No. 23-5331

IN THE SUPREME COURT OF THE UNITED STATES

AL DOUGLAS WORDLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

MAHOGANE D. REED
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner was entitled to collaterally attack his conviction for conspiring to possess a firearm in furtherance of a crime of violence or drug-trafficking crime, in violation of 18 U.S.C. 924(o), based on a claim that it might rest on an invalid predicate offense, where the court of appeals determined that the invalid predicate was inextricably intertwined with valid predicates.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is not published in the Federal Reporter but is available at 2023 WL 1775723. The order of the district court and the report of the magistrate judge are not reported in the Federal Supplement but are available at 2021 WL 5301073 and 2021 WL 5310732.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 2023. A petition for rehearing was denied on May 10, 2023 (Pet. App. A4). The petition for a writ of certiorari was filed on

August 8, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to possess marijuana and cocaine with intent to distribute, in violation of 21 U.S.C. 841(b)(1)(A)(II), (b)(1)(D), and 846 (Count 1); conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) (Count 2); conspiring to use and carry a firearm during and in relation to a crime of violence or a drug-trafficking crime, in violation of 18 U.S.C. 924(o) (Count 3); conspiring to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(b)(1)(A)(ii) and 846 (Count 4); possessing a firearm in furtherance of a crime of violence or a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i) and (A)(ii) (Count 6); conspiring to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C), and 846 (Count 7); and possessing a firearm in furtherance of a crime of violence or a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A), (A)(ii), and 2 (Count 9). Judgment 1. The district court sentenced petitioner to 660 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed, 02-16067 C.A. Order (July 7, 2003).

In 2004, petitioner filed a motion to vacate, set aside, or correct his judgment under 28 U.S.C. 2255, which the district court

denied on the merits. 04-cv-20936 D. Ct. Doc. 29 (Nov. 18, 2005). The district court denied petitioner's request for a certificate of appealability (COA), 04-cv-20936 D. Ct. Doc. 31 (Dec. 16, 2005); the court of appeals dismissed the appeal, 05-16968 C.A. Order (Apr. 4, 2006); and this Court denied a petition for a writ of certiorari, 540 U.S. 936.

In 2020, after the lower courts had rejected two prior efforts to file a further Section 2255 motion, the court of appeals granted petitioner leave to file a successive Section 2255 motion. 20-11954 C.A. Order (June 17, 2020). The district court then denied petitioner's successive Section 2255 motion, but granted petitioner's request for a COA. 20-cv-22499 D. Ct. Doc. 22 (Nov. 15, 2021). The court of appeals affirmed. Pet. App. A1, at 1-7.

1. In 1997, petitioner was involved with a group of co-conspirators who planned and undertook three armed robberies of drug dealers' stash houses. Pet. App. A1, at 2. Petitioner and his co-conspirators targeted houses that they believed would contain large quantities of cash and drugs, "which the conspirators intended to distribute after stealing." Id. at 3. Petitioner participated in the first two robberies. Ibid.

a. During the early morning hours of June 20, 1997, petitioner and four co-conspirators broke into a home where Odaysis Gordon lived with her two minor children. Presentence Investigation Report (PSR) ¶ 5, 10. They expected to find "approximately $1,000,000" and "100 kilograms of cocaine" at Gordon's residence.

PSR ¶ 10. According to a police report, Gordon and one of her children were awakened by a loud crashing noise. PSR ¶ 5.

Petitioner and two co-conspirators jumped on Gordon while she was in bed and pointed a gun at her head, demanding money and drugs. PSR ¶¶ 5, 6. When Gordon said that she did not know what they were referring to, one of the co-conspirators "pistol-whipped" Gordon "repeatedly" until she told them where they could find approximately $4000 in cash. PSR ¶ 6. One of Gordon's minor children told petitioner and his co-conspirators where they could find Gordon's jewelry, ibid., and one of the co-conspirators found a handgun underneath a pillow in Gordon's bedroom, PSR ¶ 11.

Petitioner and his co-conspirators locked Gordon and her two children inside a closet, ransacked the house, and took additional jewelry and other items. PSR ¶¶ 6, 9. They later divided the stolen cash, jewelry, firearm, and other items among themselves. PSR ¶ 11.

b. Several weeks later, in the early morning hours of August 1, 1997, petitioner and two co-conspirators kicked in the rear door of an apartment that Aaron Wiggins was sharing with Kahlia Meeks and two other people. PSR ¶ 12. The intruders encountered Meeks and pointed a gun at her, threatening to kill her if she did not follow instructions. Ibid. Wiggins was awakened by the sound of the forced entry, and used a semi-automatic weapon he kept nearby to fire "approximately five to six shots in the direction of his bedroom door." Ibid. Petitioner was shot and was treated

at a local hospital for the gunshot wound. PSR ¶ 13. Petitioner and his co-conspirators did not end up stealing anything, though they "knew that the intended victim was a street level cocaine dealer" and expected that he had cocaine and marijuana in the apartment. Ibid.

2. A federal grand jury in the Southern District of Florida charged petitioner with "three overlapping conspiracies": conspiring to possess marijuana and cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(ii) and (D), and 846 (Count 1); conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) (Count 2); and conspiring to use and carry a firearm during and in relation to a crime of violence and a drug-trafficking crime, in violation of 18 U.S.C. 924(c) and (o) (Count 3). Pet. App. A1, at 3; Superseding Indictment 1-3. Petitioner also faced substantive charges for his participation in the two robberies. Pet. App. A1, at 3.

For the June 20 robbery, the grand jury charged petitioner with attempting to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(ii), 846, and 8 U.S.C. 2 (Count 4); Hobbs Act robbery, in violation of 18 U.S.C. 1951(a)(1), and 18 U.S.C. 2 (Count 5); and possessing a firearm in furtherance of a crime of violence and drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i) and (ii) and 18 U.S.C. 2 (Count 6). Pet. App. A1, at 3; Superseding Indictment 3-5. For the August 1 robbery, the grand jury charged petitioner with

attempting to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), 846, and 18 U.S.C. 2 (Count 7); attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) (Count 8); and possessing a firearm in furtherance of a crime of violence and drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i), (A)(ii), and 18 U.S.C. 2 (Count 9). Pet. App. A1, at 3-4; Superseding Indictment 5-7. The indictment included six additional counts (Counts 10-15) against petitioner's co-conspirators. Pet. App. A1, at 4.

The indictment also listed each of the offenses in Counts 1, 2, 4, 5, 6, 7, 8, 10, 11, 12, and 13 as predicate crime-of-violence or drug-trafficking offenses for the Section 924(o) offense. Pet. App. A1, at 4; Superseding Indictment 3. Section 924(o) criminalizes "conspir[ing] to commit an offense under subsection (c)." 18 U.S.C. 924(o). Section 924(c), in turn, prescribes criminal penalties for "any person who, during and in relation to any crime of violence or drug trafficking crime[,] * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. 924(c)(1)(A). Section 924(c)(3) defines a "crime of violence" as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or 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," 18 U.S.C. 924(c)(3)(B). Section

924(c)(3)(A) is sometimes referred to as the "elements clause," while Section 924(c)(3)(B) is referred to as the "residual clause."

Petitioner proceeded to trial. The district court instructed the jury that to find petitioner guilty of the Section 924(o) offense, it could rely on any of the drug-trafficking, Hobbs Act, or firearm offenses charged in the indictment as predicate crimes of violence or drug-trafficking crimes. 01-cr-396 D. Ct. Doc. 158, at 17 (Apr. 30, 2002). The jury returned a general verdict of guilty on all counts "and did not specify which counts it found were predicates" for the Section 924(o) count. Pet. App. A1, at 4; 01-cr-396 D. Ct. Doc. 164, at 1-3 (May 6, 2002). After the jury returned its verdict, the court granted petitioner's motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29 on Counts 5 and 8 (the substantive Hobbs Act offenses) for lack of proof of a nexus to interstate commerce. Pet. App. A1, at 4; 01-cr-396, D. Ct. Doc. 189, at 1 (July 22, 2002).

The district court sentenced petitioner to a total of 660 months of imprisonment -- concurrent sentences of 360 months of imprisonment on Counts 1 and 4, and 240 months of imprisonment on Counts 2, 3, and 7; a consecutive 60-month term of imprisonment for Count 6; and a consecutive 240-month term of imprisonment for his Section 924(c) and (o) offenses -- to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed, 02-16067 C.A. Order (July 7, 2003), and this Court denied a petition for a writ of certiorari, 540 U.S. 936.

3. In 2004, petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255, alleging ineffective assistance of counsel, prosecutorial misconduct, and juror misconduct. 01-cr-396 D. Ct. Doc. 255, at 4-5 (Apr. 21, 2004); 04-cv-20936 D. Ct. Doc. 1 (Apr. 21, 2004). The district court denied petitioner's motion. 04-cv-20936 D. Ct. Doc. 29; Pet. App. A1, at 4. The court also denied petitioner's request for a COA, 04-cv-20936 D. Ct. Doc. 31 (Dec. 16, 2005), and the court of appeals dismissed the appeal, 05-16968 C.A. Order, at 2 (Apr. 4, 2006).

In 2016, petitioner filed an application for authorization to file a second or successive Section 2255 motion in light of Johnson v. United States, 576 U.S. 591 (2015). 16-13620 C.A. Doc. 1 (June 16, 2016). In Johnson, this Court invalidated on vagueness grounds the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), which defines a sentence-enhancing "violent felony" to include any crime punishable by a term of imprisonment exceeding one year that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii); see Johnson, 576 U.S. at 604-606; see also Welch v. United States, 578 U.S. 120, 129-130 (2016) (holding that Johnson announced a new rule with retroactive effect on collateral review). Petitioner contended that, under Johnson, his sentence was unconstitutional because it was enhanced under the residual clause of the crime-of-violence definition in

the career-offender provision of the then-mandatory Sentencing Guidelines. See 16-13620 C.A. Order 2-3 (July 12, 2016). About a week after he filed his application in the court of appeals, petitioner filed a successive Section 2255 motion in the district court raising substantially the same claim. 01-cr-396 D. Ct. Doc. 372, at 1 (June 24, 2016). The district court denied the motion as unauthorized. 01-cr-396 D. Ct. Doc. 374 (June 27, 2016). And the court of appeals denied petitioner's application for authorization to file a second or successive Section 2255 motion, reasoning that petitioner had not made a prima facie showing that he was entitled to relief. 16-13620 C.A. Order 6 (July 12, 2016).

In 2017, petitioner filed another application for leave to file a second or successive Section 2255 motion, arguing that Section 924(c)(3)(B)'s residual clause was unconstitutionally vague under Johnson and Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015), aff'd, Sessions v. Dimaya, 138 S. Ct. 1204 (2018). 17-13432 C.A. Doc. 1 (July 31, 2017). The court of appeals denied that application. 17-13432 C.A. Order at 7 (Aug. 31, 2017).

4. In 2020, petitioner filed a third application for authorization to file a second or successive Section 2255 motion. 20-11954 C.A. Doc. 1, at 1-18 (May 26, 2020). In his application, petitioner argued that his Section 924 (c) and (o) convictions were unconstitutional in light of United States v. Davis, 139 S. Ct. 2319 (2019), which had invalidated 18 U.S.C. 924(c)(3)(B) on vagueness grounds. See 20-11954, C.A. Doc. 1, at 8. The court of

appeals concluded that petitioner made a prima facia showing that his Davis claim satisfied the statutory criteria of Section 2255 and granted petitioner leave to file a successive Section 2255 motion. 20-11954 C.A. Order, at 7 (June 17, 2020).

The court of appeals cautioned, however, that petitioner would "bear the burden of proving the likelihood that the jury based its verdict of guilty in Count 3 solely on the Hobbs Act conspiracy" -- which was no longer classifiable as a crime of violence -- "and not also on the basis of one or more of the valid predicate offenses identified in Count 3." 20-11954 C.A. Order 6. On the recommendation of a magistrate judge, the district court stayed resolution of petitioner's motion pending the court of appeals' resolution of Granda v. United States, 990 F.3d 1272 (11th Cir. 2021), cert. denied, 142 S. Ct. 1233 (2022), which raised the similar question of whether a defendant could collaterally attack a Section 924(o) conviction under Johnson and Davis, where only one of multiple alternative predicates for the defendant's Section 924(o) conviction was invalid. 20-cv-22499 D. Ct. Doc. 13, at 1 (Feb. 2, 2021).

The court of appeals subsequently rejected the defendant's collateral attack on his Section 924(o) conviction in Granda. See 990 F.3d at 1280, 1280-1281. The court determined that Granda's vagueness challenge to his Section 924(o) conviction under Johnson and Davis was not sufficiently novel to establish the "cause" necessary to overcome his having procedurally defaulted that

challenge by failing to raise it on direct review. Id. at 1286-1287. The court explained that while Davis announced a new constitutional rule of retroactive application, it was not a sufficiently clear break with the past that an attorney representing Granda "would not reasonably have had the tools" necessary to present the claim before Davis. Id. at 1286 (citation omitted). And the court cited cases dating back to 1986 illustrating that litigants had been raising vagueness challenges to other parts of Section 924(c) for years. See id. at 1287-1288. The court further determined that, even if Granda could show cause, he could not establish the other prerequisite to overcome procedural default, actual prejudice, because he could not show a substantial likelihood that the jury relied only on the invalid predicate. Id. at 1288-1291. The court observed that the alternative predicate offenses were "inextricably intertwined -- each arose from the same plan and attempt to commit armed robbery," such that the "tightly bound factual relationship of the predicate offenses" precluded "a substantial likelihood that the jury relied solely on" the invalid predicate. Id. at 1291

Following the decision in Granda, the magistrate judge in petitioner's case recommended denying petitioner's Section 2255 motion. 20-cv-22499 D. Ct. Doc. 20, at 1 (Oct. 13, 2021). The magistrate judge observed that petitioner had procedurally defaulted his challenge to his Section 924(o) conviction by not raising it on direct appeal, and that he was therefore required to

"show cause to excuse the default and actual prejudice from the claimed error," or "show that he is actually innocent of the § 924(o) and § 924(c) convictions." Id. at 8 (quoting Granda, 970 F.3d at 1286). The magistrate judge rejected petitioner's argument that the alleged error was jurisdictional in nature and therefore not subject to procedural default. Id. at 9-11. The magistrate judge also found that petitioner could not establish "[c]ause" for the same "reasons discussed in Granda," and could not show prejudice because he failed to show how his challenged Section 924(o) conviction led to a longer term of imprisonment. Id. at 12, 14-15 (emphasis omitted).

The magistrate judge additionally explained that, even if petitioner could overcome is procedural default, he could not succeed on the merits of his claim, because the valid predicates were "inextricably intertwined" with the invalid Hobbs Act conspiracy predicate. 20-cv-22499 D. Ct. Doc. 20, at 17. And the magistrate judge also recommended denying petitioner's request for a COA. Id. at 23. The district court adopted the magistrate judge's report and recommendation and denied petitioner's Section 2255 motion, but granted petitioner's request for a COA, 20-cv-22499 D. Ct. Doc. 22, at 1-2 (Nov. 15, 2021).

5. The court of appeals affirmed the district court's denial of petitioner's motion, finding that petitioner had procedurally defaulted his claim. Pet. App. A1, at 1. After rejecting petitioner's effort to classify the alleged Davis error

as "jurisdictional," id. at 8-9, the court found that petitioner had failed to make the showing necessary to overcome his procedural default, id. at 9-13.

The court of appeals found this case materially indistinguishable from Granda. Pet. App. A1, at 9-13. The court observed that "[l]ike the movant in Granda," petitioner "raised a procedurally defaulted challenge to the validity of a § 924(o) conviction based on Davis." Id. at 9. "As in Granda," the court continued, "his indictment alleged other predicates as support for that conviction, including undisputedly valid drug-trafficking crimes." Ibid. "And like in Granda," the court added, "the jury returned a general guilty verdict after being instructed that a conviction under § 924(o) could be based on any one or more predicate offenses." Id. at 9-10.

Noting that petitioner in fact "concede[d]" that his argument that he demonstrated cause for procedural default was foreclosed by Granda, Pet. App. A1, at 11, the court of appeals also found Granda likewise controlled on the question of whether he had demonstrated prejudice, id. at 12. The court observed that "[l]ike in Granda, all the predicate offenses" in petitioner's case "arose out of the same scheme and attempts to commit armed robbery of drug dealers' stash houses and to later distribute the fruits of their crimes." Ibid. The court further observed that "the jury unanimously found [petitioner] guilty of each and every predicate offense." Id. at 12-13. And on that record, the court found it

"undeniable" that the "'valid drug trafficking predicates were inextricably intertwined with the invalid Hobbs Act conspiracy predicate,'" such that petitioner could not show a substantial likelihood that the jury relied solely on the invalid predicate. Id. at 13 (quoting Parker v. United States, 993 F.3d 1257, 1263 (11th Cir. 2021)) (brackets omitted).

Finally, the court of appeals rejected petitioner's argument that actual innocence excused his default, noting that he made no argument that he was "factually innocent of the valid predicate offenses." Pet. App. A1, at 14; see id. at 13-14.

ARGUMENT

Petitioner renews his contention (Pet. 24-29) that he established cause for his procedural default of his vagueness challenge to 18 U.S.C. 924(c)(3)(B). The court of appeals correctly rejected that contention, which does not implicate any circuit conflict warranting this Court's review. Moreover, even if petitioner could demonstrate cause, he cannot demonstrate that the jury relied on an invalid predicate in finding him guilty on the Section 924(o) count. Accordingly, petitioner cannot establish prejudice to overcome default, and any error would be harmless on the merits. This Court denied review of the court of appeals' controlling precedent in Granda v. United States, 990 F.3d 1272 (11th Cir. 2021), cert. denied, 142 S. Ct. 1233 (2022), and has likewise denied certiorari in other cases presenting

similar claims, see p. 21, infra. It should follow the same course here.

1. Petitioner does not dispute that he procedurally defaulted his vagueness claim by failing to raise it on direct review. Pet. 10-11; see Pet. App. A1, at 7, 10. Nor does petitioner challenge the court of appeals' determination that he cannot avoid the procedural bar by demonstrating that the error was jurisdictional or showing actual innocence. See Pet. App. A1, at 7-9, 13-14. Petitioner therefore does not dispute that to pursue his claim on collateral review, he must demonstrate "cause" for his failure to raise the claim and "actual prejudice" resulting from the constitutional error. Bousley v. United States, 523 U.S. 614, 622 (1998). As the court of appeals correctly determined, petitioner's claim fails at the outset because he cannot show "cause" for his default.

a. This Court has explained that "cause" may exist where a claim "[wa]s so novel that its legal basis [wa]s not reasonably available to counsel," such that counsel could not have been acting based on "strategic motives of any sort" by failing to raise the claim. Reed v. Ross, 468 U.S. 1, 15-16 (1984). "[T]he question is not whether subsequent legal developments have made counsel's task [in raising a particular claim] easier, but whether at the time of the default the claim was 'available' at all." Smith v. Murray, 477 U.S. 527, 537 (1986). To answer that question, this Court has considered whether, at the time of the default, other

litigants were raising similar claims; if such claims were repeatedly raised, then "it simply is not open to argument that the legal basis of the claim petitioner now presses on federal habeas was unavailable to counsel at the time." Ibid.; see Bousley, 523 U.S. at 622-623 (rejecting a novelty-based "cause" argument in part because the "Federal Reporters were replete with cases" considering the purportedly "novel" claim "at the time" petitioner should have raised it).

As the court of appeals recognized, petitioner cannot demonstrate "cause" under that standard. This Court has long recognized that criminal statutes and sentencing provisions are subject to vagueness challenges under the Due Process Clause. See, e.g., United States v. Batchelder, 442 U.S. 114, 123 (1979); United States v. Harriss, 347 U.S. 612, 617 (1954). Petitioner does not dispute that "for years before [petitioner's] appeal," other defendants had argued "that various other provisions of [Section] 924(c) were unconstitutionally vague," Granda, 990 F.3d at 1287,[1] and no case "deprive[d] [litigants] of the tools to challenge the [Section] 924(c) residual clause," ibid. Petitioner therefore had

[1] See, e.g., United States v. Veasey, 73 F.3d 363, 1995 WL 758439, at *2 (6th Cir. 1995) (Tbl.) (per curiam); United States v. Presley, 52 F.3d 64, 68 (4th Cir.), cert. denied, 516 U.S. 891 (1995); United States v. Powell, 967 F.2d 595, 1992 WL 127038, at *3 (9th Cir.) (Tbl.), cert. denied, 506 U.S. 960 (1992); United States v. Argo, 925 F.2d 1133, 1134-1135 (9th Cir. 1991); United States v. Sorenson, 914 F.2d 173, 175 (9th Cir. 1990), cert. denied, 498 U.S. 1099 (1991); see also Granda, 990 F.3d at 1287 (citing other examples).

the "building blocks" for a due process vagueness challenge to Section 924(c)(3)(B) at the time of his direct appeal, ibid. (citation omitted), and thus his claim was not "so novel that its legal basis [wa]s not reasonably available to counsel," Reed, 468 U.S. at 16. And one reason for counsel to have eschewed such a claim would have been a recognition that because of the intertwined nature of the charges, it was implausible that instructions identifying only a subset of the charges as valid Section 924(c) predicates would make a difference to the jury's resolution of the Section 924(o) count.

b. Petitioner errs in suggesting (Pet. 24-29) that he can nevertheless show "cause" for his procedural default under this Court's decision in Reed v. Ross. In Reed, the Court stated that it had previously identified, for purposes of retroactivity analysis, three circumstances "in which a 'new' constitutional rule, representing 'a clear break with the past' might emerge from this Court": "First, a decision of this Court may explicitly overrule one of our precedents"; "[s]econd, a decision may 'overturn[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 third, "a decision may disapprov[e] a practice this Court arguably has sanctioned in prior cases." 468 U.S. at 17 (quoting United States v. Johnson, 457 U.S. 537, 549, 551 (1982)) (internal quotation marks omitted; second and third set of brackets in original). Reed suggested

that when a decision of this Court "falling into one of the first two categories is given retroactive application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a [lower] court to adopt the position that this Court has ultimately adopted," and that the "failure of a defendant's attorney to have pressed such a claim * * * is sufficiently excusable to satisfy the cause requirement." Ibid.

Reed's three categories were derived from this Court's decision in United States v. Johnson, which determined that a new constitutional rule does not apply retroactively, even to cases on direct review, if the new rule represented a "clear break with the past." 457 U.S. at 549 (citation omitted); see id. at 551. But after Reed, this Court overruled that aspect of United States v. Johnson in Griffith v. Kentucky, 479 U.S. 314 (1987), "hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Id. at 328.

The Court does not appear to have relied on United States v. Johnson's "clear break" categories since then, suggesting that any special distinction for those categories may lack continuing salience. And even if those categories retained significance after Griffith, Reed itself concerned only "the third category." 468 U.S. at 18. The most relevant aspect of Reed -- its explanation

that a defendant may show "cause" when "a constitutional claim is so novel that its legal basis is not reasonably available to counsel," id. at 16 -- cuts against petitioner here, as defendants raised similar claims before petitioner's default, see pp. 17-18, supra. In any event, petitioner errs in asserting (Pet. 24-27) that he can show cause under Reed's three categories.

Petitioner contends (Pet. 25) that this Court's decision in Johnson v. United States, 576 U.S. 591 (2015), satisfies each category. But Johnson was a decision concerning the constitutionality of the ACCA's residual clause, not Section 924(c)(3)(B). Id. at 597. Thus, with respect to Reed's first two categories, Johnson did not "overrule" any decision, or "overturn" or "disapprove" any practice, pertaining to the statutory provision at issue here. Reed, 468 U.S. at 17 (brackets and citations omitted). Indeed, no precedent of this Court foreclosed petitioner's vagueness challenge to Section 924(c)(3)(B) at the time of his default. See Granda, 990 F.3d at 1287 ("Unlike the Johnson ACCA decision, Davis did not overrule any prior Supreme Court precedents holding that the § 924(c) residual clause was not unconstitutionally vague."). Similarly, as the court of appeals has recognized, "few courts, if any, had addressed a vagueness challenge to the [Section] 924(c) residual clause before the conclusion of [petitioner's] direct appeal." Ibid. There was accordingly no "widespread" and "near-unanimous body" of precedent "expressly" rejecting the particular vagueness claim that

petitioner now seeks to advance. Reed, 468 U.S. at 17 (citation omitted).

And even assuming the Eleventh Circuit would have concluded that petitioner's challenge was foreclosed by circuit precedent at the time of petitioner's direct appeal, this Court has held that "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" Bousley, 523 U.S. at 623 (citation omitted); see Murray, 477 U.S. at 535 (emphasizing that "perceived futility alone cannot constitute cause") (citation omitted). Given the lack of precedent addressing petitioner's vagueness claim, the court of appeals correctly recognized that the claim "fits most neatly" as an argument for application of Reed's third category, for circumstances in which this Court "disapproves of 'a practice [it] arguably has sanctioned in prior cases.'" Granda, 990 F.3d at 1287 (quoting Reed, 468 U.S. at 17). But petitioner cannot satisfy the requirement of that category, either.

As Reed observed, claims of "cause" premised on the Court's mere "'disapprov[al] [of] a practice [it] arguably has sanctioned in prior cases'" necessarily will "depend[] on how direct this Court's sanction of the prevailing practice had been, how well entrenched the practice was in the relevant jurisdiction at the time of defense counsel's failure to challenge it, and how strong the available support is from sources opposing the prevailing practice." 468 U.S. at 17-18 (citation omitted). And here, those

considerations weigh against a finding of novelty. Longstanding vagueness principles already provided all the necessary "'building blocks'" for petitioner's claim and "other defendants did challenge the ACCA's residual clause," as well as provisions of Section 924(c), on vagueness grounds. Granda, 990 F.3d at 1287 (emphasis added; citation omitted). Given that backdrop, the court of appeals correctly recognized that petitioner could not establish he lacked any "'reasonable basis' upon which to develop a legal theory" unless and until this Court issued decisions "so novel" as to provide one, Reed, 468 U.S. at 16-17.

3. Petitioner contends (Pet. 14-23) that the circuits are divided over whether a claim of the sort raised in his successive Section 2255 motion is sufficiently novel to demonstrate cause to excuse a procedural default. This Court has recently and repeatedly declined review of petitions for writs of certiorari asserting such a conflict. See, e.g., Maxime v. United States, 143 S. Ct. 583 (2023) (No. 22-5549); Granda v. United States, 142 S. Ct. 1233 (2022) (No. 21-6171); Blackwell v. United States, 142 S. Ct. 139 (2021) (No. 20-8016); Gatewood v. United States, 141 S. Ct. 2798 (2021) (No. 20-1233). The same result is appropriate here.

Contrary to petitioner's assertion (Pet. 19-23), neither United States v. Vargas-Soto, 35 F.4th 979 (5th Cir. 2022), cert. denied, 143 S. Ct. 583 (2023), nor Cross v. United States, 892 F.3d 288 (7th Cir. 2018), conflicts with the decision below.

Neither involved a vagueness challenge to Section 924(c)(3)(B), or addressed whether the reasoning in Davis was sufficiently novel to excuse the procedural default of a claim that Section 924(c)(3)(B) was unconstitutionally vague. See Vargas-Soto, 35 F.4th at 986 (vagueness challenge to 18 U.S.C. 16(b)); Cross, 892 F.3d at 291 (vagueness challenge to mandatory Sentencing Guidelines). The Seventh Circuit's decision in Cross is also in significant tension, if not outright conflict, with prior circuit precedent that, like the Eleventh Circuit's decision in Granda, 990 F.3d at 1287, included in its analysis of cause and prejudice an examination of whether "[o]ther defendants had been making" the procedurally defaulted claim. United States v. Smith, 241 F.3d 546, 548 (7th Cir.), cert. denied, 534 U.S. 918 (2001); see Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

The Eighth Circuit's decision in Jones v. United States, 39 F.4th 523 (2022), did concern a vagueness challenge to Section 924(c)(3)(B), and took the view that a prisoner had cause for failing to raise a vagueness challenge to Section 924(c)(3)(B) on direct appeal. See id. at 525-536. But the Court's one-paragraph analysis of the "state of the law at the time of his appeal" did not address whether, for example, other defendants were raising such claims. Ibid. In any event, such shallow and recent disagreement does not warrant this Court's review, and this Court

has previously declined to review it. See Maxime, 143 S. Ct. 583 (No. 22-5549).

4. Moreover, even if the question presented warranted this Court's review, this case would not be a suitable vehicle to address it, for two independent reasons. First, review of the question presented would be complicated by threshold questions about how this Court's ACCA-related precedents apply to Section 924(c)(B)(3). And second, petitioner would not be entitled to relief even if this Court decided the question presented in his favor.

a. Threshold questions about how this Court's ACCA-related precedents interacted with Section 924(c)(3)(B) make this case an unsuitable vehicle for addressing the question presented. The key decisions on which petitioner relies (Pet. i, 12-16, 18-21, 24-30) to establish cause for his default -- Johnson and James -- do not address Section 924(c)(3)(B), the statutory provision at issue here. Instead, those decisions address the ACCA's residual clause.

That aspect of those cases would complicate any application of Reed in this case. For example, petitioner argues (Pet. 27) that he can show cause for his default on the theory that Johnson later overruled James. But Johnson did not address the constitutionality of Section 924(c)(3)(B) or overrule any precedent rejecting a vagueness challenge to that provision. See p. 19, supra. This Court's consideration of the issues described above -- including the propriety of applying Reed's categories to

excuse a default that occurred at a time when no decision of this Court foreclosed the defendant's claim -- could thus be obscured by the need to also consider the extent to which the ACCA-related decisions in Johnson and James governed vagueness challenges to Section 924(c)(3)(B).

b. Furthermore, even if petitioner could demonstrate cause for his procedural default, he could not establish the separate requirement of showing prejudice, or that he would ultimately be entitled to relief. See Pet. App. A1, at 11-13.

To establish "prejudice" sufficient to overcome a procedural default, a defendant must show "actual prejudice" from the alleged error. United States v. Frady, 456 U.S. 152, 168 (1982). That standard requires a defendant to prove "not merely that the errors at * * * trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 170; see Murray v. Carrier, 477 U.S. 478, 494 (1986). It imposes "a significantly higher hurdle" than would exist had the defendant preserved his claim for review on direct appeal. Frady, 456 U.S. at 166; see Murray, 477 U.S. at 493-494 (explaining that "[t]he showing of prejudice" necessary to excuse a procedural default also is "significantly greater" than that required for an unpreserved claim reviewed for plain error).

As the court of appeals correctly determined, petitioner cannot make that showing here. See Pet. App. A1, at 11-13.

Petitioner's claim of error depends on the argument that his conviction for conspiring to use or carry a firearm during and in relation to a crime of violence or drug-trafficking offense, in violation of 18 U.S.C. 924(o), must be vacated because the jury relied on an invalid underlying predicate offense -- conspiracy to commit Hobbs Act robbery -- in returning a general verdict. Pet. 4. Petitioner's charge, however, was premised on several alternative predicate offenses. Superseding Indictment 3. And petitioner does not dispute that three of those offenses -- three counts of conspiracy to possess with intent to distribute controlled substances (cocaine and marijuana), in violation of 21 U.S.C. 846 (Counts 1, 4, and 7) -- qualify as predicate "drug trafficking crime[s]" under 18 U.S.C. 924(c)(2), and thus would support his Section 924(o) conviction irrespective of the application of the statute's alternative "crime of violence" definition. See 18 U.S.C. 924(c)(2) (defining drug-trafficking crime to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)").

As the court of appeals explained, "it is 'undeniable on this record' that the 'valid drug trafficking predicates [were] inextricably intertwined with the invalid Hobbs Act conspiracy predicate.'" Pet. App. A1, at 13 (quoting Parker, 993 F.3d at 1263-1264) (brackets in original). Accordingly, petitioner cannot show that any error relating to the specification of the alternative predicate offenses "worked to his actual and

substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Frady, 456 U.S. at 170 (emphasis omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Assistant Attorney General

MAHOGANE D. REED
Attorney

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