No. 21-6171

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

---

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

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

February 16, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONER

I.

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

A. There is a very real, and very important, circuit split.

This case presents a clear, entrenched, and outcome-determinative circuit split, regarding whether the constitutional rule recognized in *Johnson v. United States*, 576 U.S. 591 (2015), was sufficiently novel to provide "cause" sufficient to overcome a procedural default. *See* Petition for Writ of Certiorari ("Pet.") at 11-12.

The government attempts to disguise the split by noting that the Tenth Circuit's decision in *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017), involved a challenge to the residual clause of the Armed Career Criminal Act ("ACCA"), and the Seventh Circuit's decision in *Cross v. United States*, 892 F.3d 288, 295 (7th Cir. 2018), involved a challenge to the residual clause under the mandatory guidelines. Thus, the government contends, these cases "do not address whether the reasoning of [*United States v. Davis*, 139 S.Ct. 2319 (2019)] was sufficiently novel to excuse procedural default of a claim that Section 924(c)(3)(B) was unconstitutionally vague." *See* Brief for the United States in Opposition ("Br.Opp.") at 21-22. But the government's response only reveals the depth of the division.

In *Reed v. Ross,* the Court identified "three situations in which a 'new' constitutional rule, representing a 'clear break with the past,' might emerge from this Court." 468 U.S. 1, 17 (1984) (citation and internal quotation marks omitted). "First, a decision of this Court may explicitly overrule one of our precedents." *Id.* (citation omitted). "Second, a decision may 'overtur[n] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Id.* (citation omitted). "And, finally, a decision may 'disapprov[e] a practice this Court arguably has sanctioned in prior cases." *Id.* (citation omitted).

The Court did not suggest, however, that cause will exist under the first "*Reed* category," only when the break in precedent from this Court involves the exact same statute under which the petitioner's claim arises. To the contrary, the *Reed* opinion speaks in terms of a new constitutional "principle," "rule," "issue," and "claim" emerging from the Court. *See id.* at 14-17.

Here, *Johnson* established a new rule of constitutional law that *both* overturned established precedent, *and* clearly applies to Mr. Granda's case. Specifically, *Johnson* held that: "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 576 U.S. at 598. This clear constitutional rule requires the invalidation of ***any***

criminal statute that requires courts to determine what is embodied in the "ordinary case" of an offense, and then to quantify the level of "risk" posed by that ordinary case. Hence, in *Sessions v. Dimaya*, 138 S.Ct. 1204, 1213 (2018), the Court wrote that "*Johnson* is a straightforward decision, with equally straightforward application" which required the invalidation of the residual clause in 18 U.S.C. § 16(b) – a statutory provision materially identical to 18 U.S.C. § 924(c)(3)(B). After recounting *Johnson*'s constitutional rule, the *Dimaya* Court wrote that "*Johnson* effectively resolved the case now before us. For § 16's residual clause has the same two features as ACCA's, combined in the same constitutionally problematic way." *Id.*

By the time the Court considered *United States v. Davis*, 139 S.Ct. 2319, 2324 (2019), "[e]ven the government" agreed that if 18 U.S.C. § 924(c)(3)(B) were read to require the categorical approach, *Johnson* required its invalidation. *See id.* at 2324, 2326-27 ("*Johnson* and *Dimaya* ... teach that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.' ... For years, almost everyone understood § 924(c)(3)(B) to require exactly the same categorical approach that this Court found problematic in the residual clauses of the ACCA and § 16(b). Today, the government acknowledges that, if this understanding is correct, then § 924(c)(3)(B) must be held unconstitutional too.").

Faced with *Johnson's* reversal of precedent and the emergence of a new constitutional rule, the Seventh Circuit appropriately found in *Cross*, that *Johnson* provided cause for the movant's failure to challenge the residual clause of the then-mandatory sentencing guidelines "under *Reed*'s first category." *See Cross*, 892 F.3d at 296. The opinion below thus does more than conflict with *Cross*—as well as *Snyder* and *United States v. Raines*, 898 F.3d 680, 687 (6th Cir. 2018)—on the ultimate issue of whether *Johnson* provides "cause" for the movant's procedural default. It additionally conflicts with *Cross* regarding whether the first *Reed* category applies only when this Court overrules precedent *on the exact statute* at issue in the petitioner's case. *See Granda v. United States*, 990 F.3d 1272, 1286 (11th Cir. 2021) (finding that Granda's claim "fits most neatly" into *Reed*'s third category, because "[u]nlike the *Johnson* ACCA decision, *Davis* did not overrule any prior Supreme Court precedents holding that the § 924(c) residual clause was not unconstitutionally vague").

B. The decision below is contrary to the law of this Court and promotes enormous waste of resources.

The decision below is contrary to the law of this Court. There is simply is no basis for the Eleventh Circuit's rejection of *Reed* to the facts of this case. While the *Reed* Court was concerned that counsel should not be permitted to strategically "flout" procedural requirements and "then turn around and seek refuge," in habeas courts, it also recognized that no such conduct is implicated in the "failure of counsel to raise

a constitutional issue reasonably unknown to him." *Id*. at 14 (footnote omitted). This reasoning applies just as strongly here, as it does in a case involving the ACCA. As the Eleventh Circuit acknowledged, this Court had "***directly rejected*** the argument that the ACCA's residual clause was unconstitutionally vague" at the time of Mr. Granda's direct appeal. *See Granda*, 990 F.3d at 1287 (emphasis added) (referring to *James v. United States*, 550 U.S. 192 (2007)). There was no reason for defense counsel to believe that a similar claim would present a viable challenge to 18 U.S.C. § 924(c).[1]

The government repeats the Eleventh Circuit's flawed argument that "[e]ven though 'few, if any' litigants had challenged § 924(c)(3)(B) specifically," at the time of Mr. Granda's direct appeal, "due process vagueness challenges to criminal statutes were commonplace." Br.Opp. at 16 (quoting *Granda*, 990 F.3d at 1288). Thus, the Eleventh Circuit held, Mr. Granda did not lack the "tools" or "building blocks" to raise the challenge. *See Granda*, 900 F.3d at 1288. But *Johnson* was not simply a mine-run

---

[1] There is also no merit to the government's rank speculation that defense counsel might have "eschewed" raising a constitutional vagueness changed "because of the intertwined nature of the charges" in his case. To the contrary, Mr. Granda argued on appeal that the evidence was insufficient to prove that he knew the object of the conspiracy was a robbery of cocaine. *See United States v. Granda*, 346 F. App'x 524, 526 (11th Cir. Sept. 29, 2009). Moreover, as discussed in issue II, *infra*, Mr. Granda disagrees with the government's assumption that the intertwined nature of the alleged predicate crimes defeats his claim.

application of the constitutional vagueness doctrine, for which obvious precursors existed. Instead, "[t]he vagueness of the residual clause rests in large part on its operation under the categorical approach*" Welch v. United States*, 578 U.S. 120, 124, (2016). Thus, while due process vagueness arguments may have been raised in other contexts, *Johnson* was the first time a vagueness challenge was specifically tied to the operation of the categorical approach. "The residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense" *Welch,* 578 U.S. at 124-125. As three circuits have expressly recognized: "no one—[not] the government, the judge, or the [defendant]—could reasonably have anticipated *Johnson*." *Cross,* 892 F.3d at 295 (quoting *Snyder*, 871 F.3d at 1127 (quoting *United States v. Redrick*, 841 F.3d 478, 480 (D.C. Cir. 2016))) (internal quotation marks omitted).

The Eleventh Circuit's expectation of clairvoyance does nothing to promote the fair and efficient resolution of claims. Instead, it perpetuates an enormous waste of resources by requiring defense counsel to raise fruitless arguments, time and again, in order to shield their clients against a potential procedural default. Such requirements preclude counsel from focusing on meritorious arguments, and place significant unnecessary burdens on the courts. In fact, one panel of the Fifth Circuit became so frustrated with counsel perpetually raising a foreclosed constitutional claim, that a two-judge majority published an opinion for the sole purpose of

condemning the practice. *See United States v. Pineda-Arrellano*, 492 F.3d 624 (5th Cir. 2007) ("Pineda's case is one of hundreds, if not thousands, in this circuit in which counsel have raised this constitutional challenge. We take this opportunity to state that this issue no longer serves as a legitimate basis for appeal.").[2] Only this Court can alleviate the burden on criminal defendants, defense counsel, and the intermediate appellate courts, by making clear that a criminal defendant will not be barred from raising a meritorious constitutional claim, based on counsel's failure to anticipate a future change in the law.

C. This case presents an ideal vehicle through which to resolve the circuit conflict.

The government notes that this Court previously declined to review the question presented herein, in *Gatewood v. United States*, 141 S.Ct. 2798 (2011) (No. 20-1233), and *Blackwell v. United States*, 142 S.Ct. 139 (2021) (20-8016). But those cases presented significant vehicle problems that are not present here.

The government argued that *Gatewood* "would be a poor vehicle to address the question presented, because petitioner would not be entitled to relief even if this Court agreed that he had shown cause for his procedural default, and because review

---

[2] At least one commentator has referred to the *Pineda-Arrellano* majority as having issued "a thinly veiled threat of sanctions" against appellate counsel who continue to raise the issue. *See* Brent E. Newton, *Almendarez-Torres and the Anders Ethical Delimmma*, 45 Hous. L. Rev. 747, 787 & n.20 (Summer 2008).

of the question presented would be complicated by threshold questions about how this Court's ACCA-related precedents apply to [18 U.S.C.] Section 3559(c)." *See* Brief for the United States in Opposition, *Gatewood v. United States*, No. 20-1233 (U.S. May 21, 2021.) Here, Mr. Granda is entitled to relief on the merits and the "threshold questions" about *Johnson*'s applicability to 18 U.S.C. § 924(c) are settled.

The petitioner in *Blackwell* signed a plea agreement expressly waiving his right to collaterally attack his conviction. *See* Brief for the United States in Opposition, *Blackwell v. United States*, No. 20-8016 (U.S. July 14, 2021). The district court denied relief both based on the facts underlying the defendant's guilty plea, as well as the collateral attack waiver in the plea agreement, and did not issue a certificate of appealability ("COA"). The court of appeals did not issue an opinion at all; it simply denied a COA. *Blackwell* was thus clearly not an obvious candidate for certiorari. The fact that the government chose to respond, at all, simply underscores the importance of the issues involved.

This case has no vehicle problems. The Eleventh Circuit issued a published and precedential decision, which added to a longstanding circuit conflict regarding the circumstances under which adverse precedent from this Court provides cause to overcome a procedural default. The issue is clearly presented and outcome determinative. There is no question of waiver, nor about whether *Johnson*'s constitutional rule applies to this case. This case thus presents an ideal vehicle for the Court's review.

II.

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

A. This case presents an important question of federal law that has previously been left unanswered by the Court.

Mr. Granda has asked this Court to resolve whether a conviction obtained by a general verdict—where the jury was instructed on multiple theories of guilt, one of which was in error—may be sustained based on the reviewing court's finding that the jury relied on both a valid, ***and*** a constitutionally invalid basis to convict. The government's response simply begs the question – and insists that Mr. Granda is not entitled to relief because of the intertwined nature of the facts making up the invalid and valid offenses. Tellingly, however, the government has failed to unearth even a single precedent of this Court affirming a general verdict that rested on such ambiguous grounds.[3]

---

[3] The government quotes *dictum* from *Zant v. Stephens*, 462 U.S. 862, 883-84 (1983), stating that reversal is only required where the conviction may rest, "at least in part, on a charge that constitutionally protected activity is unlawful." *See* Br. Opp. at 27). But, as Mr. Granda has explained, that statement was made in the context of distinguishing the sentencing factors at issue in *Zant*, from the general jury verdicts at issue in *Street v. New York*, 394 U.S. 576, 588 (1969), *Thomas v. Collins*, 352 U.S. 516 (1945) and *Stromberg v. California*, 283 U.S. 359 (1931). The government did not respond to Mr. Granda's argument that allowing a general verdict to rest on

Critically, while *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (*per curiam*), held that multi-theory instructional errors are not structural and do not require reversal in the absence of prejudice, the Court has never addressed ***how*** prejudice is to be determined in this context. This is an important question of federal law, which the Court left unresolved, two years after *Hedgpeth*, in *Skilling v. United States*, 561 U.S.358 (2010). *See* Pet. at 12-13 (noting that the parties advocated the same diametrically-opposed positions as the parties do here, but the Court left the matter for resolution on remand). And it is a question on which this Court's guidance is sorely needed.

The government does not dispute that the circuits have developed myriad tests for assessing prejudice in this context. *See* Pet. at 30-31. It responds only that "in each circumstance, the court properly examined case-specific circumstances to determine whether the challenged errors were prejudicial." Br.Op. at 28. But this once again begs the question – and presupposes that "prejudice" has a uniform meaning in this context. As the cases cited at pages 30-31 of Mr. Granda's petition make clear, it does not.

---

constitutionally vague offense implicates constitutional concerns just as serious as those at involved in *Street, Thomas*, and *Stromberg*. *See* Pet. at 33-35.

B. The decision below is wrong.

The Eleventh Circuit determined that the "actual prejudice" standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), required Mr. Granda to show "a substantial likelihood that the jury relied ***solely*** on Count 3 to predicate its conviction." *Granda*, 990 F.3d at 1291 (emphasis added). But *Brecht* places no such burden on petitioners.

Under *Brecht*, prejudice exists where an error is found to have had a "substantial and injurious effect or influence in determining jury's verdict." *See Brecht*, 507 U.S. at 638 (citation omitted). Here, the inclusion of the constitutionally invalid conspiracy predicate for Mr. Granda's § 924(o) offense certainly had such an effect. Mr. Granda's role in the offense was that of the get-away driver; he took no part in the substantive offenses; he was acquitted of the substantive § 924(c) count; and the evidence regarding his knowledge that the object of the conspiracy was a cocaine robbery was circumstantial. *See United States v. Granda*, 346 F. App'x 524, 526 (11th Cir. Sept. 29, 2009). Based on the relative strength of the evidence alone, there is more than a "substantial likelihood" that the jury relied on the invalid Hobbs Act conspiracy as a predicate for the § 924(o) conviction. The Eleventh Circuit deviated from *Brecht*, however, in sustaining Mr. Granda's conviction because he failed to additionally prove, to the court's satisfaction, that the jury did not rely on valid bases for the conviction *in addition to* the substantially injurious, erroneous one.

The Eleventh Circuit compounded the error by requiring Mr. Granda to disprove the additional bases for conviction by a standard impossible for any criminal defendant to meet. Mr. Granda offered the court reasons why the jury would have relied only on the invalid predicate for his offense – but the court either rejected them outright, or else found that the jury's findings were "just as consistent with predicating the § 924(o) conviction on the other inchoate crimes." *Granda,* 990 F.3d at 1272. "Such equipoise," the court wrote, "does not help Granda meet his burden to show a substantial likelihood of actual prejudice." *Id.* But this, too, is contrary to this Court's precedents, which expressly place the risk of equipoise on the government. *See McNeal v. McAninch*, 513 U.S. 432, 436 (1995).

The Eleventh Circuit thus placed far higher a burden on Mr. Granda than this Court's precedents allow. Having shown a "substantial likelihood" that the constitutionally invalid jury instruction had a substantial and injurious effect on the jury's deliberations, Mr. Granda was entitled to relief. [4]

[4] Additionally, as the government points out in its brief, the remaining alleged predicate offenses included attempted Hobbs Act robbery and attempted carjacking. *See* Br. Opp. at 25 n.1. Therefore, if the Court declines to grant plenary review, Mr. Granda asks the Court to hold his petition pending the resolution in *United States v. Taylor*, No. 20-1459.

CONCLUSION

For the reasons stated herein and in Mr. Granda's Petition for Writ of Certiorari, he asks that the petition be granted, and that a writ of certiorari issue.

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender

/s/ Tracy Dreispul
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

Miami, Florida
February 16, 2022