No. 22A–_____

IN THE
SUPREME COURT OF THE UNITED STATES

ELADIO PADILLA,

Petitioner-Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

ON APPLICATION FOR A CERTIFICATE OF APPEALABILITY
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPLICATION TO JUSTICE SONIA SOTOMAYOR, CIRCUIT JUSTICE FOR THE SECOND CIRCUIT, FOR A CERTIFICATE OF APPEALABILITY

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ISSUES FOR WHICH A CERTIFICATE OF APPEALABILITY IS SOUGHT

1. The plea agreement states that petitioner was pleading guilty to violating 18 U.S.C. § 924(c)(1) by using a firearm during a conspiracy to commit murder in aid of racketeering, in violation of the Violent Crimes in Aid of Racketeering statute ("VICAR"), 18 U.S.C. § 1959(a)(5), which the Government concedes does not qualify as a constitutionally valid "crime of violence" after *United States v. Davis*, 139 S. Ct. 2319 (2019). Did the District Court err by denying § 2255 relief on the theory that the evidence was "legally sufficient" to show that petitioner used a firearm during a different and more serious purported "crime of violence" not mentioned in the plea agreement—i.e., a substantive VICAR murder, in violation of 18 U.S.C. § 1959(a)(1)?

2. Assuming the District Court could properly treat the predicate for petitioner's § 924(c) conviction as a substantive VICAR murder, does that offense fail to qualify a "crime of violence" after *Davis* and *Borden v. United States*, 141 S. Ct. 1817 (2021), because VICAR murder is indivisible and can be committed (a) recklessly, (b) unintentionally under a "felony murder" theory, and (c) by omission—i.e., without the intentional "use" of "physical force" against the person or property of another?

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APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c)(1) and Rule 22 of the Rules of this Court, Petitioner-Applicant Eladio Padilla respectfully requests a certificate of appealability ("COA") from the Honorable Sonia Sotomayor in her capacity as Circuit Justice for the Second Circuit.

LIST OF PARTIES

Eladio Padilla and the United States were the only parties to the proceeding in the Second Circuit below (No. 21-978-pr). The additional parties (co-defendants) in the original criminal case in the District Court (No. 1:97 Cr. 809 (DC)) were: Wilson Villanueva, James Heard, Alex Bonilla, David Diaz, and Nathan Jones.

RELATED PROCEEDINGS

The following proceedings are directly related to this case, *see* S. Ct. R. 14.1.(b)(iii):

1. *United States v. Padilla*, No. 1:97 Cr. 809 (DC), U.S. District Court for the Southern District of New York. Judgment entered August 30, 2000.
2. *United States v. Padilla*, No. 00-1658, U.S. Court of Appeals for the Second Circuit. Judgment entered July 11, 2001.

3. *Padilla v. United States*, No. 1:02 Cv. 5992 (DC), U.S. District Court for the Southern District of New York. Judgment entered April 24, 2003.

4. *Padilla v. United States*, No. 03-2589, U.S. Court of Appeals for the Second Circuit. Judgment entered July 27, 2004.

5. *Padilla v. United States*, No. 16-1725-pr, U.S. Court of Appeals for the Second Circuit. Judgment entered August 1, 2016.

6. *Padilla v. United States*, No. 16-1871-pr, U.S. Court of Appeals for the Second Circuit. Judgment entered January 28, 2020.

7. *Padilla v. United States*, No. 16 Cv. 3622 (DC), U.S. District Court for the Southern District of New York. Judgment entered March 24, 2021.

8. *Padilla v. United States*, No. 21-978-pr, U.S. Court of Appeals for the Second Circuit. Judgment entered March 1, 2022, and reconsideration denied May 18, 2022.

JURISDICTION

An individual Justice of this Court has jurisdiction to grant a COA under 28 U.S.C. § 2253(c)(1) and Fed. R. App. P. 22(b)(1). The Second

Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253(c)(1). The District Court had jurisdiction under 28 U.S.C. § 2255.

ORDERS AND OPINIONS BELOW

The District Court (Hon. Denny Chin, Circuit Judge, sitting by designation) entered a memorandum decision and order on March 24, 2021, denying Padilla's motion to vacate and correct his sentence under 28 U.S.C. § 2255 and declining to issue a COA. Petitioner's Appendix ("Pet. App.") 6a-19a; *United States v. Padilla*, 2021 WL 1143793 (S.D.N.Y. Mar. 24, 2021). The Second Circuit entered an order on March 1, 2022, denying Padilla's motion for a COA and dismissing his appeal. Pet. App. 1a. The Second Circuit entered an order on May 18, 2022, denying Padilla's motion for panel reconsideration or, alternatively, reconsideration en banc. Pet. App. 2a.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides in relevant part:

> No person shall be … deprived of life, liberty, or property, without due process of law[.]

U.S. Const. amend. V.

Section 924(c)(1), 18 U.S.C.A. (West 1995) (eff. Sept. 13, 1994), provided in relevant part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime … for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

18 U.S.C.A. § 924(c)(1) (West 1995) (eff. Sept. 13, 1994).

Section 924(c)(3), 18 U.S.C.A. (West 1995) (eff. Sept. 13, 1994), provided:

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

18 U.S.C.A. § 924(c)(3) (West 1995) (eff. Sept. 13, 1994).

Section 924(i)(1), 18 U.S.C.A. (West 1995) (eff. Sept. 1, 1994), provided in relevant part:

> **(i)** A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—
>
> **(1)** if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life[.]

18 U.S.C.A. § 924(i)(1) (West 1995) (eff. Sept. 13, 1994).

Section 1959(a), 18 U.S.C.A. (West 1995) (eff. Sept. 13, 1994), provided in relevant part:

> **(a)** Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—
>
> **(1)** for murder, by death or life imprisonment, or a fine under this title, or both […];

[and …]

(5) for attempting or conspiring to commit murder or kidnaping, by imprisonment for not more than ten years or a fine under this title, or both[.]

18 U.S.C.A. § 1959(a) (West 1995) (eff. Sept. 1, 1994).

Section 2253(c), 28 U.S.C., provides:

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

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

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

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

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

28 U.S.C. § 2253(c).

Rule 22(b)(1), Fed. R. App. P., provides in relevant part:

In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c).

Fed. R. App. P. 22(b)(1).

STATEMENT OF THE CASE

Padilla pleads guilty in 2000 to using a firearm during a conspiracy.

In 1998, a grand jury in the Southern District of New York returned a superseding indictment ("Indictment") charging Padilla and three others with numerous federal crimes. *See* Pet. App. 21a-43a. Padilla was charged with twenty counts, including:

(1) engaging in a racketeering enterprise, in violation of 18 U.S.C. § 1962(c) (Count One) (Pet. App. 21a-28a);

(2) participating in a conspiracy to murder Juan Rios, a/k/a "Amarito," in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5) (Count Three) (Pet. App. 29a-30a);

(3) participating in a conspiracy to murder Juan Rios, a/k/a "Chato," in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5) (Count Five) (Pet. App. 31a);

(4) attempting to murder Joseph Grajales, a/k/a "Macho," in aid of racketeering, and aiding and abetting the same, in violation of 18 U.S.C. §§ 1959(a)(5) and 2 (Count Ten) (Pet. App. 34a-35a);

(5) participating in a conspiracy to murder John Santos, a/k/a "Teardrop," in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5) (Count Eleven) (Pet. App. 35a);

(6) murdering John Santos, a/k/a "Teardrop," in aid of racketeering in violation of 18 U.S.C. §§ 1959(a)(1) and 2 (Count Twelve) (Pet. App. 35a); and

(7) using and carrying a firearm during and in relation to the conspiracy to murder and murder of John Santos, a/k/a "Teardrop," as charged in Act Five of Count One, in violation of 18 U.S.C. §§ 924(c) and 2 (Count Eighteen) (Pet. App. 39a).

Count One alleged six racketeering acts, including conspiracy to murder, attempted murder, and murder. *See* Pet. App. 24a-28a. Racketeering Acts One through Six of Count One were re-alleged and incorporated by reference in Counts Five, Ten, and Eleven. *See* Pet. App. 21a-23a, 24a-28a, 31a, 34a-35a. Racketeering Act Five of Count One, referenced in the § 924(c) count (Count Eighteen), alleged both the "[c]onspiracy to [m]urder John Santos" and the "[m]urder of John Santos." Pet. App. 27a.

In April 2000, the parties reached a plea agreement allowing Padilla to avoid a potential life sentence. Under the agreement, Padilla pleaded guilty to the four VICAR counts—Counts Three, Five, Ten, and Eleven, each of which carried a maximum prison term of ten years. He also pleaded guilty, under the same agreement, to a modified version of Count Eighteen—the § 924(c) count at issue here, which carried a mandatory five-year consecutive term of imprisonment. The plea agreement, unlike the Indictment, identified the sole predicate "crime of violence" for the § 924(c) count (Count Eighteen) as the VICAR *conspiracy* to murder John Santos, as charged in *Count Eleven,* not the substantive murder offense cited in Racketeering Act Five of Count One. Pet. App. 46a. As the Government later acknowledged on Padilla's direct appeal, he pleaded guilty to "use of a firearm during a crime of violence, namely, the *conspiracy* to murder John Santos, a/k/a 'Teardrop,' as charged in *Count Eleven*, in violation of Title 18, United States Code, Section 924(c)." Brief for the United States at 7, *United States v. Villanueva*, 14 F. App'x 84 (2d Cir. 2001) (No. 00-1658). In addition, Padilla agreed to allocute that the conspiracy to murder Santos "resulted in the shooting death of the victim." Pet. App. 48a n.1.

At the plea proceeding, Padilla admitted in connection with his plea to the VICAR murder conspiracy charged in Count Eleven that he

"actually pulled the trigger" in shooting and killing Santos (*see* Pet. App. 75a-76a). But the plea transcript confirms that, as the plea agreement states, the plea to the § 924(c) charge was predicated solely on the VICAR *conspiracy* to murder Santos:

> [The court]: Finally, with respect to Count 18, do you understand that you were charged in that count with the use of a firearm during a crime of violence, *that crime being participating in the conspiracy to murder John Santos*, also known as Teardrop, as charged in Count 11 of the indictment, and that that is a violation of title 18 United States Code section 924(c)?
>
> [Padilla]: Yes.

Pet. App. 62a-63a (emphasis added); *see also* Pet. App. 57a (court explaining to Padilla that he was being charged with "using a firearm during a crime of violence, which is the *conspiracy* to murder John Santos") (emphasis added).

By structuring the plea in this manner, Padilla was able to avoid a potential life sentence and to cap his total sentencing exposure at 45 years of imprisonment. Pet. App. 63a; *see Padilla v. United States*, 2003 WL 1948799, at *2 (S.D.N.Y. Apr. 24, 2003) (noting that Padilla pleaded guilty to avoid a life sentence and potentially "be released someday" so that he could "be with his young son and family"). If, however, Padilla had pleaded guilty to using a firearm during a substantive murder

(rather than simply a murder conspiracy), he would have faced a potential sentence of life imprisonment (or even death) on the § 924(c) count alone. *See* 18 U.S.C.A. § 924(i)(1) (West 1995) (eff. Sept. 1, 1994) (stating that "[a] person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—… if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life").

In August 2000, the court sentenced Padilla, as required by the then-mandatory Sentencing Guidelines, to the statutory maximum penalty of 540 months (45 years) of imprisonment: 120 months on each of the four § 1959(a)(5) VICAR counts, to run consecutively, plus the mandatory consecutive term of 60 months on the § 924(c) count. Pet. App. 89a-90a, 96a-97a.

On direct appeal, the Second Circuit affirmed Padilla's convictions and sentence. *United States v. Villanueva*, 14 F. App'x 84 (2d Cir. 2001). And in 2003, the District Court denied Padilla's first § 2255 motion, which he filed pro se. *See Padilla v. United States*, No. 02 Cv. 5992 (DC), 2003 WL 1948799 (S.D.N.Y. Apr. 24, 2003).

Neither the direct appeal nor the initial § 2255 motion included a claim that the so-called "residual clause" of § 924(c)(3)(B) was void for vagueness.

Padilla files the current § 2255 motion.

In 2020, after obtaining the Second Circuit's permission to do so, Padilla timely filed a successive § 2255 motion that, as amended, argued that his § 924(c) conviction was unconstitutional under *Johnson v. United States*, 576 U.S. 591 (2015), which invalidated the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), and *United States v. Davis*, 139 S. Ct. 2319 (2019), which invalidated the similar residual clause of § 924(c)(3). *See* S.D.N.Y., No. 97 Cr. 809 (DC), Dkt. 123. Padilla argued his § 924(c) conviction was constitutionally infirm because the sole predicate offense underlying it—conspiracy to commit VICAR murder—only qualified as a "crime of violence" under the unconstitutional residual clause, § 924(c)(3)(B), and does not qualify as a § 924(c) "crime of violence" under the surviving "elements" clause of § 924(c)(3)(A). *See id.* at 8, 14-25. Alternatively, he argued that, even if the predicate offense could be treated as a substantive VICAR murder, that offense also does not qualify post-*Davis* as a § 924(c)(3)(A) "crime of violence" because VICAR murder can be committed recklessly, or unintentionally on a "felony murder" theory, or by omission. *See* S.D.N.Y., No. 97 Cr. 809 (DC), Dkt. 130, at 23-42.

The District Court denies relief and declines to issue a COA.

Judge Chin denied § 2255 relief and declined to issue a COA. Pet. App. 6a-19a.

As a procedural matter, the court ruled that, while Padilla had "cause" for not raising his *Davis* claim on direct appeal, he could not show "actual prejudice" because, on the merits, his § 924(c) conviction is (supposedly) still valid even after *Davis*. Pet. App. 12a-17a. The court recognized that the § 924(c) count as charged in the Indictment was broader than the § 924(c) count as described in the plea agreement. Pet. App. 8a-9a. The Indictment alleged that Padilla "used and carried a firearm during and in relation to a crime of violence … to wit, the conspiracy to murder *and murder* of John Santos, a/k/a "Teardrop," as charged in Racketeering Act Five of Count One of the Indictment." Pet. App. 39a (emphasis added); But the plea agreement, in contrast, stated that "Count Eighteen charges the defendant with use of a firearm during a crime of violence, namely, *the conspiracy to murder John Santos,* a/k/a 'Teardrop,' as charged in Count Eleven." Pet. App. 46a (emphasis added).

Though the plea agreement thus specified only one offense (conspiracy) as the predicate for the § 924(c) conviction, while the Indictment alleged two such predicate offenses (conspiracy *and*

substantive murder), the District Court stated that the Indictment and plea agreement only "differ[ed] slightly." Pet. App. 8a. The court then determined that, even though Padilla agreed to plead guilty to using a firearm during a *conspiracy* only, the evidence—Padilla's factual admission that he shot Santos—was "legally sufficient" to show he actually used the gun during a substantive "[m]urder in aid of racketeering," in violation of § 1959(a)(1) and N.Y. Penal Law § 125.25 (second-degree murder). Pet. App. 15a. The court did not address Padilla's argument that he never would have pleaded guilty to the charge of using a gun during a substantive murder because doing so would have exposed him to a potential life sentence, and the whole point of the plea agreement was to ensure that he would not spend the rest of his life in prison. *See* S.D.N.Y., No. 97 Cr. 809 (DC), Dkt. 130, at 10-18.

The court also rejected Padilla's argument that even a substantive VICAR murder does not qualify as a "crime of violence" after *Davis*—because that offense can be committed recklessly, or unintentionally during a felony murder, or by omission. The court recognized that the Second Circuit has not decided in a precedential opinion whether a substantive murder in aid of racketeering is a § 924(c)(3)(A) "crime of violence" after *Davis*. Pet. App. 15a n.4. But the court relied upon several unpublished summary orders (some of which pre-date *Davis* and all of

which pre-date *Borden*) holding that the offense qualifies. *Id.* (citing *United States v. Sierra*, 782 F. App'x 16, 20 (2d Cir. 2019); *United States v. Herron*, 762 F. App'x 25, 33 (2d Cir. 2019); *United States v. Scott*, 681 F. App'x 89, 95 (2d Cir. 2017); *United States v. Praddy*, 729 F. App'x 21, 24 (2d Cir. 2018)). Accordingly, the court denied § 2255 relief, declined to issue a COA, and even found that an appeal "would not be taken in good faith." Pet. App. 18a.

The Second Circuit denies a COA and dismisses the appeal.

Padilla filed a timely notice of appeal and asked the Second Circuit to grant a COA on the same two issues presented here:

> 1. Where the plea agreement specified that petitioner was pleading guilty to violating 18 U.S.C. § 924(c) by using a firearm during a "crime of violence, namely, the *conspiracy* to murder John Santos" in aid of racketeering activity (emphasis added), in violation of 18 U.S.C. § 1959(a)(5)—an offense that no longer qualifies as a § 924(c) "crime of violence"—did the district court err by treating petitioner's § 924(c) conviction as if it were based on the *substantive* murder of John Santos?
>
> 2. Alternatively, does the substantive offense of murder in aid of racketeering, 18 U.S.C. § 1959(a)(1), no longer qualify as a § 924(c) "crime of violence" after *United States v. Davis*, 139 S. Ct. 2319 (2019), because the crime can be committed recklessly, or by non-forceful felony murder, or by culpable omission?

Padilla v. United States, 2d Cir. No. 21-978-pr, Dkt. 17-2, at 2.

By order dated March 1, 2022, the court declined to issue a COA, stating summarily that Padilla "has not 'made a substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)." Pet. App. 1a.

The Second Circuit denies reconsideration.

Padilla timely filed a motion for panel reconsideration or, alternatively, reconsideration en banc. *Padilla v. United States*, 2d Cir. No. 21-978-pr, Dkt. 48. He noted that, after the panel had denied his motion for a COA, another panel of the Second Circuit granted a COA in *Hobby Johnson v. United States*, No. 21-481 (Dkt. 59) ("*Hobby Johnson* Order"). The question in Hobby Johnson's appeal is the same as one of the questions Padilla seeks to raise on his appeal: namely, whether the offense of "murder in aid of racketeering," *see* 18 U.S.C § 1959(a)(1), does not qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) after *Davis* because the crime can be committed recklessly, or by non-forceful felony murder, or by culpable omission. *See Hobby Johnson* (Dkt. 27, 28, & 47). In granting Hobby Johnson's motion for a COA on this issue, the *Hobby Johnson* panel directed the parties to address, "[i]n addition to all other issues the parties wish to raise," the following specific issues:

> (a) whether the predicate for Petitioner's 18 U.S.C. § 924(c) conviction was (i) murder in violation of 18 U.S.C. § 1959(a)(1)

> with the murder defined by New York State law, (ii) murder in violation of § 1959(a)(1) with the murder defined generically, or (iii) some other form of murder;
>
> (b) if the murder was defined generically, what definition applies,
>
> (c) whether a murder in violation of § 1959(a)(1) can ever be less than intentional given the nexus requirement of the federal statute, and
>
> (d) whether Petitioner's arguments on that issue are barred, in whole or part, based on a failure to first raise them in district court.

Hobby Johnson Order at 1. *Hobby Johnson* is now fully briefed and awaits oral argument.[1]

Padilla also noted that, by order dated April 5, 2022, a different Second Circuit panel granted a COA in *Harris v. United States*, No. 21-2636-pr, on an issue closely related to the other issue Padilla seeks to raise on his appeal. *See* 2d Cir. No. 21-2636-pr, Order of Apr. 5, 2022 (Dkt. 34) ("*Harris* Order"). The issue in *Harris* is:

> Where the plea agreement and the guilty plea allocution provided that petitioner was pleading guilty to violating 18 U.S.C. § 924(c) by using a firearm during and in relation to "crimes of violence—namely, the crimes charged in Count 1," which was a conspiracy to commit Hobbs Act robberies, in violation of 18 U.S.C. § 1951(a)[,] an offense that no longer qualifies as a § 924(c) "crime of violence"—did the district err by treating petitioner's § 924(c) conviction as if it were based

[1] Hobby Johnson and Padilla are both represented on appeal by undersigned counsel.

> on a substantive count of robbery and a count of attempted robbery?

Harris, No. 21-2636-pr, Supplementary Papers to Motion at 2 (Dkt. 25) (Jan. 14, 2022).

Padilla argued that these COA grants demonstrated that his appellate issues, like Hobby Johnson's and Harris's, were at least reasonably debatable. Accordingly, reconsideration was warranted. Alternatively, since the resolution of *Harris* and *Hobby Johnson* was likely to bear upon the merits of his appeal, Padilla asked the court to hold his motion for reconsideration in abeyance pending the disposition of *Harris* and *Hobby Johnson*. *See* No. 21-978-pr, Dkt. 48.

By order entered May 18, 2022, the court denied reconsideration without comment. Pet. App. 2a.

REASONS FOR GRANTING A CERTIFICATE OF APPEALABILITY

A certificate of appealability is warranted because the issues for appeal are debatable among jurists of reason and deserve encouragement to proceed further. Thus, Padilla has made a "substantial showing of the denial of a constitutional right."

A. The standard for granting a certificate of appealability is not demanding.

A federal prisoner may not appeal the denial of a § 2255 motion unless the District Court, the Court of Appeals, or a Circuit Justice "issues a certificate of appealability." 28 U.S.C. § 2253(c)(1); *see also Gonzalez v. Thaler*, 565 U.S. 134, 143 n.5 (2012). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a COA "may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). This standard is not onerous. A petitioner need only demonstrate "that reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). AEDPA does not "require petitioner[s] to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). Rather,

"[a]t the COA stage, the only question is whether" the "claim is reasonably debatable." *Buck v. Davis*, 137 S. Ct. 759, 773, 774 (2017). And a claim "can be debatable even though every jurist of reason might agree, after the COA has been granted and the case received full consideration, that the petitioner will not prevail." *Miller-El*, 537 U.S. at 338.

As petitioner now shows, the two issues he seeks to raise on appeal easily satisfy this modest test.

B. Reasonable jurists could debate whether the District Court improperly relied on a purported "crime of violence" different from the one identified in the plea agreement and at the plea proceeding.

Though the District Court and the Second Circuit accurately recited the "substantial showing" language of § 2253(c)(2), they misapplied this Court's precedents in denying petitioner a COA.[2]

Reasonable jurists not only *could* debate—they *do* debate—whether a § 2255 court, in considering the validity of a § 924(c) conviction after *Davis*, may rely on a predicate "crime of violence" other

[2] This Court, of course, decides COA applications de novo, without deference to a lower court's refusal to grant a COA. *See, e.g., Ivey v. Catoe*, 36 F. App'x 718, 723 (4th Cir. 2002) ("[W]hen ruling on an application for certificate of appealability, we must conduct a de novo review to determine whether the resolution of each claim by the district court was at least debatable among reasonable jurists."); *Bell v. Oklahoma*, 242 F.3d 387, at *1 (10th Cir. 2000) (table op.) (conducting a "comprehensive *de novo* review" of a COA application).

than the one identified in the parties' plea agreement. *Compare,* Pet. App. 16a-17a (District Court decision below), *with*, *e.g.*, *United States v. Brown*, 942 F.3d 1069, 1073-75 (11th Cir. 2019) (discussed *infra*).

A plea agreement "necessarily implicates[s] a defendant's constitutional rights." *United States v. Boutcher*, 998 F.3d 603, 608 (4th Cir. 2012). For that reason (and others), a plea agreement must be applied narrowly and construed "strictly against the Government." *E.g.*, *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996); *accord, e.g.*, *United States v. Newbert*, 504 F.3d 180, 185 (1st Cir. 2007); *United States v. Rivera*, 357 F.3d 290, 295 (3d Cir. 2004); *United States v. Harvey*, 791 F.2d 294, 295 (4th Cir. 1986); *United States v. Roberts*, 624 F.3d 241, 245 (5th Cir. 2010); *United States v. Fitch*, 282 F.3d 364, 367-68 (6th Cir. 2002); *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003). And any ambiguity in a plea agreement "must be resolved in favor of the defendant." *United States v. Hamdi*, 432 F.3d 115, 123 (2d Cir. 2005); *accord, e.g.*, *United States v. Davis*, 761 F.3d 713, (7th Cir. 2014); *Andis*, 333 F.3d at 890.

Here, the plea agreement states unambiguously that the sole predicate for the § 924(c) conviction was a conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5). Pet. App. 46a. And the judge at the plea proceeding confirmed with Padilla and his counsel—

without protest from the Government—that this was their understanding. Pet. App. 62a-63a. He was never advised that he was pleading guilty to the charge that he used a gun during a substantive murder—quite the opposite. *See* Pet. App. 57a.

Yet, even though conspiracy only qualified as a "crime of violence" under the unconstitutionally vague residual clause, § 924(c)(3)(B), the District Court denied § 2255 relief, holding that the evidence (Padilla's statements during his guilty plea colloquy) was "legally sufficient" to establish that he used a gun during a different predicate offense: substantive VICAR murder.

Reasonable jurists could debate whether disregarding the language of the plea agreement in this manner, and substituting a different § 924(c) predicate offense for the one the parties agreed upon, is proper. Indeed, the Eleventh Circuit holds it is not. In *Brown*, the indictment charged Brown, among other things, with violating § 924(c) by carrying a firearm during and in relation to both an alleged "crime of violence" (Hobbs Act robbery conspiracy) and a "drug trafficking crime." 942 F.3d at 1070-71. But Brown's plea agreement stated he was pleading guilty to the § 924(c) count based on the Hobbs Act conspiracy only. *Id.* at 1071. The Eleventh Circuit recognized that the evidence (a factual proffer) was sufficient to establish that Brown had also used the gun in

connection with a proper § 924(c) predicate offense, i.e., the drug trafficking crime charged in the indictment. *Id.* at 1073-74. Nevertheless, vacatur of the § 924(c) count (Count 5) was required because, under the terms of the plea agreement, "Brown did not plead guilty to Count Five as charged in the indictment. Nor did the district court adjudge Brown guilty of Count 5 as charged in the indictment." *Id.* at 1073. Instead, "the parties repeatedly specified that Brown was pleading guilty to § 924(c)(1)(A) as predicated solely upon a 'crime of violence'—and specifically on the crime of violence that was charged in Count 1 of the indictment—conspiracy to commit Hobbs Act robbery. *It was that crime—and only that § 924(c) crime—that the trial court adjudged Brown guilty of.*" *Id.* at 1074 (emphasis added).

The same is true here: Padilla pleaded guilty to using a gun during a conspiracy only; it was that crime—and only that crime—that he was adjudged guilty of.

Equally debatable is the District Court's conclusion that Padilla cannot show prejudice, on the theory that he simply would have pleaded guilty to violating § 924(c) based on a substantive murder if *Davis* had been in effect at the time of his prosecution. *See* Pet. App. 12a, 15a-17a. The court overlooked that pleading guilty to using a gun during a substantive murder (rather than a murder conspiracy) would have

exposed Padilla to a potential life sentence, *see* 18 U.S.C.A. § 924(i)(1) (West 1995) (eff. Sept 13, 1994), and thereby defeated the whole point of the plea agreement.

Thus, reasonable jurists could disagree about whether Padilla's § 924(c) conviction must be vacated in light of *Davis*. Though the Indictment *charged* him with violating § 924(c) by using a gun during both a substantive murder and a conspiracy to commit murder, and though he admitted that he shot the victim, the plea agreement states (and the District Court advised him) that he was pleading guilty to § 924(c) based on a conspiracy only—a crime that no longer qualifies as a "crime of violence." As *Brown* held in similar circumstances, the § 924(c) conviction therefore cannot stand.

Of course, the Court is not being asked to decide at this point whether the Eleventh Circuit's position is correct, because the existence of circuit disagreement is itself sufficient to warrant the issuance of a COA, as numerous courts have held. *See Franklin v. Lucero*, No. 20-2155, 2021 WL 4595175, at *5 (10th Cir. Oct. 6, 2021) (unpublished) (holding that "the existence of a circuit split" over the issue presented "requires us to grant … a COA") (citing *United States v. Crooks*, 769 F. App'x 569, 572 (10th Cir. 2019)); *Wilson v. Sec'y Pa. Dep't of Corr.*, 782 F.3d 110, 115 (3d Cir. 2015) (holding that a conflicting decision from the

Sixth Circuit "demonstrates that the issue [the petitioner] presents is debatable among jurists of reason") (internal quotation marks omitted); *Allen v. Ornoski*, 435 F.3d 946, 951 (9th Cir. 2006) ("Even if a question is well settled in our circuit, [the issue] is debatable if another circuit has issued a conflicting ruling."); *Lambright v. Stewart*, 220 F.3d 1022, 1027-28 (9th Cir. 2000) ("[T]he fact that another circuit opposes our view satisfies the standard for obtaining a COA.").

C. Reasonable jurists could debate whether a substantive VICAR "murder" qualifies as a proper § 924(c) "crime of violence" after *United States v. Davis,* 139 S. Ct. 2319 (2019), and *Borden v. United States,* 141 S. Ct. 1817 (2021).

Even assuming the District Court could properly rely on a "crime of violence" different from the one specified in the plea agreement and discussed during the plea proceeding, a COA should still issue. That is because reasonable jurists could debate whether a substantive VICAR murder qualifies as a "crime of violence" after *Davis* and *Borden* under the applicable "categorical approach."

The Court has made clear that a crime qualifies as a § 924(c) "crime of violence" after *Davis* only if it has as an essential element the intentional—not merely the reckless or inadvertent—"use, attempted use, or threatened use, of physical force against the person or property of another." § 924(c)(3)(A). In *Borden v. United States*, 141 S. Ct. 1817

(2021), for example, the Court held that the "elements" clause of the ACCA, materially identical to the "elements" clause of § 924(c)(3)(A), requires "a purposeful or knowing mental state—a deliberate choice of wreaking harm on another, rather than mere indifference to risk." *Id.* at 1830. The clause "demands that the perpetrator direct his action at, or target, another individual." *Id.* at 1825. Because "[r]eckless conduct is not aimed in that prescribed manner," "[o]ffenses with a *mens rea* of recklessness do not qualify as violent felonies." *Id.* at 1825, 1834. And the Court expressly left open whether a mental state between recklessness and knowledge (often called "depraved heart" or "extreme recklessness") satisfies the elements clause. *Id.* at 1825 n.4.

VICAR "murder" likely does not satisfy the *Borden* standard. Because § 1959(a) does not define "murder," the term must be given its ordinary, generic meaning. *E.g.*, *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Indeed, this is exactly what Congress intended in VICAR. As the Senate Judiciary Committee responsible for drafting § 1959(a) stated: "While Section [1959] proscribes murder, kidnapping, maiming, assault with a dangerous weapon, and assault resulting in serious bodily injury in violation of federal or State law, *it is intended to apply to these crimes in a generic sense*, whether or not a particular State has chosen those precise terms for such crimes." 129 Cong. Rec. 22,906

(98th Cong. 1st Sess. Aug. 4, 1983) (emphasis added). The Senate Report regarding § 1959 similarly indicates that "Congress intended § 1959's reference to murder to include violations of 18 U.S.C. § 1111 as well as 'generic murder' because, in part, Congress viewed § 1111 as too restrictive." *United States v. Arnold*, No. 15-20652-01, 2019 WL 5842925, at *3 (E.D. Mich. Nov. 7, 2019) (citing S. Rep. No. 98-225 at 305-06, 311 (1983)).

The Government has long agreed that VICAR "murder" carries its generic meaning. *See* U.S. Dep't of Justice, *Violent Crimes In Aid of Racketeering 18 U.S.C. § 1959: A Manual for Federal Prosecutors* 9 (2006) ("*VICAR Manual*") (in which the Staff of the Organized Crime and Racketeering Section of DOJ states that "[i]t is particularly significant that Section 1959 does not enumerate violations of specific federal or state statutes that constitute the underlying crimes of violence. Rather, Section 1959 identifies 'generically' the types of proscribed underlying predicate offenses."); *see also id.* at 26 (concluding that Congress intended VICAR "murder" to include "generic murder"); *id.* at 41 (stating that "any statutory offense" that "falls within the generic definition of

murder prevailing in 1984 may constitute a crime of 'murder' within the ambit of Section 1959").[3]

Defined generically, "murder" means "the unlawful killing of a human being with malice aforethought." *United States v. Castillo*, 896 F.3d 141, 151 (2d Cir. 2018) (citing 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.1, at 566 (3d ed. 2017)); *accord Gomez Fernandez v. Barr*, 969 F.3d 1077, 1084 (9th Cir. 2020); *Wajda v. Holder*, 727 F.3d 457, 460 (6th Cir. 2013). This definition encompasses at least three types of murder: (1) intentional killing; (2) unintentional killing during the commission of certain felonies (i.e., "felony murder"); and (3) unintentional killing that occurs during "dangerous conduct that demonstrates a malignant or reckless disregard for serious risks to human life." *United States v. Marrero*, 743 F.3d 389, 400 (3d Cir. 2014), *abrogated on other grounds by Johnson v. United States*, 576 U.S. 591 (2015). Thus, as the Third Circuit has held, "murder is generically defined as causing the death of another person either intentionally, during the commission of a dangerous felony, or through conduct evincing reckless and depraved indifference to serious dangers posed to human life." *Marrero*, 743 F.3d at 401; *accord United States v. Vederoff*,

[3] The *VICAR Manual* is available here: https://www.justice.gov/sites/default/files/usam/legacy/2014/10/17/vcar.pdf.

914 F.3d 1238, 1246-47 (9th Cir. 2019); *see also United States v. Castro-Gomez*, 792 F.3d 1216, 1217 (10th Cir. 2015) (citing approvingly to *Marrero*'s definition of generic murder); *VICAR Manual* at 41 (concluding that "the generic definition of murder within the scope of Section 1959 consists of three alternative classifications of murder: (1) intentional, knowingly or purposeful murder, (2) murder committed recklessly under circumstances manifesting extreme indifference to the value of human life or (3) felony-murder").

VICAR "murder" thus criminalizes, *inter alia*, a killing committed recklessly or with extreme indifference. *See Marrero*, 743 F.3d at 401. Courts have specifically upheld VICAR "murder" convictions based on a *mens rea* of recklessness, without an intent to kill or deliberately use force against another. *See, e.g., Maggiore v. United States*, 302 F. App'x 17, 19-20 (2d Cir. 2008) (upholding a VICAR murder conviction where the defendant admitting during his guilty plea that he drove "vengeful confederates, one of whom he knew was armed, up to a rival gang member," even though the defendant "persistently denied … any knowledge that his armed passenger intended to kill"). But a reckless murder does not satisfy § 924(c)(3)(A)'s requirement of intent. At a minimum, the issue is debatable.

Admittedly, the Ninth Circuit recently ruled, in a divided en banc decision, that federal second-degree murder, in violation of 18 U.S.C. § 1111(a), which can be committed recklessly—with a "depraved heart" mental state—nevertheless qualifies as a post-*Borden* "crime of violence." *United States v. Begay*, 33 F.4th 1081, 1090-96 (9th Cir. 2022) (en banc). But three judges issued reasoned dissents. *Id.* at 1098-99 (Wardlaw, J., dissenting in part); *id.* at 1099-1107 (Ikita, J., joined by Vandyke, J., dissenting in part). And even two members of the en banc majority noted that the court's holding was "not the only plausible reading" of *Borden*. *Id.* at 1098 (Murguia, J., joined by Clifton, J., concurring). Accordingly, the issue whether VICAR "murder, " which is broader than § 1111 "murder," qualifies as a "crime of violence" is one over which reasonable jurists not only *can*—but *do*—disagree, warranting issuance of a COA.

Similarly, a person can commit VICAR "murder" unintentionally, under a felony-murder theory. This can occur, for example, if a defendant or an accomplice unintentionally causes the death of a person during a burglary or a federal arson. *See, e.g.*, *United States v. Tham*, 118 F.3d 1501, 1508 (11th Cir. 1997) (holding that the federal felony-murder rule covered the defendant's conduct because he intended to commit the arson that caused his brother's death, even though the defendant did not

intend to kill him); *Bethea v. Scully*, 834 F.2d 257, 258 (2d Cir. 1987) (holding that, under New York law, "a person is guilty of felony murder when he commits ... burglary ... and, in the course of and in furtherance of such crime … he … causes the death of a person").[4] Burglary is not a "crime of violence" under the elements clause. *E.g.*, *United States v. Welch*, 641 F. App'x 37, 42 (2d Cir. 2016). Neither is federal arson. *E.g.*, *United States v. Salas*, 889 F.3d 681, 684 (10th Cir. 2018) (holding that, because the federal arson statute, 18 U.S.C. § 844(i), can apply to a person who destroys his or her own property, the crime "does not require, as an element, the use of force against the property "of another"). But an unintentional killing during a burglary or arson will support a VICAR murder conviction. *See United States v. Mapp*, 170 F.3d 328, 335-36 (2d Cir. 1999).

The "nexus" requirement of § 1959 does not change this analysis. The statute's "nexus" requirement means that the Government must prove a connection between the alleged violent crime and interstate commerce. *E.g.*, *United States v. Torres*, 129 F.3d 710, 717 (2d Cir. 1997). Specifically, § 1959 prohibits the commission of a violent crime "as

[4] The "definitions of felony murder under both federal and New York state law are virtually identical and include the same list of predicate offenses." *Santana-Felix v. Barr*, 924 F.3d 51, 56 (2d Cir. 2019).

consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity," or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity," and defines "enterprise" as an entity "which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1959(a) & (b)(2). Thus, the Government must prove that the defendant committed the alleged violent crime in exchange for something of "pecuniary value" or for the "general purpose of maintain[ing] or increas[ing] his position in the enterprise." § 1959(a); *United States v. White*, 7 F.4th 90, 101 (2d Cir. 2021).

These requirements do not mean, however, that a VICAR murder necessarily involves the intent to kill or otherwise use force. As the Second Circuit has held:

> *We do not believe that section 1959 reaches only murders that were committed intentionally*. Instead, it is sufficient for the government to prove that the defendant committed murder—however that crime is defined by the underlying state or federal law—and that he engaged in the conduct that resulted in murder, however defined, with the purpose or motivation prescribed in the statute.

Mapp, 170 F.3d at 335-36 (italics added).

To be sure, Padilla admitted during his guilty plea that he used a gun to shoot and kill John Santos. If considered, this allocution would indicate that, as a factual matter, Padilla committed an intentional killing. But this allocution is immaterial because, as relevant, generic "murder" under § 1959(a)(1) is indivisible, such that the facts are irrelevant. *See, e.g., Mathis v. United States*, 579 U.S. 500, 504 (2016) (noting that the categorical approach "cares not a whit about [the facts]"). Consequently, the modified categorical approach is inapplicable, *see Descamps v. United States*, 570 U.S. 254, 260 (2013), and the District Court should not have consulted *Shepard* documents, *see Shepard v. United States*, 544 U.S. 13 (2005), such as the guilty plea colloquy, to narrow the predicate for the § 924(c) offense to intentional murder.

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In summary, this is a serious appeal with serious issues. Regardless of how the Second Circuit would resolve Padilla's appeal on the merits, his claims are, at a minimum, "reasonably debatable." *Buck*, 137 S. Ct. at 774. Thus, the Second Circuit erred in denying him a COA, and this Court should not allow that error to go uncorrected.

CONCLUSION

For these reasons, the Court should grant a certificate of appealability and remand to the Second Circuit so that petitioner's appeal can be considered on its merits.

Respectfully submitted,

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