Petitioner's Appendix

21-20
Young v. United States

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of June, two thousand twenty-two.

PRESENT:

GUIDO CALABRESI,
GERARD E. LYNCH,
RICHARD J. SULLIVAN,
Circuit Judges.

DAVON YOUNG,

Petitioner-Appellant,

v. No. 21-20

UNITED STATES OF AMERICA,

Respondent-Appellee.

FOR PETITIONER-APPELLANT: MATTHEW B. LARSEN, Federal Defenders of New York, Appeals Bureau, New York, NY.

FOR RESPONDENT-APPELLEE: DEREK WIKSTROM (David Abramowicz, *on the brief*), Assistant United States Attorneys, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Cathy Seibel, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Petitioner-Appellant Davon Young appeals from the district court's denial of his amended motion under 28 U.S.C. § 2255 to vacate his conviction for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). In an amendment to an earlier habeas petition, Young asserted that his section 922(g) conviction must be vacated under the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), because it was neither charged nor proven that, at the time of his possession of the firearm, he knew he had previously been convicted of a crime punishable by more than a year in prison. The district court denied the amended motion as untimely, concluding that the *Rehaif* claim did not relate back

to his earlier, timely-filed habeas motion, which had challenged his convictions under 18 U.S.C. § 924(c) based on *Johnson v. United States*, 576 U.S. 591 (2015).[1] It alternatively held that, even if the amended motion related back and was therefore timely, the *Rehaif* claim was procedurally barred because it was not raised on direct appeal. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

Young's conviction and sentence relate to his membership in a local street gang in Yonkers, New York, known as the "Elm Street Wolves." In late 2007 and early 2008, members of the gang – including Young – committed several armed robberies, during which they stole drugs and money from local drug dealers. In January 2008, Young and another gang member robbed a local drug dealer named Tyrone Bergmann. The robbery escalated, and after Bergmann shot Young's accomplice, Young shot and killed Bergmann.

Young was arrested shortly thereafter and indicted on various counts related to the murder, along with other counts charging him with robberies, firearms possession, and narcotics trafficking. On January 28, 2011, a jury

[1] Young acknowledges that his *Johnson* claim has been foreclosed by this Court's decision in *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 844 (2019).

returned guilty verdicts as to most of the charges against Young, including – as relevant here – one count of conspiracy to distribute crack cocaine in violation of 21 U.S.C. § 846; three counts of gun possession during a crime of violence in violation of 18 U.S.C. § 924(c); and one count of gun possession after having been previously convicted of a felony in violation of 18 U.S.C. § 922(g).

At his September 2011 sentencing, Young faced a mandatory minimum term of imprisonment of sixty-five years: a mandatory ten-year sentence for the drug conspiracy; a mandatory consecutive sentence of five years for the first of the three section 924(c) conviction; and two mandatory consecutive twenty-five-year sentences for each of the two subsequent section 924(c) convictions. The district court imposed this mandatory minimum sentence, along with concurrent sentences on the remaining counts – including a concurrent sentence of ten years' imprisonment for the section 922(g) violation. This Court affirmed Young's convictions and sentence on direct appeal. *United States v. Young*, 561 F. App'x 85, 87 (2d Cir. 2014).

Although Young did not challenge his felon-in-possession conviction on direct appeal, he now argues that this conviction must be vacated because the government failed to prove that he had knowledge of his felon status at the time

he possessed the gun – a required element of proof after *Rehaif*, which was decided eight years after Young's sentencing.[2] "We review de novo the question whether procedural default of a claim raised for the first time on collateral review may be excused." *Harrington v. United States*, 689 F.3d 124, 129 (2d Cir. 2012). Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, he must show "(1) good cause to excuse the default and ensuing prejudice, or (2) actual innocence." *Id. (*citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)). Here, Young argues that his default is excused under the cause-and-prejudice standard, rather than by actual innocence.

"In order to demonstrate cause, a defendant must show some objective factor external to the defense, such that the claim was so novel that its legal basis was not reasonably available to counsel." *Gupta v. United States*, 913 F.3d 81, 84 (2d Cir. 2019) (internal quotation marks, citations, and brackets omitted). "Novelty, or futility, however, 'cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time.'" *Id*. at 84–85 (quoting *Bousley*, 523 U.S. at 623).

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[2] The government argues that we should not reach either the relation-back or procedural-default issues because Young would have been subject to the same mandatory minimum at the time of his sentencing even without the section 922(g) conviction. Having previously certified these issues for appeal, we decline to avoid reaching them on that basis.

Young argues primarily that he had cause for failing to raise the challenge to his section 922(g) conviction on direct appeal because – prior to *Rehaif*, which was decided in 2019 – every federal court of appeals to have addressed the issue held that section 922(g) required the government to prove that a defendant knowingly possessed a firearm, but not that the defendant knew he belonged to one of the classes of individuals prohibited from possessing a firearm. Notably, however, the Second Circuit had not addressed the issue. *See, e.g.*, *United States v. Reap*, 391 F. App'x 99, 104 (2d Cir. 2010) (rejecting a similar challenge to a section 922(g) conviction under plain error review because "this Circuit has not yet decided whether the felon-in-possession statute requires proof of a defendant's knowledge of his felon status," so "any purported error committed by the district court was not 'clear under current law,' and thus not plain error"); *United States v. Reyes*, 194 F. App'x 69, 70–71 (2d Cir. 2006) (acknowledging "persuasive force" of argument that prosecution must prove defendant's knowledge of felon status, but declining to reach the issue on harmless error review).

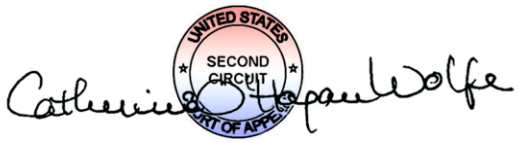
Young nonetheless appears to argue that because every *other* circuit had rejected this argument, he was justified in not bringing it *here*. But "[t]he futility test to excuse a default is strict: 'the question is not whether subsequent legal

developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all.'" *United States v. Thorn*, 659 F.3d 227, 233 (2d Cir. 2011) (quoting *Smith v. Murray*, 477 U.S. 527, 537 (1986)). At the time of Young's direct appeal, the argument that the felon-in-possession statute required the government to prove a defendant's knowledge of his felon status was clearly available to counsel; it had been raised by other litigants throughout the country for years. *See e.g.*, *United States v. Langley*, 62 F.3d 602, 606 (4th Cir. 1995) (holding that knowledge of one's prohibited status is not an element of a section 922(g) offense and collecting cases where issue had been raised). Most importantly, the issue had been raised in, and expressly left open by, this Court. *See Reap*, 391 F. App'x at 104; *Reyes*, 194 F. App'x at 70–71.

Accordingly, Young cannot show the requisite cause for failing to raise this claim on direct review, and "we need not address the further requirement of prejudice." *Thorn*, 659 F.3d at 233. The claim is therefore procedurally barred, and we affirm the district court's decision on that basis. Further, because procedural default is an independent basis to affirm the district court's judgment, we do not reach the issue of whether Young's *Rehaif* claim related back to his *Johnson* claim.

Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



CA NO. 20-15958

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TYRONNE POLLARD, JR., Defendant-Appellant.	Case No. 4:20-cv-1136-JSW Case No. 4:17-cr-613-JSW

BRIEF OF AMICI CURIAE NINTH CIRCUIT FEDERAL PUBLIC AND COMMUNITY DEFENDER OFFICES IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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Statement of the Interest of Amici Curiae and Statement of Authority to File

The Ninth Circuit Federal Public and Community Defender Offices listed below represent indigent clients accused of federal crimes throughout the Ninth Circuit. The Federal and Community Defenders in the Ninth Circuit represent individuals in direct federal criminal appeals and are frequently appointed to represent state criminal defendants pursuing federal habeas relief under 28 U.S.C. § 2254 and federal criminal defendants seeking to vacate, set aside or correct their sentence under 28 U.S.C. § 2255. The outcome in this case will significantly inform their obligation to preserve foreclosed claims when defending against federal charges, and their ability to litigate claims newly-recognized by the United States Supreme Court on behalf of state and federal habeas petitioners. Accordingly, Amici have a strong interest in the clear and accurate development of the law in this area.

No party or party's counsel or anyone other than employees of the listed amici authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief.

Counsel for both parties have consented to the filing of this brief.

Respectfully submitted,

DATED: September 10, 2021

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I. INTRODUCTION

The panel majority's decision in *United States v. Pollard* disregards two fundamental principles of judicial decision-making. The first principle is one of judicial restraint, that a court should not decide a question that is not necessary to the decision. The second is a principle of deference, that the prerogative of resolving perceived tension in Supreme Court cases belongs to that body alone. The decision here respects neither boundary.

As Judge Forrest points out in her concurrence, the Court's uncontroversial prejudice holding is all that is necessary to decide the case. The portion of the opinion that takes sides on an evenly divided circuit split about "cause" is thus unnecessary to the disposition. The Court should defer deciding whether *Bousley v. United States,* 523 U.S. 614 (1998), overruled *Reed v. Ross*, 468 U.S. 1 (1984), until a case arises where the question is dispositive.

If it will not, this question should be reheard en banc. Setting aside that this Court should "leav[e] to [the Supreme Court] the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997), the panel majority reads *Bousley* as overruling *Reed* when, in fact, *Bousley* applied *Reed*. The panel's decision forecloses any

possibility of habeas relief, regardless of the prejudice suffered, in those rare instances in which the Supreme Court both grants certiorari in a case where there is no split of authority *and* rejects a "near unanimous" wall of circuit authority. It's wrong on the law, and creates a rule that hinders, rather than furthers, the purposes behind the procedural-default rule.

The panel should amend its opinion to delete its discussion of cause. If it will not, this Court should grant rehearing en banc.

II. ARGUMENT

A. The Court should revise its opinion to delete its discussion of cause.

The majority in this case addressed both prongs of a two-pronged test, the cause-and-prejudice standard. A habeas petitioner must show both cause and prejudice to get relief from his default. *Massaro v. United States*, 538 U.S. 500, 504 (2003). And as is common with two-pronged tests, both this Court and the Supreme Court have routinely declined to address both prongs where a petitioner clearly fails one. *E.g.*, *McCleskey v. Zant*, 499 U.S. 467, 502 (1991) ("As McCleskey lacks cause . . . , we need not consider whether he would be prejudiced . . . ."); *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982) ("Since we conclude that

these respondents lacked cause for their default, we do not consider whether they also suffered actual prejudice."); *Cavanaugh v. Kincheloe*, 877 F.2d 1443, 1448 (9th Cir. 1989) (declining to consider cause where prejudice was clearly lacking).

Of the two questions, deciding the cause question required the panel majority to take sides in a deepening (and nearly evenly divided) circuit split over whether the Supreme Court *sub silentio* overruled one of its precedents. *See* Dkt. No. 38, Petition for Rehearing, at 5-6 (describing state of the circuit split). The prejudice prong, on the other hand, is straightforward: "Pollard clearly cannot meet the prejudice prong." Opinion ("Op."[1]) at 14 (Forrest, J., concurring in part and concurring in the judgment). In this case, then, "[t]here is no need to address the cause prong of the procedural-default analysis." *Id.*

More than that, the panel had a duty not to issue what is, essentially, an advisory opinion on the cause standard. This Court may decide only cases or controversies. U.S. Const. art. III, § 2, cl. 1. From this constitutional mandate flows the "cardinal principle of judicial

[1] *United States v. Pollard*, ___ F.4th ___, 2021 WL 3823626 (9th Cir. Aug. 27, 2021), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/27/20-15958.pdf.

restraint": "[I]f it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment). Put another way, "[r]eticence to expatiate in dicta is always advisable." *Marino v. Ocwen Loan Servicing LLC*, 978 F.3d 669, 679 (9th Cir. 2020) (Bea, J., concurring).

This principle should have its strongest force in a case like this one, where the unnecessary portion of the opinion purports to take sides in a deepening circuit split about the interaction between *Reed* and *Bousley*—a question about whether the Supreme Court overruled one of its precedents *sub silentio*. The Supreme Court has urged the courts of appeals not to take it upon themselves to resolve latent tension between high court precedents. *Agostini*, 521 U.S. at 237. But to take on such a task needlessly is an even greater sin. After all, one of the primary vices of dicta is that analysis not necessary to the outcome is error-prone. *See* Judge Pierre N. Leval, *Judging under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. 1249, 1263 (2006) ("In my experience, when courts declare rules that have no consequence for the case, their cautionary mechanism is often not engaged [and] [t]hey are far more

likely . . . to fashion defective rules."). The Court should not take sides on such a complex issue until it matters to the outcome of a case.

Because the majority's cause analysis is "an entirely unnecessary disquisition on a subject of no significance to the outcome," it is dicta and should be stricken. *Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 745 (9th Cir. 2016) (Kleinfeld, J., concurring); *see id.* at 748 (urging the Court to "police [its] opinions to prevent that kind of surplus language"); *see also Ford v. Peery*, __F.4th__, 2021 WL 3642156, at *6-7 (9th Cir. Aug. 18, 2021) (VanDyke, J., dissenting from denial of rehearing en banc) (criticizing panel for "refusal to remove . . . a completely advisory rule" from its decision). This crucial question should be saved for a case where it is necessary to decide.

B. The Court should not discard *Reed* based on a misreading of *Bousley*.

If it is incumbent on the Court to avoid issuing dicta, it is even more important that the Court avoids erroneous dicta. And here, the panel majority's cause analysis is not only unnecessary, it's also wrong.

1. *Bousley* reaffirmed *Reed*, it did not overrule it.

The procedural-default rule prescribes that "claims not raised on direct appeal may not be raised on collateral review unless the

petitioner shows cause and prejudice." *Massaro*, 538 U.S. at 504. In *Reed*, the Supreme Court held that "cause" can be found when a "claim is so novel that its legal basis is not reasonably available to counsel." 468 U.S. at 16. A Supreme Court decision qualifies under this "novelty" exception when it represents a "clear break with the past." *Id.* at 17. The Court identified two circumstances that fall under this novelty exception: "First, a decision of th[e] Court may explicitly overrule one of [its] precedents." *Id.* Second, a decision may "overtur[n] a longstanding and widespread practice to which th[e] Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Id.* If a case fits into one of these two categories, cause exists because "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 th[e] Court has ultimately adopted." *Id.*[2]

Although *Reed* involved a Supreme Court decision that "articulated a *constitutional principle* that had not been previously recognized," Op. at 8-9 (emphasis in original), its novelty exception

[2] A third category—a decision that "disapprov[es] a practice this Court arguably has sanctioned in prior cases"—is not at issue in this case. *Reed*, 468 U.S. at 17.

applies equally to decisions announcing a new interpretation of a federal statute. *See Bousley*, 523 U.S. at 622 (applying *Reed* to statutory-interpretation claim based on *Bailey v. United States*, 516 U.S. 137 (1995), which defined "use" under 18 U.S.C. § 924(c)); s*ee infra* at 14-16.[3]

The Court's decision in *Rehaif* fits squarely into *Reed*'s second category. It "overturn[ed] the long-established interpretation" of 18 U.S.C. § 922(g)—"an interpretation that has been adopted by every single Court of Appeals to address the question" and which "has been used in thousands of cases for more than 30 years." *Rehaif v. United States*, 139 S. Ct. 2191, 2201 (2019) (Alito, J., dissenting). Thus, *Reed* directly answers the question posed here: Cause exists because "*Rehaif* overturned near-unanimous lower court authority" with respect to the mens rea for § 922(g). *See* Order, *United States v. Garcia*, 20-1381, at 4

[3] Contrary to the panel majority's decision, Op. at 8-9, *Reed* cannot be limited to Supreme Court decisions announcing new constitutional principles. If *Reed* were a rule solely for constitutional cases, *Bousley* would have said so and would not have applied it, since the petitioner there raised a statutory-interpretation claim based on *Bailey*, where the Supreme Court addressed "use" in § 924(c) for the first time. It didn't. Instead, the Court quoted *Reed* as the controlling standard, and implicitly found that *Bousley* did not fit within the second *Reed* category. The panel majority's attempt to distinguish *Reed* on this ground is unavailing.

(10th Cir. Aug. 10, 2021) (concluding that a *Rehaif* petitioner established cause under *Reed*).

Unable to distinguish *Reed*, the government urged, and the panel majority accepted, that *Reed*'s clear rule has been overruled by *Bousley*. The panel majority pointed to *Bousley*'s statement that "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time." Op. at 7 (quoting *Bousley*, 523 U.S. at 623). In the panel majority's view, *Bousley*'s "futility rule . . . made no exception for claims that received consistent negative treatment in the courts"—that is, claims falling under *Reed*'s novelty exception—so it "follow[ed] the Supreme Court's explicit holding in *Bousley*." Op. at 9.

But *Bousley* "does not even hint at overruling or modifying *Reed*'s framework"; to the contrary, "*Reed* and *Bousley* addressed vastly different circumstances." *Rose v. United States*, 738 F. App'x 617, 628 & n.6 (11th Cir. 2018). *Bousley* sought federal habeas relief under *Bailey*, where the Supreme Court defined "use" under 18 U.S.C. § 924(c) for the first time. In the years before *Bailey*, no "near-unanimous" consensus had developed on the question; rather, the definition of use had been "the source of much perplexity in the courts," with conflicts both "in the

standards [courts had] articulated" and "in the results they ha[d] reached." *Bailey*, 516 U.S. at 142. Because he had not preserved his argument, Bousley offered "two explanations" for his procedural default: one, that his claim was novel and, two, that it would have been futile to challenge his conviction before *Bailey*. *Bousley*, 523 U.S. at 622-23. The Court addressed each separately. As to novelty, it offered *Reed* as the controlling standard, but rejected petitioner's argument that his claim "is so novel that its legal basis is not reasonably available to counsel." *Id*. at 622. The claim was being actively litigated throughout the country, (resulting in the very circuit split that culminated in a grant of certiorari in *Bailey*,) and "the Federal Reporters were replete with cases involving [similar] challenges." *Id*. The claim was thus not novel under *Reed*.

The Court then turned to the petitioner's "futility" argument. Though the petitioner argued that any appeal on the question was futile because the law in the Eighth Circuit was settled against him at the time of his appeal,[4] the Court rejected this claim summarily: "[F]utility

[4] Brief for Petitioner, *Bousley v. Brooks*, No. 96-8516, 1997 WL 728537, at *35 (1997) (arguing that Petitioner established futility

cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" *Id*. at 623 (quoting *Engle*, 456 U.S. at 130 n.35).

Bousley, then, explicitly reconfirmed *Reed* and its novelty exception, applied it to the petitioner's case, and found that the petitioner did not meet the standard. (And that conclusion was correct: *Bailey*'s description of the numerous circuit splits in both analysis and result preclude any serious claim that there was a near-unanimous wall of precedent that would make the claim novel under *Reed*.) But the panel majority does not acknowledge this part of *Bousley*. Instead, it skips over *Bousley*'s novelty discussion, and goes directly to its statement about futility. And, purporting to find no way to reconcile *Bousley*'s futility holding with *Reed*'s novelty exception, the panel majority concludes that *Bousley* overturned *Reed sub silentio*—just sentences after *Bousley* reaffirmed and applied it.

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because "settled Eighth Circuit law" left him "without a forum to present his claim").

2. There is no conflict between *Bousley* and *Reed*.

But here, too, the panel's analysis goes astray. Only by defining "novelty" and "futility" differently from the definition given those terms by the Supreme Court can the panel majority conclude that the two are in conflict.

The panel majority says that a claim is not novel "where 'other defense counsel have perceived and litigated that claim,'" Op. at 6 (quoting *Engle*, 456 U.S. at 134), and that "a futile claim is never novel" because "it has been perceived and raised at one point, even if ultimately rejected by a reviewing court." *Id.* But this truncates the statement from *Engle* in a way that distorts its meaning.

The Supreme Court in *Engle* explained that "[*w*]*here the basis of a constitutional claim is available*, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default." *Engle*, 456 U.S. at 134 (emphasis added). But "*Engle* . . . left open" whether novelty could give rise to cause. *Reed*, 468 U.S. at 13; *see also Engle*, 456 U.S. at 131 (explicitly declining to decide whether novelty could establish cause). The Supreme Court took up the open question in *Reed* and held that cause exists where a claim "is so

novel that its legal basis is not reasonably available to counsel," and then defined circumstances in which a claim is deemed not available. *Reed*, 468 U.S. at 16-17.

It is *Reed*, then, that provides the controlling standard for novelty. *See also Bousley*, 523 U.S. at 622. As the panel majority suggested, novelty does include new claims, those where the building blocks simply did not exist before the Court created them and which would not have been perceived by even competent lawyer. *Reed*, 468 U.S. at 15; Op. at 6. But novelty also includes newly-available claims: those that were foreclosed by Supreme Court or universal lower court precedent until the Court made its "clear break with the past." *Reed*, 468 U.S. at 17. This latter category of claims necessarily has been "perceived and litigated" at one point; otherwise they could not have been foreclosed by precedent. Still, they are "novel" because there was "no reasonable basis upon which an attorney previously could have urged a [lower] court to adopt the position that the Court has ultimately adopted." *Id*.

But futility is different. Futility is "a claim [that] was unacceptable to that particular court at that particular time." *Bousley*, 523 U.S. at 623. As Judge Forrest notes in her concurrence, "there is a significant difference between a claim that was unacceptable to [a]

particular court at [a] *particular* time . . . and a claim that was unacceptable in every circuit for a sustained period, as the Supreme Court posited in *Reed*." Op. at 14 (alterations in original; internal quotation marks and citation omitted).

Confirming the distinction drawn by the concurrence, in all cases where the Court held that futility was not cause, the claim was not foreclosed by the Supreme Court or by a "near-unanimous body of lower court authority." *Reed*, 468 U.S. at 17. In *Bousley*, the Eighth Circuit had found "use" on facts similar to the petitioner's, but there was no on-point Supreme Court decision and the appellate courts were all over the map. *See Bailey*, 516 U.S. at 141-42. In *Engle*, the Supreme Court had issued the decision that "laid the basis for [respondents'] constitutional claim" more than four years before their trial, and numerous state courts had accepted similar arguments during that time. *See Engle*, 456 U.S at 132-33. *See also Smith v. Murray*, 477 U.S. 527, 534, 537 (1986) (counsel's assessment that the argument "had little chance of success in the *Virginia* courts" did not excuse cause where the issue was percolating across the country in lower courts) (emphasis added). In all these cases, the claim was "unacceptable to *that* particular court"—the court of first resort—"at that particular time." *Engle*, 456 U.S. at 130

n.35; *see also Bousley*, 523 U.S. at 623. And under those circumstances, the Court has said that "the futility of presenting an objection to the [lower] courts cannot alone constitute cause for a failure to object at trial." *Engle*, 456 U.S. at 130.

The same is true of *Myer v. Washington*, 646 F.2d 355 (9th Cir. 1981), where a dissenting judge of this Court first offered the futility formulation that was later adopted in *Engle* and *Bousley*. There, Judge Poole reasoned that cause should not be found simply because the petitioner's claim was foreclosed in his state. At the time of the petitioner's trial, there was "significant controversy" regarding the relevant constitutional claim, and even an A.L.R. article setting out the conflict in the different states' approaches. *See Myers*, 646 F.2d at 364 (Poole, J., dissenting). The claim was ripe for the picking.

These decisions all use "futility" in the sense suggested by the concurrence: that the claim was unacceptable to a particular court at a particular time, *Bousley*, 523 U.S. at 623, but *not* foreclosed by the Supreme Court or by a "near-unanimous body of lower court authority." *Reed*, 468 U.S. at 17. Contrary to the panel majority's view, *Bousley*'s holding on futility and *Reed*'s holding on novelty are not in conflict. They are, in fact, fully consistent and complementary.

But even if the panel perceived some tension in these cases, it is not for this Court to declare *Reed* overruled. "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini*, 521 U.S. at 237. Here, the case that "directly controls" Pollard's cause argument is *Reed*. Under *Agostini*, the panel can point out any tension it identifies and can suggest the Court's might grant "review to determine [the] continued vitality" of its precedent. *Id.* But the prerogative of deeming *Reed* overruled belongs to the Supreme Court alone. In holding otherwise, the panel majority "scorn[ed] *Agostini*'s clear directive" that this was not a matter for this Court to decide. *Crowe v. Oregon State Bar*, 989 F.3d 714, 725 (9th Cir. 2021).

C. The panel majority's rule disregards *Reed*'s prudential underpinnings and is inefficient and unjust.

Moreover, there is good reason to draw the line between claims unacceptable to *a* court (but unsettled elsewhere) and those that are rejected by a near-unanimous body of lower court authority. The procedural-default rule is a judge-made doctrine intended to conserve

judicial resources. *See Massaro*, 538 U.S. at 504. It "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." *Reed*, 468 U.S. at 10-11. But if there is no route around default for claims long-settled by precedent, counsel "would be obliged to raise and argue every conceivable constitutional claim" that "could, some day, gain recognition." *Id*. 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.* A rule that rewards preservation and advancement of issues "on the frontier" of the law, *Myers*, 646 F.2d at 364 (Poole, J., dissenting), without requiring useless preservation briefs would look much like the line between futility and novelty described above. Good advocates look at the horizon and continue to press their own court to decide, "upon reflection," that prior decisions were wrongly reached—pointing, where they can, to decisions in other jurisdictions to urge their court to conform. *Engle*, 456 U.S. at 130. And they preserve issues to position themselves to ask a higher court to decide unsettled issues in their favor. But they do not beat a dead horse. *Cf. Kimble v. Marvel Ent.,*

LLC, 576 U.S. 446, 455 (2015) (stare decisis "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation").

The panel majority's rule, on the other hand, raises the "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." *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." *United States v. Smith*, 250 F.3d 1073, 1077 (7th Cir. 2001) (Wood, J., dissenting from denial of rehearing en banc).[5] What is normally the "hallmark of effective advocacy"—the ability to "winnow[] out weaker arguments on appeal and focus[] on those more likely to prevail," *Smith*, 477 U.S. at 536 (cleaned up)—will no longer be an option open to constitutionally competent counsel. The majority's

[5] Subsequent to *Smith*, the Seventh Circuit reaffirmed the continued viability of *Reed*. *Cross v. United States*, 892 F.3d 288, 295 (7th Cir. 2018) (holding that *Bousley*'s reliance on *Reed*, among other things, had "put . . . to rest" concerns about whether *Reed* remained good law).

rule "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]." *Smith*, 250 F.3d at 1077 (Wood, J., dissenting). It furthers neither efficiency nor fairness to promote such a rule.

The Supreme Court is also concerned about discouraging gamesmanship. There should be no exception to procedural default, it noted, for defense counsel who would make a "tactical decision to forgo a procedural opportunity" in direct criminal proceedings, only to pursue an alternative strategy in a federal habeas court. *Reed*, 468 U.S. at 14. But there can be no gamesmanship in declining to raise an issue that is as dead as the proverbial doornail. *Cf. Henderson v. United States*, 568 U.S. 266, 276 (2013) ("If there is a lawyer who would deliberately forgo objection *now* because he perceives some slightly expanded chance to argue for "plain error" *later*, we suspect that, like the unicorn, he finds his home in the imagination, not the courtroom.") (emphasis in original).

Simply put, an attorney's failure to raise claims that were foreclosed by Supreme Court law or those that were so clearly against her that they never reached the Supreme Court "does not seriously

implicate any of the concerns" that would otherwise counsel in favor of deference to a procedural bar. *Reed*, 468 U.S. at 15. Not including such a claim can't be used to gain a tactical advantage. It doesn't advance the development of the law the way that pressing open questions, even ones that have proved unpalatable to a given court, can. And 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.

Reed's approach to procedural default is eminently reasonable: it promotes judicial efficiency while protecting criminal defendants' ability to present the most effective defense and appellate arguments. The majority's rule does neither. It is inefficient and unfair, and this Court should not allow it to stand.

III. CONCLUSION

The panel should amend its opinion to remove its discussion of cause. If it will not, the Court should rehear this case en banc.

Respectfully submitted,

DATED: September 10, 2021 By */s/ Brianna Mircheff*
BRIANNA MIRCHEFF

/s/ Carmen Smarandoiu
CARMEN SMARANDOIU

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1, I certify that this opening brief is proportionally spaced, has a typeface of 14 points or more, and contains approximately 4,016 words.

DATED: September 10, 2021

By */s/ Brianna Mircheff*
BRIANNA MIRCHEFF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVON YOUNG, Petitioner, -against- UNITED STATES OF AMERICA, Respondent.	: : : : :	DECISION AND ORDER 15-CV-3941 (CS) 09-CR-274 (CS)

Seibel, J.

Before the Court is Petitioner Davon Young's amended petition pursuant to 28 U.S.C. § 2255, (Doc. 174); the Government's opposition thereto, (Doc. 175); and Petitioner's reply (Doc. 176).[1] Familiarity with prior proceedings is presumed.

Petitioner argues that his conviction on Count 15, for being a felon in possession of a firearm under 18 U.S.C. § 922(g), is invalid and must be vacated, because it was neither charged nor proven that, at the time of his possession of the firearm, he knew he had been convicted of a crime punishable by more than a year in prison.[2] The Government concedes that Petitioner's knowledge was not charged or proven at his trial, which occurred in 2011, well before the Supreme Court decided in *Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019), that such

[1]All docket references are to No. 09-CR-274.

[2]Petitioner also pursues his claim that his convictions under 18 U.S.C. § 924(c) are invalid because the underlying offense of Hobbs Act robbery is a qualifying predicate only under the residual clause of that statute, which was found in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), to be unconstitutionally void for vagueness. He acknowledges, however, that that claim is foreclosed by *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 844 (2019), which found Hobbs Act robbery to qualify as a crime of violence under the elements clause, and makes the claim only to preserve it for further review. (Doc. 174 at 5.)

knowledge was a required element of a § 922(g) conviction. But it argues that Petitioner cannot raise his claim now. I agree.

First, as Petitioner concedes, his claim comes too late under 28 U.S.C. § 2255(f). But he argues that an amendment to add his *Rehaif* claim should relate back to his earlier amended petition, in which he challenged his convictions under 18 U.S.C. § 924(c) based on the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015), and would therefore be timely. He contends that relation back is appropriate because the proposed amendment based on *Rehaif* "asserts a claim . . . that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading," Fed. R. Civ. P. 15(c)(1)(B), in that his earlier amended petition (which is the original pleading for these purposes) raised a *Johnson* challenge to his § 924(c) convictions, one of which was based on his use of a gun in the January 14, 2008 murder of Tyrone Bergmann during a robbery, and the § 922(g) conviction attacked by the amendment proposed here arose out of the possession of the same gun on the same date.

Under *Mayle v. Felix*, 545 U.S. 644, 650 (2005), relation back is not appropriate where the new ground for relief is supported by facts that differ in both time and type from those underlying the old ground.[3] That is the case here: the new *Rehaif* claim relates to Petitioner's knowledge of his status as a felon for purposes of § 922(g), whereas the old *Johnson* claim relates to whether Hobbs Act robbery is a crime of violence that can support a § 924(c) conviction. "An amendment does not relate back merely because the proposed claims concern the . . . same events presented [at trial] as existing claims." *Ross v. Miller*, No. 14-CV-3098, 2016 WL 1376611, at *20 (S.D.N.Y. Apr. 7, 2016), *report and recommendation adopted*, 2018

[3]Despite Petitioner having cited *Mayle* in its opening brief, (Doc.174 at 5 n.4), the Government did not address it in its opposition, instead citing outdated, pre-*Mayle* authority, (Doc. 175 at 4).

WL 4091070 (S.D.N.Y. Aug. 28, 2018). In other words, it is not enough that the § 922(g) offense and one of the § 924(c) offenses are based on the same conduct by Petitioner; there must be "a common core of operative facts uniting the original and newly asserted *claims*." *Mayle*, 545 U.S. at 646 (emphasis added). For the newer claim to relate back, it must arise out of the same occurrence set forth *in the original pleading*, Fed. R. Civ. P. 15(c)(1)(B) (emphasis added), not the same occurrence that led to the charges.

Here, one claim is based on a legal interpretation of § 924(c) and the other is based on Petitioner's state of mind, so they do not relate back. *See United States v. Navarro*, No. 16-CR-89, 2020 WL 709329, at *2 (S.D. Tex. Feb. 11, 2020) (ineffective assistance of counsel and sentencing miscalculation claims "involve different factual and legal questions" than *Rehaif* claim, so no relation back and later claims are time-barred); *cf. Fleury v. United States*, No. 00-CR-76, 2019 WL 6124486, at *3 n.4 (S.D.N.Y. Nov. 19, 2019) (*Rehaif* issue had to be presented to Court of Appeals via successive petition because it did not arise out of or relate to original petition raising *Johnson* claim).

Second, even if the amendment related back and was therefore timely, the *Rehaif* claim is procedurally barred because it was not raised on direct appeal. "In general, a defendant is barred from collaterally challenging a conviction under § 2255 on a ground that he failed to raise on direct appeal." *United States v. Thorn*, 659 F.3d 227, 231 (2d Cir. 2011). "An exception applies, however, if the defendant establishes (1) cause for the procedural default and ensuing prejudice or (2) actual innocence." *Id.* "A change in substantive law usually does not constitute 'cause' to overcome procedural default," *Graham v. United States*, No. 09-CV-5586, 2010 WL 2730649, at *2 (E.D.N.Y. July 8, 2010), nor does the fact that the claim was "unacceptable to that particular court at that particular time," *Bousley v. United States*, 523 U.S. 614, 623 (1998)

(internal quotation marks omitted). But "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim . . . ." *Reed v. Ross*, 468 U.S. 1, 16 (1984).

Petitioner has not shown cause for his failure to raise the *Rehaif* claim on direct appeal. That doing so would have been futile at the time does not excuse the failure to preserve the issue. *Bousley*, 523 US at 623; *Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982). Nor can that failure be excused on grounds of novelty. *Waring v. United States*, No. 17-CR-50, 2020 WL 898176, at *2 (S.D.N.Y. Feb. 25, 2020), *appeal dismissed*, No. 20-975, 2020 WL 3264061 (2d Cir. May 19, 2020). To the contrary,

> [t]he issue decided in *Rehaif* was percolating in the courts for years, including at the time [of Petitioner's appeal]. *See, e.g.*, *United States v. Reap*, 391 F. App'x 99, 103-104 (2d Cir. 2010) (in challenge to validity of a plea, rejecting while affording plenary treatment to defendant's claim that he did not know his 922(g) felon status, including his assertion that "Supreme Court jurisprudence in analogous cases" required proof of such knowledge), *cert. denied*, 564 U.S. 1030 (2011); *United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999) (rejecting defendant's argument that "district court erred in not instructing the jury that a defendant must know his status as a convicted felon to violate § 922(g)(1)"), *cert. denied*, 528 U.S. 1180 (2000); *see also Rehaif*, 139 S. Ct. at 2199 (observing that, even "[p]rior to 1986 . . . there was no definitive judicial consensus that knowledge of status was not needed").

United States v. Bryant, No. 11-CR-765, 2020 WL 353424, at *3 (E.D.N.Y. Jan. 21, 2020) (third alteration in original). Thus, most courts have "deemed the knowledge-of-status issue to have been reasonably available prior to *Rehaif*, precluding defendants from showing good cause to overcome procedural default in the context of Section 2255 or similar motions." *United States v. Simmons*, No. 08-CR-1280, 2020 WL 6381805, at *3 n.5 (S.D.N.Y. Oct. 29, 2020) (collecting cases). I join them. "Petitioner has demonstrated, at most, futility but he has failed to demonstrate that the claim was unavailable." *Jones v. United States*, No. 16-CR-94, 2020 WL 7318140, at *6 (W.D.N.C. Dec. 11, 2020); *see Mouzon v. United States*, No. CR 116-048, 2020

WL 5790405, at *21 (S.D. Ga. Sept. 28, 2020) (no cause because nothing prevented Petitioner from raising *Rehaif* issue on direct appeal), *report and recommendation adopted*, 2020 WL 7066320 (S.D. Ga. Dec. 2, 2020); *Fleury*, 2019 WL 6124486, at *3 (*Rehaif* claim procedurally defaulted where Petitioner identified no cause preventing him from raising issue on direct appeal).

Accordingly, the motion to amend is denied and the new claim in the proposed amended petition is dismissed as untimely or, in the alternative, that claim is dismissed as procedurally defaulted.[4] As Petitioner has not made a substantial showing of a denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253; *Matthews v. United States*, 682 F.3d 180, 185 (2d Cir. 2012). The Clerk of Court is respectfully directed to: (1) docket this order in No. 09-CR-274 and No. 15-CV-3941; (2) terminate Docs. 147 and 174 in No. 09-CR-274; (3) terminate Docs. 23-26 and 28 in No. 15-CV-3941; and (4) close No. 15-CV-3941.

Dated: December 29, 2020
White Plains, New York

Cathy Seibel

CATHY SEIBEL, U.S.D.J.

[4]The *Johnson* claim is also dismissed as foreclosed by *Hill*. See note 2 above.