NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

REYNALDO AVILES,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, given that there is a split in the circuits on the question, reasonable jurists could debate whether controlling circuit precedent precludes issuance of a certificate of appealability in a 28 U.S.C. § 2255 proceeding, where there is a split in the circuits on the question.

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.

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.):

Reynaldo Aviles v. United States,
No. 20-21475-Civ-Gayles (July 30, 2021)

Reynaldo Aviles v. United States,
No. 10-20725-Civ-Jordan (Dec. 23, 2010)

United States v. Nicholas Pena, et al.,
No. 06-20592-Cr-Gayles (Nov. 15, 2007)

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

Reynaldo Aviles v. United States,
No. 21-13303 (Feb. 9, 2022)

In re Reynaldo Aviles,
No. 19-13747 (Oct. 17, 2019)

Reynaldo Aviles v. United States,
No. 11-10175 (Apr. 5, 2011)

United States v. Reynaldo Aviles,
No. 07-15467 (Jan. 13, 2009)

United States Supreme Court:

Reynaldo Aviles v. United States,
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Reynaldo Aviles 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 21-13303 in that court on February 9, 2022, which denied a certificate of appealability to appeal the order of the United States District Court for the Southern District of Florida denying Petitioner's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255.

OPINIONS BELOW

The decision of the court of appeals denying a certificate of appealability (App. A-1) is unpublished and unreported. The decision of the district court denying Petitioner's 28 U.S.C. § 2255 motion to vacate sentence and a certificate of appealability (App. A-2) is unpublished and 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 February 9, 2022. 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) (2012)

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

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

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

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 any one of four predicates to convict him of an 18 U.S.C. § 924(c) offense that added a consecutive 30-year term of imprisonment to his total sentence. One of those predicates – conspiracy to commit Hobbs Act robbery – is no longer a valid predicate because it is based on the residual clause this Court found unconstitutionally vague in *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019). And this Court is currently considering whether a second of those predicates – attempted Hobbs Act robbery – is a "crime of violence" for purposes of § 924(c) in *United States v. Taylor*, 141 S. Ct. 2882 (U.S. July 2, 2021) (No. 20-1459) (argued Dec. 7, 2021).

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 § 2255 relief and a certificate of appealability (COA). *See* App. A-3. At the time the district court denied the motion and a COA, this Court had not yet granted the petition for writ of certiorari in *United States v. Taylor*, 141 S. Ct. 2882 (U.S. July 2, 2021) (No. 20-1459) (argued Dec. 7, 2021).

After this Court granted review in *Taylor*, Petitioner moved the Eleventh Circuit for a COA on several questions, including whether attempted Hobbs Act

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[1] On December 16, 2021, the Court granted the government's second extension of time to respond to the petition in *Granda*, to an including February 2, 2022.

robbery was a qualifying § 924(c) predicate, and whether the district court erred in relying on *Granda* to deny Petitioner's challenge to his § 924(c) conviction. *See* App. A-2. The Eleventh Circuit summarily denied a COA. *See* App. A-1. In the Eleventh Circuit, binding circuit precedent precludes issuance of a COA despite split in the circuits on the question, "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*). Controlling circuit authority in the Eleventh Circuit holds that attempted Hobbs Act robbery is a valid § 924(c) predicate. *See United States v. St. Hubert*, 909 F.3d 335, 351-53 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1394 (2019). Other controlling circuit authority – *Granda* – required rejection of Petitioner's claim, both as procedurally defaulted and on its merits.

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) (quotation marks omitted). In light of this Court's grant of certiorari in *Taylor*, it is beyond peradventure that reasonable jurists could debate whether attempted Hobbs Act robbery is a qualifying § 924(c) predicate. The Eleventh Circuit's reliance on controlling circuit authority to reject a COA on that issue is a perversion of the COA standard articulated by this Court. The same is true of the Eleventh Circuit's reliance the controlling circuit authority in *Granda* to deny a COA on whether

Petitioner's challenge to his § 924(c) conviction is defaulted and whether he is entitled to § 2255 relief.

For all these reasons, the petition should be granted. Or, at the very least, the petition should be held pending this Court's decision in *Taylor* and its consideration of the petition for writ of certiorari in *Granda*.

1. In 2006, two confidential informants working for law enforcement met with Nelson Pena. The informants solicited Pena's assistance in planning an armed robbery of cocaine from a tractor-trailer. Pena contacted Petitioner soon after the meeting, and after Petitioner twice met with one of the informants to plan the robbery along with Pena. Petitioner, Pena, and four other co-conspirators were arrested when they arrived at the area where the tractor-trailer was located. Three loaded firearms were recovered at the scene.

2. After Petitioner's arrest, a grand jury in the Southern District of Florida returned a multi-count indictment against Petitioner. At issue here is the firearm offense in Count 5, which charged Petitioner with using or carrying a firearm during and in relation to "a crime of violence and a drug trafficking crime," in violation of 18 U.S.C. § 924(c). This firearm offense was predicated on four of the other counts listed in the indictment: Counts 1, 2, 3, and 4. Counts 1 and 2 charged drug trafficking crimes: conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 841(a)(1) (Count 1); and attempted possession with intent to distribute five kilograms or more of cocaine, in violation of

18 U.S.C. § 841(b)(1)(A) (Count 2). Count 3 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(c). Count 4 charged attempted Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) & 2. Petitioner proceeded to trial.

3. Although the superseding indictment used conjunctive language as to Count 5, charging that Petitioner used or carried a firearm during both a crime of violence and a drug trafficking crime, the district court's jury instructions on Count 5 instead used the disjunctive. As to the § 924(c) offense in Count 5, the jury instructions required the jury to find

> *First*: That the Defendant committed a drug trafficking offense or crime of violence charged in Count 1, 2, 3, or 4 of the indictment; and
>
> *Second*: That during the commission of that offense the Defendant knowingly carried a firearm in relation to that drug trafficking crime or crime of violence, as charged in the indictment; or
>
> That during the commission of that offense the Defendant knowingly possessed the firearm in furtherance of that drug trafficking crime or crime of violence, as charged in the indictment.

4. On June 11, 2007, a jury found Petitioner guilty on all counts. The jury returned a general verdict for the § 924(c) conviction in Count 5; it did not make a finding or otherwise specify the predicate offense.

5. The district court imposed a total sentence of life imprisonment, including an 84-month consecutive sentence for § 924(c) conviction on Count 5. Petitioner's appeal was unsuccessful. *See United States v. Gomez*, 302 F. App'x 868

(11th Cir. 2008), and this Court denied *certiorari*. *Aviles v. United States*, 556 U.S. 1145 (2009).

6. In 2010, Petitioner filed a *pro se* 28 U.S.C. § 2255 motion to vacate sentence raising, *inter alia*, various claims. The district court denied the motion, and Petitioner did not appeal that decision.

7. On October 17, 2019, the Eleventh Circuit granted Petitioner's application for authorization to file a second or successive § 2255 motion. In his application, Petitioner sought, *inter alia*, leave to challenge his § 924(c) conviction as void in light of *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019), which declared unconstitutionally vague the residual clause definition of "crime of violence" in § 924(c)(3)(B). In its order granting authorization, the court of appeals explained that Petitioner satisfied the criteria for a second or successive motion in 28 U.S.C. § 2255(h)(2) because he made a *prima facie* showing that his § 924(c) conviction on Count 5 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, this court of appeals determined that Petitioner made a *prima facie* showing that his § 924(c) conviction was unconstitutional.

8. 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 relied on controlling Eleventh Circuit precedent, primarily *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 1233 (2022) (No. 21-6171), to conclude that Petitioner's post-*Davis* challenge to his § 924(c) conviction was both barred by procedural default because Petitioner could not demonstrate "cause," and "prejudice" and meritless because, notwithstanding any invalid predicate, the conviction remained supported by the remaining valid predicates. *See* App. A-2 at 8-10. The district court therefore denied relief and relied on *Granda* to deny a certificate of appealability (COA). *See id*. at 10.

9. Petitioner appealed and moved the court of appeals for a COA. *See* App. A-1. The Eleventh Circuit will not grant a COA 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). Petitioner specifically sought a COA on whether the Eleventh Circuit's *Hamilton* rule was a misapplication of this Court's decisions articulating the standard for granting a COA. He also moved for a COA on whether the Eleventh Circuit's decision in *Granda* required the conclusion that his claims were procedurally defaulted and that § 2255 relief be denied. The Eleventh Circuit denied a COA. *See* App. A-1. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's rule that a COA may not be granted where binding circuit precedent forecloses a claim conflicts with this Court's decisions in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759 (2017) and with the decisions of other circuits holding that a split in the lower courts on an issue warrants a COA.

To appeal the denial of a 28 U.S.C. § 2255 motion, a habeas petitioner 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 petitioner must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2). This standard requires the petitioner to "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) (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 the petitioner'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 where 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.'" (quoting *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007)), *cert. denied*, 136 S. Ct. 1661 (2016). The Eleventh Circuit holds this to be true 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."). It has therefore failed to heed this Court's repeated warnings that a court should not decline a COA simply because it believes that 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 courts 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 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 essentially requires a merits determination during the COA stage. It precludes the issuance of a COA even though reasonable jurists – including the justices of this Court – are debating the very issue on which a COA is sought. As such, it perverts the standard for the grant of a COA articulated by this Court.

Petitioner therefore respectfully requests that this Court grant the petition on the question of whether binding circuit precedent forecloses a COA.

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).

In *Johnson v. United States*, 576 U.S. 591 (2015), the Court deemed unconstitutionally vague the so-called "residual clause" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(ii)(B)(ii), which defines the term "violent felony" to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." In the Court's view, the process of determining what is embodied in the "ordinary case" of such an offense, and then of quantifying the "risk" posed by that ordinary case, "offer[ed] no reliable way to choose between . . . competing accounts of what 'ordinary' . . . involves." *Johnson*, 576 U.S. at 598. The Court concluded that the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by Judges," in violation of due process. *Id.* at 597.

Johnson was a marked break in the law. The Court had spent "[n]ine years . . . trying to derive meaning from" and "develop the boundaries of" the residual clause. *See id*. at 606; *Welch v. United States*, 578 U.S. 120, 136 S. Ct. 1257, 1262 (2016) (citing *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Sykes v. United States*, 564 U.S. 1 (2011)). In both *James* and *Sykes*, the Court rejected the constitutional vagueness challenge that would ultimately prevail in *Johnson*. *See*

James 550 U.S. at 211 n.6, *overruled by Johnson*, 576 U.S. at 606; *Sykes*, 564 U.S. at 15-16, *overruled by Johnson*, 576 U.S. at 606. In *Welch*, the Court held that *Johnson* was a substantive change in law that applied retroactively. *Welch*, 578 U.S. at 130.

Here, Petitioner's direct appeal was filed after *James*, but before *Johnson* and *Davis*. He did not challenge to his § 924(c) conviction on direct appeal, and that challenge was therefore procedurally defaulted. The district court found the Eleventh Circuit's decision in *Granda* compelled it to hold that Petitioner could not show "cause" sufficient to excuse the default and also to deny relief on the merits. *See* App. A-2 at 8-10. Thereafter, Petitioner specifically moved the Eleventh Circuit for a COA on whether he could show "cause" for any default, but the Eleventh Circuit summarily denied a COA. *See* App. A-1.

As a "general rule ... claims not raised on direct review may not be raised on collateral review unless the petitioner shows caused and prejudice." *Massaro v. United States*, 538 U.S. 500, 504 (2003) (citing *United States v. Frady*, 456 U.S. 152, 167-168 (1982); *Bousley v. United States* 523 U.S. 614, 621-622 (1998)). "The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Masarro*, 538 U.S. at 505. "This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his

claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." *Reed v. Ross*, 468 U.S. 1, 10 (1984)

There are circumstances, however, where it is neither efficient nor fair to prohibit a petitioner from raising a new claim on collateral review. In *Reed*, the Court held that "the novelty of a constitutional issue" and the "failure to counsel to raise a constitutional issue reasonably unknown to him" may provide "cause" sufficient to overcome a procedural default. *Id.* at 10, 15. *Reed* lists "three situations in which a 'new' constitutional rule, representing 'a clear break with the past' might emerge from this Court" and provide cause to overcome a procedural bar. *Reed*, 468 U.S. at 17 (quotation omitted).

> First, a decision of this Court may explicitly overrule one of our precedents.. . . 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.' . . . And, finally, a decision may 'disapprov[e] a practice this Court has arguably sanctioned in prior cases.

Id. (citations omitted).

At present, there is a three-way split among the courts of appeals, regarding whether *Johnson* provides cause under this standard. The Court should grant the petition to resolve this split.

First, the Seventh and Tenth Circuit have applied *Reed* in a straightforward fashion to conclude that the unavailability of a constitutional vagueness claim prior to *Johnson* provided cause sufficient to excuse a default. The Tenth Circuit held in *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017), that a *Johnson* claim was

not reasonably available at the time of the defendant's direct appeal. "As is relevant here, the Supreme Court has stated that, if one of its decisions 'explicitly overrule[s]' prior precedent when it articulates 'a constitutional principle that had not been previously recognized but which is held to have retroactive application," then, prior to that decision, the new constitutional principle was not available to counsel, so defendant has cause for failing to raise the issue." *Snyder*, 871 F.3d at 1127 (citing *Reed*, 468 U.S. at 17). The court found this was "precisely the situation" where the petitioner had failed to raise the unconstitutionality of the residual clause on direct appeal. *Id*. at 1127. The Tenth Circuit explained that "[a]s the District of Colombia Circuit has noted, 'it is fair to say that no one – the government, the judge, or the [defendant] – could reasonably have anticipated *Johnson*.'" *Id*. (quoting *United States v. Redrick*, 841 F.3d 478, 480 (D.C. Cir. 2016)). This was true even though the defendant had been sentenced prior to the Court's express rejection of the claim in *James*. *See Snyder*, 871 F.3d at 1127 ("In fact, between the time we affirmed Snyder's sentence on direct appeal and the time *Johnson* was issued, the Supreme Court twice rejected the constitutional challenges to the ACCA's residual clause.") (citing *Sykes*, 561 U.S. 1 (2011), and *James*, 55 U.S. 192 (2007)). The Tenth Circuit concluded "that the *Johnson* claim was not reasonably available to Snyder at the time of his direct appeal, and that this is sufficient to establish clause." *Id*. at 1127.

The Seventh Circuit followed *Snyder*, and found cause for a defendant's failure to bring a residual clause challenge under the mandatory guidelines, explaining that

"*Johnson* represented the type of abrupt shift with which *Reed* was concerned." *Cross v. United States*, 892 F.3d 288, 295 (7th Cir. 2018).

> Until *Johnson*, the Supreme Court had been engaged in a painful effort to make sense of the residual clause. In *James*, it took the position that the validity of the residual clause was so clear that it could summarily reject Justice Scalia's contrary view in a footnote. That footnote provided no argument, noted that the constitutional issue was not even "pressed by James or his *amici*," and took comfort from the broad use of "[s]imilar formulations" throughout the statute books. *James*, 550 U.S. at 210 n.6, 127 S. Ct. 1586. Eight years later, the Court made a U-turn and tossed out the ACCA residual clause as unconstitutionally vague.

Id. at 295-96. The Seventh Circuit thus "join[ed] the Tenth Circuit" in excusing the petitioners' failure to challenge the constitutionality of the residual clause "under *Reed*'s first category," *i.e.*, where the Court expressly overrules its own precedent. *See Cross*, 892 F.3d at 296 (citing *Snyder*, 871 F.3d at 1125, 1127).

The Seventh Circuit held, moreover, that the "second and third scenarios identified by *Reed* present[ed] even more compelling grounds to excuse" the defaults, because "*Johnson* abrogated a substantial body of circuit court precedent upholding the residual clause against vagueness challenges." *Id*. (citations omitted). No court "ever came close to striking down the residual clause ... or even suggested that it would entertain such a challenge." *Id*. "Finally, the Supreme Court had implicitly 'sanctioned' the residual clause by interpreting it as if it were determinate." *Id*. (citations omitted). "Thus," in the Seventh Circuit, a party's "inability to anticipate *Johnson* excuses their procedural default." *Cross*, 892 F.3d at 296.

The Sixth Circuit recently "part[ed] ways" with the Seventh and Tenth Circuits in *Gatewood v. United States*, 979 F.3d 391 (6th Cir. 2020), because there was no binding precedent of this Court foreclosing the challenge to the residual clause at the time of the petitioner's direct appeal. *See Gatewood*, 979 F.3d at 397-98 ("In so holding, we part ways with the Seventh and Tenth Circuits, which have concluded that, under *Reed*, *Johnson*'s overruling of *James* and *Sykes* creates cause even for petitioners whose convictions became final before *James* was decided."), *cert. denied*, 141 S. Ct. 2798 (U.S. June 21, 2021). In the Sixth Circuit, *Johnson* will provide cause only for defendants whose cases became final after this Court foreclosed the argument in *James*. *See id.* at 397-398 (distinguishing *Raines v. United States*, 898 F.3d 680 (6th Cir. 2018), on this ground).

The Sixth Circuit rejected the argument that a default could be excused based on a "near-unanimous body" of adverse circuit authority. *Id.* at 395 (citations omitted). While "*Reed* did suggest that this species of 'novelty,' later described by the Court as 'futility' could excuse procedural default," the court of appeals found that *Bousley v. United States*, 523 U.S. 614, 622 (1998), and *Smith v. Murray*, 477 U.S. 527, 536 (1986) have narrowed *Reed* to the point where futility exists only where precedent of this Court forecloses the claim. *See id.* (citations omitted).

> When, at the time of default, a petitioner's argument was foreclosed by Supreme Court precedent, then "[b]y definition, ... there will almost certainly have been no reasonable basis upon which an attorney ... could have urged a ... court to adopt the position that [the Supreme] Court has ultimately adopted. *Reed,* 468 U.S. at 17, 104 S. Ct. 2901. At that point in time, every court in the country would have been bound to reject

> the argument. But when, at the time of default, the Supreme Court had not yet foreclosed the argument, the argument was not "[b]y definition" futile, because that that time state courts, lower federal courts, and the Supreme Court itself still remained free to adopt it. *Reed*'s discussion of cases where the Supreme Court "explicitly overrule[s] one of [its] own precedents," *id*., thus must be read as taking for granted that, at the time of default, the precedent that would later be overturned was the law of the land.

Id. at 398. Thus, in the Sixth Circuit, "[a] claim foreclosed by Supreme Court precedent the time of default qualifies as actually futile, whereas a claim foreclosed by lower court precedent does not." *Id*. at 397 (citation omitted). Like the Sixth Circuit, the Eighth Circuit has also questioned *Reed*'s vitality, and determined that this Court "has rejected the argument that default can be excused when existing lower court precedent would have rendered a claim unsuccessful." *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001) (citing *Bousley*, 523 U.S. at 623).

In sharp contrast to the Sixth, Seventh, and Tenth Circuits, however, the Eleventh Circuit held in *Granda* that Granda's challenge to his § 924(c) conviction was "not sufficiently novel to establish cause," notwithstanding the fact that his appeal was decided after *James*. *See Granda*, 990 F.3d at 1286. *Reed* held that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim." *Reed*, 468 U.S. at 16. According to the Eleventh Circuit, however, "[t]hat an argument might have less than a high likelihood of success has little to do with whether the argument is available or not." *Granda*, 990 F.3d at 1286 (quotation omitted). "[T]he question is not whether subsequent legal developments have made counsel's

task easier, but whether at the time of the default the claim was available at all." *Id*. (citing *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001) (internal quotation marks and further citation omitted)).

In so holding, *Granda* declined to follow the reasoning of the Fourth Circuit in *McCoy v. United States*, which expressly rejected the premise that default could be excused by the existence of a wall of adverse circuit authority. *See McCoy*, 266 F.3d at 1249. "The problem with that position," according to the Eleventh Circuit, was that this Court "could not have been clearer that perceived futility does not constitute cause to excuse a procedural default." *McCoy*, 266 F.3d at 1259 (citing *Bousley*, 523 U.S. at 623 and *Smith*, 477 U.S. at 535). "Unless and until the Supreme Court overrules its decision that futility cannot be cause, laments about those decisions forcing defense counsel to file 'kitchen sink briefs' in order to avoid procedural bars, . . . are beside the point." *Id*. (internal citation omitted).

Specifically, *McCoy* determined that *Bousley* and *Smith* abrogated *Reed sub silento* by holding that a petitioner cannot show cause to excuse a procedural default "simply" because a particular legal claim was "unacceptable to [a] particular court at [a] particular time," and "perceived futility alone cannot constitute cause.'" *McCoy*, 266 F.3d at 1259 (quotations omitted). Moreover, in *McCoy* the Eleventh Circuit – like the Sixth Circuit in *Gatewood* and the Eighth Circuit in *Moss* – concluded that under *Bousley*, long-standing practice and near-unanimous circuit precedent

foreclosing a claim cannot excuse procedural default. *See McCoy*, 266 F.3d at 1258-59; *Moss*, 252 F.3d at 1002; *Gatewood*, 979 F.3d at 395-96.

But *Bousley* did not say it was overruling *Reed*. *See Bousley,* 523 U.S. at 622 (citing *Reed*). And *Bousley* is not inconsistent with *Reed*. *See McCoy*, 266 F.3d at 1273 (Barkett, J., concurring) ("A careful reading of *Bousley* and the cases on which it relies makes clear that the Supreme Court did not pronounce nearly as broadly as the majority suggests."). Rather, *Bousley* addressed the completely different situation in which a petitioner failed to raise a claim on direct review that was then being litigated throughout the country, and had even generated a circuit split. *See Bailey v. United States*, 516 U.S. 137, 142 (1995) (noting conflict in circuits on claim at issue in *Bousley*). "Indeed, at the time of petitioner's plea, the Federal Reports were replete with cases involving" the petitioner's claim. *Bousley*, 523 U.S. at 622 (citations omitted). In that situation, the Court held that a petitioner could not show cause to overcome a default. *Id*. But that holding does not affect *Reed's* discussion of other circumstances in which a petitioner can show cause to overcome procedural default. *See Reed*, 468 U.S. at 17. *See also McCoy,* 266 F.3d at 1273 (Barkett, J., concurring) ("It is one thing to preclude, as an excuse, the wholesale speculation that an argument not presented in the state courts would be futile; it is quite another to say that cause should not be recognized when a lawyer declines to make an argument in federal court because every single appellate court has already ruled against his position.") (emphasis omitted).

Petitioner's direct appeal was decided in 2009, after *James*. In the Sixth, Seventh, or Tenth Circuits, that fact alone would have been sufficient for him to show "cause" for his failure to raise his challenge to his § 924(c) conviction on direct appeal, and therefore overcome any procedural default. Because he filed his § 2255 motion in the Eleventh Circuit, however, that Court's decision in *Granda* compelled the district court to conclude that he could not show cause for his default, and also to deny his claim and deny him a COA. And *Granda*, when combined with the Eleventh Circuit's *Hamilton* rule requiring the denial of a COA where there is controlling circuit precedent to the contrary, resulted in the Eleventh Circuit's summary denial of a COA on the question of whether procedural default barred relief.

However, as demonstrated above, the Eleventh Circuit's jurisprudence on "cause" for procedural default of *Johnson* and *Davis* claims is out of step its peers and contrary to the precedent of this Court. Because this case presents an important and recurring question of federal law on which the circuits are divided, the Court should grant 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.

This case presents a constitutional question that has been left unresolved by previous decisions of the Court. "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the

theories requires that the conviction be set aside." *Leary v. United* States, 395 U.S. 6, 31-32 (1969) (citing *Stromberg v. California*, 283 U.S. 359 (1931)). In *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (*per curiam*), the Court held that such errors are not structural, and do not require reversal in the absence of prejudice. *Pulido*, however, left the standard by which harmlessness is to be assessed in this context unspecified.

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

It is undisputed that the jury in Petitioner's case likely relied on the unconstitutional residual clause to convict him of an offense that added a mandatory consecutive 7-year term to his total sentence. 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 in *Granda* raises a host constitutional problems, and conflicts with decisions of the Second and Fifth Circuits, which have applied the modified categorical approach to determine which of multiple alleged predicate offenses formed the basis of a § 924 conviction. *See United States v. Heyward*, 3 F.4th 75 (2d Cir. 2021); *United States v. McClaren*, 13 F.3d 386, 413-14 (5th Cir. 2021). The Court should grant the petition. 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.").

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

What these cases show, at a minimum, is that the circuits are in disarray as to the proper standard of harmless error review, where a jury has been instructed on

multiple theories of guilt, one of which is invalid. This Court's intervention is needed to bring clarity and uniformity to the law.

D. The decision below is wrong.

In light of this confusion in the circuits, the Eleventh Circuit erred when it summarily denied a COA on the question of whether *Granda* 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 *Granda* and *Hamilton* required the Eleventh Circuit to deny a COA, and it summarily 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.

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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