NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

PIKERSON MENTOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Mr. Mentor established cause sufficient to overcome the procedural default of his "ordinary-case" vagueness challenge to his convictions under 18 U.S.C. §§ 924(c) and (j), because that constitutional claim was "not reasonably available" prior to *Johnson v. United States*, 576 U.S. 591 (2015).

II. Whether the Eleventh Circuit misapplies this Court's precedents in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S. Ct. 759 (2017), by holding that a certificate of appealability may not issue in the face of adverse circuit precedent, even where the issues are debatable among jurists of reason and are the subject of a circuit-split.

INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), Mr. Mentor submits that there are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

The following proceedings directly relate to the case before the Court:

1. *United States v. Mentor*, No. 1:11-cr-20351-DLG (S.D. Fla. Jan. 31, 2013).
2. *United States v. Mentor*, No. 13-10611, 570 F. App'x 894 (11th Cir. July 1, 2014).
3. *Mentor v. United States*, No. 1:15-cv-23681-DLG (S.D. Fla. Sept. 5, 2017).
4. *Mentor v. United States*, No. 17-14421 (11th Cir. May 1, 2018).
5. *In Re: Pikerson Mentor*, No. 20-10062 (11th Cir. Jan. 31, 2020).
6. *Mentor v. United States*, No. 1:20-cv-20470-DLG (S.D. Fla. Mar. 10, 2023).
7. *Mentor v. United States*, No. 23-11572 (11th Cir. Dec. 19, 2023).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 23-11572, in that court on December 19, 2023.

DECISION BELOW

The Order of the Eleventh Circuit, *Mentor v. United States*, No. 23-11572 (11th Cir. Dec. 19, 2023) is contained in the Appendix (A-1).

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's order was entered on December 19, 2023. On March 5, 2024, Justice Thomas granted Mr. Mentor an extension of time in which to file his petition, to and including April 17, 2024. This petition is timely filed pursuant to SUP. CT. R. 13.1 & 13.5. The Eleventh Circuit had jurisdiction over this case pursuant to 28 U.S.C. §§ 1291, 2253, and 2255(d).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

. . .

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

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)

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

(A) has as 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.

18 U.S.C. § 924(j)

A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

INTRODUCTION

On December 6, 2010, United States postal worker Bruce Parton was shot to death during a robbery. PSI ¶ 3. On May 4, 2011, Saubnet Politesse was found in possession of a mailbox access key that had been stolen from Mr. Parton during the robbery. (PSI ¶ 7). Politesse confessed that he had conspired with two other men, including the Petitioner, to rob Mr. Parton. But Politesse told police that it was the Petitioner, Pikerson Mentor, who committed the robbery and pulled the trigger. *See* Cr-DE 267:16, Cr-DE 267:131.[1] As the district court correctly found, the jury at Mr. Mentor's trial rejected that aspect of Politesse's account, and found that Mr. Mentor never "carried" or "used" a firearm in relation to the crimes. Cv-DE 39:8. And, because the jury made that specific finding, the record confirms that Mr. Mentor was improperly convicted in Counts 5 and 6 of the Second Superseding Indictment under the constitutionally invalid residual clause in 18 U.S.C. § 924(c)(3)(B).

Following this Court's ruling in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), Mr. Mentor moved under 28 U.S.C. § 2255 to vacate his convictions in those counts. But for the Eleventh Circuit's erroneous procedural rulings, Mr. Mentor

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[1] Citations to record in the underlying criminal case, *United States v. Mentor et. al.*, No. 1:11-cr-29351-DLG (S.D. Fla.), will be referred to by the abbreviation "Cr-DE" followed by the docket entry number and the page number. References to the record below in the civil case, Case No. 1:20-cv-20470-DLG (S.D. Fla.), will be cited as "Civ-DE."

would have been entitled to relief. Because the procedural questions would have been resolved differently in six other circuits, Mr. Mentor asks the Court to grant review.

STATEMENT OF THE CASE

On November 14, 2011, an 18-Count Second Superseding Indictment (the "indictment") was returned against Mr. Mentor and Mr. Politesse. (Cr-DE 97). Count 1 alleged that Mentor and Politesse conspired to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a). (Cr-DE 97:2). Count 2 charged both men with substantive Hobbs Act robbery in violation of 18 U.S.C. §§ 1951(a) and 2. (Cr-DE 97:3). Count 3 alleged that both men perpetrated a carjacking that resulted in death, in violation of 18 U.S.C. §§ 2119(3) and (2). (Cr-DE 97:3). Count 4 alleged that the defendants, with premeditation and malice aforethought, and in perpetration of the robbery alleged in Count 2, "did kill Bruce Parton, a letter carrier for the United States Postal Service, while he was engaged in his official duties," in violation of 18 U.S.C. §§ 1111 and 1114. (Cr-DE 97:4).

Count 5, at issue herein, alleged that the defendants violated 18 U.S.C. § 924(c)(1)(A), by carrying or possessing a firearm, during or in furtherance of a crime of violence "as set forth in Count 1, Count 2, Count 3, and Count 4 of this Indictment." (Cr-DE 97:5). Count 6 alleged the carrying or possessing of a firearm, during or in furtherance of a crime of violence "as set forth in Count 1, Count 2, Count 3, and Count 4 of this Indictment," resulting in death, in violation of 18 U.S.C. §§ 924(c)(1)(A), (j)(1), and (2). (Cr-DE 97:6).

Mr. Mentor was additionally charged with the unlawful possession of a postal key (Count 7), being a felon in possession of ammunition (Count 8), conspiracy to commit access device fraud (Count 9), access device fraud (Count 10), and four counts of aggravated identity theft (Counts 11-14). *See* Cr-DE 97:7-14.

The Trial

Mr. Mentor proceeded to trial. Mr. Politesse testified for the government and told the jury that he had conspired with Mentor and a third man named "Freddy G," to rob a postal worker in order to steal his "arrow key." (Cr-DE 267:27). Politesse asserted that he and Freddy G waited in a car while Mentor got out and followed the victim into an apartment complex. Then, Politesse said, as he and Freddy G waited in the car, he heard gunshots and realized that Mentor had shot the postal worker. (Cr-DE 267:39).

During the charge conference, the government requested that the jury be instructed, pursuant to *Pinkerton v. United States*, 318 U.S. 640 (1946), that if it found Mr. Mentor guilty of the Hobbs Act conspiracy, it could convict him of Counts 2 through 7, "even though the Defendant did not personally participate" in those crimes. (Cr-DE 213:33). In support of the instruction, the prosecutor argued:

> So if the jury goes back to the room, and this isn't ... jurors do what they do. And they go back there and they say, Look, we don't believe Saubnet. We think Saubnet could be the shooter. Or they could play off one of the defense theories that Freddy G is the shooter. But you know what? ***We know the defendant was there on that day, letting his car be used***. So he's still on the hook for that robbery. And he's still on the hook for the death of the guard. [sic] And he's still on the hook for there being a gun used. ***Because they can still find him guilty under that theory.***

> ***In fact, it's a theory that's not inconsistent with what the defense has argued and what we've argued.*** If they decide to split the baby and just believe both of us, they say, Well, wait, Mr. Kahn said it was Freddy G that did this. But they say, Look, Mr. Altman persuaded us that the defendant was in the car and driving his car around, they would still find him properly guilty.

(DE 270:133) (emphasis added). The district court gave the prosecutor's requested instruction, and instructed the jury that if it found Mr. Mentor guilty of the conspiracy charged in Count 1, then it could also find him "guilty of any of the crimes charged in Counts 2 through 7 even though the Defendant did not personally participate in the crime." (Cr-DE 213:33). The jury was also instructed on aiding and abetting. (Cr-DE 214:32).

Although the indictment identified multiple predicate offenses for the gun charges in Counts 5 and 6, the jury instructions with respect to each count required the jury to find that a firearm was either possessed or used (or both) in connection with a singular "crime of violence." (Cr-DE 214:20).[2] The jury was also asked to find,

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[2] For Count 5, the jury was instructed that:

> The Defendant can be found guilty of this crime only if the following facts are proved beyond a reasonable doubt:
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> First: That the Defendant committed ***a crime*** of violence, as charged in Count 1, Count 2, Count 3, or Count 4 of the indictment; and
>
> Second: That during the commission of ***that offense*** the Defendant knowingly carried a firearm in relation to ***that crime*** of violence, as charged in the indictment; or

with respect to each of Counts 5 and 6, whether "[a] firearm was used or carried in relation to the crime of violence;" or whether "[a] firearm was possessed in furtherance of the crime of violence," or "[b]oth." (Cr-DE 205). The jury was not asked to make any finding regarding which crime of violence formed the predicate offense.

The jury convicted Mr. Mentor of 14 counts including Hobbs Act conspiracy, robbery, carjacking, and murder—which were all identified in the indictment as predicate "crimes of violence" for the 18 U.S.C. §§ 924(c) and (j) charges in Counts 5 and 6. (Cr-DE 205). With respect to the special interrogatories, which asked whether "[a] firearm was used or carried in relation to the crime of violence;" or whether "[a] firearm was possessed in furtherance of the crime of violence," or "[b]oth," the jury answered, for each count, that "[a] firearm was ***possessed*** in furtherance of the crime of violence." (Cr-DE 205:2) (emphasis added).

> That during the commission of ***that offense*** the Defendant knowingly possessed the firearm in furtherance of ***that crime*** of violence, as charged in the indictment.

(Cr-DE 214:20) (emphasis altered). The instructions for Count 6 repeated the above, with the additional element "[t]hat the Defendant, during the course of this violation, caused the death of a person through the use of a firearm, which killing was murder as defined in Title 18, United States Code, Section 1111." (Cr-DE 214:20).

On January 31, 2013, the district court sentenced Mr. Mentor to "Life plus 42 years (504 months)" of imprisonment. (Cr-DE 258:3).[3] Mr. Mentor was further ordered to pay restitution of $201,535.11 (Cr-DE 258:6).

Mr. Mentor filed a timely appeal to the Eleventh Circuit, which affirmed his conviction on August 1, 2014. *United States v. Mentor*, No. 13-10611, 570 F. App'x 895 (11th Cir. 2014) (Cr-DE 284). On September 28, 2015, Mentor file a *pro se* motion to vacate his sentence pursuant to 28 U.S.C. § 2255. (Cr-DE 286:36). The magistrate judge subsequently ordered Mr. Mentor to amend his petition, and the amended claims were dismissed as time-barred. *See* Cr-DE 297. Mr. Mentor also filed two separate motions for a new trial, which were denied. DE 218, 231, 300, 313.

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[3] This sentence consists of terms of imprisonment of life as to Counts 3,4 and 6, to run concurrently with each other; 240 months as to Counts 1 and 2, to run concurrently with each other and consecutively to Counts 3,4, and 6; 120 months as to Count 5, to run consecutively to Counts 1 and 2; 120 months as to Counts 7 and 8 to run concurrently with each other and all other counts; 60 months as to Count 9; and 120 months as to Count 10 these two counts are to run concurrently with each other and consecutively to Count 5; and 2 years as to each of Counts 11 through 14, which are to run concurrently with each other and consecutively to Counts 9 and 10.

(Cr-DE 258:3).

The instant proceeding

On June 24, 2019, this Court held in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), that the so-called "residual clause" in 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague. Shortly thereafter, the Eleventh Circuit held that *Davis* announced a new rule of constitutional law that applies retroactively to successive § 2255 movants. *In re Hammoud*, 931 F.3d 1032, 1038-39 (11th Cir. 2019).

On January 31, 2020, the Eleventh Circuit granted Mr. Mentor leave to file a second or successive motion to vacate under 28 U.S.C. § 2255 in light of *Davis*. (Cr-DE 314:5; Civ-DE 1). On May 5, 2020, Mr. Mentor filed a motion to vacate, arguing that his convictions and sentences in Counts 5 and 6 are invalid and must be vacated. (Civ-DE 9). The case was stayed pending the resolution of relevant cases in the Eleventh Circuit, and Mr. Mentor filed an amended motion to vacate on July 14, 2021. (Cv-DE 30). He argued that his convictions in Counts 5 and 6 must be set aside in light of *Davis*, because the jury's answers to the special interrogatories in Counts 5 and 6 showed that the jury relied on Hobbs Act conspiracy as the predicate crime of violence. After *Davis*, Hobbs Act conspiracy is no longer a crime of violence, and any § 924(c) conviction that relies on Hobbs Act conspiracy as the predicate crime of violence, is constitutionally invalid.

Mr. Mentor argued that, if the jury had relied on any predicate offense ***other than*** the conspiracy, it would have had to find that the firearm was "used or carried" in connection to the crime—a finding that the jury expressly rejected. The jury's

answers to the special interrogatories thus showed that it must have relied ***only*** on the Hobbs Act conspiracy as the predicate crime of violence.

The government filed an answer in which it contended that Mr. Mentor's claim was procedurally defaulted, or, alternatively, that the claim failed on the merits because Mr. Mentor could not establish prejudice. (Cv-DE 33). Mr. Mentor filed a reply, in which he argued, *inter alia*, that the default should be excused due to cause and prejudice. (Cv-DE 3-7). He also argued that he was entitled to relief on the merits.

On March 10, 2023, the district court entered an order denying Mr. Mentor's amended motion to vacate. (Cv-DE 39). The court agreed both with the government's arguments that the claim was procedurally defaulted and that Mr. Mentor could not show prejudice. (Cv-DE 39:7-10). With respect to the merits, the court agreed with Mr. Mentor that the record established "that the jury found that Movant possessed a firearm during the commission of the charged offense, but never 'actually used or carried' that firearm." (Cv-DE 39:8). But the court rejected Mr. Mentor's argument that this showed that the jury relied exclusively on the Hobbs Act conspiracy as the basis for Mr. Mentor's §§ 924(c) and (j) convictions. Instead, the court reasoned that the jury had convicted Mr. Mentor under a theory of accomplice liability of all of the underlying crimes. And, notwithstanding the jury's answers to the special interrogatories, the court found that the offenses were "inextricably intertwined," such that the constitutional errors in Counts 5 and 6 were harmless.

The district court declined to issue a certificate of appealability ("COA"), finding that "no 'jurists of reason' would debate the correctness of either its procedural or merits-based rulings." (Cv-DE 39:11) (citations omitted).

Mr. Mentor filed a timely notice of appeal to the Eleventh Circuit. He subsequently moved the court of appeals to issue a COA on two questions:

> 1. Whether reasonable jurists could differ as to whether the district court erred in denying Mr. Mentor's § 2255 motion, because there is "more than a reasonable possibility" that the *Stromberg*[4] errors in Counts 5 and 6 of his conviction were harmful;
>
> and
>
> 2. Whether reasonable jurists could differ as to whether the district court erred in concluding that procedural default barred consideration of Mr. Mentor's claim.

On December 19, 2023, the Eleventh Circuit entered an order denying Mr. Mentor's request for a COA. The court of appeals found that Mr. Mentor's claim was procedurally defaulted because he had not raised it at trial or on direct appeal. App. A at 3. And, the court held that Mr. Mentor had not shown "cause" to excuse his procedural default.

The Eleventh Circuit recognized the principle that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise a claim." App. A at 3 (citations omitted). However,

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[4] *Stromberg v. California*, 283 U.S. 359 (1931).

circuit precedent had already held that "a *Davis* challenge does not constitute a novel constitutional rule that excuses a procedural default." App. A at 3 (citing *Granda v. United States*, 990 F.3d 1272, 1287-88 (11th Cir. 2021)). Therefore, Mr. Mentor could not establish cause and prejudice to overcome the default.

The court also followed Eleventh Circuit precedent holding that "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." App. A at 3 (citing *Hamilton v. Secretary, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015)). The court therefore declined to issue a COA.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. There is a longstanding and entrenched circuit split regarding whether, and under what circumstances, a change in adverse authority may provide cause to overcome a procedural default. The split calls into question the continued viability of one of this Court's precedents, and had a determinative impact in Mr. Mentor's case.

In *Reed v. Ross*, 468 U.S. 1, 10, 17 (1985), 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. The *Reed* Court identified specific situations in which a "'new' constitutional rule, representing 'a clear break from the past' might emerge from this Court" and provide cause for a default. Such situations include where a decision of this Court expressly overrules one of its precedents. *Id.* at 17. In such a case, the Court held, "there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a . . . court to adopt the position that this Court ultimately adopted," and "the failure of a defendant's attorney to have pressed such a claim . . . is sufficiently excusable to satisfy the cause question." *Id.*

In the nine years since *Johnson v. United States*, 576 U.S. 591 (2015), overturned adverse precedent regarding the constitutionality of the residual clause in 18 U.S.C. § 924(e)(ii)(B)(ii), eight circuits have weighed in on the continued viability of *Reed*. While six circuits continue to follow *Reed*'s guidance, two others—

including the Eleventh Circuit—hold that intervening decisions of this Court have undermined *Reed*'s holding that novelty may provide cause for a default.

Because Mr. Mentor's direct appeal was decided after this Court expressly rejected a constitutional "ordinary-case" vagueness claim in *James v. United States*, 550 U.S 192 (2007), he would have been able to bring his constitutional claim in the First, Fourth, Sixth, Seventh, Eighth, or Tenth Circuits. The Eleventh Circuit, however, held that Mr. Mentor could not overcome his procedural default, based on circuit precedent holding that *Johnson v. United States*, 576 U.S. 591 (2015), was not so novel as to establish cause. The Fifth Circuit has similarly rejected the argument that *Johnson's* change in law, and direct overruling of *James* and *Sykes v. United States*, 564 U.S. 1 (2011), provided cause for a default.

The circumstances under which a petitioner can show cause for a default is a fundamental question of federal law and procedure, having far-reaching and obvious importance. The split is deep, mature, and unlikely to go away without this Court's intervention. Mr. Mentor can show prejudice from the constitutional error, and would have been entitled to relief if his challenge were brought in any of the six circuits that continue to follow *Reed*'s guidance as to cause. Because no right as fundamental as a prisoner's access to the courts should depend on geography, the Court should grant review.

II. The Court's review is also warranted because the Eleventh Circuit applies an erroneous COA standard. Under 28 U.S.C. § 2253(c)(2), a COA should issue upon "a substantial showing of the denial of a constitutional right." Under this standard, the applicant need not show that he would win on the merits; it is enough that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted).

In the Eleventh Circuit, however, a COA will not be granted where circuit precedent forecloses a claim—even if "reasonable jurists" in other jurisdictions would resolve the matter differently. In the Eleventh Circuit's view, "reasonable jurists will follow controlling [circuit] law," and that ends the "debatability" of the matter for COA purposes. *Hamilton v. Secretary, Fla. Dept. of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015). The Eleventh Circuit's rule that adverse circuit precedent precludes a finding that "reasonable jurists could debate" an issue is a gross misapplication of this Court's precedents *in Miller-El v. Cockrell,* 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S.Ct. 759 (2017). Because the issues herein are debatable among reasonable jurists, and indeed, the Eleventh Circuit's procedural default ruling is the subject of the circuit split discussed above, Mr. Mentor was entitled to a COA. The Eleventh Circuit's contrary ruling misapplies the Court's precedents and warrants review.

I.

Mr. Mentor established cause for his procedural default because his ordinary-case vagueness challenge was "not reasonably available" prior to *Johnson v. United States*, 576 U.S. 591 (2015).

A. Background

1. In *Johnson v. United States*, 576 U.S. 591 (2015), the Court declared the so-called "residual clause" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(ii)(B)(ii)—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"—unconstitutionally vague. In the Court's view, the process of determining what is embodied in the "ordinary case" of 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. *See also Welch v. United States*, 578 U.S. 120, 123-24 (2016) (first citing *James v. United States*, 550 U.S. 192 (2007); then citing *Begay v. United States*, 553 U.S. 137 (2008); then citing *Chambers v. United States*, 555 U.S. 122 (2009); and then citing *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. *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 on direct appeal.

On June 24, 2019, the Court relied on *Johnson*'s constitutional rule to declare the residual clause in 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319, 2336 (June 24, 2019). The Court found § 924(c)(3)(B) materially indistinguishable from 18 U.S.C. § 924(e)(2)(B)(ii), which it had struck down in *Johnson*, and 18 U.S.C. § 16(b), which had been similarly invalidated in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). *See Davis*, 139 S. Ct. at 2328-29 (noting that all three similarly-worded residual clauses required the same categorical "ordinary case" approach).

Shortly thereafter, in *In re Hammoud*, 931 F.3d 1032 (11th Cir. 2019), the Eleventh Circuit resolved many of the preliminary questions that would arise with regard to *Davis*' applicability to cases on collateral review, by holding that: (1) *Davis* had announced a new rule of constitutional law; (2) this Court had made that new of substantive law rule retroactively applicable to cases on collateral review pursuant to the analysis in *Tyler v. Cain*, 533 U.S. 656, 662-64-66 (2011); and that *Davis* therefore applied retroactively to successive § 2255 movants. *Id.* at 1038-39.

On September 9, 2019, Mr. Mentor filed an application in the Eleventh Circuit for leave to file a second or successive motion to vacate under § 2255 based upon the

new rule of constitutional law in *Davis*. He argued that, in light of *Davis*, his convictions and sentences on Counts 5 and 6, for violations of 18 U.S.C. §§ 924(c) and 924(j), were unconstitutional. The Eleventh Circuit noted that "the § 924(c) and (j) charges referenced multiple, distinct predicate offenses and the jury returned a general jury verdict." (Cr-DE 314:4) (*In re Mentor*, No. 20-10062 (11th Cir. Jan. 31, 2020) (citation omitted)). The court had already held, in *Brown v. United States*, 942 F.3d 1069 (11th Cir. 2019), that "conspiracy to commit Hobbs Act robbery is not a crime of violence under the elements clause," and found that it was possible that Mr. Mentor's §§ 924(c) and (j) convictions relied on the unconstitutional residual clause. (Cr-DE 314:5). Therefore, the Eleventh Circuit granted Mr. Mentor leave to file a second or successive § 2255 motion in light of *Davis*. (Cr-DE 314:5). Mr. Mentor timely filed his authorized successive habeas petition.

2. As a "general rule . . . claims not raised on direct review may not be raised on collateral review unless the petitioner shows caused and prejudice." *Massaro v. United States*, 538 U.S. 500, 504 (2003) (citing *United States v. Frady*, 456 U.S. 152, 167-168 (1982); *Bousley v. United States* 523 U.S. 614, 621-622 (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. The *Reed* opinion 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 default. *Reed*, 468 U.S. at 17 (quotation omitted).

> 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.'

Id. (citations omitted).

The circuits are divided over whether *Johnson* provides cause under this standard.

> B. The First, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits would have found cause for the default.

Applying *Reed*, the First, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits have all found that the unavailability of a constitutional vagueness claim—at least during the period after this Court foreclosed the availability of an ordinary-case

vagueness challenge in *James* and prior to this Court's overturning that precedent in *Johnson*—provided cause to excuse a default.

In *United States v. Lassend*, 898 F.3d 115 (1st Cir. 2018), the First Circuit held that the petitioner had cause for procedurally defaulting his claim that he was unconstitutionally sentenced under the ACCA's residual clause. The court quoted *Reed* for the proposition that "[a] petitioner has cause for procedurally defaulting a constitutional claim where that claim was 'so novel that its legal basis [wa]s not reasonably available to counsel' at the time of the default." *Lassend*, 898 F.3d at 123 (quoting *Reed* 486 U.S. at 16). The court wrote:

> Despite that broad language of reasonableness, the Supreme Court also held in *Reed* that a claim "will almost certainly have [had] . . . no reasonable basis" when the claim is based on a "constitutional principle that had not been previously recognized but which is held to have retroactive application," and the constitutional principle arises from a decision in which the Court (1) "explicitly overrule[s] one of [its own] precedents," or (2) "overtur[ns] a longstanding and widespread practice to which [the] Court ha[d] not spoken, but which a near-unanimous body of lower court authority ha[d] expressly approved.'" *Id.* at 17, 104 S. Ct. 2901. We are bound by those latter statements.

Lassend, 898 F.3d at 123.

At the time of Lassend's direct appeal, this Court's decisions in *James* and *Sykes,* both of which had rejected constitutional vagueness challenges to the ACCA's residual clause, "were still good law." *Id*. *Johnson*, however, "expressly overruled *James* and *Sykes* in relation to the ACCA." *Id*. Thus—even though Lassend had made a constitutional vagueness claim in the district court and later abandoned it on direct

appeal—the court of appeals found that the claim was "not reasonable available," and that Lassend had shown cause for his procedural default under *Reed*.

The First Circuit rejected the government's argument that *Bousley v. United States*, 523 U.S. 614 (1998) required a different result. In *Bousley*, this Court held that "futility cannot constitute cause if it means simply that a claim was 'unacceptable to [a] particular court at [a] particular time." 523 U.S. at 623. But *Bousley* was "no help to the government because petitioner's argument in that case was not based on a constitutional right created by [this] Court's overruling of its own precedent." *Lassend*, 898 F.3d at 123. Unlike the petitioner's claim in *Bousley*, "Lassened's argument was not 'available at all' ... until [this] Court 'explicitly overrule[d]' *Sykes* and *James." Lassened*, 898 F.3d at 123 (citations omitted).

In *United States v. McKinney*, the Fourth Circuit held that the petitioner's defaulted *Davis* claim fell into the third *"Reed* category." 60 F.4th 188, 194 (4th Cir. 2023). "In the years leading up to McKinney's guilty plea and sentence," this Court "had repeatedly treated the residual clause of the ACCA as if it were sufficiently determinate to put an ordinary person on notice of what it prohibited." *Id*. (first citing *Sykes*, 564 U.S. at 15; and then citing *James* 550 U.S. at 210 n.6). Furthermore, in "summarily" rejecting the vagueness argument in *James*, the Court "emphasized that 'similar formulations' appeared in other federal statutes." *Id*. (citation omitted). Thus, the Fourth Circuit found that "when McKinney pled guilty in 2012 and was sentenced in 2013, Supreme Court precedent had effectively foreclosed" his *Davis* claim. "It was

not until 2015, when the Court decided *Johnson*, that it struck down a residual clause for vagueness and therefore it was not until then that this claim because 'reasonably available.'" *Id. citing Reed*, 468 U.S. at 16.

The Fourth Circuit joined the First Circuit in rejecting the government's reliance on *Bousely*, finding that *Bousely* was "inapposite" because it "did not arise out of [this] Court ***overturning its own precedent***." *Id*. at 195 (emphasis in original) (first citing *Lassend*, 898 F.3d at 123; then citing *Gatewood v. United States*, 979 F.3d 391, 397 (6th Cir. 2020)). The Fourth Circuit found this distinction "critical," and "[f]or the same reasons," dismissed the government's reliance on two Fourth Circuit precedents, "neither of which involved claims based on the Supreme Court overturning its own precedent." *See id*. at n.4 (distinguishing *Whiteside v. United States*, 775 F.3d 179, 185-87 (4th Cir. 2014) (en banc), and *United States v. Sanders*, 247 F.3d 139, 145-46 (4th Cir. 2001)). The Fourth Circuit held that McKinney's *Davis* claim fell "squarely within *Reed*'s 'novelty' framework,' and so he ha[d] shown cause for his procedural default." *Id*. at 195.

In *Raines v. United States*, 898 F.3d 680 (6th Cir. 2018), the Sixth Circuit also found cause for failing to raise a *Johnson* claim on direct appeal, where the defendant was sentenced after *James* and *Sykes* foreclosed the viability of such claims. *See id*. (holding that the "had cause for failing to raise his *Johnson* claim on direct appeal," because "*Johnson* was not decided until June 26, 2015, well after Raines's direct appeal was decided on June 11, 2013.").

The Sixth Circuit subsequently limited its finding of cause to situations where a novel constitutional claim was directly foreclosed by precedents of this Court. *See Gatewood v. United States*, 979 F.3d 391, 397-98 (6th Cir. 2020). The *Gatewood* Court recognized that it was "part[ing] ways" with decisions of the Seventh and Tenth Circuits, discussed *infra*, which had held that a default could be excused based on a "near-unanimous body" of adverse circuit authority. *See id.* at 395 (first citing *Cross v. United States*, 892 F.3d 288, 295-96 (7th Cir. 2018); and then citing *United States v. Snyder*, 871 F3d 1122, 1127 (10th Cir. 2017)). While "*Reed* did suggest that this species of 'novelty,' later described by the Court as 'futility' could excuse procedural default," the *Gatewood* Court found that *Bousley* and *Smith v. Murray*, 477 U.S. 527, 536 (1986) have narrowed *Reed* to the point where futility exists only where precedent of this Court forecloses the claim. *See id.* (citations omitted).

As just discussed, in *Cross*, the Seventh Circuit found cause for a defendant's failure to bring a residual clause challenge under the mandatory guidelines—even though the defendant was sentenced prior to *James*—explaining that "*Johnson* represented the type of abrupt shift with which *Reed* was concerned." 892 F.3d at 295.

> 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,

> 127 S.Ct. 1586. Eight years later, the Court made a U-turn and tossed out the ACCA residual clause as unconstitutionally vague.

Id. at 295-96.

The Seventh Circuit "join[ed] the Tenth Circuit" in excusing the petitioner's failure to challenge the constitutionality of the 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 held, moreover, that the "second and third scenarios identified by *Reed* present[ed] even more compelling grounds to excuse" the defaults, 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). "Thus," in the Seventh Circuit, a party's "inability to anticipate *Johnson* excuses their procedural default," without regard to whether they were sentenced before, or after, *James*. *Cross*, 892 F.3d at 296.

In *Jones v. United States*, 39 F.4th 523 (8th Cir 2022), the Eighth Circuit found that the petitioner established cause for failing to bring his *Davis* claim on direct appeal, "because the state of the law at the time of his appeal did not offer a reasonable basis upon which to challenge the guilty plea" *Id.* at 525 (citing *Ross*, 468 U.S. at 17). Before the Eighth Circuit ruled on 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, . . . and the Court reaffirmed that ruling shortly after Jones's conviction and sentence became final." *Id*. at 525 (first citing *James*, 550 U.S. at 210 n.6; and then citing *Sykes*, 564 U.S. at 15-16). The court found that Jones's *Davis* claim "was only reasonably available after" after *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). *See also United States v. Moss*, 252 F.3d 993 (8th Cir. 2001) (citing *Bousley,* 523 U.S. at 623, for the proposition that this Court "has rejected the argument that default can be excused when existing lower court precedent would have rendered a claim unsuccessful.").

Finally, in *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017), the Tenth Circuit held that a *Johnson* claim was not reasonably available at the time of the defendant's 2005 direct appeal. "[T]he 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 available to counsel, so defendant has cause for failing to raise the issue." *Snyder*, 871 F.3d at 1127 (citing *Reed*, 468 U.S. at 17).

The court found this was "precisely the situation" where the petitioner had failed to challenge his ACCA sentence based on the unconstitutionality of the residual clause, on direct appeal. *Id*. at 1127. "As the District of Colombia Circuit has noted,

'it is fair to say that no one—the government, the judge, or the [defendant]—could reasonably have anticipated *Johnson*.'" *Id*. (quoting *United States v. Redrick*, 841 F.3d 478, 480 (D.C. Cir. 2016)). Even though the defendant had been sentenced prior to the Court's express rejection of the claim in *James*, the Tenth Circuit concluded "that the *Johnson* claim was not reasonably available to Snyder at the time of his direct appeal, and that this is sufficient to establish clause." *Id*. at 1127.

Because Mr. Mentor was sentenced after this Court had flatly rejected the constitutional vagueness argument in *James* and *Sykes*, he would have been able to bring his *Davis* claim in any of these circuits.

C. The Eleventh and Fifth Circuits have diverged from the majority in refusing to find cause based on adverse precedent from this Court.

In contrast to the six circuits cited above, the Eleventh Circuit has held that a petitioner's *Johnson/Davis* claim was "not sufficiently novel to establish cause," notwithstanding the fact that his appeal was decided after *James*. *Granda v. United States*, 990 F.3d 1272, 1286 (11th Cir. 2021). The court recognized *Reed*'s holding that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim." *Id*. (quotation omitted). According to the Eleventh Circuit, however, "[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." *Id*. (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 v. United States*,

266 F.3d 1245, 1258 (11th Cir. 2001) (internal quotation marks and further citation omitted)).

The Eleventh Circuit had previously rejected, in *McCoy v. United States*, 266 F.3d 1245, 1249 (11th Cir. 2001), the premise that default could be excused by the existence of a wall of adverse circuit authority. "The problem with that position," according to the Eleventh Circuit, was that this Court "could not have been clearer that perceived futility does not constitute cause to excuse a procedural default." *McCoy*, 266 F.3d at 1259 (citing *Bousley*, 523 U.S. at 623 and *Smith*, 477 U.S. at 535). "Unless and until the Supreme Court overrules its decision that futility cannot be cause, laments about those decisions forcing defense counsel to file 'kitchen sink briefs' in order to avoid procedural bars . . . are beside the point." *Id.* (internal citation omitted).

In *Granda*, the Eleventh Circuit found that the petitioner's "*Davis* claim fit[] most neatly into" the third *Reed* category, i.e., "when a Supreme Court decision disapproves of 'a practice [the Supreme Court] arguably has sanctioned in prior cases." *Granda*, 990 F.3d at 1286. This was because "[u]nlike the *Johnson* ACCA decision, *Davis* did not overrule any prior Supreme Court precedents holding that the § 924(c) residual clause was not unconstitutionally vague." *Id.* at 1287. Thus, although "Granda's best argument" was that *James* had already rejected an ordinary-case vagueness claim at the time of Granda's direct appeal, the Eleventh Circuit

discounted this because *James* involved a different statutory provision. *See id*. at 1287 ("*James* did not consider the § 924(c) residual clause at all.").

Moreover, the Eleventh Circuit found that—notwithstanding the *James*'s summary rejection of the argument—the dissenting opinion in *James* indicated that "at least three Justices were interested in entertaining vagueness challenges to the ACCA's residual clause, and perhaps to similar statutes." *Id*. (citing *James*, 550 U.S. at 29-31 (Scalia, J., dissenting, joined by Justices Stevens and Ginsburg)). "Even more revealing," the court found, was that "other defendants did challenge the ACCA's residual clause on vagueness grounds after *James* (but before *Johnson*))." *Id*. (collecting cases). "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," the Eleventh Circuit reasoned, "it surely did not deprive them of the tools to challenge the § 924(c) residual clause, a clause to which *James* did not even apply." *Id*. *See also id*. at 1287-88 (finding that the "building blocks" of a constitutional vagueness challenge existed at the time of Granda's direct appeal).

The Fifth Circuit has aligned itself with the Eleventh Circuit on this issue. In *United States v. Vargas-Soto*, 35 F.4th 979 (5th Cir. 2022), the Fifth Circuit held that a prisoner could not show cause for procedurally defaulting a vagueness challenge to the residual clause in 18 U.S.C. § 16(b), which was declared unconstitutional, following *Johnson*, in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

The Fifth Circuit found that this Court's intervening decisions in *Murray* and *Bousley*, had "substantially limited" *Reed*'s holding that novelty could provide cause for a default. In *Murray*, the Fifth Circuit found, this Court limited *Reed* "to establish merely this: '[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." *Vargas-Soto*, 35 F.4th at 994 (quoting *Murray*, 477 U.S. at 537). In *Bousely*, the Fifth Circuit held, this Court "reaffirmed that 'where the basis of a claim is available, and other defense counsel have perceived and litigate that claim,' the claim is not novel," and that "futility cannot constitute cause." *Vargas-Soto*, 35 F.4th at 994 (quoting *Bousley*, 523 U.S. at 623 & n.2). "Taken together," the Fifth Circuit found that these precedents "hold[] that a prisoner cannot invoke 'novelty' as cause for a default where he was legally able to make the putatively novel argument." *Id*. (first citing *Anderson v. Kelley*, 938 F.3d 949, 962 (8th Cir. 2019); then citing *Gatewood*, 979 F.3d at 395; and then citing *Granda*, 990 F.3d at 1282). Like the Eleventh, the Fifth Circuit held that this Court's rejection of ordinary-case vagueness challenges in *James* and *Sykes* "provided Vargas-Soto the tools needed to raise his vagueness claim." *Id*. at 995.

D. The decision below is wrong.

In *McCoy*, the Eleventh Circuit found that *Bousley* and *Smith* abrogated *Reed sub silento*, by holding that a petitioner cannot show cause to excuse a procedural default "simply" because a particular legal claim was "unacceptable to [a] particular court at [a] particular time," and "perceived futility alone cannot constitute cause.'" *McCoy*, 266 F.3d at 1259 (quotations omitted). The Eleventh Circuit further concluded that under *Bousley*, long-standing practice and near-unanimous circuit precedent foreclosing a claim cannot excuse procedural default. *See McCoy*, 266 F.3d at 1258-59; *Moss*, 252 F.3d at 1002; *Gatewood*, 979 F.3d at 395-96.

But *Bousley* did not say it was overruling *Reed*. *See Bousley,* 523 U.S. at 622 (citing *Reed*). And *Bousley* is not inconsistent with *Reed*. *See McCoy*, 266 F.3d at 1273 (Barkett, J., concurring) ("A careful reading of *Bousely* and the cases on which it relies makes clear that the Supreme Court did not pronounce nearly as broadly as the majority suggests."). Rather, *Bousley* addressed the completely different situation in which a petitioner failed to raise a 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).

Tellingly, in *Vargas-Soto*, the Fifth Circuit cited decisions of the First, Sixth, and Tenth Circuits, which it alleged, showed that its "sister circuits understand *Bousley* and *Murray* quashed *Reed*'s novelty categories." *See Vargas-Soto*, 35 F.4th at 997 (first citing *Gatewood*, 979 F.3d at 395; then citing *Daniels v. United States*, 254 F.3d 1180, 1191 (10th Cir. 2001) (en banc); and then citing *Simpson v. Matesanz*, 175 F.3d 200, 212 (1st Cir. 1999)). But ***each of these circuits***, as discussed above, have found that *Johnson* provided cause for a default, at least where the defendant was sentenced *after* this Court squarely rejected the viability of an ordinary-case vagueness claim in *James*.

Mr. Mentor would have been able to overcome his default in the First, Fourth, Sixth, Seventh, Eighth, or Tenth Circuits. Because this case presents an important and recurring question of federal law on which the circuits are divided, the Court should grant review.

E. Mr. Mentor would have been entitled to relief in other circuits.

The circuit split was outcome determinative in this case. The jury's answers to the special interrogatories confirm that it relied solely on the Hobbs Act conspiracy as the predicate offense for the firearm charges in Counts 5 and 6. After *Davis,* that is not a constitutionally valid predicate offense, rendering the convictions in those counts invalid.

Although the jury was not asked to name which predicate offense formed the basis for the § 924(c) and § 924(j) counts, it was asked to find whether a firearm was used or carried, or whether it was merely possessed, in connection with the predicate offense. Specifically, for each of Counts 5 and 6, the jury was asked to find whether "A firearm was used or carried in relation to the crime of violence; or A firearm was possessed in furtherance of the crime of violence; or Both." (Cr-DE 2-5:2) (emphasis omitted). For each count, the jury answered that "A firearm was ***possessed*** in furtherance of the crime of violence." (Cr-DE 205:2) (emphasis added). Critically, the jury was given the opportunity to find that the firearm was ***both*** possessed and "used or carried"—and specifically rejected the finding that the firearm was used or carried.

Based on the evidence in the case, if the jury had relied on any of the charged offenses as the predicate for the § 924(c) or § 924(j) offenses, ***other than*** the Hobbs Act conspiracy, it would have had to find that the firearm was used and carried as opposed to merely being possessed in connection with the offense. The evidence established that Mr. Mentor and Mr. Politesse were in Mentor's car together before

someone—whether Mentor, or Politesse, or "Freddy G"—got out of the car and followed the victim into an apartment complex, where the robbery, murder, and carjacking took place. It was therefore possible for the jury to find that Mr. Mentor possessed the firearm, whether actually, constructively or jointly, in furtherance of the Hobbs Act Conspiracy, even though he never got out of the car. *See* Cr-DE 214:32 (jury instructions) ("The term 'possession' includes actual, constructive, sole, and joint possession). But, if the jury had relied on any of the other crimes of violence (*i.e,* the robbery, or the carjacking, or the murder) as the predicate offense, it would have had to find that the firearm was "carried" when the shooter exited the car and followed Mr. Parton into the apartment complex, and thereafter "used" during the shooting. The jury's refusal to find that the firearm was either "used or carried" in connection with the "crime of violence" confirms that the jury did ***not*** rely on any of the substantive crimes for the § 924(c) and § 924(j) counts. "And that makes sense because if the defendant didn't commit the robbery, he couldn't have carried the gun during that robbery." (Cr-DE 270:40) (government's closing argument).

Importantly, the passive tense of the special findings did not even require the jurors to find that Mr. Mentor personally "used or carried" the firearm. Thus, if the jury had relied on any of the remaining predicate offenses—even if it had found Mr. Mentor guilty under a theory of accomplice liability—the jury would still have had to find the firearm itself was "used or carried" in connection with the offense. But the jury did not do so. The special findings thus confirm the jury selected the Hobbs Act

conspiracy—and only the Hobbs Act conspiracy—as the predicate offense for both Counts 5 and 6.

The Eleventh Circuit did not reach the merits of Mr. Mentor's claim, finding only that he had failed to overcome his procedural default. Because this ruling would have been different in six other circuits, and Mr. Mentor would have been entitled to relief in those jurisdictions, he asks the Court to grant review.

II.

This Court should grant certiorari to resolve whether a COA may issue in the face of adverse circuit precedent.

A certificate of appealability ("COA") should issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant need not show that he would win on the merits; he must only "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

The Court has emphasized that a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context that a petitioner has lost on the merits, the Court has been adamant that it will "not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338 (emphasis added); *see also Buck v. Davis*, 137 S.Ct. 759, 774 (2017) (following *Miller-El*). Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making

this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

In the Eleventh Circuit, however, COAs are not granted where circuit precedent forecloses a claim. In that court's view "reasonable jurists will follow controlling [circuit] law," and that ends the "debatability" of the matter for COA purposes. *Hamilton v. Secretary, Fla. Dept. of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) ("[W]e are bound by our Circuit precedent, not by Third Circuit precedent;" circuit precedent "is controlling on us and ends any debate among reasonable jurists about the correctness of the district court's decision under binding precedent") (citation omitted). *See also Tompkins v. Secretary, Dep't of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005).

The Eleventh Circuit's rule that adverse circuit precedent precludes a finding that "reasonable jurists could debate" an issue is an egregious misapplication of this Court's precedents in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S. Ct. 759 (2017). In *Buck*, the Court confirmed that "[u]ntil a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting

Miller-El, 537 U.S. at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit's rule improperly requires that a claim be decided on the merits and places too heavy a burden on movants at the COA stage. As the Court explained in *Buck*:

> [W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner ***at the COA stage***.... *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774 (emphasis in original) (citations omitted). Indeed, as this Court stated in *Miller-El*, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016).

That is not the case here. As discussed in Issue I, the Eleventh Circuit is in the minority of a circuit split as to whether the circumstance at issue here establish cause for a defaulted ordinary-case vagueness claim. Reasonable jurists in the First, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits would have disagreed with the Eleventh Circuit's resolution of that issue. Furthermore, for the same reasons discussed above, reasonable jurists could at least debate whether Mr. Mentor was entitled to relief on the merits. Wherefore, under this Court's precedents, the COA should have issued, and his claim should have proceeded.

The Eleventh Circuit's unduly restrictive interpretation of the 'reasonable jurists' standard misapplies this Court's precedents and warrants review.

CONCLUSION

Based upon the foregoing, Mr. Mentor asks the Court to grant certiorari and review the decision of the United States Court of Appeals for the Eleventh Circuit.

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