NO: 21-7233

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

WILLIAM SARDINAS,

***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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PETITIONER'S REPLY TO THE MEMORANDUM OF THE UNITED STATES IN OPPOSITION

MICHAEL CARUSO
Federal Public Defender

Brenda G. Bryn
Counsel of Record
Assistant Federal Public Defender
One East Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436

QUESTIONS PRESENTED FOR REVIEW

1. Whether a certificate of appealability is warranted on the question of whether attempted Hobbs Act robbery is a crime of violence, where this Court is at present considering that very question in *United States v. Taylor*, 141 S. Ct. 2882 (U.S. July 2, 2021) (No. 20-1459).

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

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

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I. The Eleventh Circuit's denial of a certificate of appealability (COA) because circuit precedent forecloses the issue, notwithstanding this Court's grant of certiorari review on the exact same issue, is a perversion of the COA standard articulated by this Court.

The government does not dispute that the COA standard applied by the Eleventh Circuit is erroneous. Nor does it dispute that this erroneous COA standard consistently prejudices Eleventh Circuit defendants who are being held to a higher standard than other similarly-situated defendants nationwide, and that Eleventh Circuit applications for COAs are being baselessly denied.

It makes no difference for this particular issue how *United States v. Taylor*, 141 S.Ct. 2882 (U.S. July 2, 2021) (No. 20-1459) is ultimately resolved. The fact that certiorari *had been granted* in *Taylor* at the time the COA was denied in this case is the only fact relevant to this issue. For indeed, a grant of certiorari, in and of itself, demonstrates that – at that particular time, unless and until there is resolution by this Court – a constitutional issue is debatable among reasonable jurists.

This recurring procedural issue, which adversely impacts Eleventh Circuit defendants, should be reviewed. And the erroneous standard applied by the Eleventh Circuit, which indisputably misapplies this Court's precedents, should be definitively rejected.

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

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

This case presents a clear, entrenched, and outcome-determinative circuit split, regarding whether the constitutional rule recognized in *Johnson v. United States*, 576 U.S. 591 (2015), was sufficiently novel to provide "cause" sufficient to overcome a procedural default. *See* Petition for Writ of Certiorari ("Pet.") at 19-28.

The government, citing its brief in opposition to the petition in *Granda v. United States*, No. 21-6171 ("*Granda* BIO") – in which certiorari was recently denied, 142 S.Ct. 1233 (2022) – argues that that the petition in this case should be denied for the reasons identified at pages 14-29 of its *Granda* BIO. Memorandum in Opposition at 5. In the *Granda* BIO, the government attempted to disguise the circuit split on "cause" by noting that the Tenth Circuit's decision in *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017), involved a challenge to the residual clause of the Armed Career Criminal Act ("ACCA"), and the Seventh Circuit's decision in *Cross v. United States*, 892 F.3d 288, 295 (7th Cir. 2018), involved a challenge to the residual clause under the mandatory guidelines. Thus, the government contended, these cases "do not address whether the reasoning of [*United States v. Davis*, 139 S.Ct. 2319 (2019)] was sufficiently novel to excuse procedural default of a claim that

Section 924(c)(3)(B) was unconstitutionally vague." *See Granda* BIO at 21-22. But the government's response in *Granda* only revealed the depth of the division.

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

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

Here, *Johnson* established a new rule of constitutional law that *both* overturned established precedent, *and* clearly applies to Petitioner's case. Specifically, *Johnson* held that: "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more

unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 576 U.S. at 598. This clear constitutional rule requires the invalidation of ***any*** criminal statute that requires courts to determine what is embodied in the "ordinary case" of an offense, and then to quantify the level of "risk" posed by that ordinary case. Hence, in *Sessions v. Dimaya*, 138 S.Ct. 1204, 1213 (2018), the Court wrote that *"Johnson* is a straightforward decision, with equally straightforward application" which required the invalidation of the residual clause in 18 U.S.C. § 16(b) – a statutory provision materially identical to 18 U.S.C. § 924(c)(3)(B). After recounting *Johnson*'s constitutional rule, the *Dimaya* Court wrote that "*Johnson* effectively resolved the case now before us. For § 16's residual clause has the same two features as ACCA's, combined in the same constitutionally problematic way." *Id*.

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

that, if this understanding is correct, then § 924(c)(3)(B) must be held unconstitutional too.").

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

B. The decision in *Granda* on the issue of "cause" is contrary to the law of this Court and promotes enormous waste of resources.

The decision in *Granda*, which the Eleventh Circuit found precluded a grant of a COA to Petitioner here, is contrary to the law of this Court. There is simply is no

basis for the Eleventh Circuit's rejection of *Reed*'s application to the facts of this case. While the *Reed* Court was concerned that counsel should not be permitted to strategically "flout" procedural requirements and "then turn around and seek refuge," in habeas courts, it also recognized that no such conduct is implicated in the "failure of counsel to raise a constitutional issue reasonably unknown to him." *Id*. at 14 (footnote omitted). This reasoning applies just as strongly here, as it does in a case involving the ACCA. As the Eleventh Circuit acknowledged in *Granda*, this Court had "***directly rejected*** the argument that the ACCA's residual clause was unconstitutionally vague" at the time of Granda's direct appeal. *See Granda*, 990 F.3d at 1287 (emphasis added) (referring to *James v. United States*, 550 U.S. 192 (2007)). And the same is true for Sardinas' case as well. There was no reason for defense counsel to believe that a similar claim would present a viable challenge to 18 U.S.C. § 924(c).

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

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

The Eleventh Circuit's expectation of clairvoyance does nothing to promote the fair and efficient resolution of claims. Instead, it perpetuates an enormous waste of resources by requiring defense counsel to raise fruitless arguments, time and again, in order to shield their clients against a potential procedural default. Such requirements preclude counsel from focusing on meritorious arguments, and place significant unnecessary burdens on the courts. In fact, one panel of the Fifth Circuit became so frustrated with counsel perpetually raising a foreclosed constitutional claim, that a two-judge majority published an opinion for the sole purpose of condemning the practice. *See United States v. Pineda-Arrellano*, 492 F.3d 624 (5th

Cir. 2007) ("Pineda's case is one of hundreds, if not thousands, in this circuit in which counsel have raised this constitutional challenge. We take this opportunity to state that this issue no longer serves as a legitimate basis for appeal.").[1] Only this Court can alleviate the burden on criminal defendants, defense counsel, and the intermediate appellate courts, by making clear that a criminal defendant will not be barred from raising a meritorious constitutional claim, based on counsel's failure to anticipate a future change in the law.

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

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

The government argued that *Gatewood* "would be a poor vehicle to address the question presented, because petitioner would not be entitled to relief even if this Court agreed that he had shown cause for his procedural default, and because review of the question presented would be complicated by threshold questions about how this Court's ACCA-related precedents apply to [18 U.S.C.] Section 3559(c)." *See* Brief for

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

the United States in Opposition, *Gatewood v. United States*, No. 20-1233 (U.S. May 21, 2021.) But here, Petitioner is entitled to relief on the merits and the "threshold questions" about *Johnson*'s applicability to 18 U.S.C. § 924(c) are settled.

The petitioner in *Blackwell* signed a plea agreement expressly waiving his right to collaterally attack his conviction. *See* Brief for the United States in Opposition, *Blackwell v. United States*, No. 20-8016 (U.S. July 14, 2021). The district court denied relief both based on the facts underlying the defendant's guilty plea, as well as the collateral attack waiver in the plea agreement. There is no similar problem here. And, although *Blackwell* was clearly not an obvious candidate for certiorari due to the collateral attack waiver, the fact that the government chose to respond, at all, simply underscores the importance of the issues involved.

This case has no vehicle problems. In denying a COA to Petitioner, the Eleventh Circuit relied upon a published and precedential decision, which added to a longstanding circuit conflict regarding the circumstances under which adverse precedent from this Court provides cause to overcome a procedural default. There is no question of waiver, nor about whether *Johnson*'s constitutional rule applies to this case. The issue is clearly presented and outcome determinative. The fact that this is an appeal from a COA denial makes no difference. The Court has frequently granted certiorari, and resolved the underlying issues, in this precise posture. *See Welch v. United States*, 578 U.S. 120, 126-28 (2016).

And indeed, the instant case presents a better vehicle for certiorari than *Granda* for several reasons. First, as Petitioner has consistently argued, two out of the four – that is, exactly one *half* – the potential predicates would be invalid if the Court affirms the Fourth Circuit in *United States v. Taylor*, 141 S.Ct. 2882 (U.S. July 2, 2021) (No. 20-1459), which would necessarily abrogate the contrary rule of *United States v. St. Hubert*, 909 F.3d 335, 351-53 (11th Cir. 2018), that all attempted crimes of violence are themselves qualifying crimes of violence under § 924(c)(3)(A). While admittedly, Granda noted in a footnote to his reply to the Government's BIO that two potential predicates in his case were also attempts, and asked the Court to hold his case pending *Taylor*, *Granda* Reply to the Brief in Opposition, at 12 n. 4, that was the first time Granda invoked *Taylor* on his behalf. He did not challenge the attempt predicates before the court of appeals at all.

Petitioner, by contrast, challenged attempted Hobbs Act robbery as a predicate from the very first instance before the court of appeals – namely, in his motion for COA. And he did so again as part of his first issue in the Petition, at 17. Second, as discussed *infra*, the evidence against Petitioner and Granda was qualitatively different. And finally, this case allows the Court an ideal opportunity to also correct the Eleventh Circuit's undisputed misapplication of the COA standard.

For all of these reasons, this case resents an ideal vehicle for the Court's review.

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

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

Petitioner has asked this Court to resolve whether a conviction obtained by a general verdict — where the jury was instructed on multiple theories of guilt, one (or two) of which were in error — may be sustained based on the reviewing court's finding that the jury relied on both a valid, ***and*** a constitutionally invalid basis (or bases) to convict. The government's incorporation of its *Granda* BIO begs these questions – by insisting that Petitioner (like Granda) is not entitled to relief simply because of the intertwined nature of the facts making up an invalid and valid offenses. Tellingly, however, the government has failed to unearth even a single precedent of this Court affirming a general verdict that rested on such ambiguous grounds.[2]

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[2] The government quotes *dictum* from *Zant v. Stephens*, 462 U.S. 862, 883-84 (1983), stating that reversal is only required where the conviction may rest, "at least in part, on a charge that constitutionally protected activity is unlawful." *See* Granda BIO at 27). But, as Petitioner has explained, that statement was made in the context of distinguishing the sentencing factors at issue in *Zant*, from the general jury verdicts at issue in *Street v. New York*, 394 U.S. 576, 588 (1969), *Thomas v. Collins*, 352 U.S. 516 (1945) and *Stromberg v. California*, 283 U.S. 359 (1931). Neither in its *Granda* BIO nor here has the government responded to the argument that allowing a general verdict to rest on a constitutionally vague offense implicates constitutional concerns just as serious as those at involved in *Street, Thomas*, and *Stromberg*.

Critically, while *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (*per curiam*), held that multi-theory instructional errors are not structural and do not require reversal in the absence of prejudice, the Court has never addressed ***how*** prejudice is to be determined in this context. This is an important question of federal law, which the Court left unresolved, two years after *Hedgpeth*, in *Skilling v. United States*, 561 U.S.358 (2010). *See* Pet. at 36-37 (noting that the parties advocated the same diametrically-opposed positions as the parties do here, but the Court left the matter for resolution on remand). And it is a question on which this Court's guidance is sorely needed.

The government does not dispute that the circuits have developed myriad tests for assessing prejudice in this context. *See* Pet. at 37-39. It responds only that "in each circumstance, the court properly examined case-specific circumstances to determine whether the challenged errors were prejudicial." *Granda* BIO at 28. But this once again begs the question – and presupposes that "prejudice" has a uniform meaning in this context. As the cases cited at pages 37-39 of the Petition make clear, it does not.

B. *Granda* was wrongly-decided as a matter of law, but its facts are also distinguishable from Petitioner's case in crucial respects.

The Eleventh Circuit determined in *Granda* that the "actual prejudice" standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), required Granda to show "a

substantial likelihood that the jury relied ***solely*** on Count 3 to predicate its conviction." *Granda*, 990 F.3d at 1291 (emphasis added). But *Brecht* places no such burden on petitioners.

Under *Brecht*, prejudice exists where an error is found to have had a "substantial and injurious effect or influence in determining jury's verdict." *See Brecht*, 507 U.S. at 638 (citation omitted). In *Granda*, the court found that the inclusion of the single constitutionally invalid conspiracy predicate for Mr. Granda's § 924(o) offense had no such effect. 990 F.3d at 1293. But notably, the Eleventh Circuit also deviated from *Brecht*, and erred as a matter of law, in sustaining Granda's conviction ultimately because he failed to additionally prove, to the court's satisfaction, that the jury did not rely on valid bases for the conviction *in addition to* the substantially injurious, erroneous one.

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

513 U.S. 432, 436 (1995). The Eleventh Circuit thus placed far higher a burden on Granda (and in turn on Petitioner) than this Court's precedents allow.

In any event, even if the Court believed that Granda did not show a "substantial likelihood" that a single constitutionally invalid jury instruction had a substantial and injurious effect on the jury's deliberations, that should not have any bearing on this different case given that the evidence against Petitioner is distinguishable from that against Granda in multiple respects. Notably, unlike Petitioner here, the defendant in *Granda* was specifically asked by one of the other co-conspirators to bring a gun to the robbery, and he was fully involved in every aspect of the offense. By contrast, as defense counsel argued at sentencing and the Court agreed by amending numerous unfounded factual allegations in the PSI, the government's own evidence at trial was clear that no one ever discussed the use of weapons or used the word "cocaine" in front of Petitioner. Thus, unlike *Granda*, there was a real question before the jury in this case whether Petitioner had prior knowledge that a gun was in the duffel bag given to him by Socorro – which he placed in the back seat of the CI's vehicle.

And significantly, because the Court gave both a *Pinkert*on instruction as well as an aiding and abetting instruction which notably did *not* require a finding of the type of prior knowledge now required by *Rosemond v. United States*, 572 U.S. 65 (2014), the jury could have easily convicted Petitioner on Count 5 without an*y* reliable evidence that he had "any personal participation" in the gun offense or knowledge of

the true object of the conspiracy. In these unique circumstances, unlike in *Granda*, there was a substantial likelihood that the non-qualifying predicate of conspiracy to commit Hobbs Act robbery was the basis for the challenged conviction. And, contrary to the government's suggestion, Memorandum in Opposition at 6, the mere fact that the Court denied certiorari for Petitioner's co-defendant, Wong, is of no moment here as Petitioner's role in the offense was different than Wong's.

Based on the relative weakness of the evidence against Petitioner here, there is more than a "substantial likelihood" that the jury relied on the invalid Hobbs Act conspiracy as a predicate for the § 924(c) conviction. And it may well have relied upon the potentially invalid attempted Hobbs Act predicate as well.

CONCLUSION

Based upon the foregoing argument and authority, as well as that in the Petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Brenda G. Bryn*
Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
May 10th, 2022