NO. 18-9808

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

MANUEL REYES,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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REPLY BRIEF FOR PETITIONER

I.

The Government fails to address Eleventh Circuit's misapplication of the COA standard.

The second Question Presented in Mr. Reyes' petition for certiorari is:

> Whether the Eleventh Circuit erred under *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003) and *Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017), by denying Petitioner a certificate of appealability based on adverse circuit precedent, when the issue was nonetheless being debated among jurists around the country -- and has since been resolved in Petitioner's favor

Petition for Writ of Certiorari ("Pet.") at i.

The Memorandum for the United States in Opposition ("Mem.") does not address this argument. Instead, the government follows the Eleventh Circuit's lead in skipping over the threshold inquiry of whether Mr. Reyes was entitled to a certificate of appealability ("COA"), and argues against Mr. Reyes' habeas claim on the merits. But whether Mr. Reyes will ultimately prevail on his claim does not determine whether he is entitled to a COA. The granting of a COA simply requires a showing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

A court "should not decline the application for a COA merely because it believes the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). The Court has explained: "We do not require petitioner to prove,

before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

As discussed in Mr. Reyes' petition, the Eleventh Circuit disregards this guidance and precludes the grating of a COA in any case where circuit precedent forecloses a claim. *See* Pet. at 11-14. This is true even where, as here, a split of authority was brewing on a constitutional issue, and it was apparent that the matter would ultimately be resolved by this Court.

Whether the Eleventh Circuit is misapplying the COA standard is a question of obvious importance. The government's failure to even address the Eleventh Circuit's application of *Miller-El* and *Buck v. Davis*, 137 S. Ct. 759 (2017), is thus telling. Not only did the government ignore the question presented here, but it similarly evaded the issue in *Bachiller v. United States*, No. 18-8737 (U.S. June 10, 2019) — another case arising from the Eleventh Circuit that squarely raises the issue. The government's failure to defend the Eleventh Circuit's application of this Court's COA precedents suggests that it is either unwilling or unable to do so.

Importantly, as discussed in the next section, Mr. Reyes would likely be entitled to relief if he filed his 28 U.S.C. § 2255 motion in the Fourth Circuit instead of the Eleventh. The Eleventh Circuit's refusal to even issue a COA under these circumstances thus threatens the equal administration of the laws, and presents a question of exceptional importance warranting the Court's review.

II.

There is a split between the Eleventh and Fourth Circuits regarding whether a defendant's guilty plea to a single disjunctive charge actually establishes multiple variants of the offense.

In this Court, rather than focusing on the flawed reasoning of the Eleventh Circuit, the government adopted the equally flawed reasoning of the district court – which denied relief because the violation 18 U.S.C. § 924(c) to which Mr. Reyes pled guilty alleged multiple predicate crimes. *See* Pet. at 14. This reasoning, which was incorporated into Eleventh Circuit law in *In re Navarro*, 931 F.3d 1298, 1302 (11th Cir. 2019), is inconsistent with both the plain language of § 924(c) and the categorical approach. Furthermore, it is directly contrary to the law of the Fourth Circuit.

In *In re Navarro*, the Eleventh Circuit held that a defendant's guilty plea was "predicated ***both*** on conspiracy to commit Hobbs Act robbery and drug-trafficking crimes." 931 F.3d at 1302 (emphasis added). This ruling conflicts with the law of the Fourth Circuit, which holds that: "when a defendant pleads guilty to a formal charge in the indictment which alleges conjunctively the disjunctive components of a statute, the rule is that the defendant admits to the least serious of the disjunctive statutory conduct." *United States v. Chapman*, 666 F.3d 220, 227-28 (4th Cir. 2012). The *en banc* Fourth Circuit expressly rejected the notion that a defendant admits to multiple versions of a crime when he pleads guilty to a conjunctively-phrased charge. *See United States v. Vann*, 660 F.33d 771, 774 (4th Cir. 2011) (*per curiam* for the *en banc*

majority) ("That Vann's predicate charging documents properly use the conjunctive term "and," rather than the disjunctive 'or,' does not mean that Vann "necessarily" pleaded guilty to subsection (a)(2)."). "That position is untenable, ... as demonstrated by the principles generally applicable to charging documents," which allow prosecutors to charge alternative allegations in the conjunctive, and prove them disjunctively at trial. *See id*. *See also Valansi v. Ashcroft*, 278 F.3d 203, 215-218 (3d Cir. 2002) (finding that specific intent to defraud was not established, where element alleged that the defendant "acted with the intent to injure or defraud").

There is thus a split among the circuits regarding whether a defendant who pleads guilty to a disjunctively-charged crime admits one specified set of facts, or whether he instead pleads guilty to various, alternatively charged versions of the crime. For the reasons that follow, the Fourth Circuit has the better view.

III.

A guilty plea to a single count of violating 18 U.S.C. § 924(c) necessarily rests on one – and only one – predicate crime.

A. The statutory language of 18 U.S.C. § 924(c)(1)(A) demands a single predicate offense.

"When interpreting a statute, we look first to the language." *Richardson v. United States*, 526 U.S. 813, 818 (1999). "This language is conclusive, absent a clearly expressed legislative intent to the contrary." *United States v. Rawlings*, 821 F.3d 1543, 1545 (11th Cir. 1987) (citations omitted). "[W]e must assume that Congress used the words of the statute as they are commonly and ordinarily understood." *Id*.

Title 18 U.S.C. § 924(c) makes it an offense to carry or possess a firearm "during and in relation to any crime of violence or drug trafficking offense." 18 U.S.C. § 924(c) (emphasis added). The statute identifies the predicate offenses disjunctively ("or") and uses the singular form of the words "crime" and "offense." 18 U.S.C. § 924(c). Congress could have written the statute to apply to a "crime or crimes" of violence. But it did not. It clearly and specifically identified a singular "crime" of violence (or drug trafficking "offense") to attach to each count of conviction.

Consistent with this statutory language, the Eleventh Circuit – following an apparent majority of circuits – has held that a separate § 924(c) count may be charged for each separate predicate offense the defendant committed. *See United States v. Hamilton*, 953 F.2d 1344, 1346 (11th Cir. 1992) (collecting cases). *See also In re Gomez,* 830 F.3d 1225, 1227 (11th Cir. July 25, 2016) (holding that an indictment

enumerating two or more predicate crimes in a single § 924(c) count actually alleged two or more separate and independent § 924(c) offenses; "the jurors had multiple crimes to consider in a single count"). These cases confirm the longstanding understanding that the term "crime of violence" in 18 U.S.C. § 924(c)(1)(A), is to be satisfied by proof of a single predicate offense.

This interpretation is bolstered by *Davis'* holding that 18 U.S.C. § 924(c) requires the categorical approach. *Davis v. United* States, 139 S. Ct. 2319, 2329 (2019). Under that approach — which dates back to *Taylor v. United States*, 495 U.S. 575 (1990) — a defendant can be found guilty of committing a specified offense if, and only if, the elements of the defendant's crime "are the same as, or narrower than, those of the generic offense." *See Mathis v. United States*, 136 S. Ct. 2243 (2016). A statute which "list elements in the alternative, and thereby define[s] multiple crimes," is said to be "divisible." *Id.* at 2249. In such cases, the Court may apply the modified categorical approach, and examine a limited universe of documents to determine which, of the several alternative crimes, "necessarily" formed the basis of the conviction. *See Shepard v. United States*, 544 U.S. 13, 21-23 (2005); *Descamps v. United States*, 570 U.S. 254 (2013). The categorical approach applies in the case of guilty pleas as well as trials, and has been consistently applied for nearly 30-years. *See Shepard*, 544 U.S. at 15 (including plea agreement and transcript of plea colloquy among documents the court may consider in determining the nature of the offense); *Descamps*, 133 S. Ct. at 264 ("Applied in that way — which is the only way we have ever allowed — the modified approach merely helps implement the categorical

approach when a defendant was convicted of violating a divisible statute."). Conspicuously absent from the Court's 30-year history of applying the categorical approach, however, is any suggestion that one element of an offense may be satisfied by multiple, alternative sets of facts.

1. Elements must be based on specifically identified facts.

"'Elements' are the 'constituent parts' of a crime's legal definition – the things the 'prosecution must prove to sustain a conviction.' At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Mathis*, 136 S. Ct. at 2449 (citations omitted). "Calling a particular kind of fact an 'element' carries certain legal consequences." *Richardson*, 526 U.S. at 817. Importantly, "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." *Id*. (citations omitted).

A related consequence of calling a particular fact an "element" is that the defendant must be in a "position to understand with some specificity" the basis of the charge against him. *Schad v. Arizona,* 501 U.S. 624, 662-63 (1991) (plurality opinion) (internal citation omitted). "[I]t is an assumption of our system of criminal justice 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' ... that no person may be punished criminally save upon proof of some specific illegal conduct." *Id*. at 633 (internal citations omitted). As Justice Souter wrote: "nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of

embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for examine, would suffice for conviction." *Id.* By definition, therefore, elements must be determined with specificity at the time of the verdict or guilty plea. They are immutable, and cannot later be exchanged for a substitute set of facts. In a word, they are not fungible.

2. The "crime of violence" is an element which must be unanimously determined by the jury or identified at the time of the guilty plea.

The government does not dispute, of course, that the "crime of violence" is an element of 18 U.S.C. § 924(c)(1)(A). Nonetheless, the *Richardson* Court's discussion of the continuing criminal enterprise ("CCE") statute, 18 U.S.C. § 848(a), sheds light on the issues herein.

In *Richardson*, the Court determined that each "violation" in a "series of violations" was an element of CCE offense under § 848(a). *See Richardson*, 526 U.S. at 818. Although the statutory language was inconclusive, it was also "not totally neutral." *Id*. This was because "[t]he words 'violates' and 'violations' are words that have a legal ring. A 'violation' is not simply an act or conduct; it is an act or conduct that is contrary to law." *Id*. at 818-819. "To hold that each 'violation' here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant engaged in conduct that violates the law. To hold to the contrary is not." *Id.* at 819. Thus, the jurors in *Richardson* were required to agree on which three "violations" constituted the "series of violations" under the statute.

Similarly, here, 18 U.S.C. § 924(c) makes it a crime to carry, use, or possess a firearm in connection with any "crime of violence .... for which the person may be prosecuted in a court of the United States." The statute thus requires a finding that the defendant has "engaged in conduct that violates the law;" and this finding is an element requiring unanimity. *See Richardson*, 526 U.S. at 819. Hence, a jury in a § 924(c) case must agree as to which specific "crime of violence" or "drug trafficking offense" the defendant committed with the assistance or possession of a firearm.

As a necessary corollary to the above, when a defendant pleads guilty to a single count of violating 18 U.S.C. § 924(c), he is pleading guilty to a single set of elements, including a specifically identified predicate crime. "And there's the constitutional rub." *Descamps*, 570 U.S. at 270. "The Sixth Amendment contemplates that a jury ... will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances." *Id.*, *citing*, "*e.g.*," *Richardson*, 526 U.S. at 817. "Similarly, when a defendant pleads guilty to a crime, he waives his right to a jury determination only of that offense's elements; whatever he says, or fails to say, about superfluous facts" is "irrelevant." *Decamps*, 507 U.S. at 270.

"A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense – and may have good reason not to." *Id.* For example, "during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations." *Id.* (emphasis added). That does

not mean, of course, that he pled guilty to distinct, alternative crimes made up of facts that were legally "superfluous" at the time of the plea hearing. Rather, the Court in such a case will use the modified categorical approach to determine "which," of "several different crimes" necessarily "formed the basis of the defendant's conviction." *Id.* at 263 (citing *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009)). The focus remains "on the elements, rather than the facts, of a crime." *Id.*

The government's reliance on the "brute facts" of the case (Mem. at 5-6) is thus misplaced. *Mathis*, 136 S.Ct. at 2248. "These are 'circumstance[s]' or 'event[s]' having no 'legal effect [or] consequence'" *Id.* "And ACCA [and, hence, the categorical approach] ... cares not a whit about them." *Mathis*, 136 S. Ct. at 2249. This is true whether or not the defendant admitted to them. *See Descamps*, 570 U.S. at 270 ("Whether Descamps did break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant") (emphasis in original).

Under the modified categorical approach, if it is unclear which of several alternative versions of an offense the defendant pled guilty to, the Court "must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized." *See Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (citing *Johnson v. United States*, 559 U.S. 133, 137 (2010)). The Court may not do what the district court did here — and substitute an alternative set of facts that may or may not have formed the basis of the charge at the time of the plea.

3. The modified categorical approach is consistent with the *Stromberg* line of cases.

In this sense, the modified categorical approach is consistent with a line of precedent stemming from *Stromberg v. California*, 283 U.S. 359 (1931), and *Yates v. United States*, 354 U.S. 298 (1957), *overruled in part on other grounds Burks v. United States*, 473 U.S. 1 (1978).

"[T]he law is well established that where an indictment charges in the conjunctive several means of violating a statute, a conviction may be obtained on proof of only one of the means, and accordingly the jury instructions may properly be framed in the disjunctive." *United States v. Simpson*, 228 F.3d 1294, 1300 (11th Cir. 2000). In such a case, the government has charged "more than was required by the statute." *See id.* But it does not follow that a defendant convicted on a general verdict is thereafter guilty of multiple, alternative versions of the crime.

Were that the case, there would have been no need for the Court to hold — as it has for nearly a century — that *vacatur* is required where it is "impossible to tell" whether a defendant was convicted based on an unconstitutional alternatively-phrased ground. *See, e.g.*, *Stromberg*, 283 U.S. at 368; *Yates*, 354 U.S. at 312. *See also Williams v. North Carolina*, 317 U.S. 287, 292 (1942) ("To say that a general verdict of guilty should be upheld even though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights.").

Importantly, while *Stromberg* and *Yates* involved convictions which might have rested on constitutionally protected conduct, in *Black v. United States*, 561 U.S. 465 (2010), the Court invoked *Yates* where the defendant might have been convicted – as in this case – of an unconstitutionally vague offense. *Black* was issued the same day as *Skilling v. United States*, 561 U.S. 358 (2010), and involved a challenge to the defendants' convictions under the unconstitutionally vague "honest services" theory of wire fraud. The Court reaffirmed that "[u]nder the rule declared by this Court in *Yates v. United States* ... a general verdict may be set aside 'where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.'" *Black*, 501 U.S. at 470.

In none of these cases did the Court find that the defendant was really convicted on multiple, alternative grounds. Indeed, the Court has "made clear that the reasoning of *Stromberg* encompasses a situation in which the general verdict on a single-count indictment or information rested on both a constitutional and an unconstitutional ground." *See Zant v. Stephens*, 462 U.S. 862 (1983) (citing *Thomas v. Collins*, 323 U.S. 516, 528-29 (1945), and *Street v. New York*, 394 U.S. 576, 586-590 (1969)). In such a case, "the judgment ... must be affirmed as to both or as to neither." *Thomas*, 323 U.S. at 529. And, the fact that the defendant entered a guilty plea makes no difference. *See Vann*, 660 F.3d at 774 (rejecting this view).

This is not a multiplicity claim, as suggested by the district court. *See* Mem. at 4 (citing Pet. App. A6 at 7). Mr. Reyes has never argued that his conviction should be vacated merely because the charge was multiplicitous. He simply argues that the

elements of his offense must be determined according to the long-established principles discussed above. Following these principles, as recognized by the Fourth Circuit, Mr. Reyes is entitled to relief. *See Chapman*, 666 F.3d at 228 ("[T]he rule is that the defendant admits to the least serious of the disjunctive statutory conduct."). The result should be no different because he was convicted in the Eleventh.

B. Mr. Reyes can show cause and prejudice for the default.

The government notes that Mr. Reyes procedurally defaulted his *Davis* claim by failing to raise it on direct appeal. But Mr. Reyes can demonstrate cause for any default because he was sentenced after this Court twice squarely rejected a vagueness challenge to ACCA's residual clause. *See Sykes v. United States*, 564 U.S. 1, 15 (2011); *James v. United States*, 550 U.S. 192, 210 n.6 (2007). The Court expressly overruled that precedent in *Johnson v. United States,* 135 S. Ct. 2551, 2563 (2015), and gave it retroactive application in *Welch v. United States*, 136 S. Ct. 1257 (2016). The Court has recognized that cause exists under precisely these circumstances – namely, where it "articulate[s] a constitutional principle that had not been previously recognized," that "explicitly overrule[d] one of [its] precedents," and "is held to have retroactive application." *Reed v. Ross*, 468 U.S. 1, 17 (1984). Under those rare circumstances, which exist here, the Court explained that "there will almost certainly [be] no reasonable basis upon which an attorney previously could have urged a . . . court to adopt the position that this Court has ultimately adopted." *Id.* Because the issue was foreclosed by precedent of this Court, the claim was unavailable to petitioner, thus providing cause for the default.

And, Mr. Reyes has suffered prejudice in the form of an unconstitutional conviction and consecutive sentence. "There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and present(s) exceptional circumstances that justify collateral relief under § 2255." *Davis v. United States*, 417 U.S. 333, 346-47 (1974).

Wherefore, Mr. Reyes respectfully asks the Court to issue the writ.

CONCLUSION

For the reasons stated herein and in his initial Petition for Writ of Certiorari, Mr. Reyes respectfully asks the Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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