A P P E N D I X

APPENDIX

A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13303-C

REYNALDO AVILES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Reynaldo Aviles is a federal prisoner serving life imprisonment for various drug, robbery, and firearm offenses. In 2020, he filed a counseled, authorized successive 28 U.S.C. § 2255 motion, arguing that he was actually innocent of his conviction for carrying a firearm during a crime of violence or drug-trafficking crime, pursuant to 18 U.S.C. § 924(c), in light of *United States v. Davis*, 139 S. Ct. 2319 (2019) (holding § 924(c)'s residual clause unconstitutionally vague). Specifically, he argued that, although the indictment referenced multiple predicate offenses to support his § 924(c) conviction, conspiracy to commit Hobbs Act robbery was a "constitutionally invalid predicate," and, because the jury returned a general verdict, his conviction may have rested on that invalid predicate offense.

As background, in 2006, a grand jury charged Aviles with conspiracy to possess with intent to distribute cocaine, 21 U.S.C. § 841(a)(1) (Count 1), attempted possession with intent to

distribute cocaine, § 841(a)(1) (Count 2), conspiracy to commit Hobbs Act robbery, 18 U.S.C. § 1951(a) (Count 3), attempted Hobbs Act robbery, § 1951(a) (Count 4), carrying a firearm during and in relation to a crime of violence and a drug-trafficking crime – specifically, the offenses charged in Counts 1 through 4 – § 924(c) (Count 5), and possession of a firearm by a felon, 18 U.S.C. § 922(g) (Count 6). At trial, the government presented evidence that showed that Aviles and his codefendants conspired with a confidential informant to carry out an armed robbery of a fictional cocaine stash truck, and they attempted to do so before being stopped by law enforcement.

The jury was instructed that it could only convict Aviles of Count 5 if it found that he: (1) "committed a drug trafficking offense or crime of violence charged in Count 1, 2, 3, or 4;" and (2) "knowingly carried a firearm in relation to . . . or . . . knowingly possessed the firearm in furtherance of that drug trafficking crime or crime of violence." The jury returned a general verdict, finding Aviles guilty as charged. The district court sentenced him to life as to each of Counts 1 and 2, 240 months as to each of Counts 3 and 4, and 180 months as to Count 6, all set to run concurrently, followed by 84 months as to Count 5, to run consecutively, for a total of life imprisonment.

We affirmed his convictions and total sentence, and in 2010, Aviles filed his first § 2255 motion, which the district court denied. After receiving authorization from us to file a successive motion, Aviles filed the instant § 2255 motion.

In July 2021, the district court denied Aviles's § 2255 motion, concluding that his claim was procedurally defaulted, as he had not presented it on direct appeal. Further, the court concluded that he could not show: (1) cause to excuse the default because he had the tools to challenge § 924(c)'s residual clause as vague on direct appeal; or (2) actual prejudice because the jury had convicted him of attempted Hobbs Act robbery, and it could not have concluded that he

carried a firearm during the Hobbs Act conspiracy without also finding that he did the same as to his attempted Hobbs Act robbery. Additionally, the district court concluded that, even if Aviles could overcome the procedural bar, he could not prevail on the merits because "the underlying predicate offenses of attempted Hobbs Act robbery and drug trafficking [we]re so inextricably intertwined with the Hobbs Act conspiracy that any reasonable juror would have found that the § 924 convictions were supported by each of the still valid predicates." The district court also denied him a certificate of appealability ("COA").

Aviles appealed and now moves for a COA on three grounds. First, he asserts that reasonable jurists could debate whether controlling circuit precedent precludes issuance of a COA, as circuits are split on the issue. He argues that we, in *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261 (11th Cir. 2015), misapplied Supreme Court precedent when we stated that no COA should issue where a claim is foreclosed by binding precedent. Second, he asserts that reasonable jurists could debate whether procedural default bars relief, as they could debate whether: (a) the error in his indictment was jurisdictional, and, therefore, could not be procedurally defaulted; (b) cause and prejudice excused his procedural default; and (c) his claim of "legal innocence" satisfies the "actual innocence" standard. Third, he asserts that he is entitled to relief because we, in *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), employed an incorrect legal standard when evaluating a movant's claim that his § 924(o) conviction was based on an invalid predicate.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court denied a habeas petition on procedural grounds, the petitioner must show that reasonable jurists would debate whether (1) the petition states a valid claim of the denial of a constitutional right, and (2) the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

We have concluded that no COA should issue where a claim is foreclosed by binding precedent, given that "reasonable jurists will follow controlling law." *Hamilton*, 793 F.3d at 1266. Further, "[t]he prior-panel-precedent rule requires subsequent panels of the [C]ourt to follow the precedent of the first panel to address the relevant issue, unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court." *Scott v. United States*, 890 F.3d 1239, 1257 (11th Cir. 2018) (quotations omitted).

A § 2255 claim may be procedurally defaulted if the movant failed to raise the claim on direct appeal. *Bousley v. United States*, 523 U.S. 614, 622 (1998). A movant can overcome a procedural bar by demonstrating: (1) cause for the default and actual prejudice; or (2) that he is actually innocent. *Id.* Cause for not raising a claim can be shown when a claim "is so novel that its legal basis [was] not reasonably available to counsel." *Id.* Notably, *Davis* claims are not novel in the sense necessary to excuse procedural default. *See Granda*, 990 F.3d at 1286-88. Further, "[a]ctual innocence means factual innocence, not mere legal innocence." *Id.* at 1292 (quotations omitted).

Additionally, a movant can avoid the procedural default bar altogether, meaning he can raise a claim for the first time on collateral review without demonstrating cause and prejudice, if the alleged error is jurisdictional. *United States v. Bane*, 948 F.3d 1290, 1294 (11th Cir. 2020). We have held "that a district court lacks jurisdiction when an indictment alleges only a non-offense." *See United States v. Peter*, 310 F.3d 709, 715 (11th Cir. 2002). Notably, we have also held that a challenge that the § 924(c) counts of an indictment failed to charge an offense against the laws of the United States, because the predicate offenses were not crimes of violence under § 924(c)(3)(A), was jurisdictional, and, thus, not waived by the defendant pleading guilty.

United States v. St. Hubert, 909 F.3d 335, 344 (11th Cir. 2018), *abrogated on other grounds by Davis*, 139 S. Ct. 2319.

Section 924(c) provides a mandatory consecutive sentence for anyone that uses or carries a firearm in furtherance of a "crime of violence" or "drug trafficking crime." 18 U.S.C. § 924(c)(1). A "crime of violence," in turn, is a felony offense that: (A) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another;" or (B) "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." *Id.* § 924(c)(3)(A)–(B). The first prong of that definition is referred to as the "elements clause," while the second prong contains the "residual clause." *Davis*, 139 S. Ct. at 2324.

In *Davis*, the Supreme Court held that § 924(c)(3)(B)'s residual clause was unconstitutionally vague. *Id.* at 2336. We have since held that conspiracy to commit Hobbs Act robbery does not qualify as a "crime of violence" under § 924(c)'s elements clause and, thus, would only qualify as a predicate offense under the unconstitutional residual clause. *Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019). Conversely, conspiracy to possess with intent to distribute cocaine and attempt to possess with intent to distribute cocaine each qualify as a "drug trafficking crime" for purposes of § 924(c), while attempted Hobbs Act robbery qualifies as a "crime of violence" under § 924(c)(3)(A)'s elements clause. *Granda*, 990 F.3d at 1284-85.

In *Granda*, the indictment charged multiple, separate offenses, including Hobbs Act conspiracy, as predicate offenses for a § 924(o) charge, and the jury returned a general guilty verdict. *Id.* at 1281-82. In addressing procedural default, we held that, "[t]o establish novelty sufficient to provide cause based on a new constitutional principle, [the defendant] must show that the new rule was a sufficiently clear break with the past, so that an attorney representing him would

not reasonably have had the tools for presenting the claim." *Id.* at 1286. We then determined that the defendant could not show cause for failing to raise a vagueness challenge to § 924(c) on direct appeal, in 2009, because the law in existence at the time of his appeal confirmed that "he did not then lack the building blocks of a due process vagueness challenge" to the residual clause. *Id.* at 1287 (quotations omitted).

We also held that, to show prejudice sufficient to excuse a procedural default for the defendant's *Davis* claim, "it is not enough for [the defendant] to show that the jury may have relied on the . . . Hobbs Act conspiracy conviction as the predicate for his . . . § 924(o) conviction." *Id.* at 1288. Instead, where the other predicate offenses would have provided "a wholly independent, sufficient, and legally valid basis to convict on" the § 924(c) count, the defendant must show that there is a "a substantial likelihood that the jury relied *only* on the [Hobbs Act conspiracy] conviction." *Id.* (emphasis in original).

We then determined that the defendant could not show prejudice, as the record was clear that the jury's finding of guilt on each of the predicate offenses "rested on the same operative facts and the same set of events," such that the offenses were "inextricably intertwined." *Id.* at 1289-90. We concluded that each of the predicate offenses arose from the same plan and attempt to commit armed robbery of a tractor-trailer full of cocaine, and thus, the "tightly bound factual relationship of the predicate offenses preclude[d] [the defendant] from showing a substantial likelihood that the jury relied solely on" the Hobbs Act conspiracy offense. *Id.* at 1291.

More recently, we applied *Granda* to another § 2255 movant challenging his § 924(c) and (o) convictions under *Davis*. *Parker v. United States*, 993 F.3d 1257, 1262-65 (11th Cir. 2021). There, the movant had been caught in a reverse sting operation in which he had attempted to commit armed robbery of a house that he believed held a drug-trafficking organization's cocaine

stash. *Id.* at 1259. Aside from his § 924(c) and (o) convictions, a jury found the movant guilty of Hobbs Act conspiracy, conspiracy to possess with intent to distribute cocaine, and attempt to possess with intent to distribute cocaine, all of which were listed as potential predicate offenses in the indictment and jury instructions. *Id.* at 1260-61. We determined that the movant's challenges were procedurally defaulted, as he did not argue during his original proceedings that his convictions under § 924(c) and (o) must be vacated because § 924(c)'s residual clause was unconstitutionally vague. *Id.* at 1262. We noted that "*Granda* held that a vagueness-based challenge to the § 924(c)(3)(B) residual clause was not sufficiently novel to establish cause, and the inextricability of [a petitioner's] valid and invalid predicate offenses would prevent him from showing prejudice." *Id.* at 1265.

Here, reasonable jurists would not debate the district court's denial of Aviles's § 2255 motion. Aviles's claim is procedurally defaulted, as it is undisputed that he failed to raise it on direct appeal. *See Bousley*, 523 U.S. at 622. Although he argues that a *Davis* claim cannot be procedurally defaulted because it is jurisdictional in nature, we have held, in *Granda* and *Parker*, which were both decided after *St. Hubert*, that a claim like Aviles's can be procedurally defaulted, and we are bound by our prior decisions. *See Granda*, 990 F.3d at 1286; *Parker*, 993 F.3d at 1262; *Scott*, 890 F.3d at 1257. Further, although the procedural bar does not apply to jurisdictional errors, the error in this case is not jurisdictional because, while Count 5 included Hobbs Act conspiracy as an invalid predicate offense, it was also predicated on 3 other valid offenses, similar to the indictment in *Granda*. *See Bane*, 948 F.3d at 1294; *Granda*, 990 F.3d at 1281-82. Consequently, the indictment did not allege only a non-offense because, without the invalid predicate, it alleged conduct that fell within the scope of § 924(c). *See Peter*, 310 F.3d at 715.

Moreover, although Aviles argues that, due to a circuit split on the issue, reasonable jurists could debate whether controlling precedent precludes issuance of a COA, our binding precedent holds that a COA shall not issue if the claim is foreclosed by binding precedent. *See Hamilton*, 793 F.3d at 1266 ("[W]e are bound by our Circuit precedent, not by Third Circuit precedent."); *Scott*, 890 F.3d at 1257.

Additionally, Aviles cannot demonstrate cause for the procedural default, or actual prejudice sufficient to excuse it. *See Bousley*, 523 U.S. at 622. First, he cannot demonstrate cause because his *Davis* claim is not so novel that it excuses the procedural default. *See Granda*, 990 F.3d at 1286-88. Second, he cannot establish prejudice, as he cannot show that there is a substantial likelihood that the jury relied solely on the Hobbs Act conspiracy offense in Count 3 to convict him on Count 5. *See id.* at 1288. Specifically, as in *Granda*, the indictment in this case charged multiple, separate offenses as bases for Aviles's § 924(c) conviction, one of which, Hobbs Act conspiracy, is no longer constitutional under *Davis*. *See Granda*, 990 F.3d at 1281-82; *Brown*, 942 F.3d at 1075.

However, the other charged predicate offenses – conspiracy to possess with intent to distribute cocaine, attempt to possess with intent to distribute cocaine, and attempted Hobbs Act robbery – remain valid predicate offenses that would have provided a wholly independent, sufficient, and legally valid basis to convict him on Count 5. *See Granda*, 990 F.3d at 1284-85, 1288. Those predicate offenses also arose from the same set of facts and events, which was the conspiracy and attempt to commit armed robbery of a fictional cocaine stash, and, therefore, he is precluded from showing that there was a substantial likelihood that the jury relied solely on the Hobbs Act conspiracy offense. *See Granda*, 990 F.3d at 1291.

Finally, although Aviles argues that reasonable jurists could debate whether his claim of legal innocence satisfies the actual innocence standard, we have held that a showing of legal innocence does not suffice. *See Granda*, 990 F.3d at 1292. In sum, because he cannot overcome the procedural default, the district court properly denied Aviles's § 2255 motion. Accordingly, Aviles's motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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February 09, 2022

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 21-13303-C
Case Style: Reynaldo Aviles v. USA
District Court Docket No: 1:20-cv-21475-DPG
Secondary Case Number: 1:06-cr-20592-DPG-2

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Walter Pollard, C
Phone #: (404) 335-6186

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:20-cv-21475-GAYLES/MATTHEWMAN

REYNALDO AVILES,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE comes before the Court upon Reynaldo Aviles' ("Movant") Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. The Eleventh Circuit granted leave for Movant to file a successive motion to vacate. [ECF No. 1]. The Court appointed the Federal Public Defender to brief the issues raised. [ECF No. 4]. Appointed counsel filed an Amended Motion to Vacate Aviles' conviction for violation of 18 U.S.C. § 924(c) entered in Case No. 06-cr-20592-DPG. [ECF No. 7]. The United States filed a response, [ECF No. 11], to which Movant replied, [ECF No. 12]. The motion is now ripe for review.

I. BACKGROUND

The procedural history of the underlying criminal case reveals that Movant was charged by indictment with conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 846 ("Count 1"); attempt to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 846 ("Count 2"); conspiring to obstruct commerce by means of robbery, in violation of 18 U.S.C. § 1951(a) ("Count 3"); attempt

to obstruct commerce by means of robbery, in violation of 18 U.S.C. § 1951(a) ("Count 4"); 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)(1)(A) ("Count 5"); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) ("Count 6"). [CR-ECF No. 18].[1] On September 22, 2006, Movant entered a plea of not guilty. [CR- ECF No. 19].

The charges in this case stem from activity of a federal task force ("Task Force") investigating home invasion robberies, using confidential informants ("CIs") and undercover officers. [CR-ECF No. 272 at 280–81]. In May of 2006, Task Force officers learned Alexis Cruzata was interested in committing such offenses. [*Id*. at 282–83]. Although Cruzata, Nelson Pena, Petitioner, and others agreed to participate in a robbery, they ultimately withdrew when they discovered it was a police set-up. [*Id*. at 297–332].

Three months later, in August 2006, Task Force officers learned from a CI named "Pipa" that Pena was interested in committing an armed robbery of a stash house. [*Id*. at 300–01]. A plan for a new sting operation, involving theft of cocaine from a truck, was developed as part of the investigation. [*Id*. at 304]. Because the original CI's identity was compromised, the Task Force used a trusted second CI (Humberto Gamez). [*Id*. at 301–02]. Gamez's meetings and calls related to this investigation were monitored, and video and audio tapes and transcripts of meetings were introduced at trial. [CR-ECF No. 273 at 579]. On August 25, 2006, Gamez, posing as a cocaine trafficker, met with Pipa and Pena, telling Pena he needed people to help him steal drugs from a tractor-trailer. [CR-ECF No. 272 at 304]. Pena said he would participate, and it was discussed with Pena how to do the robbery, what equipment and weapons would be needed, and who would participate. [*Id*. at 305]. Cell phone monitoring after the meeting showed calls were made between

[1] References to entries in the Movant's criminal case, 06-cr-20592-JORDAN, will be denoted by CR-ECF No. and the page within that docket entry.

Pena's and Movant's phones, and between Movant's and Emilio Gomez's phones. [CR-ECF No. 275 at 1027–28]. In a recorded phone call, CI Gamez and Pena used coded language to discuss the arrival of the drugs from Mexico and the plan to steal them from the truck upon their arrival. [CR-ECF No. 272 at 409–16].

On August 31, 2006, Gamez told Pena he was expecting 80 kilograms of cocaine and discussed plans for stealing it and dividing portions among members of Pena's crew. [CR ECF No. 273 at 459–65]. When Gamez asked to meet Pena's crew, Pena said his crew was trustworthy. [*Id*. at 469–70]. At a meeting on September 5, 2006, Pena introduced Gamez to Movant and Gomez. [*Id.* at 475–78]. The four men sat in Gamez's car and discussed details of the plan to steal the cocaine, which Gamez said belonged to a man who had betrayed him. [*Id*. at 485–505]. This conversation, in which Movant participated, included discussions about where the drugs were coming from, where on the truck they would be hidden, and when they were expected to arrive, and addressed Gomez's concern that the drivers might be armed and the need for the crew to be armed. [*Id*. at 487–500]. The men also discussed how the drugs would be split after the robbery. [*Id*. at 496, 504]. Cell phone records showed that within minutes of this meeting, calls were placed from both Movant's and Gomez's cell phones to co-defendant Mario Bachiller's cell phone. [CR-ECF No. 275 at 1032–33].

The next day there was another recorded meeting between Gamez, Movant, and Pena, discussing the truck's arrival time, their plan to steal the drugs, and the splitting of the drugs among the participants. [CR-ECF No. 273 at 507–20]. Records showed that after this meeting, there were numerous calls between cell phones belonging to the five men charged as defendants in the case. [CR-ECF No. 275 at 1034–35]. Co-defendant Joe Guevara's participation was by Movant's invitation. Guevara's friend, Jorge Torres, also volunteered to participate. [CR-ECF No. 274 at

797–802].

The recordings of phone conversations and meetings with the CI convinced Task Force officers that the participants were serious about wanting to commit the robbery. [CR-ECF No. 273 at 597]. Accordingly, the decision was made to go forward and to arrest them when they made their attempt to do so. [*Id*.]. A tractor-trailer was parked outside a warehouse in a safe, controlled part of the Doral area in Miami with surveillance in place. [*Id*. at 597–605].

On September 6, 2006, Movant, Gomez, Bachiller, Pena, Guevara, and Torres gathered three or four times at Torres' house to prepare. [CR-ECF No. 274 at 802–04]. Their plan was to approach in law enforcement attire, yell "police," and steal the drugs. [*Id*. at 803–04]. Movant, Gomez, and Pena met the CI at a gas station to do a drive-by of the truck, during which their conversation was monitored and recorded. [CR-ECF No. 273 at 530–38]. The CI explained where the cocaine was hidden; Gomez noted possible escape routes; and Pena told the CI they planned to bring firearms and intended to use two or three cars for the robbery. [*Id*. at 273 at 535–38].

At one of the meetings, Movant and Pena passed out police shirts and walkie talkies to the participants. [CR-ECF No. 274 at 807–09]. The plan, specifically discussed in the presence of Movant, included use of those firearms to commit the robbery. [*Id*. at 813].

Guevara, Torres, and Bachiller left Torres' house in the Cadillac and followed Movant's Mitsubishi to a gas station. [*Id*. at 816–18]. Based on cell phone signals, officers knew that just after midnight on September 7, 2006, the Movant and his co-defendants were converging at the gas station. [CR-ECF No. 275 at 1047–48]. Police surveillance units observed three cars driving in tandem toward the Doral warehouse district and then enter the area. [CR-ECF No. 273 at 609–15].

At trial, Guevara testified that he, Torres, and Bachiller put on police shirts (marked "FBI",

"DEA", and "Police"); but contrary to the plan, Gomez, Movant, and Pena did not change into police shirts. [CR-ECF No. 274 at 820]. Movant, by walkie talkie, told Guevara and Torres to enter the area; because they were still changing shirts, Movant drove in first in the Mitsubishi, followed by the other two cars. [*Id*. at 821–22]. Torres drove the Cadillac up to the truck and he and Guevara got out of the car. [*Id*. at 823–24]. Torres, armed with firearm, opened the door of the truck as Movant yelled "Police" from behind the trunk of his Mitsubishi. [*Id*. at 824–25, 864]. Guevara testified that he saw bright lights and heard someone shout, "Freeze! Police." [*Id*. at 824].

Guevara and Torres were shot by actual police officers when they ignored police demands and made threatening movements with their weapons. Guevara was taken to the hospital and arrested. Torres died from his wounds. Gomez was arrested by the driver's side of his Chevrolet. [CR-ECF No. 275 at 982]. The police recovered a loaded Tec-9 firearm and a walkie talkie by the driver's side rear tire of the Cadillac, a loaded .45 automatic from the passenger side of the Cadillac, and a loaded shotgun wrapped in a blanket from the back seat of the Cadillac. [CR-ECF No. 275 at 963–70]. Police also recovered ski masks, caps, flex cuffs, and a police baton from the Cadillac, and a total of four walkie talkies. [CR-ECF No. 275 sat 969–97].

At the conclusion of trial, the jury found Movant guilty as charged in the indictment. [CR-ECF No. 205-1]. Regarding Counts 1 and 2, the jury returned a special verdict finding that the offenses involved 5 kilograms or more of cocaine. [*Id*.]. Movant was sentenced on November 15, 2007, to life imprisonment for Counts 1 and 2,240 months' imprisonment for Counts 3 and 4, 180 months' imprisonment for Count 6, and an 84 month consecutive term of imprisonment for Count 5. [*Id*.].

Movant appealed his conviction and sentence. [CR-ECF No. 299]. The Eleventh Circuit affirmed Movant's conviction and sentence, finding no merit to any of the arguments raised.

United States v. Gomez, 302 F. App'x 868 (11th Cir. 2008). Movant's petition for certiorari was denied by the Supreme Court. *Aviles v. United States*, 129 S. Ct. 1658 (2009).

Movant filed his first motion to vacate in March 2010. [CR-ECF No. 348]. He raised multiple claims of ineffective assistance of counsel. [*Id*.]. The trial court denied the motion. [CR-ECF No. 354]. On October 17, 2019, the Eleventh Circuit, in consideration of the Supreme Court opinion in *United States v. Davis*, 139 S. Ct. 2319 (2019), granted Movant leave to file this successive § 2255 motion to vacate. [ECF No. 1].

II. LEGAL STANDARD

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on a final judgment, pursuant to § 2255, are extremely limited. A prisoner is entitled to relief under § 2255 if the court imposed a sentence that: (1) violated the Constitution or laws of the United States; (2) exceeded its jurisdiction; (3) exceeded the maximum authorized by law; or (4) is otherwise subject to collateral attack. *See* § 2255(a); *McKay v. United States*, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). Relief under § 2255 is reserved for transgressions of constitutional rights, and for that narrow compass of other injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (per curiam) (citing *United States v. Frady*, 456 U.S. 152, 165 (1982) (collecting cases)); *Massaro v. United States*, 538 U.S. 500, 504 (2003). If a court finds a claim under § 2255 valid, the court shall vacate and set aside the judgment and discharge the prisoner, grant a new trial, or correct the sentence. *See* 28 U.S.C. § 2255. The burden of proof is on Movant, not the Government, to establish that vacatur of the conviction or sentence is required. *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017), *reh'g en banc denied*, *Beeman v. United States*, 899 F.3d 1218 (11th Cir. 2018), *cert. denied*, *Beeman v. United States*, 139 S. Ct. 1168

(2019).

III. DISCUSSION

Movant contends he is actually innocent of any offense under 18 U.S.C. § 924(c) in light of *United States v. Davis*, 139 S. Ct. 2319 (2019). In *Davis*, the Supreme Court held that the § 924(c)(3)(B) residual clause definition of "crime of violence" was unconstitutionally vague. *Davis*, 139 S. Ct. at 2336. Subsequently, the Eleventh Circuit took the position that *Davis* announced a "substantive" rule of law with retroactive effect to cases on collateral review. *In re Pollard*, 931 F.3d 1318, 1320 (11th Cir. 2019); *In re Navarro*, 931 F.3d 1298, 1301 (11th Cir. 2019); *In re Cannon*, 931 F.3d 1236, 1241 (11th Cir. 2019).

Movant argues that his conviction on Count 5 for violation of § 924(c) is invalid because Hobbs Act conspiracy is not a crime of violence.[2] Further, he contends that the underlying predicate for his conviction for Count 5 must be the Hobbs Act conspiracy, rather than the other predicates of attempted Hobbs Act robbery and drug trafficking.

In its response, the government argues that Movant has procedurally defaulted his claim by failing to raise constitutional vagueness objections to his conviction on Count 5 on direct appeal and cannot establish either cause for that default or actual innocence. [ECF No. 11 at 17–21]. The Government also contends that Movant cannot meet his burden to prove his conviction on Count 5 was predicated solely on the Hobbs Act conspiracy charge. [*Id*. at 9–16.]

Recent decisions of the Eleventh Circuit are dispositive of Movant's claims. *See Granda v. United States*, 990 F.3d 1272, 1292 (11th Cir. 2021); *Parker v. United States*, No. 19-14943, 2021 WL 1259432 (11th Cir. Apr. 6, 2021). *Parker* is particularly instructive as the facts are most

[2] In light of *Davis*, the Eleventh Circuit has held that conspiracy to commit Hobbs Act Robbery is no longer a crime of violence under § 924(c) because it cannot satisfy the elements clause of § 924(c)(3)(A). *Brown v. United States*, 942 F.3d 1069, 1074–75 (11th Cir. 2019).

analogous to the instant case. In both *Parker* and here, the underlying crime was based on a reverse sting operation. *Parker*, 2021 WL 1259432, at *1–2. In both cases, the government charged the defendants with Hobbs Act conspiracy and drug trafficking as predicate offenses to support the § 924 charges. *Id*. at *2. The jury in *Parker*, as in the instant case, returned a general verdict with respect to the § 924 charge. *Id*. The court, relying on *Granda*, affirmed the denial of Parker's motion to vacate, finding the claim was procedurally defaulted and without merit. *Id*. at 6.

Movant did not argue in the trial court or on direct appeal that his § 924(c) conviction was invalid because the residual clause was unconstitutionally vague. "[A] defendant generally must advance an available challenge to a criminal conviction on direct appeal or else the defendant is barred from raising that claim in a habeas proceeding." *See Fordham v. United States*, 706 F.3d 1345, 1349 (11th Cir. 2013). Movant, therefore, procedurally defaulted this claim and cannot succeed on collateral review unless he can either (1) show cause to excuse the default and actual prejudice from the claimed error, or (2) show that he is actually innocent of the § 924(c) conviction. *Id*. "Actual innocence" means factual innocence, not mere legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998). Here, Movant cannot show actual innocence of his § 924(c) and (o) convictions for the same reason that he cannot establish prejudice—because the conduct underlying the still valid predicates of attempted Hobbs Act robbery and the drug trafficking charges were so inextricably intertwined that the jury could not have convicted him of the § 924 charges based solely on the now invalid Hobbs Act conspiracy predicate. Therefore, the Court considers only whether Movant has demonstrated "cause" and "actual prejudice."

After the decision of the Eleventh Circuit in *Granda*, Movant cannot establish cause. According to the Eleventh Circuit, defendants, such as Movant, had the tools to challenge the § 924(c) residual clause based on vagueness on direct appeal. *Granda*, 990 F.3d at 1288 ("That

few, if any, litigants had contended that the § 924(c) residual clause was unconstitutionally vague before the conclusion of *Granda*'s appeal [in 2009] arguably cuts in favor of finding novelty. But as *Pitts* [*v. Cook*, 923 F.2d 1568 (11th Cir. 1991)] makes clear, the behavior of other litigants is not the whole of the inquiry. The tools existed to challenge myriad other portions of § 924(c) as vague; they existed to support a similar challenge to its residual clause. Granda cannot show cause to excuse his procedural default.").

Further, Movant cannot demonstrate actual prejudice. Movant contends he suffered actual prejudice due to the possibility that the jury relied on the Hobbs Act conspiracy conviction as the sole basis for his § 924(c) conviction. However, as held by the court in *Granda*, Movant must show at least a "substantial likelihood" that the jury relied solely on the Hobbs Act conspiracy charge to convict on Counts 5 and 6. *Granda*, 990 F.3d at 1291. Just as the movant in *Granda* could not make this showing, neither can Movant. As in *Granda*, "each of the predicate offenses arose out of the same plan to rob" a cocaine stash. *Id*. Similarly, the jury could not have found that Movant conspired to possess a firearm in furtherance of a Hobbs Act conspiracy without also finding that he conspired to possess a firearm in furtherance of his attempted Hobbs Act robbery, as well as in furtherance of conspiring and attempting to possess cocaine with intent to distribute. *Id*. at 1280.

Even if Movant could surmount the procedural default bar, he cannot prevail on the merits for the same reason—the underlying predicate offenses of attempted Hobbs Act robbery and drug trafficking are so inextricably intertwined with the Hobbs Act conspiracy that any reasonable juror would have found that the § 924 convictions were supported by each of the still valid predicates. *Id.* at 1292 ("The inextricability of the alternative predicate crimes compels the conclusion that the error Granda complains about—instructing the jury on a constitutionally invalid predicate as one

several of potential alternative predicates—was harmless."). In light of both *Granda* and *Parker*, Movant cannot prevail on the merits because he cannot establish that any error was harmful.

The Court further notes that Eleventh Circuit recently found, relying on *Granda*, that Movant's co-defendant, Bachiller, was not entitled to relief under *Davis* because the crimes were so inextricably intertwined that he could not meet his burden of showing error. *Bachiller v. United States*, No. 18-11161, 2021 WL 2012514 (11th Cir. May 20, 2021). The court found that "[t]he tightly bound factual relationship of the predicate offenses" precludes Bachiller from making the requisite showing for reversible error under *Brecht* [*v. Abrahamson*, 507 U.S. 619 (1993)]." *Id*. at *5.

IV. CERTIFICATE OF APPEALABILITY

Unless a judge issues a certificate of appealability ("COA"), an appeal may not be taken to the Court of Appeals from the final order in a proceeding under § 2255. 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009). This Court should issue a COA only if the petitioner makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2).

To merit a COA, petitioners must show that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioners need not show that an appeal would succeed among some jurists. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). After all, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [a] petitioner will not prevail." *Id*. at 338. But, for the reasons explained above, there is no basis to issue a certificate of appealability in this case.

V. CONCLUSION

Based on the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. The Amended Motion, [ECF No. 7], is **DENIED**.

2. No certificate of appealability shall issue.

3. The Clerk is directed to **CLOSE** this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of July, 2021.

DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

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