No. 24-7240

IN THE SUPREME COURT OF THE UNITED STATES

LUIS FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to postconviction relief based on United States v. Davis, 588 U.S. 445 (2019), where petitioner has not shown that it was more likely than not that he was convicted under the residual clause of 18 U.S.C. 924(c), which was invalidated in Davis, as opposed to Section 924(c)'s still-valid elements clause.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Fernandez, No. 07-cr-20714 (June 30, 2009)

Fernandez v. United States, No. 16-cv-25087 (Mar. 14, 2018)

United States Court of Appeals (11th Cir.):

United States v. Perez, No. 09-13409 (Oct. 26, 2011)

United States v. Fernandez, No. 09-13455 (Oct. 26, 2011)

Fernandez v. United States, No. 18-11044 (Jan. 17, 2019)

Fernandez, In re, No. 20-12404 (July 22, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is reported at 114 F.4th 1170. The order of the district court (Pet. App. A3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2024. A petition for rehearing was denied on January 16, 2025 (Pet. App. A2). On April 7, 2025, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including May 16, 2025, and the petition was filed on May 15,

2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); one count of attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; 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) and 2. Judgment 1; Superseding Indictment 2. He was sentenced to 360 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed, 661 F.3d 568, and petitioner did not seek certiorari. In 2016, petitioner unsuccessfully moved under 28 U.S.C. 2255 to vacate his Section 924(c) conviction. 2018 WL 10447093. In 2020, petitioner obtained leave to file a second Section 2255 motion to vacate his Section 924(c) conviction. 20-12404 C.A. Doc. 2-2 (July 22, 2020). The district court denied the motion but granted a certificate of appealability. 20-cv-23034 D. Ct. Doc. 19 (June 28, 2021); 20-cv-23034 D. Ct. Doc. 27 (Aug. 2, 2021). The court of appeals affirmed. Pet. App. A1.

1. In February 2007, petitioner carjacked a pregnant college student at gunpoint on her way to class. 374 Fed. Appx. 912, 914–915; 09-12203 U.S. C.A. Br. 7. Petitioner and three accomplices then drove to the woman's house where they held her,

her husband, and their 23-month-old son hostage and threatened to kill the entire family. 374 Fed. Appx. at 914.

Petitioner and his accomplices beat the husband with a flashlight, submerged his head underwater in a jacuzzi, shocked him with electrical cords, and stabbed him in the buttocks, demanding to know where the family kept its money and jewelry. 374 Fed. Appx. at 915; 09-12203 U.S. C.A. Br. 11-12. They twice brought the woman into the room to show her what they were doing to her husband and warned her that she would be next. 374 Fed. Appx. at 915. And they continued the torture until one of them stated that the husband was dead. Ibid. Petitioner and his accomplices then left, stealing the family's car, photographic equipment, and a 9mm Beretta handgun. Ibid. The husband ultimately survived. Ibid. Petitioner was not apprehended at the time.

In August 2007, petitioner and several others conspired and attempted to rob what they believed to be a cocaine stash house. Pet. App. A1, at 2; Presentence Investigation Report (PSR) ¶¶ 8-25. The plan called for petitioner and several co-conspirators to enter the stash house in advance of an expected delivery of 20-25 kilograms of cocaine, tie up the people inside, and steal the cocaine when it arrived. PSR ¶¶ 11, 16, 20, 24. During a recorded conversation, petitioner discussed bringing several firearms, including an "AK-type weapon," and said he would cut anyone who resisted in half with a saw. PSR ¶ 18. Petitioner helped provide guns and tie straps for the planned robbery. PSR ¶¶ 18, 20, 23.

Unbeknownst to petitioner and his co-conspirators, the "stash house" was part of a law-enforcement operation. Pet. App. A1, at 2. Officers arrested the conspirators on their way to the planned robbery, recovering five loaded firearms -- including an AK-47 and the 9mm Beretta stolen during the hostage-taking -- and other weapons. PSR ¶¶ 20-23.

2. Petitioner faced separate charges for the hostage-taking and stash-house robberies. In the hostage-taking case, a jury found petitioner guilty of two counts of carjacking in violation of 18 U.S.C. 2119; hostage-taking in violation of 18 U.S.C. 1203(a); possessing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. 924(c)(1)(A); and possessing a stolen firearm (the 9mm Beretta) in violation of 18 U.S.C. 922(j). 374 Fed. Appx. at 913.

The district court sentenced petitioner to life imprisonment on the hostage-taking count, concurrent terms of imprisonment on the carjacking and Section 922(j) counts, and a consecutive 84-month sentence on the Section 924(c) count. 08-cr-20704 D. Ct. Doc. 109, at 1-2 (Apr. 14, 2009). The court of appeals affirmed, 374 Fed. Appx. at 921, and petitioner did not seek certiorari. Petitioner later filed two Section 2255 motions challenging his Section 924(c) conviction, which were both denied. 08-cr-20704 D. Ct. Doc. 151 (June 27, 2017); 08-cr-20704 D. Ct. Doc. 154 (Apr. 2, 2021). Petitioner does not challenge those convictions -- or his life sentence on the hostage-taking count -- here.

Separately, in the stash-house case, a federal grand jury charged petitioner with one count of conspiring to possess five kilograms or more of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(ii), and 846 (Count 3); one count of attempting to possess five kilograms or more of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(ii), and 846, and 18 U.S.C. 2 (Count 4); one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) (Count 5); one count of attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2 (Count 6); and one count of possessing a firearm in furtherance of a crime of violence and a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A) and 2 (Count 7). Superseding Indictment 3-7.

The indictment premised the Section 924(c) charge on the other charged counts. Superseding Indictment 7. At trial, the district court instructed the jury that, to find petitioner guilty on the Section 924(c) charge, it had to find that he "committed a drug trafficking offense or crime of violence charged in Counts [3, 4, 5, or 6]." Pet. App. A1, at 2 (brackets in original). The jury found petitioner guilty on the counts of conspiring to commit Hobbs Act robbery (Count 5), attempted Hobbs Act robbery (Count 6), and the Section 924(c) charge (Count 6). Jury Verdict 1-2. It found petitioner not guilty of the drug charges (Counts 3 and 4). Id. at 1.

The district court sentenced petitioner to 360 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court specified that petitioner's 60-month sentence on the Hobbs Act counts (Counts 5 and 6) would run concurrently with his life sentence in the hostage-taking case. Judgment 2. The court also specified that petitioner's 300-month sentence for the Section 924(c) offense (Count 7) would run consecutively to the life sentence in the hostage-taking case. Ibid. The court of appeals affirmed, 661 F.3d 568, and petitioner did not seek certiorari.

3. In 2015, this Court held in Johnson v. United States, 576 U.S. 591, that the residual clause of the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), Pub. L. No. 98-473, 98 Stat. 2185, is unconstitutionally vague. 576 U.S. at 594-597. This Court subsequently held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. Welch v. United States, 578 U.S. 120, 122, 130, 135 (2016).

In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his Section 924(c) conviction in light of Johnson. 16-cv-25087 D. Ct. Doc. 1 (Dec. 7, 2016) (motion); 16-cv-25087 D. Ct. Doc. 2 (Dec. 7, 2016) (memorandum of law). One of Section 924(c)'s two alternative definitions of "crime of violence," 18 U.S.C. 924(c)(3)(B), uses language similar to the ACCA's residual clause, 18 U.S.C. 924(e)(2)(B)(ii). The district court denied

petitioner's Section 2255 motion and declined to issue a certificate of appealability, reasoning that petitioner's claims were time-barred and procedurally defaulted. 2018 WL 10447093, at *3-*4; see also 2018 WL 10447059(report and recommendation); 2018 WL 10447054(denying motion to alter or amend judgment). The court of appeals denied a certificate of appealability, 18-11044 C.A. Doc. 15-2 (Jan. 17, 2019), and petitioner did not seek certiorari.

4. In 2019, this Court held in United States v. Davis, 588 U.S. 445, that Section 924(c)(3)(B)'s "crime of violence" definition is itself unconstitutionally vague. Id. at 470. Petitioner applied to the court of appeals under 28 U.S.C. 2255(h) for authorization to file a second Section 2255 motion based on Davis. 20-12404 C.A. Doc. 1 (June 26, 2020). Section 2255(h) allows a second or successive Section 2255 motion if a court of appeals panel "certifie[s] as provided in section 2244" that the motion "contain[s]" newly discovered persuasive evidence of innocence or a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255(h)(1) and (2). The court of appeals granted authorization. 20-12404 C.A. Doc. 2-2.

The district court, however, denied petitioner's motion. Pet. App. A3. The court reasoned, as a threshold matter, that petitioner's claim was procedurally defaulted and that petitioner had no good cause to excuse his default. Id. at 5. And the court also determined, in the alternative, that petitioner had not

established prejudice, because attempted Hobbs Act robbery was a crime of violence under circuit precedent applying Section 924(c)(3)(A)'s elements clause. Id. at 5-6; see Granda v. United States, 990 F.3d 1272, 1285 (11th Cir. 2021), cert. denied, 142 S. Ct. 1233 (2022).

After this Court granted certiorari in United States v. Taylor, 596 U.S. 845 (2022), to decide whether attempted Hobbs Act robbery is a crime of violence, the district court granted a certificate of appealability. 20-cv-23034 D. Ct. Doc. 27. This Court's subsequent decision in Taylor then held that attempted Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A)'s elements clause. 596 U.S. at 860.

5. Reviewing petitioner's case post-Taylor, the court of appeals affirmed. Pet. App. A1.

The court of appeals observed that, under Section 2255(h)(2), a "second or successive motion" for postconviction relief "must be certified * * * to contain . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Pet. App. A1, at 5 (quoting 28 U.S.C. 2255(h)(2)). And the court explained that "only claims that contain a new rule of constitutional law satisfy § 2255's gatekeeping requirements." Ibid.

The court of appeals further observed that, while Davis's invalidation of Section 924(c)(3)(B)'s residual clause rested on constitutional grounds, Taylor and circuit precedent holding that

Hobbs Act conspiracy does not satisfy Section 924(c)(3)(A)'s elements clause were statutory decisions. Pet. App. A1, at 2. It explained that petitioner therefore could not prevail on his second Section 2255 motion unless he could show as a matter of historical fact that his Section 924(c) conviction rested on the residual clause (and was thus unconstitutional under Davis) and not the elements clause (in which case his claims would be statutory). Id. at 5-6.

The court of appeals found that petitioner could not make that showing. Pet. App. A1, at 6. The court observed that, under circuit precedent, petitioner could carry his burden either based on record evidence or by showing "'at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a' crime of violence." Id. at 7 (quoting Beeman v. United States, 871 F.3d 1215, 1224 n.5 (11th Cir. 2017), cert. denied, 586 U.S. 1153 (2019)). The court found nothing in the record that indicated that petitioner's Section 924(c) conviction relied on the residual clause. Id. at 6. And after examining the case law at the time of petitioner's conviction, the court of appeals found that a district court could have treated Hobbs Act attempt or conspiracy as crimes of violence under Section 924(c)(3)(A)'s elements clause. Id. at 7-8.

Each judge filed a separate concurrence. Judge Rosenbaum urged the en banc court of appeals to overrule its precedent requiring prisoners bringing second or successive Section 2255

motions based on Johnson or Davis to prove that they were sentenced under the residual clauses. Pet. App. A1, at 8-11. Judge Newsom explained that he had reconsidered earlier misgivings about taking the same approach to postconviction Johnson and Davis claims, but noted potential issues with that approach that might arise in a future case. Id. at 11-13. Judge Luck, who concurred in the judgment only, agreed that petitioner had not met his burden, and stated that two small portions of the panel opinion (an assumption in petitioner's favor on one point and agreement with petitioner on another) were unnecessary dicta. Id. at 13.

ARGUMENT

Petitioner contends (Pet. 8-30) that the court of appeals erred in requiring him, as a prerequisite for relief on a second or successive Section 2255 motion premised on United States v. Davis, 588 U.S. 445 (2019), to show that his Section 924(c) conviction was more likely than not based on the residual clause that Davis invalidated. The court of appeals' decision is correct and does not warrant this Court's review. Notwithstanding some circuit disagreement as to the standard for second or successive Section 2255 motions premised on Johnson v. United States, 576 U.S. 591 (2015), this Court has repeatedly denied certiorari of issues similar to the one presented here in the Johnson context.[1]

[1] See, e.g., Sanders v. United States, 142 S. Ct. 460 (2021) (No. 20-8053); Brown v. United States, 141 S. Ct. 1271 (2021) (No. 20-5762); Franklin v. United States, 141 S. Ct. 960 (2020) (No. 20-5030); McKenzie v. United States, 141 S. Ct. 954 (2020) (No. 19-8597); Tinker v. United States, 140 S. Ct. 1137

In any event, petitioner's claim is premised on Davis, not Johnson. And review would be unlikely to have meaningful practical significance for petitioner, given that he is serving a life sentence for another offense not at issue here.

1. A federal prisoner generally may not obtain postconviction relief unless he establishes that his sentence was "imposed in violation of the Constitution or laws of the United

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(2020) (No. 19-6618); Anzures v. United States, 140 S. Ct. 1132 (2020) (No. 19-6037); Starks v. United States, 140 S. Ct. 898 (2020) (No. 19-5129); Clay v. United States, 140 S. Ct. 866 (2020) (No. 19-6884); Wilson v. United States, 140 S. Ct. 817 (2020) (No. 18-9807); McCarthan v. United States, 140 S. Ct. 649 (2019) (No. 19-5391); Levert v. United States, 140 S. Ct. 383 (2019) (No. 18-1276); Morman v. United States, 140 S. Ct. 376 (2019) (No. 18-9277); Ziglar v. United States, 140 S. Ct. 375 (2019) (No. 18-9343); Zoch v. United States, 140 S. Ct. 147 (2019) (No. 18-8309); Walker v. United States, 587 U.S. 1065 (2019) (No. 18-8125); Ezell v. United States, 587 U.S. 966 (2019) (No. 18-7426); Garcia v. United States, 587 U.S. 941 (2019) (No. 18-7379); Harris v. United States, 587 U.S. 920 (2019) (No. 18-6936); Wiese v. United States, 586 U.S. 1227 (2019) (No. 18-7252); Beeman v. United States, 586 U.S. 1153 (2019) (No. 18-6385); Jackson v. United States, 586 U.S. 1152 (2019) (No. 18-6096); Wyatt v. United States, 586 U.S. 1078 (2019) (No. 18-6013); Washington v. United States, 586 U.S. 1077 (2019) (No. 18-5594); Prutting v. United States, 586 U.S. 1077 (2019) (No. 18-5398); Curry v. United States, 586 U.S. 1068 (2019) (No. 18-229); Sanford v. United States, 586 U.S. 1052 (2018) (No. 18-5876); Jordan v. United States, 586 U.S. 1038 (2018) (No. 18-5692); George v. United States, 586 U.S. 1038 (2018) (No. 18-5475); Sailor v. United States, 586 U.S. 968 (2018) (No. 18-5268); McGee v. United States, 586 U.S. 968 (2018) (No. 18-5263); Murphy v. United States, 586 U.S. 968 (2018) (No. 18-5230); Perez v. United States, 586 U.S. 921 (2018) (No. 18-5217); Safford v. United States, 586 U.S. 910 (2018) (No. 17-9170); Couchman v. United States, 586 U.S. 909 (2018) (No. 17-8480); Oxner v. United States, 586 U.S. 839 (2018) (No. 17-9014); King v. United States, 586 U.S. 827 (2018) (No. 17-8280); Casey v. United States, 585 U.S. 1017 (2018) (No. 17-1251); Westover v. United States, 584 U.S. 964 (2018) (No. 17-7607); Snyder v. United States, 584 U.S. 964 (2018) (No. 17-7157).

States." 28 U.S.C. 2255(a). In addition, under 28 U.S.C. 2255(h), a second or successive motion for postconviction relief may not be filed unless a court of appeals certifies that it contains (as relevant here) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255(h)(2). Section 2255(h) incorporates by reference the certification procedures in 28 U.S.C. 2244, under which a panel need only determine that the prisoner has made a "prima facie" showing to that effect. 28 U.S.C. 2244(b)(3)(C). Section 2244 further provides, however, that even when such a prima facie showing initially is made, a legal claim in a second or successive habeas application "shall [be] dismissed" if it does not in fact "satisf[y] the requirements of this section," i.e., the requirements for certification. 28 U.S.C. 2244(b)(4).

Those stringent standards reflect the principle that collateral review "is an extraordinary remedy" that "'will not be allowed to do service for an appeal.'" Bousley v. United States, 523 U.S. 614, 621 (1998) (citation omitted). After the completion of direct review in a criminal case, "a presumption of finality and legality attaches to the conviction and sentence," Brecht v. Abrahamson, 507 U.S. 619, 633 (1993), and courts are "entitled to presume" that the defendant's sentence is lawful, United States v. Frady, 456 U.S. 152, 164 (1982). That "presumption of regularity * * * makes it appropriate to assign a proof burden to the

defendant" on collateral review. Parke v. Raley, 506 U.S. 20, 31 (1992); see Hawk v. Olson, 326 U.S. 271, 279 (1945) (explaining that a prisoner necessarily "carries the burden in a collateral attack on a judgment").

The limitations on postconviction relief, and the prisoner's burden of proof, require a prisoner seeking postconviction relief from a Section 924(c) conviction based on Davis to show that his conviction actually resulted from a Davis error. Davis invalidated Section 924(c)(3)(B)'s residual clause, but it did not call into question Section 924(c)(3)(A)'s elements clause. 588 U.S. at 470. Accordingly, the court of appeals correctly determined that a prisoner who files a second or successive Section 2255 motion based on Davis is required to establish, by a preponderance of the evidence, that he was convicted under the unconstitutional residual clause, not the still-valid elements clause. Pet. App. A1, at 5-6. A Section 2255 movant who cannot show that his conviction was more likely than not based on constitutional error cannot nonetheless bypass Congress's stringent limits on second or successive Section 2255 motions to litigate statutory challenges to his conviction and sentence that might have brought in his original appeal. Because petitioner failed to make the required showing -- indeed, he appears to acknowledge (Pet. 24) that he cannot make it -- relief was properly denied.

2. Petitioner's contrary arguments lack merit and would upend the burden of proof on collateral review.

Petitioner argues (Pet. 25-28) that once a movant makes a prima facie showing of a constitutional error sufficient to satisfy the "gatekeeping" function of Section 2255(h)(2), he is entitled to plenary review for legal error under Section 2255(a), including on questions of statutory interpretation. That argument disregards Section 2255(h)(2)'s incorporation of Section 2244's provisions concerning appellate certification, including subsection (b)(4)'s directive that the district court dismiss any claim "unless the applicant shows that the claim satisfies the requirements of this section." 28 U.S.C. 2244(b)(4).

That directive requires that a second or successive Section 2255 motion be dismissed unless the prisoner shows that his claim satisfies the certification criteria. See U.S. Br. at 45-48, Bowe v. United States, No. 24-5438 (June 11, 2025) (Bowe U.S. Br.).[2] Otherwise, a prisoner could seek to leverage a prima facie showing of constitutional error -- no matter how minor or meritless it turns out to be -- to bring a statutory attack on his conviction or sentence, even one wholly unrelated to his constitutional claim.

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[2] This Court has granted review in Bowe to consider whether it has certiorari jurisdiction and, if it has such jurisdiction, whether 28 U.S.C. 2244(b)(1) applies to a claim presented in a second or successive motion to vacate under 28 U.S.C. 2255. Although the government's explanation of why Section 2244(b)(1) does not apply includes a discussion of why Section 2244(b)(4) does apply, see Bowe U.S. Br. at 45-48, the question directly presented in Bowe is not implicated in this case. And petitioner has not requested that the Court hold this petition pending the disposition of Bowe.

That result cannot be squared with Congress's choice of "finality over error correction" in carefully limiting second or successive collateral attacks. Jones v. Hendrix, 599 U.S. 465, 480 (2023). Even if the constitutional and statutory claims are related, a Section 2255 movant cannot use the prima facie determination of a constitutional claim to obtain postconviction relief without a carefully examined showing that it is more likely than not that the judgment in his criminal case was in fact the result of a constitutional error.

For similar reasons, petitioner's objections that prisoners have received "illegal convictions" or "sentences" and that he will "'spend twenty-five years in prison for something that Congress did not make a crime'" are misplaced. Pet. i, 2, 20, 25-26, 30 (citations omitted). As a threshold matter, petitioner himself will never actually serve such time because his Section 924(c) sentence is set to run consecutively to his life sentence for hostage-taking. See p. 6, supra.

Regardless, in every case where a conviction is predicated on a statutory error not identified within a year of the conviction becoming final, Congress has prioritized finality over the risk of error. See 28 U.S.C. 2255(f)(1); cf. Jones, 599 U.S. at 480 (emphasizing "§ 2255(h)'s exclusion of statutory claims"). If, for example, Congress had never enacted Section 924(c)(3)(B)'s residual clause, petitioner unquestionably could not collaterally attack his Section 924(c) conviction, even though Hobbs Act

conspiracy and attempt convictions were later held to be invalid predicates under the elements clause.

Petitioner asserts (Pet. 20-21) that second or successive Johnson and Davis claims are effectively unavailable in circuits that require prisoners to demonstrate the existence of the claimed constitutional error, and he urges (Pet. 29) that such a rule is "hopelessly impractical." Petitioner is incorrect. To meet his burden, a movant may point to the record or to case law from the time of his conviction showing that it is more likely than not that the conviction or sentence relied on the invalid residual clause, rather than the elements clause. See Pet. App. A1, at 6-8. The circuits following the approach in the decision below have repeatedly granted relief on Johnson claims in second or successive motions, including in some of the very cases cited by petitioner.[3] And where the government determines that a prisoner has a valid Davis claim, the government's usual practice is to waive any applicable procedural defenses on collateral review and agree that

[3] E.g., Weeks v. United States, 930 F.3d 1263, 1279 (11th Cir. 2019) (finding that "relevant legal precedent" made it "obvious" that sentence rested on residual clause); United States v. Driscoll, 892 F.3d 1127, 1135 (10th Cir. 2018) (cited at Pet. 18) (finding that "background legal environment" showed that court must have relied on residual clause); United States v. Taylor, 873 F.3d 476, 482 (5th Cir. 2017) (cited at Pet. 13) (declining to select standard because prisoner could meet his burden to show that court relied on residual clause under any rule); see also Walker v. United States, 900 F.3d 1012, 1015-1016 (8th Cir. 2018) (cited at Pet. 18) (vacating denial of successive 2255 motion and remanding for a determination whether movant had shown Johnson error), cert. denied, 587 U.S. 1065 (2019).

the Section 924(c) conviction should be vacated. See Br. in Opp. at 10-11, Grzegorczyk v. United States, 142 S. Ct. 2580 (2022) (No. 21-5967).

Petitioner's assertions (Pet. 28) that the court of appeals' approach imposes an "unfair" burden and leads to an "arbitrary application of Johnson and Davis" are incorrect. "The burden of proof and persuasion reflects longstanding and fundamental interests in finality," and that burden applies to Johnson and Davis claims "as with any other type of claim." Beeman v. United States, 871 F.3d 1215, 1223 (11th Cir. 2017), cert. denied, 586 U.S. 1153 (2019). Nor does requiring prisoners to meet the burden of proof result in the selective application of Johnson or Davis. As the First Circuit has observed in the Johnson context, "[r]equiring [Section 2255 movants] to establish -- by a preponderance of the evidence -- that they were sentenced pursuant to the residual clause does not lead to treating similarly situated defendants differently. Precisely the opposite: it is imposing a uniform rule." Dimott v. United States, 881 F.3d 232, 242, cert. denied, 585 U.S. 1017 (2018). "What would be arbitrary is to treat Johnson [or Davis] claimants differently than all other § 2255 movants claiming a constitutional violation." Beeman, 871 F.3d at 1224.

Finally, petitioner is incorrect to the extent he contends (Pet. 11, 13-14) that his claim is supported by Stromberg v. California, 283 U.S. 359 (1931), which invalidated a conviction

based on a general verdict when the jury had been instructed on alternative theories of guilt, one of which was unconstitutional. Id. at 367-369. Stromberg involved a direct appeal from a state-court conviction, and thus did not implicate a federal prisoner's burden to prove his claim in order to obtain collateral relief. And even Stromberg errors are subject to harmless-error review, meaning that reversal is not warranted based on the theoretical possibility that the jury relied on an improper ground. See Hedgpeth v. Pulido, 555 U.S. 57, 61-62 (2008) (per curiam). Stromberg does not support petitioner's view that he should be allowed to use Davis to obtain plenary review of his conviction years after the fact without demonstrating that his case actually rests on a Davis error.

3. Petitioner contends (Pet. 8-19) that this Court's review is warranted because of a disagreement among the courts of appeals over whether prisoners bringing second or successive Johnson claims bear the burden to demonstrate that their sentence was based on the ACCA's residual clause. But on petitioner's own account (Pet. 9-19), that disagreement has existed since at least 2017, with nine of the ten circuits that petitioner identifies in the split having joined issue by 2019. This Court has denied certiorari on the Johnson question numerous times since then. See p. 10 n.1, supra. And petitioner does not point to any development in the intervening years that would warrant a different outcome here.

Johnson claims themselves -- which must generally have been filed by June 26, 2016, see 28 U.S.C. 2255(f)(3) -- have grown increasingly stale. And while petitioner appears now to have abandoned his argument below that Davis claims should be subject to a lower standard than Johnson claims, C.A. Reply Br. 4, any disagreement with respect to Davis claims in particular -- which themselves must have been filed by June 24, 2020, see 28 U.S.C. 2255(f)(3) -- has not been addressed by many circuits.

Like the court below, the Fifth and Tenth Circuits have relied on Johnson cases to recognize that a prisoner bringing a Davis claim must show that he was most likely sentenced under Section 924(c)'s residual clause. United States v. Lott, 64 F.4th 280, 283-284 (5th Cir. 2023); United States v. Bowen, 936 F.3d 1091, 1108-1109 (10th Cir. 2019). While the Third Circuit has permitted Davis claims to advance so long as the prisoner's conviction "may have" been based on the residual clause, United States v. Jordan, 96 F.4th 584, 589, cert. denied, 145 S. Ct. 256 (2024), the nascent disagreement is shallow. And petitioner himself has neither identified nor asserted it as a basis for this Court's review.

4. In any event, this case would be an unsuitable vehicle to resolve the question presented because the issue lacks practical significance for petitioner. While petitioner emphasizes (Pet. 23) the length of his Section 924(c) sentence, petitioner is serving a separate life sentence for hostage-taking. 08-cr-20704

D. Ct. Doc. 109; p. 4, supra. That sentence is final and not at issue here. It is therefore unlikely that even a favorable decision by this Court on the question presented would have a practical effect on petitioner's prison term.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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