No. 25-7026

IN THE SUPREME COURT OF THE UNITED STATES

COREY DURAN BERRY, 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 a certificate of appealability in the lower courts on his second collateral attack under 28 U.S.C. 2255, when he was unable to obtain relief under controlling law due to his inability to show 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 United States v. Davis, 588 U.S. 445 (2019), as opposed to Section 924(c)'s still-valid elements clause.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-3a) is available at 2026 WL 706333. The order of the district court (Pet. App. 41a-52a) is available at 2025 WL 1148445.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2026. The petition for a writ of certiorari was filed on March 10, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of attempted carjacking, in violation of 18 U.S.C. 2119(1); one count of brandishing a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii); and one count of carjacking, in violation of 18 U.S.C. 2119(1). Pet. App. 42a. The district court sentenced petitioner to 218 months of imprisonment. Ibid. Petitioner voluntarily dismissed his appeal. Ibid.

In 2016, petitioner moved to vacate his Section 924(c) conviction, but the district court denied relief, Pet. App. 43a; the court of appeals denied a certificate of appealability, 2017 WL 11623201; and this Court denied certiorari, 585 U.S. 1009. In 2023, petitioner sought, and the court of appeals granted, authorization to file a second Section 2255 motion. Pet. App. 43a. The district court later denied the motion and denied a certificate of appealability. Id. at 41a-52a. The court of appeals also denied a certificate of appealability. Id. at 1a-3a.

1. In June 2013, petitioner attempted to carjack a man in South Florida by pressing a revolver to the back of the man's head while he stood near the trunk of his car. Pet. App. 41a-42a. Petitioner took the victim's keys but fled after he was unable to start the car. Id. at 42a. Minutes later, petitioner approached four others standing near a different car, threatened them at

gunpoint, and drove off with their vehicle. Ibid. Two days later, police found petitioner in the stolen car and arrested him. Ibid. Petitioner confessed to both the first attempted carjacking and the subsequent completed carjacking. Ibid.

A federal grand jury charged petitioner with attempted carjacking, in violation of 18 U.S.C. 2119(1) (Count 1); brandishing a firearm during a crime of violence (specifically, the attempted carjacking), in violation of 18 U.S.C. 924(c)(1)(A)(ii) (Count 2); carjacking, in violation of 18 U.S.C. 2119(1) (Count 3); and brandishing a firearm during a crime of violence (specifically, the carjacking in Count 3), in violation of 18 U.S.C. 924(c)(a)(A)(ii) (Count 4). Pet. App. 42a. Petitioner pleaded guilty to the first three counts; in return, the government voluntarily dismissed the brandishing charge based on the actual carjacking. Ibid. The district court sentenced petitioner to 218 months of imprisonment. Ibid. Petitioner voluntarily dismissed his appeal. Ibid.

2. In 2016, petitioner moved to vacate his Section 924(c) conviction for brandishing a firearm during a "crime of violence," claiming that one of the two alternative statutory definitions of "crime of violence" -- specifically, Section 924(c)'s residual clause in 18 U.S.C. 924(c)(3)(B) -- is unconstitutionally vague. Pet. App. 43a. Petitioner based that claim on Johnson v. United States, 576 U.S. 591 (2015), which had held that the residual clause of the definition of "violent felony" in 18 U.S.C.

924(e)(2)(B)(ii) is unconstitutionally vague. 576 U.S. at 594-597. The district court dismissed petitioner's claim, finding that his conviction for attempted carjacking qualified as a "crime of violence" under the term's alternative definition in Section 924(c)'s elements clause, 18 U.S.C. 924(c)(3)(A), even if Section 924(c)'s residual clause were unconstitutionally vague. 2017 WL 11623195, at *3.

Before a federal prisoner may appeal from a final Section 2255 order, he must obtain a certificate of appealability issued by "a circuit justice or judge." 28 U.S.C. 2253(c)(1)(B). A certificate of appealability may issue only if the prisoner has made "a 'substantial showing of the denial of a constitutional right.'" Gonzalez v. Thaler, 565 U.S. 134, 137, 145 (2012) (quoting 28 U.S.C. 2253(c)(2)). And where a district court has rejected the prisoner's constitutional claim on the merits, that standard requires the prisoner to show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Buck v. Davis, 580 U.S. 100, 115 (2017) (quoting Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)).

The district court denied a certificate of appealability, 2017 WL 11623195, at *3; the court of appeals also denied a

certificate of appealability, 2017 WL 11623201; and this Court denied certiorari, 585 U.S. 1009.

3. In October 2023, petitioner applied to the court of appeals for authorization to file a second Section 2255 motion. Pet. App. 44a.

a. Before a federal prisoner may file a second or successive Section 2255 motion, he must obtain authorization from a panel of the court of appeals certifying that it satisfies one of two statutory criteria, one of which is satisfied if the motion contains "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 includes a special statute of limitations that runs for one year from "the date on which" the asserted "right * * * newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review" was "initially recognized by the Supreme Court." 28 U.S.C. 2255(f)(3).

Petitioner relied on two intervening decisions to support his claim that his Section 924(c) conviction was unconstitutional. First, he invoked United States v. Davis, 588 U.S. 445 (2019) -- decided more than four years earlier -- which held that Section 924(c)'s residual-clause definition of "crime of violence" is unconstitutionally vague, id. at 470. See Pet. App. 44a. Second, petitioner relied on United States v. Taylor, 596 U.S. 845 (2022)

-- decided more than one year before his request to file a second Section 2255 motion -- which held that, as a statutory matter, attempted Hobbs Act robbery does not qualify as a "crime of violence" under the alternative definition of the term in Section 924(c)'s elements clause, id. at 860. See Pet. App. 44a.

The court of appeals granted petitioner authorization to file his second Section 2255 motion. 23-13310 C.A. Order (Oct. 31, 2023). The court took the view that "[petitioner] ha[d] made a prima facie showing that his proposed [constitutional] Davis claim challenging his § 924(c) conviction * * * satisfies the statutory criteria when analyzed alongside Taylor's [statutory] interpretation of § 924(c)(3)(A)'s elements clause." Id. at 11. But the court emphasized that its "threshold determination that [petitioner] ha[d] made a prima facie showing" that he had satisfied Section 2255(h)'s criteria for a second Section 2255 motion did "not conclusively resolve that issue" because "the district court looks at the § 2255(h) requirements de novo" and must decide whether they are in fact satisfied. Id. at 13. And it stressed that in district court, petitioner would "bear[] the burden of showing that he is actually entitled to relief on his Davis claim, meaning he will have to show that his § 924(c) conviction resulted from application of solely the residual clause." Id. at 14 (quoting In re Hammoud, 931 F.3d 1032, 1041 (11th Cir. 2019), which cites

Beeman v. United States, 871 F.3d 1215, 1222–1225 (11th Cir. 2017), cert. denied, 586 U.S. 1153 (2019)).

b. The district court denied petitioner's second 2255 motion. Pet. App. 41a-52a; see 2024 WL 5657662 (magistrate judge's report and recommendation). The court observed that, in order to satisfy Section 2255(h)'s requirement that a second Section 2255 motion rest on a new rule of constitutional law petitioner has "the burden of showing that he is actually entitled to relief on his Davis claim," which requires that he "show that his [Section] 924(c) conviction resulted from application of solely the residual clause." Pet. App. 44a-45a (quoting Hammoud, 931 F.3d at 1041). And the court explained that petitioner could not rely on Taylor because "Taylor announced a statutory rule, not a constitutional one," and thus did not satisfy Section 2255(h)(2), id. at 50a, which requires "a new rule of constitutional law," 28 U.S.C. 2255(h)(2).

The district court also observed that, under circuit precedent beginning with Beeman v. United States, petitioner had to "show it was more likely than not" that the crime-of-violence determination underlying his conviction was based "solely on the residual clause" that had been held unconstitutional in Davis. Pet. App. 45a-46a (citing Beeman, 871 F.3d at 1221, and Fernandez v. United States, 114 F.4th 1170, 1179–1180 (11th Cir. 2024), cert. denied, 146 S. Ct. 294 (2025)). The court -- the same district judge who accepted petitioner's guilty plea and sentenced him -- then determined that

petitioner had failed to make that showing. Id. at 48a. The court noted that petitioner did "not dispute that he has not met his burden of showing that he is entitled to relief on his Davis claim under Beeman's framework." Id. at 49a. And while the court noted that petitioner argued that Beeman was incorrect, it observed that "Beeman remains binding precedent in the Eleventh Circuit." Ibid.

The district court denied a certificate of appealability. Pet. App. 52a & n.5.

4. The court of appeals also denied a certificate of appealability. Pet. App. 1a-3a.

The court of appeals observed that petitioner had sought a certificate of appealability on the question whether he could prevail on his constitutional Section 2255 claim under Davis "when the record is unclear about whether [his] § 924(c) conviction was based on the now-invalid residual clause." Pet. App. 1a-2a. The court stated that it "will not issue a [certificate of appealability] when a claim is foreclosed by binding circuit precedent, as reasonable jurists will follow controlling law." Id. at 2a (citing Hamilton v. Secretary, Fla. Dep't of Corr., 793 F.3d 1261, 1266 (11th Cir. 2015), cert. denied, 578 U.S. 926 (2016)). And it added that, "[t]o the extent [petitioner] seeks a [certificate of appealability] on whether courts must grant a [certificate of appealability] 'if the issue is debatable among reasonable jurists, even if there is controlling circuit authority to the contrary,' the motion

is DENIED because that question does not implicate the denial of a constitutional right." Id. at 3a n.1 (citing 28 U.S.C. 2253(c)(2)).

ARGUMENT

Petitioner contends (Pet. 4, 29-33) that the court of appeals should have granted him a certificate of appealability on the question of whether a prisoner collaterally attacking a count of conviction under Section 2255 on the ground that a statutory provision is unconstitutionally vague must show that his conviction likely rested on the invalid provision in order to obtain relief. This Court has repeatedly denied certiorari on petitioner's underlying claim; the procedural issue that he presents will not materially affect the ultimate disposition of Section 2255 claims; and the question presented does not warrant this Court's review. Review is particularly unwarranted in this case because petitioner procedurally defaulted his claim, which is also time-barred under Section 2255(f).

1. A federal prisoner seeking to appeal the denial of a final order under Section 2255 must obtain a certificate of appealability from "a circuit justice or judge." 28 U.S.C. 2253(c)(1)(B). A certificate of appealability may issue only if the prisoner has made "a 'substantial showing of the denial of a constitutional right.'" Gonzalez v. Thaler, 565 U.S. 134, 137, 145 (2012) (quoting 28 U.S.C. 2253(c)(2)). Where, as here, a district court has rejected the prisoner's constitutional claim on the merits, that

standard requires the prisoner to show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Buck v. Davis, 580 U.S. 100, 115 (2017) (quoting Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)); see Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Petitioner asserts (Pet. 12-17) disagreement among three courts of appeals, two of which (including the court in this case) have determined that a certificate of appealability should be denied "where the [prisoner's] claim is foreclosed by binding circuit precedent," even if another circuit has contrary precedent. Hamilton v. Secretary, Fla. Dep't of Corr., 793 F.3d 1261, 1266 (11th Cir. 2015), cert. denied, 578 U.S. 926 (2016); see Pet. App. 2a (applying Hamilton); see also Jordan v. Epps, 756 F.3d 395, 405, 408, 411 n.5 (5th Cir. 2014) (per curiam) (concluding that its binding precedent was not "distinguishable"), cert. denied, 576 U.S. 1071 (2015).[1] The Ninth Circuit has stated that a certificate

[1] Justice Sotomayor dissented from the denial of certiorari in Jordan (a capital case) but did not explicitly disagree with the proposition that a certificate of appealability should not issue if a claim is "foreclosed" by binding circuit precedent. 576 U.S. 1071, 1076 (2015). She instead appeared to conclude that the panel was wrong to view the matter as foreclosed, where the precedent was "susceptible of more than one reasonable interpretation" and involved "materially different" circumstances, noting that the prisoner's contrary "reading of [the precedent] need not be the best one to allow him to obtain further review." Id. at

of appealability should issue on a question that is "well-settled in a particular circuit" if "another circuit has reached a conflicting view." Lambright v. Stewart, 220 F.3d 1022, 1025-1026 (9th Cir. 2000).[2]

Any limited disagreement, however, about the role of binding circuit precedent in the certificate-of-appealability analysis does not appear to have any significant practical effect on the ultimate disposition of Section 2255 claims. In contexts in which

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1076-1077. Petitioner identifies (Pet. 22-23) two other opinions dissenting from the denial of certiorari, but neither addresses certificate of appealability contexts involving binding circuit precedent. See Shockley v. Vandergriff, 145 S. Ct. 894, 895 (2025) (Sotomayor, J.) (taking the view that the Court should have granted certiorari to decide whether "a panel majority can deny a [certificate of appealability]" if one judge "on the panel votes to issue one"); Johnson v. Vandergriff, 143 S. Ct. 2551, 2553 (2023) (Sotomayor, J.) (stating that dissenting judges had "good reason * * * to debate the merits of Johnson's habeas petition" because the state supreme court's decision in that capital case was "objectively unreasonable").

[2] Petitioner cites (Pet. 13-16) nonprecedential decisions from the Sixth and Tenth Circuits, but those decisions do not reflect a division of authority because, absent binding precedent, those courts could consider the matter afresh even if nonprecedential decisions had addressed the question presented. The other decisions petitioner identifies to support his claim of a circuit conflict do not address the effect of binding precedent on the certificate of appealability inquiry. See Mitchell v. United States, 43 F.4th 608, 616 (6th Cir.) (stating that court's binding precedent is "the proper reference point" when considering a certificate of appealability without addressing whether a certificate of appealability should issue if conflicting out-of-circuit precedent exists), cert. denied, 143 S. Ct. 534 (2022); Wilson v. Secretary, Pa. Dep't of Corr., 782 F.3d 110, 115 (3d Cir. 2015) (granting certificate of appealability where out-of-circuit decision "conflict[ed] with the District Court's decision in th[e] case") (emphasis added).

a district court has rejected a Section 2255 claim on the basis of binding circuit precedent that (as here) clearly forecloses that claim, the issuance of a certificate of appealability to allow the prisoner to appeal would simply authorize an appeal to an appellate panel that itself would be bound by the same precedent. The burdens of briefing and merits disposition of every case in which the issue is asserted, with an outcome controlled by circuit precedent, will secure no significant offsetting benefit to litigants or courts.

2. In arguing otherwise, petitioner principally relies (Pet. 24-26) on the possibility that the court of appeals, on en banc review, or this Court, on certiorari review, could overturn the binding circuit precedent. But those rare procedures could readily be utilized irrespective of whether the case is resolved on the merits through briefing and rote application of binding circuit precedent (as petitioner would require in every case, including where, as here, the precedent's applicability is conceded) or instead through the denial of a certificate of appealability.

a. En banc review to overturn circuit precedent will occur only if a majority of the judges support it. And if that is the case, any one judge within the majority of judges willing to overturn otherwise binding circuit precedent may grant a certificate of appealability to allow the claim to proceed on appeal and the en banc procedure to proceed. See 28 U.S.C. 2253(c)(1)(B)

(requiring a certificate of appealability issued by either "a circuit justice or judge"). An appellate panel could do the same. See Fed. R. App. P. 22(b)(2) (certificate of appealability application "may be considered by a circuit judge or judges, as the court prescribes").

Although the court of appeals here has stated that "no [certificate of appealability] should issue where the claim is foreclosed by binding circuit precedent 'because reasonable jurists will follow controlling law,'" Hamilton, 793 F.3d at 1266 (citation omitted), it is far from clear that the court would interpret its statement to preclude a majority of its judges from revisiting en banc a precedent that they deemed questionable. Cf., e.g., Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.") (citation omitted). Indeed, that statement does not foreclose granting a certificate of appealability in such cases on the ground that, notwithstanding what reasonable jurists might conclude, "the issues presented are adequate to deserve encouragement to proceed further." Buck, 580 U.S. at 115 (quoting Miller-El, 537 U.S. at 327).

Moreover, if an appellate judge or panel denies a certificate of appealability, nothing in Section 2255's text prevents the court of appeals from reconsidering that denial en banc and overturing its own precedent. Cf. Buck, 580 U.S. at 115 (noting lower court's

divided vote denying en banc review of certificate of appealability denial); Hohn v. United States, 524 U.S. 236, 240 (1998) (same). The court of appeals here, for instance, has previously granted en banc review to revisit certificate of appealability denials. See Gonzalez v. Secretary for Dep't of Corr., 366 F.3d 1253, 1260, 1262 (11th Cir. 2004), aff'd on other grounds sub nom. Gonzalez v. Crosby, 545 U.S. 524 (2005). And although the court has adopted a local rule stating that the denial of a certificate of appealability "may not be the subject of a * * * petition for rehearing en banc," 11th Cir. R. 22-1(c), that rule explicitly applies only to "petitions," and would not necessarily preclude the grant of en banc rehearing sua sponte. And in any event, a litigant can ask the court to suspend the operation of that rule to allow an en banc rehearing petition "in a particular case." Fed. R. App. P. 2, 47(a); see 11th Cir. R. 2-1 (allowing court to grant such a request "as it deems appropriate").

In this case, however, petitioner provides no basis for concluding that he might plausibly obtain en banc review to overturn the precedent foreclosing his claim under United States v. Davis, 588 U.S. 445 (2019). Roughly a year ago, the court of appeals was petitioned for rehearing en banc in Fernandez v. United States, 114 F.4th 1170 (11th Cir. 2024), cert. denied, 146 S. Ct. 294 (2025), which applied the court's precedent in Beeman v. United States, 871 F.3d 1215, 1222–1225 (11th Cir. 2017), cert. denied,

586 U.S. 1153 (2019), for the proposition that a federal prisoner "bears the burden to 'show that -- more likely than not -- it was use of [Section 924(c)'s] residual clause [which this Court invalidated in Davis]" that led to his enhanced sentence, Fernandez, 114 F.4th at 1178-1180 (citation omitted). See Pet. for Reh'g at 8-12, Fernandez, supra (No. 21-12915). The court of appeals denied that petition without a single judge requesting a poll. See 1/16/2025 C.A. Order at 2, Fernandez, supra. Given its ability to have entertained that petition, and its denial of it, granting certificates of appealability from every district court decision involving uncontested application of circuit precedent will make no practical difference to the availability of relief in such cases.

b. Requiring a certificate of appealability, briefing, and merits disposition in every case presenting a long-settled issue is likewise unnecessary to enable certiorari review in this Court. For one thing, a prisoner may seek a certificate of appealability from "a circuit justice." 28 U.S.C. 2253(c)(1)(B). Although a Justice would likely grant such a request only rarely, the Justice could consider the existence of a sufficiently square circuit conflict on the question for which the certificate of appealability is sought when considering whether a certificate of appealability is warranted in a particular case. For another, the prisoner may petition this Court for a writ of certiorari to review a court of appeals' order denying a certificate of appealability, Hohn, 524

U.S. at 241-251, by invoking the circuit conflict on the issue underlying the Section 2255 claim for which he seeks a certificate of appealability. And review of the denial of the certificate of appealability could encompass a full decision on the merits of the underlying claim.

Section "2253 does not limit the scope of [the Court's] consideration of the underlying merits" when reviewing an appellate court's denial of a certificate of appealability. Buck, 580 U.S. at 118. Accordingly, this Court has in fact granted certiorari from denials of certificates of appealability and resolved legal questions in the course of reversing those denials. See, e.g., id. at 128 (holding that court of appeals "erred in denying" the prisoner a certificate of appealability based on this Court's determination that the habeas applicant was entitled to relief on his claim of ineffective assistance); Jimenez v. Quarterman, 555 U.S. 113, 118, 121 (2009) (reversing denial of certificate of appealability after concluding that court of appeals erred in its interpretation of the statute of limitations); Slack v. McDaniel, 529 U.S. 473, 483, 485-486 (2000) (reversing denial of certificate of appealability after concluding that habeas petition was misclassified); see also, e.g., Banks v. Dretke, 540 U.S. 668, 703-706 (2004) (reversing denial of certificate of appealability after suggesting that lower courts had erred in failing to apply Federal Rule of Civil Procedure 15(b)).

Despite the availability of certiorari review, however, petitioner has not sought this Court's review based on the issue on which he sought a certificate of appealability -- i.e., whether a prisoner is entitled to relief on a vagueness claim in a second or successive Section 2255 motion where he has not shown that it is more likely than not that his conviction was actually premised on the vague provision (here, Section 924(c)'s residual clause). The court of appeals' decisions required him establish that likelihood, which petitioner has conceded he cannot do. Pet. App. 49a. And although petitioner (Pet. 28-29) asserts circuit disagreement on the proper approach in such cases, he did not try to seek certiorari to review that approach. The denial of a certificate of appealability did not prevent him from seeking such review, and the grant of a certificate of appealability would not have made the underlying issue -- on which the Court has denied review numerous times -- any more deserving of certiorari.

This Court in fact denied certiorari to the court below in Fernandez, which (as discussed above, see pp. 14-15, supra) denied en banc review to reconsider the court of appeals' longstanding approach to Section 2255 vagueness claims like petitioner's. See Fernandez v. United States, 146 S. Ct. 294 (2025) (No. 24-7240). Before that, the Court had denied review in dozens of cases presenting the issue in the context of a challenge under Johnson v. United States, 576 U.S. 591 (2015), to a Section 924(e) conviction.

See Beeman v. United States, 586 U.S. 1153 (2019) (No. 18-6385); see also Br. in Opp. at 10 n.1, Fernandez, supra (listing 39 denials of certiorari between 2018 and 2021, including Beeman). That issue has had significantly diminished importance for several years because (1) it can arise only if one of two alternative definitions for a criminal offense has been held constitutionally invalid, and (2) Section 2255 claims arising from the Court's three decisions addressing such definitions -- Johnson (2015); Sessions v. Dimaya, 584 U.S. 148 (2018); and Davis (2019) -- have been foreclosed since at least June 2020 under Section 2255's one-year statute of limitations. See 28 U.S.C. 2255(f)(3). And as the government explained in its brief in opposition in Fernandez, the court of appeals' approach follows from the text of Section 2255 and general principles of postconviction review. See Br. in Opp. 11-18, Fernandez, supra (No. 24-7240).[3]

3. In any event, this case would be an unsuitable vehicle for review for two further reasons. First, petitioner procedurally defaulted his Davis claim. If a prisoner fails to raise a claim on direct appeal, the claim is procedurally defaulted for purposes of collateral review, and a court may not consider the defaulted claim unless the prisoner establishes both "cause" for the default and "actual prejudice," or shows that he is "actually innocent" of

[3] The government has served petitioner with a copy of its brief in opposition in Fernandez, which is also available on this Court's electronic docket.

the offense. Bousley v. United States, 523 U.S. 614, 622-623 (1998) (citations and internal quotation marks omitted). Because the government agreed "in the course of plea bargaining" to dismiss Count 4 -- brandishing a firearm during a crime of violence (specifically, petitioner's completed carjacking offense), in violation of Section 924(c)(a)(A)(ii) -- "petitioner's showing of actual innocence must also extend to [that] charge[]." Id. at 623; see Pet. App. 42a. Petitioner cannot clear the high bar needed to excuse his procedural default. The government asserted that default in the district court when petitioner objected to a magistrate judge's recommended disposition of the case, see D. Ct. Doc. 23, at 1, 6-7 (Feb. 5, 2025), and while petitioner has argued that the government did not thereby adequately preserve the procedural-default defense, he did not contest its application, see D. Ct. Doc. 24, at 2-4 (Feb. 7, 2025).

Second, although the government did not assert a timeliness defense below, petitioner's claim is also untimely, and could be denied on that basis as well. See Wood v. Milyard, 566 U.S. 463, 466 (2012) ("Our precedent establishes that a court may consider a statute of limitations or other threshold bar the State failed to raise in answering a habeas petition."). A Section 2255 motion asserting a "right [that] has been newly recognized by [this] Court and made retroactively applicable to cases on collateral review" must be filed within one year of "the date on which the right

asserted was initially recognized by [this] Court." 28 U.S.C. 2255(f)(3). Petitioner thus needed to file his Davis-based claim no later than June 2020. He missed that deadline by nearly three-and-a-half years.

Although petitioner sought to supplement his Davis claim by relying on this Court's decision in United States v. Taylor, 596 U.S. 845 (2022), which concluded that attempted Hobbs Act robbery does not qualify as a crime of violence under the elements clause at Section 924(c)(3)(A), id. at 860, Taylor cannot make petitioner's Davis claim timely. Taylor's holding is statutory and thus cannot qualify as a "new rule of constitutional law" that might support petitioner's second Section 2255 motion, 28 U.S.C. 2255(h)(2), from which petitioner could have one year to seek collateral relief, 28 U.S.C. 2255(f)(3). In any event, even if the Court's June 2022 decision in Taylor itself restarted the one-year clock, petitioner sought leave to file his second 2255 motion in October 2023 and filed his claim in November 2023, more than a year after Taylor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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