No. 21-___

In the
Supreme Court of the United States

Davon Young,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A claim not raised on direct review "may be raised in habeas [] if the defendant can [] demonstrate [] 'cause' and actual 'prejudice.'" *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citation omitted). As to cause, if the claim was contrary to "'a near-unanimous body of lower court authority'" at the time of direct review, but was later endorsed by this Court, then not raising the claim on direct review "is sufficiently excusable to satisfy the cause requirement." *Reed v. Ross*, 468 U.S. 1, 17 (1984) (citation omitted).

The question presented, which evenly divides four circuits, is whether the *Reed* rule applies to a claim brought under *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which "overturn[ed] the long-established interpretation of an important criminal statute, 18 U.S.C. § 922(g), an interpretation that ha[d] been adopted by every single Court of Appeals to address the question." *Id.* at 2201 (Alito, J., dissenting).

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The ruling of the United States Court of Appeals for the Second Circuit is unreported and appears at Petitioner's Appendix ("Pet. App.") 1a-8a.

JURISDICTION

The District Court had jurisdiction 28 U.S.C. § 2255. The Second Circuit had jurisdiction under §§ 1291 and 2253. This Court has jurisdiction under § 1254(1).

INTRODUCTION

This Court held in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), that to secure a conviction for gun possession in violation of 18 U.S.C. § 922(g), the "Government must prove [] that the defendant . . . knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* at 2200. At petitioner Davon Young's trial in 2011, the government offered no such proof. Young was convicted of violating § 922(g) anyway.

When he sought to vacate that conviction given *Rehaif*, the district court ruled Young had not shown cause for failing to raise a *Rehaif*-type claim at trial or in his direct appeal, which concluded in 2014. The Second Circuit affirmed. It said that, although a *Rehaif*-type claim was foreclosed in every circuit but the Second before *Rehaif* was decided, its not being foreclosed in the Second meant Young should have raised it; because he did not, the court held, "Young cannot show the requisite cause for failing to raise this claim on direct review." Pet. App. 7a.

Certiorari should be granted. The Second Circuit did not acknowledge *Reed*, which controls here: a "*near*-unanimous body of lower court authority" necessarily allows for a circuit that hasn't weighed in on a claim, and *Reed* says plainly that not

making the claim in that situation "is sufficiently excusable to satisfy the cause requirement." 468 U.S. at 17 (emphasis added).

The Second Circuit's ruling – in conflict with those of the Seventh and Tenth Circuits – also means that, to preserve matters for habeas review, litigants will have to raise all conceivable claims not expressly rejected by the court at issue—and even if, as here, the ruling giving life to a claim "overturns . . . every single Court of Appeals to address the question." *Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting). That is not the law, *see Reed*, nor should it be.

STATEMENT OF THE CASE

1. In the midst of an atrocious childhood, *see* S.D.N.Y. 09-cr-274, Docket Entry 89, Young joined a gang of older boys in 2005, the year he turned 17. *See* Pre-Sentence Report ("PSR") ¶ 26. On January 14, 2008, when Young was 19, he and the 22-year-old leader of the gang, Gregory Fuller, *see id*., robbed Tyrone Bergmann of drugs and a gun. As they were exiting the car in which they robbed him, Bergmann grabbed a gun from a hiding place and shot Fuller in the back. Young, thinking he was next, then shot Bergmann, who later died. *See* PSR ¶ 36.

This conduct spawned five charges against Young: Hobbs Act robbery in violation of 18 U.S.C. § 1951; gun possession during that robbery in violation of § 924(c); gun use resulting in death during that robbery in violation of § 924(j); intentional killing in violation of 21 U.S.C. § 848(e)(1)(A); and gun possession in violation of 18 U.S.C. § 922(g). *See* Indictment, S.D.N.Y. 09-cr-274, Docket Entry 34, Counts 9, 10, 11, 12 and 15.

After a month-long trial in January 2011, the jury acquitted Young of intentional killing but convicted him of the four other charges resulting from his conduct on January 14, 2008. In addition, the jury convicted Young and Fuller of another armed robbery earlier that month in violation of 18 U.S.C. §§ 1951 and 924(c). *See* Indictment, Counts 5 and 6. The jury also convicted Young and Fuller of drug conspiracy in violation of 21 U.S.C. § 846, and of gun possession during that conspiracy in violation of 18 U.S.C. § 924(c). *See* Indictment, Counts 1 and 2.

Thus, Young had three § 924 convictions: gun possession in relation to the drug conspiracy, and in relation to each of the two robberies in January 2008 (the government dropped the § 924(c) count resulting from the January 14 robbery as a lesser included offense covered by the § 924(j) conviction). Per the law in effect at the time of Young's sentencing – a law Congress repealed in 2018 – his first § 924 conviction mandated a 5-year minimum term, and his two other § 924 convictions each mandated 25-year consecutive terms. Thus, the minimum sentence mandated by Young's § 924 convictions was 55 years.[1]

On top of that 55-year minimum, the judge ruled the drug conspiracy, concerning 50 grams of crack cocaine, mandated a minimum term of 10 years.[2]

Thus, Young's overall mandatory minimum sentence was 65 years, which is

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[1] The minimum today is 15 years: 5 years for each § 924 conviction, which must run consecutively. *See* 18 U.S.C. § 924(c)(1). Though one § 924 charge alleged brandishing, which carries a 7-year minimum, and the other alleged discharge, which carries a 10-year minimum, Young's jury was not asked to find brandishing or discharge. *See* Transcript of Jan. 26, 2011, at 2756-63. Thus, the minimum term for each conviction is 5 years. *See Alleyne v. United States*, 570 U.S. 99 (2013).

[2] The minimum now for a 50-gram offense is 5 years. 21 U.S.C. § 841(b)(1)(B).

what the court imposed. *See* S.D.N.Y. 09-cr-274, Docket Entry 98.

2. Years later, given *Johnson v. United States*, 576 U.S. 591 (2015), Young alleged in a § 2255 petition that his § 924 convictions based on Hobbs Act robbery were void because such robbery is not a "crime of violence" under § 924(c). He also argued, given *Rehaif*, that his § 922(g) conviction was void: *Rehaif* requires the government to prove a § 922(g) defendant "knew he belonged to the relevant category of persons barred from possessing a firearm," 139 S. Ct. at 2200, but the government offered no such proof and thus the jury found no such knowledge.

The district court denied the *Johnson* claim pursuant to *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018) (Hobbs Act robbery remains a "crime of violence").

The court did not reach the *Rehaif* claim, ruling Young had "not shown cause for his failure to raise the *Rehaif* claim on direct appeal." Pet. App. 41a (*Young v. United States*, 2020 WL 7711686, at *2 (S.D.N.Y. Dec. 29, 2020)).

3. The Second Circuit affirmed. It reasoned that, although a *Rehaif*-type claim was foreclosed in "every *other* circuit" before *Rehaif* was decided, it was an "open" question in the Second Circuit. Pet. App. 6a-7a (emphasis in original). "Accordingly, Young cannot show the requisite cause for failing to raise this claim on direct review." Pet. App. 7a. The circuit made no mention of *Reed*.

REASONS FOR GRANTING THE WRIT

I. The Circuits are Split, and the Second Circuit is Wrong

This Court held in *Reed* that the defendant "had cause for failing to raise the issue" in question on direct review. 468 U.S. at 17. The Court explained there are

various situations in which "'a clear break with the past'" means that failing to raise a claim before the Court recognized it is excusable. *Id*. (citation omitted). Relevant here is where the Court "'overtur[ns] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.'" *Id*. (citation omitted). In such a case, "the failure of a defendant's attorney to have pressed such a claim" before this Court recognized it "is sufficiently excusable to satisfy the cause requirement." *Id*.

The rule that cause exists where a "*near*-unanimous body of lower court authority" had foreclosed a claim allows for a circuit or two in which the claim had either been endorsed or never ruled on. Young's case is in the latter category, as the Second Circuit had never ruled on whether § 922(g) requires the knowledge *Rehaif* says it requires. And when *Rehaif* said that, it "overturn[ed] the long-established interpretation of an important criminal statute, 18 U.S.C. § 922(g), an interpretation that ha[d] been adopted by every single Court of Appeals [11 of 12] to address the question." *Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting). *See id.* at 2210 n.6 (listing 10 circuits); *United States v. Olender*, 338 F.3d 629, 637 (6th Cir. 2003) (The "government does not have to prove that the defendant knew he was a felon, only that he knowingly possessed the ammunition.").

Accordingly, the Seventh and Tenth circuits have recognized *Reed* applies to a *Rehaif* claim, meaning a litigant who did not raise such a claim before *Rehaif* was decided had cause for not doing so. *See United States v. Maez*, 960 F.3d 949, 956-57 (7th Cir. 2020) ("An intervening legal decision that overturns settled law amounts

to good cause. . . . *Rehaif* went counter to the settled views of every federal court of appeals." Thus, "*Rehaif* establishes good cause."); *United States v. Garcia*, 2021 WL 5994630, at *2 (10th Cir. 2021) ("*Rehaif* overturned near-unanimous lower court authority. As a result, Petitioner contends, his claim was so novel that it was unavailable to him at the time of his plea. The district court agreed and held that Petitioner established cause. We, too, agree that Petitioner established cause.").

And these circuits applied the *Reed* rule to *Rehaif* claims even though *Reed* spoke of "a 'new' constitutional rule," 468 U.S. at 17, and *Rehaif* is a ruling of statutory interpretation. The point in *Reed* was that developments "representing 'a clear break with the past'" are sufficiently novel that failing to anticipate them "is sufficiently excusable to satisfy the cause requirement." *Id*. (citation omitted). That logic applies to any constitutional, statutory or other break with settled practice. *See, e.g., United States v. Shelton*, 848 F.2d 1485, 1490 (10th Cir. 1988) (Where the Supreme Court "limit[ed] the reach of the mail fraud statute . . . , reject[ing] the broader construction adopted by every circuit that had addressed the issue," the "petitioner had cause for failing to raise" claim earlier.); *United States v. Roberson*, 194 F.3d 408, 414-15 (3d Cir. 1999) (Where "no court of appeals had" agreed with claim as to Sentencing Guidelines, there was "cause for failing to raise" it sooner.) (Alito, J., for the court).

On the other side of the split here are the Second and Eleventh Circuits, which make no mention of *Reed*. *See* Pet. App. 6a-7a; *United States v. Innocent,* 977 F.3d 1077, 1084 (11th Cir. 2020) ("*Rehaif* was not 'truly novel' in the sense

necessary to excuse procedural default.").

The Seventh and Tenth Circuits are right: the *Reed* rule applies here, as *Rehaif* "overturn[ed] . . . every single Court of Appeals [11 of 12] to address the question." *Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting). Failing to raise a *Rehaif*-type claim before *Rehaif* was decided is therefore "sufficiently excusable to satisfy the cause requirement." *Reed*, 468 U.S. at 17.

II. The Second Circuit's Ruling Will Work Mischief

The Second Circuit's ruling, like that of the Eleventh and any others that join their side of the split, is problematic for reasons beyond being wrong.

In a Ninth Circuit case, *United States v. Pollard*, the panel initially denied relief on the ground that the litigant had "not adequately shown cause for his failure to raise [a *Rehaif*] claim on direct appeal." 10 F.4th 948, 951 (9th Cir. 2021). Pollard then sought rehearing, enlisting the aid of the Federal Defenders for the Ninth Circuit, who filed an amicus brief detailing all the problems with the panel's ruling that Pollard had not shown cause.

Among other things, "if there is no route around default for claims long-settled by precedent, counsel 'would be obliged to raise and argue every conceivable [] claim' that 'could, some day, gain recognition.'" Pet. App. 32a (quoting *Reed*, 468 U.S. at 16). "This is neither effective advocacy, nor does it promote efficiency for busy trial and appellate courts 'already overburdened with meritless and frivolous cases and contentions.'" *Id.* (quoting *Reed*, 468 U.S. at 16). Indeed, it is a "'particularly disturb[ing] . . . prospect' that counsel will be required to raise far-fetched questions in order to preserve their clients' right to relief 'upon some future,

unforeseen development in the law.'" Pet. App. 33a (quoting *Reed*, 468 U.S. at 16). "Competent 'defense counsel will have no choice but to file one "kitchen sink" brief after another, raising even the most fanciful defenses that could be imagined based on long-term logical implications from existing precedents.'" *Id.* (citation omitted). This "'will create an administrative nightmare not only for defense counsel trying to represent their clients responsibly, but also for the district courts and [appellate] court[s].' It furthers neither efficiency nor fairness to promote such a rule." Pet. App. 34a (citation omitted). In sum, "*Reed*'s approach to procedural default is eminently reasonable," as "permitting a path around default for the rare case where the Supreme Court does an abrupt about-face – bucking either its own precedent or the precedent set by every circuit – promotes efficiency of the courts and effective advocacy." Pet. App. 35a.

The Ninth Circuit granted Pollard's rehearing request, deleting its initial holding as to lack of cause and instead ruling against him on the ground that he had "not adequately shown actual prejudice." 20 F.4th 1252, 1255 (9th Cir. 2021).

The Ninth Circuit's reversal confirms how the rule it initially embraced was both wrong per *Reed* and ill-advised. The Second and Eleventh Circuits have nonetheless opted for that rule— under which, to preserve issues for habeas review, litigants in both state and federal courts must raise every claim that could benefit them, even if the claims have already been rejected by the court in question or by every other court. Besides flouting *Reed* – which the Second and Eleventh Circuits each ignored – there is no good reason for that rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 12, 2022