No. _____

IN THE

Supreme Court of the United States

LAZARO VELIZ,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Johnson v. United States*, 576 U.S. 591 (2015), establishes "cause" to excuse procedurally defaulted 28 U.S.C. § 2255 claims that are predicated on the unconstitutionally vague residual clause in 18 U.S.C. § 924(c)(3)(B).

PARTIES TO THE PROCEEDINGS

The case caption contains the names of all parties to the proceedings.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

- *United States v. Lazaro Veliz*, No. 1:95-cr-00114-FAM (S.D. Fla.) (Judgment entered Aug. 29, 1996).
- *Lazaro Veliz v. United States*, No. 1:20-cv-20264-FAM (S.D. Fla.) (Judgment entered Oct. 22, 2021).
- *Lazaro Veliz v. United States*, No. 21-14435 (11th Cir. Mar. 15, 2023).

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

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Lazaro Veliz ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's opinion (App. A) is unreported, and available at 2023 WL 2506680 (11th Cir. Mar. 15, 2023).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Eleventh Circuit entered judgment on March 15, 2023. As a result, Petitioner's petition is due on or before June 13, 2023. Thus, the petition is timely filed.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(1)(A)

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

> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(3)

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

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

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

STATEMENT OF THE CASE

On November 27, 1995, a federal grand jury in the Southern District of Florida returned a 30-count second superseding indictment charging Petitioner with the following offenses: conspiracy to commit racketeering, in violation of 18 U.S.C. § 1962(d) (Count 1); conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1952 (Counts 2, 6, 12, and 15); Hobbs Act robbery/aiding and abetting Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951 and 2 (Counts 3, 7, 10, 13, and 16); conspiracy to use and carry a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(o)[1] (Count 4); using and carrying a firearm during and in relation to a crime of violence/aiding and abetting using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1) and 2 (Counts 5, 8, 11, 14, and 17); and money laundering/aiding and abetting that crime, in violation of 18 U.S.C. §§ 1956(a)(1)(B)(ii) and 2 (Count 28). (Cr Dist. Ct. Dkt. No. 149.)

On June 10, 1996, a jury found Petitioner guilty on all counts. (Cr Dist. Ct. Dkt. No. 321.) The jury returned a general verdict. (Cr Dist. Ct. Dkt. No. 321.) With

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[1] The offense of conspiracy to use and carry a firearm during and in relation to a crime of violence was found under § 924(n) at the time that Petitioner was indicted. But, that offense is currently found under § 924(o).

regard to the §§ 924(o) and 924(c) convictions in Counts 4, 5, 8, 11, 14, and 17, the jury did not make a finding or otherwise specify the predicate offense. (*Id.*) And, the district court did not instruct the jury to unanimously find or agree on the predicate offense underlying each of the §§ 924(o) and 924(c) convictions. (Cr Dist. Ct. Dkt. No. 330.) In fact, when instructing the jury on the § 924(c) offenses, the district court specifically noted that Petitioner could be found guilty only if the jury found beyond a reasonable doubt that he "committed the felony offense charged in the particular count, that is, Counts 2, 3, 6, 7, 9, 10, 12, 13, 15, 16, 18, *or* 19, respectively." (*Id.* at 20 (emphasis added).)

Additionally, the district court instructed the jury that it could find Petitioner guilty of every count—excluding the conspiracy counts—if the jury simply found that he aided and abetted his codefendants in the crimes charged. (*Id.* at 31.) The jury did not specify whether the convictions for Counts 3, 5, 7, 8, 10, 11, 13, 14, 16, 17, and 28 were based on a finding that Petitioner committed the substantive offenses, or simply aided and abetted a codefendant. More specifically, with regard to the § 924(c) convictions in Counts 5, 8, 11, 14, and 17, the jury did not specify whether the predicate offense was conspiracy to commit Hobbs Act robbery, substantive Hobbs Act robbery, or aiding and abetting a Hobbs Act robbery, or whether the jurors even unanimously agreed upon a predicate to begin with.

The district court imposed a total sentence of 105 years, comprised of concurrent 20-year sentences on Counts 1, 2, 3, 4, 6, 7, 9, 10, 12, 13, 15, 16, and 28, a

mandatory consecutive sentence of 5 years on Count 5, and mandatory consecutive sentences of 20 years for each of Counts 8, 11, 14, and 17. (Cr Dist. Ct. Dkt. No. 506.) Petitioner twice appealed his convictions and sentence to the Eleventh Circuit. His first appeal was granted in part and his sentence vacated for the limited purpose of conforming the judgment to the oral pronouncement of sentence. (Cr Dist. Ct. Dkt. No. 504.) His second appeal was unsuccessful. (Cr Dist. Ct. Dkt. No. 520.)

On April 25, 2003, Petitioner filed a *pro se* 28 U.S.C. § 2255 motion to vacate his sentence, raising the following grounds for relief: (1) ineffective assistance of counsel because counsel was conflicted; (2) ineffective assistance of counsel because counsel failed to conduct a reasonable investigation into the criminal histories of the cooperating witnesses for impeachment purposes; (3) ineffective assistance of counsel because counsel failed to seek a favorable plea deal on behalf of Mr. Veliz; and (4) that the Comprehensive Crime Control Act of 1984 allowing for the stacking of § 924(c) sentences was unconstitutional. (Dist. Ct. Case No. 03-Civ-21024, Dkt. Nos. 1, 3.) After appointing Petitioner counsel and holding an evidentiary hearing, the district court denied the motion as well as a certificate of appealability. (Dist. Ct. Case No. 03-Civ-21024, Dkt. No. 33.) This Court affirmed. (Dist. Ct. Case No. 03-Civ-21024, Dkt. No. 44.) Petitioner then filed a motion with the Eleventh Circuit seeking leave to file a second or successive § 2255 motion raising one issue: that his 18 U.S.C. § 924(c) convictions were invalid after the Supreme Court's decision in *Johnson v.*

United States, 135 S. Ct. 2551 (2015). (Cr Dist. Ct. Case No. 538.) The Eleventh Circuit denied Petitioner's motion on June 27, 2016. (*Id.*)

Shortly thereafter, on June 30, 2016, Petitioner filed a second § 2255 motion before the district court raising the same *Johnson* claim he previously raised before the Eleventh Circuit. (Cr Dist. Ct. Dkt. No. 540.) The district court dismissed the motion as an unauthorized second or successive § 2255 motion. (Cr Dist. Ct. Dkt. No. 541.) Though Petitioner did not appeal that decision, he subsequently filed a petition for relief under 28 U.S.C. § 2241 in the United States District Court for the Southern District of Georgia, raising the same *Johnson* claim. (Dist. Ct. Case No. 16-Civ-00152, Dkt. No. 1.) The district court denied his motion (Dist. Ct. Case No. 16-Civ-00152, Dkt. No. 20), and the Eleventh Circuit affirmed (Appeal Case No. 17-15134). Petitioner then filed a petition for a writ of certiorari with this Court, which was denied on October 15, 2019. (Sup. Ct. Case No. 18-9360.)

On January 3, 2020, the Eleventh Circuit granted Petitioner's application for authorization to file a second or successive § 2255 motion. (Civ Dist. Ct. Dkt. No. 1.) In his application, Petitioner sought to challenge his §§ 924(o) and 924(c) convictions based on *United States v. Davis*, 139 S. Ct. 2319 (2019), which declared unconstitutionally vague the residual clause definition of "crime of violence" in § 924(c)(3)(B). (*Id.* at 3.) In its order, the Eleventh Circuit explained that Petitioner had made the requisite prima facie showing satisfying the criteria in 28 U.S.C. § 2255(h)(2). (*Id.* at 7.) The Court recognized that, in declaring the residual clause

in § 924(c)(3)(B) unconstitutionally vague, *Davis* announced a new rule of constitutional law that the Supreme Court had made retroactive to cases on collateral review. (*Id.* at 4.)

The Eleventh Circuit found that Petitioner made a prima facie showing that his §§ 924(o) and 924(c) convictions in Counts 4, 5, 8, 11, 14, and 17 were unconstitutional. (*Id.* at 7.) It explained that, although those counts contained multiple predicates, one of those predicates—conspiracy to commit Hobbs Act robbery—was for an offense that does not qualify as a "crime of violence" under the elements clause. (*Id.* at 6.) And because it was unclear whether that offense served as the predicate given the jury's general verdict, Petitioner had made a prima facie showing that his §§ 924(o) and 924(c) convictions in Counts 4, 5, 8, 11, 14, and 17 were unconstitutional. (*Id.* at 7.)

After the district court docketed the Eleventh Circuit's grant of Petitioner's second or successive application, (Civ Dist. Ct. Dkt. No. 1), it appointed counsel, (Civ Dist. Ct. Dkt. No. 4), and Petitioner filed a counseled 28 U.S.C. § 2255 motion arguing that his 18 U.S.C. §§ 924(o) and (c) convictions on Counts 4, 5, 8, 11, 14, and 17 were invalid in light of the Supreme Court's decision in *Davis*, (Civ Dist. Ct. Dkt. No. 6). The government filed a response in opposition to the motion, (Civ Dist. Ct. Dkt. No. 7), and Petitioner replied, (Civ Dist. Ct. Dkt. No. 8). On March 2, 2021, the district court stayed Petitioner's case pending the Eleventh Circuit's decisions in *Granda v. United States*, No. 17-15194, and *Foster v. United States*, No. 19-14771. (Civ Dist. Ct.

Dkt. No. 17.) After the Eleventh Circuit decided *Granda* and *Foster*, the district court entered an order sua sponte reopening the case, and subsequently adopted the magistrate judge's report recommending Petitioner's § 2255 motion be denied. (Civ Dist. Ct. Dkt. Nos. 20; 21; 23.)

The district court relied on *Granda* to find Petitioenr's claim procedurally defaulted because he could not show cause or actual prejudice to excuse his procedural default, nor could he show actual innocence because "the valid and invalid predicate offenses for the §§ 924(o) and (c) convictions are inextricably intertwined." (Civ Dist. Ct. Dkt. No. 21:11.)

The district court, relying on *Granda*, *Foster v. United States*, 996 F.3d 1100 (11th Cir. 2021), and *United States v. Cannon*, 987 F.3d 924 (11th Cir. 2021), also reasoned that Petitioner's claim failed on the merits because his §§ 924(o) and (c) convictions "were predicated alternatively on Counts 3, 7, 10, 13 and 16—substantive Hobbs Act robbery offenses," and are, therefore, "completely unaffected by *Davis*." (*Id.* at 15.)

The district court did, however, grant a certificate of appealability as to "whether the procedural default rule bars relief in this case as set forth in *Granda*." (Civ Dist. Ct. Dkt. No. 23.) On October 22, 2021, the district court entered a separate judgment denying relief. (CIv Dist. Ct. Dkt. No. 24.) On December 20, 2021, Petitioner timely appealed. (Civ Dist. Ct. Dkt. No. 25.)

On appeal, Petitioner argued both that the error alleged was jurisdictional—and therefore not subject to procedural default—as well as that he was actually innocent of the §§ 924(o) and (c) convictions and could demonstrate cause and prejudice to excuse any procedural default. (Pet. C.A. Br. at 11–22.) More specifically, he argued that *Reed v. Ross*, 468 U.S. 1 (1984), excused any procedural default, and that the Eleventh Circuit had misinterpreted *Reed*. (*Id.* at 15–17.)

The Eleventh Circuit held that the error alleged was not jurisdictional and that Petitioner could not overcome procedural default. More specifically, the Eleventh Circuit held that Petitioner could not establish cause because Petitioner possessed "the building blocks of a due process vagueness challenge to the § 924(c) residual clause." (App. A at 2a.)

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve the Circuit Split Regarding Whether *Johnson v. United States*, 576 U.S. 591 (2015), Establishes "Cause" to Overcome Procedurally Defaulted 28 U.S.C. § 2255 Claims Predicated on the Unconstitutional Residual Clause in 18 U.S.C. § 924(c)(3)(B)

In *Johnson v. United States*, 576 U.S. 591 (2015), the Court deemed unconstitutionally vague the so-called "residual clause" in the Armed Career Criminal Act ("ACCA"), which defines the term "violent felony" to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). In the Court's view, the process of

determining what is embodied in the "ordinary case" of such an offense, and then of quantifying the "risk" posed by that ordinary case, "offer[ed] no reliable way to choose between . . . competing accounts of what 'ordinary' . . . involves." *Johnson*, 576 U.S. at 598. The Court concluded that the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by Judges," in violation of due process. *Id.* at 597.

Johnson was a marked break in the law. The Court had spent "[n]ine years . . . trying to derive meaning from" and "develop the boundaries of" the residual clause. *See id.* at 606; *Welch v. United States*, 578 U.S. 120, 124–25 (2016) (citing *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Sykes v. United States*, 564 U.S. 1 (2011)). In both *James* and *Sykes*, the Court rejected the constitutional vagueness challenge that would ultimately prevail in *Johnson*. *See James* 550 U.S. at 211 n.6, *overruled by Johnson*, 576 U.S. at 606; *Sykes*, 564 U.S. at 15–16, *overruled by Johnson*, 576 U.S. at 606. In *Welch*, the Court held that *Johnson* was a substantive change in law that applied retroactively. *Welch*, 578 U.S. at 130.

Petitioner's direct appeal was filed before *Johnson* and *United States v. Davis*, 139 S. Ct. 2319 (2019). *Davis*, of course, applied the new rule from *Johnson* and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)—"that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk

posed by a crime's imagined 'ordinary case'"—to invalidate the residual clause in § 924(c)(3)(B), as unconstitutionally vague. 139 S. Ct. 2319, 2326–27.

Petitioner did not, however, challenge the unconstitutional vagueness of § 924(c)(3)(B) on direct appeal, so any challenge to his §§ 924(o) & (c) convictions on that basis was procedurally defaulted. As a "general rule . . . claims not raised on direct review may not be raised on collateral review unless the petitioner shows cause and prejudice." *Massaro v. United States*, 538 U.S. 500, 504 (2003) (citing *United States v. Frady*, 456 U.S. 152, 167–68 (1982); *Bousley v. United States*, 523 U.S. 614, 621–22 (1998)). "The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Masarro*, 538 U.S. at 505. "This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." *Reed v. Ross*, 468 U.S. 1, 10 (1984).

There are circumstances, however, where it is neither efficient nor fair to prohibit a petitioner from raising a new claim on collateral review. In *Reed*, the Court held that "the novelty of a constitutional issue" and the "failure to counsel to raise a constitutional issue reasonably unknown to him" may provide "cause" sufficient to overcome a procedural default. *Id.* at 10, 15. *Reed* lists "three situations in which a

'new' constitutional rule, representing 'a clear break with the past' might emerge from this Court[,]" and provide cause to overcome a procedural bar because it was, "so novel that its legal basis was not reasonably available to counsel," at the time of default:

> First, a decision of this Court may explicitly overrule one of our precedents . . . Second, a decision may 'overtur[n] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.' . . . And, finally, a decision may 'disapprov[e] a practice this Court has arguably sanctioned in prior cases.'

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

A rough consensus emerged among the courts of appeals that § 2255 claims predicated on § 924(e)(2)(B)(ii)—the same residual clause that was struck down in *Johnson*—could establish "cause" to overcome procedural default, pursuant to *Reed*, because the claim was "not reasonably available" before *Johnson*. *See, e.g.*, *United States v. Snyder*, 871 F.3d 1122, 1127 (10th Cir. 2017); *Lassend v. United States*, 898 F.3d 115, 122–23 (1st Cir. 2018); *Raines v. United States*, 898 F.3d 680, 687 (6th Cir. 2018); *Ezell v. United States*, 743 F. App'x 784, 785 (9th Cir. 2018); *Rose v. United States*, 738 F. App'x 617, 626 (11th Cir. 2018); *United States v. Bennerman*, 785 F. App'x 958, 963 (4th Cir. 2019). *But see Gatewood v. United States*, 979 F.3d 391, 396–

97 (6th Cir. 2020) (distinguishing *Johnson*-based claims that were defaulted before or after *James*, and holding that the former could not overcome default because *James* had not yet foreclosed claim).

That consensus, however, has not extended to § 2255 claims predicated on the unconstitutional vagueness of non-ACCA residual clauses. For example, the district court in Petitioner's case found the Eleventh Circuit's decision in *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), compelled it to hold that Petitioner could not show "cause" sufficient to excuse the default (and also to deny relief on the merits), because, similar to the movant in *Granda*, "at the time of trial, he had not been deprived of the tools to challenge the § 924(c) residual clause." *Veliz v. United States*, 2021 WL 4943008, at *5 (S.D. Fla. Sept. 30, 2021).

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

This disagreement is not limited to § 924(c)(3)(B) claims, or to the Eighth and Eleventh Circuits. It extends to other circuits, and additional non-ACCA residual

clauses, as well. *Compare Cross v. United States*, 892 F.3d 288, 296 (7th Cir. 2018) (holding that *Johnson* provides "cause" to overcome procedurally defaulted § 2255 claim predicated on the residual clause in the mandatory Sentencing Guidelines); *with United States v. Vargas-Soto*, 35 F.4th 979, 993–99 (5th Cir. 2022) (holding that *Johnson* does not provide "cause" to overcome procedurally defaulted § 2225 claim predicated on the residual clause in 18 U.S.C. § 16(b)). This Court should grant the petition to resolve this latest split between the Eighth and the Eleventh Circuits—thereby also clarifying the "cause" standard for all post-*Johnson* § 2255 claims predicated on the unconstitutional vagueness of non-ACCA residual clauses.

A. There Is A Clear Circuit Split Between the Eleventh Circuit and the Eighth Circuit Regarding Whether *Johnson* Provides "Cause" to Overcome Procedurally Defaulted Claims Predicated on the Unconstitutional Residual Clause in § 924(c)(3)(B)

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

Granda had not raised this claim on direct appeal, resulting in procedural default. A majority of the panel found that Granda could not establish cause to overcome the default. The court first recognized that "[b]oth *Johnson* and *Davis* announced new constitutional rules," but that "to establish novelty 'sufficient to provide cause' based on a new constitutional principle, Granda must show that the new rule was 'a sufficiently clear break with the past, so that an attorney representing [him] would not reasonably have had the tools for presenting the claim.'"

Granda, 990 F.3d at 1286 (internal citation omitted). Next, the court discussed the three circumstances from *Reed* in which novelty can establish cause. *Id.*

The court determined that the first *Reed* circumstance—"when a decision of the Supreme Court explicitly overrules one of its precedents" did not apply, despite *Johnson* having explicitly overturned *James*, because, "*Davis* did not overrule any prior Supreme Court precedents holding that the § 924(c) residual clause was not unconstitutionally vague." *Id.* at 1287 (citing *Reed*, 468 U.S. at 17).

The court then rejected, without discussion, the second *Reed* circumstance—"when a Supreme Court decision overturns 'a longstanding and widespread practice to which [the Supreme] Court has not spoken but which a near-unanimous body of lower court authority has expressly approved.'" *Id.* (citing *Reed*, 468 U.S. at 17). The Eleventh Circuit, however, had previously rejected the premise that default could be excused by the existence of a wall of adverse circuit authority. *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001). According to the Eleventh Circuit, this Court "could not have been clearer that perceived futility does not constitute cause to excuse a procedural default." *Id.* at 1259 (citing *Bousley v. United States*, 523 U.S. 614, 623 (1998), and *Smith v. Murray*, 477 U.S. 527, 535 (1996)). The court in *Granda* thus reiterated, "[t]hat an argument might have less than a high likelihood of success has little to do with whether the argument is available or not." 990 F.3d 1282, 1286 (quotation omitted). "[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was

available at all." *Id.* (citing *McCoy*, 266 F.3d at 1258 (internal quotation marks and further citation omitted)). It appears therefore that *Reed*'s second "cause" category is no longer viable in the Eleventh Circuit, under the theory that *Bousley* and *Smith* invalidated that portion of *Reed*, sub silentio.

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

According to the court, "Granda's best argument," with respect to cause under the third *Reed* category, was that *James*, "had directly rejected the argument that the ACCA's residual clause was unconstitutionally vague" at the time of Granda's direct appeal. *See Granda*, 990 F.3d at 1287. "However," the court wrote, "*James* did not consider the § 924(c) residual clause at all." *Id.* The Eleventh Circuit reasoned that the dissenting Justices in *James* signaled that they "were interested in entertaining vagueness challenges to ACCA's residual clause, and perhaps to similar

statutes," and that other defendants had raised vagueness challenges to ACCA's residual clause after *James*. *See id.* "These claims did not succeed. But if *James* did not deprive litigants of the tools to challenge even the ACCA's residual clause on vagueness grounds, it surely did not deprive them of the tools to challenge the § 924(c) residual clause." *Id.*

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

A little more than a year after the Eleventh Circuit decided *Granda*, the Eighth Circuit faced its own procedurally defaulted *Davis*-based § 2255 claim, in *Jones v. United States*, 39 F.4th 523 (8th Cir. 2022). Like Granda—and Petitioner—Jones asserted that, in light of *Davis*, his § 924 conviction should be vacated because the predicate offense fell under the unconstitutionally vague residual clause in § 924(c)(3)(B). *Id.* at 525. Jones had also failed to raise this claim prior to sentencing or on direct appeal. Unlike the Eleventh Circuit majority in *Granda*,[2] however, the

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

Eighth Circuit in *Jones* unanimously held that Jones had "established cause for failing to raise the *Davis* claim on direct review, because the state of the law at the time of his appeal did not offer a reasonable basis upon which to challenge the guilty plea." *Id.* (citing *Reed*, 468 U.S. at 17). The *Jones* court noted that, at the time of Jones's direct appeal, "the Supreme Court had declared that the comparable residual clause in 18 U.S.C. § 924(e)(2)(B) was not unconstitutionally vague," in *James*. *Id.* Thus, it concluded that "Jones's present [*Davis*] claim was reasonably available only after the Supreme Court in *Johnson* . . . overruled prior decisions and held that the residual clause of § 924(e)(2)(B) was unconstitutionally vague." *Id.* at 525–26 (citing *Snyder*, 871 F.3d at 1127).[3]

The reasoning of *Jones* applies equally to Petitioner. Thus, had Petitioner brought his *Davis*-based § 2255 claim before the Eighth Circuit, he would have been able to clear this hurdle to relief and obtain a merits review of his claims. Because he was convicted in the Eleventh Circuit, however, he was denied on a procedural ground that does not bar relief elsewhere.

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

B. This Circuit Split Extends to Other Non-ACCA Residual Clauses, to Other Circuits, and to the Continued Viability of *Reed v. Ross*, 468 U.S. 1 (1984)

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

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

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

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

entertain such a challenge." *Id.* "Finally, the Supreme Court had implicitly 'sanctioned' the residual clause by interpreting it as if it were determinate." *Id.* (citations omitted).

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

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

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

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

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

Importantly, the Fifth Circuit also opined that *Reed*'s first two "cause" categories—(1) a Supreme Court decision that overturns its own precedent and (2) a Supreme Court decision that overturns a widespread lower-court practice—were not only "dicta," but were effectively "unraveled" by *Bousley* and *Smith*, "because their entire premise is futility." *Vargas-Soto*, 35 F.4th at 997. *Bousley*, according to the Fifth Circuit, thus whittled *Reed* down to a fraction of its third "cause" category: to the "single question of whether the 'claim is so novel that is legal basis is not reasonably available to counsel.'" *Id.* (citing *Bousley*, 523 U.S. at 622).

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

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

Judge W. Eugene Davis dissented. He argued that Vargas-Soto's claim was not "reasonably available," because—through his sentencing and direct appeal—

James foreclosed "the constitutional void-for-vagueness claim he now raises." *Id.* at 1001 (W. Eugene Davis, J., dissenting).

Judge Davis contended that, "because *Johnson* expressly overruled *James*," it "squarely" satisfied *Reed*'s first category of cases that are sufficiently novel to constitute cause, because "a claim is not 'reasonably available' when the Supreme Court bars it." *Id.* at 1002–03. The dissenting judge further pointed out that "every circuit, seven total, to consider whether *Johnson* is sufficiently novel to establish cause have held, under *Reed*, that it is," and rejected both *Granda*'s "overly formalistic distinction between '*Johnson* claims' which involve § 924(e)(2)(B), and '*Davis*' claims, which involve § 924(c)(3)(B)"—as well as the majority's contention that *Reed*'s first two "cause" categories were no longer good law. *Id.* Instead, Judge Davis maintained that:

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

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

C. The Decision Below—and *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021)—Is Wrong

There is a clear circuit split regarding whether *Johnson* provides "cause" to overcome procedural default for § 2255 claims predicated on non-ACCA residual clauses. The Eleventh Circuit's "overly formalistic" application of *Reed* and *Johnson* to exclude the *Davis*-based claim in *Granda* (and this case) is wrong. Petitioner's claim that his §§ 924(o) & (c) convictions are invalid because they were predicated on the unconstitutionally vague residual clause in § 924(c)(3)(B) was not "reasonably available" until the Court first determined, in *Johnson*, that requiring judges to use the "categorical approach" while applying the residual clause "produced 'more unpredictability and arbitrariness' when it comes to specifying unlawful conduct than the Constitution allows." *See Davis*, 139 S. Ct. at 2326 (citing *Johnson*, 135 S. Ct. at 2557–59).

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

Johnson." *Snyder*, 871 F.3d at 1127 (quoting *United States v. Redrick*, 841 F.3d 478, 480 (D.C. Cir. 2016)). Prior to *Johnson*, the Supreme Court had "twice rejected constitutional challenges to the ACCA's residual clause." *Id*. (citing *James* and *Sykes*). And *Johnson* "explicitly overruled" that prior precedent—thereby satisfying the first *Reed* category. *Snyder*, 871 F.3d at 1127. *Accord Cross*, 892 F.3d at 295; *Lassend*, 898 F.3 at 122.

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

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

> *Johnson* abrogated a substantial body of circuit court precedent upholding the residual clause against vagueness challenges. *E.g.*, *Brierton*, 165 F.3d at 1138–39; *United States v. Presley*, 52 F.3d 64, 68 (4th Cir. 1995); *United States v. Argo*, 925 F.2d 1133, 1134–35 (9th Cir. 1991) . . . no court ever came close to striking down the residual

> clause . . . or even suggested that it would entertain such a challenge. Finally, the Supreme Court had implicitly "sanctioned" the residual clause by interpreting it as if it were determinate. *Stinson v. United States*, 508 U.S. 36 [] (1993); *Taylor v. United States*, 495 U.S. 575 [] (1990).

Cross, 892 F.3d at 296.

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

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

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

Finally, the application of the categorical approach to the § 924(c)(3)(B) residual clause, for example, was "a practice this Court ha[d] arguably sanctioned in prior cases," by applying the categorical approach to *other* residual clauses. *See, e.g.*, *James*, 127 S. Ct. at 1593 (applying categorical approach to ACCA's residual clause);

Leocal v. Ashcroft, 125 S. Ct. 377, 381 (2004) (applying categorical approach to §16(b) residual clause). *Johnson* inarguably "disapproved" of this practice. *See Reed*, 468 U.S. at 17 ("And, finally, a decision may 'disapprov[e] a practice this Court has arguably sanctioned in prior cases.'").

Reed also remains good law. While disagreeing about how, the Eleventh and Fifth Circuits each contend that *Bousley* and *Smith* significantly narrowed *Reed*. *See McCoy*, 266 F.3d at 1258–59; *Vargas-Soto*, 35 F.4th at 993–97. However, *Bousley* did not say it was overruling or narrowing *Reed*. *See Bousley,* 523 U.S. at 622 (citing *Reed*). And *Bousley* is not inconsistent with *Reed*. *See United States v. Werle*, 35 F.4th 1195, 1201 (9th Cir. 2022) ("*Reed* and *Bousley* co-exist comfortably."). *Bousley* also did not address a situation in which the Supreme Court recognized a new constitutional principle *and* overturned its own precedent in doing so. *See Lassend*, 898 F.3d at 123; *Vargas-Soto*, 35 F.4th at 1005 (W. Eugene Davis, J., dissenting). Nor did *Bousley* address a situation "where a claim has been uniformly rejected by every circuit to consider it for a sustained period of time." *United States v. Pollard*, 20 F.4th 1252, 1262 (9th Cir. 2021) (Forrest, J., concurring). Instead, *Bousley* addressed a situation that is not applicable here, in which the petitioner failed to raise a non-constitutional claim on direct review that was then being litigated throughout the country, and had even generated a circuit split. *See Bailey v. United States*, 516 U.S. 137, 142 (1995) (noting conflict in circuits on claim at issue in *Bousley*). "Indeed, at the time of petitioner's plea, the Federal Reports were replete with cases involving"

the petitioner's claim. *Bousley*, 523 U.S. at 622 (citations omitted). In that situation, the Court held that a petitioner could not show cause to overcome a default. *Id.* But that holding does not affect *Reed's* discussion of other circumstances in which a petitioner can show cause to overcome procedural default. *See Reed*, 468 U.S. at 17. *See also McCoy,* 266 F.3d at 1273 (Barkett, J., concurring) ("It is one thing to preclude, as an excuse, the wholesale speculation that an argument not presented in the state courts would be futile; it is quite another to say that cause should not be recognized when a lawyer declines to make an argument in federal court because every single appellate court has already ruled against his position.") (emphasis omitted).[4]

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

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

II. This Case Presents a Uniquely Uncomplicated Vehicle to Resolve a Growing Circuit Split

Due to the narrowness of the decision below—which rests solely upon procedural default—and the development of a crystal-clear circuit split, Petitioner's case provides an uncomplicated opportunity for the Court to resolve an open question of federal law, about which the courts of appeals continue to disagree, with profound implications for federal prisoners and post-conviction practitioners. Whether *Johnson* provides "cause" to excuse procedural default for § 2255 claims predicated on the unconstitutionally vague residual clause in § 924(c)(3)(B) is important in its own right, but, naturally, an opinion from the Court on that question will also bring order to the disarray as to "cause" which has spread to other non-ACCA residual clauses in the post-*Johnson* era. This is an urgent, growing issue that only this Court can resolve, and one that can—and should—be resolved through this petition.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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