NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

CARLOS GRANDA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should resolve the three-way circuit split regarding whether, and under what circumstances, a movant's procedural default may be excused because his constitutional vagueness challenge was "not reasonably available" prior to *Johnson v. United States*, 576 U.S. 591 (2015).

2. Whether a general verdict that was obtained in reliance on the unconstitutionally vague residual clause in 18 U.S.C. § 924(c)(3)(B), may be sustained based on the reviewing court's finding that the jury also relied on a valid basis to convict.

INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), Mr. Granda submits that there are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

The following proceedings directly relate to the case before the Court:

1. *United States v. Granda*, 1:07-cr-20155-DMM (S.D. Fla. Aug.3, 2007), *aff'd, United States v. Granda*, No. 07-14101, 346 F. App'x 524 (11th Cir. Sept. 29, 2009), *cert. denied*, No. 09-10921 (U.S. Mar. 1, 2010).

2. *Granda v. United States*, 1:11-cv-21283-DMM (S.D. Fla. Dec. 12, 2011), *appeal dismissed*, *Granda v. United States*, No. 12-13189-D (11th Cir. Nov. 19, 2012).

3. *Granda v. United States,* 1:13-cv-21801-DMM (S.D. Fla. June 19, 2013), *motion for COA denied*, *Granda v. United States*, No. 14-10307 (11th Cir. Aug. 21, 2014), *cert. denied*, *Granda v. United States*, No. 14-7895 (U.S. Feb. 23, 2015).

4. *In re: Carlos Granda*, No. 16-14674 (11th Cir. Aug. 8, 2016); *Granda v. United States*, 1:16-cv-23426-DMM (S.D. Fla. Nov. 1, 2017), *aff'd, Granda v. United States,* 990 F.3d 1272 (11th Cir. 2021).

5. *In re: Carlos Granda*, No. 20-12136-E (11th Cir. July 1, 2020); *Granda v. United States*, 1:20-cv-22610-DMM (S.D. Fla. June 21, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-15194, in that court on March 11, 2021. *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), *reh'g denied*, (11th Cir. June 2, 2021).

OPINION BELOW

The Eleventh Circuit decision under review, *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), *reh'g denied*, (11th Cir. June 2, 2021), is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The Eleventh Circuit's decision was entered on March 11, 2021. Mr. Granda timely filed a petition for rehearing *en banc*, which was denied on June 2, 2021. This petition is timely filed pursuant to SUP. CT. R. 13.1 and the Court's March 19, 2020 Order, temporarily extending the time to file petitions for certiorari to 150 days from the judgment of the lower court. The Eleventh Circuit had jurisdiction over this case pursuant to 28 U.S.C. §§ 1291, 2253, and 2255(d).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 924(c)(1)(A)

(1)(A) 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;

....

18 U.S.C. § 924(o)

A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm or silencer or muffler, shall be imprisoned for any term of years of life.

STATEMENT OF THE CASE[1]

In February 2007, Carlos Granda was arrested in a reverse-sting operation, after he "served as the lookout for a criminal crew that attempted to rob a tractor trailer purportedly filled with sixty to eighty kilograms of cocaine." *Granda v. United States*, 990 F.3d 1272, 1280 (11th Cir. 2021), *reh'g denied*, (11th Cir. June 2, 2021). He was named in 7 counts of an 8-count superseding indictment. (Cr-DE 61). Count 1 charged a conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846. (Cr-DE 61:1-2). Count 2 alleged that Mr. Granda and his co-defendants attempted to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2. Count 3 charged a conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a). (Cr-DE 61:3). Count 4 alleged that the defendants attempted to commit Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2. Count 5 charged an attempted carjacking in violation of 18 U.S.C. §§ 2119 and 2. (Cr-DE 61:3-4).

Count 6, at issue herein, alleged a conspiracy to use and carry, or to possess, a firearm in connection with "a crime of violence and a drug trafficking crime," as

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[1] Citations to record in the district court will be referred to by the abbreviation "Cv-DE " followed by the docket entry number and the page number. Citations to record in the underlying criminal case, *United States v. Granda et. al*., 1:07-cr-20155-DMM (S.D. FL. Apr. 24, 2007), will be referred to by the abbreviation "Cr-DE " followed by the docket entry number and the page number.

alleged in Counts 1, 2, 3, 4, and 5, in violation of 18 U.S.C. § 924(o). (Cr-DE 61:4-5). Count 7 alleged that each defendant "did knowingly use and carry" or possess a firearm in connection with "a crime of violence and a drug trafficking crime," as alleged in Counts 1, 2, 3, 4, and 5, in violation of 18 U.S.C. § 924(c). (Cr-DE 61:5-6).

The jury found Mr. Granda guilty of Counts 1, 2, 3, 4, 5, and 6, and not guilty of Count 7, the substantive § 924(c) count. The jury made no findings as to which predicate offense (or offenses) formed the basis for the § 924(o) charge in Count 6. (Cr-DE 203).

The district court sentenced Mr. Granda to 360 months' imprisonment, consisting of 360-month terms as to Counts 1 and 2, 180 months as to Count 5, and 240 months as to Counts 2, 4, and 6, all running concurrently. (Cr-DE 247). The sentence was later reduced to 324 months pursuant to Amendment 782 to the United States Sentencing Guidelines. (*See* Cr-DE 352:2).

In his direct appeal, Mr. Granda argued that the evidence was insufficient to prove that he knew the object of the conspiracy was a robbery of cocaine. *See United States v. Granda*, 346 F. App'x 524, 526 (11th Cir. Sept. 29, 2009). The court of appeals acknowledged that the evidence establishing Granda's knowledge of the cocaine robbery was circumstantial, but held that "[t]he cumulative effect of the circumstantial evidence" was sufficient to sustain the conviction. *Id.*

On August 8, 2016, the Eleventh Circuit granted Mr. Granda leave to file a second or successive motion pursuant to 28 U.S.C. § 2255(h), based *Johnson v. United*

States, 135 S. Ct. 2551 (2015). In *Johnson*, this Court invalidated the so-called "residual clause" in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), as unconstitutionally vague. Mr. Granda argued that *Johnson* rendered the residual clause in 18 U.S.C. § 924(c)(3)(B), unconstitutional as well.

On November 17, 2016, Granda filed a *pro se* motion to vacate his conviction in Count 6, in the district court. (*See* Cv-DE 10).[2] The government responded that *Johnson* had not invalidated the residual clause of § 924(c), and that Granda had procedurally defaulted his claim. (Cv-DE 12:4-9).

On July 5, 2017, a United States Magistrate Judge recommended that Mr. Granda's claim be denied. (Cv-DE 19). The magistrate judge found that Granda could show cause for the default, because "[w]here the Supreme Court explicitly overrules well-settled precedent and gives retroactive application to that new rule after a litigant's direct appeal '[b]y definition' a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal." (Cv-DE 19:6) (citing *Reed v. Ross*, 468 U.S. 1, 17 (1984)). The magistrate found, however, that Granda could not establish prejudice because the indictment alleged alternative

[2] Although the *pro se* pleading referred to Mr. Granda's "current 18 U.S.C. § 924(c) conviction," it was clear that Granda was referring to the § 924(o) conviction in Count 6.

predicate offenses, which would have been "independently sufficient to sustain Movant's § 924(o) conviction." (Cv-DE 19:6).

The district court adopted the R&R in part, and denied the claim. (Cv-DE 23). In light of then-controlling circuit precedent, *see Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), *on rehearing en banc*, 905 F.3d 1321 (11th Cir. 2018) (en banc), and *abrogated by United States v. Davis*, 139 S. Ct. 2319 (2019), the court found that Mr. Granda's constitutional challenge failed on the merits. (Cv-DE 23:6). The court alternatively found that, even if *Johnson* invalidated § 924(c)(3)(B), Granda could not establish prejudice. (Cv-DE 23:5-6). Nonetheless, the court granted a certificate of appealability "as to whether *Johnson* applies to § 924(o) and if so, whether Movant has met his burden of proving that he is entitled to relief under *Johnson*." (Cv-DE 23:7).

While the case appeal was pending, this Court held in *United States v. Davis*, 139 S. Ct. 2319 (2019), that the residual clause § 924(c)(3)(B) is unconstitutionally vague, and abrogated the Eleventh Circuit's contrary ruling in *Ovalles*. The court of appeals thereafter appointed counsel to represent Mr. Granda, and a new round of briefing ensued.

The Opinion Below

On March 11, 2021, the Eleventh Circuit issued a published decision affirming the decision of the district court. *Granda v. United States*, 990 F.3d 1282 (11th Cir. 2021) *reh'g denied*, (11th Cir. June 2, 2021). A majority of the panel found that Mr. Granda's claim was procedurally defaulted, and that he could establish neither cause and prejudice, nor actual innocence, to overcome the default.[3]

The court wrote that "Granda's best argument," with respect to cause, was that *James v. United States*, 550 U.S. 192 (2007) "had directly rejected the argument that the ACCA's residual clause was unconstitutionally vague" at the time of Granda's direct appeal. *See Granda*, 990 F.3d at 1287. "However," the court wrote, "*James* did not consider the § 924(c) residual clause at all." *Id.* The Eleventh Circuit reasoned that the dissenting Justices in *James* signaled that they "were interested in entertaining vagueness challenges to ACCA's residual clause, and perhaps to similar statutes," and that other defendants had raised vagueness challenges to ACCA's residual clause after *James*. *See id*. "These claims did not succeed. But if *James* did not deprive litigants of the tools to challenge even the ACCA's residual clause on

[3]Judge Jordan would not have reached the issue of procedural default and did not join in that portion of the opinion. *See Granda*, 990 F.3d at 1296 (Jordan, J., concurring in part and concurring in the judgment).

vagueness grounds, it surely did not deprive them of the tools to challenge the § 924(c) residual clause." *Id.*

The court further reasoned that Granda did not lack the "building blocks" to raise a due process vagueness challenge at the time. Although "few courts, if any," had addressed a vagueness challenge to § 924(c)(3)(B), "as a general matter, due process vagueness challenges to criminal statutes were commonplace. *Id.* "The tools" thus "existed" to challenge § 924(c)'s residual clause before Granda's direct appeal, and he could not show cause for his default. *See id.* at 1288.

As to prejudice, the court held it was "not enough for Granda to show that the jury may have relied on the Count 3 Hobbs Act conspiracy conviction as the predicate for his Count 6 § 924(o) conviction." *Id.* Granda had to show "at least a 'substantial likelihood' that the jury ***actually relied***" and "***only***" relied on the Hobbs Act conspiracy as a predicate for the § 924(o) conviction. *Id.* (emphasis in original). The court held that Granda could not make that showing because "the jury could not have concluded that Granda conspired to possess a firearm in furtherance of his robbery conviction without also finding at the same time that he conspired to possess the firearm in furtherance of his conspiracy and attempt to obtain and distribute the cocaine, his attempt at carjacking, and the attempt at the robbery itself." *See id.* at 1288-1289. The "same shortcoming" prevented Mr. Granda from showing actual innocence. The fact that the remaining offenses were "inextricably intertwined" with

the Hobbs Act conspiracy made it "impossible for Granda to show that his § 924(o) conviction was in fact based on the conspiracy-to-rob predicate." *Id.* at 1292.

Even if the claim were not defaulted, the court held that "the same problem would rear its head again on the merits." *Id.* In the Eleventh Circuit's view, "[t]he inextricability of the alternative predicate crimes compelled the conclusion that the error ... was harmless." *Id.* There was "little doubt that if the jury found Granda conspired to possess a firearm in furtherance of his conspiracy to commit Hobbs Act robbery, it also found that he conspired to possess a firearm in furtherance of the other crime-of-violence and drug-trafficking predicates on which the jury convicted him." *Id.* The court rejected Mr. Granda's argument that *Stromberg v. California*, 283 U.S. 359 (1931) limited its inquiry to a review of the indictment, jury instructions, and verdict form. It further dismissed his argument that the court should apply the categorical approach to determine which predicate offense formed the basis for the jury's verdict. *See Granda*, 990 F.3d at 1295.

This petition follows.

REASONS FOR GRANTING THE PETITION

Overview

This case presents two important questions of federal law stemming from the changes brought about by *Johnson v. United States*, 576 U.S. 591 (2015), and *United States v. Davis*, 139 S. Ct. 2319 (2019), warranting the Court's review.

I. There is an irreconcilable, three-way circuit split, regarding whether and under what circumstances adverse authority may provide cause to overcome a procedural default. In *Reed v. Ross*, this Court stated that such cause may exist where a decision of the Court expressly overrules one of its precedents, or overturns a "longstanding and widespread practice ... which ... a near-unanimous body of lower court authority" has approved. 468 U.S. 1, 10, 17 (1985). While some circuits continue to follow this guidance, others, including the Eleventh, hold that intervening decisions of this Court have either limited, or eliminated, the circumstances in which "novelty" may provide cause for a default.

Applying *Ross*, the Seventh and Tenth Circuits have held that counsel's reasonable failure to anticipate the change in law occasioned by *Johnson* established cause for a procedural default. The Sixth Circuit "part[ed] ways" with those courts, and held that cause may be shown, under *Reed*, only where this Court expressly overturns one of its own precedents. In contrast to both of these positions, the Eleventh Circuit has interpreted intervening decisions of this Court to reject the

premise that futility, even in the face of an adverse ruling from this Court, may ever provide cause for a default.

The split had a determinative impact in this case. Because Mr. Granda's appeal was decided after this Court rejected a constitutional vagueness claim in *James v. United States*, 550 U.S 192 (2007), he would have been able to bring his claim in the Sixth, Seventh, or Tenth Circuits. The Eleventh Circuit, however, held that Mr. Granda could ***not*** establish cause, because the "building blocks" of a vagueness claim existed, notwithstanding this Court's express rejection of the claim.

The circumstances under which a petitioner can show cause for a default is a fundamental question of federal law and procedure, having far-reaching and obvious importance. The split is longstanding, entrenched, and unlikely to go away without this Court's intervention.

II. Review is further warranted because this case presents a constitutional question that has been left unresolved by previous decisions of the Court. "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." *Leary v. United* States, 395 U.S. 6, 31-32 (1969) (citing *Stromberg v. California*, 283 U.S. 359 (1931)). In *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (*per curiam*), the Court held that such errors are not structural, and do not require reversal in the absence of prejudice. *Pulido*, however, left the standard by which harmlessness is to be assessed in this context unspecified.

The standard was again left undefined in *Skilling v. United States,* 561 U.S. 358 (2010), after the Court held that one of theories under which the defendant may have been convicted of fraud was invalid. The government argued that error is harmless when a conviction based on a legally invalid theory logically entails conviction on a legally valid theory. The defendant argued that the government must show that the "conviction rested ***only***" on the legally valid theory. *See Skilling*, 561 U.S. at 414. The Court "[left] this dispute for resolution on remand" *id.,* and the circuits are in disarray.

It was undisputed that the jury in Mr. Granda's case most likely relied on the unconstitutional residual clause. The Eleventh Circuit found the error harmless, however, based on its belief that the jurors must additionally have relied on one or more valid bases to convict. But this Court has repeatedly held that a conviction based on both a valid *and* constitutionally invalid theory cannot stand; and there is no reason to believe that *Pulido* undermined those holdings. Nonetheless, the circuits have jettisoned the Court's precedents on this issue, and failed to develop a coherent means of evaluating prejudice in their stead. The Eleventh Circuit's reasoning raises a host constitutional problems, and conflicts with decisions of the Second and Fifth Circuits, which have applied the modified categorical approach to determine which of multiple alleged predicate offenses formed the basis of a § 924 conviction. *See United States v. Heywood*, 3 F.4th 75 (2d Cir. 2021); *United States v. McClaren*, 13 F.3d 386, 413-14 (5th Cir. 2021).

I.

The Court should resolve the three-way circuit split regarding whether, and under what circumstances, a movant's procedural default may be excused because his constitutional vagueness challenge was "not reasonably available" prior to *Johnson v. United States*, 576 U.S. 591 (2015).

A. Background

1. In *Johnson v. United States*, 576 U.S. 591 (2015), the Court declared the so-called "residual clause" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(ii)(B)(ii), – which defines the term "violent felony" to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another" – unconstitutionally vague. In the Court's view, the process of determining what is embodied in the "ordinary case" of an offense, and then of quantifying the "risk" posed by that ordinary case, "offer[ed] no reliable way to choose between . . . competing accounts of what 'ordinary' . . . involves." *Johnson*, 576 U.S. at 598. The Court concluded that the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by Judges," in violation of due process. *Id.* at 597.

Johnson was a marked break in the law. The Court had spent "[n]ine years ... trying to derive meaning from" and "develop the boundaries of" the residual clause. *See id*. at 606; *Welch v. United States*, 578 U.S. 120, 136 S. Ct. 1257, 1262 (2016) (citing *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Sykes v. United States*,

564 U.S. 1 (2011)). In both *James* and *Sykes*, the Court rejected the constitutional vagueness challenge that would ultimately prevail. *See James* 550 U.S. at 211 n.6, *overruled by Johnson*, 576 U.S. at 606; *Sykes*, 564 U.S. at 15-16*, overruled by Johnson*, 576 U.S. at 606. In *Welch*, the Court held that *Johnson* was a substantive change in law, that applied retroactively on direct appeal.

Mr. Granda filed an authorized successive habeas petition, challenging his conviction in Count 6, in light of *Johnson* and *Welch*. Mr. Granda was convicted in Count 6 of conspiring to violate 18 U.S.C. § 924(c), which defines a "crime of violence" to include a felony offense "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." 18 U.S.C. § 924(c)(3)(B). While his claim was on appeal, this Court issued *United States v. Davis*, 139 S. Ct. 2319 (2019), which applied *Johnson* to invalidate § 924(c)(3)(B) as unconstitutionally vague. It was thus clear that *Johnson* applied to his claim. The Eleventh Circuit held, however, that the claim was defaulted and Mr. Granda could not show cause to overcome the default.

2. As a "general rule ... claims not raised on direct review may not be raised on collateral review unless the petitioner shows caused and prejudice." *Massaro v. United States*, 538 U.S. 500, 504 (2003) (citing *United States v. Frady*, 456 U.S. 152, 167-168 (1982); *Bousley v. United States* 523 U.S. 614, 621-622 (1998)). "The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the

law's important interest in the finality of judgments." *Masarro*, 538 U.S. at 505. "This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." *Reed v. Ross*, 468 U.S. 1, 10 (1984)

There are circumstances, however, where it is neither efficient nor fair to prohibit a petitioner from raising a new claim on collateral review. In *Reed*, the Court held that "the novelty of a constitutional issue" and the "failure to counsel to raise a constitutional issue reasonably unknown to him" may provide "cause" sufficient to overcome a procedural default. *Id*. at 10, 15. The *Reed* opinion lists "three situations in which a 'new' constitutional rule, representing 'a clear break with the past' might emerge from this Court" and provide cause to overcome a procedural bar. *Reed*, 468 U.S. at 17 (quotation omitted).

> First, a decision of this Court may explicitly overrule one of our precedents. ... Second, a decision may 'overtur[n] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.' ... And, finally, a decision may 'disapprov[e] a practice this Court has arguably sanctioned in prior cases.

Id. (citations omitted).

As discussed below, there is a three-way split among the courts of appeals, regarding whether *Johnson* provides cause under this standard.

B. The circuits have divided three ways over whether adverse authority provides cause.

1. Applying a straightforward application of *Reed*, the Seventh and Tenth Circuits have found that the unavailability of a constitutional vagueness claim, prior to *Johnson*, provided cause to excuse a default. In *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017), the Tenth Circuit held that a *Johnson* claim was not reasonably available at the time of the defendant's direct appeal. "As is relevant here, the Supreme Court has stated that, if one of its decisions 'explicitly overrule[s]' prior precedent when it articulates 'a constitutional principle that had not been previously recognized but which is held to have retroactive application," then, prior to that decision, the new constitutional principle was not available to counsel, so defendant has cause for failing to raise the issue." *Snyder*, 871 F.3d at 1127 (citing *Reed*, 468 U.S. at 17).

The court found this was "precisely the situation" where the petitioner had failed to challenge his ACCA sentence, based on the unconstitutionality of the residual clause, on direct appeal. *Id*. at 1127. "As the District of Colombia Circuit has noted, 'it is fair to say that no one –the government, the judge, or the [defendant] – could reasonably have anticipated *Johnson*.'" *Id*. (quoting *United States v. Redrick*, 841 F.3d 478, 480 (D.C. Cir. 2016)). This was true even though the defendant had been sentenced prior to the Court's express rejection of the claim in *James*. *See Snyder*, 871 F.3d at 1127 ("In fact, between the time we affirmed Snyder's sentence on direct appeal and the time *Johnson* was issued, the Supreme Court twice rejected

the constitutional challenges to the ACCA's residual clause.") (citing *Sykes*, 561 U.S. 1 (2011), and *James*, 55 U.S. 192 (2007)). The Tenth Circuit concluded "that the *Johnson* claim was not reasonably available to Snyder at the time of his direct appeal, and that this is sufficient to establish clause." *Id.* at 1127.

The Seventh Circuit followed *Snyder*, and found cause for a defendant's failure to bring a residual clause challenge under the mandatory guidelines, explaining that "*Johnson* represented the type of abrupt shift with which *Reed* was concerned." *Cross v. United States*, 892 F.3d 288, 295 (7th Cir. 2018).

> Until *Johnson*, the Supreme Court had been engaged in a painful effort to make sense of the residual clause. In *James*, it took the position that the validity of the residual clause was so clear that it could summarily reject Justice Scalia's contrary view in a footnote. That footnote provided no argument, noted that the constitutional issue was not even "pressed by James or his *amici*," and took comfort from the broad use of "[s]imilar formulations" throughout the statute books. *James*, 550 U.S. at 210 n.6, 127 S.Ct. 1586. Eight years later, the Court made a U-turn and tossed out the ACCA residual clause as unconstitutionally vague.

Id. at 295-96.

The Seventh Circuit thus "join[ed] the Tenth Circuit" in excusing the petitioners' failure to challenge the constitutionality of the residual clause "under *Reed*'s first category," *i.e.*, where the Court expressly overrules its own precedent. *See Cross*, 892 F.3d at 296 (citing *Snyder*, 871 F.3d at 1125, 1127). The Seventh Circuit held, moreover, that the "second and third scenarios identified by *Reed* present[ed] even more compelling grounds to excuse" the defaults, because "*Johnson* abrogated a substantial body of circuit court precedent upholding the residual clause against

vagueness challenges." *Id.* (citations omitted). No court "ever came close to striking down the residual clause ... or even suggested that it would entertain such a challenge." *Id.* "Finally, the Supreme Court had implicitly 'sanctioned' the residual clause by interpreting it as if it were determinate." *Id.* (citations omitted). "Thus," in the Seventh Circuit, a party's "inability to anticipate *Johnson* excuses their procedural default." *Cross*, 892 F.3d at 296.

2. The Sixth Circuit "part[ed] ways" with these holdings, in *Gatewood v. United States*, 979 F.3d 391 (6th Cir. 2020), because there had been no binding precedent of this Court foreclosing the claim at the time of the petitioner's direct appeal. *See Gatewood*, 979 F.3d at 397-98 ("In so holding, we part ways with the Seventh and Tenth Circuits, which have concluded that, under *Reed*, *Johnson*'s overruling of *James* and *Sykes* creates cause even for petitioners whose convictions became final before *James* was decided."), *cert. denied*, 141 S. Ct. 2798 (U.S. June 21, 2021). In the Sixth Circuit, *Johnson* will provide cause only for defendants whose cases became final after this Court foreclosed the argument in *James*. *See id.* at 397-398 (distinguishing *Raines v. United States*, 898 F.3d 680 (6th Cir. 2018), on this ground).

The Sixth Circuit rejected the argument that a default could be excused based on a "near-unanimous body" of adverse circuit authority. *Id.* at 395 (citations omitted). While "*Reed* did suggest that this species of 'novelty,' later described by the Court as 'futility' could excuse procedural default," the court found that *Bousley v.*

United States, 523 U.S. 614, 622 (1998), and *Smith v. Murray*, 477 U.S. 527, 536 (1986) have narrowed *Reed* to the point where futility exists only where precedent of this Court forecloses the claim. *See id.* (citations omitted).

> When, at the time of default, a petitioner's argument was foreclosed by Supreme Court precedent, then "[b]y definition, ... there will almost certainly have been no reasonable basis upon which an attorney ... could have urged a ... court to adopt the position that [the Supreme] Court has ultimately adopted. *Reed,* 468 U.S. at 17, 104 S. Ct. 2901. At that point in time, every court in the country would have been bound to reject the argument. But when, at the time of default, the Supreme Court had not yet foreclosed the argument, the argument was not "[b]y definition" futile, because that that time state courts, lower federal courts, and the Supreme Court itself still remained free to adopt it. *Reed*'s discussion of cases where the Supreme Court "explicitly overrule[s] one of [its] own precedents," *id.*, thus must be read as taking for granted that, at the time of default, the precedent that would later be overturned was the law of the land.

Id. at 398.

Thus, in the Sixth Circuit, "[a] claim foreclosed by Supreme Court precedent the time of default qualifies as actually futile, whereas a claim foreclosed by lower court precedent does not." *Id*. at 397 (citation omitted). *See also United States v. Moss*, 252 F.3d 993 (8th Cir. 2001) (questioning *Reed*'s vitality and finding that this Court "has rejected the argument that default can be excused when existing lower court precedent would have rendered a claim unsuccessful.") (citing *Bousley*, 523 U.S. at 623).

3. In contrast to the Sixth Circuit, as well as the Seventh and Tenth, the Eleventh Circuit held that Granda's claim was "not sufficiently novel to establish cause," notwithstanding the fact that his appeal was decided after *James*. *See*

Granda, 990 F.3d at 1286. *Reed* held that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim." *Reed*, 468 U.S. at 16. According to the Eleventh Circuit, however, "[t]hat an argument might have less than a high likelihood of success has little to do with whether the argument is available or not." *Granda*, 990 F.3d at 1286 (quotation omitted). "[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was available at all." *Id.* (citing *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001) (internal quotation marks and further citation omitted)).

The court had previously rejected, in *McCoy*, the premise that default could be excused by the existence of a wall of adverse circuit authority. *See McCoy*, 266 F.3d at 1249. "The problem with that position," according to the Eleventh Circuit, was that this Court "could not have been clearer that perceived futility does not constitute cause to excuse a procedural default." *McCoy*, 266 F.3d at 1259 (citing *Bousley*, 523 U.S. at 623 and *Smith*, 477 U.S. at 535). "Unless and until the Supreme Court overrules its decision that futility cannot be cause, laments about those decisions forcing defense counsel to file 'kitchen sink briefs' in order to avoid procedural bars, ... are beside the point." *Id.* (internal citation omitted).

C. The decision below is wrong.

In *McCoy*, the Eleventh Circuit found that *Bousley* and *Smith* abrogated *Reed sub silento*, by holding that a petitioner cannot show cause to excuse a procedural default "simply" because a particular legal claim was "unacceptable to [a] particular court at [a] particular time," and "perceived futility alone cannot constitute cause.'" *McCoy*, 266 F.3d at 1259 (quotations omitted). The Eleventh Circuit – like the Sixth Circuit in *Gatewood* and the Eighth Circuit in *Moss* – further concluded that under *Bousley*, long-standing practice and near-unanimous circuit precedent foreclosing a claim cannot excuse procedural default. *See McCoy*, 266 F.3d at 1258-59; *Moss*, 252 F.3d at 1002; *Gatewood*, 979 F.3d at 395-96.

But *Bousley* did not say it was overruling *Reed*. *See Bousley,* 523 U.S. at 622 (citing *Reed*). And *Bousley* is not inconsistent with *Reed*. *See McCoy*, 266 F.3d at 1273 (Barkett, J., concurring) ("A careful reading of *Bousely* and the cases on which it relies makes clear that the Supreme Court did not pronounce nearly as broadly as the majority suggests."). Rather, *Bousley* addressed the completely different situation in which a petitioner failed to raise a claim on direct review that was then being litigated throughout the country, and had even generated a circuit split. *See Bailey v. United States*, 516 U.S. 137, 142 (1995) (noting conflict in circuits on claim at issue in *Bousley*). "Indeed, at the time of petitioner's plea, the Federal Reports were replete with cases involving" the petitioner's claim. *Bousley*, 523 U.S. at 622 (citations omitted). In that situation, the Court held that a petitioner could not show cause to

overcome a default. *Id*. But that holding does not affect *Reed's* discussion of other circumstances in which a petitioner can show cause to overcome procedural default. *See Reed*, 468 U.S. at 17. *See also McCoy,* 266 F.3d at 1273 (Barkett, J., concurring) ("It is one thing to preclude, as an excuse, the wholesale speculation that an argument not presented in the state courts would be futile; it is quite another to say that cause should not be recognized when a lawyer declines to make an argument in federal court because every single appellate court has already ruled against his position.") (emphasis omitted).

Mr. Granda would have been able to overcome a default in the Sixth, Seventh, or Tenth Circuits. The Eleventh Circuit's jurisprudence on out of step its peers and contrary to the precedent of this Court. Because this case presents an important and recurring question of federal law on which the circuits are divided, the Court should grant review.

II.

A conviction obtained in reliance on an unconstitutional ground may not be sustained based on a reviewing court's finding that the jury additionally relied on one or more valid bases to convict.

A. Prior to 2008, it was clear that the error in this case would have required reversal.

The rule that a general verdict which "may have rested" on a constitutionally invalid ground must be set aside, dates back at least to *Stromberg v. California*, 283 U.S. 359, 367-68 (1931). In *Stromberg*, a 19-year old member of the Young Communist League was convicted of violating a California law that criminalized the display of a flag for any of three specified purposes: "as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchist action or as an aid to propaganda that is of a seditious character." *Stromberg*, 283 U.S. at 361. "The charge in the information as to the purposes for which the flag was raised, was laid conjunctively." *Id*. The jury instructions, however, "followed the express terms of the statute and treated the described purposes disjunctively, holding that the appellant should be convicted if the flag was displayed for any one of the three purposes named." *Id*. at 363.

The state appellate court doubted the constitutionality of the clause of the statute that prohibited the raising of a flag "as a sign . . . of opposition to organized government," but held that the conviction could be sustained based on the other two clauses. *See id*. at 367. This Court reversed. The jury had returned a general verdict

and did not specify which way the statute had been violated. "As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it [was] impossible to say under which clause of the statute the conviction was obtained." *Stromberg*, 283 U.S. at 368. The "necessary conclusion" was that, "if any if the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." *Id.* at 368. Because the Court determined that at least the first clause of the statute was unconstitutional, the conviction was vacated.

The Court applied the same rule to an improper jury instruction in *Yates v. United States*, 354 U.S. 298 (1957), *overruled in part on other grounds, Burks v. United States*, 473 U.S. 1 (1978). There, the jury had been improperly instructed with respect to one object of the conspiracy for which the petitioners were convicted. The government contended "that even if the trial court was mistaken in its construction of the statute, the error was harmless" because the conspiracy charge had embraced a valid objective as well, "and the jury was instructed that in order to convict it must find a conspiracy extending to both objectives." *Id.* at 311. The Court disagreed, finding that the jury instructions were "not sufficiently clear or specific to warrant drawing the inference" that the jury understood it must find both the valid and invalid object in order to convict. *See id.* The jury was required to find only a singular "object or purpose" charged in the conspiracy, and the Court had no way of knowing which object or purpose the jury relied on. The Court further noted that "[t]he

character of most of the overt acts alleged associates them as readily with" both the improper and proper object. *Id*. at 312. "In these circumstances," the Court thought the "proper rule to be applied is that which requires a verdict to be set aside where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected." *Id*., 354 U.S. at 312 (citing *Stromberg*, 283 at 367-68; *Williams v. North Carolina*, 317 U.S. 287, 291-92 (1942); and *Cramer v. United States*, 352 U.S. 1 (1945)).

The Court derives two "rules" from *Stromberg*. *See Zant v. Stephens*, 462 U.S. 862, 881 (1983) (holding that *Stromberg* did not require the invalidation of a death sentence under Georgia's capital sentencing scheme, where the jury specifically found three aggravating factors, one of which was legally insufficient to support the death sentence). The first rule "requires that a general verdict must be set aside if the jury was instructed that it could rely upon any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively upon the insufficient ground." *Zant*, 462 U.S. at 881 (citing *Williams*, 317 U.S. at 292; *Cramer*, 325 U.S. at 36 n.45; *Terminello v. Chicago*, 377 U.S. 1, 5-6 (1946); and *Yates*, 354 U.S. at 311-12).

"The second rule derived from *Stromberg*" is that – at least where constitutionally protected conduct is involved – "*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." *Zant*, 462 U.S. at 881-882

(emphasis in original). The rationale is "that when a single-count indictment or information charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trial of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together." *Id.* at 881-82 (quoting S*treet v. New York*, 394 U.S. 576, 586-90 (1969)). *See also Thomas v. Collins*, 352 U.S. 516 (1945).

B. The Court has previously left unresolved whether the "second rule derived from *Stromberg*" survived *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (*per curiam*).

In *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (*per curiam*), the Court clarified that the sort of "alternative theory" instructional error identified in *Stromberg* and *Yates* is not "structural" error. Pulido had been convicted of felony murder. The jury was properly instructed that it could convict if it found that Pulido formed the intent to aid and abet the underlying felony before the murder; but the instructions also erroneously permitted the jury to convict if it concluded that Pulido formed the requisite intent only after the murder. *Pulido*, 555 U.S. at 59. The district court found that the error had a "substantial and injurious effect or influence" on the verdict and granted relief. *Id.* The state appealed to the Ninth Circuit. On appeal, Pulido argued that the district court's analysis was correct under *Brecht v. Abrahamson*, 507 U.S. 619 (1993); but he also raised structural error as an alternative ground to affirm. The Ninth Circuit stated that the error was structural and required setting aside the

conviction unless the reviewing court "could determine with 'absolute certainty' that the defendant was convicted under a proper theory." *Id*. at 59-60 (internal quotation marks citations omitted).

By the time the case reached this Court, both parties agreed that Ninth Circuit had been wrong to characterize the error as structural. *Id*. at 57. The parties further agreed that "a reviewing court finding such error should ask whether the flaw in the instructions 'had substantial and injurious effect or influence in determining the jury's verdict' under *Brecht*." *Id*. This Court agreed as well, and remanded the case to the Ninth Circuit for an evaluation of harmlessness. *Pulido*, 555 U.S. at 62.

The Court noted that "[b]oth *Stromberg* and *Yates* were decided before [the Court] concluded in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967), that constitutional errors can be harmless." *Pulido*, 557 U.S. at 60. "In a series of post-*Chapman* cases, however," the Court had "concluded that various forms of instructional errors are not structural error but instead trial errors subject to harmless-error review." *Id*. at 60-61(citing *Neder v. United States*, 527 U.S. 1 (1999); *California v. Roy*, 519 U.S. 2 (1966) (*per curiam*); *Pope v. Illinois*, 481 U.S. 497 (1987); *Rose v. Clark*, 478 U.S. 570 (1986)). The Court saw no reason why a "different harmless-error analysis should govern" review of an instructional error where the jury was instructed on multiple theories of guilt. *Id.* at 61. "In fact, drawing a distinction between alternative-theory error and the instructional errors in *Neder, Roy, Pope,* and *Rose*, would be 'patently illogical,' given that such a distinction

'reduces to the strange claim that, because he jury . . . received both a 'good' charge and a 'bad' charge, the error was somehow more pernicious than . . . where the ***only*** charge on the critical issue was a mistaken one." *Id*. at 61 (emphasis in original and citations omitted).

The majority rejected Pulido's assertion that the Ninth Circuit had, in fact, engaged in the proper *Brecht* analysis despite its description of the error as "structural." The Court held "[i]n any event," that the "absolute certainty" standard applied by the Ninth Circuit was "plainly inconsistent with *Brecht*." *Id*. at 62. The Court did not, however, provide any further "guidance regarding how to assess the impact of an erroneous instruction in the context of a general verdict." *See Babb v. Lozowsky*, 719 F.3d 1019, 1034 (9th Cir. 2013), *overruled on other grounds by White v. Woodall*, 572 U.S. 415, 421 (2014).

The issue reemerged two years later, in *Skilling v. United States*, 561 U.S. 358, 369 (2010). Skilling had been convicted of crimes related to a scheme to defraud, which Congress had defined to include "a scheme or artifice to deprive another of the intangible right to honest services." *Skilling*, 560 U.S. at 369 n.1. In order to avoid an untenable vagueness problem, the Court limited the definition of "honest-services" fraud to "schemes to defraud involving bribes and kickbacks." 561 U.S. at 368. Skilling had not been alleged to participate in such conduct, and could not validly be convicted under an honest-services theory. "Because the indictment alleged three objects of the in conspiracy," which included an improperly-defined "honest-services"

theory alongside two legitimate theories of fraud, the conviction was flawed. *See id.* at 414.

The Court recognized that this did not necessarily require reversal. *See Skilling*, 561 U.S. at 414 (noting that the Court had recently "confirmed . . . that errors of the *Yates* variety are subject to harmless-error analysis"). The Court declined to resolve, however, how that harmless-error analysis should proceed. Notably, the parties advocated the same diametrically opposed theories of harmless error at issue in this case. Specifically, the government argued that the conviction should be sustained because "any juror who voted for conviction based on [the honest-services theory] also would have found [Skilling] guilty of conspiring to commit securities fraud." *Id.* at 414 (alteration and citation omitted). Skilling argued, by contrast, that the government was required to show "that the conspiracy conviction rested ***only*** on the securities-fraud theory, rather than the distinct, legally-flawed honest-services theory." *Id.* (emphasis in original, citation omitted). The Court did not decide between the two competing theories of harmlessness, and instead "[left] this dispute for resolution on remand." *See id.*

C. The circuits have failed to develop a coherent standard of harmless-error review.

The question remains unanswered, and has taken on renewed significance in the wake of *Davis*. The surge in post-*Davis* litigation has given rise myriad variations of harmless-error review. *Compare United States v. Wilson*, 960 F.3d 136, 151 (3d Cir. 2020) (affirming § 924(c) conviction after determining that "there is no 'reasonable

possibility' that the jury based its § 924(c) convictions only" on the invalid predicate) (quotation omitted); *United States v. Eldridge*, 2 F.4th 27, 39 (2d Cir. 2021) (finding no prejudice because a properly instructed jury "would have returned" a guilty verdict); *Reyes v. United States*, 998 F.3d 753, 759 (7th Cir. 2021) ("No rational juror could have concluded that the gun was brandished in furtherance of only the conspirators' agreement to commit a robbery, but not in furtherance of the robbery itself, during which the gun was actually brandished."); *with United States v. Jones*, 935 F.3d 266, 273 (5th Cir. 2019) (finding a "reasonable probability that the jury's verdict would not have been the same" absent the error, where the invalid RICO conspiracy "encompassed conduct beyond the controlled-substance conspiracy"); *United States v. McClaren*, 13 F.4th 386, 414 (5th Cir. 2021) (following *Jones* and vacating where the court could not determine the basis for the conviction); *and United States v. Heyward*, 3 F.4th 75, 85 (2d Cir. 2021) (applying categorical approach and finding plain error where "924(c) conviction may very well have been premised on an unconstitutionally vague provision of that statute").

Significantly, those courts that have found prejudice in this situation have done so, whether expressly or implicitly, through application of the categorical approach. *See Heyward*, 3 F.4th at 81 ("Applying the foregoing analysis and taking into account the specific circumstances of this litigation, we cannot conclude that Heyward's § 924(c) conviction necessarily rested upon either a qualifying drug-trafficking offense or categorical crime of violence."); *Jones*, 936 F.3d at 272 (rejecting

the government's assertion of harmlessness were the non-qualifying RICO conspiracy "encompassed a broader range of conduct than the controlled-substance conspiracy, allowing the jury to convict on the § 924 counts based on conduct unrelated to drug trafficking"); *McClaren*, 13 F.4th at 414 ("[W]e cannot determine whether the jury relied on the RICO or drug-trafficking predicate, and because a RICO conspiracy is not a crime of violence, the basis for the conviction may have been improper."). The Eleventh Circuit, however, rejected Mr. Granda's argument that the categorical approach should apply – stating that he had cited "no authority that justifies extending the categorical approach – a method for determining whether a conviction under a particular statute qualifies as a predicate offense under a particular definitional clause – to the context of determining on which of several alternative predicates a jury's general verdict relied." *Granda*, 990 F.3d at 1295. [4]

What these cases show, at a minimum, is that the circuits are in disarray as to the proper standard of harmless error review, where a jury has been instructed on multiple theories of guilt, one of which is invalid. This Court's intervention is needed to bring clarity and uniformity to the law.

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[4] A petition asking whether "a court must apply the modified categorical approach to determine whether a verdict of conviction under 18 U.S.C. § 924(c) necessarily rests on a valid predicate offense" is currently pending *Ali v. United States*, No. 21-482 (pet. for cert. filed Sept. 27, 2021).

D. The decision below is wrong.

It was undisputed that Mr. Granda's jury was invited to convict him of a constitutionally invalid offense. Nonetheless, the Eleventh Circuit held that the error was harmless because it presumed that the jury must ***also*** have found Mr. Granda guilty of committing a valid version of the offense. There are at least five reasons why this holding is wrong:

1. First the Eleventh Circuit's holding risks allowing a conviction to stand which the district court had no authority to enforce. The federal courts' authority to adjudicate presupposes the existence of a valid federal offense. *See* 18 U.S.C. § 3231 (granting district courts jurisdiction over "offenses against the laws of the United States"). As the Court stated in *Davis*, however, "[i]n our constitutional order, a vague law is no law at all." *Davis*, 139 S.Ct. at 2323. And "when an indictment affirmatively alleges conduct that does not constitute a crime at all," it fails to invoke the jurisdiction of the district court. *See United States v. Brown*, 752 F.3d 1344, 1352–53 (11th Cir. 2014). The Eleventh Circuit's permissive interpretation of harmless-error in this circumstances admits the possibility that the defendant will stand convicted of a non-existent offense, and runs afoul of the federal courts' core duty to assure that jurisdiction is validly established in every case.

2. The Eleventh Circuit's reasoning directly contravenes the line of cases from this Court – which both precede and post-date *Chapman v. California* – holding that *vacatur* is required where valid and invalid theories of an offense are factually

intertwined. Notably, *Street v. New York*, 394 U.S. 576 (1969) was decided two years after *Chapman,* and the Court was certainly aware that constitutional errors may be harmless. It nonetheless concluded that a conviction must be vacated where "there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together." *Street*, 394 U.S. at 588.

In *Zant,* the Court wrote that this "second rule" of *Stromberg* "applies only in cases in which the State has based its prosecution, at least in part, on a charge that constitutionally protected activity is unlawful." 462 U.S. at 883-84. But that statement was made in the context of distinguishing a conviction for constitutionally protected conduct from the finding of aggravating sentencing factors at issue therein. *See id*. at 884 ("In this case, the jury's finding that respondent was a person who has a 'substantial history of serious assaultive criminal convictions' did not provide a sufficient basis for imposing the death sentence. But it raised none of the concerns underlying the holdings in *Stromberg, Thomas,* and *Street*, for it did not treat constitutionally protected conduct as an aggravating circumstance.").

In this case, by contrast, constitutional rights are clearly implicated. The Hobbs Act conspiracy charged in the indictment was obviously not "constitutionally protected" conduct. But it is equally obvious that the Due Process Clause protects an individual from being convicted for an unconstitutionally vague or invalid offense. *See Davis*, 139 S. Ct. at 2323. Thus, *Stromberg*'s second rule should apply here, just as it does in cases involving protected speech.

3. Presuming the facts underlying a jury's verdict requires the sort of inquiry into a jury's reasoning that is generally impermissible. In *United States v. Powell,* 469 U.S. 57 (1984), the Court rejected a rule that would allow defendants to challenge their convictions based on inconsistent verdicts. "Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." *Id.* at 66. The Eleventh Circuit, however, engaged in just such an "individualized assessment" of the reason for Mr. Granda's conviction, and committed the very transgressions warned against in *Powell*.

4. Relatedly, allowing a conviction to stand based on the speculation that the jurors would have found multiple predicates for the offense eviscerates a defendant's Fifth and Sixth Amendment rights to a unanimous verdict. It is impossible to know whether a juror or jurors might have disagreed that the § 924(o) conviction was proven with respect to the remaining alleged predicates, even if they found it proven with respect to the robbery conspiracy. And, under *Powell*, the juror or jurors would have been entitled to make such a distinction, regardless of the reviewing court's view of the evidence. In other words, the fact that the jury convicted on one ground does not guarantee that it would have convicted on another. *Cf. Powell*, 469 U.S. at 68-69 ("the best course to take is simply to insulate jury verdicts from review on this ground").

5. Finally, the opinion below improperly incentivizes prosecutors to seek and obtain improperly duplicitous convictions. Federal prosecutors routinely allege counts of § 924(c) with multiple predicate offenses. Those counts are then submitted to juries with instructions that any ***one*** of the alleged predicate offenses is sufficient to convict. This manner of 'charging in the conjunctive and proving into the disjunctive' is designed to make it easier to convict. It should not also insulate that conviction from review, when it is later found that one of the predicate offenses argued to the jury was a constitutionally invalid basis for the conviction.

CONCLUSION

Based upon the foregoing, the petition should be granted.

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