A P P E N D I X

APPENDIX

A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-12397-D

JOSE LUIS WONG,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

ORDER:

Jose Wong's motion for a certificate of appealability is DENIED because he has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Robert J. Luck
UNITED STATES CIRCUIT JUDGE

A-2

NO. 21-12397-D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOSE LUIS WONG,
Movant/Appellant,

v.

UNITED STATES OF AMERICA,
Respondent/Appellee.

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

MOTION FOR CERTIFICATE OF APPEALABILITY BY MOVANT/APPELLANT JOSE LUIS WONG

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Jose Luis Wong v. United States
Case No. 21-12397-D

Appellant, Jose Luis Wong, files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Altonaga, Honorable Cecilia M., United States District Judge

Bergmann, Janice L., Assistant Federal Public Defender

Bronis, Beatriz Galbe, Esquire

Bryn, Brenda G., Assistant Federal Public Defender

Caruso, Michael, Federal Public Defender

De Armas, Raydel Garcia, Co-defendant

Fajardo Orshan, Ariana, Former United States Attorney

Ferrer, Wifredo, Former United States Attorney

Gerson, Andrew J., Esquire

Gonzalez, Juan Antonio, Acting United States Attorney

Greenberg, Benjamin G., Former United States Attorney

Healy, William C., Assistant United States Attorney

Kaiser, Allan Bennett, Esquire

Kapetanakis, Alexander, Esquire

Matters, Michael A., Esquire

Maxwell, Cristina V., Assistant United States Attorney

McAliley, Honorable Chris M., United States Magistrate Judge

McLaughlin, Sean T., Assistant United States Attorney

O'Donnell, Sonia E., Esquire

Ramirez Socorro, Raul, Co-defendant

Reid, Honorable Lisette M., United States Magistrate Judge

Sardinas, William, Co-defendant

Smachetti, Emily M., Chief, Appellate, United States Attorney

Smith, II, Jan Christopher, Assistant Federal Public Defender

Snow, Honorable Lurana S., United States Magistrate Judge

Suri, Arnaldo J., Esquire

Torres, Honorable Edwin G., United States Magistrate Judge

United States of America, Plaintiff/Appellee

Wallace, III, Arthur L., Esquire

Wax, Barry M., Esquire

White, Honorable Patrick A., United States Magistrate Judge

Wong, Jose Luis, Defendant/Appellant

s/Janice L. Bergmann
Janice L. Bergmann

MOTION FOR CERTIFICATE OF APPEALABILITY

Comes now Movant/Appellant, Jose Luis Wong, by and through undersigned counsel, and respectfully requests that this Court grant him a certificate of appealability on the following questions:

1. Whether this Court's precedent in in *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261 (11th Cir. 2015) (*per curiam*), holding that a certificate of appealability cannot be granted when there is controlling circuit authority to the contrary, even if there is a split in the circuits on the question, misapplies the standard for a certificate articulated by the Supreme Court in *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003), and *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017).
2. Whether attempted Hobbs Act robbery is a crime of violence for purposes of 18 U.S.C. § 924(c).
3. Whether procedural default bars consideration of Mr. Wong's claim that his 18 U.S.C. § 924(c) conviction is invalid in light of *United States v. Davis*, 139 S. Ct. 2319

(2019).

4. Whether the district court erred in concluding that Mr. Wong's § 2255 motion should be denied.

In support thereof, Mr. Wong states as follows:

BACKGROUND

On July 15, 2008, the grand jury returned a superseding indictment charging Mr. Wong with the following offenses: conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 1); attempted Hobbs Act robbery, in violation of 18 U.S.C. §§ 2, 1951(a) (Count 2); conspiracy to possess with intent to distribute five of more kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846 (Count 3); attempt to possess with intent to distribute five kilograms or more of cocaine, in violation of 18 U.S.C. § 2, 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846 (Count 4); carrying and possessing a firearm during and in relation to a crime of violence and a drug trafficking crime, specifically, the offenses set forth in Counts 1, 2, 3 and 4, in violation of 18 U.S.C. § 924(c) (Count 5); possession of a firearm by a convicted felon, in

violation of 18 U.S.C. § 922(g) (Count 6); and possession of a forearm with an obliterated serial number, in violation of 18 U.S.C. §§ 922(k), 924(a)(1)(B) (Count 7). Cr. DE 79.[1]

Although the superseding indictment used conjunctive language as to Count 5, charging that Mr. Wong used or carried a firearm during both a crime of violence and a drug trafficking crime, *see* Cr. DE 79:4, the court's instructions on Count 5 instead used the disjunctive, *see* Cr. DE 159:9. The instructions stated: "The indictment charges that Defendants knowingly carried a firearm during and in relation to a drug trafficking offense or a crime of violence and possessed a firearm in furtherance of a drug trafficking offense or a crime of violence. It charged, in other words, that Defendants violated the law as charged in Count 5 in two separate ways." Cr. DE 159:9 (emphasis omitted). The jury was further instructed that because Mr. Wong was charged with violating § 924(c) in these "two separate ways," it was "not necessary . . . for the Government to prove that [Mr. Wong] violated the law in both of

[1] "Cr. DE" refers to docket entries in Mr. Wong's underlying criminal case, S.D. Fla. No. 08-20380-Crim-Altonaga.

those ways." *Id.* Rather, it was "sufficient if the Government proves, beyond a reasonable doubt, that Defendants knowingly violated the law in either way." *Id.*

The government, in closing argument, reinforced that the jury need only find *one* predicate offense to convict Mr. Wong of a violation of § 924(c), stating that as to Count 5,

> what the Government must prove . . . is that the defendant committed a drug trafficking offense *or* a crime of violence, as charged in Counts I, II, III and IV of the Indictment.
>
> So if the defendant did *any one or more* than one of those counts, the drug crime being the conspiracy to possess with intent to distribute cocaine *or* the attempted possession with intent to distribute cocaine. The crime of violence being either the conspiracy to commit robbery *or* the attempted robbery, and that while committing that offense, the defendant knowingly carried a firearm in relation to that drug trafficking crime *or* crime of violence, as charged in the Indictment, or that during the commission of that offense, the defendant knowingly possessed the firearm in furtherance of that drug trafficking crime *or* crime of violence, as charged in the Indictment…
>
> Cr. DE 245:28-29 (emphases added).

On September 5, 2008, a jury found Mr. Wong guilty on all counts. Cr. DE 155. The jury returned a general verdict for the § 924(c)

conviction in Count 5; it did not make a finding or otherwise specify the predicate offense. *Id.*

The court imposed a total sentence of 600 months, including a consecutive 360-month sentence for the § 924(c) conviction in Count 5. Cr. DE 206. Mr. Wong's appeal to the Eleventh Circuit was unsuccessful. Cr. DE 287.

On October 24, 2011, Mr. Wong filed a *pro se* 28 U.S.C. § 2255 motion to vacate sentence raising numerous grounds for relief: (1) ineffective assistance of appellate counsel for failure to challenge the sufficiency of the indictment; (2) the government failed to follow the requirements of 21 U.S.C. § 851, thereby rendering trial counsel ineffective; (3) insufficiency of the evidence to establish the jurisdictional element required for a violation of the Hobbs Act; (4) under *Blakely v. Washington*, 542 U.S. 296 (2004), the jury, not the judge, should have made findings as to certain enhancements under the Sentencing Guidelines; (5) the court erred in making Mr. Wong's sentence on Count 5 consecutive to his sentence on Count 6; (6) counsel was ineffective for failing to object to the jury instructions on unanimity on Count 4; (7) due

process and the rules of evidence were violated by admission of the "bad act" testimony of Ken Wyatt; (8) commerce clause firearm jurisdiction does not extend to after the "first sell;" (9) counsel was ineffective for not objecting to the government's failure to disclose government witness Miguel Gonzalez; (10) counsel was ineffective for failing to object that the grand jury selection process; (11) Mr. Wong suffered a miscarriage of justice because his sentence was enhanced using a prior conviction under Fla. Stat. § 893.13. Cr. DE 313. The Court denied the motion. Order, *Wong v. United States*, No. 11-23818-Civ-Altonaga, DE 10 (S.D. Fla. June 8, 2012). Mr. Wong did not appeal.

In April 2016, Mr. Wong applied to this Court *pro se* for leave to file a second or successive 28 U.S.C. § 2255 motion challenging his 18 U.S.C. § 924(c) conviction in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). This Court denied the application. Order, *In re Jose Wong*, No. 16-11922 (11th Cir. May 24, 2016).

On January 7, 2020, this Court granted Mr. Wong's application for authorization to file a second or successive § 2255 motion. DE 1. In his application, Mr. Wong sought, *inter alia*, to challenge his § 924(c)

conviction based on *United States v. Davis*, 139 S. Ct. 2319 (2019), which declared unconstitutionally vague the residual clause definition of "crime of violence" in § 924(c)(3)(B). *Id.* at 34-36. In its Order, this Court explained that Mr. Wong had made the requisite *prima facie* showing satisfying the criteria in 28 U.S.C. § 2255(h)(2). The Court recognized that, in declaring the residual clause in § 924(c)(3)(B) unconstitutionally vague, *Davis* announced a new rule of constitutional law that the Supreme Court had made retroactive to cases on collateral review. *Id.* at 5-6.

This Court found that Mr. Wong made a *prima facie* showing that his § 924(c) conviction in Count 5 was unconstitutional. It explained that, although that count contained multiple predicates, one of those predicates was for an offense – conspiracy to commit Hobbs Act robbery – which does not qualify as a "crime of violence" under the elements clause. *Id.* at 7 (citing *Brown v. United States*, 942 F.3d 1069, 1075-76 (11th Cir. 2019)). And because it was unclear whether that offense served as the predicate given the jury's general verdict, Mr. Wong made a *prima facie* showing that his § 924(c) conviction in Count 5 was

unconstitutional. *Id.* at 8.

After the district court docketed this Court's grant of Mr. Wong's second or successive application, DE 1, it appointed counsel, DE 3, and Mr. Wong filed a counseled 28 U.S.C. § 2255 motion arguing that his 18 U.S.C. § 924(c) conviction on Count 5 was invalid in light of the Supreme Court's decision in *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019), DE 5. The government filed a response in opposition to the motion, DE 6, and Mr. Wong replied, DE 7. On February 5, 2021, the district court stayed decision on Mr. Wong's § 2255 motion pending this Court's decisions in *Granda v. United States*, No. 17-15194 and *Foster v. United States*, No. 19-14771. DE 11. After the parties informed the district court that this Court had decided *Granda* and *Foster*, DE 12 & 13, it denied the motion, DE 14.

The district court relied on *Granda* to find Mr. Wong's claim procedurally defaulted because he could not show cause, prejudice or actual innocence. DE 14: 6-8. As to "cause" for his default, entirety of the district court's analysis was as follows: "*Granda*'s reasoning applies here; Movant thus cannot show cause to excuse his default." *Id.* at 7.

In concluding that Mr. Wong could not show prejudice to excuse his default, the district court relied on its determination that attempted Hobbs Act robbery is a "crime of violence" for purposes of 18 U.S.C. § 924(c). *Id.* Specifically, the district court concluded that Mr. Wong could not show prejudice in light of the "inextricably intertwined" nature of his "valid" drug trafficking and attempted Hobbs Act robbery predicates and the invalid conspiracy to commit Hobbs Act robbery predicate. DE 14: 7-8. The district court held that Mr. Wong could not demonstrate actual innocence excusing default for the same reasons, again relying on its conclusion that Mr. Wong's conviction in Count 2 for attempted Hobbs Act robbery was a valid § 924(c) predicate. *See id.* at 8.

The district court also held that Mr. Wong's claim failed on the merits under *Granda* because his "conspiracy-to-rob predicate offense was inextricably intertwined with the other predicate offenses of attempted Hobbs Act robbery and drug trafficking crimes" and therefore any error resulting from instructing the jury as to his constitutionally "invalid" Hobbs Act conspiracy predicate. *Id.*

The district court denied a certificate of appealability. *Id.* at 9.

On May 18, 2021, the district court entered a separate judgment denying relief. DE 15. On July 15, 2021, Mr. Wong timely appealed. DE 16.

LEGAL STANDARD

A COA must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484, (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

As the Supreme Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Supreme Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus.

Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

The Supreme Court recently applied this standard in *Welch v. United States*, 136 S. Ct. 1257 (2016), which arose from the denial of a COA, *id.* at 1263-64. *Welch* broadly held that *Johnson v. United States*, 576 U.S. 591 (2015), announced a substantive rule that applied retroactively in cases on collateral review. *Id.* at 1268. But, in considering the particular case before it, the Supreme Court also held that the court of appeals erred by denying Welch a COA. *See id.* at 1263, 1268. Specifically, the Court held that "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence," given that there was no binding precedent resolving the question on which Welch's entitlement to relief depended, and a COA should therefore issue. *See id.* at 1263-64, 1268.

Here, as was true in *Welch*, Mr. Wong has clearly satisfied this standard. He therefore respectfully requests that the Court grant him a COA on the issues specified.

I. Given that other circuits hold that a split in the circuits on the question presented warrants a COA, reasonable jurists could debate whether controlling circuit precedent precludes issuance of a COA.

The district court held that no COA should issue on the merits of Mr. Wong's challenge to his 18 U.S.C. § 924(c) conviction because of the binding circuit authority in *Granda* and *Foster*, 996 F.3d 1100 (11th Cir. 2021).

In *Hamilton*, this Court that binding circuit precedent precludes issuance of a COA "'because reasonable jurists will follow controlling law.'" 793 F.3d at 1266 (quoting *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007)). The fact that there was a circuit split on the issue was held irrelevant. *See id.* Even though the Third Circuit had disagreed with this Court's precedent on the substantive issue before the Court in *Hamilton*, this Court explained, "we are bound by our Circuit precedent, not by Third Circuit precedent," and the existence of Eleventh Circuit precedent on the issue "end[ed] any debate among reasonable jurists about the correctness of the district court's decision under binding

precedent." *Id.* (citation omitted).

Hamilton, however, is a misapplication of Supreme Court precedent governing the issuance of a COA. Under that precedent, "[a]t the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). And, "[u]ntil a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Id.* (citing *Miller-El,* 537 U.S. at 336). Therefore, "[w]hen a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336-37).

In *Hamilton*, this Court took the very course *Buck* rejected. *Hamilton* holds that a claim's lack of merit under circuit law precludes the grant of a COA, even in the face of express disagreement with that

conclusion by United States Circuit Judges in other circuits. *See Hamilton*, 793 F.3d at 1266. In sharp contrast, several of this Court's sister circuits have held – in accordance with *Miller-El* and *Buck*, and contrary to *Hamilton* – that a split in the circuits warrants the grant of a COA. *See Wilson v. Sec'y, Pa. Dep't of Corr.*, 782 F.3d 110, 115 (3d Cir. 2015); *Lowe v. Swanson*, 663 F.3d 258, 260 (6th Cir. 2011); *Lambright v. Stewart*, 220 F.3d 1022, 1028-29 (9th Cir. 2000).

A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). Whether *Hamilton* states the appropriate standard for grant of a COA certainly cannot be "beyond all debate" where other circuits have reached the exact opposite conclusion.

Here, because reasonable jurists actually disagree as to whether a COA can issue in the face of contrary circuit precedent, this Court should issue a COA on that question.

II. In light of the Supreme Court's grant of the petition for writ of *certiorari* in *United States v. Taylor* on the issue of whether 18 U.S.C. § 924(c)(3)(A)'s definition of "crime of violence" excludes attempted Hobbs Act robbery, reasonable jurists could debate whether Mr. Wong's conviction for attempted Hobbs Act robbery in Count 2 is a "crime of violence" for purposes of 18 U.S.C. § 924(c).

On July 2, 2021, the Supreme Court agreed to decide whether 18 U.S.C. § 924(c)(3)(A)'s definition of "crime of violence" excludes attempted Hobbs Act robbery. *See United States v. Taylor*, ___ S. Ct. ___, 2021 WL 2742792 (U.S. July 2, 2021) (No. 20-1459). This Court has held that attempted Hobbs Act robbery qualifies as a crime of violence for purposes of § 924(c). *United States v. St. Hubert*, 909 F.3d 335, 351-53 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1394 (2019).

The court below found Mr. Wong could not show prejudice for his default or actual innocence, and was not entitled to § 2255 relief on the merits, because any error resulting from instructing the jury as to his constitutionally "invalid" Hobbs Act conspiracy predicate was harmless

due to the fact that offense was "inextricably intertwined" with his "valid" attempted Hobbs Act robbery predicate and drug-trafficking predicates. In *Granda*, the jury was instructed that it could rest its general verdict on five possible predicates, only one of which is constitutionally invalid. *Granda*, 990 F.3d at 1280. This Court found any error in the instruction harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), due to the inextricably intertwined nature of the predicate offenses. The same cannot be true where the jury is instructed that it can rest its verdict on four possible predicates, and half of those predicates are constitutionally invalid.

Under *O'Neal v. McAninch*, 513 U.S. 432, 435 (1985), the Supreme Court held that if "the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error," then "the judge should treat the error, not as if it were harmless, but as if it affected the verdict (*i.e.,* as if it had a 'substantial and injurious effect or influence in determining the jury's verdict.'"). If the Court in *Taylor* holds that attempted Hobbs Act robbery is not a "crime of violence" for purposes of § 924(c), then, under *Granda*'s analysis, the jury would relied on two valid

predicates (the drug trafficking offenses) and two invalid predicates (conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery) to convict Mr. Wong of a § 924(c) offense. That "equipoise" is sufficient to show that reasonable jurors could debate whether the district court erred in holding the instructional error here harmless.

Mr. Wong respectfully requests that the Court grant a certificate of appealability on this issue.

III. Reasonable jurists could debate whether procedural default bars relief.

The district court relied on *Granda* to hold that procedural default bars relief. DE 26 at 2-3. However, *Granda* did not address whether the error was jurisdictional and therefore not subject to default, and reasonable jurists can debate whether the error was jurisdictional. Moreover, reasonable jurists can debate whether "cause and prejudice" or "actual innocence" excuse any default. Mr. Wong therefore respectfully requests that the Court grant a COA on whether procedural default bars relief.

A. Reasonable jurists can debate whether the error is jurisdictional.

The movant in *Granda* did not argue, and therefore this Court did not address, whether the error was jurisdictional and therefore could not be procedurally defaulted. *See Granda*, *passim*. In sharp contrast, Mr. Wong can avoid any default because the error alleged here is jurisdictional.

A defendant "can avoid the procedural-default bar altogether, meaning he can raise a claim for the first time on collateral review without demonstrating cause and prejudice, if the alleged error is jurisdictional." *United States v. Bane*, 948 F.3d 1290, 1294 (11th Cir. 2020). Although district courts have statutory power to adjudicate prosecutions of federal offenses, 18 U.S.C. § 3231, "when an indictment affirmatively alleges conduct that is not a federal offense, it does 'not invoke the district court's jurisdiction to enter judgment or accept a guilty plea,'" *Bane*, 948 F.3d at 1295 (quoting *United States v. Brown*, 752 F.3d 1344, 1352–53 (11th Cir. 2014); and citing *United States v. Peter*, 310 F.3d 709, 713, 715 (11th Cir. 2002)). For example, in *Peter*, this Court

held that the district court committed a jurisdictional error when it accepted a guilty plea to mail fraud when the indictment contained allegations of conduct that was "outside the reach of the mail fraud statute." 310 F.3d at 715. For the same reason, a defendant's challenge to a § 924(c) conviction on grounds that the purported "crime of violence" is not – as a matter of law – a "crime of violence," is a jurisdictional claim that cannot be waived. *United States v. St. Hubert*, 909 F.3d 335, 340-44 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1394 (2019), *and abrogated in part on other grounds by United States v. Davis*, 139 S. Ct. 2319, 2323-35, 2336 (2019).

A number of district courts have followed *Bane* and its progeny to conclude that a *Davis* challenge to a § 924(c) conviction supported by a predicate offense that no longer qualifies as a "crime of violence" is jurisdictional in nature and therefore cannot be procedurally defaulted. *See Abraham v. United States, No. 20-civ-24980-Huck,* slip op. at 2 (S.D. Fla. June 10, 2021) (so holding post-*Granda); Wainwright v. United States*, No. 19-62364-civ-Cohn, slip op. at 28-29 (S.D. Fla. April 6, 2020); *Taylor v. United States*, No. 20-22628-Civ-Huck, slip op. at 7-8 (S.D. Fla.

Aug. 19, 2020); *Adside v. United States*, No. 19-24475-Civ-Huck, slip op. at 8 (S.D. Fla. Sept. 25, 2020); *Wright v. United States*, No. 19-24060-civ-Huck, slip op. at 7 (S.D. Fla. Oct. 8, 2020). That is precisely Mr. Wong's challenge here. He alleges that after *Davis*, a "crime of violence" supporting his § 924(c) conviction is not, as a matter of law, a "crime of violence," and therefore the error he alleges is jurisdictional. *See St. Hubert*, 909 F.3d at 340.

As a result, reasonable jurists can debate – and indeed have debated – the correctness of the district court's conclusion that procedural default barred its consideration of Mr. Wong's *Davis* claim.

B. Reasonable jurists can debate whether "cause and prejudice" or "actual innocence" excuse any default.

Procedural default may also be excused by a showing of "cause and prejudice," *Massaro v. United States*, 538 U.S. 500, 504 (2003), or "actual innocence," *Bousley v. United States*, 523 U.S. 614, 622 (1998). Reasonable jurists can debate whether Mr. Wong can show "cause" and "actual innocence" to excuse any default. Mr. Wong therefore respectfully requests that the Court issue a COA on those issues.

In *Reed v. Ross*, 468 U.S. 1, 15 (1984), the Supreme Court held that default does not preclude a petitioner from raising a new claim on collateral review when it overturns "a longstanding and wide-spread practice to which this Court has not spoken, but which a near-unanimous body of lower-court authority has expressly approved," and when "a decision of this Court . . . explicitly overrule[s] one of [its] precedents." *Id.* at 17 (internal quotation marks omitted). The Third, Seventh, Ninth, and Tenth Circuits have held that *Reed* excuses procedural default when near-unanimous circuit precedent foreclosed a claim, when the Supreme Court overrules its own precedent, or both. *See, e.g., United States v. Doe*, 810 F.3d 132, 153 (3d Cir. 2015); *Cross v. United States*, 892 F.3d 288, 295-96 (7th Cir. 2018); *English v. United States*, 42 F.3d 473, 479 (9th Cir. 1994); *United States v. Snyder*, 871 F.3d 1122, 1127 (10th Cir. 2017). But three other courts of appeal, including this Court in *Granda*, have held to the contrary. *See Granda*, 990 F.3d at 1286 (following *McCoy v. United States*, 266 F.3d 1245, 1258-59 (11th Cir. 2001)); *Gatewood v. United States*, 979 F.3d 291 (6th Cir. 2020), *cert. denied*, ___ S. Ct. ___, 2021 WL 2519127 (U.S. June 21, 2021); *United*

States v. Moss, 252 F.3d 993, 1002-03 (8th Cir. 2001).

This Court and others in the minority have concluded that under *Bousley*, long-standing practice and near-unanimous circuit precedent foreclosing a claim cannot excuse procedural default. *See McCoy*, 266 F.3d at 1258-59; *Moss*, 252 F.3d at 1002-03; *Gatewood*, 979 F.3d at 395-96. It is true that *Bousley* stated that a petitioner cannot show cause "simply" because a particular legal claim was "unacceptable to [a] particular court at [a] particular time." *Bousley*, 523 U.S. at 613 (internal quotation marks omitted). But *Bousley* did not say it was overruling *Reed*. *See id.* at 622 (citing *Reed*). And *Bousley* is not inconsistent with *Reed*. *Bousley* addressed the completely different situation in which a petitioner failed to raise a claim on direct review that was subject of a circuit split. *See Bailey v. United States*, 516 U.S. 137, 142 (1995) (noting conflict in circuits on claim at issue in *Bousley*). In that situation, the Court held that a petitioner could not show cause to overcome a default. *See Bousley*, 523 U.S. at 623. But that holding does not affect *Reed*'s discussion of *other* circumstances in which a petitioner *can* show cause to overcome procedural default. *See Reed*,

468 U.S. at 17. Reasonable jurists could therefore debate whether this Court erred in *Granda* by concluding that *Bousley* somehow overruled *Reed* by implication.

In addition, *Reed* states that there is cause to excuse procedural default when the Supreme Court overturns its own precedent, indicating "a clear break with the past." 468 U.S. at 17 (internal quotation marks omitted). The Seventh and Tenth Circuits hold that under *Reed*, the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), was a clear break from the past, providing cause to excuse procedural default. *See Cross*, 892 F.3d at 296 (7th Cir.); *Snyder*, 871 F.3d 1127 (10th Cir.). *Granda*, however, disagrees, finding cause *only* in cases where Supreme Court precedent expressly foreclosed a petitioner from raising a residual clause challenge. *See Granda*, 990 F.3d at 1286-87.

Mr. Wong acknowledges that this Court is bound by the decisions in *Granda* and *McCoy* regarding the showing to demonstrate "cause" for a procedural default, notwithstanding the decisions of other circuit courts to the contrary. However, this split in the circuits shows that

reasonable jurists could differ on the issue, and Mr. Wong respectfully requests that the Court grant a COA on the question of whether cause excuses Mr. Wong's procedural default. And, should the Court rely on *Hamilton* to deny a COA on this issue, Mr. Wong respectfully submits that doing so is an additional reason why this Court should grant a COA on the first question presented in herein, relating to whether a split in the circuits warrants a COA, even in the face of controlling circuit precedent.

Reasonable jurists can also debate whether Mr. Wong has demonstrated prejudice sufficient to excuse his procedural default. The district court also relied on *Granda* to conclude that Mr. Wong could not demonstrate prejudice. DE 26 at 3. However, Granda only challenged a § 924(o) conviction and sentence that was concurrent and coterminous with the sentences imposed by the district court on his other counts. *Granda*, 990 F.3d at 1282. In contrast, Mr. Wong has also challenged his § 924(c) conviction and the *consecutive* minimum mandatory sentence resulting from that conviction. This is a meaningful difference. Granda did not raise, and therefore this Court had no reason to address,

the prejudice inherent in a consecutive minimum mandatory term of imprisonment. *See Granda*, *passim*.

To demonstrate "actual prejudice," a movant must show the error he alleges "worked to his *actual* and substantial disadvantage." *Reece v. United States*, 119 F.3d 1462, 1467 (11th Cir. 1997) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original)). There is "no doubt that an extended prison term . . . constitutes prejudice" that excuses a procedural default. *Cross v. United States*, 892 F.3d 288, 295 (7th Cir. 2018) (citing *Glover v. United State*s, 531 U.S. 198, 203 (2001)). *Cf. In re Jones*, 830 F.3d 1295, 1303 (11th Cir. 2016) (Rosenbaum, and Jill Pryor, JJ., concurring) (finding manifest injustice where "an error means that an inmate may potentially sit in prison for years beyond his constitutionally authorized sentence"). District courts in this circuit have found additional prison time constitutes prejudice sufficient to excuse a procedural default where a § 2255 movant challenges a § 924(c) conviction and sentence in light of *Davis*. *See Wright v. United States*, No. 19-24060-civ-Huck, slip op. at 7 (S. D. Fla. Oct. 8, 2020); *Watson v. United States*, No. 04-CR-00591-LMM-JMF, slip op. at 5-6 (N.D. Ga.

Mar. 9, 2020) (in a § 2255 proceeding arising from *Davis*, finding prejudice where movant "received a prison sentence longer than he would have received" absent the alleged error).

Due to his unlawful § 924(c) conviction, Mr. Wong received a prison sentence longer than the one he would have otherwise received. His mandatory consecutive sentence on the § 924(c) conviction in Count 5 increased his total term of imprisonment by five years. That fact distinguishes his case from *Granda*. Granda did not receive even one additional day of imprisonment as a result of his concurrent § 924(o) conviction. Therefore, reasonable jurists could conclude that *Granda* does not control here. And, as a result, reasonable jurists could debate whether the extension of Mr. Wong's prison term as a result of his invalid § 924(c) conviction demonstrates prejudice sufficient to excuse any procedural default.

In light of the above, Mr. Wong respectfully requests that the Court grant a COA on whether "cause and prejudice" excuses his procedural default.

Finally, the district court concluded that under *Granda*, Mr. Wong

cannot demonstrate "actual innocence." DE 26 at 3. Mr. Wong recognizes *Granda*'s holding that his claim was one of "legal" rather than "actual" innocence, but respectfully requests that the Court grant a COA on this issue. The Fifth Circuit has held that a claim of actual innocence based on a new statutory interpretation like that in *Davis* is viable. *See United States v. Reece*, 938 F.3d 630, 634 n.3 (5th Cir. 2019), as revised (Sept. 30, 2019) ("If [the petitioner]'s convictions were based on the definition of [crime of violence] articulated in § 924(c)(3)(B), then he would be actually innocent of those charges under *Davis*."). Moreover, although *Granda* cited *Bousley* to support its ruling, *Bousley* actually supports a finding of actual innocence here.

In *Bousley*, the defendant pled guilty to the charge that he knowingly and intentionally used firearms "during and in relation to any . . . drug trafficking crime" in violation of § 924(c). *Bousley*, 523 U.S. at 616; § 924(c)(1)(A) (1994). Bousley admitted to selling methamphetamine[2] and to storing two pistols in close proximity to the

[2] Brief for the United States, *Bousley*, 1997 WL 805418, at *5.

drugs.[3] But later, in *Bailey*, the Supreme Court interpreted the phrase "knowingly and intentionally used . . . firearms" to mean "active employment of a firearm," not "merely . . . storing a weapon near drugs." *Id.* at 148-49 (quotation marks omitted). Thus, after *Bailey*, Bousley, who merely placed a firearm near drugs, was not actually guilty of the crime established by § 924(c), but legally innocent.

Bousley held that *Bailey* was retroactive and then proceeded to address whether Bousley's procedural default of the claim was excused because, in light of the narrowing of § 924(c) in *Bailey*, he was actually innocent of a § 924(c) offense. 523 U.S. at 620. The Supreme Court ultimately remanded the case for a determination of whether Bousley was actually innocent. *Id.* at 623. As such, a noted habeas scholar explains, "Bousley . . . recognized that legal innocence, if the defendant's conduct did not fall within the scope of the relevant criminal statute, would constitute cause for procedural default." See Leah M. Litman, Legal Innocence and Federal Habeas, 104 Va. L. Rev. 417, 469 (2018).

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[3] Brief for the Petitioner, *Bousley*, 1997 WL 728537, at *5, *9; Brief for the United States, *Bousley*, 1997 WL 805418, at *5.

Reasonable jurists could therefore debate whether under *Bousley*, and contrary to *Granda*, a claim of "legal innocence" such as that raised by Mr. Wong's *Davis*-based challenge to his § 924(c) conviction can satisfy the "actual innocence" standard. Mr. Wong therefore respectfully requests that the Court grant a COA on whether actual innocence excuses any procedural default here.

III. Reasonable jurists could debate whether Mr. Wong is entitled to 28 U.S.C. § 2255 relief.

The district court found that because Mr. Wong's predicate offenses are "inextricably intertwined," he cannot overcome the harmless error analysis articulated in *Granda*. DE 11 at 5. Reasonable jurists could debate whether *Granda* employed an incorrect legal standard, and therefore a COA should issue on whether Mr. Wong is entitled to § 2255 relief.

Although this Court rejected these arguments in *Granda*, both *Stromberg v. California*, 283 U.S. 359 (1931) and application of the categorical approach mandate that Mr. Wong's motion be granted. The district court instructed the jury that it could find Mr. Wong guilty of the

§ 924(c) offenses based on any one of several predicates, including the now-invalid predicate of conspiracy to commit Hobbs Act robbery. And the jury returned only a general verdict; it was not asked to, and did not make, a special finding specifying what offense it concluded was the basis of the § 924(c) convictions. District courts have granted § 2255 relief to other defendants in the exact same situation. *See Said v. United States*, No. 2:10-cr-57-1, slip op. at 12-24 (E.D. Va. July 19, 2021); *Wainwright v. United States*, No. 19-62364-Civ-Cohn, slip op. at 27-31 (S.D. Fla. April 6, 2020); *Taylor v. United States*, No. 20-22618-Civ-Huck, slip op. at 3-7 (S.D. Fla. Aug. 19, 2020); *Adside v. United States*, No. 19-24475-Civ-Huck, slip op. at 3-7 (S.D. Fla. Sept. 25, 2020); *Wright v. United States*, No. 19-24060-Civ-Huck, slip op. at 3-6 (S.D. Fla. Oct. 8, 2020). These district court rulings demonstrate that reasonable jurists can debate – and indeed have debated – the correctness of the decision of the district court below.

And indeed, even if the verdict in Count 5 was based on *all* of the charged predicates (to the extent the jury believed the predicates were intertwined), under settled Supreme Court precedent the intertwining of

predicates cannot save the conviction. In *Zant v. Stephens*, 462 U.S. 862 (1983), the Supreme Court clarified that there were actually "two rules" that have derived from *Stromberg*. *Stephens*, 462 U.S. at 881. The first is that "a general verdict must be set aside if the jury was instructed that it could rely upon any one of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively upon the insufficient ground." *Id.* But there is also a second rule encompassed by *Stromberg*. It governs whenever a general verdict on a single count of an indictment or information "rested on *both* a constitutional and an unconstitutional ground." *Stephens*, 462 U.S. at 882 (emphasis in original).

In this second situation – exemplified by cases like *Thomas v. Collins*, 323 U.S. 516, 528-29 (1945) and *Street v. New York*, 394 U.S. 576, 586-90 (1969) – the Court noted, "there is no uncertainty about the multiple grounds on which the general verdict rests." In fact, the penalty was necessarily "imposed on account of *both*" alleged acts. *Id.* But in this situation as well, the Court confirmed in *Stephens*, the same rule applies "[i]f, under the instructions to the jury, one way of

committing the offense charged is to perform an act protected by the Constitution." *Stephens*, 462 U.S. at 883. In such cases, a general verdict of guilt must "be set aside" even if the constitutional ground, "considered separately, would support the verdict." *Id*.

On that point, the *Stephens* Court noted with significance that in *Street* it had stated:

> We take the rationale of *Thomas* to be 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 trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together*. *See* 323 U.S., at 528-529 [].

Stephens, 462 U.S. at 883 (emphasis added).

Thus, contrary to the suggestions in *Granda*, the fact that predicates may be "inextricably intertwined" does not compel the conclusion that a *Stromberg* error was harmless. To the contrary, the Supreme Court was clear in *Stephens* that the judgment cannot be affirmed unless all bases are constitutionally valid. And that, indisputably, was not the case here.

On this record, reasonable jurists could debate whether both

Stromberg and its progeny including *Stephens* (never overruled by the Supreme Court, and never considered in *Granda*), as well as faithful application of the categorical approach, mandate that Mr. Wong's § 924(c) conviction be vacated and set aside, and a COA should issue.

Finally, this area of law is very fluid. The Supreme Court has yet to consider the implications of *Davis* for movants like Mr. Wong – where the jury was instructed that it could find the defendant guilty of § 924(c) offense based on any one of several predicates, one of which is invalid after *Davis*, and the jury returned only a general verdict. As discussed above, a question of first impression warrants a COA. *See Hicks*, 333 F.3d at 1282; *Saenz*, 282 F.3d at 354; *Espinoza-Saenz*, 235 F.3d at 502.

For all these reasons, reasonable jurists could debate whether Mr. Wong is entitled to § 2255 relief on the merits of his claim. He therefore respectfully requests that the Court grant a COA on this issue.

CONCLUSION

WHEREFORE, Movant/Appellant, Jose Luis Wong, respectfully requests that this Court grant him a certificate of appealability.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation and typeface requirements of FED. R. APP. P. 32(a)(7)(B), because it contains 6,316 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Century Schoolbook.

s/Janice L. Bergmann
Janice L. Bergmann
Attorney for Appellant Wong
Dated: August 2, 2021

CERTIFICATE OF SERVICE

I HEREBY certify that on this 2nd day of August, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day via CM/ECF on Emily M. Smachetti, Chief, Appellate Division, United States Attorney's Office, 99 N.E. 4th Street, Miami, Florida 33132 and mailed via U.S. Mail to Mr. Jose Luis Wong, Reg. No. 70126-004, USP Terre Haute, P.O. Box 33, Terre Haute, IN 47808.

s/Janice L. Bergmann
Janice L. Bergmann

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-20111-CIV-ALTONAGA

JOSE LUIS WONG,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER

THIS CAUSE came before the Court on Movant, Jose Luis Wong's Motion to Vacate 18 U.S.C. [Section] 924(c) Conviction Pursuant to 28 U.S.C. [Section] 2255 [ECF No. 5]. The Government filed an Answer [ECF No. 6], to which Movant filed a Reply [ECF No. 7]. Thereafter, Movant and the Government supplied supplemental authorities [ECF Nos. 9, 13]. For the following reasons, the Motion is denied, and a certificate of appealability does not issue.

Background

The offense conduct. This case arises from Movant and his co-defendants' conspiracy and attempt to rob a fictional drug stash house. *See United States v. Sardinas*, 386 F. App'x 927, 929 (11th Cir. 2010). In deciding the direct appeal of Movant's conviction, the Eleventh Circuit Court of Appeals described the salient facts of the case based on the evidence presented during the Government's case in chief at trial:

> The High Intensity Drug Trafficking Area Taskforce is a joint operation of the Miami Dade Police Department and the Bureau of Alcohol, Tobacco, Firearms and Explosives. It focuses on violent crimes, including home invasion robberies. The Taskforce sometimes receives information from one of its confidential informants that a group of people is seeking to commit a home invasion robbery for drugs, sometimes also known a "drug rip-off." When the Taskforce receives such a tip, it typically performs undercover operations to investigate the group and prepare a case for prosecution if the facts justify doing so.

An undercover officer often poses as a disgruntled drug trafficker seeking people to help him commit a robbery in order to steal drugs from one of his employer's stash houses. The confidential informant introduces the undercover agent to the people interested in committing a drug rip-off. The meetings are usually recorded. There usually are no real drugs and no real stash house.

Miguel Gonzalez, a confidential informant working with the Taskforce, offered [Movant] the opportunity to commit an armed home invasion robbery for drugs. On March 25, 2008, [Movant] and Gonzalez discussed strategy for carrying out the proposed robbery during a recorded telephone conversation. [Movant] agreed to bring a partner to meet with Gonzalez and the disgruntled drug trafficker, who was in reality undercover ATF Special Agent Richard Checo.

The next day, Gonzalez and Agent Checo met with [Movant] and [Movant's Co-Defendant] Sardinas in a Sears parking lot. The meeting was audio recorded in its entirety and partially video recorded. Checo told [Movant] and Sardinas that he transported cocaine for Colombian drug traffickers and that he was responsible for delivering the cocaine to a drug stash house once it arrived in Miami on a freighter. Checo then explained that he wanted to steal the cocaine because the Colombian drug traffickers who employed him had failed to pay him the promised amount for his services.

Checo said that he expected a shipment of twenty to twenty-five kilograms of cocaine to arrive soon. He stated that he would know when the cocaine was to arrive only one day in advance and that he would not know the location of the stash house until he picked up the drugs from the freighter. [Movant] replied that he understood that his crew would have to be ready at that point. Checo then told [Movant] and Sardinas that the stash house would be guarded by two men with firearms. [Movant] told Checo not to worry because three cars full of [Movant's] people would follow Checo to the stash house.

On April 8, 2008, [Movant], Sardinas, Gonzalez, and Agent Checo met again, this time in the parking lot of a Publix supermarket. The Taskforce audio and video recorded the meeting. During that meeting, [Movant] said, "Everything's ready on my end." He added, "I have the group already, you copy?" [Movant] also explained the plan: He would not enter the stash house, but his crew would follow Checo inside as Checo delivered the cocaine, catching the armed guards by surprise. Checo told [Movant] and Sardinas that if they changed their minds, they would have to alert Checo or Gonzalez. [Movant] and Checo then haggled over how to split the cocaine, eventually agreeing that [Movant], Sardinas, and the rest of [Movant's] crew would receive twenty kilograms and that Checo and his people would receive the remaining five kilograms.

On April 15, 2008, [Movant] again met with Gonzalez and Agent Checo. The meeting was audio and video recorded. Checo told [Movant] that the boat containing the cocaine had arrived, and the two agreed that the robbery would occur the following evening. Checo then asked if [Movant] had everything he needed to

commit the robbery, including "hierros." [Movant] replied, "Everything is ready." (At trial, Agent Checo testified that "hierros" is slang for "firearms.") Checo, while gesturing toward his waistband, told [Movant] to warn his crew that Checo would have a "hierro" as well. [Movant] said that he could have his crew together and ready around 3:00 or 4:00 p.m. the next day.

On April 16, 2008, . . . [a]t 7:18 p.m., Gonzalez called [Movant] and instructed [Movant] to meet him in the parking lot of the El Tropico Restaurant and to bring his crew with him. The two planned to wait at El Tropico for Agent Checo's call. Once they received it, Gonzalez, [Movant], and [Movant's] crew would drive to meet Checo and then follow him to the fictional stash house where they would carry out the armed robbery.

. . . That evening, Gonzalez waited in the parking lot of El Tropico. He sat in a black Ford Expedition that had been equipped with hidden audio and video recorders.

Just before 9:00 p.m., [Movant] entered the parking lot of El Tropico and got in the front passenger seat of the Expedition. [Movant] assured Gonzalez that his people were already in the area surrounding El Tropico. The two discussed how they would travel to the stash house and the planned split of the cocaine. Cellular telephone records revealed that [Movant] spoke to Sardinas, [Co-Defendant] Socorro, and [Co-Defendant] De Armas while inside the Expedition.

. . . .

Back in the Expedition, [Movant] instructed someone through his cell phone to "go separate ways." [Movant] then explained to Gonzalez "that they had parked and they had to move. And he's saying that there's a car following them." . . .

[Movant] told Gonzalez that: "one followed the girl and the other one followed him. And then they told Sardinas, 'Take off because this is hot.' Sardinas took off, and now they're coming back." [Movant] said into his cell phone: "Brother, because maybe you parked maybe everything is hot, because all the Latin American are super hot." He added, "Do me a favor, pick that up. Call me and come to where I'm at. And if you want, you can keep going afterwards but I want that, please. Bring me that." When [Movant] hung up, Gonzalez asked, "Did he throw away the, the gun?"

. . . .

[A]t El Tropico, officers observed Sardinas enter the parking lot and approach the Expedition. After speaking with [Movant] and Gonzalez briefly, Sardinas walked back across the parking lot and up to a black Chevy Blazer, which was driven by Socorro. As Sardinas approached, Socorro rolled down the driver side window. The two spoke briefly before Socorro handed a blue gym bag to

> Sardinas. Sardinas immediately returned to the Expedition, blue gym bag in hand, and entered that vehicle.
>
> After Sardinas climbed inside, the Expedition left the El Tropico parking lot. Gonzalez drove the Expedition to a warehouse, where [Movant] and Sardinas were arrested. When police officers searched the Expedition, they discovered the blue gym bag. When they opened the bag, they discovered a smaller bag containing a shortened rifle, two silencers, and a magazine clip of ammunition.
>
> After [Movant] and De Armas had been arrested, officers placed them together in the backseat of a squad car equipped with a recording device. During their recorded conversation, De Armas said, "I told you. I told you. They are going to find my 'cañón' around there. Shit, fucking–a man!" [Movant] observed: "And now they are searching where you tossed that." The transcripts introduced into evidence at trial translated the Spanish word "cañón" into English as "gun."
>
> . . . .
>
> . . . In his [post-arrest] statement, [Movant] said that he had been instructed by a friend to contact Gonzalez about a proposition regarding cocaine. [Movant] also admitted to meeting with Agent Checo and Gonzalez and discussing a robbery to get twenty-five kilograms of cocaine from a drug stash house. [Movant] also admitted that he expected to receive seven kilograms of cocaine from the robbery.

Id. at 929–32 (alterations added; other alterations adopted; footnote call number omitted).

In 2008, a federal grand jury returned a Superseding Indictment [CR ECF No. 79],[1] charging Movant with: conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. section 1951(a) (Count 1); attempted Hobbs Act robbery, in violation of 18 U.S.C. sections 1951(a) and 2 (Count 2); conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. sections 846 and 841 (Count 3); attempted possession with intent to distribute a controlled substance, in violation of 21 U.S.C. sections 846 and 841, and 18 U.S.C. section 2 (Count 4); carrying and possessing a firearm during and in relation to a crime of violence and drug trafficking crime, in violation of 18 U.S.C. sections 924(c) and 2 (Count 5); possession of a firearm after a prior felony conviction, in violation of 18 U.S.C sections 922(g)(1) and 2 (Count 6); and possession of a firearm

[1] The Court refers to docket entries in Movant's criminal case, case number 08-cr-20380, as "CR ECF No."

with an obliterated serial number, in violation of 18 U.S.C. sections 922(k), 924(a)(1)(B), and 2 (Count 7). (*See generally* Superseding Indictment).

Jury instructions. Movant proceeded to a jury trial. *See Sardinas*, 286 F. App'x at 933. At trial, with respect to Count 5 — Movant's section 924(c) charge — the jury instructions stated the jury could convict if it found (1) Movant "committed a drug trafficking offense *or* crime of violence[,]" and (2) Movant, during the commission of the crime, "knowingly carried a firearm in relation to" or "possessed the firearm in furtherance of that drug trafficking crime or crime of violence[.]" (Ct.'s Instrs. to Jury [CR ECF No. 159] 8–9 (alterations and emphasis added)).

Conviction and verdicts. On September 5, 2008, the jury convicted Movant of all seven counts. (*See* Verdict [CR ECF No. 155] 1–3). Regarding Movant's drug trafficking offenses in Counts 3 and 4, the jury found Movant conspired or attempted to possess 5 kilograms or more of cocaine, with intent to distribute. (*See id.* 1–2). With respect to the section 924(c) weapons charge — Count 5 — the jury determined Movant carried or possessed a Ruger 10-22, 22LR caliber short-barreled rifle equipped with a firearm silencer or muffler. (*See id.* 3).

On November 19, 2008, the Court sentenced Movant to 600 months' imprisonment, consisting of 240 months each for Counts 1, 2, 3, and 4; 120 months as to Count 6; 60 months as to Count 7 — to be served concurrently; and 360 months as to Count 5, to be served consecutively to the terms in the other Counts. (*See* J. [CR ECF No. 206] 3).

Appeal and postconviction proceedings. In 2010, the Eleventh Circuit affirmed Movant's conviction. *See generally Sardinas*, 386 F. App'x 927. Movant filed his first section 2255 motion to vacate his sentence in 2011, raising various ineffective-assistance-of-counsel claims. *See Wong v. United States*, No. 11-cv-23818, Mot. Pursuant to 28 U.S.C. § 2255 . . . [ECF No. 1] (S.D. Fla. Oct. 24, 2011). The Court denied Movant's section 2255 motion. *See id.*, Order [ECF No. 10] (S.D. Fla. June 8, 2012).

After obtaining permission from the Eleventh Circuit (*see* [ECF No. 1] 2–9), Movant filed his present Motion seeking to vacate his section 924(c) conviction based on the United States Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). Specifically, Movant challenges his section 924(c) conviction and sentence — Count 5 — on the basis that the conviction may have rested on section 924(c)'s now-voided residual clause and is thus unconstitutional under *Davis*. (*See* Mot. 1 (citing *Davis*, 139 S. Ct. 2319)).

Analysis

Procedural default. The Government contends Movant procedurally defaulted his claim. (*See* Resp. 9–14; Gov't's Suppl. Auth. 2–4).[2] The Court agrees.

"Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a [section] 2255 proceeding." *McKay*, 657 F.3d at 1196 (alteration added; quotation marks and citation omitted). "But the [procedural-default] bar is not absolute." *United States v. Bane*, 948 F.3d 1290, 1294 (11th Cir. 2020) (alteration added). A defendant "can overcome it if he establishes cause and prejudice." *Id.* (citation omitted).

Recently, in *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), the Eleventh Circuit held that a vagueness-based challenge to the section 924(c) residual clause was not sufficiently novel to establish cause. *See id.* at 1287–1288 ("[T]he case law extant at the time of [the movant's] appeal confirms that he did not then lack the building blocks of a due process vagueness challenge to the [section] 924(c) residual clause. . . . [The movant] cannot show cause to excuse his procedural default." (alterations added; citation omitted)); *see also Martinez v. United States*, -- F. App'x --, 2021 WL 1561593, at *2 (11th Cir. Apr. 21, 2021) ("[A]lthough *Davis* announced a

[2] The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

new constitutional rule of retroactive application, it was not a sufficiently clear break with the past such that an attorney would not reasonably have had the tools necessary to present the claim before that decision." (alteration added; quotation marks omitted; citing *Granda*, 990 F.3d at 1286)).

Movant contends he has shown "cause" because his "claim is so novel that its legal basis [was] not reasonably available to counsel" on direct appeal. (Reply 12 (alterations added; quotation marks omitted)). *Granda*'s reasoning applies here; Movant thus cannot show cause to excuse his default.

The Court also agrees with the Government that Movant cannot show actual prejudice. (*See* Resp. 11–12). "Actual prejudice means more than just the possibility of prejudice; it requires that the error worked to the [movant's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Granda*, 990 F.3d at 1288 (alteration added) quotation marks and citation omitted). To satisfy this standard, Movant must show "a substantial likelihood that the jury relied *only* on the Hobbs Act conspiracy conviction, because reliance on any of the [valid predicates] would have provided a wholly independent, sufficient, and legally valid basis to convict Movant of the [section] 924(c) . . . offense[]." *Rodriguez v. United States*, No. 03-20759-cr, 2021 WL 1421698, at *2 (S.D. Fla. Apr. 15, 2021) (alterations added; other alterations adopted; original emphasis; quotation marks omitted; quoting *Granda*, 990 F.3d at 1288).

Movant cannot satisfy this standard. As the Government notes, "the trial record makes abundantly clear that [Movant's Hobbs Act conspiracy, attempted Hobbs Act robbery, and drug trafficking offenses] rested on the same operative facts and the same set of events — the jury found beyond a reasonable doubt that [Movant] had conspired and attempted to rob the stash house in order to possess and distribute the cocaine it held." (Gov't's Suppl. Auth. 3 (alterations added; other alterations adopted; quotation marks and citation omitted)). The jury convicted Movant of

attempted Hobbs Act robbery and drug trafficking offenses. The attempted Hobbs Act robbery, drug trafficking, and conspiracy offenses were inextricably intertwined. The jury could not have concluded Movant carried a firearm during and in relation to, and possessed a firearm in furtherance of, the Hobbs Act conspiracy without also finding he did the same as to his attempted Hobbs Act robbery and two drug trafficking crimes. Movant thus cannot show actual prejudice.

Movant contends he "is actually innocent of his [section] 924(c) offense because it is predicated on Hobbs Act conspiracy, which is not a crime of violence." (Reply 15 (alteration added; quotation marks omitted)). "The actual innocence exception to the procedural default bar is exceedingly narrow in scope as it concerns a [movant's] actual innocence rather than his legal innocence." *Granda*, 990 F.3d at 1292 (alteration added; quotation marks and citation omitted). To demonstrate actual innocence of the section 924(c) offense, Movant must show "that no reasonable juror would have concluded he conspired to possess a firearm in furtherance of any of the valid predicate offenses." *Id.* Simply put, the Court finds "the same shortcoming that prevents [Movant] 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 [Movant] to show that his [section] 924[(c)] conviction was in fact based on the conspiracy-to-rob predicate." *Id.* (alterations added).

Since Movant cannot show cause, actual prejudice, or actual innocence, Movant cannot overcome procedural default.

The merits. Movant's Motion also fails on the merits. In *Granda*, the Eleventh Circuit found "[t]he inextricability of the alternative predicate crimes compels the conclusion that the error [the movant] complains about — instructing the jury on a constitutionally invalid predicate as one [of] several [] potential alternative predicates — was harmless." 990 F.3d at 1292 (alterations added). The same is true here. Movant's conspiracy-to-rob predicate offense was inextricably

intertwined with the other predicate offenses of attempted Hobbs Act robbery and drug trafficking crimes. Movant makes no showing that the jury relied solely on the invalid predicate in convicting him under section 924(c). "There is little doubt that if the jury found that [Movant] 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." *Granda*, 990 F.3d at 1293 (alteration added). Any error in instructing Movant's jury on the invalid predicate offense was harmless.

In short, Movant is not entitled to section 2255 relief.[3]

Certificate of Appealability

A movant seeking to appeal a district court's final order denying his motion to vacate has no absolute entitlement to appeal and must obtain a certificate of appealability to do so. *See* 28 U.S.C. § 2253(c)(1); *see also Harbison v. Bell*, 556 U.S. 180, 183 (2009). The Court should issue a certificate of appealability only if the movant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a district court has rejected a movant's constitutional claims on the merits, the movant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Upon review, the Court concludes reasonable jurists would not find her assessment of Movant's claims debatable or wrong. *See, e.g.*, *Granda*, 990 F.3d 1272; *Foster*, 2021 WL 1742267.

Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that Movant, Jose Luis Wong's Motion

[3] The *Granda*, 990 F.3d 1272, and *Foster v. United States*, -- F.3d --, 2021 WL 1742267 (11th Cir. May 4, 2021), decisions rejected several of the arguments raised by Movant in his Motion.

to Vacate 18 U.S.C. [Section] 924(c) Conviction Pursuant to 28 U.S.C. [Section] 2255 **[ECF No. 5]** is **DENIED**. A certificate of appealability shall not issue. Final judgment shall issue by separate order. This case remains **CLOSED**.

DONE AND ORDERED in Miami, Florida, this 18th day of May, 2021.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record