NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

WILFREDO RODRIGUEZ,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

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

INTERESTED PARTIES

Petitioner submits that there are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

Rodriguez v. United States, No. 20-22003-Civ-Cooke (April 15, 2021)

Rodriguez v. United States, No. 16-22309-Civ-Cooke (Mar. 16, 2018)

United States v. Rodriguez, No. 03-20759-Cr-Cooke (Sept. 20, 2004)

United States Court of Appeals (11th Cir.):

Rodriguez v. United States, No. 21-12001 (Sept. 2, 2021)

Rodriguez v. United States, No. 18-12090 (Jan. 3, 2020)

United States v. Rodriguez, No. 09-14277 (May 28, 2010)

United States v. Rodriguez, No. 04-14961 (Dec. 15, 2005)

United States Supreme Court

Rodriguez v. United States, No. 05-9668 (April 17, 2006)

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Wilfredo Rodriguez respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 21-12001 in that court on September 3, 2021, which affirmed the order of the United States District Court for the Southern District of Florida denying Petitioner's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255.

OPINIONS BELOW

The decision of the court of appeals denying a certificate of appealability (App. A-1) is unpublished but reported at 2021 WL 4188126. The decision of the district court affirming and adopting the magistrate judge's report (App. A-2) is unpublished but reported at 2021 WL 1421698. The report of the magistrate judge (App. A-3) is unpublished.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on August 12, 2021. This petition is timely filed pursuant to Sup. Ct. R. 13.1 and the Court's March 19, 2020 Order, temporarily extending the time to file petitions for certiorari to 150 days from the judgment of the lower court. The lower court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1291, 2253, and 2255.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(1)(A)

(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(3) (2012)

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has 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.

STATEMENT OF THE CASE

Petitioner's jury was instructed that it could rely on one of three predicates to convict him of 18 U.S.C. § 924(o) and (c) offenses that added a consecutive five-year term of imprisonment to his total sentence. One of those predicates is no longer valid because it was based on the residual clause this Court found unconstitutionally vague in *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019).

The Eleventh Circuit found the *Davis* error harmless based on its belief that the jurors must also have relied on one or more of the three valid predicates to convict. Admittedly, *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (*per curiam*), held that such errors do not require reversal in the absence of prejudice. However, it left unspecified the standard by which harmlessness is to be assessed in this context. And there is no reason to believe that *Pulido* undermined the Court's repeated holdings that a conviction based on both a valid and constitutionally invalid theory cannot stand,. Yet the harmless error standard adopted by the Eleventh Circuit allows exactly that. The petition should be granted.

1. In late 2002, Petitioner was employed in the pool business run by someone who worked as a confidential informant for law enforcement. In February 2003, the confidential informant introduced Petitioner to an undercover Miami-Dade County, Florida police officer who, with the confidential informant, solicited Petitioner's assistance in planning the armed robbery cocaine from a fake stash house. Petitioner held a number of meetings with the confidential informant and

the undercover police officer. Petitioner and his co-conspirators were arrested when they arrived at the final meeting location before proceeding to the stash house. Two firearms were found in a car driven to the scene by one of Petitioner's co-conspirators.

2. After Petitioner's arrest, a grand jury in the Southern District of Florida returned a multi-count indictment against Petitioner. At issue here are the firearm offenses in Counts 3 and 5. Count 3 charged Petitioner with conspiracy to use or carry a firearm during "a crime of violence and drug trafficking crime" in violation of 18 U.S.C. § 924(o). Count 5 charged him with the substantive version of the same offense – using or carrying a firearm during "a crime of violence and drug trafficking crime," in violation of 18 U.S.C. § 924(c).

These firearm offences were both predicated on three other counts listed in the indictment: Counts 1, 2 and 4. Counts 1 and 4 charged drug trafficking crimes: conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 841(a)(1) (Count 1); and attempted possession with intent to distribute five kilograms or more of cocaine, in violation of 18 U.S.C. § 841(b)(1)(A) (Count 4). Count 2 charged conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), which, at the time of Petitioner's trial, was a "crime of violence" for purposes of § 924(c) and § 924(o). Petitioner proceeded to trial

3. The jury was instructed that to convict Mr. Rodriguez on Count 3, the government needed to prove only that the object of the conspiratorial plan was that the firearm be used in furtherance of "a federal drug trafficking crime, a federal crime

of violence, *or both*, as charged in the indictment." As to Count 5, the jury was instructed that the indictment charged that Mr. Rodriguez carried a firearm during and in relation to "a drug trafficking crime *or* a crime of violence. It charged, in other words, that the [defendant] violated the law in two separate ways. It is not necessary, however, for the government to prove that the defendant violated the law in both of those ways."

On July 8, 2004, a jury found Mr. Rodriguez guilty on all counts. It returned a general verdict, making no finding or otherwise specifying the predicate offense supporting the § 924(o) conviction on Count 3 or the § 924(c) conviction on Count 5.

4. The district court imposed concurrent life sentences on Counts 1, 2, 3, 4, and 6, and a consecutive life sentence for § 924(c) conviction on Count 5. Petitioner's appeal was unsuccessful. *See United States v. Rodriguez*, 159 F. App'x 900 (11th Cir. 2005) (No. 04-14961).

5. In 2007, Petitioner filed a *pro se* 28 U.S.C. § 2255 motion to vacate sentence raising, *inter alia*, various claims of ineffective assistance of counsel, including the claim that counsel was constitutionally ineffective in failing to object to the government's 18 U.S.C. § 3559 notice as defective. The district court granted the motion as to this ineffective assistance claim, and entered an amended judgment sentencing Petitioner to a total of 420 months. That 420-month sentence is comprised of concurrent terms of imprisonment of 360 months on Counts 1 and 4, 240

months as to Counts 2 and 3, and 120 months on Count 6; and a consecutive 60-month term of imprisonment on Count 5.

6. In 2016, Petitioner filed a 28 U.S.C. § 2255 motion challenging his career-offender status in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court denied the motion, and the Eleventh Circuit denied a certificate of appealability. Order, *Wilfredo Rodriguez v. United States* (11th Cir. January 3, 2020) (No. 18-12090).

7. On May 13, 2020, the Eleventh Circuit granted Petitioner's application for authorization to file a second or successive § 2255 motion. In his application, Petitioner sought leave to challenge his § 924(o) and (c) convictions as void in light of *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019), which declared unconstitutionally vague the residual clause definition of "crime of violence" in § 924(c)(3)(B). In its granting authorization, the court of appeals explained that Petitioner made the requisite *prima facie* showing satisfying the criteria in 28 U.S.C. § 2255(h)(2). The Court also determined that Petitioner made a *prima facie* showing that his § 924(o) conviction on Count 3 and his § 924(c) conviction on Count 5 were unconstitutional in light of *Davis*. The court of appeals explained that, although those offenses were based on multiple predicates, one of the predicates was for conspiracy to commit Hobbs Act robbery, and it had held in *Brown v. United States*, 942 F.3d 1069, 1075-76 (11th Cir. 2019) that that offense no longer qualified as a "crime of violence" after *Davis*. And because it was unclear whether the Hobbs Act

conspiracy offense served as the predicate given the jury's general verdict, this court of appeals determined found that Petitioner made a *prima facie* showing that his § 924(o) and § 924(c) convictions were unconstitutional.

8. After the Eleventh Circuit's authorization was docketed in the district court, Petitioner filed a § 2255 motion in the district court raising his *Davis* claim, which the government opposed. A magistrate judge issued a report recommending that the motion be denied. App. A-3. The district court overruled Petitioner's objections to the report, approved and adopted the report, and denied the § 2255 motion but granted a certificate of appealability.

However, after denying the motion, the district court *sua sponte* stayed proceedings in Petitioner's case pending the Eleventh Circuit's resolution of several appeals raising similar issues, including the appeal that resulted in the decision in *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), *petition for cert. filed* (U.S. November 1, 2021) (No. 21-6171).[1] Unsure that the district court's stay would toll the time to appeal, Petitioner appealed the denial of his § 2255 motion to the Eleventh Circuit.

After Petitioner filed his notice of appeal, the district court *sua sponte* issued an indicative ruling indicating that its denial of Petitioner's § 2255 motion was entered into the docket in error, and asking the Eleventh Circuit to relinquish

[1] On November 23, 2021, the government moved the Court for an extension of time to file a response to the petition for writ of certiorari filed in *Granda*.

jurisdiction so that it could vacate the denial and take the matter back under advisement. The district court's indicative ruling prompted the Eleventh Circuit to dismiss the appeal, and the district court reopened Petitioner's § 2255 proceeding.

9. In the meantime, the Eleventh Circuit decided *Granda*. And soon after it reopened Petitioner's case, the district court entered an order in which it again approved and adopted the magistrate judge's report and denied relief. App. A-2. Specifically, the district court relied on *Granda* to hold that Petitioner procedurally defaulted his *Davis* claim because he failed to raise it on direct appeal and failed to show either cause and prejudice or actual innocence. *Id*. at 2-3 (citing *Granda*, 990 F.3d at 1286-92). The district court also relied on *Granda* to conclude that Petitioner was not entitled to § 2255 relief. *Id*. at 4. Finally, although the report recommended that the district court grant a certificate of appealability, the district court concluded that "after *Granda*, Movant is not entitled to a COA." *Id*. at 4 n.4.

10. On appeal, the Eleventh Circuit determined that *Granda* compelled it to deny a COA. App. A-1. The court of appeals held that the district court "properly found that Mr. Rodriguez's claim was procedurally defaulted, as he failed to raise it during trial or on direct appeal," and, in light of *Granda* "properly found that Mr. Rodriguez could not show prejudice sufficient to excuse his procedural default." *Id*. at 3-4. The Court stated:

> As in *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), the indictment in this case charged multiple, separate offenses as bases for his § 924(c) and (o) convictions, only one of which, Hobbs Act conspiracy,

> is no longer constitutional under *Davis*. *Id.* at 1281. . . . However, the other two charged predicate offenses . . . remain valid predicate offenses and would have provided a wholly independent, sufficient, and legally valid basis to convict Mr. Rodriguez on Counts 3 and 5. *See Granda*, 990 F.3d at 1284, 1288 (holding that a criminal defendant must show "at least a substantial likelihood that the jury *actually relied*" on the Hobbs Act conviction as the predicate offense) (quotation marks and citation omitted). Each of these predicate offenses arose from the same set of facts and event – the conspiracy to commit armed robbery of a home in order to steal cocaine. Accordingly, Mr. Rodriguez cannot establish prejudice, and he cannot show that there is a substantial likelihood that the jury relied solely on the Hobbs Act conspiracy offense to convict him on Counts 3 and 5. *See id.* at 1291.

Id. at 4. The court of appeals also concluded that Petitioner could not establish actual innocence sufficient to overcome his procedural default, and denied a COA. *See id.* at 5.

This petition follows.

REASON FOR GRANTING THE WRIT

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

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

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

It is undisputed that the jury in Petitioner's case likely relied on the unconstitutional residual clause to convict him of an offense that added a mandatory consecutive five-year term to his total sentence. The Eleventh Circuit found the error harmless based on its belief that the jurors must additionally have relied on one or more valid bases to convict. This Court, however, has repeatedly held that a conviction based on both a valid *and* constitutionally invalid theory cannot stand; and there is no reason to believe that *Pulido* undermined those holdings. Nonetheless, the circuits have jettisoned the Court's precedents on this issue, and failed to develop a coherent means of evaluating prejudice in their stead.

The Eleventh Circuit's reasoning raises a host constitutional problems, and conflicts with decisions of the Second and Fifth Circuits, which have applied the modified categorical approach to determine which of multiple alleged predicate offenses formed the basis of a § 924 conviction. *See United States v. Heyward*, 3 F.4th 75 (2d Cir. 2021); *United States v. McClaren*, 13 F.3d 386, 413-14 (5th Cir. 2021). The Court should grant the petition.

A. Prior to 2008, the error in this case would have required reversal.

The rule that a general verdict which "may have rested" on a constitutionally invalid ground must be set aside, dates back at least to *Stromberg v. California*, 283 U.S. 359, 367-68 (1931). In *Stromberg*, a 19-year old member of the Young Communist League was convicted of violating a California law that criminalized the

display of a flag for any of three specified purposes: "as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchist action or as an aid to propaganda that is of a seditious character." *Stromberg*, 283 U.S. at 361. "The charge in the information as to the purposes for which the flag was raised, was laid conjunctively." *Id.* The jury instructions, however, "followed the express terms of the statute and treated the described purposes disjunctively, holding that the appellant should be convicted if the flag was displayed for any one of the three purposes named." *Id.* at 363.

The state appellate court doubted the constitutionality of the clause of the statute that prohibited the raising of a flag "as a sign . . . of opposition to organized government," but held that the conviction could be sustained based on the other two clauses. *See id.* at 367. This Court reversed. The jury had returned a general verdict and did not specify which way the statute had been violated. "As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it [was] impossible to say under which clause of the statute the conviction was obtained." *Stromberg*, 283 U.S. at 368. The "necessary conclusion" was that, "if any if the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." *Id.* at 368. Because the Court determined that at least the first clause of the statute was unconstitutional, the conviction was vacated.

The Court applied the same rule to an improper jury instruction in *Yates v. United States*, 354 U.S. 298 (1957), *overruled in part on other grounds, Burks v. United States*, 473 U.S. 1 (1978). There, the jury had been improperly instructed with respect to one object of the conspiracy for which the petitioners were convicted. The government contended "that even if the trial court was mistaken in its construction of the statute, the error was harmless" because the conspiracy charge had embraced a valid objective as well, "and the jury was instructed that in order to convict it must find a conspiracy extending to both objectives." *Id*. at 311. The Court disagreed, finding that the jury instructions were "not sufficiently clear or specific to warrant drawing the inference" that the jury understood it must find both the valid and invalid object in order to convict. *See id*. The jury was required to find only a singular "object or purpose" charged in the conspiracy, and the Court had no way of knowing which object or purpose the jury relied on. The Court further noted that "[t]he character of most of the overt acts alleged associates them as readily with" both the improper and proper object. *Id*. at 312. "In these circumstances," the Court thought the "proper rule to be applied is that which requires a verdict to be set aside where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected." *Id*. (citing *Stromberg*, 283 at 367-68; *Williams v. North Carolina*, 317 U.S. 287, 291-92 (1942); and *Cramer v. United States*, 352 U.S. 1 (1945)).

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

"The second rule derived from *Stromberg*" is that – at least where constitutionally protected conduct is involved – "*Stromberg* encompasses a situation in which the general verdict on a single count indictment or information rested on ***both*** a constitutional and an unconstitutional ground." *Zant*, 462 U.S. at 881-882 (emphasis in original). The rationale is "that when a single-count indictment or information charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trial of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together." *Id.* at 881-82 (quoting S*treet v. New York*, 394 U.S. 576, 586-90 (1969)). *See also Thomas v. Collins*, 352 U.S. 516 (1945).

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

In *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (*per curiam*), the Court clarified that the sort of "alternative theory" instructional error identified in *Stromberg* and *Yates* is not "structural" error. Pulido had been convicted of felony murder. The jury was properly instructed that it could convict if it found that Pulido formed the intent to aid and abet the underlying felony before the murder; but the instructions also erroneously permitted the jury to convict if it concluded that Pulido formed the requisite intent only after the murder. *Pulido*, 555 U.S. at 59. The district court found that the error had a "substantial and injurious effect or influence" on the verdict and granted relief. *Id.* The state appealed to the Ninth Circuit. On appeal, Pulido argued that the district court's analysis was correct under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), but also raised structural error as an alternative ground to affirm. The Ninth Circuit stated that the error was structural and required setting aside the conviction unless the reviewing court "could determine with 'absolute certainty' that the defendant was convicted under a proper theory." *Id.* at 59-60 (internal quotation marks citations omitted).

By the time the case reached this Court, both parties agreed the Ninth Circuit had been wrong to characterize the error as structural. *Id.* at 57. The parties further agreed that "a reviewing court finding such error should ask whether the flaw

in the instructions 'had substantial and injurious effect or influence in determining the jury's verdict' under *Brecht*." *Id*. This Court agreed as well, and remanded the case to the Ninth Circuit for an evaluation of harmlessness. *Pulido*, 555 U.S. at 62.

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

The majority rejected Pulido's assertion that the Ninth Circuit had, in fact, engaged in the proper *Brecht* analysis despite its description of the error as

"structural." The Court held "[i]n any event," that the "absolute certainty" standard applied by the Ninth Circuit was "plainly inconsistent with *Brecht*." *Id.* at 62. The Court did not, however, provide any further guidance regarding how to assess the impact of an erroneous instruction in the context of a general verdict.

The issue reemerged two years later, in *Skilling v. United States*, 561 U.S. 358, 369 (2010). Skilling had been convicted of crimes related to a scheme to defraud, which Congress had defined to include "a scheme or artifice to deprive another of the intangible right to honest services." *Skilling*, 560 U.S. at 369 n.1. In order to avoid an untenable vagueness problem, the Court limited the definition of "honest-services" fraud to "schemes to defraud involving bribes and kickbacks." 561 U.S. at 368. Skilling had not been alleged to participate in such conduct, and could not validly be convicted under an honest-services theory. "Because the indictment alleged three objects of the in conspiracy," which included an improperly-defined "honest-services" theory alongside two legitimate theories of fraud, the conviction was flawed. *See id.* at 414.

The Court recognized that this did not necessarily require reversal. *See Skilling*, 561 U.S. at 414 (noting that the Court had recently "confirmed . . . that errors of the *Yates* variety are subject to harmless-error analysis"). The Court declined to resolve, however, how that harmless-error analysis should proceed. Notably, the parties advocated the same diametrically opposed theories of harmless error at issue in this case. Specifically, the government argued that the conviction

should be sustained because "any juror who voted for conviction based on [the honest-services theory] also would have found [Skilling] guilty of conspiring to commit securities fraud." *Id.* at 414 (alteration and citation omitted). Skilling argued, by contrast, that the government was required to show "that the conspiracy conviction rested ***only*** on the securities-fraud theory, rather than the distinct, legally-flawed honest-services theory." *Id.* (emphasis in original, citation omitted). The Court did not decide between the two competing theories of harmlessness, and instead "[left] this dispute for resolution on remand." *See id.*

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

The question remains unanswered, and has taken on renewed significance in the wake of *Davis*. The surge in post-*Davis* litigation has given rise myriad variations of harmless-error review. *Compare United States v. Wilson*, 960 F.3d 136, 151 (3d Cir. 2020) (affirming § 924(c) conviction after determining that "there is no 'reasonable possibility' that the jury based its § 924(c) convictions only" on the invalid predicate) (quotation omitted); *United States v. Eldridge*, 2 F.4th 27, 39 (2d Cir. 2021) (finding no prejudice because a properly instructed jury "would have returned" a guilty verdict); *Reyes v. United States*, 998 F.3d 753, 759 (7th Cir. 2021) ("No rational juror could have concluded that the gun was brandished in furtherance of only the conspirators' agreement to commit a robbery, but not in furtherance of the robbery itself, during which the gun was actually brandished."); *with United States v. Jones*,

935 F.3d 266, 273 (5th Cir. 2019) (finding a "reasonable probability that the jury's verdict would not have been the same" absent the error, where the invalid RICO conspiracy "encompassed conduct beyond the controlled-substance conspiracy"); *United States v. McClaren*, 13 F.4th 386, 414 (5th Cir. 2021) (following *Jones* and vacating where the court could not determine the basis for the conviction); *and United States v. Heyward*, 3 F.4th 75, 85 (2d Cir. 2021) (applying categorical approach and finding plain error where "924(c) conviction may very well have been premised on an unconstitutionally vague provision of that statute").

Significantly, those courts that have found prejudice in this situation have done so, whether expressly or implicitly, through application of the categorical approach. *See Heyward*, 3 F.4th at 81 ("Applying the foregoing analysis and taking into account the specific circumstances of this litigation, we cannot conclude that Heyward's § 924(c) conviction necessarily rested upon either a qualifying drug-trafficking offense or categorical crime of violence."); *Jones*, 936 F.3d at 272 (rejecting the government's assertion of harmlessness were the non-qualifying RICO conspiracy "encompassed a broader range of conduct than the controlled-substance conspiracy, allowing the jury to convict on the § 924 counts based on conduct unrelated to drug trafficking"); *McClaren*, 13 F.4th at 414 ("[W]e cannot determine whether the jury relied on the RICO or drug-trafficking predicate, and because a RICO conspiracy is not a crime of violence, the basis for the conviction may have been improper.").

In *Granda*, however, the Eleventh Circuit rejected the argument that the categorical approach should apply – stating that Granda had cited "no authority that justifies extending the categorical approach – a method for determining whether a conviction under a particular statute qualifies as a predicate offense under a particular definitional clause – to the context of determining on which of several alternative predicates a jury's general verdict relied." *Granda*, 990 F.3d at 1295.

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

D. The decision below is wrong.

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

First, the Eleventh Circuit's holding risks allowing a conviction to stand which the district court had no authority to enforce. A federal court's authority to adjudicate presupposes the existence of a valid federal offense. *See* 18 U.S.C. § 3231 (granting district courts jurisdiction over "offenses against the laws of the United States"). As the Court stated in *Davis*, however, "[i]n our constitutional order, a

vague law is no law at all." *Davis*, 139 S. Ct. at 2323. And "when an indictment affirmatively alleges conduct that does not constitute a crime at all," it fails to invoke the jurisdiction of the district court. *See United States v. Brown*, 752 F.3d 1344, 1352–53 (11th Cir. 2014). The Eleventh Circuit's permissive interpretation of harmless-error in this circumstances admits the possibility that the defendant will stand convicted of a non-existent offense, and runs afoul of the core duty of the federal courts to assure that jurisdiction is validly established in every case.

Second, the Eleventh Circuit's reasoning directly contravenes the line of cases from this Court – which both precede and post-date *Chapman v. California* – holding that *vacatur* is required where valid and invalid theories of an offense are factually intertwined. Notably, *Street v. New York*, 394 U.S. 576 (1969) was decided two years after *Chapman,* and the Court was certainly aware that constitutional errors may be harmless. It nonetheless concluded that a conviction must be vacated where "there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together." *Street*, 394 U.S. at 588.

In *Zant,* the Court wrote that this "second rule" of *Stromberg* "applies only in cases in which the State has based its prosecution, at least in part, on a charge that constitutionally protected activity is unlawful." 462 U.S. at 883-84. But that statement was made in the context of distinguishing a conviction for constitutionally protected conduct from the finding of aggravating sentencing factors at issue therein.

See id. at 884 ("In this case, the jury's finding that respondent was a person who has a 'substantial history of serious assaultive criminal convictions' did not provide a sufficient basis for imposing the death sentence. But it raised none of the concerns underlying the holdings in *Stromberg, Thomas,* and *Street*, for it did not treat constitutionally protected conduct as an aggravating circumstance.").

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

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

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

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

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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