

No. 23-

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IN THE  
**Supreme Court of the United States**

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DWAUN JABBAR GUIDRY,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Fifth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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### **QUESTION PRESENTED FOR REVIEW**

Petitioner, DWAUN JABBAR GUIDRY, submits the Fifth Circuit Court of Appeals' ("Fifth Circuit") denial of relief was a violation of due process because the Fifth Circuit determined the law of the case doctrine was controlling. The parties were ordered to apply *Davis*, a recent decision issued by this Court, which they did in their briefing. However, in its opinion the Fifth Circuit held *Davis* was not controlling and a pre-Davis decision, *Johnson*, was the law of the case. As discussed below, this violated the Due Process Clause. Thus, the Fifth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court and thus a compelling reason is presented for discretionary review. Mr. Guidry therefore requests that this Court grant this petition and allow this case to proceed further.

**PARTIES TO THE PROCEEDING**

The parties to the proceeding are listed in the caption:

Dwaun Jabbar Guidry:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner, DWAUN JABBAR GUIDRY, requests that this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit. Mr. Guidry submits the Fifth Circuit committed reversible error by refusing to use a standard of review as set out by this Court and the Fifth Circuit. Thus, the decision by the Fifth Circuit is in conflict with decisions of this Court and therefore a compelling reason is presented in support of discretionary review.

### **CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE**

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Dwaun Jabbar Guidry*, No. 21-50365 (5th Cir. July 11, 2023), appears at Appendix A to this Petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Western District of Texas, San Antonio Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

### **GROUND FOR JURISDICTION**

This Petition arises from an appeal of the denial of a motion under 28 U.S.C. § 2255 wherein Mr. Guidry sought to set aside a firearm enhancement. A copy of the Judgment appears at Appendix B. A copy of the decision by the Fifth Circuit appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## **CONSTITUTIONAL PROVISIONS**

### **U.S. CONST. Amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **U.S. CONST. Amend. VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

## **STATEMENT OF THE CASE**

### **Overview**

Petitioner, Dwaun Jabbar Guidry, was prosecuted for civil rights, conspiracy, and firearm offenses based on claims of sexual misconduct and abuse while he was serving as a Balcones Heights, Texas, police officer. Mr. Guidry was convicted of all charges and sentenced to 465 months' imprisonment.

On direct appeal to the Fifth Circuit, Mr. Guidry contended that the admission of a surprise witness's testimony violated Rule 413, and that the District Court deprived him of his right to present a defense when it refused either to exclude her prejudicial testimony or



to grant him a recess to prepare a defense to her allegations. Mr. Guidry also challenged three of the other counts of conviction.

The Fifth Circuit affirmed the convictions. *Guidry*, 456 F.3d at 493-509. Subsequently, there were several post-conviction motions filed by Mr. Guidry. Relevant to this case is that, on March 24, 2021, the District Court denied Mr. Guidry's motion under 28 U.S.C. § 2255 to vacate his convictions. ROA.1327, 1329-41. One of his arguments was that his conviction under 18 U.S.C. § 924(c)(1)(A)(i) should be vacated based on *United States v. Davis*, 139 S. Ct. 2319 (2019). ROA.1327, 1329-41. Although the District Court denied his motion, the Court granted a Certificate of Appealability ("COA") on the issue of "the denial of Mr. Guidry's § 924 claim." ROA.17. Thus, the § 924 claim was the issue before the Fifth Circuit on direct appeal.

#### Proceedings Before the District Court

A four-count indictment charged Mr. Guidry with deprivation of civil rights involving kidnaping (Count One) and deprivation of civil rights by aggravated sexual abuse (Count Two), both in violation of 18 U.S.C. § 242; with carrying a firearm during and in relation to the civil rights/sexual abuse charge, in violation of 18 U.S.C. § 924(c) (Count Three); and with conspiracy to deprive individuals of due process, in violation of 18 U.S.C. § 241 (Count Four). ROA.4-9. Mr. Guidry pleaded not guilty, and his case was tried before a jury. After a seven-day trial, Mr. Guidry was found guilty of all charges. ROA.352-57.

The presentence investigation report ("PSR" or "the Report") set Mr. Guidry's Guideline offense level at 45, which provided for a life sentence, even though Mr. Guidry had

no prior convictions. ROA.2511. The District Court imposed concurrent terms of 405 months' imprisonment on Count One and Count Two, a concurrent statutory maximum 10-year term on Count Four, and a consecutive 5-year term on Count Three, the § 924(c) count. ROA.352-57. Mr. Guidry appealed. ROA.358. The Fifth Circuit Court affirmed. *United States v. Guidry*, 456 F.3d 493 (5th Cir. 2006).

#### The Ruling of the Fifth Circuit (2006)

In the initial appeal in 2006, Mr. Guidry argued to the Fifth Circuit that his 18 U.S.C. § 924(c) conviction should be vacated. *Id.* at 507. The Fifth Circuit disagreed and affirmed his conviction because the evidence was sufficient “to prove that Guidry carried a firearm during and in relation to the rape of Denise Limon in violation of 18 U.S.C. § 924(c).” *Id.* at 509.

#### The District Court's Granting of the COA (§ 2255 in 2019)

On December 10, 2019, Mr. Guidry filed an application to file a successive motion to vacate with the Fifth Circuit under 28 U.S.C. § 2255(a)(2). *In re Guidry*, No. 19-51147 (5th Cir. 2019). The Fifth Circuit granted the motion. *Id.* Hence, Mr. Guidry filed a § 2255 motion with the District Court. ROA.1330. Mr. Guidry argued that his conviction under the § 924 count must be vacated in light of the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). ROA.1331.

The District Judge evaluated the argument under § 924(c), applied the holding in *Davis*, and denied relief. ROA.1331-345. The Judge further observed that “because the Court finds that Guidry's claim is without merit, it is not necessary to address the

Government's timeliness or procedural default arguments." ROA.1341. Nonetheless, the District Court granted a COA on the § 924 claim, and explained:

[B]ecause this Circuit's definition of force in the context of [18 U.S.C.] § 2241 does not require proof of actual violence and permits an inference of force based on a disparity in size and coercive power between the defendant and the victim, the question of whether deprivation of rights under color of law based on aggravated sexual abuse by the use of force abuse qualifies as a crime of violence under [18 U.S.C.] § 924(c)(3)(A) is sufficiently debatable that reasonable minds could differ, warranting a certificate of appealability.

ROA.1341.

Pursuant to this ruling, Mr. Guidry filed a notice of appeal. ROA.358-60. The Fifth Circuit appointed the undersigned counsel on December 22, 2021.

The issue before the Fifth Circuit was whether Mr. Guidry's conviction under 18 U.S.C. § 924(c) must be vacated pursuant to *Davis*. As set forth below, the Fifth Circuit did not apply *Davis*, but rather denied relief based on the law of the case doctrine.

#### The Decision by the Fifth Circuit

Following oral argument, the Fifth Circuit issued its decision denying Mr. Guidry relief. The Fifth Circuit summarized Mr. Guidry's argument in the following fashion:

Guidry asserts that the district court erred in denying his challenge to his conviction under 18 U.S.C. § 924(c)(3)(A) based on *Davis*, 139 S. Ct. 2319. Guidry asserts that his conviction under § 924(c)(1)(A)(i) of carrying a firearm during and in relation to aggravated sexual abuse should be vacated for essentially two reasons: Because *Davis* concluded that the residual clause of § 924(c)(3)(B) is unconstitutionally vague; and because his predicate crime did not qualify as a COV under the elements clause of § 924(c)(3)(A).

(Appendix A at page 3) (footnote omitted).

However, the Fifth Circuit did not address these issues or discuss any of the specific arguments raised by Mr. Guidry and the Government. (Appendix A, generally). Instead, the Court held and explained:

Guidry's argument is foreclosed by the law of the case doctrine. *See Tollett v. City of Kemah*, 285 F.3d 357, 363 (5th Cir. 2002) (citation omitted) ("Under the law of the case doctrine, an issue of law or fact decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal.").

In denying Guidry's motion for authorization to file a successive habeas petition in 2016, a panel of this court relied on *United States v. Williams*, 343 F.3d 423, 432 & n.5 (5th Cir. 2003) in concluding that "the crime charged in count two satisfied the requirements for a crime of violence as set out in § 924(c)(3)(A) without requiring resort to the residual clause of § 924(c)(3)(B)." ECF 16-50208, 47-2. Further, *Guidry* fails to argue for any exception to the law of the case doctrine. Thus, we will not reexamine this issue.

(Appendix A at pages 3-4). Thus, the Fifth Circuit affirmed the order of the District Court.

(*Id.* at page 4). Mr. Guidry now files this Petition with this Honorable Court.

### **ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT**

#### **I.**

#### **Overview of the Law of the Case Doctrine**

As noted above, the Fifth Circuit concluded that Mr. Guidry's argument (*i.e.*, the District Court reversibly erred in denying his challenge to his conviction under 18 U.S.C. § 924(c)(3)(A) based on *Davis*) is foreclosed by the law of the case doctrine. (Appendix A at pages 3-4). In doing so, the Court quoted *Tollett*, 285 F.3d at 357, wherein the Fifth Circuit held: "[u]nder the law of the case doctrine, an issue of law or fact decided on appeal may

not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal.” (Appendix A at page 3). Thus, review of the law of the case is in order.

The law of the case doctrine provides that, “when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Pepper v. United States*, 562 U.S. 476, 506 (2011) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). This doctrine permits courts “to refuse to re-open what has been decided,” but it does not limit the power of the Court. *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). Instead, the law of the case doctrine operates to “describe an appellate court’s decision not to depart from a ruling that it made in a prior appeal in the same case.” *Musacchio v. United States*, 577 U.S. 237, 245 (2016) (citing C. Wright, et al., 18B Federal Practice and Procedure § 4478, p. 646 & n.16 (2d ed. 2002) (collecting cases)).

Importantly, the doctrine is “something of a misnomer” when it is used to describe how an appellate court assesses a lower court’s rulings. *United States v. Wells*, 519 U.S. 482, 487 n.4 (1997). Then, it is “[a]n appellate court’s function to revisit matters decided in the trial court.” *Musacchio*, 577 U.S. at 244. However, the law of the case review may well be constrained by other doctrines (such as waiver, forfeiture and estoppel), “as well as the type of challenge it is evaluating.” *Id.*

Before any substantive argument on whether the law of the case doctrine applies in this case, counsel requests that this Court first address whether the failure of the Government to urge the doctrine was waived or forfeited as a result of inaction on its part.

II.  
The Fifth Circuit’s Application of the Law of the Case Doctrine

Background

As noted above, the Fifth Circuit explained that “Guidry asserts that his conviction under § 924(c)(1)(A)(i) of carrying a firearm during and in relation to aggravated sexual abuse should be vacated for essentially two reasons: Because *Davis* concluded that the residual clause of § 924(c)(3)(B) is unconstitutionally vague; and because his predicate crime did not qualify as a COV under the elements clause of § 924(c)(3)(A).” (Appendix A at page 3). However, the Fifth Circuit refused to apply *Davis* or to entertain Mr. Guidry’s arguments at all. The Fifth Circuit did not employ any review because the Court characterized Mr. Guidry’s argument as violating the rule of the case doctrine, and under a previous order Mr. Guidry had failed to show he was entitled to relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). (*Id.* at pages 3-4).

Applying the law of the case doctrine violated Mr. Guidry’s right to due process and a fair hearing. The Fifth Circuit relied on *Johnson* to deny relief four years before *Davis* was handed down. (*Id.*) The District Court granted a COA to determine whether *Davis* assisted Mr. Guidry. The Fifth Circuit, however, refused to discuss *Davis* based on its prior ruling that *Johnson* (not *Davis*) did not assist Mr. Guidry. (*Id.*)

By way of background, in denying relief in this case, the Fifth Circuit cited to its denial of Mr. Guidry’s previous “motion for authorization to file a successive habeas petition from 2016.” (*Id.*) In that case, “a panel of [the Fifth Circuit] relied on *United States v. Williams*, 343 F.3d 423, 432 & n.5 (2003), in concluding that ‘the crime charged in count two

satisfied the requirements for a crime of violence as set out in § 924(c)(3)(A) without requiring resort to the residual clause of § 924(c)(3)(B), ECF 16-50208, 47-2.” (*Id.* at 3-4).

Fifth Circuit Case ECF 16-50208 (2016 case)

The order in 16-50208 cited by the Fifth Circuit was issued before the Supreme Court handed down *Davis*. *In re Guidry*, No. 16-50208, 47-2 (5th Cir. May 6, 2016). Mr. Guidry sought to file a successive petition challenging his conviction under 18 U.S.C. § 924(c)(1)(A). Relevant to the issue, Mr. Guidry and the Fifth Circuit cited *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Fifth Circuit noted that Mr. Guidry was challenging his conviction under 18 U.S.C. § 924(c)(1)(A) based on the holding in *Johnson*. (*Id.* at page 1). In a single concise paragraph, the Fifth Circuit explained the reasons for its denial of the motion. The Fifth Circuit declared:

[Guidry’s] argument assumes that he was not sentenced for a crime of violence as defined in § 924(c)(3)(A), but the crime of violence alleged in count three of the indictment against Guidry was the offense charged in count two, namely deprivation of civil rights while acting under color of law by “assaulting involving aggravated sexual abuse and resulting in bodily injury” to the victim, in violation of 18 U.S.C. § 242. We examined the interplay between § 242 and § 924(c)(3) in *United States v. Williams*, 343 F.3d 424 (5th Cir. 2003), where we concluded that conviction and sentencing for a crime involving bodily injury “creates a separate offense that necessarily satisfies *either* § 924(c)(3)(A) or (B).” 343 F.3d at 432 & n.5 (emphasis added). Based on *Williams*, the crime charged in count two satisfied the requirements for a crime of violence as set out in § 924(c)(3)(A) without requiring resort to the residual clause of § 924(c)(3)(B). This renders Guidry’s *Johnson* argument irrelevant.

(*Id.* at pages 1-2).

### This Case

The 28 U.S.C. § 2255 motion that is the subject of this petition began when Mr. Guidry filed a motion to file a subsequent § 2255 application. Mr. Guidry relied on *Davis* as the authority for relief. (Fifth Circuit No. 19-51147). The Fifth Circuit granted the motion and the subsequent § 2255 application was filed in the District Court. The District Court applied the holding in *Davis* and denied relief, but granted a COA with respect to *Davis*. The matter was appealed to the Fifth Circuit.

As this case was then litigated through the Fifth Circuit, both the Government and the defense applied *Davis*. No mention was made of the order from 2016 referencing *Johnson*. In fact, the 2016 ruling was never mentioned before the District Court, by the District Court in its rulings, by the Fifth Circuit in its order permitting Mr. Guidry to file his successive petition, by the Government in its briefing to the Fifth Circuit, by the Government in a Rule 29 letter, by counsel for Mr. Guidry or by Mr. Guidry in his *pro se* briefings. Ultimately, the Fifth Circuit did not mention the 2016 ruling until it issued the opinion now on appeal.

### III. The Due Process Violation

The jurisprudence of this Court establishes that it is a violation of due process to deny Mr. Guidry a fair opportunity to argue *Davis* and to be put on fair notice that the holding in *Johnson* was relevant to the matters before the Court. *See In re Oliver*, 333 U.S. 257, 273 (1948). To this end, this Court in *In re Oliver* identified the following rights as among the minimum essentials of a fair ruling.



A person's right to reasonable notice . . . and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

*See id.* While *In re Oliver* addressed the right to cross examine a witness, this Court's explanation of the law is relevant here because it was grounded in due process. *See id.* at 294-95. Specifically, this Court held that the right to examination is implicit in the Constitutional right of confrontation and helps assure the "accuracy of the truth-determining process." *Id.* at 295. Indeed, this Court indicated that the denial of the right to develop the argument as required by the Court—and any discussion of the legal issues before the Court—are essential to due process to determine the ultimate "integrity of the fact finding process." *Id.*

The action of the Fifth Circuit in this case was essentially a deprivation of the right to be confronted with the factual and legal matters Mr. Guidry must address. The Courts ordered the parties to apply *Davis*, yet the Fifth Circuit ruled that *Davis* was irrelevant and that the matter had been addressed four years' earlier. Therefore, Mr. Guidry's due process rights were violated when the Fifth circuit determined the issue before the Government and the defendant was not at issue.

### CONCLUSION

For the reasons set forth above, Mr. Guidry submits his due process rights were violated and therefore a compelling reason is presented in support of discretionary review by this Court on the important issue of constitutional guarantees and concerns.

WHEREFORE, PREMISES CONSIDERED, Petitioner, DWAUN JABBAR GUIDRY, respectfully requests that this Court grant this petition and issue a Writ of Certiorari. Mr. Guidry also requests any further relief to which he may be entitled under the law and in equity.

Respectfully Submitted,

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