No. _____

IN THE

Supreme Court of the United States

AL WORDLY,
***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

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. Al Douglass Wordley*, No. 1:01-cr-00369-RLR (S.D. Fla.) (Judgment entered Oct. 28, 2002).
- *Al Douglass Wordly v. United States*, No. 1:20-civ-22499-FAM (S.D. Fla.) (Judgment entered Jan. 14, 2022).
- *Al Wordly v. United States*, No. 22-10166 (11th Cir. Feb. 6, 2023).
- *Al Wordly v. United States*, No. 22-10166 (11th Cir. May 10, 2023).

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IN THE
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AL WORDLY,
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On Petition for a Writ of Certiorari to the
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for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Al Wordly ("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 1775723 (11th Cir. Feb. 6, 2023). The Eleventh Circuit's denial of Mr. Wordly's petition for rehearing en banc (App. B) is unreported.

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 February 6, 2023. Petitioner timely filed a petition for rehearing en banc. The Eleventh Circuit denied the motion for rehearing on May 10, 2023. Petitioner's petition is now due on or before August 8, 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 July 12, 2001, the grand jury returned a multi-count Superseding Indictment charging Mr. Wordly with: conspiracy to possess with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. § 846 (Count 1); conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 2); conspiracy to use a firearm during and in relation to, and possess a firearm in furtherance of, a crime of violence and a drug-trafficking crime, namely the crimes "as set forth in Counts 1, 2, 4, 5, 7, 8, 10, 11, 12, and 13," of the Superseding Indictment in violation of 18 U.S.C. § 924(c) and (o) (Count 3); possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a) (Count 4); Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) (Count 5); possession of a firearm in relation to, and in furtherance of, a crime of violence and a drug trafficking crime, referencing Counts 4 and 5, in violation of 18 U.S.C. § 924(c) (Count 6); possession with intent to distribute cocaine, in violation of

21 U.S.C. 846 (Count 7); attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 8); and possession of a firearm in relation to, and in furtherance of, a crime of violence and a drug trafficking crime, referencing Counts 7 and 8, in violation of 18 U.S.C. § 924(c) (Count 9). (Dist. Ct. Dkt. No. 51.)

On May 6, 2002, a jury found Mr. Wordly guilty on all counts. (Dist. Ct. Dkt. No. 164.) The jury was instructed to convict Mr. Wordly on Count 3, the government needed to prove only that the object of the conspiratorial plan was that the firearm be used in furtherance of "a crime of violence or a drug trafficking crime as charged." (Dist. Ct. Dkt. No. 158.) The jury returned a general verdict; it did not make a finding or otherwise specify the predicate offense supporting the Section 924(o) conviction on Count 3. (Dist. Ct. Dkt. No. 164.)

On July 24, 2002, the district court judge granted Mr. Wordly's Rule 29 Motion for Judgment of Acquittal on Counts 5 and 8, the two substantive Hobbs Act robberies. (Dist. Ct. Dkt. No. 189.) The court found the government had failed to meet the jurisdictional requirement to prove the robberies affected interstate commerce. (*Id.*)

At sentencing, the court imposed a sentence of 660 months' incarceration, consisting of terms of 360 months for Counts 1 and 4 (conspiracy to possess with intent to distribute marijuana and cocaine, and conspiracy to possess with intent to distribute cocaine), and 240 months as to Counts 2, 3, and 7 (conspiracy to commit Hobbs Act robbery, conspiracy to possess a firearm in furtherance of a crime of

violence and drug trafficking crime, and conspiracy to possess with intent to distribute cocaine), to run concurrently with each other, and 60 months as to Count 6 (possession of a firearm during a crime of violence and drug trafficking crime), to run consecutively to Counts 1, 2, 3, 4, and 7, and 240 months as to Count 9 (possession of a firearm during a crime of violence and drug trafficking offense), to run consecutively to Count 6. (Dist. Ct. Dkt. No. 222.) Mr. Wordly's subsequent appeal to the Eleventh Circuit was unsuccessful. *United States v. Wordly*, No. 02-16067 (11th Cir. July 7, 2003).

In 2004, Mr. Wordly filed a *pro se* 18 U.S.C. § 2255 Motion to Vacate the sentence raising the following claims: (1) trial counsel was constitutionally ineffective for failing to seek dismissal of the Superseding Indictment based on collateral estoppel and protection against double jeopardy; (2) trial counsel was constitutionally ineffective for failing to strike a potential juror from the venire panel on the basis that the juror indicated an inability to support the death penalty; (3) prosecutorial misconduct; (4) the trial court erred in refusing to investigate juror misconduct and extreme influence of deliberating jurors; and (5) the trial court erred in answering a jury note questioning whether money constitutes commerce. (Cr.DE 255.) The court denied the motion on November 18, 2005. *Wordly v. United States*, Case No. 04-civ-20936, DE 29 (S.D. Fla. Nov. 18, 2005).

In 2016, Mr. Wordly filed an application for leave to file a second or successive Section 2255 motion in light of *Johnson v. United States*, 135 S. Ct. 2251 (2015).

Wordly v. United States, Case No. 16-13620-C (11th Cir. June 16, 2016). In that application, Mr. Wordly argued that he was sentenced as a career offender when the Sentencing Guidelines were still mandatory and that his sentence relied on the residual clause in the career offender definition of the Sentencing Guidelines. The Eleventh Circuit denied his application. *Wordly v. United States*, Case No. 16-13620 (11th Cir. July 12, 2016).

Simultaneously, Mr. Wordly filed a 28 U.S.C. § 2255 motion challenging his 18 U.S.C. § 924(o) conviction in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), in the district court raising substantially the same claims. Cr.DE 372. On June 27, 2016, this Court dismissed the motion as an unauthorized second or successive Section 2255 petition. (Dist. Ct. Dkt. No. 374.) Mr. Wordly did not appeal.

In 2017, Mr. Wordly filed a second application for leave to file a successive Section 2255 motion based on *Johnson* and other cases, arguing that Section 924(c)(3)(B)'s residual clause was unconstitutionally vague. *Wordly v. United States*, Case No. 17-13432 (11th Cir. July 31, 2017). The Eleventh Circuit denied the application. *Wordly v. United States*, Case No. 17-13432 (11th Cir. Aug. 31, 2017).

On May 26, 2020, Mr. Wordly filed in the United States Court of Appeal for the Eleventh Circuit an application for authorization to file a second or successive Section 2255 motion, giving rise to the instant action. *In re: Al Wordly*, Case No. 20-11954 (11th Cir. May 26, 2020). In his application, Mr. Wordly sought leave to challenge his Section 924(o) conviction as void in light of *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 15-16.

On June 17, 2020, the Eleventh Circuit granted Mr. Wordly's application for authorization to file a second or successive Section 2255 motion. *In re: Al Wordly*, Case No. 20-11954 (11th Cir. June 17, 2020). In its Order, the Eleventh Circuit explained that Mr. Wordly made the requisite *prima facie* showing satisfying the criteria in 28 U.S.C. § 2255(h)(2). *Id.* at 6. The Court recognized that, in declaring the residual clause in Section 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.*

The Court of Appeals found further that Mr. Wordly made a *prima facie* showing that his Section 924(o) conviction on Count 3 unconstitutional in light of *Davis*. The Eleventh Circuit explained that, although that offense was based on multiple predicates, one of those predicates was for an offense—conspiracy to commit Hobbs Act robbery—that no longer qualifies as a "crime of violence" after *Davis*. *Id.* at 5 (citing *Brown v. United States*, 942 F.3d 1069, 1076 (11th Cir. 2019)). Because it was unclear whether that offense served as the predicate given the jury's general verdict, the Court of Appeals found that Mr. Wordly made a *prima facie* showing that his Section 924(o) conviction on Count 3 was unconstitutional. *Id.* at 5-6.

On February 2, 2021, the district court stayed Mr. Wordly's case pending the Eleventh Circuit's decisions in *Granda v. United States*, No. 17-15194, and *Foster v.*

United States, No. 19-14771. After the Eleventh Circuit decided *Granda* and *Foster*, the parties filed a motion to re-open the case, which the district court granted on July 6, 2021, Dist. Ct. Civ. Dkt. No. 19. On November 15, 2021, the district court adopted the magistrate judge's report recommending Mr. Wordly's § 2255 motion be denied. (Dist. Ct. Civ. Dkt. Nos. 20, 22).

The district court found Mr. Wordly'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) convictions are inextricably intertwined.

The district court relied on *Granda* to find Mr. Wordly'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) conviction are inextricably intertwined.

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*." (Dist. Ct. Civ. Dkt. No. 22.) On November 15, 2021, the district court entered a separate judgment denying relief. (Dist. Ct. Civ. Dkt. No. 23.) On January 13, 2022, Mr. Wordly timely appealed. (Dist. Ct. Civ. 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 11–21.) 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 13–16.)

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 "at the time of his direct appeal the building blocks to make a due process vagueness challenge to the § 924(c) residual clause." (App. A at 8a.)

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, a district court in a similar case found the Eleventh Circuit's decision in *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), compelled it to hold that the similarly situated 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." *Rosello v. United States*, 2021 WL 4943024, at *4 (S.D. Fla. Oct. 1, 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*,[1] however, the 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

[1] 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).

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).[2]

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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[2] 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).[3]

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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[3] 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.

Respectfully submitted,

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