show cause for his default. *See id.* at 1288.

A little more than a year after the Eleventh Circuit decided *Granda*, the Eighth Circuit faced its own procedurally defaulted *Davis*-based § 2255 claim, in *Jones v. United States*, 39 F.4th 523 (8th Cir. 2022). Like Granda—and petitioner—Jones asserted that, in light of *Davis*, his § 924 conviction should be vacated because the predicate offense fell under the unconstitutionally vague residual clause in § 924(c)(3)(B). *Id*. at 525. Jones had also failed to raise this claim prior to sentencing or on direct appeal. However, unlike the Eleventh Circuit majority in *Granda*,[5] the Eighth Circuit panel in *Jones* unanimously held that Jones had "established cause for failing to raise the *Davis* issue on direct review, because the state of the law at the time of his appeal did not offer a reasonable basis upon which to challenge the guilty plea." *Id*. (citing *Reed*, 468 U.S. at 17). The *Jones* court noted that, at the time of Jones' direct appeal, "the Supreme Court had declared that the comparable

[5] Judge Jordan would not have reached the issue of procedural default and therefore did not join in that portion of the opinion. *See Granda*, 990 F.3d at 1296 (Jordan, J., concurring in part and concurring in the judgment).

residual clause in 18 U.S.C. § 924(e)(2)(B) was not unconstitutionally vague," in *James*. *Id*. Thus, it concluded that "Jones's present [*Davis*] claim was reasonably available only after the Supreme Court in *Johnson* . . . overruled prior decisions and held that the residual clause of § 924(e)(2)(B) was unconstitutionally vague." *Id*. at 525-26 (citing *Snyder*, 871 F.3d at 1127).[6]

The reasoning of *Jones* applies equally to petitioner Maxime—and Granda—because, at the time of petitioner's direct appeal, "the Supreme Court had declared that the comparable residual clause in 18 U.S.C. § 924(e)(2)(B) was not unconstitutionally vague," in *James*. *See id*. at 525. *See also United States v. Maxime*, 484 Fed. App'x 439, 441 (11th Cir. 2012). Thus, had Maxime brought his *Davis*-based § 2255 claim before the Eighth Circuit, he would have been able to clear this hurdle to relief, and to obtain review of the merits of his § 2255 claim. However, because he was convicted in the Eleventh Circuit, he was denied even the opportunity to appeal.

[6] At least one other judge, in the Fourth Circuit Court of Appeals, has expressed the same view as the court in *Jones* as to "cause" for post-*Johnson* challenges to the § 924(c)(3)(B) residual clause. *United States v. Crawley*, 2 F.4th 257, 269 n.3 (4th Cir. 2021) (Thacker, J., dissenting) (rejecting government's argument that petitioner had procedurally defaulted a claim that § 924(c)(3)(B) was unconstitutionally vague because that claim was "so novel that its legal basis was not reasonable available to counsel" at the time of default, thereby satisfying *Reed*).

II. This circuit split extends to other non-ACCA residual clauses, to other circuits, and to the continued viability of *Reed v. Ross*, 468 U.S. 1 (1984).

Before *Granda* and *Jones,* the Seventh Circuit Court of Appeals found cause for a defendant's failure to bring a residual clause challenge under the mandatory sentencing guidelines, explaining that "*Johnson* represented the type of abrupt shift with which *Reed* was concerned," because:

> Until *Johnson*, the Supreme Court had been engaged in a painful effort to make sense of the residual clause. In *James*, it took the position that the validity of the residual clause was so clear that it could summarily reject Justice Scalia's contrary view in a footnote. That footnote provided no argument, noted that the constitutional issue was not even "pressed by James or his *amici*," and took comfort from the broad use of "[s]imilar formulations" throughout the statute books. *James*, 550 U.S. at 210 n.6[]. Eight years later, the Court made a U-turn and tossed out the ACCA residual clause as unconstitutionally vague.

Cross, 892 F.3d at 295-96. The Seventh Circuit thus excused the petitioners' failure to challenge the constitutionality of the mandatory guidelines' residual clause "under *Reed*'s first category," *i.e.*, where the Court expressly overrules its own precedent. *See Cross*, 892 F.3d at 296 (citing *Snyder*, 871 F.3d at 1125, 1127).

The Seventh Circuit also held that the "second and third scenarios identified by *Reed* present[ed] even more compelling grounds to excuse" the default, because "*Johnson* abrogated a substantial body of circuit court precedent upholding the residual clause against vagueness challenges." *Id*. (citations omitted). No court "ever came close to striking down the residual clause . . . or even suggested that it would entertain such a challenge." *Id*. "Finally, the Supreme Court had implicitly

'sanctioned' the residual clause by interpreting it as if it were determinate." *Id*. (citations omitted).

The Seventh Circuit summarily dismissed the legal import of any distinction between the residual clause in the mandatory guidelines, because "the [ACCA residual clause] language [that the Court in *Johnson*] evaluated was nearly identical to that in the career-offender guidelines." *Id*. at 295. "Thus," in the Seventh Circuit, a party's "inability to anticipate *Johnson* excuses their procedural default," for even non-ACCA residual clauses. *Cross*, 892 F.3d at 296.

Notably, the Seventh Circuit rejected the government's contention that *Reed* was no longer good law in light of *Teague v. Lane*, 489 U.S. 288 (1989). *Id*. The court noted that the Supreme Court had "relied on" *Reed* in *Bousley*—decided after *Teague*—and concluded that post-*Teague* circuit caselaw had clarified that "legal change under *Teague* was concentrically nested within legal change under *Reed*, rendering the latter superfluous once a claim qualified under *Teague*." *Id*. (internal citation omitted).

In sharp contrast to the Seventh Circuit in *Cross*—and the Eighth Circuit in *Jones*—the Fifth Circuit recently aligned with the Eleventh Circuit by holding that *Johnson* does not provide clause to excuse the procedural default of a claim predicated on the unconstitutional vagueness of the similarly-worded residual clause in 18 U.S.C. § 16(b). *Vargas-Soto*, 35 F.4th at 993–99.

The majority of the panel in *Vargas-Soto* reasoned that post-*Reed* Supreme Court decisions "have substantially limited" *Reed*'s holding that "that where a

constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause." *Id.* at 993 (citing *Reed*, 468 U.S. at 16). Like the Eleventh Circuit in *Granda*, the Fifth Circuit cited *Bousely* and *Smith* for the post-*Reed* rules that "perceived futility alone cannot constitute" cause, and that a claim cannot be "novel" "where the basis of a claim is available, and other defense counsel have perceived and litigated that claim." *Id.* at 993-94.

Thus, the Fifth Circuit reasoned, even if *Johnson* and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), were "bolts from the blue . . . Vargas-Soto undisputedly had the tools for timely raising his vagueness claim," for three reasons: the Supreme Court had long "recognized that criminal statutes are subject to vagueness challenge," other defendants had challenged § 16(b)'s residual clause as unconstitutionally vague years before Vargas-Soto's sentencing, and other defendants had also challenged similarly-worded statutes—such as the ACCA challenge brought (and rejected) in *James* and *Sykes*. *Id.* at 994-95 (internal citations omitted). According to the Fifth Circuit majority, far from establishing cause, Supreme Court decisions that rejected the unconstitutional vagueness of similarly-worded residual clauses "provided Vargas-Soto the tools needed to raise his vagueness claim." *Id. See also Granda*, 990 F.3d at 1286-88.

Importantly, the Fifth Circuit also opined that *Reed*'s first two "cause" categories—(1) a Supreme Court decision that overturns its own precedent and (2) a Supreme Court decision that overturns a widespread lower-court practice—were not only "dicta," but were effectively "unraveled" but *Bousley* and *Smith*, "because their

entire premise is futility." *Vargas-Soto*, 35 F.4th at 997. *Bousley*, according to the Fifth Circuit, thus whittled *Reed* down to a fraction of its third "cause" category: to the "single question of whether the 'claim is so novel that is legal basis is not reasonably available to counsel.'" *Id.* (citing *Bousley*, 523 U.S. at 622).

The Fifth Circuit majority also contended that "rigid" application of *Reed* would run contrary to the Antiterrorism and Effective Death Penalty Act (AEDPA), and *Teague*, which, together, demand that "new or novel rules generally do *not* help prisoners file new requests for post-conviction relief." *Id.* at 995-96.

Finally, it offered a "practice"—or policy—reason for its position: defense lawyers "routinely raise arguments to preserve them for further review despite binding authority to the contrary," and allowing futility to constitute cause would make this "entire enterprise" "pointless." *Id.* at 997-98. The court worried, also, that it "would create a system of litigation freeriding, under which prisoners who do not make arguments get a free ride from those who do." *Id.* at 998.

Judge W. Eugene Davis dissented. He argued that Vargas-Soto's claim was not "reasonably available," because—through his sentencing and direct appeal—*James* foreclosed "the constitutional void-for-vagueness claim he now raises." *Id.* at 1001 (W. Eugene Davis, J., dissenting).

Judge Davis contended that, "because *Johnson* expressly overruled *James*," it "squarely" satisfied *Reed*'s first category of cases that are sufficiently novel to constitute cause, because "a claim is not 'reasonably available' when the Supreme Court bars it." *Id.* at 1002-03. The dissenting judge further pointed out that "every

circuit, seven total, to consider whether *Johnson* is sufficiently novel to establish cause have held, under *Reed*, that it is," and rejected both *Granda*'s "overly formalistic distinction between '*Johnson* claims' which involve § 924(e)(2)(B), and '*Davis*' claims, which involve § 924(c)(3)(B)"—as well as the majority's contention that *Reed*'s first two "cause" categories were no longer good law. *Id*. Instead, Judge Davis maintained that:

> Properly construed, *Murray* and *Bousley* reflect that a futile claim may be the basis for cause, as long as it is sufficiently novel. *Reed* remains the best guidance on how to define novelty, and neither *Murray* nor *Bousley* dealt with a situation in which the Supreme Court overturned its own precedent. Rather than imposing the majority's extraordinary legally-able-to-make standard, both *Murray* and *Bousley* reaffirm that cause exists 'where a constitutional claim is so novel that its legal basis is not ***reasonably available*** to counsel.'

Id. (emphasis in original). Judge Davis concluded that, "[t]he fundamental fallacy to the majority's reasoning is its failure to recognize that a novel claim will almost always be futile." *Id*.

III. The decision below—and *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021)—is wrong.

There is a clear circuit split regarding whether *Johnson* provides "cause" to overcome procedural default for § 2255 claims predicated on non-ACCA residual clauses. Thus, notwithstanding *Granda*, the Eleventh Circuit misapplied the COA standard by finding that its ruling on procedural default—which is contrary to *Cross*, and *Jones*—was beyond all debate. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding that COA standard merely requires the petitioner to "sho[w] that reasonable jurists could debate whether . . . the petition should have been resolved in a different

manner") (internal quotation marks omitted).

More importantly, the Eleventh Circuit's "overly formalistic" application of *Reed* and *Johnson* to exclude the *Davis*-based claim in *Granda* (and this case) is wrong. Petitioner's claim that his §§ 924(c) & (j) conviction is invalid because it is predicated on the unconstitutionally vague residual clause in § 924(c)(3)(B) was not "reasonably available" until the Court first determined, in *Johnson*, that requiring judges to use the "categorical approach" while applying the residual clause "produced 'more unpredictability and arbitrariness' when it comes to specifying unlawful conduct than the Constitution allows." *See Davis*, 139 S.Ct. at 2326 (citing *Johnson*, 135 S.Ct. at 2557-59).

"The Supreme Court has stated that, if one of its decisions 'explicitly overrule[s]' prior precedent when it articulates 'a constitutional principle that had not been previously recognized but which is held to have retroactive application,' then, prior to that decision, the new constitutional principle was not reasonably available to counsel, so a defendant has cause for failing to raise the issue." *Snyder*, 871 F.3d at 1127 (quoting *Reed*, 468 U.S. at 17). "[T]hat is precisely the situation," that *Johnson* created. *Id*. *Johnson* announced a new constitutional rule with "retroactive application" on collateral review. *Welch*, 578 U.S. at 135. "[N]o one—not the government, the judge, or the [defendant]—could reasonably have anticipated *Johnson*." *Snyder*, 871 F.3d at 1127 (quoting *United States v. Redrick*, 841 F.3d 478, 480 (D.C. Cir. 2016)). Prior to *Johnson*, the Supreme Court had "twice rejected constitutional challenges to the ACCA's residual clause." *Id*. (citing *James* and *Sykes*).

And *Johnson* "explicitly overruled" that prior precedent—thereby satisfying the first *Reed* category. *Snyder*, 871 F.3d at 1127. *Accord Cross*, 892 F.3d at 295; *Lassend*, 898 F.3 at 122.

Moreover, as the Seventh Circuit found in *Cross*, *Johnson* satisfies *Reed*'s first "cause" category as to *both* ACCA *and* non-ACCA residual clause claims. *Cross*, 892 F.3d at 295-96. *See also Vargas-Soto*, 35 F.4th at 1003 (W. Eugene Davis, dissenting) ("*Reed*'s first category is plainly applicable and should resolve this case."). Nothing in *Reed*—or elsewhere—supports the distinction made by the Eleventh Circuit between claims predicated on the residual clause § 924(e)(2)(B) as opposed to the residual clause § 924(c)(3)(B). To the contrary, the *Reed* opinion speaks in broad terms of a new constitutional "principle," rather than a more narrow term, like "holding." *See Reed*, 468 U.S. at 14-17.

Note that the Seventh Circuit also correctly concluded that *Johnson* also satisfies *Reed*'s second and third "cause" categories, including as to the non-ACCA residual clause at issue in that case:

> *Johnson* abrogated a substantial body of circuit court precedent upholding the residual clause against vagueness challenges. *E.g.*, *Brierton*, 165 F.3d at 1138–39; *United States v. Presley*, 52 F.3d 64, 68 (4th Cir. 1995); *United States v. Argo*, 925 F.2d 1133, 1134–35 (9th Cir. 1991) . . . no court ever came close to striking down the residual clause . . . or even suggested that it would entertain such a challenge. Finally, the Supreme Court had implicitly "sanctioned" the residual clause by interpreting it as if it were determinate. *Stinson v. United States*, 508 U.S. 36 [] (1993); *Taylor v. United States*, 495 U.S. 575 [] (1990).

Cross, 892 F.3d at 296.

Another way to understand why *Johnson* satisfies all three *Reed* categories as

to non-ACCA residual clauses, such as § 924(c)(3)(B), is to recognize that *Johnson* did more than merely invalidate the ACCA's residual clause, such that claims predicated on *Johnson* are more than run-of-the-mill vagueness claims. Instead, *Johnson* first ignored the long-standing rule that a criminal statute can only be void-for-vagueness if it is vague in all of its applications, *Johnson*, 135 S.Ct. at 2580-81 (Alito, J., dissenting), and then identified—also for the first time—that the practice of *combining* a residual clause *with the categorical approach* created a degree of uncertainty in punishment that violated the constitutional prohibition against vague criminal laws. *Davis*, 139 S. Ct. at 2334. This "practice" was never limited to the ACCA's residual clause, and, thus, neither was the "constitutional principle" that *Johnson* identified. *See id*. at 2326; *Dimaya*, 138 S.Ct. at 1215-16 (observing that, *Johnson* had "straightforward application" to § 16(b) because, like the ACCA's residual clause, it requires application of the categorical approach to its residual clause). *See also Reed*, 468 U.S. at 17 ("cause" exists when the Court "has articulated a constitutional principle that has not been previously recognized").

Importantly, the *Johnson* Court also "explicitly overruled" prior Supreme Court precedent, including *James* and *Sykes*—each of which involved application of the categorical approach to the ACCA's residual clause. *See James*, 127 S.Ct. at 1593; *Sykes*, 131 S.Ct. at 2272-73. *See also Reed*, 468 U.S. at 17 (observing that a new constitutional principle emerges when "a decision of this Court may explicitly overrule one of our precedents").

Additionally, the application of the categorical approach to non-ACCA residual

clauses—such as § 924(c)(3)(B)—was "a longstanding and widespread practice to which this Court [had] not [yet explicitly] spoken, but which a near-unanimous body of lower court authority had expressly approved." *Davis*, 139 S.Ct. at 2326 ("For years, almost everyone understood § 924(c)(3)(B) to require exactly the same categorical approach that this Court found problematic in the residual clauses of the ACCA and § 16."); *Id*. at 2326 n. 4 (listing cases from twelve federal circuits between 1998 and 2017). *See also Reed*, 468 U.S. at 17 (observing that a new constitutional principle emerges when, "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'").

Finally, the application of the categorical approach to the § 924(c)(3)(B) residual clause, for example, was "a practice this Court ha[d] arguably sanctioned in prior cases," by applying the categorical approach to *other* residual clauses. *See, e.g.*, *James*, 127 S.Ct. at 1593 (applying categorical approach to ACCA's residual clause); *Leocal v. Ashcroft*, 125 S.Ct. 377, 381 (2004) (applying categorical approach to §16(b) residual clause). *Johnson* inarguably "disapproved" of this practice. *See Reed*, 468 U.S. at 17 ("And, finally, a decision may 'disapprov[e] a practice this Court has arguably sanctioned in prior cases.'").

Reed also remains good law. While disagreeing about how, the Eleventh and Fifth Circuits each contend that *Bousley* and *Smith* significantly narrowed *Reed. See McCoy*, 266 F.3d at 1258-59; *Vargas-Soto*, 35 F.4th at 993-97. However, *Bousley* did not say it was overruling or narrowing *Reed*. *See Bousley,* 523 U.S. at 622 (citing

Reed). And *Bousley* is not inconsistent with *Reed*. *See United States v. Werle*, 35 F.4th 1195, 1201 (9th Cir. 2022) ("*Reed* and *Bousley* co-exist comfortably."). *Bousley* also did not address a situation in which the Supreme Court recognized a new constitutional principle *and* overturned its own precedent in doing so. *See Lassend*, 898 F.3d at 123; *Vargas-Soto*, 35 F.4th at 1005 (W. Eugene Davis, J., dissenting). Nor did *Bousley* address a situation "where a claim has been uniformly rejected by every circuit to consider it for a sustained period of time." *United States v. Pollard*, 20 F.4th 1252, 1262 (9th Cir. 2021) (Forrest, J., concurring). Instead, *Bousley* addressed a situation that is not applicable here, in which the petitioner failed to raise a non-constitutional claim on direct review that was then being litigated throughout the country, and had even generated a circuit split. *See Bailey v. United States*, 516 U.S. 137, 142 (1995) (noting conflict in circuits on claim at issue in *Bousley*). "Indeed, at the time of petitioner's plea, the Federal Reports were replete with cases involving" the petitioner's claim. *Bousley*, 523 U.S. at 622 (citations omitted). In that situation, the Court held that a petitioner could not show cause to overcome a default. *Id.* But that holding does not affect *Reed's* discussion of other circumstances in which a petitioner can show cause to overcome procedural default. *See Reed*, 468 U.S. at 17. *See also McCoy,* 266 F.3d at 1273 (Barkett, J., concurring) ("It is one thing to preclude, as an excuse, the wholesale speculation that an argument not presented in the state courts would be futile; it is quite another to say that cause should not be recognized when a lawyer declines to make an argument in federal court because every single appellate

court has already ruled against his position.") (emphasis omitted).[7]

Pursuant to *Reed*, and *Bousley*, petitioner's claim—that his §§ 924(c) & (j) conviction is invalid because it is predicated on the unconstitutionally vague residual clause in § 924(c)(3)(B)—was "not reasonably available" to him until the Court overturned itself in *Johnson* and first identified the constitutional infirmity of *combining* the categorical approach and a residual clause. This same constitutional principle applies to, and invalidates, § 924(c)(3)(B). *See Davis*, 139 S.Ct. at 2334. It also provides "cause" to overcome petitioner's procedural default.

IV. This case presents a uniquely uncomplicated vehicle to resolve a growing circuit split.

Due to the narrowness of the decision below—which rests on procedural default, alone, *see* App. A-1, and the timing of this petition—two months after the emergence of a crystal-clear circuit split, and seven years after *Johnson*, Maxime's case provides an uncomplicated opportunity for the Court to resolve an open question of federal law, about which the courts of appeals continue to disagree, with profound implications for federal prisoners and post-conviction practitioners. Whether *Johnson* provides "cause" to excuse procedural default for § 2255 claims predicated on the unconstitutionally vague residual clause in § 924(c)(3)(B) is important in its own

[7] Because even the Eleventh Circuit apparently agrees that *Reed*'s first "cause" category remains viable, *see Granda*, 990 F.3d at 1286-87, and because the most straightforward resolution of this petition would be to find that *Johnson* satisfies that category for claims predicated on the unconstitutionally vague residual clause in § 924(c)(3)(B), the Court need not necessarily resolve the separate circuit split regarding the extent to which all of *Reed*'s "cause" categories remain viable.

right, but, naturally, an opinion from the Court on that question will also bring order to the disarray as to "cause" which has spread to other non-ACCA residual clauses in the post-*Johnson* era. This is an urgent, growing issue that only this Court can resolve, and one that can—and should—be resolved through this petition.

One final aspect of petitioner Maxime's case weighs in favor of granting his petition. Due to the Eleventh Circuit's narrow but erroneous procedural default ruling below—predicated on *Granda*—petitioner was wrongfully denied appellate review of a meritorious claim. Were Maxime in the Eighth Circuit, he would have overcome procedural default—pursuant to *Jones*—and obtained consideration of the merits of his *Davis* claim. As argued in his motion for COA, because there is a substantial likelihood that the jury in Maxime's case relied only on a Hobbs Act conspiracy predicate in convicting him of a §§ 924(c) & (j) violation, he is entitled to relief. *See* App-2, at 23-31. Thus, in the Eighth Circuit, Maxime's §§ 924(c) & (j) conviction and sentence could have been vacated. Whether petitioner has to serve a consecutive life sentence of imprisonment should not come down to the vagaries of geography. By granting Maxime's petition, the Court can resolve this otherwise unwarranted disparity.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

/s/ Sara W. Kane
SARA W. KANE
ASSISTANT FEDERAL PUBLIC DEFENDER
**Counsel for Petitioner*
150 W. Flagler St., Suite 1700
Miami, FL 33130-1555
(305) 533-7000
Email: Sara_Kane@fd.org

Miami, Florida
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