No. 22-5549

IN THE SUPREME COURT OF THE UNITED STATES

EMMANUEL MAXIME, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying a certificate of appealability on petitioner's unpreserved claim, which he asserted on collateral review, that his conviction and sentence for using a firearm during and in relation to a crime of violence resulting in death, in violation of 18 U.S.C. 924(c)(1)(A) and (j)(1), should be vacated based on United States v. Davis, 139 S. Ct. 2319 (2019).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1, at 1-3) is unreported. The order of the district court (Pet. App. A3, at 1-12) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2022. The petition for a writ of certiorari was filed on September 6, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); one count of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and one count of using a firearm during and relation to a crime of violence resulting in death, in violation of 18 U.S.C. 924(c)(1)(A) and (j)(1). Judgment 1. The district court sentenced him to 20 years of imprisonment on the Hobbs Act conspiracy count, a consecutive sentence of 20 years of imprisonment on the Hobbs Act robbery count, and a consecutive life sentence on the Section 924(c) count, all to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. 484 Fed. Appx. 439.

Petitioner subsequently filed unsuccessful motions under 28 U.S.C. 2255 to vacate his sentence. D. Ct. Doc. 404 (Apr. 10, 2015); D. Ct. Doc. 407 (Sept. 13, 2016). In 2019, the court of appeals authorized petitioner to file an additional Section 2255 motion. 19-14246 C.A. Order (Nov. 20, 2019). The district court denied the motion and declined to issue a certificate of appealability (COA). Pet. App. A3, at 1-12. The court of appeals likewise denied a COA. Pet. App. A1, at 1-3.

1. On December 1, 2008, Carlos Alvarado, an armored-car driver for Dunbar Security, arrived at the Dadeland Mall in Miami-Dade County, Florida, and collected money from several stores in

the mall. 484 Fed. Appx. at 441. Alvarado had over $60,000 in a Dunbar Security canvas bag as he walked toward a mall exit to return to his armored vehicle. Ibid. As Alvarado approached the exit, petitioner and Dwight Carter, with firearms in their hands, rushed up to Alvarado and yelled at him to drop his bag and get on the ground. Id. at 441-442. When Alvarado did not immediately comply, Carter fired eight or nine shots, four of which hit Alvarado. Id. at 442. Carter grabbed the canvas bag, and he and petitioner made a successful getaway, assisted by two other co-conspirators. Ibid. Alvarado died an hour later in a hospital. Ibid. Witnesses subsequently identified Carter and petitioner as the perpetrators. Ibid.

A federal grand jury in the Southern District of Florida indicted petitioner on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); one count of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and one count of using a firearm during and relation to a crime of violence resulting in death, in violation of 18 U.S.C. 924(c)(1)(A) and (j)(1). Superseding Indictment 1-2. Section 924(c) defines a "crime of violence" as a felony offense that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or, "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)(B). The indictment

identified both of the other offenses charged in the indictment -- conspiring to commit Hobbs Act robbery and Hobbs Act robbery -- as predicate crimes of violence for the Section 924(c) count. Superseding Indictment 2.

Following a trial, a jury found petitioner guilty on all three counts. Jury Verdict 1-2. In 2010, the district court sentenced petitioner to 20 years of imprisonment on the Hobbs Act conspiracy count, a consecutive sentence of 20 years of imprisonment on the Hobbs Act robbery count, and a consecutive life sentence on the Section 924(c) count, all to be followed by five years of supervised release. Judgment 2-3.

2. On appeal, petitioner argued that his confession should have been suppressed, that the prosecution improperly exercised its peremptory challenges, that the district court erred in admitting evidence pursuant to Federal Rule of Evidence 404(b), that he was arrested without probable cause, and that his sentence was substantively unreasonable. 484 Fed. Appx. at 442-443. He did not challenge Section 924(c)(3)(B) as unconstitutionally vague. See ibid.; Pet. App. A3, at 7. The court of appeals rejected petitioner's arguments and affirmed. 484 Fed. Appx. at 443-449.

In 2014, petitioner filed a motion under Section 2255 to vacate his sentence, alleging, among other things, ineffective assistance of counsel. D. Ct. Doc. 398, at 5-11 (Jan. 31, 2014). The district court denied the motion and declined to issue a COA.

D. Ct. Doc. 404, at 1-2. The court of appeals likewise denied a COA, 15-12586 C.A. Order (July 26, 2016), and this Court denied certiorari, 137 S. Ct. 665 (2017).

3. 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 filed a second Section 2255 motion, arguing that Section 924(c)(3)(B)'s definition of "crime of violence" was unconstitutionally vague in light of Johnson and that his Hobbs Act conspiracy and Hobbs Act robbery convictions did not qualify as crimes of violence under the alternative definition in Section 924(c)(3)(A). D. Ct. Doc. 406, at 4 (July 5, 2016). The district court dismissed the motion because the court of appeals had not authorized petitioner to file a second Section 2255 motion. D. Ct. Doc. 407, at 1; see 16-cv-22876 D. Ct. Doc. 7, at 4-6 (Aug. 12, 2016). Petitioner subsequently applied for such authorization. 17-15400 Pet. C.A. Appl. for Leave (Dec. 7, 2017). The court of appeals denied the application,

relying on post-Johnson circuit precedent rejecting a vagueness challenge to Section 924(c)(3)(B). 17-15400 C.A. Order 4 (Jan. 5, 2018) (citing Ovalles v. United States, 861 F.3d 1257, 1265-1267 (11th Cir. 2017)).

4. In United States v. Davis, 139 S. Ct. 2319 (2019), this Court held that Section 924(c)(3)(B) is unconstitutionally vague. Id. at 2336. In 2019, the court of appeals granted petitioner authorization to file a successive Section 2255 motion arguing that Davis precluded reliance on Section 924(c)(3)(B) and that his Section 924(c) conviction is unconstitutional. 19-14246 C.A. Order.

The district court denied petitioner's Section 2255 motion. Pet. App. A3, at 1-12. The court observed that petitioner had not challenged the constitutionality of his Section 924(c) conviction on direct appeal, and determined that petitioner had not shown "cause" or "'actual innocence" to excuse his procedural default. Id. at 7 (citation omitted).

The district court then further determined that even if petitioner had not procedurally defaulted his challenge to his Section 924(c) conviction, the challenge "fail[ed] on the merits." Pet. App. A3, at 8. The court recognized that under circuit precedent, "conspiracy to commit Hobbs Act robbery was not a 'crime of violence' and could therefore not be the sole predicate offense to a conviction under § 924(c)." Id. at 5-6 (citing Brown v. United States, 942 F.3d 1069, 1075-1076 (11th Cir. 2019)). The

court determined, however, that petitioner had not met his burden of "showing a substantial likelihood that the jury relied solely on the conspiracy charge * * * to predicate its conviction on" the Section 924(c) count. Id. at 9.

The district court found that because the conspiracy to commit Hobbs Act robbery was "'inextricably intertwined'" with the Hobbs Act robbery itself, it was "'inconceivable that the jury could have found that [petitioner] conspired to, and did, use and carry a firearm in furtherance of [the] conspiracy * * * without also finding at the same time that he did so' during the robbery," which still qualified as a valid predicate offense. Pet. App. A3, at 8-9 (citations omitted). The court declined to issue a COA. Id. at 12.

5. The court of appeals likewise denied a COA. Pet. App. A1, at 1-3. The court observed that petitioner had procedurally defaulted his claim that Section 924(c)(3)(B) is unconstitutionally vague by failing to raise it in the original proceedings and that to excuse that procedural default, petitioner "must show either (1) cause and prejudice, or (2) his actual innocence." Id. at 2. Relying on circuit precedent, the court explained that petitioner "lacks cause" because "'the building blocks . . . to make a due process vagueness challenge'" to Section 924(c)(3)(B) "existed at the time of his direct appeal in 2010." Ibid. (quoting Granda v. United States, 990 F.3d 1272, 1286-1288 (2021), cert. denied, 142 S. Ct. 1233 (2022)) (brackets

omitted). And the court determined that petitioner "has not shown his actual innocence because he asserts only that he was legally innocent." Ibid. The court also found that "reasonable jurists" would not debate the district court's denial of petitioner's Section 2255 motion on "procedural grounds." Ibid.

ARGUMENT

Petitioner contends (Pet. 26-32) that the court of appeals erred in denying a COA on his claim, which he brought in a motion under 28 U.S.C. 2255, that his conviction for using a firearm during and in relation to a crime of violence resulting in death, in violation of 18 U.S.C. 924(c)(1)(A) and (j)(1), should be vacated in light of this Court's decision in United States v. Davis, 139 S. Ct. 2319 (2019). The court of appeals' decision is correct and 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 review of the question presented would be complicated by threshold questions about how this Court's ACCA-related precedents apply to Section 924(c)(3)(B), and because petitioner would not be entitled to relief even if this Court agreed that he had shown cause for his procedural default. The petition for a writ of certiorari should be denied.*

* Another pending petition for a writ of certiorari raises a similar issue. See Vargas-Soto v. United States, No. 22-5503 (filed Aug. 31, 2022).

1. Once a federal prisoner's conviction becomes final on appeal, he may file a motion under Section 2255 to "move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. 2255(a). If the district court denies relief, the prisoner must obtain a COA from "a circuit justice or judge" before he may appeal that decision. 28 U.S.C. 2253(c)(1); see Fed. R. App. P. 22(b)(1) ("[T]he applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability."). A COA may issue only if the prisoner has made "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), and must "indicate which specific issue or issues satisfy the showing required by paragraph (2)," 28 U.S.C. 2253(c)(3). The "substantial showing" requirement is satisfied only when the prisoner demonstrates "that reasonable jurists could debate" entitlement to relief on the merits and the resolution of any relevant procedural issues. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Contrary to petitioner's contention (Pet. 26), the court of appeals did not err in denying a COA on his argument that he had showed cause for the procedural default of his vagueness challenge to Section 924(c)(3)(B). Although "[t]he COA inquiry * * * is not coextensive with a merits analysis," Buck v. Davis, 137 S. Ct. 759, 773 (2017), this Court has made clear that a prisoner seeking a COA must still show that jurists of reason "could conclude [that] the issues presented are adequate to deserve encouragement to

proceed further," ibid. (citation omitted). Petitioner's argument that he had showed cause did not "deserve encouragement to proceed further," ibid. (citation omitted), particularly given that it was foreclosed by circuit precedent, Granda v. United States, 990 F.3d 1272, 1286-1288 (2021), cert. denied, 142 S. Ct. 1233 (2022).

2. The lower courts correctly determined that petitioner cannot show "cause" to excuse his undisputed procedural default of his vagueness challenge to Section 924(c)(3)(B). Pet. App. A1, at 2; Pet. App. A3, at 7.

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 v. United States, 523 U.S. 614, 623 (1998) (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 "the 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 legal basis for a vagueness challenge to Section 924(c)(3)(B) was reasonably available to petitioner at the time of his sentencing and direct appeal. This Court has long recognized that criminal statutes and sentencing provisions are subject to vagueness challenges under the Due Process Clause. See, e.g., United States v. Batchelder, 442 U.S. 114, 123 (1979); United States v. Harriss, 347 U.S. 612, 617 (1954). And other defendants had raised such challenges to similarly worded statutes long before petitioner's sentencing. 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); see also Granda, 990 F.3d at 1287 (citing other examples). 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 924(c)(3)(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 residual clause had rendered the clause incompatible with "the constitutional prohibition against vague criminal laws." Id. at 230 (Scalia, J., dissenting). Justice Scalia thereby "laid the basis" for vagueness challenges to the ACCA's residual clause and other similarly worded provisions, Engle, 456 U.S. at 131, giving petitioner "the tools" necessary "to construct [his] constitutional claim," id. at 133, even if he would not have had them already.

b. Petitioner errs in contending (Pet. 27-28) 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. Even if those categories retained significance after Griffith, Reed itself concerned only "the third category." 468 U.S. at 18. And 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," id. at 16 -- cuts against petitioner here, as defendants raised similar claims before petitioner's default, see p. 11, supra.

In any event, petitioner errs in asserting (Pet. 27-28) that he can show cause under Reed's three categories. He contends (Pet. 28) that this Court's decision in Johnson v. United States, 576 U.S. 591 (2015), satisfies each category. But Johnson was a decision concerning the constitutionality of the ACCA's residual

clause, not Section 924(c)(3)(B). 576 U.S. at 597. Johnson therefore did not "overrule" any decision, or "overturn" or "disapprove" any practice, pertaining to the statutory provision at issue here. Reed, 468 U.S. at 17 (brackets and citations omitted). Indeed, no precedent of this Court foreclosed petitioner's vagueness challenge to Section 924(c)(3)(B) at the time of his default. See Granda, 990 F.3d at 1287 ("Unlike the Johnson ACCA decision, Davis did not overrule any prior Supreme Court precedents holding that the § 924(c) residual clause was not unconstitutionally vague.").

Similarly, as the court of appeals has recognized, "few courts, if any, had addressed a vagueness challenge to the [Section] 924(c) residual clause before the conclusion of [petitioner's] direct appeal." Granda, 990 F.3d at 1287. There was accordingly no "widespread" and "near-unanimous body" of precedent "expressly" rejecting the particular vagueness claim that petitioner now seeks to advance. Reed, 468 U.S. at 17 (citation omitted). And even assuming that the Eleventh Circuit would have concluded that petitioner's challenge was foreclosed by circuit precedent at the time of petitioner's direct appeal, this Court has held that "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" Bousley, 523 U.S. at 623 (citation omitted); see Murray, 477 U.S. at 535 (emphasizing that "perceived futility alone cannot constitute cause") (citation omitted).

3. Petitioner contends (Pet. 17-26) 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 review of petitions asserting such a 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.

Petitioner asserts (Pet. 17-21) that the Eleventh Circuit's decision in Granda v. United States, on which the lower courts relied here, conflicts with the Eighth Circuit's decision in Jones v. United States, 39 F.4th 523 (2022), which found that a prisoner had cause for failing to raise a vagueness challenge to Section 924(c)(3)(B) on direct appeal, id. at 525. The Eighth and Eleventh Circuits, however, are the only circuits to have squarely confronted the issue of cause to excuse the procedural default of a claim that Section 924(c)(3)(B) is unconstitutionally vague. That shallow and recent disagreement does not warrant this Court's review.

Contrary to petitioner's assertion (Pet. 22-26), the disagreement does not extend beyond the Eighth and Eleventh Circuits. Neither United States v. Vargas-Soto, 35 F.4th 979 (5th Cir. 2022), petition for cert. pending, No. 22-5503, nor Cross v. United States, 892 F.3d 288 (7th Cir. 2018), involved a vagueness

challenge to Section 924(c)(3)(B), or addressed whether the reasoning in Davis was sufficiently novel to excuse the procedural default of a claim that Section 924(c)(3)(B) was unconstitutionally vague. See Vargas-Soto, 35 F.4th at 986 (vagueness challenge to 18 U.S.C. 16(b)); Cross, 892 F.3d at 291 (vagueness challenge to mandatory Sentencing Guidelines).

The Seventh Circuit's decision in Cross also involved a sentencing that predated Justice Scalia's explication of vagueness principles in James. See Cross, 892 F.3d at 292. Here, however, that explication highlighted for petitioner the tools that he might have needed to raise his vagueness claim. See p. 12, supra. And the Seventh Circuit's approach in Cross is in significant tension, if not outright conflict, with prior circuit precedent that, like the Eleventh Circuit's decision in Granda, 990 F.3d at 1287, included in its analysis of cause and prejudice an examination of whether "[o]ther defendants had been making" the procedurally defaulted claim. United States v. Smith, 241 F.3d 546, 548 (7th Cir. 2001), cert. denied, 534 U.S. 918 (2001); 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.").

4. In any event, this case would not be a suitable vehicle to address the question presented, for two reasons. First, review of the question presented would be complicated by threshold questions about how this Court's ACCA-related precedents apply to

Section 924(c)(B)(3). And second, petitioner would not be entitled to relief even if this Court decided the question presented in his favor.

a. Threshold questions about how this Court's ACCA-related precedents interacted with Section 924(c)(3)(B) make this case an unsuitable vehicle for addressing the question presented. The key decisions on which petitioner relies (Pet. i, 5-6, 12-17, 26-33) to establish cause for his default -- Johnson and James -- do not address Section 924(c)(3)(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. 29) that he can show cause for his default on the theory that Johnson later overruled James. But Johnson did not address the constitutionality of Section 924(c)(3)(B) or overrule any precedent rejecting a vagueness challenge to that provision. See pp. 14-15, supra. This Court's consideration of the issues described above -- including the propriety of applying Reed's categories 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 and James governed vagueness challenges to Section 924(c)(3)(B).

b. In any event, as the district court found, even if petitioner had not procedurally defaulted his challenge to his

Section 924(c) conviction, the challenge would "fail[] on the merits." Pet. App. A3, at 8. Thus, even if he could demonstrate cause for his procedural default, he could not establish the separate requirement of showing prejudice, or that he would ultimately be entitled to relief.

To establish "prejudice" sufficient to overcome a procedural default, a defendant must show "actual prejudice" from the alleged error. United States v. Frady, 456 U.S. 152, 168 (1982) (emphasis added). That standard requires a defendant to prove "not merely that the errors at * * * trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 170; see Murray v. Carrier, 477 U.S. 478, 494 (1986). It imposes "a significantly higher hurdle" than would exist had the defendant preserved his claim for review on direct appeal. Frady, 456 U.S. at 166; see Murray, 477 U.S. at 493-494 (explaining that "[t]he showing of prejudice" necessary to excuse a procedural default also is "significantly greater" than that required for an unpreserved claim reviewed for plain error).

Here, the jury was instructed that it could rely on either petitioner's commission of Hobbs Act conspiracy or his commission of Hobbs Act robbery as the predicate "crime of violence" for his Section 924(c) conviction. D. Ct. Doc. 267, at 19 (Aug. 16, 2010). Although Hobbs Act conspiracy is no longer a valid predicate offense in light of Davis, Pet. App. A3, at 8, "Hobbs Act robbery

remains a valid predicate offense for § 924(c)," Pet. App. A1, at 3. Accordingly, to overcome procedural default and prevail on his challenge to his Section 924(c) conviction, petitioner must "establish a substantial likelihood that the jury relied only" on the Hobbs Act conspiracy count in finding him guilty of the Section 924(c) offense. Granda, 990 F.3d at 1288.

As the district court correctly determined, petitioner has not met that burden. Pet. App. A3, at 9. The facts of his particular conduct -- participating in the armed robbery of a security guard at a mall -- show a "'tightly bound factual relationship'" between the conspiracy and the robbery that "preclude[s] [petitioner] from showing a substantial likelihood that the jury relied solely on the conspiracy charge * * * to predicate its conviction" on the Section 924(c) count. Ibid. (quoting Granda, 990 F.3d at 1291). Because they were "inextricably intertwined," id. at 8 (citation omitted), it is "'inconceivable that the jury could have found that [petitioner] conspired to, and did, use and carry a firearm in furtherance of [the] conspiracy * * * without also finding at the same time that he did so' during the robbery," id. at 9 (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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