NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

JULIO RODRIGUEZ,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether a certificate of appealability can be issued despite controlling circuit authority to the contrary.

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

INTERESTED PARTIES

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

RELATED PROCEEDINGS

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

Julio Rodriguez v. United States,
No. 20-22626-Civ-Cooke (July 2, 2021)

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

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

Julio Rodriguez v. United States,
No. 21-12937 (Dec. 7, 2021)

In re Julio Rodriguez,
No 20-12060 (June 23, 2020)

United States v. Julio Rodriguez,
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PETITION FOR WRIT OF CERTIORARI

Julio Rodriguez respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 21-12937 in that court on December 7, 2021, which affirmed the order of the United States District Court for the Southern District of Florida denying Petitioner's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255.

OPINIONS BELOW

The decision of the court of appeals denying a certificate of appealability (App. A-1) is unreported. The district court's final judgment (App. A-2), as well as its decision denying Petitioner's motion to vacate sentence under 28 U.S.C. § 2255 (App. A-3) are unreported.

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 December 7, 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.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(1)(A)

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

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

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

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

18 U.S.C. § 924(c)(3)

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

(A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(o)

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under the title, or both; and if the firearm is a machine-gun or destructive device or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

Title 28, U.S.C. § 2253(c)

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken be taken to the court of appeals from –

* * *

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Petitioner's jury was instructed that it could rely on either of two predicates to convict him of conspiracy to use a firearm in furtherance of a crime of violence or drug trafficking offense in violation of 18 U.S.C. § 924(o). One of those predicates – conspiracy to commit Hobbs Act robbery – is no longer a valid predicate because it relies on the residual clause this Court found unconstitutionally vague in *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019). Petitioner moved to vacate his § 924(o) conviction in light of *Davis* under 28 U.S.C. § 2255. The district court relied on controlling Eleventh Circuit precedent, primarily *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), *petition for cert. filed* (U.S. November 1, 2021) (No. 21-6171),[1] to deny both the merits of Petitioner's *Davis* claim and a certificate of appealability (COA). *See* App. A-3. In the Eleventh Circuit, binding circuit precedent precludes issuance of a COA – even in the face of a circuit split – "because reasonable jurists will following controlling law." *Hamilton v. Sec'y, Fla. Dep't Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (*per curiam*).

To obtain a COA, the petitioner 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)

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[1] This Court is to consider the petition in *Granda* at its March 4, 202 conference.

(quotation marks omitted). The Eleventh Circuit's reliance on controlling circuit authority to reject a COA is a perversion of the COA standard articulated by this Court. The petition should be granted. Or, at the very least, the petition should be held pending its consideration of the petition for writ of certiorari in *Granda*.

1. In 2003, a confidential informant working for law enforcement approached Petitioner's brother and solicited assistance in planning an armed robbery of cocaine from a fake stash house. In the following weeks, Petitioner and his cousin attended two meetings between his brother and the confidential informant at which the armed robbery was discussed. However, on the date of the planned robbery, although Petitioner's brother and cousin arrived ready to commit the robbery, Petitioner did not join them. Petitioner's brother and cousin were arrested when they arrived at the final meeting location before proceeding to the stash house. Two firearms were found in a bag brought to the final meeting by Petitioner's brother and cousin. Petitioner was subsequently arrested.

2. After Petitioner's arrest, a grand jury in the Southern District of Florida returned a multi-count indictment against him. At issue here is the firearm offense in Count 3, which charged Petitioner with conspiring to use, carry, and brandish a firearm during and in relation to "a drug trafficking crime or crime of violence," in violation of 18 U.S.C. § 924(o). This firearm offense was predicated on Counts 1 and 2. Count 1 charged a drug trafficking crime. Count 2 charged conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), which, at the time, was

a "crime of violence" for purposes of § 924(o). Petitioner proceeded to trial and was convicted on all counts.

3. The jury was instructed that to convict Petitioner of the § 924(o) offense, the government need only prove that the object of the conspiratorial plan was that a firearm be used in furtherance of "a federal drug trafficking crime, a federal crime of violence, *or both*, as charged in the indictment." The jury returned a general verdict; it did not make a finding or otherwise specify the predicate offense supporting the § 924(o) conviction on Count 3.

4. The district court imposed a life sentence on Count 1, and a term of imprisonment of 240 months as to Counts 2 and 3, concurrent to Count 1. Petitioner's appeal to the Eleventh Circuit was unsuccessful. *United States v. Rodriguez*, 159 F. App'x 900 (11th Cir. 2005).

5. In 2007 and again in 2016, Petitioner filed 28 U.S.C. § 2255 motions that challenged his convictions and sentence on various grounds. The district court denied both motions, and Petitioner did not appeal either decision.

6. In 2020, the Eleventh Circuit granted Petitioner leave to file a second or successive § 2255 motion. *In re Julio Rodriguez*, No. 20-12060 (11th Cir. Jun 23, 2020). In his application, Petitioner challenged his § 924(o) conviction in light of *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019), which declared unconstitutionally vague the residual clause definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B). In its order granting authorization, the court of appeals held

that Petitioner made a *prima facie* showing that his § 924(o) conviction on Count 3 was unconstitutional in light of *Davis*. The court of appeals explained that, although that offense was based on multiple predicates, one of the predicates was for conspiracy to commit Hobbs Act robbery, an offense it held no longer qualified as a "crime of violence" after *Davis* in light of *Brown v. United States*, 942 F.3d 1069, 1075-76 (11th Cir. 2019). And because it was unclear whether the Hobbs Act conspiracy offense served as the predicate given the jury's general verdict, the court of appeals determined that Petitioner made a *prima facie* showing that his § 924(o) conviction was unconstitutional in light of *Davis*.

7. After the Eleventh Circuit's authorization was docketed in the district court, Petitioner filed a § 2255 motion raising his *Davis* claim, which the government opposed. The district court held that controlling Eleventh Circuit precedent, primarily *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), *petition for cert. filed* (U.S. November 1, 2021) (No. 21-6171), compelled it to conclude that Petitioner's *Davis* challenge to his § 924(o) conviction was meritless because, notwithstanding any invalid predicate, the conviction remained supported by the remaining valid predicate. *See* App. A-3 at 3-4. The district court therefore denied relief.

8. The district court also relied on *Granda* to deny a certificate of appealability (COA). *See id*. at 4. In the Eleventh Circuit, binding circuit precedent requires the denial of a COA. *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (*per curiam*). The district court expressly cited

Hamilton in support of its decision to deny a COA. App. A-3 at 4 & n.5 (citing *Hamilton*).

9. Petitioner moved the Eleventh Circuit for a COA on whether the Eleventh Circuit's decision in *Granda* required the conclusion that § 2255 relief be denied. The Eleventh Circuit denied a COA. *See* App. A-1. The Eleventh Circuit's order did not specifically cite *Granda*, but instead cited two of the primary cases *Granda* relied upon to deny relief on the merits to the movant there. *See id*. at 4 (citing *In re Cannon*, 931 F.3d 1236, 1242 (11th Cir. 2019) and *In re Navarro*, 931 F.3d 1298, 1302 (11th Cir. 2019)); *Granda*, 990 F.3d at 1290 (also citing *Cannon* and *Navarro*). This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's rule requiring denial of a certificate of appealability (COA) where circuit precedent forecloses the issue is a perversion of the COA standard articulated by this Court.

To appeal the denial of a 28 U.S.C. § 2255 motion, the movant must obtain a certificate of appealability ("COA"). 28 U.S.C. § 2253(c). "Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759, 773 (2017). To obtain a COA, the movant must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2). This standard requires the movant to "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the [motion] 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) (internal quotation marks omitted). The ultimate resolution of the issues on appeal is irrelevant. "At the COA stage, the only question is whether the application has shown that 'jurists of reason would 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*, 137 S. Ct. at 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

In light of this standard, this Court has repeatedly admonished the lower courts that it is error to deny a COA upon a finding that a movant's claims lack merit.

Most recently in *Buck*, this Court reiterated that because "[t]he COA inquiry . . . is not coextensive with a merits analysis[,] . . . [t]his threshold question should be decided 'without full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336). To do otherwise risks resolving the merits of an appeal without the jurisdiction to do so. "'When 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).

The Eleventh Circuit has adopted a rule that effectively requires that COAs be adjudicated on the merits if there is controlling circuit precedent on the issue on which a COA is sought. Under that rule, a COA may not be granted where binding Eleventh Circuit precedent forecloses a claim. *See Hamilton v. Sec'y, Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (holding "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law" (internal quotation marks omitted)), *cert. denied*, 136 S. Ct. 1661 (2016). The Eleventh Circuit follows this rule even where there is a split in the circuits on the question on which a COA is sought. *See id.* (rejecting circuit-split argument and writing that "we are bound by our Circuit precedent, not by Third Circuit precedent."); *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1171 (11th Cir.), *cert. denied*, 138 S. Ct. 217 (2017) (holding that despite split in the circuits on

the issue on which a COA was sought it "need not evaluate that circuit split because [the petitioner's] argument is foreclosed by our binding [precedent] and his attempted appeal does not present a debatable question because reasonable jurists would follow controlling law."). The Eleventh Circuit has therefore failed to heed this Court's repeated warnings that a court should not decline a COA simply because the petitioner's claim will not prevail on the merits.

In sharp contrast to the Eleventh Circuit's "binding circuit precedent" rule, the Third, Sixth, and Ninth Circuits have all held that adverse circuit precedent does not preclude a COA. To the contrary, in those circuits a COA is warranted where there is split in the courts of appeal on the question. *See United States v. Doe*, 810 F.3d 132, 147 (3d Cir. 2015); *Lowe v. Swanson*, 663 F.3d 258, 260 (6th Cir. 2011); *Lambright v. Stewart*, 220 F.3d 1022, 1025-36, 1028-29 (9th Cir. 2000). The Fifth Circuit has also granted a COA on a question on which there is a split in the circuits, albeit in an unpublished decision. *See Busby v. Davis*, 677 F. App'x 884, 890-91 (5th Cir. 2017). And this Court has held that a certificate of probable cause, the COA's precursor prior to the Antiterrorism and Effective Death Penalty Act of 1996, must be granted where there is a circuit split on the merits of the underlying claim. *See Lozada v. Deeds*, 498 U.S. 430, 432 (1991).

The Eleventh Circuit's reliance on its "binding circuit precedent" rule burdens petitioners too heavily at the COA stage. As this Court recently stated in *Buck*:

> Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner at the COA stage. *Miller–El*, 537 U.S., at 336–337, 123 S. Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253. *Ibid.*

Buck, 137 S. Ct. at 774 (brackets and ellipses in original). Thus, a COA should be denied only when the resolution of the petitioner's claim is "beyond all debate." *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 1264 (2016).

The Eleventh Circuit's *Hamilton* rule perverts the standard for the grant of a COA articulated by this Court. It precludes the issuance of a COA even though reasonable jurists – including the judges in its sister circuits – are debating the very issue on which a COA is sought. As such, it essentially requires a merits determination during the COA stage, contrary to this Court's COA precedents.

That certainly happened here. The district court expressly relied on *Hamilton* and *Granda* when it denied Petitioner a COA. *See* App. A-3 at 4 & n.5. And the court of appeals also relied solely on circuit precedent when it denied Petitioner a COA. *See* App. A-1 at 3. This Court should grant the petition to resolve the circuit split as to whether controlling circuit precedent bars the issuance of a COA.

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

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

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

It is undisputed that the jury in Petitioner's case likely relied on the unconstitutional residual clause to convict him of his § 924(o) offense. The district

court, compelled by the Eleventh Circuit's decision in *Granda*, found the error harmless based on its belief that the jurors must additionally have relied on one or more valid bases to convict. This Court, however, has repeatedly held that a conviction based on both a valid *and* constitutionally invalid theory cannot stand; and there is no reason to believe that *Pulido* undermined those holdings. Nonetheless, the circuits have jettisoned the Court's precedents on this issue, and failed to develop a coherent means of evaluating prejudice in their stead.

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

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

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

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

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

The Court applied the same rule to an improper jury instruction in *Yates v. United States*, 354 U.S. 298 (1957), *overruled in part on other grounds, Burks v.*

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

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

three aggravating factors, one of which was legally insufficient to support the death sentence). The first rule "requires that a general verdict must be set aside if the jury was instructed that it could rely upon any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively upon the insufficient ground." *Zant*, 462 U.S. at 881 (citing *Williams*, 317 U.S. at 292; *Cramer*, 325 U.S. at 36 n.45; *Terminello v. Chicago*, 377 U.S. 1, 5-6 (1946); and *Yates*, 354 U.S. at 311-12).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. The decision below is wrong.

In light of this confusion in the circuits, the Eleventh Circuit erred when it summarily denied a COA on the question of whether *Granda* and its predecessors required the denial of § 2255 relief on the merits of Petitioner's constitutional challenge to his § 924(c) conviction. As explained above, the court of appeals denied Petitioner a COA in light of its rule, established in *Hamilton*, that controlling circuit precedent on an issue precludes a COA. The combination of controlling circuit precedent and *Hamilton* required the Eleventh Circuit to deny a COA, and it did so. But the confusion in the circuits described above shows that reasonable jurists could debate the proper standard of harmless error review, where a jury has been instructed on multiple theories of guilt, one of which is invalid. Petitioner has

therefore made the showing for a COA this Court articulated in *Miller-El* and *Buck*. The Eleventh Circuit's rejection of a COA on this important question was wrong, and the Court should grant the petition. Alternatively, the Court should hold the petition pending its resolution of the petition in *Granda.*

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit. Or, the Court should hold the petition pending its decisions in *Granda v. United States*, No. 21-6171.

Respectfully submitted,

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