NO: 22-5549

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONER

I. The acknowledged circuit split between the Eighth and Eleventh Circuits establishes that the Eleventh Circuit was wrong to deny a COA—and that the Court's review is warranted.

The government concedes that the Eighth and Eleventh Circuits have published opposing opinions regarding whether *Johnson v. United States*, 135 S.Ct. 2551 (2015) provides "cause" to overcome procedurally-defaulted claims predicated on *United States v. Davis*, 139 S. Ct. 2319 (2019). Opp. 16. (discussing *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), and *Jones v. United States*, 39 F.4th 523 (8th Cir. 2022)).[1]

Given the circuit split, it would seem uncontroversial that jurists of reason could debate the correctness of the Eleventh Circuit's denial of petitioner Maxime's motion for a certificate of appealability (COA), on the basis that *Johnson* did not provide "cause" for petitioner's procedurally-defaulted *Davis* claim—and, thus, that the Eleventh Circuit incorrectly denied a COA. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (requiring petitioner to "sho[w] that reasonable jurists could debate

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[1] The government notes that the petition was denied in *Granda v. United States*, 142 S. Ct. 1233 (2022) (No. 21-6171). Opp. 16 (citing also *Blackwell v. United States*, 142 S. Ct. 139 (2021) (No. 20-8016)). At that time, no other circuit had spoken directly as to whether *Johnson* provided cause to excuse procedurally-defaulted *Davis* claims. Opp. 21-23, *Granda v. United States*, No. 21-6171 (U.S. 2022); Opp. 8-9, *Blackwell v. United States*, No. 20-8016 (July 14, 2021). Now that *Jones* has established a circuit split, prior certiorari denials have no bearing on the appropriate course of action in this case.

whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further" to obtain a COA) (quotation marks omitted).

Yet, the government maintains that the Eleventh Circuit correctly denied a COA, as "[p]etitioner's argument that he had showed cause did not 'deserve encouragement to proceed further,'" "particularly given that it was foreclosed by" *Granda*. Opp. 9-10. This conclusion perverts the COA standard. *See Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) ("[A] court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief."); *Welch v. United States*, 578 U.S. 120, 128 (2016) (explaining that denial of a COA is appropriate only when "reasonable jurists would consider [the issue] to be beyond all debate"). Whether *Johnson* provides "cause" to overcome procedurally-defaulted *Davis* claims cannot be "beyond all debate" where at least two courts of appeals are actively engaged in opposite sides of a debate on that issue. *See also Lowe v. Swanson*, 663 F.3d 258, 260 (6th Cir. 2011) (observing that the existence of a circuit split satisfies the COA standard); *Lambright v. Stewart*, 220 F.3d 1022, 1027-28 (9th Cir. 2000) ("[T]he fact that another circuit opposes our view satisfies the standard for obtaining a COA.").

The government also mischaracterizes the circuit split as "shallow" and

"recent," and therefore unworthy of the Court's review. Opp. 16.[2] However, the Fourth Circuit has joined the Eighth Circuit, at least in result, by holding that, since a *Davis* claim satisfies 28 U.S.C. §2255(h)(2), a *Davis* movant necessarily has cause to excuse any procedural default. *United States v. Jackson*, 32 F.4th 278, 283 n. 3 (4th Cir. 2022), petition for cert. pending, No. 22-5982 (filed Oct. 31, 2022). And, as explained previously, the circuits are more broadly divided regarding whether *Johnson* establishes "cause" for procedurally-defaulted claims relating to other non-ACCA residual clauses. *See* Pet. 16-17, 22-26 (comparing *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018), with *United States v. Vargas-Soto*, 35 F.4th 979 (5th Cir. 2022), petition for cert. pending, No. 22-5503).[3] There is also a closely-related

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[2] There is no minimum number of circuits that must weigh in for the Court to review an important question that is the subject of a circuit split. *See* SUP. CT. R. 10(a). Notably, in its opposition to other petitions, where *every* court of appeals had issued a precedential opinion on an issue, the government has argued that review was not warranted because the last circuit to weigh in did "not appreciably deepen the conflict." Opp. 8, *Jones v. Hendrix*, 21-857 (U.S. 2022). The government's "heads I win, tails you lose" position as to the ideal depth of a circuit split offers no principled basis to deny review.

[3] The government does not meaningfully rebut petitioner's position that *Cross* and *Vargas-Soto* are extensions of the circuit split at issue here. It instead points out that, in *Cross*, the Seventh Circuit addressed the mandatory guidelines' residual clause, and, in *Vargas-Soto*, the Fifth Circuit addressed the residual clause in 18 U.S.C. § 16. Opp. 16-17. Petitioner never claimed otherwise. Nonetheless the reasoning of the Seventh and Fifth Circuits rationally predicts how those courts would consider the

disagreement regarding the continued validity of *Reed*. *See id.*; Pet. 30-32 & n. 7. By deciding whether *Johnson* establishes "cause" to overcome procedurally-defaulted *Davis* claims, the Court would go a long way toward resolving these wider disputes.

Furthermore, the Eleventh Circuit's "overly formalistic distinction between '*Johnson* claims' which involve [18 U.S.C.] § 924(e)(2)(B), and '*Davis* claims,' which involve § 924(c)(3)(B)," is wrong. *See* Pet. 25-32 (quoting *Vargas-Soto*, 35 F.4th at 1002-03 (Davis., J., dissenting)). "Before *Johnson* and [*Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)] identified constitutional problems with the categorical approach," *Davis*,139 S. Ct. at 2334, the claim that § 924(c)(3)(B)—which is indistinguishable, for vagueness purposes, from the residual clauses at issue in *Johnson* and *Dimaya*, *id*.—was unconstitutionally vague was "not reasonably available" to defendants, because, in *James v. United States*, 127 S.Ct. 1586, 1598 n.6 (2007), the Court determined that the ACCA's residual clause was *not* unconstitutionally vague. *See Reed v. Ross*, 468 U.S. 1, 16 (1984) (holding that cause exists where, along other requirements, the legal basis for claim was "not reasonably available" to counsel on direct appeal).[4]

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question presented here, and demonstrates that the circuits disagree regarding whether *Johnson* establishes cause as to any non-ACCA residual clause claims. *See* Pet. 26-32.

[4] The long-standing availability of vagueness challenges to criminal statutes, *see* opp. 11-12, does little to advance the government's position. As argued previously, *Johnson*-based claims are not run-of-the-mill vagueness claims. *See* Pet. 28-29. Even when raised in the form of unsuccessful, purportedly similar claims, or dissenting opinions, *see* opp. 11-12, the mere existence of the vagueness

"[N]o one—not the government, the judge, or the [petitioner]—could reasonably have anticipated *Johnson*." *United States v. Redrick*, 841 F.3d 478, 480 (D.C. Cir. 2016). By insisting that § 924(c)(3)(B) defendants should have referred to prescient crystal balls, rather than respect the Court's then-binding reasoning, *Granda*'s "cause" conclusion (and the government's position) punishes prisoners who took the Court in *James* (and *Sykes v. United States*, 131 S. Ct. 2267 (2011)), at its word, and unjustly promotes finality over fairness and efficiency. *See Reed*, 468 U.S. at 15 (observing that, while procedural default promotes finality, efficiency, and fairness, "[t]his Court has never held [] that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights"). The Eighth Circuit's contrary approach is correct, efficient, and fair. *See Jones*, 39 F.4th at 525-26 (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 clear circuit conflict as to whether a judicially-crafted procedural doctrine—designed in part to ensure fairness—precludes collateral review of a

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doctrine does not transform a claim that was effectively foreclosed by then-existing precedent into one that was "reasonably available." Moreover, exactly zero of the authorities cited involve the Supreme Court reversing itself, as it did in *Johnson*, and, in so doing, establishing a new, retroactive constitutional rule. *See Welch*, 136 S.Ct. at 135. *Reed* holds that "cause" exists under that precise circumstance, 468 U.S. 1, 17, and the Court has never narrowed *Reed* to fit the government (and *Granda*'s) cramped contrary interpretation.

prisoner's constitutional claim, which undisputedly satisfies the stringent requirements set by Congress in § 2255(h)(2), warrants the Court's review.

II. There are no vehicle problems.

The government also contends that Maxime's petition is an unsuitable vehicle to address the question presented, for three reasons: "threshold questions" would unnecessarily complicate the Court's analysis; even if he could establish "cause," petitioner cannot establish "prejudice" to overcome procedural default; and, finally, that petitioner is not entitled to relief on the merits. Opp. 18-20. These contentions are incorrect, irrelevant, or both.

A. The government claims that "[t]hreshold questions about how this Court's ACCA-related precedents [such as *Johnson* and *James*] interacted with Section 924(c)(3)(B) make this case an unsuitable vehicle for addressing the question presented." Opp. 18. Characterizing questions about how *Johnson* (and *James*) relate to § 924(c)(3)(B) as "threshold" issues, which "would complicate any application of *Reed* to this case," is misleading at best. Whether *Johnson* satisfies *Reed*'s "cause" criteria for purposes of procedurally-defaulted § 924(c)(3)(B) claims is the very question that petitioner asks the Court to answer. Pet. i (identifying question presented as, "[w]hether *Johnson* [], 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)"); Pet. 26-32 (arguing that *Johnson* satisfies each *Reed* category, thereby establishing "cause" to excuse procedurally-defaulted § 924(c)(3)(B) claims). It is also, logically, the same question about which

the Eleventh and Eighth Circuit disagree. *Compare Granda*, 990 F.3d at 1286-88, *with Jones*, 39 F.4th at 525. *See also* Pet. 17-21 (outlining circuit split). Concerns regarding the complexity of the question presented weigh only in favor of granting certiorari, so that the divided circuits may benefit from the Court's guidance.

B. The government next argues that, even if petitioner could establish "cause" to overcome procedural default, he still cannot establish "actual prejudice." Opp. 19. Yet the district court *and* the circuit court declined to address prejudice. *See* Pet. App. A1 & A3. This Court "does not ordinarily decide questions that were not passed on below." *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 609 (2015). Perhaps more importantly, petitioner is serving a consecutive life sentence as to the challenged §§ 924(c) & (j) offense—well beyond the statutory maximum sentences that were imposed, consecutively to each other and to the §§ 924(c) & (j) offense, as to his 18 U.S.C. § 1951(b) offenses. (Cr. DE 295). Thus, the *Davis* error alleged below caused "actual prejudice" to petitioner. *See Cross*, 892 F.3d at 295 (observing that there is "no doubt that an extended prison term . . . constitutes prejudice" that excuses procedural default) (citing *Glover v. United States*, 531 U.S. 198, 203 (2001)); *Vargas-Soto*, 35 F.4th at 1001 & n. 3 (Davis, J., dissenting) (observing the "obvious," "actual," and undisputed prejudice created by a sentence exceeding the otherwise-applicable statutory maximum).

C. Finally, the government cites to the district court's denial of relief on the merits as a basis to deny review. Opp. 18-20. However, as outlined in his motion for a COA, the district court was wrong. Pet. App. A2, 19-27. The conspiracy and

substantive Hobbs Act robbery §§ 924(c) and (j) predicates were not "inextricably intertwined": the conspiracy began weeks before the robbery itself, and involved the procurement of the firearm that petitioner's co-conspirator would ultimately use to shoot the robbery victim. *Id.* at 3, 19-27. At trial, petitioner—through counsel—conceded his guilt as to the Hobbs Act conspiracy, and argued that he had withdrawn from the conspiracy moments before his co-conspirator committed the robbery and shot the robbery victim. *Id.* at 3-4. Moreover, the co-conspirator's guilt as to the robbery and §§ 924(c) and (j) offenses was uncontested, having been established prior to petitioner's trial. *Id.* at 2-3. The jury was also instructed to choose between the conspiracy and robbery predicates—it was not permitted to rely on both. *Id.* at 6-7. Consistent with the facts, the theory of defense, and the jury instructions, the government asked the jury to convict petitioner of the §§ 924(c) and (j) offense on the basis of petitioner's conceded guilt as to the conspiracy, combined with his co-conspirator's acknowledged guilt as to the §§ 924(c) and (j) offense. *Id.* at 4-5 (quoting government's closing argument that "just by participating in [the conspiracy], the defendant is guilty of [the §§ 924(c) and (j) offense]") (citation to record omitted). Finally, the jury's special § 924(j) verdict makes clear that, rather than having been convicted of any purported use by petitioner of a firearm during the robbery, petitioner was instead convicted of his co-conspirator's use of a firearm, because *that* firearm use caused the victim's death. *Id.* at 8, 23-26. *See also Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("[T]o hypothesize a guilty verdict that was never in fact rendered . . . would violate the [Sixth Amendment] jury-trial guarantee."). Under

these unique facts, it is "'[]conceivable 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[.]" *See* Opp. 20 (citing Pet. App. A3, 9). Thus, contrary to the district court's conclusion below, and the government's position, here, petitioner can establish a substantial likelihood that the jury relied solely on his conceded guilt as to Hobbs Act conspiracy to convict petitioner of his co-conspirator's §§ 924(c) & (j) offense.

Notwithstanding his disagreement with the district court's merits ruling, petitioner ultimately seeks review of his *Davis* claim *from the court of appeals*—not from this Court. The Eleventh Circuit denied a COA *solely* on the basis that petitioner could not establish "cause," or "actual innocence," pursuant to *Granda*. Pet. App. A1, 3 ("[B]ecause Mr. Maxime is not entitled to a COA on the threshold procedural issue, this Court need not consider whether he is entitled to a COA on the merits of his claim."). It therefore lacked jurisdiction to consider the merits of petitioner's *Davis* claim. *See Miller-El*, 537 U.S. at 336 ("[U]ntil a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners"). Hence, petitioner now asks the Court to overturn *Granda*'s holding as to "cause"—about which there is a circuit split—so that he may press his meritorious *Davis* claim upon remand. Pet. 6. n. 3 ("[T]he merits of Maxime's claim are not the subject of the instant petition . . . 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."). The question presented thus properly relates only to "cause." *See* Pet. i. "As

a general rule . . . [the Court does] not decide issues outside the questions presented by the petition for certiorari." *Glover*, 531 U.S. at 205. A disputed issue, outside the question presented, and beyond the jurisdiction of the appellate court, offers no basis to deny review.

CONCLUSION

For the foregoing reasons, and those stated in the petition, petitioner Maxime respectfully request that the Court grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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