

24-5416
No.

ORIGINAL

FILED

AUG 19 2024

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER E. DOMINGUEZ — PETITIONER
(Your Name)

VS.

U.S COURT OF APPEALS TENTH — RESPONDENT(S)
CIRCUIT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER E. DOMINGUEZ
(Your Name)

U.S PENITENTARY ATWATER PO Box 019001
(Address)

ATWATER, CA 95301
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- WHETHER THERE IS A "CIRCUIT SPLIT" AMONG THE TENTH CIRCUIT AND FOURTH CIRCUIT APPLYING DIFFERENT RULES TO WHAT SHOULD BE THE SAME LAW IN REGARDS TO APPLYING APPEAL WAIVERS / COLLATERAL ATTACK BARS AND PROCEDURAL BARS?

- WHETHER THE TENTH CIRCUIT AND DISTRICT COURT OF WYOMING ERRONEOUSLY ENFORCED PETITIONER'S COLLATERAL ATTACK WAIVER THAT CLEARLY RESULTS IN A COMPLETE "MISCARRIAGE OF JUSTICE"?

- WHETHER THE TENTH CIRCUIT AND DISTRICT COURT OF WYOMING ERRONEOUSLY "PROCEDURALLY DEFAULTED" PETITIONERS CLAIM FOR RELIEF UNDER 28 U.S.C. 2255 § BECAUSE (UNITED STATES V. TAYLOR, 142 S.Ct. 2015, 2021 (2022)) WAS NOT READILY AVAILABLE AT THE TIME OF PETITIONERS DIRECT APPEAL?

- WHETHER "ATTEMPTED ROBBERY INVOLVING CONTROLLED SUBSTANCES 18 U.S.C. § 2118" QUALIFIES AS A CRIME OF VIOLENCE IN LIGHT OF (UNITED STATES V. TAYLOR, 142 S.Ct. 2015, 2021 (2022)) UNDER § 924(C)'S ELEMENTS CLAUSE?

- WHETHER THE TENTH CIRCUIT ABUSED ITS DISCRETION FOR DENYING "COA" UNDER 28 U.S.C. § 1254, 28 U.S.C. § 2253 IN ACCORDANCE WITH U.S.A. VS. Hahn?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

DOMINGUEZ V. UNITED STATES. NO. 22-CV-0246-NDF
CRIMINAL: 17-CR-98-F
18-CR-186-F
U.S. DISTRICT COURT FOR THE DISTRICT OF WYOMING
Judgment entered 2/27/23 Feb. 27th, 2023

DOMINGUEZ V. UNITED STATES NO. 23-8016

U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT
Judgment entered 1/25/24 Jan. 25th, 2024
RE-Hearing En Banc ENTERED 3/22/24 MAR. 22nd, 2024

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION.....	30

INDEX TO APPENDICES

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix N/A to the petition and is

☐ reported at _____; or,
☒ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix N/A to the petition and is

☐ reported at _____; or,
☒ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was JANUARY 25, 2024.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: MARCH 25, 2024, and a copy of the order denying rehearing appears at Appendix n/a.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including AUGUST 22, 2024 (date) on MAY 2, 2024 (date) in Application No. 23 A 967.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

See Attachments

" Statement of The Case "

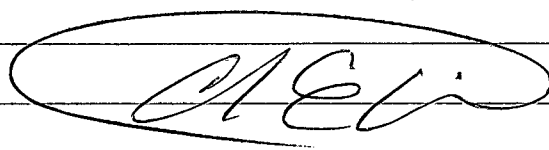
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Statement of Case

Dominguez was convicted of 924(c) and the predicate crime of violence was Attempted Robbery involving Controlled Substances § 2118 in light of "Taylor 142, S.Ct 2015, 2021 (2022)". The court held that Attempted Robbery no longer qualified as a crime of violence because no element requires the defendant to use, attempt to use, or threaten use of force. Dominguez then filed a timely 2255 seeking to vacate his conviction on said charge. The District Court denied his claim enforcing his procedural default because he did not raise this claim on direct appeal. Dominguez appealed to the Tenth Circuit and they affirmed on Jan 25th, 2024 with en banc denied March 25th 2024 thus making his writ of Cert timely. The Tenth Circuit only heard his collateral attack waiver and affirmed stating that he didn't raise it on direct appeal in the

Following Briefs Dominguez will Demonstrate all proper
Dimensions to overcome The procedural Default and
Collateral attack waiver. Dominguez Dosent want to
Sound repetitive Througout his brief so he asks The
Courts to please review his "Reasons For granting
The petition" Attachments and The Court will undoubtly
Find Dominguez is warranted relief. Dominguez
Thanks This Court For its time and Consideration

Respectfully

A handwritten signature, likely "MEJ", enclosed within a hand-drawn oval.

REASONS FOR GRANTING THE PETITION

See Attachments

"Reasons For granting petition"

on next page

"

REASONS FOR GRANTING THE PETITION"

THE RECORD IS CLEAR THAT THE SOLE PREDICATE OFFENSE UNDERLYING DOMINGUEZ'S § 924(C) CONVICTION IS ATTEMPTED ROBBERY INVOLVING CONTROLLED SUBSTANCES, BECAUSE ATTEMPTED ROBBERY INVOLVING CONTROLLED SUBSTANCES DOES NOT CONSTITUTE A PREDICATE "CRIME OF VIOLENCE" FOR A 924(C) VIOLATION. DOMINGUEZ NOW STANDS CONVICTED OF A CRIME THAT NO LONGER EXISTS. ORDINARILY, THAT ALONE WOULD ENTITLE HIM RELIEF ON HIS § 2255 MOTION. THE GOVERNMENT CONTENTS HOWEVER, THAT DOMINGUEZ EXECUTED A PLEA AGREEMENT THAT BARS HIS CLAIM. SPECIFICALLY IT ARGUES THAT DOMINGUEZ'S CLAIM WAS WAIVED BY TERMS OF HIS PLEA AGREEMENT AND THAT HIS CLAIM IS PROCEDURALLY BARRED ABSENCE A SHOWING OF NECESSARY CAUSE AND PREJUDICE. FURTHERMORE THE DISTRICT COURT OF WYOMING AGREED WITH THE GOVERNMENT THAT DOMINGUEZ'S "TAYLOR" BASED CLAIM IS BARRED BECAUSE IT WAS NOT RAISED FIRST ON DIRECT APPEAL. TAYLOR VS. UNITED STATES 142, S.Ct. 2015, 2021 (2022) WAS NOT DECIDED UNTIL JUNE 21ST 2022. DOMINGUEZ'S DIRECT APPEAL WAS DECIDED ON JUNE 2ND 2021 WITH CERT. DENIED MAY 31ST, 2022, MAKING THE "LEGAL BASIS [WAS] NOT REASONABLY AVAILABLE TO COUNSEL" UNDER REED V. ROSS, 468 U.S. 1, 16, 104 S.Ct. 2901, 82 L.Ed. 2d(1)(1984). DOMINGUEZ CAN DEMONSTRATE BOTH CAUSE AND PREJUDICE TO EXCUSE HIS PROCEDURAL DEFAULT AND DOMINGUEZ CAN ALSO DEMONSTRATE A MISCARriage OF JUSTICE TO OVERCOME HIS COLLATERAL ATTACK WAIVER. FURTHERMORE THERE'S

BEEN A "CIRCUIT SPLIT" AMONG THE TENTH CIRCUIT AND FOURTH CIRCUIT BASED ON BOTH CIRCUITS DECISIONS IN UNITED STATES V. DOMINGUEZ NO. 23-8016 (10TH CIR 2024) AND UNITED STATES V. MCKINNEY 60 F. 4TH 188 (4TH CIR 2023) ON HOW THEY'RE ENFORCING PROCEDURAL DEFAULTS AND COLLATERAL ATTACK WAIVERS, THUS APPLYING DIFFERENT RULES TO WHAT SHOULD BE THE SAME LAW. IN SHORT A DEFENDANT CHARGED IN THE FOURTH CIRCUIT HAS MORE JUDICIAL AND CONSTITUTIONAL BENEFITS THAN A DEFENDANT CHARGED IN THE TENTH CIRCUIT WHICH UNDERMINES THE FAIRNESS, INTEGRITY, OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS. POST CONVICTION CHALLENGES ARE ALREADY A HIGHER HURDLE TO OVERCOME FOR A DEFENDANT. BUT "TO PUNISH A PERSON BECAUSE HE HAS DONE WHAT THE LAW PLAINLY ALLOWS HIM TO DO IS A DUE PROCESS VIOLATION OF THE MOST BASIC SORT" UNITED STATES V. GOODWIN 457 U.S. 368, 372, 102, S. CT. 2485, 73 L. ED 2D 74. ALSO ATTEMPTED ROBBERY INVOLVING CONTROLLED SUBSTANCES IS NO LONGER A CRIME OF VIOLENCE IN LIGHT OF "TAYLOR" NO ELEMENTS OF ATTEMPTED ROBBERY INVOLVING CONTROLLED SUBSTANCES HAVE THE USE, ATTEMPTED USE, OR THREATENED USE OF FORCE AND IT CAN BE COMMITTED WITHOUT SUCH, MEANING A DEFENDANT ONLY NEEDS TO MAKE A SUBSTANTIAL STEP FOR THE GOVERNMENT TO SATISFY A CONVICTION. THEREFORE MAKING DOMINGUEZ'S

(9)

Predicate crime of violence not authorized by Congress. THE THIRD CIRCUIT Recently in *United States v. Humbert* U.S. LEXIS 101486 (2024) Ruled that The element "The taking was by Force and violence OR by intimidation" ^W Dose NOT MEAN THE SAME AS USE, Attempt to use, OR Threaten to use Force as That's The only Element OF such nature in Dominguez's Attempted Robbery involving Controlled Substances (See PSI For Dominguez Case: 2:17-cr-00098 Doc. 186 pg 8 PSI). Making His crime no longer a crime of violence to satisfy a 924(c) Conviction. Subjecting Dominguez to a sentence not sanctioned by Congress does constitute an error seriously affecting The Fairness, integrity, or public reputation of judicial proceedings. Enforcing Dominguez's waiver of appeal rights would constitute a miscarriage of justice. Refraining Dominguez in prison for a consecutive 10 years, if The District Court did not intend to do so is a costly proposition both financially and socially. Dominguez prays This court Remands and vacates His 924(c) Conviction back to The District Court to exercise its lawful discretion to re-sentence Dominguez would have obvious potential benefits to Dominguez and obviously there would be potential benefits for The public both financially and socially. Just as The

Criminal Justice System must see The Guilty Convicted and Sentenced to a Just punishment, So too it must Ferret out and vacate improper Convictions and illegal Sentences not authorized by Congress. For all The Reasons Stated in This Following brief Dominguez Ask's The Court to please Grant writ of CERTIORARI. The Following Attachments are each argument Dominguez would like The Court to look over. First we Address THE Procedural Default. (CAUSE)

Two Showings excuse a procedural Default: a defendants demonstration of "either cause and actual prejudice or That he is actually innocent" Bousley v. United States, 523 U.S. 614, 622, 118 S.Ct. 1604 140 L.Ed.2d 828 (1998) (cleaned up)

As Directed by The Supreme Court we First address Cause and prejudice For procedural Default. See Dretke V. Haley, 541 U.S. 386, 393-94, 124 S.Ct. 1847, 158 L.Ed.2d 659 (2004) "a Court " must First address all... other grounds For Cause and prejudice. we begin with Cause The existence of Cause For procedural default turns on wheter "some objective Factor external to the Defense" prevented Counsel (11)

From raising the claim on direct appeal. See *Murray v. Carrier*, 477 U.S. 478, 488, 492, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). For example, a claim that "is so novel that its legal basis is not reasonably available to counsel" may constitute cause. *Reed v. Ross*, 468 U.S. 1, 16, 104 S.Ct. 2901, 82 L.Ed.2d (1984) (Emphasis added) "because the state of law at the time of [his] appeal did not offer a reasonable basis upon which to challenge the guilty plea" *Jones v. United States*, 39 F.4th 523, 525 (8th Cir. 2022) AND *Wilson v. United States* NO: 20-CV-165-GKF-JFT, *Wilson*, 2022 U.S. App. Lexis 19960 (N.D. Okla.) Citing *Reed v. Ross*, 468 U.S. 1, 17 (1984) "every court to have considered the issue had concluded attempted Hobbs act robbery is a crime of violence under the elements clause, as a result of *Taylor* 142, S.Ct. 2015, 2021 (2022) (*Dominquez*) has therefore established cause for failing to do so" *Wilson*, 2022 U.S. App. Lexis 19960 (N.D. Okla.). In "Reed" the Supreme Court delineated three situations in which the novelty of a claim could constitute cause. First a decision of (the Supreme) court may explicitly overrule one of (its) precedents. Second a decision may "overturn a longstanding and widespread practice to which (the Supreme) (12)..."

Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved And Finally A Decision may disapprove a practice (The supreme) Court ~~Arguably~~ has sanctioned in prior cases. Id. at 17, 104 S.Ct. 2901 (quoting United States v. Johnson 457 U.S. 537, 551-52, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) The Third "Reed" Category Contemplates precisely the type of novel claim Dominguez advances here. At the time Dominguez pled guilty Dec 18th, 2018 and Sentenced Feb 2019 The supreme Court had affirmatively upheld The constitutionality of residual clauses and elements clauses like the one at issue here. In sum when Dominguez pled guilty in 2018 and Sentenced in 2019 Supreme Court precedent had effectively foreclosed The claim Dominguez now asserts. It was not until 2022 when The supreme Court decided Taylor 142, S.Ct. 2015, 2021 (2022) That it struck down That Attempted Robbery Does not qualify as a Crime of violence Because no element Just as in Attempted Robbery involving Controlled Substances "Can be committed without The use, attempted use or Threatened use of Force" Citing Taylor 142, S.Ct. 2015, 2021 213 L.Ed.2d 349 (2022) prior to "Davis" in 2019 and "Taylor", in 2022 There was almost certainly

(13)

no reasonable basis upon which an attorney previously could have urged a court to adopt the position ultimately endorsed by the Supreme Court by the Supreme Court in "Davis" and "Taylor" See *Reed*, 468 U.S. at 17, 104 S.Ct. 2901 Thus *Dominguez* has established cause. See *Jones v. United States*, 39 F.4th 523, 525 (8th Cir 2022) *McKinney v. United States* 60 F.4th 188, 195 (2023), *Wilson v. United States* 2022 U.S. App. Lexis 19960 (N.D. Okla) AND *Wright*, 2022 WL 3348980 (10th Cir 2022) Also ("Finding Cause For procedural Default under "Reed" where Defendants Conviction for a violation of § 924(c) no longer had a valid predicate"); *United States v. Garcia*, 811 F. Appx 472, 480 (10th Cir 2022) After *Davis* and *Taylor*. Seeking to avoid this conclusion the District Court And tenth circuit ignores "Reed" and instead relies on "Bousley" For the proposition That "Futility Cannot constitute Cause" IF "a claim was unacceptable to that particular Court at that particular time" 523 U.S. at 622-23, 118 S.Ct. 1604 (quoting *Engle v. Issac*, 456 U.S. 107, 130 n.35, 102 S.Ct. 1558, 71 L.Ed.2d 786 (1982) ("Finding no Cause" at the time of petitioners plea, The Federal reporters were replete with Cases" Considering The same argument) But *Bousley* is in apposite. The

(14)

Claim in "Boorsley" did not arise out of The Supreme Court overturning its own precedent. See *Jassend v. United States*, 898 F.3d 115, 123 (1st CIR 2018); *Gatewood v. United States* 979 F.3d 391, 397 (6th CIR 2020) (noting that "Reed" remains The "Controlling decision" decision where Supreme Court precedent Forecloses an argument at The time of procedural Default) That Distinction is critical. At The time of his guilty plea in 2018 and Sentence in 2019 Dominguez's "Claim would have been rejected by our Court and every other Circuit due to Then - Controlling Supreme Court precedent" Citing *United States v McKinney*, 60 F.4th 188, 195 (2023) in sum when Dominguez pled guilty in 2018 and sentenced in 2019 The Supreme Court had implicitly approved § 924(c)'s residual Clause and Then in 2022 "Taylor" Elements Approach to Elements For Attempted Robbery. "It wasn't until 2015 did The Supreme Court in *Johnson* Cause a Sea Change in The disapproving of its prior precedent upholding similar residual Clauses against void For Vagueness Challenges And it wasn't until 2019 that Davis dealt The Final blow to § 924(c)'s

(15)

residual Clause" (United States v. McKinney, 60 F. 4th 188, 195 (2023))

And Furthermore it was not until (2022) when "Taylor" changed the posture of the elements Clause. Dominguez's Case Falls squarely within "Reed's" "novelty" Framework and so he has shown Cause for his procedural Default. Dominguez stands convicted of a crime that no longer exists ordinarily. That alone would entitle him to relief on his § 2255 motion. Dominguez has established Cause and now takes us to the Prejudice prong.

(PREJUDICE)

TO ESTABLISH PREJUDICE a Defendant must show that the error "worked to his actual and substantial Disadvantage" United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584 71 L.Ed. 2d 816 (1982) (Emphasis in original)

The Supreme Court has yet to define exact contours of the prejudice standard in the § 2255 procedural-Default Context See *Id.* at 168 102 S.Ct. 1584 (noting that "Future Cases" would provide "Further elaboration" on prejudice outside the Context of erroneous Jury instructions given at trial)

what is clear is that Dominguez's 924(c) conviction subjects him to imprisonment for conduct that the law does not make criminal.

In finding another § 2255 claim cognizable, the Supreme Court has explained that if the Defendants "conviction and punishment are for an act that the law does not make criminal" then there can be no doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances "that justify collateral relief when Defendants § 2255 *Davis v. United States* 417 U.S. 333, 346-47 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974) Accordingly in analogous cases our sister courts have found prejudice justifying collateral relief when the Defendants conviction or sentence is no longer "authorized by law" See e.g. *Raines v. United States*, 898 F.3d 680, 687 (6th Cir 2018) (ACCA); *United States v. Snyder* 871 F.3d 1122, 1127-28 (10th Cir) (same); *Garcia*, 811 F.App'x at 480 (924)(c) The District Court of Wyoming agreed with the Government that Dominguez had "Two dismissed charges each alleging aggravated

Violations of 924(c) with legally sufficient predicates which involved
cumulatively mandatory minimum penalties that what Dominguez received for
the conviction at issue." *Dominguez v United States* 22-CV-0246-NDF. But
where the record in a case shows that a count of conviction is
now invalid, no precedent authorizes a court to then rely on a
dismissed count to negate that demonstrated prejudice. Rather in
determining prejudice, we ask whether it is likely a defendant, had
he known of the error, would not have pled guilty to the count of conviction.
See, e.g. *United States v Dominguez Benitez*, 542 U.S. 74, 124 S.Ct. 2333,
159 L.Ed.2d 157 (2004); *United States v Heyward*, 42 F.4th 460 (4th Cir. 2023).
"we do not look to whether it is likely a defendant, had he known of the error, would
not have pled guilty to a dismissed count" (*United States v McKinney*, 60, F.4th 182,
196 (2023)) (Of course in this case the record makes abundantly clear that Dominguez
likely would not have pled guilty to the dismissed § 924(c) counts ECF 161 (17-CR-
98) *Dominguez vs United States*, Dominguez sought to withdraw his plea.

(18)

See Heyward, 412 F. 4th at 460 (Explaining That we may look to "Contemporaneous evidence to substantiate a defendant's expressed preferences") (quoting Lee v. United States - U.S. - 137 S.Ct. 1958, 1967, 198 L.Ed.2d 476 (2017))

There are no cases that "require or permit an appellate court to search for an alternative, valid predicate offense that the government did not charge as the predicate for the count of conviction. And none of cases permit an appellate court to find a crime for which permit an appellate court to find a crime for which a defendant was not convicted to uphold an indisputably invalid conviction and justify the sentence for that invalid conviction." See United States v. McKinney, 60, F.4th 188, 196, 197 (2023). The government would instead insist on the district court convict Dominguez in the first instance of a 924(c) count which the government in fact dismissed that you cannot do. Cf. United States v. Hodge, 902 F.3d 420, 430 (4th Cir. 2018) (we will not allow the government to change its position regarding which convictions support [AN] APCA enhancement now that one of its original choices...

Cannot do The Job"). For all The reasons its clear Dominguez has Demonstrated Cause and prejudice and The error worked to Dominguez's "actual and substantial Disadvantage" with no predicate offense to Support a Crime of violence Dominguez has established That he likely would not have entered The guilty plea and it would be a miscarriage of Justice to leave in place his 120 month Sentence on his 924(c) Conviction. "The Court should address Cause and prejudice in turn because ~~he~~ has Demonstrated Cause and prejudice here you do not need to Consider actual innocence excuse For procedural Default." see United States v. Garcia, 811 F. App'x 472, 480 (10th Cir 2020) and United States v. McInaney, 60 F.4th 188, 193 (2023) prejudice exists where The alleged error is one "of Constitutional Dimensions." That worked to [the Defendants] actual and substantial disadvantage" Snyder, 871 F.3d at 1128 (internal Quotation marks omitted) "IF [Dominguez] is Correct That Attempted Robbery involving Controlled Substances was not a Crime of violence within

924(c)(3)'s elements clause at the time of his conviction and given that Davis's holding (that 924(c)(3)'s residual clause is unconstitutional) and is retroactively applicable to cases on collateral review per Bowen, 936 F.3d at 1100. Then [Dominguez's] Count 5 Conviction was "not authorized by law" which is certainly an actual and substantial disadvantage of constitutional dimensions" Snyder, 871 F.3d at 1128 and United States v Garcia, 811 F.3d 472 (10th Cir 2020). Adhering to what simple justice requires in this circumstance, the eight circuit in Jones, 39 F.4th at 526 and Wilson 2022 US App Lexis 19960, Wilson and Jones the courts "rejected both Governments similar attempt to use a dismissed count to negate a finding of prejudice. "There ~~As~~ here, the defendants challenged their 924(c) conviction because it was no longer sustained by a valid predicate offense. The eight circuit rejected that same argument, reasoning that the "Carjacking was not charged as a predicate offense (crime of violence

and so the Government could not rely on it to ~~sub~~STAIN that Count and negate a Finding of prejudice. I.D. (emphasis added)

So as here the Court should "refuse to substitute an alternative predicate, not charged as the basis for the § 924(c) Count of Conviction to negate a Finding of prejudice; "moreover delving into whether a defendant ultimately would have received the same Sentence, based on an uncharged or dismissed charge, improperly equates

the Standards for actual innocence and prejudice for the purpose of excusing procedural Default" *United States v. McKinney* 60 F.4th 188, 197

(2023) See *United States v. Jimenez-Segura*, 476 F.Supp3d 326, 338

(E.D. VA 2020) Actual innocence and prejudice are not one and the same.

The Supreme Court has made clear, stating that actual innocence requires "a stronger showing than that needed to establish prejudice"

See *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d

808 (1995) "in contrast demonstrating prejudice sufficient to
(22)

excuse procedural Default" Does not require consideration of The Charges Foregone by The government in The Course of plea bargaining" Jimenez-Segura, 476 F. Supp 3d at 338 See also Calderon v United States, NO 7:12-CR-37-FA-2, 2022 WL 821152 (E.D.N.C Mar 17 2022) Dominguez has shown prejudice and that it worked to his actual and substantial Disadvantage.

Collateral Attack waiver:

When reviewing a collateral attack waiver, Courts look to "(1) whether The Disputed appeal Falls within The scope of The waiver or appeal rights; (2) whether The Defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing The waiver would result in a miscarriage of Justice." United States v Hahn, 359 F.3d 1315, 1325 (10th Cir 2004)

Dominguez contends that enforcing The waiver would result in a miscarriage of Justice. The tenth Circuit has held that There are only Four instances in which enforcing a collateral attack waiver

would result in a miscarriage of Justice "(1) where The District Court relied on an impermissible Factor Such as race, (2) where ineffective assistance of Counsel in connection with The negotiation of The waiver renders The waiver invalid, (3) where The Sentence exceeds The Statutory maximum or (4) where The waiver would be "otherwise unlawful" Hahn 359 F.3d at 327. Enforcing a waiver would be "otherwise unlawful if doing so "would seriously affect The Fairness, integrity, or public Reputation of Judicial proceedings". Id. Dominguez Doesnt argue That The First, Second or Fourth instances apply. Dominguez "Contends That The Third instance applies because any Sentence he received For [his 924(c)] is "rendered a nullity by Taylor" "^{see} United States v. Wright No. 4:12-CR-197 (N.D. Okla), United States v Wright, 2022 WL 3348980 (10th Cir Aug 15 2022) And it would be a "Fundamental/miscarriage of Justice if The erroneous [120] month Sentence is left in place" The Government argued That Dominguez Failed to raise This Claim on (29)

Direct appeal but as stated in The procedural Default
Claim, Taylor 142 S.Ct. 2015, 2021 (2022) and wright, 2022
WL 3348980 (10th cir (2022)) were not yet Decided as a result
The State of Law at The time did not offer a reasonable
basis For Challenging His illegal Conviction And Sentence. The
government also contends That Dominguez admitted Facts That would
have Supported a Conviction on A Different predicate offense
to support a 924(c) The Government in The 8th circuit Jones vs
United states, 39 F.4th 523 (2022) Attempted This Same argument
As well in The 10th circuit in wright vs United states 2022 WL
3348980 (10th cir 2022) And The Courts said "Any number of
Circumstances could have and likely would have, changed Had
The law with respect to Attempted Hobbs act robbery and § 924(c)
been Different at The time These Crimes were originally Charged
it is not possible, however to reconstruct what might have
(25)

happened. Then had the law been different" The Fact remains
That the only predicate offense for Dominguez's 924(c)
Conviction was attempted robbery involving controlled substances
which cannot be qualified as a crime of violence because
no element requires the Defendant to use, attempt to use,
or threaten to use force. Just like in "Taylor" As a result any
Sentence imposed for [his] Convictions for that crime exceeds
that which is authorized by law because, per "Taylor" Congress
has not authorized any sentence" Wright v. United States
2022 WL 3348980 (10th Cir 2022) it would therefore
be a complete miscarriage of justice to enforce the
collateral attack waiver to prevent Dominguez from
challenging his 924(c) Conviction. Dominguez has
overcome the miscarriage of justice prong in
accordance with the precedent set forth in Hahn.
(26)

And Thus bringing us to The Circuit split claim.

Circuit split.

The decisions of The tenth Circuits and Fourth Circuits have conflicted with each other and fall squarely

within Supreme Courts Rule 10 (a) In united states

✓ mckinney, 60 F 4th 138 (2023) NO: 20-6396 (4th cir)

The District Court Denied mckinney's § 2255 motion to vacate his 924(c) Conviction asserting that The appeal waiver in his plea agreement and procedural Default Forclosed

his claim But on review The court of appeals For The Fourth

Circuit reversed and remanded The case to The District

Court with instructions to vacate mckinney's § 924(c) Conviction

because mckinney has demonstrated Both cause and prejudice

because his Hobbs act Conspiracy did not qualify as a

predicate Crime of violence and his Failure in Failing to raise

Claim on Direct appeal and That the enforcement of his appeal waiver would result in a miscarriage of Justice. In The tenth

Circuit united states v Dominguez. NO. 22-CV-0246-NDF

The tenth circuit only reviewed The collateral attack waiver stating because its validity precludes relief for Dominguez. Dominguez

Claims That The Third Factor For enforcing appeal waivers

applies to him (3) whether enforcing The waiver would result in

a miscarriage of Justice stating The (3) instance where The

Sentence exceeds The Statutory maximum But The tenth Circuit

erroneously Held That Dominguez's Argument was made For The

First time in court and rejected his argument As stated in The

procedural Default Claim Dominguez Shows why That argument

was made For The First time. Dominguez and McKinney's

Cases are Identical when considering Cause and prejudice

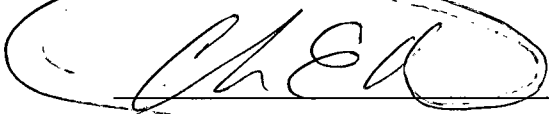
and appeal waivers Thus causing The tenth Circuit and

Fourth Circuit to apply Different rules to what
should be The Same law. Causing a Circuit split
That severely undermines The Fairness and integrity
OF our Justice System As it Stands A Defendant
IN The Fourth Circuit has more Judicial benefits That
those IN The tenth Circuit Thus granting Them more
Constitutional right Than Those IN The tenth Circuit
That we Cannot have and need The Supreme
Court review it. To not be repetitive Dominguez would
Remind The Court That he stands The Same on The grounds
For his claims OF The tenth Circuit ABusing its discretion
IN not granting COA As he Demonstrated why IN his
Collateral Attack Argument and The Same For why his
Attempted Robbery involving Controlled Substances Does not
Qualify as a Crime OF violence IN light OF "Taylor".
(29)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



A handwritten signature, possibly "C. H. E. A.", is written over a horizontal line. The signature is enclosed in a hand-drawn oval.

Date: July 15TH 2024