

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 WRIT OF CERTIORARI

---

MICHAEL CARUSO  
Federal Public Defender  
TRACY DREISPUL\*  
Assistant Federal Public Defender  
Deputy Chief, Appellate Division  
*\*Counsel of Record*  
150 W. Flagler Street, Suite 1500  
Miami, FL 33130  
305-536-6900

November 1, 2021

---

---

## **APPENDIX**

## TABLE OF APPENDICES

*Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021)

Decision of the Eleventh Circuit ..... A-1

*Granda v. United States*, No. 17-15194,

Order Denying Rehearing (11th Cir. June 2, 2021) ..... A-2

*Granda v. United States*, No. 16-CV-23426-Middlebrooks,

Order Denying Motion to Vacate Sentence Under § 2255 ..... A-3

*Granda v. United States*, No. 16-CV-23426-Middlebrooks,

Report of Magistrate Judge (July 5, 2017) ..... A-4

**A-1**

990 F.3d 1272

United States Court of Appeals, Eleventh Circuit.

Carlos GRANDA, Petitioner - Appellant,

v.

UNITED STATES of America,

Respondent - Appellee.

No. 17-15194

|

(March 11, 2021)

**Synopsis**

**Background:** After convictions and sentences on multiple crimes resulting from reverse-sting operation based on prisoner's participation in plan to rob tractor trailer containing cocaine were affirmed on direct appeal, 346 Fed.Appx. 524, initial motion to vacate, set aside or correct sentence was denied, and motion to reduce sentence was granted, prisoner requested and obtained leave to file second motion to vacate, set aside or correct sentence, in which prisoner sought vacatur of conspiracy to possess of firearm during and in relation to crime of violence or drug-trafficking crime under  *Johnson v. United States*. The United States District Court for the Southern District of Florida, Nos. 1:16-cv-23426-DMM, and 1:07-cr-20155-DMM-3, Donald M. Middlebrooks, J., adopted in part report and recommendation,  2017 WL 6550900, of Patrick A. White, United States Magistrate Judge, and denied motion, 2017 WL 6554412. Prisoner appealed.

**Holdings:** The Court of Appeals, Marcus, Circuit Judge, held that:

[1] Court of Appeals had jurisdiction over appeal;

[2] Supreme Court's holding in  *United States v. Davis*, 139 S. Ct. 2319, governed prisoner's appeal, even though leave to file second motion and appeal from denial of motion was based on  *Johnson v. United States*;

[3]  *United States v. Davis*, 139 S. Ct. 2319, applied retroactively on prisoner's second motion to vacate, set aside, or correct sentence;

[4] prisoner's claim that conviction for conspiracy to possess firearm in furtherance of crime of violence or drug-trafficking crime was constitutionally invalid to extent it might have been predicated on conspiracy to commit Hobbs Act robbery, under *Davis*, was procedurally defaulted;

[5] prisoner did not establish cause for his failure to raise procedurally defaulted claim, as required to excuse default on collateral review;

[6] in order for prisoner to show actual prejudice, as required to excuse his procedural default, prisoner had to show substantial likelihood that jury actually relied only conviction for conspiracy to commit Hobbs Act robbery as predicate "crime of violence";

[7] prisoner could not show that he was actually prejudiced, as required to excuse procedural default;

[8] prisoner could not show actual innocence, as required to obtain relief from conviction for conspiracy to possess firearm in furtherance of crime of violence or drug-trafficking crime; and

[9] any possible error in instruction that included charge for conspiracy to commit Hobbs Act robbery as predicate "crime of violence" on charge for conspiracy to possess firearm during and in relation to crime of violence or drug trafficking crime was harmless.

Affirmed.

Jordan, Circuit Judge, filed opinion concurring in part and in judgment.

**Procedural Posture(s):** Appellate Review; Post-Conviction Review.

West Headnotes (41)

[1] **Criminal Law**  Appellate Jurisdiction

110 Criminal Law

110XXIV Review

110XXIV(B) Nature and Grounds of Appellate Jurisdiction

110k1016 Appellate Jurisdiction

110k1017 In general

Even if neither party has raised the issue of whether the Court of Appeals has subject matter jurisdiction over this case, the Court is are obliged to address the issue sua sponte.

**[2] Criminal Law** 🔑 On motion to set aside judgment or coram nobis

**Criminal Law** 🔑 Particular issues and cases

110 Criminal Law  
 110XXIV Review  
 110XXIV(C) Decisions Reviewable  
 110k1021 Decisions Reviewable  
 110k1023 Appealable Judgments and Orders  
 110k1023(15) On motion to set aside judgment or coram nobis

110 Criminal Law  
 110XXX Post-Conviction Relief  
 110XXX(C) Proceedings  
 110XXX(C)3 Hearing and Determination  
 110k1666 Effect of Determination  
 110k1668 Successive Post-Conviction Proceedings  
 110k1668(3) Particular issues and cases

Court of Appeals had jurisdiction over appeal from district court's denial of prisoner's second motion to vacate, set aside or correct sentence for conspiracy to possess firearm in furtherance of crime of violence or drug-trafficking crime, where prisoner obtained leave to file successive motion based on Supreme Court's holding in

 *Johnson v. United States* that invalidated, as unconstitutionally vague, residual clause of definition of “crime of violence,” in Armed Career Criminal Act (ACCA), which was new rule that applied retroactively to cases on collateral review; prisoner asserted that jury might have relied on conspiracy to commit Hobbs Act robbery as predicate “crime of violence,” under residual clause that was similarly worded to residual clause of “crime of violence” invalidated in  *Johnson v. United States*, and Supreme Court had not yet declared that residual clause of “crime of violence” defined in statute of conviction was unconstitutionally vague.  18 U.S.C.A. §§ 924(c),  (e)(2)(B)(ii),  (o); 28 U.S.C.A. § 2255(h).

3 Cases that cite this headnote

**[3] Criminal Law** 🔑 Proceedings

110 Criminal Law  
 110XXX Post-Conviction Relief  
 110XXX(C) Proceedings  
 110XXX(C)3 Hearing and Determination  
 110k1666 Effect of Determination  
 110k1668 Successive Post-Conviction Proceedings  
 110k1668(9) Proceedings

A district court is without jurisdiction to consider an unauthorized second or successive postconviction petition. 28 U.S.C.A. § 2255(h).

**[4] Courts** 🔑 Highest appellate court

106 Courts  
 106II Establishment, Organization, and Procedure  
 106II(G) Rules of Decision  
 106k88 Previous Decisions as Controlling or as Precedents  
 106k91 Decisions of Higher Court or Court of Last Resort  
 106k91(1) Highest appellate court

When a precedent of the Supreme Court has direct application, the Circuit Courts of Appeal must follow it.

**[5] Criminal Law** 🔑 Effect of change in law or facts

110 Criminal Law  
 110XXIV Review  
 110XXIV(U) Determination and Disposition of Cause  
 110k1181 Decision in General  
 110k1181(2) Effect of change in law or facts

Supreme Court's holding in  *United States v. Davis*, 139 S. Ct. 2319, governed prisoner's appeal from denial of second motion to vacate, set aside or correct sentence for conspiracy to possess firearm in furtherance of crime of violence or drug-trafficking crime, in which prisoner alleged that Supreme Court's holding in  *Johnson v. United States* that residual clause of definition of “crime of violence” in Armed Career Criminal Act (ACCA) was

unconstitutionally vague applied to similarly worded residual clause defining “crime of violence” in statute of conviction, regardless of whether leave to file second or successive motion was granted on basis of *Johnson*; *Davis* extended *Johnson's* holding to “crime of violence” in statute of conviction, and thus directly controlled resolution of prisoner's claim. 18 U.S.C.A. § 924(c)(3)(B), (e)(2)(B)(ii), (o).

[6] **Conspiracy** Weapons and explosives

91 Conspiracy

91II Criminal Responsibility

91II(B) Particular Subjects of Criminal

Conspiracy

91k190 Weapons and explosives

Conspiracy to commit Hobbs Act robbery was not categorically “crime of violence,” and thus, conviction on that charge could not serve as predicate “crime of violence” on charge for conspiracy to possess a firearm in furtherance of a crime of violence or drug-trafficking crime; conspiracy to commit Hobbs Act robbery did not have as element use, attempted use, or threatened use of physical force against person or property of another. 18 U.S.C.A. § 924(c)(3), (o).

5 Cases that cite this headnote

[7] **Conspiracy** Weapons and explosives

91 Conspiracy

91II Criminal Responsibility

91II(B) Particular Subjects of Criminal

Conspiracy

91k190 Weapons and explosives

Attempted Hobbs Act robbery categorically qualifies as a “crime of violence,” and thus, can serve as a predicate “crime of violence” on a charge for conspiracy to possess a firearm in furtherance of a crime of violence or drug-trafficking crime. 18 U.S.C.A. § 924(c)(3), (o).

1 Cases that cite this headnote

[8] **Conspiracy** Weapons and explosives

91 Conspiracy

91II Criminal Responsibility

91II(B) Particular Subjects of Criminal

Conspiracy

91k190 Weapons and explosives

Attempted carjacking categorically qualifies as a “crime of violence,” and is therefore a valid predicate “crime of violence” to a charge for conspiracy to possess a firearm in furtherance of a crime of violence or drug-trafficking crime.

18 U.S.C.A. § 924(c)(3)(A), (o).

[9] **Courts** In general; retroactive or prospective operation

106 Courts

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

106k100 In General

106k100(1) In general; retroactive or prospective operation

Supreme Court's holding in *United States v. Davis*, 139 S. Ct. 2319, invalidating as unconstitutionally residual clause of definition of “crime of violence” in statute prohibiting possession of firearm in furtherance of crime of violence or drug-trafficking crime, as one 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,” applied retroactively on prisoner's second motion to vacate, set aside or correct sentence for conspiracy to possess firearm in furtherance of crime of violence or drug-trafficking crime. 18 U.S.C.A. § 924(c)(3)(B), (o).

[10] **Criminal Law** Presentation of Issue in Prior Proceedings

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1428 Presentation of Issue in Prior Proceedings

110k1429 In General

110k1429(1) In general

Prisoner's claim that jury may have impermissibly relied on conviction for conspiracy to commit Hobbs Act robbery as predicate crime of violence to support conviction for conspiracy to possess firearm in furtherance of crime of violence or drug-trafficking crime, based on finding that conspiracy to commit Hobbs Act robbery met definition of "crime of violence" under residual clause of definition that was subsequently declared to be unconstitutionally vague in  *United States v. Davis*, 139 S. Ct. 2319, was procedurally defaulted on second motion to vacate, set aside or correct sentence, where he did not raise claim at trial or on direct appeal.  18 U.S.C.A. § 924(c) (3)(B),  (o).

7 Cases that cite this headnote

**[11] Criminal Law**  Matters which either were or could have been adjudicated previously, in general

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1427 Matters which either were or could have been adjudicated previously, in general

A defendant generally must advance an available challenge to a criminal conviction on direct appeal or else the defendant is barred from raising that claim in a habeas proceeding.

5 Cases that cite this headnote

**[12] Criminal Law**  Fundamental or constitutional error; innocence

**Criminal Law**  Cause and prejudice in general

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1435 Consideration Despite Waiver or Other Bar

110k1437 Fundamental or constitutional error; innocence

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1435 Consideration Despite Waiver or Other Bar

110k1438 Cause and prejudice in general

A defendant whose claim is procedurally defaulted for the failure to raise the claim at trial or on direct appeal cannot succeed on collateral review unless he can either (1) show cause to excuse the default and actual prejudice from the claimed error, or (2) show that he is actually innocent of the crime of conviction. 28 U.S.C.A. § 2255.

4 Cases that cite this headnote

**[13] Criminal Law**  Review De Novo

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo

110k1139 In general

The Court of Appeals reviews de novo whether procedural default precludes a habeas petitioner's claim, which is a mixed question of law and fact. 28 U.S.C.A. § 2255.

**[14] Criminal Law**  Cause

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1435 Consideration Despite Waiver or Other Bar

110k1439 Cause

Where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, defendant has "cause" for his failure to raise the claim at trial or on direct appeal, as required for the defendant to obtain collateral review of the otherwise procedurally defaulted claim.

1 Cases that cite this headnote

**[15] Criminal Law**  Cause

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1435 Consideration Despite Waiver or Other Bar

110k1439 Cause

That an argument might have less than a high likelihood of success has little to do with whether the argument is reasonably available to counsel, for the purposes of determining whether the defendant can establish cause for the failure to raise the claim at trial or on direct appeal, as required to excuse the procedural default to permit consideration of the claim on collateral review; in this context, an argument is “available” to counsel if there is a reasonable basis in law and fact for it.

#### [16] **Criminal Law** 🔑 Cause

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1435 Consideration Despite Waiver or Other Bar

110k1439 Cause

In determining if a constitutional claim was reasonably available to defense counsel at trial or on direct appeal, for purposes of determining whether the defendant can establish “cause” for the failure to do so, as required for the procedurally defaulted claim to come within the “cause and prejudice” exception to the bar against collateral review of procedurally defaulted claims, the question is not whether subsequent legal developments have made defense counsel's task easier, but whether at the time of the default the claim was available at all.

1 Cases that cite this headnote

#### [17] **Criminal Law** 🔑 Cause

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1435 Consideration Despite Waiver or Other Bar

110k1439 Cause

To establish novelty sufficient to provide cause for a procedural default based on a new constitutional principle, a defendant must show that the new rule was a sufficiently clear break with the past, so that an attorney representing him would not reasonably have had the tools for

presenting the claim either at trial or on direct appeal.

#### [18] **Criminal Law** 🔑 Cause

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1435 Consideration Despite Waiver or Other Bar

110k1439 Cause

When a Supreme Court decision disapproves of a practice that the Court arguably has sanctioned in prior cases, “cause” exists to excuse a procedural default of the claim on collateral review based on the new decision, and in such a case, a habeas court analyzes whether others were recognizing and raising same or similar claims in the period preceding or concurrent with the petitioner's failure to raise his claim; however, even if others have not been raising a claim, the claim may still be insufficiently “novel” to excuse a procedural default if a review of the historical roots and development of the general issue involved indicates that petitioners did not lack the tools to construct their constitutional claim.

#### [19] **Criminal Law** 🔑 Particular issues and cases

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(C) Proceedings

110XXX(C)3 Hearing and Determination

110k1666 Effect of Determination

110k1668 Successive Post-Conviction Proceedings

110k1668(4) Excuses for Failure to Raise Issue in Previous Post-Conviction Proceeding

110k1668(6) Particular issues and cases

Prisoner's claim that conviction for conspiracy to possess firearm during and in relation to crime of violence was invalid because residual clause of definition of “crime of violence” was unconstitutionally vague was not so novel at time of his direct appeal as would establish cause for his failure to raise claim, as required to excuse procedural default and permit consideration of claim on successive postconviction review, where other defendants had raised vagueness challenge to similarly worded residual clause in

definition of “crime of violence” under Armed Career Criminal Act, albeit unsuccessfully, before Supreme Court declared residual clause was unconstitutionally vague, and therefore, defense counsel did not lack tools to challenge residual clause in statute of conviction at time of direct appeal.  18 U.S.C.A. § 924(c)(3)(B),  (o).

[1 Cases that cite this headnote](#)

**[20] Criminal Law**  **Prejudice**

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1435 Consideration Despite Waiver or Other Bar

110k1441 Prejudice

To prevail on a cause and prejudice theory to excuse the procedural default of a constitutional claim, a habeas petitioner must show “actual prejudice,” which means more than just the possibility of prejudice, but requires that the error worked to the petitioner's actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

[5 Cases that cite this headnote](#)

**[21] Criminal Law**  **Prejudice**

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(B) Grounds for Relief

110k1454 Prejudice

The “actual prejudice” standard for collateral review of a procedurally defaulted claim is more stringent than the “plain error” standard of review of an unpreserved objection, and the ultimate inquiry is whether the intrusion affected the jury's deliberations and thereby its verdict.

[3 Cases that cite this headnote](#)

**[22] Criminal Law**  **Prejudice**

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1435 Consideration Despite Waiver or Other Bar

110k1441 Prejudice

In order for prisoner to show actual prejudice as would excuse his procedural default on claim that conviction for conspiracy to possess firearm during and in relation to crime of violence or drug trafficking crime was invalid because jury may have relied on conviction for conspiracy to commit Hobbs Act robbery as predicate “crime of violence,” under residual clause of definition of “crime of violence” in firearm statute that was later declared unconstitutionally vague in  *United States v. Davis*, 139 S. Ct. 2319, prisoner had to show that there was substantial likelihood that jury actually relied only conviction for conspiracy to commit Hobbs Act robbery as predicate “crime of violence,” and not on any other convictions that categorically qualified as drug trafficking crimes or crimes of violence.  18 U.S.C.A. § 924(c)(3)(B),  (o).

[15 Cases that cite this headnote](#)

**[23] Criminal Law**  **Prejudice**

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1435 Consideration Despite Waiver or Other Bar

110k1441 Prejudice

Prisoner was not actually prejudiced with respect to conviction for conspiracy to possess firearm during and in relation to crime of violence or drug trafficking crime, as required to excuse procedural default on postconviction claim that jury may have relied on conviction for conspiracy to commit Hobbs Act robbery as predicate “crime of violence,” under residual clause of definition of “crime of violence” in firearm statute that was later declared unconstitutionally vague in  *United States v. Davis*, 139 S. Ct. 2319; jury also found prisoner guilty of attempt to possess cocaine with intent to distribute and related conspiracy, which were “drug trafficking” crimes, and for attempted carjacking and attempted Hobbs Act robbery, which categorically qualified as “crimes

of violence,” and all predicate offenses were so inextricably intertwined, having arisen out of prisoner's role in scheme to rob truck containing 60 to 80 kilograms of cocaine, that jury could not have found possession of firearm in relation to one predicate offense but not other.  18

U.S.C.A. § 924(c)(3)(B),  (o).

7 Cases that cite this headnote

**[24] Criminal Law**  Fundamental or constitutional error; innocence

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1435 Consideration Despite Waiver or Other Bar

110k1437 Fundamental or constitutional error; innocence

The “actual innocence” exception to the procedural default bar to a motion to vacate, set aside, or correct sentence is exceedingly narrow in scope as it concerns a petitioner's actual innocence rather than his legal innocence. 28 U.S.C.A. § 2255.

1 Cases that cite this headnote

**[25] Criminal Law**  Fundamental or constitutional error; innocence

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1435 Consideration Despite Waiver or Other Bar

110k1437 Fundamental or constitutional error; innocence

“Actual innocence,” for purposes of the actual innocence exception to the procedural default bar to a motion to vacate, set aside, or correct sentence, means factual innocence, not mere legal innocence. 28 U.S.C.A. § 2255.

2 Cases that cite this headnote

**[26] Criminal Law**  Fundamental or constitutional error; innocence

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1435 Consideration Despite Waiver or Other Bar

110k1437 Fundamental or constitutional error; innocence

To establish “actual innocence,” for purposes of the “actual innocence” exception to the procedural default bar to a motion to vacate, set aside, or correct sentence, the petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him. 28 U.S.C.A. § 2255.

1 Cases that cite this headnote

**[27] Criminal Law**  Fundamental or constitutional error; innocence

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1435 Consideration Despite Waiver or Other Bar

110k1437 Fundamental or constitutional error; innocence

Prisoner could not show actual innocence on conviction for conspiracy to possess firearm during and in relation to crime of violence or drug trafficking crime, as required to excuse procedural default on claim that conviction was invalid to extent that jury may have relied on conviction for conspiracy to commit Hobbs Act robbery as predicate “crime of violence,” under residual clause of definition of “crime of violence” in firearm statute that was later declared unconstitutionally vague in

 *United States v. Davis*, 139 S. Ct. 2319, where there was overwhelming evidence of defendant's role in scheme to rob tractor trailer containing cocaine that gave rise to convictions for attempt to possess cocaine with intent to distribute and related conspiracy, which qualified as “drug trafficking” crimes, and for attempted carjacking and attempted Hobbs Act robbery, which categorically qualified as “crimes of violence,” and all convictions were inextricably intertwined so that no reasonable juror would have found that his possession of firearm was linked only to conspiracy to commit Hobbs Act

robbery but not to any of other offenses.  18

U.S.C.A. § 924(c)(3)(B),  (o).

[11 Cases that cite this headnote](#)

**[28] Criminal Law**  **Instructions**

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(B) Grounds for Relief

110k1551 Instructions

110k1552 In general

Any possible error in trial court's instruction that included charge for conspiracy to commit Hobbs Act robbery as predicate "crime of violence" on charge for conspiracy to possess firearm during and in relation to crime of violence or drug trafficking crime, when conspiracy to commit Hobbs Act robbery did not qualify as "crime of violence" after Supreme Court invalidated residual clause of definition of "crime of violence" in statute of conviction, was harmless, and could not support grant of motion to vacate, where conspiracy to commit Hobbs Act robbery was inextricably linked with other offenses of which prisoner was also convicted, all of which qualified as either "drug trafficking" crimes or "crimes of violence" under elements clause of "crime of violence."  18 U.S.C.A. § 924(c)(3)(B),  (o).

[5 Cases that cite this headnote](#)

**[29] Criminal Law**  **Prejudice**

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(B) Grounds for Relief

110k1454 Prejudice

On collateral review, the "harmless error" standard mandates that relief is proper only if the court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict; there must be more than a reasonable possibility that the error was harmful.

[11 Cases that cite this headnote](#)

**[30] Criminal Law**  **Prejudice**

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(B) Grounds for Relief

110k1454 Prejudice

Under the "harmless error" standard applicable to claims on collateral review, the court may order relief on a motion to vacate, set aside or correct sentence only if the error resulted in actual prejudice. 28 U.S.C.A. § 2255.

[1 Cases that cite this headnote](#)

**[31] Criminal Law**  **Prejudice**

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(B) Grounds for Relief

110k1454 Prejudice

The "harmless error" standard of review on a claim of error on collateral review is not phrased as a burden of proof; instead, the reviewing court should ask directly whether the error substantially influenced the jury's decision.

**[32] Criminal Law**  **Prejudice**

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(B) Grounds for Relief

110k1454 Prejudice

Under the "harmless error" standard of reviewing claims of constitutional error on collateral review, if the court cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, the court must conclude that the error was not harmless.

[1 Cases that cite this headnote](#)

**[33] Criminal Law**  **Review De Novo**

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo

110k1139 In general

The Court of Appeals reviews de novo the question of whether a constitutional error was harmless, as a basis for granting collateral relief.

**[34] Criminal Law** 🔑 General Verdict

110 Criminal Law

110XX Trial

110XX(K) Verdict

110k880 Sufficiency

110k881 General Verdict

110k881(1) In general

Where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground.

**[35] Criminal Law** 🔑 Effect of verdict or determination

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1172 Instructions

110k1172.8 Effect of verdict or determination

Instructional error arising in context of multiple theories of guilt does not vitiate all jury's findings.

**[36] Criminal Law** 🔑 Prejudice

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(B) Grounds for Relief

110k1454 Prejudice

The harmlessness inquiry with respect to error is more searching on collateral review than on direct review.

1 Cases that cite this headnote

**[37] Sentencing and Punishment** 🔑 Violent or Nonviolent Character of Offense

**Weapons** 🔑 Crimes of violence

350H Sentencing and Punishment

350HVI Habitual and Career Offenders

350HVI(C) Offenses Usable for Enhancement

350HVI(C)1 In General

350Hk1261 Violent or Nonviolent Character of Offense

350Hk1262 In general

406 Weapons

406IV Offenses

406IV(C) Possession, Use, Carrying, or Personal Transport

406k189 Use or Possession During and in Relation to Commission of Crime

406k194 Crime at Issue

406k194(2) Crimes of violence

Under “categorical approach” that courts use to determine whether a particular offense qualifies as a “crime of violence” under the Armed Career Criminal Act (ACCA) and the statute making it a crime to possess a firearm in furtherance of or in relation to a crime of violence, the court examines only the elements of the statute of conviction, not the specific conduct of a particular offender.  18 U.S.C.A. § 924(c)(3) (A),  (e)(2)(B)(i).

2 Cases that cite this headnote

**[38] Sentencing and Punishment** 🔑 Violent or Nonviolent Character of Offense

**Weapons** 🔑 Crimes of violence

350H Sentencing and Punishment

350HVI Habitual and Career Offenders

350HVI(C) Offenses Usable for Enhancement

350HVI(C)1 In General

350Hk1261 Violent or Nonviolent Character of Offense

350Hk1262 In general

406 Weapons

406IV Offenses

406IV(C) Possession, Use, Carrying, or Personal Transport

406k189 Use or Possession During and in Relation to Commission of Crime

406k194 Crime at Issue

406k194(2) Crimes of violence

Under the “categorical approach” that courts use to determine whether a conviction on a particular offense qualifies as one for a “crime of violence,” under the Armed Career Criminal Act (ACCA) and the statute making it a crime to possess a firearm in furtherance of or in relation to a crime of violence, the court first assumes that the conviction rested on the least

of the acts criminalized by the statute, because to determine upon which of the criminalized acts the conviction rested would violate the categorical approach's command not to analyze the facts underlying the conviction; then, the court determines whether that act has an element that brings the offense within the ambit of the relevant clause.  18 U.S.C.A. § 924(c)(3)(A),  (e)(2)(B)(i).

2 Cases that cite this headnote

[39] **Jury**  Sentencing Matters

**Sentencing and Punishment**  Factors enhancing sentence

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k34 Restriction or Invasion of Functions of Jury

230k34(5) Sentencing Matters

230k34(6) In general

350H Sentencing and Punishment

350HII Sentencing Proceedings in General

350HII(F) Evidence

350Hk322 Degree of Proof

350Hk322.5 Factors enhancing sentence

The Sixth Amendment right to a jury trial under  *Alleyne* applies to findings of fact that increase a mandatory minimum sentence, thereby altering the prescribed range of sentences to which a defendant is exposed in a manner that aggravates the punishment; such facts must be proven to a jury beyond a reasonable doubt. U.S. Const. Amend. 6.

[40] **Jury**  Particular cases in general

**Jury**  Drug offenses

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k34 Restriction or Invasion of Functions of Jury

230k34(5) Sentencing Matters

230k34(7) Particular cases in general

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k34 Restriction or Invasion of Functions of Jury

230k34(5) Sentencing Matters

230k34(8) Drug offenses

Under  *Alleyne*, a sentencing judge may not look at the evidence afresh to determine by a preponderance of the evidence whether a defendant “brandished” a firearm during an offense and is therefore subject to an increased mandatory minimum based on the possession of the firearm during and in relation to a crime of violence or drug trafficking offense.  18 U.S.C.A. § 924(o).

[41] **Jury**  Sentencing Matters

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k34 Restriction or Invasion of Functions of Jury

230k34(5) Sentencing Matters

230k34(6) In general

A judge conducting a harmless error analysis on collateral review does not find a fact at all, as would implicate the right to a jury trial under  *Alleyne*; instead, the judge asks as a matter of law whether there is grave doubt about whether an instruction on an invalid predicate offense that subjected the defendant to an enhanced sentence substantially influenced what the jury already found beyond a reasonable doubt. U.S. Const. Amend. 6.

1 Cases that cite this headnote

**West Codenotes**

**Recognized as Unconstitutional**

 18 U.S.C.A. § 924(c)(3)(B),  (e)(2)(B)(ii)

\*1279 Appeal from the United States District Court for the Southern District of Florida, D.C. Docket Nos. 1:16-cv-23426-DMM; 1:07-cr-20155-DMM-3

**Attorneys and Law Firms**

Tracy Michele Dreispul, Sara Wilson Kane, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Miami, FL, for Petitioner - Appellant.

Sivashree Sundaram, U.S. Attorney's Office, West Palm Beach, FL, Andrea G. Hoffman, Emily M. Smachetti, U.S. Attorney's Office, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, Miami, FL, for Respondent - Appellee.

Before **WILLIAM PRYOR**, Chief Judge, **JORDAN** and **MARCUS**, Circuit Judges.

**Opinion**

**MARCUS**, Circuit Judge:

\*1280 This is Carlos Granda's second trip to our Court. In this reverse sting case, Granda served as the lookout for a criminal crew that attempted to rob a tractor trailer purportedly filled with sixty to eighty kilograms of cocaine. The scheme netted him several serious criminal convictions. On direct appeal, we affirmed his convictions and sentence. Now, Granda appeals the denial of his § 2255 petition. He collaterally attacks his conviction for conspiracy to possess a firearm in furtherance of a crime of violence or drug-trafficking crime in violation of 18 U.S.C. § 924(o). The trial court instructed the jury that to convict on this charge, it could rely on any of several predicate crimes: conspiracy to possess cocaine with intent to distribute; attempt to possess cocaine with intent to distribute; attempted Hobbs Act robbery; conspiracy to commit Hobbs Act robbery; and attempted carjacking. The jury found Granda guilty of each of these crimes, which were independently charged in Granda's indictment.

Granda's claim turns entirely on the observation that one of these offenses -- conspiracy to commit Hobbs Act robbery -- no longer qualifies as a valid crime-of-violence predicate after *United States v. Davis*, — U.S. —, 139 S. Ct. 2319, 2336, 204 L.Ed.2d 757 (2019) and *Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019). Granda reasons that the indictment, jury instructions, and general verdict make it impossible to tell for sure whether the jury relied on this invalid predicate or on one or more of the undeniably valid predicates to convict him of violating § 924(o). Granda

says we must vacate his conviction because of the possibility that the jury relied on an invalid predicate and, therefore, convicted him of a non-existent crime.

Granda faces two insuperable problems: he cannot overcome the procedural default of his claim (which he raises for the first time on collateral attack), nor could he otherwise prevail on the merits. Among the shortcomings that defeat his claim is a fundamental one that cuts across both the procedural and merits inquiries: all of the § 924(o) predicates are inextricably intertwined, arising out of the same cocaine robbery scheme. On this record, the jury could not have found that Granda conspired to possess a firearm in furtherance of a Hobbs Act conspiracy without also finding that he conspired to possess a firearm in furtherance of his attempted Hobbs Act robbery, as well as in furtherance of conspiring and attempting to possess cocaine with intent to distribute and in furtherance of attempting a carjacking. Each of these crimes remains a lawful predicate for the § 924(o) conviction. Thus, Granda cannot show actual prejudice or actual innocence \*1281 to excuse his procedural default. Moreover, the overlapping factual relationship between the alternative predicate offenses renders any error in the jury instructions harmless.

Accordingly, we affirm.

I.

A.

In 2007, Carlos Granda's ("Granda") brother Paulino told a confidential informant ("CI") that he was putting together a criminal crew and looking for work. On January 26, 2007, the CI introduced Paulino to a detective who was working in an undercover capacity. The undercover agent claimed to be a disgruntled drug trafficker who wanted to rob his boss; and he knew where in Miami his boss kept a tractor-trailer full of some sixty to eighty kilograms of cocaine. Paulino orchestrated a plan to rob the tractor-trailer at gunpoint. He and his crew planned to approach the truck while armed and dressed as a police S.W.A.T. team, remove and detain the drivers, and steal the truck and the drugs. Paulino explained that he would secure the perimeter by having his associates do surveillance. He added that, if it became necessary, he and his crew were willing to shoot the driver and anyone else who resisted. Appellant Granda's role was to serve as a lookout. Paulino also asked him to bring a gun to the robbery.

Granda and the crew met up at his parents' apartment, where members of the crew packed up guns, as well as construction ties to use as handcuffs. The crew then drove to a warehouse where they expected to find the stash truck. Granda stationed himself in his car near the entrance to the warehouse. Just as a member of the crew approached the truck, police officers revealed themselves and initiated a takedown. One of the would-be robbers raised his revolver, triggering a shootout. In the ensuing minutes, the police killed two members of the crew and wounded two others. Granda attempted to flee in his car but encountered a police blockade. He tried to evade the blockade by turning in front of a police car, striking it. The police arrested Granda, and found handcuffs, but not a firearm, in his car. They did find a loaded Hi-Point 9mm semi-automatic pistol in Paulino's car.

#### B.

A grand jury sitting in the Southern District of Florida returned a superseding indictment against Carlos Granda and his co-defendants. Granda was charged with conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 (Count 1); attempting to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846 (Count 2); conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 3); attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 4); attempted carjacking, in violation of 18 U.S.C. § 2119 (Count 5); conspiracy to use and carry a firearm during and in relation to, and to possess a firearm in furtherance of, a crime of violence and drug-trafficking crime, in violation of 18 U.S.C. § 924(o) (Count 6); and possession of a firearm in furtherance of a crime of violence or drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 7). The indictment listed each of the offenses charged in Counts 1, 2, 3, 4, and 5 as predicate crime-of-violence or drug-trafficking offenses for the § 924(o) offense charged in Count 6.

At trial, Granda's counsel insisted that Granda lacked the requisite criminal intent \*1282 because he thought Paulino was working as a government informant the whole time. Granda also offered the theory that the government failed to establish that he knew the object of the robbery was to obtain

cocaine. Plainly unconvinced, the jury returned a general verdict convicting Granda of Counts 1–6 (but acquitting him of Count 7). The district court then sentenced Granda to concurrent prison terms of 360 months as to Counts 1 and 2, 180 months as to Count 5, and 240 months as to Counts 3, 4, and 6. The sentence also included a five-year term of supervised release and a \$100 special assessment on each count. We upheld Granda's convictions and sentence on direct appeal. [United States v. Granda](#), 346 F. App'x 524, 529 (11th Cir. 2009).

Granda filed several unsuccessful collateral attacks, including an earlier § 2255 petition and a petition for a writ of *audita querela*. He did, however, successfully move the district court for a sentence reduction pursuant to section 3582 of Title 18. The trial court reduced his sentence to 324 months in prison, consisting of concurrent terms of 324 months on counts 1 and 2 to run concurrently with the terms for the other counts.

Proceeding pro se, Granda then sought leave to file the instant § 2255 petition; we granted leave to file this second or successive petition in August 2016. He claimed that his § 924(o) conviction had to be vacated because the supporting predicate may have been a crime that qualified as a crime-of-violence predicate only under § 924(c)'s residual clause. In other words, the jury may have used Count 3 -- the conspiracy to commit Hobbs Act robbery -- as the supporting predicate. See 18 U.S.C. § 924(c)(3)(B) (defining “crime of violence” in part as a felony “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”). Granda argued that § 924(c)'s residual clause was unconstitutionally vague under the reasoning of [Johnson v. United States](#), 576 U.S. 591, 597, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), which had invalidated a similar residual clause found in the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B)(ii). Since the general verdict left open the possibility that the jury had relied on an invalid predicate to convict him of the § 924(o) offense, this conviction must be set aside. The government responded that Granda had procedurally defaulted his claim because he did not raise it on direct appeal, and that, in any event, [Johnson](#) did not invalidate the § 924(c) residual clause.

A magistrate judge issued a Report and Recommendation concluding that Granda could not establish actual prejudice to overcome procedural default, and that, while the conspiracy to commit Hobbs Act robbery (Count 3) did not independently support Granda's § 924(o) conviction, his drug-trafficking, attempted Hobbs Act robbery, and attempted carjacking crimes were valid predicates that did so. The district court partially adopted the Report and Recommendation, holding based on then-applicable Eleventh Circuit case law that *Johnson* did not extend to the § 924(c) residual clause. Moreover, even if *Johnson* did apply, the district court reasoned that Granda “failed to meet his burden of proving entitlement to relief under” *Johnson* pursuant to this Court's holding in *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017). He could not “show that it was more likely than not that at least one juror relied on conspiracy to commit Hobbs Act robbery (Count 3) in \*1283 voting to convict [him] on Count 6 [the § 924(o) conviction].” Still, the district court granted a certificate of appealability on two issues: “whether [*Johnson*] applies to § 924(o) and if so, whether [Granda] met his burden of showing entitlement to relief under” *Johnson*.

Proceeding pro se, Granda filed this appeal, and a full round of briefing ensued. Then the Supreme Court decided *Davis*, 139 S. Ct. at 2336, concluding that the § 924(c) residual clause was in fact unconstitutionally vague. We appointed counsel to represent Granda and ordered a new round of briefing.

## II.

[1] [2] To begin, we have (and the district court had) jurisdiction over Granda's § 2255 petition. “While neither party has raised the issue of whether we have subject matter jurisdiction over this case, we are obliged to address the issue” sua sponte. *Arthur v. Haley*, 248 F.3d 1302, 1303 n.1 (11th Cir. 2001). Because this is Granda's second § 2255 petition, he properly asked this Court for certification to file it. We authorized Granda's second petition because he relied on *Johnson*, which had established a new, retroactive rule of constitutional law. See 28 U.S.C. § 2255(h) (“A second or successive motion must be certified as provided

in section 2244 ... to contain ... a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.”). We have jurisdiction over this appeal from the denial of an authorized second § 2255 petition. See 28 U.S.C. § 2253(a), (c)(1).

[3] To be sure, we gave Granda leave to file a *Johnson* challenge -- the Supreme Court had not yet decided *Davis*, so we did not (nor could we then) certify that Granda's second petition “contain[ed]” the new rule of constitutional law *Davis* announced. See 28 U.S.C. § 2255(h). Section 2255(h) instructs us to certify “as provided in section 2244” that a second or successive motion contains a new rule of constitutional law; in turn, § 2244 focuses on whether a “claim” contains a new constitutional rule, not on whether the motion as a whole does. 28 U.S.C. § 2244(b)(2). And in *In re Hammoud*, a panel of this Court held that a *Johnson* claim is distinct from a *Davis* claim for purposes of the rule against filing repeat petitions raising claims that had been previously rejected. See 931 F.3d 1032, 1039–40 (11th Cir. 2019). One might argue, then, that while we have authorized Granda to bring a *Johnson* claim, we did not authorize the filing of a *Davis* claim. See *Morton v. United States*, 776 F. App'x 651, 652–53 (11th Cir. 2019) (unpublished per curiam opinion). Of course, a district court is without jurisdiction to consider an unauthorized second or successive petition. *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003).

[4] [5] But to resolve the *Johnson* claim we did authorize, we can, indeed we must, apply the controlling Supreme Court law of *Davis*. As this Court held en banc in *United States v. Johnson*, “when ‘a precedent of the Supreme Court has direct application,’ we must follow it.” 921 F.3d 991, 1001 (11th Cir.) (en banc) (alteration accepted) (citation omitted), cert. denied, — U.S. —, 140 S. Ct. 376, 205 L.Ed.2d 215 (2019); see also *Brown*, 942 F.3d at 1072 (applying *Davis* to resolve a pre-*Davis* petition that raised a *Johnson* claim). *Davis* extended the reasoning of *Johnson*, providing us with the answer to a question central to Granda's petition: whether the § 924(c) (3)(B) residual clause is unconstitutionally \*1284 vague.

Applying  [Davis](#) to resolve Granda's vagueness claim does not transform the authorized claim -- which originally relied on  [Johnson](#) -- into a distinct, unauthorized  [Davis](#) claim. Indeed, a contrary holding would yield the odd result that the Supreme Court's eventual endorsement of the constitutional right argued for in Granda's petition now precludes him from seeking to vindicate that very right, even though he complied with all procedural requirements. Granda could not now file a new petition based on  [Davis](#), because the one-year statute of limitations on such claims has run. 28 U.S.C. § 2255(f)(3). We are obliged to follow  [Davis](#), and we have jurisdiction.

### III.

#### A.

Granda challenges his conviction on Count 6, conspiracy to use or carry a firearm during and in relation to, and to possess a firearm in furtherance of, a drug-trafficking crime or a crime of violence in violation of  18 U.S.C. § 924(o). In relevant part,  § 924(o) provides that “[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.”

 18 U.S.C. § 924(o). In turn,  § 924(c) provides:

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 ... 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 ....

Id. § 924(c)(1)(A). The statute straightforwardly defines a “drug trafficking crime” (in relevant part) as “any felony punishable under the Controlled Substances Act ( 21 U.S.C. 801 et seq.).” Id. § 924(c)(2). The definition of “crime of violence” is a bit more complex:

For purposes of this subsection the term “crime of violence” means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. § 924(c)(3). Subsection (A) is known as the “elements clause” and subsection (B) as the “residual clause.”

Since Granda filed the instant § 2255 petition, there has been a deluge of legal developments related to  § 924(c)(3). The following state of affairs now greets Granda's appeal:

- Count 1, conspiracy to possess with intent to distribute cocaine, is a “drug trafficking crime” and is, therefore, a valid predicate for Granda's Count 6 conviction. (Granda does not dispute that Counts 1 and 2 are “drug trafficking crimes,” nor could he.)
- Count 2, attempt to possess with intent to distribute cocaine, is a “drug trafficking crime” and is, therefore, a \*1285 valid predicate for Granda's Count 6 conviction.

[6] • Count 3, conspiracy to commit Hobbs Act robbery, is not a valid potential predicate for Granda's Count 6 conviction. It is not a drug-trafficking offense, so it must qualify, if at all, as a crime of violence. But the  § 924(c)(3) residual clause is unconstitutionally vague under  [Davis](#), 139 S. Ct. at 2336, and conspiracy to commit Hobbs Act robbery categorically is not a crime of violence under the  § 924(c)(3) elements clause.  [Brown](#), 942 F.3d at 1075.

[7] • Count 4, attempted Hobbs Act robbery, categorically qualifies as a crime of violence under the  § 924(c)(3) elements clause and is, therefore, a valid predicate for Granda's Count 6 conviction.   [United States v. St. Hubert](#), 909 F.3d 335, 351–53 (11th Cir. 2018), abrogated on other grounds by  [Davis](#), 139 S. Ct. at 2336.

[8] • Count 5, attempted carjacking, categorically qualifies as a crime of violence under the § 924(c)(3) elements clause and is, therefore, a valid predicate for Granda's Count 6 conviction. [Ovalles v. United States](#), 905 F.3d 1300, 1305–07 (11th Cir. 2018).

[9] • [Davis](#) applies retroactively to Granda's case. [Hammoud](#), 931 F.3d at 1037–39.

Thus, any one of Counts 1, 2, 4, or 5 could have validly predicated Granda's Count 6 conviction. Count 3 could not have. But we cannot tell from the general verdict whether the jury relied on Counts 1, 2, 4, or 5 (alone or in combination with one another), or on any of them in addition to Count 3, or on Count 3 alone. Nor can we tell from the superseding indictment, which simply alleged in Count 6:

[Granda and his co-defendants] did knowingly and intentionally combine, conspire, confederate, and agree with each other to use and carry a firearm during and in relation to a crime of violence and a drug trafficking crime, and to possess a firearm in furtherance of a crime of violence and a drug trafficking crime, which are felonies prosecutable in a court of the United States, specifically ... Counts 1, 2, 3, 4, and 5 of this Indictment ....

The jury instructions likewise did not shed any light on the problem. The district court told the jury that in order to sustain a conviction on Count 6, they had to find beyond a reasonable doubt that “the object of the unlawful plan was to use or carry a firearm during and in relation to, or to possess a firearm in furtherance of, one of the federal drug trafficking crimes, or one of the federal crimes of violence, or both, as charged in counts 1, 2, 3, 4, or 5 of the Superseding Indictment.”

If the jury relied on Count 3 alone, Granda would have been convicted of violating an unconstitutionally vague law, which “[i]n our constitutional order ... is no law at all.” [Davis](#), 139 S. Ct. at 2323. Granda claims that we cannot definitively rule

out this possibility and, therefore, must vacate his conviction on Count 6. We remain unpersuaded.

B.

[10] [11] [12] First, procedural default. This problem arises because Granda did not argue in the trial court, or on direct appeal, that his § 924(o) conviction was invalid \*1286 since the § 924(c)(3)(B) residual clause was unconstitutionally vague. “[A] defendant generally must advance an available challenge to a criminal conviction on direct appeal or else the defendant is barred from raising that claim in a habeas proceeding.” See [Fordham v. United States](#), 706 F.3d 1345, 1349 (11th Cir. 2013). He, therefore, procedurally defaulted this claim and cannot succeed on collateral review unless he can either (1) show cause to excuse the default and actual prejudice from the claimed error, or (2) show that he is actually innocent of the § 924(o) conviction. *Id.* Granda cannot establish cause, actual prejudice, or actual innocence. Thus, he cannot collaterally attack his conviction on a vagueness theory.

[13] We review de novo whether procedural default precludes a § 2255 petitioner's claim, which is a mixed question of law and fact. *Id.* at 1347.

*1. Granda's claim is not sufficiently novel to establish cause.*

[14] [15] [16] “[W]here 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.”

[Howard v. United States](#), 374 F.3d 1068, 1072 (11th Cir. 2004) (quoting [Reed v. Ross](#), 468 U.S. 1, 16, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984)) (internal quotation marks omitted). “That an argument might have less than a high likelihood of success has little to do with whether the argument is available or not. An argument is available if there is a reasonable basis in law and fact for it.” [Pitts v. Cook](#), 923 F.2d 1568, 1572 n.6 (11th Cir. 1991). “[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.” [McCoy v. United States](#), 266 F.3d 1245, 1258 (11th Cir. 2001) (internal quotation marks and citation omitted).

[17] Granda brought his claim under [Johnson](#) (arguing that [Johnson](#)'s reasoning should be extended to [§ 924\(c\)](#) (3)(B)); [Davis](#) then reinforced the basis for his claim. Both [Johnson](#) and [Davis](#) announced new constitutional rules, and each has been held to have retroactive application. [Welch v. United States](#), — U.S. —, 136 S. Ct. 1257, 1268, 194 L.Ed.2d 387 (2016); [Hammoud](#), 931 F.3d at 1037–39. To establish novelty “sufficient to provide cause” based on a new constitutional principle, Granda must show that the new rule was “a sufficiently clear break with the past, so that an attorney representing [him] would not reasonably have had the tools for presenting the claim.” [Howard](#), 374 F.3d at 1072 (internal quotation marks and citations omitted). In [Reed v. Ross](#), the Supreme Court identified three circumstances in which novelty might constitute cause for defaulting a claim. First, when a decision of the Supreme Court explicitly overrules one of its precedents, cause exists to excuse default of a claim based on the new decision. [468 U.S. at 17](#), 104 S.Ct. 2901. Second, when a Supreme Court decision overturns a “longstanding and widespread practice to which [the Supreme] Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved,” cause exists. [Id.](#) (internal quotation marks and citation omitted).

[18] The third category -- when a Supreme Court decision disapproves of “a practice [the Supreme Court] arguably has sanctioned in prior cases” -- is more complicated. [Id.](#) (internal quotation marks and citation omitted). For this category, we analyze “whether others were recognizing \*1287 and raising the same or similar claims in the period preceding or concurrent with the petitioner's failure to raise his claim.” [Pitts](#), 923 F.2d at 1572. Importantly, however, “[e]ven if others have not been raising a claim, the claim may still be unnovel if a review of the historical roots and development of the general issue involved indicate that petitioners did not ‘lack the tools to construct their constitutional claim.’” [Id.](#) at 1572 n.6 (alteration accepted) (quoting [Engle v. Isaac](#), 456 U.S. 107, 133, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)). Granda's [Davis](#) claim fits most neatly into this third category. (Unlike the [Johnson](#) ACCA decision, [Davis](#) did not overrule any prior Supreme Court

precedents holding that the [§ 924\(c\)](#) residual clause was not unconstitutionally vague.)

[19] Granda's best argument that his defaulted vagueness claim was not available on direct appeal is that at the time of that appeal,<sup>1</sup> [James v. United States](#), 550 U.S. 192, 210 n.6, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007) had directly rejected the argument that the ACCA's residual clause was unconstitutionally vague. See [Johnson](#), 576 U.S. at 594, 135 S.Ct. 2551 (In [James](#), “the Court rejected suggestions ... that the [ACCA's] residual clause violates the Constitution's prohibition of vague criminal laws.”).

<sup>1</sup> We issued our decision in Granda's direct appeal on September 29, 2009.

However, [James](#) did not consider the [§ 924\(c\)](#) residual clause at all. In fact, [James](#) indicated that at least three Justices were interested in entertaining vagueness challenges to the ACCA's residual clause, and perhaps to similar statutes. See [James](#), 550 U.S. at 229–31, 127 S.Ct. 1586 (Scalia, J., dissenting, joined by Justices Stevens and Ginsburg) (noting that the “shoddy draftsmanship” of the ACCA's residual clause left courts to choose between narrowing its scope and “recogniz[ing] the statute for the drafting failure it is and hold[ing] it void for vagueness”). Even more revealing, other defendants did challenge the ACCA's residual clause on vagueness grounds after [James](#) (but before [Johnson](#)). See, e.g., [United States v. Devo](#), 457 F. App'x 908, 910 (11th Cir. 2012); [United States v. LaCasse](#), 567 F.3d 763, 765 (6th Cir. 2009); [United States v. Spells](#), 537 F.3d 743, 753 n.4 (7th Cir. 2008); [United States v. Verner](#), 300 F. App'x 435, 435 (8th Cir. 2008); [United States v. Brown](#), No. 2:11-cr-30-FtM-29DNF, 2012 WL 39383, at \*5 (M.D. Fla. Jan. 9, 2012). These claims did not succeed. But if [James](#) did not deprive litigants of the tools to challenge even the ACCA's residual clause on vagueness grounds, it surely did not deprive them of the tools to challenge the [§ 924\(c\)](#) residual clause, a clause to which [James](#) did not even apply.

Moreover, the case law extant at the time of Granda's appeal confirms that he did not then lack the “building blocks of” a due process vagueness challenge to the [§ 924\(c\)](#) residual

clause. [United States v. Bane](#), 948 F.3d 1290, 1297 (11th Cir. 2020). To be sure, few courts, if any, had addressed a vagueness challenge to the  § 924(c) residual clause before the conclusion of Granda's direct appeal. Still, as a general matter, due process vagueness challenges to criminal statutes were commonplace. Thus, for example, litigants had for years before Granda's appeal argued (without success) that various other provisions of  § 924(c) were unconstitutionally vague. See [United States v. Whitehead](#), 257 F. App'x 777, 784 (5th Cir. 2007) (vagueness challenge to the term “not less than 7 years” in  § 924(c)(1)(A)(ii)); \*1288 [United States v. Hungerford](#), 465 F.3d 1113, 1117 (9th Cir. 2006) (vagueness challenge to the term “second or subsequent conviction” in  § 924(c)(1)(C)(i)); [United States v. Helton](#), 86 F. App'x 889, 891 (6th Cir. 2004) (vagueness challenge to the term “in furtherance of” in  § 924(c)(1)(A)); [United States v. Bennett](#), 165 F.3d 36 (Table), 1998 WL 781231, at \*1 (9th Cir. 1998) (vagueness challenge to the term “firearm” as applied to a silencer); [United States v. Pettit](#), 933 F.2d 1017 (Table), 1991 WL 83902, at \*1 n.1 (9th Cir. 1991) (vagueness challenges to the terms “during and in relation to” and “uses or carries a firearm” in  § 924(c)(1)(A)); [United States v. Meyer](#), 803 F.2d 246, 248 (6th Cir. 1986) (vagueness challenge to  § 924(c); unclear which clause).

That few, if any, litigants had contended that the  § 924(c) residual clause was unconstitutionally vague before the conclusion of Granda's appeal arguably cuts in favor of finding novelty. But as [Pitts](#) makes clear, the behavior of other litigants is not the whole of the inquiry. The tools existed to challenge myriad other portions of  § 924(c) as vague; they existed to support a similar challenge to its residual clause. Granda cannot show cause to excuse his procedural default.

## 2. Granda cannot show actual prejudice.

Even if Granda could show cause, however, he still could not overcome the procedural default of his vagueness claim because he cannot show actual prejudice.

[20] [21] “To prevail on a cause and prejudice theory, a petitioner must show actual prejudice. Actual prejudice means more than just the possibility of prejudice; it requires that the error worked to the petitioner's actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” [Fordham](#), 706 F.3d at 1350

(alteration accepted) (internal quotation marks and citation omitted). The actual prejudice standard is “more stringent than the plain error standard.” [Parks v. United States](#), 832 F.2d 1244, 1245 (11th Cir. 1987) (internal quotation marks omitted). The “ultimate inquiry” is: “Did the intrusion affect the jury's deliberations and thereby its verdict?”  [Ward v. Hall](#), 592 F.3d 1144, 1178–79 (11th Cir. 2010) (internal quotation marks and citation omitted).

[22] So it is 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; Granda must show at least a “substantial likelihood,” see  [Ward](#), 592 F.3d at 1180, that the jury actually relied on the Count 3 conviction to provide the predicate offense. More specifically, he must establish a substantial likelihood that the jury relied only on the Count 3 conviction, because reliance on any of Counts 1, 2, 4, or 5 would have provided a wholly independent, sufficient, and legally valid basis to convict on Count 6. If the absence of the invalid Count 3 predicate would not likely have changed the jury's decision to convict, Granda has not suffered actual prejudice.<sup>2</sup> Cf.  [United States v. Frady](#), 456 U.S. 152, 172, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) (no actual prejudice from erroneous \*1289 jury instructions existed where, on the facts of the case, there was “no substantial likelihood” that the jury would have mitigated a first-degree murder conviction to manslaughter if “only the malice instructions had been better framed”).

2 Granda disputes this burden, arguing that the prejudice from having possibly been convicted of a non-existent crime is self-evident. He relies on  [Davis v. United States](#), 417 U.S. 333, 346–47, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974) (“If this contention is well taken, then  [Davis](#)' conviction and punishment are for an act that the law does not make criminal. 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.”) (internal quotation marks omitted). But in  [Davis](#), the provision the petitioner claimed was invalid and so could not criminalize his conduct was the sole basis for his charge and conviction. His conviction under that provision therefore necessarily established

prejudice. In sharp contrast, Granda could have been convicted under one or more of several valid predicates, so in order to establish prejudice he must show that the invalid predicate was actually the basis for his conviction.

[23] Granda cannot make this showing. Based on his role as a lookout in a conspiracy and an attempt to rob at gunpoint a truck carrying some sixty to eighty kilograms of cocaine, the jury unanimously found Granda guilty of conspiracy and attempt to possess cocaine with intent to distribute, attempted carjacking, conspiracy to commit Hobbs Act robbery, and attempt to commit Hobbs Act robbery. [Granda](#), 346 F. App'x at 525. The trial record makes it abundantly clear that all of these findings rested on the same operative facts and the same set of events -- the jury found beyond a reasonable doubt that Granda had conspired and attempted to rob the truck in order to possess and distribute the cocaine it held. The evidence supporting Granda's alleged conspiracy to possess a firearm in furtherance of these crimes included Paulino's instruction to Granda, who was to act as a lookout during the robbery, to bring a pistol. Notably, Granda also attended a meeting at which the co-conspirators packed guns and makeshift handcuffs for the robbery and discussed the execution of the crime.

As for Granda's knowledge of the drug-trafficking objective of the robbery, this Court explained in affirming his convictions on direct appeal:

[T]he jury was presented with evidence that (1) Paulino ... specifically identified Granda in discussing the drug theft ... ; (2) Granda was present during two-drug related meetings, one of which involved explicit discussion of marijuana; (3) Granda had telephone contact with various members of the conspiracy during critical times in planning and executing the drug theft; (4) vague references to the cocaine robbery were made to Granda or in his presence; (5) and Granda was apprehended within close proximity to the scene of the robbery.

[Id.](#) at 527. The objective of the robbery and the carjacking was the same: to obtain and sell the multi-kilogram quantity of cocaine that was to be taken by force from the truck. So the jury could not have concluded that Granda conspired to possess a firearm in furtherance of his robbery conspiracy 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.

[United States v. Cannon](#), 987 F.3d 924, 947–50 (11th Cir. 2021) (“[Lance Cannon](#)”), which presents very similar facts, underscores and compels this conclusion. There, the defendants were convicted of several crimes -- including using and carrying a firearm during and in relation to a drug trafficking crime in violation of [18 U.S.C. § 924\(c\)](#) -- for participating in a scheme to rob a cocaine stash house. The indictment listed both an invalid predicate (Hobbs Act conspiracy) \*1290 and a valid predicate (conspiracy to possess cocaine with intent to distribute) for this charge. [Id.](#) at 931, 946–47. Like Granda, the defendants argued that “because the jury entered a general verdict, [the court could not] know if the jury unanimously found their guns connected to the now-invalid Hobbs Act robbery conspiracy predicate or the still-valid cocaine conspiracy predicate.” [Id.](#) at 947. We rejected the argument and held that the government had sustained its burden of proving that the error of submitting the invalid predicate to the jury was harmless. We reasoned:

[T]he trial evidence established the same facts and time period underlying each [predicate offense]. The cocaine the defendants were planning to rob from the narcotics traffickers was the same cocaine they were planning to possess with the intent to distribute. Undisputedly, the goal of the robbery scheme was to steal cocaine from a stash house so they could then distribute it themselves. ... No reasonable juror could have found that Cannon and Holton carried their firearms in relation to the Hobbs Act robbery conspiracy but not the cocaine conspiracy.

Id. at 948–49. And the jury had convicted the defendants of both the underlying Hobbs Act conspiracy and the conspiracy to possess cocaine with intent to distribute, which “conclusively establish[ed] that the jury unanimously found beyond a reasonable doubt that the defendants were conspiring to rob the stash house of cocaine so they could then possess and distribute the cocaine themselves.” Id. at 948.

The “trial record ma[de] clear that the two predicate ... crimes were so inextricably intertwined that no rational juror could have found that [the defendants] carried a firearm in relation to one predicate but not the other.” Id. at 948. So, too, with Granda's predicates. See also  In re Cannon, 931 F.3d 1236, 1243–44 (11th Cir. 2019) (observing in dicta that, even on the limited record available at the second or successive § 2255 petition authorization stage, there was “some indication that” the challenged  § 924(o) conviction “did not rest solely” on a Hobbs Act conspiracy predicate “because (1) the robberies were inextricably intertwined with the [alternative predicate of] conspiracy to possess with intent to distribute cocaine and marijuana, and (2) the jury found the narcotics conspiracy proven beyond a reasonable doubt.”);  In re Navarro, 931 F.3d 1298, 1302 & n.2 (11th Cir. 2019) (concluding based on the record available -- a factual proffer which the § 2255 petitioner had acknowledged was accurate -- that Hobbs Act conspiracy and drug trafficking predicates “seem[ed] inextricably intertwined, given the planned robbery underlying the charge for conspiracy to commit Hobbs Act robbery was the robbery of a drug stash house”).

Granda cites no record evidence to suggest otherwise. At trial, he did not offer a theory that would have permitted the jury to drive a wedge between any plan to possess a firearm in furtherance of his conspiracy-to-rob and his attempt-to-rob. As we've noted, Granda's defense at trial was that he believed Paulino, the leader of the conspiracy, was working as a government informant; Granda thus argued that he thought he was assisting a legitimate law enforcement effort and lacked the requisite criminal intent. But the jury plainly did not credit this account, finding Granda guilty of conspiracy and attempt to commit robbery and to possess cocaine with intent to distribute, along with attempted carjacking. If the jury did not believe Granda's \*1291 claim that he thought he was helping a government agent with respect to planning to possess a firearm in furtherance of the conspiracy-to-rob

count, it could not believe this claim with respect to the other counts, either.

Granda did offer a theory that might have permitted jurors to distinguish between his conspiracy-to-rob and the drug-trafficking offenses -- he argued “that he knowingly participated in a robbery, but not a cocaine robbery,” Granda, 346 F. App'x at 527 -- but the jury rejected this defense, too, finding beyond a reasonable doubt that he conspired and attempted to possess cocaine with the intent to distribute.<sup>3</sup> And we know that the jurors did not split into two camps, one of which found that Granda conspired to possess a firearm in furtherance of one or more valid predicates while the other found Granda conspired to possess a firearm only in furtherance of the Hobbs Act conspiracy. Besides the lack of any record evidence to suggest such a split, the district court instructed the jury that it must “unanimously agree upon the way in which the defendant” violated  § 924(o). See Lance Cannon, 987 F.3d at 950 (relying on a similar instruction to conclude “that it is not possible some of the jurors found that the defendants carried a firearm only during the Hobbs Act robbery conspiracy, while some other jurors found that they did so only during the cocaine conspiracy”); In re Price, 964 F.3d 1045, 1049 (11th Cir. 2020) (“We not only can, but we must, presume that juries follow their instructions.”).

<sup>3</sup> We also rejected Granda's lack-of-knowledge argument on direct appeal because there was sufficient evidence from which the jury “could have reasonably inferred that [Granda] was a knowing participant in a drug conspiracy.” Granda, 346 F. App'x at 527. And that is exactly the inference the jury drew.

Granda argues, nevertheless, that the jury's acquittal on Count 7 -- which charged Granda with using and carrying a firearm during, and with possessing a firearm in furtherance of, a crime of violence and drug-trafficking crime in violation of  § 924(c) -- suggests “that the jury convicted him of  § 924(o) based on his conduct in joining the conspiracy, rather than because the jury found that he used or possessed a firearm in connection with any substantive crime.” But the jury's conclusion that Granda did not actually possess a firearm in connection with a crime of violence or drug-trafficking crime, but did conspire to do so, is just as consistent with predicated the  § 924(o) conviction on the other inchoate crimes -- attempt-to-rob, attempt-to-carjack, and attempt/conspiracy to possess cocaine with intent

to distribute -- as it is with predicating the  § 924(o) conviction on the conspiracy-to-rob crime. Such equipoise does not help Granda meet his burden to show a substantial likelihood of actual prejudice.

In short, just as in [Lance Cannon](#), the alternative predicate offenses are inextricably intertwined -- each arose from the same plan and attempt to commit armed robbery of a tractor-trailer full of cocaine. The tightly bound factual relationship of the predicate offenses precludes Granda from showing a substantial likelihood that the jury relied solely on Count 3 to predicate its conviction on Count 6. Cf.  [Lomelo v. United States](#), 891 F.2d 1512, 1516, 1519 (11th Cir. 1990).

### 3. Granda cannot show actual innocence.

[24] [25] [26] Inasmuch as Granda cannot establish both cause and prejudice, his only way around procedural default would \*1292 be to establish that he is actually innocent of the  § 924(o) conviction. This he cannot do. The actual innocence exception to the procedural default bar is “exceedingly narrow in scope as it concerns a petitioner’s actual innocence rather than his legal innocence. Actual innocence means factual innocence, not mere legal innocence.” [Lynn v. United States](#), 365 F.3d 1225, 1235 n.18 (11th Cir. 2004) (alterations accepted) (internal quotation marks and citations omitted). “To establish actual innocence, [the] petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.”  [Bousley v. United States](#), 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (internal quotation marks and citation omitted).

[27] To demonstrate actual innocence of the  § 924(o) offense, Granda would have to show that no reasonable juror would have concluded he conspired to possess a firearm in furtherance of any of the valid predicate offenses. In the face of the overwhelming corpus of evidence of Granda’s plan to possess a firearm in furtherance of an attempted robbery of a cocaine truck, Granda cannot make this showing, nor does he try. Instead, he admits that his actual innocence argument “rises and falls with the merits of [his] argument that his [ § 924(o)] conviction is ‘based on’ conspiracy to commit Hobbs Act robbery.” But the same shortcoming that prevents Granda from showing actual prejudice -- that the valid drug-trafficking and crime-of-violence predicates are inextricably intertwined with the invalid conspiracy-to-rob

predicate -- makes it impossible for Granda to show that his  § 924(o) conviction was in fact based on the conspiracy-to-rob predicate.

Since Granda can show neither cause, nor prejudice, nor actual innocence, he cannot overcome procedural default.

### C.

[28] Even were we to assume that the overlap between the valid and invalid predicates did not bar Granda’s claim on procedural default grounds, the same problem would rear its head again on the merits. The inextricability of the alternative predicate crimes compels the conclusion that the error Granda complains about -- instructing the jury on a constitutionally invalid predicate as one several of potential alternative predicates -- was harmless.

[29] On collateral review, the harmless error standard mandates that “relief is proper only if the ... court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury’s verdict. There must be more than a reasonable possibility that the error was

[30] harmful.”  [Davis v. Ayala](#), 576 U.S. 257, 267–68, 135 S.Ct. 2187, 192 L.Ed.2d 323 (2015) (internal quotation marks and citations omitted); [Ross v. United States](#), 289 F.3d 677, 682 (11th Cir. 2002) (per curiam) (applying this standard to a § 2255 motion). Put another way, the court may order relief only if the error “resulted in actual prejudice.”  [Brecht v. Abrahamson](#), 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (internal quotation marks and citation omitted).

[31] [32] [33] “We do not phrase the [ [Brecht](#)] requirement as a burden of proof, for it is not.”  [Trepal v. Sec’y, Fla. Dep’t of Corr.](#), 684 F.3d 1088, 1111 n.26 (11th Cir. 2012); see  [O’Neal v. McAninch](#), 513 U.S. 432, 436, 438, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995) (explaining that  [Brecht](#)’s use of language suggesting the petitioner must establish prejudice “is not determinative” and “deliberately phras[ing] the issue ... \*1293 in terms of a judge’s grave doubt, instead of in terms of ‘burden of proof’ ”); [McWilliams v. Comm’r, Ala. Dep’t of Corr.](#), 940 F.3d 1218, 1230 (11th Cir. 2019) (Jordan, J., concurring in the judgment) ( [Brecht](#) “is

not a burden of proof.”). Instead, the reviewing court should “ask directly” whether the error substantially influenced the jury’s decision. [O’Neal](#), 513 U.S. at 436, 115 S.Ct. 992. Still, if the court “cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error,” the court must conclude that the error was not harmless. [Trepal](#), 684 F.3d at 1114 (quoting [O’Neal](#), 513 U.S. at 437, 115 S.Ct. 992). We review de novo the question of harmlessness under [Brecht](#), [Phillips v. United States](#), 849 F.3d 988, 993 (11th Cir. 2017).

This record does not provoke grave doubt about whether Granda’s § 924(o) conviction rested on an invalid ground. As we have explained, Granda’s conspiracy to commit Hobbs Act robbery was inextricably intertwined with the other predicate offenses. There is little doubt that if the jury found that 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 of which the jury convicted him. On this record, there can be no grave doubt about whether the inclusion of the invalid predicate had a substantial influence in determining the jury’s verdict. See [O’Neal](#), 513 U.S. at 435, 115 S.Ct. 992 (1995) (“By ‘grave doubt’ we mean that, in the judge’s mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.”); cf. [Lance Cannon](#), 987 F.3d at 949 (trial record “ma[de] clear” that no rational juror could have found that defendants carried firearms in connection with a conspiracy to rob a cocaine stash house but not also in connection with a conspiracy to possess with intent to distribute the cocaine to be taken from the house).

[34] Granda marshals several arguments against the application of [Brecht](#). None are persuasive. First, Granda says that it is improper to rely on the presence of alternative, valid grounds for conviction to conduct a harmless error analysis. This argument largely rests on [Stromberg v. California](#), 283 U.S. 359, 367–68, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), which stands for “the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground.” [Griffin v. United](#)

[States](#), 502 U.S. 46, 53, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991); see also [Yates v. United States](#), 354 U.S. 298, 312, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957) (“[W]e think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.”), overruled in part on other grounds by [Burks v. United States](#), 437 U.S. 1, 10–18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

In [Parker v. Sec’y for Dep’t of Corr.](#), also cited by the petitioner, we held that [Stromberg](#) barred the conclusion that an allegedly deficient felony murder instruction -- the judge had given a written instruction on felony murder but had failed to mention felony murder during his oral instructions -- was harmless solely because there was a valid, alternative basis for the petitioner’s first-degree murder conviction \*1294 (a premeditation instruction). 331 F.3d 764, 778–79 (11th Cir. 2003) (“[E]rror with respect to one independent basis is not rendered harmless solely because of the availability of another independent basis where it is impossible to say on which basis the jury’s verdict rests.”); see also [Adams v. Wainwright](#), 764 F.2d 1356, 1362 (11th Cir. 1985). Thus, in [Parker](#), a panel of this Court focused its harmless error analysis only on the allegedly invalid basis for the first-degree murder conviction (felony murder). 331 F.3d at 779–80. Granda, therefore, argues that [Parker](#) bars us from looking behind his verdict to determine whether his § 924(o) conviction might have rested on an alternative, valid ground.

[35] But, notably, after we decided [Parker](#), the Supreme Court held in [Hedgpeth v. Pulido](#) that [Stromberg](#) error is subject to the [Brecht](#) harmless error standard. [Hedgpeth](#), 555 U.S. 57, 58, 62, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008) (per curiam). The Court concluded that a [Stromberg](#) error is not structural; it does not “require[ ] automatic reversal.” [Id.](#) at 60–62, 129 S.Ct. 530. It expressly rejected the standard the Ninth Circuit had applied in that case, which required that the conviction be overturned unless the court was “absolutely certain” that the jury relied on a valid ground. [Id.](#) at 62, 129 S.Ct. 530

(citation omitted). This standard was “plainly inconsistent with” [Brecht, id.](#), which held that reversal is warranted only when the petitioner suffered “actual prejudice” from the error, [Brecht](#), 507 U.S. at 637, 113 S.Ct. 1710 (citation omitted). “An instructional error arising in the context of multiple theories of guilt” does not “vitiat[e] all the jury’s findings.” [Hedgpeth](#), 555 U.S. at 61, 129 S.Ct. 530.

Thus, it is proper to look at the record to determine whether the invalid predicate actually prejudiced the petitioner -- that is, actually led to his conviction -- or whether the jury instead (or also) found the defendant guilty under a valid theory. Limiting harmless error review to the invalid basis alone, as Granda suggests, would in this case effectively entitle Granda to relief if the jury may have relied on the invalid predicate to convict. But this result cannot be reconciled with [Brecht](#)’s requirement that “[t]here must be more than a reasonable possibility that the error was harmful,” [Ayala](#), 576 U.S. at 268, 135 S.Ct. 2187 (internal quotation marks and citation omitted), or with the Supreme Court’s rejection in [Hedgpeth](#) of a standard requiring automatic reversal if there is any chance that the jury relied on an invalid basis, see [id.](#) (explaining that [Brecht](#) rejects the idea that relief is appropriate based on “mere speculation that the defendant was prejudiced by trial error”) (internal quotation marks and citation omitted).

[36] Supreme Court cases decided since [Hedgpeth](#) confirm this conclusion. See [Skilling v. United States](#), 561 U.S. 358, 414 n.46, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010) (“The Fifth Circuit appeared to prejudge this issue, noting that, ‘if any of the three objects of Skilling’s conspiracy offers a legally insufficient theory,’ it ‘must set aside his conviction.’ That reasoning relied on the mistaken premise that [[Hedgpeth](#)] governs only cases on collateral review. Harmless-error analysis, we clarify, applies equally to cases on direct appeal. Accordingly, the Fifth Circuit, on remand, should take a fresh look at the parties’ harmless-error arguments.” (citations omitted)); see also [Black v. United States](#), 561 U.S. 465, 467, 474, 130 S.Ct. 2963, 177 L.Ed.2d 695 (2010) (recognizing the possibility that error in instructing an honest-services fraud defendant’s jury on two alternative \*1295 theories, one of which was invalidated by [Skilling](#), 561 U.S. at 368, 130 S.Ct. 2896, may have been

harmless). [Skilling](#) and [Black](#) involved direct review, but to the extent this distinction makes any difference, the harmless inquiry is more searching on collateral review than on direct review. See [Brecht](#), 507 U.S. at 637, 113 S.Ct. 1710.

[37] [38] Next, Granda claims that “[t]he categorical approach requires the Court to presume that [his] conviction [on] Count 6 rests on [the] Hobbs Act conspiracy.” This argument misapprehends the categorical approach, which courts use to determine whether a particular offense qualifies under crime-of-violence-type elements clauses such as those found in [§ 924\(c\)\(3\)\(A\)](#) and in the ACCA, [18 U.S.C. § 924\(e\)\(2\)\(B\)\(i\)](#). Under the categorical approach, we “examin[e] only the elements of the statute of conviction, not the specific conduct of a particular offender.” [United States v. Oliver](#), 962 F.3d 1311, 1316 (11th Cir. 2020) (internal quotation marks and citation omitted). We first assume that the conviction rested on the “‘least of the acts criminalized’ by the statute,” because to determine upon which of the criminalized acts the conviction rested would violate the categorical approach’s command not to analyze the facts underlying the conviction. [Id.](#) (quoting [Moncrieffe v. Holder](#), 569 U.S. 184, 190–91, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013)). Next, the court determines whether that act has an element that brings the offense within the ambit of the relevant clause. [Id.](#)

Granda reasons that because the general verdict does not reveal which predicate the jury relied on to find guilt for the [§ 924\(o\)](#) offense, we should apply the categorical approach and just assume that the jury rested its conclusion on the least culpable of the alternative offenses, which Granda contends is the invalid Hobbs Act conspiracy predicate. But Granda cites 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.

[39] [40] [41] Granda claims that the categorical approach must apply because determining that the jury did not rely solely on the Hobbs Act conspiracy predicate to convict would constitute impermissible judicial factfinding in violation of [Alleyne v. United States](#), 570 U.S. 99, 114–16,

133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).  [Alleyne](#) applies to findings of fact that increase a mandatory minimum, thereby “alter[ing] the prescribed range of sentences to which a defendant is exposed ... in a manner that aggravates the punishment.”  [Id.](#) at 108, 133 S.Ct. 2151. Such facts,  [Alleyne](#) holds, must be proven to a jury beyond a reasonable doubt.  [Id.](#) For example, a sentencing judge may not look at the evidence afresh to determine by a preponderance of the evidence whether a defendant “brandished” a firearm during an offense and is therefore subject to an increased mandatory minimum. See  [id.](#) at 117, 133 S.Ct. 2151. But a judge conducting a  [Brecht](#) harmless error analysis does not find a fact at all; instead, the judge asks as a matter of law whether there is grave doubt about whether an instruction on an invalid predicate substantially influenced what the jury already found beyond a reasonable doubt. See [Phillips](#), 849 F.3d at 993. Absent any sound reason for doing so, we decline Granda’s invitation to adopt what we see as an unprecedented expansion of the categorical approach.

\*1296 Finally,  [In re Gomez](#), 830 F.3d 1225 (11th Cir. 2016) does not help Granda. In  [Gomez](#), a § 2255 petitioner’s indictment had charged him with carrying and possessing a firearm “in relation to a crime of violence and a drug trafficking crime” in violation of  § 924(c).  [Id.](#) at 1226–27. The indictment listed as predicates two of the other counts charged, conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery.  [Id.](#) at 1227. A jury convicted Gomez with a general verdict.  [Id.](#) We held that Gomez had made a prima facie showing sufficient to receive authorization to file a second or successive § 2255 motion alleging that his  § 924(c) conviction rested on an invalid predicate “[s]ince the jury may have found that Gomez only ‘possessed’ a firearm during his Hobbs Act conspiracy offense.”  [Id.](#) at 1228. The “general verdict of guilty [did] not reveal any unanimous finding by the jury

that the defendant was guilty of conspiring to carry a firearm during one of the potential predicate offenses, all of [the] predicate offenses, or guilty of conspiring during some and not others.”  [Id.](#) at 1227.

But this prima facie decision is not inconsistent with a holding that, on the merits, the harmless error inquiry requires an examination of whether alternative, valid predicates grounded Granda’s conviction. In  [Gomez](#), this Court expressly noted that it was for the district court to consider the merits of Gomez’s petition -- so it left open the possibility that the district court would apply  [Brecht](#) on the merits.  [Id.](#) at 1228; see also  [id.](#) at 1229 (Carnes, C.J., concurring) (“The district court will determine, in the first instance, which crimes constitute the basis for Gomez’s  § 924(c) sentence.”). Thus,  [Gomez](#) does not stand for the proposition that a court may not inquire as to which of several alternative predicates actually supplied the basis for a  § 924(c) (or (o)) conviction or that a court is constrained to assume the verdict rested on the least culpable predicate offense.

We, therefore, hold, in addition to our conclusion that procedural default bars Granda’s claim, that Granda did not suffer harm from the erroneous jury instruction.

Accordingly, we **AFFIRM**.

[JORDAN](#), Circuit Judge, concurring in part and concurring in the judgment.

I join Parts I, II, III.A, and III.C of the court’s opinion and concur in the judgment. Because Mr. Granda cannot prevail on the merits, I would not address the issue of procedural default and therefore do not join Part III.B.

#### All Citations

990 F.3d 1272, 28 Fla. L. Weekly Fed. C 2536



**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

David J. Smith  
Clerk of Court

For rules and forms visit  
[www.ca11.uscourts.gov](http://www.ca11.uscourts.gov)

June 02, 2021

**MEMORANDUM TO COUNSEL OR PARTIES**

Appeal Number: 17-15194-AA  
Case Style: Carlos Granda v. USA  
District Court Docket No: 1:16-cv-23426-DMM  
Secondary Case Number: 1:07-cr-20155-DMM-3

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: T. L. Searcy, AA/lt  
Phone #: (404) 335-6180

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

No. 17-15194-AA

---

CARLOS GRANDA,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

---

Appeal from the United States District Court  
for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, Chief Judge, JORDAN and MARCUS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)



**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.:16-CV-23426-MIDDLEBROOKS/BRANNON  
(07-CR-20155)

CARLOS GRANDA,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

---

**ORDER ADOPTING REPORT IN PART AND DENYING MOTION TO VACATE  
SENTENCE UNDER § 2255**

THIS CAUSE comes before the Court upon the Report and Recommendation issued by Magistrate Judge Patrick A. White on July 5, 2017 (DE 19). Movant filed a Motion to Vacate pursuant to 28 U.S.C. § 2255 (DE 1, "Motion"), seeking relief in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Report recommends denying Movant's Motion to Vacate and recommends that a certificate of appealability should not be issued. Movant filed Objections to the Report on September 19, 2017. (DE 22).

**BACKGROUND**

Movant was charged in a multi-count superseding indictment with the following:

Count 1: conspiracy to possess a controlled substance with intent to distribute in violation of 21 U.S.C. § 846;

Count 2: attempt to possess a controlled substance with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 846;

Count 3: conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a);

Count 4: attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951(a);

Count 5: attempted carjacking in violation of 18 U.S.C. § 2119;

Count 6: conspiracy to use and carry, and to possess a firearm “during and in relation to a crime of violence and a drug trafficking crime” in violation of 18 U.S.C. § 924(o); and

Count 7: using and carrying and possess a firearm “during and in relation to a crime of violence and a drug trafficking crime” in violation of 18 U.S.C. § 924(c).

(CR-DE 61). Movant proceeded to trial and was convicted of Counts 1-6, but was acquitted of Count 7. Movant was sentenced to 360 months’ imprisonment, followed by a 5-year term of supervised release, and \$600 assessment. (CR-DE 243). After his appeal, Movant filed a motion to vacate pursuant to 28 U.S.C. § 2255, which was ultimately denied. In February 2015, Movant filed a motion to reduce his sentence pursuant to 18 U.S.C. § 3582, which was granted, and Movant’s sentence was reduced to 324 months’ imprisonment.

On August 8, 2016, the Eleventh Circuit granted Movant leave to file a second or successive § 2255 Motion as to his § 924(o) conviction. In that order, the Eleventh Circuit explained:

Count 6 of the superseding indictment charged Granda with conspiracy to use and possess a firearm “during and in relation to a crime of violence and a drug trafficking crime.” This § 924(o) count referred to two drug trafficking crimes (Counts 1 and 2); conspiracy to commit Hobbs Act robbery (Count 3); attempted Hobbs Act robbery (Count 4); and attempted carjacking (Count 5), presumably offering each as a possible predicate for the § 924(o) charge. Because “the jurors had multiple crimes to consider in a single count, [] they could have convicted [Granda] of the § 924(c) offense without reaching unanimous agreement on during which crime it was that [Granda conspired to possess] the firearm.” *In re Gomez*, \_\_ F.3d \_\_, \_\_, 2016 WL 3971720, at \*2 (11th Cir. July 25, 2016). The record does not make clear on which predicate offense the jury relied.

(DE 1 at 4).

## DISCUSSION

Movant challenges his 18 U.S.C. § 924(o) conviction based on *Johnson*. The Report finds that Movant cannot overcome the procedural bar because he cannot establish prejudice. Specifically, the Report finds that “regardless of whether *Johnson* applies to § 924(c)’s residual clause, Movant’s companion drug trafficking charges, his attempted Hobbs Act robbery charge, and his attempted carjacking charge are all independently sufficient to sustain Movant’s § 924(o) conviction.” (DE 19 at 6).

**The ACCA.** A conviction for felon in possession typically carries a statutory maximum sentence of ten years in prison. *See* 18 U.S.C. § 924(a)(2). However, if the defendant has three or more previous convictions for certain types of felonies, he is subject to an enhanced minimum sentence of fifteen years imprisonment with a maximum term of life imprisonment. Title 18 U.S.C. § 924(e)(1) provides:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .

The statute defines “violent felony” as

any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

18 U.S.C. § 924(e)(2)(B). The first clause, § 924(e)(2)(B)(i), is typically referred to as the elements clause (“has as an element the use, attempted use, or threatened use of physical force

against the person of another.”). The first part of the second clause, § 924(e)(2)(B)(ii), lists specific offenses—burglary, arson, extortion, offenses involving use of explosives—and is known as the enumerated offense clause. The portion of § 924(e)(2)(B)(ii) covering a conviction that “otherwise involves conduct that presents a serious potential risk of physical injury to another” is referred to as the residual clause.

On June 26, 2015, the Supreme Court held that the residual clause of the ACCA violates due process as it “denies fair notice to defendants and invites arbitrary enforcement by judges.” *Johnson v. United States*, 576 U.S. \_\_\_, 135 S. Ct. 2551, 2557 (2015). The residual clause can no longer support a defendant’s classification as an armed career criminal. On April 18, 2016, the Supreme Court decided *Welch v. United States*, 578 U.S. \_\_\_, 136 S. Ct. 1257 (2016), which held that the newly established right recognized in *Johnson* is retroactive to cases on collateral review.

**18 U.S.C. § 924(c).** Section 924(c)(1)(A) provides for a separate consecutive sentence if any person uses or carries a firearm during and in relation to a crime of violence or drug trafficking crime, or possesses a firearm in furtherance of such crimes. For the purposes of § 924(c), “crime of violence” is an offense that is a felony and:

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

*Id.* § 924(c)(3). The former clause is referred to as the “use-of-force” clause and the latter is referred to as the residual or “risk-of-force” clause. In *Ovalles v. United States*, \_\_\_ F.3d \_\_\_, 2017 WL 2829371 (11th Cir. June 30, 2017), the Eleventh Circuit held that *Johnson* does not

apply to § 924(c)(3)(B), the risk-of-force clause, and thus the risk-of-force clause of § 924(c)(3)(B) “remains valid.”<sup>1</sup>

Section 924(o) provides:

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 silencer or muffler, shall be imprisoned for any term of years or life.

18 U.S.C. § 924(o).

**Movant’s Challenge.** Movant challenges his § 924(o) conviction based on *Johnson*. However, in light of *Ovalles*, Movant’s challenge to his § 924(o) conviction fails. Because *Johnson* does not apply to § 924(c), it naturally follows that *Johnson* does not apply to § 924(o), which is simply conspiracy to commit an offense under § 924(c). Accordingly, Movant’s Motion is denied.

Even if *Johnson* could apply to a § 924(o) conviction, Movant has failed to meet his burden of proving entitlement to relief under *Johnson*. In *Beeman v. United States*, No. 16-16710, 2017 WL 4210419 (11th Cir. September 22, 2017), the Eleventh Circuit recently described the burden of proving a *Johnson* claim as follows:

We conclude, and hold, that, like any other § 2255 movant, a *Johnson* § 2255 claimant must prove his claim. To prove a *Johnson* claim, the movant must show that—more likely than not—it was use of the residual clause that led to the sentencing court’s enhancement of his sentence. If it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause.

*Beeman*, 2017 WL 4210419 at \*5.

---

<sup>1</sup> The mandate has been withheld in *Ovalles* and there is a pending petition for rehearing *en banc*.

The jury was provided with five potential predicate crimes to convict Movant under § 924(o): two drug trafficking crimes (Counts 1 and 2); conspiracy to commit Hobbs Act robbery (Count 3); attempted Hobbs Act robbery (Count 4); and attempted carjacking (Count 5). In order for Movant to meet his burden of proving his *Johnson* claim, he must show that, more likely than not, his § 924(o) conviction was based on the residual clause under 924(c). The jury was instructed that, in order to convict Movant under § 924(o) (Count 6), the following facts must be proven beyond a reasonable doubt:

- First: That two or more persons in some way or manner came to a mutual understanding to accomplish a common and unlawful plan, as charged in the Superseding Indictment;
- Second: That the Defendant, knowing the unlawful purpose of the plan, joined in it willfully, that is, with the intent to further its unlawful purpose; and
- Third: That the object of the unlawful plan was to use or carry a firearm during and in relation to, or to possess a firearm in furtherance of, one of the federal drug trafficking crimes, or one of the federal crimes of violence, or both, as charged in Counts 1, 2, 3, 4, or 5 of the Superseding Indictment.

(CR-DE 200 at 25).<sup>2</sup> Movant has offered no evidence to suggest that the jury relied on any crime of violence (Counts 3, 4, or 5) as opposed to any drug trafficking crime (Counts 1 or 2). Because drug trafficking crimes were not affected by *Johnson*, Movant has failed to carry his burden of proving his *Johnson* claim. Indeed, the Report finds that two out of the three potential crimes of violence (Counts 4 and 5) continue to remain crimes of violence without reliance on the residual/risk-of-force clause. Thus, for Movant to succeed, he must show that it was more likely

---

<sup>2</sup> The Report incorrectly states that because the Superseding Indictment stated that the § 924(o) conviction was based on a firearm used, carried, or possessed “during and in relation to a crime of violence *and* a drug trafficking crime,” Movant was necessarily convicted of using, carrying, or possessing a firearm during and in relationship to a drug trafficking crime. (DE 19 at 23). However, as explained above, the jury was instructed differently.

than not that at least one juror relied on conspiracy to commit Hobbs Act robbery (Count 3) in voting to convict Movant on Count 6. Movant has cited to no evidence to show this and thus, even assuming *Johnson* applied to § 924(o), he has failed to prove he is entitled to relief under *Johnson*.

Upon a careful, *de novo* review of the record, the Court agrees with the Report's recommendation to deny the Motion to Vacate for the reasons articulated above. I disagree, however, with the Report's recommendation to deny a certificate of appealability and find that a certificate of appealability should be issued.

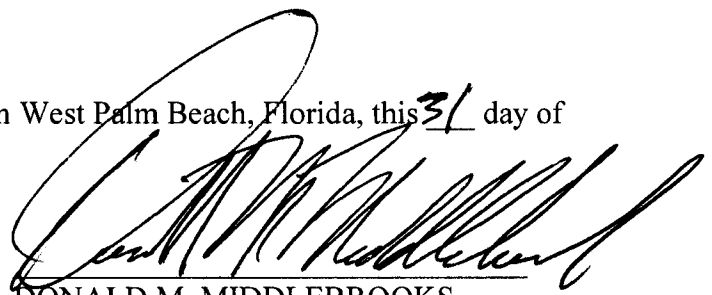
Accordingly,

It is **ORDERED AND ADJUDGED**:

- (1) The Report (DE 19) is **ADOPTED IN PART** as explained above.
- (2) The Motion to Vacate (DE 1) is **DENIED**.
- (3) A Certificate of Appealability is **GRANTED** 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*.

(4) The Clerk of Court shall **CLOSE** this case and **DENY** all pending motions as **MOOT**.

**DONE AND ORDERED** in Chambers in West Palm Beach, Florida, this 31 day of October, 2017.



DONALD M. MIDDLEBROOKS  
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record;  
Carlos Granda, pro se  
79349-004  
Coleman Low  
Federal Correctional Institution  
Inmate Mail/Parcels  
Post Office Box 1031  
Coleman, FL 33521



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CIV-23426-MIDDLEBROOKS  
(07-CR-20155-MIDDLEBROOKS)  
MAGISTRATE JUDGE P.A. WHITE

CARLOS GRANDA, :  
 :  
 Movant, :  
 :  
 v. :  
 :  
 UNITED STATES OF AMERICA, :  
 :  
 Respondent. :

---

REPORT OF  
MAGISTRATE JUDGE

Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, attacking his conviction and sentence entered in Case No. 07-CR-20155-MIDDLEBROOKS.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the motion (CV-DE#1), Movant's memorandum of law in support thereof (CV-DE#10), the government's response (CV-DE#12), Movant's reply (CV-DE#18), and all pertinent portions of the underlying criminal file.

Claims

Movant's sole claim in this proceeding is that his § 924(o) conviction is no longer lawful after the Supreme Court's decision in Johnson v. United States, 135 S.Ct. 2551 (2015).<sup>1</sup>

---

<sup>1</sup>This is the only claim that the Eleventh Circuit authorized Movant to file (CV-DE#1).

### Procedural History

Movant was charged in a multiple-count superseding indictment with conspiracy to possess a controlled substance with intent to distribute in violation of 21 U.S.C. § 846 (Count 1); attempt to possess a controlled substance with attempt to distribute in violation of 21 U.S.C. § 841(a)(1) (Count 2); conspiracy to commit Hobbs Act in violation of 18 U.S.C. §1951(a) (Count 3); attempted Hobbs Act robbery in violation of 18 U.S.C. §1951(a) (Count 4); attempted carjacking in violation of 18 U.S.C. § 2119 (Count 5); conspiracy to carry and possess a firearm "during and in relation to a crime of violence and a drug trafficking crime" in violation of 18 U.S.C. § 924(c) which, in turn, is in violation of 18 U.S.C. § 924(o); and using and carrying a firearm "during and in relation to a crime of violence and a drug trafficking crime in violation of 18 U.S.C. § 924(c) (Count 7). (DE#61). As the predicates for the §§ 924(o) & (c) counts, the indictment specifically referenced all of the conspiracy and attempt offense charged in Counts 1 - 5, above. (Id.).

Movant proceeded to trial and was convicted of Counts 1-6, but acquitted him of the substantive § 924(c) count charged in Count 7. (CR-DE#203). Movant filed a motion for a new trial based, in part, on his allegation that he and his codefendants were subjects of a personal vendetta by state Circuit Court Judge Pedro Echarte, Jr. (CR-DE#208). The government opposed the motion, and the court denied it (CR-DE#216).

The probation office prepared a Presentence Investigation Report, calculating Movant's offense level at 40 (PSI ¶51), and his criminal history category at IV (PSI ¶61). That resulted in an advisory guideline range of 360 months' to Life incarceration. The trial court sentenced Movant to a total imprisonment term of 360 months, a five-year supervised release term, and a \$600 assessment (CR-DE#243).

Movant appealed his convictions and sentences. (CR-DE#260). Movant's convictions and sentence were upheld on appeal. United States v. Granda, 346 Fed.Appx. 524 (2009) (CR-DE#303). On June 29, 2010, the United States Supreme Court denied Movant's petition for writ of certiorari (CR-DE#315).<sup>2</sup>

In April 2011, Movant filed a Motion to Pursuant to 28 U.S.C. § 2255, which was assigned civil case number 11-Civ-21283-Middlebrooks. That motion was ultimately denied. (See Docket, Case No. 11-Civ-21283-Middlebrooks, DE#9, 12). The Court of Appeals then affirmed the court's denial of a Certificate of Appealability in that case. (Id. at DE#28).

In May 2013, Movant filed a petition for writ of Audita Querela, pursuant to 28 U.S.C. §16511, attacking the indictment and judgment in the criminal case, which the court recharacterized and denied as a successive, but unauthorized, motion pursuant to 2255. (See Case No. 13-Civ-21801-Middlebrooks, DE#1, 7, 10). Movant appealed, and the Eleventh Circuit denied his request for a Certificate of Appealability (Id. at DE#21, 22, 23).

In February 2015, Movant filed a Motion to Reduce Sentence Pursuant to 18 U.S.C. 3582 (CR-DE#348). That motion was granted, and the court entered an order reducing Movant's sentence on Counts 1 and 2 to 324 months' incarceration and running the other sentences concurrent thereto for a total sentence of 324 months' down from 360 months' incarceration. (CR-DE#352).

On August 8, 2016, the Eleventh Circuit Court of Appeals granted Movant leave to file a second or successive Section 2255 Motion. (CV-DE#1). In so doing, the Eleventh Circuit stated as follows with regard to Movant's § 924(o) conviction:

---

<sup>2</sup>After the convictions and sentences were affirmed on appeal, but while Movant was apparently seeking relief in the Supreme Court, Movant filed a motion for a new trial based on newly-discovered evidence (CR-DE#301), was ultimately denied (CR-DE#312).

Count 6 of the superseding indictment charged Granda with conspiracy to use and possess a firearm "during and in relation to a crime of violence and a drug trafficking crime." This § 924 (o) count referred to two drug trafficking crimes (Counts 1 and 2); conspiracy to commit Hobbs Act robbery (Count 3); attempted Hobbs Act robbery (Count 4); and attempted carjacking (Count 5), presumably offering each as a possible predicate for the § 924( o) charge. Because "the jurors had multiple crimes to consider in a single count, [] they could have convicted [Granda] of the § 924(c) offense without reaching unanimous agreement on during which crime it was that [Granda conspired to possess] the firearm." In re Gomez, - F.3d. -, - , 2016 WL 3971720, at \*2 (11th Cir. July 25, 2016). The record does not make clear on which predicate offense the jury relied.

(CV-DE#1, p.3).

#### Procedural Bar<sup>3</sup>

The government argues that Movant's claim is procedurally barred. Specifically, the government argues that Movant failed to raise his Johnson claim either at trial or on direct appeal, and that Movant cannot satisfy either the cause-and-prejudice or the actual innocence exceptions to the procedural default rule.

As a general matter, a criminal defendant must assert an available challenge to a conviction or sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding; Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). It is well-settled that a habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477

---

<sup>3</sup>The government has not raised any defense based on the statute of limitations. The Court thus specifically finds that the government has waived any such defense, assuming one existed. See Day v. McDonough, 547 U.S. 198, 205, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006) (the AEDPA statute of limitations defense is not jurisdictional and is subject to waiver by the failure to raise it initially); see also Dodd v. United States, 545 U.S. 353 (2005) (in cases where the constitutional right asserted is a newly recognized right made retroactively applicable to cases on collateral review, the AEDPA's one-year limitations period runs from the date of that decision).

U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) (citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999). Cause for not raising a claim can be shown when a claim "is so novel that its legal basis [wa]s not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998). To show prejudice, a petitioner must show actual prejudice resulting from the alleged constitutional violation. United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Wainwright v. Sykes, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977).

If a petitioner is unable to show cause and prejudice, yet another avenue exists for obtaining review of the merits of a procedurally defaulted claim. Under exceptional circumstances, a prisoner may obtain federal habeas review of a procedurally defaulted claim if such review is necessary to correct a fundamental miscarriage of justice, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 495-96; see also Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862, 122 L. Ed. 2d 203 (1993); Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). The actual innocence exception is "exceedingly narrow in scope" and requires proof of actual innocence, not just legal innocence. Id. at 496; see also Bousley, 523 U.S. at 623 ("'actual innocence' means factual innocence, not mere legal insufficiency"); Sawyer v. Whitley, 505 U.S. 333, 339 (1992) ("the miscarriage of justice exception is concerned with actual as compared to legal innocence").

Where 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. Reed v. Ross, 468 U.S. 1, 17 (1984) That is precisely the circumstance here. Johnson overruled precedent, announced a new rule, and the Supreme Court gave retroactive application to that new rule. However, no actual prejudice that would result from finding a procedural default here because, as set forth *infra*, regardless of whether Johnson applies to § 924's residual clause, Movant's companion drug trafficking charges, his attempted Hobbs Act robbery charge, and his attempted carjacking charge are all independently sufficient to sustain Movant's §924(o) conviction. Accordingly, Movant cannot establish cause-and-prejudice overcome the procedural bar.<sup>4</sup>

#### Standard of Review

The Court of Appeals may grant a § 2255 movant leave to file a second or successive motion if the Court certifies that the second or successive motion contains a claim involving:

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

---

<sup>4</sup>And assuming without deciding that the rule of McKay v. United States, 657 F.3d 1190 (11<sup>th</sup> Cir. 2011) does not extend to cases where, as here, a § 2255 Movant challenges the conviction itself that is arguably unconstitutional, Movant would not be able to establish actual innocence of his § 924(c) conviction for the same reason; that is, because his companion drug trafficking, attempted Hobbs Act robbery and attempted carjacking crimes are independently sufficient to sustain Movant's § 924(o) conviction. Stated another way, even if Movant's conviction for conspiracy to commit Hobbs Act robbery does not qualify as a "crime of violence," Movant is still guilty of committing drug trafficking crimes and other crimes that still qualify as "crimes of violence."

(2) 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). The statute further provides that the Court may authorize the filing of a second or successive application "only if it determines that the application makes a *prima facie* showing that the application satisfies the requirements of this subsection." Id. However, the Court of Appeals' determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination. Jordan v. Sec'y, Dep't of Corrs., 485 F.3d 1351, 1357-58 (11th Cir. 2007). Thereafter, the District Court must decide in the first instance whether Movant has met the statutory criteria of § 2255(h). Id. at 1357 ("the district court not only can, but must, determine for itself whether those [§ 2255(h)] requirements are met"); 28 U.S.C. § 2244(b)(4) (cross-referenced in § 2255(h)). In making that determination, the District Court owes no deference to the findings of the Eleventh Circuit's *prima facie* determination that the requirements have been met, and instead must conduct a *de novo* review of the matter. Id.; see also In re Moss, 703 F.3d 1301, 1303 (11th Cir. 2013) (threshold determination by appellate court is a "limited determination" and district court must decide "fresh" if the requirements of § 2255(h) are met and, if they are, then consider the merits of the motion).

### Discussion<sup>5</sup>

#### *Section 924 and the ACCA*

Under the Armed Career Criminal Act of 1984 ("ACCA"), a defendant convicted of being a felon in possession of a firearm faces a more severe punishment if he or she has three or more convictions for a "violent felony" or "serious drug offense," or both, committed on occasions different from one another. The ACCA defines "violent felony" any crime punishable by imprisonment exceeding one year that:

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e) (2) (B). The words "or otherwise involves conduct that presents a serious potential risk of physical injury to another" have come to be known as the Act's residual clause. Johnson v. United States, 135 S.Ct. 2551, 2555-56 (2015). As everyone by now is well aware, in Johnson, the Supreme Court held that the ACCA's residual clause was unconstitutionally vague, and that imposing an enhanced sentence pursuant to that clause thus

---

<sup>5</sup>Because, as set forth above, the Court's conclusion that Movant's claim is procedurally barred turns on whether Movant's companion drug trafficking, attempted Hobbs Act robbery and attempted carjacking charges are independently sufficient to sustain Movant's §924(o) conviction, the Court must address this issue. However, since the Court concludes that they are, the Court need not address the unsettled question of whether Johnson invalidates § 924(c)'s residual clause. See United States v. Mottaz, 476 U.S. 834, 848, n.11, 106 S. Ct. 2224, 2233, 90 L. Ed. 2d 841 (1986) ("In light of our conclusion that the District Court's jurisdiction . . . rested on § 1346(f) . . . , we need not reach the difficult and unsettled question of how an appeal raising both issues committed to the Federal Circuit's jurisdiction and issues outside its jurisdiction is to be treated."); see also Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

violates the Constitution's guarantee of due process. 135 S.Ct. at 2563.

Title 18 U.S.C. § 924(c)(1)(A) makes it unlawful for a ny person to use or carry a firearm during and in relation to any "crime of violence or drug trafficking crime." The statute further defines "crime of violence" as any felony that "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3). As such, § 924(c)(3) contains a "residual clause," very similar to the residual clause declared unconstitutionally vague in Johnson.<sup>6</sup>

In the context of the ACCA's definition of "violent felony," the phrase "physical force" in paragraph (i) "means violent force-- that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140, 130 S. Ct. 1265, 1271, 176 L. Ed. 2d 1 (2010) ("Johnson I"). As the Supreme Court has noted, the term "violent felony" has been defined as "a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a deadly weapon, [and] calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." Id. (internal quotations and citations omitted); see also Leocal v. Ashcroft, 543 U.S. 1, 11, 125 S. Ct. 377, 383, 160 L. Ed. 2d 271 (2004) (stating that the statutory definition of "crime of violence" in 18 U.S.C. § 16, which is very similar to § 924(e)(2)(B)(i) in that it includes any felony offense which has as an element the use of physical force against the person of another,

---

<sup>6</sup>The ACCA's residual clause that was held to be unconstitutionally vague in Johnson defines "violent felony" as an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

"suggests a category of violent, active crimes . . ."). In addition, the Supreme Court has stated that the term "use" in the similarly-worded elements clause in 18 U.S.C. §16(a) requires "active employment;" the phrase "use . . . of physical force" in a crime of violence definition "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." Leocal, 543 U.S. at 9-10; see also United States v. Palomino Garcia, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (because Arizona "aggravated assault" need not be committed intentionally, and could be committed recklessly, it did not "have as an element the use of physical force;" *citing Leocal*). While the meaning of "physical force" is a question of federal law, federal courts are bound by state courts' interpretation of state law, including their determinations of the (statutory) elements of state crimes. Johnson I, 599 U.S. at 138. And a federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts, absent some persuasive indication that the state's highest court would decide the issue otherwise. See Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (11th Cir.1983).

To determine whether a past conviction is for a "violent felony" under the ACCA (and thus whether a conviction qualifies as a "crime of violence" for purposes of § 924(c) (assuming Johnson extends to § 924(c)), courts use what has become known as the "categorical approach." Descamps v. United States, 133 S. Ct. 2276, 2281, 186 L. Ed. 2d 438 (2013); see also United States v. Estrella, 758 F.3d 1239 (11<sup>th</sup> Cir. 2014). To determine if an offense "categorically" qualifies as a "crime of violence" under the "elements" or "use-of-force" clause in § 924(c)(3)(A) then, the court would have to determine if Hobbs Act robbery has an element of "force capable of causing physical pain or injury to

another person" as contemplated by Johnson I and its progeny. See Johnson, 559 U.S. at 140; Leocal, 543 U.S. at 11.

The Supreme Court has also approved a variant of the categorical approach, labeled the "modified categorical approach," for use when a prior conviction is for violating a so-called "divisible statute." Id. That kind of statute sets out one or more elements of the offense in the alternative. Id. If one alternative matches an element in the generic offense, but another does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, known as Shepard documents,<sup>7</sup> to determine which alternative formed the basis of the defendant's prior conviction. Id. The modified categorical approach then permits the court to "do what the categorical approach demands: [analyze] the elements of the crime of conviction . . . ." Id.

The modified categorical approach does not apply, however, when the crime of which the defendant was convicted has a single, indivisible set of elements. Id. at 2282. And when a defendant was convicted of a so-called "'indivisible' statute" - *i.e.*, one not containing alternative elements- that criminalizes a broader swath of conduct than the relevant generic offense," that conviction cannot serve as a qualifying offense. Id. at 2281-82.

In sum, when determining whether a conviction qualifies as a predicate offense, the courts can only look to the elements of the statute of the conviction, whether assisted by Shepard documents or not, and not to the facts underlying the defendant's prior conviction. See Descamps, 133 S.Ct. 2283-85. And in so doing, courts "must presume that the conviction 'rested upon nothing more

---

<sup>7</sup>In Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the Supreme Court held that a sentencing court could examine only a limited category of documents in determining whether a prior guilty plea constituted a "burglary," and thus a "violent felony," under the Armed Career Criminal Act ("ACCA"). See id. at 16, 125 S.Ct. 1254.

than the least of the acts' criminalized." Moncrieffe v. Holder, \_\_\_ U.S. \_\_\_, 133 S.Ct. 1678, 1684 (2011) (quoting Johnson I, 559 U.S. at 137).

Finally, in Mathis v. United States, — U.S. —, 136 S. Ct. 2243 (2016), the Court was most recently called upon to determine whether federal courts may use the modified categorical approach to determine if a conviction qualifies when a defendant is convicted under an indivisible statute that lists multiple, alternative means of satisfying one (or more) of its elements. 136 S. Ct. at 2247-48. The Court declined to find any such exception and, in so doing, addressed how federal courts are to make the threshold determination of whether an alternatively-phrased statute sets forth alternative elements (in which case the statute would be divisible and the modified categorical approach would apply to determine which version of the statute the defendant was convicted of violating), or merely lists alternative means of satisfying one element of an indivisible statute (in which case the categorical approach would apply). Id. at 2256-57.

#### *Movant's Drug §§ 846 and 841 Convictions*

Nothing in Johnson calls into question predicating an ACCA enhancement upon a prior conviction for a "serious drug offense."<sup>8</sup> United States v. Darling, 619 F. App'x 877, 880 (11th Cir. 2015) ("The Supreme Court's recent decision in Johnson . . . has no bearing on Darling's sentence because he had more than three predicate convictions for "serious drug offenses" as defined in 18 U.S.C. § 924(e)(2)(A)(ii)"); see also In re Rogers, 825 F.3d 1335, 1340 (11th Cir. 2016) (When . . . it is clear . . . that each predicate conviction qualified under the ACCA's elements or

---

<sup>8</sup>The ACCA provides for enhanced penalties for felons in possession of firearms who have three or more prior convictions for a "serious drug offense," or a "violent felony," as those terms are defined in the Act. See 18 U.S.C. § 924(e).

enumerated crimes clause, or as a serious drug offense . . . then [an application for authorization to file a second or successive § 2255 motion] does not 'contain' a Johnson claim."); In re Robinson, 822 F.3d 1196, 1197 (11th Cir. 2016) ("[T]he rule announced in Johnson does not benefit Robinson. Robinson's ACCA sentence was based on convictions for two serious drug offenses, as well as convictions for armed robbery and for aggravated battery with a firearm.").

"Serious drug offense" is defined in the ACCA as:

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

18 U.S.C. § 924(e) (2) (A). Similarly, § 924(c), the portion of the ACCA that Movant pleaded guilty to violating for various weapons offenses "during and in relation to a crime of violence or drug trafficking crime," defines "drug trafficking crime" as:

any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

18 U.S.C. § 924(c) (2). And here, as set forth above, two of the crimes that were charged as the predicates for Movant's § 924(o) conviction were drug trafficking crimes: to wit, conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846, and attempt to possess with intent to distribute cocaine in

violation of 21 U.S.C. § 841. And as further set forth above, Movant was convicted of these crimes.

*Movant's Hobbs Act Conspiracy Conviction*

"To convict on a Hobbs Act conspiracy, the government must show that (1) two or more people agreed to commit a Hobbs Act robbery; (2) that the defendant knew of the conspiratorial goal, and (3) that the defendant voluntarily participated in furthering that goal." United States v. Ransfer, 749 F.3d 914, 929 (11th Cir. 2014). In these elements, there is neither a requirement that the defendant engage in an overt act in furtherance of the conspiracy, United States v. Pistone, 177 F.3d 957, 959-60 (11th Cir. 1999), nor that a defendant was "even capable of committing" the underlying offense. Ocasio v. United States, 136 S. Ct. 1423, 1432 (2016). Applying the categorical approach,<sup>9</sup> then, a conviction for conspiracy to commit a Hobbs Act robbery in violation of § 1951(a) does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A) (describing the elements of a felony offense that constitute a "crime of violence"). As such, a conspiracy to commit a Hobbs Act robbery does not qualify as a crime of violence under § 924(c)'s elements clause. See Edmundson, 153 F. Supp. 3d at 864 (reviewing Fourth Circuit case law to hold that "the elements of neither conspiracy offense require the defendant to commit an overt act in furtherance of the conspiracy. Accordingly,... conspiracy to commit Hobbs Act robbery does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another, and

---

<sup>9</sup>See Descamps v. United States, 133 S. Ct. 2276, 2281, 186 L. Ed. 2d 438 (2013)

therefore does not fall within the § 924(c) force clause.”);<sup>10</sup> United States v. Luong, 2016 WL 1588495, at \*3 (E.D. Cal. Apr. 20, 2016) (relying on Ninth Circuit precedent to determine that “conspiracy to commit Hobbs Act robbery does not have as an element the use or attempted use of physical force and is not a crime of violence under the force clause.”). Movant’s conviction for conspiracy to commit Hobbs Act robbery, which served as one of the predicate “crimes of violence” for his § 924(c) conviction, thus could only have qualified under § 924(c) (3) (B)’s unconstitutionally vague residual clause. Therefore, assuming that the rule of Johnson extends to invalidate §924’s residual clause, Movant’s conviction for conspiracy to commit Hobbs Act robbery cannot serve as a predicate “crime of violence” for purposes of sustaining his § 924(o) conviction.<sup>11</sup>

#### *Movant’s Attempted Hobbs Act Conviction*

The Eleventh Circuit has resolved the issue of whether Movant’s conviction for attempted Hobbs Act robbery still qualifies as a predicate “crime of violence” for purposes of § 924(c) after Johnson. Specifically, in In re Saint Fleur, 824 F.3d 1337 (11th Cir. 2016), in the context of an application for leave to file a second or successive motion under § 2255, the Court considered whether Johnson impacts a robbery charge under the Hobbs Act, 18 U.S.C. § 1951(a), and a separate firearm charge during and in

---

<sup>10</sup>As previously noted, the elements clause is also sometime referred to as the “use-of-force” or “force” clause.

<sup>11</sup>As previously noted, however, the Court does not need to reach the unsettled issue of whether the rule of Johnson extends to § 924(c) because, even if it did, Movant’s companion drug trafficking charges, as well as his charges for attempted substantive Hobbs Act robbery and attempted carjacking, are still independently sufficient to sustain Movant’s § 924(o) conviction

relation to a "crime of violence" in violation of § 924(c).<sup>12</sup> The Eleventh Circuit denied the application, stating:

But we need not decide, nor remand to the district court, the § 924(c)(3)(B) residual clause issue in this particular case because even if Johnson's rule about the ACCA residual clause applies to the § 924(c)(3)(B) residual clause, [defendant's] claim does not meet the statutory criteria for granting this § 2255(h) application. This is because [defendant's] companion conviction for Hobbs Act robbery, which was charged in the same indictment as the § 924(c) count, clearly qualifies as a "crime of violence" under the use-of-force clause in § 924(c)(3)(A).

824 F.3d at 1340.

Movant could argue that Saint Fleur wholly fails to conduct the requisite analysis under Taylor and its progeny for determining whether Hobbs Act robbery in fact still qualifies after Johnson. See Scalia, Antonin, J., The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1177 (1989) (lower courts are not only bound by the narrow "holdings" of higher court decisions, but also by their "mode of analysis"). Movant could thus argue that, if this Court conducts the proper analysis, it will conclude that substantive Hobbs Act robbery does not qualify as a crime of violence for purposes of § 924(c). That may well be true. The problem is that it would be futile for the Court to conduct any such analysis, because the Eleventh Circuit has already decided the issue in Saint Fleur, supra.

---

<sup>12</sup>The Court is cognizant that in Saint Fleur the Court was addressing substantive Hobbs Act robbery, and that here Movant was convicted of attempted Hobbs Act robbery. However, that distinction is immaterial. As a general matter, if a substantive crime qualifies as a predicate "crime of violence," an attempt to commit that crime of violence, which generally requires a substantial step toward the commission of the substantive crime, similarly qualifies. See United States v. Lockley, 632 F.3d 1238, 1245 (11th Cir. 2011); see also United States v. Gonzalez, 322 F. App'x 963, 969 (11th Cir. 2009) (evidence was sufficient to sustain convictions for attempt to commit Hobbs Act robbery; evidence indicated defendants engaged in substantial steps toward commission of robbery).

Movant could also argue that the only question presented in an application for leave to file a second or successive motion under § 2255 is whether the applicant has made the requisite *prima facie* showing sufficient to satisfy one of the gatekeeping provisions of the AEDPA's restrictions on such filings. These applications are frequently filed by pro se litigants and that the Court frequently does not have a full record, and that such applications must be resolved within a tight 30-day window. Indeed, there are numerous cases where judges on the Eleventh Circuit have been troubled about how wrong many of their own decisions that have gone beyond determining whether the applicant has made a *prima facie* showing have been in the deluge of Johnson-based applications.

Movant could thus also argue that, regardless of what Saint Fleur says about Hobbs Act robbery, that this Court must follow In re Pinder, 824 F.3d 977, 978 (11th Cir. 2016) under the prior panel precedent rule. In Pinder, the Eleventh Circuit concluded that an applicant seeking authorization to file a second or successive § 2255 motion had made a *prima facie* showing that his claim contained a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, in a case wherein the defendant's claim was that he was subjected to an unlawfully enhanced penalty under § 924(c) in light of Johnson. 824 F.3d at 979. In so doing, the Court explained that the law was unsettled as to whether Johnson similarly invalidated § 924(c)'s residual clause, and noted:

Pinder's § 924(c) sentence appears to have been based on a conviction for conspiracy to commit Hobbs Act robbery. "To convict on a Hobbs Act conspiracy, the government must show that (1) two or more people agreed to commit a Hobbs Act robbery; (2) that the defendant knew of the conspiratorial goal; and (3) that the defendant voluntarily participated in furthering that goal." This Court "has not decided that a Hobbs Act robbery categorically qualifies as a 'crime of violence' for the purposes of § 924(c)" after Johnson. We also haven't

decided this question for conspiracy to commit Hobbs Act robbery. At least two district courts have held that conspiracy to commit Hobbs Act robbery is not a "crime of violence" after Johnson. We leave the merits of Pinder's claim to the District Court to decide in the first instance.

824 F.2d at 979, n.1 (internal citations omitted).

Movant could argue that this is the correct approach; that is, that the Eleventh Circuit should have limited itself in Saint Fleur simply to a determination of whether Saint Fleur had made a *prima facie* showing, and left it for the district court to decide in the first instance whether Saint Fleur's Hobbs Act robbery categorically qualified as "crime of violence." Again, that may be true. The problem is that the Eleventh Circuit did not do that. Rather, as set forth above, in Saint Fleur the Eleventh Circuit went further and determined that Hobbs Act robbery does qualify.

It is axiomatic that federal district courts in the are bound by the precedent of their circuit. See In re Hubbard, 803 F.3d 1298, 1309 (11th Cir. 2015), citing Generali v. D'Amico, 766 F.2d 485, 489 (11th Cir.1985). Courts are, however, generally only bound by the holdings of cases. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67, 116 S. Ct. 1114, 1129, 134 L. Ed. 2d 252 (1996). Dicta, conversely, is "not binding on anyone for any purpose." Edwards v. Prime, Inc., 602 F.3d 1276, 1298 (11th Cir.2010). As the Eleventh Circuit has noted, "dicta is defined as those portions of an opinion that are 'not necessary to deciding the case then before us.'" United States v. Kaley, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (citations omitted). The holding of a case, on the other hand, is "comprised both of the result of the case and 'those portions of the opinion necessary to that result by which we are bound.'" Id. Finally, under the prior panel precedent rule, the holding of a prior panel of the Eleventh Circuit is binding on all subsequent panels, unless and until it is

overruled or undermined to the point of abrogation by the Supreme Court or by the Eleventh Circuit sitting en banc. United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008) (citations omitted).<sup>13</sup>

Here, regardless of whether the Eleventh Circuit in Saint Fleur should have undertaken a determination of whether Saint Fleur's Hobbs Act conviction qualified as a "crime of violence," the fact remains that it did. Moreover, the Court's conclusion that Saint Fleur's Hobbs Act conviction did qualify as a "crime of violence" was necessary to the result in that case, since his application for leave to file a second or successive § 2255 motion was denied on that basis. As such, Saint Fleur holds that Hobbs Act robbery is a "crime of violence" for purposes of § 924(c), see Kaley, 579 F.3d at 1253 n.10 (the holding of a case is comprised both of the result of the case and those portions of the opinion necessary to that result), and this Court is thus bound by it. In re Hubbard, 803 F.3d at 1309 (federal district courts in the are bound by the precedent of their circuit).

Finally, any reliance on Pinder and the prior panel precedent rule would be unavailing. As set forth above, this rule provides that the holding of a prior panel of the Eleventh Circuit is binding on all subsequent panels, unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by the Eleventh Circuit sitting en banc. Archer, 531 F.3d at 1352. It does not authorize a federal district court to disregard binding precedent that is directly on point, simply because the Court concludes that the Eleventh Circuit took a better general approach in a factually inapposite case. Specifically, as set forth above, Pinder addressed *conspiracy* to commit Hobbs Act robbery, whereas

---

<sup>13</sup>"While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point." Garrett v. University of Alabama at Birmingham Bd. of Trustees, 344 F.3d 1288, 1292 (11th Cir.2003).

here Movant had a companions charges of substantive Hobbs Act robbery, which were specifically referenced as the predicate crimes of violence supporting the §924(c) charges. Therefore, Pinder is not even in conflict with Saint Fleur in the first place. See In re Gordon, 827 F.3d 1289, 1294 (11th Cir. 2016) ("The applicant's argument that Saint Fleur . . . conflicts with Pinder fails because the companion conviction in Pinder was conspiracy to commit Hobbs Act robbery, while Saint Fleur . . . substantive Hobbs Act robbery . . . Indeed this Court specifically distinguished Pinder in . . . Saint Fleur . . . Therefore, we reject the claim that under the prior panel precedent rule, Pinder, not Saint Fleur . . . control[s] . . .").

*Movant's Attempted Carjacking Conviction*

In In re Smith, 829 F.3d 1276 (11th Cir. 2016), in the context of an application for leave to file a second or successive motion under § 2255, the Eleventh Circuit also considered whether Johnson impacts a carjacking charge, 18 U.S.C. § 2119, and thus a separate firearm charge during and in relation to a "crime of violence" in violation of § 924(c) predicated upon that charge.<sup>14</sup> The Eleventh Circuit denied the application, stating that in United States v. Moore, 43 F.3d 568 (11th Cir. 1994), the Court had held:

The term "crime of violence" as Congress defined it in 18 U.S.C § 924(c)(3) clearly includes carjacking. "Tak[ing]

---

<sup>14</sup>Again, the Court is cognizant that in Smith the Court was considering whether substantive carjacking still qualified as a "crime of violence" for purposes of § 924 after Johnson. But again, if a substantive crime qualifies as a predicate "crime of violence," an attempt to commit that crime of violence, which generally requires a substantial step toward the commission of the substantive crime, similarly qualifies. See Lockley, 632 F.3d at 1245; see also United States v. Baker, 669 F. App'x 525, 526 (11th Cir. 2016) ("Because Baker was charged with attempted carjacking, the government need only show that Baker 'had the specific intent to engage in criminal conduct and that he took a substantial step toward commission of the offense.'"), citing United States v. Baptist-Rodriguez, 17 F.3d 1354, 1369 (11th Cir. 1994).

or attempt[ing] to take by force and violence or by intimidation," 18 U.S.C. § 2119, encompasses "the use, attempted use, or threatened use of physical force...." 18 U.S.C. § 924(c) (3) (A). Stated another way, an element requiring that one take or attempt to take by force and violence or by intimidation, which is what the federal carjacking statute does, satisfies the force clause of § 924(c), which requires the use, attempted use, or threatened use of physical force. In short, our precedent holds that carjacking in violation of § 2119 satisfies § 924(c)'s force clause, and that ends the discussion.

In re Smith, 829 F.3d 1280-81 (internal citations omitted)

The Court notes, as does the dissent in Smith, that the majority wholly fails to conduct the requisite analysis under Taylor and its progeny for determining whether carjacking in fact still qualifies after Johnson. Movant, for his part, could thus argue as does the dissent that if this Court conducts the proper analysis, it will conclude that carjacking does not qualify as a crime of violence for purposes of § 924(c). That may well be true. The problem, however, is, as with Movant's attempted Hobbs Act robbery conviction, that it would be futile for the Court to conduct any such analysis. Specifically, as set forth above, the Eleventh Circuit has already decided the issue in Moore and Smith, *supra*.

Movant could presumably also argue that, as with his attempted Hobbs Act robbery conviction, the correct approach in Smith would have been for the Eleventh Circuit to have limited itself simply to a determination of whether Smith had made a *prima facie* showing, and left it for the district court to decide in the first instance whether Smith's carjacking conviction categorically qualified as "crime of violence." Again, as with Movant's attempted Hobbs Act conviction, that may be true. The problem again is that, as with Saint Fleur, wherein the Eleventh Circuit determined that substantive Hobbs Act robbery still qualifies as a "crime of violence" for purposes of § 924(c), the Eleventh Circuit did not so

limit itself in Smith with regard to carjacking either. Rather, as set forth above, in Smith, as well as in Moore before it, the Eleventh Circuit determined that § 2119 carjacking still categorically qualifies as a predicate "crime of violence" for purposes of § 924.

Again, it is axiomatic that federal district courts in the are bound by the precedent of their circuit. See In re Hubbard, 803 F.3d at 1309. And based on the analysis of Saint Fleur with regard to Movant's attempted Hobbs Act robbery, the Court concludes that the Smith holds that § 2119 carjacking is a "crime of violence" for purposes of § 924(c), see Kaley, 579 F.3d at 1253 n.10 (the holding of a case is comprised both of the result of the case and those portions of the opinion necessary to that result). This Court is thus bound by Smith, as well as by the Eleventh Circuit's prior holding in Moore. In re Hubbard, 803 F.3d at 1309 (federal district courts in the are bound by the precedent of their circuit).

*In re: Gomez*

As set forth above, in granting Movant's application for leave to file this successive § 2255 motion, the Eleventh Circuit in reliance on In re Gomez, 830 F.3d 1225 (11th Cir. 2016), that they could have convicted Movant of the § 924(o) offense without reaching unanimous agreement on during which crime it was that conspired to possess the firearm. However, as further set forth above, the Eleventh Circuit's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met to file a second or successive § 2255 motion is simply a threshold determination. Jordan, 485 F.3d at 1357-58. And as the Eleventh Circuit itself stated in its order granting Movant leave to file this second § 2255 motion, that "[i]t is the job of the district court to decide every aspect of [Movant's] motion 'fresh,

or in the legal vernacular, *de novo*.'" (CV-DE#1, p.4, *citing Jordan*, 485 F.ed at 1358). And here, as set forth above, a *de novo* review of the record reveals that the indictment charged in the § 924(o) count at issue that Movant was charged with conspiring to use and carry a firearm during and in relation to or possessing a firearm in furtherance of the drug trafficking crimes *and* crimes of violence alleged in Counts 1 - 5 of the superseding indictment. (CR-DE#61)). Stated another way, the way the indictment read, Movant was charged with and convicted of conspiring to use and carry a firearm during and in relation to the alleged Hobbs Act conspiracy, which admittedly cannot independently sustain the § 924(o) conviction, *as well as the* during and in relation to the drug trafficking crimes, attempted Hobbs Act, and attempted carjacking charges, all of which can.

#### Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and that if a certificate is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." Rule 11(a) further provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Id. Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Habeas Rules.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Where a §2255 movant's constitutional claims have been adjudicated and denied on the merits by the district court, the movant must demonstrate reasonable jurists could debate

whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a §2255 movant's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the movant can demonstrate both "(1) 'that jurists of reason would find it debatable whether the [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4<sup>th</sup> Cir.2001) (quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that Movant's claims are barred on procedural grounds, the court considers whether Movant is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in the instant motion. After reviewing the issues presented in light of the applicable standard, the court concludes that reasonable jurists would not find debatable the correctness of the court's procedural rulings. Accordingly, a certificate of appealability is not warranted. See Slack, 529 U.S. at 484-85 (each component of the §2253(c) showing is part of a threshold inquiry); see also Rose, 252 F.3d at 684.

#### Conclusion

Based upon the foregoing, it is recommended that the motion to vacate be DENIED, and that no certificate of appealability be issued.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report, including any objections with regard to the denial of a certificate of appealability.

SIGNED this 5<sup>th</sup> day of July, 2017.

A handwritten signature in black ink, appearing to read "H. P. White", is written over a horizontal line.

UNITED STATES MAGISTRATE JUDGE

Copies furnished:

Carlos Granda  
79349-004  
Coleman Low  
Federal Correctional Institution  
Inmate Mail/Parcels  
Post Office Box 1031  
Coleman, FL 33521

Michael E. Gilfarb  
United States Attorney's Office  
99 NE 4 Street  
Miami, FL 33132