

No. _____

IN THE
Supreme Court of the United States

ZENON GRZEGORCZYK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THOMAS W. PATTON
Federal Public Defender

COLLEEN MCNICHOLS RAMAIS
Assistant Federal Public Defender
Counsel of Record
OFFICE OF THE FEDERAL PUBLIC DEFENDER
300 W. Main Street
Urbana, Illinois 61801
Phone: (217) 373-0666
Email: colleen_ramais@fd.org
Counsel for Petitioner

QUESTION PRESENTED

In 2018, this Court held that an unconditional guilty plea does not prevent a criminal defendant from challenging the constitutionality of their conviction. *Class v. United States*, 138 S. Ct. 798 (2018). In 2019, it held that part of the definition of “crime of violence” was unconstitutionally vague and, therefore, void. *United States v. Davis*, 139 S. Ct. 2319 (2019). *Davis* narrowed the scope of predicate offenses upon that can support a conviction under 18 U.S.C. § 924(c). As a new constitutional rule that changes the substantive reach of law, *Davis* applies retroactively to cases on collateral review. *See, e.g., Welch v. United States*, 136 S. Ct. 1257 (2016).

Zenon Grzegorzczuk pleaded guilty to violating § 924(c) in 2014, well before *Davis* was decided. Nevertheless, the Seventh Circuit held that he could not challenge the constitutionality of his conviction on collateral attack because he had waived any such challenge through his unconditional guilty plea.

The question presented is:

Pursuant to this Court’s holding in *Class*, does an unconditional guilty plea, by itself, waive a defendant’s right to challenge his conviction under § 924(c) on the grounds that *Davis* rendered it unconstitutional?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

DIRECTLY RELATED CASES

Grzegorzcyk v. United States

(Habeas case on review)

No. 18-3340, U.S. Court of Appeals for the Seventh Circuit. Judgment entered May 13, 2021. Opinion published at 997 F.3d 743.

No. 16-cv-8146, U.S. District Court for the Northern District of Illinois. Denial of habeas relief filed on October 7, 2018.

United States v. Grzegorzcyk

(Underlying criminal case)

No. 14-3460, U.S. Court of Appeals for the Seventh Circuit. Judgment entered September 1, 2015. Opinion published at 800 F.3d 402.

No. 12-cr-320, U.S. District Court for the Northern District of Illinois. Final Judgment in a Criminal Case entered on October 31, 2014.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Zenon Grzegorzczuk respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

DECISIONS BELOW

The Seventh Circuit's decision is published at 997 F.3d 743 and is included as Appendix A. The October 17, 2018, Memorandum of Opinion and Order of the United States District Court for the Northern District of Illinois denying Petitioner's habeas petition is unpublished, though available on Westlaw at 2018 WL 10126077, and is included as Appendix B. The Seventh Circuit's decision in the underlying criminal case is published at 800 F.3d 402 and is included as Appendix C.

JURISDICTION

The Seventh Circuit entered judgment on May 13, 2021. Pet. App. 1a. No petition for rehearing was filed. On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari to 150 days. This petition is filed within 150 days of the May 13, 2021 judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Mr. Grzegorzczuk pleaded guilty to one count of using a facility of interstate commerce with intent that a murder be committed in violation of 18 U.S.C. § 1958(a),

and one count of possessing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A).

Title 18 U.S.C. § 1958(a) provides in relevant part:

Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than \$250,000, or both.

Title 18 U.S.C. § 924(c)(1)(A) provides in relevant part:

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.

Title 18 U.S.C. § 924(c)(3) provides:

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.

INTRODUCTION

A guilty plea, by itself, does not bar criminal defendants from challenging the constitutionality of their statute of conviction on direct appeal. *Class v. United States*, 138 S. Ct. 798, 803 (2018). In this case, we ask the Court to clarify that this rule applies to a defendant’s challenge to his conviction that relies on a partial challenge to the constitutionality of the statute of conviction and statutory interpretation of the remaining portion thereof.

A marked division has arisen between the Circuits on this issue in the context of unpreserved challenges to convictions pursuant to 18 U.S.C. § 924(c). As it stands today, a defendant’s ability to avail himself of the new substantive rule announced in *United States v. Davis*, 139 S. Ct. 2319 (2019), hinges on his circuit of conviction. Two opinions highlight this stark contrast, with the Seventh and Eleventh Circuits drawing opposite conclusions from this Court’s decision in *Class*.

Compare *Grzegorzcyk v. United States*, 997 F.3d 743 (7th Cir. 2021), with *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018) (overruled on other grounds).

Because a conviction under 18 U.S.C. § 924(c)(1)(A) does not distinguish between the different clauses of the definition of “crime of violence” in § 924(c)(3), a claim that such a conviction is invalid necessarily implicates a two-pronged argument. A defendant must first establish that the residual clause is unconstitutional. *See* 18 U.S.C. § 924(c)(3)(B). Second, he must show that he could have only been convicted through the use of the unconstitutional clause because the identified predicate does not have “as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A). Establishing this second proposition invariably requires an assessment of the statutory language of the predicate offense.

The Seventh Circuit has held that this statutory interpretation component dooms a claim that follows an unconditional guilty plea. The court has reasoned that, because the ultimate resolution of the merits of such a claim implicates statutory interpretation, it is the proper subject of a motion to dismiss the indictment, pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v). *See Grzegorzcyk*, 997 F.3d at 748 (citing *United States v. Wheeler*, 857 F.3d 742, 745 (7th Cir. 2017)). By pleading guilty without conditions, a defendant waives any such argument. *Id.*

The Eleventh Circuit, by contrast, has come to precisely the opposite conclusion, finding that a guilty plea does not preclude a later challenge to a

§ 924(c) conviction predicated on *Davis. St. Hubert*, 909 F.3d at 344. The court reasoned that the crux of a *Davis*-based argument is fundamentally an argument that the defendant pleaded guilty to a non-offense that the government could not constitutionally prosecute. *Id.* In the Seventh Circuit, these defendants are categorically denied relief even when their underlying conviction may fail to qualify as a crime of violence under § 924(c)'s elements clause. This conflict arises from two competing interpretations of this Court's opinion in *Class*.

The Seventh Circuit has narrowly interpreted *Class* to stand only for the proposition that “a guilty plea, by itself, does not implicitly waive a defendant's right to challenge the constitutionality of his statute of conviction.” *Grzegorzcyk*, 997 F.3d at 748. However, it maintains that, as long as any portion of a defendant's argument turns on statutory interpretation, the claim *is* waived because *Class* only authorizes a challenge to the constitutionality of the *entire* statute in order to seek post-conviction relief after entering into an unconditional guilty plea. *Id.* Additionally, the Seventh Circuit believes that a defendant who argues that his conduct does not legally constitute a crime of violence after *Davis* is necessarily “contradicting the terms of his guilty plea.” *Id.* at 747.

The Eleventh Circuit, however, reads *Class* to support its conclusion that an unconditional guilty plea does not waive a defendant's right to assert that the facts alleged in the indictment and admitted by the defendant do not constitute a crime at all because “that kind of claim challenges the district court's power to act.” *St. Hubert*, 909 F.3d at 343-44. According to the Eleventh Circuit, *Class* permits this

type of claim because the defendant is admitting his conduct, but asserting that the admitted conduct is not a crime and thus not susceptible to constitutional prosecution.

Clarification of the scope and proper interpretation of *Class* is required to resolve the circuit split over whether a defendant who has entered into an unconditional guilty plea will be able to avail himself of the constitutional rule newly announced in *Davis*. If, as the Seventh Circuit suggests, *Class* holds that a defendant must challenge the constitutionality of an *entire* statute in order to seek post-conviction relief under after an unconditional guilty plea, then any retroactive effect *Davis* would have would be gutted, given that the vast majority of defendants are convicted pursuant to a guilty plea. If, however, *Class* permits a claim that the charging document did not allege conduct that constituted a crime as the Eleventh Circuit has held despite an unconditional guilty plea, then defendants will be able to avail themselves of *Davis*'s newly announced rule of law on appeal and collateral review.

This case presents an excellent opportunity to resolve the split. The issue was fully litigated before the Seventh Circuit. There are no peripheral issues preventing the Court from squarely addressing, and deciding, this purely legal question: Does an unconditional guilty plea waive a defendant's right to assert that his conviction under § 924(c) is no longer constitutional after *Davis*?

For these reasons, and as explained more fully below, this Court should grant *certiorari* and resolve the circuit split. It should then conclude that an unconditional

guilty plea does not waive a claim that the defendant's conduct did not constitute a crime.

STATEMENT OF THE CASE

I. Proceedings in the District Court

In July 2014, pursuant to a plea agreement, Mr. Grzegorzcyk pleaded guilty to one count of murder-for-hire (in violation of 18 U.S.C. § 1958(a)) and one count of possession of a firearm in furtherance of a crime of violence (in violation of 18 U.S.C. § 924(c)(1)(A)). *United States v. Grzegorzcyk*, 800 F.3d 402, 405 (7th Cir. 2015). He was sentenced to 151 months' imprisonment on the murder-for-hire count, followed by 60 months' imprisonment on the firearm charge. *Id.* Mr. Grzegorzcyk appealed his sentence, and the Seventh Circuit Court of Appeals affirmed on September 1, 2015. *Id.* at 407.

In pleading guilty, Mr. Grzegorzcyk admitted that he

knowingly possessed a firearm, namely, a Taurus PT9 9mm semi-automatic pistol, in furtherance of a crime of violence for which defendant may be prosecuted in a court of the United States, namely, use of interstate commerce facilities in the commission of murder-for-hire, in violation of Title 18 United States Code, Section 1958(a), as charged in Count Three of the indictment, in violation of Title 18, United States Code, Section 924(c)(1)(A).

United States v. Grzegorzcyk, No. 1:12-cr-320 (N.D. Ill.), R.66 at 4. The plea agreement also detailed the specific rights Mr. Grzegorzcyk surrendered in pleading guilty. *Id.*, R.66 at 11-14. In addition to waiving his trial rights, Mr. Grzegorzcyk explicitly waived "all appellate issues that might have been available if he had exercised his right to trial," and agreed he was only permitted to "appeal the validity of this plea of guilty and the sentence imposed." *Id.*, R.66 at 13. The plea

agreement was silent as to Mr. Grzegorzcyk's rights under 28 U.S.C. § 2255 to collaterally attack his conviction or sentence.

On June 26, 2015, a month after Mr. Grzegorzcyk's direct appeal was argued and taken under advisement by the Seventh Circuit, this Court held the residual clause of the Armed Career Criminal Act unconstitutional. 18 U.S.C. § 924(e); *Johnson v. United States*, 576 U.S. 591 (2015); see also *Grzegorzcyk*, 800 F.3d 402 (argued May 26, 2015). Mr. Grzegorzcyk filed a *pro se* § 2255 petition in August 2016. *Grzegorzcyk v. United States*, No. 1:16-cv-8143 (N.D. Ill.), R.1. Relying on *Johnson*, he argued that the similarly-worded residual clause in § 924(c) was also invalid, and, therefore, his conviction under § 924(c) should be vacated and he should be resentenced. *Id.* While it was pending, this Court decided *Davis*, which bolstered Mr. Grzegorzcyk's claim. The district court denied his motion, concluding that he had waived any challenge under *Johnson* or *Davis* when he entered into an unconditional guilty plea to the indictment (despite the fact that *Johnson* was decided over a year after Mr. Grzegorzcyk pleaded guilty and *Davis* was decided almost five years after his guilty plea). App. at 11a-14a. It entered a Judgment in a Civil Case reflecting that decision, and Mr. Grzegorzcyk appealed.

II. The Seventh Circuit's Decision Below

The Seventh Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. §§ 1291 and 2253. On appeal, Mr. Grzegorzcyk argued that his *Davis*-based claim was cognizable under 18 U.S.C. § 2255 because *Class* established that the simple fact of pleading guilty does not extinguish a defendant's right to challenge the constitutionality of his conviction. Mr. Grzegorzcyk noted that, although the

Seventh Circuit had previously held that a guilty plea operated to waive a *Johnson*-based claim, its rationale was seriously undermined by this Court's decision in *Class*. He argued that *Class* applied to his particular situation: his unconditional guilty plea did not waive his right to assert that he was convicted under 924(c)'s residual clause because his predicate offense did not qualify as a crime of violence under the surviving elements clause.

The Seventh Circuit disagreed. It held that it need not address whether murder-for-hire is a crime of violence under § 924(c)'s elements clause because Mr. Grzegorzcyk waived this challenge through his pre-*Johnson* unconditional guilty plea. *Grzegorzcyk*, 997 F.3d at 746. According to the Seventh Circuit, the guilty plea admitted that he committed a "crime of violence" and any assertion that murder-for-hire is not a crime of violence as defined by § 924(c) had to be raised prior to trial pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v). *Id.*

Although the Seventh Circuit recognized this Court's recent decision in *Class*, the court found *Class* distinguishable because Mr. Grzegorzcyk's claim contradicted the terms of his plea agreement. *Id.* This was so, according to the court, because Mr. Grzegorzcyk had already admitted that his conviction was a "crime of violence" for the purposes of § 924(c).

Recognizing that Mr. Grzegorzcyk's murder-for-hire conviction is only a crime of violence after *Davis* if it qualifies under § 924(c)'s elements clause, the Seventh Circuit nonetheless found that Mr. Grzegorzcyk's reading of *Class* was "too broad." *Id.* The Seventh Circuit believed that the "only" thing this Court held in *Class* was

that a guilty plea, by itself, does not implicitly waive the right to challenge the constitutionality of a statute of conviction. *Id.* at 748. The court found that Mr. Grzegorzcyk's claim was not one of constitutionality, but rather a claim of statutory interpretation that did not challenge the government's power to criminalize his admitted conduct. *Id.* As such, it appears that the Seventh Circuit held that *Class* only controls when a defendant is attacking the constitutionality of the entire statute of conviction, rather than asserting that he was convicted under an admittedly unconstitutional subsection of a statute, a portion of which remains constitutionally valid.

The Seventh Circuit's interpretation of *Class* thus resulted in Mr. Grzegorzcyk being denied the retroactive effect of *Davis* in a case where he had a valid and meritorious argument that his statute of conviction was not a crime of violence under § 924(c)'s elements clause.

REASONS FOR GRANTING THE PETITION

There is an open split between the Seventh and Eleventh Circuits that warrants resolution by this Court. The two Circuits have cited to the same portion of *Class* to reach opposite results. Though these are the only two circuits to have directly addressed this issue, the split is likely to deepen; the issue is now pending before the Ninth Circuit and is likely to be raised in other circuits. The instant case is an excellent vehicle to resolve this split as the issue was fully addressed below. Finally, Mr. Grzegorzcyk's fundamental rights are at stake, as his admitted conduct does not actually constitute a crime against the laws of the United States.

I. A clear split exists between the Seventh and Eleventh Circuits that affects criminal defendants’ fundamental right to be constitutionally prosecuted.

In *Class v. United States*, this Court held that the defendant had not waived a claim that the statute of his conviction was unconstitutional when he entered into an unconditional guilty plea admitting to violating the statute. 138 S. Ct. 798, 805 (2018). After a thorough discussion of precedent, the Court summarized its holding as follows:

In sum, the claims at issue here do not fall within any of the categories of claims that Class’ plea agreement forbids him to raise on direct appeal. They challenge the Government’s power to criminalize Class’ (admitted) conduct. They thereby call into question the Government’s power to “‘constitutionally prosecute’” him. A guilty plea does not bar a direct appeal in these circumstances.

Id. (internal citations omitted). The clear split between the Seventh and Eleventh Circuits is primarily based on each court reaching a different conclusion as to the scope of this Court’s holding. Each court cites this section of the decision as the basis for their opposing conclusions. The Seventh Circuit focuses on “the Government’s power to criminalize” a defendant’s admitted conduct, only permitting claims arguing that the entire statute of conviction is invalid. *See Grzegorzcyk*, 997 F.3d at 748. By contrast, the Eleventh Circuit zeros in on the next sentence, holding that because a *Davis* claim amounts to a claim that the plea was to a “non-offense that the government did not have the power to prosecute,” *Class* supports a finding that the claim was *not* waived. *St. Hubert*, 909 F.3d at 341, 343-44 (11th Cir. 2018). This matters: the divide has resulted in *Davis*’s functional retroactivity becoming a matter of circuit of conviction. This Court’s intervention is

necessary to clarify the scope of *Class* and to ensure equal treatment for similarly situated defendants.

A. The circuit split is the result of differing interpretations of this Court’s opinion in *Class*.

The Seventh and Eleventh Circuits do appear to agree on some aspects of *Class*. For example, both courts recognize that a guilty plea, by itself, does not waive a defendant’s right to challenge the constitutionality of a statute. *Grzegorzcyk*, 997 F.3d at 748; *St. Hubert*, 909 F.3d at 344. Moreover, both the Seventh and Eleventh Circuits recognize that a defendant cannot contradict the facts of his guilty plea in arguing that his admitted conduct does not constitute a crime. *Grzegorzcyk*, 997 at 747; *St. Hubert*, 909 F.3d at 343. However, the split appears to stem from a fundamental disagreement as to how broadly to read *Class*, as well as which claims “contradict the terms of a plea agreement.”

The Eleventh Circuit’s reads *Class* to support its conclusion that an unconditional guilty plea does not waive a claim that the defendant’s conviction is not a crime of violence under § 924(c)’s elements clause after *Davis*. *St. Hubert*, 909 F.3d at 343-44. Finding support in *Class*’s discussion of the principles of waiver, the court found that this claim cannot be waived because it is jurisdictional in nature—the challenge ultimately goes to the district court’s power to act. *Id.* (citing *Class*, 138 S. Ct. at 805). Specifically, the *St. Hubert* court noted that *Class*’ discussion of examples of claims not waived by a guilty plea “included cases in which the defendant argued that the charging document did not allege conduct that constituted a crime.” *Id.* at 344. Thus, because *St. Hubert* was alleging that his

indictment failed to charge an offense against the laws of the United States after *Davis*, his challenge was jurisdictional and therefore not waived through his unconditional guilty plea, despite the fact that resolution of his claim required the court to engage in statutory interpretation. *Id.*

The Seventh Circuit's far more narrow reading of *Class* only allows a defendant who entered into an unconditional guilty plea to challenge the legality of his conviction on the basis that his statute of conviction is invalid *as a whole*. *Grzegorzcyk*, 997 F.3d at 748. Focusing on the "Government's power to criminalize" the admitted conduct, the Seventh Circuit reasoned that an argument that the indictment failed to state an offense because murder-for-hire cannot be deemed a crime of violence must be raised via pretrial motion. *Id.* at 747. Essentially, the court holds that because the legislature *could* criminalize possession of a firearm in connection with murder-for-hire, the argument that it *did not* do so in § 924(c) should have been raised in a motion to dismiss the indictment (despite the fact that the residual clause was still in effect at the time). According to the Seventh Circuit, the holding in *Class* is limited only to situations where the defendant's claim is one of pure "constitutional immunity from prosecution." *Id.* Because Mr. Grzegorzcyk only claimed that his conduct did not constitute a crime of violence after *Davis*, and not that the entirety of § 924(c) was invalid, the Seventh Circuit determined that he was raising "an issue of statutory construction, not a claim of constitutional immunity from prosecution." *Id.* The effect of this holding abrogates any retroactive application of *Davis*, because it requires a criminal defendant to have foreseen the

holding in *Davis* and raised (and properly preserved) the argument that the residual clause was unconstitutional in order to make a challenge to the indictment not frivolous.

It is also worth noting that there appears to be a second disagreement between the Seventh and Eleventh Circuits regarding when a claim contradicts the “admissions necessarily made upon entry of a voluntary guilty plea.” *Class*, 138 S. Ct. at 805 (quoting *United States v. Broce*, 488 U.S. 563, 573-74 (1989)). The Eleventh Circuit viewed the question through a “conduct-based” approach, holding that a defendant who admits the facts of his plea agreement but argues that those facts, as admitted, do not constitute a crime is not contradicting the terms of his plea agreement. *St. Hubert*, 909 F.3d at 343. The Seventh Circuit, however, held that Mr. Grzegorzczuk “contradicted the terms of his guilty plea” not because he denied that he possessed a firearm during commission of murder-for-hire, but by simply claiming that his admitted conduct did not legally constitute a crime of violence. *Grzegorzczuk*, 997 F.3d at 747.

The circuit split over how to read *Class* is creating confusion and unfair results. This Court’s intervention is necessary. Does *Class* hold, as the Eleventh Circuit suggests, that a claim that a defendant’s admitted conduct is not a crime at all cannot be waived because it challenges the district court’s power to act? Or, does *Class* hold that a defendant must challenge his entire statute of conviction to avoid waiver by unconditional guilty plea as the Seventh Circuit believes? Additionally, does *Class* stand for the proposition that a challenge to the statutory reach of a

statute that has been only partially invalidated necessarily contradicts the terms of an unconditional plea agreement?

The answer to these questions is critical in determining who may seek relief after the newly announced constitutional rule of *United States v. Davis*. Without an answer from this Court, defendants who have the identical *Johnson-* and *Davis-* based claims will continue to be treated differently based on where they were convicted. There will remain an open dispute about the scope of this Court's opinion in *Class* and scores of defendants who admit their conduct but argue that the conduct does not constitute a crime will be denied any avenue for retroactive relief.

B. The Eleventh Circuit's reading of *Class* is the correct interpretation.

The Eleventh Circuit's holding in *St. Hubert* is more consistent with *Class*. In *Class*, the defendant pleaded guilty to possession of a firearm on U.S. Capitol grounds in violation of 40 U.S.C. § 5104(e) after he left a firearm locked in his car parked in a lot on the grounds of the Capitol. He expressly waived several rights by the terms of the plea agreement, but nonetheless appealed his conviction on the grounds that the statute violated the Second Amendment and the Due Process Clause.

In finding that *Class* did not waive his right to challenge the constitutionality of his conviction, this Court held that his constitutional claims “do not contradict the terms of the indictment or the written plea agreement.” 138 S. Ct. at 804. Rather, “[t]hey are consistent with *Class*' knowing, voluntary, and intelligent admission that he did what the indictment alleged.” *Id.*

Moreover, this Court held that Class' claims do not focus on "case-related constitutional defects that 'occurred prior to the entry of the guilty plea.'" *Id.* at 804-05 (*citing Blackledge v. Perry*, 94 S. Ct. 2098 (1974)). The alleged unconstitutionality of the statute could not "have been 'cured' through a new indictment by a properly selected grand jury." *Id.* at 805 (*quoting Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). Where a constitutional claim could have been so cured, a guilty plea renders it "irrelevant to the constitutional validity of the conviction." *Id.* (*quoting Haring v. Prosise*, 462 U.S. 306, 321 (1983)). The Court found, instead, that prior precedent made it clear that a guilty plea "does not affect the does not make irrelevant the kind of constitutional claim Class seeks to make" because his claims "call into question the Government's power to 'constitutionally prosecute' him." *Id.* (*quoting Broce*, 488 U.S. at 575).

In *St. Hubert*, the Eleventh Circuit correctly noted that the defendant's claim that Hobbs Act robbery is not a crime of violence under § 924(c)'s elements clause does not contradict the terms or his indictment or his written plea agreement. 909 F.3d at 343. Critically, the court reached this conclusion by focusing on St. Hubert's admitted *conduct* rather than any alleged admission in his plea agreement that his conduct *legally* fit the definition of "crime of violence" under § 924(c). *Id.* Again, this is consistent with *Class* where the defendant admitted that he carried a gun on the grounds of the United States Capital, but denied that this *conduct* constituted a crime. *St. Hubert*, 909 F.3d at 344; *Class*, 138 S. Ct. at 804.

Moreover, St. Hubert correctly determined that the defendant was focusing on non-case related claims that could not have been cured through a new indictment. *Class*, 138 S. Ct. at 804. Rather, St. Hubert was asserting that his conduct did not fall within the scope of § 924(c), and therefore was *not* actually a crime. 909 F.3d at 344. This is consistent with the holding of *Class*. The government could not have cured the constitutional defect through a new indictment (or so St. Hubert claimed). If, as St. Hubert claimed, Hobbs Act robbery was not a crime of violence under the elements clause, the government could not have re-formulated the indictment to properly state a violation of § 924(c). Thus, the Eleventh Circuit correctly found that a guilty plea does not make this type of claim irrelevant to the constitutionality of St. Hubert's conviction. *See Class*, 138 S. Ct. at 805. In sum, *St. Hubert* is a natural extension of the rationale behind *Class*.

C. The Seventh Circuit's position expands waiver principles to apply to unknown rights.

By contrast, the Seventh Circuit, in focusing on whether the government (read: the legislature) *could* criminalize Mr. Grzegorzcyk's conduct, rather than whether it *did* (thereby permitting the executive to constitutionally prosecute him), reaches a conclusion that contradicts the spirit, if not the precise holding, of *Class*. Because § 924(c) remains largely intact, the Seventh Circuit noted that Mr. Grzegorzcyk's conviction remains "constitutionally permissible" after *Davis* as long as it relies on the elements clause rather than the residual clause. *Grzegorzcyk*, 997 F.3d at 747. The court refused to actually address whether his conviction relied on the elements clause, finding that he waived any argument that murder-for-hire does

not qualify as a crime of violence under § 924(c)'s elements clause solely on the basis of his guilty plea. *Id.* (holding his argument contradicted the admission that he “knowingly possessed a firearm, namely, a Taurus PT99 9mm semi-automatic pistol, in furtherance of a crime of violence’—murder-for-hire—in violation of § 924(c)(1)(A)”).

This raises the question of whether the rule announced in *Broce* and reaffirmed in *Class*, that a guilty plea waives even constitutional claims that contradict the terms of the indictment or written plea agreement, extends not only to factual admissions made, but to legal conclusions as well. Like the defendants in *Class* and *St. Hubert*, Mr. Grzegorzcyk is not denying his actual conduct. Mr. Grzegorzcyk admits that he knowingly possessed a firearm in furtherance of murder-for-hire. He only challenges whether murder-for-hire is a crime of violence under the elements clause of § 924(c) – a purely legal determination. This Court should grant *certiorari* and hold that a claim that contradicts a purely legal determination admitted by a plea agreement based on intervening legal developments is not waived by the mere act of pleading guilty.

Such a holding would be consistent with this Court's prior precedent. This Court has held that a defendant can only abandon *known* rights, even through a plea agreement. *United States v. Olano*, 507 U.S. 725, 733 (1993) (emphasis added). Because neither *Johnson* nor *Davis* had been decided when Mr. Grzegorzcyk pleaded guilty, he could not have abandoned a known right to contest the propriety of his charge: it would have been futile to argue that murder-for-hire did not qualify

as a crime of violence under the elements clause where it clearly satisfied the requirements of the residual clause.

The Sixth Circuit has addressed a closely related issue after *Johnson*. In *United States v. McBride*, the defendant agreed, as part of his plea agreement, that he was a career offender under the Sentencing Guidelines. 826 F.3d 293 (6th Cir. 2016). After he was sentenced as a career offender, the defendant appealed and argued to the Sixth Circuit that after *Johnson*, one of his predicate offenses was no longer a career offender predicate. *Id.* at 294. The *McBride* court held that the defendant had waived this argument by agreeing that he was a career offender, “except insofar as it could not have been made before *Johnson*.” *Id.* Though the plea agreement expressly acknowledged that the defendant agreed he was a career offender, the court held that the plea agreement could not have abandoned any rights the defendant had under *Johnson*, because *Johnson* was not decided until after sentencing. *Id.* at 295. Thus, “[t]he only claim that McBride could not have waived is that his prior convictions for bank robbery *were* crimes of violence before *Johnson*, but through the residual clause alone.” *Id.* (emphasis in original). It therefore addressed his *Johnson*-based claim on the merits. This approach is consistent with *Olano* and *Class*.

The Seventh Circuit, however, has come out the other way. Just as McBride agreed at the time that the definition of “crime of violence,” as it was understood at the time, encompassed his predicate offenses, so did Mr. Grzegorzczuk. But the Seventh Circuit seems to conclude that a subsequent change in the law does not

justify the withdrawal of a plea agreement despite the fact that the defendant was not on notice as to the actual scope of the charged offense. *See Grzegorzcyk*, 997 F.3d at 748-49. This Court should confirm that a defendant who has admitted that his conduct constituted a crime of violence before *Johnson* and *Davis* could not have waived a claim that his conduct was a crime of violence through the residual clause alone prior to *Johnson* or *Davis* because that right was unknown to him at the time.

D. The Seventh Circuit’s interpretation of *Class* effectively negates any retroactive effect of new substantive rules such as *Davis* and *Johnson* that invalidate only part of a statute as unconstitutional.

As discussed *supra*, the conflict between the Seventh and Eleventh Circuits appears to arise from a disagreement about the scope of waiver generated from a guilty plea. On the one hand, the Seventh Circuit holds that a guilty plea waives all challenges to the indictment other than those that claim that the government (the legislature) cannot constitutionally *criminalize* a defendant’s conduct, resulting in a rule that only a challenge to the entire statute survives a plea of guilty.

Grzegorzcyk, 997 F.3d at 747-48; *see also United States v. Wheeler*, 857 F.3d 742, 745 (7th Cir. 2017). The Eleventh Circuit holds instead that a claim that the government (the executive, in this case the Department of Justice) cannot constitutionally *prosecute* a defendant’s conduct under valid existing law survives the broad waiver implicit in a guilty plea. *St. Hubert*, 909 F.3d at 343-44. This distinction carries significant consequences for criminal defendants, and should be addressed to create uniformity throughout the country.

Significantly, the practical effect of the Seventh Circuit’s holding requires that, in order for a criminal defendant to receive any retroactive relief from the holding in *Davis*, they must have effectively been “Davis before *Davis*”— they must have anticipated a constitutional claim to part of the statute and argued that their predicate offense did not fall within the remaining portion of the statute. This places an insurmountable burden on litigants (and defense counsel) who are charged with anticipating the future and highlights the incongruity with traditional principles of waiver.

II. The circuit split will only continue to grow.

As established, the Seventh and Eleventh Circuits are directly at odds over whether an unconditional guilty plea waives a defendant’s right to assert that his underlying conviction was not a crime of violence after *Johnson* and *Davis*. As of this filing, these were the only Circuits to have addressed this issue squarely. *Class* has not settled the division. This split will soon deepen, as the issue is currently pending in the Ninth Circuit, and is set to be argued on December 8, 2021. *United States v. Hernandez*, 9th Cir. Case No. 20-17328, R.36.

As it currently stands, habeas petitions based on *Davis* or *Johnson* are treated differently depending on the circuit a defendant finds himself in. In the Fourth, Eighth, and Tenth Circuits, the government appears to have declined to raise the issue of waiver in the face of these petitions. However, the cases that have been addressed in these circuits overwhelmingly deal with claims that Hobbs Act robbery is not a crime of violence. *See, e.g., United States v. Taylor*, 979 F.3d 203, 205 (4th Cir. 2020) (addressing a second § 2255 petition on the merits on the basis

of *Johnson*); *Golinveaux v. United States*, 915 F.3d 564 (8th Cir. 2019) (no discussion of waiver for *Johnson*-based § 2255 after defendant pleaded guilty and stipulated that she was an Armed Career Criminal); *United States v. Washington*, 890 F.3d 891 (10th Cir. 2018) (addressing second § 2255 on the merits after *Johnson* for defendant who pleaded guilty and was sentenced as an Armed Career Criminal without mentioning whether the claim was waived by pleading guilty). The Circuit courts have agreed that Hobbs Act robbery qualifies as a crime of violence under § 924(c)'s elements clause. *See United States v. Dominguez*, 954 F.3d 1251, 1260 (9th Cir. 2020) (collecting cases). It is highly likely that the split will continue to grow as other, less obvious underlying criminal offenses (such as murder-for-hire) are brought before the circuits and the government has a higher incentive to assert a claim of waiver to avoid an unfavorable ruling on the substantive issue.

Courts in the Second, Fifth, and Sixth Circuits have grappled with the effect of a collateral attack waiver in a plea agreement on *Johnson*- and *Davis*-based claims. *See, e.g., Sanford v. United States*, 841 F.3d 578, 580 (2d Cir. 2016); *United States v. Morrison*, 852 F.3d 488, 491 (6th Cir. 2017); *Thompson v. United States*, No. 3:14-cr-0340-K, 2020 WL 1905817, at *2 (N.D. Tex. Apr. 17, 2020). However, none of these circuits have directly addressed the issue in regards to unconditional guilty pleas. The potential for split to continue to grow without proper guidance from this Court is immense.

The resolution of this question in this case is vitally important to Mr. Grzegorzcyk, and illustrates exactly why it is so important to many others. As noted

above, the split directly impacts the functional retroactivity of decisions like *Johnson* and *Davis*. Without proper resolution of this split and clarification of this Court's opinion in *Class*, scores of defendants will continue to file for post-conviction relief based on *Davis*. Depending on what circuit they were convicted in, some will have their cases heard on the merits, while others will see their petitions for post-conviction relief denied out of hand. When a defendant's access to relief from a newly announced rule of Constitutional law is dependent on his location, courts are undermining confidence in the justice system and disregarding the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Potentially even more troubling is the idea that myriad defendants could be sitting in prison for something that is not actually a crime under federal law. Two defendants, identical in every way, may end up with drastically different outcomes in different courtrooms, simply because of different interpretations of *Class*. Guidance from this Court will provide not only clarity, but uniformity.

III. This case is an excellent vehicle for resolution of this important issue.

This case represents an ideal vehicle for review, for several reasons. First, the issue was fully presented and before the Seventh Circuit. The Seventh Circuit clearly held that Mr. Grzegorzcyk's unconditional guilty plea waived his right to assert whether his underlying offense constituted a crime of violence under § 924(c)'s elements clause after *Davis*. In doing so, the Seventh Circuit created a direct split with the Eleventh Circuit. There are no alternative holdings or

additional explanations from the Seventh Circuit that would impede this Court's ability to squarely address and answer the questions presented. The issues are before this Court on a clean and well-defined circuit split.

Second, there is no chance that the case will become moot. If this Court remands this case to the Seventh Circuit, the court will be forced to confront the question of whether murder-for-hire is a crime of violence under the elements clause. As noted below, several courts have held it is not. Thus, resolution of this case will likely provide substantial relief for Mr. Grzegorzcyk.

Third, the issues here are purely legal questions. Whether an unconditional guilty plea, on its own, waives a defendant's right to later challenge his conviction as falling outside the scope of the statute due to an intervening substantive ruling by this Court does not turn on the particularities of any case, but rather on broad principles of waiver and the effect of simple stipulations inherent in a guilty plea. The issue is worthy of resolution, as the Seventh and Eleventh Circuit are pointing to the same paragraph of *Class* in support of their diametrically opposed conclusions.

IV. Resolution of this case is necessary because Mr. Grzegorzcyk is serving an sentence on the basis of an unconstitutional conviction.

Because the Seventh Circuit found that Mr. Grzegorzcyk waived his claim by pleading guilty, it did not address the merits of his petition. However, murder-for-hire is not a crime of violence under § 924(c)'s surviving elements clause, which undermines the very basis of his firearm conviction. Mr. Grzegorzcyk admitted that he possessed a firearm in furtherance of "use of interstate commerce facilities in the

commission of murder-for-hire,” a violation of 18 U.S.C. § 1958(a), as the factual basis to support his charge under § 924(c). Section 1958(a) penalizes 1) travel in interstate or foreign commerce (or causing another to so travel), 2) with intent that a murder be committed, 3) as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value.

Davis reaffirmed that the categorical approach (not the case-specific approach) applies to an analysis of whether an offense is a crime of violence. 139 S. Ct. at 2327. Murder-for-hire categorically requires neither the use, attempted use, nor the threatened use of physical force against anyone or anything. To be convicted of murder-for hire, one only needs to travel in interstate commerce with the intent that the statute forbids. *See United States v. Bowman*, 873 F.3d 1035, 1042 (8th Cir. 2017) (noting that murder-for-hire can only constitute a crime of violence under the residual clause, not the elements clause, and, therefore, a conviction under § 924(c) did not qualify as a predicate “violent felony” under the elements clause of the Armed Career Criminal Act). The elements of § 1958 do not require that the government prove that any person used any degree of force or that any person was injured as a result. *Dota v. United States*, 368 F. Supp. 3d 1354, 1360–61 (C.D. Cal. Oct. 30, 2018). In fact, Mr. Grzegorzcyk’s case is a perfect example of this: he engaged in travel, to meet undercover officers, with the intent that they engage in murders in exchange for money; but no threats were made and no force was used or attempted to be used in this case.

Murder-for-hire, as defined by § 1958(a), cannot be considered a predicate “crime of violence” to form the basis of Mr. Grzegorzcyk’s conviction for possession of a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). No other offense was alleged, nor facts admitted to, that would provide an alternate basis upon which to affirm Mr. Grzegorzcyk’s conviction. He is, thus, actually innocent of the crime of possession of a firearm in furtherance of a crime of violence, as defined in § 924(c).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

THOMAS W. PATTON
Federal Public Defender

s/ Colleen McNichols Ramais
COLLEEN MCNICHOLS RAMAIS
Assistant Federal Public Defender
Counsel of Record
OFFICE OF THE FEDERAL PUBLIC DEFENDER
300 W. Main Street
Urbana, Illinois 61801
Phone: (217) 373-0666
Email: colleen_ramais@fd.org
Counsel for Petitioner

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