APPENDIX

APPENDIX

A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-11482-J

EMMANUEL MAXIME,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Emmanuel Maxime is a federal prisoner who is serving a life sentence for conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 1); Hobbs Act robbery, in violation of § 1951(a) (Count 2); and possession of a firearm in furtherance of a crime of violence and causing the death of a person, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 3). He filed a counseled authorized second or successive 28 U.S.C. § 2255 motion to vacate to challenge his § 924(c) conviction based on *United States v. Davis*, 139 S. Ct. 2319 (2019), asserting that the jury may have convicted him using an improper predicate. The district court denied the claim as procedurally defaulted and, alternatively, as meritless. The court also denied a certificate of appealability ("COA"). On appeal, Mr. Maxime now moves in this Court for a COA on both the procedural and merits issues of his *Davis* claim.

To obtain a COA, Mr. Maxime must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court denied his habeas motion on procedural grounds, he must show that reasonable jurists would debate (1) whether the motion states a valid claim alleging the denial of a constitutional right, and (2) whether the district court's procedural ruling was correct. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A claim that a movant did not raise in his original criminal proceedings is procedurally defaulted. *Parker v. United States*, 993 F.3d 1257, 1262 (11th Cir. 2021). To excuse the default, he must show either (1) cause and actual prejudice, or (2) his actual innocence. *Id.* at 1263.

Here, reasonable jurists would not debate the district court's finding that Mr. Maxime's *Davis* claim was procedurally defaulted because he never argued in his original criminal proceedings that his § 924(c) conviction was "invalid since the [18 U.S.C.] § 924(c)(3)(B) residual clause was unconstitutionally vague." *Granda v. United States*, 990 F.3d 1272, 1285-86 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 1233 (2022). And because "the building blocks . . . [to make] a due process vagueness challenge to the § 924(c) residual clause" existed at the time of his direct appeal in 2010, he lacks cause to excuse the default. *Id.* at 1286-88 (citation omitted). He also has not shown his actual innocence because he asserts only that he was legally innocent. *See McKay v. United States*, 657 F.3d 1190, 1197 (11th Cir. 2011) (noting that "actual innocence" refers to factual innocence, not legal insufficiency).

Mr. Maxime asserts that his *Davis* claim is jurisdictional, meaning it could not be procedurally defaulted, but he is incorrect. *See United States v. Bane*, 948 F.3d 1290, 1294 (11th Cir. 2020). The district court had jurisdiction because Count 3 of the superseding indictment did not "affirmatively allege facts that conclusively negated the existence of any offense against the laws of the United States." *United States v. Brown*, 752 F.3d 1344, 1353 (11th Cir. 2014). In

addition to alleging that conspiracy to commit Hobbs Act robbery was a predicate offense for Count 3, the superseding indictment alleged that the Hobbs Act robbery charged in Count 2 was also a predicate offense. Post-*Davis*, Hobbs Act robbery remains a valid predicate offense for § 924(c). *See In re Cannon*, 931 F.3d 1236, 1242 (11th Cir. 2019). Thus, Count 3 alleged a valid federal offense, such that the district court had jurisdiction. *See Brown*, 752 F.3d at 1353.

Lastly, because Mr. Maxime is not entitled to a COA on the threshold procedural issue, this Court need not consider whether he is entitled to a COA on the merits of his claim.

Accordingly, Mr. Maxime's motion for a COA is DENIED.

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

A-2

No. 22-11482

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EMMANUEL MAXIME,
***Petitioner/appellant*,**

v.

UNITED STATES OF AMERICA,
***Respondent/appellee*.**

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

MOTION FOR CERTIFICATE OF APPEALABILITY BY APPELLANT EMMANUEL MAXIME

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THIS CASE IS ENTITLED TO PREFERENCE
(28 U.S.C. § 2255 APPEAL)

CERTFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1:

Adelstein, Stuart, Counsel for Co-Defendant Carter

Armstrong, Lance, Counsel for Co-Defendant Thomas

Bandstra, Honorable Ted E., United States Magistrate Judge

Brown, Honorable Stephen T., United States Magistrate Judge

Carter, Dwight, Co-Defendant

Caruso, Michael, Federal Public Defender

Chase, Alexandra, Assistant United States Attorney

Damian, Honorable Melissa, United States Magistrate Judge

DiRosa, Phillip D., Assistant United States Attorney

Dube, Honorable Robert L., United States Magistrate Judge

Edenfield, Scott M., Assistant United States Attorney

Feigenbaum, Martin A., Counsel for Co-Defendant Carter

Ferrer, Wilfredo A., Former United States Attorney

Garber, Honorable Barry L., United States Magistrate Judge

Gerarde, Kevin, Assistant United States Attorney

Gonzalez, Juan Antonio, United States Attorney

Greenberg, Benjamin G., Former United States Attorney

Jordan, Honorable Adalberto, United States District Judge

Kane, Sara W., Assistant Federal Public Defender

Lacosta, Anthony W., Assistant United States Attorney

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Martinez, Honorable Jose E., United States District Judge

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O'Sullivan, Honorable John J., United States Magistrate Judge

Palermo, Honorable Peter R., United States Magistrate Judge

Patel, Kashyap P., Assistant Federal Public Defender

Potolsky, Steven M., Assistant Federal Public Defender

Reid, Honorable Lisette M., United States Magistrate Judge

Ritchie, Erskaneshia, Co-Defendant

Rubio, Lisa Tobin, Assistant United States Attorney

Sayler, Kathleen M., Assistant United States Attorney

Schultz, Anne R., Assistant United States Attorney

Shapiro, Jacqueline E., Counsel for Co-Defendant Carter

Smachetti, Emily M., Assistant United States Attorney

Smith, II, Jan C., Assistant Federal Public Defender

Stage, Gail M., Assistant Federal Public Defender

Thomas, Nikkia, Co-Defendant

Torres, Honorable Edwin G., United States Magistrate Judge

United States of America, Plaintiff/Appellee

Vora-Puglisi, Sabrina D., Assistant Federal Public Defender

MOTION FOR CERTIFICATE OF APPEALABILITY

Emmanuel Maxime, through undersigned counsel, respectfully moves this Court for a certificate of appealability ("COA") on the following two issues:

1) Whether the district court erred in concluding that Mr. Maxime's 28 U.S.C. § 2255 motion should be denied on the merits?
2) Whether the district court erred in concluding that procedural default barred consideration of Mr. Maxime's claim?

PROCEDURAL HISTORY[1]

I. The Charges.

In April 2010, Mr. Maxime was charged with three crimes, in a superseding indictment: count 1 charged him with conspiring to commit a Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a), from November 2008 through December 1, 2008; count 2 charged him with Hobbs Act Robbery, in violation of 18 U.S.C. §§ 1951(a) and 2, on or about December 1, 2008; count 3 charged him with knowingly carrying and using a firearm during and in relation to, or possessing a firearm in furtherance of, the crimes of violence charged in counts 1 and 2, and "in the course of this violation caus[ing] the death of a person, through the use of a firearm," in violation of 18 U.S.C. §§ 924(c)(a)(A)(I), 924(j)(1), 1111, and 2, on or about December 1, 2008. (Cr. DE 122).

II. The Co-Defendant.

Mr. Maxime's co-conspirator and co-defendant, Dwight Carter, was charged in the same indictment with counts 1, 2 and 3, as well as additional drug crimes. (Cr. DE 122). Mr. Maxime's case was severed

[1] References to the underlying criminal case, Case No. 09-CR-20470-Martinez, will be noted as "Cr. DE __." References to the civil case, Case No. 19-CV-24827-Martinez, will be noted as "Civ. DE ___."

from Mr. Carter's for trial. (Cr. DE 156). Mr. Carter was convicted on all counts (Cr. DE 254), before Mr. Maxime proceeded to trial. (Cr. DE 259).

III. The Trial.

In opening statements, Mr. Maxime's counsel conceded his guilt as to the conspiracy to commit a Hobbs Act robbery charged in count 1. (Trial Tr. Vol. II: 249). It was uncontested that the conspiracy—the planning of the robbery—had taken place in the weeks and days leading up to the robbery, and had involved multiple conversations among the co-conspirators, "casing" the location and target of the robbery (an armored truck guard at a mall), Mr. Carter obtaining firearms for himself and for Mr. Maxime, and borrowing a "getaway" car. (Trial Tr. Vol. II: 244-45; 249-53; 363-66). Both parties also agreed that Mr. Carter followed through with the robbery, and that, during the robbery, Mr. Carter had shot and killed the victim. (Trial Tr. Vol. II: 242, 246, 248-49; Trial Tr. Vol. V: 947; 970).

The only contested aspect of the trial was Mr. Maxime guilt as to the Hobbs Act robbery itself, in count 2, and the §§ 924(c) & (j) offense, in count 3. The government introduced evidence that Mr. Maxime actively participated in the robbery, while armed with a separate firearm than

the one that Mr. Carter used to shoot the victim. (Civ. DE 18:9-10) (citing trial evidence). The defense vigorously challenged this evidence, and maintained that, while Mr. Maxime was involved in—and guilty of—planning the robbery, he panicked and withdrew from the robbery conspiracy moments before Mr. Carter's commission of the robbery/murder. (Trail Tr. Vol. II: 248-257; Trial Tr. Vol. V: 970-992).

The government proposed multiple theories to support its position that Mr. Maxime was guilty on all counts. Some of these theories did not require the jury to find that Mr. Maxime was directly involved in the robbery, or that he himself had used or carried a firearm during the robbery. One of those theories included "co-conspirator" or *Pinkerton* liability, which the government explained to the jury as follows:

> [U]nder the law . . . when you join a conspiracy, you're responsible for the act of your co-conspirators. **When Emmanuel Maxime joined that conspiracy, he became responsible for the acts of Dwight Carter that Dwight Carter committed during the conspiracy. So Emmanuel Maxime is responsible for Dwight Carter's commission of Count II, Count III, and of the murder.**

(Trial Tr. Vol. V: 947-48) (emphasis added). The government actually explained this theory more than once:

> Co-conspirator liability again. Three elements. Carter committed the charged crimes, Maxime was a member of the

> conspiracy at the time and the crimes were reasonably foreseeable. All of those are true. They're true as to regards [to . . .] Count II, and they're also true with regards to Count III, Carter's use of the firearm. Also true and prove that Emmanuel Maxime is guilty beyond a reasonable double with regards to the murder.

(Trial. Tr. Vol. V: 960). The government also repeatedly told the jury that it did not need to rely on count 2 as the predicate for count 3, because it could rely on Mr. Maxime's undisputed guilt as to the conspiracy in count 1 as the predicate for count 3. (Trial Tr. Vol. V: 948-949; Trial Tr. Vol. V: 952).

In Mr. Maxime's closing argument, his counsel again conceded guilt as to the conspiracy charged in count 1:

> We've told you from the very beginning, [defense co-counsel] told you in opening statement, the very first thing he said to you, Emmanuel Maxime is responsible for the conspiracy, Count I. And you will find him guilty of that. We are here, you are here, for Counts II and III.

(Trial Tr. Vol. V: 971; Trial Tr. Vol. V: 992). In the government's rebuttal closing argument, counsel for the government sought to undermine the defense theory by explaining to the jury that, "**just by participating in Count I, the defendant is guilty of Count III**." (Trial Tr. Vol. V: 1002) (emphasis added).

Jury Instructions. After closing arguments, the Court read the jury instructions, including an overview of the indictment and the standard instructions as to the conspiracy charge in count 1, and as to the robbery in count 2. Next, the Court instructed the jury as to count 3, as follows:

> Count 3 of the superseding indictment charges the defendant with violating Title 18, United States Code, Section 924(c)(1)(A) and Section 924(j). Section 924(c)(1)(A) makes it a separate Federal crime for anyone to use or carry a firearm during and in relation to, or to possess a firearm in furtherance of a crime of violence. The United States has further alleged, pursuant to Title 18, United States Code, Section 924(j), that during the course of the defendant's violation of § 924(c)(1)(A), the defendant caused the death of a person through the use of a firearm and that the killing was a murder defined by Title 18, United States Code, Section 1111.
>
> The defendant can be found guilty of violating Section 924(c)(1)(A) only if all of the following facts are proved beyond a reasonable doubt:
>
> First, that the defendant committed the crime of violence charged in Count I or Count II of the indictment and that during the commission of that offense, the defendant knowingly carried or used a firearm in relation to that crime of violence, or during the commission of that offense, the defendant knowingly possessed that firearm in furtherance of a crime of violence . . .
>
> In other words, the defendant is charged with violating the law in Count III in two separate ways. The government has to prove only one of those ways, not both, but to find the

> defendant guilty, you must all agree on which of the two ways the defendant violated the law.
>
> If you find the defendant guilty of Count III, you will be further required to determine if the defendant, during the course of this violation, violated Section 924(j) by causing the death of a person through the use of the firearm and if the killing was murder as defined in Title 18, United States Code, Section 1111. . . .

(Trial Tr. Vol. V: 1020-23; Cr. DE: 267).

The Court then gave the following modified *Pinkerton* instructions to the jury, as to counts 2 and 3:

> During a conspiracy, if a conspirator commits a crime to advance the conspiracy toward its goals, then in some cases a co-conspirator may be guilty of the crime even though the co-conspirator did not participate directly in the crime. **So regarding Counts II and III, if you have first found the defendant guilty of the crime of conspiracy as charged in Count I, you may also find that defendant guilty of any of the crimes charged in Count II and III, even if you find the defendant did not personally participate in that crime.** To do so, you must first find beyond a reasonable doubt:
>
> First, during the conspiracy, a conspirator committed the additional crime charged to further the purposes of the conspiracy.
>
> Second, that the defendant was a knowing and willful member of the conspiracy when the crime was committed.
>
> And third, it was reasonably foreseeable that a co-conspirator would commit the crime as a consequence of the conspiracy.

(Trial Tr. Vol. V: 1023-24; Cr. DE: 267) (emphasis added). After the *Pinkerton* instruction, the district court read the standard aiding and abetting and agency instructions. (Trial Tr. Vol. V: 1024-25; Cr. DE: 267). Unlike the Court's *Pinkerton* instruction, however, the Court did not modify the aiding and abetting instruction by referring to the specific count or counts to which the jury could apply the principal liability instructions. *Id.*[2]

The verdict. The jury found Mr. Maxime guilty of all three counts. (Cr. DE: 271). As to count 3, the jury made a special finding that Mr. Maxime, during the course of the § 924(c) violation "caused the death of Carlos Alvarado through the use of a firearm and . . . the killing was murder." *Id.* In accordance with the law, the jury was not asked to, and did not, specify which theory of liability they adopted as to count 3, nor did they specify which predicate—count 1 or count 2—they relied on to find Mr. Maxime guilty of count 3. *Id.*

[2] Mr. Maxime's trial took place before the Supreme Court found that a defendant may not be convicted of aiding and abetting use of a firearm in relation to a crime of violence unless the jury finds that the defendant had "advance knowledge of a firearm's presence." *Rosemond v. United States*, 134 S.Ct. 1240, 1251-51 (2014). Accordingly, Mr. Maxime's jury was not instructed regarding that requirement.

IV. Sentencing

Counts 1 and 2 carried statutory penalties of zero to twenty years' imprisonment. PSR ¶ 84. Count 3 carried a consecutive minimum mandatory of 10 years' imprisonment, and maximum term of life imprisonment. *Id*. Mr. Maxime was sentenced to the statutory maximum for each count: life imprisonment as to count 3, to be served consecutively to consecutive twenty-year sentences as to each count 1 and count 2. (Cr. DE: 295).

V. Prior post-conviction proceedings

Mr. Maxime's direct appeal was denied. *United States v. Maxime*, 484 Fed. App'x 439, 441 (11th Cir. 2012). Mr. Maxime's prior motions to vacate pursuant to 28 U.S.C. § 2255 were denied (Cr. DE: 404), or dismissed (Cr. DE: 407), and the related motions for a certificate of appealability were also denied.

V. The instant § 2255 proceedings.

On November 20, 2019, this Court granted Mr. Maxime's pro se application for leave to file the instant successive § 2255 motion, pursuant to *United States v. Davis*, 139 S. Ct. 2319 (2019). (Civ. DE 1). In so doing, the Court found that Mr. Maxime had established a prima

facie claim that his § 924(c) conviction and life sentence are unconstitutional. *Id*. As a result of the Court's authorization, the district court appointed the Federal Public Defender's office to represent Mr. Maxime, and to file a second, authorized § 2255 motion on his behalf. (Civ. DE 3).

In his amended § 2255 motion and memorandum, Mr. Maxime argued that his §§ 924(c) & (j) conviction and sentence was unconstitutional after *Davis*. (Civ. DE 15). More specifically, Mr. Maxime pointed out that his jury was instructed that it could convict him of violating §§ 924(c) & (j) predicated on either a Hobbs Act conspiracy or a Hobbs Act robbery—but not both—and that the Hobbs Act conspiracy predicate was unconstitutional after *Davis*. *Id*. at 1, 7 (citing *Brown v. United States*, 942 F.3d 1069 (11th Cir. 2019)).[3]

Since the jury rendered a general verdict, and it was impossible to know with certainty upon which predicate the jury relied for its § 924(c) conviction, Mr. Maxime argued that three separate lines of authority

[3] In addition, while noting contrary circuit law, Mr. Maxime also preserved the argument that Hobbs Act robbery itself, as well as Hobbs Act robbery by aiding and abetting or *Pinkerton* liability, was not a "crime of violence." (Civ. DE 15:2, 18-26).

required that the court vacate his count 3 conviction: the categorical approach, which required that the court assume the § 924(c) conviction was predicated upon the least culpable act (Civ. DE 15:12-13, 17-18); the rule of *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016), regarding lack of specificity in a general verdict following a duplicitous indictment, which had Sixth Amendment significance after *Alleyne v. United States*, 570 U.S. 99 (2013) (Civ. DE 15:15-17); and the rule of *Stromberg v. California*, 283 U.S. 359 (1931), and its progeny, which holds that:

> a conviction cannot be upheld if (1) the jury was instructed that a guilty verdict could be returned with respect to any one of several listed grounds, (2) it is impossible to determine from the record on which ground the jury based the conviction, and (3) one of the listed grounds was constitutionally invalid.

(Civ. DE 15:14-15) (citing *Knight v. Dugger*, 863 F.2d 705, 730 (11th Cir. 1988)).

In its Answer (Civ. DE 18), the government urged the court to find that Mr. Maxime had the burden—but failed—to establish that, "the jury's verdict as to Count 3 rested solely on the now invalid predicate crime of violence identified in Count 1 (conspiracy)." According to the government, the jury likely relied on *both* the Count 1 and Count 2, in light of the:

> overwhelming evidence that demonstrated that Maxime participated in the robbery himself (Count 2), while carrying his own firearm or alternatively aided and abetted the commission of the robbery (Count 1), while carrying his own firearm.

(Civ. DE 18:5-6). The government further argued that Mr. Maxime could not prevail because his predicate offenses were "inextricably intertwined." *Id.* at 5, 7-8. Finally, the government asserted that Mr. Maxime could not overcome procedural default because he could establish neither cause and prejudice, nor actual innocence. *Id.* at 11-15.

In his Reply, Mr. Maxime maintained that, *regardless* of whether his predicates were "inextricably intertwined," he was still entitled to relief because the *Stromberg* error in his trial was not harmless. (Civ. DE 21:3-9) (citing *O'Neal v. McAninch*, 513 U.S. 432 (1995); *Zant v. Stephens*, 462 U.S. 862, 881-83 (1983); and *Parker v. Sec'y for Dep't of Corr.*, 331 F.3d 764, 779 (11th Cir. 2003)). Mr. Maxime also maintained that the particular facts of his case, combined with the attorneys' arguments, jury instructions, and verdict, established that his count 3 conviction rested on his *co-conspirator's* §§ 924(c) & (j) violation. He also explained why the jury more likely than not relied "solely" on the conspiracy predicate to convict Mr. Maxime of *that* §§ 924(c) & (j) violation. (Civ. DE 9-13). Thus,

under *any* standard, Mr. Maxime maintained that he was entitled to vacatur of his count 3 conviction and life sentence.

Mr. Maxime also argued that his claim was not subject to procedural default because the *Davis/Stromberg* error in his case was jurisdictional. (Civ. DE 21: 17). And, even if it were not jurisdictional, he argued that he could establish cause and prejudice, as well as actual innocence, thereby overcoming any procedural default. (Civ. DE 21: 18-23).

The parties submitted various notices of supplemental authority, in which Mr. Maxime continued to press his *Stromberg* argument in particular, noting that it had been embraced by other judges, and that the reasoning in those decisions was persuasive. *See* Civ. DE 22 (citing *Wainwright v. United States*, Case No. 19-62364-civ-COHN, DE 22 (S.D. Fla. Apr. 6, 2020)), and *Taylor v. United States*, Case No. 20-civ-22618-HUCK, DE 220 (S.D. Fla. Aug. 19)). The government filed *Garcia v. United States*, Case No. 19- 14374 (11th Cir. Jan. 8, 2021) (Civ. DE 25)—an opinion which was subsequently withdrawn. (Civ. DE 27).

Neither party submitted any authority subsequent to *Garcia*. Nor did the district court request additional briefing. Though the § 2255

motion had been referred to the magistrate for report and recommendation (Civ. DE 2; Civ. DE 24, Civ. De 28), no report and recommendation was issued.

Instead, on February 28, 2022, the district court entered an Order denying Mr. Maxime's § 2255 motion. (Civ. DE 29). In its Order, the district court first found that Mr. Maxime's argument was procedurally defaulted because he could not establish "cause for failing to raise the claim," because the "tools existed" for Mr. Maxime to have challenged § 924(c)(3)(B) as unconstitutionally vague on direct appeal. *Id*. at 7 (citing *Granda v. United States*, 990 F.3d 1272, 1287-88 (11th Cir. 2021)). The district court also found that Mr. Maxime could not avoid default based on "actual innocence," since "actual" innocence is not "legal innocence," and Mr. Maxime had:

> fail[ed] to present new facts that rebut the overwhelming evidence that [Maxime] possessed a firearm, acted in concert with his co-defendant to rob the victim, and that the co-defendant shot and killed the victim during the course of the robbery.

Id. (citing *Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001); and *Parker v. United States*, 993 F.3d 1257, 1263 (11th Cir. 2021)).

The district court further reasoned that "even if [Mr. Maxime's] argument was not procedurally defaulted, it fails on the merits," because his invalid Hobbs Act conspiracy § 924(c) predicate was "inextricably intertwined," with his still-valid Hobbs Act robbery § 924(c) predicate. *Id.* at 8 (citing *Granda*, 990 F.3d at 1292-90; *Parker*, 993 F.3d at 1263; and *Foster v. United States*, 996 F.3d 1100, 1107 (11th Cir. 2021)). According to the district court, it was "'inconceivable that the jury could have found that [Mr. Maxime] conspired to, and did, use and carry a firearm in furtherance of his conspiracy to rob [the armored truck] (the invalid predicate) without also finding at the same time that he did so' during the robbery." *Id.* at 9 (citing *Parker*, 993 F.3d at 1263). Therefore, Mr. Maxime was "preclude[d] . . . from showing a substantial likelihood that the jury relied solely on the conspiracy charge (Count 1) to predicate its conviction on Count 3." *Id.* (citing *Granda*, 990 F.3d at 1291). Thus, "any potential error would be harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)." *Id.* at 11 (citing *Granda*, 990 F.3d at 1988-89).

The district court rejected Mr. Maxime's argument that the particular facts, arguments, instructions, and verdict in his case supported the conclusion that the jury relied solely on the conspiracy

predicate, because, "[w]hile it is true that Carter was the shooter, the evidence at trial also established that [Maxime] was with Carter at the time of the robbery and that he carried his own firearm." *Id*. at 10 (citing *Maxime*, 484 F. App'x at 441-42). "Furthermore, precedent in this Circuit makes clear that when the predicate offenses are inextricably intertwined, the Movant cannot show that the jury relied solely [on] one of the predicates to the exclusive of the other." *Id*. at 10-11 (citing *Granda*, 990 F.3d at 1289-90). Moreover, the district court found that the "unanimity instruction" was "insufficient to suggest the jury relied on one predicate due to the inextricability of the predicate offenses." *Id*. at 11.

The district court also denied a certificate of appealability. *Id*. at 12.

Mr. Maxime timely appealed. (DE 31).

LEGAL STANDARD

A COA must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant 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) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

When the district court denies a claim on procedural grounds, a COA should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

As the Supreme Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in

which the petitioner has lost on the merits, the Supreme Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, 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 petitioner will not prevail." *Id.* at 338.

Under this "debatable among reasonable jurists" standard, a question of first impression warrants issuance of a COA. *See United States v. Espinoza-Saenz*, 235 F.3d 501, 502 (10th Cir. 2000). Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

As explained below, Mr. Maxime has satisfied this standard, and a COA should issue on the two questions identified in this motion.

I. REASONABLE JURISTS COULD DEBATE WHETHER MAXIME IS ENTITLED TO RELIEF ON THE MERITS.

Mr. Maxime was found guilty of his co-conspirator's undisputed §§ 924(c) and (j) violation, by a jury that was instructed to unanimously choose *one* of the *two* potential §§ 924(c) and (j) predicates, after Mr. Maxime had conceded guilt as to the Hobbs Act conspiracy predicate—which was not co-extensive with the Hobbs Act robbery predicate—and after the government had repeatedly argued that, consistent with the jury instructions, the jury could rely *solely* on Mr. Maxime's conceded guilt as to the conspiracy to convict Mr. Maxime for his co-conspirator's uncontested § 924(c) & (j) violation.

Even though these facts clearly distinguish Mr. Maxime's case from *Granda*—and any other "stash house" robbery case—the district court relied heavily on *Granda*, and its progeny, to conclude that Mr. Maxime was ineligible for §2255 relief on the merits. (Civ. DE 29:8-11). In so doing, the district court found that Mr. Maxime's §§ 924(c) & (j) predicates: conspiracy to commit Hobbs Act robbery, in count 1, and substantive Hobbs Act robbery, in count 2, were—like the five § 924(o) predicates in *Granda*—"inextricably intertwined." *Id.* at 8-9. And,

because the valid and invalid[4] §§ 924(c) & (j) predicates were so "inextricably intertwined," the district court found that any *Davis/Stromberg* error as to Mr. Maxime's conviction in count 3, for violating §§ 924(c) & (j), had to be "harmless"—just like the error in *Granda*. *Id*. at 11 (citing *Granda*, 990 F.3d at 1288-89, and *Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

However, given how different Mr. Maxime's case is from *Granda*, reasonable jurists could debate the correctness of the district court's reliance on *Granda* to conclude that any *Davis/Stromberg* error in Mr. Maxime's case must be harmless. Mr. Maxime's unique facts arguably establish *at least* "virtual equipoise as to the harmlessness" of the inclusion of the invalid conspiracy predicate. *See Granda*. 990 F.3d at 12993 (citing *O'Neal v. McAninch*, 513 U.S. 423, 435-36) (1995)). More importantly, for the purposes of a certificate of appealability, reasonable jurist could debate whether the invalid conspiracy predicate was so "inextricably intertwined" with the robbery predicate such that "there can be no grave doubt about whether the inclusion of the invalid

[4]*Brown v. United States*, 942 F.3d 1069, 1075–76 (11th Cir. 2019) (holding that conspiracy to commit a Hobbs Act robbery is not a § 924(c)(3) "crime of violence" after *Davis*).

predicate had a substantial influence in determining the jury's verdict." *See id.* Thus, a COA should be granted regarding whether Mr. Maxime is entitled to relief on the merits.

A. Reasonable jurists could debate whether Mr. Maxime's §§ 924(c) & (j) predicates were "inextricably intertwined," thereby making any *Davis* error "harmless" under *Granda*'s standards.

According to the district court, it was "'inconceivable that the jury could have found that [Maxime] . . . use[d] and carr[ied] a firearm in furtherance of his conspiracy to rob [the armored truck] (the invalid predicate) without also finding at the same time that he did so during the robbery." *Id.* at 9 (citing *Parker v. United States*, 993 F.3d 1257, 1263 (11th Cir. 2021)). Because of the "tightly bound factual relationship" between the predicates, the district court found that Mr. Maxime could not establish "a substantial likelihood that the jury relied solely on the conspiracy charge (Count 1) to predicate its conviction on Count 3." *Id.* at 9 (quoting *Granda*, 990 F.3d at 1291).

Yet, *Granda* held that a "searching" review of the trial record is required to determine whether the kind of error alleged by Mr. Maxime is "harmless" or, if, instead, there is "substantial likelihood that the jury relied only" on an invalid predicate to convict him of violating §§ 924(c)

& (j). *See Granda*, 990 F.3d at 1294-95. And, a "searching" review of Mr. Maxime's trial record reveals that his jury never found Mr. Maxime guilty of *personally* using and carrying a firearm during *either* the conspiracy *or* the robbery. Relatedly, because of the unique facts of this case, it is *not* "inconceivable" that the jury could have found Mr. Maxime guilty of violating §§ 924(c) & (j), in furtherance of the conspiracy to rob an armored truck, without also finding Mr. Maxime guilty of violating §§ 924(c) & (j), in furtherance of the robbery itself. In fact, in light of the following three aspects of Mr. Maxime's case, there is a "substantial likelihood that the jury relied only" on the Hobbs Act conspiracy predicate, in convicting Mr. Maxime of the §§ 924(c) & (j) violation in count 3, making the *Davis/Stromberg* error in his case *not* harmless.

First, recall that Mr. Maxime was charged as a co-conspirator with Mr. Carter—in a conspiracy to commit a robbery that was *not* co-extensive with the robbery itself (Cr. DE 122; Trial Tr. Vol. II: 244-45; 249-53; 363-66)—and that Mr. Carter's guilt *as the shooter* of the victim was an established and undisputed fact by the time Mr. Maxime went to trial. (Trial Tr. Vol. II: 242, 246, 248-49; Trial Tr. Vol. V: 947, 970; Cr. DE 254). Then consider that, at trial, Mr. Maxime—through counsel—

conceded his guilt as to the Hobbs Act conspiracy in count 1. (Trial Tr. Vol. II: 249). This concession significantly strengthened the government's already compelling argument that—consistent with the court's instructions—the jury could convict Mr. Maxime of count 3 premised on his culpability *as an admitted co-conspirator* for *Mr. Carter's uncontested* § 924(c) & (j) violation. (Trial Tr. Vol. V: 947-48, 960, 1002 (arguing that, "just by participating in Count I, the defendant is guilty of Count III"); Cr. DE 267). *Nothing* about the verdict undermines the possibility (indeed, the likelihood) that the jury convicted Mr. Maxime of count 3 (and, for that matter, count 2) on the basis of the government's "co-conspirator liability" theory.

Second, the jury was presented with evidence that Mr. Maxime possessed *a separate firearm* than the firearm that his co-defendant used to shoot the victim, during the robbery. (Trial Tr. Vo. V: 945, 949-50; Civ. DE 18: 9-10). However, the jury's guilty §§ 924(c) **and (j)** verdict shows that **this evidence *did not form* the basis of the jury's guilty verdict in count 3**. This is so because the jury was required to specially determine whether:

> the defendant, during the course of this [§ 924(c)] violation, violated Section 924(j) by causing the death of a person

> through the use of the firearm and if the killing was murder as defined in Title 18, United States Code, Section 1111. . . .

(Trial Tr. Vol. V: 1023; Cr. DE 267) (emphasis added). Because the jury answered this question in the affirmative, *see* Cr. DE 271, and because it was undisputed that Mr. Carter killed the victim with Mr. Carter's own, separate firearm, Mr. Maxime's § 924(c) & (j) conviction *must* have been premised on Mr. Maxime's culpability—either as a co-conspirator or an aider and abetter—for *Mr. Carter's* §§ 924(c) & (j) violation. *Cf. Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (explaining that courts can use jury instructions to determine the crime of conviction). Mr. Maxime was thus *not convicted* of personally using and carrying, or possessing, a during or in furtherance of *either* the conspiracy, *or* the robbery. *See id.*

Finally, the jury was instructed that it had to unanimously agree on which of the two predicates—the Hobbs Act conspiracy in count 1, *or* the Hobbs Act robbery in count 2—it relied on to convict Mr. Maxime of the §§ 924(c) & (j) violation in count 3. (Trial Tr. Vol. V: 1021-22; Cr. DE 267). In closing arguments, the government confirmed that the jury was to decide whether Mr. Maxime "carried a firearm in relation to *one of the first two crimes*"—meaning *either* the conspiracy *or* the robbery. (Trial Tr. Vol. V: 946) (emphasis added). The verdict does not reflect which

predicate the jury chose. (Cr. DE 271). Nonetheless, the court *must* assume that the jury picked *one* predicate—not two—in convicting Mr. Maxime of violating §§ 924(c) & (j). *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (courts assume jurors follow their instructions).[5] Moreover, in sharp contrast to the "stash house" robbery cases at issue in *Granda*, *Parker*, and *Foster*, Mr. Maxime's jury had only *one* valid and *one* invalid potential § 924(c) predicate to consider—not *two* valid and one invalid, or *four* valid and one invalid, predicate. *Foster*, 996 F.3d at 1103-04 (two valid); *Parker*, 993 F.3d at 1260 (two valid); *Granda*, 990 F.3d at 1280 (four valid). Based on numbers alone, there is a greater likelihood in Mr. Maxime's case—as opposed to in *Granda*, *Foster*, or *Parker*—that his jury *actually* relied on an invalid §§ 924(c) & (j).

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[5] The district court asserted that the "unanimity instruction" in Mr. Maxime's case does not support relief because the Court "tacit[ly] endors[ed]" these instructions in *Granda*, *Parker*, and *Foster*. *See* Civ. DE 29:11 & n.2. Yet, the jury in *Granda* was instructed that it could convict Mr. Granda of violating § 924(o) if it found that Mr. Granda conspired to possess a firearm in furtherance of a crime of violence—including Hobbs Act conspiracy—or a drug trafficking offense, "***or both.***" *See* 990 F.3d at 1285 (emphasis added). And the jurors in *Parker* and *Foster* were not instructed to unanimously agree on the § 924(c) predicate. *Parker*, 993 F.3d at 1264; *Foster v. United States*, 996 F.3d 1100, 1109 (11th Cir. 2021). Thus, the instructions in Mr. Maxime's case further differentiate his record from the records in *Granda*, *Parker*, and *Foster*.

In summary, the government repeatedly argued—and the jury instructions allowed—for the jury to convict Mr. Maxime for *Mr. Carter's* §§ 924(c) & (j) violation, premised on "co-conspirator" liability. *Because* Mr. Maxime's guilt as to the conspiracy in count 1, *and* Mr. Carter's guilt as to count 3, were both uncontested, this argument was compelling; the jury's count 3 verdict is clearly premised on Mr. Maxime's culpability, either as a co-conspirator or as an aider and abetter, for *Mr. Carter's* §§ 924(c) & (j) offense—*not* on Mr. Maxime's purported possession of a separate firearm during the robbery; and the Court must presume that the jury followed its instructions and chose *either* the conspiracy *or* the robbery predicate in convicting Mr. Maxime of violating §§ 924(c) & (j) in count 3—*not both*. Moreover, the conspiracy and the robbery predicates were not co-extensive; the conspiracy preceded the robbery by several weeks. (Trial Tr. Vol. II: 244-45; 249-53; 363-66; Cr. DE 122).

These unique factors, considered together, not only distinguish Mr. Maxime's case from *Granda* and its progeny, but more importantly, they establish a "substantial likelihood that the jury relied only" on Mr. Maxime's conceded involvement in the underlying Hobbs Act conspiracy, when it convicted Mr. Maxime violating §§ 924(c) & (j).

While there were other paths to §§ 924(c) & (j) guilt available to Mr. Maxime's jury, these alternate theories of guilt were more complex—and entirely unnecessary. Further, a "substantial likelihood" is still well below certainty. Given the ease with which the jury could rely on Mr. Maxime's conceded guilt as to the conspiracy to convict Mr. Maxime of Mr. Carter's uncontested §§ 924(c) & (j) violation, reasonable jurists could debate whether there is a "substantial likelihood that the jury relied only" on the conspiracy offense in convicting Mr. Maxime of § 924(c) & (j). Given the unique facts of this case—and the consecutive life sentence at stake—a COA should therefore be granted.

B. Reasonable jurists could debate whether the harmless error standard adopted and applied in *Granda* is the right standard, and whether the *Stromberg* error in Mr. Maxime's case meets the correct harmless error standard.

Based upon *Stromberg* and its progeny discussed below, reasonable jurists would certainly debate *Granda*'s conclusion that *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (holding that a *Stromberg* error is not "structural"), somehow changed the standard for evaluating *Stromberg* errors on collateral review, and permitted the court—as *Granda* found—to "look at the [entire] record to determine whether [an] invalid predicate actually prejudiced the petitioner." 990 F.3d at 1294.

As argued before the district court, *Stromberg* and its progeny—and application of the categorical approach—mandated that Mr. Maxime's §2255 motion be granted. At trial, the district court instructed the jury that it could find Mr. Maxime guilty of the §§ 924(c) & (j) offense in count 3, based on one of two predicates, the first being a conspiracy to commit Hobbs Act robbery. Importantly, the jury returned only a general verdict; it was not asked to, and did not make, a special finding specifying what offense it concluded was the basis of the § 924(c) conviction.

Notably, district courts have granted § 2255 relief to other defendants in this exact situation by following the narrower harmless error standard of *Parker* under the prior panel precedent rule, as well as *Zant v. Stevens*, 462 U.S. 862, 881-82 (1983)—which remains still-controlling Supreme Court authority. Consistent with *Parker* and *Stevens*, district courts have rejected the government's request for a full record review to evaluate harmlessness of an undisputed *Stromberg* error. *See Wainwright*, No. 19-62364-Civ-Cohn, slip op. at 27-31; *Taylor v. United States*, No. 20-22618-Civ-Huck, slip op. at 3-7 (S.D. Fla. Aug. 19, 2020); *Adside v. United States*, No. 19-24475-Civ-Huck, slip op. at 3-7 (S.D. Fla. Sept. 25, 2020); *Wright v. United States*, No. 19-24060-Civ-

Huck, slip op. at 3-6 (S.D. Fla. Oct. 8, 2020). These district court rulings demonstrate that reasonable jurists can debate – and indeed have debated – the correctness of the approach resulting in the ultimate decision of the district court below.

And indeed, even *if* (contrary to the court's own instructions dictating "a" singular predicate) the verdict in count 3 had in fact been based on *both* of the charged predicates, because the jury believed the predicates were intertwined, under settled Supreme Court precedent, the intertwining of predicates does not made the jury's error harmless.

In *Zant v. Stephens*, the Supreme Court clarified that there were actually "two rules" that have derived from *Stromberg*. *Stephens*, 462 U.S. at 881. The first is that "a general verdict must be set aside if the jury was instructed that it could rely upon any one of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively upon the insufficient ground." *Id*. But there is also a second rule encompassed by *Stromberg*. It governs whenever a general verdict on a single count of an indictment or information "rested on *both* a constitutional and an unconstitutional ground." *Stephens*, 462 U.S. at 882 (emphasis in original).

In this second situation – exemplified by cases like *Thomas v. Collins*, 323 U.S. 516 (1945) and *Street v. New York*, 394 U.S. 576 (1969) – the Court noted, "there is no uncertainty about the multiple grounds on which the general verdict rests." In fact, the penalty was necessarily "imposed on account of *both*" alleged acts. *Id.* But in this situation as well, the Court confirmed in *Stephens*, the same rule applies "[i]f, under the instructions to the jury, one way of committing the offense charged is to perform an act protected by the Constitution." *Stephens*, 462 U.S. at 883. In such cases, a general verdict of guilt must "be set aside" even if the constitutional ground, "considered separately, would support the verdict." *Id.*

On that point, the *Stephens* Court noted with significance that in *Street* it had stated:

> We take the rationale of *Thomas* to be 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 trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together*. *See* 323 U.S., at 528-529 [].

Stephens, 462 U.S. at 883 (emphasis added).

Thus, contrary to the suggestion in *Granda*—applied by the district court below—the fact that predicates may be "inextricably intertwined" does *not* compel the conclusion that a *Stromberg* error was harmless. *See* Civ. De 29:10-11. Rather, the Supreme Court was clear in *Stephens* that a judgment cannot be affirmed unless *all* bases for that judgment are constitutionally valid. Indisputably, that was *not* the case here.

On this record, reasonable jurists could most definitely debate whether *Stromberg* and its progeny—including *Stephens* (never overruled by the Supreme Court, and never even considered in either *Hedgpeth* or *Granda*)—as well as faithful application of the categorical approach, mandate that Mr. Maxime's §§ 924(c) & (j) conviction be vacated and set aside, and a COA should issue.

Finally, assuming for the sake of argument that, as the Court held in *Granda*, the *Brecht* harmless error standard governs a *Stromberg* instructional error, the Supreme Court clarified the proper application of the *Brecht* standard in *McAninch*, 513 U.S. at 435. Specifically, in *O'Neal*, the Court held that if "the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error," then "the judge should treat the error, not as if it were harmless, but as

if it affected the verdict (*i.e.,* as if it had a 'substantial and injurious effect or influence in determining the jury's verdict.'"). Reasonable jurists could most definitely find that instructing the jury that it could predicate a §§ 924(c) & (j) conviction on either of two offenses, where one such offense was an unconstitutional, invalid predicate, and the government explicitly and repeatedly asked the jury to rely on solely on that invalid predicate, to which the defendant had conceded guilt, would meet the "equipoise" harmlessness standard of *O'Neal*.

For all these reasons, reasonable jurists could debate whether Mr. Maxime is entitled to § 2255 relief on the merits of his claim. A COA is therefore warranted on this issue as well.

II. REASONABLE JURISTS COULD DEBATE WHETHER PROCEDURAL DEFAULT BARS RELIEF.

The district court did not address Mr. Maxime's argument that his claim was jurisdictional, and therefore not subject to procedural default; nor did the district court address Mr. Maxime's arguments that he could establish prejudice sufficient to overcome any default. (Civ. DE 29). Instead, the district court—again relying mostly on *Granda*—held that Mr. Maxime could not overcome procedural default because he could establish neither cause nor actual innocence. (Civ. DE 29:6-8). However,

as explained below, reasonable jurists could debate the correctness of the court's procedural default ruling, for multiple reasons.

A. Reasonable jurists can debate whether the error is jurisdictional.

The movant in *Granda* did not argue, and this Court in *Granda* did not address, whether the error was jurisdictional and therefore could not be procedurally defaulted. *See Granda*, *passim*. Mr. Maxime asserted below (Civ. DE 21:17)—and maintains—that his claim is not subject to default because the error alleged is jurisdictional.

A defendant "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). Although district courts have statutory power to adjudicate prosecutions of federal offenses, 18 U.S.C. § 3231, "when an indictment affirmatively alleges conduct that is not a federal offense, it does 'not invoke the district court's jurisdiction to enter judgment or accept a guilty plea,'" *Bane*, 948 F.3d at 1295 (quoting *United States v. Brown*, 752 F.3d 1344, 1352–53 (11th Cir. 2014); and citing *United States v. Peter*, 310 F.3d 709, 713, 715 (11th Cir. 2002)). For example, in *Peter*, this Court

held that the district court committed a jurisdictional error when it accepted a guilty plea to mail fraud when the indictment contained allegations of conduct that was "outside the reach of the mail fraud statute." 310 F.3d at 715. For the same reason, the Court held in *St. Hubert*, a defendant's challenge to a § 924(c) conviction on grounds that the purported "crime of violence" is not – as a matter of law – a "crime of violence," is a jurisdictional claim that cannot be waived. 909 F.3d at 340-44.

A number of district courts have followed *Bane* and its progeny to conclude that a *Davis* challenge to a § 924(c) or (o) conviction supported by a predicate offense that no longer qualifies as a "crime of violence" is jurisdictional in nature and therefore cannot be procedurally defaulted. *See Wainwright*, No. 19-62364-civ-Cohn, slip op. at 28-29; *Taylor v. United States*, No. 20-22628-Civ-Huck, slip op. at 7-8 (S.D. Fla. Aug. 19, 2020); *Adside v. United States*, No. 19-24475-Civ-Huck, slip op. at 8 (S.D. Fla. Sept. 25, 2020); *Wright*, No. 19-24060-civ-Huck, slip op. at 7. That is precisely Mr. Maxime's challenge here. He alleges that after *Davis*, a "crime of violence" supporting his §§ 924(c) & (j) conviction is not, as a

matter of law, a "crime of violence," and therefore the error he alleges is jurisdictional. *See St. Hubert*, 909 F.3d at 340.

As a result, reasonable jurists could debate the correctness of the district court's reasoning in concluding that procedural default barred its consideration of Mr. Maxime's *Davis* claim.

B. Reasonable jurists can debate whether "cause and prejudice" or "actual innocence" excuse any default.

Procedural default may also be excused by a showing of "cause and prejudice," *Massaro v. United States*, 538 U.S. 500, 504 (2003), or "actual innocence," *Bousley v. United States*, 523 U.S. 614, 622 (1998). Although the district court found that Mr. Maxime could not show "cause" or "actual innocence," reasonable jurists can debate this conclusion. Plus, reasonable jurist can debate whether Mr. Maxime can establish prejudice—since both "cause *and* prejudice," *or* "actual innocence" are required. Mr. Maxime therefore respectfully requests that the Court issue a COA on those issues.

Cause. In *Reed v. Ross*, 468 U.S. 1, 15 (1984), the Supreme Court held that default does not preclude a petitioner from raising a new claim on collateral review when it overturns "a longstanding and wide-spread practice to which this Court has not spoken, but which a near-unanimous

body of lower-court authority has expressly approved," and when "a decision of this Court . . . explicitly overrule[s] one of [its] precedents." *Id.* at 17 (internal quotation marks omitted). The Third, Seventh, Ninth, and Tenth Circuits have held that *Reed* excuses procedural default when near-unanimous circuit precedent foreclosed a claim, when the Supreme Court overrules its own precedent, or both. *See, e.g., United States v. Doe*, 810 F.3d 132, 153 (3d Cir. 2015); *Cross v. United States*, 892 F.3d 288, 295-96 (7th Cir. 2018); *English v. United States*, 42 F.3d 473, 479 (9th Cir. 1994); *United States v. Snyder*, 871 F.3d 1122, 1127 (10th Cir. 2017). But three other courts of appeal, including this Court in *Granda*, have held to the contrary. *See Granda*, 990 F.3d at 1286 (following *McCoy v. United States*, 266 F.3d 1245, 1258-59 (11th Cir. 2001)); *Gatewood v. United States*, 979 F.3d 291 (6th Cir. 2020); *United States v. Moss*, 252 F.3d 993, 1002-03 (8th Cir. 2001).

This Court and others in the minority have 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 1002-03; *Gatewood*, 979 F.3d at 395-96. It is true that *Bousley* stated that a petitioner cannot show cause

"simply" because a particular legal claim was "unacceptable to [a] particular court at [a] particular time." *Bousley*, 523 U.S. at 613 (internal quotation marks omitted). But *Bousley* did *not* say it was overruling *Reed*. *See id.* at 622 (citing *Reed*). And, generally, the Supreme Court does not reach holdings *sub silentio*. *See Agostini v. Felton*, 521 U.S. 203, 207 (1997) (explaining that the Supreme Court retains the exclusive "prerogative of overruling its own decisions"). Finally, critically, *Bousley* is not inconsistent with *Reed*. *Bousley* addressed the completely different situation in which a petitioner failed to raise a claim on direct review that was—at the time of his direct appeal—the subject of a circuit split. *See Bailey v. United States*, 516 U.S. 137, 142 (1995) (noting conflict in circuits on claim at issue in *Bousley*). In that situation, the Court held that a petitioner could not show cause to overcome a default. *See Bousley*, 523 U.S. at 623. That holding simply 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. Reasonable jurists could therefore debate whether this Court erred in *Granda* by concluding that *Bousley* somehow overruled *Reed* by implication.

In addition, *Reed* states that there is cause to excuse procedural default when the Supreme Court overturns its own precedent, indicating "a clear break with the past." 468 U.S. at 17 (internal quotation marks omitted). The Seventh and Tenth Circuits hold that under *Reed*, the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), was a clear break from the past, providing cause to excuse procedural default. *See Cross*, 892 F.3d at 296 (7th Cir.); *Snyder*, 871 F.3d 1127 (10th Cir.). *Granda*, however, disagreed, finding cause *only* in cases where Supreme Court precedent expressly foreclosed a petitioner from raising a residual clause challenge to § 924(c)(3)(B). *See Granda*, 990 F.3d at 1286-87.

Mr. Maxime acknowledges that this Court is bound by the decisions in *Granda* and *McCoy* regarding the showing to demonstrate "cause" for a procedural default, notwithstanding the decisions of other circuit courts to the contrary, unless and until such decisions are abrogated. However, this split in the circuits shows that reasonable jurists *do* differ on this issue.

Prejudice. Having determined that Mr. Maxime could not establish "cause," the district court did not reach whether Mr. Maxime

had established "prejudice." Nonetheless, reasonable jurists could debate whether Mr. Maxime established "prejudice."

Importantly, *Granda* does not foreclose a finding of "prejudice" in Mr. Maxime's case. The defendant in *Granda* had only challenged a § 924(o) conviction and sentence that was concurrent and coterminous with the sentences imposed by the district court on his other counts. *Granda*, 990 F.3d at 1282. In contrast, Mr. Maxime challenges his §§ 924(c) & (j) conviction and the *consecutive sentence of life imprisonment* resulting from that conviction.

There is "no doubt that an extended prison term . . . constitutes prejudice" that excuses a procedural default. *Cross v. United States*, 892 F.3d 288, 295 (7th Cir. 2018) (citing *Glover v. United State*s, 531 U.S. 198, 203 (2001)). *Cf. In re Jones*, 830 F.3d 1295, 1303 (11th Cir. 2016) (Rosenbaum, and Jill Pryor, JJ., concurring) (finding manifest injustice where "an error means that an inmate may potentially sit in prison for years beyond his constitutionally authorized sentence"). District courts in this circuit have agreed that additional prison time constitutes prejudice sufficient to excuse a procedural default where a § 2255 movant challenges a § 924(c) conviction and sentence in light of *Davis*. *See*

Wright, No. 19-24060-civ-Huck, slip op. at 7; *Watson v. United States*, No. 04-CR-00591-LMM-JMF, slip op. at 5-6 (N.D. Ga. Mar. 9, 2020) (in a § 2255 proceeding arising from *Davis*, finding prejudice where movant "received a prison sentence longer than he would have received" absent the alleged error).

Due to his unlawful §§ 924(c) & (j) conviction, Mr. Maxime received an additional, consecutive sentence of life imprisonment. (Cr. DE 295). Moreover, Mr. Maxime was sentenced to the statutory maximum sentence of 20 years—consecutive to each other, and to his §§ 924(c) & (j) sentence—for his Hobbs Act offenses. *Id*. These key facts easily distinguish his case from *Granda*, since Granda did not receive a single additional day of imprisonment as a result of his concurrent § 924(o) conviction. Therefore, reasonable jurists could conclude that *Granda* does not control here. And, they could debate whether Mr. Maxime's consecutive sentence of life imprisonment, imposed as a result of an invalid §§ 924(c) & (j) conviction, and in excess of the maximum sentence authorized by his other counts of conviction, demonstrates prejudice sufficient to excuse any procedural default.

Second, as argued above, the underlying facts of Mr. Maxime's case are also distinguishable from the facts at issue in *Granda*. Mr. Maxime's §§ 924(c) & (j) predicates were *not* "inextricably intertwined," and, after *Davis*, only *one* of his *two* potential predicates remained valid—whereas, in contrast, the petitioner in *Granda* had *five* potential predicates, only *one* of which was invalidated by *Davis*. *See* 990 F.3d at 1281.

The holding of *Granda* cannot reach any further than the facts and circumstances before it. *See United States v. Birge*, 830 F.3d 1229, 1232 (11th Cir. 2016) (explaining that Court has repeatedly explained that "as decision can hold nothing beyond the facts of that case"). As such, it is an open issue in this Circuit at this time whether, on a record where *half* of the potential predicates suggested to the jury were invalid, a defendant can show prejudice to excuse a default of a *Stromberg* instructional error claim. And where an issue is one of first impression, a COA should be granted. *See Espinoza-Saenz*, 235 F.3d at 502.

Actual Innocence. The district court noted that this Circuit has held that "legal" innocence is not the same as "actual" innocence, and that only the latter—not the former—is sufficient to overcome procedural default. (Civ. DE 29:7) (citing *Johnson v. Alabama*, 256 F.3d 1156, 1171

(11th Cir. 2001)). The district court found that Mr. Maxime could not establish "actual innocence," under this standard, because:

> [Maxime] fail[ed] to present new facts that rebut the overwhelming evidence that movant possessed a firearm, acted in concert with his co-defendant to rob the victim, and that the co-defendant shot and killed the victim during the course of the robbery.

(Civ. DE 29:7) (citing *United States v. Maxime*, 484 F. App'x 439, 441-42 (11th Cir. 2012).

There are at least two aspects of the district court's conclusion that reasonable jurists could debate.

First, as argued above, since it was the co-defendant's firearm that indisputably "caused the death" of the victim, by convicting Mr. Maxime of the *same* § 924(c) "violation" that "caused the death" of the victim, the jury's special verdict makes clear that Mr. Maxime's §§ 924(c) & (j) conviction rests solely on *his co-defendant's* §§ 924(c) & (j) firearm offense. (Cr. DE 122; Cr. DE 271). No matter how "inescapable" a court may find the evidence that Mr. Maxime also violated § 924(c) through his own possession of a separate firearm, judicial fact-finding cannot supplant the jury's special verdict. *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—

would violate the [Sixth Amendment] jury-trial guarantee."). Therefore, Mr. Maxime's §§ 924(c) & (j) conviction cannot rest—nor can it be upheld—on the basis of Mr. Maxime's apparent actual possession of a separate firearm that did not "cause[] the [victim's] death." *See id*. Since the proper inquiry is whether Mr. Maxime established a claim of actual innocence as to the §§ 924(c) & (j) offense *of which he was convicted*, reasonable jurists could debate the propriety of the district court's finding that Mr. Maxime could not establish "actual innocence" in part because the district court found that there was "overwhelming evidence" that Mr. Maxime committed *a separate § 924(c) offense*—of which he was *not* convicted.

Secondly, not all courts agree that "legal" innocence is insufficient to overcome procedural default. For example, the Fifth Circuit has held that a claim of actual innocence based on a new statutory interpretation like that in *Davis* is viable. *See United States v. Reece*, 938 F.3d 630, 634 n.3 (5th Cir. 2019), as revised (Sept. 30, 2019) ("If [the petitioner]'s convictions were based on the definition of [crime of violence] articulated in § 924(c)(3)(B), then he would be actually innocent of those charges under *Davis*.").

The Supreme Court's decision in *Bousley* also suggests that "legal innocence" counts as "actual innocence," for purposes of overcoming default. In *Bousley*, the defendant pled guilty to knowingly and intentionally using firearms "during and in relation to any . . . drug trafficking crime" in violation of § 924(c). *Bousley*, 523 U.S. at 616; § 924(c)(1)(A) (1994). Bousley admitted to selling methamphetamine[6] and to storing two pistols in close proximity to the drugs.[7] But later, in *Bailey*, the Supreme Court interpreted the phrase "knowingly and intentionally used . . . firearms" to mean "active employment of a firearm," not "merely . . . storing a weapon near drugs." *Id.* at 148-49 (quotation marks omitted). Thus, after *Bailey*, Bousley, who merely placed a firearm near drugs, was not actually guilty of the crime established by § 924(c), but legally innocent.

Bousley held that *Bailey* was retroactive and then proceeded to address whether Bousley's procedural default of the claim was excused because, in light of the narrowing of § 924(c) in *Bailey*, he was actually

[6] Brief for the United States, *Bousley*, 1997 WL 805418, at *5.

[7] Brief for the Petitioner, *Bousley*, 1997 WL 728537, at *5, *9; Brief for the United States, *Bousley*, 1997 WL 805418, at *5.

innocent of a § 924(c) offense. 523 U.S. at 620. The Supreme Court ultimately remanded the case for a determination of whether Bousley was actually innocent. *Id*. at 623. As such, a noted habeas scholar explains, "*Bousley* . . . recognized that legal innocence, if the defendant's conduct did not fall within the scope of the relevant criminal statute, would constitute cause for procedural default." *See* Leah M. Litman, Legal Innocence and Federal Habeas, 104 Va. L. Rev. 417, 469 (2018). Reasonable jurists could therefore debate a claim of "legal innocence"—such as that raised by Mr. Maxime's *Davis*-based challenge to his §§ 924(c) & (j) conviction—can satisfy the "actual innocence" standard.

Based upon the above arguments as to "cause and prejudice," and "actual innocence," Mr. Maxime respectfully requests that the Court grant a COA as to whether the district court erred in concluding that procedural default barred consideration of Mr. Maxime's *Davis* claim.

CONCLUSION

For the foregoing reasons, Emmanuel Maxime respectfully requests that this Court grant a COA regarding both of the above issues, thereby

allowing him to pursue an appeal of the denial of his *Davis*-based challenge to his unconstitutional 18 U.S.C. §§ 924(c) & (j) conviction and consecutive life sentence. *See Barefoot*, 463 U.S. at 893 (observing that "the nature of the penalty is a proper consideration in determining whether to issue a" COA).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this motion complies with 11th Cir. R. 22-2 and contains 10,068 words. This brief also complies with the requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Century Schoolbook font.

/s/ Sara W. Kane

CERTIFICATE OF SERVICE

I certify that on this 5th day of May 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, and it is being served this day via CM/ECF on Lisa Tobin Rubio, Chief, Appellate Division, U.S. Attorneys' Office, 99 N.E. 4th Street, Miami, FL 33132-2111.

/s/ Sara W. Kane

A-3

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number: 19-24827-CIV-MARTINEZ
(09-20470-CR-MARTINEZ)

EMMANUEL MAXIME,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER DENYING 28 U.S.C. § 2255 MOTION TO VACATE

THIS CAUSE is before the Court upon Movant Emmanuel Maxime's ("Movant" or "Maxime") Amended Motion to Vacate pursuant to 28 U.S.C. § 2255 ("Motion"). (ECF No. 15). Movant has received permission from the United States Court of Appeals for the Eleventh Circuit to file a successive § 2255 motion in this Court challenging his conviction and sentence in Case No. 09-20470-CR, (ECF No. 1); *In re: Emmanuel Maxime*, No. 19-14246 (11th Cir. Nov. 20, 2019). Having considered the Motion, the Government's Answer, (ECF No. 18), Movant's Reply, (ECF No. 21), and the record in this case, the Court **DENIES** the Motion.

I. BACKGROUND

A. *Factual Background & Movant's Sentences*

On April 20, 2010, a grand jury filed a superseding indictment against Movant and his co-defendant, Dwight Carter, with conspiracy to commit a Hobbs Act robbery (Count 1), Hobbs Act robbery (Count 2), and possession of a firearm in furtherance of a crime of violence and causing

the death of a person (Count 3). (ECF-Cr No. 122).[1] The Government alleged that Maxime and Carter acted together to rob Carlos Alvarado ("Mr. Alvarado"), an armored vehicle driver employed by Dunbar Security, Inc. ("Dunbar Security"). *United States v. Maxime*, 484 F. App'x 439, 441 (11th Cir. 2012). As Mr. Alvarado finished making his collections at Dadeland Mall in Miami-Dade County, Florida, the two defendants, who were armed with firearms, "rushed up to Alvarado yelling for him to drop his bag and get on the ground." *Id.* at 441–42. When Mr. Alvarado "did not immediately comply," Carter fired at least eight or nine shots, four of which hit Mr. Alvarado. *Id.* at 442. He was pronounced dead at the hospital about an hour later. *Id.*

The case proceeded to trial on August 9, 2010. (ECF-Cr No. 259). During his opening statement, Movant's counsel conceded that Movant was guilty of Count 1—the Hobbs Act conspiracy charge—but argued that Movant was not guilty of the substantive robbery offense or the firearm offense that led to Mr. Alvarado's death. (ECF-Cr No. 329 at 21). On August 13, 2010, a jury found Movant guilty of all three counts as charged in the superseding indictment. (ECF-Cr No. 271). The verdict form did not specify whether the "crime of violence" predicate for Count 3 was based on Count 1, Count 2, or both. (*See id.*). Movant was sentenced to twenty years imprisonment on Count 1, twenty years imprisonment on Count 2, and life imprisonment on Count 3, with all counts to run consecutively to each other. (ECF-Cr No. 295). Movant appealed his conviction and sentences which were affirmed on direct appeal by the Eleventh Circuit. *See Maxime*, 484 F. App'x at 449.

B. *Movant's Motions to Vacate*

Movant filed his first motion to vacate pursuant to § 2255 on January 21, 2014 in Case No. 14-cv-20265. The Court adopted Magistrate Judge Patrick A. White's Report and

[1] Citations to Movant's underlying criminal case, 09-20470-CR, are referred to herein as "ECF-Cr."

Recommendations and denied this motion on the merits. *See Maxime v. United States*, No. 14-20265-CIV (S.D. Fla. Apr. 10, 2015), (ECF No. 22), *cert. denied* 137 S. Ct. 665 (2017). Movant then filed another § 2255 motion on July 5, 2016, in Case No. 16-22876-CIV, arguing that he was entitled to relief based on the Supreme Court's recent decision in *Johnson v. United States*, 576 U.S. 591 (2015), but the Court dismissed this motion as successive as required by § 2255(h). *See Maxime v. United States*, No. 16-22876-CIV-MARTINEZ (S.D. Fla. Sept. 13, 2016), (ECF No. 8). Movant sought application for leave to file a successive § 2255 motion based on *Johnson* in the Eleventh Circuit, and the Eleventh Circuit denied his application. *See In re: Emmanuel Maxime*, No. 17-15400 (11th Cir. Jan. 5, 2018).

Movant again sought application for leave to file a second or successive § 2255 motion from the Eleventh Circuit, this time arguing that the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019) had rendered his conviction on Count 3 unconstitutional. (*See* ECF No. 1 at 3). The Eleventh Circuit agreed that Movant made a *prima facie* showing that § 2255(h)(2) was implicated and granted Movant's application. (*Id.*). This Court appointed the Federal Public Defender to represent Movant, (ECF No. 3), and the instant Motion was filed on April 8, 2020, (ECF No. 15).

Movant's sole claim on the Motion is that, due to the Supreme Court's decision in *Davis*, he is entitled to have his conviction and life sentence on Count 3 vacated. (ECF No. 15 at 27). Movant's argument for relief is multi-faceted. First, Movant argues that conspiracy to commit a Hobbs Act robbery can no longer be considered a "crime of violence" under § 924(c)'s residual clause pursuant to *Davis*. (*Id.* at 12–13). Second, Movant relies on *Stromberg v. California*, 283 U.S. 359 (1931) to argue that Count 3 must be vacated because it "may have rested" on a constitutionally invalid predicate in light of *Davis*. (*Id.* at 14–15). Third, Movant claims that

because the jury returned a general verdict without specifying which predicate it relied on to convict Movant of Count 3, it would require improper "judicial factfinding" in violation of *Alleyne v. United States*, 570 U.S. 99 (2013), to allow Count 3 to stand based on the still-valid predicate of Hobbs Act robbery. (*Id.* at 16–17). Finally, Movant challenges the Eleventh Circuit's precedent holding that Hobbs Act robbery is a crime of violence under § 924(c). (*Id.* at 18–26).

In its Answer, the Government acknowledges that "Hobbs Act conspiracy is no longer a valid predicate crime of violence post-*Davis*." (ECF No. 18 at 5–6). Despite this concession, the Government argues that relief is not warranted under § 2255 for two reasons: (1) Movant's claim is procedurally defaulted since it was not previously raised on direct appeal, and (2) the claim fails on the merits because Movant's § 924(c) conviction could have been predicated on a valid crime of violence (i.e., Hobbs Act robbery) and it is unlikely that the jury's verdict on Count 3 was solely based on his conspiracy conviction. (*Id.* at 20–21).

II. LEGAL STANDARD

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on a final judgment, pursuant to 28 U.S.C. § 2255(b), 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* 28 U.S.C. § 2255(a); *McKay v. United States,* 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). Thus, 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. *United States v. Frady,* 456 U.S. 152, 165 (1982); *Lynn v. United States,* 365 F.3d 1225, 1232–33 (11th Cir. 2004) (per curiam) (citations omitted). 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, 1222 (11th Cir. 2017) (quoting *Rivers v. United States,* 777 F.3d 1306, 1316 (11th Cir. 2015)).

III. DISCUSSION

In *Davis*, the Supreme Court addressed a challenge to 18 U.S.C. § 924(c), a statute which "threatens long prison sentences for anyone who uses a firearm in connection with certain other federal crimes." 139 S. Ct. at 2323. Section 924(c) criminalizes the use or carrying of a firearm "during and in relation to any crime of violence." § 924(c)(1)(A). The statute defines a "crime of violence" as a felony that either "(A) has as 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." § 924(c)(3)(A)–(B). In *Davis*, the Supreme Court found that the statute's "residual clause"—subsection (B)—was unconstitutionally vague. 139 S. Ct. at 2336. *Davis*, however, does not affect offenses that qualify as "crimes of violence" under subsection (A), also called the "elements clause." *E.g., Steiner v. United States*, 940 F.3d 1282, 1285 (11th Cir. 2019).

Shortly after *Davis*, the Eleventh Circuit held that *Davis* announced a new rule of constitutional law that was retroactively applicable, meaning that a *Davis* claim could form the basis of a valid, successive § 2255 motion. *In re Hammoud*, 931 F.3d 1032, 1037–39 (11th Cir. 2019). A few months later, the Eleventh Circuit concluded in *Brown v. United States* that conspiracy to commit a Hobbs Act robbery was not a "crime of violence" and could therefore not

be the sole predicate offense to a conviction under § 924(c). 942 F.3d 1069, 1075–76 (11th Cir. 2019). Movant "bears the burden of proving the likelihood that the jury based its verdict of guilty in Count 3 solely on the Hobbs Act conspiracy, and not also on one of the other valid predicate offenses[.]" *In re Cannon*, 931 F.3d 1236, 1243 (11th Cir. 2019); *accord Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021) (holding that the movant did not meet its burden of showing "a substantial likelihood that the jury relied solely" on the Hobbs Act charge to predicate its conviction of the § 924(c) offense).

Movant contends that he is entitled to relief under *Davis* and *Brown* because it is unclear whether his conviction on Count 3 was solely based on his conspiracy conviction. The Government responds that (1) Movant's argument is procedurally defaulted for failure to raise it on direct appeal; and (2) even if it is not, the argument fails on the merits.

The Court turns first to whether Movant's argument is procedurally defaulted. A postconviction movant's claim is procedurally defaulted when he fails to raise it on direct appeal. *Granda*, 990 F.3d at 1286. To overcome a procedural default arising from a claim that could have been, but was not raised on direct appeal, Movant must demonstrate: (1) cause for failing to raise the claim and resulting prejudice or (2) that a miscarriage of justice excuses the procedural default because Movant is actually innocent. *See McKay*, 657 F.3d at 1996. "[W]here 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." *Howard v. United States*, 374 F.3d 1068, 1072 (11th Cir. 2004) (quoting *Reed v. Ross*, 468 U.S. 1, 16 (1984)) (internal quotation marks omitted). "That an argument might have less than a high likelihood of success has little to do with whether the argument is available or not. An argument is available if there is a reasonable basis in law and fact for it." *Pitts v. Cook*, 923 F.2d 1568, 1572 n.6 (11th Cir. 1991). "[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." *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001) (internal quotation marks and citation omitted). Moreover, the actual innocence exception is exceedingly narrow in scope as it concerns a movant's "actual" innocence, rather than his "legal" innocence. *Johnson v. Alabama,* 256 F.3d 1156, 1171 (11th Cir. 2001).

Here, it is undisputed that Movant did not challenge the constitutionality of his conviction on Count 3 on direct appeal. *See Maxime*, 484 F. App'x at 442–43; (ECF No. 21 at 16–17). Movant cannot demonstrate cause since the "tools existed" for Movant to challenge § 924(c) as unconstitutionally vague. *Granda*, 990 F.3d at 1288. Movant argues the contrary. He contends that *Davis* extended the ruling in *Johnson v. United States*, 135 S. Ct. 2551 and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and that *Johnson* itself was a "clear break from the past" because it expressly overruled the Supreme Court's prior precedents in *James v. United States*, 550 U.S. 192, 210 n.6 (2007) and *Sykes v. United States*, 564 U.S. 1, 15 (2011). (ECF No. 21 at 18). The Eleventh Circuit rejected a similar argument in *Granda*. 990 F.3d at 1288. The Eleventh Circuit noted that *James* did not consider the § 924(c) residual clause at all and that *James* "did not deprive [litigants] of the tools to challenge the § 924(c) residual clause, a clause to which *James* did not even apply." *Granda*, 990 F.3d at 1287. The same applies here, where neither *Johnson* nor *James* considered the § 924(c) residual clause, thereby not depriving the litigants of the tools to challenge that residual clause.

Nor could Movant save his claim under the "actual innocence" doctrine since Movant fails to present new facts that rebut the overwhelming evidence that Movant possessed a firearm, acted in concert with his co-defendant to rob the victim, and that the co-defendant shot and killed the victim during the course of the robbery. *Maxime*, 484 F. App'x at 441–42; *see also Parker*

v. United States, 993 F.3d 1257, 1263 (11th Cir. 2021) ("Parker admits that [his actual innocence] argument, and his ability to overcome the procedural default, rises and falls with the merits of his claim that his [] convictions are predicated on the invalid predicate conviction for conspiracy to commit Hobbs Act robbery."). Therefore, Movant has procedurally defaulted his *Davis* claim for failing to raise it on appeal under binding Eleventh Circuit precedent. *See Granda*, 990 F.3d at 1291–92; *Parker*, 993 F.3d at 1262–63.

But even if Movant's argument was not procedurally defaulted, it fails on the merits. The Eleventh Circuit recently held that §§ 924(c) and (o) convictions are still valid post-*Davis* if the invalid predicate offense—in this case, Hobbs Act conspiracy—was "inextricably intertwined" with other valid predicate offenses. *See Granda*, 990 F.3d at 1292–93, *Parker*, 993 F.3d at 1263; *Foster v. United States*, 996 F.3d 1100, 1107 (11th Cir. 2021), *cert. denied* 142 S. Ct. 500 (2021). To put it differently, a movant cannot prevail on a *Davis* challenge to a §§ 924(c) or (o) conviction if his invalid predicate "rested on the same operative facts and the same set of events" as his other, still-valid predicates. *See Granda*, 990 F.3d at 1289.

In *Granda*, the Eleventh Circuit explained that all of Granda's predicate offenses were "inextricably intertwined" because "each arose from the same plan and attempt to commit armed robbery of a tractor-trailer full of cocaine." *Id.* at 1291. "The tightly bound factual relationship of the predicate offenses preclude[d] Granda from showing a substantial likelihood that the jury relied solely on Count 3 [Hobbs Act conspiracy] to predicate its conviction on Count 6 [§ 924(o)]." *Id.* Likewise, in *Foster*, the Eleventh Circuit found that "Foster's valid drug trafficking predicates [were] inextricably intertwined with the invalid Hobbs Act conspiracy predicate" because "Foster was an active participant in a plan to rob at gunpoint a stash house that he believed held at least 15 kilograms of cocaine." 996 F.3d at 1107. Therefore, "there [was] no real possibility that Foster's

convictions on [the §§ 924(c) and (o) counts] rested solely on the invalid Hobbs Act conspiracy predicate, [and] the inclusion of an invalid predicate offense in the indictment and jury instructions was harmless." *Id.* at 1108.

The material similarities between the facts in *Granda*, *Parker*, and *Foster* and this case compel the same result. Movant's crimes were "inextricably intertwined" because they involved "the same operative facts and the same set of events." *Granda*, 990 F.3d at 1289. Indeed, the evidence adduced at trial shows that Movant was a participant in a plan to rob at gunpoint a Dunbar Security armored vehicle that was transporting cash collected from various retail merchants. Both the Hobbs Act conspiracy and the substantive robbery offense arose out of the same event on December 1, 2008, where Movant and his co-defendant, Carter, robbed Mr. Alvarado while on duty as a security guard employed by Dunbar Security, and where Carter subsequently shot Mr. Alvarado for failing to immediately comply. *Maxime*, 484 F. App'x at 441–42; *see also Calderon v. United States*, 811 F. App'x 511, 516 (11th Cir. 2020) (holding that Hobbs Act conspiracy and Hobbs Act robbery were "inextricably intertwined" because "the offenses arose from the same incident."). Based on these events, the jury found Movant guilty of all three offenses, including the Hobbs Act conspiracy and the substantive robbery offense. Much like in *Parker*, "[i]t is inconceivable that the jury could have found that [Movant] conspired to, and did, use and carry a firearm in furtherance of his conspiracy to rob [the armored truck] (the invalid predicate) without also finding at the same time that he did so" during the robbery. *See* 993 F.3d at 1263. This "tightly bound factual relationship" of the predicate offense and the invalid preclude Movant from showing a substantial likelihood that the jury relied solely on the conspiracy charge (Count I) to predicate its conviction on Count 3. *See Granda*, 990 F.3d at 1291.

In his Reply, Movant argues that the record establishes proof that the jury did not rely on the substantive Hobbs Act robbery in convicting him on Count 3 for three reasons. First, Movant points to a portion of the trial transcript where this Court instructed the jury that: "the defendant is charged with violating the law in Count [3] in two separate ways. The government has to prove only one of those ways, not both, but to find the defendant guilty, you must all agree on which of the two ways the defendant violated the law." (ECF No. 21 at 10; ECF-Cr No. 332 at 93). Movant argues that this instruction means that the jury must have decided on one specific predicate, even though the specific predicate was not enumerated on the verdict form. (ECF No. 21 at 10). Second, Movant points out that trial counsel conceded that Movant was guilty of the conspiracy charge and that the Government took advantage of this concession by arguing that the jury could find that one of the elements of Count 3 was met because of this concession. (*See* ECF No. 21 at 10–11; ECF-Cr No. 332 at 19–20). According to Movant, the jury agreed with the Government's argument and used the conspiracy count as the predicate for Count 3. (ECF No. 21 at 10–11). Finally, Movant argues that the jury was specifically instructed under § 924(j) to find whether he committed a crime of violence with a firearm that resulted in the death of a person. (*Id.* at 11). He suggests that the jury's finding in the affirmative indicates that they relied on the conspiracy charges, instead of the substantive Hobbs Act robbery, as the predicate for Count 3, since it is undisputed that the co-defendant—and not Movant—shot the victim with a firearm during the course of substantive robbery offense. (*Id.* at 12–13).

These arguments are unavailing because the jury found Movant guilty of Count 2 and, as explained above, Counts 1 and 2 are inextricably intertwined. While it is true that Carter was the shooter, the evidence at trial also established that Movant was with Carter at the time of the robbery and that he carried his own firearm. *Maxime*, 484 F. App'x at 441–42. Furthermore, precedent in

this Circuit makes clear that when the predicate offenses are inextricably intertwined, the Movant cannot show that the jury relied solely only one of the predicates applied to the exclusion of the other. *Granda*, 990 F.3d at 1289–90. Under the facts of this case, no reasonable juror could conclude that Movant carried his firearm in relation to the conspiracy but not the substantive robbery offense. *See United States v. Cannon*, 987 F.3d 924, 948 (11th Cir. 2021). The fact that the jury was presented with a "unanimity instruction" regarding the predicates is insufficient to suggest that the jury only relied on one predicate due to the inextricability of the predicate offenses. *Parker*, 993 F.3d at 1264.[2] Movant fails to prove that there is a substantial likelihood that the jury *only* relied on the conspiracy conviction as the proper predicate for Count 3 and so any potential error would be harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Granda*, 990 F.3d at 1288–89.

Accordingly, Movant cannot prevail on the merits of his § 2255 claim.

IV. EVIDENTIARY HEARING

Movant is not entitled to an evidentiary hearing because "the motion and the files and records of the case conclusively show that [Movant] is entitled to no relief." 28 U.S.C. § 2255(b); *see also Schriro v. Landrigan*, 550 U.S. 465, 473–75 (2007) (holding that if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing).

[2] The Court further notes that the jury instructions in this case are nearly identical to the instructions used in *Granda*, *Parker*, and *Foster*, meaning that the Eleventh Circuit's tacit endorsement of these instructions apply in the instant case. *See United States v. Granda*, No. 07-cr-20155 (S.D. Fla. June 1, 2007) (ECF No. 200 at 26–27); *United States v. Subran*, No. 07-cr-60237 (S.D. Fla. May 21, 2008) (ECF No. 202 at 20).

V. CERTIFICATE OF APPEALABILITY

A prisoner seeking to appeal a district court's final order denying his § 2255 motion has no absolute entitlement to appeal, and to do so, must obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009) (citing *Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000)); *Wilkinson v. Dotson*, 544 U.S. 74, 78–83 (2005)). A Court may issue certificate of appealability only if Movant makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Where a district court has rejected Movant's constitutional claims on the merits, Movant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack*, 529 U.S. at 484. Upon consideration of the record and for the reasons explained above, this Court denies a certificate of appealability.

VI. CONCLUSION

For the foregoing reasons, it is **ORDERED and ADJUDGED** that:

1. Movant's Motion to Vacate pursuant to 28 U.S.C. § 2255, (ECF No. 15), is **DENIED**.

2. A certificate of appealability is **DENIED**.

3. This case is **CLOSED**, and all pending motions are **DENIED AS MOOT**. A final judgment in Respondent's favor shall enter via separate order.

DONE AND ORDERED in Chambers at Miami, Florida, this 25 day of February, 2022.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
All counsel of record