NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

PEDRO RAFAEL CARABALLO-MARTINEZ,

***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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January 11, 2022

QUESTION PRESENTED

"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)). Such errors are not structural, and do not require reversal in the absence of prejudice. *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (*per curiam*). *Pulido*, however, left the standard by which harmlessness is to be assessed in this context unspecified.

The question was again left unresolved in *Skilling v. United States,* 561 U.S. 358 (2010), after the Court held that one of the 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.

The question presented is:

> Whether a conviction under 18 U.S.C. § 924(c)(1)(A) may be sustained based on the reviewing court's finding that the jury relied equally on a valid predicate offense and a predicate offense that was obtained in reliance on the unconstitutionally vague residual clause invalidated in *United States v Davis*, 139 S.Ct. 2319 (2019)?

INTERESTED PARTIES

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

RELATED PROCEEDINGS

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

Caraballo-Martinez v. United States, No. 21-12206-G (11th Cir. Oct. 13, 2021)

Caraballo-Martinez v. United States, 20-cv-22282-JAL (S.D. Fla. May 10, 2021)

Caraballo-Martinez v. United States, No. 20-11803 (11th Cir. June 1, 2020)

Caraballo-Martinez v. United States, No. 04-11156 (11th Cir. May 18, 2004)

United States v. Ferreira et al., 275 F.3d 1020 (11th Cir. 2001)

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Mr. Pedro Caraballo 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 denying Mr. Caraballo a certificate of appealability, rendered and entered in case number 21-12206, in that court on October 13, 2021. *Caraballo-Martinez v. United States*, No. 21-12206 (11th Cir. Oct. 13, 2021).

OPINION BELOW

A copy of the order of the United States Court of Appeals for the Eleventh Circuit, which denied a request for a certificate of appealability to appeal the judgment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on May 20, 2021. This petition is timely filed pursuant to SUP. CT. R. 13.1. The lower court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1291, 2253, and 2255(d).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V

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

U.S. CONST. amend. VI

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

18 U.S.C. § 924(c)(1)(A)

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

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

(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.

STATEMENT OF THE CASE

On February 3, 2000, a federal grand jury in the Southern District of Florida returned a five-count indictment charging Mr. Caraballo-Martinez with the following offenses: conspiracy to commit hostage taking, in violation of 18 U.S.C. § 1203(a) (Count 1); hostage taking, in violation of 18 U.S.C. § 1203(a) (Count 2); conspiracy to commit carjacking, in violation of 18 U.S.C. § 371 (Count 3); carjacking, in violation of 18 U.S.C. § 2199(e) (Count 4); and using or carrying a firearm during a crime of violence, 18 U.S.C. § 924(c) (Count 5). Cr.DE 25.

On June 5, 2000, a jury found Mr. Caraballo-Martinez guilty on all counts. Cr.DE 129. Although the superseding indictment states that the § 924(c) offense in Count 5 was predicated on both the hostage-taking offense in Count 2 and the carjacking offense in Count 4, *see* Cr.DE 25:5, the jury was instructed that it could convict Mr. Caraballo-Martinez on Count 5 if it found beyond a reasonable doubt that he "committed the crime of violence charged in Counts Two *or* Four of the indictment," Cr.DE 126:21 (emphasis added). The jury returned a general verdict; it did not make a finding or otherwise specify the predicate offense supporting the § 924(c) conviction on Count 5. Cr.DE 129.

The Court imposed a life sentence, including a consecutive 60-month sentence for the § 924(c) conviction on Count 5. Cr.DE 189:3. Mr. Caraballo-Martinez's appeal to the Eleventh Circuit was unsuccessful. Cr.DE 259.

On October 30, 2003, Mr. Caraballo-Martinez filed a *pro se* 28 U.S.C. § 2255 motion to vacate sentence raising the following grounds for relief: (1) trial counsel

was constitutionally ineffective for failing to: explore the possibility of a plea agreement, inform the defendant of the possibility of a life sentence, and inform the defendant that the motion to suppress was denied; (2) trial counsel was constitutionally ineffective for failing to object to an unconstitutional indictment; (3) the indictment was defective; (4) ineffective assistance of appellate counsel; and (5) the Court should vacate the sentence due to United States Sentencing Guideline amendment 549 being made retroactive. Cr.DE 290. The Court denied the motion, Cr.DE 291, and the Eleventh Circuit denied a certificate of appealability, Order, *Caraballo-Martinez v. United States* (11th Cir. May 18, 2004) (No. 04-11156).

On June 1, 2020, the Eleventh Circuit granted Mr. Caraballo-Martinez's application for authorization to file a second or successive § 2255 motion. *Caraballo-Martinez v. United States*, No. 20-11803 (11th Cir. June 1, 2020). In his application, Mr. Caraballo-Martinez sought leave to challenge his § 924(c) conviction as void in light of *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 4. In its Order, the Eleventh Circuit explained that Mr. Caraballo-Martinez made the requisite *prima facie* showing satisfying the criteria in 28 U.S.C. § 2255(h)(2). *Id.* at 5. 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*.

The court of appeals found further that Mr. Caraballo-Martinez made a prima facie showing that his § 924(c) conviction on Count 5 was unconstitutional in light of

Davis. The Eleventh Circuit explained that, although that count contained multiple predicates, one of those predicates was for an offense – hostage taking – for which there was no binding precedent holding that it qualified as a "crime of violence" under the elements clause. *Id*. at 6. And because it was unclear whether that offense served as the predicate given the jury's general verdict, Mr. Caraballo-Martinez made a prima facie case showing that his § 924(c) conviction on Count 5 was unconstitutional. *Id*.

Pursuant to the leave granted by this Court, Mr. Caraballo-Martinez filed a second or successive 2255 motion in the district court. In the motion, Mr. Caraballo-Martinez made the following arguments:

Mr. Caraballo-Martinez's § 924(c) conviction on Count 5 is invalid and unconstitutional in light of *United States v. Davis*, 139 S. Ct. 2319 (2019).

Procedurally, Mr. Caraballo-Martinez's *Davis* claim is cognizable on collateral review under 28 U.S.C. § 2255(a). His claim is timely under § 2255(f)(3). And *Davis* applies retroactively to cases on collateral review.

Substantively, Mr. Caraballo-Martinez's § 924(c) conviction on Count 5 is unconstitutional despite its multiple predicates, because one of those predicates – hostage taking – is not a "crime of violence" under § 924(c)(3)(A) or a drug trafficking crime, and the jury returned a general verdict.

The Court should therefore grant this motion, and vacate his conviction and sentence on Count 5.

After reviewing the motion, the government's response in opposition, and Mr. Caraballo-Martinez' reply, the district court entered an order denying Mr. Caraballo-Martinez' 2255 motion. DE 14. Specifically, the district court denied relief based on *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021) and on the Eleventh Circuit's unpublished opinion in the case of Mr. Caraballo-Martinez' codefendant, *Ewin Oscar Martinez v. United States*, ___ Fed. App'x ___, 2021 WL 1561593 (11th Cir. 2021), which itself relied on *Granda*, to hold that Mr. Caraballo-Martinez 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 17-23 (citing *Granda*, 990 F.3d at 1286-92). The district court also relied on *Granda* and *Martinez* to conclude that Mr. Rodriguez was not entitled to § 2255 relief. *Id*. at 23-25. Finally, the district court denied the request for a certificate of appealability without any reasoning. *Id*. at 26.

Mr. Caraballo timely appealed. DE 16. Mr. Caraballo requested a certificate of appealability from the Eleventh Circuit. However, the Eleventh Circuit denied Mr. Caraballo's request for a certificate of appealability. *Caraballo-Martinez v. United States*, No. 21-12206-G (11th Cir. October 13, 2021). In its three-page order denying the request for a certificate of appealability, the Eleventh Circuit relied almost exclusively on *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021).

REASONS FOR GRANTING THE PETITION

This case presents an important question of federal law that has previously been left unresolved by the Court: whether a multiple-theory instructional error is harmless where the jury relied on both an invalid and a valid basis to convict.

A. For more than 75 years, the answer to the question presented was clear.

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. . . . But in the instructions to the jury, the trial court 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 Court noted that this was "far from being a merely academic proposition," as the trial prosecutor had urged that the jury could convict on the first (invalid) clause alone. *See id.* The necessary conclusion" was that, "if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld. *Id.* at 368. Because the Court determined that at least the first clause of the statute was unconstitutional, the conviction was vacated.

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

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

The Court has stated that it derives two "rules" from *Stromberg*. *See Zant v. Stephens*, 462 U.S. 862, 881 (1983) (holding that *Stromberg* did not require that invalidation of a death sentence under Georgia's capital sentencing scheme, where 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 the *Stromberg* cases" 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 882. This

principle was "illustrated by" *Street v. New York*, 394 U.S. 576, 586-90 (1969) and *Thomas v. Collins*, 352 U.S. 516 (1945). 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 *Street*, 394 U.S. at 586-90 (1969).

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

In *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam), this 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*; but he also raised structural error as an alternative ground to affirm. The Ninth Circuit stated that the

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

By the time the case reached this Court, both parties agreed that 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 v. Abrahamson*, 507 U.S. 619, 623 (1993)." *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" of a jury instructed on multiple theories of guilt. *Id*. at 61. "In fact, drawing a distinction between alternative-theory error and the instructional errors in *Neder, Roy, Pope,* and *Rose*, would be 'patently illogical,' given that such a distinction 'reduces to the strange claim that, because he jury . . .

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

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

The issue reemerged two years later, in *Skilling v. United States*, 561 U.S. 358, 369 (2010). Skilling had been convicted of crimes related to a scheme to defraud, which Congress had defined to include "a scheme or artifice to deprive another of the intangible right to honest services." *Skilling*, 560 U.S. at 369 n.1. In order to avoid an untenable vagueness problem, the Court limited the definition of "honest-services" fraud to "schemes to defraud involving bribes and kickbacks." 561 U.S. at 368. Skilling, however, 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, however, 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. <u>This case presents an important and recurring question of federal law on which this Court's guidance is needed.</u>

The question remains unanswered, and has taken on renewed significance in the wake of *United States v. Davis*, 139 S. Ct. 2319 (2019).

Title 18 U.S.C. § 924(c)(1)(A) provides mandatory consecutive penalties for any person who uses, carries, or possesses a firearm in connection with "any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States." In *Davis*, the Court declared one of the statutory

definitions of "crime of violence," unconstitutionally vague. 139 S. Ct. at 2325-2336. Since *Davis*, countless federal prisoners have challenged their § 924(c) convictions, many of which were the result of general verdicts allowing multiple potential theories of guilt.

The surge in post-*Davis* litigation has given rise to myriad variations of harmless-error review. *See*, *e.g.*, *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."); *United States v. Jones*, 933 F.3d 266 (5th Cir. 2019) (vacating conviction where there was a "reasonable probability that the jury's verdict would not have been the same" absent the error); *United States v. Heyward*, 3 F.4th 75 (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").

The circuits are in complete disarray as to the proper standard of harmless error review to apply, 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. This Court should grant certiorari to reaffirm that a conviction based "inextricably" on both valid and invalid legal theories cannot stand.

It was undisputed that Mr. Caraballo's jury was invited to convict him of an offense based on a constitutionally invalid predicate offense. Nonetheless, the District Court for the Southern District of Florida denied Mr. Caraballo relief holding that the error was harmless because it presumed that the jury must ***also*** have found Mr. Caraballo guilty of that offense based on a separate valid predicate offense. *Caraballo-Martinez v. United States*, 20-cv-22282-JAL (S.D. Fla. May 10, 2021). There are at least five reasons why this holding is wrong:

1. The district court'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 this 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,* this 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 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.

2. The holding risks allowing a conviction to stand which the district court had no authority to enforce. The federal courts' authority to adjudicate presupposes the existence of a valid federal offense. *See* 18 U.S.C. § 3231 (granting district courts original jurisdiction of "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. Thus, "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 circumstance admits the possibility that the defendant will stand convicted of a non-existent

offense, and runs afoul of the federal courts' core duty to assure that jurisdiction is validly established in every case.

3. Presuming the facts underlying the 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.

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

5. Finally, the decision below improperly incentivizes prosecutors to seek and obtain improperly duplicitous convictions. Just as happened in this case, 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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